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In the matter of  
Hearing on Proposed Amendments of  
Sections 536.1 and 536.2 (Area of  
Production) of Regulations issued  
under the Fair Labor Standards Act  
of 1938  
Fresh Fruits and Vegetables

Findings and Recommen-  
dation of the Presiding  
Officer  
March 14, 1939.

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The Texas Citrus Shippers' Association, The West Michigan Growers' and Shippers' Association, the Agricultural Producers' Labor Committee, the International Apple Association, and sundry other parties having filed petitions with the Administrator for an amendment of Section 536.1 and Section 536.2 of regulations issued by the Administrator under authority of Section 7(c) and Section 13(a)(1) of the Fair Labor Standards Act of 1938 - Title 29, Labor, Chapter 5, - Wage and Hour Division, the Administrator gave notice of a public hearing to be held at the Hotel Raleigh, Washington, D. C., 10 o'clock A. M., December 14, 1938, before the undersigned as presiding officer. By subsequent notices the said hearing was postponed to January 9, 1939 at the same hour and place.

Pursuant to notice the undersigned convened the hearing and an opportunity was afforded to all who appeared to present testimony and to question witnesses through the Presiding Officer. Appearances were entered for and against the various proposed amendments. Pursuant to permission, briefs and additional statements were filed subsequent to the hearing by petitioners and protestants.

#### I Introduction

The scope of this hearing was stated in the notice of hearing by the following question, "What, if any, amendment should be made of Section 536.1 or Section 536.2 of the regulations issued under the Fair Labor Standards Act of 1938 in respect to the definition of 'area of production' for fresh fruits and vegetables." 1/ The breadth of the problem is reflected in the widely representative capacity of the persons who appeared at the hearing. While it is true that the processors and packers of certain fresh fruits and vegetables

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1/ It is clear that Section 536.1 is not applicable to fresh fruits and vegetables, since the exemption in Section 7(c) of the Act is valid for fresh fruits and vegetables wherever first processed, canned, or packed.

in certain districts did not appear in person, the volume and nature of the facts presented are sufficient to reveal the major problems involved in defining "area of production" for the industries mentioned. Particularly full data are supplied for the California citrus industry, for the California deciduous fruit and vegetable industry (except canning), for the South Texas fruit and vegetable industries, for the Florida citrus and celery industries, for the apple industry, and for various other sections and commodities. The record reflected the limitation of the hearing to fresh fruits and vegetables. Little testimony was offered on other commodities. One possible exception to this may be found in the inclusion of testimony concerning west coast walnuts. Inasmuch as the petitioner appearing on behalf of the walnut industry indicated that a special treatment of walnuts might be considered desirable and did not insist that walnuts need necessarily be included herein, it appears appropriate to exclude walnuts from this finding without prejudice to a subsequent determination.

The terms of Section 13(a)(10) of the Fair Labor Standards Act of 1938 include certain operations clearly applicable to the fresh fruit and vegetable industry and others clearly not so applicable. The record fails to show a sharp distinction in the use of all the potentially applicable terms, and the precise determination of their scope need not be made at this time. As a matter of con-

venience the present findings will consider in turn:

- (1) Preparing fresh fruits and vegetables in their raw or natural state for market. (Including handling and packing). 2/
- (2) Canning fresh fruits and vegetables for market.
- (3) Drying fresh fruits and vegetables for market.
- (4) Storing fresh fruits and vegetables for market.

Finally, it may be well to note that these findings are concerned only with fresh fruits and vegetables that move in interstate commerce, since the Act applies by its terms only to persons engaged in interstate commerce or in the production of goods for interstate commerce. It is possible that fruits and vegetables grown, handled and consumed in the same state are differently handled, but no consideration thereof is necessary herein. The interstate movements are large and consequential, and the industry described at the hearing is national in its range.

II Preparing Fresh Fruits and Vegetables in Their Raw or Natural State for Market.

