PART 782—EXEMPTION FROM MAXIMUM HOURS PROVISIONS FOR CERTAIN EMPLOYEES OF MOTOR CARRIERS

Sec.

AUTHORITY: 52 Stat. 1060, as amended; 29 U.S.C. 201 *et seq.*

SOURCE: 36 FR 21778, Nov. 13, 1971, unless otherwise noted.

§ 782.0 Introductory statement.

(a) Since the enactment of the Fair Labor Standards Act of 1938, the views of the Administrator of the Wage and Hour Division as to the scope and applicability of the exemption provided by section 13(b)(1) of the act have been expressed in interpretations issued from time to time in various forms. This part, as of the date of its publication in the FEDERAL REGISTER, supersedes and replaces such prior interpretations. Its purpose is to make available in one place general interpretations of the Administrator which will provide ''a practical guide to employers and employees as to how the office representing the public interest in enforcement of the law will seek to apply it.'' (*Skidmore* v. *Swift & Co.*, 323 U.S. 134)

(b) The interpretations contained in this part indicate, with respect to the scope and applicability of the exemption provided by section 13(b)(1) of the Fair Labor Standards Act, the construction of the law which the Secretary of Labor and the Administrator believe to be correct in the light of the decisions of the courts, the Interstate Commerce Commission, and since October 15, 1966, its successor, the Secretary of Transportation, and which will guide them in the performance of their administrative duties under the act unless and until they are otherwise directed by authoritative decisions of

the courts or conclude upon reexamination of an interpretation that it is incorrect.

(c) Public Law 89–670 (80 Stat. 931) transferred to and vested in the Secretary of Transportation all functions, powers, and duties of the Interstate Commerce Commission: (1) Under section 204 (a)(1) and (a)(2) to the extent they relate to qualifications and maximum hours of service of employees and safety of operations and equipment, and (2) under section 204(a)(5) of the Motor Carrier Act. The interpretations contained in this part are interpretations on which reliance may be placed as provided in section 10 of the Portal-to-Portal Act (Pub. L. 49, 80th Cong., first sess. (61 Stat. 84), discussed in part 790, statement on effect of Portal-to-Portal Act of 1947), so long as they remain effective and are not modified, amended, rescinded, or determined by judicial authority to be incorrect.

§ 782.1 Statutory provisions considered.

(a) Section 13(b)(1) of the Fair Labor Standards Act provides an exemption from the maximum hours and overtime requirements of section 7 of the act, but not from the minimum wage requirements of section 6. The exemption is applicable to 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 of 1935, (part II of the Interstate Commerce Act, 49 Stat. 546, as amended; 49 U.S.C. 304, as amended by Pub. L. 89–670, section 8e which substituted ''Secretary of Transportation'' for ''Interstate Commerce Commission''—Oct. 15, 1966) except that the exemption is not applicable to any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service solely by virtue of section 204(a)(3a) of part II of the Interstate Commerce Act. (Pub. L. 939, 84th Cong., second sess., Aug. 3, 1956, secs. 2 and 3) The Fair Labor Standards Act confers no authority on the Secretary of Labor or the Administrator to extend or restrict the scope of this exemption. It is settled by decisions of the U.S. Supreme Court that the applicability of the exemption to an employee otherwise entitled to the benefits of the Fair Labor Standards Act is determined exclusively by the existence of the power conferred under section 204 of the Motor Carrier Act to establish qualifications and maximum hours of service with respect to him. It is not material whether such qualifications and maximum hours of service have actually been established by the Secretary of Transportation; the controlling consideration is whether the employee comes within his power to do so. The exemption is not operative in the absence of such power, but an employee with respect to whom the Secretary of Transportation has such power is excluded, automatically, from the benefits of section 7 of the Fair Labor Standards Act. (*Southland Gasoline Co.* v. *Bayley*, 319 U.S. 44; *Boutell* v. *Walling*, 327 U.S. 463; *Levinson* v. *Spector Motor Service*, 330 U.S. 649; *Pyramid Motor Freight Corp.* v. *Ispass*, 330 U.S. 695; *Morris* v. *McComb*, 332 U.S. 422)

(b) Section 204 of the Motor Carrier Act, 1935, provides that it shall be the duty of the Interstate Commerce Commission (now that of the Secretary of Transportation (see § 782.0(c))) to regulate common and contract carriers by motor vehicle as provided in that act, and that ''to that end the Commission may establish reasonable requirements with respect to * * * qualifications and maximum hours of service of employees, and safety of operation and equipment.'' (Motor Carrier Act, sec. 204(a)(1)(2), 49 U.S.C. 304(a)(1)(2)) Section 204 further provides for the establishing of similar regulations with respect to private carriers of property by motor vehicle, if need therefor is found. (Motor Carrier Act, sec. 204(a)(3), 49 U.S.C. 304(a)(3))

(c) Other provisions of the Motor Carrier Act which have a bearing on the scope of section 204 include those which define common and contract carriers by motor vehicle, motor carriers, private carriers of property by motor vehicle (Motor Carrier Act, sec. 203(a)(14), (15), (16), (17), 49 U.S.C. sec. 303(a)(14), (15), (16), (17)) and motor vehicle (Motor Carrier Act, sec. 203(a)(13)); those which confer regulatory powers

with respect to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce (Motor Carrier Act, sec. 202(a)), as defined in the Motor Carrier Act, sec. 203(a) (10), (11), and reserve to each State the exclusive exercise of the power of regulation of intrastate commerce by motor carriers on its highways (Motor Carrier Act, sec. 202(b)); and those which expressly make section 204 applicable to certain transportation in interstate or foreign commerce which is in other respects excluded from regulation under the act. (Motor Carrier Act, sec. 202(c))

§ 782.2 Requirements for exemption in general.

(a) The exemption of an employee from the hours provisions of the Fair Labor Standards Act under section 13(b)(1) depends both on the class to which his employer belongs and on the class of work involved in the employee's job. The power of the Secretary of Transportation to establish maximum hours and qualifications of service of employees, on which exemption depends, extends to those classes of employees and those only who: (1) Are employed by carriers whose transportation of passengers or property by motor vehicle is subject to his jurisdiction under section 204 of the Motor Carrier Act (*Boutell* v. *Walling*, 327 U.S. 463; *Walling* v. *Casale*, 51 F. Supp. 520; and see Ex parte Nos. MC–2 and MC–3, in the Matter of Maximum Hours of Service of Motor Carrier Employees, 28 M.C.C. 125, 132), and (2) engage in activities of a character directly affecting the safety of operation of motor vehicles in the transportation on the public highways of passengers or property in interstate or foreign commerce within the meaning of the Motor Carrier Act. *United States* v. *American Trucking Assns.*, 310 U.S. 534; *Levinson* v. *Spector Motor Service*, 330 U.S. 649; Ex parte No. MC–28, 13 M.C.C. 481; Ex parte Nos. MC–2 and MC–3, 28 M.C.C. 125; *Walling* v. *Comet Carriers*, 151 F. (2d) 107 (C.A. 2).

(b)(1) The carriers whose transportation activities are subject to the Secretary of Transportation jurisdiction are specified in the Motor Carrier Act itself (see § 782.1). His jurisdiction over private carriers is limited by the statute to private carriers of property by motor vehicle, as defined therein, while his jurisdiction extends to common and contract carriers of both passengers and property. See also the discussion of special classes of carriers in § 782.8. And see paragraph (d) of this section. The U.S. Supreme Court has accepted the Agency determination, that activities of this character are included in the kinds of work which has been defined as the work of drivers, driver's helpers, loaders, and mechanics (see §§ 782.3 to 782.6) employed by such carriers, and that no other classes of employees employed by such carriers perform duties directly affecting such ''safety of operation.'' Ex parte No. MC–2, 11 M.C.C. 203; Ex parte No. MC–28, 13 M.C.C. 481; Ex parte No. MC–3, 23 M.C.C. 1; Ex parte Nos. MC–2 and MC–3, 28 M.C.C. 125; *Levinson* v. *Spector Motor Service*, 330 U.S. 649; *Pyramid Motor Freight Corp.* v. *Ispass*, 330 U.S. 695; *Southland Gasoline Co.* v. *Bayley*, 319 U.S. 44. See also paragraph (d) of this section and §§ 782.3 through 782.8.

(2) The exemption is applicable, under decisions of the U.S. Supreme Court, to those employees and those only whose work involves engagement in activities consisting wholly or in part of a class of work which is defined: (i) As that of a driver, driver's helper, loader, or mechanic, and (ii) as directly affecting the safety of operation of motor vehicles on the public highways in transportation in interstate or foreign commerce within the meaning of the Motor Carrier Act. *Pyramid Motor Freight Corp.* v. *Ispass*, 330 U.S. 695; *Levinson* v. *Spector Motor Service*, 330 U.S. 649; *Morris* v. *McComb*, 332 U.S. 442. Although the Supreme Court recognized that the special knowledge and experience required to determine what classifications of work affects safety of operation of interstate motor carriers was applied by the Commission, it has made it clear that the determination whether or not an individual employee is within any such classification is to be determined by judicial process. (*Pyramid Motor Freight Corp.* v. *Ispass*, 330 U.S. 695; Cf. *Missel* v. *Overnight Motor Transp.*, 40 F. Supp. 174 (D. Md.), reversed on other grounds 126 F. (2d) 98 (C.A. 4), affirmed 316 U.S. 572; *West* v.

