UNITED STATES DEPARTMENT OF LABOR
Office of the Solicitor
May 1, 1946

File

LFL - 106

Legal Field Letter
No. 106

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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LETTERS

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25 BD 303.220
303.221

Mr. John R. Dille, Director
Field Operations Branch
Wage and Hour and Public Contracts Divisions

SOL:EGT:EG

February 7, 1946

Harold C. Nystrom
Chief, Wage-Hour Section

Travel time of home workers

This will reply to your memorandum of January 3, 1946, in which you inquire whether an employer should be charged for the full travel time of his home workers under the following conditions:

> Industrial home workers who live in the country call for home work materials and return finished products while in town on a trip for shopping or other personal purposes. The trip has not been made especially for the purpose of returning finished work and picking up new materials, but has been primarily made for shopping or other personal purposes. The home work activity is merely incidental to the other purposes of the trip. The trip may involve as many as 75 miles round-trip and take as long as two hours.

Although it is stated that the trip is not made "especially" to pick up material and return finished goods, I assume that the employee is required to call for the materials and return the finished products (no other mode therefor having been supplied by the employer) or is suffered or permitted to do so. In that event the time spent by the home workers in such travel would, under the well-established position of the Divisions, constitute compensable travel time. See Legal Field Letters, No. 35, page 6; No. 57, page 15; No. 103, page 9. The time required for such duties clearly constitutes work performed for the benefit of the employer and does not lose its status as compensable travel time simply because the home worker utilizes the same trip to attend to various personal matters. Of course, deviations from the usual travel route, resulting in additional travel time utilized solely for personal purposes, as, for instance, traveling by a more circuitous route in order to reach a shopping district, would not be regarded as hours worked.

(04392)

23 CB 401
23 CB 101

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

SOL:FUR:HD

February 19, 1946

Donald M. Murtha, Assistant Solicitor

Penn Economy Oil Co., Inc.
Bedford, Pennsylvania

This will reply to your memorandum of February 7, 1946, discussing our letter of February 4 to subject. The matter was carefully considered in this office and informally discussed with the representative of the Interstate Commerce Commission on the Inter-Departmental Committee, who expressed his concurrence.

In the letter we took the position that where a wholesaler opens a commercial garage and in it services his own trucks as well as the general public, the garage employees are not exempt under section 13(b)(1). You suggest that the situation is factually distinguishable from the Boutell case in that the garage in Boutell is operated by a separate, albeit a related, corporation from that operating the trucks. We believe, however, that the factual distinction, although it strengthens the Boutell case, is not controlling. Where a carrier operates a separate business (your reference to paragraph 4(b) of Interpretative Bulletin No.9 is not pertinent for this reason), the "carrier" exemption is not applicable to such business, notwithstanding its incidental relationship to the business which makes the owner a "carrier." Cf. Walling v. The Connecticut Co., 62 F. Supp. 733.

The penultimate paragraph of Legal Field Letter No. 96, page 11, is distinguishable. It there appeared that the transfer company involved did general hauling work as well as truck repair on trucks it rented but did not operate. The truck repair work was not performed in a commercial garage open to the general public. Under such circumstances, that company might well be operating as a carrier with respect to its garage activities, and the usual 50 percent rule would be applied. The case is different from that of a commercial garage open to the general public whose claim to the "carrier" exemption arises solely because the garage owner has another business in which he operates as a private carrier.

(04392)

21 BC 204.22
207.3132
21 BC 203
21 BC 207.21

AIR MAIL

Dorothy M. Williams, Regional Attorney
San Francisco, California

SOL:EGT:HCH:MFS

Harold C. Nystrom
Chief, Wage-Hour Section

February 20, 1946

Murphy Ranch Mutual Water Company
East Whittier, California
File No. 4-4203-C

I regret that it has not been possible to reply sooner to your memorandum regarding the application of the exemption provided by section 13(a)(6) of the Fair Labor Standards Act to subject's employees who are engaged in irrigation work.

The subject company is a mutual water company engaged in supplying water to its shareholders, in amounts proportional to the number of shares held, through a system consisting of wells, pumping equipment, reservoirs, pipes, and irrigation ditches. The shareholders consist of the Murphy Ranch Company, which operates some 4,800 acres of citrus-producing land on which the wells, pumping station, and distribution system are located, and several small owners of subdivided tracts, formerly part of the Murphy Ranch, amounting in all to approximately 200 acres, used by the owners for residential and citrus-growing purposes. The Murphy Ranch Company, which is one of the largest growers and packers of citrus fruit in Southern California, has contracted with the owners of the subdivided tracts to maintain their groves and to pack the fruit grown on their land. The Ranch Company operates on the ranch property a machine shop for the repair of ranch machinery and equipment, a commissary to feed employees of the ranch company, and a packing house. Presumably the employees fed at the commissary and the machinery and equipment repaired at the machine shop are employed in connection with the fruit grown on the subdivided tracts as well as that grown on the ranch. It is not stated whether the packing house packs any fruit other than that grown on the ranch and, pursuant to the contract, on the subdivided tracts. The water distributed by the subject water company comes chiefly from wells operated by it and located on the ranch, although some water is purchased from independent water companies as needed. The water supplied by the subject company is used to irrigate the land of the shareholders, and also is supplied for domestic use in the homes on the subdivided tracts and to the ranch machine shop, the ranch commissary, and the packing house.

You inquire whether, under the foregoing facts, the employees working in the water company's pumping plants on the ranch property are within the exemption provided by section 13(a)(6) of the Act. You state that Ivan C. McDaniel, attorney for the company takes the position that the exemption is applicable, apparently on the theory that operation of the system is a practice performed on a farm as an incident to or in conjunction with exempt farming operations. He also suggests that the inclusion of the term "production" with reference to agricultural commodities in section 3(f) may require exemption coincident with coverage by virtue of the definition of "production"in section 3(j).

