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

January 11, 2005 **FLSA2005-10**

Dear ***Name****,

This is in response to your letter requesting an opinion as to the application of the FLSA's section 13(b)(1) motor carrier exemption to drivers working for an associated group of common carriers of petroleum products. The employers in question have approximately 3,000 drivers and operate in 30 states.

The business of the ***Name**** employers involves the transportation by truck of shipments of gasoline, kerosene, home heating oil, diesel fuel, and ethanol that have previously moved across state lines by pipeline, rail, or ship. These petroleum products have been produced by the major petroleum refining companies and shipped by various means to their retail customers and commercial users. The ***Name**** drivers pick up the products at various terminals or storage facilities after their previous movement and transport them over the last leg of the delivery of the products. The question is whether these drivers are subject to the FLSA's section 13(b)(1) overtime exemption during this intrastate movement.[1]

Name* states that in some of the trips the out-of-state producer/shipper has designated the shipment to fill the order of a specifically named customer. Other shipments are the result of standing orders or the historic demands of the producers' customers and, when shipped, do not name a final destination beyond the end of the pipeline or storage facility at that location.

Section 13(b)(1) applies to "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 31502 of Title 49" (the "Motor Carrier Act" or "MCA"). The Department of Transportation ("DOT") has jurisdiction over the safety-affecting employees of motor carriers when the employees operate in interstate commerce, as defined in the MCA. There is no question that the ***Name**** employers are motor carriers and that the drivers are safety-affecting employees. The only issue is whether the drivers are operating in interstate commerce under the MCA, as interpreted by DOT, when they transport products over the last leg of their journey and do not drive across a state line.

The Wage and Hour Division's enforcement position for section 13(b)(1) provides that an intrastate leg of an interstate trip is in interstate commerce if it "forms a 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).[2] There is no question that this requirement is satisfied under the MCA and section 13(b)(1) for the intrastate leg of the trip when the out-of-state shipper designates a final destination of the goods at the time of shipment. See Bilyou v. Dutchess Beer Distributors, Inc., 300 F.3d 217, 223 (2nd Cir. 2002) (interstate commerce present when "'the property is carried to a selected destination . . .'") (citation omitted). Thus, under the relevant interpretations of interstate commerce, the ***Name**** drivers would be in interstate commerce and exempt under section 13(b)(1) when they transport the shipments to a specifically named final destination.

The determination of interstate commerce for the final leg of shipments not sent to a named recipient, but held in storage between legs of the trip, has traditionally been governed by a more specific provision at 29 C.F.R. 782.7(b)(2). This regulation is based on rulings of the Interstate Commerce Commission as to its jurisdiction in this particular situation, and is one of the exceptions from the application of the general FLSA definition of interstate commerce described in section 782.7(b)(1).[3]That specific regulation provides

[1] ***Name**** states that in approximately 26% of their deliveries the drivers move across state lines. Interstate commerce is clear for such movements.

[2] 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." Section 782.7(b)(1). As discussed below, the specific situation described in the opinion request does involve a situation subject to decisions of the courts and the Secretary of Transportation.

[3] The Interstate Commerce Commission regulated motor carrier safety prior to the Secretary of Transportation. Congress abolished the ICC on January 1, 1996 and transferred many of its functions to the newly created Surface Transportation Board, an agency within the Department of Transportation. *See* ICC Termination Act of 1995, Pub.L. No. 104-88, § 101, 109 Stat. 803, 804 (1995).

that interstate commerce, and thus the application of section 13(b)(1), stops at the terminal storage facility if the shipper has no fixed and persisting transportation intent past the terminal storage point at the time of shipment. A shipper has no such intent if three conditions are satisfied:

> (i) At the time of shipment there is no specific order being filled for a specific quantity of a given product to be moved through to a specific destination beyond the terminal storage, and (ii) the terminal storage is a distribution point or local marketing facility from which specific amounts of the product are sold or allocated, and (iii) transportation in the furtherance of this distribution within the single State is specifically arranged only after sale or allocation from storage.[4]

29 C.F.R. 782.7(b)(2). Where these facts are established, interstate commerce is deemed to end at the terminal storage facility. See Watkins v. Ameripride Services, 2004 WL 1487393 *4 (9th Cir. 2004) (where uniforms were purchased from out of state and held in a warehouse until later sold, trip from warehouse to customer was intrastate and the drivers were not subject to section 13(b)(1)).