Smoky Mountains Stages, 40 F. Supp. 296 (N.D. Ga.); *Magann* v. *Long's Baggage Transfer Co.*, 39 F. Supp. 742 (W.D. Va.); *Walling* v. *Burlington Transp. Co.* (D. Nebr.), 5 W.H. Cases 172, 9 Labor Cases par. 62,576; *Hager* v. *Brinks, Inc.*, 6 W.H. Cases 262 (N.D. Ill.)) In determining whether an employee falls within such an exempt category, neither the name given to his position nor that given to the work that he does is controlling (*Pyramid Motor Freight Corp.* v. *Ispass*, 330 U.S. 695; *Porter* v. *Poindexter*, 158 F.—(2d) 759 (C.A. 10); *Keeling* v. *Huber & Huber Motor Express*, 57 F. Supp. 617 (W.D. Ky.); *Crean* v. *Moran Transp. Lines* (W.D. N.Y.) 9 Labor Cases, par. 62,416 (see also earlier opinion in 54 F. Supp. 765)); what is controlling is the character of the activities involved in the performance of his job.

(3) As a general rule, if the bona fide duties of the job performed by the employee are in fact such that he is (or, in the case of a member of a group of drivers, driver's helpers, loaders, or mechanics employed by a common carrier and engaged in safety-affecting occupations, that he is likely to be) called upon in the ordinary course of his work to perform, either regularly or from time to time, safety-affecting activities of the character described in paragraph (b)(2) of this section, he comes within the exemption in all workweeks when he is employed at such job. This general rule assumes that the activities involved in the continuing duties of the job in all such workweeks will include activities which have been determined to affect directly the safety of operation of motor vehicles on the public highways in transportation in interstate commerce. Where this is the case, the rule applies regardless of the proportion of the employee's time or of his activities which is actually devoted to such safety-affecting work in the particular workweek, and the exemption will be applicable even in a workweek when the employee happens to perform no work directly affecting ''safety of operation.'' On the other hand, where the continuing duties of the employee's job have no substantial direct effect on such safety of operation or where such safety-affecting activities are so trivial, casual, and insignificant as to be de minimis, the exemption will not apply to him in any workweek so long as there is no change in his duties. (*Pyramid Motor Freight Corp.* v. *Ispass*, 330 U.S. 695; *Morris* v. *McComb*, 332 U.S. 422; *Levinson* v. *Spector Motor Service*, 330 U.S. 649; *Rogers Cartage Co.* v. *Reynolds*, 166 F. (2d) 317 (C.A. 6); *Opelika Bottling Co.* v. *Goldberg*, 299 F. (2d) 37 (C.A. 5); *Tobin* v. *Mason & Dixon Lines, Inc.*, 102 F. Supp. 466 (E.D. Tenn.)) If in particular workweeks other duties are assigned to him which result, in those workweeks, in his performance of activities directly affecting the safety of operation of motor vehicles in interstate commerce on the public highways, the exemption will be applicable to him those workweeks, but not in the workweeks when he continues to perform the duties of the non-safety-affecting job.

(4) Where the same employee of a carrier is shifted from one job to another periodically or on occasion, the application of the exemption to him in a particular workweek is tested by application of the above principles to the job or jobs in which he is employed in that workweek. Similarly, in the case of an employee of a private carrier whose job does not require him to engage regularly in exempt safety-affecting activities described in paragraph (b)(1) of this section and whose engagement in such activities occurs sporadically or occasionally as the result of his work assignments at a particular time, the exemption will apply to him only in those workweeks when he engages in such activities. Also, because the jurisdiction of the Secretary of Transportation over private carriers is limited to carriers of property (see paragraph (b)(1) of this section) a driver, driver's helper, loader, or mechanic employed by a private carrier is not within the exemption in any workweek when his safety-affecting activities relate only to the transporation of passengers and not to the transportation of property.

(c) The application of these principles may be illustrated as follows:

(1) In a situation considered by the U.S. Supreme Court, approximately 4 percent of the total trips made by drivers employed by a common carrier by motor vehicle involved in the hauling of interstate freight. Since it appeared

that employer, as a common carrier, was obligated to take such business, and that any driver might be called upon at any time to perform such work, which was indiscriminately distributed among the drivers, the Court considered that such trips were a natural, integral, and apparently inseparable part of the common carrier service performed by the employer and driver employees. Under these circumstances, the Court concluded that such work, which directly affected the safety of operation of the vehicles in interstate commerce, brought the entire classification of drivers employed by the carrier under the power of the Interstate Commerce Commission to establish qualifications and maximum hours of service, so that all were exempt even though the interstate driving on particular employees was sporadic and occasional, and in practice some drivers would not be called upon for long periods to perform any such work. (*Morris* v. *McComb*, 332 U.S. 422)

(2) In another situation, the U.S. Court of Appeals (Seventh Circuit) held that the exemption would not apply to truckdrivers employed by a private carrier on interstate routes who engaged in no safety-affecting activities of the character described above even though other drivers of the carrier on interstate routes were subject to the jurisdiction of the Motor Carrier Act. The court reaffirmed the principle that the exemption depends not only upon the class to which the employer belongs but also the activities of the individual employee. (*Goldberg* v. *Faber Industries*, 291 F. (2d) 232)

(d) The limitations, mentioned in paragraph (a) of this section, on the regulatory power of the Secretary of Transportation (as successor to the Interstate Commerce Commission) under section 204 of the Motor Carrier Act are also limitations on the scope of the exemption. Thus, the exemption does not apply to employees of carriers who are not carriers subject to his jurisdiction, or to employees of noncarriers such as commercial garages, firms engaged in the business of maintaining and repairing motor vehicles owned and operated by carriers, firms engaged in the leasing and renting of motor vehicles to carriers and in keeping such vehicles in condition for service pursuant to the lease or rental agreements. (*Boutell* v. *Walling*, 327 U.S. 463; *Walling* v. *Casale*, 51 F. Supp. 520). Similarly, the exemption does not apply to an employee whose job does not involve engagement in any activities which have been defined as those of drivers, drivers' helpers, loaders, or mechanics, and as directly affecting the ''safety of operation'' of motor vehicles. (*Pyramid Motor Freight Corp*. v. *Ispass*, 330 U.S. 695; *Levinson* v. *Spector Motor Service*, 330 U.S. 649; *United States* v. *American Trucking Assn*., 310 U.S. 534; *Gordon's Transports* v. *Walling*, 162 F. (2d) 203 (C.A. 6); *Porter* v. *Poindexter*, 158 F. (2d) 759 (C.A. 10)) Except insofar as the Commission has found that the activities of drivers, drivers' helpers, loaders, and mechanics, as defined by it, directly affect such ''safety of operation,'' it has disclaimed its power to establish qualifications of maximum hours of service under section 204 of the Motor Carrier Act. (*Pyramid Motor Freight Corp*. v. *Ispass*, 330 U.S. 695) *Safety of operation* as used in section 204 of the Motor Carrier Act means ''the safety of operation of motor vehicles in the transportation of passengers or property in interstate or foreign commerce, and that alone.'' (Ex parte Nos. MC–2 and MC–3 (Conclusions of Law No. 1), 28 M.C.C. 125, 139) Thus the activities of drivers, drivers' helpers, loaders, or mechanics in connection with transportation which is not in interstate of foreign commerce within the meaning of the Motor Carrier Act provide no basis for exemption under section 13(b)(1) of the Fair Labor Standards Act. (*Walling*, v. *Comet Carriers*, 151 F. (2d) 107 (C.C.A. 2); *Hansen* v. *Salinas Valley Ice Co*. (Cal. App.) 144 P. (2d) 896; *Reynolds* v. *Rogers Cartage Co*., 71 F. Supp. 870 (W.D. Ky.), reversed on other grounds, 166 F. (d) 317 (C.A. 6); *Earle* v. *Brinks, Inc*., 54 F. Supp. 676 (S.D. N.Y.); *Walling* v. *Villaume Box & Lumber Co*., 58 F. Supp. 150 (D. Minn.); *Hager* v. *Brinks, Inc*., 11 Labor Cases, par. 63,296 (N.D. Ill.), 6 W.H. Cases 262; *Walling* v. *DeSoto Creamery & Produce Co*., 51 F. Supp. 938 (D. Minn.); *Dallum* v. *Farmers Cooperative Trucking Assn*., 46 F. Supp. 785 (D. Minn.); *McLendon* v. *Bewely Mills* (N.D. Tex.); 3 Labor Cases, par. 60,247, 1 W.H. Cases 934; *Gibson* v.

