UNITED STATES DEPARTMENT OF LABOR

Office of the Solicitor

August 16, 1941

Legal Field Letter

No. 62 Attached Opinions

Copies of recent opinions on subjects indicated below are furnished herewith for your information and proper notation in the Opinion Manual.

MEMORANDA

Date	From		Subject
7-14-41	Rufus G. Poole (EGL)	Llewellyn B. Duke	Wilson & Company Lubbock, Texas (Application of Section 13(a)(10) exemption - Whether phrase "for Market" defeats exemption under Section 13(a)(10) merely because products handled by an establishment are subsequently processed at another establishment operated by the same employer.) (p. 56, par. B; p. 111, par. KK.)
7-17-41	Rufus G. Poole (EGL)	Donald M. Murtha	Applicability of Section 7(c) Exemption to Canteen (p. 66, par. L; p. 95, par. U; p. 103, par. 3.)
7-19-41	Rufus G. Poole (GFH)	Dorothy M. Williams	Construction of Logging Roads -- Coverage (Whether construction of roads to undeveloped mining claims is covered by the Act.) (p. 175, par.3(d)[redacted].)

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Legal Field Letter

No. _____

MEMORANDA

Date	From		Subject
7-29-41	Rufus G. Poole (EGL)	Jerome A. Cooper	Request for Opinion (Application of Section 13(a)(6) exemption to an independent contractor who removes tung tree stumps and sells them to companies engaged in producing naval stores. (p. 53, par. 3; p. 110, par. 5(d).
7-29-41	Rufus G. Poole (GH)	Arthur E. Reyman	Standard Dredging Corporation 80 Broad Street New York, New York File No. 31-2402 (Application of exemption under Section 13(a)(3) to various employees of a dredging company.) (p. 73, par. O; p. 105, par. EE.)
8-1-41	Rufus G. Poole (RJW)	Dorothy M. Williams	Alaska Steamship Company Seattle, Washington File 46-1 (Application of Section 13(a)(3) exemption to musicians employed on passenger boats.) (p. 73, par. O; p. 105, par. EE.
8-6-41	Rufus G. Poole (EGL)	Donald M. Murtha	Request for Opinion (Application of Section 7(b)(3) exemption to office employees of a grain elevator who, among other duties, make entries of purchases by the elevator of grain on cash and on "futures" contracts, together with the elevators' hedge positions.) (p. 25, par. A; p. 74, par. P; p. 94, par. T.)

LETTERS

Date	To	Subject
7-26-41	J. C. McNulty Minneapolis, Minnesota (EGL)	(Application of Section 7(b)(3) exemption to independent contractors who "cooper" and "reclaim" grain doors.) (p. 74, par. p; p. 94, par. T; p. 167, par. (4) i.)

(8960)

Llewellyn B. Duke, Esquire
Regional Attorney
Dallas, Texas

LE:EGL:FB

Rufus G. Poole
Assistant Solicitor
In Charge of Opinions and Review

July 14, 1941

Wilson & Company
Lubbock, Texas

File No. 42-2929

With your memorandum of June 13, 1941, you enclosed a copy of a memorandum you have written concerning the application of the section 13(a)(10) exemption to small receiving stations operated by the subject concern within the area of production. The eggs, live poultry, milk, and cream received by these stations are sent to a branch plant of the subject firm where the poultry is dressed, the eggs are frozen, and the milk and cream are manufactured into cheese and butter. You have expressed the opinion that these receiving stations do not handle products "for market" within the meaning of section 13(a)(10) because the products are sent to an establishment operated by the same employer where they are changed in form.

Your opinion conforms with our past interpretations, but, after giving the matter further consideration and study, we have concluded that there is no economic justification for treating concentration points owned by processors of agricultural commodities differently from independent receiving stations, which often ship their products to the same processing plants. For this reason we believe the "for market" qualification of section 13(a)(10) should not be interpreted to defeat the exemption merely because products handled by an establishment are subsequently processed at another establishment operated by the same employer.

