Mr Glasgow

File

UNITED STATES DEPARTMENT OF LABOR
Office of the Solicitor
May 16, 1946

Legal Field Letter
No. 107

LFL - 107.

Attached Opinions

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

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21 AC 409.30
409.35
21 AC 409.395
409.4213

AIR MAIL

Dorothy M. Williams
Regional Attorney
San Francisco, California

SOL:EG:VOW:FH

Harold C. Nystrom
Chief, Wage-Hour Section

Feb. 28, 1946

Application of the Act to maintenance employees working in buildings occupied exclusively by firms engaged solely in interstate commerce

This will reply to your memorandum of March 11, 1944, to which you attached a copy of a memorandum of March 11 addressed to the San Francisco branch office. The delay in replying to your memorandum was occasioned by the fact that we were awaiting the results of a number of pending cases, including Western Union, Callus, and Borden, and were also engaged in discussions with the Administrator and the Solicitor's Office in Washington. The views expressed below represent those of the Administrator as well as of the Solicitor's Office.

The question raised is whether the Act covers janitors employed by an independent contractor to work in buildings occupied by the following types of firms:

1. TRANSPORTATION COMPANIES

   a. Airlines handling both passengers and freight.

   b. Bus Lines handling passengers and baggage, such baggage being primarily incidental to the transportation of passengers.

2. COMMUNICATION COMPANIES

   a. Telephone
   b. Telegraph Companies
   c. Radio Broadcasting Stations

3. TOLL BRIDGE COMPANIES

In your memorandum to the San Francisco office you express the opinion that the Administrator is not prepared to take a position with respect to the applicability of the Act to maintenance employees in any building, the occupants of which are engaged solely in interstate commerce and not in the production of goods for interstate commerce.

As you know, the cases in which the courts have held maintenance employees of office buildings occupied by tenants engaged in interstate commerce as not within the

coverage of the Act, were cases which involved buildings in which the interstate activities of the tenants were generally limited to the preparation and transmission of documents, reports and other written material and the use of the telephone, telegraph or other instrumentalities of interstate commerce for communication purposes. The enforcement policy with reference to maintenance employees in office buildings, expressed in release PR-19 and Field Operations Bulletin, Volume VI, No. 7, was motivated by these decisions and was not intended to apply to employees engaged in the maintenance of actual instrumentalities of commerce.

On the contrary, it has been the consistent position of the Divisions that where a building or part of a building is occupied by an actual instrumentality of interstate commerce, such as a telegraph sending and receiving office, telephone exchange, transportation terminal, or radio broadcasting studio, employees who spend a substantial part of their time in servicing and maintaining premises occupied or used by any such instrumentality of commerce, are considered to be engaged in interstate commerce and therefore covered by the Act. See, in this connection, Overstreet v. North Shore Corp. 318 U.S. 125; McLeod v. Threlkeld, 319 U.S. 491; North Shore Corp. v. Barnett, 143 F. (2d) 172 (C.C.A. 5); Mornford v. Andrews, 8 Wage Hour Rept. 1057 (C.C.A. 5); Slover v. Wathan, 140 F. (2d), 258 (C.C.A. 4); Ramos v. Porto Rico Telephone Co., 8 Wage Hour Rept. 111; and Walling v. Atlantic Greyhound Corp., 61 F. Supp. 992(see also 8 Wage Hour Rept. 1082). Cf.Shaver v. Fidelity Bankers Trust Co., 6 Wage Hour Rept. 757, 865 (C.A. Tenn.) On the other hand, building maintenance employees of an office building who spend a substantial part of their time in servicing and maintaining premises occupied by the executive offices and clerical force of a company elsewhere operating an actual instrumentality of interstate commerce are not believed, on that account alone, to be engaged in work so closely related to the movement of interstate commerce as to be in legal contemplation a part thereof. Cf. Greene v. Anchor Mills Co., 8 Wage Hour Rept. 41 (N.C. Sup. Ct.) Therefore, the Divisions do not consider the Act applicable to such employees.

Your memorandum fails to set forth a description of the buildings in question sufficient to determine whether they actually house instrumentalities of commerce. Thus, for example, it is impossible to ascertain whether in the buildings tenanted by transportation companies, the tenants' interstate activities are limited to the preparation and transmission of letters and similar written material and the regular use of other interstate facilities, or whether the premises are themselves used as part of the instrumentalities of commerce operated by the transportation firms. Similarly, in the case of the telephone company, coverage of the maintenance employees would depend upon whether the building occupied by the telephone company is a telephone exchange which is itself an instrumentality of commerce or whether the building is used merely as a central business office. However, I believe that, on the basis of the above general principles, you will be able to reach a specific determination in each case.

(04444)

23 CB 204.3
401
301.1

Ernest N. Votaw
Regional Attorney
Philadelphia, Pennsylvania

SOL:EGT:MET

Harold C. Nystrom, Chief
Wage-Hour Section

March 12, 1946

Columbian Transportation Company
Reading, Pennsylvania
File No. 37-68343

Columbian Warehouse Company
Reading, Pennsylvania
File No. 37-85221

This will reply to your memorandum of January 18, 1946, regarding subject, in which you inquire whether "an employee who spends a considerable length of time in crating and packing goods at the warehouse preparatory to their being loaded on vehicles transporting the goods in interstate commerce" is exempt under section 13(b)(1) of the Act. Subject company, you state, takes the position that the employee in question may be considered a "loader," as that term has been defined by the Interstate Commerce Commission, citing Epps v. Weathers, 48 F. Supp. 2.

