

June 29, 1981

Thank you for your letter regarding compensable hours of work under the Fair Labor Standards Act (FLSA) of employees who, in any given workweek, may work part of the time in the United States, and in the same workweek may work on United States naval vessels on the high seas, or in foreign countries at United States installations or elsewhere in a foreign country. We regret the delay in responding.

It is noted that you furnished a copy of the collective-bargaining agreement between The National Association of Broadcast Employees (NABE) and the National Broadcasting Company (NBC) and that this agreement covers the employment under discussion. The agreement defines the regular workday as consisting of not less than 8 hours, which shall be computed by totaling the number of hours between the time an employee reports for work and the time of completion of his or her duties for such workday, including meal periods where applicable. A tour of duty starting any day and continuing into the following day shall be considered as one tour of duty and attributed to the first day. A regular workweek is defined as consisting of any 5 regular workdays as defined above for a total of 40 hours, and as beginning at 12:01 a.m. Saturday and continuing until 12:00 p.m. the following Friday. Hours worked outside of a regular workweek or a regular workday shall be regarded as overtime and compensated at one and one-half times the regular rate of pay in quarter-hour segments. In no case, however, shall overtime accrue on overtime.

For purposes of this response, the questions will be answered on the basis of the application of the FLSA and the applicable provisions of the Portal-to-Portal Act of 1947. We will also assume that all meal periods were counted as hours worked and were paid for since your examples and the collective-bargaining agreement indicate this is the case. In connection with said meal periods, see Section 778.320 of 29 CFR Part 778, copy enclosed.

Section 13(f) of the Act states "The provisions of sections 6, 7, 11, and 12 (minimum wages, overtime compensation, record-keeping and child labor, respectively) shall not apply with respect to any employee whose service during the workweek is performed in a workplace within a foreign country or within a

territory under the jurisdiction of the United States other than the following: a State of the United States; the District of Columbia; Puerto Rico; the Virgin Islands; Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (ch. 345,67 Stat. 462); American Samoa; Guam; Wake Islands; Eniwetok Atoll; Kwajalein Atoll and Johnston Island."

We do not count as compensable hours under the Act time spent working in a foreign country, traveling from one foreign country to another, or travel to and from a foreign country, when performed during a workweek in which no work is performed in any area described in section 13(f). Work performed by employees in "a workplace within a foreign country or within territory under the jurisdiction of the United States" other than those enumerated in 29 CFR Part 776, copy enclosed, section 776.7(b), is exempt from coverage under the Act. When part of the work performed by an employee for an employer in any workweek is covered work performed in any State, the employee is entitled to the benefits of the Act for the entire workweek unless he or she comes within some specific exemption. See 29 CFR Part 776, Section 776.7(b), footnote 20.

Further, under section 4 of the Portal Act, an employer who fails to pay an employee minimum wages or overtime compensation for or on account of activities engaged in by such employee is relieved from liability or punishment therefore, if and only if, such activities meet the following three tests: (1) They constitute "walking, riding, or traveling" of the kind described in the statute, or other activities "preliminary" or "post-liminary" to the "principal activity or activities" which the employee is employed to perform; and (2) They take place before or after the performance of all the employees "principal activities" in the workday; and (3) They are not compensable during the portion of the day when they are engaged in, by virtue of any contract, custom, or practice of the kind described in the statute.

It will be observed that section 4 of the Portal Act relieves an employer of liability or punishment only with respect to activities of the kind described, which have not been made compensable by a contract or by a custom or practice (not inconsistent with a contract) at the place of employment, in effect at the time the activities are performed. The statute states that "the employer shall not be so relieved" if such activities are so compensable; it does not matter in such a situation that they are so-called portal-to-portal" activities.

Accordingly, an employer who fails to take such activities into account in paying compensation to an employee who is subject to the FLSA is not protected from liability in either of the following situations. (1) Where, at the time such activities are performed there is a contract, whether written

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or not, in effect between the employer and the employee (or the employee's agent or collective-bargaining representative), and by an express provision of this contract the activities are to be paid for; or (2) Where, at the time such activities are performed, there is in effect at the place of employment a custom or practice to pay for such activities, and this custom or practice is not inconsistent with any applicable contract between such parties.

Section 16.4 of the NABET-NBC Master Agreement (1976-1980) states that "full time shall be credited for all travel by air notwithstanding the provisions of Sections 16.7 to 16.10. Full time shall be credited for all other travel time except as herein-after provided. No meal periods need be scheduled during any period for which an employee is being credited with travel time.

