UNITED STATES DEPARTMENT OF LABOR
Office of the Solicitor
May 12, 1945

gal Field Letter
. 99

## Attached Opinions

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

### MEMORANDA

| Date | Page | From | To | Subject |
|---|---|---|---|---|
| 2/5/45 | 1-2 | William S. Tyson (EG:HCN) | Archibald Cox | Lynchburg Foundry Co. Overtime compensation. What constitutes a chang from salary for regular number of hours to salar for variable number of hours. Possible tests. 26 CD 703.1 302.4 703.3 26 CB 101 26 CD 303 |
| 2/7/45 | 3 | Douglas B. Maggs (JMS) | All Regional Attorneys | FLSA coverage - "de minimis" and restitution policy 21 AC 302 |
| 2/7/45 | 4-6 | William S. Tyson (AJF:HCN) | Donald M. Murtha | Regulations, Part 516 requirements of record-keeping regulations. 211AA DB |
| 2/14/45 | 7-8 | Thacher Winslow (LG) | L. A. Hill | Monumental Sales & Mfg.Co. St. Cloud, Minnesota Notice of wage order proceedings. Regs. 642 Miscellaneous |
| 3/8/45 | 9 | Donald M. Murtha (HJE) | Kenneth P. Montgomery | Missouri Valley Bridge & Iron Co. Evansville, Indiana Applicability of executive and professional exemption to photographer. 21 BI 302.2230 21 BF 303.41 |

99



(03147)

| Date | Page | From | To | Subject |
|---|---|---|---|---|
| 3/9/45 | 10-11 | Donald M. Murtha (HJE) | Amzy B. Steed | Franklin Coal Mining Co. Birmingham, Alabama FLSA coverage of re-building of destroyed mine hoist, washer and tipple. 21 AC 409.4113 .514 .55 |
| 3/12/45 | 12 | Donald M. Murtha (HJE) | Ernest N. Votaw | National Malleable & Steel Casting Co. Sharon, Pennsylvania Salary requirement of 13(a)(1) exemptions: employee on hourly rate with minimum monthly guarantee. 21 BF 303.33 21 BB 302.430 21 BI 302.330 |
| 3/13/45 | 13-14 | Donald M. Murtha (LG) | Irving Rosen | Botanical Industries of America, Inc. New York, New York Wage order coverage of preserving and flame-proofing of vegetation and other articles by chemical means. Regs. 651 645 647 |
| 3/16/45 | 15-17 | Donald M. Murtha (ERG) | Dorothy M.Williams | Consolidated Freight-ways, Inc. Portland, Oregon Application of section 13(b)(1) to dockmen of motor carrier. 21 CB 401 204.3 |
| 3/21/45 | 18 | William S. Tyson (EG) | Ernest N. Votaw | Release A-13 - bonuses 26 CD 402.2110 |
| 3/21/45 | 19 | William S. Tyson (EG) | Donald M. Murtha | Pepsi-Cola Bottling Co. Tupelo, Mississippi Coverage of producer of goods for consumption within State who re-ceives materials from other States and returns containers. 21 AC 205.10 102.1210 |

| Date | Page | From | To | Subject |
|---|---|---|---|---|
| 3/23/45 | 20-21 | William S. Tyson (AGW) | Robert T. Amis | Ford Motor Company River Rouge Plant Dearborn, Michigan Collection fee paid to union for securing restitution of wages due not violation of Copeland Act. |
| 3/24/45 | 22-23 | Donald M. Murtha (LG) | Amzy B. Steed | Kansas City Southern Railway DeRidder, Louisiana Employer-employee relationship - railroad watchman hired under arrangement between city and railroad. 21 AB 403.20 21 AB 307 301 309 305 102.244 |
| 4/27/45 | 24 | William S. Tyson (AGW) | Harry Weiss | Application of section 3(m) to company store purchases where no deductions are made. 27 BC 27 AB |

LETTERS

| Date | Page | To | Subject |
|---|---|---|---|
| 4/10/45 | 25-26 | Mr. Vincent P. Ahearn Executive Secretary National Sand & Gravel Association Washington, D. C. (EG:HCN) | Coverage of materialmen supplying construction materials. 21 AC 101.63 202.10 409.63 21 AC 406.20 409.30 409.40 |



(03147)

SOL:EG:HCN:DMH

Archibald Cox

February 5, 1945

William S. Tyson

Lynchburg Foundry Co.
Lynchburg, Virginia

Your note on my memorandum of February 3, 1945, raises the question of whether the subject company is in compliance with section 7(a) with respect to its salaried employees.

It appears that prior to March 19, 1941, subject paid overtime on the basis of a rate one and one-half times the rate arrived at by dividing the weekly salary by 40. Subsequently, acting on advice from the regional office, the company began paying overtime on the basis of 33-1/3 percent of the rate which it used before. Prior to the institution of the practice of paying only an additional half time in lieu of full time and a half for overtime hours, an interoffice memorandum was prepared by Mr. McLennan and addressed to ten other executives of the company. The memorandum concluded with the instruction that all employees affected by the change in the method of computing their overtime pay be advised. Whether or not the employees affected were in fact advised of the change does not appear in your memorandum of January 31, 1945. The only information I have on this point is the quoted statement by Regional Attorney Davis, that "all employees regarded hours worked in excess of 40 a week as overtime hours and considered that the employer pays them only half time rather than time and one-half for such hours."

It is, of course, true that an employer may agree with his employees that the salary paid formerly for a given number of hours will in the future be regarded as compensation for all hours of work in the workweek. Where the employees work a greater number of hours than the number for which the salary previously constituted compensation, such an agreement amounts to a lowering of the employees' regular rate. The question in such cases ordinarily is, was such an agreement actually made? We have never expressed the view that such an agreement may be said to have been reached on the basis of the unilateral understanding of the employer. On the contrary, we have looked to all the surrounding facts and circumstances including the understanding of the employees in order to determine whether the employees were in fact employed on a fluctuating workweek basis within the intendment of paragraph 12 of Interpretative Bulletin No. 4.

Among the considerations taken into account in arriving at a determination in situations of this kind are: (1) does the employee receive his salary irrespective of the number of hours worked in the workweek; (2) does the employee understand that his salary represents straight time compensation for all hours worked in the week; (3) how does the employer arrive at the employee's regular rate; (4) what rate does the employer use for bookkeeping purposes.