The widespread use of central packing houses is a development of recent years. In the past the individual grower shipped his produce to market without special preparation other than to place it in such containers as were abso-

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2/ The trade expression "packing house" is used herein only in reference to preparation in the raw or natural state.



lutely necessary for shipment. The change that has come about was caused partly by legislation, partly by new marketing or purchasing habits. It has been learned by growers that the best prices are paid for fruits and vegetables that have been carefully cleaned, graded, and packed. 3/ It has also been learned that the varying tastes of different markets can best be served by the supply of certain grades and types. Hand in hand with this change in marketing techniques go the new requirements imposed by State and Federal legislation and regulation. Sprayed apples cannot move in interstate commerce unless they are washed; fruits destined for foreign ports must be federally inspected and must measure up to federal standards of purity; only graded citrus fruit may be shipped out of the State of Florida. This list of laws and regulations could, of course, be greatly extended, but it is sufficient to indicate that a very important part of the fresh fruits and vegetables that move in interstate commerce must be prepared for market in an establishment where cleaning, grading, packing and other facilities are available. When the compulsion of marketing demands and practices is added to the compulsion of legislation and regulation, it is evident that the total amount of produce so prepared that reaches the mar-

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3/ Various attendant operations such as bringing out latent color are of importance with some commodities.

ket is of great consequence. The proportion undoubtedly varies in different parts of the country and with different commodities but such preparation appears to be characteristic of the major portion of all interstate shipments.

Data supplied by various witnesses show that modern machinery for the preparatory operations is too expensive for individual growers to provide. Thus the equipment in a one-chain Florida celery wash house costs \$15,000 to \$25,000 and the investment in two apple packing houses in Virginia and West Virginia totals \$35,000. The investment in large fruit and vegetable packing houses may be far greater. Furthermore, the capacity of even a small packing house is such that a large volume of production is necessary to make its operation economical or feasible. Under the circumstances it is obvious that only a minute percentage of farmers have enough capital and enough production to make it possible for them to own and operate their own packing houses. The average grower must depend on a central packing house if his produce is to be prepared for market, and, as stated above, to an increasing degree he must, by legal or commercial compulsion, have his produce prepared for market if it is to be marketed at all, or marketed profitably. It is important to note that fruits and vegetables from all sections are in competition in the great consuming markets.

As a result of these conditions, producing areas are habitually serviced by community packing houses. A great

many of these are operated by producers' cooperatives; for example, cooperative packing houses handle over 85% of California citrus, 53% of Texas citrus, about 70% of the fruit produced in the Hood River District, about 70% of California avocados, and about 25% of the Eastern Shore of Virginia fruits and vegetables. However, the degree of cooperative control varies greatly with different commodities and in different sections.

The second characteristic form of ownership and operation of packing houses is the locally controlled independent, i.e. non-cooperative, establishment. In some instances these establishments may buy the produce, but in many they operate on a custom basis, i.e., they charge the grower for the services performed but do not take title to the goods. The testimony given at the hearing indicates that rates and services are similar in cooperative and independent establishments. Only in a few instances does there appear to be anything approaching domination of the packing industry by independent (i.e., non-cooperative) institutions. Indeed, in some important instances, particularly on the West Coast, packing house practices and standards are set by the cooperatives. 4/

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4/ The whole subject of packing house control is inadequately dealt with in the record. Additional material is found in the Federal Trade Commission Inquiry into Farm Income, Part II, (Government Printing Office, 1938), of which cognizance is taken herein.

No quantitative data are supplied on packing houses operated by non-local owners, but insofar as the record goes on this subject, such external control appears to be an inconsiderable element. However, in certain commodities the large independent shipper, who may or may not operate a packing house, is an important factor. <sup>5/</sup> Likewise small (probably very much smaller) in relation to total production is the operation of packing houses by individual growers, although there is some evidence that there is a slight competitive factor between on-farm and off-farm packing houses of this nature under the present definition of "area of production" in a few localities.

