UNITED STATES DEPARTMENT OF LABOR
Office of the Solicitor
October 15, 1946

Legal Field Letter
No. 111

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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26 CD 402.251
402.253
302.1
501
26 CE 101
26 CD 402.524
26 CD 704

A. A. Caghan, Regional Attorney
Cleveland, Ohio

Harold C. Nystrom
Chief, Wage-Hour Section

General Detroit Corporation -C/D Fog Division
2930 Denten
Hamtramck, Michigan
File No. 21-3266

SOL:ERG:PLG

July 17, 1946

Reference is made to former Regional Attorney Reynard's memorandum in the subject matter in which he inquired whether the company's method of paying overtime to its employees complies with the requirements of section 7 of the Fair Labor Standards Act. Since Mr. Reynard's inquiry posed problems analogous to several under consideration in Washington, subject inquiry was referred to the Solicitor in Washington for consideration along with other related problems. Our reply has, therefore, necessarily been somewhat delayed.

It appears that the company (engaged almost exclusively on public contract work) has a union contract which provides that employees in departments operating on a production quota shall be paid for their full schedule of hours even though they are permitted to go home early upon their completion of the daily production quota. The contract further sets forth hourly rates of pay for the various job classifications and provides for time and one-half to be paid for hours worked beyond 8 in a day or 40 in a week, whichever is the greater.

Former Regional Director Glascott's memorandum to Mr. Reynard, dated June 6, 1944, states that about two and one-half years ago the firm conducted a time study in order to determine the number of units which could be produced per person per 11-hour day. The number so determined was $15\frac{1}{4}$ units. The firm determines each day's production quota by multiplying $15\frac{1}{4}$ by the number of productive employees reporting for work. No one productive employee may leave the plant until the entire quota has been filled; all productive employees are released from work at the same time. In the event an employee finishes his work prior to the completion of the entire quota, he is required to help other employees complete their quota. The contract specifically states: "There shall be no piece work system." Time clock records show that the daily production quota is usually completed in $5\frac{1}{2}$ to 6 hours per day, at which time employees are permitted to go home. Employees are paid $12\frac{1}{4}$ times the hourly rate set up in the union contract for the particular job classification upon completion of the quota (8 hours at the straight-time rate and 3 hours at the overtime rate based upon a theoretical 11-hour day).

Where an employee leaves the plant before the daily production quota is completed, he is paid a sum arrived at by multiplying actual hours worked by his stipulated hourly rate. Similarly, where a regular productive employee is required to perform non-productive work (presumably, before the daily production quota is met), he is paid a sum equal

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to the actual number of hours worked multiplied by his stipulated hourly rate of pay; time and one-half is paid him only after 8 actual hours have been worked in the day.

If an employee is required to perform non-productive work after the day's quota has been completed, he is paid time and one-half his hourly rate of pay for all such work, even though some of it is performed before 8 actual hours have been worked. Both the firm and the union, in the latter case, consider that such work is in excess of 11 hours per day.

It further appears that the company's pay roll records show that 11 hours per day have been worked by the productive employees (unless an employee performs non-productive work or leaves before the quota has been completed, in which case actual hours are reflected); time clock cards show actual hours worked.

Mr. Reynard pointed out that under the above-described arrangement, through the device of paying for three hours not worked each day at the overtime rate, very little actual overtime is paid, since the alleged daily overtime payments are large enough in amount to effect any overtime due on the basis of actual overtime hours worked.

He inquired whether:

1) In the situation described above, is it necessary to give credit for overtime paid and which is based upon the agreed basic rate?

2) Must the overtime based on a fictitious rate, and paid for fictitiously long hours be considered part of the straight time compensation?

In our opinion, the employees in question are being employed on a daily-shift rate-of-pay basis. Their contract requires that they receive a fixed amount ($12\frac{1}{4}$ times the stipulated hourly rate) for a day's production regardless of the actual number of hours worked during that day. Consequently, the employee's regular rate of pay under the Fair Labor Standards Act is to be determined by dividing his total straight-time earnings by the actual number of hours worked in the week.

The mere fact that an employer labels part of an employee's earnings as overtime compensation does not establish it as such where there exists no reasonable relationship between the amount so paid and the number of overtime hours actually worked (Legal Field Letter No. 59, page 6, and Legal Field Letter No. 96, page 15), particularly where, as here, a fixed amount is paid the employee even though, in fact, no overtime hours have actually been worked. Cf. Legal Field Letter No. 97, page 29.

Furthermore, the fact that, in the instant case, actual overtime hours (either daily or weekly) may have been worked in a particular day would not necessarily establish the required relationship between overtime compensation paid as such and overtime hours worked where, as here, such alleged overtime would have been paid even though no overtime

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hours had, in fact, been worked. Such compensation is, in reality, not being paid for actual overtime hours worked but as an incentive and inducement for increased production per unit of time.

In this connection, your attention is directed to paragraph 69 of Interpretative Bulletin No. 4, in which it is stated:

> * * * the employer may properly consider as overtime compensation paid by him * * * only the extra amount of compensation--over and above straight time--paid by him as compensation for overtime work--that is, for hours worked outside the normal or regular working hours * * *.

Consequently, compensation paid for hours not worked, even if it can be so regarded, does not constitute extra compensation for overtime worked, since in no case is it paid for overtime hours worked.

Volume IV of the Wage-Hour Code (8C18) states:

> Since, however, special overtime compensation is by definition an extra amount representing a higher rate paid for the working of hours 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 and with reference to the number of hours worked in excess of the maximum * * * 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.]

Moreover, I might add, the allocation of compensation to "hours not worked" in subject case is extremely unrealistic since such compensation represents, in substance, merely additional compensation for hours actually worked and is wholly unlike the type of payment referred to in release R-1625.

As was pointed out in Mr. Reynard's memorandum, a similar conclusion was reached in Legal Field Letter No. 19, page 8, involving a somewhat analogous situation.