(04392)

Some time ago Mr. Tyson and I discussed the general question of the application of the agricultural exemption to irrigation activities with Mr. McDaniel in Washington. We told him at that time that the Divisions had recognized that irrigation employees might in a proper case be exempt if employed by a farmer or on a farm in practices performed as an "incident to or in conjunction with such farming operations," but that the Divisions had not interpreted the word "production" in section 3(f) as including "occupations or processes necessary to production." (see II Wage-Hour Code 4C12) and had not, up to the present time, expressed the opinion that irrigation company employees could be considered exempt on the theory that they were engaged in "cultivation and tillage of the soil." We also informed him a study was being made of the latter two questions to determine whether the Divisions should regard additional groups of irrigation company employees as within the exemption. The results of this study and a statement of the general principles by which the Administrator will be guided in determining the application of this exemption to employees engaged in irrigating farm land are summarized in a memorandum dated September 24, 1945, addressed to Regional Attorney Reid Williams, concerning the Grand Valley Irrigation Company, which was published in Legal Field Letter No. 103, page 11. Although I believe most of your questions may be answered on the basis of the memorandum of the Grand Valley company, it may be helpful to state briefly our views concerning the application of the principles there stated to the specified facts of the subject case.

It is clear on the principles stated in the cited legal field letter that any employees of the subject company whose work during any workweek is confined exclusively to the application of water <u>directly</u> to the farm land on the Murphy Ranch and on the subdivided tracts, as by operating the last headgates for diverting or distributing water to the citrus groves thereon, are within the exemption for such workweek on the ground that they are engaged in "cultivation and tillage of the soil." The exemption would be defeated, however, if any of their activities were connected with the pumping stations, reservoirs, or other parts of the distribution system serving the land of the various owners. This is true because such activities are not "cultivation or tillage of the soil" (Legal Field Letter No. 103, page 16), nor are they practices "performed by a farmer or on a farm as an incident to or in conjunction with such farming operations."

The Murphy Ranch Mutual Water Company is clearly not a farmer. Although it appears that its activities are confined to the Murphy Ranch and the subdivided tracts, the operation of the distribution system on the Murphy Ranch cannot be brought within the scope of the exemption on the theory that this activity is a practice performed on a farm solely as an incident to or in conjunction with the farming operations <u>on that farm</u>. For it is clear that this work relates also to the supplying of water (1) to the subdivided tracts which are separately owned and operated, and (2) to the machine shop, the commissary, and the packing house, which, insofar as they may serve the equipment, employees, or products of other farms as well as those of the Murphy Ranch, are not identified exclusively with the farming operations on the Murphy Ranch. See II Wage-Hour Code 4C27 (cf. 4C30). The mere fact that the Murphy Ranch Company has contracted to maintain the groves and to pack the

fruit grown on the subdivided tracts would not, in my opinion, justify the view that the supplying of water to the several separately owned and occupied tracts should be regarded as a practice exempted under the language of sections 3(f) and 13(a)(6). See II Wage-Hour Code 4C26, f.n. 113; 4C29, f.n. 123; 4C22, f.n. 97; 4C24.

I should add that if an employee performing irrigation work is otherwise exempt under section 13(a)(6), we would not necessarily consider that the exemption would be defeated merely because farmers to whom the water is supplied may use a small amount for their own domestic purposes or for watering livestock being raised by them.

(04392)

21 AC 205.10
.21
.27
21 AC 409.4211

Lemuel H. Davis
Regional Attorney
Richmond 19, Virginia

SOL:JL:CTN

Harold C. Nystrom
Chief, Wage-Hour Section

February 21, 1946

Request for Opinion -- Coverage of
Strip Coal Mine Operations

This will reply to your memorandum of February 5, 1946 requesting a further opinion in the subject matter. In my memorandum to you, dated December 11, 1945 (appearing in Legal Field Letter No. 104, page 3) the opinion was expressed that employees engaged in the replacement of spoil and the landscaping incident thereto, in connection with the strip-mining of coal for interstate commerce, are subject to the Act since such activities are necessary to production within the meaning of 3(j).

You now state that since my memorandum referred to the fact that the employees in question were "presumably * * * employed by the strip-mining operator," you advised the Regional Director that

> This opinion, therefore, is limited to just those employees and should not be regarded as authority for asserting coverage as to employees of independent contractors who may engage in replacing spoil and in landscaping.

You further state that you have been advised by the Supervising Inspector that "the principal purpose of the original request for an opinion was to facilitate making price arrangements with subcontractors to do the backfilling and landscaping," and you therefore request our opinion as to coverage if the operations are performed by the employees of "a bona fide contractor or subcontractor."

The fact that the operations in question are performed for the strip-mining company by the employees of a separate contractor rather than by its own employees would not, in my opinion, make such activities any less necessary to the production of coal for commerce. As stated by the Supreme Court in Roland Electrical Co. v. Walling, 9 Wage Hour Rept. 89:

> If [such services were] not supplied to the customers by employees of the petitioner, such customers would have to employ comparable employees of their own or of other contractors.

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To like effect see the Supreme Court's decision in Martino v. Michigan Window Cleaning Co., 9 Wage Hour Rept. 111, wherein the Court stated:

> Respondent's employees are not to be excluded from such coverage merely because their employment to do the same work was under independent contracts.

See, also, the opinion of Judge Bratton in E. C. Schroeder v. Clifton, 9 Wage Hour Rept. 93 (C.C.A. 10), and Walling v. C. E. Amidon (C.C.A. 10), 9 Wage Hour Rept. 41.

