FLSA-983

October 6, 1982

This is in reply to your letter of September 24, 1982, concerning the application of section 13(b)(1) of the Fair Labor Standards Act (FLSA) to employees of a carpet installation firm. The employees in question deliver and install carpeting in the customer's home.

The carpet installation firm has agreements with stores to install carpeting sold by such stores within the State. Carpeting, including installation, is sold to the customer by the stores and the carpeting order is sent directly to the producing mills which are located outside the State. The sales order specifies style, color, and quantity, and specifies delivery directly to the installation firm and the customer to whom the carpeting was sold. A copy of the sales order is sent to the installation firm by the seller.

Upon receipt of the carpeting by the installer at its warehouse, the installer arranges for delivery and installation of the carpeting with the customer. The carpeting is loaded into delivery vans in the original mill wrapping. Sometimes because of size, the carpeting must be cut into smaller pieces for delivery convenience by making simple cuts. Installation and fitting cuts are made in the customer's home. Well in excess of 90 percent of the firm's installations occur as described. Carpet installers interchangeably load, drive, and help on the delivery vans as a normal and integral part of their duties in delivering and installing the carpeting on a daily basis.

As you know, section 13(b)(1) of the Act provides a complete overtime pay exemption for any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act (MCA) of 1935. This has been interpreted as applying to any driver, driver's helper, loader, or mechanic employed by a carrier, and whose duties affect the safety of operation of a motor vehicle engaged in transportation on public highways in interstate or foreign commerce, as outlined in Interpretative Bulletin, Part 782.

To establish the Department of Transportation's jurisdiction under section 204 of the MCA over a driver who has not been working on an interstate shipment the carrier must first be able to show its own involvement in interstate commerce. Secondly, the carrier must then be able to present evidence that the employee could, in the regular course of his or her employment, be reasonably expected to have been involved in the carrier's interstate activities. Satisfactory evidence could consist of statements from the employees, their employers, or employment agreements.

Evidence of interstate activity would be accepted as proof that the driver is subject to section 204 of the MCA for a four-month period beginning with the date they could have been called upon to, or actually did, engage in the carrier's interstate activity. If at the end of the 4-month period the driver is no longer engaged in interstate commerce, jurisdiction under section 204 of the MCA will cease and the employee will no longer be exempt from overtime pay under section 13(b)(1) of the Act.

It should be noted that in determining whether or not transportation is interstate or intrastate under the MCA is determined by the essential character of the commerce, manifested by the shipper's fixed and persisting transportation intent at the time of shipment, and is ascertained from all of the facts and circumstances surrounding the transportation. Southern Pacific Transportation Co. v. ICC, 565 F. 2d 615 (9th Cir. 1977).

Transportation confirmed to points within a single State from a storage terminal of commodities which have had a prior movement by rail, pipeline, motor, or water from an origin in a different State is in interstate or foreign commerce within the meaning of the Motor Carrier Act, if the shipper of the commodities into the State has a fixed or persisting transportation intent beyond the terminal storage point at the time of shipment. This requirement will be met if the shipper of the commodities controls the interstate movement in that he or she initiates the interstate movement of the merchandise, and knows and intends that the merchandise will be forwarded to specific customers after delivery to the warehouse. Where there is no fixed and persisting transportation intent on the part of the shipper beyond the warehouse, the merchandise would no longer be in interstate commerce within the meaning of the MCA. Where a driver is not subject to the provisions of section 204 of the MCA, the overtime pay exemption contained in section 13(b)(1) of the Fair Labor Standards Act would not apply.

Thus, based upon the information you present it would appear that the 13(b)(1) exemption would be applicable for all practicable purposes to all installers in all workweeks of employment. Please let us know if you have further questions.

Sincerely,

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Assistant Administrator
Wage and Hour Division

William M. Otter
Administrator