UNITED STATES DEPARTMENT OF LABOR
Office of the Solicitor
January 25, 1946

Legal Field Letter
No. 104

Attached Opinions

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

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21AC205.10
21AC205.23
.27
21BC208.34
208.1
21AC409.514

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

SOL:AS:MIS

Harold C. Nystrom
Chief, Wage-Hour Section

December 7, 1945

Delta Drilling Company
Greenwood, Mississippi
File No. 23-3369

Reference is made to your memorandum concerning coverage under the Act of employees engaged in the drilling of water wells to furnish water required in the drilling of oil wells the products of which move into other States.

It is your opinion that the Divisions should take no position regarding coverage of such employees, since the water does not leave the State either as water or as a part or ingredient of the goods ultimately produced from the oil wells. You refer, in this connection, to Legal Field Letter No. 101, page 1, in which the Divisions took no position regarding the applicability of the Act to coal company employees delivering coal to a local water pumping station which furnished water to establishments producing goods for interstate commerce. You state that since the situations presented in the instant case and in the Legal Field Letter referred to are not quite identical, you request my comments.

It is the position of the Divisions that employees engaged in drilling water wells are covered by the Act where their employer knows or has reason to believe that a substantial amount of the water so produced will be used in the production of goods for commerce. Such employees are engaged in the "production" of water, as that term is used in release R-1789. This conclusion is implicit in G-162 where it is stated that employees engaged in constructing an oil derrick are "engaged in the process of production" and further that such construction must "properly be regarded as an integral step in the actual drilling operations." If the construction of a derrick (preparatory to drilling) is part of the process of producing oil, it would seem that the actual drilling of the water well in the instant situation is of the essence of the production of water (Warren-Bradshaw Drilling Co. v. Hall, 317 U.S. 88; Culver v. Bell & Loffland, 146 F.(2d) 29 (C.C.A. 9)). Since the water is to be used in the production of oil for interstate commerce, it is my opinion that employees engaged in the production of such water (including the drilling of water wells) are covered under 3(j) of the Act and the principles set forth in release R-1789.

Moreover, the fact emphasized in your memorandum that the water does not leave the State of Mississippi either as water or as a part or ingredient of the goods ultimately produced from the oil is not

determinative of the question presented, since, as you know, under Release R-1789 coverage exists not merely where the electric energy, steam, fuel or water leaves the State but where it is used by an instrumentality of commerce or "by manufacturers who in turn produce goods for interstate commerce" (Richardson v. Delaware Housing Assn., 6 Wage Hour Rept. 473 (S.D. Fla. 1943); Shepler v. Crucible Fuel Co., 8 Wage Hour Rept. 185 (W.D. Pa.), reversed on other grounds, 6 Wage Hour Rept. 936 (C.C.A. 3); Williams v. Wisconsin Electric Power Co., 6 Wage Hour Rept. 1149 (C.C. Wis., Milwaukee Co. 1943); Allen v. Arizona Power Corp., 7 Wage Hour Rept. 1120 (C.C.A. 5 1944)).

You are, of course, aware of the possible application of the section 13(a)(6) exemption to employees engaged in drilling water wells on a farm as an incident to, or in conjunction with, farming operations.

(04043)

21 AC 205.10
205.21
205.27
409.4211

Lemuel H. Davis
Regional Attorney
Richmond, Virginia

SOL:WCH:ERG:HIS

December 11, 1945

Harold C. Nystrom
Chief, Wage-Hour Section

Request for Opinion - Coverage of
Strip Coal Mining Operations
(LE:LHD:NW)

This will reply to your memoranda dated June 1 and October 29, 1945, in which you request an opinion as to whether "the replacement of spoil" in connection with the strip-mining of coal (which coal subsequently moves in commerce) is an operation necessary to the production of coal and covered under the Fair Labor Standards Act.

You state that strip coal mining operations consist of three distinct operations. In the first operation, the earth removed in order to reach the coal vein is cast aside or hauled to a nearby dump. In the second operation, the coal is mined; and in the third, the spoil or earth is replaced in order to level and landscape the site where the strip-mining was performed. You further state that a recent State statute conditions the granting of a permit for the strip-mining of coal on the posting of $500 per acre, which sum is forfeited if the contractor fails to level off and landscape the site after the coal has been removed. You inquire whether such operations as back filling and landscaping are covered under the Act. Presumably employees engaged in such operations are employed by the strip-mining operator.

Based on the facts set forth above, it is my opinion that the replacement of spoil (and the landscaping incident thereto) in connection with the strip-mining of coal constitute activities which are necessary to the production of coal for interstate commerce and that employees engaged therein are covered under the Act.

As you know, the Act does not require as a prerequisite to its application that an activity or occupation be indispensable to the production of goods for commerce. As the United States Supreme Court has recently pointed out, in considering whether fire guards employed by a manufacturer of goods for commerce were covered under the Act as being employed in an "occupation necessary to the production" of such goods, "What is required is a practical judgment as to whether a particular employer actually operates the work as part of an integrated effort for the production of goods." (Underscoring supplied.) Armour & Co. v. Wantock, 323 U.S. 126, 130. See also Kirschbaum Co. v. Walling, 316 U.S. 517, and Warren-Bradshaw Drilling Co. v. Hall, 317 U. S. 88.

The word "necessary" was defined, as you know, by Chief Justice Marshall in McGullough v. Maryland, 4 Wheat, 360, 413, as follows:

> To employ the means necessary to an end is generally understood as employing any means calculated to produce the end, and not as being confined to those single means without which the end would be entirely unattainable.

