UNITED STATES DEPARTMENT OF LABOR
Office of the Solicitor
February 28, 1944

Legal Field Letter
No. 91

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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(01172)

MEMORANDA

MEMORANDA

LETTERS

23 CD 302.2
23 CD 401

Llewellyn B. Duke
Regional Attorney
Dallas 2, Texas

SOL:JMS:DMH

William S. Tyson
Assistant Solicitor

October 26, 1943

Letter dated September 24, 1943

Reference is made to subject letter to Deep Rock Oil Corporation, Atlas Life Building, Tulsa, Oklahoma, in which you advised that there would be no objection to the company's setting aside or doing away with the provisions in its union contracts drawn in accordance with section 7(b)(1) of the act and henceforth operating in accordance with the requirements of section 7(a) thereof.

It is noted that your reply contained the assumption that the employees affected thereby have not in fact been required to work in excess of 1000 hours in any period of 26 consecutive weeks. However, the conclusion does not appear to be predicated upon this assumption and, as stated, is not, in my opinion, correct.

You will note in paragraph 19 of Interpretative Bulletin No. 8 that where an agreement merely provides that no employee shall work more than 1000 hours during any period of 26 weeks a literal interpretation of the phrase "during any period of 26 consecutive weeks" must be adhered to and, accordingly, each week of operation under the agreement must be considered as beginning a new 26-week period during each of which periods no employee may be worked more than 1000 hours. On the basis of this statement, it appears that the last workweek in which the thousand-hour clause was in effect started a new 26-week period during which the employment of an employee for more than 1000 hours would necessitate the payment of time and one-half for hours in excess of 40 occurring in any week in that period, including the week just prior to the setting aside of the contractual provisions.

The following example may clarify the preceding paragraph: Assume that a 1000-hour clause in a contract exists pursuant to which an employee works 56 hours a week. Further, assume that said clause is only in existence one week and then by mutual consent of the parties is set aside; and that for the next 25 weeks the employee works only 40 hours per week. In that 26-week period a total of 1056 hours were worked and it would therefore be necessary to compensate the employee at time and one-half for all hours worked in excess of 40 in any week during the period. Accordingly, the employee would be entitled to receive an additional half time for the 16 hours in excess of 40 which were worked during the first week of the period.

I think it advisable to inform the subject company that the hours worked under the thousand-hour clause are to be taken into consideration insofar as hours worked in excess of 40 in those weeks in which the clause was in effect are concerned, if 1000 hours in any 26-week period (covering both old and new agreements) were exceeded.

(01172)

21 AB 102:2322

Mr. Joseph C. Noah
Regional Director
Birmingham, Alabama

SOL:ERG:RH

L. Metcalfe Walling
Administrator

November 11, 1943

Lloyd Brasileiro
New Orleans, Louisiana
File No. 17-51,900

Reference is made to your memorandum dated September 18, 1943, transmitting the subject file in accordance with instructions contained in Field Operations Bulletin, Vol. V, No. 2, Page 5, Item 5.

It appears that the subject firm, having its headquarters in Rio de Janeiro, Brazil, and local offices in New York and New Orleans, is owned and controlled by the Brazilian Government. Apparently the business has been conducted under the subject name from the time it was absorbed by the Brazilian Government in June of 1937. The file does not disclose whether the firm is a corporation, and, if so, under what law it was incorporated. The firm engages solely in the transportation of goods to and from Brazil. Goods going to Brazil, consisting usually of ammunition and machinery, are brought to the firm's loading spaces on the wharves, where they are stored until such time as one of the company's ships arrives from Brazil. Goods coming from Brazil, usually coffee, are unloaded from the company's ships and subsequently shipped by truck or train to cities throughout the United States.

The firm appears to employ from 20 to 30 employees, some of whom may qualify for the executive or administrative exemptions. In addition to its regular employees, the company frequently hires from 10 to 35 stevedores, as the occasion warrants, from the Atlantic and Gulf Stevedores, Inc. It does not appear that any segregation takes place based on the nature of cargo handled. The Bureau of Internal Revenue has apparently ruled that since June 11, 1937, when the enterprise was taken over by the Brazilian Government, the firm has operated as an instrumentality of the Brazilian Government and hence is exempt from the taxing provisions of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act.

