

Chapter 24

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Chapter 24

TRANSPORTATION EXEMPTIONS

24a MOTOR CARRIER EXEMPTION - SEC 13(b)(1)

24a00 General provisions of FLSA Sec 13(b)(1) and IB 782

- (a) FLSA Sec 13(b)(1) provides that FLSA Sec 7 shall not apply to any employee for whom the Department of Transportation's Federal Highway Administration (DOT/FHWA) has power to establish qualifications and maximum hours of service pursuant to the provisions of Sec 204 of the Motor Carrier Act of 1935.
- (b) IB 782, together with the instructions contained in this chapter, form the official WH position with respect to the application of Sec 13(b)(1).

24a01 Leasing and renting of motor vehicles

- (a) Generally, the Sec 13(b)(1) exemption is limited to employees of motor carriers (see IB 782.2). However, the Motor Carrier Act gives the DOT power to establish qualifications and maximum hours of service for drivers employed by non-carriers in situations where the non-carrier leases or rents motor vehicles with such drivers to motor carriers. Thus, where all other tests for exemption are met, Sec 13(b)(1) is applicable to these drivers while they are driving the motor vehicles leased or rented to motor carriers, on the same basis as if they were actually employed by the carriers.
- (b) Except as provided in (a) above, Sec 13(b)(1) does not extend to other safety-affecting employees of the leasing or renting establishment, such as mechanics, unless the employer is a motor carrier in his own right. For example, the employer may conduct his operations in such a manner as to be a private carrier, or he may lease or rent motor vehicles to a shipper under such conditions that he maintains control and direction over the carrier services performed in which case he would be a contract carrier.

24a02 Effect of ownership of motor vehicles upon status as a motor carrier

A company may be a motor carrier for the purposes of the Motor Carrier Act whether it owns, rents, or leases the motor vehicles it uses.

24a03 FLSA Sec 13(b)(1) not applicable under PCA

While certain employees may be exempt under Sec 13(b)(1) from the OT pay requirements of the FLSA, the daily and weekly OT pay provisions of the PCA are applicable to these employees if they are subject to the PCA. Likewise, the exemption contained in FLSA Sec 13(b)(1) has no relationship to PCA Sec 9 which provides a specific exemption under the PCA for the carriage of freight or personnel by bus or truck where published tariff rates are in effect.

24a04 Motor carriers of migrant workers

While DOT/FHWA has authority to establish certain regulations with respect to carriers of "migrant workers", the Motor Carrier Act specifically provides that the exemption under FLSA Sec 13(b)(1) shall not extend to such carriers solely by virtue of such transportation. A migrant worker is defined in that law as any individual proceeding to or returning from employment in agriculture as defined in FLSA Sec 3(f).

24a05 DOT jurisdiction over private carriers limited to carriage of property

- (a) Sec 203(a)(17) of the Motor Carrier Act defines the term "private carrier of property by motor vehicle" to mean "any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle', who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise".
- (b) It should be noted that the DOT jurisdiction over private carriers is limited to private carriers of "property". If the transportation of persons is the primary purpose of a trip in interstate commerce by a private carrier and any incidental transportation of property is not significant as a reason for the trip, the transportation involved would not be within the jurisdiction of the DOT. An employee would not be considered as engaged in transporting property for purposes of the Motor Carrier Act because of an arrangement to drive by the post office on his way to or from work to pick up or deliver his employer's interstate mail or packages, whether bulky or not.
- (c) If the transportation of property, regardless of its bulk or weight, is the primary purpose of an interstate trip by a private carrier, or if the transportation of such property is a distinct and definite reason for the trip along with the transportation of persons, the transportation is within the jurisdiction of the DOT. This principle would apply, for example, where property such as an automobile or a truck is driven to another State not simply as a means of transportation for the driver or passengers but because the movement of the vehicle itself is a distinct purpose of the trip. Likewise, this principle applies where self-propelled machines such as bulldozers and cranes are driven over the public highways as part of a journey in which such vehicles are moved from one State to another.
- (d) The fact that an employee of a private carrier may use his own vehicle in transporting property in interstate commerce does not deny an otherwise applicable exemption.

24a06 Freight forwarders who are not carriers

The FLSA Sec 13(b)(1) exemption does not apply to the loading and checking employees of an interstate freight forwarder who does not

own, lease, or rent trucks, but contracts for transportation of the goods with a carrier. Such a freight forwarder is not a motor carrier within the meaning of the Motor Carrier Act.

24a07 Transportation of explosives and other dangerous articles

The DOT (FHWA) has power to regulate the intrastate, as well as interstate and foreign shipment of explosives and other dangerous articles (such as corrosive acids, flammable liquids, radioactive materials, etc.) under the Explosives and Other Dangerous Articles Act. However, the Motor Carrier Act and the Explosives and Other Dangerous Articles Act are completely separate pieces of legislation. Consequently, the fact that the Federal Highway Administration asserts jurisdiction under the Explosives and Other Dangerous Articles Act over employees engaged in such transportation has no bearing on their status under Sec 13(b)(1). The exempt or nonexempt status of such employees under Sec 13(b)(1) shall be determined in the normal manner.

24b SAFETY-AFFECTING ACTIVITIES - SEC 13(b)(1)

24b00 "Spotting" trucks, tractors, trailers

The movement of trucks, tractors, or trailers (either empty or loaded) over the public highways between loading platforms, the garage, storage facilities or terminals, where such movement is either the beginning or continuation of an interstate or foreign journey, is itself transportation in interstate or foreign commerce subject to the jurisdiction of the DOT. If such "spotting" of equipment takes place entirely on the premises of a terminal or other private property, however, DOT would have no jurisdiction since it would not be transportation over the public highways.

24b01 Mechanics

- (a) Activities of mechanics which directly affect safety of operation of motor vehicles are described in IB 782.6(a). Activities which do not affect the safety of operation and do not, therefore, afford a basis for exemption are described in IB 782.6(c).
- (b) If a mechanic actually exercises discretion or responsibility with regard to the proper mechanical repair of motor vehicles for their safe operation in interstate commerce on the highways, the mere fact that his work is subject to supervision or approval by the foreman would not withdraw the otherwise applicable exemption from him. Likewise, an employee who inspects and tests motor vehicles to see that they are in a safe operating condition is performing safety-affecting work even though he may not himself make the repairs.

24b02 Refrigeration mechanics

The DOT has determined that the installation, inspection, repair, and maintenance of refrigeration equipment on motor vehicles operated in interstate commerce are safety-affecting activities subject to DOT jurisdiction under Sec 204 of the Motor Carrier Act.

24b03 Bus line hostesses

Certain interstate passenger carriers operate motor buses with "hostesses" who have such duties as looking after the comfort of the passengers, keeping the aisles clean and clear, and assisting the driver and passengers in case of accident or vehicle failure. For purposes of applying Sec 13(b)(1), these hostesses are classified as "helpers" and their duties are considered to affect the safety of operation of the vehicle. (See IB 782.4, Footnote 44.)

24c TRANSPORTATION IN INTERSTATE OR FOREIGN COMMERCE - SEC 13(b)(1)**24c00 Interstate transportation under the Motor Carrier Act.**

- (a) The definitions of "interstate commerce" contained in the Motor Carrier Act and the FLSA are not identical. Consequently, transportation by motor vehicle which is in "interstate commerce" under FLSA *may* not constitute transportation over which DOT has the power to exercise control and upon which the Sec 13(b)(1) exemption could be based. In applying the exemption, however, and for enforcement purposes only, WH will consider that a movement in interstate commerce for purposes of FLSA is also a movement in interstate commerce for purposes of the Motor Carrier Act, except where DOT or the courts hold otherwise. (See IB 782.7(b) and FOH 24d02.)
- (b) If transportation which is considered intrastate under the FLSA is performed under operating authority granted by the DOT after a hearing and finding that it will accept jurisdiction under the Motor Carrier Act, it is the policy of WH to recognize this decision in applying Sec 13(b)(1).

24c01 Transportation in "foreign commerce" or within a territory or possession.