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Donald M. Murtha, Esquire
Regional Attorney
Minneapolis, Minnesota

July 17, 1941

Rufus G. Poole
Assistant Solicitor
In Charge of Opinions and Review

LE:EGL:FB

Applicability of Section 7(c) Exemption to Canteen

In your memorandum of June 3, 1941, you present a situation where a canning company operates a canteen or restaurant in connection with the cannery. The canteen, which is in a separate building but not on the same premises as the cannery, is not open to the general public and closes when the cannery is not in operation. You say that the hours worked by the canteen employees vary directly with the flow of commodities into the cannery.

Under our old Interpretative Bulletin No. 6 which was in effect until July 1, 1941, the employees at the canteen were employed in a service establishment and were exempt under section 13(a)(2). However, under our new Interpretative Bulletin No. 6 such an establishment no longer qualifies as a service establishment within the meaning of the exemption. (See paragraphs 39 and 40 of the bulletin).

Although the employment of the canteen employees is controlled by the irregular movement of commodities into the cannery, we do not believe they are within the section 7(c) exemption, because the operations which they perform are not so closely associated with the canning operations that they cannot be readily segregated therefrom.

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AIR MAIL

Miss Dorothy M. Williams
Regional Attorney
San Francisco, California

LE:GFH:MAG:KK

Rufus G. Poole
Assistant Solicitor
In Charge of Opinions and Review

July 19, 1941

Construction of Logging Roads -- Coverage
JRS:fc

This is with reference to your memorandum of November 4, 1940, on the above subject. We regret that an earlier reply has not been possible.

We quote from your memorandum:

"We have had several inquiries from employers regarding the application of the Fair Labor Standards Act to employees engaged in the original construction of logging roads.

"It is our opinion that the construction of a road as a part of logging operations under way at the time of the construction of the road can be distinguished from the construction of a road prior to the beginning of any logging operations.

"It would appear that employees engaged in building logging roads as a part of the logging operations under way at that time would be engaged in occupations necessary to the production of goods for commerce and therefore within the coverage of the Act, assuming, of course, that the logs will move either directly or indirectly outside of the state of origin.

"It is also our opinion that employees engaged in the original construction of a road prior to the time that any logging operations are being carried on would not be within the coverage of the Act. This is in line with your memorandum of August 5, 1940, wherein you state that the construction of roads to undeveloped mining claims would not be within the coverage of the Act. Please advise us if we are mistaken in our conclusions."

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In recent months we have been considering the problem presented by you, and we have come to the conclusion that the opinion expressed in our memorandum to you under date of August 5, 1940, was incorrect. It is our opinion that the construction of roads to undeveloped mining claims is covered by the Act, provided that the employer at the time the construction operations are being performed has reason to believe that the resulting minerals or ore will move in interstate commerce. Likewise, if at the time logging roads of the type to which you refer are being constructed, the employer has reason to believe that the resulting logs or timber will move in interstate commerce, it is our opinion that employees engaged in such construction operations are covered by the Act as being engaged in an occupation necessary to the production of goods for commerce, and hence within the Act's coverage. We believe that coverage exists in such situations both where such roads are constructed prior to the time that logging operations have actually begun, and where the construction is performed after the logging operations are under way. In both instances the purpose and net result of such work are identical; namely, to facilitate or make possible the lumbering operations by rendering accessible timber resources which, without the means of transportation which such roads afford, could not be brought into the channels of interstate commerce. Hence, in our opinion, the construction of logging road prior to the commencement of the actual logging operations is no less necessary to the production of goods for commerce than is the construction of such roads after the logging operations have actually begun; and the circumstance that there is not a temporal coincidence of these two types of work, in our opinion, is unimportant.

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Jerome A. Cooper, Esquire
Regional Attorney
Birmingham, Alabama

SOL:EGL:ELW

Rufus G. Poole
Assistant Solicitor
In Charge of Opinions and Review

Request for Opinion

In your memorandum of July 12, 1941, you request our opinion on the applicability of the section 13(a)(6) exemption to the situation presented in the memorandum from Mr. Matthew Harper, Jr., to you dated July 2, 1941.

A lumber company has planted tung trees (which produce nuts used in the production of paints and varnishes) in cut-over timber land which it owns. Several stumps were left standing on the land and a contractor has agreed to remove them without receiving compensation from the lumber company. He sells these stumps to companies engaged in producing naval stores.