(04392)

26 CD 703.2
26 CD 402.526

Charles A. Reynard, Regional Attorney
Cleveland 13, Ohio

SOL:JFS:HD

Donald M. Murtha, Assistant Solicitor

February 21, 1946

The Warren Featherbone Co.
Three Oaks, Michigan

This is in regard to your memorandum of January 11, 1946, addressed to Assistant Solicitor Ray. According to the firm's attached letter, under a proposed plan, nonexempt foremen will be paid "a guaranteed weekly rate for 40 hours of work . . . An additional weekly payment, to be made whenever the hours worked exceed 40, to be considered as extra compensation for working more than 40 hours. Added to the guaranteed rate, the resulting total is subject to computation of overtime premium for that week on the variable workweek basis." The letter frankly admits that "The amount of the proposed additional weekly payment, for each workweek of over 40 hours, is computed to yield in total computation, including overtime premium, an amount approximately straight time for overtime on the same base rate." The letter contains the following example:

Hours per week - 45		
Total compensation with straight time for overtime		- $64.13
Guaranteed rate	- $57.00	
Additional for hours over 40	- 3.75	
Week's rate subject to overtime premium	- $60.75	
Overtime premium	- 3.38	
Total compensation		- $64.13

Apparently the "guaranteed weekly rate for 40 hours of work" is intended to cover straight time only up through the first 40 hours and nothing more. In such case an employee receiving a guaranteed weekly rate of $57.00 and working 45 hours during the week would be due $67.69 ($57.00 + 1-1/2($57/40) x 5) under the Act. As the letter frankly admits, the figure of $64.13 results in paying "straight time for overtime" ($57 + ($57/40) x 5). That the proposed plan does not comply with the requirements of section 7 is obvious, which defect is not corrected by the firm's clever mathematical gymnastics. I am returning the firm's letter for your use in preparing a reply. Since it appears that the guaranteed weekly rate covers straight time for the first 40 hours and since the employees are paid additional straight time for all hours in excess of 40, therefore, the employees are entitled to an additional one-half their regular rates for all hours in excess of 40, the regular rates being determined by dividing the guaranteed weekly rates by 40.

Your memorandum also refers to a similar problem described in your memorandum of January 3, 1946, addressed to Assistant Solicitor Ray, re: Commercial Bookbinding Company. For your information, this latter memorandum has been referred to me for an opinion by Supervising Attorney Funston and a reply has been prepared stating that the plan also does not comply with the requirements of section 7 of the Act.

(04392)

21 AC 101.64
21 AC 102.1210
21 AC 401.2
408.4

Irving Rozen
Regional Attorney
New York 1, New York

SOL:NCH:CTN

Harold C. Nystrom
Chief, Wage-Hour Section

February 26, 1946

American Locker Company
1472 Broadway
New York, New York
File No. 31-30284

This is in reply to your memorandum dated May 31, 1945, requesting an opinion with respect to the coverage of certain service men employed by the American Locker Company.

It appears from your memorandum that the subject company, a nation-wide checking service having branches in New York, Philadelphia, Chicago, Atlanta and Boston, with its main office being located in Boston, owns and services lockers in railroad and bus stations. These lockers are of the coin slot variety; the traveler deposits a dime in a coin slot, which entitles him to store his baggage in a locker compartment for 24 hours and permits him to retain the key as his check. Baggage left in a locker compartment over 24 hours is removed by the subject's service men to the station's main checkroom, or, if there is none at the station, to the firm's New York office. The traveler can reclaim such baggage by paying an "overtime fee." The service men in question, in addition to removing baggage left over 24 hours, visit these lockers daily in order to take meter readings, and where baggage remains unclaimed for several days, remove the locks and install new ones on the lockers. The locks removed, or their serial numbers, are then sent to Boston, where new keys are made up in order to permit re-use of the locks.

You also state that service men employed by the New York branch of the subject company operate in New York City (Pennsylvania Station) and in Newark, New Jersey. Apparently, they go to Newark only on one or two days a week for a period of four or five weeks and then may not go there again for another month or more.

It is our opinion, from the foregoing facts, that subject's service men are covered under the Act, since, in reading meters, removing baggage left in locker compartments after 24 hours, and in removing and reinstalling locks, they are engaged in a terminal service so closely related to the physical transportation of passengers and goods in interstate commerce as to be deemed in legal contemplation

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a part thereof. These activities, in my opinion, meet the test set forth by Mr. Justice Reed in McLeod v. Threlkeld, 319 U.S. 491, 497, which was "not whether the employees' activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of commerce as to be part of it." It is common knowledge that passengers traveling in interstate commerce carry baggage and customarily avail themselves of baggage room facilities provided for them in railroad or bus terminals. The subject's locker service is similar to baggage room or other baggage facilities, and persons engaged in providing such service are engaged in interstate commerce, since they aid or facilitate the carrying on of interstate commerce by the railroads. In this connection, your attention is referred to the cases of Southern Ry. Co. v. Black, 127 F. (2d) 280 (C.C.A. 4), and Stopher v. Cincinnati Union Terminal, 246 I.C.C. 41, 45. In Walling v. Atlantic Greyhound Corp., 61 F.Supp. 992 (E.D.S.C.), the court, in holding that a janitor employed at an interstate bus terminal was engaged in commerce, stated on page 995:

> I can not agree that a terminal is not a necessary adjunct to the bus business. It is as much needed as a railroad depot * * *. It is necessary to provide waiting rooms, lavatories, ticket offices and all other incidental services connected with the arrival and departure of busses. To maintain such facilities it is absolutely necessary that janitors and other employees be engaged to service and make habitable and useful the terminal facilities, and I am of the opinion that the maintenance and operation of a bus terminal such as the one alleged to be operated in Charleston is a part of the business of the defendant corporation and, it being engaged in commerce, this is a part of such commerce.