It was urged by the applicants that the areas in which some fresh fruits and vegetables are grown in commercial quantities are recognized in law (such as marketing agreements for production control) and in common usage. Among the districts thus cited are: - citrus - Northern California (6 named counties); Central California (3 named counties); Southern California (7 named counties); Arizona (3 named counties); - apples - California (Sebastopol district); Washington and Oregon (Yakima, Wenatchoe, Walla Walla, Medford, Milton, Hood River, and Freewater districts); Virginia (Winchester district); avocados - California (5 named counties); - celery - Florida (9 named counties).

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<sup>5/</sup> See Federal Trade Commission, Agricultural Income Inquiry, Part II, p. 6.



It appears that some of the recognized districts are sharply defined by natural or political boundaries, whereas many others are not easily definable or separable from one another. <sup>6/</sup> Thus in California the applicants request that the definition to be adopted consider the sixteen citrus producing counties in three different districts as a single area of production. Similarly the vegetable producing area in California is said to consist of 40 of the 58 counties in the State. Whatever might be found by further investigation, the present record does not contain the data for mapping all the area in which fresh fruits and vegetables are grown.

On the whole the record shows a common tendency for packing houses to be located as close to the farms from which they draw their produce as access to transportation, refrigeration, and other facilities will permit. The reasons for this are obvious. First, fresh fruits and vegetables are best maintained in prime condition if they are handled promptly after picking. Second, there is a saving in freight costs since preparation for market frequently includes the removal of culls, etc.

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<sup>6/</sup> As instances of producing districts that are obviously distinct may be mentioned the Southern Rio Grande Valley, and the Hood River area. It is interesting to observe that the strongest proponent of "recognized districts", offers alternative suggestions as to district delineation in named areas (Phillips Brief p.3.)

It can be expected from the foregoing that the typical packing house will be found near the farms from which it draws a major part of its products, and, as a corollary, usually in the country or in a small town; this conclusion, based on a priori considerations, is supported by the clear weight of evidence. Exception to such typical packing house locations are relatively few. Variability in distance from the producing farms is caused among other factors by (a) absence of transportation and other facilities in the immediate producing areas; (b) density of production; (c) perishability of the products; (d) character of farm-to-packing house roads.

Citrus fruit, although perishable, does not deteriorate rapidly and is not highly fragile. Thus in California, with good roads, the fruit may be hauled as much as 80 miles to the packing house, although distances of 18 to 30 miles are much more common. In Florida, where the citrus acreage is spread over a large part of the State, average hauls are frequently longer and maximum hauls go up to 250 miles in some cases. On the other hand, in Texas, where the acreage is confined to one small area, the maximum haul is about 60 miles. By contrast with citrus, celery, which is highly perishable until it is iced, is hauled in Florida an average distance of only  $2\frac{1}{2}$  miles, and the longest known haul is only 17 miles. An illustration of normal conditions is furnished by California vegetables which move only 10 to 35 miles.

It has been indicated above that packing houses are

frequently found in the small towns near the farms they serve, or on the outskirts thereof. In a few instances the houses are located in large cities, for example in Los Angeles, although usually these cities are close to the producing areas. There is evidence to show that these large city houses bear a somewhat different relation to the farms than the open country and small town or small city packing houses. Thus in California some non-citrus fruits and some vegetables are shipped in mixed car lots to satisfy market demand. In making up the mixed cars the packing house must frequently look beyond its normal producers for produce to fill out the orders; this produce it obtains from other growers or from other packing houses. The produce is thus subjected to an abnormally long first haul, or to a second shipment (before shipment to market), and it so happens, probably not accidentally, that this mixed car business in California is concentrated largely in the 16 vegetable packing houses within the corporate limits of the city of Los Angeles. 7/

In Florida, the normal, rather direct movement from farm to nearby packing house, is somewhat distorted in some instances by a choice of packing house with reference to further

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7/ The California mixed car business is small in comparison with total California production. In South Texas the mixed car business is of greater consequence, but the producing area is so concentrated that no significant distortion of normal hauls is caused thereby.

shipment. Thus among the longest hauls of Florida citrus are those to the packing houses in the three gateway cities of Ft. Pierce, Tampa and Jacksonville, the last two named being large cities. It must be assumed that the location or development of the packing houses in these cities was caused less by direct access to major producing areas than by direct access to markets.

