UNITED STATES DEPARTMENT OF LABOR
Office of the Solicitor
August 23, 1946

Legal Field Letter
No. 110

Attached Opinions

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

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MEMORANDA

LETTERS

(04770)

21 BF 303.41

Kenneth P. Montgomery
Regional Attorney
Chicago 54, Illinois

SOL:HJE:CTN

June 4, 1946

Harold C. Nystrom
Chief, Wage-Hour Section

Hein-Werner Motor Parts Corporation
Waukesha, Wisconsin
File No. 48-51,938

This will reply to your memorandum dated August 30, 1945, requesting my opinion as to whether certain work performed by some of subject's employees is nonexempt work within the meaning of sub-division (F) of section 541.1 of the regulations. The employees in question, you state, are employed as foremen and set-up men. You also state that the set-up work and adjustment of set-ups performed in subject's plant may be complicated or simple. The type referred to as "complicated" apparently requires unusual skill and ingenuity and is performed by the foremen under consideration, while the more "simple" type, which does not require unusual skill or ingenuity, is performed by nonexempt workers under them. Of subject's 315 employees, about 6 of the supervisory personnel perform the complicated set-up work, while approximately 12 non-supervisory employees perform the simpler type. You believe that the situation presented is not wholly analogous to that described in release G-201, apparently because some of subject's set-up work is done by non-supervisory personnel. Consequently, you inquire whether the foremen are exempt in view of the fact that the set-up work which they perform consumes in excess of 20 percent of the standard workweek. You also wish to know what is meant by the term "small plant" as used in the fourth paragraph of G-201. Furthermore, you inquire as to the position to be adopted where other skilled employees in the plant may be capable of performing the more complicated set-up work but where, as a matter of fact, such work is performed only by the supervisory employees as described above.

The term "set-up work" as used in release G-201 was intended to describe a type of layout work which is so closely related to supervisory functions as to be an integral part of them and therefore exempt. In large plants, where specialization is at its maximum, such work would not be exempt if, as is commonly the case, it is performed by non-supervisory employees. On the other hand, set-up work may be exempt in those plants where it is a supervisory function and is not performed by nonexempt employees, even though in larger plants such work is delegated to highly qualified nonexempt employees. Of course, work of the type that is usually performed by the subordinates of an exempt employee is work which, when performed by that executive, must always be counted as nonexempt work.

It is clear, therefore, that whether or not set-up work in any given case should be counted as nonexempt work when performed by an otherwise exempt employee is a factual question involving particular consideration of such matters as the degree of skill required and the degree of specialization present in the plant. In this connection, the performance of certain set-up work in the same plant by nonexempt employees would not

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make all set-up work ipso facto nonexempt work. However, such a circumstance would seem to have factual value in determining whether the "complicated" set-up work cannot in fact be performed by any other employee in the plant, and whether such work calls for the "extraordinarily high degree of skill" required for it to be exempt work under the principles expressed in G-201.

The terms "large plant" and "small plant" are not used in release G-201 as sole or absolute criteria for determining under what conditions set-up work is exempt. As stated in that release, set-up work requiring a high degree of skill would be nonexempt in a large plant where specialization is at its maximum and where it is performed by highly skilled employees whose principal duties are not supervisory in nature. On the other hand, set-up work "may well be considered an integral part of the supervisor's duties" so as to be exempt work where the duties of the supervisor who performs it are principally supervisory in nature and where there are no skilled workers capable of performing this work, as in a small plant. Thus it is recognized that generally a large plant is subject to a high degree of specialization resulting in the performance of set-up work by non-supervisory employees, whereas a small plant would not have such specialization and its set-up work may therefore be performed by employees who are primarily supervisory workers. Accordingly, no specific sized plant may be denominated a large plant or a small plant for the purpose of determining whether or not the set-up work performed by its supervisors is an integral part of their supervisory functions so as to be exempt in character. The terms are merely used in the release to denote types of plants in which set-up work may or may not be a supervisory function, depending upon the degree of specialization practiced.

Finally, the fact that other skilled employees in the plant are qualified to perform the set-up work actually performed by the supervisory employees is ordinarily conclusive as to the nonexempt character of the work since it would seem to constitute convincing evidence that such work does not call for an extraordinarily high degree of skill. (Cf. Legal Field Letter No. 52, page 15.) Conceivably, however, there may be situations where this is not the case, but they would in all probability be rare. The language of the release must again be referred to:

> This set-up work * * * cannot as a rule be performed by any other employee in the plant.
> /Underscoring supplied./

I am sure that by applying the foregoing principles you will be able to reach a determination on the basis of all the available facts. However, if you should require a more definitive opinion, I shall, of course, be pleased to furnish it upon being supplied with all the facts.

The blueprint which you enclosed is returned herewith.

Attachment

(04770)

23 CB 203.1
23 CB 401
21 AC 205.10
21 AC 405
21 AC 102.10

George H. Foley, Regional Attorney
Boston, Massachusetts

Harold C. Nystrom
Chief, Wage-Hour Section

SOL:AS:ERG:EG

Derby Beverage Company
Manchester, New Hampshire
File No. 28-583

June 6, 1946

I regret that it has not been possible to reply sooner to your memorandum referring Supervising Inspector Clark's request for an opinion, together with regional correspondence in the matter. The problem involves division of a trip, as between exempt and nonexempt driving under section 13(b)(1), on which a driver starts out with a load to be delivered in intrastate commerce and picks up, during the course of his trip, empty bottles at each stop for return to the warehouse and subsequent shipment to out-of-State suppliers. You state that since the empties are known, from the moment of their pick-up, to be destined for shipment across State lines, they are from that moment in interstate commerce. You suggest that the question as to division of the trip could reasonably be answered in one of three ways-.

(1) that interstate driving starts with the first pick-up.

(2) that if at the outset it is known that some empties will be picked up, the entire trip is in interstate commerce.

(3) that the entire outgoing trip is intrastate commerce, and only the return trip, after the last delivery, is in interstate commerce.

You state that you are inclined to adopt the second approach and request our opinion in this matter.

The mere fact that the empty bottles are known, from the moment of their pick-up, to be destined for subsequent interstate shipment does not, in my opinion, itself determine that they are in interstate commerce from the moment they are so picked up unless the entry of the bottles into the warehouse is but a "temporary pause in their transit" within the meaning of the principles set forth in the Jacksonville Paper Co. case. See Dallum v. Farmers Cooperative Trucking Assn. 46 F. Supp. 785, in which the court stated:

> Mere intention by the owner to place goods in interstate commerce, or the gathering of goods at a depot for that purpose, is not sufficient. It must appear that the goods have entered upon transportation to another state before it can be said that they are in interstate commerce. /Underscoring supplied./

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See, also, Walling v. Villaume Box & Lbr. Co., 58 F. Supp. 150; Ridley v. General Cab Co. of Nashville, 6 Wage Hour Rept. 62 (see Lit. Man. Memos. Nos. 493 and 493(a)); and Walling v. Sanders, 48 F. Supp. 9, affirmed in part, 136 F. (2d) 78 (C.C.A. 6). Cf. Pennsylvania R. R. Co. v. Public Utilities Commission of Ohio, 298 U.S. 170; Colorado Interstate Gas Co. v. Federal Power Comm., 324 U.S. 581, 598.

In the instant case it appears from Supervising Inspector Clark's memorandum that "after the empty bottles are picked up they are brought into the warehouse and remain at rest there for as much as a month before they are finally loaded onto freight cars or large trucks for interstate shipment." (Underscoring supplied.) It is also possible (although specific information concerning this point is not available in the material you submitted) that the empty bottles in question may have to be prepared or processed (e.g., assembled, washed, sorted, inspected, etc.) at the warehouse before they are ready to be shipped out of State. See Legal Field Letter No. 96, page 18. Accordingly, although I do not have sufficient facts before me to give you a definite opinion, it may be that, under all the circumstances, the activities of the subject driver in picking up and delivering the empty bottles to the warehouse would be considered to constitute "production," within the meaning of section 3(j) of the Fair Labor Standards Act, rather than the commencement of a journey in interstate commerce. See Western Union Telegraph Co. v. Lenroot, 323 U.S. 490; Walling v. Comet Carriers, 151 F. (2d) 107 (C.C.A. 2); and Legal Field Letters No. 96, page 18, and No. 100, page 1; see, also, Mr. Maggs' memorandum dated February 26, 1945, to Miss McConnell; the Western Union decision and its implications (6 CLLO 6) which was attached to Field Operations Bulletin, Volume XII, No. 5. Cf. Legal Field Letter No. 103, page 25. It would follow, in such event, that subject driver's entire trip would be a trip in intrastate commerce covered by the Act on production grounds and that the section 13(b)(1) exemption would be inapplicable to any portion of such trip. See Legal Field Letters No. 96, page 1; No. 96, page 18; and No. 100, page 1.

On the other hand, if it is clear -- under all the facts and circumstances -- that the pick-up of the empty bottles, their delivery to the warehouse, the rapidity and regularity of their shipment from the warehouse to out-of-State suppliers, constitute, within the meaning of the Jacksonville Paper Co. case, a practical continuity of movement of such empties in interstate commerce, I would concur in your conclusion that the entire trip in question (which appears to constitute a single trip) is in interstate commerce and consequently exempt under section 13(b)(1). See, in this connection, the Divisions' brief in Walling v. Sanders before the Sixth Circuit Court of Appeals and the cases cited on page 17 thereof. See, also, Orange Crush Bottling Co. v. Tuggle, 6 Wage Hour Rept. 1020. I might note that such a conclusion would be reinforced by the existence of contractual arrangements between subject company and its out-of-State suppliers whereby it is required that all empty bottles be picked up and returned.

