UNITED STATES DEPARTMENT OF LABOR
Office of the Solicitor
July 31, 1946

Legal Field Letter
No. 109

## Attached Opinions

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

### MEMORANDA

| Date | Page | From | To | Subject |
|---|---|---|---|---|
| 5/3/46 | 1-4 | Harold C. Nystrom (AS:ERG) | George H. Foley | Joseph Martinelli & Co. Springfield, Mass. Application of sectic 13(b)(1) exemption to various trips made by driver employed by wholesaler of fresh fruits and vegetables<br>23 CB 101 23 CB 204.<br>203.1 401<br>204.2 |
| 5/6/46 | 5-7 | Harold C. Nystrom (ERG) | Lemuel H. Davis | Federal Lithograph Company Washington, D. C. Status under section 7 of FLSA (and Walsh-Healey Act) of premium wage payments to (1) regular night-shift employees and (2) regular day-shift employees working nights.<br>26 CD 601 26 CD 402.524<br>26 CC .525<br>26 CD 402.521 |
| 5/14/46 | 8-9 | Harold C. Nystrom (JL) | Raymond G. Garceau | Constitutional privilege against self-incrimination and illegal search and seizure as applied to FLSA records produced voluntarily or under compulsion.<br>212 CA 101<br>212 D<br>211 AA |

(04691)

| Date | Page | From | To | Subject |
|---|---|---|---|---|
| 5/24/46 | 10-12 | Harold C. Nystrom (ERG) | A. A. Caghan | Bay de Noquet Co.<br>Nahma, Michigan<br>Coverage and exemption of hotel, general store, hospital, club house and rooming and boarding house located in company town.<br>21AC 205.10<br>205.250<br>205.251<br>205.27<br>414.95<br>21AC 509<br>409.521<br>409.4211<br>21BJ 403.3<br>403.24331<br>403.1 |
| 5/27/46 | 13-14 | Harold C. Nystrom (NCH) | Dorothy M. Williams | No position expressed re coverage of recreational employees in Hawaiian sugar industry.<br>21AC 205.10 21AC 205.27<br>205.250 404.95<br>205.251 509 |
| 6/12/46 | 15 | Donald M. Murtha (JFS) | Harold C. Nystrom | Bert Rice Trucking Service<br>Chase, Kansas<br>Off-highway driving held exempt under 13(b)(1) where performed as part of a single continuous interstate trip partly on public highways and partly on private ways.<br>23CB 203.21 23CB 203.22<br>201 401<br>301.1 204.3 |
| 7/8/46 | 16 | Harold C. Nystrom (VOW) | All Regional Attorneys | The Hearst Corporation<br>Albany Times Union<br>Dept.<br>Albany, New York<br>Applicability of local retailing capacity exemption to newspaper |

| Date | Page | From | To | Subject |
|---|---|---|---|---|
| | | | | circulation supervisors.<br>21AC 411.1 21BK 102.33<br>21BK 101.0 102.34<br>102.31 |
| 2/28/46 | 17-19 | Donald M. Murtha (SSB) | Harold C. Nystrom | The Hearst Corporation<br>Albany Times Union<br>Dept.<br>Albany, New York<br>See memo above to All Regional Attorneys. |
| | | | LETTERS | |
| 4/30/46 | 20-21 | | Mr. K. R. Hancock<br>A.J. Axtell & Company<br>100½ Lincoln Avenue<br>Endicott, New York<br>(EGT) | Application of 13(a)(4) and 13(a)(1) exemptions to pilots and aircraft service employees.<br>21BE 101 21AC 401.6<br>200 21BB 301.34<br>202 |
| 5/10/46 | 22-24 | | Mr. William R. James<br>c/o Ivan G. McDaniel<br>642 Title Insurance Building<br>Los Angeles 13, California<br>(EGT:HCN) | Application of section 13(a)(10), 7(c) and 7(b)(3) exemptions to ice manufacturing carried on by fruit packing firm.<br>21AC 414.8 23CE 205.631<br>21BD 301 23CF 202.221<br>301.7 .231<br>23CE 205.641 .233<br>.643 303.6 |
| 5/31/46 | 25 | | Mr. Sol Jacobson<br>Joseph Kantor & Company<br>261 Fifth Avenue<br>New York, New York<br>(NCH) | Circumstances in which transportation furnished by employer may be a "facility"; status of such transportation as "hours worked."<br>25 BD 202.23<br>27 CC 303.995 |

23 CB 101
23 CB 203.1
204.2
204.3
401

George H. Foley, Regional Attorney
Boston, Massachusetts

Harold C. Nystrom
Chief, Wage-Hour Section

SOL:AS:ERG:YS

Joseph Martinelli & Co.
Springfield, Massachusetts
File No. 20-5295

May 3, 1946

This will reply to your memorandum of July 28, 1945 transmitting memoranda from Regional Director Gleason to you under date of May 21, 1945, Supervising Inspector Masucchi to Regional Supervising Inspector Blake dated May 17, 1945, and Inspector Wason to Supervising Inspector Masucchi dated May 17, 1945, the last of which propounds a series of questions relating to the applicability of the section 13(b)(1) exemption. I regret that the pressure of our duties has delayed an earlier reply to your memorandum.

Inspector Wason's memorandum states that subject company is what is known in the trade as a "car-lot receiver and wholesaler" of fresh fruits and vegetables whose place of business is located in the market district and consists of two small offices, a warehouse with refrigerated storage vault and other storage space and platform. The company operates 3 small trucks and one large covered truck. You request my opinion as to the application of the 13(b)(1) exemption to each of the following activities which I shall consider seriatim:

1. Is driving a truck from the warehouse of the firm to the freight yards, a distance of approximately one-half mile, in order to pick up freight to truck back to the warehouse under ICC jurisdiction. The company purchases all car lots as such and they are inspected at the yards by the company, and where necessary by paid Government inspector, before being accepted and acceptance is made at the yard before the car is unloaded.