These matters are dwelt on because they form a contrast to the usual direct and short haul relationship between the farmer and the packing house, but the concept of a short direct haul does not inevitably mean that a grower hauls his produce to the packing house nearest his farm. He is frequently influenced by such matters as membership in a cooperative, availability of special facilities at another house, nearness of the house selected to a source of farm supplies, etc.

It has already been noted that for certain shipments, the packing house from which the produce is shipped is not the first concentration point for the fruits or vegetables. Other instances of a similar variation from the basic pattern may be observed. For example, in some parts of the country where there are not many packing houses, the produce is first assembled at an assembly point for convenience and economy in transportation to the packing house.

In connection with the location of most packing houses in small cities, towns, and rural areas, it is asserted that there is great difficulty in obtaining a large supply of labor to meet the seasonal peaks of production. 8/ The

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8/ The exemption set forth in Section 7(c) of the Act was intended to provide for this situation.



aggregate length of peak periods is considerably affected by the duration of the operating season. This varies greatly; the season for Southern California citrus lasts from December through October, whereas many crops are harvested and packed in a period of three or four weeks. However, packing houses, especially in California, Texas, and Florida operate over long periods by packing successive crops, either of different commodities or of the same commodity successively ripening in different areas. <sup>9/</sup> Even when the packing house operates continuously or almost continuously throughout the year, it is normally subject to sudden demands on its facilities that must be met if it is to render adequate service to the grower. To some extent this condition may be overcome by the enlargement of the working force, and this step is used in practice; but it is contended by the petitioners that the normal packing house, situated away from large reservoirs of labor, cannot surmount the seasonal peak or peaks solely by hiring additional workers, and that it must therefore employ its workers for occasional or frequent periods of hours in excess of the present statutory maximum. To what extent this practice could be abated by improved management methods cannot be said, but the existence of the practice, modified, especially in the case of

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<sup>9/</sup> This factor affects the length of haul from farm to packing house.

women, by state legislation limiting hours of work and by general social considerations, cannot be denied. 10/ In its defence it is argued that the shortness or irregularity of seasonal operations makes long hours essential for a worker who must gain all or most of his whole year's cash income in a restricted period of time, but it may be noted that many packing houses operate for a major portion of the year. In this connection the petitioners presented evidence to show that most packing house workers are residents of the community, and frequently members of farm families. While there are many migratory workers employed, the desirability of avoiding the influx of additional large groups of seasonal migratory workers was also urged by certain witnesses. 11/

In addition to the problem of finding labor is the problem of relating the investment in equipment to its operation by the optimum number of employees each year. The

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10/ Strong opposition to the extraordinarily long hours worked by some packing house and cannery employees will be found expressed in the Record, pp. 355-8.

11/ The record contains no convincing data on total packing house employment but figures for the citrus industry of 20,000 employees (peak) in California and Arizona, and 30,000 in Florida (combined packing house and cannery employment) may be noted. Apparently total employment has increased greatly over the years.

evidence on the number of employees in packing houses is not clear but some similarity in average packing house employment is shown: - California - Arizona citrus employees 50 to 200; Texas fruits and vegetables 15 to 200; California deciduous fruits 25 to 80; apples 30 to 90; Florida celery 30 to 230; 12/ Virginia Eastern Shore vegetables 10 to 40. Furthermore it is stated that at least in Michigan the typical fruit packing house can be operated with a skeleton crew of 15, but for efficient operation should have 26 as a minimum. For obvious reasons, there were no witnesses present to testify about the small packing shed with seven or fewer employees, but it is plain that normal conditions in a great number of establishments that pack fruits and vegetables for market in commercial quantities require more than seven employees.