I am returning herewith the regional correspondence which accompanied your request for an opinion.

Attachments

(04770)

21 AC 101.2
102.1210
102.11
405

Ernest N. Votaw, Regional Attorney
Philadelphia, Pennsylvania

Harold C. Nystrom
Chief, Wage-Hour Section

SOL:AS:PLC

June 12, 1946

Lehigh Valley Cold Storage Company
Bethlehem, Pennsylvania
File No. 37-54724

We refer to your memorandum in the subject matter in which you request our opinion as to whether certain of subject's employees are covered by the Act under the following circumstances:

> In the subject case, a wholesaler of citrus fruits purchases carload lots from outside of the State of Pennsylvania. These cars are unloaded directly at the subject concern's warehouse and stored in the subject concern's cold storage compartments. Subsequently, the wholesaler removes the fruit to his own warehouse for sale to his customers. The wholesaler apparently orders this citrus fruit for stock and does not know who will purchase it from him until after it arrives at his own warehouse, or at least until after it has arrived and has been stored in the subject concern's refrigerated rooms.

You state that you have no question as to the employees who unload the cars at subject conern's cold storage plant. The question is raised, however, with respect to employees who remove the goods from cold storage and send them on to the wholesaler's (original purchaser's) place of business and with respect to the engineer and other employees who maintain the cold storage plant in operation while the goods are in storage.

As you know, under the decisions of the Supreme Court the principle has been firmly established that interstate transportation does not necessarily end with delivery by the carrier but, as demonstrated in the Jacksonville Paper Co. case, 317 U.S. 564, interstate transportation continues until the goods reach the destination intended for them by the importer. This is true, moreover, even in "second wholesaler" situations. See Legal Field Letter No. 94, page 1. Although you present no facts regarding the rapidity of movement of the produce from subject's cold storage plant to the wholesaler's warehouse, it would appear from the facts submitted that in ordering the carloads of citrus fruit from outside the State of Pennsylvania, the wholesaler contemplates an interstate shipment of such goods from their point of origin to his warehouse, which is his place of business and which is the place where the goods are held by him for future distribution to his customers. The fact that such interstate shipments are first unloaded and temporarily stored at the subject's cold storage plant does not necessarily terminate their interstate journey at that point. In the Jacksonville Paper Co. case, the Court held, you will recall, that "A temporary pause in their transit does not mean that they are no longer 'in commerce' within the meaning of the Act * * * if the

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halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain in commerce until they reach those points." The fact that the wholesaler orders the citrus fruit for stock and does not know who will purchase it from him until after it arrives at his own warehouse, or at least until after it has arrived and has been stored in the subject's refrigerated rooms, does not preclude the application of this principle to the situation you present. See, in this connection, the case of Walling v. Harris, 9 Wage Hour Rept. 287, involving a somewhat analogous set of facts, in which the court held covered employees loading produce which had been stored in a third party's warehouse for transportation to defendant's storehouse, transporting such produce from the warehouse to defendant's storehouse and unloading such goods coming from the warehouse into defendant's storehouse. Cf. Baker v. Sharpless Mendler Ice Cream Co., 9 Wage Hour Rept. 211. See, also, Legal Field Letter No. 102, page 29, and No. 103, page 25.

Moreover, as stated in McLeod v. Threlkeld, 319 U.S. 491, 497, and in Overstreet v. North Shore Corp., 316 U.S. 125, 129, interstate commerce embraces not only the interstate movement of goods but also activities so closely related to such movement as to be in practice and legal contemplation a part of it. It would follow, therefore, that subject's employees who remove the goods from cold storage and send them on to the wholesaler's place of business and the engineers and other employees who maintain the cold storage plant in operation while the goods are in the cold storage plant (see Republic Pictures Corp. v. Kappler, 151 F. (2d) 543 (C.C.A. 8)) are engaged in activities which are so closely related to the continuous interstate movement of the goods to their intended destination as to be a part of such interstate movement and, as such, are engaged in commerce and covered by the Act.

(04770)

21 BJ 500 21 BJ 403.3
21 BJ 501 21 BJ 403.440
502 21 BJ 403.441
21 AC 401.2 21 BJ 201
21 BJ 402.1

Kenneth P. Montgomery
Regional Attorney
Chicago, Illinois

Harold C. Nystrom
Chief, Wage-Hour Section

SOL:EGT:CTN

June 14, 1946

Fred Harvey Service, Inc.
2146 East 7th Street
Los Angeles, California
File No. 4-4105-C

Reference is made to your memorandum of January 21, 1946, regarding subject, in which you inquire whether dining-car employees on trains operating between Chicago and the Pacific Coast may be considered to be engaged in a service establishment under section 13(a)(2). All of the dining-car employees in question except porters and barber-baggagemen are engaged solely in serving food and drink or selling merchandise directly to passengers. The porters also "keep cars in order and care for crew sleeping quarters," while the barber-baggagemen handle the passengers' baggage. You express the opinion that each dining car may be considered a service establishment.

It is the position of the Divisions that a dining car on an interstate train is not a retail or service establishment within the contemplation of the section 13(a)(2) exemption. This position was taken as far back as September 14, 1942, in an opinion from Charles N. Livengood, Jr., former Chief of this Section, to former Regional Attorney Stoneman of Boston, involving the Armstrong Company of Boston.

The 13(a)(2) exemption is meant to apply only to the type of establishment having the attributes of a local enterprise. As stated by the United States Supreme Court in A. H. Phillips, Inc. v. Walling, 324 U.S. 490:

> From the standpoint of its legislative ancestry, § 13 (a)(2) is the offspring of a manifest desire to exclude from the scope of the Act "business in the several States that is of a purely local nature." Sen. Rep. 884, 75th Cong., 1st Sess., p. 5. Congress was interested in exempting those regularly engaged in local retail activities and those employed by small local retail establishments, epitomized by the corner grocery, the drug store and the department store. /Underscoring supplied./

Paragraphs 3, 22 and 23 of Interpretative Bulletin No. 6 are to the same effect. A dining car on an interstate train serving passengers moving in interstate commerce is not a local establishment of the type mentioned above. (Cf. Legal Field Letter No. 98, page 33.)

Moreover, as stated in the Phillips case, above, "Section 13(a)(2) by its very terms exempts only those employees engaged in a retail or

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service establishment operating primarily in local commerce." (Underscoring supplied.) As you know, the United States Supreme Court in the recent case of Boutell v. Walling, 9 Wage Hour Rept. 178 (February 25, 1946), held that servicing performed for an interstate carrier which uses such services in interstate commerce may not be regarded as servicing in intrastate commerce within the meaning of the 13(a)(2) exemption. Since the servicing performed by employees in a dining car moving in interstate commerce is rendered as part of the transportation of passengers in interstate commerce, it would, in my opinion, be interstate servicing and would not be exempt under section 13(a)(2).

The letter from the subject company is herewith returned.

Attachment

(04770)

21 AC 409.31
21 AC 205.23
21 AC 202.0

James M. Miller
Regional Attorney
Minneapolis, Minnesota

SOL:VOW:CTN

Harold C. Nystrom
Chief, Wage-Hour Section

June 14, 1946

Central States Electric Company
Donavan Contracting Company

This will reply to your memorandum of July 20, 1945, in which you request my opinion regarding the coverage of the employees of subject companies.

(1) You state that the Donavan Contracting Company of St. Paul, Minnesota, has a contract with the city of Watertown, New York, to maintain its street and other lighting facilities. It appears that the employees in question spend about 75 percent of their time each workweek in servicing the street lights and traffic signals in Watertown and that a substantial amount of such servicing is performed on street lights which furnish illumination and traffic signals which guide vehicles in connection with and over highways and roads carrying: (a) interstate traffic; and (b) traffic to nearby plants producing goods for interstate commerce. You inquire as to whether the employees of a private contractor performing such maintenance work are covered by the Act.

It appears that the inspector believes that the employees in question are engaged in commerce and in the production of goods for commerce. It is your opinion that such servicing helps to maintain the roadway in a usable condition just as dredging of safe channels and anchoring marking buoys improves the navigability of a river as an instrumentality of commerce. You therefore believe that the employees are engaged in commerce but are uncertain as to whether such activities also constitute the production of goods for commerce.

I agree with your conclusion that employees engaged in servicing street lights and traffic signals on highways carrying interstate traffic and traffic to plants producing goods for interstate commerce are engaged in commerce under the general principles of Interpretative Bulletin No. 5, paragraph 13, and release G-162, section IV. The street lights and traffic signals constitute an integral part of a network of interstate highways and are indispensable to the safe, efficient, and continuous use of the roads as instrumentalities of interstate commerce. In Walling v. McCrady Construction Co., 8 Wage Hour Rept. 375, 379, dealing in part with employees engaged in building an underpass to avoid a level grade crossing of the railroad directly at the point of entry to the plant, the court held:

> We are of the opinion that the defendant's employees engaged in this work were covered by reason of the fact that the elimination of accident hazards is an integral part of commerce in which the Railroad was engaged. [Underscoring supplied.]

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See, in this connection, Overstreet v. North Shore Corp., 318 U.S. 125, and New Mexico Public Service Co. v. Engel, 145 F.(2d) 636; cf, North Shore Corp. v. Barnett, 7 Wage Hour Rept. 620 (C.C.A. 5). See, also, Legal Field Letter No. 9, page 8, wherein it was held that the erection of signposts indicating road curves, intersections and other road hazards and names of places constitutes engagement in commerce. (It may be noted that the remainder of the memorandum antedates release A-14 and is probably no longer the position of these Divisions.)