As you know, the United States Supreme Court, in United States v. American Trucking Assns., 310 U.S. 534, held that the power of the Interstate Commerce Commission to prescribe qualifications and maximum hours of service for employees of motor carriers under the Motor Carrier Act is limited to "those employees whose activities affect the safety of operation" of motor vehicles engaged in interstate transportation. See paragraph 4 of revised Interpretative Bulletin No. 9. In Ex. Parte No. MC-2 and MC-3, the Interstate Commerce Commission specifically stated, moreover, in its findings of fact, that "no employees" other than drivers, mechanics, loaders and helpers "perform duties which directly affect safety of operation" of motor vehicles. Accordingly, unless the employee's duties bring him squarely within the category of one of these employments, he is not exempt under section 13(b)(1).

In my opinion, the employee in question is not a "loader" nor do his duties "directly affect" the safety of operations of motor vehicles within the meaning of the 13(b)(1) exemption. See Legal Field Letters No. 99, pages 15-16, and No. 98, pages 9-10, where it is stated: "* * * employees who are not actually engaged in loading activities and who have no discretion or responsibility with regard to the manner and safe method of loading would not be considered to be 'loaders.'" Cf. Ispass v. Pyramid Motor Freight Corp., 9 Wage Hour Rept. 9 (C.C.A. 2). See, also, paragraph 4(b) of revised Interpretative Bulletin No. 9 in which it is stated that the Divisions regard warehouse work as nonexempt under section 13(b)(1).

(04444)

I might add that our Washington office concurs in our opinion that the crating and packing activities in question do not constitute exempt safety work under section 13(b)(1) and that the Epps case does not express the Divisions' position on this question. I am further advised that the matter has been discussed with a representative of the Interstate Commerce Commission who expressed the view that the packing of goods in boxes or barrels would not constitute safety work but the crating would (his reasoning being that while light goods packed in boxes and barrels are practically immune from damage in transit, the heavy goods required to be crated are easily damaged in transit if the crating is not performed properly). This view accords with the general position, expressed to us previously by representatives of the Commission, that "safety work" is not limited to safety of operation of motor vehicles on the public highways, as the Divisions contend, but also includes safety of the load itself. As pointed out above, however, we disagree with the Interstate Commerce Commission representative's views in this matter.

(04444)

25 BA 101
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305.1
25 BB 205

Kenneth P. Montgomery
Regional Attorney
Chicago 54, Illinois

Harold C. Nystrom
Chief, Wage-Hour Section

SOL:AS:EM

March 19, 1946

Standard Oil Employees' Association, Inc.
1114 West 119th Street
Whiting, Indiana

This will reply to your memorandum of October 12, 1945, concerning the question as to whether time spent by employees who are members of the subject union is to be deemed hours worked under the Act in the circumstances you set forth.

It appears that when an employee is away from work for one or more days of his scheduled work period for any reason other than vacation, upon his return to work the foreman may order him to obtain a certificate of ability to work from the company doctor at the hospital apparently located on company premises. The employee is not permitted to resume work until such certificate is obtained. The company instituted the rule on the ground that it protects the other employees from being infected by a contagious disease which the absent employee may have incurred during his absence. The time spent by the employee in obtaining this certificate is not paid for by the company. Because of the likelihood that the foreman will require a certificate, employees often report to the hospital prior to their scheduled starting time in the hope that their examination can be completed and they can obtain a certificate before their regular shift commences, thus avoiding possible loss of pay. However, their waiting time at the hospital often cuts into their working time, and they are not paid for time so lost from work.

You request confirmation of your opinion that the subject union is correct in asserting that time spent by the employee during his working hours in obtaining the certificate should be treated as hours worked.

As you know, compensable time under the Act includes all time during which an employee is required to be on duty or to be on the employer's premises or to be at a prescribed workplace, and all time during which an employee is suffered or permitted to work, whether or not he is required to do so (Interpretative Bulletin No. 13, paragraph 2).

Your memorandum refers to our opinions concerning the type of case where an employee is injured at his work or becomes ill during his working hours (citing, in particular, Field Operations Bulletin, Volume V, No. 6, page 6, and Legal Field Letter No. 101, page 22), and suggests that these opinions may be a basis for the conclusion that the time in question is to be considered hours worked under the Act. However, it does not seem to me that the opinions

to which you refer are applicable to the facts submitted, since it appears that the employees in the situation you present are neither injured at work nor become ill during working hours. An opinion which may be more relevant to the instant case is one in which the Divisions took the position that time spent by newly-employed persons in being fingerprinted and photographed at the identification bureau of the employer before entering upon their duties should be considered as compensable time on the ground that it was time during which an employee's freedom of movement is restricted for the purpose of serving the employer and time during which the employee was subject to the employer's direction and control. Similarly, the Brotherhood of Railroad Trainmen was advised that railroad employees who are required to spend time in taking physical examinations which must be passed in order to continue in service should have such time counted as "hours worked" for purposes of the Act. It would seem that on similar principles the time which the employees in the instant case are required to spend in order to obtain the certificate of ability to resume work should be considered hours worked under the Act.