See, also, Mornford v. Andrews, 8 Wage Hour Rept. 1057 (C.C.A. 5), and Young v. Andrews, 7 Wage Hour Rept. 1040. The court further indicated that the same result would be reached if the employees performing terminal services were employed by persons other than the operators of the terminal. See, in this connection, the recent Supreme Court decisions in Martino v. Michigan Window Cleaning Co., 9 Wage Hour Rept. 111, and Roland Electrical Co. v. Walling, 9 Wage Hour Rept. 89.

In my opinion, another ground for coverage can be spelled out of the activities of subject's service men in removing locks and sending them or their serial numbers to the main office in Boston in order to obtain new keys when users of lockers neglect to return keys or reclaim baggage. Regular use of the interstate mails and the

(04392)

channels or instrumentalities of interstate commerce in the transmission of locks and keys constitutes engagement in interstate commerce insofar as employees doing such work are concerned. The courts have consistently held, as you know, that the transmission and receipt in interstate commerce of goods, including information, intelligence and documents, is engagement in interstate commerce. (See Lenroot v. Western Union, 323 U.S. 490, and Kappler v. Republic Pictures Corp., 151 F.(2d) 543 (C.C.A. 8).

For the reasons set forth above, it is my opinion that subject's service men are within the coverage of the Fair Labor Standards Act.

I might also add that, under the facts set forth above, certain of the activities engaged in by subject's employees may be covered on production as well as commerce grounds. It does not appear necessary, however, to discuss this basis for coverage at length in view of the conclusions set forth above.

(04392)

21 BJ 402.454
21 BJ 403.443

Kenneth P. Montgomery, Regional Attorney
Chicago, Illinois

SOL:EGT:ERG:YS

Harold C. Nystrom
Chief, Wage-Hour Section

February 27, 1946

Memorandum to Regional Director O'Malley
dated June 12, 1945 re Ticket Agents

Reference is made to the subject memorandum, a copy of which was transmitted to this office for post review. Mr. O'Malley had requested an opinion with respect to the status of ticket agents hired by hotels to sell bus tickets.

It appears that various bus lines often have their waiting rooms "in a hotel lobby due to the fact that there is lounging rooms, restrooms, etc. The hotel then hires a girl to sell interstate and local tickets at a starvation wage." It further appears that "the hotel is given a flat 10% of all money taken in for tickets for this service." In replying to Mr. O'Malley's inquiry as to whether hotel employees under such circumstances would be considered covered under the Act, you stated:

> There is no question that employees such as you describe are engaged in commerce. However, section 13(a)(2) of the Act grants an exemption from the minimum wage and maximum hours provisions with respect to any employee "engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce * * *.
>
> It is our opinion that the employees in question are engaged in a qualified service establishment and that, unless it could be shown that the hotel lobbies were being used either exclusively or being maintained almost solely for the benefit of the bus companies whose tickets are sold by the hotel, the employees selling the tickets are exempt from the operation of the wage and hour provisions of the Act.
>
> It is assumed, of course, that the total gross receipts from the sale of bus tickets is not in excess of 25 percent of the total hotel receipts. However, should such bus ticket receipts be in excess of the 25 percent figure, then the exemption under section 13(a)(2) would not be applicable to those hotel employees engaged in interstate commerce.
>
> The opinion contained in your memorandum to Mr. O'Malley does not represent the position of the Divisions. In our opinion, the sale of such bus tickets is as foreign to the nature of a retail or service establishment as is manufacturing, and defeats the exemption to the same extent. See paragraphs 17-18 of Interpretative Bulletin No. 6. See also II Wage Hour Code 4K35, and cf. Legal Field Letters No. 68, page 7 and No. 66, page 9. Consequently, the section 13(a)(2) exemption is defeated

(04392)

for the ticket sellers whether they are employees of the hotel or of the bus companies and regardless of the amount of time spent in such work. The exemption may still apply, however, to the rest of the hotel personnel if adequately segregated. cf. paragraph 41 of Interpretative Bulletin No. 6.

Of course, where bus tickets are not actually sold in the hotel but are merely obtained by the hotel for its guests as one of its services, the 13(a)(2) exemption would not be defeated for an otherwise exempt employee by the performance of such work.

(04392)

26 CD 402.524
CE 101
24 AC 302.2
26 CD 601
26 CD 701
402.526
402.50

Earl Street
Regional Attorney
Dallas, Texas

Harold C. Nystrom
Chief, Wage-Hour Section

SOL:ERG:CTN

Consolidated Vultee Aircraft Corporation
Fort Worth, Texas
SOL:HC:MB

March 7, 1946.

Reference is made to former Regional Attorney Duke's memorandum dated June 26, 1944, in which he requested an expression of our views with respect to the validity, both under the Fair Labor Standards Act and the Walsh-Healey Public Contracts Act, of the subject firm's practice of paying overtime to certain of its employees. I am sorry that an earlier reply was not possible. The opinion which follows is based on a careful study of the problems presented, both by my staff and by the staff of the Solicitor in Washington. The recent Supreme Court decisions concerned with the regular rate of pay have also been thoroughly considered in order to insure a proper application in the instant case of the principles enunciated by the Court.

It appears that the company has three regular shifts, two of 8 hours each and one of 6½ hours. The first shift begins at 7:00 a.m. and ends at 3:30 in the afternoon (there is a 30-minute lunch period during each shift); and the second shift begins at 3:30 pm. and continues until 12:00 midnight; the third shift begins at midnight and ends at 7:00 the following morning. Employees on the 6½ hour shift receive the same amount of pay for the first 6½ hours of work as employees on the other two shifts receive for 8 hours. It appears from the attachments to the memorandum from your office that employees on the third shift who work a full 8 hours or more because of revolving shifts are, however, paid for the additional time worked at the regular overtime rate for the second shift, viz, $1.50.