It has been stated above that hours of work in packing houses are to some extent limited by state legislation. Even more striking is the effect of state legislation on wages. Minimum rates (in general applicable only to women) are California 33-1/3¢; Washington 32-1/2¢; Oregon 30¢; Wisconsin 22-1/2¢; Minnesota 24-36¢; Massachusetts 27¢; Puerto Rico, \$1 per 8 hour day (adults). The actual prevailing average rate of pay in these states (except Puerto Rico) is usually

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12/ The celery wash shed is set up with units called chains. Apparently a single chain requires about 30 workers.

above the state statutory minima and the rate for men is consistently higher than the rate for women. Thus in the packing houses in this group of states, a base rate of 30¢ would require no adjustment in the Western states and only a slight revision elsewhere. There is evidence to show that rates of 25¢ or more are common in such diverse states as Nevada, Indiana, Michigan, New Jersey and Pennsylvania. In Florida only a few citrus houses pay less than 25¢. On the other hand, lower rates are common in Texas, in Virginia and in other states. Disparity in existing rates finds its counterpart in the chief preoccupation of the applicants. Thus the major concern of the packing houses in the higher wage states is in the overtime penalties, which severely increase the disparity between their rates and rates elsewhere whenever overtime must be paid. Plants in low wage areas are, of course, primarily concerned with the present and future statutory wage minima.

The question of wage rates is intimately connected with the general problem of costs and profits in the industry. It is apparent that, whatever the condition of individual packing houses, the fresh fruit and vegetable industry is seriously depressed at the present time for both growers and packers. It is the contention of many witnesses that enforcement of the wage and hours standards of the Act would automatically result in even lower prices to producers. However, the record fails to supply any adequate statistical data to support this contention



It may well be doubted that all the increased cost would inevitably be charged against the grower. It is also probable that the percentage of the total delivered cost attributable to the packing house (and particularly to packing house labor) varies in different localities and with different commodities; in some instances it may represent a very small percentage of the total, in others it may be considerable. In any event, any estimates of increased cost given at the hearing appear to be no more than guesses.

### III Canning Fresh Fruits and Vegetables for Market

Canning is defined by Mr. H. Thomas Austern, appearing for the National Cannery Association (Record p. 532) as follows: "Canning is defined as hermetically sealing a product and thereafter sterilizing it by heat." It would be superfluous to dwell on the tremendous importance of this process both to growers of fresh fruits and vegetables, and to consumers. Canned goods are non-perishable for long periods of time; they need neither refrigeration nor other special handling; broadly considered, canning is much the most important method for the profitable preservation of a

seasonal oversupply of fresh fruits and vegetables. 13/

The record contains no evidence of a general shift from farm canning to central off-farm canning comparable to the historical trend in unprocessed preparation for market. Indeed, the urban origin of canning was testified to by witnesses from Baltimore who stated that the American canning industry was born in that city. In any event, modern canneries are typically independently, not cooperatively owned and operated. There does not appear to be any important fruit or vegetable in which cooperative canning plays a dominant part.

For example, it was testified to that only two of the approximately 300 members of the Ozark Cannery Association are cooperatives, nor does it appear that there are other cooperative canneries in the Ozark Region. Illustrative data on this question may be found in the Agricultural Income Inquiry Part II, pp. 127-138.

There is evidence in the record tending to show that many canneries are locally owned; against this must be set other evidence in the record and the conclusions in

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13/ The record shows that apples are preserved in large quantities in refrigerated warehouses without processing, and it is probable that root vegetables are similarly held off the market, but this appears to be an exception to the general practice of the industry.

the Agricultural Income Inquiry Part II, pp. 127-138, indicating that a major portion of some commodities and a substantial portion of others are canned by a comparatively few large canning companies. These companies have numerous branches in the country as well as large establishments in cities. Their control and operation is clearly commercial and industrial, and removed from the grower.

