UNITED STATES DEPARTMENT OF LABOR
Office of the Solicitor
June 28, 1945

gal Field Letter
No. 100

Attached Opinions

Copies of recent opinions on subjects indicated below are furnished herewith f or your information and proper notation in the Index to Legal Field Letter s.

MEMORANDA

Date	Page	From	To	Subject
2/28/45	1 - 3	Donald M. Murtha (ERG)	James M. Miller	West Central Cooperatives, Inc., Benson, Minnesota. Application of 13(b)(1) exemption to employees of cooperative trucking association. 23 CB 203.1 23 CB 401 21 AC 101.2 101.40 102.10 201
3/29/5	4 - 5	Donald M. Murtha (LG)	Amzy B. Steed	E. I. Du Pont deNemours & Co., Baton Rouge, Louisiana. Lunch period during which employees are on call constitutes compensable working time. 25 BB 202.0 25 BB 202.1
4/4/	6 - 8	William S. Tyson (JFS)	Donald M. Murtha	The Union Paper & Twine Company. Application of 13(b)(1) exemption to truck drivers hauling loads only part of which consist of goods transported in interstate commerce. 23 CB 203.1 23 CB 401
4/5	9	Donald M. Murtha (ERG)	Earl Street	"Productive factory workers" as used in special learner certificates and regulations do not include home workers. 24 BA 501 24 BB 701

(03322)

100

Date	Page	From	To	Subject
4/13/45	10-11	Donald M. Murtha (HJE)	Dorothy M. Williams	Southern California Edison Co., Los Ange[illegible] California. Effect of deductions from salaries of employees of a public utility company on salary requirement under Regs., Part 541. 21 BF 303.32 21 BB 302.42 21 BI 302.32
5/3/45	12-13	Donald M. Murtha (ERG)	Jeter S. Ray	Delaware Powde[illegible] Company, Hazard, Kentuck[illegible]y. Application of 13(b)(1) exemption to tr[illegible]uck drivers employe[illegible]d by firm engaged in whol[illegible]esale distribution of[illegible] explosive materials. 21 AC 205.23 21 AC 205.10 21 AC 404.1 21 AC 205.27 21 CB 203.21 23 CB 203.1
5/7/45	14	William S. Tyson (AGW)	George A. Downing	Status of restitution and liquidated damages as taxable income to employee and deductible expense to employer under Internal Revenue Code. 27 CC 303.98 27 F 201.12 PC 603.6 PC 700
5/9/45	15-16	William S. Tyson (HCN)	Ernest N. Votaw	Letter from Drinker, Biddle & Reath[illegible]; Sharp & Dohme, Inc. Fictitious dai[illegible] overtime payments st[illegible] be included in c[illegible]uting the regular r[illegible] of pay. 26 CD 402.5[illegible] 26 CE 101

(03322)

Date	Page	From	To	Subject
5/25/45	17-19	William S. Tyson (JFS:EG)	Donald M. Murtha	Lenox Shoe Company, Freeport, Maine. Reasonable cost of transportation provided by company included in regular rate when transportation primarily for benefit of employees and travel time does not constitute hours worked. 27 CC 303.995 .27 CC 401.1
5/28/45	20-21	William S. Tyson (WST)	Donald M. Murtha	Comstock Canning Company East Pembroke, New York. Effect of failure to pay overtime compensation for hours in excess of 12 a day or 56 a week under 7(b)(3). 23 CD 401
6/8/45	22-24	William S. Tyson (EG)	Donald M. Murtha	Otis Elevator Company New York, New York. Payment for hours of travel outside regular working hours. Travel during regular working hours. Unreasonably disproportionate test limited to normal travel area. 25 BD 303.120 .121

LETTERS

Date	Page	To	Subject
3/8/45	25-26	Mr. W. A. Gallahan Acting Deputy Administrator Treasury Department Washington 25, D. C. (SSB)	Effect of deductions for absences due to illness where company operates a sick-leave plan on exempt status of executive, administrative and professional employees. 21 BB 302.431 21 BF 303.33 21 BI 302.330
3/29/45	27-28	Mr. J. T. Kiser Assistant Vice President Houston National Bank Houston, Texas (HJE)	Applicability of administrative exemption to bank tellers. 21 BB 303.1 21 BB 302.3

(03322)

(03322)

23 CB 203.1
23 CB 401.
21 AC 101.2
101.40
102.10
201.

James M. Miller
Regional Attorney
Minneapolis, Minnesota

SOL:ERG:ES

Donald M. Murtha
Chief, Wage-Hour Section

February 28, 1945

West Central Cooperatives, Inc.
15th Street & Utah Avenue
Benson, Minnesota
File: 22-2346

Reference is made to your memorandum dated January 10, 1945, in which you request an opinion respecting the application of the section 13(b)(1) exemption to the subject firm's activities.

You state the the company is a cooperative trucking association engaged primarily in transporting butter and supplies for cooperative creameries. The butter is hauled from Benson and other points in Minnesota to the Twin Cities by the subject's drivers; supplies for the creameries are hauled on the return trip. You state further that the facts with respect to such butter-hauling are very similar to those found in the case of Dallum v. Farmers Cooperative Trucking Assn., 46 F.Supp. 785 (1942). That is, the butter is hauled from producers' establishments to the Twin Cities where it is cut, printed and wrapped. At the time the butter is transported by the subject firm, neither the producers nor the hauler know its destination although it appears that after the completion of the cutting, printing and wrapping a very substantial part of the product is subsequently shipped across State lines.

We agree with your view that while the hauling in question constitutes a process or occupation necessary to the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act (Armour & Co. v. Wantock, 7 Wage Hour Rept. 1163; Western Union Telegraph Co.v. Lenroot, 8 Wage Hour Rept. 58; Callus v. 10 East 40th Street Bldg., 7 Wage Hour Rept. 1208), it does not constitute interstate transportation under the Motor Carrier Act and hence, is not hauling subject to the section 13(b)(1) exemption. Walling v. Villaume Box & Lumber Co., 6 Wage Hour Rept. 544; Walling v. Comet Carriers, 7 Wage Hour Rept. 1057; and Walling v. Rockton & Rion R.R., 54 F.Supp. 342, affirmed per curiam, 8 Wage Hour Rept. 12. See, also, Legal Field Letter No. 96, page 18.

In the Western Union Telegraph Co. case, the Supreme Court, referring to the term "produced" as defined in section 3(j), stated:

> We are clear that "handled" or "worked on" includes every kind of incidential operation preparatory to putting goods into the stream of commerce.

(03322)

And in the Wantock case, the Supreme Court stated:

> * * * an occupation is not to be excluded from the Act merely because it contributes to economy or to continuity of production rather than to volume of production.
> /Underscoring supplied./

You state further that sometimes the loads hauled by the subject firm to the Twin Cities also contain a number of tubs of butter which have a known out-of-State destination--a definite consignee. These tubs travel on to other States as they are, without further processing, printing, etc. With respect to such carriage you raise the following questions:

> Where only part of a truck load of butter consists of tubs moving in interstate transportation, will the time spent by the driver in transporting that load constitute "interstate transportation" so as to make the 13(b)(1) exemption applicable?

and

> Is there a point at which we must take the position that the production of goods moving in interstate transportation on the particular truck is so small in comparison with the remainder of the load that the 13(b)(1) exemption would not apply? E.g., would that point be reached if but one tub out of 150 tubs of butter was moving in "interstate transportation"?

We have, in the past, had occasion to consult with the Interstate Commerce Commission with respect to the problem raised in your memorandum. The Commission has adopted the following position: Where it is known that 100 percent of the goods being hauled have extrastate destination, the Commission will assert jurisdiction. In situations where an unsegregated part of a mass of goods is destined for another State, but it is known that other parts of the goods will be processed or disposed of locally and it is not possible to predict that any given load of the goods will contain some which will leave the State, the Commission will not assert jurisdiction over employees hauling such goods. If, however, it is known that some portion of a particular load will leave the State, whether this is an identifiable portion of the load or not, the Commission will view a trip with such a load as an interstate trip and assert jurisdiction over the hauling.

Consequently, it is our opinion that where a truckload of butter contains one or more tubs moving in interstate commerce (viz, having a known out-of-State destination), the driving of such a load constitutes exempt work under section 13(b)(1), assuming, of course, that such "interstate" tubs of butter were not made part of the load as an artifice for the purpose of evading the provisions of section 7 of the

Fair Labor Standards Act.

Your last question concerns itself with a movement of butter from Benson, Minnesota to the Twin Cities, the load consisting of (a) butter consigned to Twin Cities establishments for cutting, printing and wrapping and (b) set-aside butter. You state that under various Governmental orders, producers have been required to set aside certain percentages of the butter in storage during certain periods of time. Various firms in the Twin Cities act as agents for the Federal Government receiving the set-aside butter and holding it in storage subject to Government order. This storage may, in some cases, be a matter of days or weeks or even months. You state, further, that at the time such set-aside butter is transported from producers in and around Benson, Minnesota to the Government agents in the Twin Cities, it is not consigned to any out-of State consignees. In fact, neither the producers nor the haulers know where the particular set-aside butter will be sent, although they have reason to believe that the Government will require the agent to ship most of it to other States.

Under the above facts, you inquire whether "set-aside butter" is to be considered as moving in interstate transportation when it is transported by the subject firm from Benson, Minnesota, to the establishment of the Twin Cities Government agent.

For the reasons previously advanced in this memorandum, we agree with your conclusion that the answer to the above question is "no." In our opinion, the facts as you have detailed them do not establish that "practical continuity of movement" which the Supreme Court, in the Jacksonville case, stated to be necessary to establish an engagement in interstate commerce. See, again, in this connection, Legal Field Letter No. 96, page 18.

25 BB 202.1

25 BB 202.0

Amzy B. Steed
Regional Attorney
Birmingham, Alabama

SOL:LG:MIS

Donald M. Murtha
Chief, Wage-Hour Section

March 29, 1945

E. I. Du Pont deNemours & Company
Baton Rouge, Louisiana

We refer to your memorandum of March 8, 1945, requesting our opinion as to whether time spent during certain described "lunch periods" should be regarded as hours worked under the Fair Labor Standards Act.

It appears that the subject company provides a 30-minute period each day to enable its employees to have lunch. The employees are relieved from their work and allowed to leave the place where their work is being performed in order that they may go to another part of the plant to eat their lunch. They are, however, forbidden to leave the plant. Why they are forbidden to leave the plant does not appear. It is noted, however, that at times employees are called back to work during their scheduled 30-minute period. You state that it may be presumed that the company, realizing that it may be necessary to call them back to work during the "lunch period," has imposed the restriction against leaving the plant site to assure the presence of the employees in case they are needed. The frequency of such call-backs does not appear. When the employees are called back to work, they are furnished with 30 full minutes later during the day within which to eat. It is assumed that during such subsequent periods, they are still forbidden to leave the plant and are still subject to be called back to work before the full period has passed.