(2) Central States Electric Company of South Dakota produces and furnishes electrical energy used to operate street lights illuminating segments of main highways carrying interstate traffic. It is your understanding that the street lights are part of an "ornamental" lighting system, the cables being placed underground where the curb and street join, the fixture being situated on the curb itself. You ask whether the employees engaged in producing electrical energy to operate street lights illuminating interstate highways are covered by the Act. It is your opinion that the principles expressed in release A-14 are applicable herein since the production of the electrical energy "facilitate/s/ commerce."

I assume that the electrical energy is not transmitted across State lines but is used exclusively within the State. In view of the opinion expressed above that street lights constitute part of an interstate instrumentality, the employees producing electrical energy would be engaged in commerce within the express language of release R-1789. It is held therein, as you know, that "the Act is applicable to employees engaged in producing * * * power * * * for use or consumption entirely within the State by essential instrumentalities of interstate commerce when such use or consumption aids or facilitates the interstate activities performed by means of such instrumentalities." This position is one which the Divisions have consistantly maintained (see, for example, Legal Field Letter No. 78, page 21, and Legal Field Letter No. 89, page 20) and is supported by judicial authority. See, in this connection, New Mexico Public Service Co. v. Engel, 145 F(2d) 636; Allen v. Arizona Power Corp., 7 Wage Hour Rept. 395; Pollard v. Franklin Power & Light Co., 8 Wage Hour Rept. 626; also Southern Pacific Co. v. Industrial Accident Comm., 251 U.S. 259.

Furthermore, as you correctly point out, the employees in question are also engaged in the production of goods for commerce under release A-14, since they are engaged in the production of electrical energy which aids or facilitates the carrying on of interstate commerce by an essential instrumentality of commerce.

In order to determine the exact effect of street lighting upon motor vehicular traffic, an examination has been made of technical bulletins and statistics published on the subject by the following organizations: Illuminating Engineering Society, New York City; Street Lighting Section of the National Electrical Manufacturers Association, New York City; New Jersey State Highway Department, Trenton; and the Committee on Engineering of the President's Highway Safety Conference (May 1946). In addition, expert opinions were secured from officials associated with the Illuminating Engineering Society, the National Electrical Manufacturers Association, the

Street and Highway Section of the New York City Department of Water Supply, Gas and Electricity, and the Electrical Department of the District of Columbia. These data and opinions all lead to the conclusion that street lighting has a very definite effect upon the accident rate and upon the speed and volume of traffic, both in rural districts and in built-up sections.

Mr. Walling has indicated his approval of the position taken in the memorandum.

21 AC 413.30
21 AC 101.61
21 AC 302

A. A. Caghan
Regional Attorney
Cleveland 13, Ohio

SOL:NCH:JL:EG

Harold C. Nystrom
Chief, Wage-Hour Section

June 14, 1946

Detroit Automobile Inter-Insurance Exchange
Detroit, Michigan
File No. 21-3669

This will reply to Mr. Reynard's memorandum of November 29, 1945, requesting an opinion as to whether employees of the subject company are covered by the provisions of the Fair Labor Standards Act. From Mr. Reynard's memorandum and the supplementary information contained in the inspection file, including the company's statement, it appears that the subject was organized under a special statute applicable to reciprocal inter-insurers and is licensed to engage in the automobile insurance business, including casualty, fire, theft and collision, in the State of Michigan only. In connection therewith, the subject sells policies, collects premiums, adjusts losses by way of settlement or litigation, pays its operating expenses and returns, by way of dividends to its policy holders, all sums earned over and above a cautious surplus.

It operates a home office in Detroit and branch offices in several cities in Michigan but has no branches outside of Michigan. None of its salesmen sells insurance in any State except Michigan, but interstate transactions arise as a result of the necessity of adjusting losses resulting from out-of-State accidents involving policy holders, and in the mailing of policies of insurance across State lines to policy holders who, it is stated, are temporarily or for a short interval out of the State. The company claims that during the war these out-of-State transactions were larger than usual as a result of a number of servicemen temporarily situated outside the State.

Although the company states that if a policy holder's residence is changed to another State or if he is out of the State for a substantially long interval it will refuse to renew such business, and that the total of interstate transactions amounted to less than one percent of the total business of the subject, the statements of some of its employees seem to indicate that the subject conducts interstate business with some regularity. Thus, one of its employees stated that the company has an attorney in Washington, D. C., who handles its work in that area, having referred to him accident claims arising there which he settles, forwarding a release to the company which draws checks in Michigan and sends them out of the State. The same employee states that the company handles business for the Auto Club of Southern California, San Diego, an auto club in San Francisco and the Chicago Motor Club (Exhibit 12-G). Another employee

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stated that policy holders who temporarily move from Michigan continue to be insured by the "Exchange" at a higher rate and that the volume of that business has increased during the war "because men in the armed services buy ins. from the Det. Ex." (Exhibit 12-E). Several employees stated that they handled interstate claims each week or several times a month, and others indicated that either they or other persons in subject's employ travel outside the State on subject's business with some degree of regularity.

Mr. Reynard states that after a careful study of release G-232, it is his opinion, based on the facts contained in the file, that the subject company is not within the coverage of the Act, since "There is no evidence whatsoever in this case of the regular and continuous use by the subject company of the mails and other channels and instrumentalities of interstate commerce and communication." He further states: "At best, we have a case of not only thin but a sporadic coverage which makes it entirely unsuitable for litigation."

While I agree that the volume of interstate transactions involved in this case constitutes only a minor portion of the company's business, I do not conclude, on the basis of the evidence in the file, that such business is by any means "trifling," or so insignificant as to be disregarded. Mr. Reynard did not, of course, have the benefit of the Supreme Court decision in the Mabee case at the time of preparing his memorandum. The company's volume of interstate business (based on a survey of only one month) is admittedly not less than one-half of one percent, which was the volume of interstate shipments in the Mabee case upon which the Court held that coverage existed. If this month is typical, I am unable to agree that the interstate aspects of the subject company's business are so inconsequential or sporadic as to require the conclusion that none of its employees are within the coverage of the Act.

The courts are virtually uniform in holding that an employee is within the protection of the Act, even though the volume of interstate transactions is small, if such transactions constitute a regular part of the business and are not casual, isolated or sporadic. As stated by the Supreme Court in the Mabee case:

> Though we assume that sporadic or occasional shipments of insubstantial amounts of goods were not intended to be included in the prohibition, there is no warrant for assuming that regular shipments in commerce are to be included or excluded dependent on their size. /Underscoring supplied./

See, also, Schmidt v. Peoples Telephone Union of Maryville, Mo., 138 F. (2d) 13 (C.C.A. 8), where coverage was held to exist although

only one-sixth of one percent of defendant's revenues was derived from interstate calls; Walling v. Connecticut Co., 62 F. Supp. 733 (Conn.), affirmed, 9 Wage Hour Rept. 288 (C.C.A. 2), where coverage was upheld although less than one percent of defendant's revenues was derived from interstate business; Muldowney v. Seaburg Elevator Co., 39 F. Supp. 275 (E.D.N.Y.), where the Act was held applicable although defendant's interstate business amounted to only three-fifths of one percent of the company's total business. See, further, United States v. Darby, 312 U.S. 100; Phillips v. Star Overall Dry Cleaning Laundry Co., 149 F. (2d) 416; North Shore Corp., v. Barnett, 143 F. (2d) 1005; Strand v. Garden Valley Telephone Co., 51 F. Supp. 898; McKeown v. Southern California Freight Forwarders, 148 F. (2d) 890 (C.C.A. 9), cert. denied, 8 Wage Hour Rept. 991 (U.S. Sup. Ct. 1945); Wagner v. American Service Co., 58 F. Supp. 32; Engel v. New Mexico Public Service Co., 145 F. (2d) 636; Grippentrog v. Cheese Makers Mfg. Co., 7 Wage Hour Rept. 473; Phillips v. Meeker Cooperative Light & Power Assn., 63 F. Supp. 733; Keen v. Mid-Continent Petroleum Corp., 58 F. Supp. 915.

The subject company appears to be engaged, with some degree of regularity, in the following transactions which the Divisions, under release G-232, regard as covered: Solicits or sells insurance to persons in other States; collects premiums from persons in other States; actively adjusts claims for losses in other States; delivers policies to persons in other States; receives remittances from persons in other States.

Of course, as indicated by the Supreme Court in the Mabee case, the fact that the company is engaged in covered activities does not necessarily mean that all of its employees are covered, since the applicability of the Act is dependent on the character of the individual employee's work. However, if the statements in the file are to be believed, some at least of the employees would appear to be engaged in interstate activities with a fair degree of regularity.

I cannot, of course, advise you whether this case is suitable for litigation, since that question would appropriately have to be determined by the Assistant Solicitor in Charge of Litigation. Likewise, whether the case should be closed administratively, without restitution, on the basis of the company's offer to come into compliance is not a matter within the province of this office.

Since your inquiry is limited to the coverage question, I have not discussed the possibilities of exemption under 13(a)(1) for some of the employees. Such a determination can only be made on the basis of a full job description for these employees.