There is no information in your memorandum on the first point. All that does appear is that the employees work a fluctuating number of hours and when overtime is worked are paid an additional one-half time of the rate arrived at by dividing their salary by 40.

(03147)

The information on the second point in your memorandum indicates that the employees do not understand that their salary is straight time compensation for all hours of work. Moreover, since the company utilizes hourly rates on its payrolls rather than monthly or weekly salaries, it would appear that the company itself does not seriously regard the salaries as controlling factors.

The fact that the employees continued to work after the change in the method of calculating their compensation in the instant case would not, in my opinion, necessarily indicate their agreement that a salary previously paid for 40 hours of work now covered all hours worked. Certainly it would not if their understanding was, as indicated in Mr. Leist's memorandum, merely that overtime was henceforth to be calculated at one-half time rather than at time and one-half.

Finally, the use of an hourly rate calculated by dividing the salary by 40 is further indication, rebuttable, of course, that the salary is intended to represent compensation for 40 hours of work.

Before I would be able to express a definitive opinion as to whether subject's method of calculating its salaried employees' overtime compensation satisfies the requirements of section 7, I would need the information indicated. If the employees are in fact employed on a fluctuating workweek basis, there is no objection to the employer paying more overtime than is required by section 7 (cf. Legal Field Letter 7, page 27).

In my opinion, the principles of the Belo case are not applicable to this case. There the court was concerned with the validity of an agreement to pay employees the same wages they received prior to the passage of the act through the establishment of a contractual regular rate for purposes of overtime compensation. The question was, what was the regular rate of the employees involved and not whether an employer compensating his salaried employees had changed the basis from a salary for 40 hours of work a week to a salary for a fluctuating workweek. In the Belo case the court pointed out that there is nothing in the act to bar an employer from contracting with his employees to pay them the same wages that they received previously so long as the minimum required by the act is respected. But the court did not indicate that less than time and one-half of the regular rate could be paid for overtime hours.

The question in the subject case is not: "What is the regular rate?" but rather, "Is time and one-half being paid for the hours over 40?"

SOL:JMS:DMH

ALL REGIONAL ATTORNEYS February 7, 1945

Douglas B. Maggs
Solicitor

"De Minimis" -Fair Labor Standards Act

The desirability of a clarifying statement concerning the Divisions' position on the application of the "de minimis" doctrine with respect to the applicability of, or the enforcement policy under, the Fair Labor Standards Act has been brought to my attention.

It is not deemed necessary or advisable, either from a Legal or an enforcement policy standpoint, to define in terms of percentages what amount of covered work an employee must perform in order to come within the general coverage of the act. As you know, there have been numerous court decisions holding the act applicable to employees who spent only a very small proportion of their time in covered work. Five percent, for example, would certainly seem more than de minimis, both under the decisions of the courts and under the Divisions' long-established position as expressed in Interpretative Bulletin No. 5. Since coverage is based on the work of the employee, it is obviously not decisive that only a small percentage of the employer's business consists of interstate commerce or the production of goods for interstate commerce.

The Divisions have never expressed either an opinion or an enforcement policy defining the limits of the "de minimis" doctrine in terms of a percentage for purposes of determining coverage under the act. A so-called "de minimis" rule was adopted as a matter of enforcement policy with regard to restitution in a single factual situation, namely: Where 5 percent or less of the goods produced for intrastate consumption by an establishment has inadvertently entered interstate commerce, due entirely to the circumstance of the establishment's proximity to an adjoining State. See Field Operations Handbook, pp. C 22 (Rev. 8/43) and R 7(Rev. 1/44); also, Field Operations Bulletin, Vol. VI, No.3, p.16. As is made clear in the references cited above, this policy relates only to enforcement with respect to past violations. That it is not intended to be used as a test of coverage is evident from the instruction that future compliance should be sought in such cases.

Care should be taken to avoid any statements which may leave employers or employees with the erroneous impression that the Divisions consider the failure of an employee to spend a particular percentage of his worktime in covered work as sufficient in and of itself to exclude him from coverage under the "de minimis" doctrine.



(03147)

Donald M. Martha, Chief, Wage and Hour
Headquarters Section, New York 19, N. Y.

SOL:AJF:HCN:DMH

William S. Tyson, Assistant Solicitor

February 7, 1945

Regulations, Part 516

This will reply to your memorandum of January 19, 1945, requesting my opinion as to what is necessary to satisfy the requirements of the record-keeping regulations, Part 516, with respect to determining violations under section 11(c).

As you know, section 516.1 definitely states that "No particular order or form of records is prescribed by these regulations." This section imposes upon an employer the duty to determine for himself the order and form of his records and it is this very latitude which indicates that the regulations are interested principally in substance rather than form. Exceptions to this rule are few and they are applicable to employers of learners, apprentices, messengers, homeworkers, etc.

The data which the regulations call for may be set down in any form of record and the information contained therein need not be in any particular order. This is so notwithstanding section 516.2 which states "Every employer shall maintain and preserve payroll or other records containing the following information and data * * *." (Emphasis supplied.) The section itself does not say that the information should be in any particular order or form; nor does the mere numbering of the several items justify an inference that the information should necessarily be contained in that order or be carried as entirely separate items in the records, for to impose such a requirement would render nugatory section 516.1. And as stated in the Explanatory Bulletin, page 3, "Sections 516.2 through 516.3 are subordinate to section 516.1." The regulations are designed to insure that information as to all the items listed will be available from whatever form of records the employer may choose to keep; they do not purport to require a separate entry of each listed item of information, as such, in the employer's records.

In a given instance, the employer need only show that the information required by the regulations is readily ascertainable from his records, either upon direct review or with a reasonable amount of recomputation or extension of the totals carried; in either event, the records would meet the requirements of the regulations although individual items are not shown separately. The manuscript of the Wage-Hour Code covering the subject of records indicates that we have ruled in the past that no application under section 516.18 for an exception from the record-keeping requirements is necessary in order to enable an employer to keep his records in a form from which the information or data required by the regulations to be recorded may be obtained through extension, recomputation, or transcription of such records. In view of the fact that the principal purpose of the record-keeping regulations is to make available the information necessary to determine whether the provisions of the statute concerning minimum wages and overtime compensation are complied with, the keeping of records from which all the specific items of information listed can be readily ascertained ought not to be deemed to constitute a violation of 11(c) merely because the employer has adopted a form of record which does not contain a separate entry for each individual item among those listed. * * *



(03147)

I cannot agree, therefore, with the view expressed by Regional Attorney Miller in his memorandum of November 18, 1944, wherein he says "* * * it is my position that a failure to show affirmatively upon the face of the records any of the items specified in section 516.2 of Regulations, Part 516, constitutes a violation of the act * * *."