We agree with your opinion that under the foregoing circumstances the lunch period in question is compensable time under the Act, unless it is usually uninterrupted, in which case it would not be considered hours worked by the Division. (See our Supreme Court brief in the Skidmore v. Swfit Co. case, page 13.) It is the position of the Division that a bona fide lunch period, when the employee is relieved of all duties for the purpose of eating, which lunch period occurs at a regularly recurring period of the day, is not to be regarded as hours worked under the Fair Labor Standards Act (Interpretative Bulletin No. 13, paragraph 2). In our opinion, however, employees have not been relieved of all duties within the meaning of this rule where they remain subject to call during the lunch period and are called back to work whenever needed, as in the instant case. Being on call, the employees would seem to be under the control of their employer during the entire lunch period. Cf. Walling v. Dunbar Transfer & Storage, 6 Wage Hour Rept. 476 (W.D.Tenn. 1943), where truck drivers and helpers were held entitled to compensation under the Act for lunch periods, including lunch periods when they were standing by, on the ground that they were on duty during such periods.

(03322)

You also present the question whether a 30-minute lunch period is compensable worktime if the employees are relieved of all duties and are not subject to call, but the employer requires that they remain at the plant. You state that this question is involved in a file now pending in your office. It is our opinion that if a lunch period is a bona fide lunch period during which the employee is relieved of all duties for the purpose of eating, such meal period need not be considered time spent in employment merely because the employees are not free to leave the employer's premises. Eating lunch is a purely private pursuit which presumably would occupy the employees' time whether or not they remained in the plant. Therefore, in our opinion the mere lack of freedom to leave the plant is not sufficient to render time spent in such eating compensable work time under the Act.

(03322)

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

SOL:JFS:DMH

William S. Tyson, Assistant Solicitor

April 4, 1945

Section 13(b)(1) exemption
The Union Paper & Twine Company

This is in regard to your memorandum requesting my comments on a problem submitted to you by Regional Attorney Reynard. The problem involves the application of section 13(b)(1) to truck drivers hauling loads only part of which consist of goods transported in interstate commerce.

Under paragraph 4(b) of Interpretative Bulletin No. 9 the section 13(b)(1) exemption is, as a general rule, considered to apply only to employees who spend 50 percent or more of their time during the workweek in activities affecting the safety of operation of motor vehicles engaged in transportation in interstate commerce. In my memorandum to All Regional Attorneys dated February 9, 1944, discussing this rule, it was stated that where a driver devotes less than 50 percent of his time in a workweek to exempt driving and the whole remainder of his time to noncovered driving or other noncovered work, the section 13(b)(1) exemption would not be defeated by the performance of nonexempt work, no part of which is covered. But where a driver devotes less than 50 percent of his time in a workweek to exempt work and some part of the remainder of his time to nonexempt but covered driving or other nonexempt but covered work, the exemption is considered inapplicable.

Whether a driver is engaged in transportation in interstate commerce depends upon the nature of the trip and not solely upon the character of the load. The driving of an empty truck in interstate commerce as a necessary incident to hauling in interstate commerce constitutes transportation in interstate commerce. Field Operations Bulletin Vol. VIII, No. 2, p. 222. If transportation in interstate commerce takes place throughout a particular trip the whole trip constitutes transportation in interstate commerce even though the driver may have a mixed load, a large part of which is not being transported in interstate commerce.

As stated in my memorandum of June 3, 1944, to Regional Attorney Votaw, Re: Motor Carrier Employees-Section 13(b)(1), it is a question of fact in each individual case whether a particular period of driving is a single continuous trip in interstate commerce with intermediate stops along the way, in which case the whole trip would constitute exempt driving; or is a series of two or more separate trips, in which case only the time spent performing the trip or trips involving transportation in interstate commerce would constitute exempt driving.

This position as to what constitutes driving where the Interstate Commerce Commission claims the power to regulate has met with approval in informal discussions held with representatives of the Commission. However, the Commission takes a very broad view as to what constitutes a single continuous trip in interstate commerce with intermediate stops along the way. The fact that a trip involving the carriage of a load of goods, part of which are being transported in interstate commerce, is not made over the shortest or most direct interstate route would not, in the opinion of the Commission, necessarily mean that the trip is not a single continuous trip in

interstate commerce. The position of the Commission is that where a trip involving a mixed load consisting in part of goods being transported in interstate commerce is made as a normal and regular part of a carrier's business and there is no element of legal subterfuge to confer jurisdiction on the Commission, the whole trip is a single continuous trip in interstate commerce, even though certain parts of the trip may actually depart from the route most appropriate for the interstate movement. Whether such departure is a normal and regular incident of the whole movement or is a separate undertaking and whether the interstate hauling has been injected as a legal subterfuge to claim Interstate Commerce Commission jurisdiction must be determined from all of the facts involved.

Three specific questions are presented by Regional Attorney Reynard; which may be answered on the basis of the above discussion:

1. Where a load consists of a number of deliveries, some small part of which constitutes transportation of goods in interstate commerce and the majority of which constitutes local distribution and consumption after the goods have come to rest within the state, is the driver's time in hauling this split load to be considered as transporting goods in commerce?

2. In the same case stated in No. 1 above, assume that the goods being transported in commerce (from railheads to local consumer) are unloaded during the first one-third of the driver's route, the remaining two-thirds of the route consisting of local delivery of goods not being transported in commerce, what part of the driver's time is to be considered exempt driving?

3. In applying the 13(b)(1) exemption which now requires a consideration of the driver's time spent in exempt driving, how should a return trip be classified in the case of a driver who hauls a load only a small part of which consists of goods being transported in interstate commerce?

In answer to questions 1 and 2, it may be said that where a trip involves the making of deliveries within a single state from a mixed load consisting of goods being transported in interstate commerce and goods which have come to rest within the State, or which were never in commerce, the whole trip is exempt work since the trip constitutes a single trip in which the driver is engaged in transportation in interstate commerce.

Whether a return trip constitutes exempt or nonexempt driving involves the same considerations as those concerned in determining the same problem for the outgoing trip. In other words, depending on the facts involved as to each trip, both the outgoing and return trips may constitute exempt driving or one trip may constitute exempt driving and the other may constitute nonexempt driving. Of course, where the return trip merely involves the returning of an empty truck to the employer's place of business after the completion of delivery of a load consisting wholly or in part of goods being transported in interstate commerce, the round trip would constitute a single trip in interstate commerce.

A further aspect of this general problem is the fact that the section 13(b)(1) exemption is applicable on a workweek basis and depends upon the percentage of time an employee spends during the workweek in

performing exempt and nonexempt work. Where an inspection is made a year after certain driving has occurred, it is often difficult for inspectors to determine whether section 13(b)(1) was applicable.

As you know, the general rule that employers claiming exemptions under the act have the affirmative burden of proving the exemption, has been applied to the section 13(b)(1) exemption. Hutchinson v. Barry, 50 F.Supp. 292 (D.Mass.); Thornberg v. E. T. & W.N.C. Motor Transp. Co., 157 S.W.(2d) 823 (Tenn.). The courts have held that such burden requires an employer to prove that a "substantial" part of the time of an employee for whom the exemption is sought was spent during each workweek in performing activities directly affecting the safety of operation of motor vehicles engaged in transportation in interstate commerce. Walling v. Mutual Wholesale Food & Supply Co., 141 F.(2d) 331 (C.C.A. 8); Hutchinson v. Barry, Supra; Potashnick Local Truck System, Inc., v. Archer, 179 S.W.(2d) 696 (Ark.).

In considering what should be deemed "substantial," under the rule enunciated by these courts, for purposes of applying section 13(b)(1) as distinguished from whether the Interstate Commerce Commission may regulate qualifications and maximum hours of service, regard must be had to the position of the Administrator that the exemption is inapplicable unless 50 percent or more of an employee's time during a workweek is devoted to activities directly affecting the safety of operation of motor vehicles engaged in transportation in interstate commerce. Hutchinson v. Barry, supra; Anuchick v. Transamerican Freight Lines, Inc., 46 F.Supp. 861 (E.D. Mich.). Of course, the exemption is not considered to be defeated where less than 50 percent of an employee's time during a workweek is devoted to exempt safety work and none of the remaining work is covered by the act. Where an employee performs exempt and nonexempt covered work during the same workweek and the portion of time spent in each type of work cannot be definitely ascertained, the exemption would be inapplicable. Davis v. Southern California Freight Lines, 7 Wage Hour Rept. 905 (S.D. Calif., 1944); Hutchinson v. Barry, supra. Cf. Release A-5. As is apparent from the foregoing discussion, this should not be taken to mean that a single trip in hauling a mixed load, consisting in part of goods being transported in interstate commerce, is to be viewed as the performance of unsegregated exempt and nonexempt work rather than the performance only of exempt work.

24 BA 501
24 BB 701

Earl Street
Regional Attorney
Dallas, 2, Texas

SOL:ERG:CTN

Donald M. Murtha
Chief, Wage-Hour Section

April 5, 1945

Number of Learners Authorized by Special Learner Certificates

This will reply to your memorandum dated February 7, 1945, in which you inquire whether the term "productive factory workers" as used in learner certificates includes home workers.

It appears that a recent inspection of the Juvenile Manufacturing Company, San Antonio, Texas, an establishment holding learner certificates authorizing the employment at any one time of not more than "ten percent of its total number of productive factory workers (not including office and sales personnel)," disclosed that the firm had considered as "factory workers" for learner purposes all employees on the pay roll, including home workers, excepting only those employees exempt under section 13(a)(1). Although the language contained in the certificates expressly refers to "factory" workers as the basis for computation of authorized learners, you point out that Field Operations Handbook, page L-3, defines productive factory workers as consisting of all employees on the pay roll, excluding those employees engaged in clerical, sales and primarily supervisory capacities. You inquire, consequently, whether home workers constitute "productive factory workers" as that term is used both in the special certificates and the learner regulations.

The term "productive factory workers" as used both in the certificates and in the learner regulations does not, in my opinion, include home workers. Learner certificates are issued, as you know, on a plant basis, and the fact that both the regulations and the certificates restrict the percentage of learners that may be employed at any one time to a percentage of productive factory workers indicates rather clearly that home workers were not intended to be included for purposes of such computation.

The exclusionary language in the certificates, i.e., "(not including office and sales personnel)," excludes, of course, only those employees who would otherwise be included were it not for such exclusion. It indicates that, exclusive of non-factory employees, all employees in the factory are to be counted with the exception of office and sales personnel. It does not mean that the only employees on an employer's pay roll who are excluded from the count are office and sales personnel.

