of their crops during the same hours that are worked by the farmers. (See 107 Cong. Rec. (daily ed.) p.5883.) The reason for the exemption does not justify its application to employees selling products and services to farmers otherwise than as an incidental and subordinate part of the business of a country elevator as commonly recognized. An establishment making such sales must be ''such an establishment'' to come within this exemption. An employer may, however, be engaged in the business of making sales of goods and services to farmers in an establishment separate from the one in which he provides the recognized country elevator services. In such event, the exemption of employees who work in both establishments may depend on whether the work in the sales establishment comes within another exemption provided by the Act. (See *Remington* v. *Shaw* (W.D. Mich.), 2 WH Cases 262, and infra, § 780.724.)

EMPLOYMENT OF ''NO MORE THAN FIVE EMPLOYEES''

§ 780.712 Limitation of exemption to establishments with five or fewer employees.

If the operations of an establishment are such that it is commonly recognized as a country elevator, its employees may come within the section 13(b)(14) exemption provided that ''no more than five employees are employed in the establishment in such operations''. The exemption is intended, as explained by its sponsor, to ''affect only institutions that have five employees or less'' (107 Cong. Rec. (daily ed.) p. 5883). Since the Act is applied on a workweek basis, a country elevator is not an exempt place of work in any workweek in which more than five employees are employed in its operations.

§ 780.713 Determining the number of employees generally.

The number of employees referred to in section 13(b)(14) is the number ''employed in the establishment in such operations''. The determination of the number of employees so employed involves a consideration of the meaning of employment ''in the establishment'' and ''in such operations'' in relation to each other. If, in any workweek, an employee is ''employed in the establishment in such operations'' for more than a negligible period of time, he should be counted in determining whether, in that workweek, more than five employees were so employed. An employee so employed must be counted for this purpose regardless of whether he would, apart from this exemption, be within the coverage of the Act. Also, as noted in the following discussion, the employees to be counted are not necessarily limited to employees directly employed by the country elevator but may include employees directly employed by others who are engaged in performing operations of the elevator establishment.

§ 780.714 Employees employed "in such operations" to be counted.

(a) The five-employee limitation on the exemption for country elevators relates to the number of employees employed in the establishment ''in such operations.'' This means that the employees to be counted include those employed in, and do not include any who are not employed in, the operations of the establishment commonly recognized as a country elevator, including the operations of such an establishment in selling products and services used in the operation of a farm, as previously explained.

(b) In some circumstances, an employee employed in an establishment commonly recognized as a country elevator may, during his workweek, be employed in work which is not part of the operations of the elevator establishment. This would be true, for example, in the case of an employee who spends his entire workweek in the construction of an overflow warehouse for the elevator. Such an employee would not be counted in that workweek because constructing a warehouse is not part of the operations of the country elevator but is an entirely distinct activity.

(c) Employees employed by the same employer in a separate establishment in which he is engaged in a different business, and not employed in the operations of the elevator establishment, would not be counted.

(d) Employees not employed by the elevator establishment who come there

sporadically, occasionally, or casually in the course of their duties for other employers are not employed in the operations of the establishment commonly recognized as a country elevator and would not be counted in determining whether the five-employee limitation is exceeded in any workweek. Examples of such employees are employees of a restaurant who bring food and beverages to the elevator employees, and employees of other employers who make deliveries to the establishment.

§ 780.715 Counting employees "employed in the establishment."

(a) Employees employed ''in the establishment,'' if employed ''in such operations'' as previously explained, are to be counted in determining whether the five-employee limitation on the exemption is exceeded.

(b) Employees employed ''in'' the establishment clearly include all employees engaged, other than casually or sporadically, in performing any duties of their employment there, regardless of whether they are direct employees of the country elevator establishment or are employees of a farmer, independent contractor, or other person who are suffered or permitted to work (see Act, section 3(g)) in the establishment. However, tradesmen, such as dealers and their salesmen, for example, are not employed in the elevator simply because they visit the establishment to do business there. Neither are workers who deliver, on behalf of their employers, goods used in the sideline business of the establishment to be considered employed in the elevator.

(c) The use of the language ''employed in'' rather than ''engaged in'' makes it plain also that the employees to be counted include all those employed by the establishment in its operations without regard to whether they are engaged in the establishment or away from it in performing their duties. This has been the consistent interpretation of similar language in other sections of the Act.

EMPLOYEES ''EMPLOYED * * * BY'' THE COUNTRY ELEVATOR ESTABLISHMENT

§ 780.716 Exemption of employees "employed * * * by" the establishment.

If the establishment is a country elevator establishment qualified for exemption as previously explained, and if the ''area of production'' requirement is met (see § 780.720), any employee ''employed * * * by'' such establishment will come within the section 13(b)(14) exemption. This will bring within the exemption employees who are engaged in duties performed away from the establishment as well as those whose duties are performed in the establishment itself, so long as such employees are ''employed * * * by'' the country elevator establishment within the meaning of the Act. The employees employed ''by'' the establishment, who may come within the exemption if the other requirements are met, are not necessarily identical with the employees employed ''in the establishment in such operations'' who must be counted for purposes of the five-employee limitation since some of the latter employees may be employed by another employer. (See §§ 780.712 through 780.715.)

§ 780.717 Determining whether there is employment "by" the establishment.

(a) No single test will determine whether a worker is in fact employed ''by'' a country elevator establishment. This question must be decided on the basis of the total situation (*Rutherford Food Corp.* v. *McComb,* 331 U.S. 722; *U.S.* v. *Silk,* 331 U.S. 704). Clearly, an employee is so employed where he is hired by the elevator, engages in its work, is paid by the elevator and is under its supervision and control.

(b) ''Employed by'' requires that there be an employer-employee relationship between the worker and the employer engaged in operating the elevator. The fact, however, that the employer carries an employee on the payroll of the country elevator establishment which qualifies for exemption does not automatically extend the exemption to that employee. In order to be exempt an employee must actually be ''employed by'' the exempt establishment. This means that whether the