It further appears that particular employees involved herein are not employed on any one of the three regular shifts but work relief shifts from 9:00 p.m. to 6:00 a.m., a total of 8½ hours per day. These employees are paid at the rate of $1.23 per hour for the first 6½ hours of this shift (i.e., 8 hours' pay for 6½ hours of work) and for the last 2 hours of the shift they are paid on a base rate of $1 but receive time and one-half thereon, since those hours are regarded as overtime hours. Thus, each of such employees receives for each of the first five days of the workweek a total of $11. On the sixth day of the workweek, the employee receives 6½ hours at time and one-half of $1.23 (a total of $12) plus time and one-half the base rate of $1 for the last two hours (a total of $3) making a net total of $15 for the day and a total of $70 for the week.

(04392)

Relief Shift Employees

With regard to the relief shift employees, Mr. Duke stated that "there can be no doubt but what the $1.50 paid for the two hours each day and $1.83½ /should be $1.84½/ paid for the 6½ hours on the sixth day are paid as overtime compensation." Accordingly, in computing the employee's regular rate of pay, he proposed to deduct from the employee's gross compensation the extra amounts which he considered paid as overtime (which sums total $10), and to divide the remainder, viz, $60, by 51 hours worked, resulting in a "regular rate" of pay of $1.17½. Based on this hourly rate, Mr. Duke concluded that the employees "have been underpaid $6.46, since they should have received a total of $76.46 rather than the sum of $70."

I note that Mr. Duke appears to have made a miscalculation here, since under his theory the employees would have been entitled to but $66.46 rather than 76.46, viz (51 hours X $1.17½) plus (11 hours X $.59) = $66.46.

We cannot agree with Mr. Duke's analysis regarding these employees who, according to his statement, are not employed on any one of the three regular shifts but work from 9:00 p.m. to 6:00 a.m. This statement is confirmed by the graphic presentation set out on page 2 of Mr. Duke's memorandum. If, as it appears, the employees in question regularly work an 8 or 8½-hour day (and are not merely members of a revolving shift who occasionally work such hours), it is our opinion that the views expressed in Legal Field Letter No. 59, page 8, and Legal Field Letter No. 100, page 15, are applicable. Cf. Walling v. Helmerich & Payne, 323 U.S. 37; see, also, the Divisions' brief before the ninth circuit in Walling v. Alaska Pacific Consolidated Mining Co. Their daily wage of $11 for the first five days appears to constitute straight-time compensation, no part of which may be allocated to overtime. With respect to the compensation paid them for the sixth day worked, only the $4 paid in excess of the daily wage for a nonovertime day can be considered as true overtime compensation and be offset against Fair Labor Standards Act overtime. Consequently, their regular rate is arrived at by dividing weekly strainght-time earnings, viz, $66, by weekly hours worked, 51, resulting in a regular rate of $1.294. For the 11 overtime hours worked, the employees are entitled to receive an additional $7.12, viz, $.647 X 11 hours, for a net total of $73.12. Since the employees have already been paid $70, including $4 overtime compensation, they are entitled to receive an additional sum of $3.12 weekly.

Third Shift Employees

On the other hand, with respect to employees who regularly work the third-shift, viz, the hours from midnight to 7:00 a.m., any sums paid as true daily overtime for hours worked in excess of 6½ daily may be credited against overtime compensation otherwise due. See paragraphs 69 and 70(3) of Interpretative Bulletin No. 4. However, even with respect to the third-shift employees (who may work a full eight hours or more because of revolving shifts), it is not completely clear that any of the compensation paid for the hours worked in excess of 6½ in a day is, in fact, paid as overtime compensation.

It would, in our opinion, be possible to interpret paragraph 4 of the memorandum entitled "Basis for Paying All Bi-weekly Salary Employees Assigned to the Third Shift" as calling for a straight-time rate for the hours worked in excess of 6½ a day which is measured by the overtime rate for the second shift. If this should be the correct interpretation of that paragraph, no part of such compensation may be regarded as overtime compensation. Moreover, the fact that the rate is not one and one-half times any rate actually paid to any such employee for nonovertime hours of work, but is one and one-half times a rate which is (1) never actually applicable to these employees for straight-time work, and is (2) lower than any rate they are paid for straight time, strengthens this possible construction. So does the fact that in the example given in paragraph 6 of that memorandum, the $1.50 rate remains the same when compensation is computed either on an adjusted-hours or an adjusted-rate basis.

Paragraph 4 of the cited memorandum, however, refers to the rate as a "second overtime rate"; the mathematical presentation in paragraph 5 classifies the additional hours as overtime hours; and the memorandum generally refers to the scheduled third-shift time of 6½ hours. If, in fact, the normal worktime of the third shift employees is 6½ hours, and if the extra compensation paid for the hours worked in excess of 6½ hours a day actually represents, not merely a higher rate of pay, but overtime compensation for work beyond the normal daily hours worked, such extra compensation could, under our present position, be credited against the overtime compensation required to be paid under the Acts.

Assuming that the extra compensation paid to the third-shift employees in the instant case for hours in excess of 6½ daily is true overtime, it is our opinion that the contract rate for nonovertime hours ($1.23) is the employee's regular rate, and only the compensation in excess of that rate (27 cents) paid for daily overtime work may be regarded as creditable against overtime compensation. The conclusion that the $1.23 rate is the regular rate is supported also by the fact that compensation for the work performed during the first 6½ hours of the sixth day of work is computed at one and one-half times that rate. On the facts here presented, there would appear to be no valid reason to regard as the regular rate, for the purpose of computing overtime compensation required to be paid for hours in excess of 40, any other rate than the $1.23 per hour paid for the employee's normal nonovertime workweek and workday and which the parties themselves consider as the regular rate for sixth-day overtime purposes.