The position expressed above is also supported by the Supreme Court's decision in Walling v. Helmerich & Payne, where, you will recall, the Court stated that the term "regular rate," while not defined in the Fair Labor Standards Act, obviously meant "the hourly rate actually paid for the normal, non-overtime workweek." (Underscoring supplied.) The vice of the "paxon plan" there in issue, said the Court, lay in the fact "that the contract regular rate did not represent the rate which was actually paid for ordinary, non-overtime hours, nor did it allow extra compensation to be paid for true overtime hours." (Underscoring supplied.) See, also, United States v. Rosenwasser, 328 U.S. 360; Youngerman-Reynolds Hardwood Co., 325 U.S. 419; and Walling v. Harnishfeger, 325 U.S. 427 Cf. Walling v. Uhlmann Grain Co., 151 F. (2d) 381 (C.C.A. 7).

The Court further stated that the fact that the artificial regular rate was a product of contract or in excess of the statutory minimum was inconclusive, since "freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes."

Consequently, for the reasons set forth above, we would answer Mr. Reynard's first question in the negative and his second question in the affirmative.

Women's Apparel Wage Order
Woolen Wage Order
Textile Wage Order
Embroidery Wage Order

Irving Rozen
Regional Attorney
New York, New York

SOL:HJE:EG

Harold C. Nystrom
Chief, Wage-Hour Section

July 17, 1946

Mme. Contrisciani
2061 Broadway
New York, N. Y.

File No. 31-73313

This will reply to your memorandum of August 23, 1945, inquiring as to the applicability of the exclusionary clause in the Embroideries Industry wage order to subject firm's operations in connection with the manufacture of bibs, towels, and blankets. You state the facts as follows:

> In the manufacture of bibs and towels the firm buys terry-cloth in bulk from dealers and sends it to outside contractors who cut and bind the material into bibs and towels. Its homeworkers then do applique work and hand embroidery on these items, and the firm markets them as its own product. On some occasions the firm has bought ready-made towels of terry-cloth in the retail market (presumably because of lack of bulk terry-cloth in a rush season), and has sent these towels to outside contractors to cut and bind into bibs. On other occasions the firm has ordered bibs and towels from the mills where they have been cut and bound to firm's order. These bibs are then embroidered by subject firm's employees.
>
> In the manufacture of blankets the firm usually buys blanket material in bulk and sends it to an outside contractor for cutting and binding. It has also bought a small quantity of blankets already cut and bound from the same firm. These blankets are embroidered by subject firm's employees and marketed by subject firm as its own product.

You wish to know whether subject firm is a "manufacturer" of the bibs, towels, and blankets within the meaning of that quoted term under the first exclusionary clause of the Embroideries Industry wage order.

It is the established position of the Divisions that where a firm assumes full responsibility for the manufacture and distribution of certain products, purchasing the materials, designing and styling the products, and having the actual manufacture performed by others, its employees are subject to the wage orders applicable to the manufacture of such products. By reason of that position, it is my opinion that

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such a firm is the "manufacturer" of its products as that term is used in the first exclusionary proviso of the wage order for the Embroideries Industry. The situation is otherwise, however, with respect to the final products that subject purchases and on which the only work performed through its own responsibility is the embroidery work of its home workers. In connection with such products, the firm is not a "manufacturer" of the article on which the embroidery is performed, so that the wage order for the Embroideries Industry would be applicable to its home workers under these latter circumstances.

Accordingly, it is my opinion that the wage orders applicable to subject's home worker employees in each case are as follows:

(1) The wage order for the Textile Industry is applicable to those home workers who are engaged in embroidering towels made by subject's contractors from bulk terry-cloth furnished by subject firm. Where the towels are purchased from the mill, however, the embroideries wage order would apply to subject's home workers who subsequently embroider such towels.

(2) Depending on the content of the blankets, the wage order for the Textile Industry or for the Woolen Industry is applicable to those of subject's home workers who are engaged in the embroidery of blankets made by subject's contractors out of bulk blanketing. However, those home workers who are engaged in embroidering blankets which have been purchased by subject firm from the mill are subject to the Embroideries Industry wage order.

(3) The wage order for the Women's Apparel Industry as infants' and children's outerwear is applicable to those of subject's home workers who embroider bibs made by subject's contractors out of bulk terry-cloth towelling or out of ready-made towels furnished by subject. However, the embroideries wage order is applicable to the home workers working on bibs which the company has purchased from the mill.

(04906)

21 AC 205.23
.22

Glenn M. Elliott
Regional Attorney
Nashville, Tennessee

SOL:EGT:MET

July 17, 1946

Harold C. Nystrom
Chief, Wage-Hour Section

Eureka Roller Mills
Telford, Tennessee
File No. 51-53555

This will reply to your memoranda of April 18 and May 20, 1946, regarding subject.

You state that the business consists of the manufacture of grain products sold locally in three Tennessee counties. Sales are made to farmers, dairymen and poultrymen, as well as to some dealers. All operations are performed at the feed mill, and the products include flour, food, meal and some feed mixing materials. Various kinds of grain products are manufactured from grain purchased from farmers and mixed by formula with other ingredients. Some of the other ingredients include salt, meat scraps, limestone, oyster shells, phosphate, bone meal, cod-liver oil, dairy products, etc. The employees in question are engaged exclusively in the production and distribution of the products intrastate. The receipt and unloading of goods from other States is performed by other employees. Segregation of duties is adequate. According to the evidence in the file the prepared feeds are distributed "at wholesale to large farm operators." The "large farm operators" are poultrymen and dairymen who feed the prepared feeds to the poultry and livestock that they raise for interstate shipment.

You express the opinion that the employees in question are covered under the principles expressed in Legal Field Letter No. 97, pages 26 and 56, and Reynolds v. Salt River Valley Water Users Assn., 143 F.(2d) 863 (C.C.A. 9).

