UNITED STATES DEPARTMENT OF LABOR
Office of the Solicitor
November 25, 1946

Legal Field Letter
No. 112

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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(05035)

21 AB 301
21 AB 308
21 AB 402.21
21 AB 402.22
21 AB 402.25

Ernest N. Votaw
Regional Attorney
Philadelphia, Pennsylvania

Harold C. Nystrom
Chief, Wage-Hour Section

SOL:AS:CTN

August 1, 1946

C. J. Fonas, B. A. Kovaly and W. D. McVicker
East McKeesport, Pennsylvania
File No. 37-68408

This will reply to your memorandum dated June 7, 1946, and your earlier memorandum dated April 10, 1946, in connection with which you attached memoranda from Assistant Inspector Lockard and from Supervising Inspector Wood in the above matter.

It appears from Inspector Lockard's memorandum dated March 18, 1946, that in October 1944 the three subject individuals who are full-time employees of the Westinghouse Airbrake Company entered into a partnership agreement which stated that the purpose of the partnership was to complete a contract with Westinghouse Airbrake Company held by one of the partners and to complete other contracts in the machine parts line. Since that time, the partnership has performed, in a machine shop in the basement of the home of C. J. Fonas, various machine jobs totaling somewhat more than fifty thousand dollars for Westinghouse Airbrake Company. Work for other companies has also been done, totaling $114.65. Apparently little, if any, attempt has been made by the partners to secure work for companies other than Westinghouse Airbrake Company. The products made for Westinghouse are machine parts, some of which the partners believe are for experimental use, and others of which are used as parts of goods produced for commerce or as replacement parts on machines producing such goods. In their operations, the partners have employed a number of other machinists from time to time, working mostly evenings and weekends after completing their regular working schedules, either at Westinghouse Airbrake Company or at other industrial concerns in the area. All materials used by the partners are furnished by Westinghouse Airbrake Company when work is done for that company. The partnership is compensated at the rate of $5 per hour for every man-hour consumed in the performance of a job. The partners derive a profit by paying employees less than this amount and retaining the difference, except in cases where they themselves work, in which case the entire $5 per hour is credited to the partner working. The partnership pays social security and deducts withholding tax from amounts paid to employees.

I agree with your opinion that the three partners and those assisting them in the work performed for Westinghouse Airbrake Company must be considered employees of Westinghouse Airbrake Company on a piece-rate basis.

As you know, whether there is an employer-employee relationship, for purposes of the Fair Labor Standards Act, between the Westinghouse Airbrake Company on the one hand, and the partners and the machinists assisting them on the other hand, with respect to the work performed for the

(05035)

Westinghouse Airbrake Company in the partners' machine shop, must be determined primarily by the activities and actual operations of the parties rather then by the terms of the written contract into which they may have entered. (See Walling v. Rutherford Food Corp., 6 Wage Hour Cases 182 (C.C.A. 10); Walling v. Southwestern Greyhound Lines, 9 Wage Hour Rept. 338, and the cases cited therein.) Nor does the fact that the work is done away from the employer's premises, in the homes or shops of the workers, preclude the existence of an employment relationship with respect thereto, for purposes of the Act (Walling v. American Needlecrafts, 139 F. (2d) 60 (C.C.A. 6); Walling v. Sieving, 9 Wage Hour Rept. 356 (N.D. Ill.); Walling v. Twyeffort, 9 Wage Hour Rept. 284 (S.D.N.Y.); Walling v. Friedlin, 6 Wage Hour Cases 166 (M.D.Pa)). The cases above cited demonstrate that workers may, within the intendment of the Act, be employees of a firm for whom they perform work, even though the only arrangement between the parties for the performance of work is a so-called "independent contract." However, a significant aspect of the actual operations of the parties in the instant case is the fact that the subject individuals and most of the other machinists concerned are employees of the Westinghouse Airbrake Company during their regular working schedules. As you know, in similar situations the Divisions have in the past stated that it is unrealistic to assume that an employment and independent contractor relationship may exist concurrently between the same parties during the same workweek.

The facts available would further seem to indicate that the occupation in which these workers are engaged after their regular working hours is not distinct in character, separate and apart from the Westinghouse Airbrake Company's production of goods for commerce, but is an integral and essential part thereof. The particular arrangement with the subject individuals constitutes a regular and continuing feature of the operations of the Westinghouse Airbrake Company since October 1944. It further appears that all materials used by the partners are furnished by the Westinghouse Airbrake Company when work is done for that company. It is to be noted, also, that little, if any, attempt has been made by the partners to secure work for companies other than Westinghouse Airbrake Company and that, in fact, the total amount of work performed for Westinghouse Airbrake Company is more than $50,000, whereas work for other companies during the same period totals only $114.65. Under these circumstances, the work on machine parts for the Westinghouse Airbrake Company which is performed by the subject individuals and the machinists assisting them in the partner's machine shop after completing their regular working schedules, equally with the work performed by most of these men in the Westinghouse plant during their regular working schedules, would appear to constitute a functional part of an integrated effort in the Westinghouse Airbrake Company's production of goods for commerce. (See, in this connection, the language of the court in Walling v. Rutherford Food Corp, and Walling v. Southwestern Greyhound Lines, Inc., above.)

As you know, outside workers have been held, in comparable circumstances, to be employees within the meaning of the Act even though they were unsupervised in their work, were not required to devote any particular amount of time to their work, were under no restriction not to work for competitors of defendant firm, and supplied their own tools (Walling v. American Needlecrafts, 139 F. (2d) 60; Walling v. Seiving; and Walling v. Twyeffort, supra). The fact that such workers might be considered

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independent contractors at common law is not controlling. See the cases cited, also Glenn v. Beard 141 F (2d) 376; Walling v. Rutherford Food Corp., supra; Walling v. Woodbine Coal Co., 64 F.Supp. 82 (E.D.Ky.); Walling v. T. Buettner & Co., 5 Wage Hour Rept. 279 (N.D.Ill.), reversed on other grounds, 133 F. (2d) 306; United States v. The Vogue, Inc., 145 F. (2d) 609. Furthermore, as you know, the fact that the partnership pays social security and deducts withholding tax from amounts paid to the other machinists is not conclusive in determining whether an employer-employee relationship continues to exist between the Westinghouse Airbrake Company on the one hand and the partners and the other machinists on the other hand for purposes of the Fair Labor Standards Act. See, in this connection, Warner v. Goltra. 293 U.S. 155, 157, 158. See, also, Walling v. Sieying, supra. Nor is the continuance of such employment relationship precluded merely because the subject individuals are paid on the basis of $5 for every man-hour consumed in the performance of a job and, in turn, pay the other machinists out of sums received under the arrangement. As you know, neither the time nor the mode of compensation controls the determination of whether one is an employee within the meaning of the Act (United States v. Rosenwasser, 323 U.S. 360).

