U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

July 29, 2005 **FLSA2005-5NA**

Dear ***Name****,

This is in response to your request for an opinion on the application of section 13(b)(1) of the Fair Labor Standards Act (FLSA) (29 U.S.C. § 201, *et seq.*) to your clients who are drivers for a corporation that contracts to deliver mail for a major private express mail company. As you know, the FLSA, which provides for the payment of overtime at one and one-half times the regular rate of pay for hours worked in excess of 40 in a workweek, contains an exemption in section 13(b)(1) (29 U.S.C. § 213(b)(1)) from its overtime pay provisions for any employee for 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), 49 U.S.C. § 31502 (copy enclosed). Your clients' employer claims that the employees are subject to section 204 of the MCA, and that the overtime requirement of section 7 of the FLSA does not apply to the drivers.

You mention a U.S. Fifth Circuit Court of Appeals case, *Steinmetz v. Mitchell*, that held that the overtime pay exemption of section 13(b)(1) of the FLSA does *not* apply to employees who transport mail in motor vehicles used specifically for this purpose. 268 F.2d 501, 503 (5th Cir. 1959). Based on this decision you question the fact that section 13(b)(1) *has* been applied to your clients. However, at the time that *Steinmetz* was decided, both the Interstate Commerce Commission, which enforced the Motor Carrier Act prior to a transfer of enforcement authority to the Secretary of Transportation, and the Wage and Hour Division took the position that employees engaged in transportation of mail under contract with the U.S. Postal Service did not fall within the section 13(b)(1) exemption and were therefore subject to the overtime provisions of the FLSA. On June 14, 1972, the Department of Transportation published a notice in the Federal Register, 37 Fed. Reg. 11781 (copy enclosed), asserting its power to establish qualifications and maximum hours of service for contract mail haulers. This means that an employer of drivers, drivers' helpers, loaders, and mechanics, working under a contract with the U.S. Postal Service, whose duties affect the safety of operation of motor vehicles engaged in transportation of mail on the public highways in interstate commerce, thereafter could consider those employees exempt under section 13(b)(1) of the FLSA. See 29 C.F.R. § 782.8(b) (29 C.F.R. Part 782 enclosed).

The drivers you represent, however, are employees of a private company that holds a contract with a *private* express mail-delivery company, not the U.S. Postal Service. Therefore, the exception to the section 13(b)(1) exemption described in the *Steinmetz* case never would have been relevant to your clients, and the traditional section 13(b)(1) rules always would have applied.

In order for your clients' employer to correctly claim the section 13(b)(1) exemption, it must first establish the Department of Transportation's jurisdiction under section 204 of the MCA by demonstrating that it is a carrier involved in interstate commerce. Section 204 of the MCA provides that the Secretary of Transportation may prescribe qualifications and maximum hours of service for employees of motor carriers, including common and contract carriers, and motor private carriers who are engaged in activities that directly affect the safe operation of vehicles in interstate commerce. 49 U.S.C. § 31502; 29 C.F.R. § 782.1(b); Field Operations Handbook 24e01 (copy enclosed). The drivers you represent are engaged in activities that directly affect the safe operation of motor vehicles. See 29 C.F.R. § 782.3(b). However, your letter does not make clear whether your clients are operating in interstate commerce.

You state that all your clients' routes have been within a single state, but you do not mention whether the mail they deliver may have originated in another state. The Wage and Hour Division's enforcement position is that under section 13(b)(1) an intrastate leg of an interstate trip is interstate commerce if it "forms part of a 'practical continuity of movement' across state lines from the point of origin to the point of destination." 29 C.F.R. § 782.7(b)(1); See Opinion Letters dated January 11, 2005 and October 29, 2004

(copies enclosed).[1] 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 the shipment, and is ascertained from all of the facts and circumstances surrounding the transportation. See Opinion Letters dated October 29, 2004 and February 10, 1999 (copy enclosed). There is no question that an intrastate trip constitutes interstate commerce where an out-of-state shipper designates a final destination of the goods at the time of shipment, as opposed to merely shipping goods to a storage terminal. See *Bilyou v. Dutchess Beer Distributors*, *Inc*., 300 F.3d 217, 223-24 (2d Cir. 2002); Opinion Letter dated January 11, 2005. If it is known that some portion of a particular load is moving in interstate commerce, whether or not this is an identifiable portion of the load, the trip will be viewed as an interstate trip. Field Operations Handbook 24c06(a) (copy enclosed). Because a shipper of express mail always designates a final destination for the goods at the time of shipment, if some portion of the mail your clients are delivering originated out of state, your clients are engaged in activities that directly affect the safe operation of vehicles in interstate commerce and are subject to the section 13(b)(1) exemption.

Moreover, the U.S. Department of Transportation has held that a driver would be subject to the Secretary of Transportation's jurisdiction under section 204 of the MCA for a 4-month period beginning with the date the driver *could* reasonably have been expected to, or actually did, engage in interstate or foreign transportation. If at the end of the 4-month period a driver is no longer engaged in interstate or foreign commerce, or in the regular course of his or her employment is no longer subject to making one of the interstate or foreign trips, jurisdiction under section 204 of the MCA would cease and the driver would no longer be exempt from overtime pay under section 13(b)(1) of the FLSA. See Opinion Letters dated August 17, 2004 and May 27, 1999; Application of the Federal Motor Carrier Safety Regulations, 46 Fed. Reg. 37902-2 (July 23, 1981) (copies enclosed).

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to a pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust the above information is responsive to your inquiry.

Sincerely,

Barbara Relerford
Office of Enforcement Policy
Fair Labor Standards Team

Enclosures:
49 U.S.C. § 31502
37 Fed. Reg. 11781
29 C.F.R. Part 782
Opinion Letters dated 1/11/05, 10/29/04, 2/10/99, 8/17/04, 5/27/99

[1] This is a traditional test of interstate commerce under the FLSA. *Walling v. Jacksonville Paper Co.*, 317 U.S. 564 (1943). The enforcement position recognizes that interstate commerce under the FLSA and the Motor Carrier Act are not identical, but adopts the slightly broader FLSA interpretation of interstate commerce for purposes of applying the section 13(b)(1) exemption, "except in those situations where the [Interstate Commerce] Commission has held or the Secretary of Transportation or the courts hold otherwise." See 29 C.F.R. §§ 782.7(a) and (b)(1); Field Operations Handbook 24c00 (copy enclosed).

FOH 24e01, 24c06 and 24c00
46 Fed. Reg. 37902-02

***** *Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. 552 (b)(7).*