In this connection, it is our opinion that an employee's regular rate of pay in a situation of this kind is not to be determined by averaging his week's compensation where he receives a certain hourly rate of compensation for nonovertime hours but a lower straight-time rate of compensation, never applicable during his nonovertime hours, is assigned to the employee for performance of the same type of work, during overtime hours. Cf. Legal Field Letter No. 22, page 33; Legal Field Letter No. 101, page 14; Field Operations Bulletin, Volume XIII, No. 7, pages 618-619, and Volume XIV, No. 4, pages 676-677. It is evident, in such a situation, that averaging the employee's hourly earnings will result in a rate lower than "the hourly rate actually paid for the

normal, nonovertime workweek," which is the "regular rate" as defined by the United States Supreme Court in Walling v. Helmerich & Payne, 323 U.S. 37; United States v. Rosenwasser, 323 U.S. 360; Walling v. Youngerman-Reynolds Hardwood Co., 8 Wage Hour Rept. 602; and Walling v. Harnischfeger Corp., 8 Wage Hour Rept. 603. To permit the averaging of a bona fide straight-time rate and a lower rate purportedly applicable for the same type of work in overtime hours results in at least a partial defeat of the purposes for which section 7 of the Fair Labor Standards Act was enacted, viz, to increase the employer's labor costs "by 50% at the end of the 40-hour week" and to give the employees "a 50% premium for all excess hours" (Walling v. Youngerman-Reynolds Hardwood Co., supra). Instead, it puts a premium on working longer hours as the cost of overtime work to the employer decreases proportionately to the increase in hours worked, and the employee never receives for each overtime hour as much as one and one-half times what he receives for each nonovertime hour.

I am returning herewith copies of the memoranda dated May 19, to the resident contracting officer, and May 30, 1944, from the contracting officer.

Attachments.

SOL:JFS:HD

Beatrice McConnell
Director, Industrial Division

March 7, 1946

Donald M. Murtha, Assistant Solicitor

Applicability of agricultural exemption to the employment of minors in the feed pens of the Tovrea Packing Company, Phoenix, Arizona.

This is in regard to your memorandum of February 27, 1946. From the attachments it appears that the subject firm owns and operates a slaughtering house for the production of meat products and by-products for commerce, and also owns several hundred acres of adjacent land which is mostly occupied by cattle-feeding pens. About half of the cattle purchased by the firm consists of fattened animals which remain in the corral pens for a day or two and are then slaughtered. The remainder of the cattle purchased by the firm consists of range cattle which are placed in feed pens for fattening for an average of 90 days, but as high as 120 days, and then 10 percent of these fattened animals is resold and the remaining 90 percent is slaughted by the firm. In some instances range cattle are fattened by the subject firm in its feed pens in behalf of other owners, and after fattening, the cattle are sold, in most instances, to the subject firm for slaughtering. You inquire whether either of these two types of caring for cattle constitutes employment in agriculture within the meaning of section 13(c) of the Fair Labor Standards Act of 1938, and if not, what is the applicable minimum age for the employment of minors.

Section 13(c) provides that "The provisions of section 12 relating to child labor shall not apply with respect to any employee employed in agriculture while not legally required to attend school." Section 3(f) defines the term "agriculture" to include inter alia "the raising of livestock." Such term includes the fattening, feeding and general care of cattle and the definition makes no distinction with respect to employees on the basis of the purpose for which the livestock is raised. See Interpretative Bulletin No. 14, paragraph 6. However, it has been the consistant position of the Solicitor's Office that the exemption includes the fattening, feeding and general care of cattle only if performed over a substantial period of time, and does not include the temporary handling of cattle for immediate slaughter or resale. See L.F.L. 97, p. 32, 36, 89, p. 30, 31-32; Interpretative Bulletin No. 14, par. 6.

In the case of National Labor Relations Board v. Tovrea Packing Co., 111 F (2d) 626 (C.C.A.9), an action under the National Labor Relations Act and apparently against the subject firm, the problem arose whether the work of employees of employees of defendant engaged in operating and maintaining "feeding pens, retaining pens, and a feed well "adjacent to its packing plant" was "agricultural in character." Nothing appears in the facts of the case or the court's observation to indicate that defendant engaged in two types of cattle feeding--temporary feeding of fattened cattle for a day or two before slaughtering, and feeding of range cattle for an average of 90 days so that they may be fattened sufficiently for slaughtering. Also, there was no indication that defendant resold 10 percent of its fattened range cattle or that it

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fattened range cattle on behalf of other owners. In holding the work of the employees at the "feeding pens" not to be "agricultural in character" the court stated that the employees' work did not constitute "stock feeding or conditioning as a separate activity, but we do have stock ready for conditioning and fattening confined in relatively small corrals and fed intensively for short spaces of time as an incident to a meat slaughtering and packing industrial enterprise."

On the basis of the holding in L.F.L. 89, p. 30, it appears that when a firm is engaged in the feeding and fattening of cattle and also in the slaughtering of cattle, the temporary feeding pending immediate sale, shipment or slaughtering does not constitute employment in agriculture within the meaning of section 3(f); but the feeding, fattening and general care of cattle over a substantial period of time does constitute employment in agriculture within the meaning of section 3(f) even though some of the fattened cattle are ultimately slaughtered by the feeder. In my opinion a day or two does not constitute a substantial period of time, but 90 days does.