- (a) For purposes of the application of Sec 13(b)(1), the term "foreign commerce" means commerce, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water:
 - (1) Between any place in the United States and any place in a foreign country, or between places in the United States through a foreign country; or
 - (2) Between any place in the United States and any place in a Territory or possession of the United States, insofar as such transportation takes place within the United States; or
 - (3) Between places in a foreign country, or between a place in one foreign country and a place in another foreign country, insofar as such transportation takes place within the United States.
- (b) Transportation within a Territory or possession of the United States is nonexempt since such transportation is not included in the definition of interstate or foreign commerce under the Motor Carrier Act.

24c02 Processing or packaging in transit.

- (a) In most cases the transportation of goods from a point of origin within a State to a processing or manufacturing establishment in the same State is not exempt under Sec 13(b)(1) because an actual out-of-State movement of the goods does not begin until the processing or manufacturing has taken place. (See IB 782.7(c).) In the usual situation there are two separate and distinct movements of the goods under the Motor Carrier Act, the one before processing being in "intrastate" commerce and the one after processing being in "interstate or foreign" commerce. There are certain situations, however, where processing or packaging operations are performed on goods during the course of their movement to a specified out-of-State destination under such circumstances that the exemption may be applied to the transportation preceding the operations as well as to that which follows. Such transportation is viewed as a single movement for purposes of the Motor Carrier Act and FLSA Sec 13(b)(1) where the practical continuity of the journey from the point of origin within the State to the intended out-of-state destination has not been broken. The following examples illustrate this principle:

- (1) Coal being shipped to an out-of-State buyer is hauled to a tipple where, in a continuous operation, it is unloaded from the truck and cleaned, crushed, or graded and loaded directly into railroad cars for shipment out-of-State; or
- (2) Household goods are transported by truck from a home to a warehouse to be crated or packed so that the movement by motor vehicle to the intended out-of-State destination may be continued.

24c03 Vending machine servicemen.

Vending machine servicemen who transport products between a warehouse and points within the same State, where such products have been procured from other States for stocking vending machines, are engaged in the transportation of property in interstate commerce until placed in the vending machines (see FOH llv00). Thus, no assertion will be made that Sec 13(b)(1) does not apply in such situations.

24c04 Drivers of buses/shuttle services/limousines operating to and from transportation terminals.

Drivers of buses/shuttle services/limousines carrying interstate passengers and their baggage to and from transportation terminals within a single state are not engaged in interstate transportation of passengers and property within the meaning of the Motor Carrier Act, unless the transportation is part of a through-ticketing or other common arrangement between the motor carrier and the air carrier. Therefore, Sec 13(b)(1) will not apply except in the case of a through-ticketing or other common arrangement for continuous passage or interchange between the motor carrier and the air carrier.

An example would be where there is a through-ticketing arrangement under which passengers purchase a single ticket which is good for both the local bus ride and the prior or subsequent interstate journey by air, rail, or bus.

24c05 Transportation of consumable goods (fuel, food, supplies) to railroads, docks, and airports.

Under the Motor Carrier Act, the movement of "consumable goods," such as food and drink, ice, coal, and gasoline (see IB 782.8(a)), terminates upon delivery to railroads, ship docks, airports, or other similar points. Thus, such transportation is not in interstate or foreign commerce so as to be within the jurisdiction of the DOT except where the transportation is an integral part of a single movement which commenced outside the State in which delivery is made.

24c06 Combination interstate and intrastate transportation.

- (a) 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 and therefore subject to the jurisdiction of the DOT.
- (b) If a driver employed by a manufacturer makes a trip by motor vehicle from the plant to a railhead or other transportation terminal to pick up or deliver goods moving in interstate commerce, the transportation is subject to the jurisdiction of the DOT regardless of the fact that the employee may make stops along the way in connection with production activities.

24c08 Ambulance and hearse transportation.

- (a) It is the position of WH that the Department of Transportation (DOT) has no jurisdiction over the operation of ambulances and hearses within the meaning of the FLSA Sec 13(b)(1) motor carrier exemption, and that the exemption does not apply to employees so engaged. This position is derived from court and administrative decisions and a statement by DOT disclaiming jurisdiction over ambulances. Spires v. Ben Hill County, 980 F.2d 683 (11th Cir. 1993); Jones v. Giles, 741 F.2d 245 (9th Cir. 1984); Lonnie W. Dennis, Common Carrier Application 63 M.C.C. 66 (1954); 42 Federal Register 60,078, 60,080 (November 23, 1977).
- (b) The Eleventh Circuit (Spires) recently joined the Ninth Circuit (Jones) in holding that ambulance drivers are not subject to FLSA Sec 13(b)(1). Both courts noted that the Interstate Commerce Commission (ICC) (DOT predecessor) had determined that the unique operation of ambulances compared to other forms of motor transportation put them outside the ICC's jurisdiction. The only decision specifically contrary is Benson v. Universal Ambulance Service, Inc., 675 F.2d 783 (6th Cir. 1982), a decision which did not deal with the ICC ruling, and both the Ninth and Eleventh Circuits specifically declined to follow Benson. (See also FOH 52p07.)

24c09 Contractual hauling of debris and rubble.

WH will not deny the Sec 13(b)(1) exemption with respect to employees engaged in transportation of garbage, refuse, and trash, including rock debris and like commodities obtained from excavations and the demolition of buildings, who would otherwise be considered exempt except for the disclaimer of jurisdiction over such transportation by the DOT.

24c10 Transportation of checks drawn on out-of-State banks.

- (a) In the usual operation of an armored car company the vehicles transport checks drawn on out-of-State banks as well as coins and currency to a bank for subsequent out-of-State transmittal. The transportation to the main bank for further transmittal is part of a "practical continuity of movement" across State lines, making the Sec 13(b)(1) exemption applicable.
- (b) On the other hand, there is a significant difference with respect to route salespersons who pick up checks from their customers and turn them in to the office before they continue on to the bank for subsequent out-of-State transmittal. Such checks must be credited on the firm's books, endorsed, and otherwise "processed" before depositing. Such processing in the office is sufficient to constitute a break in the interstate movement, and Sec 13 (b)(1) would not be applicable.

24c11 Acquisition of interstate business.

- (a) A common carrier that holds itself out in good faith for interstate business, pursuant to a valid ICC certificate, is subject to DOT's jurisdiction under Sec 204 of the Motor Carrier Act. Therefore, drivers, driver's helpers, loaders, and mechanics employed by such carriers may be exempt under Sec 13(b)(1) even though the carrier may never actually acquire any interstate business.
- (b) Thus, the exemption is applicable to such employees notwithstanding the implication in IB 782.2(c) that there should be an expectation of a small percentage of interstate work.

24d INTRASTATE TRANSPORTATION - SEC 13(b)(1)

24d00 Drivers delivering newspapers within the State

- (a) The delivery of newspapers within the State in which they are printed is not transportation over which the DOT has jurisdiction. While such delivery drivers are engaged in the interstate communication or transmission of news so as to be covered by the FLSA, they are not transporting property (the newspaper) in interstate or foreign commerce within the meaning of the Motor Carrier Act.
- (b) Certain newspapers of the type described in (a) above contain as an integral part weekly supplements, such as comics, magazines and the like, which are produced outside the State. If these supplements are obtained by the newspaper in complete and finished form and no processing work is performed on them by the newspaper establishment, the movement within the State of the supplements printed out of State constitutes part of a practical continuity of movement of the goods from the point of origin to the ultimate destination. Thus, the Sec 13(b)(1) exemption is applicable to the delivery drivers who transport and deliver the newspaper containing the supplements. The temporary storage of the supplements at the newspaper establishment awaiting insertion into the paper does not change the interstate character of the transportation.

24d01 "Off-highway" transportation

Drivers engaged in transportation solely on private property do not come within the Sec 13(b)(1) exemption since such transportation is not "over the public highways." The fact that a State line or a public highway is crossed during the course of such transportation would not change this conclusion.

