(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