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

Legal Field Letter
No. 102

102

Attached Opinions

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

MEMORANDA

Date	Page	From	To	Subject
6/1/45	1	Donald M. Murtha (EGT)	Dorothy M.Williams	Chanley Bros. Trucking Co.,Bakersfield, California Applicability of section 7(c) exemption to drivers employed by independent trucking company to transport livestock to market, slaughterhouse or stockyards. 23 CF 304 403.2 303.2 202.421 303.31
6/18/45	2-3	Donald M. Murtha (EGT)	Irving Rozen	York and Sawyer 101 Park Avenue, New York, New York Effect of deductions for absences on salary requirements under Regs.,Park 541, where vacation and sick leave are accumulated. 21 BB 302.430 21 BF 303.33 21 BI 302.330

(03910)

Date	Page	From	To	Subject
7/7/45	4-5	William S. Tyson (AGW:RB)	Donald M. Murtha	Regular rate of pay. Circumstances under which additional compensation approved by Salary Stabilization Unit and paid in lieu of overtime may be credited against statutory overtime. 26 CD 601 26 CC 26 AA 204 26 CB 101 26 CD 402.526 703.3 703.2
7/10/45	6-7	Donald M. Murtha (VOW)	Irving Rozen	Lillyhall Accessories. Coverage under Embroideries Industry wage order; clarification of exclusionary clause therein. Reg. 633
7/26/45	8	Donald M. Murtha (MWP)	Jeter S. Ray	Knoxville Reweavers, Inc. Knoxville, Tennessee Applicability of section 13(a)(2) exemption to establishment performing reweaving both for individuals and for clothing stores. 21 BJ 403.24322 .243331 .241 .21
8/7/45	9-10	Donald M. Murtha (EG)	Ernest N. Votaw	Release A-13. Interpretation of term "arranged" as used in bonus release A-13; principles utilized by War Labor Board with regard to bonus payments. 26 CD 402.2110 402.2112 402.2113

(03910)

Date	Page	From	To	Subject
8/21/45	11	Donald M. Murtha (SSB)	Earl Street	Etex Outdoor Advertising Co., Inc., Longview, Texas. Coverage of intrastate advertising activities under release A-14 where performed for covered firms. 21 AC 411.44 411.41 101.61 101.63 205.27 202.0
8/28/45	12-13	Harold C. Nystrom (EG)	George H. Foley	J. Press, Inc., New Haven, Conn., and New York, N.Y. Clarification of 7(b)(1) exemption; effect of relinquishment by employer of exemption prior to expiration date of agreement. 23 CD 401 23 CD 302.1 23 CD 302.2
9/10/45	14	William S. Tyson (EG)	Amzy B. Steed	Release A-14 - Production of Ice for Commerce. Legal and enforcement policy re: production of ice supplied to interstate railroad crews for drinking water purposes under release A-14. 21 AC 414.8 202.0 101.63
9/13/45	15	Donald M. Murtha (AGW:DMM:WST)	Ernest N. Votaw	The Charles E. Hires Company, Philadelphia, Pennsylvania Clarification of "quarterly" test as used in bonus release A-13. 26 CD 402.2110 .2113

Date	Page	From	To	Subject
11/5/45	16-18	Harold C. Nystrom (ERG)	Harry Campbell, Jr.	Continental Oil Company, West Lake, La. Application of 13(b)(2) exemption to employees of intrastate pipeline company where 50% of oil is transported directly in commerce and remainder is shipped to intrastate refinery. 23 CC 303.320 .3210

LETTERS

Date	Pages	To	Subject
6/21/45	19-20	Mr. Richard Steimmig Business Manager New York Association for the Blind 111 East 59th Street New York 22, New York (ERG)	Validity of split percentage "cost-of-living" bonus paid quarterly and based on total earnings. 26 CD 402.2121 .2111
6/23/45	21-22	Mr. Donelson M. Lake The Equitable Life Assurance Society of the United States Equitable Floor, Sterick Building Post Office Box 197 Memphis 1, Tennessee (EG:JFS)	Insurance premiums paid by employer held part of regular rate where employees may surrender policies and receive cash surrender value therefor. 26 CD 402.323 .2110
7/31/45	23-24	Mr. E.E. Saperston, Comptroller Mechanical Handling Systems, Inc. 4600 Nancy Avenue Detroit 12, Michigan (JDC)	Applicability of administrative exemption to field foremen who supervise installation of conveyor systems in industrial plants. 21 BB 301.33
8/7/45	25-26	W.G.Cornett, Esquire J.A.Jones Construction Co. Inc. Panama City, Florida (SSB)	Effect of deductions for leave in excess of 14 days per year on salary requirement under Regs., Part 541. 21 BB 302.430 BF 303.33 BI 302.330

Date	Pages	To	Subject
8/8/45	27	Mr. E. J. Ryger, Manager Mid-West Producers' Creameries, Inc. 510 Pythian Building 224 W. Jefferson Street South Bend 2, Indiana (SSB)	Applicability of section 7(c) exemption to production of sweetened condensed skimmed milk. 23 CF 201.224 .2222 .232
8/23/45	28	Mr. M. D. O'Dell 631 Seldon Detroit 1, Michigan (SSB)	Applicability of section 7(b)(2) exemption to employees who agree to guaranteed annual wage based on a reduced regular rate of pay. 23 CD 303
8/31/45	29-30	Mr. John J. Riley, Secretary American Bottlers of Carbonated Beverages 1128 Sixteenth Street, N.W. Washington 6, D.C. (AGW)	Termination of commerce where extra-State goods are received and deposited on warehouse platform or floor. 21 AC 102.120 102.1211 405
9/19/45	31	Colonel Ralph F. Gow Director, Industrial Personnel Division General Staff Corps War Department Washington 25, D.C. (SSB)	Standards for leave plans affecting salary requirement under Regs., Part 541, as interpreted in release A-9 21 BB 302.430 BF 303.33 BI 302.330
10/25/45	32	Rufus G. Poole, Esquire National Press Building Washington 4, D.C. (JFS)	Applicability of section 7(b)(3) exemption to processing of sweet potatoes into starch. 23 CE 205.631 .6396

23 CF 202.421
23 CF 303.31
23 CF 304
23 CF 403.2
23 CF 303.2

Dorothy M. Williams
Regional Attorney
San Francisco, California

Donald M. Murtha
Chief, Wage-Hour Section

SOL:EGT:MIS

Chanley Bros. Trucking Co.,
Bakersfield, California
File No. 4-4190-C

June 1, 1945

Reference is made to Acting Regional Attorney Roberts' memorandum of March 31, 1945, in which he inquired concerning the application of the 7(c) exemption to truck drivers employed by an independent trucking company to transport livestock to market, to the slaughterhouse, or to stock yards.

He states that there is a difference of opinion in your office concerning the scope of the exemption. One group feels that the 7(c) exemption is inapplicable to the employees of such an independent trucking company since their employer does not have a place of employment where he is engaged in exempt operations but rather has an office and a garage where his trucks are stored and maintained which, it is felt, cannot be considered an exempt place of employment since no exempt operations are performed therein. However, he cites various opinions issued by the Solicitor's Office which he thinks indicates that the 7(c) exemption may be applicable to truck drivers of an independent contractor.

In my opinion, the section 7(c) exemption may be applicable to the employees in question. As you know, under the principles expressed in R-1892 and the Swift case, an employer must be engaged in the operations described in the section in order that the exemption may apply to his employees. The term "handling" of livestock as used in section 7(c) includes transportation to the slaughterhouse, stockyards, or other places where the livestock is to be sold. (Interpretative Bulletin No. 14, paragraph 21, Wage-Hour Code 5F41). Transportation of livestock is therefore an operation described in the section and is not merely a "necessary incident" to except operations. Consequently, it affords a proper basis for the exemption of employees of an employer engaged in such transportation. Such an employer is entitled to the exemption for "handling" livestock in his own right and it is immaterial whether he is an independent contractor. The actual transportation of livestock is an operation which is not normally performed in an establishment and it would nullify the 7(c) exemption for handling livestock to hold that because trucking operations are not performed in an establishment, the exemption is defeated. In order to effectuate the purpose of the exemption, it is necessary to regard the office where duties relating to the transportation of the livestock are performed and the garage where the trucks are maintained as an exempt place of employment within the meaning of the 7(c) exemption. Accordingly, where the drivers are in fact employed in such a place of employment and transport livestock to slaughterhouses, stockyards, or other places where the livestock is to be sold, they would qualify for the 7(c) exemption. Of course, employees of the trucking company who work in the office and garage and who perform work necessarily incidental to the transportation of the livestock, would likewise qualify for the exemption.

