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§ 780.902 Legislative history of exemption.

Since the language of section 13(b)(16) and its predecessor, section 13(a)(22) is identical, the legislative history of former section 13(a)(22) still retains its pertinency and vitality. The former section 13(a)(22) was added to the Act by the Fair Labor Standards Amendments of 1961. The original provision in the House-passed bill was in the form of an amendment to the Act's definition of agriculture. It would have altered the effect of holdings of the courts that operations such as those described in the amendment are not within the agriculture exemption provided by section 13(a)(6) when performed by employees of persons other than the farmer. (*Chapman v. Durkin*, 214 F. 2d 360, certiorari denied 348 U.S. 897; *Fort Mason Fruit Co. v. Durkin*, 214 F. 2d 363, certiorari denied, 348 U.S. 897.) The amendment was offered to exempt operations which, in the sponsor's view, were meant to be exempt under the original Act. (See 107 Cong. Rec. (daily ed.) p. 4523.) The Conference Committee, in changing the provision to make it a separate exemption made it clear that it was "not intended by the committee of conference to change by this exemption (for the described transportation employees) * * * the application of the Act to any other employees. Nor is it intended that there be any implication of disagreement by the conference committee with the principles and tests governing the application of the present agricultural exemption as enunciated by the courts." (H. Rept. No. 327, 87th Cong., first session, p. 18.)

§ 780.903 General scope of exemption.

The exemption provided by section 13(b)(16) is in two parts, subsection (A), which exempts employees engaged in the described transportation and preparation for transportation of fruits or vegetables, and subsection (B) which exempts employees engaged in the specified transportation of employees who harvest fruits or vegetables. The transportation and preparation for transportation of fruits and vegetables must be from the farm to a place of first processing or first marketing located in the same State where the farm

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is located; the transportation of harvesters must be between the farm and a place located in the same State as the farm.

§ 780.904 What determines the exemption.

The application of the exemption provided by section 13(b)(16) depends on the nature of the employee's work and not on the character of the employer's business. An employee is not exempt in any workweek unless his employment in that workweek meets all the requirements for exemption. To determine whether an employee is exempt an examination should be made of the duties which that employee performs. Some employees of the employer may be exempt and others may not.

§ 780.905 Employers who may claim exemption.

A nonfarmer, as well as a farmer, who has an employee engaged in the operations specified in section 13(b)(16) may take advantage of the exemption. Employees of contractual haulers, packers, processors, wholesalers, "bird-dog" operators, and others may qualify for exemption. If an employee is engaged in the specified operations, the exemption will apply "whether or not" these operations are "performed by the farmer" who has grown the harvested fruits and vegetables. Where such operations are performed by the farmer, the engagement by his employee in them will provide a basis for exemption under section 13(b)(16) without regard to whether the farmer is performing the operations as an incident to or in conjunction with his farming operations.

EXEMPT OPERATIONS ON FRUITS OR VEGETABLES

§ 780.906 Requisites for exemption generally.

Section 13(b)(16), in clause (A), provides an exemption from the overtime pay provision of the Act for an employee during any workweek in which all the following conditions are satisfied:

(a) The employee must be engaged "in the transportation and preparation

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for transportation of fruits and vegetables"; and

(b) Such transportation must be transportation "from the farm"; and

(c) The destination to which the fruits or vegetables are transported must be "a place of first processing or first marketing"; and

(d) The transportation must be from the farm to such destination "within the same State".

§ 780.907 "Fruits or vegetables."

The exempt operations of preparing for transportation and transporting must be performed with respect to "fruits or vegetables." The intent of section 13(b)(16) is to exempt such operations on fruits or vegetables which are "just-harvested" and still in their raw and natural state. As explained at the time of adoption of the amendment on the floor of the House, the exemption was intended to eliminate the difference in treatment of farmers and nonfarmers with respect to exemption of such "handling or hauling of fruit or vegetables in their raw or natural state." (See 107 Cong. Rec. (daily ed.) p. 4523.) Transporting and preparing for transportation other farm products which are not fruits or vegetables are not exempt under section 13(b)(16). For example, operations on livestock, eggs, tobacco, or poultry are nonexempt. Sugarcane is not a fruit or vegetable for purposes of this exemption (*Wirtz v. Osceola Farms Co.*, 372 F. 2d 584).

§ 780.908 Relation of employee's work to specified transportation.

In order for the exemption to apply to an employee, he must be engaged "in the transportation and preparation for transportation" of the just-harvested fruits or vegetables from the farm to the specified places within the same State. Engagement in other activities is not exempt work. The employee must be actually engaged in the described operations. The exemption is not available for other employees of the employer, such as office, clerical, and maintenance workers.

§ 780.909 "Transportation."

"Transportation," as used in section 13(b)(16), refers to the movement by any means of conveyance of fruits or

vegetables from the farm to a place of first processing or first marketing in the same State. It includes only those activities which are immediately necessary to move the fruits or vegetables to the specified points and the return trips. Drivers, drivers' helpers, loaders, and checkers perform work which is exempt. Transportation ends with delivery at the receiving platform of the place to which the fruits or vegetables are transported. (*Mitchell v. Budd*, 350 U.S. 473.) Thus, unloading at the delivery point by employees who did not transport the commodities would not be a part of the transportation activities under section 13(b)(16).

§ 780.910 Engagement in transportation and preparation.

Since transportation and preparation for transportation are both exempt activities, an employee who engages in both is performing exempt work. In referring to "the transportation and preparation for transportation" of the fruits or vegetables, the statute recognizes the two activities as interrelated parts of the single task of moving the commodities from the farm to the designated points. Accordingly, the word "and" between the words "transportation" and "preparation" is not considered to require that any employee be employed in both parts of the task in order to be exempt. The exemption may apply to an employee engaged either in transporting or preparing the commodities for transportation if he otherwise qualifies under section 13(b)(16).

§ 780.911 Preparation for transportation.

The "preparation for transportation" of fruits or vegetables includes only those activities which are necessary to prepare the fruits or vegetables for transportation from the farm to the places described in section 13(b)(16). These preliminary activities on the farm will vary with the commodity involved, with the means of the transportation to be used, and with the nature of operations to be performed on the commodity after delivery.