As already indicated, it is difficult from the facts stated in the Tovrea case, supra, to determine what type of "feeding pens" the court was discussing. However, the reference to the fact that the cattle were "fed intensively for short spaces of time" would seem to indicate that the court had under consideration the corral pens where fattened cattle were kept a day or two before slaughtering, rather than the feed pens where range cattle are fed and fattened for an average of 90 days and as high as 120 days. Furthermore, the "raising of livestock" per se is defined by the statute to constitute "agriculture" and no distinction is made with respect to the purpose for which the livestock is raised. Consequently, the raising of livestock primarily for industrial purposes, such as to obtain serum or virus, constitutes "agriculture" under section 3(f), even though such work may not fall strictly within the narrower term "agricultural in character" which the court in the Tovrea case had under consideration. See Interpretative Bulletin No. 14, paragraph 6.

Consequently, in my opinion, the fattening, feeding and general care of cattle for a substantial period of time, such as 90 days, constitute "agriculture" under section 3(f), even though the fattened cattle are ultimately slaughtered by the feeder. On the other hand, the temporary handling and feeding of cattle, such as for a day or two, for immediate resale, shipment or slaughter does not constitute "agriculture" under section 3(f).

On the basis of Mr. Tyson's memorandum to you of July 13, 1945, reversing 3 C.L.L.O. 7, it would appear that the corral pens here involved where fattened cattle are fed and handled for a day or two prior to slaughtering for production of goods for commerce, constitute a producing establishment within the meaning of section 12(a). Presumably it is to the advantage of the firm to slaughter cattle fattened by others, as soon as possible after being received at the corral pens, in order to prevent the cattle from losing weight. Consequently, where the slaughtering occurs within a day or two after receipt of the cattle at the corral pens, it appears that the temporary feeding and handling are so closely connected with the slaughtering as to be a part of it and thus constitute processing occupations within the exclusion of Child Labor Regulation No. 3. In such a case the applicable minimum age is 16 years.

Pursuant to your request, the attachments submitted by you are returned herewith.

Attachments.

(04392)

SOL:AGW:DMH

Washington 25, D. C. August 17, 1945

Mr. H. K. Swenerton
Wage & Salary Administrator
Consolidated Vultee Aircraft Corp.
San Diego; California

Dear Mr. Swenerton:

This will reply to your letter inquiring whether the method of computing overtime compensation employed by Consolidated Vultee Aircraft Corporation meets the overtime requirements of the Fair Labor Standards Act.

You state that the company's first and second shifts are 8 hours a day and the third shift is 6½ hours a day. You state further that third-shift employees are paid 8 hours' pay at second-shift rates for 6½ hours of work. Work in excess of 6½ hours on the third shift or 8 hours on the second shift is paid for at time and one-half the established rate for the second shift. Similarly, work in excess of 8 hours on the first shift is compensated at the rate of time and one-half the established first-shift rate.

Your letter also sets out the following example of how an employee's hourly earnings vary as between the three shifts.

Shift	Reg. No. of Working Hours	Rate of Pay Per Hour
1	8	$ 1.00
2	8	$1.00 plus $.08 = $1.08
3	6½	8 x (1.00 plus $.08) ÷ 6.5 = $1.33

You state that it is your view that $1.33 is the proper rate to use in computing overtime compensation of the third-shift employees under the Fair Labor Standards Act and that amounts paid in excess of this sum to such employees for work in excess of 6½ hours may be credited against overtime due under the Fair Labor Standards Act for work performed in excess of 40 hours a week whether they work only occasionally or whether they work regularly in excess of 6½ hours a day.

Paragraph 69 of Interpretative Bulletin No. 4, a copy of which is enclosed, states:

> "Extra compensation paid for overtime work, even if required to be paid by a union agreement or other agreement between the employer and his employees need not be included in determining the employee's regular hourly rate of pay (see par. 13 of this bulletin). Furthermore, in determining whether he has met the overtime requirements of section 7 the employer may properly consider as overtime compensation paid by him for the purpose of satisfying these requirements, only the extra amount of

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compensation--over and above straight time-- paid by him as compensation for overtime work--that is, for hours worked outside the normal or regular working hours--regardless of whether he is required to pay such compensation by a union or other agreement. In no week, of course, will the overtime requirements of section 7 be met unless the employee receives an amount equal to at least his regular rate of pay for 40 hours and time and one-half such rate for the hours worked in excess of 40."

It should be noted that this quotation stresses the point that daily overtime compensation must be paid for work in addition to the employees' regular schedule, if it is to be credited against overtime required by the Fair Labor Standards Act. In this connection, see also subparagraphs (3) and (4) of paragraph 70 of the bulletin.

In Walling v. Helmerich & Payne, 323 U.S. 37, the Supreme Court in discussing the question of daily overtime compensation said (on pages 40, 41):

"The split-day plan, moreover, violated the basic rules for computing correctly the actual regular rate contemplated by section 7(a). While the words 'regular rate' are not defined in the act, they obviously mean the hourly rate actually paid for the normal, non-overtime workweek. Overnight Motor Co. v. Missel, supra.

* * * *

"But respondent's plan made no effort to base the regular rate upon the wages actually received or upon the hours actually and regularly spent each week in working. Nor did it attempt to apply the regular rate to the first 40 hours actually and regularly worked. Instead the plan provided for a fictitious regular rate consisting of a figure somewhat lower than the rate actually received. This illusory rate was arbitrarily allocated to the first portion of each day's regular labor; the latter portion was designated 'overtime' and called for compensation at a rate one and one-half times the fictitious regular rate. * * * Hence he was entitled to no additional remuneration for work in excess of 40 hours except in the unlikely situation, which never in fact occurred, of his actually working more than 80 hours. The vice of respondent's plan lay in the fact that the contract regular rate did not represent the rate which was actually paid for ordinary, non-overtime hours, nor did it allow extra compensation to be paid for true overtime hours.***"

I am unable to agree with your view that an employee who regularly works 8 hours a day (or some other number in excess of $6\frac{1}{2}$) receives overtime compensation which is creditable against overtime due under the Fair Labor Standards Act, if he is paid extra compensation for the work in excess of $6\frac{1}{2}$ hours which he regularly performs merely because he reports to work at the same time as employees who either never or only occasionally work in excess of $6\frac{1}{2}$ hours a day. In other words, the question of whether particular compensation is for hours in excess of the

regular or normal hours of work or is the normal non-overtime workweek should be answered on the basis of the individual employee's hours of work rather than those of the shift to which he is deemed to be attached.