Glasgow (Tenn. Sup. Ct.), 157 S.W. (2d) 814; cf. *Morris* v. *McComb*, 332 U.S. 422. See also §782.1 and §§782.7 through 782.8.)

(e) The jurisdiction of the Secretary of Transportation under section 204 of the Motor Carrier Act relates to safety of operation of motor vehicles only, and ''to the safety of operation of such vehicles on the highways of the country, and that alone.'' (Ex parte Nos. MC–2 and MC–3, 28 M.C.C. 125, 192. See also *United States* v. *American Trucking Assns.*, 319 U.S. 534, 548.) Accordingly, the exemption does not extend to employees merely because they engage in activities affecting the safety of operation of motor vehicles operated on private premises. Nor does it extend to employees engaged solely in such activities as operating freight and passenger elevators in the carrier's terminals of moving freight or baggage therein or the docks or streets by hand trucks, which activities have no connection with the actual operation of motor vehicles. (*Gordon's Transport* v. *Walling*, 162 F. (2d) 203 (C.A. 6), certorari denied 322 U.S. 774; *Walling* v. *Comet Carriers*, 57 F. Supp. 1018, affirmed, 151 F. (2d) 107 (C.A. 2), certiorari dismissed, 382 U.S. 819; *Gibson* v. *Glasgow* (Tenn. Sup. Ct.), 157 S.W. (2d) 814; Ex parte Nos. MC–2 and MC–3, 28 M.C.C. 125, 128. See also Pyramid Motor Freight *Corp.* v. *Ispass*, 330 U.S. 695; *Levinson* v. *Spector Motor Serv.*, 330 U.S. 949.)

(f) Certain classes of employees who are not within the definitions of drivers, driver's helpers, loaders, and mechanics are mentioned in §§782.3–782.6, inclusive. Others who do not come within these definitions include the following, whose duties are considered to affect safety of operation, if at all, only indirectly; stenographers (including those who write letters relating to safety or prepare accident reports); clerks of all classes (including rate clerks, billing clerks, clerks engaged in preparing schedules, and filing clerks in charge of filing accident reports, hours-of-service records, inspection reports, and similar documents); foremen, warehousemen, superintendents, salesmen, and employees acting in an executive capacity. (Ex parte Nos. MC–2 and MC–3, 28 M.C.C. 125; Ex parte No. MC–28, 13 M.C.C. 481. But see §§782.5(b) and 782.6(b) as to certain foremen and superintendents.) Such employees are not within the section 13(b)(1) exemption. (*Overnight Motor Transp. Co.* v. *Missel*, 316 U.S. 572 (rate clerk who performed incidental duties as cashier and dispatcher); *Levinson* v. *Spector Motor Service*, 330 U.S. 649; *Porter* v. *Poindexter*, 158 F. (2d) 759 (C.A. 10) (checker of freight and bill collector); *Potashnik, Local Truck System* v. *Archer* (Ark. Sup. Ct.), 179 S.W. (2d) 696 (night manager who did clerical work on waybills, filed day's accumulation of bills and records, billed out local accumulation of shipments, checked mileage on trucks and made written reports, acted as night dispatcher, answered telephone calls, etc.).)

§782.3 Drivers.

(a) A ''driver,'' as defined for Motor Carrier Act jurisdiction (49 CFR parts 390–395; Ex parte No. MC–2, 3 M.C.C. 665; Ex parte No. MC–3, 23 M.C.C.1; Ex parte No. MC–4, 1 M.C.C. 1), is an individual who drives a motor vehicle in transporation which is, within the meaning of the Motor Carrier Act, in interstate or foreign commerce. (As to what is considered transportation in interstate or foreign commerce within the meaning of the Motor Carrier Act, see §782.7). This definition does not require that the individual be engaged in such work at all times; it is recognized that even full-duty drivers devote some of their working time to activities other than such driving. ''Drivers,'' as thus officially defined, include, for example, such partial-duty drivers as the following, who drive in interstate or foreign commerce as part of a job in which they are required also to engage in other types of driving or nondriving work: Individuals whose driving duties are concerned with transportation some of which is in intrastate commerce and some of which is in interstate or foreign commerce within the meaning of the Motor Carrier Act; individuals who ride on motor vehicles engaged in transportation in interstate or foreign commerce and act as assistant or relief drivers of the vehicles in addition to helping with loading, unloading, and similar work; drivers of chartered buses or of farm trucks who

have many duties unrelated to driving or safety of operation of their vehicles in interstate transportation on the highways; and so-called ''driver-salesmen'' who devote much of their time to selling goods rather than to activities affecting such safety of operation. (*Levinson* v. *Spector Motor Service*, 300 U.S. 649; *Morris* v. *McComb*, 332 U.S. 422; *Richardson* v. *James Gibbons Co*., 132 F. (2d) 627 (C.A. 4), affirmed 319 U.S. 44; *Gavril* v. *Kraft Cheese Co*., 42 F. Supp. 702 (N.D. Ill.); *Walling* v. *Craig*, 53 F. Supp. 479 (D. Minn.); *Vannoy* v. *Swift & Co*. (Mo. S. Ct.), 201 S.W. (2d) 350; Ex parte No. MC–2, 3 M.C.C. 665; Ex parte No. MC–3, 23 M.C.C. 1; Ex parte Nos. MC–2 and MC–3, 28 M.C.C. 125; Ex parte No. MC–4, 1 M.C.C. 1. Cf. *Colbeck* v. *Dairyland Creamery Co*. (S.D. Supp. Ct.), 17 N.W. (2d) 262, in which the court held that the exemption did not apply to a refrigeration mechanic by reason solely of the fact that he crossed State lines in a truck in which he transported himself to and from the various places at which he serviced equipment belonging to his employer.)

(b) The work of an employee who is a full-duty or partial-duty ''driver,'' as the term ''driver'' is above defined, directly affects ''safety of operation'' within the meaning of section 204 of the Motor Carrier Act whenever he drives a motor vehicle in interstate or foreign commerce within the meaning of that act. (*Levinson* v. *Spector Motor Service*, 330 U.S. 649, citing *Richardson* v. *James Gibbons Co*., 132 F. (2d) 627 (C.A. 4), affirmed 319 U.S. 44; *Morris* v. *McComb*, 332 U.S. 422; Ex parte No. MC–28, 13 M.C.C. 481, 482, 488; Ex parte Nos. MC–2 and MC–3, 28 M.C.C. 125, 139 (Conclusion of Law No. 2). See also Ex parte No. MC–2, 3 M.C.C. 665; Ex parte No. MC–3, 23 M.C.C. 1; Ex parte No. MC–4, 1 M.C.C. 1.) The Secretary has power to establish, and has established, qualifications and maximum hours of service for such drivers employed by common and contract carriers or passengers or property and by private carriers of property pursuant to section 204, of the Motor Carrier Act. (See Ex parte No. MC–4, 1 M.C.C. 1; Ex parte No. MC–2, 3 M.C.C. 665; Ex parte No. MC–3, 23 M.C.C. 1; Ex parte No. MC–28, 13 M.C.C. 481; *Levinson* v. *Spector Motor Service*, 330 U.S. 649; *Southland Gasoline Co*. v. *Bayley*, 319 U.S. 44; *Morris* v. *McComb*, 332 U.S. 422; Safety Regulations (Carriers by Motor Vehicle), 49 CFR parts 390, 391, 395) In accordance with principles previously stated (see §782.2), such drivers to whom this regulatory power extends are, accordingly, employees exempted from the overtime requirements of the Fair Labor Standards Act by section 13(b)(1). (*Southland Gasoline Co*. v. *Bayley*, 319 U.S. 44; *Levinson* v. *Spector Motor Service*, 330 U.S. 649; *Morris* v. *McComb*, 332 U.S. 422; *Rogers Cartage Co*. v. *Reynolds*, 166 F. (2d) 317 (C.A. 6). This does not mean that an employee of a carrier who drives a motor vehicle is exempted as a ''driver'' by virtue of that fact alone. He is not exempt if his job never involves transportation in interstate or foreign commerce within the meaning of the Motor Carrier Act (see §§782.2 (d) and (e), 782.7, and 782.8, or if he is employed by a private carrier and the only such transportation called for by his job is not transportation of property. (See §782.2. See also Ex parte No. MC–28, 13 M.C.C. 481, Cf. *Colbeck* v. *Dairyland Creamery Co*. (S. Ct. S.D.), 17 N.W. (2d) 262 (driver of truck used only to transport himself to jobsites, as an incident of his work in servicing his employer's refrigeration equipment, held non exempt).) It has been held that so-called ''hostlers'' who ''spot'' trucks and trailers at a terminal dock for loading and unloading are not exempt as drivers merely because as an incident of such duties they drive the trucks and tractors in and about the premises of the trucking terminal. (*Keegan* v. *Ruppert* (S.D. N.Y.), 7 Labor Cases, par. 61,726 6 Wage Hour Rept. 676, cf. *Walling* v. *Silver Fleet Motor Express*, 67 F. Supp. 846)

§782.4 Drivers' helpers.