Regional Director Hill, in his memorandum of November 15, 1944, to Mr. Dillo, calls attention to a statement in the Field Operations Handbook which he states appears to be contrary to section 516.1 of the regulations. I agree that the statement in the Handbook does not accurately reflect the fact that the regulations require information to be kept in the records, rather than the entry in the records of each individual item of this information separately. Clearly, however, no statement in the Handbook could be regarded as modifying or superseding the regulations themselves, and Mr. Winslow, in his memorandum to Mr. Hill, is doubtless correct when he says, "* * * the Handbook is not intended to supersede or modify the regulations and hence the statement to which you refer should be read with section 516.1 in mind."

It is, therefore, my opinion that the position of the Field Operations Branch, as indicated in your memorandum, to the effect that "records containing the following information and data" actually means that the items specified need not be set forth individually but need merely be available by computation from the records kept, is, in general, the correct interpretation of the record-keeping regulations.

I do not believe the language or the holdings of the courts in Fleming v. Pearson Hardware Flooring Co., 39 F.Supp. 300 (E.D. Tenn.) and in Walling v. New Orleans Private Patrol, 57 F.Supp. 143 (E.D. La.) are necessarily to the contrary. In the New Orleans case, it does not appear that the items of information called for by the regulations were ascertainable from the records actually kept. In the Pearson case, violations of the earlier regulations, which were superseded by those now in effect, were involved. The manuscript of the chapter of the Wage-Hour Code which was prepared on this subject contains the following statement:

> "These regulations, as presently phrased, are designed to allow employers some latitude as to form and content of records, without, however, in any respect relieving them of full responsibility for the making and keeping of records which contain (that is, have within them) the information and data specified by the Administrator."

A footnote to this statement, based on the files examined, points out:

> "The regulations were redrafted with the purpose stated in the text in mind, and with the understanding that the revised regulations would allow the Regional Directors some discretionary power in determining the adequacy of records as maintained by employers in their regions."

While it is true that in Walling v. Reilly, 7 Wage Hour Rept. 1026, the defendant's violations with respect to items specified in the regulations are listed by the court, the court does not say that there would still be a violation of section 11(c) if there were other data in the records from

which the necessary information could readily have been ascertained. It is clear from the court's Finding of Fact No. 6 that earnings at piece rates were computed and recorded on a bi-weekly basis only, so that it was not possible, by reference to any data actually contained in the records, to ascertain the information called for by sections 516.2(6), 516.2(8) and 516.2(9) of Regulations, Part 516.

With reference to your memorandum of January 30, 1945, I do not believe that the forms in which informations, indictments or complaints have been drawn evidence any inconsistency between the position taken in litigation and the views herein expressed. I find no conflict between the position herein stated and the language found in complaints or decrees to the effect that a defendant "failed to make, keep and preserve records * * * as prescribed by the regulations;" or the language you cite in your memorandum (" that the records kept by defendant failed to show adequately and accurately, etc.") as typical of some complaints. Such language leaves open the question as to whether the records actually kept are adequate and accurate enough to provide the information and data called for by the regulations.

Attachment



(03147)

Regs. 642
Miscellaneous

Mr. L. A. Hill
Regional Director
Minneapolis 3, Minnesota

SOL:LG:CTN

Thacher Winslow
Acting Deputy Administrator

February 14, 1945

Monumental Sales & Manufacturing Company
St. Cloud, Minnesota

I refer to your memorandum of January 17, 1945, to Harry Weiss, Director, Economics Branch, and to the attached copy of a letter from the subject company dated January 8, 1945. The subject company's letter and your memorandum concern the adequacy of the notice given to the public with reference to the wage order proceedings and the promulgation of the wage order for the Stone, Clay, Glass and Allied Industries. The subject company claims that the requirements of sections 8(d) and 8(f) of the Act were not satisfied. It refers in particular to the provision in section 8(d) that the Administrator shall give "due notice to interested persons" and shall give them "an opportunity to be heard" before approving or disapproving the recommendations of the industry committee; and to the provision in section 8(f) that "no such order shall take effect until after due notice is given of the issuance thereof by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give to interested persons general notice of such issuance."

The matter was referred to the Solicitor's Office and they advised that the Fair Labor Standards Act does not require that all those who may be affected by a contemplated wage order shall have had personal knowledge of the pendency of the proceeding or of the promulgation of the order. Such a condition would be impossible in practice. All that the statute requires is that general notice of hearing be given to interested persons by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give such general notice. The "other means" which are to be employed in giving general notice, in addition to publication in the Federal Register, are not specified. This is left within the discretion of the Administrator. The mere fact that an individual producer does not actually learn of the hearing or of the promulgation of the order at the time is not controlling. In this connection, I refer you to Pearson v. Walling, 6 W.H.Rept. 1139 (C.C.A. 8, November 10, 1943). As the court said in that case (at p. 1141):

> Due process in a proceeding of this character does not require that all those who may be affected by a contemplated wage order shall have had personal knowledge of the pendency of the proceeding or of the promulgation of the order. The statute does not so require, and such a condition would be utterly impossible in practice. * * * Notice of hearing "by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give general notice to interested persons" sufficiently satisfies the general requirement of due process in a proceeding for the promulgation of a remedial wage



(03147)

order by the Administrator, under an industry definition which can soundly be said to indicate to the producers of particular goods that their product is in all reasonable certainty covered by the definition and within the scope of the proceeding being had.

I should also like to point out that the Federal Register Act, 44 U.S.C., sec. 307, provides that, where a Federal statute requires notice of hearing, notice by publication in the Federal Register shall be deemed to give due notice to all United States residents, except where notice by publication is insufficient by law. Notice of the public hearing on the committee's recommendation, at which interested parties were afforded an opportunity to present testimony, was published in the Federal Register on June 8, 1943. The wage order was published therein December 4, 1943.

Of course, the Division was desirous of having all interested members of the industry informed concerning the various developments in connection with the issuance of the wage order. The measures taken to publicize these developments were therefore not limited to publication in the Federal Register. The Economics Branch has informed me that copies of the Administrative order appointing the committee (Administrative Order No. 192), the notice of public hearing and the wage order, were sent to a list of interested parties. Included among these are * * * associations, trade unions, and trade publications concerned with the manufacture of granite or related products.