To determine the regular rate of pay at which an employee is employed in a situation such as you present, all compensation, except true overtime compensation received by the employee, should be divided by the number of non-overtime hours worked. Extra compensation for work in excess of 6½ hours a day may be considered as overtime compensation due under the Fair Labor Standards Act only if it is paid as overtime compensation and is paid for hours in excess of those normally and regularly worked by that employee. Thus, where an employee is employed on the third shift and regularly works only 6½ hours for which he receives the same pay as if he had worked 8 hours on the second shift, his regular hourly rate of pay if 1/6.5 x 8 x the stated hourly rate of the second shift. However, if an employee regularly works longer hours his regular hourly rate of pay must be computed by adding together all compensation received for all his non-overtime hours and dividing the resulting sum by the number of hours for which it is compensation. Accordingly, the compensation of an employee employed on the third shift, who is paid in the manner described in the second paragraph of this letter, would be computed as follows, if he regularly works 8 hours, the second-shift rate is $1.08 and he works six 8-hour days in a particular week:

No. of non-overtime hours for the week during the first 6½ hours a day	=	32.5
No. of non-overtime hours for the week after the first 6½ hours a day	=	7.5
Total non-overtime hours for the week	=	40.
Overtime hours for the week	=	8
Total hours worked in the week	=	48
Pay for hours in excess of 6½ a day	=	1½ x 1.08
Straight-time compensation		
40 hours (for 32.5 hours' work) x $1.08	=	$43.20
11.25 hours (1½ x 7.5 hours' work) x 1.08	=	12.15
Total Straight-time compensation for 40 hours	=	$55.35
Regular rate of pay per hour--$55.35 ÷ 40	=	1.38
Straight-time and overtime compensation for 8 hours--$1.38 x 1½ x 8 hours	=	16.56
Straight-time compensation for 40 hours	=	55.35
Total straight-time and overtime compensation for the week	=	$71.91

Very truly yours,

WM. R. McCOMB
Deputy Administrator

Enclosure

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Mr. R. E. Helmer
Director, Washington Office
Prentice-Hall, Inc.
941 Munsey Building
Washington, D. C.

SOL:JFS:gf
November 20, 1945

Dear Mr. Helmer:

This is in regard to your letter of October 2, 1945, addressed to Mr. Murtha. Therein you refer to release R-1743 which discusses the problem of whether contributions by an employer to pension, annuity and similar plans for the benefit of his employees need be included in computing the regular rate of pay for overtime purposes under the Fair Labor Standards Act of 1938. As you know, the release states that if the two conditions contained therein are met, such contributions need not be included in computing the regular rate of pay. As you point out the conditions are not considered by the Wage and Hour and Public Contracts Divisions to have been met where an employee may surrender an insurance policy and receive the cash surrender value thereof.

You inquire as to what is the required action on the part of an employer towards computing the base wage to include the employer's contribution towards a pension trust where vesting is deferred for a period of years. By "vesting" I presume you mean that in lieu of the benefits under the plan the employee after a specified lapse of time becomes entitled to receive a cash consideration, either in the form of a predetermined amount or the cash surrender value of the policy.

If at the time an employer makes a contribution to a pension, annuity or similar plan the two conditions of release R-1743 are not met, the contribution is treated the same as any bonus payment which is part of the regular rate of pay, and at the time the contribution is made the amount thereof must be apportioned back over the workweeks of the period during which it may be said to have accrued. See enclosed copies of releases R-1548(a) and A-13 dealing with the general problem of bonus payments under the Act. As you will note by release A-13, it is the present enforcement policy of the Wage and Hour and Public Contracts Divisions not to insist on the inclusion of any bonus (except where there is obvious evasion of the overtime requirements) which is paid at greater intervals than quarterly in computing the regular rate of pay even though the bonus would otherwise be of a type requiring such inclusion.

As is apparent from the preceding paragraph, when at the time the contribution is made the two conditions of release R-1743 are not met, the employer at such time, and not at the time of the so-called vesting, must apportion the amount back over the workweeks of the period during which it may be said to have accrued. The fact that the so-called vesting does not occur immediately or that an employee may sever his employment before the so-called vesting occurs would not affect the result.

Lastly you inquire as to what action an employer should take who has made contributions to a pension, annuity or similar plan which do not meet the two conditions stated in release R-1743. As you know rights under the Act are conferred upon employees by the statute itself

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and the Administrator has no authority to relinquish or impair these statutory rights. Failure to include a contribution which does not meet the two conditions stated in release R-1743 in computing the regular rate of pay, is no different than any case where a bonus is omitted from the regular rate of pay. So far as the Wage and Hour and Public Contracts Divisions are concerned if the failure was not wilful or an attempt to evade the requirements of the Act, no enforcement action would generally be taken where the employer pays restitution for past violations and agrees to comply with the Act in accordance with release R-1743 in the future. Of course, what action an employee may take under section 16(b) is a matter over which the Divisions have no jurisdiction.

Very truly yours,

WM. R. McCOMB
Deputy Administrator

Enclosures