We agree with Mr. Harper's conclusion that the employees of the contractor do not come within the section 13(a)(6) exemption. The definition of the term "agriculture," contained in section 3(f), includes "any practices (including any forestry or lumbering operations) performed . . . on a farm as an incident to or in conjunction with such farming operations." Assuming, without deciding, that the cut-over timber land is a farm within the meaning of section 3(f), the removal of the stumps is not incidental to or in conjunction with farming operations performed on that land. The stumps are not being removed for the purpose of clearing the land for immediate cultivation nor are they to be used in conjunction with farming operations on the land. (See paragraph 6 of Interpretative Bulletin No. 7.)

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You also inquire about the applicability of the section 13(a)(6) exemption where the facts are the same as those presented by Mr. Harper, with the exception that the lumber company or its principal stockholders, doing business under another name, buy the stumps from the contractor and use them in the production of naval stores.

Section 3(f) defines "agriculture" as including "the production, cultivation, growing and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended)." Section 15(g) of the Agricultural Marketing Act defines "agricultural commodity" as including crude gum (oleoresin) from a living tree and certain naval stores processed by the original producer of the oleoresin. Since stumps are not living trees, oleoresin from stumps and naval stores produced therefrom are not agricultural commodities within the meaning of section 3(f), and the operations connected with the production of such products are not farming operations. Consequently, even though the employees who extract oleoresin from the stumps and who produce naval stores therefrom are employees of the lumber company, they are not within the section 13(a)(6) exemption. The employees of the contractor removing the stumps are in the same position as they are in the situation presented by Mr. Harper; they are not engaged in practices which are incidental to or in conjunction with farming operations performed on the land where they work.

Mr. Harper also inquires whether the employees of the contractor are engaged in the production of goods for interstate commerce. If the contractor has reason to believe that any of the naval stores produced from the stumps, he sells will eventually leave the state, his employees, in our opinion, are covered by the Act. (See paragraphs 2, 4 and 5 of Interpretative Bulletin No. 5.)

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Arthur E. Reyman, Esquire
Regional Attorney
New York, New York

Rufus G. Poole
Assistant Solicitor
In Charge of Opinions and Review

SOL:GH:HC

July 29, 1941

Standard Dredging Corporation
80 Broad Street
New York, New York
File No. 31-2402

This is with reference to your memorandum of May 19, 1941, contained in the inspection file of the above case, and in which you inquire concerning the status under the Act of employees of the subject company.

It appears from the copy of the memorandum addressed to you by Mr. Fred O. Koetteritz, supervising inspector, under date of May 13, 1941, which was attached to the file, that the subject company owns and operates various types of vessels, which it uses in its dredging operations. The principal types of vessels used by the company are dredge boats, tug boats and scows.

A dredging job is accomplished by a fleet of vessels consisting of one dredge boat and a number of tugs and scows. Since the dredges and scows have no means of self-propulsion, the motive power required to take the fleet to the scene of operation is furnished by the tugs.

On the question of whether the operations performed by employees of the subject company are covered by the Act, the only information available to us is set forth in the second paragraph of your memorandum addressed to Mr. Reilly, from which I quote:

> "The subject firm is a New York corporation engaged in dredging so-called inland waterways (including coastal harbor facilities, ship channels and ship canals) and navigable rivers. It was reported on January 30, 1941 that the subject firm or its subsidiaries were filling contracts, including harbor dredging and filling in San Juan Bay, Porto Rico, for the United States Naval Base,

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> dredging the Mississippi River for the United States Engineer Corps under the Emergency Flood Control Act and dredging the Houston ship channel at Galveston, Texas for the United States Engineer Corps. It appears that most of the work done is done for the United States Government. Probably full information concerning the firm's activities are in the files of the War Department. I do not know whether this information will be made available to us."

As you know, we have consistently taken the position that employees of marine construction contractors are covered by the Act if the purpose and effect of their activities is to enhance and improve navigable waters as essential instrumentalities of interstate commerce. Even on the basis of the meager facts at our disposal, it would appear probable that many of the activities in which employees of the subject company engage fall within this category of covered employment.