See, also, Volume I of the Wage-Hour Code, 3G14, which defines the term "necessary" as used in the Act to mean "economically necessary, appropriate, useful, convenient, beneficial, or intimately related to the productive process, but not necessarily indispensable thereto." In the Armour case, referred to supra, the court stated:

> The fact that respondents were hired by an employer which shows no ostensible purpose for being in business except to produce goods for commerce is not withoutweight, even though we recognized in Kirschbaum Co. v. Walling that it might not always be decisive (316 U.S. at. 525). A court would not readily assume that a corporation's management was spending stockholders money on a mere hobby or extravagance * * *. More is necessary to a successful enterprise than that it be physically able to produce goods for commerce. It also aims to produce them at a price at which it can maintain its competitive place, and an occupation is not to be excluded from the act merely because it contributes to economy or to continuity of production rather than to volume of production. /Underscoring supplied./

In the Kirschbaum case, as you know, maintenance employees of a loft building were held to be covered under section 3(j) where their activities had "a close and immediate tie with the process of production for commerce," even though the employees did not directly participate in the physical production of the goods destined to move in commerce.

Since the term "necessary" as contained in section 3(j) of the Act may not be construed as being synonymous with "indispensable" (see Legal Field Letter No. 66, page 14), it is my opinion that the replacement of spoil and the incidental landscaping which takes place in connection with the strip-mining of coal constitute activities which are clearly necessary to the production of goods for commerce within the meaning of section 3(j) of the Act. This view is based not only on the fact that such activities appear to be necessary to, and functionally integrated with, the coal mining operations, but on the further fact that, by State statute, it is required that the land be filled in, leveled off, and landscaped after coal has been removed in the course of strip-mining operations. Since, by State statute, the very engagement

by an operator in strip coal mining operations is conditioned upon the issuance of a permit and the posting with the State of the sum of $500 per acre (which sum is forfeited if the land is not filled in and landscaped after coal has been extracted), it would seem reasonable clear that such activities are necessarily performed within the meaning of 3(j), as part of the productive process of extracting coal via strip coal mining operations.

As you know, both the courts and the Divisions have consistently held employees to be covered on "production" grounds under section 3(j) even though they were not directly participating in the physical production of goods for commerce. See, for example, Warren-Bradshaw Drilling Co. v. Hall, 317 U.S. 88, and Walton v. Southern Package Co., 320 U.S. 540. See, also, Bicanic v. J.C. Campbell Co., 7 Wage Hour Rept. 745, and the opinions expressed in Legal Field Letters Nos. 66, page 14, and 89, page 34. Both of the afore-mentioned legal field letters support the view that the employees in the subject case are engaged in a process or occupation necessary to production within the meaning of section 3(j) of the Act. See, also, Legal Field Letter No. 50, page 3.

Your attention is also invited to the opinion set forth in Field Operations Bulletin, Vol. V, No. 2, page 12, wherein employees engaged in the manufacture of mining props and mine cap wedges used in mines entirely within the State were held to be covered under section 3(j) where it appeared that the coal produced was subsequently to be shipped in commerce. Similarly, the Divisions have asserted coverage over employees of an independent contractor engaged in the cleaning of oil wells, employees of an independent contractor engaged in the manufacture of concrete blocks for use in coal mining operations within a State, and employees engaged in the cutting of logs for use as fuel for a brick kiln on the ground that the oil, coal, or bricks produced were subsequently shipped in interstate commerce. The Divisions have also held that employees of a sawmill producing goods moving in interstate commerce were covered when they were engaged in the disposal of slabs resulting from the sawmill operations by dumping them into a "hog" where they were ground into saw dust and used by furnaces in order to generate steam to drive the mill machinery, or when they were engaged in preparing such slabs for sale as fuel for either domestic or possibly industrial purposes, or when they were engaged in placing such slabs in a burner operated for the sole purpose of comsuming such waste by fire, even though such activities were performed subsequent to the production of the goods actually moving in commerce. See, also, 1 Wage-Hour Code 3G35.

For the reasons expressed above, it is my opinion that the employees in question, i.e., those engaged in the replacement of spoil and in landscaping operations in connection with the strip mining of coal, are engaged in a "process or occupation necessary to the production" of coal for commerce and, therefore, are subject to the provisions of the Act.

(04043)

AIR MAIL
Dorothy M. Williams, Regional Attorney
San Francisco

414.95
205.10
21 AC 205.250

SOL:AS:ERG:YS

December 11, 1945

Harold C. Nystrom
Chief, Wage-Hour Section

Retail Credit Co., Inc.
San Diego, California

This will reply to your memorandum of August 22, 1945 requesting my opinion as to whether clerical employees working for an independent investigating agency who type reports of investigators as to the qualifications of prospective employees of war plants are engaged in the production of goods for commerce within the meaning of the Act. You state that none of the reports, which are sent to the prospective employers of the individuals under investigation, leaves the State.

I agree with your view that the investigators employed by the subject company would be within the coverage of the Act. As stated in the memorandum to which you make reference (i.e., memorandum from Mr. Murtha to you dated December 24, 1943 re Hartnett Inspection Service), "employees of an independent detective agency who are engaged in investigating individuals who are employed in the production of goods for commerce are within the coverage of the Act."

With respect to the company's clerical employees, you indicate that such employees can be deemed covered under the Act on the premise that the typing of the reports is an integral and component part of the investigation and, therefore, the clerical employees can be deemed covered for the same reason that the investigators are covered.

It appears that the activities of the clerical employees are intimately and functionally related to the furnishing of investigation service by the subject firm to its clients. Such service requires not only that investigators ascertain information concerning the individuals under investigation, but, also, that the information thus obtained be furnished the prospective employers in the form of typed reports. In its final form, the investigation service rendered by the subject to its clients is a report (typed by a clerical employee) of the investigation (made by an investigator). Both employments would appear to be integral and necessary factors in the continued functioning of the subject as an investigating agency.

As you know, an employee is deemed to be engaged in "production of goods" under section 3(j) of the Act if he is engaged "in any process or occupation necessary to the production thereof." The Supreme Court has recently pointed out that the test of coverage under this language is "whether a particular employer actually operates the work as part of an integrated effort for the production of goods." (Underscoring supplied). Armour & Co. v. Wantock, 323 U. S. 126, 130. In the instant case, the clerical work incidental to the services performed by the subject company for its clients engaged in covered production is carried on "as part of an integrated effort for the production of goods." As pointed out by the Fourth Circuit Court of Appeals in the Roland Electrical Co. case 146 F.(2d) 745:

> No one would contend, we think, that employees who did for the customers of the company what its employees did here would not have been engaged in the production of goods for commerce if they had been employed by the customers, but the fact that they were employed by an independent contractor makes no difference, since the application of the Act depends not upon the nature of the employer's business but upon the character of the employee's activity.