Thus, the employee does not obtain the certificate for his own convenience but is ordered to do so by the foreman. Nor is such employee permitted to obtain the certificate on his own time from his private physician, but he is required by the employer to obtain the certificate during working hours from the company doctor at the company hospital apparently located on the company's premises. The length of time which the employee is required to spend in obtaining the certificate in the particular manner required by the employer would appear to depend upon conditions within the control of the employer, such as the availability of the company doctor for the issuance of the certificate, the type of examination required by the employer, etc. Moreover, the spending of time during working hours in obtaining the certificate is the result of a specific requirement of the employer in order to serve the employer's interests, namely, to protect the efficiency of production by guarding against the spread of contagious disease among employees. Under these facts, I am of the opinion that time spent by the employee during his working hours in obtaining the certificate required by the foreman should be treated as hours worked under the Act (Armour & Co. v. Wantock, 323 U.S. 126; Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 509, affirming 137 F. (2d) 176 (C.C.A. 5); Jewell Ridge Coal Corp. United Mine Workers of America, 8 Wage Hour Rept. 505 (U.S. Sup. Ct. 1945), affirming 7 Wage Hour Rept. 986 (C.C.A. 4 1944); and Walling v. Frank, 8 Wage Hour Rept. 941 (W.D. Ky. 1945)).

Since compliance by the employer with the Act's requirement that the time so spent be compensated as hours worked will undoubtedly result in the abandonment of the employees' practice of obtaining certificates in anticipation of the foreman's probable requirements, it would appear to be unnecessary to render an opinion as to whether time spent in obtaining certificates not previously demanded by the foreman constitutes hours worked under the Act.

21 AC 409.4110 21 BJ 602.1
21 AC 408.2 21 BJ 603
21 BJ 602 21 BJ 602.3

George A. Downing
Regional Attorney
Atlanta 3, Georgia

SOL:MWP:VOW:MIS

Harold C. Nystrom
Chief, Wage-Hour Section

March 19, 1946

Economy Electric Company
33 West Broad Street
Greenville, South Carolina

This will reply to your memorandum of November 5, 1945, with which you submitted a copy of an opinion sent by you to Regional Director Johnson concerning the subject company. You request that this opinion be reviewed and that you be advised if we do not concur.

From your memorandum it appears that the subject company is a general electrical contractor and that some of its employees are engaged in some weeks in repairing the electrical systems of retail stores, such as Sears-Roebuck and Company, in which goods are ordered, received and unloaded directly from out-of-State points. Your memorandum does not state whether any goods are shipped by the store outside the State (in which event, of course, employees of the store might be engaged in the production of goods for commerce).

In your memorandum, you stated that employees engaged in repairing the electrical system of a building in which interstate commerce is carried on are within the coverage of the Act. In this connection, you cited Legal Field Letter No. 74 as well as releases R-1789 and A-14 and the Roland Electrical Company case. On the basis of the limited facts presented in your memorandum, it would appear that your conclusion is somewhat broader than the position presently taken by these Divisions. As you know, the courts have indicated that the definition of engagement in commerce does not include all employees who are engaged in activities "necessary to" or "affecting" the carrying on of such commerce. Coverage on commerce grounds is, rather, limited to those employees who are actually engaged in the movement of commerce or whose services are so closely related thereto as to be, for all practical purposes, a part thereof (McLeod v. Threlkeld, 319 U.S. 491; Overstreet v. North Shore Corp., 318 U.S. 125). A more recent decision dealing with coverage on commerce grounds holds that "the cessation of services" which would "cause an interruption or interference with the free movement of commerce is ordinarily regarded as an essential or indispensable part thereof" (New Mexico Public Service Co. v. Engel, 145 F. (2d) 636). See, also, the recent decision of the Circuit Court of Appeals for the Eighth Circuit in the case of Republic Pictures Corp. v. Kappler, 8 Wage Hour Rept. 1101, wherein it is stated that in determining whether an employee is engaged in commerce "the practical test to be applied is whether, without the particular service, interstate commerce would be impeded or abated." (Underscoring supplied.) As you know, this decision was affirmed by the United States Supreme Court on February 4, 1946, 9 Wage Hour Rept. 119.

In accordance with the above decisions, it is my opinion that employees engaged in electrical repair work relating to the general

(04444)

operation of a retail store (some of whose employees may be covered as being engaged in the ordering, receipt, and unloading of extra-State goods) would not ordinarily be engaged in commerce or in an activity directly related thereto. However, if, on the basis of all of the facts available to you, it appears that the activities of the repairmen are directly and immediately connected with light, power and elevator services facilitating the ordering, receipt and unloading of the extra-State goods in the retail store, the employees would appear to be engaged in interstate commerce. See, in this connection, Keen v. Mid-Continent Petroleum Co., 8 Wage Hour Rept. 1029. In other words, unless the facts demonstrate that the discontinuance of the repair service would result in impediing or abating the continued receipt of goods from outside of the State, it would be difficult to support the conclusion expressed in your memorandum with regard to the repair activities carried on in the retail store. In this connection, see the Administrator's brief before the Circuit Court of Appeals for the Seventh Circuit in Walling v. Goldblatt at page 22, in which the following language appears:

> The courts have uniformly held that: "All employees who rendered services in connection with incoming goods (whether in the actual physical handling of the goods or in the compilation of records or other operations pertaining to incoming goods) are subject to the provisions of the Act." Fleming v. American Stores Co., 5 Wage Hour Rept. 31, 38 (E.D. Pa. 1941); Fleming v. Alterman, 38 F. Supp. 94 (N.D. Ga. 1941); Super-Cold Southwest Co. v. McBride, 124 F. (2d) 90 (C.C.A. 5th, 1941); Jax Beer Co. v. Redfern, 124 F. (2d) 172 (C.C.A. 5th, 1941); Drake v. Hirsch, 40 F. Supp. 290 (N.D. Ga. 1941); Owin v. Liquid Carbonic Corp., 5 Wage Hour Rept. 69 (S.D. Tex. 1941); Klotz v. Ippolito, 40 F. Supp. 422 (S.D. Tex. 1941); Cline v. Super-Cold Southwest Co., 4 Wage Hour Rept. 583 (N.D. Tex. 1941); Lewis v. Nailling, 36 F. Supp. 187 (W.D. Tenn. 1940); Eddings v. Southern Dairies, 5 Wage Hour Rept. 87 (1942).