In his memorandum to you, Mr. Koetteritz devotes a few paragraphs to a description of the technical details of dredging operations. According to his account, the dredging employees are engaged in such activities as anchoring the dredge at the site of the dredging operations, pumping sand through pipe lines or into scows, setting out, maintaining, "breaking," and taking in pipe lines and pontoons.

While the dredge boats are licensed as coast-wise or ocean-going boats, their crews need not be licensed as would be necessary in the case of vessels which are self-propelling. The captain in charge of the dredge boat is documented with the Bureau of Navigation as the master of the vessel but is not necessarily a licensed master or even a licensed seaman. Generally he is in charge of all the operations on the job. "Directly under the captain are a number of mates each of whom is in charge of a 'watch' or shift. The mate supervises the deckhands, levermen and other workers."

We quote from Mr. Koetteritz's memorandum:

> "The deckhands who work under the mates are considered by the company as being similar to ordinary able-bodied seamen. They need not hold seamen's certificates since this is not a legal requirement of dredge boat crew members. Some of them, however, do have such certificates. They were described as doing the usual work of seamen such as washing down, making fast, taking in letting out slack rope.

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They also work on pipe lines as mentioned under "Dredging Operations', above.

"The engineering department takes care of all the machinery on the dredge boat or the tug whether for propulsion or otherwise. Working in this department besides engineers are oilers, firemen, water-tenders, and wipers who have the same duties as similar employees on any other boat as well as being required to assist with the pipe lines. It was pointed out to the Inspector that the fact that many of these employees work on machinery other than propulsion equipment should be no ground for distinction from engineers on board vessels used as a means of transportation since in the latter class of vessels, certain engineers may be engaged only in connection with stationary machinery such as refrigerating machinery, pumps for flushing toilets and pressure equipment.

"Another group of men, variously considered to be either in the deck or engineering departments, are the lever men who, by means of levers connected with machinery, operate the lowering and raising of the anchors or 'spuds' and the 'ladder' while the boat is engaged in dredging operations.

"The steward's department consists of cooks, stewards and messmen who look after the living facilities of the crew and of the other workers on a job who may have their meals on board the dredge."

In our opinion, none of the employees of the types described above, who are engaged in connection with the operations of these dredges, is to be considered as exempt from the Act as a seaman. As you know, the Administrator recently reversed his ruling relative to the status under the Act of the dredge employees of the Smoot Sand & Gravel Company, and it is his present opinion that dredge employees are not seamen, since their services are not rendered primarily as an aid in the operation of the vessel as a means of transportation. Enclosed for your convenience is a copy of Release R-1467, which was recently issued, and which, as you know, sets forth the Administrator's most recent opinion regarding the status of dredge employees under the Act.

Mr. Koetteritz' memorandum continues to describe the activities performed by the tug boat crews. It appears that the tug boats transport the dredges and the scows to and from the job, and do all the necessary work on the job location requiring transportation,

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such as transporting of scows, men and equipment to and from the shore or out to sea for the dumping of sand. The master of the tug must be licensed for the waters in which he operates or he must pick up a pilot for waters in which he has no license. His crew consists of a mate, deckhands and engineers. Only those who take part in the steering of the ship or work in the engine room must be licensed. We quote from Mr. Koetteritz' memorandum:

> "The deckhands and mates on these boats do what was described as usual seamen's work, such as making fast, playing out and taking in slack lines and washing down. They also work on the pipe lines during dredging operations. The work on the lines is said to require a degree of skill since the particular case varies with the size of the cargo and the rise and fall of the tides. The engineers, which includes foremen, oilers, wipers and water-tenders, operate the boat's engines, and assist with the pipe line during dredging."

If the work performed on the pipe lines during the dredging operations is merely incidental to the navigation duties of the tug boat crew it would not, in our opinion, defeat the application of the seamen exemption.

