Memo #10

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September 26, 1958

Mr. Dwight R. G. Palmer, Commissioner
State Highway Department
State of New Jersey
Trenton, New Jersey

Dear Mr. Palmer:

This is in further reference to your recent inquiries in which you request an opinion, in accordance with Section 5.11 of Regulations, Part 5 (29 CFR, Subtitle A), as to the applicability of Section 115 of the Federal-Aid Highway Act of 1956 to truck drivers engaged in certain operations. As was suggested, these matters have been discussed with representatives of the Associated General Contractors of New Jersey in order to obtain the views of that organization with respect to coverage in this general area of activity. In brief, the factual situations which have been presented are as follows:

1. Truck drivers employed by an established concrete supplier deliver transit mix concrete to an interstate project in the supplier's own trucks. The concrete is discharged between road forms by the truck drivers and is spread and processed by employees of the interstate project contractor.

2. Truck drivers employed by an established quarry supplier deliver 2-1/2 inch stone to an interstate project in trucks owned by the quarry supplier. The stone is spread, shaped and compacted by employees of the interstate project contractor.

3. An interstate project contractor purchases blacktop material from an established supplier at a price which includes delivery to the site. The supplier contracts with a trucking firm to make the deliveries; however, the material is spread and processed by employees of the interstate project contractor.

4. An interstate project contractor purchases blacktop material from an established producer at a price which includes delivery and placing of the material at the project site with the producer's equipment and personnel.

5. Truck drivers employed by an established material supplier deliver to an interstate project stockpile, in trucks owned by the supplier such materials as cement, steel, pipe and calcium chloride.

6. Truck drivers employed by an interstate project contractor haul material from a borrow pit to the job site in trucks owned by the contractor.

7. Truck drivers employed by a trucking firm subcontractor haul material from a borrow pit to the project site under a contract with the interstate project contractor.

8. Material is hauled from a borrow pit to the job site by individual truck owner-operators.

Section 115 of the Federal-Aid Highway Act of 1956 applies the Davis-Bacon Act (40 U.S.C., Sec. 276-a) to the initial construction of the "National System of Interstate Highways." It provides that all laborers and mechanics employed by contractors and subcontractors on the initial construction of projects on the Interstate System shall be paid not less than the prevailing wages as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended. Since the situations which have been presented relate only to the initial construction of interstate projects, it would appear that the application of the Act involves only the following considerations:

(a) Are the truck drivers laborers and mechanics within the meaning of the Act?

(b) Are the truck drivers employed by contractors or subcontractors as distinguished from materialmen?

In resolving these questions, it must be kept in mind that the Davis-Bacon Act, as amended, and as extended to the Federal-Aid Highway Act of 1956, is remedial in nature and its provisions should be liberally construed to effectuate its basic purposes. United States v. Binghamton Construction Co., 347 U.S. 171, Gillioz v. Webb, 99 F. 2d 585, 33 Comp. Gen. 497, and the cases collected at 163 A.L.R. 1302.

The terms "laborers and mechanics" are not specifically defined in the statutes under consideration. However, in answering

a question involving the scope of these terms as used in the Eight Hour Laws, the Attorney General in 39 Op. Atty. Gen. 232 (1939) stated that, "In the administration of the statute the term 'laborers and mechanics' has been given a somewhat broad meaning" and "the inclusion or exclusion of particular employees presents a question largely of fact, having regard to the actual duties of the employees concerned x x x . It is, under all the circumstances, a well-warranted assumption that the Congress intended the 8-hour law to have a broad application and to be liberally construed with this end in view." Like principles appear to be applicable to the determination of who are the "laborers and mechanics" for whom the Secretary of Labor is required to determine wage rates under the Davis-Bacon Act, as amended, and as extended to the Federal-Aid Highway Act of 1956. Accordingly, these terms have consequently been construed as including at least those workers whose duties are mainly manual or physical in nature as distinguished from mental or managerial. Under such circumstances, there would appear to be no doubt that truck drivers fall within the meaning of these terms.

You will note that in Section 5.2(g) of the enclosed Regulations, Part 5, the terms "construction," "prosecution," "completion" or "repair" mean all types of work done on a particular building or work at the site thereof <u>including the transportation of materials and supplies to and from the building or work by the employees of the construction contractor or subcontractor</u>. Regulations, Part 5, as you know applies to the Davis-Bacon Act, as amended, and as extended to the Federal-Aid Highway Act of 1956 and to similar statutes. Also see 51 C.J.S. 475; <u>McElwaine</u> v. <u>Hosey</u>, 35 N.E. 272; <u>Matlock</u> v. <u>Sanderson & Porter</u> (Ark. Cir. Ct., Jefferson Co., 1943) 7 Labor Cases 61,806; and 18 Comp. Gen. 337.