I agree with your opinion that employees who produce feed for use locally in raising poultry and livestock for interstate commerce are engaged in a process and an occupation necessary to production, within the meaning of section 3(j) of the Act. In this connection, see the Supreme Court's discussion of coverage in the case of Roland Electrical Co. v. Walling, 9 Wage Hour Rept. 89, and Schulte v. Gangi, 6 Wage Hour Cases 2. Moreover, it could well be argued that the feeds become a part or ingredient of the poultry and livestock produced for interstate commerce. Since, as you know, "goods" includes "any part or ingredient thereof." the subject company would be engaged in production for interstate commerce if it has reason to believe that the feed it produces will become part of products to be shipped out of the State. As you will recall, in the Reynolds case the court stated that "irrigating water is not only a cause sine qua non but one of the several proximate causes of vegetable growth. Its intimate immediacy is obvious." In my opinion, feed bears an equally intimate relationship to animal growth and its production is similarly necessary to the raising of poultry or livestock. See, also, Legal Field Letters No. 85, and No. 89, page 27; and the Divisions' brief in the Reynolds case.

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21 AC 101.2
21 AC 202.10
21 AC 101.410
21 AC 101.64
201A
414.95

Earl Street
Regional Attorney
Dallas, Texas

Harold C. Nystrom
Chief, Wage-Hour Section

SOL:NCH:FUR:MET

Request for opinion

July 25, 1946

In reply to your memorandum dated November 1, 1945, we wish to confirm your opinion that the coverage of the Act extends to employees engaged in the production of pasteurized milk and other dairy products where such products are sold to various railroad companies who, in turn, sell them to armed service personnel "traveling on troop trains, moving across state lines." You state that "Frequently the sales are made in towns located near the state line and substantial quantities of the products unquestionably move outside the state."

In a memorandum from William S. Tyson, then Assistant Solicitor, to Regional Attorney Kenneth P. Montgomery, dated February 21, 1945, it was stated that all employees of Fred Harvey Service, Inc. "engaged in connection with the procurement, storage and distribution of food destined to be consumed on Santa Fe dining cars, and employees engaged in connection with the furnishing of linens used in the dining cars were engaged in interstate commerce and in the production of goods for interstate commerce." The "ice cases" (see release A-14) were cited in support of this statement. The employees in the case you put are engaged in handling goods which their employer has reason to believe will leave the state so that coverage in your case can be based on paragraph 2 of Interpretative Bulletin No. 5 and on United States v. Darby, 312 U.S. 100, 115, as well as on the "ice cases." McLeod v. Threlkeld is plainly irrelevant whenever coverage is predicated upon "production."

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Ernest N. Votaw, Regional Attorney
Philadelphia, Pennsylvania

Harold C. Nystrom
Chief, Wage-Hour Section

Denver & Ephrata Telephone & Telegraph Co.
Ephrata, Penna.
File No. 37-9855

26 CD 301
601
302.22
701
27 DA 101
24 AC 302.1

SOL:ERG:YS

July 26, 1946

Reference is made to your memorandum in the subject matter dated September 21, 1944, raising a question as to the proper method of computation of overtime for certain linemen employed by the company and paid on an hourly rate basis. Consideration of subject file by the Solicitor's Office in Washington and by the Administrator's Office has occasioned our delay in providing you with an opinion in this matter.

The employees in question, it appears, were paid only for actual working time and for travel time on the trip out to the worksite. An inspection revealed that 3 hours of waiting and travel time (from the worksite back to the office), constituting hours worked under the Fair Labor Standards Act, had not been included in computing the hours worked in the workweek, and, you state, the employees had received no pay at all for those hours. It further appears that in computing the overtime compensation due under the Act, the inspector calculated the employee's regular rate of pay by dividing total straight-time earnings for the week by total hours worked (including the waiting and incoming travel time). The company was directed to pay an additional half time of that rate for all hours worked in excess of 40 in each workweek.

You state that the subject file was referred to the Administrator because a question was raised as to the correctness of the method of computation used, i.e., whether paragraph 14 of Interpretative Bulletin No. 4 is applicable to the instant case. You view the case as governed by release R-609 and paragraph 14 of Interpretative Bulletin No. 4 and state that: "It is immaterial that instead of working part of the time at 50 cents and part of another time at 40 cents the employee works for part of the time at $1 and for the rest of the time for nothing. The principle involved is the same."

For the reasons set out below, we disagree with your conclusion and believe that overtime compensation for the company's linemen is to be computed in accordance with paragraph 9 of Interpretative Bulletin No. 4.

While it is, of course, true that an employer may elect to pay an employee less for travel time than for time spent in actual productive work (Legal Field Letter No. 61, page 22), and while it is also true that in determining compliance with section 6 of the Act the Divisions have, in release R-609, taken the position for enforcement purposes that total straight time compensation may be averaged over all hours worked in a workweek, the question still remains — what is the employee's regular rate of pay for purposes of determining compliance

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with section 7. See, for example, Legal Field Letter No. 36, page 13, involving a similar problem, wherein the question of the employee's regular rate of pay in overtime weeks was expressly left open.

As you know, under the Fair Labor Standards Act, each employee must be paid compensation for his employment (including waiting and travel time) in excess of 40 hours in a week, at a rate not less than one and one-half times the regular rate at which he is employed. The Supreme Court in Skidmore v. Swift & Co., 323 U.S. 134, in considering a case where time outside the recorded hours was deemed to constitute hours worked under the Act, stated: "* * * his compensation may cover both waiting and task, or only performance of the task itself." Accordingly, it is necessary to determine from all the facts and circumstances of the case whether the payment to the hourly rate employees here involved of an hourly rate for hours worked constituted payment for all waiting and travel time as well as task hours worked. If the fact is that the compensation purportedly paid for task work only was actually paid and received as straight time compensation for all hours worked, including all waiting and travel time, then the regular hourly rate for overtime purposes must be determined by dividing total compensation by total hours worked (including all waiting and travel time which may be hours worked under the Act). On the other hand, if the compensation paid for the work actually performed (task) and for the outgoing travel time (time spent in traveling out to the worksite) was actually paid and received as straight time compensation for those hours only, then there is, in our opinion, no basis for assigning as the regular hourly rate any rate other than that stipulated by the parties. Cf. Legal Field Letter No. 105, pages 7-9 and Legal Field Letter No. 105, pages 3-4.