This opinion is limited solely to that subsection of the 7(c) exemption concerning employees engaged in "handling, slaughtering or dressing poultry or livestock". It does not relate to independent truckers engaged in hauling raw materials to or transporting processed commodities away from establishments dealt with under other subsections of section 7(c).

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Irving Rosen
Regional Attorney
New York, New York

21BB 302.430
21BF 303.33
21BI 302-330

Donald M. Murtha
Chief, Wage-Hour Section

SOL:FGT:ES

June 18, 1945

York and Sawyer
101 Park Avenue
New York, New York
(Cost-Plus-Fixed-Fee)

This will reply to your memorandum of March 2, 1945, in which you inquire whether the salary requirement under section 13(a)(1) of the Act and Regulations, Part 541, is met in the following situation:

The employees are paid a fixed weekly salary for a 40-hour workweek plus additional compensation for all hours worked in excess of 40 hours a week at a rate determined by dividing the fixed weekly salary by 40. These employees are also allowed a total of two days each month as vacation and/or sick leave. Despite the leave allowance, however, employees are docked for absences of any nature during a particular workweek. The leave allowances may not be credited against deductions for absences during particular workweeks but, rather, are accumulated from month to month until the completion of the work on the Government contract by the subject firm. In other words, an employee is docked for absences of any nature during a particular week and the leave continues to accumulate until the project is completed or until the employment of the particular employee with the firm is terminated. At the conclusion of the project, the employee is paid, in cash, the equivalent of all accumulated leave.

As you know, release A-9 sets forth the Division's position with respect to the meaning of payment on a "salary basis" within the meaning of section 541.1, 541.2, or 541.3 of Regulations, Part 541. Under the principles expressed in that release payment on a salary basis contemplates the regular receipt each pay period by an employee under his employment agreement of a predetermined amount on a weekly, monthly or annual basis, which amount constitutes all or part of his compensation and is not subject to reduction because of variations in the number of hours worked. However, the fact that less than this amount is paid for a particular pay period because disciplinary deductions are made for unreasonable absences would not in itself prove that an employee is not employed on a salary basis. On the other hand, an employee will not be regarded as paid on a salary basis if deductions are made for those types of absences ordinarily allowed executive, administrative and professional employees.

Since the employees in question "are docked for absences of any nature during a particular workweek," it would appear that deductions are made for those types of absences ordinarily allowed executive, administrative and professional employees, and consequently the employees are not deemed compensated on a salary basis within the meaning of Regulations, Part 541, and

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release A-9. The fact that the deductions are returned to the employees to the extent of their accumulated leave credits at the termination of the project or employment is not sufficient to place the employees' wage payments "on a salary basis" within the meaning of release A-9, since they do not receive the required payments each pay period. You will note that A-9 defines "salary basis" as the regular payment each pay period to the employee under his employment agreement of the predetermined amount which is not subject to reduction because of variations in the number of hours worked (except for disciplinary deductions).

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26CD 601
26CC
26AA 204
26CB 101
26CD 402.526
26CD 703.3
26CD 703.2

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

SOL:AGW:RB:IMG

William S. Tyson, Assistant Solicitor

July 7, 1945

Regular Rate of Pay

This will reply to your memorandum of March 22, 1945, inquiring whether compensation paid in lieu of overtime may be credited against overtime due under section 7 of the act in the case of employees who were at one time considered by the Salary Stabilization Unit of the Treasury to be exempt from the overtime provisions of the act and subsequently were determined to be nonexempt.

It appears that Mr. Dille in a memorandum dated October 7, 1944, addressed to Regional Director Glascott, discussed the question and concluded that such payments made in lieu of overtime are not to be included in determining the employee's regular rate of pay. In reaching this conclusion Mr. Dille's memorandum discussed three examples of salaried employees who were paid additional amounts allowed by the Treasury Department for the hours between 40 and 48 in the workweek. (1) An employee paid $60 for a 40-hour week received pursuant to Treasury ruling, $1.25 an hour for the hours worked between 40 and 48 in the week. (2) An employee paid $40 for a 40-hour week received pursuant to Treasury ruling, $1.25 an hour for the hours worked between 40 and 48 a week. (3) An employee paid a salary of $50 a week for a fluctuating workweek which averaged about 40 hours a week received 75 cents an hour for the 8 hours worked over 40 in a workweek.

Where an employee is paid a different rate of compensation for hours worked in excess of 40 than for the first 40 hours for the sole reason that those are the hours over 40, the employee's regular rate should, in my opinion, be determined generally by the compensation paid for the first 40 hours. If the rate paid for the hours over 40 is lower than that for the hours worked up to and including 40, it is clear that the purpose and intent of section 7 are frustrated since the employer would not then have to pay, and the employee would not then receive, 50% more for each hour worked over 40 in the week as compared to the employee's hourly compensation for the hours up to and including 40. On the other hand, if the rate paid for the hours over 40 is higher than that paid for the nonovertime hours and such higher rate is paid for the sole reason that the hours thus paid for are those after 40 in the workweek, it is my opinion that the purposes of section 7 are effectuated by determining the employee's regular rate from his compensation for the first 40 hours in the workweek and regarding the increase in his hourly rate for the hours after 40 as overtime compensation. In such a case there is compliance with section 7 if the hourly compensation paid for the hours over 40 equals or exceeds 150% of the hourly compensation paid for the first 40 hours, the statutory purpose of overtime compensation, as set out in the Youngerman-Reynolds and Helmerich & Payne cases, has then been achieved in that the employer pays and the employee receives an additional 50 percent

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for the overtime work. See also my recent memorandum to Regional Attorney Rozen on Willmark Service System, Inc. It is only to the extent that the hourly compensation for hours in excess of 40 does not equal or exceed 150% of the hourly compensation for the first 40 hours, that a violation of section 7 occurs.

In the first situation presented, the employee is paid $60 for a 40-hour week. His regular rate of pay is, therefore, $1.50 ($60 ÷ 40 hours). Overtime compensation is, therefore, due at the rate of $2.25 (time and one-half of $1.50). The $1.25 received for the hours between 40 and 48 is therefore not sufficient compensation, an additional $1.00 an hour being due.

In the second situation the employee is paid $40 for a 40-hour week. It follows that his regular rate of pay is $1.00 ($40 ÷ 40 hours). Overtime compensation is, therefore, due at the rate of $1.50 (one and one-half of $1.00) an hour. The $1.25 received for the hours between 40 and 48 is, therefore, not sufficient compensation, an additional 25 cents an hour being due. The first two situations vary only in that the overtime rate established under the Treasury ruling is less than straight time in the first situation and greater than straight time in the second. In neither instance, however, does it amount to one and one-half times the employee's regular rate of pay.

It is more difficult to determine whether there is compliance with section 7 in the third situation only because it is not clear whether the salary is intended to cover straight time compensation for all hours worked or whether under the new pay arrangement it is intended to cover only the first 40 hours. If the effect of the pay arrangement is that the salary covers payment for all hours worked with an additonal 75 cents for each of the hours over 40 of the additional 75 cents an hour payment for the overtime hours would bring the compensation for the overtime hours above 50 percent premium required, since the regular rate would be $1.25 ($50 ÷ 40 hours) in a 40 hour week and $1.05-1/6 ($50 ÷ 48) in a 48 hour week. On the other hand, if under the present arrangement the salary covers only the first 40 hours, the payment of 75 cents an hour is not even sufficient to cover straight time compensation for the overtime hours. In such a case the regular rate would be $1.25 and time and one-half would amount to $1.87-1/2. Since the employee would have received only 75 cents for each of the overtime hours he would be entitled to an additional $1.12-1/2 for the hours worked in excess of 40.