See, also, with respect to coverage under 3(j) of the subject firm's clerical employees, the following cases: Hertz Drivurself Stations v. United States, 8 Wage Hour Rept. 900 (C.C.A.8); Walling v. New Orleans Private Patrol Service, Inc., 7 Wage Hour Rept. 847; and Holland v. Amoskeag Machine Co., 47 F. Supp. 884, Cf. Walling v. Craig, 53 F. Supp. 479.

For the reasons and authorities set out above, it is my opinion that the subject's clerical employees fall within the coverage of the Act.

Lemuel H. Davis
Regional Attorney
Richmond, Virginia

401.1
402.2110
402.2121

Harold C. Nystrom
Chief, Wage-Hour Section

SOL:VOT:EG

December 12, 1945

Snead & Company
Orange, Virginia
File No. 45-2613

This will reply to your memorandum of October 24, 1945, requesting an opinion as to whether increased job rates of pay which are to go into effect retroactively must be included, for overtime purposes, in computing the employee's regular rate of pay.

It appears that subject company and the union entered into an agreement providing that new job classifications and increased rates of pay should be established retroactive to May 7, 1944. The agreement further provided that "Any increase as a result of a job classification will be applicable only to base rates, and will not increase incentive or overtime pay retroactively." Having obtained War Labor Board approval for such increased rates on March 30, 1945, the company has now requested an opinion, prior to making a final allotment of the retroactive increases, as to whether the above clause will violate the requirements of the Fair Labor Standards Act or the Walsh-Healey Public Contracts Act.

I agree with your conclusion that the new base rates which are applied retroactively to increase the straight-time earnings of the employees must be included in the regular rate of pay on which overtime compensation is based. As stated in the Wage-Hour Code (IV WHC 8010)--

> All payments made to an employee that constitute a payment of wages as compensation for services are to be counted in determining the regular rate at which an employee is employed. The special occasion for any payment, or the particular basis of its calculation, is immaterial, so long as it represents compensation for services rendered * * * Nor is it important that the full extent of the compensation is not determinable in advance, as where additional compensation is dependent upon the happening of a condition subsequent. If an amount later paid is paid as compensation for services, it is to be counted in determining the employee's regular rate of pay and must be prorated over the previous weeks in which the work to which the compensation is attributed was performed. /Underscoring supplied./

Payments that are in the nature of deferred compensation for services rendered, as in the instant case, where increased wage payments were delayed solely pending the joint establishment of the new classifications and rates by the employer and the union and subsequent approval by the War Labor Board, must be included in the computation of the employee's regular rate of pay. See, for example, the recent Suprome Court decision in the case of Walling v. Youngerman- Reynolds Harwood Co., 8 Wage Hour Rept. 602 (U. S. Sup. Ct. 1945) wherein it is stated that "the regular

rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments." Once the parties have decided upon the amount of wages and the mode of payment, the Court stated, "the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts." (Underscoring supplied).

Accordingly, regardless of the provisions of the union agreement, the employer will not have complied with the provisions of section 7 of the Act unless he pays overtime compensation at the rate of time and one-half of the employee's regular rate based on all straight-time earnings, including payments made at the regular pay period and those subsequently paid pursuant to the Contract. This position is further supported by the Supreme Court's decision in Walling v. Harnischfeger Corp., 8 Wage Hour Rept. 604 (U. S. Sup. Ct. 1945), where it was held that "until that premium is 50% of the actual hourly rate received from all regular sources, Section 7 (a) has not been satisfied." See, also, Walling v. Helmerich & Payne, 323 U.S. 37, and United States v. Rosenwasser, 323 U. S. 360. Cf. Jewell Ridge Coal Co. v. United Mine Workers, 8 Wage Hour Rept. 505.

The subject file is returned herewith.

Attachment
(File)

(04043)

Ernest N. Votaw
Regional Attorney
Philadelphia, Pennsylvania

SOL:SSB:GF

December 13, 1945

Donald M. Murtha
Assistant Solicitor

Release A-13

Reference is made to your memorandum of August 9, 1945, relative to percentage bonuses, as referred to in releases R-1548 (a) and A-13.

Mr. Yaraus, of your office, states that he is not certain as to whether we require a percentage bonus to be determined by the contract or arrangement with the employee prior to the time the bonus is declared, or whether the employer may sit back and say nothing to the employee with reference to the percentage bonus, but at the time the bonus is declared indicate that such bonus is based upon a percentage of the total earnings of the employee or group of employees. "If we permit the employer to say nothing about the percentage until after he has determined that he will pay a bonus and how much he will pay in dollars and cents, then," says Mr. Yaraus, "it becomes comparatively simple to evade the overtime requirements of the Act by translating the dollar amount of the bonus into a percentage."

Mr. Yaraus indicates that, in his opinion, if an employer is to be regarded as being in compliance with the act when he uses a "percentage of total earnings" bonus, he must obligate himself or arrange to pay this percentage bonus before he has determined how much money in dollars and cents he is going to distribute. He requests our opinion as to when, if at all, we require the employer to make such commitment. He refers to the following sentence from release R-1548(a): "For example, a contract made prior to the performance of services may provide for the payment of additional compensation in the way of a bonus at the rate of 10 percent of the employee's straight-time earnings, and 10 percent of his overtime earnings." He asks whether this means that such a bonus must be contracted for or arranged prior to the performance of services, or may the employer defer his decision to pay this type of bonus until the time the bonus is actually declared.