You state that the New Orleans establishment was inspected and that while section 7(a)(3) and 11(c) violations of the Act were disclosed, payment of restitution was not pressed because of the non-inspection policy announced in the interim. You state, further, that the establishment has agreed to comply in the future and that the New Orleans manager has agreed to make restitution if his superiors in New York authorize him to do so.

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As you know, as a matter of administrative policy I have adopted a non-inspection policy with respect to firms owned and controlled by foreign governments engaged in governmental functions. It was not my purpose, however, to discontinue enforcement in cases where such firms are engaged in ordinary commercial activities in competition with private industry. Consequently, employees of the subject firm engaged in commercial import-export operations are entitled to the benefits of the Act. (See Legal Field Letter No. 88, page 5.)

We are returning the file herewith.

Attachment (File)

(01172)

21 BE 202.2
205.20

Amzy B. Steed
Acting Regional Attorney
Birmingham, Alabama

SOL:EG:RH

Donald M. Murtha
Chief, Wage-Hour Section

November 26, 1943

Woodward Iron Company
Woodward, Alabama
RA:ABS:MSB

Reference is made to your memorandum of November 12, 1943 which referred for opinion the question of whether time spent by armed guards of the subject company in drilling under the supervision of the United States Army should be considered hours worked under the provisions of the Fair Labor Standards Act and Executive Order No. 9240.

It appears that the guards of the subject company were organized in July 1942 as a part of the auxiliary military police under the Army Service Command. In November 1942 the company was informed by the Army authorities that it would be necessary for the guards to undergo military training and that the guards would be required to drill for one hour every two weeks. On June 16, 1943, the military authorities issued orders that all guards must report for military training one hour every two weeks, and since June 16 it has been compulsory for the men to engage in such military drill. You wish to know whether the time spent in drilling prior to and subsequent to June 16 should be considered hours worked under the Act.

We have had occasion to consider similar circumstances in the past. Our previous correspondence with the War Department indicates that such training programs as the one under consideration are designed primarily to increase the effectiveness of guards in their job of watching, guarding and protecting the employer's plant and its production. The training is an obligatory requirement of the job, and as such the time spent is under the employer's direction and control and would constitute hours worked under the Fair Labor Standards Act and Executive Order No. 9240. (Cf. Legal Field Letter No. 87, page 26.) It seems clear that the guards remain employees of the subject company. In this connection it should be noted that Circular No. 15 specifically states: "Basically, the militarization of plant guard forces does not change the existing systems of hiring, compensation, and dismissal; all remain primarily a matter between the guards and the plant managements."

Of course, if the facts indicate that the training program prior to June 16, 1943 was different from the one in operation after June 16, 1943, the criteria appearing in paragraph 15 of Interpretative Bulletin No. 13 should be applied for the purpose of determining whether the time spent in training during that period should be considered hours worked.

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Transmitted herewith are the Guard Agreement and War Department Circular No. 15, as requested in your memorandum.

Attached for your information are two letters dated May 5 and June 4, 1943 respectively, signed by the Administrator, which express the Division's views with respect to this general problem.

Attachments

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21 BD 301.95
21 BD 301.0

Donald M. Murtha, Chief
Wage and Hour Headquarters Section
New York 19, New York

SOL:HK:MPJ

Douglas B. Maggs
Solicitor

December 1, 1943

Watchmen at warehouses in which agricultural or horticultural commodities are stored as engaged in "storing" of such commodities within the meaning of section 13(a)(10) of Fair Labor Standards Act

Reference is made to your memorandum of October 19, 1943, to which is attached a copy of a memorandum from Acting Regional Attorney Hynes, pertaining to the Federal Compress and Warehouse Company, Carthage, Mississippi, in which he questions our present interpretation that watchmen employed at cotton warehouses are not engaged in "storing" within the meaning of the section 13(a)(10) exemption. You also attach a copy of an economic report from Mr. Weiss pertaining to the employment of watchmen by cotton warehouses. You state that there is some disagreement of your staff as to the need and desirability of a change in our present interpretation and you present the arguments pro and con. Mr. Hynes states that the company in question vigorously contests our present position and is prepared to litigate the question, and he expresses doubt of our ability to sustain our view in the Fifth Circuit.