(03322)

AIR MAIL

21 BF 303.32
21 BB 302.42
21 BI 302.32

Dorothy M. Williams
Regional Attorney
San Francisco, California

Donald M. Murtha
Chief, Wage-Hour Section

SOL:HJE:BS

Interpretation of the Salary Requirement
of Regulations, Part 541
Southern California Edison Company
Los Angeles, California

April 13, 1945

Certain deductions were made from the salaries of the employees of a public utility company, as follows:

1. At certain of subject's substations and hydro plants, some of which are in remote locations, houses owned by the company are available to employees at a rental of $25 a month. If an employee decides to occupy a company-owned house and one is available for him, the rent is deducted from his salary upon his authorization. In a few instances it is necessary, as a practical matter, for certain key personnel to occupy company-owned houses but in the majority of cases the employee may or may not occupy the company-owned house, as he chooses. The rentals deducted are reported as income by the company on its tax returns.

2. Single men employed at hydro stations occupy dormitory rooms at a rental of $15 per month with an addition flat rate deducted for meals. The living at the dormitories and the taking of meals there are at the discretion of the employee but in the majority of instances, both because of the low rates and because of the convenience, the men do choose to live in the dormitories. The rental and the charge for the meals are deducted from the salaries upon authorization of the employee.

3. A pension plan and group life and disability insurance are provided for all company employees who qualify and who choose to participate. The company and employees share in the payment of premiums. Membership in either plan is purely voluntary and deductions are made upon receipt of written authorization signed by the employee.

Your office has advised subject that the making of the type of deduction described in (1) and (2), above, if it results in the payment of less than the minimum amount specified in an applicable section of Regulations, Part 541, would defeat the exemptions defined in that section. However, you state that deductions for an employee's voluntary contributions toward his participation in a pension plan and in a group life and disability insurance plan are not for "facilities," as that term is used in the regulations, and do not, therefore, affect the employees' eligibility for exemption. In view of subject's request for a reconsideration of your opinion, you have transmitted it to me for confirmation.

(03322)

I agree with the opinion which your office has expressed to subject to the effect that the section 13(a)(1) exemption for executive, administrative and professional employees, as defined in Regulations, Part 541, would be defeated where deductions for board, lodging, or other facilities reduce the compensation paid to an employee below the minimum salary rate prescribed in those definitions. Although, for the purposes of determining compliance with sections 6(a) and 7(a) of the Act, the reasonable cost of board, lodging, or other facilities furnished to employees may, under section 3(m), be counted as wages, sections 541.1 to 541.3, inclusive, of the Regulations, Part 541, specifically provide that the minimum salary rates required to be paid for exemption purposes shall be exclusive of such deductions. In view of these specific requirements, it is apparent that it was definitely intended by the Administrator to exclude the cost of board, lodging, or other facilities furnished to an employee in determining the adequacy of his salary under the regulations. See Legal Field Letter No. 26, page 22.

Subject contends, however, that the furnishing of the facilities for which deductions are made are optional with the employee; that the custom of making such charges antedated the regulations; and that your opinion would result in so-called "distortions" and discrimination since the payment of extra compensation for overtime would vary between employees performing the same work and receiving the same compensation, depending only upon whether or not the particular employee is receiving facilities. The short answer is that the employer can control this situation by paying all the salaried employees in question in cash. If then all the facts and circumstances show that the employees are free to rent company houses and purchase company board or refuse to do so, and that their transactions with the company with respect to such board and housing are entirely voluntary, the company's problem in meeting the salary requirements of Regulations, Part 541, for employees using company facilities would be met. Cf. paragraph 5, Interpretative Bulletin No. 3

With respect to deductions for voluntary contributions by an employee toward participation in a pension plan or in a group life, disability and insurance plan, I agree that these do not constitute "facilities" within the meaning of section 3(m) and Regulations, Part 531. Such deductions, however, are deemed payments to third parties for the benefit and credit of the employee and are considered equivalent, for purposes of the Act, to payment to the employee. See Interpretative Bulletin No. 3, paragraph 17.

21 AC 205.23
21 AC 205.10
21 AC 404.1
21 AC 205.27
23 CB 203.21
23 CB 203.1

Jeter S. Ray
Regional Attorney
Nashville 3, Tennessee

Donald M. Murtha
Chief, Wage-Hour Section

SOL:ERG:MIB

Delaware Powder Company
Hazard, Kentucky
File No. 16-54863

May 3, 1945

Reference is made to your memorandum in the subject matter dated March 16, 1945, in which you request an opinion in respect to the coverage and the applicability of the section 13(b)(1) exemption to certain truck drivers employed by the subject firm.

You state that the company engages in the wholesale distribution of explosive materials (such as explosive caps, shooting paper, fuses, powder and dynamite) which are sold to mines engaged in the production of coal for commerce. The company employs two truck drivers who haul out-of-State explosive materials from the railroad station to the company's magazine, and who unload and store the explosives in the magazine; these employees subsequently distribute the explosives to various coal mines in the vicinity.

You state that it has been determined that the truck drivers spend approximately 90 percent of their time in intrastate distribution of explosives, 8 percent in hauling from the railhead to the magazine, and 2 percent in unloading the trucks and storing the materials in the magazine. You raise the following three questions:

1. Is the transportation of the explosive materials from the magazine to the coal mines where they are used in the production of goods for commerce covered as being necessary to such production?

2. Would such intrastate hauling of explosives, if covered, be subject to the 13(b)(1) exemption?

3. If the intrastate distribution is not covered in and of itself, would the unloading and storage in the magazine of the interstate shipments be covered non-exempt work of such a nature as to make all work covered and defeat the 13(b)(1) exemption upon an application of the 50 percent rule?

Under the principles set forth in release R-1789, it is my opinion that the intrastate distribution of explosives to coal mines engaged in the production of coal for commerce constitutes a process or occupation necessary to production within the meaning of section 3(j) of the Act. (See Legal Field Letter No. 83, page 47; Legal Field Letter No. 97, page 26 and Legal Field Letter No. 85.) See, also, the Supreme Court's recent decision in the Western Union case. The fact that the employees involved are engaged in the distribution, as distinguished

(03322)

from the production, of explosives consumed entirely within the State by mines engaged in the production of goods for commerce would appear to be immaterial (Legal Field Letter No. 89, page 20). In the one case, as in the other, the work of the employees in producing and transporting the explosives is necessary to the production of goods for commerce.

With respect to the section 13(b)(1) exemption, it is the Divisions' position, as you know, that where out-of-State goods have come to rest and are, subsequently, distributed wholly intrastate (and such intrastate distribution is covered under section 3(j) of the Act), such intrastate transportation is not an exempt activity under section 13(b)(1). However, as you will note from Legal Field Letter No. 96, page 44, the Interstate Commerce Commission has asserted power to regulate the intrastate transportation of explosives or other dangerous articles under section 204 of the Motor Carrier Act as a result of which the Division presently takes no position with respect to the applicability of the section 13(b)(1) exemption to truck drivers engaged in the intrastate transportation of explosives or inflammable liquids.

In answer to your third question, it is my opinion that the unloading and storage in the magazine of interstate shipments of explosives for use in mines engaged in covered production is covered work under the Act and nonexempt under section 13(b)(1). Consequently, were it not for the special character of the goods in question, vis, explosives, such activities would defeat the application of the 13(b)(1) exemption even if the subsequent intrastate transportation of the goods were not subject to the Fair Labor Standards Act. See exemple 4 in Legal Field Letter No. 96, page 1. However, in view of the "no position" which the Division has taken with respect to 90 percent of the employee's time, vis, intrastate distribution of explosives, the subject case constitutes one in which the Division takes no position with respect to the application of section 13(b)(1) to the truck drivers in question.

The subject file is returned herewith.

Attachment
(File)

27 CC 303.98
27 F 201.12
PC 603.6
PC 700

George A. Downing, Regional Attorney
Atlanta, Georgia

William S. Tyson, Assistant Solicitor

SOL:AGW:IMG

Status of Restitution and Liquidated Damages
Under Internal Revenue Code

May 7, 1945

This will supplement my memorandum of January 30, 1945 replying to your memoranda of December 20, 1944 and January 18, 1945. The Administrator has recently received a reply to his letter to the Commissioner of Internal Revenue. The rulings given may be summarized as follows:

1. Restitution made under the Fair Labor Standards Act whether or not pursuant to a consent decree constitutes wages for withholding of tax purposes and a deductible expense to the employer for income tax purposes. The same is true of restitution made directly to employees under the Public Contracts Act.

2. Liquidated damages paid to the Secretary of Labor for wage and hour violations of the Public Contracts Act are deductible expenses to the employer for income tax purposes. However neither such payment nor the payment by the Secretary of Labor to the underpaid employee is a payment of wages for income tax withholding purposes. The money received by the employee is taxable income.

3. A payment made to satisfy a judgement obtained in an employee's suit under section 16(b) of the Fair Labor Standards Act is a proper item of expense to the employer for income tax purposes. The portion of the judgement which represents liquidated damages is not wages for income tax withholding purpose. However the portion of the judgement which represents unpaid wages or overtime compensation is wages for that purpose.

4. As you were advised in my prior memorandum child labor penalties are not proper items of expense for income tax purposes.

(03322)

26 CD 402.524
26 CE 101

Ernest N. Votaw, Regional Attorney
Philadelphia, Pennsylvania

William S. Tyson, Assistant Solicitor — SOL:HCN:IMG

Letter from Drinker, Biddle & Reath — May 9, 1945
Re: Sharp & Dohme, Inc.

The subject letter which you left in this office recently presents the question of whether truck drivers and helpers who are not exempt from the overtime provisions of the Fair Labor Standards and Walsh-Healey Acts are properly paid in accordance with the requirements of these acts under the terms of a master agreement between the Labor Relations Division of the Philadelphia Chapter of the Pennsylvania Motor Truck Association, Inc. and Local 107 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Prior to the agreement in question an agreement between the association and the union provided a regular hourly rate for the first 8 hours of work in any day or the first 48 hours of work in any week and an overtime rate for all hours of work in excess of 8 in any one day, or 48 in any one week. Under the agreement in question, dated November 10, 1942, compensation for the employees of the subject company covered by the agreement was fixed at a "regular hourly rate" for the first 6-2/3 hours of employment in any day or the first 40 hours of employment in any week. No standard workweek was fixed in the agreement for such operations but the normal workweek of employees during the period involved was 48 hours. I assume that this is the customary workweek consisting of six 8 hour days.

