UNITED STATES DEPARTMENT OF LABOR
Office of the Solicitor
December 27, 1945

Legal Field Letter
No. 103

Attached Opinions

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21 BF 303.220
303.25

Lemuel H. Davis
Regional Attorney
Richmond 19, Virginia

SOL:HJE:CTN

Donald M. Murtha
Chief, Wage-Hour Section

July 3, 1945

Phillip Morris & Company, Ltd.
Richmond, Virginia
File No. 45-2235

This will reply to your memorandum of June 7, 1945, inquiring as to the applicability of the executive exemption as defined in section 541.1 of the regulations, to certain of subject's employees known as thermo-vactor operators.

The employees in question operate certain intricate apparatus for processing tobacco. They are furnished with a production schedule which indicates the order in which tobacco is to be withdrawn from the warehouse for processing and the conditions under which such processing is to take place, namely, the length of time, the amount of moisture and the amount of heat to which the tobacco is to be subjected in the thermo-vactor apparatus. When the tobacco is put into the machine, the operator merely switches certain buttons to set the controls.

The operators also supervise the men loading and unloading the chambers of the machine by checking the tobacco to identify it as the tobacco referred to in his set of instructions. He also performs such "routine supervision" as seeing that the tobacco, after processing, is passed along to "the next department." His principal responsibility, however, appears to be that of remaining at all times at the controls of the conditioning apparatus and the completing of reports on his work. In case the automatic controls get out of order, the operators are supposed to call in the engineer. The thermo-vactor operators receive less than $200 per month.

On the basis of the foregoing facts, it is my opinion that the thermo-vactor operators are not exempt as executive employees, since their primary duty does not consist of the management of the establishment in which they are employed or of a customarily recognized subdivision thereof but consists of the operation of a machine, and, incidentally, the supervision of employees who assist him in performing this principal manual function. As you correctly point out, the operators do not customarily and regularly exercise discretionary powers to any great degree, since both the tobacco and the conditions of processing have been determined for them by other employees, the operators acting only upon very specific instructions.

It is apparent, therefore, that the employees in question are merely employees who, with the assistance of other employees, operate certain processing machinery and do not come within the exemption for employees employed in an executive capacity.

(03951)

Mr. Thacher Winslow
Acting Deputy Administrator
Wage and Hour and Public Contracts Divisions

Donald M. Murtha
Chief, Wage-Hour Section

Plastic Turning Company, Inc.
Leominster, Massachusetts
File No. 20-56,032

26 CD 402.526
26 CD 601
26 CE 101
24 AC 302.2
24 AC 402.3
26 CD 702
26 CD 701

SOL:ERG:ES

July 10, 1945

Reference is made to your memorandum dated October 12, 1944, transmitting memoranda from the Boston regional office relating to the subject firm's method of payment of overtime under the Fair Labor Standards Act.

It appears that the subject company pays its employees on piece-work rates for the first 40 hours and then pays them at a fixed hourly rate for all hours worked in excess of 40. Overtime is computed on the basis of time and one-half the fixed hourly rate paid during the overtime hours, which rate, Regional Attorney Foley states, "is always substantially less than the regular hourly rate obtained from the piece-work earnings." The nature of the work remains the same at all times. Under this system, a piece worker earning an average of $1 an hour during the first 40 hours worked would be paid at piece rates during the first 40 hours worked and, for hours worked in excess of 40, would be paid on the basis of a 60-cent rate, receiving 90 cents per hour as his overtime compensation. In reply to an inquiry from Regional Director Gleason, Mr. Foley, on October 4, 1944, pointed out that releases R-1913 and R-1913(a) were inapplicable, since the employees were not performing different types of work. Mr. Foley stated that the employee's regular rate of pay would have to be based on his average hourly rate for the week.

Although Regional Director Gleason does not disagree with Mr. Foley's opinion that releases R-1913 and R-1913(a) are inapplicable, he feels, however, that the company's method of paying the employees piece rates for the first 40 hours and at fixed hourly rates (which are substantially less than average hourly earnings based on piece-rate earnings) during the overtime hours for the same type of work, amounts to an evasion of the requirements of section 7 of the Fair Labor Standards Act. This problem, he points out, would be considerably accentuated if the employer elected to pay his employees on the basis of a rate of 10 cents an hour for hours worked in excess of 40 rather than on the basis of 60 cents an hour.

We agree with Regional Attorney Foley's advice that releases R-1913 and R-1913(a) have no application in the instant case, since the employees do not perform different types of work during the overtime hours.

I am, furthermore, of the opinion that the type of pay arrangement in question is one where the proper method of computing the employee's regular rate is to divide the compensation received in the first 40 hours by 40. In the instant case, it is clearly evasive of the requirements of section 7(a) to pay one rate for the first 40 hours, and a lower rate for the hours over 40. By use of such a plan, an employer could easily

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circumvent one of the purposes of the Fair Labor Standards Act. i.e., that hours after 40 should, in addition to straight time, carry a penalty of one-half the employee's regular rate of pay. Cf. the Supreme Court's decisions in the Helmerich & Payne, Resenwasser, Youngerman-Reynolds and Harnischfeger cases. Cf., also, Legal Field Letter No. 22, page 33.

This opinion should not be construed as conflicting with paragraph 14 of Interpretative Bulletin No. 4, which contemplates a bona fide employment at two rates of pay, not tied up with an effort to evade the overtime provisions of the Act.

I am returning herewith the memoranda from the Boston regional office which accompanied your request for an opinion.

Attachments

25 BB 202.1
202.0

Amzy B. Steed, Regional Attorney
Birmingham, Alabama

Harold C. Nystrom
Chief, Wage-Hour Section

SOL:LG:YS

July 31, 1945

E. I. DuPont de Nemours & Company
Baton Rouge, Louisiana
File No. 17-50012

Reference is made to our memorandum of March 29, 1945 (Legal Field Letter No. 100, page 4), and to your memorandum of May 28, 1945, concerning the subject company. You inquire further as to whether time spent during certain described lunch periods by employees of the subject company should be regarded as hours worked under the Fair Labor Standards Act.

The employees concerning whom you inquire fall into two groups. The first group is relieved of all duties for a period of thirty minutes to eat lunch. The employees in this group are not subject to be called back for the performance of further duties during that lunch period. However, the time during which they are relieved for the purpose of eating lunch varies from day to day, since their department is kept in continuous operation and they may not eat lunch until they have been relieved by another employee. You state that the inspector's report does not satisfactorily indicate the range of time over which an employee is given relief; that is, assuming that the shift runs from 8 a.m. to 4 p.m., the report does not indicate whether all employees on that shift are relieved between the hours of 11 a.m. and 1 p.m., or whether some are relieved a considerable period of time before or after those hours. The question submitted as to these employees is whether, under these circumstances, the lunch period may be said to be one which "occurs at a regularly recurring period of the day." You ask specifically whether the lunch period would be given at a "regularly recurring period" within the meaning of the rule stated in the above legal field letter, if it falls between 11 a.m. and 1 p.m. You also ask us to indicate how much before 11 a.m. or after 1 p.m. the employees could be relieved for lunch without destroying the "regularly recurring period" feature.

In our opinion, the lunch period would be considered as occurring at a "regularly recurring period of the day" if it falls between 11 a.m. and 1 p.m., under the circumstances described. For an employee on a shift running from 8 a.m. to 4 p.m., a lunch period which occurs between 11 in the morning and 1 in the afternoon would appear to be reasonable and therefore bona fide. We are not prepared, however, to express any opinion with respect to a meal period which occurred at varying times earlier than 11 a.m. or later than 1 p.m. in the absence of specific facts. If you have an actual case and will submit precise information, including a respresentative sample of the time of such employee's lunch periods, we shall be gald to advise you further.

The second group of employees are "leaders," and this group of employees are subject to being called back during the lunch period and are called back from time to time. However, when called back under such circumstances, these employees are subsequently given a full thirty minutes

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to eat lunch without interruption. The same question is submitted as to these employees, that is, whether, under the circumstances, their lunch period may be said to occur at a "regularly recurring period of the day." With respect to this group of employees, your attention is directed to our prior memorandum in which you were advised that a lunch period which is usually interrupted will be regarded as hours worked. However, if the lunch period of such employees regularly falls between the hours of 11 a.m. and 1 p.m., and when interrupted they are given a substitute uninterrupted lunch period during the same hours, we would not regard any uninterrupted lunch period occurring during such hours, as time worked if it otherwise meets the criteria previously indicated. Where the substitute lunch period occurs subsequent to 1 p.m., we cannot, as previously indicated, express any definite opinion in the absence of full information in a specific case.