(a) A Driver's ''helper,'' as defined for Motor Carrier Act jurisdiction (Ex Parte Nos. MC–2 and MC–3, 28 M.C.C. 125, 135, 136, 138, 139), is an employee other than a driver, who is required to ride on a motor vehicle when it is being operated in interstate or foreign commerce within the meaning of the Motor Carrier Act. (The term does not include employees who ride on the vehicle and act as assistants or relief drivers. Ex parte Nos. MC–2 and MC–3, supra. See

§ 782.3.) This definition has classified all such employees, including armed guards on armored trucks and conductorettes on buses, as ''helpers'' with respect to whom he has power to establish qualifications and maximum hours of service because of their engagement in some or all of the following activities which, in his opinion, directly affect the safety of operation of such motor vehicles in interstate or foreign commerce (Ex parte Nos. MC–2 and MC–3, 28 M.C.C. 125, 135–136): Assist in loading the vehicles (they may also assist in unloading (Ex parte Nos. MC–2 and MC–3, supra), an activity which has been held not to affect ''safety of operation,'' see § 782.5(c); as to what it meant by ''loading'' which directly affects ''safety of operation,'' see § 782.5(a)); dismount when the vehicle approaches a railroad crossing and flag the driver across the tracks, and perform a similar duty when the vehicle is being turned around on a busy highway or when it is entering or emerging from a driveway; in case of a breakdown: (1) Place the flags, flares, and fuses as required by the safety regulations. (2) go for assistance while the driver protects the vehicle on the highway, or vice versa, or (3) assist the driver in changing tires or making minor repairs; and assist in putting on or removing chains.

(b) An employee may be a ''helper'' under the official definition even though such safety-affecting activities constitute but a minor part of his job. Thus, although the primary duty of armed guards on armored trucks is to protect the valuables in the case of attempted robberies, they are classified as ''helpers'' where they ride on such trucks being operated in interstate or foreign commerce, because, in the case of an accident or other emergency and in other respects, they act in a capacity somewhat similar to that of the helpers described in the text. Similarly, conductorettes on buses whose primary duties are to see to the comfort of the passengers are classified as ''helpers'' whose such buses are being operated in interstate or foreign commerce, because in instances when accidents occur, they help the driver in obtaining aid and protect the vehicle from oncoming traffic.

(c) In accordance with principles previously stated (see § 782.2), the section 13(b)(1) exemption applies to employees who are, under the Secretary of Transporation's definitions, engaged in such activities as full- or partial-duty ''helpers'' on motor vehicles being operated in transporation in interstate or foreign commerce within the meaning of the Motor Carrier Act. (*Ispass* v. *Pyramid Motor Freight Corp.*, 152 F. (2d) 619 (C.A. 2); *Walling* v. *McGinley Co.* (E.D. Tenn.), 12 Labor Cases, par. 63,731, 6 W.H. Cases 916. See also *Levinson* v. *Spector Motor Service*, 330 U.S. 649; *Pyramid Motor Freight Corp.* v. *Ispass*, 330 U.S. 695; *Dallum* v. *Farmers, Coop Trucking Assn.* 46 F. Supp. 785 (D. Minn.).) The exemption has been held inapplicable to so-called helpers who ride on motor vehicles but do not engage in any of the activities of ''helpers'' which have been found to affect directly the safety of operation of such vehicles in interstate or foreign commerce. (*Walling* v. *Gordon's Transports* (W.D. Tenn.) 10 Labor Cases par. 62,934, 6 W.H. Cases 831, affirmed 162 F. (2d) 203 (C.A. 6), certiorari denied, 332 U.S. 774 (helpers on city ''pickup and delivery trucks'' where it was not shown that the loading in any manner affected safety of operation and the helper's activities were ''in no manner similar'' to those of a driver's helper in over-the-road operation).) It should be noted also that an employee, to be exempted as a driver's ''helper'' under the Secretary's definitions, must be ''required'' as part of his job to ride on a motor vehicle when it is being operated in interstate or foreign commerce; an employee of a motor carrier is not exempted as a ''helper'' when he rides on such a vehicle, not as a matter of fixed duty, but merely as a convenient means of getting himself to, from, or between places where he performs his assigned work. (See *Pyramid Motor Freight Corp.* v. *Ispass*, 330 U.S. 695, modifying, on other grounds, 152 F. (2d) 619 (C.A. 2).)

§ 782.5 Loaders.

(a) A ''loader,'' as defined for Motor Carrier Act jurisdiction (Ex parte Nos. MC–2 and MC–3, 28 M.C.C. 125, 133, 134, 139), is an employee of a carrier subject to section 204 of the Motor Carrier Act

(other than a driver or driver's helper as defined in §§782.3 and 782.4) whose duties include, among other things, the proper loading of his employer's motor vehicles so that they may be safely operated on the highways of the country. A ''loader'' may be called by another name, such as ''dockman,'' ''stacker,'' or ''helper,'' and his duties will usually also include unloading and the transfer of freight between the vehicles and the warehouse, but he engages, as a ''loader,'' in work directly affecting ''safety of operation'' so long as he has responsibility when such motor vehicles are being loaded, for exercising judgment and discretion in planning and building a balanced load or in placing, distributing, or securing the pieces of freight in such a manner that the safe operation of the vehicles on the highways in interstate or foreign commerce will not be jeopardized. (*Levinson* v. *Spector Motor Service*, 300 U.S. 649; *Pyramid Motor Freight Corp.* v. *Ispass*, 330 U.S. 695; *Walling* v. *Gordon's Transport* (W.D. Tenn.), 10 Labor Cases, par. 62,934, affirmed 162 F. (2d) 203 (C.A. 6), certiorari denied 332 U.S. 774; *Walling* v. *Huber & Huber Motor Express*, 67 F. Supp. 855; Ex parte Nos. MC–2 and MC–3, 28 M.C.C. 125, 133, 134)

(b) The section 13(b)(1) exemption applies, in accordance with principles previously stated (see §782.2), to an employee whose job involves activities consisting wholly or in part of doing, or immediately directing, a class of work defined: (1) As that of a loader, and (2) as directly affecting the safety of operation of motor vehicles in interstate or foreign commerce within the meaning of the Motor Carrier Act, since such an employee is an employee with respect to whom the Secretary of Transporation has power to establish qualifications and maximum hours of service. (*Levinson* v. *Spector Motor Service*, 330 U.S. 649; *Pyramid Motor Freight Corp.* v. *Ispass*, 330 U.S. 695; *Walling* v. *Silver Fleet Motor Express*, 67 F. Supp. 846; *Walling* v. *Huber & Huber Motor Express*, 67 F. Supp. 855; *Walling* v. *Gordon's Transports* (W.D. Tenn.); 10 Labor Cases, par. 62,934, affirmed 162 F. (2d) 203 (C.A. 6) certiorari denied 332 U.S. 774; *Tinerella* v. *Des Moines Transp. Co.*, 41 F. Supp. 798.) Where a checker, foreman, or other supervisor plans and immediately directs the proper loading of a motor vehicle as described above, he may come within the exemption as a partial-duty loader. (*Levinson* v. *Spector Motor Service*, 330 U.S. 649; *Walling* v. *Gordon's Transports* (W.D. Tenn.), 10 Labor Cases, par. 62,934; affirmed 162 F. (2d) 203 (C.A. 6), certiorari denied 332 U.S. 774; *Walling* v. *Huber & Huber Motor Express*, 67 F. Supp. 885; *Walling* v. *Silver Fleet Motor Express*, 67 F. Supp. 846; *Crean* v. *Moran Transporation Lines*, 57 F. Supp. 212 (W.D. N.Y.). See also 9 Labor Cases, par. 62,416; *Walling* v. *Commercial Motor Freight* (S.D. Ind.), 11 Labor Cases, par. 63,451; *Hogla* v. *Porter* (E.D. Okla.), 11 Labor Cases, par. 63,389 6 W. H. Cases 608.)