For the foregoing reasons I am of the opinion that the subject individuals and the workers assisting them would be held by the courts to be employees of the Westinghouse Airbrake Company, for purposes of the Fair Labor Standards Act, while engaged in work for that company in the machine shop in question, and must be compensated accordingly.

(05035)

21 BL 302.2[illegible]5
21 BL 302.44

Earl Street
Regional Attorney
Dallas, Texas

SOL:VOW:MET

August 2, 1946

Harold C. Nystrom
Chief, Wage-Hour Section

Central Cooperative Investment Company
Tulsa, Oklahoma

This will reply to your memorandum of November 7, 1945, requesting my opinion as to the applicability of the exemption for outside salesmen, as defined in Regulations, Part 541, section 541.5, to outside contact men engaged in the solicitation of loans by subject concern.

It appears that the primary duty of the employees in question is the solicitation of loans. They visit prospective clients in the area assigned to them, leave literature with them explaining the company's loan plan, and attempt to influence such individuals to secure loans at the employee's headquarters office. A record is submitted by these employees showing the name of each individual contacted, and if a loan is made to any of these clients the employee soliciting the business is given credit therefor. The outside contact man thereafter calls on his own clients from whom he has solicited the business in order to keep the loan payments up to date. It appears that, in all cases, these follow-up visits are made only by the employees who originally contacted the clients and solicited the business.

You state that it is your opinion that the employees in question do not meet the qualifications for exemption as outside salesmen provided by section 13(a)(1) of the Act. Section 541.5 of Regulations, Part 541, provides in part that an outside salesman shall mean an employee who is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business in "obtaining orders or contracts for the use of facilities for which a consideration will be paid by the client or customer." Since, you state, the employees in question do not obtain orders but rather "solicit" business for the employer, you do not believe that the work of these outside contact men satisfies the requirements for exemption. You call our attention, however, to Legal Field Letter No. 47, page 23, wherein it is stated that the outside salesman exemption may be applicable to an employee who is "engaged customarily and regularly away from his employer's place of business in soliciting contracts from individuals." In addition, you point out that outside contact employees of subject firm, engaged in similar activities in Mississippi, have apparently been deemed to qualify for the section 13(a)(1) exemption by the regional office there.

You further state, assuming that the solicitation constitutes exempt work, that the subsequent collection work would not be work of an exempt nature and, if in excess of the 20-percent limitation, would defeat the exemption.

In my opinion, the obtaining (or soliciting) of loans constitutes the type of exempt work which falls within section 541.5(a)(2) of the

regulations. See, in this connection, II Wage-Hour Code 4M6, wherein it is stated that "Included within the class of activities described are those of such employees as solicitors of contracts for the commercial use of radio time or for advertising, freight, financing or other services." (Underscoring supplied.) See, also, footnote 605 on page 344 of the Code and Legal Field Letter No. 47, page 23, to which you refer. Cf. Legal Field Letter No. 81, page 3.

The employees in question do not appear to be engaged in general promotion or missionary activities for the purpose of spreading good will or paving the way for other salesmen employed by subject company. See page 46 of the Stein report. Cf. Legal Field Letter No. 61, pages 3 and 10. On the contrary, they visit specific persons assigned to them as potential customers, with the purpose of inducing such contacted persons to avail themselves of the loan services offered by the subject concern. Each such employee is given credit for the loan consummated through his efforts, and each salesman appears to be responsible for all outside work connected with the servicing of his individually-obtained account. Section 4M5 of the Wage Hour Code states that--

> Generally, however, it may be said that an employee, in order to qualify as an outside salesmen, need not himself participate in all the incidents of the sales relied upon to support his exemption. Thus, the contract of sale need not be completely executed by him. Inasmuch as activities of salesmen commonly consist of no more than the taking of orders, it is immaterial that the transaction between the salesman and the customer is made subject to the approval of the salesman's home office, provided that the transaction is considered by his employer as a sale for which the salesman receives credit. /Underscoring supplied./

Since your memorandum suggests a distinction between the "solicitation" of orders and contracts and the "obtaining" of such orders and contracts, your attention is invited to the Stein report, pages 45-46, Legal Field Letter No. 57, page 34, and Legal Field Letter No. 47, page 23, in which the words "soliciting" and "obtaining" are apparently used interchangeably. Cf. Legal Field Letter No. 57, page 58.

I am further of the opinion that the subsequent collection work performed by subject's outside contact men constitutes exempt work and should not be counted in determining whether the 20-percent tolerance for nonexempt work has been exceeded if, as appears likely, such collection work is performed incidental to and in conjunction with the employee's own outside sales or solicitations. As set forth in subsection (B) of section 541.5 of the regulations, "work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall not be regarded as nonexempt work." (Underscoring supplied.) (See, also, II Wage-Hour Code 4M16.)

(05035)

21 BH 102.31
102.32

Earl Street, Regional Attorney
Dallas, Texas

SOL:JL:MFS

Harold C. Nystrom
Chief, Wage-Hour Section

August 22, 1946

Lovell Publishing Company
Mansfield, Texas

This will reply to your memorandum of August 2, 1946 in which you inquire whether the 13(a)(8) exemption is applicable to employees of the subject company which is engaged in the publication of two newspapers individually qualifying for exemption under that section but whose combined circulation is in excess of 3,000 copies.

It is the position of the Divisions that where a publishing company publishes more than one newspaper, it may treat each newspaper separately for the purpose of determining whether the circulation of such papers is less than the maximum set forth in section 13(a)(8). Assuming that in the instant case the major part of the circulation of each paper is within the county where printed and published, the exemption would be applicable. If, of course, the situation is one where the purported separate publications are properly to be regarded as one and the same newspaper, the total circulation of both publications would have to be considered in determining whether the exemption is applicable.

(05035)

SOL:VOW:LG:FH

Irving Rozen
Regional Attorney
New York, New York

August 27, 1946

Harold C. Nystrom
Chief, Wage-Hour Section

"Article" as used in the exclusionary clause
of the Embroideries Industry wage order

Reference is made to your memorandum requesting a clarification of the exclusionary clause of the Embroideries Industry wage order. It is your opinion that a memorandum from Murtha to Rozen dated May 17, 1945, in regard to Lillyhall Accessories, and a letter dated July 16, 1945, to Morris A. Bauer, adopt conflicting positions regarding the application of the exclusionary clause.