24d02 Transportation of commodities from terminal storage

- (a) IB 782.7(b)(1) contains an enforcement policy with respect to motor carrier transportation of property or passengers within a single State which provides that any such movement which is in interstate commerce under the FLSA will be considered a movement in interstate commerce under the Motor Carrier Act (Part II of the Interstate Commerce Act) except where the DOT or the courts hold otherwise. However, as stated in IB 782.7(b)(2), the DOT has held that transportation confined to points in 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 not in interstate commerce within the meaning of the Motor Carrier Act if the shipper has no fixed and persisting transportation intent beyond the terminal storage point at the time of the shipment. It has been specifically found that there is no fixed and persisting intent where the following three conditions are present:
- (1) 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;

- (2) The terminal storage is a distribution point or local marketing facility from which specific amounts of the product are sold or allocated; and
- (3) Transportation in the furtherance of this distribution within the single State is specifically arranged only after sale or allocation from storage.

The term "fixed and persisting transportation intent" as used by the DOT refers to the intent of the shipper of the commodities into the State, who may or may not also be the importer. If in applying the tests set out in (1) through (3) above it is determined that there was no such intent on the part of the shipper, the interstate movement of the commodities under the Motor Carrier Act ends with delivery to a terminal storage facility even where a "practical continuity of movement" through the terminal (Jacksonville Paper rule) makes the subsequent movement of all or part of the commodities from terminal storage to a destination in the same State a part of their movement in interstate commerce under the FLSA. Thus, in situations where the three tests are in fact met, as has been found to be true with respect to movement of petroleum products through pipeline and water terminals, such a subsequent movement would be considered a separate intrastate movement under the Motor Carrier Act even though the importer ordered the out-of-State goods in anticipation of the needs of a stable group of specified customers, or to meet the needs of particular customers pursuant to an understanding with them, or to fill previously received orders of his customers. However, these facts which demonstrate a "practical continuity of movement" under FLSA may, in particular cases, also demonstrate that one or more of the three DOT conditions are not met, and must be carefully examined with this in mind in any situation in which the application of the tests to the facts present in such situation has not specifically been determined by the DOT.

- (b) In some situations the shipper is also the importer, as would be the case where a manufacturer, such as a bakery, produces goods in one State and moves them through his distribution point in another State to his customers in that State. The employer, as the shipper, knows at the time of the shipment what he intends to do with the goods after they reach his out-of-State distribution point. If, as would normally be the case, there is a "practical continuity of movement" of the out-of-State goods through the firm's distribution point to its customers, this is sufficient to establish a "fixed and persisting transportation intent" beyond the distribution point for purposes of applying Sec 13(b)(1).
- (c) Transportation within a single State of petroleum products from pipeline or water terminals, as ordinarily performed, has specifically been held by the DOT to be in intrastate rather than interstate commerce within the meaning of the Motor Carrier Act. Employees engaged in such transportation, if covered on traditional or enterprise grounds under FLSA, are not within the Sec 13(b)(1) exemption.

- (d) Transportation within a single State from a chain store warehouse to outlets of the chain, of goods brought into the State for sale at the outlets, is covered on traditional "in commerce" grounds under the FLSA and is also transportation in interstate commerce under the Motor Carrier Act. The Sec 13(b)(1) exemption applies to the drivers, drivers' helpers, loaders and mechanics concerned with such transportation. This has been established in the courts and the DOT determination in paragraph (a) above has no application. The situation of the chain store warehouse differs in essential respects from that of the terminals considered by the DOT in its decision. As the courts have uniformly held, the situation in the chain store cases is one where goods are shipped from one State and briefly warehoused in another for the convenience of the owner in making an efficient distribution of those goods to its local retail outlets. All goods ordered from other States for delivery to the warehouse are ordered to supply the needs of the retail stores, and the shipper will know or can be presumed to know that these stores are the ultimate destination of the goods shipped. Transportation of goods from the warehouse to the retail outlets is typically scheduled for the most part on a continuing basis, rather than only after specific items have been sold or allocated from storage.
- (e) Transportation within a single State from the warehouse of an independent wholesaler or supplier of goods ordered from other States to meet the needs of an associated or allied group of retail stores may be assumed to be in interstate commerce within the meaning of the Motor Carrier Act for purposes of Sec 13(b)(1) pending further clarification by DOT or the courts, if the warehouse serves such stores exclusively and the situation is in other respects comparable to the chain store situation discussed in paragraph (c) above.
- (f) In situations other than those in (b), (c), (d), and (e) above, the CO shall make every effort to determine the "fixed and persisting transportation intent" of the shipper by ascertaining from the information available at the establishment under investigation whether the three DOT tests are met. In the case of the typical wholesaler or supplier this will generally present no problem because the facts will be available to show whether tests (2) and (3) in (a) above are met and the presence or absence of any transportation intent beyond the importer's establishment on the part of the shipper can ordinarily be demonstrated from the importer's purchase orders, invoices, and other similar records. In the event the CO is unable to resolve the question from information available at the establishment under investigation, he shall make no attempt to contact the shipper. In such situations the matter shall be referred promptly to the AD and the ARA shall be contacted as necessary for additional guidance or to consult the RS as appropriate.

24e APPLICATION OF THE EXEMPTION - SEC 13(b)(1)

24e00 Requirements for exemption in general

IB 782.2 sets forth the bases on which the exemption is applied to employees of common, contract, and private carriers.

24e01 Extent of DOT jurisdiction

- (a) DOT has held that drivers, driver's helpers, loaders, and mechanics engaged in activities which directly affect the safe operation of motor vehicles in interstate commerce will be subject to its jurisdiction under Sec 204 of the Motor Carrier Act. This applies to such employees who are employed by a common, contract, or private carrier which has engaged in the interstate transportation of goods. In the case of a common carrier that has solicited interstate transportation business pursuant to a valid I.C.C. certificate, it would not be necessary to have actually engaged in the interstate transportation of goods.
- (b) Where a driver or driver's helper has not made an actual interstate trip, or a loader or mechanic has not been working on an interstate shipment or vehicle which has been utilized in such a shipment, they may still be subject to DOT's jurisdiction, if:
- (1) The carrier is shown to have an involvement in interstate commerce and,
 - (2) It can be established that the driver or driver's helper could have, in the regular course of his/her employment, been reasonably expected to make one of the carrier's interstate runs or, in the case of a loader or mechanic, could have been reasonably expected to perform as such in the carrier's interstate activity.

Satisfactory evidence of the above could take the form of statements from the carrier's employees, or documentation such as employment agreements. Where such evidence is developed with regard to an employee, DOT will assert jurisdiction over that employee for a 4-month period beginning with the date they could have been called upon to, or actually did, engage in the carrier's interstate activity. Thus, such employees would be exempt under Sec 13(b)(1) for the same 4-month period, notwithstanding references to the contrary contained in IB 782.2.

- (c) Where it is not clear whether this exemption will apply to a carrier's drivers, driver's helpers, loaders, and mechanics, the following information should be developed and forwarded to the AA/OFLS:
- (1) With regard to the carrier:
 - a. The extent to which it is involved in interstate commerce;
 - b. Evidence, in the case of a common carrier which has not engaged in interstate transportation, that it has solicited such business; and

- c. Whether it operates pursuant to a valid ICC certificate.
- (2) With regard to the employees in question:
 - a. The degree to which their duties affect the safety of operation of motor vehicles on the public highways in interstate commerce;
 - b. The frequency with which they engage in the duties of a driver, driver's helper, loader, or mechanic in an interstate activity; and
 - c. Evidence that they could be called upon to perform the duties of a driver, driver's helper, loader, or mechanic in an interstate activity.
 - (3) Any other pertinent information regarding the exempt status of the carrier's employees.

24f LOCAL DELIVERY DRIVERS AND HELPERS - SEC 13(b)(11)

24f00 General provisions of FLSA Sec 13(b)(11)

Sec 13(b)(11) provides that FLSA Sec 7 shall not apply to "any employee employed as a driver or driver's helper making local deliveries, who is compensated for such employment on the basis of trip rates, or other delivery payment plan, if the Secretary shall find that such plan has the general purpose and effect of reducing hours worked by such employees to, or below, the maximum workweek applicable to them under Sec 7(a)".