* * *

In addition to the above, press releases were sent at the time of the issuance of the wage order to all of the press services and the Wage and Hour Reporter.

Accordingly, all employees within the coverage of the order have been entitled to its benefits from the effective date regardless of the fact that their employer failed to receive personal notice.

Attachment

21 BI 302.2230

Kenneth P. Montgomery, Regional Attorney
Chicago, Illinois

Donald M. Murtha
Chief, Wage-Hour Section

SOL:HJE:MFS

March 8, 1945

The Missouri Valley Bridge & Iron Company
100 South Wabash Avenue
Evansville, Indiana
File No. 13-51,416

We have just post-reviewed a memorandum dated November 8, 1944, addressed by A. W. Ewbank, attorney, to Mr. G. E. Brickley, District Supervising Inspector, and a letter dated November 17, 1944, which you wrote to subject in connection therewith. In those items of correspondence it is stated that an employee of subject firm who is variously designated as "clerk-photography" and "supervisor clerk" may be exempt under a combination of the executive and professional exemptions.

It appears that the employee in question is in charge of the photography section of the firm and has under his supervision a photographer and five clerks. In addition, he is required to take photographs of commissioning ceremonies and other special events. He performs such specialized work in the processing of films as blue-toning, reducing, and intensifying, although the routine developing and printing are done by a photographer and three darkroom clerks who work under him. You recognize that this photographic work is nonexempt work with reference to the executive exemption, but you state that it is work which qualifies for the professional employee exemption under section 541.3 of the regulations.

On the basis of the facts as stated in the afore-mentioned correspondence, it is my opinion that the employee referred to is not, either wholly or in part, exempt as a professional employee, since it does not appear that he is engaged in work requiring knowledge which is customarily acquired by a professional education, nor that his work is predominantly original and creative in character in a recognized field of artistic endeavor. A photographer may be exempt under section 541.3 "where artistic effect is of particular importance and the result is dependent upon invention, imagination or talent" (Manual of Newspaper Job Classifications, page 9). However, ordinary industrial photography, such as that which seems to be called for in the instant case, is not characterized by these qualities. Furthermore, such photographic laboratory work as reducing, intensifying and toning is not predominantly original and creative in character, but although it may require skill, is merely a routine job. It is therefore my opinion that the photographic work described herein is nonexempt work under section 541.3 of the regulations, unless it corresponds to the type of artistic and creative work referred to above as professional work. Accordingly, if it exceeds the 20-percent limitation on nonexempt work laid down in section 541.1 of the regulations, the employee in question would not qualify for exemption as an executive employee, nor could the 541.1 and 541.3 exemptions be tacked in subject case. I suggest that subject be advised accordingly.



(03147)

Amzy B. Steed
Regional Attorney
Birmingham, Alabama

21 AC 409.4113
.514
.55

Donald M. Murtha
Chief, Wage-Hour Section

SOL:HJE:CTN

March 9, 1945

Franklin Coal Mining Company
806 Protective Life Building
Birmingham, Alabama

This will reply to your memorandum of September 1, 1944, requesting an opinion as to the correctness of a letter which you propose to send to subject. Apparently, the only facts furnished by subject firm concerning its problem are contained in its statement, as follows:

> Our tipple, washer, and mine hoist at Powhatan was destroyed by fire yesterday.
>
> It is our understanding of the "Fair Labor Standards Act" that in rebuilding this plant that the labor in constructing it will not be subject to this act. In other words, as we understand it the construction labor would not require time and one-half pay in excess of 40 hours per week.

In the proposed reply, you expressly assume that subject is engaged in producing goods for interstate commerce. You state that the construction of a new tipple, washer and mine hoist would constitute repair or reconstruction work which is covered by the Act. You also state that an additional ground for coverage in this situation is that the rebuilding of the facilities in question constitutes activities necessary to production within the meaning of section 3(J) of the Act. However, in view of the statement in section V(B)(3) on page 10 of release G-162, you inquire whether you have correctly stated the Divisions' position.

As I understand it, a mine hoist is an apparatus by which coal is removed from a mine and dumped into the tipple. The latter is a structure or device located at the opening of the mine and is used to unload the coal from the mine cars or mine lift and to deliver the coal by means of conveyor belt, railroad or truck to another structure, generally known as the coal breaker, for processing. The breaker is the building in which the coal is crushed by machinery into appropriate sizes, after which pieces of rock, shale and clay or bone coal are removed with the aid of other machines, including agitators and washing devices. Thereafter, the cleaned coal is sorted into different sizes by means of screening machinery and each size is placed into a separate bin for loading into railroad cars.

In actual practice, however, the foregoing description may be found to constitute a simplification of the true productive process, since frequently several operations may be combined in one building. Thus, the tipple may sometimes be the place for "head house preparation," that is, the removal of large pieces of rock from the raw product, and



(03147)

the preliminary sizing of the coal. Furthermore, in the soft coal mining industry, the structure referred to in the foregoing as a "breaker" is usually known as a "washer."

On the basis of the foregoing, it is my opinion that the construction of subject's tipple, washer, and mine hoist which were destroyed by fire are covered by the Act, inasmuch as such construction constitutes the erection or installation of facilities which are integral parts of a coal mine. Such erection and installation would seem to be so closely related and so necessary to the mining of coal as to properly be deemed an integral part of coal mining operations. As such, it would seem to constitute work which is necessary to production of coal for commerce within the meaning of section 3(j). An analogous situation is contained in Legal Field Letter No. 44, page 6, where the installation in connection with oil well operations of a storage tank was stated to be a process or occupation necessary to the production of goods for commerce and so integrally connected with the drilling and pumping oil well operations as to constitute activities of producing petroleum. Again, paraphrasing Legal Field Letter No. 35, page 16, it can be said that in the instant situation the employees engaged in the activities in question are covered, since the installation and erection of mine hoists and coal tipples are indispensable to the mining of coal and are an integral part of mining operations. See also the second paragraph on page 17 of Legal Field Letter No. 35.

You will agree that in view of the foregoing there is no need to answer your specific question as to the applicability in this situation of the principle expresses in section V(B)(3) on page 10 of release G-162.