In my opinion, the safekeeping of agricultural or horticultural commodities stored in a warehouse is an essential part of the storing services performed by such warehouses. A watchman who is employed in furtherance of the safekeeping services and in fulfillment of the duty of a warehouse to exercise reasonable care in safeguarding articles stored therein, would seem to be engaged in "storing" within the meaning of the exemption. Moreover, the services of such a watchman would appear to be an integral part of "taking care of the commodities while they are being so held" within the meaning of paragraph 28 (2) of Interpretative Bulletin No. 14. Serious doubts would appear to exist in connection with our ability to sustain the present interpretation in court and I am inclined toward the view that the term "storing" as used in section 13(a)(10) of the act, has been given an unduly restricted meaning.

Accordingly, I would favor a change in our interpretation and the adoption of the position that watchmen employed at warehouses in which agricultural or horticultural commodities are stored, and whose sole duty is to guard such commodities, are deemed engaged in "storing" of such articles within the meaning of section 13(a)(10) of the Fair Labor Standards Act. It is to be noted that this change in our position should in no wise affect the existing interpretations relative to watchmen employed in connection with the other exempt activities set forth in section 13(a)(10). Since this opinion is merely a revised interpretation

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of the words "taking care" in paragraph 28(d) of Interpretative Bulletin No. 14, no change in the Interpretative Bulletin itself is necessary. Also, this interpretation in no way changes our view that office or other employees who do not actually perform the operations enumerated in section 13(a)(10) would not be entitled to exemption under that section.

23 CB 204.3
23 CB 204.1

Jeter S. Ray
Regional Attorney
Nashville, Tennessee

SOL:ERG:RBP

Donald M. Murtha
Chief, Wage-Hour Section

December 13, 1943

Request for opinion
Southeastern Greyhound Lines, Inc.
Lexington, Kentucky
File No. 16-346
(7 other files)
LE:JSR:KT

This will reply to your memorandum of September 30, 1943 in which you request an opinion as to the application of the section 13(b)(1) exemption to certain of subject firm's employees.

You state that the subject is a passenger motor carrier and that it maintains, at its principal stations, garages for the maintenance of its busses. Among the employees whom you consider exempt under 13(b)(1) are (1) the mechanics who adjust, dismantle or install parts of the operating mechanism directly on the busses; (2) tire men, whose duties are to check the inflation of tires and inflate them if necessary, remove and mount tires, vulcanize punctured tires, check tires to see if they need recapping and check the wheel alignments. Nonexempt classifications include upholsterers, painters, gas and oil men, greasers and body men.

You inquire as to the status of certain mechanics who do not usually work directly on the busses. Thus, you state that the subject firm employs garage employees classified as "testers" whose duties are to test the operation of busses after repairs are made by making an actual test run of three miles or longer, if necessary, to see that everything is in good mechanical operation and in condition to make a pay run. You also state that the subject firm maintains in stock extra motors, generators, and other units. When such units get out of order, they are removed from the busses and a spare unit is installed with a minimum of delay. After the unit is removed certain of the firm's employees, variously termed mechanics, machinists and unit men, are employed to tear down, repair, recondition, or rebuild the motor, air compressor, generator, or other mechanical unit, after which such unit is placed in stock for future use.

We have communicated with the Interstate Commerce Commission and are informed that the Commission asserts jurisdiction with respect to both classifications of employees. While we agree with the Commission's determination with respect to the "testers" in question, we entertain some doubt as to the Commission's jursidiction over the latter class of employees. The status of those employees is presently under consideration, and we will advise you when a determination is made. The "testers" in question would, however, appear to be exempt from the overtime requirements of the Act under section 13(b)(1).

(01172)

George H. Foley
Regional Attorney
Boston, Massachusetts

SOL:HCN:CP

December 14, 1943

Donald M. Murtha
Chief, Wage-Hour Section

Klavale Worsted Company
Pittsfield, Massachusetts
File No. 20-2062

Klavale Dye Works, Inc.
Pittsfield, Massachusetts
File No. 20-2173

Reference is made to your memoranda dated September 23, October 21 and November 16, 1943. In your memorandum of September 23 (SL:MEY:CE), you presented the question whether the regular practice in the manufacture of woolen textiles as indicated in the Field Operations Bulletin, Volume IV, No. 2, page 6, must be taken to govern the subject case, or whether the facts presented by the secondary contractors here involved would justify their classification as subcontractors rather than substitute manufacturers for purposes of the Walsh-Healey Act.