21 AC 413.32
" 102.11
" 101.10
" 201(A)
" 414.4

MEMORANDUM

To: George W. Kretzinger, Jr.
Regional Attorney

SOL:EA:MAW

From: Donald M. Murtha
Assistant Solicitor

August 27, 1945

Subject: Insurance Broker - Coverage
Alberto Ortiz Toro

This is in reply to your memorandum of August 1, 1945 in which you requested an opinion as to whether the employees of Alberto Ortiz Toro, an insurance broker, are covered by the Fair Labor Standards Act.

The copy of the inspector's report of July 19, 1945 which accompanied your memorandum indicates that Mr. Ortiz Toro maintains an independent insurance brokerage business which operates in the manner hereinafter described. Mr. Ortiz Toro contacts prospective clients residing in Puerto Rico, discusses various types of insurance contracts with them, advises them as to payment of premiums, etc., and obtains from clients desiring insurance all information necessary for writing the policy. Having negotiated the sale of a policy, Mr. Ortiz Toro contacts any one of several local insurance agents representing insurance companies in the United States or England, gives the agent a description of the risks to be insured, occasionally drafts a clause to be incorporated into the policy and negotiates payment to the agent of the premium. The agent, after payment of the premium deducts his and the broker's commission and remits the remainder to the principal office of the company. The insurance policy and all papers are written by the agent in Puerto Rico and duplicate copies are sent to the home offices with whom the agents are regularly in communication by mail. No correspondence relating to insurance transactions is carried on by the broker or his employees with any client or agent located outside of Puerto Rico. Mr. Ortiz Toro is sometimes notified by the assured of a claim arising from an insurance contract and he advises the client as to necessary steps to obtain payment, which is negotiated through the local office. Occasionally, the broker accompanies the claimant to the office of the local agent, acting as advisor for the assured. Payment is made directly to the assured by the local agent or by the company in the United States through the agent. Two stenographers are employed by Mr. Ortiz Toro to take dictation and type letters to customers and agents in Puerto Rico, prepare letters notifying customers of the expiration of policies and enclosing new policies or renewal certificates, type model forms of endorsement clauses or descriptions of property to be insured, etc.; one accountant is employed to keep books of accounts, including the accounts of commissions with local agents, and to maintain the customers' card records; a mail and file clerk is employed to file all correspondence, bills covering commissions and other accounting papers, and to go to the bank and post office to make deposits and withdrawals of money and collections and delivery of mail.

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On the basis of these facts and the legal principles governing coverage of employees engaged in interstate commerce, it is my opinion that the employees of Mr. Ortiz Toro, whose duties are described above, are covered by the Act.

The United States Supreme Court in U.S. v. South-Eastern Underwriters, Assn., 322 U.S. 533, held that insurance transactions which stretch across state lines constitute interstate commerce subject to congressional regulation, stating: "As recognized by the District Court, the insurance business described in the indictment included not only the execution of insurance contracts but also negotiations and events prior to execution of the contracts and the innumerable transactions necessary to performance of the contracts. All of these alleged transactions, we shall hereafter point out, constitute a single continuous chain of events, many of which were multistate in character, and none of which, if we accept the allegations of the indictment could possibly have been continued but for that part of them which moved back and forth across state lines." The court in the cited case further stated, page 547; "* * * a nationwide business is not deprived of its interstate character merely because it is built upon sales contracts which are local in nature."

While Mr. Ortiz Toro has no branch office either in Puerto Rico or elsewhere, and does not regularly correspond with persons or companies outside of Puerto Rico, this is not determinative since other grounds for coverage appear to exist. The facts as presented in the inspection report and as outlined above indicate that the insurance brokerage business carried on by Mr. Ortiz Toro calls for the regular performance by his employees of many acts or transactions which are so closely related to the interstate insurance business carried on in Puerto Rico by Mainland and English insurance firms that the employees are, by the reasoning of the South-Eastern Underwriters case and by the principles expressed in the Jacksonville Paper, McCleod, and Overstreet decisions, engaged in interstate commerce. The fact that the activities of the subject broker and his employees involve purely local correspondence and communication with locally situated clients and agents is not conclusive in determining coverage of the employees under the act, where, as here, the functions which they perform are so closely related to the interstate insurance business carried on by the extra-state insurance firms through their agents in Puerto Rico as to constitute an integral part thereof. Through the activities of the broker and his employees, persons in Puerto Rico purchase insurance policies and interests from concerns located throughout the United States and in England. Thus, the broker and his employees in effect are engaged in ordering "goods" (as defined in sec. 3(i), which includes within the meaning of the term "subjects of commerce of any character") from insurance companies located in other states, and are, under the principles expressed in the Jacksonville Paper case, thereby engaged in interstate commerce within the coverage of the Act. The term "subjects of commerce of any character" would seem to include insurance policies and insurance interests since the courts have interpreted that term to include lottery tickets (Lottery case, 188 U.S. 321, 355), labor, intelligence, care, and various commodities of exchange (Gibbons v. Ogden, 9 Wheaton 229, 230), Securities (Electric Bond Co. v. Securities and

Exchange Comm. 303 U.S. 419, 432, 433; Securities and Exchange Comm. v. Jones. 12 F. Supp. 210,213, 79 F. (2d) 621, reversed on other grounds 289 U.S. 1, 28), money (Basila v. Western Union, 24 F.(2d) 569). Moreover, the policies negotiated by the broker with the assistance of his employees may and do result in the payment of claims by out of state insurance companies to residents in Puerto Rico.

L. Metcalfe Walling, Administrator
Wage and Hour and Public Contracts Divisions
New York 19, New York

SOL:LW:MH

September 10, 1945

Donald M. Murtha
Assistant Solicitor

C. B. Wood Company
Rocky Face, Georgia

Reference is made to your memorandum of August 3, 1945, in which you requested a review of the question whether time spent by homeworkers transporting work materials or goods between home and factory should be considered hours worked.

The position that such travel time of homeworkers should be compensated as hour worked is supported by the principles set forth in paragraphs 9 through 12 of Interpretative Bulletin No. 13 and has been consistently held by the Division during the past five years. See Legal Field Letter No. 35, p. 6, October 28, 1940; Legal Field Letter No. 56, p. 15, May 8, 1941; Field Operations Bulletin, vol. I, No. 4, July 7, 1941; Findings and Opinion of the Administrator in the Embroideries Industry, August 21, 1943, pp. 59-60; Field Operations Handbook, December 1942, as revised December 1943 at H-16; Field Operations Bulletin, vol. XII, No. 7, p. 557, April 13, 1945. The Division's views on this question were published in Wage and Hour Manual 1942 Ed. at pp. 163-4. Additional publicity was given in a statement issued by Regional Director Arthur J. White in April 1944 which appears in 6 W.H.R. 343-344.

The following homework laws dealing with compensatory travel time for homeworkers likewise support the Division's past position:

<u>Massachusetts</u>. Rule 2, effective November 2, 1937, issued pursuant to Sec. 147(e) of Ch. 149 of the General Laws (Ter. Ed.).

<u>New Jersey</u>. Rule 8(1)(h) issued August 6, 1941, pursuant to Sec. 17 of Ch. 308, Laws of 1941.

<u>New York</u>. Homework Orders Nos. 1 and 4 for the Men's and Boy's Outer Clothing Industry and the Glove Industry, and Orders No. 2 and 3 for the Men's and Boy's Neckwear Industry and the Artificial Flower and Feather Industry, issued pursuant to Art. 13, sec. 351 of the Labor Laws.

<u>Rhode Island</u>. General Laws of 1938, Ch. 293, sec. 4(d) (Public Laws of 1936, Ch. 2328).

In view of the above considerations and our well-established position in favor of compensating homeworkers for time spent in transporting materials or goods of the employer between home and factory, there would appear to be no basis for changing our views in the absence of strong and compelling reasons.

It has been suggested that I inquire into the necessity of issuing regulations concerning this phase of homeworkers. Whether the employer must pay for and count as "hours worked" for the purposes of Section 7 the time spent in transporting materials or goods between home and factory is not dependent upon regulation. There is no authority given to the Administrator to make a binding determination as to what constitutes "hours worked". The answer in each case is essentially a matter of interpretation of the basic provisions of the Act.

With respect to your inquiry about litigation, Mr. Ray has advised me that he views this problem as no different than any other and would authorize suit in a proper case.