(03910)

Reg. 633

Irving Rozen
Regional Attorney
New York 1, New York

SOL:VOW:MIS

July 10, 1945

Donald M. Murtha
Chief, Wage-Hour Section

Lillyhall Accessories

This will reply to your memorandum of May 24, 1945, in which you request a clarification of the conclusion reached in my memorandum of May 17, 1945, in regard to subject company. It is stated therein that the wage order for the Embroideries Industry is inapplicable to the decorating with spangles and beads, of covered buttons manufactured by subject company, since such embroidery operations fall within the exclusionary clause which excepts embroidery when performed by the manufacturer of an article for use on that article. You call my attention to various opinion letters dealing with the above exclusionary clause which you state appear to be in conflict with the conclusions reached in the instant letter, and inquire as to whether there is any guiding policy to be used in the interpretation of this clause.

I believe that there is no actual inconsistency between the opinion rendered in the subject case and the earlier memoranda referred to by you. It is probable that the apparent conflict arises from a misunderstanding as to the purpose and meaning of the exclusionary clause. It was intended by this provision to avoid interjecting an additional rate (for the Embroideries Industry) into the plant of the manufacturer of a particular article, the manufacture of which was not itself subject to the embroideries definition and was already or would be subject to another industry wage order. (See Findings and Opinion, Industry Committee No. 15, page 17.) However, where a firm performs embroidery operations on an article which it has not manufactured, there is no reason to exclude it from the Embroideries Industry since it is not already subject to the wage order applicable to the manufacture of that article.

Thus in the case of two of the memoranda referred to by you (Murtha to Rozen, July 11, 1944, Deluxe Trimming Company, SOL:HJE:GM, and Murtha to Keyman, April 5, 1943, Grace Giommarino, SOL:ELG:CF) the companies involved were performing embroidery operations on a purchased article and the finished article was made by an embroidery process. The knotting of the cord on the purchased wooden whistles and the crocheting of covers for purchased wooden mold and metal snap fasteners involve the decoration of articles by a separate embroidery establishment performing those very operations which bring the employees within the scope of the wage order for the Embroideries Industry. Naturally, the end product will differ from the component purchased articles as a result of the embroidery operations which the firms in question perform, but this is distinguishable from the application of embroidery, by a manufacturer, to an article which he has manufactured by a non-embroidery process. To exclude the type of embroidery operations involved in the above memoranda from the embroideries wage order would mean the negation of that wage order since in every case application of embroidery transforms an item to a greater or lesser degree into a different article.

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These two cases would appear to be analogous to the decoration of purchased buttons which I previously advised you came within the coverage of the Embroideries Industry wage order. It is apparent that the untrimmed button differs from the spangled button and may serve a completely different function; nevertheless the decoration thereof does not constitute embroidery on an article manufactured by subject company.

One other memorandum which you mention deals with the manufacture of shoulder boards for naval uniforms (memorandum from Murtha to Rozen, March 26, 1944, Hillborn-Hamburger, SOL:RJE:GH) which reaches the same conclusion as an opinion holding that the manufacture and stitching of chenille athletic letters and emblems is within the wage order (memorandum from Livengood to Williams, April 30, 1942, Bencoe Company, Inc., SOL:LW:YS). The conclusions arrived at therein appear to be based on the specific inclusion of emblems in the definition of the industry, and by analogy to other articles of adornment made by the embroidery process and which are in themselves embroidery items. Thus the entire manufacture of emblems constitutes an embroidery operation and not solely the stitching performed on the article itself. (See Findings and Opinion, Industry Committee No. 45, pages 6-8.)

It would appear to be unnecessary to discuss other examples which you set forth, since, in my opinion, distinction can be made in each case on the basis of the principles set forth above.

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21 BJ 403.24322
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Jeter S. Ray, Regional Attorney
Nashville 3, Tennessee

Donald M. Murtha
Chief, Wage-Hour Section

SOL:MWP:YS

Knoxville Reweavers, Inc.
Knoxville, Tennessee
File No. 41-54367

July 26, 1945

This will reply to your memorandum of June 4, 1945 in which you inquire concerning the application of the section 13(a)(2) exemption to subject company. It appears that subject company is a branch of the American Institute of Reweaving, Inc. The firm reweaves holes in suits, dresses, linens, and hose, caused by tearing, burning, moths or other causes both for individuals and for clothing stores. The firm's interstate business amounts to only 10 or 15 percent.

The reweaving operations are performed by highly skilled employees who the employer claims require 18 months training. The instruments used in reweaving are reweaving needles which are not sold to the general public but are sold only to reweaving shop owners. It is not possible to determine from the file what percentage of work is done for clothing stores.

In my opinion, the subject company may qualify as a service establishment under section 13(a)(2). As you stated in your memorandum of April 9 to Mr. Eaves, it is the Division's position that the 13(a)(2) exemption is applicable to hosiery repair services, which constitute a part of the work of subject company. I believe that the similarity of the reweaving performed by subject company to ordinary clothing repair and to the reweaving of hosiery is sufficient to establish that such servicing is exempt when done for the ultimate consumer. Cf. Legal Field Letter No. 46, page 6. The fact that the reweaving technique, as described in the file, is a highly skilled operation does not disturb this result.

However, such servicing when performed for clothing stores upon goods which are not the property of the ultimate consumer would not be exempt servicing within the meaning of section 13(a)(2) and if subject company performed a substantial amount of such reweaving work, such work would defeat the 13(a)(2) exemption. See paragraph 18 of Interpretative Bulletin No. 6.

Attachment (file)

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26 CD 402.2110
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.2113

Ernest N. Votaw, Regional Attorney
Philadelphia, Pa.

SOL:EG:ING

Donald M. Murtha, Assistant Solicitor

August 7, 1945

Release A-13

Reference is made to your memorandum of March 24, 1945 relative to the release A-13.

The term "arranged" as used in release A-13 is not synonymous with the words "promised" and "agreed." It is intended to cover a situation where bonus payments were not based upon an expressed mutual agreement but rather upon custom and practice sufficient to imply an understanding.

As you suggest, it is true that the facts of each case will determine whether the bonus involved is a category (A) or (B) bonus. The principles to be applied in determining whether a bonus is in one category or the other are referred to in Mr. Tyson's memorandum of March 21, 1945 on this subject. You may find in this connection the opinion of the National War Labor Board in the Nineteen Hundred Corporation case (12 W.L.R. 417) helpful in explaining to employers the reasons why a bonus that has been determined by this office to be an "arranged" bonus cannot be viewed as a bonus over which the employer has retained complete discretion both as to payment and amount. In the Nineteen Hundred case, Chairman William H. Davis pointed out in part:

> "In each case, therefore, the basic question must be: May the bonus properly be considered to be an integral part of the wage or salary structure? This is a question of fact to be answered according to the particular circumstances of each case.
>
> "Manifestly, a wage or salary structure may include arrangements for compensation not expressly provided for in the collective bargaining agreement between the employer and his employees, not required by statute, or not otherwise carrying an obligation enforceable by ordinary legal process. Sanction for such arrangements rests only in the compulsion of conscience or of expediency felt by the employer, or in the employee's ability to withhold his services or to demand alternative compensation if the arrangements are ignored. Yet these arrangements may be rooted in custom embodied, for example, in informal agreements long established and long observed. In such event they may constitute part of the wage or salary structure, and disregard of them may result in a decrease in wage rates requiring prior approval of the Board.
>
> "For the employee's conception of his wage or salary quite naturally and properly arises not only from the obligatory practice of the employer, but from the latter's voluntary acts as well. The employee's expectations are strengthened by repetition of the voluntary act and are conditioned by

(03910)

existence of circumstances which he understands to have been the basis of the act. To the extent that the employer by repeated voluntary action has raised the reasonable expectations of his employee he has fettered his own discretion. An element of compulsion, albeit self-imposed compulsion, necessarily emerges which governs the employer in the continued exercise of his discretion.