The courts have held that, when used in statutes pertaining to the construction trades, the word "subcontractor" is to be given the meaning by which it is generally understood in the construction industry. Thus in <u>MacEvoy</u> v. <u>United States</u>, 322 U.S. 102 (1944), a case arising under the Miller Act, 40 U.S.C.A 270(a), the Supreme Court stated that "under the more technical meaning as established by usage in the building trades a subcontractor is one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract, thus excluding ordinary laborers and materialmen." It should be noted that the Davis-Bacon Act, as amended, provides that the ". . . Contractor or his subcontractor shall pay all mechanics and laborers . . . at wage

rates not less than those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics. . ."

In the MacEvoy case the court held that a firm which contracted to furnish wall-board building materials for use in a housing project was a materialman and not a subcontractor, since there was no undertaking to perform a specific part of the original contract. An opposite result was reached in Basich Bros. Const. Co. v. United States, 159 F. 2d 182 (C.A. 9) (1946). In that case the original contract provided for the performance of certain construction, and included in various items the specific rock, sand and gravel requirements for the performance of the work. Another firm contracted with the prime contractor to furnish the labor, supplies and equipment to fulfill the requirements of these particular items in accordance with the provisions and specifications of the original contract and "under the direction and to the satisfaction of the principal's engineer." The court concluded that the secondary contractor had undertaken to perform a "specific part" of the requirements of the original contract, and was, therefore, a subcontractor within the meaning of the MacEvoy case. Also, in United States v. John A. Johnson & Sons, 137 F. Supp, 562, a secondary contractor who agreed to furnish "all millwork and related items as specified under Section 18, carpentry as required by the contract drawings and in accordance with specifications, general conditions and amendments" of the original contract was held to be a subcontractor rather than a materialman. See also Holt & Bugbee Co. v. City of Melrose, 41 N.E. 2nd 562, 141 ALR 319; Avery v. Ionia County, 39 N.W. 742; G. G. Waugh & Co. v. Rollison, 192 S.E. 69 and Am. Jur. 47. It is interesting to note that in U. S. v. Landis and Young, 16 Fed. Supp. 832, the court held that a subcontractor for construction of a post office building who agreed to do electrical work for a fixed price was entitled to recover prevailing wages for work which he performed himself.

It is my opinion that the Act is not applicable to the truck drivers in situations 1, 2 and 5, since their employers were regular suppliers who furnished standard materials for the work and were not engaged in performing a portion of the original contract. Furthermore, the drivers performed no work at the site except that which was required for making normal deliveries.

Situation 4 is to be distinguished from the foregoing in that the supplier undertook to perform a part of the labor requirements of the contract, that is, placing the blacktop material to

produce a finished product. Employees who were engaged in such activities performed an essential part of the construction work required by the original contract and were, therefore, entitled to the benefits of the Act. The Act would also apply to a supplier's employees who spread materials on the road, by truck or by other means. It is to be noted, however, that only those employees who perform covered work are within the purview of the Act. Thus, if in this situation the truck drivers did not engage in placing the materials or in other construction work at the job site but confined their activities to those normally required for making deliveries the Act would not apply to them.

In situation 3, the supplier contracted with a trucking firm to make the deliveries. However, the fact that employees of such a contractor hauled the material on behalf of the supplier does not alter the purpose for which such work was performed, that is, to effectuate the sale. Therefore, since the deliveries were made for the supplier they continued to be incidental to the sale of the material rather than to the construction of the road just as if the deliverymen had been employed directly by the supplier. Thus if the truck drivers in this situation performed no work at the job site other than that normally required for making the deliveries, the Act would not apply to them.

Situations 3 and 7 are similar except that in the latter the project contractor rather than the materialman contracted with the trucking firm to do the hauling. Since, in effect, the subcontractor agreed to take from the contractor a specific part of the labor requirements of the original contract, he was a subcontractor within the meaning of the Act and the truck drivers employed by him were covered.

In situation 6, the truck drivers were employed by the project contractor. Since the Act specifically applies to laborers and mechanics employed by contractors engaged in the initial construction, the truck drivers would be covered. The fact that the trucks were owned by the contractor is immaterial.

I have attached a recent letter to the General Counsel of the Bureau of Public Roads regarding situation 8, which I believe you will find self-explanatory.

The above comments are based on the facts stated in your letter and may not be applicable to an altered factual situation.

In this connection, the answers to situations 1, 2, 3 and 5 are based on the assumption that the established supplier is not engaged exclusively in the servicing of an interstate project (See attached letter to Mr. Malcolm ?. McGregor).

If you have any further questions, please do not hesitate to write me.

Very truly yours,

Stuart Rothman
Solicitor of Labor

By_____
James R. Beaird
Acting Assistant Solicitor

Enclosures