In answering this question, you ask that I "disregard the factor of rapidity of turnover which is presumably present in the case of fresh produce." Assuming that such produce comes from outside the State, I am of the opinion that both the outgoing and incoming trips are exempt. The trucking of produce from the freight yards to the warehouse appears to constitute part of a continuous interstate journey of the goods from their out-of-State origin to the warehouse. There would appear to be, therefore, a practical continuity of movement of such goods in commerce within the meaning of the Jacksonville Paper Co. case notwithstanding the fact that such goods may be purchased subject to inspection at the freight yards. Likewise, the driving of the empty truck from the warehouse to the freight yards in order to pick up and deliver the produce to the warehouse, since it appears to be part of one trip and a necessary incident to hauling in interstate commerce, constitutes exempt transportation in interstate commerce. See Legal Field Letters No. 100, pages 6-8; No. 94, page 9; cf. Legal Field Letter No. 97, page 3.



(04691)

2. Is unloading boxes and crates of fruit and produce from the freight car under ICC jurisdiction? Is loading the same onto the truck under ICC jurisdiction? In practice, the two operations are usually simultaneous. The truck is backed right up to the car and one man may take the box up and place it in the truck without moving. Or it may be necessary to walk a short distance either in the car to get the box unloaded or in the truck to place it, or load it. Or one man may hand out the box from the car to a man on the truck, one unloading the car, the other loading the truck.

I again assume that the goods in question have an extrastate origin. It is clear, in response to your first question, that the unloading of goods from the freight car is nonexempt under section 13(b)(1), since it is in no way related to the safety of operation of a motor vehicle. On the other hand, loading interstate goods into a truck is ordinarily exempt, since it is an activity regarded as affecting the safety of operation of motor vehicles. See paragraph 4(a) of revised Interpretative Bulletin No. 9. In the case under consideration, however, it appears that the unloading and loading activities "are usually simultaneous" in actual practice because the truck is backed right up to the freight car. "One man," it is stated, "may take the box up and place it in the truck without moving. Or it may be necessary to walk a short distance either in the car to get the box unloaded or in the truck to place it, or load it." Under such circumstances, it appears that the freight car is utilized as a loading dock or platform; if then, as is likely, the activity of transferring freight from the freight car into the truck is analogous to the picking up of freight at a loading platform and loading it into a truck, such work would appear to constitute exempt loading under section 13(b)(1).

As is pointed out in Legal Field Letters No. 99, pages 15-17, and No. 98, pages 9-10 however, not all "loaders" are necessarily engaged in exempt "loading" within the meaning of section 13(b)(1) as interpreted in revised Interpretative Bulletin No. 9. See, also, the recently decided case of Ispass v. Pyramid Motor Freight Corp., 152 F. (2d) 619 (C.C.A. 2), now pending in the United States Supreme Court. Thus, if in a given situation one employee is engaged in unloading produce from the freight car and placing it on the tailboard of the truck, while another employee is charged with the responsibility for the actual disposition of the goods on the truck, the latter employee would clearly be engaged in exempt activities, whereas the former would be engaged in the performance of nonexempt work.

3. Is driving the truck, loaded, back to the warehouse under ICC?

Yes, if goods have extrastate origin. See answer to question No. 1.

4. It is assumed that unloading the truck under any circumstances is not under ICC as it does not affect safety of operations.



(04691)

Yes. See previous references and citations.

5. The same procedure, except that instead of being brought back to the warehouse, the goods after being loaded on the truck are delivered directly to customers in Massachusetts, without any further steps at the warehouse.

A driver engaged in transporting such produce from the freight yards directly to customers in Massachusetts would be regarded as being engaged in an exempt activity under section 13(b)(1), if, as appears likely, such hauling constitutes part of a single continuous trip in interstate commerce and there exists within the meaning of the Jacksonville Paper Co. decision a practical continuity of movement of goods in commerce from the point of origin to the customers situated in Massachusetts. I assume, of course, that the produce comes from outside the State.

6. The same procedure, except that the goods are delivered directly to customers outside Massachusetts.

The driving would be exempt regardless of whether the goods have an intrastate or extrastate origin, since the deliveries require transportation in interstate commerce to customers located outside the State of Massachusetts.

7. The same procedure, except that the goods are delivered some to customers in Massachusetts and some to customers in Connecticut.

Here again you ask that I "disregard the factor of rapidity of turnover, which is presumably present in the case of fresh produce." The answer to this question is, I believe, contained in Legal Field Letter No. 100, pages 1-3; No. 100; page 6; and Legal Field Letter No. 97, page 3.

8. A truck starts at the warehouse, puts on part of its load there, proceeds to the freight yards, puts on the balance of its load directly from the freight cars, and then delivers locally.

9. A truck starts from the warehouse, drives to the yards, returns to the warehouse with part of load, puts on rest at warehouse from floor or vault, and delivers to customers locally.

You ask that I assume in connection with these questions and questions Nos. 10 and 11 that the goods picked up at the warehouse "had come to rest on or before arrival at the warehouse." I shall also assume that the goods picked up at the freight yards have an extrastate origin. If, as tested by the principles laid down in the Jacksonville Paper Co. case, any portion of the load is moving in interstate commerce after the truck leaves the warehouse, the entire trip (which appears to be a single trip rather than a series of trips) will be regarded as interstate in character and the driving of the truck under such circumstances would be regarded as exempt. See the legal field letter references contained in the answer to question No. 7; cf. answer to question No. 5.



(04691)

10. Truck takes on full load at freight yards, returns to warehouse, unloads part of load, puts on other items from floor and delivers locally.

This situation appears distinguishable from that presented in questions 8 and 9 above in that here the trip to and from the freight yards serves a dual purpose -- (1) to pick up goods at the freight yards for delivery to the warehouse and (2) to pick up goods at the warehouse for delivery locally (along with that portion of the extrastate goods not unloaded at the warehouse.) Under such circumstances, it would seem that the trip from the warehouse to the freight yards and return constitutes one trip while the subsequent movement from the warehouse to local customers probably marks the beginning of a new trip. If so, the driving of the truck from the warehouse to the freight yards and back to the warehouse would appear to be exempt (see answers to questions No. 1 and 3 above) under section 13(b)(1). Whether the driving of the truck from the warehouse to local customers, under the described circumstances, is likewise exempt depends, of course, on whether that portion of the load picked up at the freight yards (other than that which is unloaded at the warehouse) is in interstate commerce under the principles expressed in the Jacksonville Paper Co. case. If such goods are still in commerce, the entire trip - involving the making of local deliveries from a mixed load consisting of goods being transported in commerce and goods which have previously come to rest within the State -- would be deemed exempt under section 13(b)(1). See Legal Field Letter No. 100, pages 1-3, and No. 100, pages 6-8.