24f01 Approval of Sec 13(b)(11) payment plans

Reg 551 sets out the requirements and procedures for submission of petitions to the Adm for approval of plans to operate under this OT exemption. Reg 516.15 provides for certain records to be kept by employers operating under an approved plan. Employers desiring to make use of the Sec 13(b)(11) exemption should be furnished a copy of Reg 551 and advised of the necessity to secure prior approval of such plans.

24f02 Plans approved prior to issuance of Reg 551

The Adm has approved a small number of plans submitted to him prior to the issuance of Reg 551. Should an employer claim this exemption based on such approval, the facts shall be obtained as to whether the plan operates to meet the requirements as set out in Reg 551. If there is any question as to whether the operation of the plan is consistent with Reg 551, the matter shall be referred through channels to the AA for OFLS without further action.

24g STREET, SUBURBAN, OR INTERURBAN ELECTRIC RAILWAYS OR LOCAL TROLLEY OR MOTORBUS CARRIER - SEC 13(b)(7), SEC 7(n), OLD SECS 13(b)(7) AND 13(a)(9)

24g00 General considerations. (a) Sec 13(b)(7) of the amended Act, effective 5/1/74, provides a partial OT exemption as follows:

"Any driver, operator, or conductor employed by an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier (regardless of whether or not such railway carrier is public or private or operated for profit or not for profit), if such employee receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed."

(NOTE: Effective 5/1/75, OT compensation must be paid for hours worked in excess of 44 per week; and effective 5/1/76, the exemption is repealed and thus OT compensation must be paid for hours worked in excess of 40 per week.)

(b) Sec 7(n) of the amended Act provides that in determining the hours of employment of an employee of a transit system or carrier, the hours worked in "charter activities" shall not be included if (1) the employee's employment in such activities was pursuant to an agreement or understanding with his employer arrived at before engaging in such employment, and (2) if employment in such activities is not part of such employee's regular employment.

(c) An employer cannot satisfy his obligations under the Act by the unilateral adoption of the provision in Sec 7(n). Sec 7(n) is operable only if pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work. If the employees express their unwillingness to accept the exclusion of hours spent in charter activities from the number of hours worked, Sec 7(n) is inapplicable.

24g01 General considerations, 1966 Amendments (2/1/67 - 4/30/74).

(a) During the period 2/1/67 to 4/30/74, Sec 13(b)(7) provided an OT exemption for:

"any driver, operator, or conductor employed by an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency."

(b) The OT exemption in Sec 13(b)(7) in the period 2/1/67 - 4/30/74 for any driver, operator, or conductor applied in all cases where the State or political subdivision thereof was the "employer".

(c) With respect to a publicly-owned railway or carrier, it will be assumed for purposes of former Sec 13(b)(7) that such public ownership carries with it the regulation of rates and services. With respect to such a railway or carrier which is privately owned, the rates and services are normally regulated by the State or by a local agency. However, this is a question of fact and must be determined on the circumstances in each case.

24g02 General considerations - Sec 13(a)(9) of the Act, prior to 1966 Amendments. (a) Sec 13(a)(9) of the Act, prior to 2/1/67, provided that the MW and OT requirements of the FLSA would not apply to "any employee of a street, suburban or interurban electric railway, or local trolley or motor bus carrier, not in an enterprise described in Section 3(s)(2)".

(b) It should be noted that the MW and OT exemption provided by Sec 13(a)(9) as amended in 1961, was available only for employment which was not in an enterprise described in old Sec 3(s)(2). 1/

24g03 Applicable MW rates and OT standards effective 5/1/74. (a) Employment by a private employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier is subject to MW and OT standards as follows:

(1) MW standard. The MW standard provided by Sec 6(a)(1) applies if the employment is in an enterprise described in 1961 Sec 3(s)(2)1/ or is in non-carrier activities; otherwise the MW standard provided by Sec 6(b) applies.

(2) OT standard. An employee (not otherwise exempt) must be paid OT for hours worked in excess of 40 per w/v; any driver, operator, or conductor not otherwise exempt must be paid OT for hours worked in excess of 48 in the w/v (44 hours, effective 5/1/75; and 40 hours, effective 5/1/76). (See also FOH 24g00(b).)

(b) If a State or political subdivision thereof is the "employer", employees engaged in performing activities connected with the operation of the described railway or carrier are subject to MW and OT standards as follows:

(1) The MW standard provided by Sec 6(b) applies.

(2) The OT standard is the same as for private employees (see FOH 24g03(a)(2) above).

24g05 "Of a street, suburban or interurban electric railway". (a) The phrase "of a street, suburban or interurban electric railway" refers to the various types of streetcar or electric railway service used in city, suburban, or interurban transportation.

1/ Old Sec 3(s)(2). Local transit enterprises having an annual gross volume of sales of at least \$1 million (exclusive of excise taxes at the retail level which are separately stated).

(b) The term "interurban electric railway" does not include railways which carry freight only and do not carry passengers.

24g06 "Trolley or motorbus". The term "trolley or motorbus" refers to the type of buses operated by electrical power derived from fixed overhead wires as well as to the ordinary gasoline or diesel power motorbus used in furnishing local passenger transportation similar to street railway service.

24g07 "Local". (a) The word "local" modifies only the words "trolley or motorbus". The indispensable characteristic of a local motorbus carrier is that it is a carrier which serves an integrated commercial or industrial area for the purposes of carrying persons to and from their work in offices and factories, children to and from school daily, and other persons attending to necessary routine business. If a carrier does not meet this test, it is not exempt. On the other hand, the mere serving, as above, of an integrated commercial area by a carrier would not conclusively establish the fact that such a carrier is local unless it has generally the following characteristics, the first three of which are the most significant:

(1) The fare on a local bus route is either paid to the driver directly or deposited in a coin box. Tickets are not sold at terminals or other designated places for single trips. School tickets, weekly passes, or commutation tickets are in some instances, however, used on local carriers.

(2) The fare on a local bus route is either a single fare for the entire route, or is based on the number of zones through which a person travels. The fare is not based on the number of miles traveled.

(3) Buses of a local carrier traverse the same route at frequent intervals, usually with a "headway" of less than 1 hour, and make frequent stops at designated places, ordinarily spaced at a given number of feet. These operating schedules are generally speeded up during the morning and evening peak periods.

(4) The buses used on local routes differ from the over-the-road buses in that the seats in the former are more narrowly spaced and the aisle is wider to accommodate standees.

(5) Local buses are built not to exceed a speed of approximately 45 miles per hour, while the top speed of the over-the-road bus is much higher.

(6) Local buses are geared for the quick acceleration necessary for short runs in congested traffic.

(7) Local buses do not maintain space for baggage, having at best a package rack for small items such as lunch boxes and packaged merchandise. Over-the-road buses have space set aside in the rear, on the roof, or within the bus for the luggage commonly required in traveling considerable distances.

(8) Drivers of local buses are ordinarily paid on an hourly rather than a mileage basis.

(9) Drivers of local buses do not make runs which prevent them from returning home each day after work.

(10) Local bus carriers do not maintain schedules designed to make connections with over-the-road carriers, nor are they engaged in carriage which is a continuation of over-the-road travel, preliminary thereto, or a part thereof.

(11) The statistical pattern of national over-the-road travel indicates a falling off of business during the fall, winter, and early spring months with a sharp increase during the late spring months and summer, traceable to pleasure trips taken during vacation periods. The statistical pattern for local bus travel depicts a low degree of travel during the late spring months and summer.

(b) The crossing of State lines does not of itself change the local character of a carrier if the tests set out in (a) above are met.

24g08 Sec 13(b)(7) exemption not defeated by minor discrepancies. While FOH 24g07 sets forth the principal characteristics of a local trolley or motorbus carrier, as those terms are used, minor discrepancies will not defeat the Sec 13(b)(7) exemption (nor did they defeat the exemptions provided by old Sec 13(b)(7) or old Sec 13(a)(9)). Since no hard and fast rule is possible, a determination will depend upon an appraisal of all the facts.