The Divisions' inspector advised the company that under the decision in Walling v. Helmerich and Payne, Inc. the so-called "regular hourly rate" fixed by the contract was not the regular rate of pay for purposes of the Fair Labor Standards Act and that the so-called "overtime compensation" for the last 1-1/3 hours of the normal workday should be included in computing the regular rate of pay. The subject letter seeks to draw a distinction between the situation herein involved and the situation involved in the Helmerich and Payne case.

After giving the matter full consideration we are convinced that the arrangement here involved is not different in substance and effect from the arrangement considered by the Supreme Court in Walling v. Helmerich and Payne and from those described in paragraph 70(4) of Interpretative Bulletin No. 4 and in Legal Field Letter 59, page 8. Where, as here, the employees normally work 8 hours per day, no statute characterizes any of these hours as overtime hours, and there is no evidence whatever than an actual normal workday of 6-2/3 hours ever existed for these employees or is contemplated as the scheduled workday in the future, we think the arrangement is subject to the same objections as was the arrangement involved in the Helmerich and Payne case. The "regular rate" specified by the parties clearly is not and cannot be regarded as "the hourly rate actually paid for the normal non-overtime workweek." Insofar as the so-called overtime rate governs part of the compensation for the employees' normal workday, the compensation it provides must be included in determining the regular or basic rate for purposes of both acts.

(03322)

The subject firm argues that the arrangement is bona fide and should be considered to satisfy the requirements of the acts because its purpose was to "provide a uniform method of compensation that would place all the employees represented by the union in a position of exact equality in the computation of both their daily and weekly wages." The subject firm points out in this connection that 95% or more of the employees covered by the contract are not subject to the overtime provisions of the Fair Labor Standards Act. What is overlooked in this argument is that the provisions of section 7 of the act govern the overtime compensation of 5% of these employees and that the act clearly does not contemplate that the overtime compensation payable to them should be governed by wholly different provisions contained in collective bargaining agreements which are intended primarily to govern the compensation of employees not subject to the act's overtime provisions, and which are not designed to, and in fact do not, carry out the statutory policy. As pointed out by the Supreme Court in Tennessee Coal, Iron & RR. v. Muscoda, Local 123, no custom or contract falling short of the basic policy reflected in the requirements of the act can be utilized to deprive employees of their statutory rights.

I suggest therefore, that you reply to the subject firm in accordance with the principles expressed above and in paragraphs 69 and 70(4) of the bulletin. I am returning the letter from Drinker, Biddle & Reath.

Attachment

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

27 CC 303.995
27 CC 401.1

7/14/45

Cancellation sheet

William S. Tyson
Assistant Solicitor

SOL:JFS:EG:MH

May 25, 1945

Lenox Shoe Company
Freeport, Maine
File No. 18-43.

This is in regard to your memorandum transmitting for comment a copy of your proposed reply to Regional Attorney Foley. It appears that the subject firm has a number of employees who live in or near Lewiston and Auburn about 20 miles distant. There are no scheduled bus or train routes between Freeport and Lewiston or Auburn and the firm has in effect several plans to provide free transportation for its employees from their homes to work and return. Under one plan drivers of private cars are paid 50 cents per day for each employee riding with them. Under another plan the firm purchased and pays all operating costs of cars which certain employees are allowed to drive between their homes and work, taking other employees with them. Under a third plan the firm rented a bus which transports 15 to 20 employees between their homes and work. Use of the company provided transportation is entirely optional with the employees who are free to, and do, drive between their homes and work in their own cars or car pools for which driving the firm assumes no financial responsibility. The inspector estimates the value of the company provided transportation to amount to 50 cents per day for those employees who wish to avail themselves of the same and the problem is whether this amount should be included in computing these employees' regular rates of pay.

Section 3(m) of the Fair Labor Standards Act provides that "Wage paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees." Pursuant to this authority the Administrator has issued Regulations, Part 541, for determining the reasonable cost of board, lodging or other facilities.

Paragraph 6 of Interpretative Bulletin No. 3 provides that "Section 3(m) applies to both of the following situations: (1) Where board, lodging, or other facilities are furnished in addition to a stipulated wage; and (2) where charges for board, lodging, or other facilities are deducted from a stipulated wage. The use of the word 'furnishing' and the legislative history of section 3(m) clearly indicate that this section was intended to apply to all facilities furnished by the employer as compensation to the employee, regardless of whether the employer calculates charges for such facilities as additions to or deductions from wages."

Paragraph 8 of Interpretative Bulletin No. 3 provides that "Where deductions are made for board, lodging, or other facilities, the regular rate of pay is arrived at on the basis of the stipulated wage before any deductions have been made." We have held that transportation furnished employees between their homes and work constitutes a "facility"

(03322)

within the meaning of section 3(m) and the reasonable cost thereof may be deducted from the cash wage due for the workweek, provided that the travel time does not constitute hours worked compensable under the act. (Letter from McComb to Lt. Col. Wm. J. Brennan, August 29, 1944, SOL:JFS:DMH) and that the transportation is not an incident of and necessary to the employment, Interpretative Bulletin No. 3, paragraph 12. In the converse situation the transportation would not be considered a "facility" within the meaning of section 3(m) and no deduction whatsoever for the cost thereof would be permitted. Nor would the employer be permitted to add the reasonable cost of such transportation in fulfilling his obligations under section 6 of the act. Similarly, the reasonable cost of such transportation would not be included in computing the employee's regular rate of pay under section 7. To the extent that implications to the contrary are contained in Legal Field Letters Nos. 50, page 4, and 60, page 30, they should be deemed superseded by the views expressed above.

Inasmuch as the facts in this case disclose that the travel time does not constitute time worked and the transportation is primarily for the benefit of the employee, the transportation should be deemed under our previous holdings a facility within the meaning of section 3(m). The express language of section 3(m) would seem to compel the view that the reasonable cost of the facility must be deemed to constitute wages. As wages such reasonable cost must be included in computing the employees' regular rate of pay for purposes of section (7); this view is in accord with the principles expressed at paragraphs 6, 8, 9(b)(2) and 11 of Interpretative Bulletin No. 3.

The holdings of the District Court in the cases of Brotherhood of Maintenance of Way Employees v. N. C. and St. L. Ry., 56 F. Supp., 552 and 559 (M.D. Tenn.), to the extent that they rule that an employer could not include the reasonable cost of furnishing houses to employees as part of the minimum wage paid to them where there was no obligation requiring the employer to furnish the houses as part of the compensation and no obligation requiring the employees to use the houses as part of their compensation would appear to be contra to the plain meaning of the language of section 3(m). See also the legislative history of section 13(a)(3) as discussed in pages 18 and 19 of the Administrator's brief in Walling v. Great Lakes Dredge and Dock Company, which supports the inference that Congress understood and intended that section 3(m) would have the force and effect of making the reasonable cost of furnishing board, lodging and other facilities to employees "wages" under sections 6 and 7 of the act, regardless of the fact that such failities had not hitherto been furnished as wages to such employees. See also IV Wage-Hour Code 9 F 9 and footnote 43, page 574; Legal Field Letter 34, page 43.

It should be noted that while the inspector has estimated the "value" of the transportation at 50 cents per person per day, this sum may not represent the "reasonable cost," which must be determined in accordance with Regulations, Part 531.

As you correctly point out, the time spent by employees driving their own or company-owned cars to transport other employees between their homes and work at the request of the company constitutes time worked by the drivers and is compensable under the act, F.O.B. vol. V, No. 6, page 6; Legal Field Letter 64, page 4.

The principles to be applied in computing the regular rate of pay for the employee who drives his own car and is paid by the employer 50 cents per day for each fellow employee he transports between home and work are set out in Legal Field Letter 64, page 4, and Legal Field Letter 96, page 25. Only that part of the compensation thus received which exceeds the actual costs incurred by the employee in the operation of his car on behalf of the employer should be included in computing the employee's regular rate of pay.

As requested, I am returning herewith the correspondence transmitted by you.

Attachments

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

SOL:WST:IMG

William S. Tyson, Assistant Solicitor

May 28, 1945

Comstock Canning Company
Plant No. 1
East Pembroke, New York

Reference is made to your memorandum transmitting for comment a copy of your proposed reply to Regional Attorney Rozen on the subject matter.

It appears that during workweeks selected by the subject company as exempt workweeks under section 7(b)(3) of the act, some employees of the company worked more than 12 hours a day without receiving overtime compensation for the hours over 12, and that this occurred in workweeks when these employees did not work as many as 56 hours in the week. In some of these workweeks these employees did not work as much as 40 hours in the week.

Your proposed reply takes the position that the effect of the failure to pay overtime compensation for hours in excess of 12 a day or 56 a week, as the case may be, is that the exemption is lost for the employee thus underpaid and that the requirements of section 7(a) are applicable during that particular workweek. This would mean that overtime should be paid for the hours in excess of 40 worked in the workweek, and that if the employee had worked more than 12 hours on any day in the workweek but had not worked more than 40 hours in the week no overtime compensation would be due.

After giving full consideration to all of the possible alternatives to the position taken in your proposed reply to Regional Attorney Rozen, it is my opinion that your proposed reply states the correct view.

It further appears that subject company hired four watchmen to work three days of 12-1/2 hours each and one day of 6-1/2 hours each week. The end of one employee's short shift, constituted the commencement of a second employee's short shift. For their own convenience the watchmen arranged among themselves for each to alternate between three-day and four-day weeks, each day to consist of a full 12-1/2 hours. Thus, at the end of the scheduled short shift the employee on duty would punch his own time card out and punch in the time card of the employee scheduled to relieve him. The regional attorney states that the assistant manager and plant superintendent knew of the plan and considered it to be a legal arrangement. Those employees were subject to section 7(b)(3) during the workweeks in question and were paid for 44 hours of straight time each week. On the basis of these facts the following questions were asked:

1. If overtime is due for hours over 12 even in workweeks in which employees worked less than 40 hours (3 days of 12-1/2 hours each) may the half time due be offset against the overpayment of straight time in that week?

2. We assume that the overpayment in the short week cannot be credited against overtime due in the long week. May it be credited against straight-time due in the long week?

(03322)

3. Assuming that the employees are compensated at a rate considerably in excess of the statutory minimum so that straight time paid for 44 hours exceeds $19.20 (48 hours x 40 cents) should any amount other than the overtime due for the 4 half hours over 12 in the day be collected on behalf of these employees? In other words, does Release R-609 apply to a situation of this kind?

4. Can the voluntary arrangement made by the employees themselves affect their regular rate of pay so that we would consider that they are employed on a fluctuating workweek basis and compute accordingly?