(03147)

Ernest N. Votaw, Regional Attorney
Philadelphia, Pennsylvania

21 BF 303.33
21 BB 302.430
21 BI 302.330

Donald M. Murtha
Chief, Wage-Hour Section

National Malleable and Steel Casting Company
South Dock Street
Sharon, Pennsylvania
File No. 37-60933

SOL:HJE:YS

March 12, 1945

This will reply to your memoranda of January 19 and February 27, 1945 requesting an opinion with respect to the meaning of the term "on a salary basis" as that term is used in the Regulations, part 541, and interpreted in release A-9. You state that in the situation to which you refer an employee was hired at $1.00 per hour with a guarantee of $130 per month, such guaranteed amount being payable even if the employee should be absent for an entire month because of illness. To illustrate this arrangement, you cite the following examples:

> Example 1 - First week 50 hours, second week 50 hours, third week, 10 hours, fourth week, 50 hours. The employee is paid $160.
>
> Example 2 - First week 45 hours, second week 40 hours, third week no hours, fourth week 40 hours. Employee worked 125 hours but received $130.
>
> Example 3 - First week 50 hours, second week 25 hours, third week 50 hours, fourth week 5 hours. Employee worked exactly 130 hours and received $130.

Since the receipt of $130 a month is mathematically equivalent to $30 a week, you inquire whether in examples 1 and 3 above the employee is paid in accordance with the principles of release A-9 inasmuch as the crediting from the monthly total of $1.00 per hour in each of the 50-hour weeks leaves less than $30 for each of the remaining weeks. I assume that the employee in question has a monthly pay period.

As you know, under release A-9, payment "on a salary basis" under Regulations, Part 541, contemplates the regular receipt each pay period by an employee under his employment agreement of a predetermined amount on a weekly, monthly or annual basis, which amount constitutes all or part of his compensation and is not subject to reduction because of variations in the number of hours worked. Furthermore, the payment on a salary basis of $130 per month is equivalent to the payment on a salary basis of $30 per week. See Wage-Hour Code, Vol. II, page 213, Section 10. Assuming, therefore, that the guaranteed sum of $130 a month paid to the employee under consideration is not subject to deductions for those types of absences ordinarily allowed executive employees, it is my opinion that the payment each month to the employee of that minimum amount of $130 constitutes payment on a salary basis within the meaning of the regulations and release A-9. The fact that by computing his earnings at $1.00 per hour, he is paid an additional sum in excess of the $130 would not affect this conclusion since the sum of $130 a month, although representing only a part of his total compensation, is nevertheless a predetermined sum not subject to reduction because of variations in the number of hours worked, and is not less than the minimum designated in section 541.1.



(03147)

Regs. 651
645
647

To: Irving Rozen
Regional Attorney
New York 1, New York

SOL:LG:CTN

March 13, 1945

From: Donald M. Murtha
Chief, Wage-Hour Section

Subject: Botanical Industries of America, Inc.
123 West 20th Street
New York, New York
File No. 31-4024

We refer to your memorandum of January 9, 1945, in which you inquire as to the wage orders applicable to the operations performed by the subject company.

Subject firm is engaged in the preserving of natural foliage, grass, trees and other vegetation by chemical means so that they retain their verdure. These plants are used for decorative purposes in hotels, department stores, night clubs and other public places. Included in this business is the preservation of Christmas trees, holly wreathes and other decorations prevalent at Christmas time. We assume that several coverage under the Act exists and that your inquiry is limited solely to wage order coverage.

The other facet of the firm's business consists of flame-proofing both the natural vegetation mentioned above and the interiors of night clubs and other places of public assembly which are required to be so flame-proofed by the regulations of the Fire Department of the city of New York. Flame-proofing activities involve not only the spraying and otherwise treating of chairs, walls, draperies, curtains, etc. in such establishments, but also the flame-proofing of articles in the plant for certification as having been flame-proofed by subject concern.

We understand that the subject company purchases the trees, plants, and other vegetation which it processes, and resells these products after processing. It is our opinion that the activities of the company in purchasing, processing and selling such products are subject to the wage order for the Logging, Lumber and Timber and Related Products Industries insofar as they relate to trees. The Christmas trees and other types of trees that may be handled by the company are timber products included within that industry. See the economic report for the industry, entitled Economic Factors Bearing on the Establishment of Minimum Wages in the Logging, Lumber and Timber and Related Products Industries, August 1943, page 2. Insofar as such activities relate to grass, plants, holly wreathes, or other natural foliage or vegetation, they are covered by the wage order for the Fruit and Vegetable Packing and Farm Products Assembling Industry. In this respect, the company's activities constitute "the assembling and preparing for market of * * * farm and related products" within the meaning of the definition of the latter industry.



(03147)

The flame-proofing of the interiors of night clubs and other establishments, which includes the treatment of chairs, walls, draperies, curtains and other objects, is a service activity included within the definition of the Finance, Insurance, Real Estate, Motion Picture, and Miscellaneous Industries, in our opinion.

As to the "flame-proofing of articles in the plant," we assume that employees engaged in this aspect of the subject company's business travel to different plants where various kinds of goods are manufactured, and flame-proof articles of all types on order. In our opinion, this is also a service activity included within the last-mentioned industry.

21 CB 401
21 CB 204.3

AIR MAIL

SOL:ERG:ES

To: Dorothy M. Williams
Regional Attorney
San Francisco 3, California

March 16, 1945

From: Donald M. Murtha
Chief, Wage-Hour Section

Subject: Consolidated Freightways, Inc.
Portland, Oregon
File No. 36-50809

Reference is made to your memorandum dated December 13, 1944, attaching a copy of Inspector Reeder's memorandum to Branch Manager Charles H. Elrey, dated September 8, 1944, requesting an opinion concerning the applicability of section 13(b)(1) to about 100 employees of the subject company who spend the vast majority of their time in unloading, loading, and general handling of freight on the company's freight dock.

The employees in question, it is stated, engage in an inseparable activity which includes both unloading and loading. After the pick-up and delivery trucks arrive from various urban points, these employees, referred to as "dock-men" or "helpers", unload the trucks and hand-truck the goods across the freight dock into waiting motor vans or line-haul trucks which haul the goods to out-of State points. In instances in which the line-haul truck is delayed, the goods are piled on the freight dock pending the arrival of the truck at that particular point.