21 BC 208.34
208.2
207.21
204.21
204.22
204.44
208.312
21 AC 205.23
25 DE

Reid Williams
Regional Attorney
Kansas City 6, Missouri

Harold C. Nystrom
Chief, Wage-Hour Section

The Grand Valley Irrigation Company
Grand Junction, Colorado

SOL:ERG:CTN

September 24, 1945

Reference is made to your memoranda of June 5, 1944, August 31, 1944 and March 28, 1945, in which you inquire as to the application of the section 13(a)(6) exemption to employees of the subject company.

You state that the pertinent facts relating to the subject's operations are as follows:

> The firm is a Colorado corporation. It is a ditch or canal company, organized under the laws of Colorado relating to ditch companies, and the company has no other purpose and is organized for no other purpose except the carrying and distribution of water to its stockholders for irrigation use, and all of such water is applied solely to the irrigation of farm lands. There is no limitation upon the ownership of stock in the corporation except that the stockholders alone are entitled to receive irrigation water from the company. The bylaws of the company provide that each share of stock shall entitle the holder to receive five-sixteenths statutory inches of water. The company is purely mutual, and its shares of stock represent specific quantities of water and the right to supply rests solely on stock ownership. The company operates the canals by assessments levied on the shares in amount sufficient to pay running expenses only, and it makes no profits and pays no dividends. Under the laws of Colorado, the stock issued by the corporation is personal property and there is nothing in relation to the corporation or its organization which make the water rights appurtenant to the land, but no one can get any water for irrigation or domestic use except by virtue of stock ownership.
>
> The corporation operates the original ditch and canal furnishing water for irrigation and domestic purposes in the valley of the Colorado River, the center of which is at Grand Junction, Colorado. The company is not a common carrier of water and it performs no function except to furnish the farmers and fruitgrowers of this valley with water for irrigation and domestic use. The company has not to exceed seven employees during the year, except in emergencies in cleaning the ditches and in getting ready for the irrigation season when a greater number is employed.

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The canal and irrigation system operated by this corporation is confined within the limits of the State of Colorado. All of the water is procured in Colorado and all is distributed to farmers and fruitgrowers within Colorado. None of the water is brought into or distributed outside the state. However, the farmers and fruitgrowers who use the water in the irrigation of their lands are engaged in the production of fruits and other farm crops which are shipped in commerce throughout the several states of the union.

The activities of the corporation's employees are typical of such mutual irrigation ditch corporations. Their duties would consist of maintaining the ditches, performing clerical duties relating to the levy of assessments and accounting for water distribution, and patrolling the ditches for the purpose of servicing the members of the corporation and releasing the required water at the headgates.

I regret the long delay in furnishing you with an opinion in this matter. The problems incidental to a determination of the applicability of the section 13(a)(6) exemption to the activities carried on by the subject company have, however, required a good deal of research and have been under consideration both by this office and by our Washington office for some time. The views set forth in this memorandum represent the considered opinion of both the Solicitor and the Administrator.

As you will recall, in the case of Reynolds v. Salt River Valley Water Users Assn. 143 F.(2d) 863 (C.C.A. 9), certierari denied 65 S. Ct. 117, employees engaged in pumping water and conducting the water through irrigation canals for the purpose of irrigating land on which agricultural products were grown and shipped in commerce, were held to be engaged in "a 'process' and an 'occupation' necessary to the production of such goods as defined in section 3(j) of the Act." The court also noted that "appellee did not make the affirmative plea that its employees were 'engaged in agriculture' within the exemption of section 13(a)(6) of the act * * *. Our decision is without prejudice to the disposition of the question whenever it is appropriately presented."

On the basis of the facts presented in the instant case, the Grand Valley Irrigation Company does not appear to be a farmer within the meaning of section 3(f). The fact that the stockholders of the company are farmers does not operate to make the separate corporate entity also a farmer. Walling v. McCracken County Peach Growers Assn. 50 F. Supp. 900 (W.D.Ky.); Redlands Foothill Groves v. Jacobs, 30 F. Supp. 995 (S.D.Calif.); North Whittier Heights Citrus Assn. v. National Labor Relations Board, 109 F. (2d) 76 (C.C.A. 9). See Interpretative Bulletin No. 10.

Under the definition of "agriculture" contained in section 3(f) the only parts which might possibly exempt the activities performed by employees of the subject firm are:

> farming in all its branches and among other things includes the cultivation and tillage of the soil * * * the production * * of any agricultural or horticultural commodities * * * and any practices * * * performed * * * on a farm as an incident to or in conjunction with such farming operations * * *.

The first problem is one of determining whether the phrase "the production of any agricultural or horticultural commodities" as used in section 3(f) operates to exempt the employees in question. Section 3(j), as you know, defines the term "produced" as including "any process or occupation necessary to the production" of goods. In Western Union Telegraph Co. v. Lenroot, 65 S. Ct. 335, the United States Supreme Court stated in discussing the term "produced" as used in section 12(a), "nor can we assume, contrary to the statute that 'produced' means one thing in one section and something else in another." Consequently, applying the statutory definition of "produced" to the literal language of section 3(f) it might be argued that where an employee is engaged in a "process or occupation necessary to the production of any agricultural or horticultural commodities" for purposes of general coverage he is likewise so engaged for purposes of exemption under section 3(f). This, as you know, would be contrary to the Divisions' long-established position. See II Wage-Hour Code 4C12.

In view of this possibility, our Washington office examined very closely the legislative history of section 3(f), on the basis of which study we have concluded that such an interpretation was neither intended nor contemplated by Congress. The congressional discussion of the term "production" related only to coverage under the wage, hour and child labor provisions of the various bills considered and not to the term "production" as it appeared in the final definition of "agriculture." The definition of "agriculture" contained in the bill passed by the House referred only to the "cultivation, growing, and harvesting of any agricultural or horticultural commodities." The Conference Committee added the word "production" before the word "cultivation" at the same time that it added the parenthetical phrase "(including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended)" after the word "commodities." In submitting the conference report to the House, Chairman Norton of the Committee on Labor and one of the conferees also submitted a "statement in explanation of the effect of the action agreed upon and recommended in the accompanying conference report." (83 Cong. Rec. 9253.) In explanation of the term "agriculture" the statement advised that

> "Agriculture" is defined in the same way as in the House amendment with the following exceptions: (1) The production of commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act is included within the definition of agriculture * * *. (Emphasis supplied.)

Because of court decisions holding that the terms "cultivation" and "growing" are not properly applicable to the extraction of these commodities, it is apparent that the word "production" was necessarily

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inserted in order to make the exemption properly applicable to these commodities. Consequently, despite the literal reading of section 3(f) of the Act, it is apparent from the legislative history that the term "production" as used in the definition of "agriculture" was intended to refer only to agricultural commodites defined in section 15(g) of the Agricultural Marketing Act, which were added in conference, and that Congress did not intend to exempt, in section 3(f), the "production," as distinguished from the "cultivation, growing, and harvesting," of any other agricultural or horticultural commodities.

While the United States Supreme Court has stated that there is "no more persuasive evidence of the purpose of the statute than the words by which the legislature undertook to give expression to its wishes," nevertheless, "when that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the Act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words." United States v. American Trucking Assns. 310 U.S. 534; United States v. Katz, 271 U.S. 354. The limited congressional purpose of including the word "production" in the definition of "agriculture" seems readily apparent. If section 3(f) were held to exempt "the production of any agricultural or horticultural commodities" within the meaning of section 3(j), two absurd or unreasonable results would result. First, this phrase would swallow up and render unnecessary the rest of what Congress clearly intended to be a very elaborate and comprehensive definition of "agriculture." Second, the phrase would except such industries as the fertilizer and seed industries. Congress, however, definitely rejected an amendment to the definition of "agriculture" which would have had the effect of exempting the fertilizer and seed industries. 83 Cong. Rec. 7421-7423. See Legal Field Letter 97, page 56. cf. Bowie v. Gonzalez, 117 F. (2d) 11 (C.C.A. 1).