The answers to Regional Attorney Rozen's questions would appear to depend upon the effect of the arrangement which he describes as having been made between the watchmen in question. The facts presented are not in sufficient detail to permit a conclusive determination whether the parties actually did modify the employment agreement so that the employees are now paid on a two-rates-of-pay basis, that is, whether the salary subsequent to the institution of the new schedule was acutally paid for and received as straight-time compensation for all work performed in the weeks consisting of 37 and one-half hours and also for all work performed in the weeks consisting of 50 hours. The regional office, we believe, would be best able to ascertain whether the parties had in fact changed the employment agreement in this manner. If they did do so, questions No. 1 and 2 would not arise because there would be, of course, no overpayment of straight-time in any week. The regular rate should in such case be determined by dividing the number of hours worked in the respective weeks into the salary. On the basis of the few facts that are here presented, I am inclined to the view that the original employment agreement was modified so that the employees are now paid on a two-rates-of-pay basis. This view could, of course, be modified if Regional Attorney Rozen should find further facts justifying such a modification.

This opinion has been cleared with Mr. Walling.

25 BD 303.120
.121

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

William S. Tyson, Assistant Solicitor — SOL:EG:IMG

Otis Elevator Company
New York, N. Y. — June 8, 1945

Reference is made to your memorandum of March 17, 1945 relative to the travel by train problem in the subject case.

Inasmuch as the information in your memorandum and in the attachments thereto indicate that the facts in the case are somewhat different than those suggested in former Regional Attorney Carrol's memorandum, on which my memorandum of February 7, 1945 was based, the views expressed in my memorandum of February 7, would not appear to be wholly applicable to the situations presented.

As I understand the facts, the employees in question are engaged in installing, repairing and servicing elevators. Article 8 of their employment agreement provides:

"It is agreed that when members of the party of the second part are sent outside of the jurisdiction radius covered in this agreement, traveling time will be paid at single time rates for the actual hours traveled during working hours. Additional traveling time up to five hours will be paid, at single time rates, for the actual hours traveled beyond regular working hours the first day only."

The inquiry from Mr. Carrol poses the following questions:

1. When the employee travels for 24 consecutive hours or more, it is our understanding that only the hours from 8 a.m. to 5 p.m. need be considered hours worked, assuming that proper sleeping accommodations are provided. In that case, does the payment of five hours' additional pay on the first day's trip operate to raise an employee's regular rate of pay for the week in which such travel takes place, or is the pay for such five hours to be treated in the same manner for holidays not worked or for supper money?

2. When the employee travels for several days or more, from city to city, stopping over at intervals of less than 24 hours to perform repairs or install machinery, which of the hours spent in actual travel should be considered hours worked? What effect does your decision on this question have upon the provision in the agreement for the payment of five hours outside working hours on the first day of travel? If it is the fact that during the entire course of such a trip the employee either works or travels for all hours between 8 a.m. and 5 p.m. so that he is paid eight hours' pay under the contract for such day of the trip, must he be paid for additional travel time outside these hours?

3. With regard to situations where the employee works outside the jurisdictional limits, but returns to his home after a particular job at the end of one day's work, does the agreement establish

"reasonable standards" within the meaning of that term as used in paragraph 12 of Interpretative Bulletin 13? Is it permissible to pay for up to five hours travel time in this circumstance without counting such hours as hours worked in computing overtime due?

In the first situation where the employee travels for 24 consecutive hours or more and has been provided with either proper sleeping accomodations or the price of a pullman berth, the time spent in travel during normal working hours and the five hours of travel time beyond regular working hours for which the employee was paid at his straight time rate should be regarded as time worked for purposes of the act. Time spent in travel by the employees in question beyond regular working hours on the first day of any trip to the extent that the parties to the collective bargaining agreement have agreed to regard it as compensable time would appear to constitute a "part of the day's work." In providing for the payment of the employee's straight time rate for actual travel time up to five hours beyond regular working hours, the agreement has in effect included within the workweek time spent in travel which the Divisions ordinarily would permit the employer to exclude. The agreement, it should be noted, does not purport to be an agreement as to disproportionate travel time. It does not attempt to establish a relationship between the travel time it requires to be compensated at straight time rates and the actual amount of time that is in fact disproportionate to the normal period of travel necessary to reach the employee's worksite. Insofar as this agreement requires payment for the actual time spent in travel beyond regular working hours on the first day of any trip, it simply indicates that the parties have agreed to view such travel time on the first day of any trip as a continuation or extension of the employee's workday. Where, as here, the employer and employee have through collective bargaining agreed to regard as time worked time spent by the employee in travel pursuant to his employer's instructions outside of normal working hours, the agreement of the parties, if it is a reasonable agreement, should be respected. Certainly, there is nothing in the act or our interpretations thereof which would require us to question a bona fide agreement of such a nature. Accordingly, the five hours pay in this situation should be deemed straight time compensation paid for five hours of work creditable against compensation required to be paid by the act.

In the second situation the employee travels for several days or more from city to city, stopping over at intervals of less than 24 hours to perform repairs or to install machinery. I assume in this situation that the employee does not perform any repair or installation work outside of his regular working hours, i.e., after 5 p.m. or before 8 a.m. On the basis of this assumption, and the further assumption that the employee is furnished proper sleeping facilities or the price of a pullman berth when his travel occurs between 11 p.m. and 7 a.m., only the time spent in production work and in travel during normal working hours and so much of the travel time on the first day of the trip beyond normal working hours as is compensable under the collective bargaining agreement should be regarded as hours worked for purposes of the act. It should be borne in mind that the hours of travel beyond normal working hours for which the employee is entitled to compensation under the union agreement are to be considered as time worked for the reasons given above and should therefore be included in computing the total number of hours worked for purposes of overtime compensation. The payment of 8 hours a day in the situation described would be insufficient only if total worktime as viewed above, exceeded 8 hours.

In answer to the third question, as indicated above the pay for up to five hours' travel time outside regular working hours should be regarded as compensation for time actually worked and not as a standard agreed upon or designed to compensate the employee for the amount of time spent in travel which is unreasonably disproportionate to the normal travel time required in reporting for work at the headquarters of the employer. It would be clear, of course, that the requirements of the act have been met if the employee in the situation involved in question 3, were paid by virtue of this agreement for all of his travel time and the hours so spent were included in computing hours worked for purposes of overtime compensation. Where, however, the employee in such a situation engages in travel which is not compensable under Article 8 of the agreement, i.e., train travel outside his regular working hours, in excess of 5 hours, the question of whether such travel time is compensable depends upon whether the "unreasonably disproportionate test" is applicable. The "unreasonably disproportionate test" would apply where the employee is assigned a task at a place which is outside the "jurisdictional limits" but which is within the area normally traversed in home to work travel by employees working or living in the community from which the employee is required to travel. On the other hand, the "unreasonably disproportionate test" would not be applicable, in my opinion, to train travel to points outside that area, in which the employee would in effect occupy the status of the "ordinary traveler" referred to in the Jewell Ridge case. In such cases, our "regular working hours" test rather than the "unreasonably disproportionate" test should be applied. I might say that it seems most improbable that the "unreasonably disproportionate" rule would be applicable in a situation where the employee travels by train five hours or more.

21 BB 302.431
21 BF 303.33
21 BI 302.330

Mr. W. A. Gallahan
Acting Deputy Administrator
Treasury Department
Washington 25, D. C.

SOL:SSB:IMG

March 8, 1945

Dear Mr. Gallahan:

This is in reply to your letter of February 2, 1945, addressed to Mr. Archibald Cox, Associate Solicitor of Labor, inquiring whether the sick-leave plan of the Lockheed Aircraft Corporation, as approved by your office, would result in salaried employees being considered non-exempt employees under the provisions of the Fair Labor Standards Act.

I assume that the sick-leave plan under discussion covers, and your inquiry relates to, executive, administrative and professional employees who are exempt under the provisions of section 13(a)(1) of the act and Regulations, Part 541.

The sick-leave plan of the Lockheed Aircraft Corporation, in part, provides, "Sick-leave credit of one week (six working days) shall be granted to a salaried employee for each six months of continuous service from his date of hire, subject to a limitation on total accumulation during each successive year. Credit shall be granted at the start of each six-month period of service."

Under the proposed plan, employees are permitted to carry over unused sick-leave credit at the rate of one week for each year of service. Under the plan as modified by your regional office and affirmed by your office, each day of absence due to sickness must be deducted from accumulated sick-leave credit. After such sick-leave credit is exhausted, further absences on account of sickness would, under this provision, apparently result in deductions from the employee's salary.

As explained in release A-9, a copy of which is enclosed, the salary requirement of the executive, administrative or professional exemption is not met if deductions from the employee's salary are made for absences of the types ordinarily allowed bona fide executive, administrative, or professional employees. It is the Division's position that a reasonable number of absences on account of sickness is ordinarily allowed without loss in pay to employees in this category. Typically, although not invariably, the number of such absences allowed to these types of employees is greater than that allowed to employees in a less responsible capacity. On the basis of available information of this point, we have concluded that, for administrative purposes, any sick-leave plan which provides for not less than 15 days of absence due to sickness in each year, or the equivalent, without consequent reduction in salary, will be considered to provide adequately for those absences due to sickness which are ordinarily allowed bona fide executive, administrative, or professional employees, and deductions for absences on account of sickness in excess of this number will not be considered to defeat the exemption, if it is otherwise applicable. This assumes that the plan is not qualified in such a way as to permit deductions for reasonable absences due to sickness which occur before the employee has had an opportunity to earn sufficient sick-leave credit. Adequate provision for such absences will be considered to be made, however, if half the year's sick-leave may be drawn upon by the employee at any time during the first six months of employment and the full year's leave or the unused balance, may be drawn upon thereafter.

(03322)

It is only where a sick-leave plan possesses the features mentioned above that it is safe to assume that deductions for absences due to sickness in excess of the number allowed by the plan may be made without jeopardizing the exemption provided for executive, administrative, and professional employees. Plans which do not provide a minimum of 15 days per annum of sick leave, or the equivalent, as above explained, will be scrutinized carefully by the Divisions in order to ascertain whether they do in fact provide adequately, by reasons of their other features, for the absences due to sickness which are ordinarily allowed employees in this category.

Although the Lockheed plan allows only 12, rather than 15 days of paid absence on account of sickness per year, analysis of its other provisions reveals that it provides other features which may compensate for the slightly shorter sick-leave allowance. The provision for accumulating sick-leave credit at the rate of one week for each year of service after one year of service, in particular, lends support to the view that the plan as a whole appears to provide adequately for absences ordinarily allowed bona fide executive, administrative and professional employees on account of sickness.

Where the employee's absence due to sickness is in excess of the number of days allowed under this plan, deductions from the salary of the employee will not be considered to defeat the exemption. Such deductions would not be deemed inconsistent with employment on a salary basis, within the meaning of Regulations, Part 541, as interpreted in release A-9.