To the extent that they may be contrary to the views herein expressed, the principles of Legal Field Letter No. 74 must be deemed to be superseded by the specific limitations set forth herein.

You further state that employees thus engaged (assuming they are covered) for an entire workweek in such a retail establishment would be exempt under section 13(a)(2). You state that you see no reason why these employees should not be in the same category as traveling auditors, manufacturers, demonstrators, display window arrangers, sales instructors, etc. The position stated in your letter is also in accord with the position of the Divisions. Thus, in a memorandum from Livengood to Worrell, dated August 29, 1942, concerning the firm of Horwath and Horwath, it was stated that food cost accountants employed by an independent accounting firm are exempt in any week in which they work exclusively in an exempt hotel or restaurant. Further, in a letter to Jesse Bay Robinson, attorney for the McCall Corporation, it was stated that stylists employed

by the McCall Corporation to put on fashion shows, etc., in retail stores may qualify for the section 13(a)(2) exemption. Inspection Field Letter No. 48, revised, contains the statement that the 13(a)(2) exemption includes maintenance and repair men employed solely for the purpose of maintaining and repairing equipment in the retail stores when such employees are paid by the retail stores. See, also, 2 Wage-Hour Code, 4K55, footnote 559. In a memorandum dated October 18, 1943, from Walling to King, it is stated that the proviso requiring that employees be "paid by the retail store" in order to qualify for the 13(a)(2) exemption, has been superseded by paragraph 38 of the new Interpretative Bulletin No. 6.

I further agree with your discussion of the second question in your memorandum as to the application of the Callus case to employees repairing electrical systems of an office building housing a miscellany of tenants, some of whom are engaged in interstate commerce.

I have assumed, of course, in discussing the questions presented by you, that the commerce carried on in the retail stores and office building is regular and not sporadic in nature.

(04444)

AIR MAIL

26 CC 26 CE 301
26 BB 26 CB 102
26 CD 501 26 CD 601
26 CD 701

Dorothy M. Williams, Regional Attorney
San Francisco, California

SOL:ERG:VOW:YS

Harold C. Nystrom
Chief, Wage-Hour Section

March 29, 1946

Regular Rate of Pay - Los Angeles Warehousemen's Assn. and General Warehousemen's Union, Local No. 598

This will reply to your recent memorandum in which you request my opinion as to whether the proposed provisions of a labor agreement, which is presently being negotiated between the above association and union, constitute a violation of section 7 of the Act.

You state that the problem was presented to you in a letter from the law firm of Bailey & Poe, attorneys for the above-mentioned association, as follows:

> Assuming that the present hourly straight time rate of pay is 90¢, it is proposed to increase that rate to $1.00, subject to the conditions hereinafter stated. The regular workweek would be provided as 6 days of 8 hours each, making a total of 48 hours. Time and one-half would be paid for all hours worked in excess of 40. If the employer so desires, he may reduce the workweek to 44 hours and in such event, the hourly straight time rate of pay would be increased to $1.05. Furthermore, if the employer so elects, he may reduce the workweek to 40 hours in which case the rate of pay would be increased to a $1.10.

This outline of the proposed plan has been amplified through conferences with the labor representatives which reveal the exact mechanics and practical effect of the agreement. On the basis of information obtained from such conferences, you state:

> If an employee works 40 hours a week, he will be paid $1.10 an hour for each hour worked, or a total of $44. If the employee, however, works 43 hours, he will be paid $1.05 an hour for each hour worked, plus an additional half-time, or 52½ cents for each of the three hours worked over 40. If the employee works over 44 hours, he will be paid $1 for each hour worked, plus an additional 50 cents for each hour worked over 40. In other words, there is no guaranteed compensation or hours of work, the only guarantee being that the regular rate will be $1.10 per hour for workweeks of 40 hours or less, $1.05 per hour for workweeks between 40 and 44 hours, and $1 per hour for workweeks in excess of 44 hours.

The association's attorneys have now inquired:

> * * * If such provisions were incorporated in a contract, leaving the determination of the workweek to the employer and permitting fluctuation from week to week, would the lower straight

time rates specified for the 44 and 48-hour workweeks be recognized in the application of section 7(a), in the face of the higher straight time rate payable for a 40-hour week? The question may be stated generally as follows: It is permissible to have various regular rates of pay dependent upon the length of the workweek, when the determination of the length of the workweek rests solely with the employer? /Underscoring supplied./

It is stated that the purpose of this proposal is to provide "a mutually agreeable wage structure for application during the next year while the warehouses are accomplishing a gradual reduction in their regular workweek." The plan is, therefore, designed to offset in part the decrease in "take home" pay resulting from the loss of overtime compensation.

