

**FLSA-329**

June 18, 1982

This is in reply to your letter of May 24, 1982, concerning the application of Regulations, 29 CFR Part 541 to supervisors working during strikes. Specifically you are concerned with the application of the short test for exemption in section 541.(f) in light of the ruling of the Third Circuit in Marshall v. Western Union Telegraph Co., 24 WH Cases 704 (C.A. 3, 1980).

As you know, during a strike, highly-paid executive, administrative, and professional employees often perform the work of nonexempt rank and file employees. This raises a question as to their exemption status under 29 CFR Part 541. The "primary duty" test does not expressly apply on a workweek basis. Thus, it is unlike the 20 percent and 40 percent tolerances for nonexempt work under the long test, which do expressly apply on a workweek basis. On the basis of this distinction, the Court held in Western Union (which involved a three-month strike) that the primary duty requirement in the short test could not be applied on a workweek basis, or over any specific time frame, until such time as 29 CFR Part 541 is amended to specify a time frame.

However, the court did not otherwise nullify the short test. On the basis of this ruling and until further notice we will deem the primary duty test to be satisfied during a strike period, provided that the otherwise exempt employee who takes on rank and file work during that period (1) satisfied the primary duty test prior to the strike and (2) is paid no less than the upset salary during the strike.

Regulations, 29 CFR Part 541 have been targeted for review under Executive Order 12291 by the President's Task Force on Regulatory Review. The Court's ruling in Western Union together with other issues are being given careful consideration in our review of this regulation.

Sincerely,

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Wage and Hour Division

William M. Otter  
Administrator