24g09 Local operations that are not within the exemptions. (a) Certain operations, although local in character, do not fall within the new Sec 13(b)(7) (or old Sec 13(b)(7) or old Sec 13(a)(9)) exemption, which was intended to include only those trolley or motorbus carriers rendering daily common passenger service as part of the transportation system of the locality. Thus, motorbus carriers engaged in contractual hauling of goods or persons are not within the exemption since these services are not rendered to the public at large as part of the available transportation facilities.

(b) Those employees who perform the contractual hauling activities of a motorbus carrier, whether such hauling be of persons or property, are performing nonexempt work under Sec 13(b)(7) (and were performing nonexempt work under old Sec 13(b)(7) and old Sec 13(a)(9)).

24g10 Tolerance for nonexempt work. In applying Sec 13(b)(7) (or old Sec 13(b)(7) or old Sec 13(a)(9)) the exemption shall be deemed

applicable even though some nonexempt work is performed by the employee during the w/w, unless the amount of such nonexempt work is substantial. The amount of nonexempt work will be considered substantial if it occupies more than 20% of the time worked by the employee during the w/w. (See IB 786.50.)

24g11 Charter activities excludable under Sec 7(n). (a) Charter activities which meet the statutory tests of Sec 7(n) are excluded from "hours worked" for OT purposes (see also FOE 24g00(b) and (c)). Thus, only the time spent in charter activities which begins outside the employee's ordinary workday or w/w is excludable under Sec 7(n). Where such a charter is of such duration that it carries over to the next workday or w/w, such work continues to be excludable provided the employee is relieved from duty at the conclusion of the charter until the next workday begins. Any charter activity performed in a regular workday or w/w (i.e., which begins in any part of the regular workday or w/w), must be included in "hours worked" for OT purposes.

(b) The fact that a transit system regularly engages in charter work does not preclude the use of Sec 7(n). The term "regular" as used in Sec 7(n) relates to the employee's activities, not the employer's.

(c) Sums paid for charter activities would be excluded from the "regular rate" if such activities are excluded from "hours worked" pursuant to Subsec (a) above.

24h TAXICABS-SEC 13(b)(17)

24h00 General. Sec 13(b)(17) provides an OT exemption as follows: "any driver employed by an employer engaged in the business of operating taxicabs".

24h01 "Business of operating taxicabs". The taxicab business consists normally of common carrier transportation in small motor vehicles of persons and such property as they may carry with them to any requested destination in the community. The business operates without fixed routes or contracts for recurrent transportation. It serves the miscellaneous and predominantly local transportation needs of the community. It may include such occasional and unscheduled trips to or from transportation terminals as the individual passengers may request, and may include stands at the transportation terminals as well as at other places where numerous demands for taxicab transportation may be expected.

24h02 Exemption limited to drivers. The OT exemption contained in Sec 13(b)(17) applies to "any driver" employed by an employer engaged in the business of operating taxicabs. The exemption is thus limited to drivers only. (For discussion of nonexempt work, see FOH 24h03.)

24h03 Examples of nonexempt work. (a) Examples of nonexempt work by "any driver" for purposes of Sec 13(b)(17) are:

- (1) Acting as a dispatcher.
- (2) Performing general clerical duties (making reports in connection with his own driving operations is within the exemption).
- (3) Performing general mechanical or repair services on vehicles (cleaning, washing, or making incidental minor repairs on the vehicle assigned to him as a driver are within the exemption.)
- (4) Performing work, including driving, in connection with other business operations of the employer (i.e., not his taxicab operations), such as operation of an airport limousine service (see FOH 24c04), a pick-up and delivery service, or a moving and storage service.

24h04 Tolerance for nonexempt work. In applying Sec 13(b)(17) the exemption shall be deemed applicable even though some nonexempt work is performed by the employee during the workweek, unless the amount of such nonexempt work is substantial. The amount of nonexempt work will be considered substantial if it occupies more than 20% of the time worked by the employee during the workweek. (See IB 786.200.)

24h05 Possible application the Sec 13(b)(1) exemption. If for any reason, taxicab drivers are not exempt from the OT requirements of the Act under Sec 13(b)(17), the possible application of Sec 13(b)(1) should not be overlooked. (See FOH 24c04 and 24e).

24h06 MW rate considerations. (a) Old Sec 13(a)(12), prior to 2/1/67, provided a MW and OT exemption for "any employee of an employer engaged in the business of operating taxicabs". Since the old Sec 13(a)(12) exemption extended to all employees whose work is performed in connection with the employer's taxicab business, it would include drivers, dispatchers, office workers, mechanics, etc. Employment which became subject to the MW provisions by virtue of the repeal of old Sec 13(a)(12) is subject to the Sec 6(b) rate.

(b) Tolerance for nonexempt work. Nonexempt work, for purposes of old Sec 13(a)(12), is work which is not normally considered a part of the taxicab business. However, for enforcement purposes, the exemption shall be deemed applicable even though some nonexempt work is performed by a particular employee during the w/w, unless the amount of such nonexempt work is substantial. The amount of nonexempt work will be considered substantial if it occupies more than 20% of the time worked by the employee during the w/w. (See IB 786, Subpart E.) Examples of nonexempt work include:

- (1) the transfer of baggage or freight which is not performed in conjunction with and as an incident to the transportation of persons in the same vehicle;
- (2) work performed in connection with garage and repair services on vehicles other than those used in the employer's taxicab business; or
- (3) work performed in connection with other business operations of the employer (i.e. not his taxicab operations) such as the operation of an airport limousine service (see FOH 24c04), a pick-up and delivery service, or a moving and storage service. (See FOH 24h03.)

241 COMMON CARRIER BY RAILROAD OR PIPELINE - SEC 13(b)(2)

24100 General provisions. (a) Sec 13(b)(2) of the amended Act, effective 5/1/74, provides an exemption from the OT provisions of the FLSA for "any employee of an employer engaged in the operation of a common carrier by rail and subject to the provisions of Part I of the Interstate Commerce Act".

(b) For the period 2/1/67 - 5/1/74, Sec 13(b)(2) provided an OT exemption for "any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act".

(c) As indicated above, the OT exemption for employees of oil pipeline transportation companies was repealed by the 1974 Amendments. Therefore, such employees must be paid OT compensation after 40 hours per week, effective 5/1/74.

24101 Scope of the FLSA Sec 13(b)(2) exemption. (a) The provisions of Part I of the Interstate Commerce Act apply only to common carriers engaged in interstate commerce in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are under common control, management, or arrangement for a continuous carriage or shipment. Employers in this category include railroad carriers, express companies, sleeping car companies, and refrigerator car companies. (Prior to 5/1/74, the exemption also applied to employees of common carriers engaged in interstate commerce by pipeline (except carriers of water or of natural or artificial gas).)

(b) In the foregoing paragraph, the words "common control, management, or arrangement" may include a common understanding between carriers as to traffic policy, even though the separate corporate entities of the carriers may be maintained. For example, a car ferry company which maintains its own carriage distinct and independent by having separate contracts, independent rates, and receiving direct instructions from the shippers concerning carriage by it, is not under common control, management, or arrangement with another carrier. If, however, the transportation by a railroad and such a ferry company is covered by a through bill of lading, or by through rates or charges, or if there is any other arrangement indicating a common traffic policy by the two companies, the ferry company may be an employer subject to Part I of the Interstate Commerce Act.

(c) The exemption applies only to those employees who perform activities which subject their employer to Part I of the Interstate Commerce Act.

(d) The term "employer", as used in the exemption, refers to the person or persons who would be legally obligated to pay OT wages, if not specifically exempted therefrom.

(e) Employees of an employer who leases refrigerator and tank cars to railroads and shippers for the interstate transportation of goods

are exempt from the requirements of the FLSA under Sec 13(b)(2).