The quoted sentence from release R-1548(a) was not intended to embody the sole criteria for determining whether or not a bonus is a percentage bonus. It was intended merely to illustrate a clear example of a percentage bonus. There is no requirement in release R-1548(a) or A-13 that the bonus percentage, if the bonus is to be characterized as a percentage bonus, be fixed at the very same time that the employer "promises, agrees or arranges" to pay the bonus. The answer as to whether or not a bonus is a percentage bonus is, as stated in your postscript, to be found in the statement in release A-13 that "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 the individual employees" (underscoring supplied). "Predetermined," as you suggest, does not mean determined before the employee commenced his services, nor does it mean determined simultaneously with the origin of the employee's

expectation of a bonus. It merely means prior to the calculation of the amount of the bonus paid to the individual employee. As stated in release A-13, "where the amount paid to each employee is actually based on a percentage of his total earnings," the bonus is a percentage bonus.

There is no prohibition which prevents an employer from determining how much he will distribute to all his employees as a group in the way of a bonus (assuming, of course, the amount of the bonus is still in his discretion) and then distributing it to individual employees on a percentage basis. However, a true percentage bonus within the meaning of release A-13 is not paid if the employer first determines the amount due the individual employee on the basis of factors such as seniority, quantity or quality of work, wage bracket, etc., and then translates that amount into a percentage of the employee's total earnings.

(04043)

Charles A. Reynard
Regional Attorney
Cleveland, Ohio

SOL:EGT:MET

Harold C. Nystrom
Chief, Wage-Hour Section

December 19, 1945

Bay De Noquet Company
Nahma, Michigan

This will reply to your memorandum of June 23, 1945, regarding the subject company, in which you inquire whether the peeling of cedar posts is included in the pulpwood sap peeling branch of the lumber industry for which a seasonal exemption has been granted.

The peeling of cedar posts is not included in the pulpwood sap peeling branch of the lumber industry. The record of the hearing to determine whether certain branches of the lumber industry are an industry or branches of an industry of a seasonal nature within the meaning of section 7(b)(3) of the Act indicates that the exemption for the sap peeling of pulpwood was sought on the ground that sap peeled pulpwood could be produced only "during the period during which the sap is in the trees and when bark can be completely removed" (official report of proceedings, volume I, page 110). The Administrator's determination that the pulpwood sap peeling branch of the lumber industry is an industry of a seasonal nature (R-283) was also based on the fact that "the sap peeling of pulpwood can be performed only during the months of the year when the sap is running."

Moreover, it is our understanding that the term pulpwood is used to apply to the raw material used in the manufacture of paper, cellulose products (such as cellophane), rayon, fibre board, plastic, insulating boards, cellulose wadding, explosives and other products of a fiberous nature. The term pulpwood also has been judicially construed to mean woods "used for making pulp in the manufacture of paper" (United States v. Pierce, 147 Fed. 199). See, in this connection, C.L.L.O. No. 2 (Legal Field Letter No. 86) page 43. Cedar trees used for posts cannot, therefore, be considered pulpwood, and their peeling is consequently not included in the exemption.

Your attention is directed to Legal Field Letter No. 26, page 19, in which it is stated that the 7(b)(3) exemption may apply to the felling, trimming and piling of cedar posts during the sap peeling season, if those operations are a necessary component of sap peeling operations. In that case, however, the activities enumerated with respect to cedar posts were performed as a necessary and component part of sap peeling operations on pulpwood.

(04043)

Jerome A. Cooper
Regional Attorney
Birmingham 3, Alabama

SOL:NCH:MET

December 20, 1945

Harold C. Nystrom
Chief, Wage-Hour Section

J. B. Delaney Company
New Orleans, Louisiana
File No. 17-2579

This is in reply to your memorandum dated November 23, 1945, in which you request an opinion regarding the applicability of the section 13 (b)(1) exemption to subject's truck drivers.

The subject firm is engaged in the distribution of chandleries, such as groceries, cordage, canvas, repair parts, wire rope, etc., to ocean-going vessels that move in interstate commerce on their departure from the port of New Orleans at which point the delivery is made. You state that paragraph 6(b) of Interpretative Bulletin No. 9 is authority for holding that subject's drivers who transport groceries to ships at the port of New Orleans are entitled to the benefits of the Fair Labor Standards Act since they are not subject to the jurisdiction of the Interstate Commerce Commission. You ask for an expression of my views as to whether it would be proper to follow the same line of reasoning in regard to drivers engaged in delivery of "cordage, etc., since they are used on the ships until worn out and so discarded."

In my opinion, subject's drivers who deliver the aforementioned consumable goods from within the State of Louisiana to ocean-going ships in the port of New Orleans are not exempt under section 13(b)(1) since they are engaged in activities over which the Interstate Commerce Commission does not assert jurisdiction. As you know, paragraph 6(b) of Interpretative Bulletin No. 9 states:

> The Interstate Commerce Commission has consistently maintained that transportation of consumable goods (such as food, coal and ice) to railroads, docks, etc., for use on trains and steamships is not such transportation as is subject to its jurisdiction. [Underscoring supplied.]

You will note that the commodities listed above, viz, food, coal and ice, are not intended to be exhaustive but are merely illustrative of the type of consumable goods with regard to whose movement the Commission disclaims jurisdiction under the conditions set forth above.

In the matter of Bunker Coal from Alabama to Gulf Ports, 227 I.C.C. 483, the question was presented as to whether the Interstate Commerce Commission had jurisdiction over rates charged for the delivery of bunker coal from coal fields in Alabama to shipsides at Mobile, Alabama. The Commission therein stated on page 488 that:

> So far as appears, coal which moves from mines in Alabama to Mobile for bunkerage purposes is dumped into the bunkers of vessels for which intended and

> is for use and is used as fuel on such vessels. In every instance it thus becomes the property of the vessel at the Mobile dock and ceases to be an article of commerce, as would ordinary ship supplies or a piece of machinery installed on a vessel as part of its equipment. Upon these facts we are of the opinion and find that the Commission has no jurisdiction over the transportation of this Bunker Coal from mines in Alabama to Mobile over the lines of the respondent, Southern and Louisville & Nashville, respectively. Compare New Pittsburgh Coal Co. v. Rocking Valley Ry. Co., 24 I.C.C. 244; Basin Supply Co. v. Texarkana & F.S. Ry. Co., 33 I.C.C. 137; Corona Coal Co. v. Secretary of War, 69 I.C.C. 389; and Swain & Finch Co. v. United States, 190 U.S. 143. [Underscoring supplied.]