As you know, the Act does not prohibit parties from entering into collective contracts setting rates of pay, so long as such rates are bona fide, are the actual rates at which the employees are employed, and there is no effort made to evade the overtime requirements of the Act. See IV Wage Hour Code, 803. Thus, if as a part of a plan for a bona fide reduction in the number of hours normally worked in the workweek, a collective bargaining agreement sets a bona fide hourly rate of $1 for a warehouse on a workweek of more than 44 hours, a bona fide hourly rate of $1.05 for a warehouse when on a workweek of 41 to 44 hours and a bona fide hourly rate of $1.10 in the event the workweek is reduced to 40 hours or less, and there is no effort made to evade the overtime requirements of the Act, the Act would not be deemed to require the payment of overtime on the basis of the hourly rate of $1.10 (or $1.05) unless the workweek is reduced to 40 hours (or 44, as the case may be) in accordance with the contract. This assumes, of course, that the employer in question will operate for a substantial period of time on the workweek schedule for which the particular rate is fixed and will not change his weekly schedule of hours from week to week, except where such fluctuations in weekly hours occur in a constantly and progressively downward pattern.

Whether or not the proposed contract will meet these tests, is, as in the case of pseudo-Belo-type contracts, a question which can ultimately be settled only by the courts and then only on the basis of all the available evidence including, among other things, the circumstances surrounding the adoption of the contract, the average weekly earnings of the employees prior to the new arrangement, the actual operation of the plan, the number of hours actually worked each week by the employees in question and the degree, frequency and nature of fluctuation in hours of employment from week to week.

The proposed plan, in the subject case, does not appear to contemplate that workweeks of 48, 44 or 40 hours will operate over substantial periods of time. Thus, counsel for the association states that it is contemplated that the determination of the workweek is to be left solely to the employer and that the contract is intended to permit "fluctuation from week to week." Furthermore, it is nowhere indicated whether such fluctuations in the workweek as may occur will occur in a constantly downward pattern so as to achieve a progressive reduction in weekly hours of employment from 48 to 40. If such fluctuations in the weekly schedules as may occur from week to week may be either upward or downward at the

sole discretion of the employer, the proposed plan, in my opinion, may well be regarded as manipulative and evasive of section 7's requirements. See in this connection Legal Field Letter No. 22, page 33, wherein it was stated that the payment to employees of a lower rate of pay in a long workweek than that paid employees in a short workweek indicates that the higher rate of pay is the regular rate of pay at which the employees are employed. See, also, in this connection, the Supreme Court's decisions in Walling v. Helmerich & Payne, 323 U.S. 37; Walling v. Harnischfeger Corp., 325 U.S. 427; Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 119, and U.S. v. Rosenwasser, 8 Wage Hour Rept. 35.

As the court stated in Walling v. Helmerich & Payne, supra:

> It is no answer that the artificial regular rate was a product of contract or that it was in excess of the statutory minimum. The Act clearly contemplates the setting of the regular rate in a bona fide manner through wage negotiations between employer and employee * * *. But this freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes * * *. Any other conclusion * * * would exalt ingenuity over reality and would open the door to insidious disregard of the rights protected by the Act.

Cf. T.C.I. v. Muscoda Local No. 133, 321 U.S. 590 and Jewell Ridge Corp. v. United Mine Workers, 325 U. S. 161.

You state that the very statement of facts, i.e., that the hourly rate decreases as the number of hours increases, "suggests that the arrangement is violative of the spirit of the Act," but you are unable to distinguish the instant case from that approved by the Supreme Court in the Missel case. In that case, however, the employees were paid a fixed weekly wage for a fluctuating workweek, whereas here the employees are paid on an hourly rate basis. These employees are not paid in accordance with the method set forth in paragraphs 10 and 12 of Interpretative Bulletin No. 4, i.e., at a fixed salary for whatever number of hours may be worked in a week. On the contrary, the employees receive none of the comparable benefits inherent in a fluctuating workweek for salaried employees since they will be paid, in short workweeks, only at the rate of $1.10 an hour for the actual number of hours worked.

Furthermore, the proposed plan involved here appears distinguishable from the one approved in Legal Field Letter No. 87, page 4. In that case, the Divisions' approval was given to the establishment of a plan whereby an employer provided by prior agreement for a lower specific rate of pay for the busy season when longer hours were worked, than during the slack season when fewer hours were worked, even though "the purpose and effect of the two rates is to maintain a constant wage for the employees." You will note, however, that under the approved plan, the specified rates remained in effect for substantial periods of time, were established by prior agreement, and were regarded as bona fide since they represented the rates at which the employees were actually paid at all times during each of the two periods. See also IV Wage Hour Code 803, footnote 26 stating that:

> There is no objection to an employee's receiving different rates of pay in different seasons, provided the rates are in fact the regular rates at which he is employed and overtime is actually based upon them.

21 BB 302.42
BF 303.32
BI 303.32
27 BB 101
27 EA

Earl Street, Regional Attorney
Dallas, Texas

Donald M. Murtha, Assistant Solicitor

SOL:EHA:HD

Southwestern Peanut Shellers Association

April 12, 1946

This will reply to your memorandum of March 22, 1946 in which you asked my opinion as to whether subsistence allowances paid under Public Law 346 to veterans employed by members of the subject association for training as buyers may be added to the salaries paid by the employer in order to determine whether the employees are receiving at least $200 per month as required by section 541.2 of the Regulations of the Administrator, defining the exemption provided by section 13(a)(1) of the Fair Labor Standards Act.