(f) Employees of an independent railroad contractor engaged in laying and grading track and other maintenance of way operations are not within the Sec 13(b)(2) exemption, even though the railroad exercises jurisdiction over the manner in which the work is performed and gives written approval for the wages and OT paid employees by the independent contractor. The contractor, being engaged in construction work for a railroad, is not an employer subject to Part I of the Interstate Commerce Act.

(g) Employees of a railroad contractor, engaged in maintaining and servicing air-conditioning and car-lighting equipment sold to railroads, are not within the Sec 13(b)(2) exemption since the contractor is neither a common carrier nor engaged in transportation in interstate commerce. The fact that a railroad contractor may be subject to the Railroad Retirement Act or the Railway Labor Act is not a criterion for determining the application of the Sec 13(b)(2) exemption.

24102 Operations included within the FLSA Sec 13(b)(2) exemption.

(a) Employees of a railroad company manufacturing ice are within the Sec 13(b)(2) exemption where the ice is made solely for use by the railroad.

(b) The loading and unloading of livestock by employees of a public stockyard onto and from railroad cars is within the Sec 13(b)(2) exemption, but other stockyard activities, such as the yarding, feeding, watering, and handling of livestock before or after the loading or unloading operations, are not within the exemption.

(c) For purposes of the old Sec 13(b)(2) exemption during the period prior to 5/1/74, employees of a carrier engaged in the transportation of oil by pipeline within a State as part of an interstate system of transportation (or connecting with such a transportation system), uninterrupted by processing, were within Sec 13(b)(2) because such activities are subject to regulation under Part I of the Interstate Commerce Act. This was true even though a firm was transporting only its own products in its own pipeline or gathering system since the term "common carrier" in such Act included all pipelines. (A line laid on an oil lease to move crude oil from the well-head to a lease storage tank, or from one lease storage tank to another, is not considered to be a "common carrier".)

(d) For the period prior to 5/1/74, activities involving the blending of gasoline by employees employed by a pipeline company which was a carrier subject to Part I of the Interstate Commerce Act were exempt under FLSA Sec 13(b)(2).

24103 Employees not within the FLSA Sec 13(b)(2) exemption. (a) The FLSA Sec 13(b)(2) exemption does not apply to employees

- (1) Who are not employed by a carrier subject to Part I of the Interstate Commerce Act.
- (2) Who do not perform activities which subject their employer to Part I of the Interstate Commerce Act.
- (3) In any workweek in which they are engaged in non-exempt work, in addition to the work which might otherwise be within the scope of the exemption, if the nonexempt work amounts to more than 20% of the total hours worked.
- (4) Of a warehouse, if the warehouse stores goods that have not been carried over the lines of the railroad which owns the warehouse, and the storage of such goods constitutes a substantial portion (which for enforcement purposes has been defined as more than 20%) of the warehouse business, even though in addition to such business, the warehouse stores goods that have been carried over the lines of the railroad which owns the warehouse.
- (5) Of an employer engaged exclusively in a pick-up and delivery service under a contract with a railroad express agency, as the employees are not employees of the railroad or railroad express agency.
- (6) Of a trucking company, even though the trucking company may be wholly owned and controlled by a railroad company, inasmuch as the trucking company is not an employer subject to Part I of the Interstate Commerce Act.

24104 Livestock shipping establishment. An establishment which ships livestock only for itself is not such a public stockyard as to constitute a "common carrier" within Part I of the Interstate Commerce Act, and consequently is not within the FLSA Sec 13(b)(2) exemption.

24j COMMON CARRIER BY AIR - SEC 13(b)(3)

24j00 General provisions. Sec 13(b)(3) provides an exemption from the OT provisions of the FLSA for "any employee of a carrier by air subject to the provisions of Title II of the Railway Labor Act".

24j01 Application of the carrier-by-air exemption. (a) The exemption under Sec 13(b)(3) is not an industry or establishment exemption. It applies to individual employees of an air carrier when their activities bear a reasonably close relationship to the exempt type of transportation activities which bring the employer's operation under Title II of the Railway Labor Act. Title II applies to "every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service". The performance of nonexempt work will defeat the exemption where such work exceeds 20% of the employee's total work during a w/w (see IB 786, Subpart A).

(b) Work performed by mechanics on training planes, transient planes, and on planes other than those used in operations which subject the employer to Title II of the Railway Labor Act clearly has no relation to exempt air transportation and would, if it constituted a substantial part of their work, defeat the exemption. Flyers and other employees who operate a flying school also perform nonexempt work, as do employees who sell airplanes and parts.

24j02 Commuter airline pilots and air taxi/charter pilots. The National Mediation Board has taken the position that any carrier that has been issued an air taxi and commercial operations (ATCO) certificate or an ATCO letter of registration by the Federal Aviation Administration and is engaged in interstate operations is a common carrier by air and subject to Title II of the Railway Labor Act. Thus, commuter airline pilots and air taxi pilots employed by such carriers may be subject to the Sec 13(b)(3) exemption. The Board does not assert jurisdiction over solely intrastate operations when there is no significant carriage of mail.

24j03 Air freight forwarders. Air freight forwarders are carriers by air subject to the provisions of Title II of the Railway Labor Act if they are owned or controlled by, or under common control with, a company that is actually engaged in air transportation and if the air freight forwarders perform services in connection with property transported by such other company.

24j04 Employees supplying food and meal service to airlines. Employees of an air carrier who supply food and meal service equipment such as thermos jugs, ovens, food racks, food trays, silverware, napkins, china, and the like, to airlines for use on the airplane are exempt under Sec 13(b)(3). Such employees are engaged in operating equipment and facilities and performing services in connection with transportation and handling of property transported by airlines. The exemption, however, applies only to those employees of such a carrier engaged in work of a nature which brings their employer within Title II of the Railway Labor Act. Work performed by such a carrier which does not bear a reasonably close relationship to the transportation activities that give rise to the exemption will be regarded as nonexempt work and a substantial amount of nonexempt work (more than 20% of the time worked by the employee during the w/v) will result in loss of the exemption.

24k SEAMEN - FLSA SECTIONS 13(a)(12) and 13(b)(6)

24k00 General provisions of Secs 13(a)(12) and 13(b)(6) - IB 783. (a) Sec 13(a)(12) provides an exemption from the MW and OT provisions of FLSA for "any employee employed as a seaman on a vessel other than an American vessel".

(b) Sec 13(b)(6) provides an exemption from the OT provisions of FLSA for "any employee employed as a seaman", including those on American vessels.

(c) The official WH interpretations of the scope and meaning of the Secs 13(a)(12) and 13(b)(6) exemptions are contained in IB 783.

24k01 Applicability of Secs 13(a)(12) and 13(b)(6) distinguished. The tests for exemption under Secs 13(a)(12) and 13(b)(6) are identical except that the MW and OT exemption provided by Sec 13(a)(12) is available only for seamen on vessels other than American vessels. Seamen on American vessels may be exempt from OT, however, under Sec 13(b)(6).

24k02 Tugboat night firemen-watchmen who never travel on boat. A night fire-watchman, whose duties are to hold steam at night, clean the ashes from under the boiler, put them overboard with the boat's steam ash remover, and syphon bilge water when necessary while the vessel is tied up to the dock, and who does not travel on the boat nor contributes towards its operation while in motion, is not a seaman within the Secs 13(a)(12) and 13(b)(6) exemptions.

24k03 Status of ferry boat employees. (a) Time spent mooring and unmooring the ferry, hooking and unhooking the chain across the stern, and as a relief operator is the work of a seaman and is, therefore, exempt work.

(b) The time spent in directing vehicles onto the boat, placing blocks, collecting fares, leveling the landing, and work about the ferry slip, such as cutting weeds, is not considered the work of a seaman and is, therefore, not exempt.

24k04 Dredging, derrick, and salvage boat employees. The seaman exemption does not apply to employees whose service is not rendered primarily as an aid to the operation of the vessel as a means of transportation. The operation of a derrick for loading or unloading cargo or salvaging materials from underwater, or raising underwater cables, or removing deposits from channels on navigable interstate waterways in conjunction with improvements and construction work on such waterways, whether from self-propelled or nonself-propelled dredges is not exempt work under Secs 13(a)(12) and 13(b)(6).

