FLSA-519

April 17, 1973

This is in reply to your letter of February 1, 1973, enclosing a joint application for authorization of a basic rate pursuant to 29 CFR 548 by *** both of ***. .

We would like to point out at the outset that applications made under §548.4 must, in addition to meeting the criteria of that section, also meet section 548.2 of the regulations and section 7(g) of the Act.

A primary requirement in establishing any basic rate, as indicated in 29 CFR 548.2(e), which restates statutory language found in section 7(g)(3), is that the basic rate be substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, over a representative period of time. Your primary proposal states that the company records indicate the average number of work units per employee is 50 per hour. This average does not meet this requirement since it is based upon the work of all the employees. Your alternative request is based upon updating the average every three months on the basis of either the prior quarter or prior 12-month period, but it does not appear that its basis would be individual employee averages. We do not find, therefore, that either of the proposals would provide rates of pay derived from a particular employee's average hourly earnings over a representative period of time, as required by the Act.

Your application indicates that some employees like to work quickly while others work at a slower pace. Premium pay, which amounts to a bonus, is given to those workers who work more rapidly and achieve more than 2000 units of work in the first 40 hours. Neither proposed plan takes this premium pay into account. It would not be possible to approve a plan that did not meet the condition given in subparagraph (ii) of section 7(g), which is restated in §548.2(j) of the regulations, that "extra overtime compensation is properly computed and paid on other forms of additional pay which have not been considered in arriving at the basic rate but which are required to be included in computing the regular rate."

As stated in §548.2(g), it is required that "the hours for which the employee is paid be less than one and one-half times such established basic rate qualify as overtime hours under section 7(e) (5), (6) or (7) of the Act." The requirement of this provision of the regulation would not be met for reasons given, in part, in the above paragraph. The premium pay, given to those workers who work more rapidly in a particular week and exceed 2000 units of work during their regular hours, would be paid for hours which do not qualify as overtime hours under section 7(e) (5), (6) or (7) of the Act.

Your proposed plans, which are based on payment of a premium of one and one-half times a stated piece rate for all work in excess of a number of units, must be viewed against the basic standards of sections 7(a), 7(e) and 7(g) requiring premium pay for overtime hours. In other words, payments at premium rates are not recognized as

satisfying these statutory overtime pay standards unless it can be clearly demonstrated that such payments are made for overtime hours of work as defined in these sections. Where the premium payments are made without regard to an hours standard it cannot be said that they were made for overtime hours.

It is clear that the basic rates in both your principal and alternative requests do not qualify for authorization under the standards prescribed in section 7(g) of the Act and 29 CFR 548. Where there is no authorized basic rate, overtime pay must be based on the "regular rate of pay."

Sincerely,

Ben P. Robertson
Acting Administrator
Wage and Hour Division