Attachment
(File)

(04770)

21 AC 414.95
21 AC 409.4111
Ernest N. Votaw 21 AC 205.10
Regional Attorney 21 AC 205.27
Philadelphia 7, Pennsylvania 21 AC 402.1
21 AC 409.4113
Harold C. Nystrom 21 AC 409.4214
Chief, Wage-Hour Section 21 AC 408.2

General Radio Service Company June 25, 1946
380 South Webster Avenue
Scranton, Pennsylvania SOL:AS:CTN

Reference is made to your memorandum dated June 10, 1946, and to your earlier memorandum dated April 11, 1946, concerning the applicability of the Act in the situation you present. It appears that subject, whose business is wiring for sound, installs and repairs inter-office communicating systems and amplifying systems in factories which produce goods for commerce. The amplifying systems are used to furnish music for the employees at the factories.

On the basis of the facts submitted I agree with your opinion that both the original installation and the repair of inter-office communicating systems on the premises of establishments producing goods for commerce constitute occupations or processes necessary to the production of goods for commerce and as such are covered under the Act. See Roland Electrical Co. v. Walling, 66 S. Ct. 413, 416, in which the Court held the Act applicable to employees engaged in "commercial and industrial wiring * * *" where the employer's customers were producers for commerce. As you know, in that case the Court, discussing coverage on production grounds, stated:

> This does not require the employee to be employed even in the production of an article which itself becomes the subject of commerce * * *. It is enough that the employee be employed, for example, in an occupation which is necessary to the production of a part of any other "articles or subjects of commerce of any character" which are produced for * * * commerce * * *. It is enough that the /occupation/ at issue is needed in such production and would, if omitted, handicap the production /Emphasis by the Court/.

See, also, Martino v. Michigan Cleaning Co., 66 S. Ct. 379.

(04770)

You further state that the work in connection with the amplifying systems may be considered covered "on the theory that the music boosts the employees' morale and thereby increases the productivity." You point out that such a conclusion would be analogous to the position of the Divisions to the effect that the operation of a canteen at an industrial establishment is necessary to production. As you know, the Court stated in the case of Armour & Co. v. Wantock, 323 U. S. 126:

> A court would not readily assume that a corporation's management was spending stockholders' money on a mere hobby or extravagance. * * * an occupation is not to be excluded from the Act merely because it contributes to economy or to continuity of production rather than to volume of production.

Similarly, it would appear that the installation and maintenance of the amplifying systems in the situation you present is not a mere hobby or extravagance on the part of the factory owners but is intended as a direct and necessary contribution to the economy and continuity of production. The utilization of music in factories as a significant method of combatting fatigue and thus directly increasing the effectiveness of production is today a recognized industrial practice. Thus, according to a survey of a complete cross-section of United States industrial plants which use music at work, published in August 1943 by the War Production Board, Washington, D. C., under the title "Music in War Plants," 57 percent of the plants surveyed indicated that the use of music increased production in their plants. A similar conclusion is contained in an article entitled "Music While You Think," which was published in the February 15, 1946, issue of Forbes magazine and reprinted and condensed in the March 1946 issue of Reader's Digest, in which it is stated that:

> Music contributed notably to the miracle of our war production on the assembly line; it stimulated output, raised morale. Now it is being piped into business offices where headwork predominates.
>
> Although skeptical at first of its benefits for brain toilers, now banks, insurance companies, publishing houses and such are finding that music accomplishes the same results in accounting, bookkeeping and editorial offices as in the factory.

(04770)

It relieves fatigue, tension, boredom, keeps the workers in a happier frame of mind. The Federal Reserve Bank of New York, National City Bank of New York, Bell Telephone Co. of New York, Research Institute of America and McGraw-Hill Publishing Co. are a few of the users.

The Supreme Court has rejected the idea that "necessary" under section 3(j) of the Act means "indispensable," "essential," or "vital." It is sufficient if the activity is performed as part of an "integrated effort for the production of goods" (Armour v. Wantock, supra). As was stated in the Roland case, "It is enough that the /occupation/ at issue is needed in such production and would, if omitted, handicap the production." See, also, Walling v. Thompson, 6 Wage Hour Cases 53 (S.D.Calif., May 3, 1946), in which the Court stated that "the test of what is 'necessary' is not indispensability, but actual use."

For the foregoing reasons I concur in your opinion that the installation and maintenance of amplifying systems for the furnishing of music to employees in factories producing goods for commerce constitutes an occupation necessary to the production of goods for commerce and as such is covered under the Act.

Moreover, as you correctly note, the fact that the employee installing or repairing the inter-office communicating systems and the amplifying systems are employees of an independent contractor rather than of the manufacturers would not affect the conclusions expressed since the general test of coverage is the relation of the activities of the individual employee to interstate commerce or to the production of goods for interstate commerce rather than the nature of the employer's business. (See Martino v. Michigan Cleaning Co., 66 S.Ct. 379; Kirschbaum v. Walling, 316 U.S. 617; Walling v. Jacksonville Paper Co., 317 U.S. 564; Warren-Bradshaw Drilling Co. v. Rall, 317 U.S. 88; see, also, Legal Field Letter No. 106, page 6.) Nor would it appear necessary, in connection with the conclusions expressed, to consider whether the particular work involved constitutes original installation or whether it constitutes maintenance work. The installation of equipment in premises used for the production of goods for commerce is not analogous to the original construction of a building which will subsequently be used to produce goods for commerce.

(04770)

21 BB 301.32
.33
302.20
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Kenneth P. Montgomery
Regional Attorney
Chicago, Illinois

SOL:HJE:CTN

Harold C. Nystrom
Chief, Wage-Hour Section

June 25, 1946

Streeter-Amet Company
4101 Ravenswood Avenue
Chicago 13, Illinois
File No. 12-57,494

This will reply to your memorandum of August 15, 1945, inquiring as to the applicability of the administrative employee exemption, as defined in section 541.2 of the regulations, to certain "field engineers" employed by subject firm.

You state that subject manufactures precision weighing machines which are used for weighing carloads while trains are in motion. These machines are built to order and are either sold or leased to various establishments, the lease being the usual form of transaction. The contracts of lease provide that subject will repair and maintain the machines in good order and that subject will make inspections at 60 or 90-day intervals. The field engineers under consideration are employed to perform the repair, maintenance and inspection operations.

It further appears that each of the field engineers has a specific district of several States making his inspection tours by automobile and traveling between 40 and 50 thousand miles a year. It is estimated that approximately half the ordinary workweek is consumed in such travel.

You state that an engineer conducts an inspection by first comparing the machine's operation against that of a test machine which he apparently carries with him. In approximately 90 percent of the cases, the machine in the establishment is found to be in good working order. If not, however, the manual work of repairing the machine is performed by the field engineer, although at times the repairs are made by the customer's own employees under his direction. He carries his own tools, such as drills, taps and dies, as well as some replacement parts. A good portion of his day is unavoidably spent in waiting for the switch engines and train cars to be brought in to the site of the weighing machine. Also, he is subject to being called out at any time of the day or night, depending upon the type of trouble involved, and may have to spend as much as 18 to 20 hours at a stretch on a job. If, in performing work for a company which has bought the machine, he works overtime or on Saturday or Sunday, the customer may be charged an additional sum, part of which is paid to the field engineer.

Besides the repair and maintenance work, the engineers supervise the installation of machines. Since the latter are custom built, the field engineers may perform some of the preliminary work prior to installation, such as obtaining the data for the engineers who design the machines. In connection with the actual installing, you state that while generally the

customer supplies the labor, this is not always possible; accordingly, the engineers may have to do some of the installation work such as laying cement floors and drilling holes. It is your estimate that since a field engineer will not engage in installing more than two or three machines a year, he will spend three weeks a year, at most, in this type of installation.

Finally, the engineers perform another function described by you as follows:

> In addition to the installation and inspection work above described the engineer acts as the good-will agent of the subject company. It is his duty to try to make sales or additional leasing contracts of the company's machines and maintain friendly relations with the customers. For example, in a coal mine a strike might be threatened by the miners because of a claim that they are not being paid properly for the amount they produce. This may be a dispute as to whether their output is being weighed properly. In such case the field engineer is called in to explain to the miners that the machine is operating properly and explain its operation. Another instance is where the customer may claim he is not receiving enough for his produce and this may be a case of the scale not showing the proper weight. Here, again, the engineer may be called in to demonstrate that the scale is operating properly.

You state that the field engineers must have at least the equivalent of a high school education. Depending on their previous education, they pursue a training program ranging from two to four years. They are selected from among the factory employees or are brought in from the outside for about two years' work in the factory in the production and assembly of weighing machinery. They must have a knowledge of certain mathematical, design, and other technical information having specific application to the principles and properties of automatic weighing machinery. You also state that "They must be able to handle the interests of the firm with management agencies in industry for whom service is performed."

It is your opinion that subject's field engineers are not exempt as administrative employees because they perform manual work. However, you question whether such manual work is really nonexempt work or whether it is incidental to their administrative duties and therefore exempt. You regard this as a borderline case apparently because of the degree of training for the work and the engineers' functions as "good-will agents." Therefore, you request an opinion as to whether subject's field engineers are exempt under section 541.2 of the regulations.

From the foregoing facts, it appears that subject's field engineers are persons of considerable training and experience who are employed principally to perform inspections and in connection therewith, repair and maintenance operations. In 90 percent of the inspections, all that is necessary is to make certain tests. It would seem, therefore,

that this constitutes the engineers' major function. However, you do not sufficiently describe the testing so as to indicate whether or not it constitutes exempt work. From what you state, testing may merely consist of temporarily attaching a weighing apparatus and taking readings from such apparatus and from the previously installed machine. This would not of itself constitute exempt work. Furthermore, you do not describe the manner in which these readings are interpreted in deciding whether repairs are necessary. Finally, it is not clear as to how these activities are claimed to be directly related to management policies or general business operations. (Cf. Stein report, pages 27-28, and see discussion of Public-Utility Fieldmen on page 30.)