Inspector Reeder's memorandum states that--

> Ordinarily employees designated as leaders actually do the final placing of freight in the line haul trucks--there are 14 of these men and there is no doubt that all of them actually spend in excess of half their time in such actual leading, and admittedly exempt operation. However, it is a more or less regular practice for the loaders to change off with the dockmen (variously called leader's helpers, platform men,etc.) and hand-truck the freight into the truck and have the dockman do the actual placing of the goods in the body of the truck or trailer. Thus practically all the dockmen do a substantial amount of actual loading, altho in all cases such actual loading is well under 50% of their total work. By "actual loading" is meant the actual final placement of goods in the truck or trailer. It should be mentioned that all of the 14 regular loaders are always responsible for the proper loading of the trucks assigned to their stations--they must scale-check the load and sign the truck out to the dispatcher as roadworthy insofar as the loading is concerned. [Underscoring supplied.]



(03147)

In the light of the decisions of the Interstate Commerce Commission in Ex Parte No. MC-2 and MC-3, you raise the following three questions:

1. If an employee, known as a loader, spends more than 50% of his workweek in unloading and loading in the manner described by Mr. Reeder, would he be entitled to the exemption provided by Section 13(b)(1)?

2. If the dockmen spend more than 50% of their workweek in unloading and in placing goods on the line haul trucks (but not finally distributing them on the truck, which, strictly speaking, is the job of the loader), would they be entitled to the exemption provided by Section 13(b)(1)?

3. If an employee, by whatever title he may be referred to, spends in excess of 50% of his workweek in unloading, handtrucking on the dock, onto the line haul truck (but not actually loading on the line haul truck), and loading, would he be entitled to the exemption provided by Section 13(b)(1)?

As you know, whether the employees in question qualify for exemption under section 13(b)(1) as loaders depends on the character of the duties they perform. Paragraph 4(b) of revised Interpretative Bulletin No. 9 states that a loader who sepnds the greater part of his time during any workweek on nonexempt activities is not within the scope of the exemption. Field Operations Bulletin Volume IX, No. 4, page 314, states that "unloading" is considered to be nonexempt work within the meaning of paragraph 4(b) of Interpretative Bulletin No. 9. This position, as you recognize, is not wholly in conformity with the views of the Interstate Commerce Commission insofar as employees engaged indiscriminately in both loading and unloading activities are concerned.

The Interstate Commerce Commission has advised us in the past that where the duties of an employee of a carrier require him to oversee and instruct loaders under his supervision as to the actual disposition of loads placed on motor vehicles with a view to insuring that the trucks are safely loaded, such supervision constitutes an integral part of the loading activities, and an employee so engaged would be considered to be a "loader" for purposes of the section 13(b)(1) exemption. On the other hand, employees who are not actually engaged in loading activities and who have no discretion or responsibility with regard to the manner and safe method of loading, would not be considered to be "loaders." Whether a particular employee of a motor carrier is a "loader" within the meaning of the Interstate Commerce Commission's decision in Ex Parte No. MC-2 and Ex Parte No. MC-3 (and revised Interpretative Bulletin No. 9) is a question of fact dependent on the actual duties and activities of the employee in each case.

Preceeding now to take up your questions in the order in which they have been presented, employees referred to as "loaders" would fall within the exemption unless more than 50 percent of their time in any workweek were devoted to unloading or other nonexempt activities. Consequently, the 14 "loaders" referred to in Inspector

Reeder's memorandum would on the basis of the facts set forth therein appear to qualify for the section 13(b)(1) exemption.

In situations 2 and 3, the dockmen or helpers would not qualify for the exemption in weeks in which the greater part of their time was devoted to nonexempt work such as unloading, hand-trucking, checking, etc. The problem of segregation does not appear to be material here inasmuch as Inspector Reeder states, with respect to dockmen that "in all cases such actual loading /as they perform/ is well under 50 percent of their total work." Of course, in weeks in which dockmen perform the duties normally performed by the 14 "loaders," they may qualify for exemption if they devote at least 50 percent of their time to loading or other exempt activities.

It is noted that Inspector Reeder states, in his memorandum to Mr. Elrey, that employees "must spend the greater part of their time in activities which affect the safety of operation of motor vehicles" in order to come within the section 13(b)(1) exemption. This statement is erroneous, since, as pointed out previously, the exemption is not defeated for employees engaged in exempt activities unless the greater part of their time is devoted to nonexempt activities (some portion of which is covered). As you know, where an employee devotes less than 50 percent of his time during a week to exempt work and the remainder of his time to nonexempt work, no portion of which is covered, the exemption is not considered to be defeated; however, if some part of the nonexempt work is covered, then the exemption is considered inapplicable (Field Operations Bulletin, Vol. IX, No. 4, page 314).



(03147)

SOL:EG:IMG

Ernest N. Votaw, Regional Attorney
Philadelphia, Pennsylvania

March 21, 1945

William S. Tyson, Assistant Solicitor

Release A-13

I have your memorandum of February 15, 1945, relative to release A-13. You inquire as to whether the criteria set forth in the Administrator's memorandum of November 10, 1943 are to be abandoned and whether the criteria set forth in releases R-1548 and R-1548 (a) alone are to be applied in determinations concerning the effect of bonus payments upon regular rate computations.

It is intended that the sole criteria to be used in determining whether bonus payments should be included in computing the regular rate of pay are those set forth in the subject release and which heretofore appeared in releases R-1548 and R-1548 (a), and in Legal Field Letters Nos. 67 page 20; 67 page 22; 71 page 30; 72 page 21; 73 page 9; 88 page 22; 88 page 39 reprinted in 6 Wage Hour Reporter 457. To the extent that the principles expressed in Legal Field Letters 71 page 30 and 73 page 9 conflict with the views set out in the later field letters, the principles of the later field letters supersede those field letters.

If a bonus is a category (B) type bonus under release A-13, it should be viewed as a part of the regular rate of pay even though the bonus may not be paid at any particular recurring date. The test to be applied is not whether the employee has a contract right apart from the rights conferred by the act to sue for the bonus, but rather has the employer promised, agreed, or arranged to pay a bonus the amount of which may be ascertained by application of a formula.

(03147)

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

SOL:EG:IMG

William S. Tyson, Assistant Solicitor

March 21, 1945

Pepsi-Cola Bottling Company
Tupelo, Mississippi
File No. 23-2610

Reference is made to your memorandum of January 17, 1945, concerning the applicability of the Fair Labor Standards Act to employees of subject company engaged in connection with the delivery of barrels of concentrates to the bottling department and employees engaged in connection with the emptying of the barrels.