"And because today the employee is not free to enforce his expectations by interrupting or retarding production and is limited by the national economic stabilization policy in demanding alternative compensation, the Board for this wartime period must determine on the facts of each disputed case whether the expectations are reasonable; in other words, by what extent, if any, the employer by past action has limited his discretion; and then finally, whether under all the circumstances, the arrangements may fairly be considered so rooted in custom as to constitute part of the wage or salary structure, departure from which will require prior approval of the Board..."

You are correct in your understanding that while the annual bonus discussed in Legal Field Letter No. 72, page 21 would be considered a category (B) bonus, the enforcement policy expressed in release A-13 takes it out of the reach of administrative action.

With respect to your inquiry concerning the propriety of advising employers to change their bonus plans so as to provide for bonus payments based upon a percentage of the employee's total earnings, such advice would appear to be proper. The employer, however, should also be advised that such a change in his bonus plan may require the prior approval of the War Labor Board or the Salary Stabilization Unit as the case may be.

21 AC 411.44
.41
101.61
101.63
205.27
202.0

Earl Street, Regional Attorney
Dallas 2, Texas

Donald M. Murtha, Assistant Solicitor

Etex Outdoor Advertising Co., Inc.
Longview, Texas

SOL:SSB:IMG

August 21, 1945

Reference is made to your memorandum inquiring as to the applicability of the Fair Labor Standards Act to the employees of the subject company. It appears that subject firm operates an outdoor advertising business within the State of Texas. Some of the firm's customers are engaged in producing goods for interstate commerce and others are engaged in interstate commerce. No billboards are maintained outside the State and no material is shipped outside the State other than correspondence and contracts which are mailed to the firm's clients throughout the United States.

It is Mr. Tyson's recollection that during the conference at Nashville to which you refer, he mentioned some extreme cases which might be covered under A-14. However, he was very careful at that time to point out that lines would have to be drawn so that assertion of coverage would not result in absurdities. Thus, we feel that we cannot successfully assert coverage under release A-14 unless the goods produced have a fairly close relationship to the interstate activities.

The employees engaged in ordering, receiving, handling and unpacking materials from outside the State and those preparing correspondence and contracts to be mailed to points outside the State, would, as you say, be covered by the act. Your opinion that the Divisions have taken no position with respect to employees posting billboards within the State after the posters have come to rest at the subject firm's headquarters is likewise correct. See Legal Field Letter 66, page 7. This position, as you imply, is in no way affected by release A-14. Likewise, we take no position with respect to coverage of employees who produce the billboard advertising matter to be used within the State.

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23 CD 401
23 CD 302.1
23 CD 302.2

To: George H. Foley
Regional Attorney
Boston, Massachusetts

SOL:EG:ES

August 28, 1945

From: Harold C. Nystrom
Chief, Wage-Hour Section

Subject: J. Press, Inc.
New Haven, Conn.
File No. 6-211

J. Press, Inc.
New York, N. Y.
File No. 31-55835

This is in reply to your memorandum of November 27, 1944, concerning the proper method of computing restitution in the case of employees covered by a section 7(b)(1) collective bargaining agreement. In your first question you ask:

> * * * if the period January 1-July 1 shows over 1000 hours, does he /the employer/ make his next computation for the period July 1-January 1, or does he have to take the periods January 8-July 8, January 15-July 15, etc? If the latter, what is the effect of finding that one, e.g. January 15-July 15, has fewer than 1000 hours?

In view of the statement in paragraph 19 of Interpretative Bulletin No. 8 that --

> * * * each week of operation under the agreement must be considered as beginning a new 26-week period during each of which periods no employee sought to be employed pursuant to the provisions of section 7(b)(1) may be worked more than 1000 hours.

it would appear that each period of 26 consecutive weeks stands by itself in determining whether the employees have been employed in pursuance of an agreement which complies with the terms of section 7(b)(1). The accumulation of hours in excess of 1000 in a period of 26 consecutive weeks will not lead to liability under section 7(a) for previous 26-week periods during which employees did not work over 1000 hours. Conversely, the employers can, in any future workweek, undertake to comply again, in our opinion, with the provisions of the contract and invoke again the section 7(b)(1) exemption from the overtime provisions of section 7(a). Thus, employees employed in excess of 1000 hours in any period of 26 consecutive weeks are entitled to overtime in accordance with section 7(a) for all hours in excess of 40 worked during any workweek falling within that period, and only that period. This result seems implicit in the language of paragraph 29 of Interpretative Bulletin No. 8. However, to determine whether or not the employee has worked more than the prescribed number of hours in any 26-week period, an examination should be made of each 26-week period covered by the contract. For example, in the case cited in your memorandum, an examination should be made of the 26-week period from January 8 to July 8 and January 15 to July 15, etc. No restitution would be due, of course, in any of the 26-week periods in which the employee worked less than 1000 hours. Nor should restitution, obviously, be collected more than once for any workweek.

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In your second question you ask:

> * * * suppose the employer relinquishes the exemption the week ending November 12, and pays time and one-half for hours over 40 from then on, and suppose further that from May 12 to November 12 the employee worked 990 hours. Is it necessary to compute hours worked in the periods May 19-November 19, May 26-November 26, etc? If so, must the overtime hours worked in the weeks ending November 19, November 26, etc., be counted toward the 1000 hours?

It would seem that where an employer relinquishes the 7(b)(1) exemption prior to the date marking the expiration of the agreement, that his employees have not been employed pursuant to an agreement limiting their hours of employment of 1000 hours during any period of 26 consecutive weeks. (Compare with paragraph 29 of Interpretative Bulletin No. 8.) The nature of the requirement described by section 7(b)(1) makes it impossible to determine whether an employee has been employed pursuant to the section's requirements until all 1000 hour periods have been concluded. Accordingly, in our opinion, an employer who relinquishes the exemption becomes liable for overtime for all hours which his employees have worked in excess of 40 hours in any workweek during any period or periods in which the employees worked more than 1000 hours.

The affirmative act of relinquishing the exemption would appear to be as clear an indication of disregarding the hour limitation as employment in excess of the prescribed number of hours. To permit an employer to relinquish the exemption and retain the benefits of the exemption prior to the date of abandonment would defeat the purpose of section 7(a) and render the 1000-hour limitation meaningless. An employer who fails to limit the hours of an employee's employment as prescribed by the statute, for whatever reason, cannot be said to have availed himself of the exemption.

If an employer wishes to retain the benefits of the exemption prior to the date of abandonment, he must continue to limit the hours his employees will be employed to 1000 during any period of 26 consecutive weeks even though they are paid time and one-half for all hours worked over 40 in weeks subsequent to the date of relinquishment. Under this interpretation no restitution would be due to the employees for the 26-week period between November 12 and May 12, since the employees do not exceed the permitted number of hours of work under the section. Since the agreement in question appears to be a literal "type of agreement," it would be necessary to examine each 26-week period during the term of the contract in order to determine whether or not the hour limitation has been met. Hours for which the employees are paid time and one-half overtime compensation during the term of the contract must be included in computing the 1000 hours. (Compare paragraph 26 of Interpretative Bulletin No. 8.) Thus, overtime hours worked in the weeks ending November 19, November 26, etc., must be counted toward the 1000 hours. See Legal Field Letter No. 91, page 1.

21 AC 4148
202.0
101.63

Amzy B. Steed, Regional Attorney
Birmingham 3, Alabama

SOL:EG:IMG

William S. Tyson, Assistant Solicitor

September 10, 1945

Release A-14
Production of Ice for Commerce

Reference is made to your memorandum of July 7, 1945, inquiring as to whether I concur in your conclusion that employees producing ice supplied to train crews of interstate railroads for drinking water purposes are not engaged either in interstate commerce or in the production of goods for interstate commerce. You suggest that the instant problem may be analogized to the production of ice for use by employees of a telephone company and its visitors which this office has held does not constitute the production of goods "for commerce" within the meaning of release A-14.