(b) When an employee leaves from his home and travels by air to a field assignment, he shall be credited with one and a quarter hours for traveling from his home to the airport. Such time shall be measured from the planes' scheduled departure. A credit of one and a quarter hours, measured from the plane's actual arrival time, shall be allowed if, at the conclusion of such assignment, the employee travels from the airport to his home. In all situations covered by this subsection (b), an additional half-hour shall be allowed in the case of a departure or return by overseas flight."

Finally, the regular rate of pay at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee except for the exclusions from the regular rate computation as provided by sections 7(e)(1) through 7(e)(7) of the Act, divided by the weekly compensable hours of work.

You ask that we review the actual work schedules of four employees and determine the hours of work for which they must be paid. We will comment on each employee's work schedule in the order presented. However, to facilitate preparation of our hours worked calculations we have converted all times given in your examples to corresponding Eastern Standard time.

Employee A works from 9 a.m. until 7:30 p.m. on Monday, 9 a.m. until 5:30 p.m. on Tuesday, 8:30 a.m. until 6:30 p.m. on Wednesday, and 8 a.m. until 6:30 p.m. on Thursday. On Friday employee A reports to the company at 5:30 a.m. to pick up equipment, travels from there directly to the airport, and takes a flight to Panama. Upon arrival in Panama at 5 p.m. on Friday, employee A began working and worked until 11 p.m.

Answer: Employee A worked 57 hours, and thus is due 40 hours at straight time and not less than one and one-half times the regular rate of pay for the 17 hours worked in excess of 40 in the workweek.

Employee B works from 9 a.m. until 7:30 p.m. on Monday, works from 9 a.m. until 2 p.m. and then travels to a foreign country from 2 p.m. until 5 p.m. on Tuesday, on Wednesday, starts to work at 8:30 a.m. in the foreign country and works until 6:30 p.m., on Thursday, works from 9 a.m. until 12 noon and then travels back to the employer's premises and works there until 9 p.m., and on Friday works from 9 a.m. until 5:30 p.m.

Answer: Employee B worked 49 hours, and thus would be due 40 hours at straight time and not less than one and one-half times the regular rate of pay for the 9 hours of work in excess of 40 in the workweek.

Employee C works from 9 a.m. until 5 p.m. on Monday, departs that night for Europe at 11 p.m., and arrives in London at 4 a.m. on Tuesday and then works from 9 a.m. until 6 p.m. that day, on Wednesday C travels to Orley Airport, France, from 1:30 a.m. until 2:30 a.m. and then travels to an Embassy arriving there at 4:30 a.m. and works until 6:30 p.m. On Thursday departs France at 4 a.m. and arrives in the U.S. at 8 p.m. and travels home, and on Friday works from 7:30 a.m. until 5:30 p.m.

Answer: Since section 16.4 subpart (a) of the union agreement specifies that all travel by air is hours of work and subpart (b) specifies that travel from the home to the airport and return is hours of work, particularly 1 3/4 hours each way in the case of overseas flights, employee C worked 66 1/2 hours and thus would be due not less than 40 hours straight time and one and one-half times the regular rate of pay for the 26 1/2 hours of work in excess of 40 in the workweek. However, we are unable to determine how the 2 hours spent in travel from Orley Airport, France, to the Embassy is to be treated since the contract language does not appear to deal with this type of travel time. Therefore, if you have additional information on this subject our response on employee C may differ.

Employee D works from 9 a.m. until 5:30 p.m. on Monday, Tuesday D works from 8:30 a.m. until 6:30 p.m., on Wednesday picks up equipment at the employer's premises at 6 a.m. and travels to a U.S. Naval vessel and works there until 11 p.m., on Thursday departs the vessel at 6:30 a.m. for a U.S. Air Force base in a foreign country and arrives at 10:30 a.m. and works until 8:30 p.m., and on Friday departs from the Air Force base at 9 a.m.,

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travels to the U.S. and upon arriving transports the equipment to the employer's premises before proceeding home at 5 p.m.

Answer: Consideration again is given to section 16.4 of the union agreement. Employee D worked 57 1/2 hours and thus would be due 40 hours at straight time and not less than one and one-half times the regular rate of pay for 17 1/2 hours of work in excess of 40 in the workweek.

We trust the above is responsive to your inquiry.

Sincerely,

Henry T. White, Jr.

Henry T. White, Jr.
Deputy Administrator

Enclosures