See, in this connection, the Supreme Court's decision in the T.C.I. & R.R. Co. case, in which it was stated:

Accordingly, we view §§ 7(a), 3(g), and 3(j) of the Act as necessarily indicative of a Congressional intention to guarantee either regular or overtime compensation for all actual work or employment. To hold that an employer may validly compensate his employees for only a fraction of the time consumed in actual labor would be inconsistent with the very purpose and structure of those sections of the Act. /Underscoring supplied./ The court, it may be noted, used the word "regular," not the word "minimum," in referring to the compensation other than overtime compensation required to be paid "for all actual work or employment." " * * * It is immaterial," said the court, "that there may have been a prior custom or contract not to consider certain work within the compass of the workweek or not to compensate employees for certain portions of their work * * * Congress intended * * * to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act." /Underscoring supplied./

In the subject case, apparently, the parties did not consider that the 3 hours of waiting and incoming travel time constituted hours worked under the Act until so advised by the Divisions. The parties agreed upon an hourly rate of pay for purposes of the employment, however, without indicating in any way any intention that such rate be not applicable to all hours worked. The employees were actually paid

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straight time compensation at this hourly rate for each hour which was recognized under the agreement of employment as an hour of work. For each such hour in excess of 40 in a workweek, the employees were paid an additional half time based on this stated hourly rate. Charles F. Allen, for example, employed at an hourly rate of 72 cents was paid $28.80 for a 40-hour week ending November 30, 1940 (40 hours x 72 cents), although waiting and incoming travel time, not regarded as hours worked, brought his actual hours of employment to 41½ for that week. Similarly, in the workweek ending December 21, 1940, Allen received overtime on the basis of the 72-cent rate and was paid $30.96 for a 42-hour week /(40 hours x 72 cents) plus (2 hours x $1.08)/, exclusive of waiting and incoming travel time in that week. In other words, the company itself regarded 72 cents as the employee's "regular rate of pay," since its own computations indicate that overtime hours were paid for on the basis of time and one-half the 72-cent rate shown on its books. Moreover, the inspection file reveals that the company did pay for travel time on the trip out to the worksite at the employee's stated hourly rate (see Raymond B. Fellenbaum's letter of December 7, 1943 in the file; see also item 10 of the inspector's narrative report dated January 15, 1944), thus evidencing a clear intention to pay for "unproductive" hours worked at the same rate as that paid for "productive" hours worked. Under these circumstances, it cannot be said that any of the compensation actually paid on the basis of the agreed hourly rate was paid or received as compensation for hours constituting hours worked under the Act but which were not so recognized by the parties. The agreed hourly rate must, therefore, be deemed to represent the valuation placed by the parties on each hour of work as such, and cannot reasonably be construed as a mere measuring device for ascertaining, on the basis of the number of productive hours, the compensation payable for both productive and nonproductive hours of employment; see Legal Field Letter No. 51, page 8.

Consequently, for the reasons set out above, it is our opinion that the regular rate of pay for the company's linemen is to be determined in accordance with paragraph 9 of Interpretative Bulletin No. 4.

(04906)

21 AC 101.622
21 AC 408.1
408.5
409.91

James M. Miller
Regional Attorney
Minneapolis 3, Minnesota

SOL:VOW:FUR:MET

Harold C. Nystrom
Chief, Wage-Hour Section

July 31, 1946

Request for opinion - coverage of employees of flooring, roofing, sound-proofing, insulating and painting contractors

Reference is made to your memorandum of September 6, 1945, requesting an opinion regarding the coverage under the Act of the above-described employees. You inquire whether the principles of G-162 should be applied to such employees even when the installation may be done pursuant to an interstate contract (which is usually a contract for the sale of goods) or regardless of the source of the materials installed.

You state that it is the practice for dealers in various types of the above activities to maintain crews which are sent out to do the work. The transaction is usually in the form of goods "installed" at so much per square foot, per cubic foot, etc. Such "installation," you indicate, requires special skill in handling the materials, and sometimes special tools or equipment is used for installation. You state that you have no question regarding the applicability of the Act when the work is done in an establishment engaged in the production of goods for commerce 1/ but that your inquiry relates rather to such "installation" in private homes, churches, schools, etc.

The different situations you present may be summarized as follows:

(1) Seller and purchaser are located in the same State, but the goods are ordered by the seller from without the State so that their delivery to the purchaser is "in commerce" under the Jacksonville Paper case.

(2) Seller and purchaser are located in different States, but seller maintains a warehouse in purchaser's State so that the goods have come to rest there. "Installation" employees cross from seller's to purchaser's State to do their work and hire local labor to assist them.

(3) Same as (2) except that seller does not maintain such a warehouse but ships goods directly across State line to purchaser.

In each case your inquiry concerns the coverage of "installation" employees.

We do not believe that the work in question can properly be termed "installation" as that term is used in the Legal Field Letters (Nos. 74; 80, page 18; and 83, page 6) to which you refer. As you note, the first two

1/ This presumably refers to repair or reconstruction and not "new construction."

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plainly exclude the installation of building construction materials from the scope of their discussion and are limited to the installation and servicing of machinery. In the third the erection of prefabricated houses was held analogous to the installation of machinery because "the manufacture is far more important than the erection" which was "a small part of the work." Generally speaking, we have not applied the "installation" doctrine to building construction materials. See, e.g., Legal Field Letters No. 47, page 25, and No. 63, page 3.