Consequently, while the subject's employees are engaged in the production of goods for interstate commerce within the meaning of section 3(j) of the Act, 1/ the Divisions are correct in maintaining that the word "production" as used in the definition of "agriculture" does not

1/ See Reynolds v. Salt River Valley Water Users Assn., 143 F.(2d) 863 (C.C.A.9), cert. denied, 65 Sup.Ct. 117, and the Divisions' brief amicus curiae before the Ninth Circuit. See, also, Allen v. Arizona Power Corp., 7 Wage Hour Rept. 395; Bicanic v. J.C. Campbell Co.,7 Wage Hour Rept.745; release R-1789; Legal Field Letter No. 85 (manufacturer of machinery for use in production of goods for commerce); Legal Field Letter No. 89, page 27 (manufacturer of land levelers for use by farmers); Legal Field Letter No. 97, page 26 (production and distribution of lime stone used by farmers); and Legal Field Letter No. 80 page 20 (distribution of electricity for prevention of pipeline corrosion). In the last-named field letter it may be noted, coverage was not predicated on the company's distribution of electricity to farmers since the facts did not disclose the degree of relationship between the distribution of power and its utilization by the farmers in the production of agricultural commodities for commerce, and since a sufficient basis for coverage existed by virtue of the electricity furnished the Shell Pipe Line Company.

operate to bring an employee within the scope of the section 13(a)(6) exemption merely because he is engaged in a process or occupation necessary to the production of agricultural or horticultural commodities within the meaning of section 3(j) for purposes of general coverage.

The next problem is whether the phrase "farming in all its branches and among other things includes the cultivation and tillage of the soil * * * and any practices performed * * * on a farm as incident to or in conjunction with such farming operations," as used in section 3(f) of the Act, operates to exempt the employees in question. In connection with this phase of the problem, we have examined various court decisions, and the regulations and interpretations of the Social Security Board, the War Food Administration and the Treasury Department dealing with irrigation in its relation to farming, agriculture, or cultivation and tillage of the soil. Our study reveals a diversity of judicial and administrative opinion on like questions arising under other statutes. Reading the judicial warning in A. R. Phillips, Inc. v. Walling, 65 S.Ct. 807, that an exemption from the Act includes only employees "plainly and unmistakably within its terms and spirit," we do not think that we should go as far as certain State court decisions have gone in holding irrigation company employees to constitute "agricultural labor." On the other hand, due to the statutory definition of "agriculture" contained in section 3(f) of the Act, we do not believe that we can be as restricted as certain other State court decisions have been. See Walker v. Finney County Water Users Assn., 92 P. (2d) 11 (Kansas).

Section 3(f) defines "agriculture" to include "any practices * * * performed * * * on a farm as an incident to or in conjunction with such farming operations." We have held this phrase to include "practices * * * even if performed by employees of someone other than the farmer * * * so long as they are performed on the farm and 'as an incident to or in conjunction with such farming activities.' " Interpretative Bulletin No. 14, paragraph 11. Thus, the Division has held that employees of an independent contractor erecting a silo on a farm are exempt while they are working on such farm and that employees engaged in servicing sprayers used by farmers to apply insecticides in fruit groves may qualify for the section 13(a)(6) exemption if such work is performed in the groves where the spraying is done(II Wage-Hour Code 4C4, fn. 52; 4C20, fn. 82). Similarly, the Division has held that the operation of a cook camp on a farm for the sole purpose of feeding persons engaged exclusively in agriculture is an activity so closely related and necessary to farming activities that it may properly be viewed as a practice "incident to or in conjunction with such farming operations" within the meaning of section 3(f). Consequently, in our opinion the employees of the subject irrigation firms who during a workweek are engaged exclusively on a farm in furnishing water used solely for farming purposes thereon are exempt under section 13(a)(6) for such workweek. Furthermore, an employee of an irrigation company engaged exclusively in the aforementioned activities on two or more farms in a given workweek would likewise be exempt. See II Wage-Hour Code 4C24. cf. II Wage-Hour Code 4A2.

It is also my opinion that certain of the company's employees may be exempt under that portion of section 3(f) which defines "agriculture" as including "farming in all its branches and among other things * * * the cultivation and tillage of the soil." Paragraph 3 of Interpretative Bulletin No. 14 states that the term "cultivation and tillage" of the soil includes all the operations necessary to improve the physical condition of the soil. Clearly, the application of water to arid farm land constitutes improving the physical condition of the soil. In Fezgate v. United States, 125 F. (2d) 775 (C.C.A. 5), cert. denied, 317 U. S. 639 and Latimer v. United States, 52 F. Supp. 228 (S.D. Calif.), the courts held that "irrigating" constitutes the cultivation of the soil. Section 3(f) does not require that the process of "cultivation * * * of the soil" must be performed by a farmer or on a farm. However, the term "cultivation * * * of the soil," insofar as it relates to irrigation activities, must, in our opinion, be limited to those activities which normally bear a close relationship to the improvement of the physical condition of particular soil. Accordingly, it is our opinion that, in addition to employees who during a workweek are engaged exclusively on a farm or farms in furnishing water solely for farming use thereon, the section 13(a)(6) exemption includes those employees who may be engaged off a farm in activities concerned solely with the application of water to particular farms, as in operating the last headgate for diverting or distributing water to a particular farm. It is our opinion that such employees are so closely connected with the improvement of the physical condition of the soil on each particular farm to the irrigation of which their activities are thus immediately directed, that they can be said to be engaged in "the cultivation * * * of the soil" on such farm. On the other hand, employees engaged in the general distribution of water, whose work is not confined to the application of water directly to individual farms as described above are further removed from the improvement of the physical condition of the soil and are not, in our opinion, exempt under section 13(a)(6).

I suggest that the subject company's attorney, Mr. Sternberg, be advised in accordance with these views.

26 CD 402.526
26 CD 601
26 CE 101
24 AC 302.2
24 AC 403.3
E. O. 9240
26 CD 703.3

Mr. Thacher Winslow, Deputy Administrator
Wage and Hour and Public Contracts Divisions

Harold C. Nystrom
Chief, Wage-Hour Section

Restitution where Executive Order 9240 is involved

SOL:ERG:PLG

October 8, 1945

Reference is made to your memorandum dated October 10, 1944, transmitting a memorandum from Inspection Liaison Officer Scott, dated October 6, 1944, requesting information concerning the method to be followed in determining the regular rate of pay where double time at an arbitrarily-designated hourly rate is paid for Sunday work to an employee who is paid on a fixed salary basis. You state that "there is no Belo contract involved." The delay involved in furnishing you with a reply in this matter was occasioned by the necessity of ascertaining the Solicitor's views with respect to the instant problem and several others involving related questions.

It appears that the employer pays the employee $61 whenever he works six days or less, regardless of the number of hours worked. Whenever the employee works on Sunday, the seventh day, he is paid at the rate of $1 an hour with double time to comply with Executive Order 9240. The employee's duties are the same on Sundays as on the other six days. In the particular example referred to in Mr. Scott's memorandum, the employee worked 50 hours during the first six days, for which he was paid $61. On the seventh day, Sunday, he worked eight hours and was paid $16 for that day. The records show, and the employer and employee agree, that one-half of the $16, or $8, was paid to comply with Executive Order 9240. While it is clear that the employee's regular rate of pay, when he does not work on the seventh day, is computed by dividing $61 by whatever number of hours have been worked in the week, a question is posed as to what the employee's regular rate is in a week in which he works a seventh day for which he receives an hourly rate of $1 an hour.

It is clear that releases R-1913 and R-1913(a) have no application in this case, since the employee's duties are the same on Sundays as on the other days. In this connection, we do not believe that the position taken in Legal Field Letter No. 87, page 39, should be extended to this type of situation.

In our opinion, the employee's regular rate of pay, in the illustration referred to above, is $1.22 an hour, which is arrived at by dividing all hours worked by him during the first six days of the week (50 hours) into $61. It may be observed, at this point, that under the Missel decision all hours worked during the first six days must be divided into the employee's salary for those hours to arrive at his regular rate of pay, even though such a method of computation fails to require the employer to pay 50 percent more for each hour of work

in excess of 40 in the week as compared to the pay for each hour up to and including 40 in that week. Cf. Walling v. Youngerman-Reynolds Hardwood Co., 8 Wage Hour Rept. 602. See, also Legal Field Letter No. 101 page 14. The straight-time compensation paid for Sunday, as well as the hours worked on that day, must be excluded from the computation of the employees regular rate under the Fair Labor Standards Act because (1) being less than the rate arrived at under the Missel formula, that compensation would, when averaged with his salary, results in an overtime burden to the employer of less than 50 percent additional pay for the overtime hours as compared to that for the non-overtime hours; and (2) the "justification" present in Missel situations where an employee receives a fixed salary is lacking in hourly rate situations, such as the Sunday pay situation involved in the instant case. See also, in this connection, Field Operations Bulletin, Vol. XIII, No. 7, pages 518-819.