In the New Pittsburgh Coal Co. matter, supra, the question of whether the Interstate Commerce Commission had jurisdiction over rates charged for the delivery of bunker coal to vessels within the State of its origin was similarly presented. It was stated on page 245 that:

> We think we have no jurisdiction over the transportation of this vessel fuel from a point in the State of Ohio to a port of that State, the rail cargo not going outside of the State and the ultimate delivery being made to a vessel at the dock.

Similarly, in the Corona opinion, supra, the delivery of bunker coal to a vessel within the same State was held to be an intrastate transaction not subject to the Commission's jurisdiction.

Accordingly, it is my view that subject's drivers engaged in the intrastate delivery of chandleries such as groceries, cordage, canvas, repair parts, wire rope, etc., to ocean-going vessels for use and consumption aboard such vessels which move in interstate or foreign commerce are not subject to the jurisdiction of the Interstate Commerce Commission and are, therefore, not exempt under section 13(b)(1) of the Fair Labor Standards Act.

25 BB 206
25 BC 206
25 BE 201
204

Kenneth P. Montgomery
Regional Attorney
Chicago, Illinois

SOL:IMP:PLG

Harold C. Nystrom
Chief, Wage-Hour Section

December 26, 1945

Time spent handling grievances as time worked

This will reply to your memorandum of July 18, 1945, addressed to Mr. Murtha, enclosing a copy of a letter from Ralph Holstein, General Counsel of the United Packinghouse Workers of America. Mr. Holstein contends that time spent by an employee in discussing his grievances with a foreman and with his departmental steward should be considered as hours worked for purposes of the Fair Labor Standards Act. Mr. Holstein also contends that time spent by employee members of a grievance committee should be considered as hours worked, at the various stages of discussion, whether such meetings and discussions take place during or after regular work hours.

It is the position of the Divisions that time voluntarily spent in grievance conferences during regular working hours pursuant to the established grievance machinery in the plant, is considered to be hours worked under the Act irrespective of whether the conference is held with a company representative or with a union representative.

Accordingly, in the specific situations numbered 1, 2 and 3 outlined by Mr. Holstein, the time spent by the individual employees and the grievance committee members in meeting with foremen and other employer representatives and in discussing grievances with union stewards, during the regular working hours of the employees in attendance, should be viewed as hours worked under the Act, when such conferences are held as part of the established grievance procedure in the plant. However, in situation 4, it appears that the regular grievance committee meetings are held after working hours, and since I assume that employee participation therein is voluntary, time so spent need not be considered as hours worked under the Act.

I trust that this fully answers your inquiry.

(04043)

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Irving Rozen
Regional Attorney
New York, New York

SOL:VOW:CTN

Harold C. Nystrom
Chief, Wage-Hour Section

December 27, 1945

Trylon Coats, Inc.
252 West 37th Street
New York, New York
File No. 31-6700

This will reply to your memorandum of September 5, 1945, in which you request my opinion as to whether a fixed hourly overtime rate paid to pieceworkers may be offset against the additional halftime due them as overtime under section 7 of the Fair Labor Standards Act.

You state that the employees in question are paid on a piecework basis, earning an average of more than $2.00 an hour during the week. I assume that you mean that each employee earns a weekly average of approximately $2.00 an hour, rather than that the $2.00 represents the average hourly earnings of all employees. They receive, in addition, a flat rate of $1.00 for each overtime hour, which is understood by the employees to constitute compensation for overtime work. Subject company has requested permission to apply this sum against statutory overtime compensation. It further appears, from Mr. Geldon's recent telephone conversation with Miss Davidson of your staff, that the employees work a regular 35 hour week and that the hourly overtime rate of $1.00 is paid for all hours worked in excess of 35 in a week.

As you know, the Divisions have established three primary criteria for determining whether a particular payment constitutes overtime compensation under the Fair Labor Standards Act. First, the employer must intend and the employees must understand that the sums are paid as overtime (see, Overnight Motor Transp. Co. v. Missel, 316 U.S. 572; Mid-Continent Pipe Line Co. v. Hargrave, 129 F. (2d) 655; Stone v. Walling, 131 F. (2d) 461. See, also, 4 Wage Hour Code 8C18 and release R-1393); second, the overtime payment must "comprise an amount calculated at a rate greater than the straight-time rate"; and third, such payment "must bear a mathematical relation to the number of overtime hours for which it purports to be special compensation." (See, 4 Wage Hour Code 8C18; Interpretative Bulletin No. 4, paragraph 69 and Legal Field Letter No. 89, page 6 and Legal Field Letter No. 98, page 16.) Since the employees in the instant case work a regular 35 hour week, there is, of course, no question that the payments here involved are actually made for overtime hours, ie., hours worked in excess of the normal or regular working hours. See, Interpretative Bulletin No. 4, paragraph 69.

In the instant case, it would appear that the payments meet the criteria established by the Divisions. The additional payments of $1.00 an hour for hours worked in excess of 35 in a week appear to be made with the intention of providing extra compensation to each employee for each overtime hour worked. Nor does such additional compensation appear to constitute a lump-sum payment allegedly paid as overtime which, in fact, is made without any relation to the number of overtime hours worked. (Cf. Legal Field Letter No. 97, page 29.) Since the average earnings of approximately

$2.00 per hour for the employees in question appear to be straight-time compensation for all hours worked in the workweek, it is clear that the additional payment of $1.00 per hour, paid for hours worked in excess of 35 in the week, results in the payment to the employees of an overtime rate in excess of the straight-time rate. Since this greater amount is paid for the sole reason that the hours thus paid for are those occurring after 35 in the workweek, it is my opinion, under the above circumstances, that these payments may be offset against the overtime compensation required to be paid under section 7 of the Act. Of course, to the extent that, in any workweek, these overtime payments do not constitute, for hours worked in excess of 40, an additional 50 percent of the employees' average weekly piecework earnings or the employees' piece-work earnings for the hours over 40 in the workweek, an additional amount must be paid by the employer in order to comply with section 7. However, in view of the fact that the subject firm pays contractual overtime for hours over 35 in a week, the 5 hours of such contractual overtime may be offset against statutory overtime. See paragraph 70(2) of Interpretative Bullotin No. 4.