11. Truck makes all day trip with principal stops Greenville, Massachusetts & Brattleboro, and White River Junction, Vermont. It is loaded at start with items destined for all three points, as well as other points in Massachusetts. Would the time spent driving to points in Massachusetts or in loading items destined for delivery in Massachusetts be subject to ICC jurisdiction as well as the time actually spent driving outside the State?

See Legal Field Letters No. 100, page 6; No. 100, page 1; and No. 97, page 3.

I am returning herewith the regional correspondence which accompanied your memorandum.

Attachments

26 CD 601
26 CC
26 CD 402.521
.524
.525

Lemuel H. Davis, Regional Attorney
Richmond, Virginia

Harold C. Nystrom
Chief, Wage-Hour Section

SOL:ERG:YS

Federal Lithograph Company
Washington, D. C.
File No. 8-817

May 6, 1946

This will reply to your memorandum of June 13, 1945 transmitting the subject file in which you inquire whether premium compensation paid for night contract work to different groups of subject's employees constitutes extra compensation creditable -- in whole or in part -- against the overtime required to be paid under the Walsh-Healey and Fair Labor Standards Acts. Since your inquiry raised questions analogous to those involved in several cases concerning stevedores (now in litigation), our reply was necessarily delayed pending consideration of this matter both by this office and by the Solicitor's Office in Washington.

The file indicates that beginning with July 1942, subject firm has been reproducing books, pamphlets, orders, releases, etc., for the Government Printing Office. Certain of the Government contracts call for what is known as "overnight" service. The GPO sends up the orders to be printed each night, and the firm is required to have such orders completed by 8 a.m. the following day. The inspector's narrative report in the file states that the employer hand-picked several of his best employees to perform this night work. Some were to work only at night; some were to work on other work during the day and to work for a while at night on these contracts; still others were to alternate on the day shift for a while and then on the night shift for a while. The inspector states that subject firm "set up night rates of approximately 1½ times the regular day rates for most of the employees. Some rates were set up at double time. Some at slightly less than time and one-half others at slightly more than time and one-half. The employer explained that he had set up these rates this way to eliminate bookkeeping as he figures that he was paying all employees working at the night rate at least time and one-half the employee's regular rate of pay -- the day rate."

The inspector considered the company in violation, stating: " * * * these rates were paid for all hours worked regardless of whether or not they were overtime hours and therefore became the employees' regular rate of pay for work performed at night." The file further reveals that some employees' night rates started at 8 p.m., some at 9 p.m., some at 10 p.m., some at 11 p.m. and some at 12 p.m. Certain of the information contained in the file indicates that this premium compensation is paid only for work performed at night on GPO contracts although elsewhere in the file it is suggested that, with respect to regular night-shift employees, premium compensation is paid regardless of the character of the work performed at night.

According to your memorandum of June 13 and Regional Director Cole's memorandum of June 2, 1945, the company's wage differential plan consists of paying employees who have already worked on the day shift



(04691)

double time for all night work performed. Those employees who have not worked on the day shift, but who work on the night shift only, are paid the regular day-shift rate plus an additional half time for all hours worked on the night shift. These rates, you state, are paid "for work performed at night regardless of the number of hours worked during the week." You do not explain the basis on which it appears, as the file indicates, that certain of the day-shift employees receive only an additional half time for work performed at night, although it may be that double time is paid such employees for work on the night shift only when such work is performed on GPO contracts. See, for example, the pay-roll transcriptions of Robert Wathen. See, also, the employee statements of Olin Merchant and Max Guervitz in the file. It is your opinion, and that of Regional Director Cole, that overtime violations of both the Walsh-Healey and Fair Labor Standards Acts have occurred during weeks in which more than 40 hours were worked on one or both shifts and during 24-hour periods where more than 8 hours were worked. Thus, Regional Director Cole points out that if an employee works on a night shift only, he will receive the regular day-shift rate plus an additional half time, regardless of whether he works 20 hours, 35 hours, or 60 hours in the week.

After reviewing subject file, we are of the opinion that the premium rates paid to regular night-shift employees for night-shift work constitute higher straight-time rates of pay, rather than overtime compensation creditable against the overtime required to be paid under the Walsh-Healey and Fair Labor Standards Acts. See, in this connection, the opinion expressed in Field Operations Bulletin, Vol. VII, No. 12, pages 207,208. Insofar as the regular night-shift employees are concerned (who, in general, receive time and one-half the day-shift rate for all work performed at night), it seems clear that such compensation represents merely a higher rate of pay for the more onerous work performed at night. Since such an employee is paid at the premium rate regardless of the number of hours worked during the week, and since the hours worked at night by such an employee represents his normal working hours, we do not perceive any basis for holding that such premium pay constitutes overtime compensation. See, in this connection, Julia O'Toole's statement in the file which states that she begins work at 12 midnight and works until 8 a.m.; is now paid 90 cents per hour; that girls working on the night shift are paid at a higher rate than those working on the day shift; and that "it was not my understanding that this was an overtime rate but I was told that this would be equivalent to overtime." See, also, the employee statement of George Hummer. Cf. Roger H. Doyle's pay-roll records indicating that he was paid at the night-shift rate of $3 an hour, regardless of the fact that during given workweeks he performed no work at all during the day; also, E. A. Gayer's statement and pay-roll transcriptions indicating that during the weeks ending July 10, 17, 24, 31 amd August 7, 1942, he was paid at the flat rate of $2 an hour for a 60-hour week, although he did not perform any work at all on the day shift during such weeks.

A like conclusion appears warranted with respect to the day-shift employees who are paid similar premium rates for work performed on the night shift. While, in the normal case, the payment of a premium rate for night work to one who has also performed day work during that day is evidence that the premium is overtime, a different result obtains here because it appears that the premium compensation would have been paid even

in the absence of the performance of day work by the employee on that day. See, in this connection, Floyd S. Schrider's statement and payroll transcriptions in the file.

