

§ 780.512 “Employed in the growing and harvesting.”

Section 13(a)(14) exempts processing operations on shade-grown tobacco only when performed by agricultural employees “employed in the growing and harvesting” of such tobacco. The use of the term “and” in the phrase “growing and harvesting” may be in recognition of the fact that in the raising of shade-grown tobacco the two operations are typically intermingled; however, it is not considered that the word “and” would preclude a determination on the particular facts that an employee is qualified for the exemption if he is employed only in “growing” or only in “harvesting.” Employment in work other than growing and harvesting of shade-grown tobacco will not satisfy the requirement that the employee be employed in growing and harvesting, even if such work is on shade-grown tobacco and constitutes “agriculture” as defined in section 3(f) of the Act. For example, delivery of the tobacco by an employee of the farmer to the receiving platform of the bulking plant would be a “delivery to market” included in “agriculture” when performed by the farmer as an incident to or in conjunction with his farming operations (*Mitchell v. Budd*, 350 U.S. 473), but it would not be part of “growing and harvesting.”

§ 780.513 What employment in growing and harvesting is sufficient.

To qualify for exemption the employee must be one of those who “were employed in the growing and harvesting of such tobacco” (H. Rept. No. 75, 87th Cong., First Sess., p. 29) and one whose processing work could be viewed as a “continuation of the agricultural process, occurring in the vicinity where the tobacco was grown.” (Ibid. p. 26.) This appears to require that such employment be in connection with the crop of shade-grown tobacco which is being processed; it appears to preclude an employee who has had no such employment in the current crop season from qualifying for this exemption even if in some past season he was employed in growing and harvesting such tobacco. Bona fide employment in growing and harvesting shade-grown tobacco would also appear to be nec-

essary. An attempt to qualify an employee for the processing exemption by sending him to the fields for growing or harvesting work for a few hours or days would not establish the bona fide employment in growing and harvesting contemplated by the Act. It would not seem sufficient that an employee has been engaged in growing or harvesting operations only occasionally or casually or incidentally for a small fraction of his work time. (See *Walling v. Haden*, 153 F. 2d 196.) Employment for a significant period in the current crop season or on some regular recurring basis during this season would appear to be necessary before an agricultural employee could reasonably be described as one “employed in the growing and harvesting of shade-grown tobacco.” The determination in a doubtful case will, therefore, require a careful examination and consideration of the particular facts.

§ 780.514 “Growing” and “harvesting.”

The general meaning of “growing” and “harvesting” of agricultural commodities is explained in §§ 780.117 and 780.118 of subpart B of this part 780, where the meaning of these terms as used in the Act’s definition of agriculture is fully discussed. As there indicated, these terms include the actual raising of the crop and the operations customarily performed in connection with the removal of the crops by the farmer from their growing position, but do not extend to operations subsequent to and unconnected with the actual process whereby the agricultural commodities are severed from their attachment to the soil. Thus, while transportation to a concentration point on the farm may be included, “harvesting” never extends to transportation or other operations off the farm. The “growing” of shade-grown tobacco is considered to include such work as preparing the soil, planting, irrigating, fertilizing, and other activities. This type of tobacco requires special cultivation and is grown in fields that are completely enclosed and covered with cheesecloth shade. The leaves of the plant are picked in stages, as they mature. The leaves are taken immediately to a tobacco barn, located on the farm, where they are strung on

sticks and dried by heat. Before the drying process is completed, the leaves are allowed to absorb moisture. Then they are dried again. It is not until the end of this drying operation that the leaves are packed in boxes and taken from the farm to a building plant for further processing (see *Mitchell v. Budd*, 350 U.S. 473). Under the general principles stated above, "harvesting" of shade-grown tobacco is considered to include the removal of the tobacco leaves from the plant and moving the tobacco from the field to the drying barn on the farm, together with the performance of other work as a necessary part of such operations. Subsequent operations such as the drying of the tobacco in the barn on the farm and packing of the tobacco for transportation to the bulking plant are not included in "harvesting."

EXEMPT PROCESSING

§ 780.515 Processing requirements of section 13(a)(14).

When it has been determined that an employee is an "agricultural employee employed in the growing and harvesting of shade-grown tobacco," to whom section 13(a)(14) of the Act may apply, it then becomes necessary to ascertain whether he is "engaged in the processing * * * of such tobacco, prior to the stemming process, for use as Cigar-wrapper tobacco."

§ 780.516 "Prior to the stemming process."

The exemption provided by section 13(a)(14) applies only to employees whose processing operations on shade-grown tobacco are performed "prior to the stemming process." (See H. Rept. No. 75, 87th Cong., first sess., p. 26). This means that an employee engaged in stemming, the removal of the midrib from the tobacco leaf (*McComb v. Puerto Rico Tobacco Marketing Co-op. Ass'n.*, 80 F. Supp. 953, affirmed 181 F. 2d 697), or in any operations on the tobacco which are performed after stemming has begun will not come within the exemption. Stemming and all subsequent operations are nonexempt work.

§ 780.517 "For use as Cigar-wrapper tobacco."

The phrase "for use as Cigar-wrapper tobacco" limits the type of end product which may be produced by the exempt operations. As its name indicates, cigar-wrapper tobacco is used as a cigar wrapper and is distinguished from other types of tobacco which serve other purposes such as filler, pipe, chewing, and other kinds of tobacco. Normally, shade-grown tobacco is used only for cigar wrappers. However, if the tobacco is not being processed by the employer for such specific and limited use, the employee is not engaged in exempt processing operations.

§ 780.518 Exempt processing operations.

The processing operations under section 13(a)(14) include, but are not limited to, "drying, curing, fermenting, bulking, rebulking, sorting, grading, aging, and baling" of the shade-grown tobacco. As previously noted, these operations are exempt only if performed on shade-grown tobacco prior to the stemming process to prepare the tobacco for use as cigar wrapper tobacco.

§ 780.519 General scope of exempt operations.

All operations normally performed in the processing of shade-grown tobacco for use as cigar wrapper tobacco, if performed prior to the stemming process and for such use, are included in the exemption. As a whole, this processing substantially changes the physical properties and chemical content of the tobacco, improves its color, increases its combustibility, and eliminates the rawness and harshness of the freshly cured leaf. In the process the leaves are piled in "bulks" of about 4,000 pounds each to undergo a "sweating" or "fermentation" process in which temperature and humidity are carefully controlled. Proper heat control includes, among other things, breaking up the bulk, redistributing the tobacco, and adding water. Proper fermentation or aging requires the bulk to be reconstructed several times. This bulking process may last from 4 to 8 months. When the tobacco is properly dried, cured, fermented, and aged, it is moved