You state that in the memorandum regarding Lillyhall Accessories it was indicated that the applicability of the Embroideries Industry wage order to the embroidery of a covered button depends upon who manufactures the button. On the other hand, in the letter to Mr. Bauer, it was stated that whether the crocheting of wooden ball-snap fasteners for fur coats is excluded from the Embroideries Industry wage order depends upon who manufactures the fur coats.

As explained in Legal Field Letter No. 102, page 6, the exclusionary clause was included within the definition of the wage order in question in order to prevent the interjection of an additional wage rate (i.e., that provided by the Embroideries Industry wage order) into the plant of the manufacturer of a particular article, the manufacture of which was subject to another wage order. If, however, the sole operations performed by a manufacturer constitute embroidery operations within the meaning of the Embroideries Industry wage order, the exclusionary clause would be inapposite.

On the basis of the above principles, the apparent discrepancy between the cases is clearly reconcilable. In the Lillyhall Accessories case, both situations appear. When the company covers purchased metal blanks with cloth it is engaging in a manufacturing process which is not an embroidery operation (by the express language of the second exclusionary clause) but is rather subject to the Miscellaneous Apparel Industry. Accordingly, the first exclusionary clause of the Embroideries Industry wage order applies in such a case to the subsequent application of spangles, since although it constitutes an embroidery operation, it is performed on an article manufactured by the same manufacturer, the manufacture of which article is subject to another wage order. Where, however, Lillyhall Accessories purchases the cloth-covered buttons, it is engaged exclusively in performing an embroidery operation on an article which it has not manufactured, and the first exclusionary clause in the Embroideries Industry wage order would not apply.

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Similarly, in the case of Mr. Bauer's client, the sole operations involved in crocheting the wooden ball-snaps are embroidery processes. Furthermore, no manufacturing operations are performed on these articles other than such embroidery work. The crocheting of such snaps is not subject to the Miscellaneous Apparel Industry wage order but is within the Embroideries Industry and the exclusionary clause in the definition of the industry is inapplicable.

21 BG 102.21
102.61
102.91

James M. Miller
Regional Attorney
Minneapolis, Minnesota

SOL:EGT:ERG:MET

Harold C. Nystrom
Chief, Wage-Hour Section

August 27, 1946

R. B. Boak Company
St. Paul, Minnesota
SOL:JMM:ES

This will reply to your memorandum of September 24, 1945, transmitting a copy of your memorandum of August 9, 1945, to Acting Regional Director Drinkwater. You inquire whether the opinions expressed therein are correct and state that, in your opinion, "there is no justification for the extension of the 13(a)(5) exemption to operations performed upon smoked, salted, dried or pickled fish although we realize that the statutory language of the exemption itself is sufficiently broad to cover same."

As appears from your August 9 memorandum, subject's employees were engaged in various fish processing operations. One employee, it appears, cut fish preparatory to pickling. The fish on which he worked were either raw or had been preserved in brine. Other employees pickled and packed fish and also made lutefish in season out of dried codfish.

After referring to various memoranda, legal field letters, and releases bearing upon the section 13(a)(5) exemption, you advised Mr. Drinkwater that under the Divisions' early position, the inspector acted properly in denying the exemption to work performed by subject firm on smoked, dried, and salted fish, since it was the Divisions' position in 1940 that further operations on fish that had been rendered relatively nonperishable were outside the scope of the exemption. You also stated that the Divisions subsequently, in releases R-1609 and R-1644 and in several legal field letters, "took the opposite view." This was apparently based upon the then recognized distinction between sections 13(a)(5) and 7(c) in that the former was not limited to "first processing." You further advised Mr. Drinkwater that the inspector was correct in denying the exemption to office employees and to employees handling canned fish which had been sterilized by heat and hermetically sealed.

You inquire whether your opinions are correct, particularly in the light of release A-15 and the memoranda of April 29 and December 9, 1944, from Mr. Tyson to Miss Williams. In the event that it is still the Divisions' position that processing operations on smoked, salted, dried or pickled fish are exempt, you inquire further as to whether there is, in the near future, any possibility of a change in the Divisions' position.

I concur in your opinion that under the Divisions' early opinions, processing operations on smoked, dried and salted fish were probably not considered exempt by the Divisions. See, however, paragraph 4 of Interpretative Bulletin No. 12 (November 1940) and footnote 370 on page 314 of II Wage-Hour Code which states that "Included within the exemption are such operations as the cleaning of fish and other treatment of them prior to their being marketed, and the processing of fish byproducts into dried

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scrap, fish meal, or fertilizer." (Underscoring supplied.) Release R-1609, issued in October 1941, modified the Divisions' earlier position by stating that employees engaged in marketing and distributing edible fish and fishery products would be considered exempt under section 13(a)(5) whether engaged in performing such operations on fresh fish or on fishery products that had been preserved through freezing, smoking, or curing. See, also, release R-1644. Previously, you will note, the Divisions had stated that the words "marketing" and "distributing" used in section 13(a)(5) "are applicable only to such operations as are performed in connection with fresh fish" (Legal Field Letter No. 57, pages 25 through 27). Neither of the afore-mentioned releases, however, expressly stated that processing (as distinguished from marketing and distributing) of smoked, dried, or salted fish was exempt under section 13(a)(5). Legal Field Letter No. 69, page 20, however, in stating that the reprocessing of frozen fish was an exempt operation, clearly indicated that reprocessing operations were exempt under section 13(a)(5). This opinion was further clarified shortly thereafter. See attached copy of Mr. Poole's memorandum to former Regional Attorney Reyman, dated December 19, 1941, re Oxenberg Brothers. Cf. Legal Field Letter No. 35, page 22, and Legal Field Letter No. 80, page 6.

I do not believe that these views have been changed by release A-15 or by the opinions contained in the April 29 and December 9, 1944, memoranda from Mr. Tyson to Miss Williams. As is stated in release A-15, the exempt shore activities described in section 13(a)(5) are those which "in general have to do with the movement of the perishable products to a nonperishable state or to points of consumption." Economic studies upon which the Divisions' present interpretation of the exemption is based indicate that while various kinds of fish may be preserved for varying lengths of time when kept at "fairly cool temperatures," they are perishable when not so refrigerated. The Divisions have therefore felt that for purposes of the section 13(a)(5) exemption such fish should be considered "perishable." See, in this connection, pages 19 and 20 of Mr. Tyson's April 29 memorandum. I do not believe that the Divisions' position in this matter will be changed in the near future.