21 AC 205.23
23 CB 201
301.1

Harry Campbell, Jr.
Acting Regional Attorney
Birmingham 3, Alabama

SOL:EGT:CTN

Harold C. Nystrom
Chief, Wage-Hour Section

October 16, 1945

Howard Cole, Agent
Quick & Grice
411 South 16th Avenue
Laurel, Mississippi
File No. 23-3676

Reference is made to your memorandum of September 25, 1945, and attached copy of a memorandum of September 19, 1945, from Mr. Ralston to you.

It appears from Mr. Ralston's memorandum that subject is engaged in the wholesale distribution of butane gas. This gas is obtained directly from extra-State sources. During the past two years, from 43 to 80 percent of the gas handled by subject has been sold to oil well drillers in the State for use in drilling operations. Presumably, oil produced as a result of the drilling operations will move in commerce. However, oil is not actually being produced at the time the gas is used in such operations. Mr. Ralston expressed the opinion that employees engaged in such intrastate distribution of the butane gas from subject's bulk plants to the drilling sites are engaged in a process or occupation necessary to production within the meaning of section 3(j) of the Act. He feels that the situation in subject case is distinguishable from that contained in Legal Field Letter No. 101, page 1, wherein the Divisions took no position with respect to employees engaged in reclaiming and delivering river coal to a local water pump station which in turn furnished water for the production of goods for commerce. You state that you agree with Mr. Ralston's opinion and ask for my views on the question.

I agree that the employees engaged in transporting the butane gas from subject's bulk plants to the drilling sites for use in producing oil for commerce are engaged in a process or occupation necessary to production within the meaning of section 3(j) and are covered under the principles expressed in R-1789 and Legal Field Letter No. 100, page 12. See, also Legal Field Letter No. 67, page 16; Legal Field Letter No. 94, page 7. As Mr. Ralston stated, the instant case is distinguishable from that considered in Legal Field Letter No. 101, page 1. The transportation of the butane gas is directly and immediately related to the oil-drilling operation, while the reclaiming of river coal for use in producing water which in turn is used in producing goods for commerce is

an additional step removed from the production of such goods. The fact that oil is not actually being produced at the time the gas is used is immaterial so long as the use of the gas is a step necessary to the production of oil (Warren-Bradshaw Drilling Co. v. Hall, 317 U.S. 88; Walton v. Southern Package Co. 320 U.S. 540; Culver v. Bell & Loffland, 146 F.(2d) 29 (C.C.A. 9); Bowie v. Gonzalez, 117 F.(2d) 11 (C.C.A. 1); Robertson v. Oil Well Drilling Co., 5 Wage Hour Rept. 1004 (Sup.Ct. N. Mex.)).

As Mr. Ralston also states, the Divisions take no position with respect to the application of the section 13(b)(1) exemption to employees engaged in transporting the butane gas, since such gas is defined by the Interstate Commerce Commission as an inflammable liquid over the intrastate transportation of which the Commission has asserted regulatory powers. See Legal Field Letter No. 96, page 44.

21 AC 101.2
23 CB 203.21

Kenneth P. Montgomery
Regional Attorney
Chicago 54, Illinois

SOL:ERG:CTN

Harold C. Nystrom
Chief, Wage-Hour Section

October 16, 1945

13(b)(1) and carriage of mail

This will reply to your memorandum of September 26, 1945, in which you inquire whether drivers employed by printing establishments, and who devote the greater part of their time to the hauling of mail from their establishments to the post office, are exempt under section 13(b)(1).

You state that the packages carried in the trucks are bags of mail already addressed and stamped and ready for posting. In both instances to which you refer, the truck drivers deliver the mail in bags to the mailchutes in the post office, unload the mail and deposit it in the chutes.

I assume that in both of subject cases, some portion of the mail hauled to the post office is destined for out-of-State points. I also assume that the time spent by the drivers in unloading the mail and depositing it in the mail chutes is inconsequential. Under such circumstances, the drivers engaged in the hauling of mail from the printing establishments to the post office would be regarded as engaged in interstate commerce both under the Fair Labor Standards Act (see Walling v. Bank of Waynesboro, 8 Wage Hour Rept. 755) and the Motor Carrier Act (see Legal Field Letter No. 46, page 3), and, accordingly, they would appear to fall within the section 13(b)(1) exemption.

Paragraph 7(b) of Interpretative Bulletin No. 9 has no application here, since the employees are not engaged in the transportation of mail under contract with the Post Office Department in vehicles used exclusively for that purpose.

(03951)

23 CB 101
23 CB 301.1
23 CB 202.2
23 CB 203.21

Harold C. Nystrom, Chief
Wage and Hour Headquarters Section
New York, New York

Donald M. Murtha, Assistant Solicitor

SOL:JFS:HD

Clayton Tinsley
Meridian, Mississippi
File No. 23-3330

October 26, 1945

This is in regard to my memorandum to Mr. Tyson, transmitting a copy of a memorandum from Associate Attorney Ralston to former Regional Attorney Steed, concerning the application of section 13(b)(1) of the Fair Labor Standards Act of 1938.

The subject firm is engaged in the passenger motor carrier business and operates routes between Meridian, Mississippi and Louisville and Philadelphia, Mississippi and Butler, Alabama. On that part of the Meridian-to-Louisville route between Meridian and Preston, the bus also carries mail. Inquiry is made as to the application of the section 13(b)(1) exemption to the driver operating the bus on the Meridian-to-Louisville route and the mechanic who services the firm's buses.

In the proceeding entitled No. MC-88479, Clayton Tinsley Common Carrier Application, 9 M.C.C. 351, the Interstate Commerce Commission found that the intrastate routes of the subject firm between Meridian, Mississippi and Louisville and Philadelphia, Mississippi are operated as connecting routes with the Meridian, Mississippi and Butler, Alabama route and, therefore, held that transportation over these intrastate routes is subject to its jurisdiction and operating authority as being in interstate commerce. As you know, where intrastate transportation is performed under operating authority granted by the Commission after a hearing and finding that the transportation is in interstate commerce within its jurisdiction under the Motor Carrier Act, it is the Divisions' policy to treat such transportation as exempt work under section 13(b)(1) or at the most to take a no-position stand. See memorandum to me from William S. Tyson, February 12, 1945, Re: Strong & Harris, Vanadium, New Mexico.

I am also advised by Mr. McHale of the Bureau of Motor Carriers that if transportation is otherwise subject to the Commission's jurisdiction as being in interstate commerce, such jurisdiction would not be affected by the fact that the vehicle carries mail in addition to passengers. In fact, in granting operating authority to the subject firm, the Commission specifically stated that such authority includes the carrying "by motor vehicle of passengers and their baggage, and of express, mail and newspapers on the same vehicle with passengers."

21 BM 100
21 BM 104

Harry Campbell, Jr.
Acting Regional Attorney
Birmingham, Alabama

SOL:NCH:CTN

Harold C. Nystrom
Chief, Wage-Hour Section

October 31, 1945

Seamen Exemption - Request for Opinion

This is in reply to a memorandum (RA:ABS:DLF) from former Regional Attorney Amzy B. Steed dated August 2, 1945, inquiring whether the section 13(a)(3) exemption applies to certain employees of Higgins Industries of New Orleans, "whose duty it is to operate landing craft and other similar light naval vessels on Lake Pontchartrain on test runs."

Mr. Steed's memorandum states that the supervising inspector of the Louisiana State office takes the position that "since the boats are not transporting passengers, freight or other goods, they are not operated 'as a means of transportation' and, therefore, the seaman exemption would be inapplicable" under the principles contained in Interpretative Bulletin No. 11. Mr. Steed indicated his agreement with this position on the basis of the views expressed in II Wage-Hour Code 4 N 3. He requested confirmation of this view from this office.

Mr. Steed's memorandum does not describe the duties of the various employees or the difference in duties performed on test runs and the duties which might be performed by them if the vessels were being operated under conditions which he would consider to be "as a means of transportation."

For this reason I assume that the activities of the employees are substantially the same during the test runs as they would be in the operation of the vessel under circumstances which would admittedly be operation "as a means of transportation."

The section of the Wage-Hour Code cited by Mr. Steed concerns itself with the meaning of the term "vessel" rather than the phrase "as a means of transportation." In the problem at hand it must be conceded that the landing craft, etc., are "vessels" for purposes of the exemption. The phrase "as a means of transportation" has been used in connection with this exemption in an attempt to draw a line between various employees working on a vessel based on their individual duties. In this connection, see the examples of exempt and nonexempt workers in paragraphs 4 and 5 of Interpretative Bulletin No. 11 and footnotes to II Wage-Hour Code 4 N 4 and 5. If the duties of the employees in question are as assumed above, it is my opinion that they are performing the work of seamen within the meaning of section 13(a)(3).

