

**FLSA-999**

July 28, 1982

This is in further reply to your letter of April 24, 1982, requesting an opinion on the application of section 13(b)(1) of the Fair Labor Standards Act to drivers employed by one of your clients.

You state your client's drivers pick-up and deliver to the client's warehouse defective television and stereo sets from customers within the State. At the warehouse, a mechanic examines the sets and if there is a defective part, it is removed. When a substantial number of parts are accumulated they are shipped back to the manufacturer who is located out-of-state. You would like to know if the overtime pay exemption contained in section 13(b)(1) of the Act applies to the drivers, since the defective parts move in interstate commerce.

Section 13(b)(1) of the Act provides a complete overtime pay exemption for any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act (MCA) of 1938. 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 in interstate or foreign commerce as outlined in Interpretative Bulletin, Part 782.

Whether transportation is interstate or intrastate under the MCA is determined by the essential character of the commerce, manifested by the shipper's fixed and persisting intent and is ascertained from all of the facts and circumstances surrounding the transportation. Southern Pacific Transportation Co. v. ICC, 565 F. 2d 615 (9th Cir. 1977).

The key to applying this test is to find out the intent of the shipper at the time the shipment starts. In your example, the shipment in question starts when the driver picks up the television or stereo set in the customer's home. The true intent cannot be known until the person controlling the shipment determines what the final destination will be. That person must decide whether the movement is to continue to an out-of-state destination or be a local movement.

Under the facts presented in your letter the decision on ultimate destination is not made until after the set arrives at the stop. With only five to ten parts being returned to manufacturers within a week it is clear that sets are sometime repaired at the shop without removal and return of parts. The driver, at the time of pick-up in the customer's home, does not know whether the set contains a defective part that will be returned to the out-of-state manufacturer. The intent at that time is only to bring the set to the shop for examination, an intrastate trip. We have been advised by the Federal Highway Administration of the U.S. Department of Transportation that the Secretary of Transportation would not assert jurisdiction under section 204 of the MCA, over the type of activity you describe. Consequently, the exemption contained in section 13(b)(1) of the Act would have no application to the drivers you have in mind.

If you should have any further questions concerning this matter do not hesitate to let us know.

Sincerely,

James L. Valin

Acting Assistant Administrator  
Wage Hour Division

William M. Otter  
Administrator

Enclosure