Regardless of whether this inspection work is exempt, however, it is clear that the resulting repair work made by the engineers is not incidental to such activities. You indicate that such work can be performed by nonexempt employees working under the field engineers' directions. Moreover, the repair work is not performed as part of the inspections but constitutes distinct and separate operations undertaken upon the completion of the inspections. Similarly, such work prior to installation as laying cement floors and drilling holes cannot be said to be incidental manual work even if the supervision of installing the machines is exempt. The performance of both this work and the nonexempt repair work is a strong indication that the employees in question are not "white-collar" employees but are more or less highly-skilled service men performing manual work. In this connection, it appears that the sales and "good-will" work which they perform is subordinate to the employees' principal duties of inspection, repair, maintenance and installation, since it appears to be of only infrequent occurrence and since the principal work can be completed without such good-will work.

As you know, the performance of manual work which is not incidental to an employee's administrative duties, defeats the 541.2 exemption (see Stein report, page 29). It is my opinion, therefore, that, even if the principal function of these employees is considered exempt, the exemption is not applicable to subject's field engineers in any workweek in which such nonexempt work is performed. Furthermore, as I have indicated in the foregoing, the facts which you have submitted do not disclose a sufficient basis for considering the general character of these employees' jobs to be of an administrative nature so as to be exempt even in workweeks when no such nonexempt work is performed.

26 CD 302.1
26 CE 201
26 CD 303
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703.3

A. A. Caghan, Regional Attorney
Cleveland, Ohio

Harold C. Nystrom
Chief, Wage-Hour Section

SOL:VOW:PLG

Regular Rate of Pay
Garaux Bros. Company
415 9th Street, S. W.
Canton, Ohio
File No. 34-5228
SOL:GED:SM

June 26, 1946

This will reply to a memorandum submitted to this office by former Regional Attorney Reynard transmitting a memorandum of former Regional Director Glascott in which an opinion was requested concerning subject company's method of computing overtime compensation. In the event that the method employed by the company constitutes a violation of section 7, it was further requested that a determination be made as to what portion of the compensation paid may be allocated to overtime and what part must be treated as straight-time earnings in computing the regular rate of pay.

Miss Glascott stated that the two nonexempt office employees are compensated for 60 hours a week, although their average workweek is approximately 48 hours. The pay-roll records indicate that the employer has established hourly rates to which the employees have agreed. The company pays the straight-time hourly rate for 60 hours and an additional half time for the 20 hours in excess of 40, whether such hours are worked or not. Thus, I assume that the employees in question receive a guaranteed 60 hours' pay, including time and a half for 20 hours, even when they work only 40 hours in a week.

It is my opinion that subject has attempted by oral arrangement to establish a Belo-type contract. The company has specified an hourly rate and has paid overtime both for hours worked and overtime hours not worked in order to maintain a standard weekly salary. It is apparent that the subject company is endeavoring to establish a minimum guaranteed salary for the employees in question regardless of the number of hours worked by them in each workweek. Cf. Legal Field Letter No. 97, page 29.

Paragraph 8C18 of the Wage-Hour Code appears directly applicable in this connection. As stated there:

> Since, however, special overtime compensation is by definition an extra amount representing a higher rate paid <u>for the working of hours</u> in excess of a maximum number fixed by contract or statute, no payment, whatever the intention of the parties, is a payment of overtime compensation unless it comprises an amount calculated at a rate greater than the straight-time rate <u>and with reference to the number of hours worked in excess of the maximum</u>. Any compensation paid in addition to that admittedly paid for straight time

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> can be considered as overtime compensation only if it bears a mathematical relation to the number of overtime hours for which it purports to be special compensation * * *. Likewise, payments that have as their purpose, not the extra compensation of the employee for the working of excessive hours, but rather the payment of whatever amount is necessary to make up the difference between the straight-time compensation required by the expressed straight-time rate and a fixed total of earnings in each day or week, are to be counted as straight-time compensation. /Underscoring supplied./

Permitting an employer to treat as overtime compensation amounts paid both for true and fictitious overtime hours may have a serious effect upon the Divisions' position regarding Belo contracts. We have consistently regarded the provision for flexible overtime as an intrinsic part of a Belo contract and have not permitted an employer whose contract lacks the proviso for a flexible "not less than" overtime rate to substitute "overtime compensation" for imaginary hours in order to maintain a constant regular salary for all workweeks.

Moreover, it is impossible to translate an arrangement to pay overtime rates for 8 overtime hours actually worked in the average workweek and for 12 fictitious overtime hours into an agreement to pay "not less than" time and one-half for hours over 40. The Divisions cannot remake the agreement for the parties. Thus, in the case of one employee receiving 70 cents an hour for 60 hours a week and an additional 35 cents for 20 hours, only 8 of which are worked, it cannot be said that the contract provides that in a 48-hour workweek the employee will be compensated for the 8 actual overtime hours at the rate of $2.62 an hour ($1.05 x 20 hours / 8 hours).

Accordingly, based on the assumption that the employees are guaranteed 60 hours' pay, including "overtime," I believe that no part of such amount may be considered as true overtime compensation. It would appear that the arrangement constitutes a weekly salary for a fluctuating workweek up to 60 hours a week and that the regular rate of pay is to be determined by dividing the hours worked into the week's compensation, including the alleged "overtime" compensation for the hours between 40 and 60. However, in the event that this reply is predicated upon an incorrect assumption regarding the guaranteed compensation, it is possible that further information as to subject company's pay practices, particularly as to amounts paid in weeks in which the employee has been absent for a day or a part of a day, may lead to some other conclusion.

26 CD 402.523
402.526
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A. A. Caghan
Regional Attorney
Detroit, Michigan

Harold C. Nystrom
Chief, Wage-Hour Section

26 CE 101
24 AC 302.2

Knight Newspapers, Inc.

SOL:ERG:CTN

June 28, 1946

I am sorry that it has not been possible to reply sooner to former Regional Attorney Reynard's memorandum dated August 24, 1945, requesting an opinion as to the proper method of computing back pay due certain employees of the subject company, publisher of the Detroit Free Press and other newspapers, who are engaged in the solicitation of advertisements for the classified ad section of the newspaper.

Mr. Reynard's memorandum states that these employees normally work a 37½-hour workweek for which they receive "a minimum guaranteed amount covering the first 37½ hours worked." They are also paid commissions based on the number of ads which they secure. In addition, they receive "overtime compensation" at a rate which is one and one-half times a rate computed on a formula hereinafter described, for all hours worked in excess of 37½ hours in the week. It is also stated that the union contract calls for the payment of overtime compensation only after 40 hours and that these employees at one time worked a regular workweek of 40 hours, which was subsequently reduced to the present workweek of 37½ hours.

The company arrives at the employee's straight-time rate, upon which it computes the "time and one-half" compensation for all hours worked in excess of 37½ hours in a week, by dividing the guaranteed minimum salary by 40 hours (rather than by 37½), excluding entirely the amount paid as commissions. Mr. Reynard's memorandum illustrates the company's practices by the following example: An employee receives a guaranteed minimum of $40 for a regular 37½-hour workweek. She worked 42 hours in the week in question and earned $42 in commissions. The company paid her:

$40.00 for 37½ hours (guaranteed pay)
6.75 for 4½ hours in excess of 37½ at "time and one-half"
($40.00 ÷ 40 hours x 4½x1½)
42.00 commissions on ads
$88.75 Total pay

The memorandum points out that the straight-time hourly rate (exclusive of commissions) which is actually paid in the foregoing example for the first 37½ hours is approximately $1.07 (actually $1.0666), whereas the straight-time hourly rate assigned to hours in excess of 37½ for purposes of computing compensation at "time and one-half" for those hours is exactly $1.

You are, of course, familiar with the recent decisions in the Helmerich & Payne, Rosenwasser, Youngerman-Reynolds and Harnischfeger cases wherein the United States Supreme Court held that an employee's

(04770)

"regular rate" under section 7 of the Act is "the hourly rate actually paid for the normal, non-overtime workweek." As you know, the Divisions have recently had occasion to pass upon the validity of certain overtime payment practices wherein employees were paid, for overtime hours worked, on the basis of a lower hourly straight-time rate of pay than the rate actually paid for the same type of work when performed during non-overtime hours. In such situations, as you will recall, the Divisions have held that the employee's true regular rate of pay is neither (1) the lower straight-time rate of pay assigned to the overtime hours, nor (2) the average rate of pay arrived at by averaging the employees' total compensation for the week at the varying "straight-time" rates over the total number of hours worked during such week, but is the rate actually in effect during the normal, non-overtime workweek. See, in this connection, Legal Field Letter No. 103, page 2; Legal Field Letter No. 106, page 14; Legal Field Letter No. 103, page 17; Legal Field Letter No. 105, page 3. See, also, Legal Field Letter No. 102, page 4; Legal Field Letter No. 103, page 31; Legal Field Letter No. 101, page 14; cf. Legal Field Letter No. 22, page 33. As pointed out in Legal Field Letter No. 103, page 2, such situations are distinguishable from the bona fide employments at two or more rates of pay that are contemplated by paragraph 14 of Interpretative Bulletin No. 4.