Your statement that the exemption is inapplicable to "employees handling canned fish which have been sterilized by heat and hermetically sealed" is perhaps a bit too broad. Releases R-1609 and R-1644 state that the exemption does not extend to employees engaged in the wholesale distribution of fishery products packed in hermetically sealed containers. The handling of canned fish which is involved in the labeling and packing of cans of fish into cases may be exempt work if performed as part of one continuous uninterrupted canning process which in its entirety constitutes freezing, canning, curing or storing. See II Wage-Hour Code 405 and footnote 363; see, also, Legal Field Letter No. 57, pages 25 through 27, and Mr. Tyson's memorandum to Miss Williams of April 29, 1944. If, however, such labeling and packing are performed on goods that have been stored for some length of time, such activities would constitute nonexempt work (II Wage-Hour Code 405). See the last paragraph of release A-15 with regard to the 20-percent tolerance for nonexempt work.

Your memorandum does not describe the work performed by the office employees who were considered exempt by the inspector. Under the Divisions'

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position as expressed in Interpretative Bulletin No. 12 and Legal Field Letter No. 80, page 17 only those office employees engaged in operations described in section 13(a)(5) could be regarded as exempt. That interpretation has, of course, since been modified. See the general principles set forth in release A-15. The last sentence in paragraph 4 of the release thus states:

> In general, the applicability of the exemption is to be tested by the functional relationship of an employee's occupation to the activities mentioned in section 13(a)(5) rather than the engagement by the employee in the specific physical operations which the terms used in that section may describe.

See, in this connection, pages 11 and 12 of Mr. Tyson's April 29 memorandum which discuss the applicability of the exemption to various clerical or office employees.

Attachment

(05035)

21 AC 205.10
205.22
205.23
407.1
209.2128
409.91

George A. Downing
Regional Attorney
Atlanta, Georgia

Harold C. Nystrom
Chief, Wage-Hour Section

SOL:AS:MET

Yadkinville Roller Mills
East Bend, North Carolina
File No. 32-53, 166

August 28, 1946

Reference is made to your memorandum dated October 11, 1945, requesting our opinion as to coverage ofemployees of the subject company who are engaged in producing curing flues from sheet metal for subsequent use within the State in tobacco barns where tobacco is cured prior to marketing. You refer to our memorandum of September 5, 1944, in reply to your request for an opinion dated August 23, 1944, subject, McCullen's Mill, Clinton, North Carolina, 32-R-11, in which we stated that no position on coverage would be taken with respect to the production of lumber for use in the construction of tobacco barns. It is your opinion that if coverage is to be asserted in the instant case, the ruling in the McCullen's Mill memorandum, which you cite, would have to be reversed.

I am unable to agree with this conclusion. As we stated in the McCullen's Mill memorandum, "The physical relationship of the lumber to the production of the goods produced for interstate commerce by the farmer does not appear to be as close and immediate as the relationship between, for example, the machine parts and the goods produced by these machines." This distinction which was a determinative factor in reaching the conclusion stated in the McCullen's Mill memorandum would appear to be equally controlling in the situation you present. Thus, it appears that there is a close and immediate relationship between the distinctive heating apparatus of which the tobacco-curing flues are an essential part and the flue-cured tobacco produced for interstate commerce by such heating apparatus. According to a description of the process by which flue-cured tobacco is produced, contained in Circular No. 249, United States Department of Agriculture, pages 6-13, which we have obtained from the Economics Branch:

> Flue-cured tobacco gets its name from the distinctive heating apparatus employed in the curing barns. This consists of fireboxes with large iron flues to give off heat. The fireboxes open on the outside of the building and extend about 6 feet into the building. They may be made of stone covered with sheet iron or of brick arched over. The smoke is conveyed through an iron flue extending from the firebox to the far side of the barn and back, with the exit on the same side of the building as the firebox and somewhat higher. Most of the heat is given off by the flues.

The use of flues would thus appear to be essential to the production of a distinctive type of tobacco, namely, flue-cured tobacco which is different from fire-cured, air-cured or sun-cured tobacco (Farmers'

Bulletin 523, United States Department of Agriculture). As you know, the Tenth Circuit Court of Appeals stated in Walling v. Amidon, 153 F. (2d) 159:

> The sand is not processed and does not become a part of the maufactured article but it is a necessary supplement to the equipment with which the manufacturing process is carried out and it or some substitute therefor is necessary in the production of the iron and steel products manufactured by the Colorado Corporation.

Similarly, in the instant situation, the flues constitute a necessary supplement to the distinctive sheeting apparatus with which the curing process of the tobacco is carried out and the flues or some substitute therefor are necessary in the production of flue-cured tobacco for commerce. For the foregoing reasons, I am of the opinion that the production of tobacco-curing flues from sheet metal for subsequent use within the State in tobacco barns where tobacco is cured prior to marketing in interstate commerce is necessary to the production of flue-cured tobacco for commerce and as such is covered under the Act (Walling v. Roland Electrical Co., 326 U.S. 657; Armour v. Wantock, 323 U.S. 126; Kirschbaum v. Walling, 316 U.S. 517; Clifton v. E. C. Schroeder Co., 153 F. (2d) 385 (C.C.A. 10), cert. denied, 6 Wage Hour Cases 63, Walling v. Hamner, 64 F. Supp. 690 (W.D.Va.); Walling v. Amidon, 153 F.(2d) 159 (C.C.A. 10); Claudio v. Sobrinos de Pertilla, 8 Wage Hour Rept. 776 (P.R. 1945); and Bicanie v. J. C. Campbell Co., 8 Wage Hour Rept. 589).

In connection with your opinion that if coverage is to be asserted in the instant case the ruling in the McCullen's Mill memorandum concerning the production of lumber used in the construction of tobacco barns would have to be reversed, it is to be noted that coverage of the Fair Labor Standards Act has not been asserted by the Administrator where employees are engaged in producing goods used within the State of production in the original construction of buildings used to produce goods for commerce. The facts in your case, of course, are clearly distinguishable since they do not concern the production of goods for use in the original construction of buildings used to produce goods for commerce but rather concern the production of equipment parts for machinery used to produce goods for commerce. The Third Circuit's decision in the McCrady case and the Tenth Circuit's decision in Clifton v. E. C. Schroeder Co. might require a reexamination of the McCullen's Mill opinion.