Whether employees engaged in producing ice that is supplied to train crews of interstate railroads for drinking water purposes are engaged in production of goods for commerce within the meaing of the act depends upon the use to which the ice is put. If the ice is used to cool drinking water aboard trains moving in commerce, the ice under the principles of the ice cases and release A-14 must be deemed to have been produced for commerce. In such a case, the ice itself moves in commerce and the fact that the drinking water which it is used to cool is consumed by employees of the railroad would not affect this conclusion. However, if the ice is used to cool drinking water which does not move in commerce such as drinking water in railroad stations or railroad yards which is provided for the consumption of railway employees exclusively, the production of such ice would not be so directly or immediately related to the carrying on of interstate commerce as to be deemed the production of goods "for commerce" under release A-14. The supplying of such drinking water would not appear to be a service maintained by the railroad company as a part of its carrying on of interstate transportation of passengers and goods.

I have discussed this matter with Mr. Walling and find that, although he agrees the act would apply to the employees in question if they produced the ice for use upon trains in cooling the train crews' drinking water, he does not feel that the Divisions ought to take enforcement action in such case until the courts have passed on other more clearly covered cases arising under release A-14. It is, therefore, suggested that you inform your inquirer, Supervising Inspector Gonsoulin of the Louisiana State Office, of the Divisions' legal position and enforcement policy in this matter in accordance with the views expressed above.

(03910)

26 CD 402.2110
402.2113

Ernest N. Votaw, Regional Attorney
Philadelphia, Pennsylvania

SOL:AGW:DMM:WST:HC

September 13, 1945

Donald M. Murtha, Assistant Solicitor

The Charles E. Hires Company
Philadelphia, Pennsylvania
File No. 37-50658

This will supplement Mr. Tyson's memorandum (SOL:JFS:DMH) of July 3, 1945 regarding the inclusion of bonuses in the regular rate of pay. Since that memorandum was written Mr. Walling has recently amplified the enforcement policy contained in the last two paragraphs of release A-13.

In A-13 the Administrator states as an enforcement policy that "the Divisions will in the future not insist on the inclusion of any bonus (***) which is paid at greater intervals than quarterly in computations of the 'regular' or 'basic' rate of pay for overtime purposes." Under Mr. Walling's amplification a bonus will be considered as paid on a quarterly basis if at least four payments are made during the same calendar year (or fiscal year if the firm operates on a fiscal year basis) regardless of the interval between the various payments. Mathematically, at least two of the four payments would be within a quarter. Only where less than four payments in a calendar or fiscal year were made would payments be considered to be at greater intervals than quarterly.

(03910)

230C303.320.
303.3210

Harry Campbell, Jr.
Acting Regional Attorney
Birmingham, Alabama

SOL:ERG:MIS

November 5, 1945

Harold C. Nystron
Chief, Wage-Hour Section

Continental Oil Company
West Lake, Louisiana
File No. 17-2111

Reference is made to former Regional Attorney Steed's memorandum in the subject matter, dated August 14, 1944, requesting an opinion regarding the applicability of the section 13(b)(2) exemption to the subject company's pipe-line activities.

The subject company is engaged in the production, transportation, refining and marketing of crude oil and refined petroleum products, acting through subsidiaries or divisions which specialize in one particular branch of the business. Through the Continental Pipeline Company, the subject concern operates various pipe lines. The pipeline here under consideration appears to run solely within the State of Louisiana, from various oil fields in that State from which the oil is carried in a system of gathering lines to the main pipe line and is transported through the main pipe line to a terminus at West Lake, Louisiana. At the terminus, the oil transported is diverted to a refinery at West Lake (refined products subsequently move in interstate commerce) or to tankers, barges or railroad tank cars for transportation to points outside the State of Louisiana. The pipe line does not itself cross any State lines but, as noted, is located solely within the borders of the State of Louisiana. About 50 percent of the oil transported goes to the refinery and the remainder is shipped in commerce as crude oil. The subject concern transports not only its own oil but also that of other producers on a tendered basis at the posted pipe-line tariff rates. The company owns its own tank cars and its own tankers which it uses for the transportation of oil and refined products.

Mr. Steed's memorandum raises two questions, viz:

(1) With respect to pipe-line companies, is the Interstate Commerce Commission's jurisdiction under Part I of the Interstate Commerce Act confined to companies whose lines either cross State lines or connect with trunk lines which themselves cross State lines? -- and

(2) Insofar as the subject company is concerned, is the section 13(b)(2) exemption defeated in any event, since, under Legal Field Letter No. 56, the employees are engaged in some activities which are not of a type which subject the employer to Part I of the Interstate Commerce Act.

(03910)

Part I of the Interstate Commerce Act (section 1) states that "the provisions of this part shall apply to common carriers engaged in * * * the transportation of oil * * * by pipe line, or partly by pipe line and partly by railroad or by water * * * from one State * * * to any other State * * *." (Underscoring supplied.) Section 3(a) of the Interstate Commerce Act states that the term "common carrier" as used in Part I "shall include all pipe-line companies." (Underscoring supplied.) See Valvoline Oil Co. v. United States, 308 U.S. 141; Pipe Line Cases, 234 U.S. 548; and Champlin Refining Co. v. United States, 5 Fed. Carr. Cases 80, 250. It is my opinion, consequently, that the section 13(b)(2) exemption may be applicable to the Continental Pipeline Company, although its pipe line is located entirely within the State of Louisiana, where it connects with other means of interstate transportation, such as railroads, tankers or barges, and the oil is shipped out of the State as part of a continuous movement in interstate commerce. See, in this connection, Walling v. Jacksonville Paper Co. 317 U. S. 564; So. Pacific Terminal Co. v. Interstate Commerce Comm., 219 U.S. 498; Texas & New Orleans R.R. Co. v. Sabine Train Co., 277 U.S. 111; Atlantic Coast Line R.R. Co. v. Standard Oil Co. of Ky., 275 U.S. 257.

This view is supported by representatives of the Interstate Commerce Commission and by the fact that the company files tariffs with the Commission as a carrier subject to Part I of the Interstate Commerce Act.

The second question presented by Mr. Steed's memorandum permits of two possibilities, first, that segregation exists with respect to that portion of the oil transported via pipe line for direct shipment in commerce and the oil transported for subsequent refining within the State of Louisiana prior to ultimate shipment in commerce and, second that the pipe line company transports mixed loads of crude oil, part for direct shipment in commerce and part for intrastate refining.

With respect to employees of the pipe line company engaged in operating an intrastate pipe line which transports mixed loads of crude oil, part for direct shipment in commerce and part for intrastate refining, it is my opinion that the principles set forth in Legal Field Letter No. 100, pages 1 and 6 dealing with the section 13(b)(1) exemption, are equally applicable to similar situations arising under section 13(b)(2).

Thus, in applying the 13(b)(1) exemption to truck drivers engaged in hauling a mixed load consisting in part of goods being transported in interstate commerce, it was decided that 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. Consequently, in the absence of evidence of an intent to evade the requirements of section 7 of the Act, 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. In such cases, the entire trip is deemed to constitute an exempt activity rather than the performance of unsegregated exempt and nonexempt work.

The same result I believe should be reached under section 13(b)(2) where a pipe line is used to transport a mixed load of crude oil only part of which throughout the whole trip is being transported in interstate commerce. The conclusion, I am informed, comforms with the views of the Interstate Commerce Commission.

If, on the other hand, the pipe line company segregates the transportation of oil moving directly in commerce from that consigned to the refinery, the principles expressed in Legal Field Letter No. 56 would be applicable. In such a case, the activities of employees in connection with the movement of oil moving directly in commerce would be viewed as exempt work under section 13 (b)(2); activities of the pipe line employees in connection with intrastate transportation of crude oil from the oil fields to the refinery at West Lake, Louisiana, would be viewed as nonexempt. If, therefore, the company's pipe line employees, during any workweek, perform a substantial amount of nonexempt work, they would not qualify for the section 13(b)(2) exemption.

