FLSA-980

July 9, 1990

This is in response to your letter to Associate Solicitor of Labor Monica Gallagher and your letter of May 5, 1989 to Attorney Alan M. Raznick of the Department's Regional office of the Solicitor in San Francisco concerning the payment by your roofing company clients of travel time and overtime under the Fair Labor Standards Act (FLSA). You ask whether your clients' method of compensating travel time complies with section 7 of FLSA. We regret the delay in responding to your inquiry.

The FLSA, the Federal law of most general application concerning wages and hours of work, requires that all covered and nonexempt employees be paid not less than the applicable minimum wage and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek. Prior to April 1, 1990, the FLSA minimum wage rate was $3.35 an hour. As of April 1, the minimum wage increased to $3.80 an hour and after March 31, 1991, the minimum wage will increase to $4.25 an hour.

Your clients compensate their employees pursuant to the terms of a collective bargaining agreement with the *** . Under the provision of the agreement governing the payment of travel time, travel and loading time occurring during the regular workday are paid at the regular (roofing) rate. However, travel and loading activities which occur before or after the regular workday are paid at 2/3 the regular (roofing) rate, increased by half-time as necessary to conform to the contractual time and one-half requirements. You assert on behalf of your clients that this form of payment is authorized by section 7(g)(2) of FLSA.

Section 7(g)(2) provides exceptions from the overtime requirement of section 7(a) for an employee performing "... two or more kinds of work ...", provided a number of requirements are satisfied. Based on your description of the loading and unloading activities at job sites, we conclude that these may be treated as "two kinds of work" for purposes of section 7(g)(2). The work at the yards consists of loading pallets of roofing material on the trucks with a forklift with a minimal amount of unloading on return to the yards. The work at the job sites consists primarily of the installation of new roofs, and materials are obtained from the truck as they are needed for the performance of roofing duties. You stress that yard loading is done entirely with mechanical equipment and does not entail manual labor, whereas the removal of heavy construction materials from pallets at the job site is hard physical labor. Secondly, yard loading is done independently of actual roofing work, while job site loading work is integrated with the performance of roofing work itself. Thus, we consider the two categories of loading and unloading duties to be sufficiently different to qualify for treatment under section 7(g)(2).

We see no such difference, however, between job-site to job-site riding or driving and riding or driving to and from the job site and the yard. We have reviewed the Administrator's opinion of October 30, 1963, but find that it does not explain how one type of travel can be a different "kind" of work than another type of travel. The opinion

merely states that the Administrator will not question the collective bargaining determination that one form of travel was sufficiently different from another to qualify for treatment under 7(g)(2). Upon further consideration, we are of the opinion that this position is no longer supportable, since it is not reasonable to conclude that travel done at different times of the day is different work.

In addition to questions concerning section 7(g)(2), you ask if payments for travel time, where such travel would otherwise be considered nonwork time under FLSA, may be excluded from the regular rate. Section 778.320 of Interpretative Bulletin, Part 778 sets out the Department's interpretative position concerning the treatment of hours that would not be hours worked if not paid for. The agreement of the parties to provide compensation for such hours (e.g., "preliminary" and "postliminary" activities) may or may not convert them into hours worked, depending on whether or not it appears from all the pertinent facts that the parties have agreed to treat such time as hours worked. Where the parties have reasonably agreed to include as hours worked time devoted to such activities, payments for such hours will not have the mathematical effect of increasing or decreasing the regular rate of an employee if the hours are compensated at the same rate as other working hours. The same would be true even if the time was spent traveling on company trucks.

Your final two questions concern travel time as hours of work. The employees are required to report to the shop and travel to the job site on a company truck rather than going directly from home to the site of work. You have advised the Department's Office of the Solicitor that the employer requires the employees to appear at the shop in order to provide instructions as to the location of the day's work and to determine the composition of work crews for various jobs scheduled each day. If too few employees appear to provide full crews for all scheduled jobs, some work may need to be postponed. And if the employees are allowed to go directly from home to the job site, the employer cannot always count on having a fully operational crew for every job.

Travel time may be excluded by the Portal-to-Portal Act, 29 U.S.C. section 254, from compensable hours of work as time spent" … traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, …." However, an activity is a "principal activity," not covered by the Portal Act, if it is done at least in part for the benefit of the employer's business. Brennan v. Field, Inc., 495 F.2d 749 (lst Cir. 1974). Where an employee is required to report to a meeting place to receive instructions, the travel from the designated place to the work place is part of the day's work and must be counted as hours worked. (See Section 785.38 of Interpretative Bulletin, Part 785.) In this case the employees' attendance at the shop for purposes of a roll call and to receive instructions is necessary to the employer's operation. Such attendance is part of the employees' principal activities, and subsequent travel time to the job site is part of the day's work and therefore compensable.

In our view, Dolan v. Project Construction Corp., 558 F. Supp. 1308 (D. Colo. 1983), is distinguishable in that, according to the facts of that case, no instructions were generally given until arrival at the worksite. Furthermore, the requirement that the employees use

company buses as transportation to the worksite was based on security considerations and safety and traffic problems on the narrow, winding road leading to the project, factors not present in the situation you describe.

However, under the circumstances you described the employees' travel at the end of the day from the job sites to home appears to be ordinary work-to-home travel that does not constitute compensable hours of work. (See Section 785.35 of Interpretative Bulletin, Part 785.) An employee's voluntary travel back to the shop on a company truck would not change this conclusion.

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.

Sincerely,

Samuel D. Walker
Acting Administrator