It is stated in Mr. Koetteritz' report that the scows, which are not self-propelling but are moved from place to place by the tug boats, are used to transport some of the equipment to the job and also, in certain cases, to receive the dredged sand and transport it for dumping either out at sea or ashore. Again we quote from Mr. Koetteritz' memorandum:

> "Each scow is manned by a barge captain who need not be licensed. His duties are to sound water in the bilges, to see that the scow is on even keel and to slack away and bring in the lines with the tides. He also takes care of the running lights at night and, if the boat has a tiller, he steers. In support of its contention that the job requires a knowledge of seaman's work, the company stated that the method of handling a scow by means of its lines depends upon the type of hook-up between the tug and the scow, which varies with the waters in which the scow is traveling. When dumping sand on land the bargeman may go ashore to assist in filling in the land. Dumping at sea involves merely the pulling of a lever on the barge."

Based upon the decision of the Fifth Circuit Court of Appeals in Gale, et al v. Union Bag and Paper Corporation, we are of the opinion that the employees employed on the scows under the circumstances described by Mr. Koetteritz are exempt by section 13(a)(3). However, the exemption would not apply under this case if the bargemen do any great amount of work in filling in the land on shore.

Attachment

240012

COPY

AIR MAIL

Miss Dorothy M. Williams
Regional Attorney
San Francisco, California

SOL:RJW:AMW

Rufus G. Poole
Assistant Solicitor
In Charge of Opinions and Review

August 1, 1941

Alaska Steamship Company
Seattle, Washington
File 46-1

This refers to your memorandum (reference LE:SPM:MN, March 4, 1941) requesting an opinion concerning the applicability of the seamen's exemption contained in section 13(a)(3) of the Fair Labor Standards Act to musicians employed on the subject company's passenger boats operating between Seattle, Washington, and Seward, Alaska. It appears that the musicians sign regular shipping articles before a United States Shipping Commissioner and that they hold certificates of efficiency as musicians and also certificates of identification issued by the Bureau of Marine Inspection and Navigation of the Department of Commerce. The men are under the direct control of the ship's master. They have regular lifeboat drills and fire drills and attend these drills and in the event of accidents are to help direct the rescue of women and children passengers. They play music for a short specified period at lunch and dinner and for about three hours in the evening.

It is our opinion that these musicians come within the language of Interpretative Bulletin No. 11, particularly paragraphs 3 and 4 thereof, and are to be considered within the seamen exemption such as a steward or purser would be.

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Donald M. Murtha, Esquire
Regional Attorney
Minneapolis, Minnesota

Rufus G. Poole
Assistant Solicitor
In Charge of Opinions and Review

SOL:EGL:EG

Aug - 6 1941

Request for Opinion

In your memorandum of July 16, 1941, you requested our opinion on a letter which you have sent to Mr. C. T. Malmborg of Pillsbury Flour Mills Company, Minneapolis, Minnesota. Mr. Malmborg is interested in the applicability of the section 7(b)(3) exemption to office employees of a grain elevator who, in addition to their duties concerning the storage of grain, make entries of purchases by the elevator of grain on cash and on "futures" contracts, together with the elevators' hedge positions.

You stated in your letter to Mr. Malmborg that:

> "It is our opinion that if the duties performed by the clerical employees with reference to entries of sales and 'hedges' are entries which relate to wheat which has been purchased and stored by your organization, the making of such entries will not deny the Section 7(b)(3) exemption with respect to these employees."

We have been informed by a representative of the National Grain Trade Council in Washington that grain purchased by an elevator either for cash or on the "futures" market is grain that is actually stored in the elevator. It therefore appears that the clerical work performed in connection with such purchases and in connection with the elevator's "hedge" position are part of the storage of grain by the elevator, and, as you state in your letter to Mr. Malmborg, within the section 7(b)(3) exemption.

259507

SOL:EGL:MS

Mr. J. C. McNulty
J. A. McNulty Company
1000 Metropolitan Life Building
Minneapolis, Minnesota

Dear Mr. McNulty:

This is in reply to your letter of June 6, 1941 and to your telegram of July 8, 1941, in which you inquire whether the Fair Labor Standards Act is applicable to your employees. We regret that the complicated nature of the problem you present has delayed our reply.