21 AC 205.22

James M. Miller
Regional Attorney
Minneapolis, Minnesota

SOL:AS:FUR:CTN

August 28, 1946

Harold C. Nystrom
Chief, Wage-Hour Section

LeSueur Concrete Block Company
LeSueur, Minnesota

Reference is made to your memorandum dated January 14, 1946, requesting us to advise you whether we agree with the opinion expressed in your memorandum to Regional Director Hill, a copy of which you attach.

It appears that the subject firm manufactures tile used by individual farmers for draining their properties. All raw materials used in such manufacture are obtained locally, and none of the tile and blocks is shipped in interstate commerce. Your memorandum states:

> We are not prepared to assert coverage as to employees who produce the tile. This situation can be distinguished from those in reference to manufacturing coal, tools, dies, etc. used in production for interstate commerce. There the relationship is closer. The principles expressed in Release A-14 do not apply as the tile is not incorporated into an instrumentality of interstate commerce. Rather the problem presented is analogous to that arising where building blocks are produced for use within the state in the construction of a building which will be or is presently used to produce goods for interstate commerce.

On the basis of the facts submitted, we are unable to agree with the conclusion stated in your memorandum. We cannot, upon the limited facts you submit, perceive any significant difference between the case you put and that presented by the manufacture of mine props under the conditions set out in Field Operations Bulletin, Volume V, No. 12, page 2. See, also, Walling v. Hawner, 64 F. Supp. 690 (W.D.Va.), decided subsequent to the date of your memorandum. Cf. Walling v. Amidon, 153 F.(2d) 159; Schroeder v. Clifton, 153 F.(2d) 385; Reynolds v. Salt River Valley Water Users Assn., 143 F.(2d) 863 (C.C.A. 9); Phillips v. Meeker Cooperative Light & Power Assn., 63 F.Supp. 733 (Minn.). The general principles of coverage outlined by the Supreme Court in Armour & Co. v. Wantock, 323 U.S. 126, and Roland Electrical Co. v. Walling, 9 Wage Hour Reporter 89, would also appear to support the conclusion that the subject's operations are necessary to production of goods for commerce, within the meaning of the Act.

(05035)

21 BE 101
201

Irving Rozen
Regional Attorney
New York, New York

SOL:NH:JL:FH
August 28, 1946

Harold C. Nystrom
Chief, Wage-Hour Section

Taca Airways

This will reply to your memorandum of February 19, 1946 requesting an opinion as to the applicability of the section 13 (a)(4) exemption to employees of the subject company. It appears that the company operates an air terminal in Florida and performs the usual services for air lines in connection therewith. While the company itself is a Deleware corporation it is directly controlled by a Panama corporation which you state does not do business in the United States "except that its planes land and take off at the Taca terminal.".

You refer to a memorandum from former Assistant Solicitor Poole to former Regional Attorney Reyman, dated July 18, 1941, with regard to Air Lines Terminal, Inc., in which the opinion was expressed that a "terminal company owned and controlled by several carriers by air which operates facilities and performs services in connection with the transportation of property by air" would be exempt under section 13(a)(4) of the Act. Since the parent air carrier in the instant case is a foreign corporation while the parent air carriers in the Air Lines Terminal opinion were domestic air carriers you appear to have some question as to whether the latter opinion is controlling.

As you know, Title II of the Railway Labor Act (45 U.S.C. 181) provides that "All of the provisions of sections 151 * * * of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce * * *" (Emphasis supplied). Section 182 of title 45 provides that section 151 is applicable "to said carriers by air * * * in the same manner and to the same extent as though such carriers * * * were specifically included within the definition of 'carrier' * * * in section 151." Section 151 provides that "The term 'carrier' includes any * * * carrier by railroad subject to chapter 1 of Title 49." Title 49 section 1(1) includes "The transportation of passengers or property * * * from or to any place in the United States to or from a foreign country, but only insofar as such transportation * * * takes place within the United States" (Emphasis supplied).

According to information received from our Washington office we understand that they have been advised by the Interstate Commerce Commission that a similar problem has arisen in the case of Canadian railroads which cross into the United States, and that the Commission has taken the position that to the extent that such railroads operate in this country they are subject to the Commission's jurisdiction under 49 U.S.C. 1(1). It is our opinion, therefore, that to the extent that a foreign air line operates as

(05035)

a common carrier by air in the United States it is subject to Title II of the Railway Labor Act and hence is exempt under section 13(a)(4) of the Fair Labor Standards Act. In this connection, we understand from our Washington office that Mr. Cole, Secretary of the National Mediation Board, has concurred in a similar conclusion regarding another foreign air carrier some of whose flights are scheduled in the United States.

Accordingly, since you state that the air line which controls the subject company lands planes and takes off at the subject company's terminal within the United States and presumably acts as a common carrier by air, it would be subject to Title II of the Railway Labor Act and would be exempt under section 13(a)(4) of the Fair Labor Standards Act. If the subject company is controlled by the air line and performs services in connection with the transportation of property by air it would likewise, under the opinion rendered by former Assistant Solicitor Poole, appear to be exempt under section 13(a)(4).

* * *

As requested, the correspondence with the National Mediation Board is herewith returned.

Attachments

21 AC 205.22

George A. Downing
Regional Attorney
Atlanta, Georgia

SOL:FUR:MET

August 28, 1946

Harold C. Nystrom
Chief, Wage-Hour Section

Flowers Woodworking Company
Marion, South Carolina

This will reply to your inquiry of June 24, 1946, concerning the applicability of the Fair Labor Standards Act to employees "engaged in producing tobacco sticks, all of which are used in the state of production by farmers as a means of supporting or staking green tobacco while it is being cured in their barns. The sticks, which are used from season to season or until they become broken or worn beyond usefulness, never leave the state but the cured tobacco does."

We concur with your suggestion that the problem presented is substantially similar to that raised in the Yadkinville Roller Mills file. Coverage here may be predicated on the same authorities cited in my memorandum to you of this date in that case.