It does not appear that the situation described in Field Operations Bulletin, Volume XIII, No. 7, page 618, is pertinent to the situation involved herein. In that case, the piece workers earning an average of $1.00 an hour during the first 40 hours worked were compensated for the same type of work on a different basis and at a lower hourly rate for the hours worked in excess of 40. The plan was designed primarily to evade the overtime requirements of the Act by allowing the employer "to escape completely the burden of a 50 percent premium for the hours so worked * * *" (Walling v. Youngerman Reynolds Hardwood Co., 8 Wage Hour Rept. 602; see, also, Walling v. Helmerich & Payne, 323 U.S. 37). No evidence is here presented, however, of manipulation or evasion of the overtime requirements of the Act.

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21 BD 201.3
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23 CF 202.421

Mr. H. T. Easley
Easley and Scollin
Deal Building
Newport News, Virginia

SOL:JFS:HD

Dear Mr. Easley:

October 29, 1945

This is in regard to your letter of October 5, 1945, concerning the application of the Fair Labor Standards Act of 1938 to one of your clients who, you state, is engaged in operating a stock farm. Also, you state that your client has recently contracted with a foreign government for the purchase of livestock on a commission basis per head. You advise that the livestock is shipped to the farm, fed and cared for by employees on the farm, and then is exported. Furthermore, you state that the farm consists of 260 acres, of which about 40 acres are utilized as pens and facilities for the actual feeding of the livestock, part is covered with standing timber, and the rest is used to grow feed for the livestock.

As you know, the minimum wage and overtime requirements of the Fair Labor Standards Act apply to employees engaged in interstate commerce or in the production of goods for interstate commerce, unless otherwise exempt. Section 13(a)(6) provides an exemption from both the minimum wage and overtime requirements of the Act as to "any employee employed in agriculture." Section 3(f) defines the term "agriculture" to include inter alia "the cultivation and tillage of the soil * * * the * * *, cultivation, growing and harvesting of any agricultural or horticultural commodities * * * the raising of livestock * * * and any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations * * *." Under this definition employees of a farmer or on a farm engaged in the cultivation, growing and harvesting of cattle feed and in the fattening, feeding and care of livestock would be exempt as being employed in "agriculture." However, employees of commission brokers engaged in the temporary handling of livestock for immediate resale, unaccompanied by feeding and fattening over a substantial period of time, would not be exempt as being employed in "agriculture." National Labor Relations Board v. Touvea Packing Co., 111 F.(2d) 626 (C.C.A. 9).

Also, section 13(a)(10) provides an exemption from both the minimum wage and overtime requirements of the Act as to "any individual employed within the area of production (as defined by the Administrator), engaged in handling * * * of agricultural or horticultural commodities for market * * *." For enforcement purposes the Wage and Hour and Public Contracts Divisions have taken the position that the handling of livestock for market within the area of production, such as the temporary handling by a commission broker, is exempt under section 13(a)(10); however, a contrary position has been taken by the courts. Stratton v. Farmers Produce Co., 134 F.(2d) 825 (C.C.A. 8). Furthermore, under the Divisions' enforcement policy it is not possible at the present time to advise whether

(04043)

employees are considered as being engaged in the handling of livestock for market within the area of production, since the United States Supreme Court in the case of Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607, held that the Administrator's definiton of the term "area of production" was invalid and added that when a valid definition is promulgated, such definition will be applied retroactively.

Also, section 7(c) provides an exemption from the overtime requirements of the Act, but not the minimum wage provisions, for a period of 14 workweeks in the aggregate in any calendar year as to "employees in any place of employment where" their employer is "engaged in handling, slaughtering, or dressing * * * livestock." This exemption applies to employees of commission brokers (1) who are engaged in the physical "handling" of livestock, or (2) whose occupations are a necessary incident to the physical handling of livestock and who work solely in those portions of the premises devoted by their employer to the physical handling of livestock.

Very truly yours,

WM. R. McCOMB
Deputy Administrator

(04043)

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Mr. Preston S. Millar
President
Electrical Testing Laboratories, Inc.
2 East End Avenue at 79th Street
New York 21, New York

SOL:MWP:CTN

October 31, 1945

Dear Mr. Millar:

This will reply to your recent letter inquiring whether your company may renew its "practice of defraying expenses and supplying facilities for employee research in which the employee voluntarily uses his own time without compensation from the Company."

You state that the arrangement which you contemplate is set forth in the company regulations as follows:

> ETL is prepared to encourage a reasonable amount of well-considered research in the spare time of employees, provided such research is within the Laboratories' scope. Any employee or employees who would like to undertake research, using their own time and the Laboratories' facilities, are invited to make request for the necessary authorization. Members of the Executive Staff and Department Heads will cooperate in promoting such work. Authorization for any such activity shall be secured by the Department Head through the filing of a requisition for a shop order number against which expenses should be charged.

You state that engagement in research "assists employees to gain in knowledge and to qualify themselves for higher classes of work, while occasionally contributing something to the advancement of one of the arts involved." You further state that the results of such research afford the employer an opportunity to ascertain whether the employees "are likely to progress in their vocations." It is not stated whether, in the event that the employee makes a contribution "to the advancement of one of the arts," this contribution is the property of the employee or becomes the property of the employer.

As you know, the Fair Labor Standards Act applies to employees engaged in interstate commerce or in the production of goods for interstate commerce, including occupations or processes necessary to such production. Employees so engaged must be paid minimum wages at rates not less than 40 cents an hour for all hours worked in each workweek and overtime compensation at rates not less than one and one-half times their regular rates of pay for all hours worked in excess of 40 in a workweek, unless specifically exempted from one or both of these requirements by some provision of the Act.