You state that you are an independent contractor exclusively engaged in installing grain doors in railroad cars to be loaded with grain by terminal elevators (which operation is called coopering), and in the removal of grain doors from cars which have been emptied by such elevators (called reclaiming). You quote the following portions of a report prepared by an examiner of the Interstate Commerce Commission in which the operations of independent contractors who cooper and reclaim grain doors are described:

> "Upon delivery of an inbound car of bulk grain to an elevator at one of these terminal points the car is placed for unloading at the grain pit within the elevator, and the grain doors on the near or unloading side of the car are forced back into the car and the grain removed, usually by some mechanical means. Thereafter the car is swept to remove all of the grain, and the grain doors which were removed are placed back in the car. When these operations are completed the car is moved outside the elevator and the men employed by the grain door agency proceed to take down the grain doors or lumber from the off side of the car, as well as from the end doors if the car is so constructed. These men then unload the grain doors and lumber onto ground adjacent and usually belonging to the elevator, clip all protruding nails from the doors, make such repairs as are found necessary, and place the doors in what are termed reclaim piles. During the

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> reclamation, as well as during the installing operation, the grain-door agency maintains an accounting system whereby the several carriers are credited or debited for doors reclaimed or installed. When the accumulation of doors in the reclaim pile becomes excessive the so-called surplus doors are loaded into freight cars by the grain-door agency for return to the owning line, each door being stenciled or otherwise marked for identification with the name of the owning line. Subsequently the same men distribute the remaining doors from the reclaim piles to so-called stock piles, from which they carry the doors to cars which are set for installation.
>
> "In the latter operation the men employed by the grain-door agency first inspect the car to see whether it is fit for bulk-grain loading, sweep the car, make such minor repairs as may be found necessary, carry the necessary grain doors from the stock piles and put them in the car, fix the folded or twisted paper in place as previously explained, and nail in the grain doors. The reclaiming work begins when these men begin to take down the grain doors which were not removed when the grain was unloaded from the inbound car, and the defendants take the position that the installation work for the outbound movements begins when the doors are taken from the reclaim piles and placed in the so-called stock piles."

Section 7(b)(3) of the enclosed copy of the Act provides that employees engaged "in an industry found by the Administrator to be of a seasonal nature" are exempt from the overtime provisions of the Act for an aggregate of 14 workweeks in the calendar year, provided that overtime compensation is paid at the rate of one and one-half times the regular rate of pay for employment in excess of 12 hours in any workday and in excess of 56 hours in any workweek. I have determined that the storing of grain by public terminal and subterminal elevators is a branch of an industry and of a seasonal nature within the meaning of section 7(b)(3) and of our definition of seasonality contained in section 526.3 of the enclosed copy of Regulations, Part 526. (As it is explained in the enclosed release R-1455, a similar determination has been made in regard to the storing of grain by country grain elevators and to the storing of grain by mill operators.)

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One of the most difficult problems confronting us under section 7(b)(3) is that of independent contractors who perform operations for a concern which is engaged in an industry or in a branch thereof found to be seasonal. After a careful study of the matter, we have concluded that the exemption applies only to those employees of independent contractors who, because of the nature of their employment, must work in a plant or in the immediate vicinity of a plant that is engaged in the exempt seasonal operations, and, in addition, whose work is completely interwoven with the seasonal operations conducted at the establishment.

We do not believe that your employees come within this category. They perform no operations until the grain is removed from the railraod cars and placed into the grain elevators. Thereafter they remove the grain doors, repair them and place them in piles. The doors are installed in the cars before they are loaded with grain. Doors which are not to be installed are placed in freight cars and shipped to the owning railroads. It does not seem that these operations must be performed in the elevator or in its immediate vicinity or that they are so interwoven with the storing of grain in the elevators that they cannot be segregated therefrom for practical purposes. Consequently, in our opinion, the section 7(b)(3) exemption does not apply to your employees who are engaged in coopering and reclaiming grain doors.

We should like to direct your attention to sections 7(b)(1) and 7(b)(2) of the Act which partially exempt from the overtime provisions of the Act employees employed in pursuance of certain types of agreements made as a result of collective bargaining by representatives of the employees certified as bona fide by the National Labor Relations Board. In this connection, your attention is directed to the enclosed copy of Interpretative Bulletin No. 8.

If you have any further questions in regard to this matter, please do not hesitate to communicate with us.

Sincerely yours,

Philip B. Fleming
Administrator

Enclosures (4)

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