



October 29, 2004

FLSA2004-27NA

Dear *Name**,

This is in response to your letter concerning the application of an overtime exemption to the tanker drivers of *Name**.

The drivers pick up cement in Newport News that has been imported from Bulgaria. The cement is then trucked to plants in Richmond where it is mixed with aggregate and water to make concrete for distribution. It is your opinion that the drivers are exempt since they pick up a product that originates outside of the state and haul it to a destination that is not its final resting point.

The Wage and Hour Division of the Department of Labor administers and enforces the Fair Labor Standards Act (FLSA), which is the Federal law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees be paid not less than the minimum wage, \$5.15 an hour, effective September 1, 1997, for all hours worked. Overtime pay of not less than one and one-half times the regular rate of pay is required for all hours worked over 40 in a workweek.

Section 13(b)(1) of the FLSA provides an exemption from its overtime pay requirements for any employee subject to the jurisdiction of the Secretary of Transportation under Section 204 of the Motor Carrier Act. 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 the public highways of passengers and property in interstate or foreign commerce (Interpretative Bulletin, Part 782, copy enclosed).

This overtime pay exemption also applies to transportation within a single state where the transportation forms a part of a practical continuity of movement across state lines from the point of origin to the point of destination. See 29 CFR §782.7(b)(1). A three-pronged test has been developed to assist in determining the essential character of the shipment based on the shipper's fixed and persisting intent at the time of shipment in interstate transport. As set out in 29 CFR §782.7(b)(2), there is no fixed and persisting intent to ship goods in interstate commerce if:

- (i) At the time of shipment there is no specific order being filled for a specific quantity of 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 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.

In the absence of any evidence of the Bulgarian shipper's intention regarding the final destination of its goods, the drivers who pick up the cement in Newport News and deliver it to the company's plants in Richmond would not be exempt under 13(b)(1). Transportation confined to points within a single state from a storage terminal of commodities that were transported from another state or foreign country is not in interstate commerce within the meaning of the Motor Carrier Act, if the shipper has "no fixed or persisting transportation intent beyond the terminal storage point at the time of shipment." See section 782.7(b)(2) of Part 782. The term "fixed and persisting transportation intent" as used by the Department of Transportation refers to the intent of the shipper of the commodities into the state. Your correspondence provides no information that indicates that it was the shipper's intention for the cement to be transported beyond the storage facilities in Newport News to your plant locations.

Even if the transport from Newport News to your plants in the Richmond area were determined to be exempt under this provision, the subsequent transport of the cement from your plants to other places within Virginia does not constitute transport in interstate or foreign commerce for purposes of this



exemption. The continuous flow of interstate commerce is interrupted when the cement is delivered to your Richmond area plants and mixed with aggregate and water to make concrete. Only those drivers who then transport the mixed cement to other states would be exempt under 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 or the Department of Labor.

We hope this information is responsive to your inquiry. If we can be of further assistance, please do not hesitate to contact us.

Sincerely,

Barbara R. Relford
Office of Enforcement Policy

Enclosure

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