

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 estab-

lishing 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

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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 en-

gages 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 transportation 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 or 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), certiorari 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.)

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(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 way-bills, 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 transportation 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*, 330 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*