It may also be noted that the Interstate Commerce Commission may assert jurisdiction over the intrastate transportation of oil to the refinery if there were indications that an ultimate extrastate destination of the oil was arranged for, understood, or fixed at the time the shipment commenced, notwithstanding the temporary delay in the interstate movement occasioned by the refining process. In other words, the Commission may take the view that the refining may be but an incident to the transportation of the oil in commerce which does not result in such a break in the continuity of transportation of the oil to other states as will defeat the Commission's jurisdiction. However, no final determination can be made with regard to the Commission's jurisdiction over the oil shipments to the refinery in the absence of information indicating whether the ultimate extrastate destination of the oil going to the refinery is so pre-arranged or understood as to necessitate viewing the refining as merely an incident to the interstate transportation of the oil.

26 CD 402.2121
26 CD 402.2111

Mr. Richard Steimmig
Business Manager
New York Association for the Blind
111 East 59th Street
New York 22, New York

SOL:ERG:CTN

June 21, 1945

Dear Mr. Steimmig:

This will reply to your letter of May 3, 1945, in which you inquire whether a high-cost-of-living bonus paid to your clients should be included in figuring hourly bases. You state that the bonus is paid quarterly on the basis of 7 percent on the first $20 and 5 percent above the $20 to $59.99 per week.

Assuming that your clients are subject to either the Walsh-Healey or Fair Labor Standards Act and are not otherwise exempt, and assuming, further, that the percentage bonuses in question are based only on straight-time earnings, it is my opinion that such bonus payments are required to be included for overtime purposes. See, in this connection, releases A-13, a copy of which is enclosed. Thus, if a client earns $20 at straight time for a 50-hour week and receives a 7 percent cost-of-living bonus, his regular rate of pay under the Fair Labor Standards Act would be determined by dividing his total straight-time compensation, viz, $20 plus $1.40 (7 percent of $20), by total hours worked, viz, 50 hours, resulting in a regular rate of 42.8 cents per hour for the week in question. The client would then be entitled to receive, for his overtime work, an additional sum equal to one-half his regular hourly rate of pay multiplied by the number of hours worked in excess of 40 in the week, resulting in a total of $23.54.

On the other hand, as you will note from release A-13, where an employer, in order to compute overtime simultaneously with the payment of additional straight-time compensation, pays a bonus, the amount of which is in fact arrived at by taking a predetermined percentage of the total earnings of the individual client (both straight time and overtime), exclusive of the "bonus," no additional overtime need be paid thereon, since the bonus already provides for such payment. A bonus based on a predetermined percentage of a client's total earnings, straighgt time and overtime, results mathematically in precisely the same amount as would be due if the percentage were applied only to straight-time earnings and the overtime were subsequently computed thereon. The Divisions have, consequently, approved such a percentage bonus as a method of arriving at the simultaneous payment of both straight time and overtime, thus facilitating bookkeeping computations.

(03910)

However, where a bonus is based on a split percentage of total earnings, viz, 7 percent of all earnings up to $20 and 5 percent of earnings between $20 and $60 per week, the requirements of section 7 of the Fair Labor Standards Act would not be satisfied in overtime weeks for, to the extent that the percentage applied to any part of a client's overtime earnings represents a lower percentage than that applicable to his straight-time earnings, the Act's requirements would not be met unless additional overtime was paid on the differential between such percentages. Thus, where a client earns $28 in a given workweek, of which $8 represents overtime earnings, and the employer pays a bonus of 7 percent on the client's first $20 and 5 percent on the remainder, to the extent of the differential, viz, 2 percent, the full amount of overtime due under the Fair Labor Standards Act has not been paid.

If, of course, an employer wishes to modify his bonus arrangement (still assuming, of course, that the bonuses paid are based upon a predetermined percentage of total earnings) so that his clients receive a constant percentage of total earnings, rather than split percentages, no additional overtime need be computed and paid on such a bonus.

You are aware, of course, that if any change in your bonus plan results in an increase or decrease in a client's compensation, it may be necessary to secure War Labor Board approval for such change.

I trust that the above information will prove of assistance to you. If, however, you have any further questions in this matter, I suggest that you communicate with the regional office of the Wage and Hour and Public Contracts Divisions located at 341 Ninth Avenue, New York 1, New York, which is charged with the enforcement of the Walsh-Healy and Fair Labor Standards Act in the New York area.

Very truly yours,

Thacher Winslow
Deputy Administrator

Enclosure

26 CD 402.323
402.2110

Washington 25, D. C.

SOL:EG:JFS:LMH

June 23, 1945

Mr. Donelson M. Lake
The Equitable Life Assurance Society
of the United States
Equitable Floor, Sterick Building
Post Office Box 197
Memphis 1, Tennessee

Dear Mr. Lake:

This will reply to your letters concerning the question of whether the life insurance premiums paid by the Corinth Machinery Company should be regarded under the Fair Labor Standards Act as part of the employee's regular rate of pay for purposes of overtime compensation.

It appears that some time ago the Corinth Machinery Company inaugurated a 5 percent insurance plan for the benefit of the employees of the company. After the company decided to operate the plan it notified its employees that all employees of the company who had been with the company for more than one year were eligible to participate in the plan and could receive the benefits thereof, if they so desired. The type of policies sold under the plan are Ordinary Life Policies which have no cash value until the end of the second year. The policies become the property of the participating employees who have the exclusive right to name the beneficiary. When the plan is discontinued or when the employee withdraws therefrom, or severs his employment with the company, the employee may keep the policy and maintain it by paying the premiums, or he may take the policy and surrender it to the company for whatever cash surrender value the policy has. For purposes of computing the amount of the premium the company will pay for each employee entitled to participate in the plan the company uses in the case of an employee paid an hourly rate the amount of the employee's hourly straight time earnings for a 40-hour week and for salaried employees the regular salaries earned. Premium payments are made each month. The Treasury Department has held that the premium payment constitutes wages and must be included for withholding purposes.

Enclosed are copies of release A-13, dealing with the general problem of bonus payments under the act, and release R-1743, dealing with the specific problem of employers' contributions to death benefit plans on behalf of employees. As you will note by release A-13, it is the Divisions' position that where an employer promises, agrees or arranges to pay a bonus, the amount of the bonus must be included in computing the regular rate of pay for overtime purposes under the act. From the information submitted by you, it appears that the Corinth Machinery Company has promised, agreed or arranged to pay the insurance premiums within the meaning of release A-13.

However, release R-1743 further states that an employer's contributions to death benefit plans on behalf of employees need not be included in computing the regular rate of pay if the following two conditions are met: (1) The employee must not have the option to receive instead of the benefits under the plan any part of the contributions of the employer,

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and (2) the employee must not have the right to assign the benefits or to receive a cash consideration in lieu of the benefits either upon termination of the plan or his withdrawal from it voluntarily or through severance of employment with the particular employer. It is the position of the Divisions that these two conditions are not met where an employee may surrender a death benefit policy and receive the cash surrender value.

As you will also note by release A-13, it is the present enforcement policy of the Divisions not to insist on the inclusion of any bonus which is paid at greater intervals than quarterly in computing the regular rate of pay. Also as you will note by release A-13, no additional overtime compensation need be computed and paid on a bonus, the amount of which is in fact arrived at by taking a predetermined percentage of the total earnings of individual employees (both straight time and overtime), exclusive of the bonus. Where the amount paid to each employee is actually based on a percentage of his total earnings, the bonus itself includes the payment of both straight time and overtime.

Very truly yours,

WM. R. McCOMB
Deputy Administrator

Enclosures

(03910)

21 BB 301.33

Washington 25, D. C.

SOL:JDC:IMG

July 31, 1945

Mr. E. E. Saperston, Comptroller
Mechanical Handling Systems, Inc.
4600 Nancy Avenue
Detroit 12, Michigan

Dear Mr. Saperston:

You have requested an opinion as to whether field foremen employed by your company are exempt from the wage and hour provisions of the Fair Labor Standards Act under section 13(a)(1) as "executive" or "administrative" employees. On the basis of an inspection made of your company by representatives of the Wage and Hour Division, our Detroit office advised you that these employees are not exempt under section 13(a)(1) of the act. Subsequently you discussed the problem with Mr. Nystrom of our Washington office who suggested that you submit a full explanation of the situation.