Our information is that the regular practice in the worsted textile industry is in accordance with the statement you cite from the Field Operations Bulletin. The dyeing and yarn manufacturing operations by the subject firms, performed as secondary contractors, would therefore seem to be operations performed by them as substitute manufacturers and subject to the requirements of the Walsh-Healey Act.

In arguing that the subject firms are only subcontractors, their attorney mentions that an appreciable portion of the requirements for worsted textiles is filled by the so-called non-vertical mills and that of 40 mills recently awarded contracts for materials such as uniform cloth, at least 21 mills bought their yarn. He also refers to the higher price differentials allowed by the Office of Price Administration and by the Quartermaster for purchases from non-integrated mills. The mere fact that more prime contracts are awarded to non-integrated than to integrated mills cannot be taken as proof that the regular practice in the industry generally is other than that which the Public Contracts Division has found it to be. Nor do we think that the price differentials noted by the attorney for the subject companies provide any basis for rejection of our previous finding as to the regular practice in the industry.

We are, accordingly, in agreement with your previously expressed opinion that the operations of the firms in question are those of substitute manufacturers rather than subcontractors and that they are subject to the Act. Further confirmation of the status of these secondary contractors as substitute manufacturers is found in the fact that they are specifically designated in the prime contracts as the firms which are to perform the operations in question. The existence of common management between the prime contractor and the secondary contractors, as indicated in your opinion of July 2, 1943, a copy of which was attached to your memorandum of September 23, 1943, would appear to constitute a further reason for regarding the subject companies as within the scope of the Act's provisions.

(01172)

21 BG 102.61

Kenneth P. Montgomery
Regional Attorney
Chicago, Illinois

SOL:ERG:RH

December 22, 1943

Donald M. Murtha
Chief, Wage-Hour Section

Letter to A. F. Schwahn & Sons Company
603 Third Street
Eau Claire, Wisconsin

Reference is made to the subject letter dated October 13, 1943, a copy of which was transmitted to this office for review. In considering the application of the section 13(a)(5) exemption to employees in the subject's fish department engaged in the smoking of fish and the cutting, spicing and packing of herring, it was stated:

> You do not submit sufficient information to permit a determination as to whether the "smoking of fish, and of the cutting, spicing and packing of herring" as engaged in by you are operations closely connected with the catching of the fish and incidental to and immediately following the catch as set forth above. Unless such are the facts, the processing referred to by you would not, in our opinion, be exempt under Section 13(a)(5).

As you probably have noted from releases R-1609 and R-1644, employees engaged in marketing and distributing edible fish and fishery products will be considered by the Division to be exempt from the Act, whether they are engaged in performing such operations on fresh fish or on fishery products that have been preserved through freezing, smoking or curing. In view of the fact that the more remote operation of distributing fish products in a semi-preserved state has been held by the Administrator to be exempt, it would appear that such preliminary operations as were described in the subject firm's letter, i.e., processing and curing, must likewise be considered to be exempt.

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21 BJ 303.21
21 BJ 303.22

Donald M. Murtha, Chief
Wage and Hour Headquarters Section
New York 19, New York

SOL:WST:GMS

December 29, 1943

William S. Tyson
Assistant Solicitor

Proposed memorandum to Regional Attorney Dorothy Williams clarifying our position under the last sentence of paragraph 41 of Interpretative Bulletin No. 6.

I regret that there has been some delay in answering your memorandum on the above subject which was addressed to Mr. Reynolds.