The record fails to give an adequate account of the extent of canning on the farm, but there is some indication of the existence of canning operations conducted by large growers for their own products. An occasional local competitive situation may arise thereby, but there is no reason to believe that this is more than a very minor element in the whole industry. It may also be assumed, since the record is silent, that farm canning of small quantities of fruits and vegetables, as a family or neighborhood undertaking, is a negligible factor in comparison with the general volume of canning. In sum, as stated above, the typical cannery is owned and operated commercially, frequently by a large canning company, and not by or for the farmer.

A highly characteristic feature of the canning industry is contracting for supplies. According to the Counsel for the National Cannery Association (Record p. 524), approximately half of all fruits and vegetables used in canning are delivered to the cannery pursuant to a contract. Usually the contract is made on an annual basis and provides for the cultivation by the farmer of a stated number of acres of each crop contracted for, and the delivery of the product thereof. The contract may also provide for financing by the canner and other matters. The balance of the fruits and vegetables received by the canneries are almost invariably bought outright. <sup>14/</sup> In neither instance is this produce handled for the farmer's account. This is not usually true with respect to cooperative canneries and certain exceptional instances of custom canning may also be noted, but it is the normal practice throughout the industry.

Canneries, in the common phrase, are both seasonal and non-seasonal. In other words, there are some canneries that operate only for a short period and others that operate all year round, or most of the year. The primary

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<sup>14/</sup> In some instances canners purchase their fruits and vegetables from commission houses.



distinguishing factor is the nature of the produce. Thus many canneries can only fresh tomatoes, others can tomatoes and snap beans, and others tomatoes, snap beans and spinach, etc., etc. Obviously, the three or four pack cannery generally operates for a longer period than the one or two pack cannery. The commodities named as illustrative, and the many others commonly canned, are clearly fresh fruits and vegetables. By contrast a tremendous part of the canning business is the manufacture of soups, fruit salads and other combined products in which one or more of the ingredients is a canned product. This process of repacking, as it is called, does not appear to be contemplated as an exempt operation under the Act; in any event, it is clearly outside the scope of this determination since canned goods are not definable as fresh fruits and vegetables. Similarly: the canning of "dry lines," even to the extent that such operations might be covered by Section 13(a)(10) is irrelevant to the present inquiry. 15/

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15/ The proper classification of by-product canning such as the manufacture of pectin is not appropriately determinable herein. Any advisory opinion thereon may be properly issued by the Administrator in an Interpretative Bulletin or similar publication.

Since the typical cannery is usually not a community undertaking operated to serve nearby farmers, its location may be dictated by a variety of general business considerations. Canneries that can several commodities are frequently located near the most perishable of these, but at a considerable distance from the others. Canneries that wish to fill out certain orders may go long distances for some of their commodities. Furthermore, the volume of canning is frequently dictated by market demand; therefore, the canner does not depend entirely on local supplies; and purchases his fruits and vegetables on the open market. Finally, one economic function of canning is the utilization of substandard fruits and vegetables that have little or no commercial value in their raw or natural state. For such canning it is practical to haul perishable commodities long distances, since bruises in fruits and vegetables used for canning are not completely destructive value.

The effect of these considerations can be seen in the highly variable actual conditions described in the record. Only a small portion of California citrus fruit is canned and it may be noted that the 13 citrus canneries, all of which operate on packing house culls, are located near the houses and the groves, so that hauls are short. The important Florida citrus canning industry, operating for about six months a year, procures part of its citrus direct from the groves and part from packing houses. There are only 50 citrus canneries in the State in comparison with 350 citrus packing