(c) An employee is not exempt as a loader where his activities in connection with the loading of motor vehicles are confined to classes of work other than the kind of loading described above, which directly affects ''safety of operation.'' (*Pyramid Motor Freight Corp.* v. *Ispass*, 330 U.S. 695; *Levinson* v. *Spector Motor Service*, 330 U.S. 649) The mere handling of freight at a terminal, before or after loading, or even the placing of certain articles of freight on a motor carrier truck may form so trivial, casual, or occasional a part of an employee's activities, or his activities may relate only to such articles or to such limited handling of them, that his activities will not come within the kind of ''loading'' which directly affects ''safety of operation.'' Thus the following activities have been held to provide no basis for exemption: Unloading; placing freight in convenient places in the terminal, checking bills of lading; wheeling or calling freight being loaded or unloaded; loading vehicles for trips which will not involve transportation in interstate or foreign commerce within the meaning of the Motor Carrier Act; and activities relating to the preservation of the freight as distinguished from the safety of operation of the motor vehicles carrying such freight on the highways. (*Pyramid Motor Freight Corp.* v. *Ispass*, 330 U.S. 695; *Levinson* v. *Spector Motor Service*, 330 U.S. 649; *Porter* v. *Poindexter*, 158 F. (2d) 759 (C.A. 10); *McKeown* v. *Southern Calif. Freight Forwarders*, 49 F. Supp. 543; *Walling* v. *Gordon's Transports* (W.D.

Tenn.), 10 Labor Cases, par. 62,934, affirmed 162 F. (2d) 203 (C.A. 6), certiorari denied 332 U.S. 774; *Walling* v. *Huber & Huber Motor Express*, 67 F. Supp. 855; *Walling* v. *Silver Fleet Motor Express*, 67 F. Supp. 846; *Crean* v. *Moran Transp. Lines*, 50 F. Supp. 107, 54 F. Supp. 765 (cf. 57 F. Supp. 212); *Gibson* v. *Glasgow* (Tenn. Sup. Ct.) 157 S.W. (2d) 814. See also *Keeling* v. *Huber & Huber Motor Express*, 57 F. Supp. 617.) As is apparent from opinion in Ex parte Nos. MC–2 and MC–3, 28 M.C.C. 125, red caps of bus companies engaged in loading baggage on buses are not loaders engaged in work directly affecting safety of operation of the vehicles. In the same opinion, it is expressly recognized that there is a class of freight which, because it is light in weight, probably could not be loaded in a manner which would adversely affect ''safety of operations.'' Support for this conclusion is found in *Wirtz* v. *C&P Shoe Corp.* 335 F. (2d) 21 (C.A. 5), wherein the court held the loading of boxes of shoes, patterned on the last in, first out principle clearly was not of a safety affecting character ''in view of the light weight of the cargo involved.'' In the case of coal trucks which are loaded from stockpiles by the use of an electric bridge crane and a mechanical conveyor, it has been held that employees operating such a crane or conveyor in the loading process are not exempt as ''loaders'' under section 13(b)(1). (*Barrick* v. *South Chicago Coal & Dock Co.* (N.D. Ill.), 8 Labor Cases, par. 62,242, affirmed 149 F. (2d) 960 (C.A. 7).) It seems apparent from the foregoing discussion that an employee who has no responsibility for the proper loading of a motor vehicle is not within the exemption as a ''loader'' merely because he furnishes physical assistance when necessary in loading heavy pieces of freight, or because he deposits pieces of freight in the vehicle for someone else to distribute and secure inplace, or even because he does the physical work of arranging pieces of freight in the vehicle where another employee tells him exactly what to do in each instance and he is given no share in the exercise of discretion as to the manner in which the loading is done. (See *Pyramid Motor Freight Corp.* v. *Ispass*, 330 U.S. 695; *Yellow Transit Freight Lines Inc.* v. *Balven*, 320 F. (2d) 495 (C.A. 8); *Foremost Dairies* v. *Ivey*, 204 F. (2d) 186 (C.A. 5); *Ispass* v. *Pyramid Motor Freight Corp.*, 78 F. Supp. 475 (S.D. N.Y.); *Mitchell* v. *Meco Steel Supply Co.*, 183 F. Supp. 779 (S.D. Tex.); *Garton* v. *Sanders Transfer & Storage Co.*, 124 F. Supp. 84 (M.D. Tenn.); *McKeown* v. *Southern Calif. Freight Forwarders*, 49 F. Supp. 543; *Walling* v. *Gordon's Transports* (W.D. Tenn.) 10 Labor Cases, par. 62,934, affirmed 162 F. (2d) 203 (C.A. 6), certiorari denied 332 U.S. 774; *Crean* v. *Moran Transporation Lines*, 50 F. Supp. 107 (see also further opinion in 54 F. Supp. 765, and cf. the court's holding in 57 F. Supp. 212 with *Walling* v. *Gordon's Transports*, cited above). See also *Levinson* v. *Spector Motor Service*, 330 U.S. 649.) Such activities would not seem to constitute the kind of ''loading'' which directly affects the safety of operation of the loaded vehicle on the public highways, under the official definitions. (See Ex parte Nos. MC–2 and MC–3, 28 M.C.C. 125, 133, 134).

§ 782.6 Mechanics.

(a) A ''mechanic,'' for purposes of safety regulations under the Motor Carrier Act is an employee who is employed by a carrier subject to the Secretary's jurisdiction under section 204 of the Motor Carrier Act and whose duty it is to keep motor vehicles operated in interstate or foreign commerce by his employer in a good and safe working condition. (Ex parte, Nos. MC–2 and MC–3, 28 M.C.C. 125, 132, 133. Ex parte No. MC–40 (Sub. No. 2), 88 M.C.C. 710 (repair of refrigeration equipment). See also *Morris* v. *McComb*, 332 U.S. 422.) It has been determined that the safety of operation of such motor vehicles on the highways is directly affected by those activities of mechanics, such as keeping the lights and brakes in a good and safe working condition, which prevent the vehicles from becoming potential hazards to highway safety and thus aid in the prevention of accidents. The courts have held that mechanics perform work of this character where they actually do inspection, adjustment, repair or maintenance work on the motor vehicles themselves (including trucks, tractors and trailers, and buses) and are, when so engaged, directly responsible for creating or maintaining physical conditions essential to the safety

of the vehicles on the highways through the correction or prevention of defects which have a direct causal connection with the safe operation of the unit as a whole. (*Walling* v. *Silver Bros.*, 136 F. (2d) 168 (C.A. 1); *McDuffie* v. *Hayes Freight Lines*, 71 F. Supp. 755; *Walling* v. *Silver Fleet Motor Express*, 67 F. Supp. 846; *Keeling* v. *Huber & Huber Motor Express*, 57 F. Supp. 617; *Walling* v. *Huber & Huber Motor Express*, 67 F. Supp. 855; *Tinerella* v. *Des Moines Transp. Co.*, 41 F. Supp. 798; *Robbins* v. *Zabarsky*, 44 F. Supp. 867; *West* V. *Smoky Mt. Stages*, 40 F. Supp. 296; *Walling* v. *Cumberland & Liberty Mills Co.* (S.D. Fla.), 6 Labor Cases, par. 61,184; *Esibill* v. *Marshall* (D. N.J.), 6 Labor Cases, par. 61,256; *Keegan* v. *Ruppert* (S.D. N.Y.), 7 Labor Cases, par. 61,726; *Baker* v. *Sharpless Hendler Ice Cream Co.* (E.D. Pa.), 10 Labor Cases, par. 62,956; *Kentucky Transport Co.* v. *Drake* (Ky. Ct. App.). 182 SW (2d) 960.) The following activities performed by mechanics on motor vehicles operated in interstate or foreign commerce are illustrative of the specific kinds of activities which the courts, in applying the foregoing principles, have regarded as directly affecting ''safety of operation'': The inspection, repair, adjustment, and maintenance for safe operation of steering apparatus, lights, brakes, horns, windshield wipers, wheels and axles, bushings, transmissions, differentials, motors, starters and ignition, carburetors, fifth wheels, springs and spring hangers, frames, and gasoline tanks (*McDuffie* v. *Hayes Freight Lines*, 71 F. Supp. 755; *Walling* v. *Silver Fleet Motor Express*, 67 F. Supp. 846; *Wolfe* v. *Union Transfer & Storage Co.*, 48 F. Supp. 855; *Mason & Dixon Lines* v. *Ligon* (Tenn. Ct. App.) 7 Labor Cases, par. 61,962; *Walling* v. Palmer, 67 F. Supp. 12; *Kentucky Transport Co.* v. *Drake* (Ky. Ct. App.), 182 SW (2d) 960.) Inspecting and checking air pressure in tires, changing tires, and repairing and rebuilding tires for immediate replacement on the vehicle from which they were removed have also been held to affect safety of operation directly. (*Walling* v. *Silver Fleet Motor Express*, 67 F. Supp. 846; *Walling* v. *Palmer*, 67 F. Supp. 12. See also *McDuffie* v. *Hayes Freight Lines*, 71 F. Supp. 755.) The same is true of hooking up tractors and trailers, including light and brake connections, and the inspection of such hookups. (*Walling* v. *Silver Fleet Motor Express*, 67 F. Supp. 846; *Walling* v. *Palmer*, 67 F. Supp. 12. See also *Walling* v. *Gordon's Transports* (W.D. Tenn.). 10 Labor cases, par. 62,934, affirmed 162 F. (2d) 203 (C.A. 6), certiorari denied 332 U.S. 744.)