Very truly yours,

L. Metcalfe Walling
Administrator

Enclosure

21 BB 303.1
302.3

Mr. J. T. Kiser
Assistant Vice President
Houston National Bank
Houston, Texas

SOL:HJE:CTN

March 29, 1945

Dear Mr. Kiser:

This will reply to your letter dated February 1, 1945, addressed to Regional Director Gus C. Street, Jr., and referred to me for reply. With your letter to Mr. Street you transmitted a letter prepared by one of your bank tellers, Mr. Isadore Miller, describing his work, such description having been endorsed by Supervising Inspector Rauch as being "substantially correct." You wish to know whether Mr. Miller is exempt as an administrative employee under section 13(a)(1) of the Fair Labor Standards Act and section 541.2 of the regulations issued thereunder.

The job description prepared by Mr. Miller indicates that he spends about 4½ hours a day in the teller's cage serving the bank's customers, and that about 85 percent of the time spent by him in the cage is devoted to handling the currency and silver included in the deposits which he receives. The remaining 15 percent of the time spent by him in the cage is devoted to paying out or cashing checks and United States bonds. After the cage is "put in balance" Mr. Miller spends 20 to 30 minutes daily assisting a bookkeeper, to whom he is assigned, in totaling her deposits and balancing her ledger in other ways. This includes examining for forgeries the checks drawn against the accounts of the customers whose names are carried on her ledger. Mr. Miller states that tellers must, through experience, familiarize themselves with the dependability of their accounts so as to determine how much scrutiny must be given in each case involving cashing of checks or accepting of deposits. He points out that in this way tellers lessen the daily risks entailed in cashing checks and in accepting deposits of the bank's customers. He states that discretion and independent judgment are also used in the cashing of checks for persons who do not have accounts with your bank, such checks being drawn both on your bank as well as on other banks.

The job description prepared by Mr. Miller accounts for only five hours a day and does not clearly indicate whether or not additional time is spent on other work or the nature of such additional work, if any. However, if the duties described in that job description are typical of all of Mr. Miller's duties, it is my opinion that Mr. Miller is not exempt under section 541.2 of the regulations as an administrative employee, since his duties call for the performance of tasks which do not involve the exercise of discretion and independent judgment within the meaning of the regulations. For example, the receipt and disbursement of money at the teller's window and the simple bookkeeping which he performs do not appear to call for the exercise of discretion and independent judgment but seem to be routine tasks. The cashing of checks seems generally to involve nothing more than examination of the signatures and a determination of whether the accounts have sufficient balances on hand. Both of these factors may be, and frequently are, established by referring to the bank's file of signature and to the records of accounts. As an employee acquires experience, he learns to recognize signatures and to know the "good" or "safe" accounts. Such knowledge, however, by making it unnecessary for him to refer to the records, merely assists the teller in working more rapidly, and the use of that knowledge does not necessarily

(03322)

constitute the exercise of discretion and independent judgment. Further, although discretion and independent judgment may well be exercised in the cashing of checks for persons who do not have accounts with your bank, it appears that this occupies only a small portion of the teller's working time and, therefore, it does not by itself furnish adequate ground for exemption. With respect to Mr. Miller's statement that deposits in unsafe accounts must receive special scrutiny, I cannot state whether the work connected therewith is exempt work or not since the statement is not explained by any factual information.

While on past occasions the Division has held that bank tellers are exempt as administrative employees, it has limited such exemptions to employees who habitually establish procedures and assist in the determination of policies which must be followed by all the employees of an employer (page 27 of the enclosed Stein report). In this connection we have also pointed out that--

> * * * the differentiation between the clerk and the person with true administrative responsibility is to be found, first, in the exercise of discretion and independent judgment, and, second, in the receipt of an appropriate salary /page 28/.

Moreover, the Division has always taken the position that the applicability of the section 13(a)(1) exemption to a particular employee can be determined only on the basis of all the pertinent facts and is not to be determined by the title given him. Your attention is invited to pages 25 and 26 of the Stein report, which emphasize the point that--

> * * * there is no description of duties or titles which in and of itself can prevent abuse or can differentiate between those persons who may reasonably be exempt under the act and those who deserve and require its benefits. One element distinguishing the two groups is the use of discretion and independent judgment and this requirement is included in each of the recommended alternatives for the term "administrative."

Since you do not state to what extent Mr. Miller's work is typical of the work of all your tellers, I am not in a position to determine whether this interpretation is also applicable to the work of such other tellers. As I have indicated, the applicability to bank tellers of the administrative employee exemption can be determined only on the basis of all the facts in each particular case and not on any general rule of thumb which attempts to determine the status of an entire class of employees.

Very truly yours,

Thacher Winslow
Deputy Administrator

Enclosure

21 BB 302.3
21 BB 303.3

Mr. Charles G. Atwell
President-Treasurer
Atwell, Vogel & Sterling, Inc.
60 John Street
New York, New York

SOL:HJE:CTN

April 18, 1945

Dear Mr. Atwell:

This will reply to your letter of October 18, 1944, addressed to Mrs. Pauline C. Gilbert. You state that your firm is engaged in furnishing audit and inspection services to insurance companies, and you inquire about the status under the Fair Labor Standards Act of your field men whose principal duties are audit, inspection and engineering work. You state that these employees are required to do "everything from solicitation to technical work" but the job descriptions contained in your letter seem to refer only to their so-called technical duties. These employees receive salaries which range from $30 a week while in training, to $4,200 a year when they become fully qualified.

According to your job description, the duties of your auditors are to perform certain auditing work which requires training as an accountant and a thorough knowledge of several branches of the insurance business. You state that a large amount of discretion and judgment is involved in this work and that an auditor's report is usually accepted as final so as to form the basis for entries on the company's records. It also appears that auditors classify pay rolls in accordance with classifications shown in insurance manuals, etc., employing their discretion and judgment with respect to borderline cases and those cases which are not specifically described in the manual. Regarding the two remaining categories of employees, you state that the only difference between inspectors and engineers is one of degree, since, in general, a man is an inspector only during the training and probationary period and thereafter he is a safety engineer. An engineer, your job description shows, performs various forms of accident prevention work and examines into a number of factors which enter into the determination of the rates charged for insurance.

In addition to the foregoing duties, your auditors and engineers have to call on agents, branch offices and companies, "doing solicitation work." You further state that the recommendations of both auditors and engineers are accepted by the insurance companies for the purpose of cancelling risks. You wish to know whether your field men are exempt under section 13(a)(1) of the Act and the Regulations, Part 541, issued thereunder.

As you may know, the exempt status of an employee under any section of the Regulations, Part 541, depends upon whether his work and compensation meet the requirements contained in that section. In this connection, I note that your statement indicates that some of the employees under consideration perform more difficult types of work than others. Consequently, it must be assumed that the degree of discretion and independent judgment exercised by these men in the performance of their duties varies with their particular assignment. Furthermore, since you state that they are required to do "everything from solicitation to technical work", it appears that in addition to the technical duties contained in the job description, some of the employees may be engaged in certain nonexempt work. It is not possible, therefore, for me to say that all employees

(03322)

within each of the three classifications are exempt or nonexempt, since the duties which you describe are apparently selected from the sum of the duties of all employees within each group and are not uniform in each group. However, for the purpose of illustrating the principles involved in applying the regulations to your employees, I shall assume that each job description is a complete description of all the duties of a particular employee in the group of employees to whom it appears to refer.

As limited by the foregoing, it is my opinion that those employees classified as auditors are exempt as administrative employees if they are engaged under only general supervision in the kinds of work enumerated in your job description of auditors and if they are compensated in accordance with the salary requirements of the administrative definition. However, employees in this category who are in training and who, therefore, receive detailed rather than general supervision, or who are engaged in routine tasks which do not require the exercise of discretion and independent judgment, would not be exempt. None of the auditors is exempt as executive employees since they serve no supervisory function.

As regards inspectors and engineers, you state that the only difference between them is one of degree, that there is no sharp dividing line between the two, and that in general, a man is an inspector only during the training and probationary period, and thereafter is a safety engineer. From these facts I would be inclined to say that the inspector, during this probationary and trial period, would not be exempt if, as appears to be the case, his job does not require him to exercise that type of discretion and independent judgment which characterize the true administrative employee. When inspectors have passed this period of training and actually perform responsible work as safety engineers in which they are required to exercise discretion and independent judgment, they may meet the requirements for exemption as "administrative" employees, provided of course, that they also satisfy the salary requirement in the definition of that term and do not perform any nonexempt work, that is, work which does not require the exercise of discretion and independent judgment and is not related to their administrative duties.

In the last analysis, the work performed by the individual employee is the determining factor rather than the job title or the job description of the position in which he is employed. Therefore, if you should have any further questions regarding the status of a particular employee, it is suggested that you submit a complete description of the work which the employee in question is actually performing. Since our regional office serving the area in which an employee is working is usually in a better position to determine all the facts, it is advisable to submit such a statement directly to the regional offices. I am enclosing for your information a bulletin which contains the addresses of the Divisions' regional and branch offices.

Very truly yours,

Thacher Winslow
Deputy Administrator

Enclosure

(03322)

Washington 25, D. C.

27 CC 301
27 CC 401.0

Louis Lieber, Jr. Esquire
Douglas Aircraft Company, Inc.
Santa Monica, California

SOL:AGW:IMG

April 27, 1945

Your file: C-Legal-LL-838

Dear Mr. Lieber:

This will reply to your letter of April 4, 1945 asking whether the method of computing employees' wages you describe is proper under the Wage and Hour Law.

You state the employees in question have customarily received as part of their wages meals the reasonable cost of which are $1.00 per day and that these employees normally work eight hours a day. You have reached the assumption from these facts that each employee's wages under the act are in effect 12½¢ an hour (8 hours divided into $1.00) higher than the cash wage they receive. As a result of this conclusion you compute (as shown by the copy of instructions to cafeteria managers attached to your letter) the wages of an employee who works a week of 52 hours in five days as follows:

Compensation - $.75 an hour plus meals @ 12½¢ an hour	= $.875
Total hours worked in 5 days	= 52 hours
40 hours @ $.875	= $35.00
12 hours @ $1.3125	= $15.75
Total Compensation	= $50.75
Deduction for meals @ 12½¢ per hour (12.5 x 52 hours)	= $ 6.50
Cash Pay	= $44.25

However, since the reasonable cost of meals furnished this employee is $1.00 per day, $1.50 more than the reasonable cost has been deducted from his compensation. This occurred because contrary to the assumption on which you computed reasonable cost, the employee worked in excess of 8 hours a day during this week. Had the employee worked a week of six 8 hour days, your method of computations would result in a smaller charge to the employee than in the week discussed above in spite of the fact that the reasonable cost of the meals furnished is greater in a six day week.