With respect to the regular day-shift employees who receive double time at night, we do not believe the facts are sufficiently clear, in the present state of the file, to enable us to definitely determine whether all or only part of that double time compensation constitutes straight-time pay under the Acts. In our opinion, the facts on this point should be further developed along the lines indicated below. The double time would be considered straight-time compensation if it is paid solely because the employee is employed on GPO work and not because he had previously performed day work that same day. In this connection it would be important to ascertain whether an employee who works only at night on a given day is paid double time when working on GPO jobs and time and one-half when working on non-GPO jobs. Similarly, it would be significant to ascertain whether an employee who has performed work during the day and is asked to work at night on non-GPO jobs that same day is paid double time or time and one-half, also, the rate paid under the same circumstances when he is employed on GPO work.

The subject file is returned herewith.

Attachment
(File)



(04691)

212 CA 101
212 D
211 AA

Mr. Raymond G. Garceau
Director, Field Operations Branch
Wage and Hour and Public Contracts Divisions

SOL:JL:FH

May 14, 1946

Harold C. Nystrom
Chief, Wage-Hour Section

Cour Order Suppressing Records
"Illegally Obtained"

Reference is made to former Director Dille's memorandum to me regarding the subject matter. In his memorandum Mr. Dille states that the Divisions' inspection experience has developed a practice under which inspectors frequently take employers' records to the Divisions' offices for intensive checking and transcribing during the course of inspections. He further states that it has come to his attention that in one case where this was done the circuit court dismissed the Government's appeal from a district court order which suppressed all records, photostats, copies or information secured therefrom, in any proceeding of any kind against defendant, and decreed return of data to defendant by officers and agents of the Division (United States v. Rosenwasser, dba Perfect Garment Co., C.C.A. 9, November 21, 1944). Mr. Dille requested to be informed as to the basis for the lower court's order, and also inquired whether the court considered the act of taking the records unlawful under any conditions or whether there was some flaw in the inspector's technique which should be avoided.

The decision of the Circuit Court of Appeals in the Rosenwasser case, which is reported in 145 F. (2d) 1015, does not contain any discussion with regard to the problem presented by you. The court amply held that the order of the district court suppressing the evidence was an interlocutory order and was therefore not appealable. Accordingly it dismissed the appeal without any discussion with regard to the merits of the case. Since the decision of the lower court is not officially reported and we did not have a copy of the decision available here, we communicated with the Assistant Solicitor in Charge of Litigation to ascertain the basis of the lower court's holding. We have received a reply from Assistant Solicitor Babe' giving us some of the background of the Rosenwasser case, which we believe will be of assistance to you in connection with the problem presented.

It appears that in the course of an inspection of the Perfect Garment Company, the inspector asked for the company's books, which were made available without question. The inspector then requested permission to take the records to the Divisions' office for the purpose of photostating, in order to save the time of transcribing them, and promised to return the records promptly. This permission was also given, and after the photostats had been made, the company's records were returned. At the first trial of the case (which involved a criminal prosecution) the photostats were admitted in evidence, and the defendant was convicted. Subsequently the defendant made a motion for a new trial, and this action was granted. The information was then dismissed, and a new information



(04691)

against the company was filed. Pending trial of the new information, a motion was made to suppress the evidence obtained by an examination of the defendant's books, on the ground that it had been secured without a search warrant, and that the Act does not authorize use of such documents in criminal prosecutions. The theory of the court in sustaining this motion was that the Administrator might examine an employer's records only by use of the subpoena authorized by sections 9 and 11 of the Fair Labor Standards Act, and since the provisions of sections 9 and 10 of the Federal Trade Commission Act are made applicable to a subpoena issued by the Administrator, the obtaining of the evidence without a subpoena deprived a person of the immunity granted by the Trade Commission Act.

It is the view of the Solicitor's Office that the decision of the district court is unsupported by logic or authority and that where one voluntarily makes his records available to an inspector, there has been no illegal search or seizure and no question of immunity is involved (Sherwin v. United States, 268 U.S. 369). Nor does there appear to be any justification for the holding that the subpoena procedure affords the only manner in which the Administrator may inspect an employer's records. While it may be that an individual testifying or producing records in obedience to a subpoena issued by the Administrator, obtains immunity by virtue of section 9 of the Trade Commission Act, it does not follow that immunity results when a person voluntarily makes his records available for inspection (Sherwin v. United States, supra).

Apart from the question of immunity under section 9 of the Trade Commission Act, it is the view of the Solicitor's Office that the constitutional privilege against self-incrimination and illegal search and seizure does not prevent a defendant from being compelled to produce records which are required by law to be kept, even though the records may contain evidence which incriminates him. The courts have held that the constitutional privilege against self-incrimination does not include records required to be kept in order that information may be obtained of transactions which are appropriate subjects of Governmental regulation, as such records are quasi-public documents and are not for the individual's private use.

The Assistant Solicitor in Charge of Litigation advises that he does not believe that there is anything in the Rosenwasser case which requires any radical change in the present instructions to inspectors.



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AIR MAIL

21 AC 205.10 21 AC 409.521
205.250 409.4211
205.251 21 BJ 403.3
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A. A. Caghan, Regional Attorney
Cleveland, Ohio

Harold C. Nystrom
Chief, Wage-Hour Section

SOL:ERG:MFS

Bay de Noquet Co.
Nahma, Michigan
21-683

May 24, 1946

Reference is made to former Regional Attorney Reynard's memorandum of August 2, 1945, transmitting a copy of his memorandum to former Regional Director Kingston under the same date, concerning coverage and exemption of various enterprises operated by subject company in the town of Nahma, Michigan. Subject company, it appears, owns the entire community of Nahma wherein it operates a hotel, a general store, a hospital, a club house and a rooming and boarding house. At some distance north of Nahma, the firm operates a sawmill and several lumber camps. Mr. Reynard requested confirmation of the views expressed in his memorandum to Mr. Kingston, particularly in respect to the boarding and rooming house operated by subject firm.

As you know, in the case of maintenance, repair or operation of mill villages, the Divisions have taken no position with respect to the applicability of the Fair Labor Standards Act to employees engaged exclusively in activities such as the maintenance or repair of company houses (Legal Field Letter No. 67, page 13; I Wage-Hour Code 3C26), the reconstruction of a company rooming and boarding house (Legal Field Letter No. 87, page 36), the collection of garbage, etc., as distinguished from activities or services carried on in connection with the plant or plant facilities. See, however, Martin Suarez et al. v. Association Azucarera Coop. Lafayette, decided June 8, 1943, in which the District Court of the United States for the District of Puerto Rico held that employees engaged in the maintenance and repair of dwelling houses owned and operated by sugar mills for the use of their employees are necessary to the production of sugar, which moves in interstate commerce, and are, therefore, covered by the Act. Cf. situation #3 discussed in Legal Field Letter No. 67, page 13; also Legal Field Letters No. 50, page 3, and No. 89, page 34.