Briefly, the facts are these. Subject company, an intrastate producer and distributor of soft drinks, purchases concentrates, an ingredient of the soft drinks it produces, from extrastate sources. The concentrates are shipped to the company in wooden barrels. Under its agreement with the supplier of the concentrates, subject company returns the barrels to the out-of-State supplier after the raw materials have been removed. These wooden barrels are regularly returned each workweek.

Upon receipt of the barrels containing the concentrates in the company's plant, they are stored at various places in the establishment. As the concentrates are needed in the manufacturing process, the barrels are taken to the bottling department, where the concentrates are emptied by employees, either manually or through the operation of machines, into the vats in which the soft drinks are manufactured. The specific question presented is - is the employee who empties the barrel into the vats in which the beverages for local consumption are manufactured engaged in production of goods for commerce.

I agree that the approach you suggest should be taken to this problem. Regional Attorney Steed should be advised that the employees of the beverage manufacturer in question who are engaged in ordering, buying, receiving or shipping syrup barrels, or in operations in connection with the making ready of the barrels for interstate transit or movement after their contents have been emptied into the vats are covered since such employees under the principles of the Western Union decision are engaged either in interstate commerce or in the production of goods for interstate commerce. He should also be advised, as you suggest, that the relationship between the removal of the contents from the barrel and the eventual movement of the barrel in interstate commerce under the facts of this case is not so close a relation as to be deemed either engagement in interstate commerce or the production of goods for interstate commerce.

(03147)

Robert T. Amis
Special Assistant to the Secretary

SOL:AGW:DMH

William S. Tyson, Assistant Solicitor

March 23, 1945

Violation of the Copeland Act
Ford Motor Company
River Rouge Plant
Dearborn, Michigan
Complainant: John Snow, Detroit, Michigan

This will reply to your memoranda of February 12 and March 14, 1945, inquiring whether a violation of the Copeland Act is indicated in the statements made by Mr. Snow in his correspondence with you.

It appears that the Ford Motor Company performed work subject to the Davis-Bacon Act but failed to pay the rates applicable to such work under that act. Subsequently, the United Auto Workers-CIO undertook to collect the wages due employees under the Davis-Bacon Act and was successful, at least in part, in this undertaking.

Upon recovering the monies the union notified the employees for whom recovery was made that they were morally obligated to contribute two percent of the recovery to the union for its legal expenses in the matter and for the services rendered. The file does not indicate whether any other means were used to effect collection of this fee, nor does it indicate that Mr. Snow was among those members of the union who received restitution of wages.

You ask whether the collection of the two percent fee is a violation of the Copeland Act or any other Federal statute or regulation.

It is my opinion that the exaction of the two percent fee by the union is not a violation of the Copeland Act even though the union may have made the fee a condition of obtaining payment for the employee. The union was acting on behalf of its membership and was independent of, and acting adversely to the interests of, the employer in collecting money due the employee. It would, in my opinion, be going outside the intent of Congress to insist that the act prohibits payment to a union for assisting its members in enforcing against the employer that right which the Copeland Act was intended to reinforce.

In the Laudani case the Supreme Court indicated that the Copeland Act was directed at employers and persons to whom the employer delegated authority over the employee. Here the union was neither the employer nor one who assumed to act on behalf of the employer; it acted in opposition to the employer and on behalf of the employee. The following language quoted from the opinion (320 U.S. 543, at p. 545) seems to bear out the distinction made above.



(03147)

"Having thus emphasized the Congressional reference to a 'contract of employment,' the /Circuit/ Court stated broadly that, 'What happens to the compensation after the employee has received it in full, and wholly without relation to or effect upon his contract of employment, is a matter with which this statute does not purport to deal.'

"The Court's statement might have been pertinent had the indictments here been against a common blackmailer, extortioner, or some other person not alleged to have been vested by the employer with power to fix and terminate the employer-employee status."

Insofar as I am aware, the two percent fee is not prohibited by any other law.



(03147)

Amzy B. Steed
Regional Attorney
Birmingham, Alabama

Donald M. Murtha
Chief, Wage-Hour Section

Kansas City Southern Railway
DeRidder, Louisiana
File No. 17-2293

21 AB 403.20
21 AB 301
21 AB 305
21 AB 307
21 AB 309
21 AB 102.244

SOL:LG:CTN

March 24, 1945

We refer to your memorandum of December 18, 1944, attaching a copy of a memorandum of Alexander A. Ralston, Jr., dated December 15, 1944, concerning subject company.

It appears that two employee-plaintiffs have performed the duties of a watchman at a railroad crossing at First Street in DeRidder, Louisiana. First Street is also a part of an interstate highway. The employees in question have received $60 a month and have worked a regularly scheduled workweek of 56 hours. They have therefore failed to receive the minimum wage required by section 6 of the Act.

Prior to November 1, 1942, there were no watchmen at this railroad crossing. Nowever, due to increased traffic caused by the opening of an Army Camp in the vicinity of DeRidder, the "city fathers" of DeRidder considered it necessary to provide some protection for automobile traffic at this crossing. Accordingly, as stated by Mr. Cecil Middleton, Mayor of De Ridder, in order to protect this crossing and to avert accidents, an oral agreement was made with the subject railroad for the hiring of watchmen at the crossing. Under the arrangement the railroad pays the city of DeRidder $120 and the city of DeRidder contributes an additional $60 a month, making a total of $180 per month to compensate watchmen at this crossing. Three men have been employed in this work, each receiving $60 a month and each working 8 hours a day, 7 days a week. These men were hired by the Mayor of DeRidder and the Mayor fixed their hours of work and compensation. The agreement was worked out with the railroad officials at the home office of the railroad in Kansas City and no local representative of the railroad, such as the local agent, has any control of the watchmen or even any knowledge of the agreement. The question is presented as to whether these watchmen are employees of the city of DeRidder or of the subject railroad.

As Mr. Ralston correctly points out, facts tending to establish an employer-employee relationship between the city and the employees in question are: (1) the employees are compensated by the city, (2) they are hired by city officials, (3) their compensation as well as their hours of work are fixed by the city officials, (4) the city has the right to discharge them, and (5) they perform a public service in protecting the general public from accidents at the railroad crossing.

On the other hand, there are certain facts which support the conclusion that these watchmen are employees of the railroad. These are (1) two-thirds of the compensation of these employees is paid by the railroad; (2) in performing watchmen duties at this crossing the employees benefit the railroad by preventing accidents and thereby protecting the railroad from personal injury suits; (3) watchmen are regularly employed by railroads to perform duties such as those performed by the watchmen in

question and in a very real sense the railroad controls the conditions and period of employment of these employees by the payment of the bulk of their salaries, since the stopping of this payment would result in the termination of their employment. No doubt, under its agreement with the city, the railroad would continue to pay its share of the salaries only so long as it was satisfied with the watchmen and the manner in which they performed their duties.