The distinction between the installation of machinery and of construction material stems largely from the distinction between York Mfg. Co. v. Colley and Browning v. Waycross, with which you are familiar. The majority of the courts appear to follow the reasoning of the Browning case, where the contract calls for the erection or construction of a building with materials supplied from outside the State, holding that such construction work cannot be treated as part of the interstate sale of goods. The courts have determined that the local construction constitutes the predominant factor of the contract (regardless of the relative cost of the materials used and the total costs of construction) as distinguished from the installation which is only incidental to the sale and delivery of machinery or equipment in interstate commerce. See, in this connection, General Railway Signal Co. v. Commission, 118 Va. 301, affirmed, 246 U.S. 500; Western Gas Construction Co. v. Commonwealth of Virginia, 147 Va. 235, affirmed, 276 U.S. 597. See, also, Kinnear & G. Mfg. Co. v. Minor, 89 Vt. 572, holding that the erection and installation of building materials shipped from without the State are not part of an interstate transaction but constitute local business, and Decorators Supply Co. v. Chaussee, 178 N.W. 665 (Mich.), holding to the same effect, with particular emphasis on the fact that the installation of plasterwork could be accomplished equally well by State mechanics as by the special crew sent from the seller's State.

Coverage may, of course, exist on grounds other than the nature of the installation work. Employees whose work relates to goods still "in commerce" under the Jacksonville Paper case are covered by the Act.

Furthermore, individuals or construction crews that regularly travel across State lines (aside from going to and from their homes) in the performance of their duties would be engaged in interstate commerce and would be entitled to the benefits of the Act. See pages 10-11 of the Administrator's brief in Keen v. Mid-Continent Petroleum Co.

(04906)

26 CD 302.1
303
302.20
302.24

Mr. Arthur J. White
Regional Director
New York, New York

26 CC
26 DB 203.1
26 CD 703.0
703.2
501

Thacher Winslow
Deputy Administrator

SOL:JL:MFS

The effect on regular rate of pay of reduction of workweek for the summer

July 31, 1946

This will reply to your memorandum of June 18, 1946 concerning the effect of a reduction in the workweek, during the summer season, on the regular rates of pay of bank and insurance company employees.

You state that the employees involved normally receive salaries for a fixed 40-hour week and that where they work in excess of 40 hours in any week their weekly salaries are divided by 40 and time and one-half that rate is paid for all hours worked in excess of 40. The normal workweek of such employees consists of 5 working days of 7 hours each from Monday through Friday, and 5 hours on Saturday, but during the summer season, from approximately June 1 to September 15, it is the practice of the banks and insurance companies to eliminate Saturday work and to operate on a 35-hour, 5-day week. You state that the reduction in the workweek during the summer season is normally accompanied by the understanding between the firm and its employees that their weekly salary continues to represent full straight-time compensation for 40 hours of work. The question presented is whether, where employees during the summer on some occasions work in excess of 40 hours a week, the firms are correct "in considering the employees' salaries as full compensation at straight time for all hours worked up to 40 hours per week, despite the fact that the workweek was reduced to 35 hours for the summer season."

You also present an additional problem involving substantially the same facts, except that the bank or insurance company pays employees performing any work on Saturday during the summer, either at straight time or time and one-half (based on an hourly rate of 1/40 the weekly salary) for all hours worked on Saturday, despite the fact that those hours may not be hours in excess of 40 during the particular workweek. However, if the same employee performs any additional work in excess of 35 hours but not more than 40 hours during the other days of the week, he receives no additional compensation. You inquire whether the payment of additional compensation for work performed on Saturday "would represent conclusive evidence that the salary compensates employees only for 35 hours work."

The problem whether the employee's salary constitutes straight-time compensation for all hours worked up to 40 during the summer months presents a question of fact which must be determined on the basis of the agreement and practice of the parties. If the salary is intended and fully understood by the parties to constitute pay in full for each and every hour worked through 40 per week during the summer months, then the

(04906)

employee's regular rate of pay in overtime weeks would be determined by dividing the weekly salary by 40 hours. On the other hand, if the salary, during the summer months, is intended and understood as payment only for work up to 35 hours and nothing more, then the arrangement would appear to set up two regular workweeks for employees within the year--a workweek of 40 hours during $8\frac{1}{2}$ months of the year and a workweek of 35 hours for the other $3\frac{1}{2}$ months. In such event, the employee's regular rate of pay for overtime purposes during the $3\frac{1}{2}$-month period must be determined by dividing the weekly salary by 35 hours, and in overtime weeks he would be entitled to full straight-time compensation at this regular rate for all hours worked through 40, plus time and one-half thereon for the overtime hours. The Divisions' opinion reported in 9 Wage Hour Reporter, page 70 (Legal Field Letter No. 105, page 3), would, as you indicate, appear to be relevant in connection with this matter.

It should be noted, however, that in determining the intent of the parties, consideration should be given not merely to the expressed agreement of the parties (written or oral) but also to the practical construction placed upon the agreement by the parties in actual practice. See, in this connection, Legal Field Letter No. 51, page 8, at page 10 (first paragraph). A significant fact to be considered in determining the intent of the parties is the manner in which deductions for absences are made. If, for example, where an employee works less than 35 hours deductions from his salary are made on the basis of 1/35 of the salary for each hour of absence, this would be strong evidence of the fact that the employee's salary is intended to cover only 35 hours of work.

The problem presented in the second situation referred to by you is governed by the principles outlined above. The fact that additional compensation is paid when the employee performs any work on Saturday would be strong evidence that his salary was intended to cover only 35 hours, if this fact were considered by itself. However, its significance is somewhat diminished by the fact that no additional compensation is paid when the employees work more than 35 hours but less than 40 hours during the other days of the week, Monday through Friday. In any event, it would seem that these payments are evidence that the salary is not, during the summer period, regarded by the parties as including compensation for work performed on Saturday.

I believe that by applying the foregoing principles to the facts in the individual cases, you will be able to advise the companies in question.