In the subject case, it appears that the hotel in question is operated in the same manner as any other hotel and that only a few of its guests are company employees. We agree with Mr. Reynard's conclusion, therefore, that "the hotel should be regarded as occupying the same status as any other hotel, and, if covered, is therefore exempted under section 13(a)(2)." Cf. Rivera v. Central Aguirre Sugar Co., (D.C.P.R.) 4 Labor Cases, paragraph 60,526. Similarly, if the general store in question handles groceries, provisions and other merchandise and is open to the general public, the establishment would probably be exempt under section 13(a)(2).

The views set forth in Mr. Reynard's memorandum concerning subject's hospital and club house do not appear to require any further comment.



(04691)

With respect to the company's rooming and boarding house, it appears that--at the time of inspection--such boarding house had 25 regular boarders all of whom were company employees. It appears, further, that approximately 80 percent of its revenue was derived from company employees, most of whom had their board bills deducted from their wages. Moreover, company employees were not charged for sleeping accommodations but were charged the flat sum of $1.20 per day for meals which, it is stated, "is in accord with similar charges made at logging camps in the area." In view of these facts, it would seem clear that the rooming and boarding house in question is not the usual type of independent hotel or boarding house but is, rather, merely a plant facility operated as part of an "integrated effort" for the production of goods for commerce. Armour & Co. v. Wantock, 323 U.S. 126; Hanson v. Lagerstrom, 133 F.(2d) 120 (C.C.A.8); Womack v. Consolidated Timber Co., 132 F.(2d) 101 (C.C.A. 9); Bicanic v. Campbell Co., 7 Wage Hour Rept. 745, affirmed 8 Wage Hour Rept. 589, cert. den. 9 Wage Hour Rept. 244; and Nasik v. General Motors Corp., 8 Wage Hour Rept. 652. See, in this connection, Legal Field Letters No. 105, page 1; No. 104, page 3; No. 104, page 6. In this connection, it may be noted also that the furnishing of board and lodging to subject's employees by the employees engaged in operating the rooming and boarding house is, under the statute, an activity comparable to that engaged in by a paymaster, since the reasonable cost of board and lodging customarily furnished by the employer to his employees is, as you know, expressly stated by section 3(m) of the Act to constitute wages. As you know, a paymaster would, under the principles expressed in Legal Field Letter No. 57, page 41, clearly be considered as engaged in a covered activity.

It is my opinion, therefore, that Mr. Reynard was correct in concluding that employees engaged in the operation of such rooming and boarding house are, like cookhouse and bunkhouse employees of logging camps, engaged in a process or occupation necessary to the production of goods for commerce within the meaning of section 5(j) of the Act.

Moreover, I agree with Mr. Reynard's opinion that the subject's rooming and boarding house would not appear to qualify for exemption under section 13(a)(2) for the reasons stated in paragraph 40 of Interpretative Bulletin No. 6 and in Hanson v. Lagerstrom and Womack v. Consolidated Timber Co., supra. Furthermore, the fact that some members of the general public, i.e., hunters and tourists, occasionally patronize the boarding house would not entitle the establishment to the section 13(a)(2) exemption where such use is merely incidental to the main purpose of the establishment which is to furnish food and lodging to subject's logging employees. As pointed out in Hanson v. Lagerstrom, where an establishment is maintained primarily for employees engaged in production, the fact that it may incidentally serve some members of the general public is of no consequence. Similarly, in the Womack case, the fact that the cookhouse, located in the company town, was used by some members of the general public did not remove its employees from the coverage of the Act nor was it deemed to justify its exemption as a service establishment where its primary purpose was to serve employees engaged in logging timber. See also Roland Electrical Co. v. Walling, 9 Wage Hour Rept. 89 (U.S. Sup.Ct.); Martino v. Michigan Window Cleaning Co., 9 Wage Hour Rept. 111 (U.S. Sup.Ct.); and Boutell v. Walling, 9 Wage Hour Rept. 178 (U.S. Sup.Ct.).

Of course, if at some future time, changing conditions result in a larger portion of the establishment's revenue deriving from tourists, hunters or other transient trade, so that it may be said that the principal and primary activity of the boarding house is the furnishing of service to the general public (see Legal Field Letter No. 98, page 1), the establishment may then qualify for exemption under section 13(a)(2).

AIR MAIL

21 AC 205.10
21 AC 205.250
21 AC 205.251
21 AC 205.27
21 AC 404.95
21 AC 509

Dorothy M. Williams
Regional Attorney
San Francisco, California

Harold C. Nystrom
Chief, Wage-Hour Section

SOL:NCH:EG

Coverage of welfare employees

May 27, 1946

This will reply to your memorandum in the subject matter in which you inquire as to the Divisions' present position in regard to coverage of welfare employees employed by the sugar industry in Hawaii. You state that the duties of the welfare employees in question are concerned with the recreational and other social activities of the sugar company's mill and field employees and that no services are performed by them for the general public. In this connection, you refer to the somewhat conflicting opinions found in a letter dated June 19, 1939, from Mr. Joseph Rauh, Chief of the Opinions Section, to the National Cash Register Company, in which coverage under the Act was asserted over employees engaged in maintaining a recreation park adjoining subject's property, and in a memorandum dated January 29, 1945, from Mr. Martha to you, in which it was stated that the Divisions were not prepared to take a position in regard to coverage of camp cleaners who maintain camps housing sugar industry employees.

The Rauh opinion to which you refer was superseded on November 7, 1940, in a letter from Mr. Rufus G. Poole, then Assistant Solicitor in Charge of Opinions and Reviews, to the same company, wherein it was stated that "With respect to employees working solely in the /recreation/ park, the Division is not prepared at this time to express an opinion as to whether such employees are within the coverage of the Act or not." In addition, in an opinion from Rufus G. Poole, Assistant Solicitor in Charge of Opinions and Review, to A. A. Cohen, Regional Attorney, Cleveland, Ohio, dated October 30, 1941, it was stated that--

> After having carefully re-examined the question of status of employees engaged in furnishing recreational facilities to other employees who are engaged in producing goods for commerce, we have concluded that we are not presently prepared to render a definite opinion regarding the applicability of the Act to their employment.