We are in accord with the opinion expressed in Mr. Ralston's memorandum that there is a joint employment of these employees by the city of DeRidder and the railroad. See Interpretative Bulletin No. 13, paragraphs 16 and 17; Mid-Continent Pipe-Line Co. v. Hargrave, 129 F.(2d) 655 (C.C.A. 10), affirming 42 F.Supp. 908 (E.D. Okla.); Greenberg v. Arsenal Bldg. Corp. 144 F.(2d) 292 (C.C.A. 2), modifying and affirming 50 F.Supp. 700 (S.D. N.Y.); National Labor Relations Board v. Long Lake Lumber Co., 138 F.(2d) 363 (C.C.A. 9, 1943). Under the circumstances, it is our opinion that the railroad is obligated to comply with the requirements of section 6 of the Act with respect to the watchmen in question. The fact that the city may be exempted from liability under section 3(d) does not, of course, affect the railroad's liability as an employer. Where there is a person not exempt under section 3(d) or other exemption liable as an employer for wages under the Act with respect to a particular employee in addition to another employer exempt under 3(d), the former's liability, in our opinion, is not affected by the latter's exemption. Cf. our memorandum of February 28, 1945 concerning A. C. Campbell Company, where a railroad contractor was held liable for overtime compensation under the Act regardless of the railroad's exemption under section 13(b)(2).

SOL:AGW:IMG

Harry Weiss, Director, Economics Branch
Wage and Hour and Public Contracts Divisions

April 27, 1945

William S. Tyson, Assistant Solicitor

Hearing in the Hawiian Sugar Industry under section 3(m)

This will supplement my memorandum of March 8, 1945, in which I advised you that the question of whether cash purchases at a company store should be treated as payroll deductions was being reserved for a reply at a later date.

It would appear that where employees buy for cash at a company store and the employer does not use his position as employer to coerce the employees into buying at the company store there is not a sufficient basis for holding that the transaction is governed by section 3(m). However, if the employers have used the employment relationship to compel employees to deal at the company store then the purchases would be subject to section 3(m). An example of the use of such compulsion would be discharge or other discipline of an employee who bought goods from other sources. The isolation from other sources of supply by the physical remoteness of the plantation from other stores is not considered sufficient to bring an arms-length cash transaction under section 3(m).

Similarly while credit purchases are not ordinarily regarded as within the purview of section 3(m) when collection of accounts is not effected through payroll deductions, such transactions are within section 3(m) if the employer uses the employment relation in collecting monies owing from employees.



(03147)

Mr. Vincent P. Ahearn
Executive Secretary
National Sand & Gravel Association
Washington, D. C.

SOL:EG:HCN:DMH

April 10, 1945

Dear Mr. Ahearn:

The recent conferences you have had with representatives of the Divisions and the Office of the Solicitor, indicate that there has been some misunderstanding of the Divisions' views with respect to the applicability of the Fair Labor Standards Act to employees of materialmen. In order to allay any misapprehension that may continue to exist among the members of your association, I deem it advisable to send you this written summarization of the principles followed by the Divisions in its enforcement of the act.

The misunderstanding that has arisen is perhaps due to the emphasis that has been placed in our correspondence on the local nature of the intrastate production and distribution of materials, such as sand, gravel and concrete. This emphasis may have been somewhat misleading inasmuch as the applicability of the act depends, as you know, upon the individual duties of the employee and not upon the nature of the employer's business. Thus, employees of materialmen engaged in delivering materials within a State are covered by the act if (1) they are engaged in interstate commerce or if (2) they are engaged in the production of goods for interstate commerce (including occupations or processes necessary to such production).

Employees delivering to a construction site materials received from other States, as a part of the interstate movement of those materials, are, of course, engaged in interstate commerce. This, I think, is clearly understood by your members.

Employees of a materialman who are engaged in producing or delivering sand, gravel, ready-mixed concrete or similar materials for use within the State where the materials are produced are not considered to be engaged in interstate commerce (as distinguished from the production of goods for commerce) except in situations where they participate in covered construction, repair, or maintenance of instrumentalities or facilities of commerce, as for example, by spreading such materials on the roadbed of an interstate highway. See the Divisions' release G-162, issued May 15, 1941. Since we have not previously notified your association that employees exclusively engaged in transporting such materials to a construction site within the State and discharging their loads at such a construction site, are under certain conditions engaged in interstate commerce as distinguished from the production of goods for commerce, the Divisions will take no enforcement action based on engagement by such employees in interstate commerce prior to April 15, 1945.

Employees of a materialman who are engaged in producing or delivering sand, gravel, ready-mixed concrete or similar materials for use within the State where such materials are produced may be covered by the act as employees engaged in the production of goods for interstate commerce, even though they may not be engaged in interstate commerce. This is true not only of employees who will be considered engaged in producing such materials "for commerce" as explained in the Divisions' release A-14, but it is also true, as the Divisions have consistently maintained, of employees performing work necessary to the production of other goods for interstate commerce. For example, employees hauling ready-mixed concrete to an oil-well site and discharging it into forms prepared for the foundation of the



(03147)

oil derrick would be considered covered on this ground if oil from the well may be expected to move to other States. Cf. Warren-Bradshaw Drilling Co. v. Hall, 317 U.S. 88; Kirschbaum v. Walling, 316 U.S. 517. Similarly, employees hauling such concrete to a factory used to produce goods for interstate commerce and pouring it into forms prepared in connection with the reconstruction or repair of the factory building, are engaged in work necessary to the production of goods in the factory. Cf. Interpretative Bulletin No. 5, paragraph 13. Many similar examples of this basis of coverage could, of course, be given. To the extent that the above statement may be in conflict with the letter addressed to you by former Regional Attorney Carroll on November 18, 1943, and may reflect a broader view of coverage than has previously been expressed in our opinions given to your association, those opinions are modified accordingly, but the Divisions will not bring enforcement action based on this broader view of coverage with respect to violations prior to April 15, 1945.

The specific matters you have referred to my attention will be disposed of in accordance with the positions outlined above.

Very truly yours,

L. Metcalfe Walling
Administrator



(03147)