I have studied the proposed memorandum which you prepared to be sent to Regional Attorney Dorothy Williams. After reviewing the background, the various interpretations and the divergencies of views on the question presented, I have come to the conclusion that the time has arrived for a realistic appraisal of our previously expressed opinions. I believe that the section 13(a)(2) exemption was placed in the Act to exempt employees in retail or service establishments, the greater part of whose selling or servicing is in intrastate commerce. Picking out particular departments in a single establishment and applying the tests for applicability of the exemption to such individual departments seems to be without justification in view of the express wording of the statute. Therefore, I am of the opinion that the last sentence in paragraph 41 of Interpretative Bulletin No. 6 is in error and that the principles stated in paragraphs 18, 34 and the remaining part of paragraph 41 of Interpretative Bulletin No. 6 should be applicable to all establishments, including automobile and parts dealers. In other words, if the non-retail selling of a single establishment does not constitute more than 25 percent of the gross receipts of the establishment and if the greater part of the selling or servicing of the establishment is in intrastate commerce, the section 13(a)(2) exemption would be applicable to the whole of that establishment. Where the non-retail selling of a business enterprise constitutes more than 25 percent of its gross receipts, if part or all of that non-retail selling is in a branch separate and distinct from the remainder of the business, the applicability of the exemption to that branch, on the one hand, and to the remainder of the business, on the other hand, is to be determined by applying the 25 percent rule to the branch and to the remainder of the business separately.

If you concur in the views expressed above, will you please clear the same with the Administrator before advising Regional Attorney Williams?

(01172)

Ernest N. Votaw
Regional Attorney
Philadelphia, Pennsylvania

Donald M. Murtha
Chief, Wage-Hour Section

SOL:HCN:FH

January 12, 1944

Kuhn, Blum & Co.
Philadelphia, Pennsylvania
ENV:al

Reference is made to your memorandum dated September 10, 1943, requesting information as to the regular practice in connection with the manufacture of camouflage nets.

You state that in connection with all the contracts involved the sewing operations were performed by one firm, the knitting operations by another, and the dyeing, finishing and shipping by a third, and that in some instances the cutting operations were performed by the firm doing the sewing and in others by the firm doing the knitting. You wish to know whether secondary contractors performing such operations are to be regarded as subcontractors or as substitute manufacturers under the Walsh-Healey Act.

Information received from the Economics Branch is to the effect that the Engineer's Office of the War Department has indicated that the camouflage nets on which the subject company has been working are lace nets or shrimp nets. This type of net, according to the Economics Branch, has a very small mesh and is not the type of net in which strips of burlap or other material are woven. The prime contractor for such nets is usually a lace manufacturer who does the knitting, cutting and sewing operations. Sewing operations on this type of net consist of sewing strips of material together to obtain the desired size as well as sewing tape on the outer edges of the net. Any dyeing operations or proofing are usually done by other firms such as manufacturers of linoleum, etc.

Based on this information as to the customary practice in the manufacture of camouflage nets of the lace net type, firms performing any of the operations except the dyeing and proofing for the prime contractor would be considered substitute manufacturers. Firms doing the dyeing and proofing would be regarded as subcontractors.

The Economics Branch has also furnished information regarding the regular practice in the manufacture of camouflage nets of the fish net type. This type of net has a 2-1/2 inch mesh and is woven from seine twine on machinery used for making fish nets. The information furnished as to the regular practice indicates that the prime contractor does all operations such as weaving, cutting, sewing and treating, but does no garnishing. Garnishing means either the weaving of two-inch strips of burlap or other dyed and treated material into the mesh, or the attaching of feathers, etc. A net made of large mesh is invariably garnished with strips of material, according to the information

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received from the Economics Branch. It is the regular practice for the prime contractor to buy the strips which are in turn hand-woven into the net by other firms.

Based on the foregoing information as to the regular practice in the manufacture of camouflage nets of the fish net type, firms performing any operations on such nets for prime contractors except garnishing would be considered substitute manufacturers. Firms that garnish such nets for prime contractors would be regarded as sub-contractors.

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Miss Beatrice McConnell
Director, Industrial Division
Children's Bureau

SOL:JL:NC

William S. Tyson
Assistant Solicitor

January 20,1944

Superior Knitting Company
Boston, Massachusetts, as producing establishment within section 12(a) of the Fair Labor Standards Act

This will reply to your memorandum of January 7, 1944, requesting my opinion on the question whether the Superior Knitting Company, a wholesale firm of Boston, Massachusetts, may be considered an establishment producing goods which are shipped or delivered for shipment in interstate commerce.

The subject company receives high-grade sweaters packed one to a box and a cheaper line of sweaters packed two to a box. These sweaters are received in large cartons. The cartons are opened and the boxes are put in stock on the shelves just as they are received. On receipt of an order the sweaters packed individually are taken from the shelves according to size, color and price indicated in the order. The boxes containing more than one sweater are opened and the sweater called for by the order is removed from the original box, repacked and then added to the rest of the ordered lot which is then put in a large carton and shipped. I assume that sweaters of this company are shipped across State lines. I also assume that at the time the sweaters reach the establishment they are not "hot goods" so that if section 12(a) is applicable at all, it is because of the employment of minors in the establishment itself.