The latter opinion went on to state that the statement on page 39 of the Opinions Manual in regard to coverage of such employees (which was based upon the Rauh letter which you cited)" * * * goes too far, and is not now to be considered controlling." See, also, Rivera v. Central Aguirre Sugar Co., 4 Labor Cases 60, 526 (April 21, 1941), wherein it was held that employees who worked at a social club, a golf club, a swimming pool, and a hotel maintained by a sugar company are not engaged in commerce or the production of goods for commerce, and, therefore, are not within the coverage of the Act. Cf. the "integrated effort" test set forth in Armour & Co. v. Wantock, 323 U.S. 126.



(04691)

In the absence of more detailed facts indicating the degree of relationship between the recreational activities in question and the production of goods for commerce, therefore, the Divisions are not prepared at this time to express an opinion as to the coverage of such recreational or welfare employees.

23 CB 203.21
201
301.1
203.22
401
204.3

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

Donald M. Murtha
Assistant Solicitor

SOL:JFS:AC

Bert Rice Trucking Service
Chase, Kansas
File No. 15-1339

June 12, 1946

This is in further regard to my memorandum to you of March 20, 1946. As you will recall the subject firm is an oil field carrier and its operations involve the transportation of oil field equipment in interstate commerce, part of which transportation is performed on the public highways and part over private ways to reach the well sites. The problem involved was, where there is a single continuous trip in interstate commerce, part of which is performed on the public highways and part on private ways, is the off-highway driving subject to the Interstate Commerce Commission's jurisdiction under section 204 of the Motor Carrier Act and thus counted as exempt work in applying the 50 percent rule under section 13(b)(1).

Attached is a copy of a letter from Director Blanning to Administrator Walling, dated April 30, 1946, in which Director Blanning expressed the opinion that the off-highway driving in such a case is subject to the Commission's regulation. In view of such opinion it seems that such off-highway driving constitutes exempt work for purposes of applying the 50 percent rule under section 13(b)(1).

Of course this does not affect the opinion expressed in Director Blanning's letter of April 10, 1946, to Administrator Walling that where transportation is performed solely on private ways, except possibly crossing a public highway, such off-highway transportation is not subject to the Commission's regulation. In such a case the off-highway driving is counted as nonexempt work in applying the 50 percent rule under section 13(b)(1). L.F.L. 101, pp. 2-3.

Attachment



(04691)

21 AC 411.1
21 BK 102.31
101.0
102.33
102.34

All Regional Attorneys

Harold C. Nystrom
Chief, Wage-Hour Section

SOL:VOW:PLG

The Hearst Corporation
Albany Times Union Department
Albany, New York

July 8, 1946

I am attaching hereto a copy of a memorandum from Assistant Solicitor Murtha dated February 28, 1946, in which the Administrator concurs, modifying Legal Field Letter No. 67, page 2, and Field Operations Bulletin, Volume IX, No. 5, page 327. As stated therein the policy expressed in the attached memorandum should serve as a basis for future opinions regarding the applicability of the local retailing capacity exemption provided by section 13(a)(1) of the Act and section 541.4 of the Regulations, Part 541, in similar situations regarding newspaper circulation supervisors. Newspapers incorrectly advised in the past on the basis of the opinions cited above should be readvised in accordance with the principles expressed in the attached opinion.

Attachment



(04691)

21AC411.1
BK101.0
102.31
102.33
102.34

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

Donald M. Murtha, Assistant Solicitor. SOL:SSB:HD

The Hearst Corporation
Albany Times Union Department
Albany, New York
File No. 31-19309

February 28, 1946

Reference is made to your memorandum of December 17, 1945, concerning the applicability of the local retailing capacity exemption provided by section 13(a)(1) of the Act and section 541.4 of Regulations, Part 541, to certain circulation supervisors employed by subject firm.

The duties of the supervisors have been described as follows:

1. City Branch Managers -- (a) who are engaged in the distribution of the daily and Sunday editions of the newspaper in a specified city territory; they distribute and supervise the carriers within their territory, are responsible for the value of the newspapers delivered to them and make collections from the carriers, check starts, stops, complaints, insurance and magazine orders; (b) deliver routes themselves and make individual customer collections; (c) deliver newspapers to and supervise carrier boys.

2. Country Territorial and Branch Managers -- (a) who have in general the same duties as City Branch Managers but whose territory embraces a suburban area which may be as large as several counties; (b) in addition to supervision of carriers within their territory, they supervise the sale of the papers by dealers and make collections from them; as a rule they do not handle the actual papers; (c) deliver newspapers to and supervise carrier boys.

3. City Dealer-Drivers -- who deliver the daily and Sunday editions of the papers to newsdealers within specified territories and are responsible for collecting from such dealers.

4. Street Sales Supervisors -- who supervise the distribution of papers of city street sales boys, keep records of such distribution and are responsible for collecting the payment for such papers from them.



(04691)

5. Circulation Collectors -- who visit subscribers on specifically assigned routes to make individual weekly customer collections.

Although there appear to be no authoritative court decisions directly in point, I am in agreement with you that our Washington Daily News opinion (as well as those re Chattanooga Free Press and the Atlanta Journal) is inconsistent with other opinions rendered by the Solicitor's Office which follow the principle that this exemption must be narrowly construed. I, too, believe that the correct view of the "local retailing capacity" exemption is that which you say is stated in an opinion of former General Counsel McNulty to the regional attorney at Kansas City, dated May 7, 1940. You state that according to this opinion (which is not in our files), the delivery of papers by circulation men to carriers should not "be considered as work immediately incidental to a retail sale * * * since it is a bulk delivery prior to subsequent retail distribution to the various subscribers."

The views expressed in the Washington Daily News opinion neither represent a full appreciation of economic realities, nor an adherence to the legislative intent of the exemption as defined in subsection (A)(2) of the Regulations. It is obvious that in a broad sense activites such as manufacturing, mining, advertising, etc., have as an ultimate purpose the making of retail sales. However, clearly the exemption was never intended to extend to such activities which, though related or essential to retail selling generally, are in fact related to the making of retail sales in an ultimate rather than in an immediate sense.