While the question presented is not free from doubt, the Wage and Hour Division as early as 1939 took this position in a somewhat similar case. At that time it was stated that employees aboard ships during a trial run, who are rendering service primarily in aid of the operation of the ship as a means of transportation, would be regarded as seamen, provided they perform no substantial amount of work of a different character, but that employees who do a substantial amount of work such as may

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be required to complete the construction of the ship would not be employed as seamen during trial run periods, even though this work was performed during the time that the vessel was in operation as a means of transportation during the trial run.

In answer to the point raised to the effect that the employees herein involved are not seamen except under section 13(a)(3) of the Act because during test runs the boats are not transporting passengers, freight or other goods and therefore are not operated "as a means of transportation," your attention is called to the following decisions of the Interstate Commerce Commission: United Truck Lines, Inc., 32 M.C. 676, 3 Fed. Carr. Cases, paragraph 30,218; Motor Rail Company, No. M.C. 87035, 3 Fed. Carr. Cases, paragraph 30,048.04; Wasie Common Carrier Application, 4 M.C.C. 726, 1 Fed. Carr. Cases, paragraph 7201; Consolidated Freight Lines, Inc., 11 M.C.C. 131, 133, 1 Fed. Carr. Cases 7313; cf. L. & L. Freight Lines, Inc., No. M.C. 19,190 (sub. No. 3), 2 Fed. Carr. Cases, paragraph 7581. In these cases the Interstate Commerce Commission has taken the position that the interstate or intrastate operation of empty vehicles by common carriers is subject to its jurisdiction as constituting engagement in commerce. To the same effect see Legal Field Letter No. 83, page 30, in regard to the Interstate Commerce Commission's jurisdiction over persons engaged in the "driving of passenger cars from factory points to points in other States by the 'drive-away' method (including single cars, one car towing another and caravanning.)"

U.S.C. Title 49, Section 303(14), 15), limits the jurisdiction of the Interstate Commerce Commission over interstate carriers and their employees to persons "who or which transport passengers or property." This criterion is at least as narrow as that contained in paragraph 3, Interpretative Bulletin No. 11, which limits the application of the seaman's exemption to "persons rendering service primarily as an aid in the operation of such vessel as a means of transportation * * *." The cases cited hold that employees of interstate carriers operating empty trucks within a State or across State lines and driving passenger cars from factory points to points in other States are subject to the jurisdiction of the Interstate Commerce Commission under the limitation stated above, since the property or persons being transported are the empty vehicles as well as the persons operating them. By the same token, employees whose duty it is to render service in aid of the operation of landing craft or other light naval vessels on test runs even though during these test runs these vessels do not carry property or persons other than the crew can be deemed entitled to the seaman's exemption, since they are operating the vessel as a means of transporting the vessel itself and themselves as crew.

21 AC 405
21 AC 102.120
21 AC 200
21 AC 102.1211

Ernest N. Votaw
Regional Attorney
Philadelphia, Pennsylvania

SOL:LG:CTN

Harold C. Nystrom
Chief, Wage-Hour Section

October 31, 1945

Exchange Cold Storage Company
Philadelphia, Pennsylvania
File No. 37-62882
ENV:al

We refer to your memorandum of January 31, 1944, in which you request our opinion as to whether the employees of the subject company are covered by the Act.

The subject concern is a small cold storage warehouse situated in the wholesale produce district of Philadelphia. It is used by nearby wholesalers to store unsold produce overnight and over weekends. Also, during the winter, Pennsylvania apples are stored for greater or shorter lengths of time, held for Spring sale. The goods stored are usually brought to the warehouse from the premises of the wholesaler within the State and returned again to the wholesaler's premises, although occasionally goods are brought directly by truck from outside the State or from the freight yard to which they have arrived without first being taken to the wholesaler's premises. You state that in practically no case would the goods stored be received by the wholesaler as prior order goods. Mostly, they would be sold to Pennsylvania customers, although a few might be sold to customers in New Jersey or Delaware. However, in the case of the apples, it is possible that a considerable portion of these might be sold to out-of-State customers. Most of the goods stored overnight or over weekends originally come from outside of the State.

The employees of the cold storage company operate the refrigeration apparatus, keep watch over the premises, keep records of the goods going in and out and charges for storage. The placing of the goods in storage and taking them out are generally done by employees of those storing the goods rather than employees of the storage company. The watchmen may help to some extent in moving the goods, but generally, where such assistance is needed, it is performed by casual temporary help.

In the absence of a more detailed statement of facts, it is impossible for us to definitely determine the status of the employees in question. We shall, therefore, limit ourselves to a statement of general principles which may be used as a guide.

Employees engaged in connection with unloading and checking goods received by truck directly from outside the State or from the freight yard at which they have arrived directly from outside the State would clearly be covered. Similarly, employees engaged in connection with any interstate shipment of apples or other goods from the warehouse would likewise be covered.

(03951)

The warehouse employees may also be covered if there is such rapidity of movement of the out-of-State merchandise from the time the merchandise is received from another State until it reaches the wholesalers' customers that there is a continuous movement of the out-of-State produce through the cold storage warehouse to the wholesalers' customers. If such is the case, all employees engaged in activities relating to such continuous movement of the goods, including the employees of the cold storage warehouse, would be engaged in commerce. While it is not clear how long a period of time elapses between the receipt of the goods from the out-of-State sources and their passage through the warehouse on to the customers of the wholesalers, it would appear from the perishable nature of the produce stored in the warehouse and from the method by which it is handled that there may be one continuous movement of the goods in interstate commerce until they reach the customers. In such case, the entrance of the goods into the warehouse would interrupt but would not terminate their interstate journey. There would be a practical continuity of the movement of the goods within the meaning of the decision in the Jacksonville Paper Company case.

Insofar as the warehouse in question stores goods destined for shipment in interstate commerce, it is our opinion that the employees of the warehouse are covered on the ground that they are engaged in the production of goods for commerce within the meaning of section 3(j). The opinion of the Supreme Court in the Western Union case makes it clear that warehousing activities preparatory to putting goods into the stream of commerce are production for purposes of the Act. (See Mr. Maggs' memorandum of February 26, 1945 to Miss McConnell on the subject "The Western Union Decision and Its Implications," which was attached to Field Operations Bulletin, Vol. XII, No. 5). It should also be observed that cold storage warehousing involves active operations in addition to those which may be involved in ordinary storage and is a more active attempt to provide protection against the elements. Therefore, to the extent that the cold storage warehousing in question relates to goods which the subject expects, or has reason to believe, will be shipped in commerce, its employees are engaged in the production of goods for commerce.

We assume, of course, that the work of the subject's employees is not segregated between goods received from or shipped to other States and goods received and shipped only intrastate.

21 AB 405.51
21 AB 405.52
21 AB 405.540

Irving Rozen
Regional Attorney
New York, New York

SOL:AS:MIS

Harold C. Nystrom
Chief, Wage-Hour Section

November 14, 1945

Dean Clothing Corporation

This will reply to your request that I advise you whether I agree with the conclusions expressed in a proposed memorandum, a copy of which you attach.

It appears that nine persons are the sole stockholders of the subject corporation, each owning one-ninth of the stock pursuant to an agreement between the corporation and the nine stockholders. The corporation agrees to employ these nine as long as they remain stockholders, and they cannot remain stockholders unless they continue in the company's employment and "devote their entire time and attention to the business of the corporation." Provision is made for the purchase by the corporation of the stock of a retiring member or of any member, upon his death or disability to perform his job, and shares of stock may not otherwise be sold or transferred except upon written consent of all stockholders. Equal wages shall be paid to all stockholders for their work except upon unanimous vote of all stockholders. In the life of the corporation, all stockholders have received equal wages. These nine persons are engaged in the occupations of cutting, sewing, finishing, etc. They work from 55 to 60 hours a week. At the inception of the agreement, they were paid $10 a week and now receive $140. In addition to these nine, the firm employs non-participating employees.

The proposed memorandum concludes that "no employer-employee relationship exists as far as the nine persons in question are concerned," since "the company, though formally organized as a corporation is in essence a partnership and it must be treated as such under both Acts." (Underscoring supplied.)