(04906)

Ernest N. Votaw
Regional Attorney
Philadelphia, Pennsylvania

23 CC 101
23 CC 401
21 AC 205.23

SOL:NCH:FUR:EG

Harold C. Nystrom
Chief, Wage-Hour Section

July 31, 1946

Reading Company - Operating Schuylkill Navigation Company

This is in reply to your memorandum dated February 21, 1946, in which you inquire whether employees of the subject "come within the suspense order now in effect with respect to non-transportation activities of railroads, such as storage warehouses."

You state that the Reading Company which operates the Reading Railroad also operates canals along the Schuylkill River which were originally owned by the Schuylkill Navigation Company. The canals are not used for transportation purposes and "have lately been used to supply water to various production plants for use in their production processes. Employees engaged in these processes have not received overtime after 40 hours. Their wages usually, if not entirely, have been paid by the Reading Company."

On May 12, 1942, the Secretary of Labor, pursuant to a request from the Secretaries of War and Navy, issued an order under section VI of the Public Contracts Act exempting railroads generally for the duration of the war from requirements of that Act when they are engaged in the manufacture of materials necessary for war purposes, and on the same day the Administrator announced that for the purposes of enforcement he would consider the exemption of section 13(b)(2) of the Fair Labor Standards Act applicable to these employees. See Field Operations Handbook, page E-27 (revised October 19, 1943). A thorough search of materials in this office and conferences with administrative officials discloses no other order suspending enforcement of the Fair Labor Standards Act in the case of employees of railroads engaged in non-transportation activities.

(1) The employees are covered by the Act. See release R-1789; Reynolds v. Salt River Valley Water Users Assn., 143 F.(2d) 863 (C.C.A. 9); Lewis v. Florida Power & Light Co., 154 F.(2d) 751 (C.C.A. 5).

(2) The 13(b)(2) exemption is inapplicable (Walling v. Connecticut Co., 154 F.(2d) 552 (C.C.A. 2); see, also Legal Field Letters Nos. 27, page 26; 56; 80, page 12).

(3) The Administrator's statement of May 12, 1942, is limited to employees in railroad shops which, in addition to their normal work on railroad equipment, are also engaged in producing war materials. See Solicitor Gardner's memorandum of June 30, 1942, to all regional attorneys, explaining the Administrator's enforcement policy. The present case does not fall within the terms of the Administrator's statement.

James M. Miller
Regional Attorney
Minneapolis 3, Minnesota

21 AC 101.2
102.120
.1210
.1211
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404.0

Harold C. Nystrom
Chief, Wage-Hour Section

July 31, 1946

Request for Opinion - Application of the *Jacksonville* Rule

SOL:HJE:FUR:CTN

We regret the delay in replying to your memorandum of October 31, 1945, raising two questions as to the point at which interstate commerce ceases under the *Jacksonville Paper* decisions.

1. A wholesaler has ordered a carload of goods from without the State without having any specific customers in mind at the time he places the order. While the car is en route to him he receives a large order from a certain customer and determines to allocate a portion of the carload to that customer. Do the goods remain in commerce until they reach the particular customer?

We agree with your opinion that the goods do remain in commerce. They are plainly in commerce until they are received at the wholesaler's place of business. By the time they reach the wholesaler he has determined to which of his customers they are to go. The goods are thus not held by him as a local merchant for local disposition but plainly continue in commerce under the *Jacksonville Paper* decision.

2. Goods are placed on a wholesaler's dock by the motor carrier which has brought them from without the State or are unloaded from a freight car on to the dock by employees of the wholesaler. You state that you "have constantly advised our people that depending upon all the facts in the case, coverage might extend to include clerical employees who check the invoices and warehouse employees who move the goods into the warehouse and place them on the shelves, in the bins or in the stacks." Your advice was entirely correct and, you will note, in accordance with Legal Field Letter 102, page 29, issued subsequent to the date of your inquiry. The *Veasey Drug Co.* case which you cite was always considered unsound by this office and has been completely discredited by the Supreme Court decisions in the *Jacksonville Paper Co.* and *A. H. Phillips* cases.

(04906)

21 AC 413.62
AC 413.30
413.60
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413.610
413.611

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

Donald M. Murtha, Assistant Solicitor

August 12, 1946

Universal C. I. T. Corporation
One Park Avenue
New York, New York

SOL:AGW:HD

This will reply to your memorandum (SOL:EGT:MIS) of December 4, 1945, requesting my comments on Regional Attorney Rozen's memorandum of November 23, 1945 to you.

As Mr. Rozen points out, Legal Field Letter 65, page 19, purports to overrule in part the prior opinion printed in Legal Field Letter 63 at page 11. Legal Field Letter 65 reviews the question of coverage of "collectors," "adjustors" and "field representatives" of automobile finance companies operating on a national basis and concludes that the duties of each such employee must be individually related to interstate commerce. However, Mr. Garnder's memorandum of May 22, 1942 to Mr. Livengood, entitled Small Loan Companies and Domestic Finance Companies, appears in turn to overrule Legal Field Letter 65.

It does not appear from our files that we have given further consideration to the basis for coverage of employees in the national automotive finance field since the date of Mr. Garnder's memorandum. However, release T-30, issued on January 8, 1942, four months earlier than that memorandum, while not expressly adopting the broad basis of coverage, does seem to imply that all employees of national companies are covered. Similarly, a broad basis of coverage was also taken in the insurance field in releases G-232 and R-1746. See also Legal Field Letter No. 103, p. 6. In view of these prior interpretations, as well as the broad view of coverage taken by the Supreme Court in the Armour and Swift cases (see also United States v. Southeastern Underwriters Ass'n., 322 U.S. 533, and Polish National Alliance v. N.L.R.B., 322 U.S. 643), I believe we should apply the "broad" basis of coverage. It is clear that the work in the branch offices of a typical automotive finance company, operating in a State other than the one in which the central office is located, is all directed toward the flow of interstate commerce between the branch and central offices. Under these circumstances, it seems unrealistic to suppose that any of the employees in the branch office do not regularly perform work connected with that commerce. This view is further supported by the recent circuit court decisions in Ritch v. Puget Sound Bridge & Dredging Co., (C.C.A. 9) (6 WH cases 126, 1946) and Walling v. McGrady Construction Co., 60 F. Supp. 243 (W.D. Pa.).