We have previously held that the subsistence allowance granted a veteran is not "wages" for the minimum wage provisions of the Act. See Field Operations Bulletin, Vol. XIV, No. 10, p. 709.

As you know, section 541.2 of the Regulations states that the exemption shall be applicable to any employee who, in addition to other criteria set forth therein, "* * * is compensated for his services on a salary or fee basis at a rate not less than $200 per month (exclusive of board, lodging and other facilities)."

It is, I think, apparent from the language of the statute that the subsistence allowances provided by Public Law 346 for payment to veterans are not to be paid as compensation for services rendered to an employer nor are they intended as subsidy payments for such employer. The declared purpose of the statute is "To provide Federal Government aid for the readjustment in civilian life of returning World War II veterans" and it can be assumed that the aid provided by the section dealing with education and training is intended to enable returning veterans to resume interrupted or delayed education or training by the payment of living expenses during the training periods set forth in the statute.

In discussing the merits of the inclusion of the salary requirement in the Regulations, Part 541, Mr. Stein, in his report preliminary to the redefinition of the words "executive, administrative, * * *" states at page 19, "Indeed, if an employer states that a particular employee is of sufficient importance to his firm to be classified as an 'executive' employee and thereby exempt from the protection of the Act, the best single test of the employer's good faith in attributing importance to the employee's services is the amount he pays for them. The reasonableness and soundness of this conclusion is substantiated by the record." Again, on page 26 it is stated in recommending a salary requirement for administrative employees, "However, it may be reiterated here that a salary requirement constitutes the best and most easily applied test of the employer's good faith in claiming that the person whose exemption is desired is actually of such importance to the firm that he is properly describable as an employee employed in a bona fide administrative capacity."

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It is clear from these statements that the regulations contemplated that the salary provided in the regulations would be paid by or on behalf of the employer. Since the subsistence payments in question are not paid by or on behalf of the employer they should, therefore, be treated no differently than other income which an employee may receive from sources unconnected with his employer. Accordingly, it is my opinion that such subsistence allowance payments are not compensation for services and for that reason may not be included in computing the salary paid to the employee in determining whether the employment meets the salary requirements of the executive and administrative exemptions.

(04444)

Henry H. Sills, Esquire
Butzel, Levin & Winston
National Bank Building
Detroit 26, Michigan

SOL:AS:JL:FH

February 20, 1946

Dear Mr. Sills:

Reference is made to your letter dated February 4, 1946, requesting a ruling as to the effect of a proposed contract of employment on the computation of overtime compensation under the Fair Labor Standards Act.

It appears that the two highly skilled employees in question are now employed at rates of $1.75 per hour and $2.10 per hour respectively, based on a 40-hour week, with time and one-half for hours in excess of 40. These men are paid weekly. They work a varying number of hours weekly ranging from between 70 and 100 hours a week in peak periods to about 40 hours a week in slack periods. Last year, the employee named Claramunt, whose regular rate was $1.75 per hour, earned the total sum of $2,149.09 during the period from May 17 to December 31. The other employee, named Weaver, whose regular rate was $2.10 per hour, earned $3,862.48 for the full year. You state that:

> The contract will provide in the case of Claramunt that he is employed for a term commencing January 1, 1946, and ending December 31, 1953. His wage rate will be the same as the present rate, that is $1.75 per hour. If, however, the aggregate amount of his earnings in any year shall be less than $7,000 in the year 1946, $8,000 in the year 1947, $9,000 in the year 1948, and $10,000 in the year 1949 and thereafter, the difference between those figures and the amount of his earnings will be paid to him as a guaranteed annual wage. If his earnings are more than the guaranteed annual amount he will retain the amount of his earnings. It is not anticipated that such a situation will arise. /Underscoring supplied./
>
> It is not contemplated that the conditions of his employment will vary substantially from those presently prevailing. He will put in such time as the needs of the business require, but it is not contemplated that it will exceed, to any great extent, the time which he has put in in the past. /Underscoring supplied./
>
> In the case of Weaver the contract will be substantially the same except that its term will be five years ending at the close of the year 1950. His wage rate will be $2.10 per hour, and time and a half for overtime, with a guaranteed annual wage during the first year of $6,000, increasing $1,000 annually to $10,000 in the last year.

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You inquire whether the Divisions "would recognize the contracts as drafted" or whether the Divisions "might take the position that the contract fixed a new rate for time and overtime." I assume that both employees are covered by the Fair Labor Standards Act and do not qualify for any of the exemptions provided therein, such as section 13(a)(1).

The Divisions do not, as a rule, pass upon the validity of particular types of overtime payment plans submitted to them for approval since such questions can be determined ultimately only by the courts on the basis of all the available evidence, including, among other things, the circumstances surrounding the adoption of the contract, the earnings of the employees prior to the new arrangement, the actual operation of the plan, and the number of hours actually worked each week by the employees in question. However, as you are probably aware, it is the position of the Divisions, based on a number of court decisions, including those of the United States Supreme Court, that overtime compensation under section 7 of the Act must be paid upon the basis of the employee's true rate of pay and not upon the basis of an artificial or fictitious rate.