It would appear that a determination that the subject firm is in essence a partnership rather than a corporation would not of itself preclude the existence of an employer-employee relationship, since a partner may be an employee of a partnership (Walling v. Plymouth Mfg. Corp., 139 F.(2d) 178 (C.C.A. 7); and U. S. Fidelity and Guarantee Co. v. Neal, 58 Ga. App. 755, 199 S.E. 846, 848). Moreover, the subject firm cannot be either a corporation or a partnership at the election of the parties, but must be one or the other, for the law does not contemplate that partners may incorporate with the intent to obtain the advantages of a corporate firm and then become at will a partnership or a corporation as the purposes of the joint enterprise may require (18 C.J.S. 390; Seitz v. Michel, 181 N.W. 102 (Minn.); Sun River Stock & Land Co. v. Montana Trust & Savings Bank, 262 Pac. 1039 (Mont.); Jackson v. Hooper, 75 Atl. 568 (N.J.)).

The proprietary interest and participation in the subject corporation by the nine sole stockholders do not necessarily preclude their status as employees of the corporation, since ordinarily a corporation is treated as a legal entity, separate and distinct in identity from its stockholders (18 C.J.S. 368; New Colonial Ice Co. v. Helvering, 292 U.S. 435). See, also, Skouitchi v. Chic Cloak & Suit Co., 230 N.Y. 296, 130 N.E. 299 -- compensation was awarded to an employee who was president and treasurer of a corporation and a holder of one-twelfth of its total stock; March v. March Gardens, 203 Minn. 195, 280 N.W. 644 - majority stockholder, president and general manager; Stevens v. Industrial Commission, 346 Ill. 495, 179 N.E. 102 -- secretary-treasurer and holder of almost half of capital stock; White v. Arnold Wood Heel Co., 8.A.(2d) 737 (N.H. 1939) -- treasurer and holder of half of stock. Moreover, the payment of weekly compensation by the subject corporation to the nine participating employees for work assumedly similar to that performed by the non-participating employees (cutting, sewing, finishing, etc.) would appear to be a significant indication that the subject firm is acting as an employer and that the nine are employees within the literal terms and within the express policy of the Act (United States v. American Trucking Assns., 310 U.S. 534, 545; Walling v. American Needlecrafts, 6 Wage Hour Rept. 1209).

For the foregoing reasons I am unable to agree with the conclusion expressed in the memorandum that no employer-employee relationship exists as far as the nine persons in question are concerned.

 (03951)

25 BE 205.32
25 BD 301
26 CD 401.0
26 CD 302.1

SOL:LG:HCN:MIS

November 15, 1945

Charles A. Reynard
Regional Attorney
Cleveland, Ohio

Harold C. Nystrom
Chief, Wage-Hour Section

Lyon, Incorporated

Reference is made to your memorandum to William S. Tyson, then Assistant Solicitor, and to the attached copies of letters of attorneys Bunin & Grandon, dated April 10 and May 7, 1945, addressed to the Detroit Area Tool and Die Commission of the Regional War Labor Board, Detroit, Michigan, and to the Cleveland regional office of the Wage and Hour Division, respectively. Your memorandum was referred to this office for reply. I regret that an earlier reply was not possible.

The questions presented are whether time spent by tool and die apprentices employed by the subject company in attending school and in traveling to and from the school must be considered as hours worked. In the subject company's letter of April 10, 1945, referred to above, it is stated that the school attended by the apprentices is "under the Federal Commission (WMC) on Tool and Die apprentices." It is also stated that the company has agreed in conjunction with the union to pay such apprentices straight-time pay at their regular rate of pay for all hours spent at school and that the employees are also paid for time spent in going to and from school. The circumstances under which the apprentices attend school are described in the last-mentioned letter of the company as follows:

> Our employees work a minimum of forty-eight (48) hours per week in our shop. They attend school one day each week, either Monday or Tuesday. The usual procedure is for these employees to work at the shop on Monday morning and part of the afternoon, putting in a total of five (5) hours that day in the factory. It takes them approximately one-half ($\frac{1}{2}$) hour to reach school, and they spend four (4) hours at the training school. They are not required to return to the plant after school, and may go directly home from there.

In your memorandum to Mr. Tyson, you refer to the fact that attorneys Bunin & Grandon attribute to the Detroit branch office of the Divisions an opinion that "hours spent in school as well as travel time to and from the school (which breaks into the normal working day)" should be regarded as hours worked under the Act. Mr. Bunin also refers to an "arrangement or agreement" between the Apprentice Training Service, War Manpower Commission and the Wage and Hour Division which permits the payment of straight time for such hours of work.

There is not, to our knowledge, any such "arrangement or agreement" between the Divisions and the Apprentice Training Service. Obviously, if the hours are hours worked, the Divisions could not, under the law,

enter into any agreement waiving the requirements of section 7 in any workweek when such hours together with other hours worked total more than 40 hours. However, as you know, it is the position of the Division that time spent in related supplemental instruction by a bona fide apprentice, that is, one who is employed under a written apprenticeship agreement wh which meets the standards of the Federal Committee on Apprenticeships or which conforms substantially with such standards, need not be considered hours worked if the written apprenticeship agreement so provides. It should be noted, however, that related supplemental instruction does not include time spent by an apprentice in performing his regular duties or in any active work. See Interpretative Bulletin No. 13, paragraph 15 (III). If the schooling received by the apprentices in question fulfills these conditions as to related supplemental instruction, time spent by the apprentices in receiving such schooling need not be considered hours worked for the subject company if the written apprenticeship agreement so provides. It is our opinion, furthermore, that in such event time spent by the apprentices in traveling to and from the school, when the travel is occasioned solely by such school attendance, need not be considered hours worked under the Act. There would be no requirement in such case that the payments made to such apprentices for time spent in school and for traveling be included in the regular rate of pay for purposes of computing overtime compensation due under the Act. See Legal Field Letter No. 83, page 16.

If, however, the schooling in question does not qualify as "related supplemental instruction," or if it does so qualify, but the written apprenticeship agreement does not provide that the time in question should be excluded in computing hours worked under the Act, the Detroit office was legally correct in its reported opinion that the time spent in school and in traveling from the plant to the school should be considered hours worked for purposes of the Act. However, in cases where schooling qualifies as time spent in "related supplemental instruction by a bona fide apprentice" in all respects, and where it appears that the parties actually intended to exclude the school hours in computing hours worked but the written apprenticeship agreement does not so provide, for enforcement purposes the Division has taken the position that restitution should not be sought because of a failure to include such school time as hours worked. In such case, the parties should be advised to amend the agreement so that it expresses their intention. This policy, I am advised, would be applicable to travel time to the school as well as to the time spent in the school.

With respect to travel time from the school, where the employees are not required to return to the plant but may go directly home, such time would not constitute hours worked unless it was unreasonably disproportionate to the time normally required for the employees to return from the plant to their homes. If it is unreasonably disproportionate to such time, the principles stated in paragraph 12 of Interpretative Bulletin No. 13 would apply in any situation where the time spent in school would be considered hours worked. I am advised that the enforcement policy mentioned above would, under the circumstances there stated, also apply to travel from school.

26 CD 703.3
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402.525

SOL:ERG:CTN

November 9, 1945

H. L. Samuels, Esquire
Doehler-Jarvis Corporation
386 Fourth Avenue
New York 16, New York

Dear Mr. Samuels:

This will reply to your letter of October 16, 1945, in which you request an opinion regarding an "overtime bonus" plan which the company has in effect for its salaried employees.

You state that previous to the inception of the "overtime bonus" plan, various of your salaried employees regarded as exempt from the overtime requirements of the Act received no additional compensation for overtime hours worked unless, during any workweek, they were deemed to be nonexempt because of the performance of nonexempt work. Their basic salary, you state, "compensated for all hours worked." In weeks in which they were deemed nonexempt, they were regarded "as on a fluctuating workweek basis; total hours worked were divided into basic salary to produce a straight-time hourly rate * * *."

At the present time, however, such salaried employees receive "a regular overtime bonus that is related to hours of work and is computed as follows:

> "3% of the basic salary per hour for hours worked after 45 during the first six days of any workweek, up to a maximum of 30% overtime bonus."

This additional compensation, it appears, is segregated and is labelled as "overtime bonus" on the employee's pay check. Furthermore, you state, "it is both related to particular overtime hours and dependent upon the number of hours worked. The employees involved work a fluctuating number of hours."