It appears from the information furnished by you and also that developed by the inspection that your company is engaged in the manufacture and installation of conveyor systems for use in industrial plants. Each installation job involves technical engineering problems which vary in complexity. The task of supervising a particular installation job is assigned to one of your field foremen who bears the responsibility for the proper execution of the work. He has authority to hire and fire employees under his supervision, makes decisions concerning alterations desired by the customer and the price to be charged therefor, purchases materials needed for completion of the job, and, when performed on the job location, supervises the fabrication of parts. He performs no manual labor, works under the general supervision of an Erection Superintendant in the main office, and is paid a salary of $350 monthly plus annual bonus.

From the foregoing facts, it is my belief that the field foremen perform, under only general supervision, "special nonmanual assignments and tasks directly related to * * * general business operations involving the exercise of discretion and independent judgment" within the meaning of section 541.2(b)(3) of the enclosed copy of Regulations, Part 541 and page 28 of the presiding officer's report, a copy of which is also enclosed. It seems clear that the work performed by these foremen is nonmanual in character although manual work is performed by those under their direction. It also clearly appears that they perform their duties under "general supervision." Furthermore, the facts clearly indicate that their work is directly related to general business operations and involves the exercise of discretion and independent judgment. For upon the proper performance of their duties would seem to depend the smooth functioning of the firm's operations and the building up and holding of the firm's good will and patronage. In addition, it is apparent that in order for the company to conduct its business with success and profit, the installation work must be skillfully handled. In the accomplishment of this, the field foremen seem to play a vital

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and responsible part thus enabling the company to carry on a successful and profitable business. It is also indicated that to satisfactorily perform the duties of a field foreman requires specialized training, skil and experience together with a high degree of good judgment. Accordingly since the employees in question receive a salary of not less than $200 pe month, it is my opinion that they qualify for exemption from the minimum wage and overtime provisions of the act as bona fide administrative em- ployees within the meaning of the regulations.

Very truly yours,

WM. R. McCOMB
Deputy Administrator

Enclosures

(03910)

Washington 25, D. C.

21 BB 302.430
BF 303.33
BI 302.330

W. G. Cornett, Esquire
J. A. Jones Construction Co., Inc.
Panama City, Florida

SOL:SSB:DMH

August 7, 1945

Dear Mr. Cornett:

This is in reply to your letter inquiring as to the applicability of the principles announced in release A-9 to the following facts: It appears that a "nonexempt" employee under the Fair Labor Standards Act is subject to call at all hours. His established workweek is 54 hours per week. However, he frequently works 10, 12 and 16 hours per day and in an emergency works around the clock. The employee is paid a predetermined salary and receives no compensation for hours worked over 40 in a week. The employer's annual leave plan permits the employee one and one-sixth days per month as annual leave. When, because of fatigue and overwork, the "nonexempt" employee stays off to rest and recuperate, the employer requires the employee to take such time on his accumulated annual leave. You ask: "Can an employer compel a nonexempt employee to charge up reasonable and bona fide absences from work to such employee's right to annual leave?"

As you know, section 13(a)(1) of the Fair Labor Standards Act provides an exemption from the minimum-wage and overtime requirements of the act for employees engaged in executive, administrative or professional capacities, as those terms are defined and delimited by the Administrator in sections 541.1, 541.2 and 541.3 of Regulations Part 541, a copy of which is enclosed. Neither the act nor the regulations contain any provision as to whether absences of an employee, exempt or otherwise, must be charged to the employee's right to annual leave. When an employee who otherwise qualifies for the exemption under Regulations, Part 541, is absent under the circumstances set forth in your letter, it is our opinion that, if the employee receives the full amount of his predetermined salary, a charge against his annual leave would not constitute a deduction from his salary. However, where deductions are made from the salary of an otherwise exempt employee for absences in excess of those allowed under a leave plan, the employee will not be regarded as being paid on a salary basis if the leave plan does not provide for those types of absences which are ordinarily allowed executive, administrative and professional employees. See the enclosed copy of release A-9. A leave plan which permits only 14 days of paid leave a year for sickness, vacations and all other purposes, will generally not provide for those types of absences which are ordinarily allowed executive, administrative, and professional employees within the meaning of release A-9. Deductions for such absences would defeat employment on a "salary basis" and render inapplicable the exemptions provided by section 13(a)(1) of the act and sections 541.1, 541.2 and 541.3 of the regulations.

If the employee in question is in fact a "nonexempt" employee, the act requires that he receive time and one-half his regular rate of pay for all hours worked in excess of 40 in a workweek. Release A-9, which states the position of the Divisions with respect to the meaning of the phrase "compensated on a salary basis" as used in the regulations, would be inapplicable to such an employee.

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I trust this satisfactorily answers your inquiry. However, if you desire any further information I suggest that you may find it more convenient to communicate with our regional office at 5th floor, Witt Building, 249 Peachtree Street, N. E., Atlanta 3, Georgia.

Very truly yours,

WM. R. McCOMB
Deputy Administrator

Enclosures

(03910)

Washington 25, D. C.

23CF 201.224
.2222
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Mr. E. J. Ryger, Manager
Mid-West Producers' Creameries, Inc.
510 Pythian Building
224 W. Jefferson Street
South Bend 2, Indiana

SOL:SSB:DMH

August 8, 1945

Dear Mr. Ryger:

This is in reply to your letter asking whether an employee engaged in making "sweetened condensed skimmilk" is engaged in "first processing." You state that the employee's duties are exactly the same as those performed when plain condensed skimmilk is made except that in making the "sweetened condensed skimmilk" he adds a quantity of sugar to the product. I regret that, due to the importance and complexity of this problem, it has not been possible to give you an earlier answer to your letter.

Your inquiry presumably relates to the applicability of the section 7(c) exemption under the Fair Labor Standards Act. That section, as you know, provides an exemption from the overtime requirements of the act for employees of an employer in any place where he is engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products. The first processing of skimmed milk, as you may know, includes among other things the making of condensed skimmed milk. See paragraph 15 of the enclosed Interpretative Bulletin No. 14. As pointed out in that paragraph, the making of malted milk, ice cream mix, ice cream, etc., is not included within the exemption since such manufacture involves the use of ingredients other than milk, etc., to a substantial extent and since such manufacture, in our opinion, does not constitute the first change in the form of the raw material. Although sugar is a foreign ingredient, information obtained from the Department of Agriculture indicates that in manufacturing sweetened condensed skimmed milk the sugar added is generally between 13 and 16 percent of the liquid skimmed milk. That amount of sugar is not, in my opinion, substantial so that its mixture with the skimmed milk in one establishment as part of a continuous series of operations in the manufacturing of sweetened condensed skimmed milk, would generally be considered a part of the "first processing" of skimmed milk within the meaning of the section 7 (c) exemption.

I trust this satisfactorily answers your inquiry.

Very truly yours,

WM. R. McCOMB
Deputy Administrator

Enclosure

(03910)

Washington 25, D. C.

23CD 303

Mr. M. D. O'Dell
631 Seldon
Detroit 1, Michigan

SOL:SSB:IMG

August 23, 1945

Dear Mr. O'Dell:

This is in reply to your letter referring to our previous correspondence with respect to the section 7(b)(2) exemption under the Fair Labor Standards Act. You state the hypothetical case of an employee who earns $2.00 an hour but who secures only 50 days of work a year, thus earning $800 a year. It is your opinion that under the Divisions' present interpretation of section 7(b)(2), a contract entered into by an employer and employee which guarantees the employee an annual wage of $3000 rather than $4160 would not meet the requirements of section 7(b)(2). You ask whether employees currently earning $2.00 per hour could, through their union, agree to a rate of $1.00 an hour so that their employer might guarantee them 2080 hours times the new $1.00 an hour rate.