From the facts submitted, it is my opinion that the compensation of the employees in question will actually be determined by the annual guaranteed salary and not by the so-called hourly "wage rate" specified in the proposed contract. The hourly rate specified in the contract does not appear to have any real significance in determining the employees' earnings. Although the number of hours to be worked will not, apparently, exceed to any great extent the number worked in the past, the guaranteed salary will greatly exceed the amount that would be due the employees on an hourly rate basis. Thus, both employees will be receiving during 1946 approximately twice as much as they have been receiving in the past at the hourly rates, for substantially the same number of hours. This disparity is even greater in the succeeding years. It seems clear, therefore, that there is no reasonable relationship between the employee's actual earnings, based on the guaranteed salary, and the hourly rate mentioned in the contract.

As you may know, in the case of Walling v. Helmerich & Payne, 323 U.S. 37, reversing 138 F.(2d) 705 (C.C.A. 10), affirming 6 Wage Hour Rept. 159 (N.D.Okla. 1942), the Supreme Court of the United States held that the term "regular rate" means "the hourly rate actually paid" for the normal non-overtime workweek and that an employee's "regular rate" must be based upon "wages actually received." Furthermore, said the Court, the fact that the artificial regular rate is a product of contract or exceeds the statutory minimum is not controlling, since "freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes." To like effect, see Walling v. Youngerman-Reynolds Hardwood Co., Inc., 325 U.S. 419; Walling v. Harnischfeger Corp. 326 U.S. 427; Walling v. Uhlmann Grain Co., 151 F.(2d) 261 (C.C.A. 7); Walling v. Alaska Pacific Consolidated Mining Co., 8 Wage Hour Rept. 1227 (C.C.A. 9); Watkins v. Hudson Coal Co., 151 F.(2d) 311; Carleton Screw Products Co. v. Fleming, 126 F.(2d) 537; Adams v. Union Dime Savings Bank, and Greenberg v. Arsenal Building Corp., 144 F.(2d) 290 and 292 (C.C.A. 2).

For the foregoing reasons, I am of the opinion that the regular rate of the employees under the plan in question is to be determined by the guaranteed annual compensation rather than by the hourly "wage rate" specified in the contract. In order to obtain the regular rate upon which overtime due under the Act must be computed in such case, the guaranteed annual salary in any given year under the contract must be divided by 52 and the average weekly wage thus obtained must be divided by the number of hours actually worked in the particular workweek in order to ascertain the regular rate of pay for that workweek. Such regular rate will, of course, fluctuate from week to week, since you indicate that the employees work a fluctuating number of hours in different workweeks.

I trust that the above information will be of assistance to you. If you have any further questions, do not hesitate to communicate with me. However, you may find it more convenient to communicate with the Divisions' branch office located at 1216 Francis Palms Building, 2111 Woodward Avenue, Detroit 1, Michigan.

Very truly yours,

Thacher Winslow
Deputy Administrator

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Mr. Harold Orlinsky
Associate Editor
Coordinators Corporation
11 South La Salle Street
Chicago, Illinois

SOL:IJB:CTN

March 26, 1946

Dear Mr. Orlinsky:

This will reply to your recent letter in which you inquire whether it would be "unlawful for a distributor of a finished product to ship it in interstate commerce under the 'hot goods' clause, (sec. 15(a)(1)) of the Fair Labor Standards Act, by reason of the fact that the men employed by the distributor in the handling of the product for shipment were not paid in accordance with the Act."

You cite, by way of illustration, a situation where a manufacturer who produces goods in compliance with the Act sells them to a distributor who pays substandard wages to shipping clerks handling the shipment of the production to wholesalers and retailers. You ask whether the distributor can be barred from shipping the product in interstate commerce under the "hot goods" clause and whether the handling of the finished product by men employed under substandard conditions makes it "hot goods." In this connection, you refer to section 3(j) of the Act which defines production, and inquire whether the "handling" included within the definition of production is limited to handling "in the process of production" or whether it extends to handling of finished products as well.

It is the position of the Divisions that the term "handling" as used in the definition of production in section 3(j) of the Act is not restricted to any particular activities involved in the manufacturing, readying or distribution of goods for interstate commerce. In addition to "handling," the definition of production also includes "transporting or in any other manner working on such goods * * * in any State." Read together with section 3(i) of the Act, which does not limit the definition of "goods" to partially processed materials, it is clear that the term production as used in the Act, includes the handling or transportation of goods, whether or not in a finished form. See, in this connection, Western Union Telegraph Co. v. Lenroot, 323 U.S. 490, wherein the Supreme Court ruled that production includes "every kind of incidental operation preparatory to putting goods into the stream of commerce," and "every step in putting the subject of commerce in a state to enter commerce." See, also, Walling v. Comet Carriers, 151 F.(2d) 107; Rockton & Rion R.R. v. Walling, 146 F.(2d) 111, cert. den. 324 U.S. 880; and Griffin Cartage Co. v. Walling, 9 Wage Hour Rept. 161, wherein the transportation of goods prior to their shipment in interstate commerce was held to constitute production. Your attention is also directed to Phillips v. Star Overall Dry Cleaning Laundry, 149 F.(2d) 416, in which the court held that the handling of finished goods owned by the ultimate consumer and temporarily returned from his possession to the stream of commerce constitutes production within the meaning of the Act.

It is my opinion, therefore, that employees of a distributor handling goods preparatory to shipment in interstate commerce would be engaged in the production of goods for commerce within the meaning of the Act, and that goods so handled under conditions violative of sections 6

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and 7 of the Act would be subject to the prohibitions contained in section 15(a)(1) of the Act.

I trust this answers your problem. If you have any further question in the matter, I suggest you may find it more convenient to communicate with the Divisions' regional office located at 1200 Merchandise Mart, 222 West North Bank Drive, Chicago 54, Illinois.