The circulation collectors whose sole duties are those described in paragraph 5 would appear to meet the requirements of section 541.4 of the Regulations. However, the duties of the employees described in paragraphs 1--4 in supervising the carriers and distributing newspapers to carriers and dealers, in my opinion, cannot be considered as work "immediately incidental" to making retail sales within the meaning of subsection (A)(2) of Regulations, Part 541, section 541.4. The described duties, of course, relate to the making of sales but it would appear that functionally they can best be described and viewed as distributional in nature rather than as being directly or closely collateral or necessary to the making of retail sales.

I fully agree with you that the Washington Daily News opinion is inconsistent with other opinions of our office relating to the construction of this exemption. The view expressed in the memorandum from Charles H. Livengood, Jr. to Mr. Walling, dated

August 17, 1942, re Willmark Service Research Corporation, concerning the meaning of subsection (A)(2) of the Regulations, in my opinion, is in accord with the court's well-established views on the construction of exemptions. In determining whether work is "immediately incidental" to the making of retail sales, therefore, it would appear to be appropriate for the Divisions to adhere to the approach to that question stated in that memorandum.

Although your proposed differentiation between this case and the Washington Daily News opinion would appear to be technically tenable, the distinction, as you indicate, seems somewhat artificial and lacks real persuasiveness. I would be inclined, therefore, to modify the Washington Daily News opinion rather then distinguish it from the present case.

I suggest, therefore, that you discuss this matter with the Administrator and after obtaining his concurrence, send a copy of this opinion to all regional attorneys and ask them to enforce in the future on the basis of this memorandum. This opinion should also be included in the Field Operations Bulletin and the Legal Field Letter. The regional offices should also be instructed to advise those newspapers in their regions who were incorrectly advised previously on the basis of the Washington Daily News opinion. The Administrator may, of course, have in mind some other ideas in the way of an enforcement program. In any event, I am confident you can work out a procedure with him after discussion.

You do not raise and we have not discussed the question of coverage. You will, however, remember discussions which mr. Tyson and you had with the Administrator on this question some time ago.

21 BE 101
200
202

Mr. K. R. Hancock
A. J. Axtell & Company
100½ Lincoln Avenue
Endicott, New York

21 AC 401.6
21 BB 301.34

SOL:EGT:CTN

Dear Mr. Hancock:

April 30, 1946

This will reply to your letter of February 15, 1946, addressed to the Divisions' New York regional office, in which you request additional information concerning the application of the Fair Labor Standards Act to the operations of an aviation school. This school, it appears, derives the greater part of its income from intrastate training flights, although it also undertakes interstate charter flights between your locality and other cities in the United States. You inquire whether, under such facts, the school qualifies as a common carrier within the purview of Title II of the Railway Labor Act. You also inquire whether the pilots are exempt as administrative employees under section 13(a)(1) of the Act.

As pointed out in my earlier letter, dated February 7, 1946 whether the pilots and service employees in question are exempt under section 13(a)(4) of the Act depends primarily upon the status of their employer under Title II of the Railway Labor Act. For a determination of this question, I suggest that you communicate with the National Mediation Board located in Washington, D. C. If the aviation school, insofar as its interstate charter flights are concerned, operates as a common--rather than as a contract--carrier by air in interstate or foreign commerce under that Act, those of its employees engaged in activities closely related to the air transportation activities which bring the employer within the provisions of the Railway Labor Act would be exempt provided they do not perform a substantial amount of nonexempt work in any workweek.

You inquire whether if the school's employees do not qualify for exemption under section 13(a)(4) of the Act, its pilots who receive a salary in excess of $200 a month would be exempt under section 13(a)(1) of the Act and section 541.2(b)(4) of Regulations, Part 541, as employees employed in a "bona fide * * * administrative * * * capacity." Without a full knowledge of all the facts, it is not possible for me to advise you whether any of the pilots in question would be



(04691)

considered to meet the requirements of this section of the regulations. You will note that the exemption under this section applies to a very limited class of transportation employees--those actually engaged in transporting goods or passengers for hire--and that it applies only to those of such employees whose work is responsible outside work of a specialized or technical nature requiring special training, experience, or knowledge and subject to only general supervision. Moreover, the employee's duties must be of a nature requiring the exercise of discretion and independent judgment as distinguished from the routine application of acquired skills and standardized techniques or procedures. A pilot who is essentially a mere aerial chauffeur would clearly not qualify for exemption under these tests. The applicability of the exemption to a particular employee can thus be determined only by a careful examination of the characteristics of his job as a whole, with special reference to his responsibilities, the amount of his salary, the nature of the work in general and what is necessary to qualify for its performance, the nature and interrelationship, if any, of the various specific duties performed by the employee and the proportionate share of his time which each such type of duty occupies during the employee's workweek.

If you are unable to determine the applicability of the administrative exemption to the pilots in question by applying the above tests, I shall be glad to advise you more definitely in the matter if you will supply me with a complete statement of the facts concerning their employment, including specific information relative to the points I have outlined above.

Very truly yours,

Thacher Winslow
Deputy Administrator



(04691)

21 AC 414.8
21 BD 301
301.7
23 CE 205.641
.643
.631
23 CF 202.221
.231
.233
303.6

AIR MAIL

Mr. William R. James
c/o Ivan G. McDaniel
642 Title Insurance Building
Los Angeles 13, California

SOL:EGT:HCN:PLG

Dear Mr. James: May 10, 1946

This is in further reply to your letter to Mr. Walling requesting an opinion as to whether or not certain employees of the Golden West Citrus Association, who are engaged in activities connected with the manufacture and handling of ice, are exempt under the provisions of section 13(a)(10) of the Fair Labor Standards Act. You also request an opinion, in the event that the employees are not exempt under section 13(a)(10), as to whether the overtime exemptions provided by sections 7(c) and 7(b)(3) of the Act would be applicable to them.

From your letter and from information received from our Los Angeles office it appears that the firm is engaged in the packing of citrus fruit. Ths firm is also engaged in the manufacture of ice which is used to fill the bunkers of railroad cars packed with fruit, so that they may be properly refrigerated. The ice is manufactured in one room of a two-room building, the other room of which adjoins a platform paralleling the spur track upon which refrigerator cars are spotted, and is used entirely for the storage of the ice cakes. Since the requirements of the **Association** for ice are usually in excess of the plant's capacity for producing it, ice is also delivered to the Association's platform by other firms.