However, the specific criteria in section 782.7(b)(2) for determining whether goods are moving in interstate commerce from terminal points or terminal storage after they have crossed a state line have been supplemented for specific situations by a more recent interpretation from DOT. DOT issued guidance as to its jurisdiction under the MCA for "motor traffic moving from warehouses or similar facilities to points in the same State after or preceding a movement from another State" at 57 Fed. Reg. 19812, May 8, 1992.[5] These newer DOT guidelines incorporate case law that developed subsequent to the cases upon which section 782.7(b)(2) was based. Thus, the DOT now provides the following factors for determining the "fixed and persisting intent" of a shipper that merchandise continue in interstate commerce when moving goods intrastate from storage facilities:

1. Even if a shipper does not know the ultimate destination of specific shipments, it bases its determination on the total volume to be shipped through the warehouse on projections of customer demand that have some factual basis, rather than a mere plan to solicit future sales within the State. This may include, but is not limited to, historical sales in the State, actual present orders, and relevant market surveys of need.
2. No processing or substantial product modification of substance occurs at the warehouse or distribution center. However, repackaging or reconfiguring (secondary packaging) may be performed.
3. While in the warehouse, the merchandise is subject to the shipper's control and direction to the subsequent transportation.
4. Modern tracking systems allow tracking and documentation of most, if not all, of the shipments coming in and going out of the warehouse or distribution center.
5. The shipper or consignee must bear the ultimate payment for transportation charges even if the warehouse or distribution center directly pays the transportation charges to the carrier.
6. The warehouse utilized is owned by the shipper.
7. The shipments move through the warehouse pursuant to a storage in transit provision.

57 Fed. Reg. at 19813. *Advantage Tank Lines, Inc.*, No. MC-C-30198, 10 ICC 2d 64 (1994). See also *Atlantic Independent Union v. Sunoco*, 2004 WL 1368808 at *7 (E.D. Pa. 2004).

Additionally, the DOT declared that the presence of one or more of the following factors is not sufficient to establish a break in the continuity that would change the interstate character of the subsequent transportation:

1. The shipper's lack of knowledge of the specific, ultimate destination or consignee at the time the shipment leaves its out-of-State origin;

[4]Under comparable circumstances, the last leg of the trip could be interstate commerce under the FLSA. *See* Jacksonville Paper, 317 U.S. at 568-9 (interstate commerce continues after storage at a warehouse when goods are ordered with a "pre-existing contract or understanding with the customer . . .," the goods are treated as "stock in trade . . .," and title passes at the warehouse).

[5]Because DOT is the final administrative authority for the MCA, its interpretation of its jurisdiction is controlling. *See* Martin v. Coyne International Enterprises, Inc., 966 F.2d 61 (2nd Cir. 1992).

2. Separate bills of lading for the inbound and outbound movements instead of through bills of lading;
3. Storage-in-transit tariff provisions;
4. Storage receipts issued by the warehouse distribution center;
5. Time limitations on storage;
6. Payment of transportation charges by the warehouse or distribution center, when the shipper or consignee is ultimately billed for these charges;
7. Routing of the outbound shipments by the warehouse or distribution center;
8. A change in carriers or transportation modes at a distribution facility;
9. Use of brokers retained by the shipper;
10. Use of a warehouse not owned by the shipper.

See 57 Fed. Reg. at 19813.

Name* services can be divided into two categories, A and B. Category A movements involve deliveries to customers for the shipper (typically a major petroleum refiner that retains control over the product until it reaches the destination intended by the shipper, such as a specific retail gas station or commercial end user) of predetermined quantities on a routine basis either to fill standing or specific orders or based on their historic demands for the products. Category B movements follow the sale of the product to marketers, and are based on pre-existing contracts with the volume based on specific or standing orders from the marketers or on their historical usage, and the marketers arrange with ***Name**** for the final transportation of the product. Based on the information provided, the above factors 1, 2, 3 and 5 from the first list are clearly met for Category A deliveries. Even when the shipper does not know the ultimate destination of the petroleum when it leaves the shipper's plant, the volume of the shipment is based on historical sales figures. Additionally, no further processing of the petroleum occurs at the storage facility. The whole process is overseen by the shipper, meeting the requirements of the third factor. The fifth factor is met because the shipper bears the ultimate payment for transportation.

As for Category B deliveries, factors 1, 2, and 3 from the first list are also met as they were for Category A deliveries. Absent information as to the remaining factors sufficient to compel a contrary result, the intrastate movements of petroleum in both categories A and B appear to qualify as interstate activity under the MCA, and thus the drivers are exempt from overtime under section 13(b)(1) during this time.

We are as of this date withdrawing opinion letters dated March 19, 1974, April 1, 1981, August 23, 1982, and January 24, 1985 to the extent that these letters conflict with the position described above. These withdrawn letters were all written before the most recent (1992) DOT interpretation that is the basis of the position taken in this letter. Thus, they do not contain a complete description of the facts that should be considered in evaluating the applicability of the MCA and section 13(b)(1).

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which 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 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 of the Department of Labor.

Sincerely,

Alfred B. Robinson, Jr.
Acting Administrator

*Note: * The actual name(s) was removed to preserve privacy.*