

FLSA-978

October 15, 1982

This is in reply to your letter of September 27, 1982, concerning the application of section 13(b)(1) of the Fair Labor Standards Act (FLSA) to warehouse and delivery employees of a wholesaler of wine, beer and related products with several establishments located in the ***.

You indicate that your client's employees deliver alcoholic beverages to retailers throughout the State which have been received by your client at its warehouses from producers located outside of North Carolina. You also indicate that North Carolina law requires that all alcoholic beverages shipped into the State must come to rest on the floor of a licensed wholesaler within the State even if momentarily, before delivery can be made to the retailer who has ordered the product. You give a number of examples in which the alcoholic beverages at the time of shipment by the producers are intended for specific retailers even though stopping at your client's warehouse because of State law.

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 confined 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 drivers, helpers, loaders, or mechanics in all workweeks of employment. Please let us know if you have further questions.

Sincerely,

William M. Otter
Administrator