(b) The section 13(b)(1) exemption applies, in accordance with principles previously stated (see §782.2), to an employee whose job involves activities consisting wholly or in part of doing, or immediately directing, a class of work which, under the definitions referred to above, is that of a ''mechanic'' and directly affects the safety of operation of motor vehicles on the public highways in interstate or foreign commerce, within the meaning of the Motor Carrier Act. The power under the Motor Carrier Act to establish qualifications and maximum hours of service for such an employee has been sustained by the courts. (*Morris* v. *McComb*, 332 U.S. 422. See also *Pyramid Motor Freight Corp.* v. *Ispass.* 330 U.S. 695; *Levinson* v. *Spector Motor Service*, 330 U.S. 649; *Walling* v. *Silver Bros.*, 136 F. (2d) 168 (C.C.A. 1)). A supervisory employee who plans and immediately directs and checks the proper performance of this class of work may come within the exemption as a partial-duty mechanic. (*Robbins* v. *Zabarsky*, 44 F. Supp. 867; *Mason & Dixon Lines* v. *Ligon* (Tenn. Ct. App.), 7 Labor Cases par. 61,962; cf. *Morris* v. *McComb*, 332 U.S. 422 and *Levinson* v. *Spector Motor Service*, 330 U.S. 649)

(c)(1) An employee of a carrier by motor vehicle is not exempted as a ''mechanic'' from the overtime provisions of the Fair Labor Standards Act under section 13(b)(1) merely because he works in the carrier's gargage, or because he is called a ''mechanic,'' or because he is a mechanic by trade and does mechanical work. (*Wirtz* v. *Tyler Pipe & Foundry Co.*, 369 F. 2d 927 (C.A. 5).) The exemption applies only if he is doing a class of work defined as that of a ''mechanic'', including activities which directly affect the safety of operation of motor vehicles in transporation on the public highways in interstate or foreign commerce. (*Morris* v. *McComb*, 332 U.S. 422; *Keeling* v. *Huber & Huber Motor Express*, 57 F.

Supp. 617; *Walling* v. *Huber & Huber Motor Express*, 67 F. Supp. 855; *Walling* v. *Silver Fleet Motor Express*, 67 F. Supp. 846; *McDuffie* v. *Hayes Freight Lines*, 71 F. Supp. 755; *Anuchick* v. *Transamerican Freight Lines*, 46 F. Supp. 861; *Walling* v. *Burlington Transp. Co.* (D. Nebr.), 9 Labor Cases, par. 62,576. Compare Ex parte No. MC–40 (Sub. No. 2), 88 M.C.C. 710 with *Colbeck* v. *Dairyland Creamery Co.* (S.D. Sup. Ct.), 17 N.W. (2d) 262. See also *Pyramid Motor Freight Corp.* v. *Ispass* 330 U.S. 695.) Activities which do not directly affect such safety of operation include those performed by employees whose jobs are confined to such work as that of dispatchers, carpenters, tarpaulin tailors vehicle painters, or servicemen who do nothing but oil, gas, grease, or wash the motor vehicles. (Ex parte Nos. MC–2 and MC–3, 28 M.C.C. 125, 132, 133, 135) To these may be added activities such as filling radiators, checking batteries, and the usual work of such employees as stockroom personnel, watchmen, porters, and garage employees performing menial nondiscretionary tasks or disassembling work. Employees whose work is confined to such ''nonsafety'' activities are not within the exemption, even though the proper performance of their work may have an indirect effect on the safety of operation of the motor vehicles on the highways. (*Morris* v. *McComb*, 332 U.S. 422; *Campbell* v. *Riss & Co.* (W.D. Mo.), 5 Labor Cases, par. 61,092 (dispatcher); *McDuffie* v. *Hayes Freight Lines*, 71 F. Supp. 755 (work of janitor and caretaker, carpentry work, body building, removing paint, preparing for repainting, and painting); *Walling* v. *Silver Fleet Motor Express*, 67 F. Supp. 846 (body building, construction work, painting and lettering); *Hutchinson* v. *Barry*, 50 F. Supp. 292 (washing vehicles); *Walling* v. *Palmer*, 67 F. Supp. 12 (putting water in radiators and batteries, oil and gas in vehicles, and washing vehicles); *Anuchick* v. *Transamerican Freight Lines*, 46 F. Supp. 861 (body builders, tarpaulin worker, stockroom boy, night watchman, porter); *Bumpus* v. *Continental Baking Co.* (W.D. Tenn.), 1 Wage Hour Cases 920 (painter), reversed on other grounds 124 F. (2d) 549; *Green* v. *Riss & Co.*, 45 F. Supp. 648 (night watchman and gas pump attendant); *Walling* v. *Burlington Transp. Co.* (D. Nebr.), 9 Labor Cases, par. 62,576 (body builders); *Keegan* v. *Ruppert* (S.D. N.Y.), 7 Labor Cases, par. 61,726 (greasing and washing); *Walling* v. *East Texas Freight Lines* (N.D. Tex.), 8 Labor Cases, par. 62,083 (Menial tasks); *Collier* v. *Acme Freight Lines*, unreported (S.D. Fla., Oct. 1943) (same); *Potashnik Local Truck System* v. *Archer* (Ark. Sup. Ct.). 179 S.W. (2d) 696 (checking trucks in and out and acting as night dispatcher, among other duties); *Overnight Motor Corp.* v. *Missel*, 316 U.S. 572 (rate clerk with part-time duties as dispatcher).) The same has been held true of employees whose activities are confined to construction work, manufacture or rebuilding of truck, bus, or trailer bodies, and other duties which are concerned with the safe carriage of the contents of the vehicle rather than directly with the safety of operation on the public highways of the motor vehicle itself (*Anuchick* v. *Transamerican Freight Lines*, 46 F. Supp. 816; *Walling* v. *Silver Fleet Motor Express*, 67 F. Supp. 846; *McDuffie* v. *Hayes Freight Lines* 71 F. Supp. 755; *Walling* v. *Burlington Transp. Co.* (D. Nebr.), 9 Labor Cases, par. 62,576. Compare *Colbeck* v. *Dairyland Creamery Co.* (S.D. Sup. Ct.) 17 N.W. (2d) 262 with Ex parte No. MC–40 (Sub. No. 2), 88 M.C.C. 710.)

(2) The distinction between direct and indirect effects on safety of operation is exemplified by the comments in rejecting the contention in Ex parte Nos. MC–2 and MC–3, 28 M.C.C. 125, 135, that the activities of dispatchers directly affect safety of operation. It was stated: ''It is contended that if a dispatcher by an error in judgment assigns a vehicle of insufficient size and weight-carrying capacity to transport the load, or calls a driver to duty who is sick, fatigued, or otherwise not in condition to operate the vehicle, or requires or permits the vehicle to depart when the roads are icy and the country to be traversed is hilly, an accident may result. While this may be true, it is clear that such errors in judgment are not the proximate causes of such accidents, and the dispatchers engage in no activities which directly affect the safety of operation of motor vehicles in interstate or foreign commerce.''

(3) Similarly, the exemption has been held inapplicable to mechanics repairing and rebuilding parts, batteries, and tires removed from vehicles where a direct causal connection between their work and the safe operation of motor vehicles on the highways is lacking because they do no actual work on the vehicles themselves and entirely different employees have the exclusive responsibility for determining whether the products of their work are suitable for use, and for the correct installation of such parts, on the vehicles. (*Keeling* v. *Huber & Huber Motor Express*, 57 F. Supp. 617; *Walling* v. *Huber & Huber Motor Express*, 67 F. Supp. 855) Mechanical work on motor vehicles of a carrier which is performed in order to make the vehicles conform to technical legal requirements rather than to prevent accidents on the highways has not been regarded by the courts as work directly affecting ''safety of operation.'' (*Kentucky Transport Co*. v. *Drake* (Ky. Ct. App.), 182 S.W. (2d) 960; *Anuchick* v. *Transamerican Freight Lines*, 46 F. Supp. 861; *Yellow Transit Freight Lines Inc*. v. *Balsen* 320 F. (2d) 495 (C.A. 8)) And it is clear that no mechanical work on motor vehicles can be considered to affect safety of operation of such vehicles in interstate or foreign commerce if the vehicles are never in fact used in transportation in such commerce on the public highways. (*Baker* v. *Sharpless Hendler Ice Cream Co*. (E.D. Pa.), 10 Labor Cases, par. 62,956)

§ 782.7 Interstate commerce requirements of exemption.

