

## **FLSA-984**

January 20, 1988

This is in further response to your letter concerning the application of section 13(b)(1) of the Fair Labor Standards Act (FLSA) to certain drivers who make intrastate deliveries. We regret the delay in responding to your inquiry.

The FLSA 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 of \$3.35 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek.

Section 13(b)(1) of FLSA provides an exemption from the overtime pay provisions, but not from the law's minimum wage requirements, for employees of a motor carrier with respect to whom the Department of Transportation (DOT) has power to establish qualifications and maximum hours of service under section 204 of the Motor Carrier Act of 1935. 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 motor vehicles in the transportation on public highways of passengers or property in interstate or foreign commerce, as outlined in Interpretative Bulletin, Part 782.

Your letter states that drivers pick up food products at the warehouse and deliver them to intrastate retailers. While at the retailers, these same drivers pick up damaged or past-dated food products and take them to the warehouse. These products are immediately shipped back to out-of-State manufacturers. The damaged or past-dated food products returned to the warehouse constitute some 8% to 30% of the food initially delivered to the retailers. During a telephone conversation with a member of my staff, you stated that not all damaged and/or past-dated food products are returned to the manufacturer. Some manufacturers may require only the return of individual samples.

Based on the information you provided, it appears that the activities of your client's drivers while transporting damaged or past-dated food products back to the warehouse for immediate shipment to out-of-State manufacturers, may be part of an interstate shipment of goods. Such transportation confined to points within the State may be interstate or foreign commerce within the meaning of the Motor Carrier Act, if the shipper has a fixed or persisting transportation intent beyond the warehouse storage point at the time of shipment.

The term "fixed and persisting transportation intent" as used by DOT refers to the intent of the shipper of the commodities. It is the DOT position that the intent existing at the time the movement starts governs and fixes the character of the shipment, provided that this intent persists throughout the movement. Since you state that there is a fixed and persisting intent on the part of the shipper with regard to the movement of damaged and past-dated food products beyond the warehouse to out-of-State manufacturers at the time of shipment, the intrastate drivers transporting such merchandise from the retailer to the

warehouse would come within the overtime pay exemption contained in section 13(b)(1) of FLSA.

We trust that the above is responsive to your inquiry.

Sincerely,

Paula V. Smith  
Administrator

Enclosure