The ice, when pulled from the freezing cans by one group of employees, is automatically carried through shutes into the storage room where it is arranged by another group of employees. As needed, the ice is taken from the storage room to the platform from which it is placed in the car bunkers. It appears that in the manufacturing room, in addition to the operation of the ice machinery, it is necessary for employees to "pull" the ice after it is frozen. You describe this operation as the taking of cans of ice which have been completely frozen by the automatic machine, dumping this ice out, and placing the cans back into the freezing machine where an automatic refiller again refills the cans so that they may again be frozen. Information received from our Los Angeles office indicates that the employees who do this work empty the cans of frozen ice on the discharging platform where the ice is conveyed automatically into the storage room.



(04691)

You are chiefly concerned about the possible application of the exemptions mentioned above to the employees who pull the ice from the freezing cans, empty the cans on the discharging platform, and return the cans to the freezing machine. You indicate that these employees are employees who work in the packing plant but perform this duty "at any time they see the ice is frozen and the cans are to be dumped and refilled." However, a representative of the company stated to a representative of the Divisions that during the busy seasons these men would be emptying the cans of ice every 15 to 30 minutes, and that they would fill in at other times by working in the packing house as general laborers. Whether they are primarily employees in the freezing room or in the plant proper would, of course, be immaterial if the work in the freezing room was nonexempt work, since the performance of any nonexempt work in a workweek would defeat the exemptions in question.

An employee is within the exemption provided by section 13(a)(10) only if he is (a) employed within the area of production as defined by the Administrator, and (b) engaged exclusively in the specific operations named in that section. Handling, storing, packing and preparing in the raw or natural state of agricultural or horticultural commodities for market are the only exempt operations named in section 13(a)(10) which appear to be pertinent here. Since in each case these operations are described in terms connecting physical contact with, or active work upon a commodity being prepared for market, it is the established position of the Divisions that the statutory language cannot operate to except any employee from the benefits of the Act unless such employee is actually and physically engaged in the operations specified. Since it does not appear that any of the employees in question are engaged exclusively in the physical operations of handling, storing, packing or preparing the fruit in its raw or natural state, this exemption would appear to be inapplicable, even if the employees were employed within the area of production.

The exemption provided by section 7(c) is not an industry exemption, but applies only to those employees who actually perform the operations mentioned in that section or whose occupations are a necessary incident to the described operations and who work solely in those portions of the premises devoted by their employer to such operations. It appears that the establishment of the Golden West Citrus Association is engaged in the manufacture of ice, an operation not declared exempt by section 7(c), as well as in the packing of fruit, which, if confined to perishable or seasonal fresh fruit, would be an exempt operation under that section. Thus, even if the firm's packing operations are of an exempt

type, employees who engage not only in such operations but also in operations which are a part of the manufacture of ice or which require the performance of duties in those portions of the premises devoted by their employer to the production of ice could not come within the exemption. See Fleming v. Swift & Co., 41 F. Supp. 825, affirmed, 131 F.(2d) 249 (C.C.A. 7), release R-1892, enclosed. It seems clear, therefore, that the employees who perform any duties during the workweek in the freezing room, either in operating the ice machinery or in pulling, emptying and replacing the ice cans, are not within this exemption.

The partial exemption from the overtime provisions of the Act provided by section 7(b)(3) is available to employees employed in the industries engaged in the handling, packing and preparing of fresh fruits or vegetables. This exemption has uniformly been considered inapplicable to employees engaged in connection with the production of ice for use in refrigeration in transit of fresh fruits or vegetables received for packing. The manufacture of ice is not included in the industry which the Administrator has found to be seasonal. Thus, even though the ice is manufactured for the use of the packing plant, this exemption would not be available to the employer with respect to any employees who spend a portion of their workweek in work connected with the production of ice.

I must, therefore, conclude that our Los Angeles office was correct in advising you that the employees in question were not exempt.

Very truly yours,

Thacher Winslow
Deputy Administrator

Enclosure

PB 790.7(c)(d)
790.8(a)(b)
25 BD 202.21
303.133
21 AB 202.20
202.3
26 CD 402.61

MEMORANDUM

March 23, 1948

To: Raymond G. Garceau, Director
Field Operations Branch
Wage & Hour & Public Contracts Divisions

From: Donald M. Murtha
Assistant Solicitor

Subject: The Lorain & Elyria Packing Company
Elyria, Ohio

This is in reply to your memorandum of February 11, 1948, concerning time spent by an employee of subject company in driving himself and two other employees in a company truck between their homes and the company's meat packing plant, 35 miles away.

It appears from Regional Director William S. Singley's memorandum of December 31, 1947, to you, which is in the case file attached to your memorandum, that this employee hauls lungs and hides for delivery on his way home at night. In item 7 of Inspector McCloskys' narrative report it is stated:

> At the end of the day, this employee drives into Cleveland with the company truck and delivers the lungs from the day's kill to a mink farm and the hides to a dealer located in Cleveland. This employee lives in Cleveland and estimates that he spends one-half hour per day in this delivery work. This half-hour consists strictly of the additional time spent in making the deliveries and not the driving time. This employee would average between 4 to 6 trips per week delivering this merchandise.

Mr. Singley states that driving between the three employees' homes and the plant takes an hour, and the total time on trips when delivery of hides and lungs is made is therefore an hour and one-half. For each trip when the driver hauls lungs and hides he is paid a flat fee of $2.00, but he receives no compensation for his driving time on days when there are no lungs or hides for delivery.

I am enclosing a copy of a memorandum dated March 3, 1948, from Mr. Tyson to Mr. Grimes, pertaining to the driving time of an employee in a situation similar to the one you present. Mr. Tyson expressed the opinion, for the reasons stated at length in his memorandum, that for the period commencing on May 14, 1947, all of an employee's driving time, both going to work and coming from work, must be regarded as time worked, regardless of any contrary contract or custom. Thus, under the facts of the situation you present, the driver must be credited, for the period starting on May 14, 1947, with two additional hours of work on days when he does no hauling and with two and a half additional hours of work on days when such hauling is performed.

Since I do not understand that any problem is raised regarding the period prior to May 14, 1947, I have confined this opinion to the problem of hours worked in the light of Section 4 of the Portal Act.

Attachment

SOL:JWFleming/409/rsq