houses; accordingly some fruit is hauled to the canneries over 200 miles, and the average haul is longer than the haul to the packing house. South Texas canneries use only the local produce, and are accordingly all located in the small towns of that restricted area. A witness for the Eastern Shore of Virginia Produce Exchange states (Record p. 623): "This market has been developed by the Exchange on a cooperative basis, mainly with canners located at points outside the Eastern Shore of Virginia, since the canneries inside the area are inadequate to care for the production." Thus this cooperative arranges for canning contracts for its members with canneries in Maryland, Pennsylvania, and New Jersey, including canneries in the cities of Baltimore and Philadelphia. The produce is first assembled and inspected at assembly points and then shipped to the canneries. In Arkansas canneries obtain tomatoes from distances up to 20 miles, but greens, beans, and spinach come from distances ranging from 35 to 110 miles. Wisconsin canneries are usually located close to their crops and in small towns. The exhibit furnished by the National Canners Association in 1938 and incorporated in the record by reference, shows hauls up to 100 miles in Minnesota to accommodate suddenly ripened crops. The Northwest canners occasionally go 700 or 800 miles for their produce and the Baltimore canners depend partly on local supplies, up to 50 miles, partly on the produce of the Delmarva Peninsula, up to

200 miles, and partly on goods brought from growers or commission houses, up to 500 miles. And in Puerto Rico the six small citrus canneries are all located on farms and draw their produce from nearby farms.

While there may be some home canning with equipment operated by 7 or fewer persons, it is the opinion of all witnesses that any commercial cannery must employ a greater number of persons. The actual number of employees varies greatly. Illustrative employment figures include Texas 10-300; Arkansas average 100; Puerto Rico 10-90; Baltimore, skeleton crews 25-50, full crews up to 200. Conditions with reference to wages paid and hours of employment, described above in connection with packing houses are substantially similar in canneries. However a difference may be noted in the possible effect of increased cannery labor costs on the net price received by the farmer for his produce. Since most canneries are independent and not cooperative, since many are branches of large canning companies, and since most canneries buy their produce and do not handle it for the grower's account, it is probable that increased cannery labor costs would be borne by the grower to a smaller degree than increased packing house costs, assuming other factors to be equal. Furthermore, since it appears probable that canneries are in general more highly mechanized than packing houses, an increase in labor cost would represent a smaller increase in total cost for canneries than for packing houses.



#### IV Drying Fresh Fruits and Vegetables for Market

The record does not contain much material on drying. Apparently most drying is done by the farmer on the farm and the product is then sent to be cleaned and packed. If the packer is a cooperative, the grower retains title; if the packer is a commercial institution, the product is bought before cleaning and packing. In some cases weather conditions cause the grower to ship his fruit to the dry yard undried. A certain amount of fruit is dried at the yard which has previously been rejected at the packing house as unsuitable for fresh shipment. Except for these qualifications, the operation of dry yards seems similar to the operation of packing houses.

#### V Storing Fresh Fruits and Vegetables for Market

The typical packing house for most commodities ships its produce direct to market. The produce may be stored at the market, but such terminal storage does not appear to be storage for market within the meaning of Section 13(a) (10), and is not considered herein.

Storage at the point of origin is common with certain fruits and vegetables, most notably apples. It includes precooling in connection with packing, and storage for later sale. Frequently, the warehouse is operated in connection with a packing house, and the additional transportation from packing house to warehouse (and occasionally back) does not

materially alter the total haul from the farm. In some instances, particularly when the crop is unusually heavy, the produce may move a considerable distance to storage. One witness spoke of shipping apples to storage in Pittsburgh and Cincinnati from the Winchester producing area.

The storage warehouse normally does not buy the produce it stores; it charges the farmer for its services and the local warehouse is thus part of the facilities used by the farmer in preparing his fruits and vegetables for market. Such storage and handling is normally for the farmer's account.

#### VI. Legislative History

It is apparent from the legislative history that there was not a complete meeting of minds on the significance of the term "area of production." In spite of the ambiguity, certain criteria may be accepted by the Administrator as well established.

An amendment proposed by Senator Schwollenbach to the original bill, was posited on the belief that the exemption of the packing house on the farm (in the definition of "agriculture") would discriminate against the small grower who was forced to use a community packing house. <sup>13/</sup> This assumption was based on the further assumption that the cost of pre-

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<sup>13/</sup> See above p. 8.

paration is borne by the grower. 17/ These assumptions are to be taken as data which the Senate had in mind in passing the Schwellenbach amendment.