(04906)

21 AC 409.81
409.1
409.4111
409.4113
409.514
409.91
23 CE 302.2
205.61
302.1
302.7
402
23 CF 101
303.6

SOL:NE:HD

July 3, 1946

Washington 25, D. C.

Mr. Ralph W. Pollock
S. Division Street
Mount Union, Pennsylvania

Dear Mr. Pollock:

Reference is made to your letter of May 29, 1946, with respect to the applicability of the Fair Labor Standards Act to employees engaged in constructing additions to existing buildings, repairing, reconstructing and remodeling other buildings and machinery used as a cannery, but which, due to the dead season, has been temporarily shut down. Enclosed are copies of the Fair Labor Standards Act, the Wage-Hour Digest and Releases G-162, A-14, R-1892 and R-974.

As you may know, the general coverage of the Act extends to employees engaged in interstate commerce or the production of goods for interstate commerce, including occupations or processes necessary to such production. It is the position of the Wage and Hour and Public Contracts Divisions that employees engaged in new construction work on canneries are not covered by the Fair Labor Standards Act, but those engaged in maintaining, repairing and reconstructing buildings or machinery used to produce goods for interstate commerce are covered. Employees on construction jobs generally come under the Act, however, if they are engaged in interstate commerce activities, such as procuring or receiving goods from other States. Also, employees who are engaged on covered and noncovered construction work during the same workweek would be covered for the entire week.

Assuming that the cannery is engaged in producing goods for interstate commerce during its regular season, employees engaged in repairing, remodeling and reconstructing the buildings and machinery, including the remodeling of the barn during the dead season, would be, in my opinion, covered by the Act in accordance with the foregoing principles, see G-162, part III. As explained more fully below, employees engaged in ordinary maintenance and repair work during the dead season may be exempt from the overtime provisions of the Act if the dead season falls within the 14 workweek limitation.

Work performed on the additions to the cannery would be covered insofar as such work amounted to remodeling and reconstruction. If the work on the additions amounted to original construction, employees engaged exclusively in any workweek in such work would not be covered (see G-162, Part V(B), par. 2). Your letter is not sufficiently clear for me to determine this matter definitely in your particular case.

(04906)

The exemptions from the overtime provisions of the Act to which you evidently have reference are set forth in sections 7c and 7b(3) of the Act. Section 7c of the Act provides for an exemption from the overtime provisions for employees in a place of employment where their employer is engaged in the first processing, which may under certain circumstances include freezing, canning, or packing perishables or seasonal fresh fruits or vegetables or in the first processing within the area of production of any agricultural or horticultural commodity during seasonal operations. During a period of or periods of not more than 14 workweeks in the aggregate in any calendar year an employer engaged in such operations need not pay overtime to employees in a place of employment where he is so engaged if such employees are engaged in the named operations or in occupations necessarily incident thereto. The enclosed copy of release R-1892 contains a full discussion of this exemption.

Section 7(b)(3) of the Act grants an exemption from the overtime provisions for not more than 14 workweeks in the aggregate in any calendar year for employees engaged in an industry found by the Administrator to be of a seasonal nature, provided such employees are paid at rates of not less than one and one-half times their regular rates of pay for work in excess of 12 hours in any workday or in excess of 56 hours in any workweek, as the case may be. Pursuant to the authority granted in this section, the Administrator has determined that the first processing and canning of perishable or seasonal fresh fruits and vegetables is an industry of a seasonal nature within the meaning of section 7(b)(3) of the Act. See enclosed copy of Release R-974.

Employees who perform ordinary maintenance work in industries found to be of a seasonal nature in R-974 are engaged in operations within the scope of the 7(b)(3) exemption. As to such employees, therefore, the 7(b)(3) exemption may be taken during the dead season, subject of course to the 14-workweek limitations.

Neither the 7(c) nor the 7(b)(3) exemption is applicable to the original construction for installation of additional facilities or equipment during the active season or at any other time. The 7(b)(3) exemption applies to employees engaged in dismantling, cleaning and greasing machinery after the seasonal operations and also to those who rearrange machinery preparatory to processing a different seasonal commodity. If any of the equipment is reinstalled under circumstances that would constitute such a rearrangement of equipment, the 7(b)(3) exemption would be applicable to such operations. The exemption would not apply, however, where the equipment is installed as an addition to or as part of the construction or equipping of the processing establishment.

If you have any further questions, I shall be glad to be of assistance to you. However, you may find it more convenient to consult the regional office of the Wage and Hour and Public Contracts Divisions at 1216 Widener Building, Chestnut and Juniper Streets, Philadelphia 7, Pennsylvania.

Very truly yours,

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

Enclosures

(04906)

21 AB 301
21 AB 402.21
26 CD 402.1
402.210
402.2123
26 CD 402.26
402.2121
27 GA

SOL:AGW:AC

August 8, 1946

Washington 25, D. C.

Sheppard, Mullin & Richter
Attorneys at Law
458 South Spring Street
Los Angeles 13, California

Gentlemen:

Your letter to the Solicitor of Labor, Mr. William S. Tyson, regarding the applicability of the Fair Labor Standards Act to mine lessees and the method of compensating such employees, has been referred to me for reply.

You state that your client, Shattuck-Denn Mining Company - Iron King Branch, operates a mine which produces gold, silver and lead, and that it also leases to various individuals small areas of the mining property. After giving a number of details of the lease agreements, you request an opinion as to whether the lessees are employees for purposes of the Fair Labor Standards Act.