24k05

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24k05 Tenders of nonself-propelled barges. An employee primarily employed on a nonself-propelled barge used as a "stationary" auxiliary facility to off-shore drilling activities, rather than as a means of transportation is not a seaman within Secs 13(a)(12) and 13(b)(6).

24L SALEMEN, PARTSMEN, AND MECHANICS OF ESTABLISHMENTS SELLING VEHICLES TO ULTIMATE PURCHASERS - FLSA SEC 13(b)(10)

24L00 General. (a) Sec 13(b)(10) of the amended Act, effective 5/1/74, provides an OT exemption as follows: (emphasis supplied)

"(A) Any salesman, partsman, or mechanic, primarily engaged in selling or servicing automobiles, trucks or farm implements if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers; or

(B) any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers;"

(b) For the period 2/1/67 - 4/30/74 old Sec 13(b)(10) provided an OT exemption for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft if employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles to ultimate purchasers" (emphasis supplied).

(c) For the period prior to 2/1/67, Sec 13(a)(19) provided an exemption from both MW and OT for "any employee of a retail or service establishment which is primarily engaged in the business of selling automobiles, trucks, or farm implements"

24L01 Application of Secs 13(a)(2) and 7(1). The possibility of exemption under Sec 13(a)(2) or Sec 7(1) for employees of certain such establishments should not be overlooked.

24L02 Applicable MW rate. Employment by such an establishment which would have been exempt from both MW and OT under old Sec 13(a)(19) prior to 2/1/67 is subject to the MW rate of Sec 6(b); employment by such an establishment which would not have been qualified for exemption under old Sec 13(a)(19) as, for example, because the 75% retail test was not met, may be subject to the MW rate of Sec 6(a)(1).

24L03 Application of exemption - type of establishment. (a) The statutory language of Sec 13(b)(10) both prior to and subsequent to 5/1/74 limits the exemption to the specified employees of nonmanufacturing establishments primarily engaged in the business of selling automobiles, trailers, trucks, farm implements (boats effective 5/1/74) or aircraft to ultimate purchasers. It does not apply to employees of automobile parts and accessories wholesalers, retail auto parts stores, automotive repair garages or other establishments not primarily engaged in selling the named vehicles.

(b) In the case of dealerships in the named vehicles it will not be necessary, where departments functionally operated as part of the dealership are at different locations, to determine whether they are parts of the main establishment or physical places of business qualifying as separate establishments under the customary tests. A specific legislative intent to include all such parts of the dealership's business as one establishment for purposes of Sec 13(b)(10) is made plain by statements in the legislative history that the exemption is intended to apply to the named classes of employees employed by a dealership in the described vehicles "even if they work in physically separate buildings or areas, or even if, though working in the principal building of the dealership, their work relates to the work of physically separate buildings or areas, so long as they are employed in a department which is functionally operated as part of the dealership". Thus, for example, if a new car dealer operates a used car lot at a different location, employees who work at that lot may qualify for the exemption if the used car lot is operated as a part of the dealership. (See also IB 779.372(b)(1).)

24LO4 "Salesman", "partsmen", and "mechanic". (a) Sec 13(b)(10) provides an OT exemption for employees of the various described establishments (see FOH 24LO3) who are employed as a "salesman", "partsmen", or "mechanic", and who are "primarily engaged" (see IB 779.372(d)) in selling or servicing the named vehicles, farm implements or aircraft (see chart FOH 24LO4). Assuming that the establishment tests are met, it is thus necessary to determine whether the employee's duties are in fact those of a salesman, partsmen, or mechanic (or some combination of these duties where appropriate), and, if so, whether he is primarily engaged in selling or servicing the named vehicles, farm implements or aircraft. The exemption applies on a w/v basis. It is not pertinent that such salesmen, partsmen, or mechanics are individually engaged in selling to or servicing the named product primarily for the "ultimate purchaser"; it is only necessary for the establishment to be primarily so engaged for the exemption to be applicable (see FOH 24LO8).

(b) In determining whether an employee is in fact a salesman, partsmen, or mechanic, a primary duty test shall be applied. Thus, for example, an employee to be classified as a "mechanic" must spend more than 50% of his time in performing the duties of a mechanic, with respect to the named vehicles, farm implements, or aircraft, including duties which are incidental thereto. (For purposes of applying the primary duty test, all the duties of an employee as a salesman, partsmen, or mechanic may be combined.)

(c) Partsmen. The term "partsmen", as used in Sec 13(b)(10), means an employee whose primary duty is to requisition, stock, and dispense parts for the named vehicles, farm implements or aircraft to be used by the establishment's employees, or to sell or dispense such parts to the establishment's customers (see IB 779.372(c)(3)). This includes incidental clerical duties involved in such work, and keeping the stockroom, bins, and shelves in order. (See also subpart (e) of this Sec.)

(d) Mechanic. (See IB 779.372(c)(3).) The term "mechanic", as used in Sec 13(b)(10), generally describes an employee whose primary duty is to perform mechanical work on a named vehicle, farm implement, or aircraft to place it in proper operating condition by making any necessary adjustments or repairs. This includes an employee doing mechanical work such as "get ready" mechanics, automotive, truck, trailer, farm implement or aircraft mechanics, body or fender mechanics, used car reconditioning mechanics, and wrecker mechanics. Work of the following types is not in itself considered mechanical work for purposes of the primary duty test in applying Sec 13(b)(10) even though performed on a named vehicle, farm implement or aircraft:

- (1) washing, cleaning or polishing
- (2) lubricating
- (3) packing wheel bearings
- (4) changing oil and oil filters
- (5) changing tires
- (6) painting
- (7) carpentry
- (8) dispatching
- (9) installing or repairing seat covers
- (10) checking, servicing, or repairing the plumbing, electrical, and butane gas systems, the doors, windows and other structural features of mobile home trailers (as opposed to the running mechanisms, such as wheels axles, brakes, hitches, and signal lights).

However, such work may be performed in some instances by an employee as an incident to mechanical work and would be included as the work of a "mechanic" in applying the primary duty test. For example, an automotive repairman may install ball joints or tie rods on the "front end" of a truck or automobile and lubricate the repaired parts when he has finished; he may replace a broken piston and in the process change oil and install a new oil filter; or he may replace a wheel bearing and at the same time repack it with the necessary lubricant.

(e) Parts chaser. A "parts chaser" whose primary duty is that of a messenger to pick up needed parts, as directed, from the warehouse and from other dealers is not exempt under Sec 13(b)(10) as a "partsman". On the other hand, if the primary duty of such an employee is to see to the adequacy of the stock on hand and to procure necessary stock, to make billings, and to clean parts for return to the factory under warranty replacement, he would be considered a "partsman" for purposes of the exemption.

(f) Mechanic - irrigation systems. Farm implement dealers who sell or service irrigation systems and component parts (see FOH 24107) may have employees engaged in repairing such items or in cutting, fitting, and tailoring at the shop the items sold, to meet the needs of a particular farming operation. Such activities are considered to be those performed by a "mechanic" as the term is used in Sec 13(b)(10). Employees engaged in assembly of an irrigation system or components in the field (after repairs have been made or the cutting, fitting and tailoring at the shop has been done) are not performing the work of a "mechanic" to whom the exemption is intended to apply. The possibility of exemption under Sec 13(a)(6) or Sec 13(b)(12) should not be overlooked.

(g) Trimmers. Some automobile dealers employ persons called "trimmers". The following are examples of duties performed by trimmers which are considered mechanical work for purposes of the 50% test of section 13(b)(10): repairing the cranking mechanism of car windows; repairing interior of doors and roofs of cars; repairing windshield wiper mechanisms; and repairing chrome strips around door frames.