While it is, of course, true that an employer may elect to pay contractual overtime for a workweek shorter than 40 hours and may credit against statutory overtime due any extra compensation paid as bona fide overtime compensation (see paragraphs 69 and 70(2) of Interpretative Bulletin No. 4), such crediting is permitted only to the extent that the amounts paid actually represent extra compensation in excess of the employee's true regular rate. See Legal Field Letter No. 106, page 14. In the instant case, the employee's normal non-overtime workweek appears to be 37½ hours since, it is stated the employees normally work a 37½-hour workweek and receive a minimum guaranteed salary which compensates them for 37½ hours. As Mr. Reynard's memorandum correctly points out with respect to the illustration given, the actual straight-time hourly rate of an employee who is paid a guaranteed salary of $40 for a 37½-hour week is approximately $1.07. On the facts here presented, this is the rate which the parties themselves have determined to be the rate payable during the "normal non-overtime workweek." The $1 rate arbitrarily assigned by the company to straight time after 37½ hours for overtime purposes, both contractual and statutory, is, on the other hand, not a rate which is ever actually paid the subject employees for non-overtime hours of work, but is, in fact, one which is lower than any rate actually paid for straight-time hours worked in the normal, non-overtime workweek.

It is my opinion, consequently, that the true regular rate of pay of the employees in question, in a workweek when no commissions were earned, would be $1.0666 under the circumstances described above. Consequently, this rate, viz., $1.0666, must, in such case, be regarded as the employee's regular rate of pay both for the purpose of computing overtime compensation required to be paid for hours worked in excess of 40 in a workweek and for the purpose of determining what sums paid as contractual overtime may be credited against statutory overtime due. See, in this connection, Legal Field Letter No. 106, page 14.

Returning now to the illustration contained in your memorandum, where an employee receives a guaranteed minimum salary of $40 for a regular workweek of 37½ hours, works 42 hours in the week, and earns an additional $42 in commissions, the employee's regular hourly rate of pay for the workweek should be determined as follows:

$40.00	(straight-time salary for 37½ hours) ÷ 37½ hours	=	$1.0666
42.00	(commissions) ÷ 42 hours	=	1.00
	Regular hourly rate	=	$2.0666

Since the employee's regular rate, inclusive of commissions, is $2.0666, the employee is entitled to receive overtime compensation for the 2 hours over 40 at a rate of $3.10 ($6.20), in addition to straight-time compensation at the regular rate for the first 40 hours, based on his salary and commissions ($2.0666 x 40 = $82.67). Cf. Legal Field Letter No. 105, page 3. The Act would thus require payment of $88.87 for the week in question. The employer, under the Divisions' policy expressed in the bulletin, may, however, credit himself with any bona fide contractual overtime compensation paid the employee. He has already paid the employee $88.75 for the week in question, including (in addition to straight time for the first 40 hours) $1.08 as bona fide overtime premium for the hours between 37½ and 40 (2½ x $.4333 (difference between $2.50 paid for each such hour and regular straight-time pay of $2.0666 per hour)), and $5 ($2.50 for each hour) for the two hours in excess of 40. Consequently, he need pay the employee only an additional 12 cents ($6.20 - ($5 plus $1.08)). Cf. Legal Field Letter No. 106, pages 14-17.

(04770)

21 BB 301.33
302.0
A. A. Caghan, Regional Attorney 302.3
Cleveland, Ohio 303.3
21 BL 302.10
Donald M. Murtha, 302.221
Assistant Solicitor 302.41

The Standard Register Co. SOL:AGW:HD

July 8, 1946

Reference is made to Mr. Reynard's memorandum of August 31, 1945 with which he submitted information supplementing that which was set forth in his memorandum of May 26, 1945 and the correspondence attached thereto. He has requested an opinion as to whether employees of the subject company designated by it as "systems analysts," who perform work at the plants and offices of customers of the subject company in connection with the setting up of business accounting systems and the designing of business forms and machines for such customers are eligible for exemption as either administrative employees or as "outside salesmen" under section 13(a)(1) of the Act.

It appears from the correspondence attached to Mr. Reynard's earlier memorandum that the subject company is engaged in furnishing of business controls systems to business in general. It employs salesmen who contact customers and pays them in proportion to their sales. It also employs systems analysts who, according to the subject company's job description, are trained in--

> analyzing existing business accounting systems; determining weaknesses, if any, in the systems; devising shortcuts and improving the efficiency of the system; making of comprehensive presentations as to their recommendations; as well as having a comprehensive knowledge of all types of business machines in use in the United States at the present time * * *.

The Standard Register Company supplies its customers with a patented "Registrator platen" and manifold printed forms designed by the systems analysts or the salesmen to conform to the needs of the business of each customer. The subject company states that the systems analysts are carefully selected women of high intelligence, usually college graduates, who are subjected to a training period of about 14 weeks. They are called in after the salesmen make--

> the original contact, to make or aid in the making of a comprehensive study of the customer's business, his methods, his products or services, as well as the records he requires in manufacturing, accounting, invoicing, payroll, inventory, production, shipping and the making of governmental returns of every type and character.

After spending a sufficient period of time at the customer's place of business to become familiar with the manner in which the customer

operates, the systems analyst works out in collaboration with the salesman a business accounting system for presentation to the management of the customer along with a flow chart indicating the improvements of the new recommended system over the customer's present practices. Upon completion of this survey she and the salesman design, subject to the approval of the home office, the machine and the business accounting system to be used by the customer which will conform to the particular customer's need. With minor exceptions, these systems analysts are paid more than $200 a month and work out of the regional sales offices of the subject company, but are required to do a considerable amount of traveling.

In her statement, Elsie Klinkenberg, a systems analyst, states that "the salesman selects the part of business" of the client company which she is to study, such as purchasing, payroll procedures, etc. The analyst uses general guides and "analysis checking charts." She traces the procedure in question, interviews the employees involved therein, observes the job, studies all phases of the machine operation, the kind of paper used, the type of machine, etc. She makes notes throughout, then organizes her notes, perhaps checking them with the client company officials, and makes a flow chart of the particular procedure. She confers with the salesman regarding the chart and they then apply the subject employer's "improvement formula." The formula includes -- "can it be eliminated, combined, changed in sequence or simplified? These questions are covered in each detail of the flow. Each system is individualized and might require different applications."

After the improvements have been worked out (presumably by the analyst) a new flow system is developed and conference again held with the salesman. When a proposed system is agreed upon, it is discussed with the customer by the salesman and the analyst. The analyst makes no attempt to sell, but is present to explain the former and the improved system. When the system is sold, the analyst may assist in its installation.

Analyst Dorothea Morgan indicates a greater degree of independence from assistance by the sales representative of the subject company. She states that after being generally advised about the customer firm and the particular procedure to be studied, she is introduced to the firm by the salesman "and from there on I am on my own." She interviews officials of the client company and other of its employees, studies the flow of work, and notes "mechanical set-ups" for possible improvements. She then organizes her notes into a flow chart, applying the subject company's formulas in making her recommendations. The flow chart or her notes are discussed with the subject employer's "regional manager," their ideas are "pooled," and a final flow chart is prepared. "We then discuss the chart with the customer . . .," Miss Morgan states. When agreement is reached, the form is devised and the salesman steps in to handle the selling. This employee states that she makes "most of the recommendations in the average study although the salesman or regional manager might add suggestions to my original proposal." She states further that because of her "I.B.M. experience" she spends about one-third of her time assisting salesmen in devising tabulating forms.

Both employees profess in general terms to the use of discretion and judgment in the performance of their work.

(04770)

From the working procedures chart supplied with Mr. Reynard's memorandum of July 31, 1945, it appears that it is contemplated by the subject firm that the systems analyst will act as an assistant to the salesman, performing under the latter's direction a more or less limited portion of his work. According to the chart the analyst is excluded from contacts with a "prospect" and begins his work only after permission to make a study has been obtained, the salesman has determined that the customer's system can be improved substantially and the particular problem has been defined. Even after the analyst has been called in she is not "on her own" but must be accompanied by the salesman when consulting with the customer's officials. Her outline of suggested improvements is prepared "in consultation" with the salesman. There also appears to be a lesser degree of creative work than might be supposed on first impression, inasmuch as this phase of the work consists primarily of selecting from the standard digests supplied by the subject for the particular job first the group systems and then the particular system or systems in the group which fit the problem under consideration. The designing of a flow chart for the customer would appear to consist only of filling in the details and perhaps making minor changes necessary to adapt the "prefabricated" system to the particular plant's operations. It should be noted that these activities not only are supervised by the salesman but are reviewed by the home office of the subject "if thought advisable."

While the extent, if any, to which the analysts actually exercise discretion and independent judgment is doubtful, a more fundamental reason for denying the exemption is that the tasks performed by the analysts are not "directly related to management policies or general business operations" within the meaning of the regulations. To say that these 30 employees are engaged in work "directly related to management policies or general business operations" would in effect so broaden the interpretation of that phrase as to render it surplusage in the regulations. Rules of construction of statutes and regulations militate against such a result.

The activities of these employees are related only to specific business transactions of their employer rather than his general business operations. Their activities are more like those of skilled craftsmen than persons who "run the business." Without attempting to give a precise definition of the term "directly related to management policies or general business operations," it may be stated that it certainly should be reserved for persons who in some way participate in the "running of the business" and should not include the ordinary operating employees. Stein indicates this result in the Report. On page 25 he says,

> "There is, however, no automatic way of distinguishing between a rate-setter * * * and a supervisor of production control * * * whose decisions effect the welfare of thousands of employees. Clearly, the latter person is employed in a 'bona fide administrative capacity', while the former is a mere cog in a large industrial wheel." (Underscoring supplied)

In the second full paragraph on page 4 he describes administrative employees in the following language:

"Primarily they determine or affect policies or carry out major assignments." (Underscoring supplied)

In evaluating the work of these employees to the business of the employer the most fitting description of their function is that each is one of many similar "cog(s) in a large industrial wheel." Nor can it be said of any one of the analysts of whom we have any information that she "determines or affects policies, or carries out major assignments." They have nothing to do with policies and the term "major assignments" does not describe assignments which are of the same approximate importance as so many other employees of the same employer.

