

## FLSA-553

August 14, 1974

This is in reply to your letter of June 6, 1974, concerning the application of section 7(n) of the amended Fair Labor Standards Act.

Section 7(n) provides that in determining the hours of employment of an employee of an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit) "there shall be excluded the hours such employee was employed in charter activities by such employer if (1) the employee's employment in such activities was pursuant to an agreement or understanding with his employer arrived at before engaging in such employment, and (2) if employment in such activities is not part of such employee's regular employment."

The letter from \*\*\* , states that Transit officials have indicated that hours spent on charter work will not count on the forty-eight which are necessary before the payment of overtime and that all charter hours will be paid at straight time regardless of the number of hours worked in a week. The letter goes on to say that the union members have been instructed not to volunteer to work at straight time.

It is the position of the Wage and Hour Division that an employer cannot satisfy his obligations under the Act by the unilateral adoption of the provision in section 7(n).

This provision is operable only if pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work. If the employees express their unwillingness to accept the exclusion of hours spent in charter activities from the number of hours worked as provided in section 7(n) and continue to voice their objection, the requisite predicate for application of that section is lacking and the overtime pay requirements of section 7(a) of the Act as modified by section 13(b)(7) are not met.

We have been advised by the Department of Transportation that local transit systems (whether public or private) utilizing motorbuses in charter activities or operating such vehicles over fixed routes which cross State lines come within the authority of the Secretary of Transportation to establish qualifications and maximum hours of service for drivers, drivers' helpers, and mechanics pursuant to the provisions of section 204 of the Motor Carrier Act of 1935. Therefore, such employees of a common carrier who are part of a group where the employee is likely to be called upon in the ordinary course of his work to perform, either regularly or from time to time, safety-affecting activities subject to the Motor Carrier Act, come within the overtime exemption provided in section 13(b)(1) of the Fair Labor Standards Act.

Sincerely,

Betty Southard Murphy  
Administrator  
Wage and Hour Division