Ordinarily, under the opinion expressed in release R-1925, deductions in overtime weeks for board, lodging and other facilities customarily furnished are not regarded as a violation of the act even though they exceed the reasonable cost of furnishing such facilities if the deduction would not cause a violation of the minimum wage provisions of the act if only 40 hours had been worked. However, as the next to last paragraph of Release R-1925 indicates, deductions which by the manner in which they are made tend to affect the overtime compensation due employees, are not permissible. Where, as in the situation you present the amount of the deduction varies in exact proportion to the number of hours worked and not in accordance with the cost of furnishing the facility, a violation of the act results from the deductions. The fact that the employee may receive a greater total amount of compensation under this plan than he would if the exact amount of the reasonable cost were included in computing his regular rate of pay and only the reasonable cost was deducted does not show the

(03322)

plan is a valid one. From the point of view of the Wage and Hour Act the company has changed the employee's regular rate of pay by adding 12½ cents an hour in lieu of meals, and makes a corresponding charge for meals which does not represent the reasonable cost of furnishing meals.

As indicated above, the infirmity of the plan set out in your letter lies solely in the method of making deductions and not in the addition of 12½ cents an hour to an employee's compensation in lieu of furnishing meals without cost to him. If deductions are made for the actual reasonable cost of meals furnished employees rather than on the basis of the number of hours worked, no violation of the act would result from the deduction. In such a case, whether the employee's hourly rate of pay is increased by a specific amount in lieu of the meals which formerly were a part of the employee's compensation, or whether no increase is made, the cost of the meals would not have to be taken into account in determining the employee's regular rate of pay since the meals would be paid for by the employee and not furnished him by the employer as compensation. Of course, if any increase is made in the hourly rate of pay, that increase must be included in the employee's regular rate of pay for computing overtime.

Very truly yours,

L. Metcalfe Walling
Administrator

Enclosure

25 BB 204.24
25 BB 204.34

SOL:EG:IMG

Mr. E. F. Kendall
Socony-Vacuum Oil Company
White Eagle Division
925 Grand Avenue
Kansas City 13, Missouri

April 30, 1945.

Dear Mr. Kendall:

Your letter addressed to Mr. D. B. Maggs, Solicitor, Department of Labor has been referred to me for reply. You ask to be advised as to the extent that the "lay-over" hours in the situations you present must be considered time worked for purposes of premium compensation. I assume from your reference to premium compensation that the employees involved are covered by the Fair Labor Standards Act and are entitled to the payment of time and one-half their regular rate of pay for all hours worked in excess of 40 in any workweek.

You indicate that for purposes of the questions you raise it should be assumed that the employees' workday runs from 8:00 a.m. to 5:00 p.m., with one hour off from 12 noon to 1:00 p.m. and that the estimated workweek from Sunday through Saturday is 48 hours. No work is performed on Sunday. Included in the hours of work is travel time from headquarters to the place of work and back to headquarters. The men involved are pipe-line employees who ride to and from their worksites in a company truck.

In the first situation the truck breaks down at 4:00 p.m. Tuesday and is repaired by 6:30 p.m. that same evening at which time the men leave for their headquarters and arrive at 7:30 p.m. I shall assume that in this situation the employees were, at the time the truck broke down, being transported to their headquarters. (It would be clear, of course, that if the employees continued to work until the truck was repaired and arrived to carry them back to headquarters that all the time between 4:00 p.m. and 7:30 p.m. would constitute time worked under the act.) On the basis of the foregoing assumption it would appear that the time spent by the employees awaiting the repair of the truck was a period of inactivity by reason of an interruption in the employees' work beyond the employees' control. Such periods should be regarded as time worked under the act. (See paragraph 4 of the enclosed Interpretative Bulletin No. 13.) In this case then the time between 8:00 a.m. to 12 noon and from 1:00 p.m. to 7:30 p.m. should be included in computing the hours worked by the employees in question for overtime purposes.

In the second situation the truck breaks down at 4:00 p.m. and the employees spend the night at a town 30 miles from headquarters. The employer pays for the hotel and meal expenses incurred by the employees. At 10:00 a.m. the next day the truck is repaired and the crew at that time starts back to the job and its members are returned to headquarters that evening on regular schedule. The facts given in this situation are insufficient to enable me to give any definite opinion as to the status of the time spent by the employees awaiting the repair of the truck. Generally, hours worked will include all time during which an employee

(03322)

is required to be on duty or to be on the employers premises or to be at a prescribed workplace, and all time during which the employee is suffered or permitted to work whether or not he is required to do so. (See the enclosed Interpretative Bulletin No. 13, paragraph 2.) On the other hand, time during which the employee is relieved of all duties and which may be used by the employee to follow his private pursuits need not in the ordinary case be regarded as time worked if the amount of time is in fact of sufficient duration to enable the employee to follow his personal inclinations. In order to answer the question posed in this situation I would have to know the place that the truck broke down, the nature of the employees' activities after the truck broke down, the time at which they were required to assemble in the morning following the breakdown, and the instructions, if any, they were given by the employer at the time of the breakdown. However, you may be able to determine the amount of compensable time in this situation for yourself through the application of the foregoing principles to the facts in this case.

In the third situation, the facts are the same as in the second situation except that the employees are transported by a public conveyance which breaks down at 4:00 p.m. and the employer hires a car to take the men home and they arrive at 8:00 p.m. I assume that in this case home refers to headquarters rather than the homes of the individual employees and I further assume that the employees are required to remain at the point where the breakdown occurs until the car hired by their employer arrives to pick them up. Under such circumstances it would seem that the time spent waiting for the car and the time spent in travl to headquarters should be included in computing the time worked by the employees in this situation. Of course, a different result may obtain if the circumstances in this situation are not as here assumed.

In the fourth situation the facts given are these. The breakdown occurs at 4:00 p.m. Saturday. The men lay-over with hotel and meals paid by the employer. The truck is repaired at 10:00 a.m. Sunday morning at which time they leave for headquarters arriving at 11:00 a.m. and then go to their homes. From the time of the breakdown until the truck is repaired the men are privileged to go to a show, to bed or spend their time in any other manner they desire. I assume in this case the truck breaks down in the town in which the employees spend the night. If as you indicate the employees are relieved of all duties and are free to pursue their own interests between the time the truck breaks down and the time of its repair, such time need not be regarded as time worked. In my opinion, the time spent in travel to headquarters from 10:00 a.m. to 11:00 a.m. should, however, be deemed time worked.

If you should have any further questions concerning this matter you may find it more convenient to communicate with the Divisions regional office located at Fidelity Building, 911 Walnut Street, Kansas City 7, Missouri.

Very truly yours,

WM. R. McCOMB
Deputy Administrator

Enclosure

(03322)

21 BB 302.431
21 BF 303.33
21 BI 302.330

SOL:SSB:IMG

Washington 25, D. C.

May 18, 1945

Colonel Ralph F. Gow
Generall Staff Corps
Director, Industrial Personnel Division
Headquarters, Army Service Forces
Washington, D. C.

Dear Colonel Gow:

This is in reply to your letter requesting the Administrator to establish certain criteria in respect to sick-leave plans for executive, administrative and professional employees which would satisfy the salary requirements set forth in Regulations, Part 541, for exemption under the provisions of section 13(a)(1) of the Fair Labor Standards Act. As explained in Release A-9, the salary requirement of the executive, administrative and professional exemptions is not met if deductions from the employee's salary are made for absences of the types ordinarily allowed bona fide, executive, administrative or professional employees. It is the Divisions' position that a reasonable number of absences on account of sickness is ordinarily allowed without loss in pay to employees in this category. Typically, although not invariably, the number of such absences allowed to these types of employees is greater than that allowed to employees in a less responsible capacity.

The Divisions still have under consideration the question of setting up general standards for company leave plans which will not be inconsistent with employment on a "salary basis" within the Regulations, Part 541, as interpreted in Release A-9.

Pending a final decision as to what, if any, general standards for leave plans may be formulated for purposes of determining compliance with the regulations, the Divisions will consider any sick-leave plan which allows executive, administrative and professional employees 15 days of sick-leave annually, or the equivalent, without consequent reduction in salary, as providing adequately for those absences due to sickness which are ordinarily allowed bona fide executive, administrative and professional employees. When such a plan is in effect, deductions for absences on account of sickness in excess of this number will not be considered to defeat the exemption, if it is otherwise applicable. This assumes that the plan is not qualified in such a way as to permit deductions for reasonable absences due to sickness which occur before the employee has had an opportunity to earn sufficient sick-leave credit. Adequate provision for such absences will be considered to be made, however, if half the year's sick leave may be drawn upon by the employee at any time during the first six months of employment and the full year's leave, or the unused balance, may be drawn upon thereafter.

The policy expressed above should not be taken to mean that the Divisions will consider a sick-leave plan which provides less than

15 days of sick leave per year as necessarily failing to provide adequately for absences ordinarily allowed bona fide executive, administrative, and professional employees on account of sickness. The adequacy of such a plan must be determined upon a consideration of all its provisions and of its operation in practice. It is not, therefore, possible to state categorically without further information whether the three plans, excerpts from which were attached to your letter, do provide adequately for absences due to sickness which are ordinarily allowed such employees. Comment on certain provisions of these plans may be helpful, however.

In a case where sick leave "is determined and authorized by the Supervisor of the section in which the employee works," the adequacy of the plan will obviously depend on whether the sick leave actually determined and authorized is sufficient to prevent deductions from salary for reasonable absence due to sickness. If in practice 15 days during the year are provided before deductions are made, the Divisions would consider the plan clearly and unquestionably adequate. If less is provided, the plan might still be considered adequate, depending on the facts. The mere fact that approval of the comptroller in writing is required for sick leave "at a rate in excess of two weeks per year" would not necessarily indicate t hat the plan fails to provide adequately for absences ordinarily allowed on account of sickness.

Provisions for accumulation or addition of days of sick leave in accordance with length of service are taken into consideration by the Divisions in determining the adequacy of sick-leave plans providing less than 15 days of sick leave before deductions are made. A plan containing such provisions may provide adequately for absences ordinarily allowed bona fide executive, administrative and professional employees even though it allows only 12 days of sick leave during the first year of employment, if in other respects the plan is adequate. In the case of plans which allow no sick leave to employees until they have been employed for a given period of time, it is clear that during such period an employee is not employed on a "salary basis" within the intendment of the Regulations as interpreted in Release A-9, if deductions are made from his salary for reasonable absences due to sickness.

I trust that the foregoing information will be of assistance to you.

Very truly yours,

L. METCALFE WALLING
Administrator

(03322)

21 BJ 301.2
21 BJ 302.3
21 BJ 502
21 BJ 503
21 BJ 503.3

Washington 25, D. C.