On the basis of these facts you have raised the following questions:

(1) If all the sweaters are shipped in the original boxes in which they had been received but packed in a large carton for shipping purposes, would such operations be classified as mere handling, or as repackaging constituting production?

(2) If some of the sweaters are taken from the original boxes in which they had been received but were repackaged and added to the order, would such repackaging operation constitute production rather than mere handling?

The answer to your first question appears to be implicit in a memorandum of this office of April 23, 1942, addressed to you which deals with the application of section 12(a) to wholesale establishments and warehouses. It is stated there that "*** merely placing fabricated goods (which had already been completely packed and wrapped for distribution by a separate concern) into several lots corresponding with

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their respective destinations would appear to constitute a mere 'handling' operation and not covered by section 12(a)."

With regard to your second question, a more difficult problem is presented. In a memeorandum to you from this office of July 11, 1942, on the employment of minors in retail establishments, it is pointed out that "the term 'produced' in section 12(a) requires the performance of some operation on goods which in some manner changes their nature or form, and it is not sufficient if the establishment merely 'handles' the goods without more." In the light of that opinion, it is impossible to bring the operations described above within the term "produced" as referred to in section 3(j) of the act. As long as the repackaging constitutes no more than a breaking of the bulk for the purpose of shipment, I do not believe that it may be classified as production without an open overruling of opinions which have been issued heretofore.

I shall be glad, of course, to confer with you on the question whether the Children's Bureau should henceforth take the position that the term "handling" as referred to in section 3(j) should be broadly interpreted as embracing any and all activities involving manipulation of goods regardless of whether or not that is done in the course of production. Until you so decide, however, I am of the opinion that the activities set forth above do not constitute production within the reach of sections 3(j) and 12(a) of the Fair Labor Standards Act.

25 BB 202.1
23 CB 401.

Mr. Albert E. Miner
c/o Pine Hill
Marysville, Kansas

SOL:HCN:CP

December 14, 1943

Dear Mr. Miner:

This will reply to your letter of October 18, 1943, addressed to the Bureau of Labor Statistics, which has been referred to this office for consideration and reply.

You state that you are a truck driver working for Armour and Company on two dealer routes, on which you buy poultry and eggs and pick up cream. One of these routes extends across the Kansas State line into Nebraska. You state that you carry a considerable amount of cash for which you furnish bond. You indicate that you work from 8 to 12 hours a day and average about 60 hours a week, for which you receive wages at the rate of 50 cents per hour for the first 40 hours and time and one-half thereafter. You state that you punch a time card when you go to work and that you punch out at night. Although your employer has not previously deducted from your wages for a lunch period, the company has now decided to take one hour off your time card each day for a noon period while you have its truck and produce on the road to care for. You inquire whether your employer can do this and whether you are receiving the proper rate of pay for a buyer.

The Fair Labor Standards Act requires the payment to employees engaged in interstate commerce or in the production of goods for interstate commerce of wages for all hours worked in a workweek at rates not less than 30 cents an hour or such higher rate up to 40 cents an hour as may be provided by an applicable wage order. It also requires payment of overtime compensation for employment in excess of 40 hours in a workweek at a rate not less than one and one-half times the employee's regular rate of pay.

An industry committee for the Meat, Poultry, and Dairy Products Industry has recommended a minimum wage rate of 40 cents an hour for that industry. The issuance of a wage order for the industry in accordance with this recommendation is presently under consideration. Payment of wages at a rate of 50 cents per hour with time and one-half for overtime would therefore satisfy the requirements of the Act and of any wage order which may be issued pursuant to the Committee's recommendation.