You inquire whether, under the above circumstances, an employer may properly credit against overtime compensation due an employee under the Act (during weeks when such an employee is not exempt from the Act's overtime requirements) the 3-percent "overtime bonus" paid for hours worked in excess of 45 during the first six days of the week. As examples illustrative of the method of payment utilized by the company, you cite the following:

> "For example, where an employee receiving a basic salary of $100 worked 50 hours in any workweek, and we were disenabled to regard him as exempt for that workweek, we would pay him $100 plus $15 (5 hours x 3% of 100) designated as overtime bonus, or $115; we would check for

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> any underpayment by dividing $100 base salary by 50 hours worked, to produce a $2 hourly rate and $110 (40 hours x $2 plus 10 hours x $3) due, and we would therefore conclude there had been no underpayment. Similarly, if such employee worked 44 hours, we would arrive at an hourly rate of $2.2727, and we would conclude there had been an underpayment of $4.55 for the workweek."

The Division has taken the position that 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 after 40, the employee's regular rate of pay is determined, generally, by the compensation paid the employee for the first 40 hours worked in the workweek. Thus, if the rate paid for the hours over 40 is higher than that paid for the non-overtime hours and such higher rate is paid for the sole reason that the hours thus paid for are those after 40 in the workweek, the employee's regular rate of pay is determined from the compensation paid him for the first 40 hours in the workweek, and the increase in his hourly rate for the hours worked after 40 is regarded as overtime compensation. In such a case there is compliance with section 7 of the Act if the hourly compensation paid for the hours worked in excess of 40 hours equals or exceeds 150 percent of the hourly compensation paid for the first 40 hours. See, in this connection, Walling v. Youngerman-Reynolds, 8 Wage Hour Rept. 602 (U.S. Sup. Ct. 1945), reversing 145 F.(2d) 349 (C.C.A. 5); and Walling v. Helmerich & Payne, 323 U.S. 37, reversing 138 F. (2d) 705 (C.C.A. 10).

Similarly, where an employee is paid a salary for a fluctuating number of hours and is paid additional compensation as overtime for hours worked after 40 in a workweek, the employee's regular rate of pay is determined, generally, by the straight-time compensation allocable to the hours worked in the workweek for which such salary is intended to provide compensation. Thus, in the instant case, if the employees involved are being paid a salary which constitutes straight-time compensation for all hours worked during the workweek, and if, in fact, the employees work a fluctuating number of hours per week, the employee's regular rate of pay is determined by dividing his salary by the total number of hours worked during the workweek. For his overtime hours worked the employee is entitled to be paid a sum, in addition to his salary, equivalent to one-half his regular hourly rate as computed above, multiplied by the number of hours worked in excess of 40 in the week. Since the 3-percent "overtime bonus" is, you state, paid as overtime compensation, i.e., relates to the particular overtime hours worked and depends upon the number of hours worked, sums so paid may be offset against overtime compensation otherwise due under the Act. See, in this connection, paragraphs 69 and 70(5) of Interpretative Bulletin No. 4, a copy of which is enclosed herewith.

I might also observe that it is not entirely clear whether the salary is, in fact, intended to cover straight-time compensation for all hours worked during the week or whether, under the new pay arrangement, it is intended to cover straight-time compensation for all hours worked

up to and including the 45th hour. If, under the new pay arrangement, the salary is intended to cover straight-time compensation for all hours worked up to and including the 45th hour, payment of the 3-percent bonus will not achieve compliance with section 7's requirements, since, in that event, such bonus payments would be insufficient to meet the Act's overtime requirements.

I trust that the above information will prove of assistance to you.

Very truly yours,

Thacher Winslow
Deputy Administrator

Enclosure

Washington 25, D. C.

26 AA 201
26 CD 702
27 AB
26 CD 402.61

SOL:AGW:smh

November 21, 1945

Mr. S. Norman Moe
Personnel Superintendent
North Star Timber Company
Neenah, Wisconsin

Dear Mr. Moe:

This will reply to your letter of September 17, 1945 to L. Metcalfe Walling, as to the proper method under the Fair Labor Standards Act to compute and pay overtime compensation to owner-operators of trucks employed by logging companies.

You ask whether the following method of payment complies with the Act in the case of an employee who owns a number of trucks driven by himself and drivers selected by him:

> "A contract is executed between the logging company and the truck owner whereby the latter is paid the stated price per cord for all pulpwood hauled, and under which the truck owner and his drivers receive the union wage rate for services performed in such hauling. The union rate is above the minimum established by the Administrator, and hours over forty are paid for at the rate of time and one-half the union rate. At the conclusion of the job, the truck owner receives his price per cord under the contract, minus any sums previously paid to the drivers at the union scale. This sum actually represents rental for the trucks."

If, as this statement seems to imply, the wages and overtime compensation paid for the work performed by the owner-operator, are deducted from the final payment, he receives under this arrangement no greater total compensation if he has worked overtime than if he has not worked overtime. Since the only benefit accruing to him is that he receives the payment earlier if it is paid "as overtime" than if he receives it as final payment under the contract, it is my opinion that this employee has not received overtime compensation.

In order to compensate this employee properly for working overtime it is necessary first to determine which part of the compensation he receives is payment for his own services and which part is paid him for the use of the trucks. Assuming the correctness of the company's determination that the employee's compensation for services is properly measured by the union wage scale, in addition to the established price per cord, the owner-operator must be paid the overtime compensation required by the Act based on that rate for overtime work if there is to be compliance with the act. In this connection, I believe I should also point out that where a deduction is made from one employee's wages to absorb the cost of overtime compensation paid another employee, it is the

position of the Divisions that the act has been violated. Whether this situation exists in the instances with which you are concerned would depend upon all the surrounding facts. However, it may be observed that such a situation would not arise if the truck drivers' compensation were not included in the per cord price paid to the owner-operator but were paid by the lumber company independently of the sums paid to the owner-operator for the use of his trucks.

If you have further questions regarding this problem, I shall be glad to advise you further. You may find it more convenient, however, to consult the regional office of the Wage and Hour and Public Contracts Divisions at 1200 Merchandise Mart, 222 West North Bank Drive, Chicago 54, Illinois, or the field office at 450-452 Federal Building, Milwaukee 2, Wisconsin.

Very truly yours,

WM. R. McCOMB
Deputy Administrator

26 CD 402.31

SOL:SSB:HD

Washington 25, D. C.

November 28, 1945

Norbury C. Murray, Esquire
1180 Raymond Boulevard
Newark 2, New Jersey

Dear Mr. Murray:

This is in reply to your letter of November 15, 1945, concerning the effect on the employee's regular rate of pay of certain contributions made by an employer to an employees' Welfare Fund. It appears that your client, the Painting and Decorating Contractors of Essex County, New Jersey, Inc., is about to enter into a contract with District Council No. 10 of the Brotherhood of Painters, Decorators, and Paperhangers of America. One of the clauses in the proposed contract is as follows:

> "The employer shall contribute to the Union, weekly, a sum equal to 5¢ for each hour during such week during which any employee covered by this agreement performs services for such employer. Said fund of 5¢ per hour shall be designated as a 'Welfare Fund' and shall be held in trust by a Committee created by the Union and shall be invested by the said Committee solely for the purposes of insuring its members against health, accident, hospitalization, medical costs, death or such other hazards including pension funds as may be determined by the Union; said fund shall be used solely for the security of the Union members and shall not be used as a strike benefit fund or for any other Union purpose as distinguished from the security purposes of the individual members. The Welfare Fund shall be maintained, operated, managed and controlled exclusively by the Union Committee for the benefit of the members and the Employer shall not have any interest or rights therein nor shall any employee have any individual right nor interest therein other than as a security beneficiary as prescribed by the regulations or by-laws of the Union."

You ask: (1) In computing overtime under the Fair Labor Standards Act, will it be necessary to pay overtime on such 5¢ contributions?

(2) Is overtime to be computed only on the wages paid excluding such 5¢ per hour payments?

As you will note from the enclosed copy of release R-1743, contributions by an employer to retirement, sickness, accident and similar plans for the benefit of his employees need not affect the employee's regular rate of pay on which overtime is computed. The two conditions, as stated in the release, which must be met are: (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 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

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withdrawal from it voluntarily or through severance of employment with the particular employee.

The proposed contributions of your client which are called for by the above clause in the union contract appear to be the type contemplated in release R-1743. Since the two conditions enumerated therein appear to be met under the language of the proposed contract, the 5¢ per hour contribution, in my opinion, need not be included in computing the overtime wages due under the Fair Labor Standards Act.

Very truly yours,

WM. R. McCOMB
Deputy Administrator

Enclosure

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