Very truly yours,

Thacher Winslow
Deputy Administrator

26 CD 302.1 26 CD 402.1
302.22 702
Washington 25, D. C. 302.23 701
601 27 DA 101
26 AB 24 AC 101

Robert C. Finley, Esquire
431 White Henry Stuart Building
Seattle, Washington

SOL:JFS:HD

April 15, 1946

Dear Mr. Finley:

This is in regard to your recent letter in reply to my letter of February 8, 1946. Therein you state that the Divisions' positions are inconsistent in determining wages due under the Fair Labor Standards Act for hourly rate and piece workers where unrecorded working time is involved. Also you state that

> "The Division has advised employers in this area that their failure to compensate hourly rate workers for make-ready time constituted violation of the Fair Labor Standards Act, and that employers should pay straight time for any uncompensated make-ready time less than forty hours per week, and time and one-half for any uncompensated make-ready time in excess of forty hours per week."

On the other hand, you state that "The position of the Wage and Hour Division with respect to make-ready time of piece rate workers has been just the opposite."

In determining wages due under the Act for hourly rate and piece workers where unrecorded working time is involved, the same principles of law and fact are applied by the Divisions. First, take the case where an employee's recorded and unrecorded hours of work are less than 40 per week. In either case, if the quotient of the total hours (recorded and unrecorded) divided into total earnings (whether hourly rate or piece rate) equals 40 cents per hour, it is the Divisions' position that no violation of the Act has occurred. What the employee may be due under a common law action for the unrecorded hours is a matter over which the Divisions have no jurisdiction.

Next, take the case where an employee's recorded and unrecorded hours of work exceed 40 per week and under the Act's requirements he must be paid overtime at a rate not less than one and one-half times his regular rate of pay for all hours in excess of 40. Before an employee can be said to be paid the full amount of overtime compensation required by the Act he first must be paid his straight-time compensation in full for all hours worked, both recorded and unrecorded, and whether occurring before or after the fortieth hour per week. Then he must be paid an extra one-half his regular rate of pay for all hours in excess of 40, both recorded and unrecorded.

As you know, the regular rate of pay for a piece worker is computed by dividing his total weekly piecework earnings by the number of weekly hours for which such amount was earned. Cf. Walling v. Youngerman-Reynolds Hardwood Co., 324 U. S. 827. This raises a question of fact--what did the parties intend under the contract of employment? If they intended that the piece rate earnings would constitute full payment of

straight time for all hours worked--both recorded and unrecorded--then no additional straight time is due and the regular rate is determined by dividing the total weekly hours of work--both recorded and unrecorded--into total piece rate earnings. On the other hand, if the parties intended that the piece rate earnings would constitute full payment of straight time only for the recorded hours of work, then the regular rate is determined by dividing the recorded hours of work into total piece rate earnings and such rate must be paid for all straight-time hours, recorded and unrecorded, in addition to the extra half time for all recorded and unrecorded hours in excess of 40.

Similarly, when an employee is paid on the basis of an hourly rate and works unrecorded hours, "His compensation may cover both waiting and task, or only performance of the task itself." Skidmore v. Swift & Co., 323 U. S. 134. If under the contract of employment the parties intended the weekly earnings, though expressed and calculated in terms of an hourly rate for recorded hours, would nevertheless constitute full payment of straight time for all hours worked--both recorded and unrecorded--then no additional straight time is due and the regular rate is determined by dividing the total weekly hours of work--both recorded and unrecorded--into total weekly earnings. On the other hand, if the parties intended that the weekly earnings, expressed and calculated in terms of an hourly rate for recorded hours, would constitute full payment of straight time only for the recorded hours of work, then the regular rate is the stipulated hourly rate agreed to by the parties and such rate must be paid as straight time for all hours worked, recorded and unrecorded, in addition to the extra half time for all recorded and unrecorded hours in excess of 40.

Apparently your difficulty concerns resolving the question of fact whether the total weekly earnings, expressed and calculated in terms of an hourly rate for recorded hours or in terms of a piece rate for the pieces produced, are intended by the parties under the contract of employment to constitute full payment of straight time for all hours worked--both recorded and unrecorded--or only for the recorded hours worked. When an employee is hired on the basis of a stipulated and agreed hourly rate and his earnings are calculated on the basis of such hourly rate for his recorded hours of work, it is considerable evidence that his total hourly earnings constitute full payment of straight time only for his recorded hours of work and that the parties intended his regular rate to be the stipulated and agreed hourly rate.

On the other hand, when an employee is hired on the basis of a piece rate, it is more difficult to determine whether his piece rate earnings constitute full payment of straight time for all recorded and unrecorded hours necessary to perform the task or only full payment of straight time for the recorded productive hours. However, it would seem prima facie that when the parties do not consider unrecorded time of piece workers as constituting hours worked under the Act, the effect of the employment contract is that the hours of employment per week which the employer intends to exact from the employees in exchange for their piece work earnings are only the recorded hours and the employees intend their piece work earnings to pay them in full for straight time only for the recorded hours.

As is evident from the foregoing discussion, the Divisions' positions are not inconsistent in determining wages due under the Act for hourly rate and piece workers where unrecorded working time is involved. I am also taking steps to see that Mr. Neubert is fully informed as to the implications of the position taken in this letter as well as my previous letter to you.

Very truly yours,

L. Metcalfe Walling
Administrator