FIELD OPERATIONS HANDBOOK - 10/20/87

The following SUPERSEDES Insert 1497, FOH 24L04(k); DELETE Insert 1497 from the Insert Record, WH-100:

- (k) Employees variously described as service writers, service advisors, service managers, or service salesmen whose primary duty is to record the condition of a vehicle and write up a report indicating the parts and mechanical work needed have been construed as within the exemption in Sec 13(b)(10)(A) by two appellate courts (Fifth and Sixth Circuits) and two district courts (in the Eighth and Tenth Circuits). Consequently, WH will no longer deny the OT exemption for such employees. This policy (that these employees are within the exemption) represents a change from the position in IB 779.372(c)(4), which will be revised as soon as is practicable.

(h) Diagnosticians and inspectors. Employees variously described as diagnosticians and inspectors may be considered as being akin to service writers. (See IB 779.372(c).) Such employees may use machines and also do visual inspections to note the condition of a vehicle, and indicate the parts and services necessary for repairs. Diagnosing and inspecting in and of itself, as would be the case for example when diagnostic and inspection work is done for other mechanics would not be exempt. However, where an employee is a mechanic and is working as a mechanic and part of his employment is diagnosing and inspecting the vehicle before doing the actual repair, such diagnostic and inspection work is part of his exempt work.

(i) Job comparison - old Sec 13(b)(10) and new 13(b)(10).

<u>Job</u>	<u>Vehicle</u>	<u>Exempt under</u>	
		<u>Prior to 5/1/74)</u> <u>Old</u> <u>13(b)(10)</u>	<u>(Beginning 5/1/74)</u> <u>New</u> <u>13(b)(10)</u>
Salesman	Automobiles	Yes	Yes
Salesman	Trailers	Yes	Yes
Salesman	Trucks	Yes	Yes
Salesman	Farm implements	Yes	Yes
Salesman	Aircraft	Yes	Yes
Salesman	Boats	No	Yes
Partsman	Automobiles	Yes	Yes
Partsman	Trailers	Yes	No
Partsman	Trucks	Yes	Yes
Partsman	Farm implements	Yes	Yes
Partsman	Aircraft	Yes	No
Partsman	Boats	No	No
Mechanic	Automobiles	Yes	Yes
Mechanic	Trailers	Yes	No
Mechanic	Trucks	Yes	Yes
Mechanic	Farm implements	Yes	Yes
Mechanic	Aircraft	Yes	No
Mechanic	Boats	No	No

(j) Enforcement policy for period prior to 5/1/74. Wage-Hour takes no position with respect to alleged OT violations in any current investigation during the period prior to 5/1/74 where the employee, e.g., boat salesman, is entitled to the OT exemption on the basis of new Sec 13(b)(10) but would have been subject to OT previously.

(K) - SEE INSERT #1757

24L05 Auto rebuilding establishment. An establishment engaged in auto rebuilding, such as rebuilding auto engines or transmissions, is not considered a nonmanufacturing establishment for purposes of Sec 13(b)(10). (See also FOH 21fa00.)

24L06 Fork lift vehicles. Fork lift vehicles or other similar industrial material handling equipment are not considered "trucks" for purposes of Sec 13(b)(10).

24L07 "Farm implements"; irrigation systems. (a) The term "farm implements" is generic rather than specific and includes all items referred to in old Sec 13(a)(19) and present Sec 13(b)(10), including such nonvehicular items as irrigation systems and component parts.

(b) The cutting, fitting and tailoring in the dealer's shop of irrigation systems sold by a farm implement dealer is considered to be subordinate and incidental to the sale of these items to the ultimate purchaser and does not constitute "manufacturing" for purposes of applying Sec 13(b)(10). (See also FOH 24L04(f).)

24L08 "Ultimate purchasers". Sec 13(b)(10) provides "...if employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles to ultimate purchasers". Since it is not necessary that the establishment be a retail or service establishment, whether a particular sale of automobiles, trucks, or their component parts is at retail or wholesale is not material. The crucial question is whether or not the sale is to the ultimate purchaser. Wage-Hour's position is that the over the counter sales of parts to the general public, the sales at discount to truck lines for use in repairing their vehicles, as well as the so-called insurance and warranty sales of parts are all to the ultimate purchaser within the meaning of Sec 13(b)(10). On the other hand, sales of parts to other dealers, service stations, body shops, garages and other establishments likely to resell the parts are sales for resale and not sales to the ultimate purchaser within the meaning of Sec 13(b)(10). The exemption is limited to nonmanufacturing establishments primarily engaged (see IB 779.372(d)) in selling the named vehicles to ultimate purchasers.

24L09 Motorcycles, motor scooters, and motor bikes. Motorcycles, motor scooters, and motor bikes are not considered automobiles, trailers, or trucks for purposes of Sec 13(b)(10).

24L10 Snowmobiles. Snowmobiles are not considered automobiles, trailers, or trucks for purposes of Sec 13(b)(10).

24L11 IB 779. IB 779.371 - 779.372 contain the basic interpretations (by the Adm) of the scope and terms of these exemptions. These interpretations apply to the old Sec 13(a)(19) exemption and to the Sec 13(b)(10) exemption prior to 5/1/74. Additionally these interpretations also apply to the Sec 13(b)(10) exemption on and after 5/1/74 except that the various job classifications and/or types of vehicles have been changed (see chart FOH 24L04(1).)

24L12 Assembling farm implements.

The assembling of plows, harrows, etc., even though they are farm implements, should not be confused with the work of a "get-ready mechanic" or the work that must be performed to prepare a functional irrigation system (see FOH 24L04(d) and (f)). The assembling of a plow or other such farm implement which has been cut to measurements and for which all the parts have been manufactured to fit together is no different than the work of a dealer assembling a "knocked down" bicycle, and is not the work of a mechanic within the meaning of Sec 13(b)(10).

24L13 Mobile homes as "trailers"

- (a) A mobile home qualifies as a "trailer" within the meaning of Sec 13(b)(10)(B) if it is designed to be a vehicle or moving conveyance. Mobile homes of any type (including "double/triple wides") may be considered to be trailers if they are designed to be transported from place to place as a trailer, that is, if they have their own wheels and suspension system and can be towed behind a powered vehicle.
- (b) WH will consider a mobile home to be a trailer if it is built on a permanent chassis or transportation system which includes a drawbar and coupling mechanism, frame, running gear assembly, and lights.
- (c) The following definitions apply to the components of a trailer chassis:
 - (1) "Drawbar and coupling mechanism" includes the rigid assembly upon which the coupling mechanism is mounted and which connects the manufactured home's frame to the towing vehicle.
 - (2) "Frame" refers to the fabricated rigid substructure which provides support to the manufactured home structure both during transport and on-site. It also provides a platform for attachment of the rest of the transportation system.
 - (3) "Running gear assembly" includes suspension springs, axles, bearings, wheels, hubs, tires, and brakes.
 - (4) "Lights" means safety lights and associated wiring.
- (d)
 - (1) In 1976, the U.S. Department of Housing and Urban Development established safety standards (known as the HUD Code) for manufactured housing intended for sale as trailers or mobile homes. A label certifying conformance with these standards is required to be affixed to all such mobile homes built since 6/15/76.
 - (2) For enforcement purposes, the presence of the HUD Code label will be sufficient proof that the manufactured home is being sold as a trailer.

- (e) (1) Notwithstanding (d) above , it may be documented at the time of sale that parts of the transportation system are to be removed and that the mobile home is to be emplaced on a permanent foundation requiring extensive site preparation. A mobile home sold under these conditions will not be considered a trailer within the meaning of Sec 13(b)(10)(B).
- (2) Typical installation on concrete pads with sewer and water connections, electricity, anchoring apparatus or cables, and "skirting" is not considered permanent emplacement.

24L14 Equipment which may be farm implements.

"Farm implements", within the meaning of Sec 13(b)(10)(A), refers to equipment and machinery normally used by farmers in their farming operations. Equipment not customarily used in such operations, as for example garden type tractors, small riding mowers, recreation type vehicles, etc., are not "farm implements". To illustrate further, tractors used in farming are usually 35 horsepower or more. (See IB 779.371(e).)