Your letter gives the following facts regarding the leases:

(1) They run for a period of six months but are terminable on 30 days' notice by either party.

(2) The tools and equipment required in the operations are leased from the mine owners.

(3) Employees of the lessee are selected and hired through the company employment office.

(4) Rent is paid in the form of 85 percent of the net profits. The lessee is not liable for losses which must be absorbed by future profits, or if there are none, by the company.

(5) The lessee receives the going rate of pay for the type of work performed by him even though the operations show a loss.

It is my opinion that the existence of these provisions indicates that the lessee is an employee for purposes of the Fair Labor Standards Act. See the enclosed copy of release R. 1845 which contains a discussion of the factors which the Wage and Hour and Public Contracts Divisions believe are controlling as to the determination of whether or not mining lessees are employees for purposes of the Act.

You also ask whether the lessee's percentage of profits is to be included in his regular rate of pay. The answer is that it should be. This payment is the compensation which the parties have agreed shall be paid the lessee for the responsibility and work involved in exploiting that portion of the mining property covered by the lease. Accordingly, it should be included in the regular rate of pay.

(04906)

You ask further to what periods the lessee's share of the profits should be attributed in computing the regular rate of pay. It appears from your letter that the net profits from the lease are computed for each monthly period and the lessee is paid his share of these profits less his share of losses, if any, carried over from the prior month. Under these circumstances the amount actually paid the employee should be allocated to the work performed in the preceding month during which the profits were made. Thus, if there are losses in the first month, and profits in the following month are not sufficient to offset those losses, but the profits in the third month are sufficient to offset the prior losses and leave a balance for payment to the lessee, the amount paid to the employee at the end of the third month is attributable to his work during the third month. Accordingly, it should be added to his straight-time compensation for the work performed during the third month. Of course, the overtime compensation due by virtue of this addition to the employee's regular rate of pay need not be paid until it is computed and paid. See <u>Walling</u> v. <u>Harnischfeger</u>, 325 U.S. 427.

Very truly yours,

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

Enclosure

21 BB 302.20
21 BB 301.32
21 BB 303.3

Washington 25, D. C.

Frederic Wingersky, Esquire
McKesson & Robbins, Inc.
155 East 44th Street
New York 17, New York

SOL:EHA:HD

August 13, 1946

Dear Mr. Wingersky:

This will reply to your letter of June 27, 1946 in which you request an opinion concerning the status under the Fair Labor Standards Act of an employee who is employed at one of your wholesale drug houses as a combination pay roll clerk and personnel manager.

You state that the employee in question devotes approximately one-half of his time to the performance of the following duties which you consider to be covered by the Act and nonexempt:

> "* * * the compilation of the payroll, the handing out of payroll checks, the preparation of payroll recapitulations, the preparation of the payroll register, the placing of new employees on the payroll and the removing of those who have been discharged or resigned, the preparation of payroll statistical reports for information of management, the computation of O. A. B. and U. C. payroll taxes, the maintenance of personnel records for all employees, and the preparation of personnel statistical reports for information of management."

The remainder of the employee's time is spent in activities which you state "satisfy the requirements prescribed by the Regulations issued under the Act." These activities you list as follows:

> "* * * administration of a group insurance plan, administration of a retirement plan, administration of a job evaluation plan, supervision of credit union record-keeping, explanation of labor policies to new employees, counseling employees on their personal financial affairs, helping Department Heads in solving their personnel problems, acting as employment manager in interviewing applicants for positions, assisting in programs for trainees, etc."

You present the additional fact that the position in question was originally that of "pay roll clerk" described in the first quotation above and that the duties of "personnel manager" were added to the previously existing duties "with the increased importance of sound personnel relations."

You ask whether an employee who performs the above-listed duties may be listed as an exempt administrative employee under section 13(a)(1) of the Fair Labor Standards Act and the Regulations, Part 541.2, issued thereunder, even though he devotes approximately 50 percent of his time to the performance of nonexempt work. You cite the case of Walling v. Newman, 61 F. Supp. 971, decided June 26, 1945, as supporting an affirmative answer to your question.

(04906)

Without deciding whether the duties performed by the employee as "personnel manager" are of such a nature as to enable the employee to qualify as an exempt administrative employee, I shall assume that such duties, if they required the devotion of the employee's full attention for the entire workweek, meet the requirements of the exemption.

The Administrator of the Wage and Hour and Public Contracts Divisions has consistently taken the position that [the performance by an otherwise qualified administrative employee of any nonexempt work which is not incidental to the performance of the employee's administrative duties will defeat the exemption in any workweek in which such work is performed.] Accordingly, even though the duties of "personnel manager" were such that they met the requirements of the exemption, the performance of any of the routine clerical duties of "pay roll clerk" which were not incidental to the performance of the exempt administrative work, would defeat the exemption.

The case of Walling v. Newman, supra, which you cite in support of the proposition that the performance of nonexempt work by an otherwise exempt administrative employee will not defeat the exemption is not, in my opinion, controlling in a situation such as the one presented in your letter. In that case the Court's views were admittedly affected by the prominent role of the single employee in "running" the employer's business, a situation which is not present here. See in this connection George Lawler and Sons Corporation v. South. (C.C.A. 1), February 4, 1944, 140 F. (2d) 439, certiorari denied 322 U.S. 746; Lorber v. Rosow, (D. Conn.) November 16, 1944, 58 F. Supp. 341; Burke v. Lecrone-Benedict Ways, Inc., (E.D. Mich.) June 15, 1945, 63 F. Supp. 883; Kincaid v. Tenn. Copper Co., (E.D. Tenn.) July 19, 1945, 10 Labor Cases (Commerce Clearing House) 62911.

I shall be glad to furnish any additional information which you may desire in this matter. However, it is suggested that you may find it more convenient to consult our regional Wage and Hour Office at Parcel Post Building, 341 Ninth Avenue, New York 1, New York, for such information.

Very truly yours,

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

Enclosure

(04906)