(05035)

21 AC 101.622
21 AC 408.1
408.5
409.91

James M. Miller
Regional Attorney
Minneapolis, Minnesota

SOL:VOW:JL:FH

Harold C. Nystrom
Chief, Wage-Hour Section

August 28, 1946

J. M. Olson Insulating Company
Fargo, North Dakota

Reference is made to your memorandum of February 7, 1946, requesting an opinion as to the coverage of employees who install insulation in homes, schools or churches outside of the State wherein their employer has his place of business. You suggest that for purposes of this inquiry we assume that this would be the only basis for coverage, i.e., that the employees do not participate in the loading, transportation or unloading of materials. You state that there would appear to be two grounds for coverage available; first, that the work is done pursuant to an interstate contract of sale, and second, under the principles of the Jacksonville case, that the insulating material does not come to rest until finally deposited within the walls of the structure as the ultimate destination intended from the moment the interstate movement was initiated.

The problem presented in your memorandum is similar to that submitted in your memorandum of September 6, 1945 requesting an opinion as to the coverage of employees of roofing, sound-proofing, insulating and painting contractors. As indicated in my memorandum to you of July 31, 1946 in reply to your earlier memorandum, the work in question cannot properly be termed "installation" as that term is used in the Legal Field Letters (Nos. 74; 80, page 18; and 83, page 6). Accordingly, the insulation work in question would not be deemed installation pursuant to an interstate contract of sale, within the meaning of the legal field letters. Nor would coverage appear to exist under the principles of the Jacksonville case. Where the work in question is considered construction rather than mere installation the materials ordered from outside the State have been deemed to come to rest at the construction site and commerce has not been considered as continuing during the actual construction process. Under the position suggested by you construction employees would always be covered where their work in the construction of a building involved the handling of materials received directly from another State. The Divisions are not yet prepared to assert coverage over construction employees engaged in handling material received from outside the State where the sole basis of coverage is that they are handling such materials in the actual process of construction after arriving at the construction site.

The subject file is returned herewith.

Attachment
(File)

(05035)

21 BJ 402.4521
21 BJ 402.451
21 BJ 403.4421
21 AC 408.5

Irving Rozen
Regional Attorney
New York, New York

SOL:VOW:HH

Harold C. Nystrom
Chief, Wage-Hour Section

August 30, 1946

Sobel & Kraus, Inc.
1204 Washington Avenue
Bronx, New York
File No. 31-81414 PC

This will reply to your memorandum of June 10, 1946, in which you request an opinion regarding the application of the 13(a)(2) exemption to employees of subject firm which is engaged in the fabrication of sheet metal and roofing in connection with the alteration and repair of old buildings and the construction of new buildings.

The inspector has stated that in fabricating sheet metal, strips of the material are cut to a pattern, bent and welded together at the plant. The strips of sheet metal are then transported to the building site where they are installed as part of the heating unit. The firm also constructs skylights, flashings (metal strips affixed where walls abut roof), leaders, gutters and ventilating ducts. The firm uses such materials as felt, pitch, asphalt, plastic cement, slag and rubberoid cap sheets in this type of activity on both old and new buildings.

It appears that, at the present time, about 14 percent of the firm's business is derived from "sales" to factories, warehouses and wholesale establishments; about 30 percent to theatres, churches, large apartment houses and retail business properties; the balance to new construction and small homes. You state that the firm employs 24 persons, of whom two are engaged in fabricating sheet metal, nine do outside work attaching and installing sheet metal items, etc., ten do roofing work, two are truck drivers, and one is a bookkeeper. Occasionally, the employees engaged in outside sheet metal work perform fabrication work in the shop.

It is your opinion, after a study of the available material on the subject, that the 13(a)(2) exemption is inapplicable to the activities carried on by subject firm. You believe that the work performed should be regarded as manufacturing, construction and reconstruction and does not constitute a "service" within the meaning of the term as used in section 13(a)(2). Furthermore, it is your view that "the work performed is not a 'service' whether it is performed for an industrial plant or theatre or a small home owner." In support of this position you call our attention to Legal Field Letter No. 74 which designates roofing material as "construction material." However, you state that earlier opinions involving roofing concerns do not appear to have passed upon the point, except a letter from Rufus G. Poole to William M. Goldweber, dated September 26, 1940, which states that roofing is construction and is not exempt under 13(a)(2).

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I agree that the other correspondence to which you refer in your memorandum appears to be somewhat ambiguous on the subject and does not afford a definitive answer. However, in another letter from Deputy Administrator Winslow to E. C. Blaske of the Wellsville Roofing Company, dated January 16, 1945, the Divisions took the following position:

> However, when a firm engages in construction activities such as sheet metal work and the installation and repair of roofing, it is performing work in the capacity of a building contractor. The 13(a)(2) exemption does not apply to building contractors or persons engaged in similar activities, since this type of work is completely unrelated to that ordinarily performed by a retail or service establishment, as you will note in paragraph 29 of Interpretative Bulletin No. 6.

In that case, similar to the instant situation, the Wellsville Roofing Company performed sheet metal work, installation of building materials and roofing for industrial plants, retail stores, domestic dwellings, schools, churches and hospitals. The character of the customer for whom this type of construction or repair work was performed was deemed to be immaterial, for the purposes of determining the applicability of the exemption (as distinguished from the question of coverage), since the work in question is, by definition, not a service activity. The above-mentioned letter to Mr. Blaske continues by stating that it is not material that only 7 percent of the total sales and services are to industrial customers--

> * * * inasmuch as the performance of any work of a type entirely foreign to that ordinarily engaged in by retail or service establishment, such as manufacturing or reconstruction of buildings, will * * * cause the section 13(a)(2) exemption to be inapplicable* * *.

Accordingly, you will see that the Divisions' position has not been revised since the earlier expressions in the letter from Rufus G. Poole to William M. Goldweber, dated September 26, 1940, and in a memorandum from the Acting Assistant Solicitor to then Regional Attorney Murtha regarding Puritan Service Company, dated August 26, 1941 (holding the 13(a)(2) exemption inapplicable to companies "engaged in insulating buildings, principally homes," although the basis for coverage was questioned).

Since the exemption will not be applicable in the case of subject company, it does not appear to be necessary to answer any of your supplementary questions (e.g., whether a business firm includes retail stores or theatres) presented in your memorandum.

26 CD 402.26
26 CD 402.2113
25 CD 402.2111

Mr. Walter J. Raleigh
Assistant Secretary
Printers League Section
New York Employing Printers Association, Inc.
461 Eighth Avenue
New York 1, New York

SOL:VOW:EG

August 16, 1946

Dear Mr. Raleigh:

This will reply to your letter of July 31, 1946, requesting an opinion as to whether a bonus paid pursuant to a plan proposed by one of your members must be included as part of wages for the purpose of computing overtime compensation under the Fair Labor Standards Act. You state that one of your members proposes to pay to his employee 2 percent of his monthly sales in excess of his monthly break-even point. The amount set aside would be distributed to the individual employee in the same ratio that the individual wages bear to the total wages for the month.