There are several answers to the theses which might be advanced that the analysts should be exempt because they would be exempt if employed by the customers. First of all, if they do not exercise discretion and independent judgment they would not be exempt under any circumstances. Secondly, if they were employed by the customers they would either be performing all of the services provided by the subject company, i.e., selecting the operation to be studied, determining whether it might be improved, defining the problem, working out the basic system supplied by the Digest, and being responsible for the ultimate determination that the system proposed is the best one, all without a salesman or a home office to furnish guidance, or the analysts would not meet the test under consideration. Finally, the regulations contemplate that those persons who are exempt as administrative employees perform work directly related to their own employer's management policies or general business operations and not to some other employers. This is in accord with the statutory purpose to exempt those employees who are either a part of management or so closely related to it as to make it impracticable to limit the number of hours they work.

The outside salesman exemption would not be applicable to the analysts, since they do not engage in making sales or in the obtaining of orders or contracts. They are prohibited from engaging in selling activities and such help as they give the salesmen is limited to preparing the "product" of the subject for sale to the customer.

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

SOL:JFS:JMR

July 10, 1946

Donald M. Murtha
Assistant Solicitor

Norfolk, Baltimore & Carolina Line, Inc.	
Norfolk, Virginia	45-3576
Baltimore, Maryland	19-3124
Charleston, South Carolina	39-1068
Greenville, North Carolina	32-127
Greenville, North Carolina	32-2889
Washington, North Carolina	32-2187

The subject firm is a Virginia corporation with main offices located on Water Street, Norfolk, Virginia, and is engaged in the transportation of freight by water. In addition to its office, the firm also has located at Norfolk, Virginia a warehouse and two piers, and has an office and warehouse located at Baltimore, Maryland; Washington, North Carolina; and Charleston, South Carolina. The firm does not own any railroad rolling stock but does control the trackage located within the area of its terminals. Normally the firm operates regularly scheduled daily trips between Norfolk and Baltimore, and two trips a week between Baltimore and points in North Carolina and South Carolina and between Norfolk and points in North Carolina and South Carolina. However, at the present time the firm operates only two boats since five of its boats have been taken over by the Navy and three were requisitioned by the War Shipping Administration.

The firm contends that it "is party to tariffs showing through rates by rail and water from various points of origin to various points of destination. Shipments are moved under a joint arrangement for through carriage and filed with Part I of the Interstate Commerce Commission. Questions of divisions of revenue are based on mutually satisfactory arrangements between the carriers involved, which is represented by what we call Division Sheets." No copies of any agreement between the firm and any rail carrier, nor of division sheets are contained in the files. The firm claims that its operations are exempt under section 13(b)(2) since such operations are subject to Part I of the Interstate Commerce Act as constituting, "The transportation of * * * property * * * partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment." 49 U.S.C. 1(1)(a). You request our advice in this matter.

In Norfolk, Baltimore & Carolina Line, Inc., Application, decided September 30, 1943 and March 13, 1944, I.C.C. Docket, W-595, not yet reported, the Commission found and ordered pursuant to the "grandfather clause" of 49 U.S.C. 903(e)(Part III) "that the continuance of applicant's operations as a common carrier by water between Baltimore, Newport News, Portsmouth, Norfolk, Wilmington, Southport, Conway, Georgetown, and Charleston * * * is required by public convenience and necessity." Also pursuant to 49 U.S.C. 911(b) the Commission had previously granted temporary

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operating authority for the subject firm to lease The Bull Steamship Line's operating rights between Baltimore, Maryland and Charleston, South Carolina. In Bull Steamship Line Lease, 250 I.C.C. 113, the Commission permanently approved such lease pursuant to 49 U.S.C. 5(2), and remarked, "The applicant (Norfolk, Baltimore & Carolina Line, Inc.) is a party to through routes and joint rates with railroads, other water carriers, and truck lines" (p. 115). The Commission's Freight Tariff Branch advises that the subject firm is a party to joint rail-water rates published in Agent W. S. Carlett's tariff, I.C.C. No. A-635, as amended, effective August 15, 1941.

Apparently there is no claim of a "common control or management" in this case, but rather a "common arrangement." Bigley Bros., Inc., Contract Carrier Application, 4 M.C.C. 711. I might point out that under the Railroad Retirement Act, 45 U.S.C. 228(a) et seq., which applies to "any carrier (defined as an express company, sleeping-car company, or carrier by railroad, subject to Part I of the Interstate Commerce Act), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith," it was held in the attached letter from the Railroad Retirement Board to the subject firm, that the firm is not subject to such act. However, it is to be noted that such act does not include a "common arrangement" relationship, but only a relationship of "directly or indirectly owned or controlled * * * or under common control."

As stated in United States v. Munson Steamship Line, 283 U.S. 43, whether in fact "there was a continuous carriage or shipment" is immaterial in invoking 49 U.S.C., 1(1)(a), unless "that carriage or shipment was pursuant to a common arrangement." Also "a common arrangement may exist without the issue of a through bill of lading or any particular formality." Whether through bills of lading are used in the subject firm's rail-water transportation can not be determined from the file.

It is clear that for a "common arrangement" to exist within the meaning of the statute, the "arrangement" must be "expressed or implied, between the carriers to create a continuous line over which traffic may move." Proportional Grain Between Federal Barge Line Ports, 225 I.C.C. 62; Mutual Transit Co. v. United States, 178 Fed. 664 (C.C.A. 2); Munson case. While a "common arrangement" has been held to exist where there is no division of charges (Standard Oil Co. of N. Y. v. United States, 179 Fed. 614 (C.C.A. 2), certiorari denied, 218 U.S. 681), generally the absence of a division of charges has been held to preclude a "common arrangement." Munson case; Mutual Transit case; Federal Barge Line case; Ex Parte Koehler, 30 Fed. 867 (ore.); Bigley Bros., Inc., Contract Carrier Application, 4 M.C.C. 711.

On the other hand a "common arrangement" has always been held to exist where there is a division of charges, either as a result of a formal joint rate (Interstate Commerce Commission v. Goodrich Transit Co., 224 U.S. 194), or an informal business practice, C.N.O. & T. P. Ry. Co. v. Interstate Commerce Commission, 162 U.S. 184; Baer Bros. Merchantile Co. v. D. & R. G. R. R. Co., 233 U.S. 479; United States v. Seaboard Ry. Co., 82 Fed. 563, (Ala.). "It is not necessary that a 'common arrangement' should be established by proof of formal concurrence in tariffs and division sheets." Mutual Transit Co. case.

In the Goodrich Transit Co. case the only evidence of a "common arrangement" was a formal joint rail-water rate. One water carrier claimed that less than 20 percent of its gross earnings was derived from its rail-water business and the other water carrier claimed that less than 1 percent of its entire revenue was derived from its rail-water business. The court held that "Certain it is that, when engaged in carrying on traffic under joint rates with railroads, filed with the Commission * * * the carriers are * * * subject to the general requirements of the act." The Court ruled that all of the companies' revenue and operations were subject to the methods of accounts and bookkeeping and reports required by the Commission, but "conceding for this purpose that the regulating power of the Commission is limited so far as rates are concerned to joint rates of the character named in section 1."

Also the Commission has stated that "It is clear that shipments of wool transported in interstate commerce over rail-and-water routes to Boston on which joint rail-and-water rates are applicable, move under a common control, management, or arrangement for a continuous carriage or shipment such as that contemplated by this provision of Part I." Wool Transportation by Motor Vehicle in and About Boston, Mass., 26 M.C.C. 297.

Since the subject firm engages in the transportation of property partly by railroad and partly by water under formal joint rail-water rates filed with the Commission, it appears that such transportation is performed under a common arrangement for a continuous carriage or shipment within the meaning of Part I of the Interstate Commerce Act. The fact that the firm's operating authority has been issued by the Commission pursuant to Part III would not prevent the firm from also being subject to Part I, since 49 U.S.C. 905(b) makes it the duty of common carriers by water to establish reasonable through routes with common carriers by railroad and 49 U.S.C. 902(a) provides for transportation being subject to both Parts I and III.

Also under the Goodrich Transit Co. case the fact that during the war the firm's rail-water business has decreased considerably would not operate to exclude the small amount of remaining rail-water transportation from being subject to Part I. On the other hand since section 13(b)(2) is applicable on an individual employee basis to include only employees performing work which subjects their employer to Part I and does not include employees performing in excess of 20 percent nonexempt work within a particular workweek, the section 13(b)(2) exemption is not necessarily applicable to all employees of the firm nor during all workweeks. L.F.L. 56.

Attachments
(6 Files and
1 Letter)

Washington 25, D. C.

26 CD 402.81
402.31
402.23
402.2111
302.1
302.22
701
26 CC
26 CE 101

Mr. John E. Morgan
333 North Michigan Avenue
Chicago, Illinois

SOL:JFS:SSB:HD

Dear Mr. Morgan:

July 11, 1946

This is in regard to your recent letter concerning the effect of vacation payments on the regular rate of pay under the Fair Labor Standards Act of 1938. Under the first type of vacation plan the union contract provides that in addition to the hourly rates, the employer shall pay as a vacation credit to each employee, the sum of 27 cents per shift but not to exceed $1.35 per week. The contract also provides that the 27 cents is to be collected from the employee by the chapel chairman and turned over to the secretary-treasurer of the union with the payment of dues, and in turn is to be distributed by the union to members accumulating vacation credits prior to the date of their scheduled vacation in exact proportion to the amount paid in by the employee under regulations established by the union. The contract also provides that the vacation is mandatory and noncumulative.