In computing minimum wages and overtime compensation due under the Act, all hours worked in the workweek must be counted. For enforcement purposes hours worked are not considered to include periods during which an employee is relieved of all duties for the purpose of eating meals. The contrary is true, however, where the employee remains on duty or is otherwise engaged in his employer's business at the time he eats his meal. In this connection, you may be interested in the case of Walling v. Dunbar Transfer & Storage Co., 6 Wage Hour Rept. 476 (W.D.Tenn. 1943), in which the court held that the Act requires payment for lunch periods of truck drivers and helpers when they are on duty for such periods. Your attention is also directed to the case of Travis v. Ray, 41 F.Supp. 6 (W.D.Ky. 1941), in which the court held that a bus driver should be compensated for lay-over periods when it was necessary for him to remain in the immediate

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vicinity of his bus in order to protect it and to take care of passengers who might arrive during the waiting interval.

Since you indicate that one of your routes crosses the State line, you may be interested in the exemption from the overtime provisions of the Act provided by section 13(b)(1) for "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935." Drivers of private carriers engaged in transportation in interstate commerce within the meaning of the Motor Carrier Act are, under this provision, exempt from the overtime requirements in any workweek when they are so engaged, unless the greater part of their time during such workweek is spent in nondriving activities which do not affect safety of operation of the vehicle. If your buying activities, as distinguished from your driving, loading and other activities affecting safety of operation occupy more than half of your worktime during the week, this exemption would not be considered to apply to your employment. The fact that you are being paid for overtime may indicate that your employer does not consider this exemption applicable to your work.

I trust this is the information you desire. If you have any further questions, I suggest that you communicate with the Division's regional office located at 3000 Fidelity Building, 911 Walnut Street, Kansas City 6, Missouri.

Very truly yours,

Thacher Winslow
Assistant to the Administrator

December 9, 1943

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21 BJ 403.0
21 BJ 403.1

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December 16, 1943

Mr. Arthur P. Hall
Aluminum Company of America
605 Southern Building
Washington, D. C.

Dear Mr. Hall:

This is in reply to your letter of October 26, 1943, in which you state that at one of your plant sites your company owns and operates a hospital which was established there for the reason that no other such facility existed within 25 miles. This hospital has been in operation more than 30 years, during which time it has treated company employees, their families, and the general public. During the first six months of 1943, there were admitted 152 cases, 82 were from families of your employees and 70 were from families in the surrounding communities but not members of employees' families. You further point out that the hospital is used as the office of two doctors who treat more people who are neither employees nor members of employees' families than of the employees group. The hospital is also used for clinics by the health department. You inquire as to whether or not the hospital employees are covered by the Wage and Hour Act.

While it might well be argued that the employees of the hospital in question are within the coverage of the Fair Labor Standards Act, nevertheless, it seems unnecessary to pass upon this question in the present case since it appears from the facts stated in your letter that the hospital would be considered a service establishment and thus exempt under section 13(a)(2) of the Act.

Very truly yours,

L. Metcalfe Walling
Administrator

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25 BB 202.1
25 BB 202.2

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December 21, 1943

AIR MAIL

Mr. B. P. Manley
Executive Secretary
Utah Coal Operators Association
709 Tribune-Telegram Building
Salt Lake City, Utah

Dear Mr. Manley:

This will reply to your letter of December 3, 1943, in which you state that you are now operating mines under the so-called Ickes-Lewis contract which provides in part as follows:

> "3. The prevailing customary 30-minute lunch period is hereby reduced to 15 minutes and the mine workers agree to work said additional 15 minutes as productive time and shall be paid therefor on the basis of time and one-half or rate and one-half, as the case may be, and be made applicable to all existing rates effective in all bituminous coal districts."

You further state that it is anticipated that a new contract will shortly be entered into which will contain a similar provision for a 15-minute lunch period, and that the period of 15 minutes is not a rest period but is an actual lunch period and occurs at approximately the same time each day for each employee. You inquire as to whether or not such a 15-minute lunch period would constitute hours worked under the Fair Labor Standards Act.

It is my opinion that a bona fide lunch period of 15 minutes when the employee is relieved of all duties for the purpose of eating, which lunch period occurs at a regular recurring period of the day, is not to be regarded as hours worked under the Fair Labor Standards Act.

Necessarily, whether or not a so-called lunch period is a bona fide lunch period or merely a rest period depends upon the object and purpose for which the cessation of work occurs and an examination of the facts in each case is necessary. The above principles would be equally applicable to a lunch period in the underground coal mining industry where employees spend their lunch period underground.

Very truly yours,

L. Metcalfe Walling
Administrator

(01172)