As stated in release A-13, a copy of which is enclosed, where an employer promises, agrees, or arranges to pay a bonus, the amount of which may be fixed or ascertainable by the application of a formula, such bonus is considered part of the employee's regular rate of pay for purposes of computing overtime compensation. The word "arranges" as used in the release is intended to apply to a situation where bonus payments are not necessarily based upon an expressed mutual agreement but upon custom and practice sufficient to imply an understanding. Although it is not possible in the absence of specific details to make a final determination, it would appear that where, as here, the contemplated payments are made regularly and recurrently, and pursuant to a formula, such payments should be included in determining the employee's regular rate of pay.

As you will note, however, from the release, if the bonus distributed to the employees is based on a predetermined percentage of the total earnings (i.e., both straight time and overtime) of the individual employees, no additional overtime need be computed and paid, since such a bonus itself includes the payment of both straight time and overtime. Accordingly, if the method of distribution described in your letter is based on the ratio of each individual employee's total wages (both straight time and overtime) to the total wages paid to all employees for the month, so that each employee's share would be equivalent to the amount he would receive by applying to his total earnings the percentage arrived at by dividing the total bonus distribution by the total monthly pay roll, it would not be necessary to pay additional overtime on the bonus payments.

You further inquire whether the employer in question may effectively reserve the right to drop the plan without Wage Stabilization Board approval. Since this is a matter which ultimately will have to be decided by the Wage Stabilization Board, I suggest you get in touch with the Regional Wage Stabilization Board, 165 West 46th Street, New York, New York, for direct assistance in this matter.

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I trust that this information will satisfactorily answer your inquiry, but if you have any further questions in this matter I suggest that you communicate with the regional office of the Divisions located at 341 Ninth Avenue, New York, New York.

Very truly yours,

Thacher Winslow
Deputy Administrator

Enclosure

(05035)

23 CB 401
203.1
204.2

Mr. W. C. Solly
Director, Service Department
Pennsylvania Motor Truck Association, Inc.
Seventh Floor, Telegraph Building
Harrisburg, Pennsylvania

SOL:EGT:FH

August 26, 1946

Dear Mr. Solly:

* * *

You state that one of the members of your Association is a manufacturing stationer, commercial printer and furnisher of school supplies located in the north-central part of Pennsylvania, with a branch plant in the city of Pittsburgh. One of his employees drives a truck loaded with paper goods and school supplies from the main plant to dealers in paper goods and to school districts in the city of Pittsburgh, where he leaves some of his load, leaving part of the remainder at the branch plant in Pittsburgh, after which he then continues on to points in West Virginia where he disposes of the remainder of his load. He travels empty on the return trip as far as Pittsburgh, where he picks up paper cartons from dealers and some school supplies, such as ink wells, etc., from supply houses in Pittsburgh. The full load is then carried to the main plant in northern Pennsylvania. These supplies and cartons are used up in shipments not only to points in Pennsylvania, but to adjoining States as well. You also state that among the articles picked up from dealers are cases of flat paper for printing. This is made up into printed forms and calendars, some of which are delivered to extra-State points, but by other employees.

You further state that the manufacturer recognizes and observes the Interstate Commerce Commission requirements with respect to drivers' legs and hours of service for this driver and estimates that only 25 percent of the round trip from the plant to West Virginia and return, via Pittsburgh, is used in the Pittsburgh work. Further, because of the other delivery work furnished by this driver from the factory to many other points in Pennsylvania other than Pittsburgh, only about 10 percent of the total pay-roll time of this driver is consumed in the Pittsburgh pick-up.

It appears that one of the Divisions' inspectors has advised that the pick-up of paper and paper cartons renders the driver subject to the Fair Labor Standards Act and that the performance of such work once a week would be sufficient to bring the employee within the coverage of the Act. You inquire as to the basis for the inspector's position.

As you probably know, the Fair Labor Standards Act applies to employees engaged in interstate commerce or in the production of goods for interstate commerce, including occupations and processes necessary to such production. A truck driver engaged in hauling goods across State lines, or engaged in the intrastate hauling of supplies, cartons, etc., which goods are destined to be shipped in interstate commerce,

(05035)

either directly or indirectly, would be subject to the applicable provisions of the Act in any week in which he was so engaged. See, in this connection, Enterprise Box Co. v. Fleming, 125 F.(2d) 897 (C.C.A. 5); Dize v. Maddrix, 144 F.(2d) 584 (C.C.A. 4), affirmed 324 U.S. 697; Walling v. Rockton & Rion R.R., 146 F.(2d) 111 (C.C.A. 4), cert. denied 324 U.S. 880; Walling v. Comet Carriers, 151 F.(2d) 107 (C.C.A. 2). Since the workweek is taken as the standard in ascertaining the applicability of the Act to a given employee, and since an employee engaged in performing any covered work in a week is considered subject to the Act for the entire week, a driver engaged in performing any covered work during a particular week would be entitled to the applicable benefits of the Act for the entire workweek. Cf. United States v. Darby, 312 U.S. 100; Mabee v. White Plains Publishing Co., 9 Wage Hour Rept. 138.

Section 13(b)(1) of the Fair Labor Standards Act, however, provides an exemption from its overtime requirements, but not from its minimum wage provisions, for "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." As discussed in paragraph 4(b) of revised Interpretative Bulletin No. 9, a copy of which is enclosed herewith, this exemption is considered inapplicable to a truck driver who spends the greater part of his time during a workweek in nonexempt activities, some portion of which is covered under the Fair Labor Standards Act. Whether or not such an employee is subject to the jurisdiction of the Interstate Commerce Commission is, of course, primarily a question for determination by that agency.

I regret that I cannot, on the basis of the facts set forth in your letter, definitely determine the exemption status under the Fair Labor Standards Act of the driver in question since all the pertinent facts are not available from your letter. The information set forth below, however, should enable you to ascertain his status under section 13(b)(1).