Under the second type of vacation plan the union contract provides that the employer shall credit employees with a certain amount per shift up to a specified weekly maximum, and on or after May 1 the employer shall deliver to each employee individual checks representing full payment of the vacation credits accumulated by such employee prior to that date. The vacation is also made noncumulative.

A third type of vacation plan is contemplated whereby the union contract will provide that the employer shall, once each year, on or after May 1, compute the total number of full shifts worked during the preceding 52-week year by each employee, and pay to him a specified sum for each such full shift worked.

I regret that on the basis of the facts contained in your letter I am unable to express a definite answer to your questions. The following general information, however, should prove helpful.

Enclosed are copies of releases R-1430 and R-1625 which deal with vacation pay and absences with pay and their effect on the regular rate of employees covered by the Fair Labor Standards Act. As you will note, it is the position of the Divisions that the regular rate of pay is determined by dividing the hours which an employee works during a workweek into the total earnings for such hours of employment. Vacation payments, therefore, made under a bona fide vacation plan for hours not worked while on vacation, and which payments are the approximate equivalent of the employee's normal earnings for a similar period of time, need not be included in computing the regular rate of pay.

However, where an employee is paid a stated amount each week (27 cents per shift but not to exceed $1.35 per week under the first plan)

which is designated as "an installment payment on vacation credit," the amount he will receive as vacation pay would appear to depend solely upon the number of shifts (8 hours of work) he works throughout the year. Under such circumstances, "the installment payment on vacation credit" might be considered, in the absence of other facts, to constitute an attendance bonus earned during the particular week when credited, and thus constitute an addition to the regular hourly rate of pay which must be included in computing overtime pay due under the Act for such week.

If you have any further questions, I shall be glad to advise you.

Very truly yours,

F. Granville Grimes, Jr.
Assistant to the Deputy Administrator

Enclosures

21 BJ 302.54 403.3
301.2 403.441
Washington 25, D. C. 303.21 600
303.3 701
402.44 23 CB 204.1

Mr. Carl F. Bailey 21 BJ 603 401
Secretary-Treasurer 21 BJ 403.1 101
Try-Me Transfer & Storage Company, Inc.
Huntington 9, West Virginia SOL:JFS:HD

Dear Mr. Bailey: July 16, 1946

This is in reply to your letter of June 29, 1946 concerning the application of the Fair Labor Standards Act of 1938. You state that your firm is primarily engaged in the moving and storage of household goods and also has a contract with the Chesapeake and Ohio Railroad Company to handle its store-door pick up and delivery. From the printing on the bottom of your letter it appears that you are the local agent for the Aero Mayflower Transit Company, national household movers. You state that you operate three medium size warehouses and specialize in the storing of household goods, that you do not store for any commercial accounts, and also that approximately 85 to 90 percent of your storage is intrastate. In performing the pick-up work, while an occasional shipper will call in his request, the larger shippers have standing orders to have your trucks call at their places of business daily for shipments. Apparently the dispatcher devotes 75 percent of his time handling local shipments for the general public and 25 percent of his time handling pick-up shipments for the railroad.

The Fair Labor Standards Act requires that all employees engaged in interstate commerce or in the production of goods for interstate commerce must be paid at a rate not less than 40 cents per hour and overtime at a rate not less than one and one-half times their regular rates of pay for all hours worked in excess of 40 hours per week, unless otherwise exempt.

Section 13(a)(2) exempts from both the minimum wage and overtime requirements of the Act "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." It is the position of the Divisions that the transportation, packing, shipping, and storing of privately owned household goods are exempt service transactions under this section. The fact that the long distance hauling of privately owned household goods may be performed by you as agent for the Aero Mayflower Transit Company would not operate to convert such transportation into a nonexempt service. On the other hand, the performance of store-door pick up and delivery for business and commercial firms under contract with the Chesapeake and Ohio Railroad Company would not constitute exempt servicing activities.

The section 13(a)(2) exemption is applicable on an individual establishment basis--an establishment being a physically separated place of business--and the applicability of the exemption depends upon whether the particular establishment possesses the characteristics of a service establishment. Thus, where a furniture warehouseman operates separate warehouses and engages in exempt transportation, packing, shipping, and storing of privately owned household goods, and also in nonexempt contract hauling for a railroad, those employees engaged exclusively during

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a workweek in the warehouses devoted solely to exempt servicing activities, the greater part of which are in intrastate commerce, would be exempt during such workweek under section 13(a)(2).

Where a furniture warehouseman, in the same warehouse, performs exempt transportation, packing, shipping and storing of privately owned household goods, and also nonexempt contract hauling for a railroad, if the two activities are performed in physically separated parts of the warehouse, employees engaged exclusively during a workweek in the part devoted solely to the exempt servicing activities, the greater part of which are in intrastate commerce, would be exempt during such workweek under section 13(a)(2), while those engaged in the other part devoted to the nonexempt contract hauling would not be so exempt. On the other hand, if the exempt servicing and nonexempt contract hauling are not performed in physically separate establishments in the warehouse but the whole warehouse is operated as a single establishment, then none of the employees engaged in the warehouse would be exempt under section 13(a)(2).

Concerning your packer and crater who packs household effects in homes prior to storage or long distance moving, and also packs and crates household goods for rail shipment, you will note that section 13(a)(2) applies only to employees "engaged in" an exempt service establishment. However, an employee will be considered to be "engaged in" an exempt household furniture warehouse if he is required regularly to perform some duties therein which constitute an integral part of the servicing by virtue of which the warehouse is exempt, viz., loading, unloading, packing, shipping and storing of privately owned household goods, even though the greater part of his time may be spent during a workweek performing exempt servicing in homes.

In regard to employees engaged in that part of your business devoted to performing contract store-door pick up and delivery for the Chesapeake and Ohio Railroad, your attention is called to section 13(b)(1) of the Act which exempts from the overtime requirements, but not the minimum wage provisions, "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935." Such power is limited to motor carrier employees whose activities affect safety of operation, which employees the Commission has found include only those performing the duties of a driver, driver's helper, loader or mechanic. A packer and crater, or a dispatcher, would not be exempt under section 13(b)(1).

It is the position of the Administrator that section 13(b)(1) is inapplicable to employees who spend more than 50 percent of their time during a workweek performing duties other than those of a driver, driver's helper, loader, or mechanic. Of course, if an employee during

the same workweek spends most of his time performing work exempt under section 13(a)(2) and the remainder of his time at work exempt under section 13(b)(1), it is the Divisions' position that he would still be exempt from the overtime requirements of the Act during such week but not from the minimum wage provisions.

Very truly yours,

F. Granville Grimes, Jr.
Assistant to the Deputy Administrator

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21 AC 402.1
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21 AC 205.27

Washington 25, D. C.

SOL:JFS:HD

Mr. Merle D. Vincent
515 20th Street, N. W.
Washington, D. C.

July 31, 1946

Dear Mr. Vincent:

This is in reply to letters recently submitted by you, which letters were addressed to you from Messrs. Oliver J. Stone and Roderick N. Stewart. The problem involves the application of the Fair Labor Standards Act of 1938 to the operations of The Delta County Co-operative Telephone Company of Peonia, Colorado. According to the information contained in the letters and revealed by an inspection of the firm by a representative of the Wage and Hour and Public Contracts Divisions, the firm operates only in Delta and Gunnison Counties, Colorado. Apparently there is no physical connection between the facilities of the firm and the Mountain States Telephone and Telegraph Company which also operates in the same area.

One of the firm's phones is located in the local office of the Western Union Telegraph Company and interstate telegraph messages are communicated over the firm's facilities. Charges for telegrams are entered on the subscriber's telephone account and are collected by the subject firm and remitted to Western Union. Also, when a long distance telephone call is received by the Mountain States Company for one of the firm's subscribers, the operator uses her phone maintained by the subject firm, or calls the local Western Union agent who uses his phone maintained by the subject firm, to call the subscriber of the subject firm and notify him to contact the Mountain States long distance operator. For such, Western Union or the operator receives a "messenger service" fee from the Mountain States Company. Furthermore, the firm's subscribers consist of local mining companies, fruit packing and processing companies, poultry packing companies, a sugar beet company, the Denver and Rio Grande Western Railroad, the Railway Express Agency, etc., which are engaged in interstate commerce or in the production of goods for interstate commerce and use the subject firm's facilities in the operation of their businesses.

As you know, the Act applies to all employees engaged in interstate commerce or in the production of goods for interstate commerce, unless specifically exempt. Clearly the communication of interstate telegrams over the firm's facilities constitutes engaging in interstate commerce. Also, I note that the firm's letterhead on Mr. Stone's letter states "Independent Telephone, Local and Long Distance." In my opinion, the use of the firm's facilities to complete long distance interstate calls also constitutes engaging in interstate commerce. Furthermore, under the broad definition of "produced" contained in section 3(j) of the Act as including "any process or occupation necessary to the production" of goods, it seems to me that telephone service is no less necessary in modern business for the production of goods for commerce than is the

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cleaning of windows, which was held to be covered by the Act in Martino v. Michigan Window Cleaning Co., 66 S. Ct. 379 (1946).

As you also know, section 13(a)(11) exempts from the minimum wage and overtime provisions of the Act "any switchboard operator employed in a public telephone exchange which has less than five-hundred stations." I am returning Messrs. Stone's and Stewart's letters.

Very truly yours,

Wm. R. McComb
Deputy Administrator

Enclosures