I regret that I cannot give you a definite reply to your question since it is the Divisions' policy not to issue opinions on hypothetical situations and to answer specific questions only on the basis of all the available facts. However, the following general information may be of interest to you. There is nothing in section 7(b)(2) or any other section of the act which prevents an employer and the certified collective bargaining representatives of his employees from agreeing, after collective bargaining, on a new bona fide regular rate which is not designed to evade the provisions of section 7 of the act, and from entering into a contract which guarantees the employees an annual wage equal to 2080 times the newly agreed bona fide regular rate.

I trust that this will prove of some help to you.

Very truly yours,

WM. R. McCOMB
Deputy Administrator

(03910)

21AC 102.120
" 102.1211
21AC 405

Mr. John J. Riley, Secretary
American Bottlers of Carbonated Beverages
1128 Sixteenth Street, N. W.
Washington 6, D. C.

SOL:AGW:IMG

August 31, 1945

Dear Mr. Riley:

I find that I have not yet given you a full reply to your letter in which you refer to the denial of a writ of certiorari by the Supreme Court in Walling v. Goldblatt Brothers. I deeply regret that the reply to your letter has been so long delayed.

You state that as you understand the effect of that action "it is decided that when materials from outside the state are deposited on the platform or warehouse floor of the receiver, not to go in interstate commerce in any form from that point on, an employee checking, handling or storing such materials after they have been so deposited is not under the Fair Labor Standards Act." As you may perhaps know, the Supreme Court has made it clear on several occasions that the denial of certiorari does not necessarily represent approval of the Circuit Court's decision (see U. S. v. Carver, 260 U. S. 482; Atlantic Coast Line Ry. Co. v. Poe, 283 U. S. 401, 403). Your question therefore relates to the effect of the Circuit Court's decision.

As I understand the portion of the Circuit Court's decision in the Goldblatt case, 128 F.(2d) 778, in which you appear to be interested, it holds only that the interstate transportation of goods, received from out of the State for subsequent intrastate use, ends when the goods are unloaded and deposited on the unloading platform or warehouse floor. Whether or not this ruling is correct under the facts before the Court, I do not think it can be regarded as fixing the precise point where interstate commerce ends. In cases arising under other statutes, interstate commerce has been held to begin before interstate transportation has commenced and to end after such transportation has ceased. See for example Lemke v, Farmers Grain Co., 258 U. S. 50; Local 167 v. U.S. 219 U. S. 293; and Currin v. Wallace, 306 U.S. 1.

In Walling v. Jacksonville Paper Co., 317 U.S. 564 and McLeod v. Threlkeld, 319 U.S. 491 the Supreme Court stated that under the Fair Labor Standards Act interstate commerce embraces not only the interstate movement but also activities so closely related to it as to be in practice and legal contemplation a part of it. Examples of activities which were considered in the Jacksonville case to be interstate commerce are ordering, unloading, checking and other activities connected with the receipt of goods from without the state. In Cudahy v. Bazanos, 15 S. (2d) 720, (Sup.Ct.Ala.) the following activities were also regarded as interstate commerce: checking goods received from out of the state against the invoice, making, in connection with interstate shipments, reports of missing or damaged goods, and entering the articles received in interstate commerce in the stock book.

Under decisions of the Supreme Court, the principle has been firmly established that interstate transportation does not necessarily end with delivery by the carrier but, as demonstrated in the Jacksonville

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Paper Company case, 1317 U.S. 564, interstate transportation continues until the goods reach the destination intended for them by the importer. Although the question as to the point where interstate commerce ends is one whose answer necessarily depends on the facts of the particular case, I believe it can be said that normally, the destination intended for goods received for storage and subsequent distribution in intrastate commerce would not be the first place at which goods are set after unloading but would be the place, such as shelves or storage bins, where they are held for future distribution. This is true even though there may be some delay in moving the goods to the shelves or storage bins. In the Jacksonville case, the Supreme Court said at page 568 that "A temporary pause in their transit does not mean that they are no longer 'in commerce' within the meaning of the act. *** if the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain 'in commerce' until they reach those points." Moreover, it is my opinion that the checking of out-of-state goods on the unloading platform and the removal of the goods from the platform into the interior of the warehouse are usually so immediately and closely connected with their receipt and unloading, the employees engaged in such activities, including the storing of the goods on the shelves or bins, are engaged in interstate commerce within the coverage of the act.

Very truly yours,

L. Metcalfe Walling
Administrator

(03910)

WASHINGTON 25, D. C.

21BB 302.430
BF 303.33
BI 302.330

Colonel Ralph F. Gow
Director, Industrial Personnel Division
General Staff Corps
War Department
Washington 25, D. C.

SOL:SSB:HD

September 19, 1945

Dear Colonel Gow:

This is in reply to your letter acknowledging my letter and requesting notice of any further determinations of the Divisions with respect to the setting of standards for company leave plans which will not be inconsistant with employment on a "salary basis" within the meaning of Regulations, Part 541, as interpreted in Release A-9.

The Divisions have recently taken the position that if a company leave plan for executive, administrative or professional employees permits such employees not less than 21 days annual leave per year with no unreasonable limitations as to the purposes for which such leave may be used, a deduction from salary for absence in excess of that allowed under the plan would be considered a disciplinary deduction for an unreasonable absence and, in accordance with Release A-9, would not, of itself, defeat the exemption. If, on the other hand, the company's leave plans for such employees are limited to a total of 21 days a year and contain restrictions on the purposes for which the 21 days of leave may be used, it is our view that such plans should allow the employee at least 7 days' sick leave, 7 days' annual leave and 7 days' leave for personal or miscellaneous needs.

It should be noted, however, that the existence of a leave plan containing the above provisions is not to be construed as foreclosing the possibility of an employer's making deductions for other disciplinary reasons in the salary of an otherwise exempt employee without causing a loss of the exemption. In such cases, of course, the Divisions will carefully scrutinize disciplinary deductions for the purpose of determining whether the deductions are consistent with compensation on a "salary basis" as explained in Release A-9.

Very truly yours,

WM. R. McCOMB
Deputy Administrator

(03910)

Washington 25, D. C.

23CE 205.631
.6396

Rufus G. Poole, Esquire
National Press Building
Washington 4, D. C.

SOL:JFS:SD

October 25, 1945

Dear Mr. Poole:

This is in regard to your letter of September 28, 1945, inquiring as to the application of section 7(b)(3) of the Fair Labor Standards Act of 1938 to the processing of sweet potatoes into starch by the United States Sugar Corporation. You state that the sweet potatoes are received at the plant as soon as possible after being removed from the ground and are washed, cut up, ground, heated by steam and passed through a centrifugal screen which separates the pulp from the starch. The starch is then passed into a dryer and thence by conveyer into an immediately adjoining packaging room. You state that the entire operation is continuous and uninterrupted, and that the estimated elapsed time from the washing to packaging will be less than 24 hours. The pulp is then loaded and trucked away to be used as cattle feed.

As you point out, the Administrator has found that effective August 24, 1940, "The first processing and canning of perishable or seasonal fresh fruits and vegetables is a branch of the industry and of a seasonal nature within the meaning of section 7(b)(3)" of the Act and Regulations, Part 526. The phrase "first processing of *** perishable or seasonal fresh *** vegetables" as used in the Administrator's finding means the first change in the form of such vegetables from their raw and natural state. After the first change from the raw and natural state has occurred, as by cutting or other processing, subsequent operations are regarded as being included in "first processing," only when all the operations are performed as part of a single continuous process, throughout which the vegetables remain perishable. The first operation in the process must in such case be performed on the vegetables in their raw and natural state, and a break in the continuity of the process, as by an interval of time longer than necessary to prepare the vegetable for the next operation, terminates the first processing.

If the washing and cutting are performed on sweet potatoes in their raw and natural state, and if the subsequent grinding, heating by steam, centrifugal separation, drying and packaging, are all performed as part of a single continuous process, such operations would constitute "first processing" of perishable or seasonal fresh vegetables within the meaning of the Administrator's finding.

Very truly yours,

WM. R. McCOMB
Deputy Administrator

(03910)