Whether a driver is engaged in an exempt activity, via, transportation in interstate commerce, depends upon the nature of the trip as well as the character of the load. Where transportation in interstate commerce takes place throughout a particular trip, the entire trip is considered to constitute transportation in interstate commerce even though the driver may have a mixed load, part of which is not being transported in interstate commerce. It is, however, a question of fact in each individual case whether a particular period of driving is a single continuous trip in interstate commerce with intermediate steps along the way (in which case the entire trip would constitute exempt driving) or is a series of two or more separate trips (in which case only the time spent performing the trip or trips involving transportation in interstate commerce would constitute exempt driving). If, therefore, the driver in question leaves his employer's main plant on his outgoing trip with a mixed load, part of which is destined for points in West Virginia and part of which is intended to be delivered in the city of Pittsburgh, the entire outgoing trip would be considered by the Divisions as transportation in interstate commerce subject to the juris-

diction of the Interstate Commerce Commission. While the time spent by the employee in driving on such a trip would be considered exempt under section 13(b)(1), time devoted by the driver to any unloading operations or other activities not affecting safety of operation of the motor vehicle in interstate commerce would not be exempt.

It is also the Divisions' view that driving an empty truck in interstate commerce as a necessary incident to hauling in interstate commerce constitutes transportation in interstate commerce subject to the jurisdiction of the Interstate Commerce Commission. Accordingly, to the extent that a return trip merely involves the return of an empty truck to the employer's place of business after the completion of delivery of a load consisting wholly or partly of goods being transported in interstate commerce, the round trip would constitute a single trip in interstate commerce and the time devoted to such driving would be deemed exempt. Where, however, as in the situation presented by you, the truck travels empty on the return trip from West Virginia to Pittsburgh, where it picks up goods from various points within Pittsburgh for transportation to the company's main plant in north-central Pennsylvania, it is a question of fact, depending upon all the surrounding circumstances, whether the entire return portion of the trip constitutes transportation in interstate commerce or whether the haul from Pittsburgh to north-central Pennsylvania is a separate and distinct undertaking involving a purely intrastate delivery falling outside the jurisdiction of the Interstate Commerce Commission.

If, for example, the driver--at the commencement of his outbound trip--customarily receives instructions concerning the Pittsburgh pick-up on his return trip and there is no break in the continuity of interstate transportation at any point, such as an unreasonable delay at Pittsburgh, this would be evidence that, under the circumstances you present, the entire journey from north-central Pennsylvania to West Virginia and return constitutes a single trip in interstate commerce subject to the jurisdiction of the Interstate Commerce Commission, rather than a series of two or more separate trips. If the time spent by this driver in such transportation, together with the time devoted by him to other exempt transportation activities, occupies at least 50 percent of his time during the workweek, the section 13(b)(1) exemption would be considered applicable to his employment in such workweek. If, on the other hand, the instructions which the driver receives at the commencement of his outgoing trip require him to return the truck to Pittsburgh rather then to the home office and contemplate that further instructions will be furnished him at Pittsburgh, or if there is a break in the continuity of the interstate trip at Pittsburgh for other reasons, this would be a factor indicating that the period of driving from Pittsburgh back to north-central Pennsylvania is an intrastate trip of a nonexempt character under section 13(b)(1).

I trust that this information will prove of assistance to you. If, however, you have any further questions in this matter, I suggest that you may find it more convenient to consult the regional office of the Divisions located at 1216 Widener Building, Chestnut and Juniper Streets, Philadelphia 7, Pennsylvania, which can rule on the particular facts.

Very truly yours,

L. Metcalfe Walling
Administrator

Enclosure

13(b)(1)
25 BA 101
23 CB 204.2
202.1
203.1
21 AC 501
101.621
101.64
24 AA 401.6
25 BD 303.123

Washington 25, D. C.

Mr. John F. Dalton
State Labor Commissioner
State of California
Department of Industrial Relations
Division of Labor Law Enforcement
609 California Building
San Diego 1, California

SOL:SSB:HD

October 3, 1946

Dear Mr. Dalton:

This is in reply to your letter inquiring whether certain practices of dealers in used motor cars are in violation of minimum wage provisions of the Fair Labor Standards Act. You state that Mr. William E. Barber's experience with a used-car dealer is typical. It appears that he was hired by an agent of the dealer to drive an automobile from Sharon, Pennsylvania to San Diego, California, the dealer's place of business. The agent and Mr. Barber signed a contract which provided, among other things, that Barber was required to pay all the expenses for gas, oil, greasing, etc., en route and also to post a cash bond of $100 with the dealer's agent in Pennsylvania. Upon delivery of the car to the dealer in San Diego, the dealer was required to pay $10.00 for the driver's services and also to return the cash bond of $100. You state that the drivers thus are only paid $10.00 for about a week or ten days' work--approximately 70 to 100 hours of actual driving.

As you know, the Fair Labor Standards Act applies to employees engaged in interstate commerce or in the production of goods for interstate commerce, including processes or occupations necessary to such production. It requires that such employees be paid a minimum wage of not less than 40 cents an hour for all hours worked, and overtime compensation at not less than one and one-half times their regular rate of pay for all hours worked in excess of 40 in a workweek, unless the employees are exempt from one or both of these requirements by virtue of some specific provision of the Act.

Employees engaged to deliver automobiles by driving from one State to another would clearly be covered by the Act as being engaged in interstate commerce and would, therefore, be entitled to the benefits of the Act. It has been the consistent position of the Divisions that time spent in driving automobiles under these circumstances is compensable time under the Act. The payment of less than 40 cents an hour for all hours worked in a workweek would clearly be a violation of the minimum wage requirement of the Act.

As you know, section 13(b)(1) provides an exemption from the overtime provisions, but not the minimum wage requirements, as to "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." Under the latter statute the Commission is empowered to prescribe qualifications and

(05035)

maximum hours of service of employees whose activities affect the safety of operation of motor vehicles and who are engaged in transportation in interstate commerce. The Commission has found that the work of drivers, drivers' helpers, loaders and mechanics engaged in transportation in interstate commerce affects the safety of operation of motor vehicles. I have discussed this matter informally with a representative of the Interstate Commerce Commission who advised me that the Commission regards used-car dealers such as you describe as motor carriers within the meaning of section 204 of the Motor Carrier Act of 1935. See Interstate Commerce Commission v. Davidson, 20 F. Supp. 832 (D.C. Nebraska, 1937). Drivers such as Mr. Barber, therefore, would appear to be exempt from the overtime requirements of the Act by virtue of section 13(b)(1).

I suggest, therefore, that you advise Mr. Barber and others with similar complaints to consult with our regional office at 501 Humboldt Bank Building, 785 Market Street, San Francisco 3, California, where they may file confidential complaints against their employers.

Very truly yours,

Wm. R. McComb
Deputy Administrator

(05035)