SOL:SSB:RB:DMH

May 18, 1945

Joseph F. Minutolo, Esquire
140 West 42nd Street
New York, New York

Dear Mr. Minutolo:

This is in reply to your letter requesting information concerning the exemption afforded employees engaged in retail or service establishments under the Fair Labor Standards Act.

You state that your client operates a retail store on the ground floor of an office building in New York City. In connection with the store your client also operates a factory which, for economic and other reasons, is located about "two city streets" away from the retail store. The firm purchases its woolens, rayons and cotton goods in Europe and the United States. The factory manufactures clothes pursuant to orders procured by the sales clerks at the store. A certain amount of ready made suits are also produced at the factory for sale in the store. The factory is divided into two separate units; one which manufactures tailored garments, pursuant to orders procured at the store, and a "busheling" department which makes alterations on all retail clothing sold. The services of the "busheling" department are performed gratuitously and are rendered after the sale has been made. A small percentage of the firm's sales are made to customers outside the State. You also state that the only other interstate feature of the firm's business is the receiving of the necessary materials from outside the State by an executive and some assistants. The purchasing, as well as all other work necessary to the operation of the store and factory, are performed at the premises where the store is located.

You ask:

(a) Does this business come under the exception of retail selling or servicing establishment?

(b) Are the employees who receive the goods as it comes from out of the state covered by the Act?

(c) Does the mere fact that a certain amount of the retail sales are made to customers outside the state bring all the employees under the Act?

(d) What percentage of the retail sales in a business having this setup need to be interstate to bring the company under the Act?

(e) Does the setup showing in this business constitute one or two separate establishments?

(03322)

As you know, the general coverage of the Fair Labor Standards Act extends to employees engaged in interstate commerce or in the production of goods for interstate commerce, including processes or occupations necessary to such production. With respect to overtime compensation, the act requires that such employees be paid not less than time and one-half their regular rates of pay for all hours worked in excess of 40 in any workweek, unless exempted by some specific provision in the act.

Coverage, under the act, depends on whether the employees are engaged in commerce or in the production of goods for commerce. Whether they are so engaged is generally determined by the nature of the individual employee's activities. From your statement of facts, it would appear that the employees engaged in activities related to the operation and conduct of the factory which manufactures and alters garments that move out of the State, are engaged in the production of goods for commerce within the meaning of sections 6 and 7 of the act. These employees are engaged in production of goods for commerce if the employer, at the time the garments are being manufactured or altered, intends, hopes or has reason to believe that the garments will move outside the State. See United States v. Darby, 312 U.S. 100. It would thus appear that the employees of the "busheling" department, as well as those in the manufacturing unit of the factory, are covered by the act.

An exemption from the minimum-wage and overtime requirements of the act is provided in section 13(a)(2) which exempts any employee who is engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce. The determination of whether a particular establishment is a retail establishment is ordinarily not difficult. A retail establishment, generally, has certain well-defined characteristics which distinguish it from other establishments (See Interpretative Bulletin No. 6, a copy of which is enclosed, paragraphs 6-17). Ordinarily, retail clothing stores are retail establishments within the meaning of the exemption. Employees in such retail establishments who engage in tailoring operations, such as the taking of measurements and the making of necessary alterations to suit the needs of the individual customers would generally come within the section 13(a)(2) exemption.

As used in section 13(a)(2), "establishment" ordinarily means a physical place of business. The term "establishment," as used in the section, is not synonomous with the words "business" or "enterprise" as applied to multi-unit companies. See Walling v. American Stores, 133 F. (2d) 840; Walling v. A. H. Phillips. Inc., 65 S. Ct. 807.

Your client's store and factory, in my opinion, would appear to constitute at least two establishments within the purview of the section 13(a)(2) exemption, one a retail store, and the other a manufacturing establishment outside the scope of the section 13(a)(2) exemption.

It appears from your letter that your client's store makes only retail sales and that only a small percentage are interstate. It is the position of the Divisions that the greater part of the selling or servicing

(03322)

of a particular establishment is in intrastate commerce for purposes of section 13(a)(2), if more than 50 percent of the total gross receipts of the establishment is derived from intrastate sales or services. A sale involving an out-of-State delivery of the goods sold is a sale in interstate commerce. If, as you state, more than 50 percent of the sales of your client's store are intrastate, and if the store's sales are at retail (as explained in paragraph 18 of Interpretative Bulletin No. 6), the section 13(a)(2) exemption would be applicable to the employees engaged in that establishment.

With respect to those employees engaged in purchasing raw materials for the factory, paying bills, keeping books and payroll records, and performing all the other clerical work for the entire business, it is noted that they are employed in the executive offices of the entire business which are located "at the premises where the store is located." The quoted phrase does not clearly indicate the actual physical location of the offices in the store. It would also be important to know whether there is a segregation of the office activities performed for the store and those performed for the factory. If, as appears to be the case, the offices are physically separated from the retail store, and the office employees perform unsegregated clerical duties connected with the activities of both the retail store and of the factory, it is my opinion that the section 13(a)(2) exemption would be inapplicable to them.

It is generally recognized that bookkeepers, stenographers, and other clerical employees of a firm which is engaged in the production of goods for commerce are engaged in occupations necessary to production within the meaning of section 3(j) of the act, and in the ordinary case, are also engaged in interstate commerce where they prepare reports, letters, credit vouchers, etc., that move in interstate commerce. The office employees in question would, therefore, appear to be covered by the act. Also, it should be noted that employees at the factory engaged in receiving goods coming from another State are engaged in interstate commerce within the coverage of the act regardless of whether or not the clothes are produced for interstate commerce.

Another exemption which may be applicable to some of your client's employees is that provided by section 13(a)(1) of the act for employees employed in a bona fide executive, administrative, professional or local retailing capacity, as those terms are defined and delimited by Regulations, Part 541, a copy of which is enclosed. In this connection, it is possible that certain of the bushelmen in the busheling department may be exempt under section 541.4 of the regulations as being engaged in a local retailing capacity if, as you state, they make minor alterations on clothes which are immediately incidental to the retail sales.

I trust that you will be able to determine the answers to your problems on the basis of the enclosures and the foregoing. If you have any additional questions, I shall be glad to assist you further. However, you may find it more convenient to consult the regional office of the Wage and Hour and Public Contracts Divisions at 341 Ninth Avenue, New York, New York.

Very truly yours,

Enclosures

WM. R. McCOMB
Deputy Administrator (03322)

21 BG 101.0

SOL:JDC:HCN:DMH

Washington 25, D. C.

May 31, 1945

Miss Leonora Decuers
National Shrimp Canners Association
Hibernia Bank Building
New Orleans 12, Louisiana

Dear Miss Decuers:

Reference is made to your letter protesting on behalf of the National Shrimp Canners Association, the revision of our interpretation of the seafood and fisheries exemption provided by section 13(a)(5) of the Fair Labor Standards Act as announced in release A-15, issued March 29, 1945. You state that the Association feels the new interpretation "improperly narrows the scope of the exemption granted by Congress."

It is believed that a comparison of our previous and present positions on the application of the exemption clearly shows that the present view somewhat broadens the scope of the exemption rather than narrows it. Under the previous interpretation, as you will note from the enclosed copy of Interpretative Bulletin No. 12 issued November 1940, the exemption was limited to those employees who engaged in operations described by the terms used in the section. The new interpretation, however, in announcing the occupational test for applying the exemption, brings within the exemption a number of employees not previously considered exempt. Thus you will observe that the first part of the exemption is now considered to include employees whose occupations involve work performed as an incident to fishing, fish farming, or similar activities. You will further note that the application of the latter part of the exemption is no longer restricted to employees engaged in operations considerably affected by natural factors but is considered to include as well any employee whose occupation is in a functional sense essential to, and an integral part of, the activities involved in the movement of the perishable products to consumers or to a nonperishable state, which are described by the terms used in the latter part of section 13(a)(5). Also, the revised interpretation recognizes that employees may perform an insubstantial amount of nonexempt work (up to 20 percent) in a workweek without defeating the exemption for that week.

You seem particularly concerned over the fact that under our revised interpretation night watchmen and employees manufacturing ice for fishing boats, etc. are not exempt. Both these classes of employees have been consistently regarded as nonexempt by the Wage and Hour and Public Contracts Divisions. The terms of the statute, interpreted in the light of the principles stated in release A-15, do not appear to justify a reversal of this established position. From the description provided by you of the duties performed by the night watchmen, it seems clear that a substantial proportion of their time is spent in activities which cannot characterize their occupation as exempt. With reference to employees engaged in the manufacture of ice for sale to fishing boats and for use in preserving the shrimp, such employees are not considered to meet the prescribed tests for exemption and this view is believed to clearly conform with the intent of Congress as evidenced by the legislative history of the exemption.

(03322)

You request that members of the Association be granted an opportunity to discuss the revised interpretation and that revision of Interpretative Bulletin No. 12 be withheld pending this discussion. As a result of a recent conference between representatives of the Divisions and the National Canning Association, it was decided that representatives of the Divisions will meet with representatives of the seafood and fishery industry and labor representatives in New Orleans, San Francisco, and Seattle for the purpose of presentation of views on the exemption. Regional Director Joseph A. Noah has arranged a meeting for this purpose to be held in New Orleans at 10 a.m. on June 20, 1945, in room A, Mezzanine floor of the St. Charles Hotel. I am informed that the National Canners Association plans to supply interested members with mimeographed copies of pertinent extracts from opinions of this office which may give them a better understanding before the meeting of the Divisions' interpretation of the scope of the exemption, so that there may be a full exchange of views. In the forthcoming revision of Interpretative Bulletin No. 12, an effort will be made to provide as definitive an answer as possible to any questions which these conferences may reveal to be of major interest to employers and employees in the industry.

In the future, should any members of your association encounter difficulty with respect to applying the exemption, it is suggested that they request from this office opinions on specific problems that may be troubling them. If sufficient information is submitted upon which to base a conclusion, I shall be glad to render an opinion concerning any particular problem upon request. In order to prevent a possible misconception as to the purpose and effect of such opinions, however, you are reminded that while, as Administrator, I am authorized and directed in certain specific instances not relevant here to make binding regulations and definitions, the statute does not confer upon me as Administrator any general power to issue binding rulings. My administrative interpretations of the act merely represent my best judgment as to how the courts would rule if the questions were to arise in litigation, and serve to indicate the construction of the law which will guide me in the performance of my duties unless I am otherwise directed by authoritative decisions of the courts. Of course, in interpreting section 13(a)(5), I must be mindful of the Supreme Court's admonition in the recent case of A. H. Phillips Co. v. Walling (decided March 26, 1945) that exemptions from this act must "be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress," and that "to extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people."

If I may be of further service in this matter, please do not hesitate to call upon me.

Very truly yours,

L. Metcalfe Walling
Administrator

Enclosure

(03322)