(a) As explained in preceding sections of this part, section 13(b)(1) of the Fair Labor Standards Act does not exempt an employee of a carrier from the act's overtime provisions unless it appears, among other things, that his activities as a driver, driver's helper, loader, or mechanic directly affect the safety of operation of motor vehicles in transportation in interstate or foreign commerce within the meaning of the Motor Carrier Act. What constitutes such transportation in interstate or foreign commerce, sufficient to bring such an employee within the regulatory power of the Secretary of Transportation under section 204 of that act, is determined by definitions contained in the Motor Carrier Act itself. These definitions are, however, not identical with the definitions in the Fair Labor Standards Act which determine whether an employee is within the general coverage of the wage and hours provisions as an employee ''engaged in (interstate or foreign) commerce.'' For this reason, the interstate commerce requirements of the section 13(b)(1) exemption are not necessarily met by establishing that an employee is ''engaged in commerce'' within the meaning of the Fair Labor Standards Act when performing activities as a driver, driver's helper, loader, or mechanic, where these activities are sufficient in other respects to bring him within the exemption. (*Hager* v. *Brinks, Inc*. (N.D. Ill.), 11 Labor Cases, par. 63,296, 6 W.H. Cases 262; *Earle* v. *Brinks, Inc*., 54 F. Supp. 676 (S.D. N.Y.); *Thompson* v. *Daugherty*, 40 F. Supp. 279 (D. Md.). See also, *Walling* v. *Villaume Box & Lbr. Co*., 58 F. Supp. 150 (D. Minn.). And see in this connection paragraph (b) of this section and §782.8.) To illustrate, employees of construction contractors are, within the meaning of the Fair Labor Standards Act, engaged in commerce where they operate or repair motor vehicles used in the maintenance, repair, or reconstruction of instrumentalities of interstate commerce (for example, highways over which goods and persons regularly move in interstate commerce). (*Walling* v. *Craig*, 53 F. Supp. 479 (D. Minn). See also *Engbretson* v. *E. J. Albrecht Co*., 150 F. (2d) 602 (C.A. 7); *Overstreet* v. *North Shore Corp*., 318 U.S. 125; *Pedersen* v. *J. F. Fitzgerald Constr. Co*., 318 U.S. 740, 742.) Employees so engaged are not, however, brought within the exemption merely by reason of that fact. In order for the exemption to apply, their activities, so far as interstate commerce is concerned, must relate directly to the transportation of materials moving in interstate or foreign commerce within the meaning of the Motor Carrier Act. Asphalt distributor-operators, although not exempt by reason of their work in applying the asphalt to the highways, are within the exemption where they transport to the road site asphalt moving in interstate commerce. See *Richardson* v. *James Gibbons Co*., 132 F. (2d) 627 (C.A. 4), affirmed 319

U.S. 44 (and see reference to this case in footnote 18 of *Levinson* v. *Spector Motor Service*, 330 U.S. 649); *Walling* v. *Craig*, 53 F. Supp. 479 (D. Minn.).

(b)(1) Highway transportation by motor vehicle from one State to another, in the course of which the vehicles cross the State line, clearly constitutes interstate commerce under both acts. Employees of a carrier so engaged, whose duties directly affect the safety of operation of such vehicles, are within the exemption in accordance with principles previously stated. (*Southland Gasoline Co.* v. *Bayley*, 319 U.S. 44; *Plunkett* v. *Abraham Bros.*, 129 F. (2d) 419 (C.A. 6); *Vannoy* v. *Swift & Co.* (Mo. Sup. Ct.), 201 S.W. (2d) 350; *Nelson* v. *Allison & Co.* (E.D. Tenn.), 13 Labor Cases, par. 64,021; *Reynolds* v. *Rogers Cartage Co.* (W.D. Ky.), 13 Labor Cases, par. 63,978, reversed on other grounds 166 F. (2d) 317 (C.A. 6); *Walling* v. *McGinley Co.* (E.D. Tenn.), 12 Labor Cases, par. 63,731; *Walling* v. *A. H. Phillips, Inc.*, 50 F. Supp. 749, affirmed (C.A. 1) 144 F. (2d) 102,324 U.S. 490. See §§782.2 through 782.8.) The result is no different where the vehicles do not actually cross State lines but operate solely within a single State, if what is being transported is actually moving in interstate commerce within the meaning of both acts; the fact that other carriers transport it out of or into the State is not material. (*Morris* v. *McComb*, 68 S. Ct. 131; *Pyramid Motor Freight Corp.* v. *Ispass*, 330 U.S. 695; *Walling* v. *Silver Bros. Co.* 136 F. (2d) 168 (C.A. 1); *Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. (2d) 331 (C.A. 8); *Dallum* v. *Farmers Cooperative Trucking Assn.*, 46 F. Supp. 785 (D. Minn.); *Gavril* v. *Kraft Cheese Co.*, 42 F. Supp. 702 (N.D. Ill.); *Keegan* v. *Rupport* (S.D. N.Y.), 7 Labor Cases, par. 61,726, 3 W.H. Cases 412; *Baker* v. *Sharpless Hendler Ice Cream Co.* (E.D. Pa.), 10 Labor Cases, par. 62,956, 5 W.H. Cases 926). Transportation within a single State is in interstate commerce within the meaning of the Fair Labor Standards Act where it forms a part of a ''practical continuity of movement'' across State lines from the point of origin to the point of destination. (*Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564; *Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. (2d) 331 (C.A. 8); *Walling* v. *American Stores Co.*, 133 F. (2d) 840 (C.A. 3); *Baker* v. *Sharpless Hendler Ice Cream Co.* (E.D. Pa.), 10 Labor Cases, par. 62,956 5 W.H. Cases 926) Since the interstate commerce regulated under the two acts is not identical (see paragraph (a) of this section), such transportation may or may not be considered also a movement in interstate commerce within the meaning of the Motor Carrier Act. Decisions of the Interstate Commerce Commission prior to 1966 seemingly have limited the scope of the Motor Carrier Act more narrowly than the courts have construed the Fair Labor Standards Act. (see §782.8.) It is deemed necessary, however, as an enforcement policy only and without prejudice to any rights of employees under section 16 (b) of the Act, to assume that such a movement in interstate commerce under the Fair Labor Standards Act is also a movement in interstate commerce under the Motor Carrier Act, except in those situations where the Commission has held or the Secretary of Transportation or the courts hold otherwise. (See §782.8(a); and compare *Beggs* v. *Kroger Co.*, 167 F. (2d) 700, with the Interstate Commerce Commission's holding in Ex parte No. MC–48, 71 M.C.C. 17, discussed in paragraph (b)(2) of this section.) Under this enforcement policy it will ordinarily be assumed by the Administrator that the interstate commerce requirements of the section 13(b)(1) exemption are satisfied where it appears that a motor carrier employee is engaged as a driver, driver's helper, loader, or mechanic in transportation by motor vehicle which, although confined to a single State, is a part of an interstate movement of the goods or persons being thus transported so as to constitute interstate commerce within the meaning of the Fair Labor Standards Act. This policy does not extend to drivers, driver's helpers, loaders, or mechanics whose transportation activities are ''in commerce'' or ''in the production of goods for commerce'' within the meaning of the act but are not a part of an interstate movement of the goods or persons carried (see, e.g., *Wirtz* v. *Crystal Lake Crushed Stone Co.*, 327 F. 2d 455 (C.A. 7)). Where, however, it has been authoritatively held that transportation of a particular character within

a single State is not in interstate commerce as defined in the Motor Carrier Act (as has been done with respect to certain transportation of petroleum products from a terminal within a State to other points within the same State—see paragraph (b)(2) of this section), there is no basis for an exemption under section 13(b)(1), even though the facts may establish a ''practical continuity of movement'' from out-of-State sources through such in-State trip so as to make the trip one in interstate commerce under the Fair Labor Standards Act. Of course, engagement in local transportation which is entirely in intrastate commerce provides no basis for exempting a motor carrier employee. (*Kline* v. *Wirtz*, 373 F. 2d 281 (C.A. 5). See also paragraph (b) of this section.)

(2) The Interstate Commerce Commission 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 or foreign commerce within the meaning of part II of the Interstate Commerce Act if the shipper has no fixed and persisting transportation intent beyond the terminal storage point at the time of shipment. See Ex parte No. MC–48 (71 M.C.C. 17, 29). The Commission specifically ruled that there is not fixed and persisting intent where: (i) 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 beyond the terminal storage, and (ii) the terminal storage is a distribution point or local marketing facility from which specific amounts of the product are sold or allocated, and (iii) transportation in the furtherance of this distribution within the single State is specifically arranged only after sale or allocation from storage. In *Baird* v. *Wagoner Transportation Co.*, 425 F. (2d) 407 (C.A. 6), the court found each of these factors to be present and held the intrastate transportation activities were not ''in interstate commerce'' within the meaning of the Motor Carrier Act and denied the section 13(b)(1) exemption. While ex parte No. MC–48 deals with petroleum and petroleum products, the decision indicates that the same reasoning applies to general commodities moving interstate into a warehouse for distribution (71 M.C.C. at 27). Accordingly, employees engaged in such transportation are not subject to the Motor Carrier Act and therefore not within the section 13(b)(1) exemption. They may, however, be engaged in commerce within the meaning of the Fair Labor Standards Act. (See in this connection, *Mid-Continent Petroleum Corp.* v. *Keen*, 157 F. 2d 310 (C.A. 8); *DeLoach* v. *Crowley's Inc.*, 128 F. 2d 378 (C.A. 5); *Walling* v. *Jacksonville Paper Co.*, 69 F. Supp. 599, affirmed 167 F. 2d 448, reversed on another point in 336 U.S. 187; and *Standard Oil Co.* v. *Trade Commission*, 340 U.S. 231, 238).