(04043)

You do not state what type of employees would be engaging in the laboratory research. However, there is an exemption from the minimum wage and overtime requirements contained in section 13(a)(1) of the Act for professional employees as defined in section 541.3 of Regulations, Part 541, a copy of which is enclosed. Thus, chemists, physicists and similar employees who might be engaged in original research would be exempt from both the minimum wage and overtime requirements of the Fair Labor Standards Act provided that they meet all of the requirements set forth in the Administrator's definition of a professional employee.

With respect to nonexempt employees engaged in research under the conditions described, it is necessary to ascertain whether the time spent in research constitutes employment within the meaning of the Act. In this connection, it should be noted that the term "employ" is defined in section 3(g) of the Act to include "suffer or permit to work."

In the ordinary case, time spent by an employee under the direction and control of his employer would be considered hours worked. This would include all time during which the employee is suffered or permitted to work, whether or not he is required to do so. It would appear that the employees engaging in research in accordance with the company's regulations are under the direction and control of the employer since (a) they are limited by the employer to "well-considered" research; (b) they are required to secure authorization therefor; (c) they receive the "cooperation" of the Executive Staff and Department Heads; (d) they are permitted to utilize the Laboratories' facilities; and (e) it appears the employer places considerable importance upon the results of research in judging the employee's ability.

Furthermore, to the extent that the results of research may become the property of, or are in any way used by, the employer, in whole or in part, it is clear that the employee in his research is engaged in active work on behalf of the employer. The fact that the employee may receive some benefit from the performance of the research work is not, in itself, controlling. Moreover, the fact that in some weeks the research work may be unproductive does not mean that such work is not covered by the Fair Labor Standards Act. If the research is being carried on for the purpose of contributing to the production of goods for commerce, such work is covered employment even though unproductive. See Warren-Bradshaw Drilling Co. v. Hall, 317 U.S. 88; affirming 124 F. (2d) 42 (C.C.A. 5), affirming 40 F.Supp. 272 (N.D. Tex.); Bowie v. Gonsales, 117 F.(2d) 11 (C.C.A. 1); Walton v. Southern Package Co., 320 U.S. 540; Skidmore v. Swift & Co., 323 U.S. 134, reversing 136 F. (2d) 112 (C.C.A. 5), affirming 53 F.Supp. 1020 (N.D.Tex.), cert. denied, 320 U.S. 763; Wantock v. Armour & Co., 323 U.S. 126, affirming 140 F.(2d) 356 (C.C.A. 7), affirming 5 Wage Hour Rept. 824 (N.D.Ill. 1942). As you know, employees who engage in any covered work during a workweek must be compensated in accordance with the Act's requirements for the entire week.

I trust this fully answers your inquiry, but should you have any further questions, please feel free to call upon me.

Very truly yours,

Thacher Winslow
Deputy Administrator

Enclosure

BI 302.32
BF 303.32

Mr. Merrill M. Flood
Merrill Flood and Associates
20 Nassau Street
Princeton, New Jersey

SOL:SSB:HD

November 27, 1945

Dear Mr. Flood:

This will reply to your letter of November 2, 1945, referring to my letters of October 23 and 26, 1945, and our telephone conversations concerning the requirements of Regulations, Part 541. You request advice concerning the conditions under which it would be determined that the minimum guarantee (a salary of $200 per month) had been given. You state that there is no formal written contract covering the terms of employment for your employees, so that the determination would, of necessity, have to be based on verbal understandings, on your office regulations and your office practices.

As you will note from sections 541.2 and 541.3 of Regulations, Part 541, a copy of which you have, one of the requirements which must be met if the employee is to qualify for the administrative or professional exemption is that the employee must be paid a salary of not less than $200 per month. Thus, if an employee is paid soley on an hourly basis, he would not qualify for the exemptions. However, if an employee meeting the other requirements of the Regulations is guaranteed a salary of not less than $200 per month, or $50 a week, the fact that he is otherwise paid on an hourly basis would not defeat the exemption.

In the case of an employee employed on an hourly basis for whom the administrative or professional exemption is sought, it would be necessary under the Regulations that the employee receive his minimum salary of $200 in all months during which he is employed and performs work, regardless of the number of hours worked in such months. Similarly, if the employee is guaranteed $50 a week, he would have to be paid that minimum amount for any weeks in which he performed any work, regardless of the number of hours worked in those weeks.

In determining whether the salary requirements of the Regulations have been met, the Divisions consider the terms of the employment agreement, whether oral or written, the payroll records, the office practices, and such. It is not necessary that there be a written contract of employment.

Very truly yours,

Donald M. Murtha
Assistant Solicitor

Enclosure

/Note: The foregoing opinion supersedes any implication to the contrary which may be contained in L.F.L. #99, p. 12./

(04043)

Metal, Plastics, etc.

SOL:LG:PLG

December 19, 1945

Mr. M. B. Nelson
Manager
Legal Department
The Maytag Company
Newton, Iowa

Dear Mr. Nelson:

I regret that it has not been possible to reply sooner to your letter in which you ask for confirmation of your understanding that the wage orders issued by the Administrator under the Fair Labor Standards Act, particularly the wage order for the Metal, Plastics, Machinery, Instrument, and Allied Industries, expired October 24, 1945, and that the posting requirements contained in those wage orders are no longer in effect.

In referring to the expiration of wage orders issued under the Act, you undoubtedly have in mind section 8(e), which provides, among other things, that "no order" issued under that section should remain in effect after the expiration of seven years from the effective date of section 6 unless the industry committee and the Administrator find that its continued effectiveness is necessary in order to prevent substantial curtailment of employment in the industry. However, I am advised that this provision did not, as a matter of law, operate to terminate the posting requirements of existing wage orders on October 24, 1945. The purpose of section 8(e) was to guarantee that the attainment of the goal of the Act, a universal minimum wage of 40 cents an hour, would not be delayed for more than seven years unless it should be definitely established that the rate of 40 cents an hour would substantially curtail employment in an industry. See the explanations of section 8(e) given by the Chairman of the Senate Committee on Education and Labor (83 Cong. Rec. 9164); by the Chairman of the House Committee on Labor (83 Cong. Rec. 9256); and by Congressman Ramspeck (83 Cong. Rec. 9266). Recognized rules of statutory construction support the view that section 8(e) should be limited to its purpose. The object was to guard against inertia, not to cut short measures indispensable to making minimum wage rates effective. The intention of Congress should be carried out by reading section 8(e) as applicable only to those provisions of wage orders which specify wage rates less than 40 cents an hour, and not to the incidental enforcement provisions of wage orders establishing 40-cent minimum rates, with which section 8(e) is in no substantial sense concerned

Accordingly, in my opinion, the provisions contained in wage orders issued under the Act relating to the posting of notices remain in effect. It will therefore be necessary to continue posting notices in accordance with such requirements in order to remain in compliance with the Act.

Very truly yours,

Thacher Winslow
Deputy Administrator

Washington 25, D. C.

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21 AC 101.63
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Theo. Quale, Esquire
Northern State Bank Building
Thief River Falls, Minnesota

SOL:ME:HD

Dear Mr. Quale:

December 29, 1945

This is in reply to your letter of November 14, 1945, with reference to coverage under the Fair Labor Standards Act for employees of an independent contractor engaged in the repair of a dam owned by the city of Thief River Falls. You state that the dam is a component part of a municipally owned light and power plant which produces electricity which is wholly consumed in Thief River Falls.

As you may know, the general coverage of the Fair Labor Standards Act extends to employees engaged in interstate commerce or in the production of goods for commerce, unless they are exempted by some specific provision of the act. The facts contained in your letter present two basic problems, namely, (a) whether the construction employees in question are engaged in interstate commerce or the production of goods for interstate commerce within the meaning of the act and (b) if so, whether they are excepted from the operation of the act under section 3(d) as employees of the State or a political subdivision thereof.

You do not state in your letter whether the electricity produced by the power plant is used in the production of goods that go into interstate commerce or serves essential instrumentalities of interstate commerce, such as highways or railroad stations. For this reason I can only give you the general principles which would guide me in my conclusion if I had all the facts.

With respect to construction employees generally it is the settled position of the Wage and Hour and Public Contracts Divisions that employees of contractors employed in maintaining, repairing or reconstructing structures or equipment used to produce goods for interstate commerce are engaged in a "process or occupation necessary to the production" of such goods within the meaning of 3(j) of the act. See Interpretative Bulletin No. 5, paragraphs 12 and 13, and release G-162, copies of which are enclosed for your convenience. See also New Mexico Public Service v. Engel, 145 F.(2d) 636; Richardson v. Delaware Housing Assn., 6 WHR 473 (S.D. Fla., 1943); Williams v. Wisconsin Electric Power Co., 6 WHR 1149.

As stated in releases A-14 and R-1789 (copies enclosed), it is also the position of the Divisions that under the act coverage of employees producing goods for interstate commerce is not limited to employees engaged in the production of goods for shipment across State lines; goods are produced for interstate commerce, even though they do not subsequently leave the State, if they are used to serve as an essential part of such commerce or to aid or facilitate the carrying on of interstate commerce by essential instrumentalities or facilities of commerce, such as interstate railroads and the like. Accordingly, employees of power plants

furnishing electricity to instrumentalities of commerce within the State for use in their carrying on of interstate commerce would, in my opinion, be engaged in producing goods for commerce within the meaning of the act. In this connection see Walling v. Atlantic Co., 131 F.(2d) 518; Walling v. Hamlet Ice Co., 127 F.(2d) 165; Clifton v. Schroeder, 8 WHR 483; New Mexico Public Service v. Engel, 145 F.(2d) 636; Phillips v. Meeker Co-operative Light and Power Assn., 8 WHR 1127.

Thus, if the electricity produced at the power plant is used within the city by instrumentalities of commerce in the carrying on of interstate commerce, it is my opinion that the employees of the construction company who are engaged in repairing the dam, which is a component part of the power-producing facilities, would be covered by the act as engaged in an occupation necessary to the production of goods for commerce.

The provisions of section 3(d) of the act, excepting political subdivisions of a State as employers from the obligations of the act, would not provide any such exception for the private contractors here involved.

If you have any further questions, I shall be glad to be of assistance to you. However, you may find it more convenient to consult the regional office at 406 Pence Building, 730 Hennepin Avenue, Minneapolis 3, Minnesota.

Very truly yours,

WM. R. McCOMB
Deputy Administrator

Enclosures

402.31
402.33

Washington 25, D. C.

James I. Poole, Esquire
Miller, Mack & Fairchild
First Wisconsin National Bank Building
Milwaukee 2, Wisconsin

SOL:AGW:HD

January 10, 1946

Dear Mr. Poole:

This will reply to your letter of December 29, 1945, asking whether employer contributions to pension and profit-sharing plans such as you described in your letter of November 10, 1945, are bonuses within the meaning of the Administrator's enforcement policy expressed in release A-13, as follows:

> "As an enforcement policy to be followed in the absence of authoritative rulings by the courts, the Divisions will in the future not insist on the inclusion of any bonus (except where there is an obvious evasion of the overtime requirements) which is paid at greater intervals than quarterly, in the computation of the 'regular' or 'basic' rate of pay for overtime purposes, even though the bonus would otherwise be of a type requiring such inclusion."

It was my intention in the last paragraph of my letter of December 20, 1945 to advise you that employer contributions to pension and profit-sharing plans of the type discussed in that letter would be considered bonuses for the purpose of the enforcement policy quoted above. That letter also pointed out that the enforcement policy cannot affect the independent right of employees under section 16(b) of the Act to sue for the recovery of unpaid wages or overtime compensation.

I trust this letter will furnish the clarification you are asking.

Very truly yours,

WM. R. McCOMB
Deputy Administrator

(04043)