(c) The wage and hours provisions of the Fair Labor Standards Act are applicable not only to employees engaged in commerce, as defined in the act, but also to employees engaged in the production of goods for commerce. Employees engaged in the ''production'' of goods are defined by the act as including those engaged in ''handling, transporting, or in any other manner working on such goods, or in closely related process or occupation directly essential to the production thereof, in any State.'' (Fair Labor Standards Act, sec. 3(j), 29 U.S.C., sec. 203(j), as amended by the Fair Labor Standards Amendments of 1949, 63 Stat. 910. See also the Division's Interpretative Bulletin, part 776 of this chapter on general coverage of the wage and hours provisions of the act.) Where transportation of persons or property by motor vehicle between places within a State falls within this definition, and is not transportation in interstate or foreign commerce within the meaning of the Motor Carrier Act because movement from points out of the State has ended or because movement to points out of the State has not yet begun, the employees engaged in connection with such transportation (this applies to employees of common, contract, and private carriers) are covered by the wage and hours provisions of the Fair Labor Standards Act and are not subject to the jurisdiction of the Secretary of Transportation. Examples are: (1) Drivers transporting goods in and about a plant producing goods for commerce; (2) chauffeurs or

drivers of company cars or buses transporting officers or employees from place to place in the course of their employment in an establishment which produces goods for commerces; (3) drivers who transport goods from a producer's plant to the plant of a processor, who, in turn, sells goods in interstate commerce, the first producer's goods being a part or ingredient of the second producer's goods; (4) drivers transporting goods between a factory and the plant of an independent contractor who performs operations on the goods, after which they are returned to the factory which further processes the goods for commerce; and (5) drivers transporting goods such as machinery or tools and dies, for example, to be used or consumed in the production of other goods for commerce. These and other employees engaged in connection with the transportation within a State of persons or property by motor vehicle who are subject to the Fair Labor Standards Act because engaged in the production of goods for commerce and who are not subject to the Motor Carrier Act because not engaged in interstate or foreign commerce within the meaning of that act, are not within the exemption provided by section 13(b)(1). (*Walling* v. *Comet Carriers*, 151 F. (2d) 107 (C.A. 2); *Griffin Cartage Co.* v. *Walling*, 153 F. (2d) 587 (C.A. 6); *Walling* v. *Morris*, 155 F. (2d) 832 (C.A. 6), reversed on other grounds in *Morris* v. *McComb*, 332 U.S. 422; *West Kentucky Coal Co.* v. *Walling*, 153 F. (2d) 582 (C.A. 6); *Hamlet Ice Co.* v. *Fleming*, 127 F. (2d) 165 (C.A. 4); *Atlantic Co.* v. *Walling*, 131 F. (2d) 518 (C.A. 5); *Chapman* v. *Home Ice Co.*, 136 F. (2d) 353 (C.A. 6); *Walling* v. *Griffin Cartage Co.*, 62 F. Supp. 396 (E.D. Mich.), affirmed 153 F. (2d) 587 (C.A. 6); *Dallum* v. *Farmers Coop. Trucking Assn.*, 46 F. Supp. 785 (D. Minn.); *Walling* v. *Villaume Box & Lbr. Co.*, 58 F. Supp. 150 (D. Minn); *Walling* v. *DeSoto Creamery & Produce Co.*, 51 F. Supp. 938 (D. Minn.); *Reynolds* v. *Rogers Cargate Co.*, 71 F. Supp. 870 (W.D. Ky.), reversed on other grounds 166 F. (2d) 317 (C.A. 6), *Hansen* v. *Salinas Valley Ice Co.* (Cal. App.), 144 P. (2d) 896).

§ 782.8 Special classes of carriers.

(a) The Interstate Commerce Commission consistently maintained that transportation with a State of consumable goods (such as food, coal, and ice) to railroad, docks, etc., for use of trains and steamships is not such transportation as is subject to its jurisdiction. (*New Pittsburgh Coal Co.* v. *Hocking Valley Ry. Co.*, 24 I.C.C. 244; *Corona Coal Co.* v. *Secretary of War*, 69 I.C.C. 389; Bunker Coal from Alabama to Gulf Ports, 227 I.C.C. 485.) The intrastate delivery of chandleries, including cordage, canvas, repair parts, wire rope, etc., to ocean-going vessels for use and consumption aboard such vessels which move in interstate or foreign commerce falls within this category. Employees of carriers so engaged are considered to be engaged in commerce, as that term is used in the Fair Labor Standards Act. These employees may also be engaged in the ''production of goods for commerce'' within the meaning of section 3(j) of the Fair Labor Standards Act. See cases cited in § 782.7(c), and see *Mitchell* v. *Independent Ice Co.*, 294 F. 2d 186 (C.A. 5), certiorari denied 368 U.S. 952, and part 776 of this chapter. Since the Commission has disclaimed jurisdiction over this type of operation (see, in this connection § 782.7(b)), it is the Division's opinion that drivers, driver's helpers, loaders, and mechanics employed by companies engaged in such activities are covered by the wage and hours provisions of the Fair Labor Standards Act, and are not within the exemption contained in section 13(b)(1). (See *Hansen* v. *Salinas Valley Ice Co.* (Cal. App.), 144 P. (2d) 896.)

(b) Prior to June 14, 1972, when the Department of Transportation published a notice in the FEDERAL REGISTER (37 FR 11781) asserting its power to establish qualifications and maximum hours of service of employees of contract mail haulers, thereby reversing the long-standing position of the Interstate Commerce Commission, the Administrator of the Wage and Hour Division had taken the position that employees engaged in the transportation of mail under contract with the Postal Service were not within the exemption provided by section 13(b)(1) of the Fair Labor Standards Act. As the result of the notice of June 14, 1972, the Administrator will no longer assert

that employees of contract mail carriers are not within the 13(b)(1) exemption for overtime work performed after June 14, 1972, pending authoritative court decisions to the contrary. This position is adopted without prejudice to the rights of individual employees under section 16(b) of the Fair Labor Standards Act.

(c) Section 202(c)(2) of the Motor Carrier Act, as amended on May 16, 1942, makes section 204 of that act ''relative to qualifications and maximum hours of service of employees and safety of operations and equipment,'' applicable ''to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a * * * railroad * * * express company * * * motor carrier * * * water carrier * * * or a freight forwarder * * * in the performance within terminal areas of transfer, collection, or delivery service.'' Thus, drivers, drivers' helpers, loaders, and mechanics of a motor carrier performing pickup and delivery service for a railroad, express company, or water carrier are to be regarded as within the 13(b)(1) exemption. (See *Levinson* v. *Spector Motor Service*, 330 U.S. 649 (footnote 10); cf. *Cedarblade* v. *Parmelee Transp. Co.* (C.A. 7), 166 F. (2d) 554, 14 Labor Cases, par. 64,340.) The same is true of drivers, drivers' helpers, loaders, and mechanics employed directly by a railroad, a water carrier or a freight forwarder in pickup and delivery service. Section 202(c)(1) of the Motor Carrier Act, as amended on May 16, 1942, includes employees employed by railroads, water carriers, and freight forwarders, in transfer, collection, and delivery service in terminal areas by motor vehicles within the Interstate Commerce Commission's regulatory power under section 204 of the same act. See *Morris* v. *McComb*, 332 U.S. 422 and §782.2(a). (Such employees of a carrier subject to part I of the Interstate Commerce Act may come within the exemption from the overtime requirements provided by section 13(b)(2). Cf. *Cedarblade* v. *Parmelee Transp. Co.* (C.A. 7), 166 F. (2d) 554, 14 Labor Cases, par. 64,340. Thus, only employees of a railroad, water carrier, or freight forwarder outside of the scope of part I of the Interstate Commerce Act and of the 13(b)(2) exemption are affected by the above on and after the date of the amendment.) Both before and after the amendments referred to, it has been the Division's position that the 13(b)(1) exemption is applicable to drivers, drivers' helpers, loaders, and mechanics employed in pickup and delivery service to line-haul motor carrier depots or under contract with forwarding companies, since the Interstate Commerce Commission had determined that its regulatory power under section 204 of the Motor Carrier Act extended to such employees.

(d) The determinations of the Interstate Commerce Commission discussed in paragraphs (a), (b), and (c) of this section have not been amended or revoked by the Secretary of Transportation. These determinations will continue to guide the Administrator of the Wage and Hour Division in his enforcement of section 13(b)(1) of the Fair Labor Standards Act.

[36 FR 21778, Nov. 13, 1971, as amended at 37 FR 23638, Nov. 7, 1972]