Section 13(a) (10) includes in effect, as one of its terms the Schwellenbach amendment. As a whole, it is based on the second Biermann amendment, the last of a series of amendments that dealt with this same general subject. While agreeing with and reemphasizing Senator Schwellenbach's assumptions, Congressman Biermann and his colleagues in the House of Representatives also referred to the lower cost of living and easier working conditions in rural areas, differential freight rates, the benefit to rural areas conferred by "farm factories," and the need for elastic hours.

Turning from the Congressional assumptions of fact to the direct question of "area of production", it is to be noted that in the Senate the phrase "immediate production area" was used. This implication of immediacy was borne out by subsequent discussion. Congress apparently had no desire to exempt plants located at a considerable distance from the farms whose products they used.

This conclusion is well illustrated by the testimony of Congressmen at the hearings:

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17/ See above pp. 17 and 24

Congressman Smith (Record p. 421): "a substantial area of production where the farmers or orchardists might bring their stuff to be processed within a reasonable area of the packing or processing plant."

Congressman Pierce (Record p. 499): "How far would you go? I know that question came to my mind and to Mr. Biermann when we were talking about it. Well, we said eight or ten miles, where the fruit is delivered the first time, and perhaps 20 miles in an area of production. You have got to have something reasonable. But when they take them from Hood River to Portland, 100 miles away, or 80 miles away, I would not admit that."

Congressman Patman (Record p. 774): "Congress meant the general vicinity, the area where it was produced not upon a particular farm."

On the second principal criterion mentioned in Congress, rural vs. urban areas, based largely on the difference in cost of living, the record is also illuminating.

Congressman Robertson (Record p. 93): "It is very clear in my mind that the House intended it to mean what Mr. Biermann said it meant, and that was to put the rural sections and the small towns on a different basis from the big cities in the adoption of the new plan in this country."

Underlying all this discussion was the concern of Congress with regard to the effect of increased labor costs on the farmer. This needs no illustration here.

The record of the debates in Congress contains suggestions of other possible criteria such as the number of employees in the plant, freight rate differentials, adequacy of labor supply, etc. But for some of these criteria the evidence is contradictory and for others the incorporation into a definition capable of adequate administrative clarity and applicable to fresh fruits and vegetables is not feasible. The definition to be adopted must there-



fore be directed toward the relation of the plant to the farmer with the three qualifications of (1) geographical immediacy, (2) rural character of the community in which the plant is situated, and (3) relation of cost factors to the farmer's income for his produce.

#### VII Distance from Farms

It is clear from the foregoing description that there is considerable variation in the distance that fruits and vegetables move from the farm to the preparing or first processing establishment. Nevertheless it appears on analysis that most of the long hauls occur when the produce is taken to an establishment that has not been located to serve a producing area but out of regard for markets, labor supply, etc. This is true of a large part of the canning industry, but it is not true of any large part of the packing industry. Clearly it was partly for this reason that the representatives of the canning industry found such difficulty in formulating a definition of "area of production." Thus Mr. H. Thomas Austern, counsel for the National Cannery Association, stated with respect to "area of production" (Record p. 527): "This concept is new to us. It is not a common denominator of anything we know in the industry." Mr. Austern also referred (Record p. 519) to "This mystical phrase," and again (Record p. 541), to "This weird subject." Finally, Mr. Austern, speaking again

as representative of the National Cannery Association, stated (Record p. 545), "I might say, also, I would be delighted to come down and talk with any representative of the administration as to what this thing means. I lived through the enactment of this law, and on the morning that I saw this I did not know what it meant. When formally requested, as counsel for the association, to tell them what it means, we gave them an accurate and complete answer, which was that we did not know, and I have no reason today, and no reason at the hearing of all of this testimony, to have any further knowledge of it."

As a result of the above considerations, the farm to cannery distance is frequently not indicative of a direct relationship between the location of the cannery and the location of the farms whose produce it cans. On the other hand, most packing houses are located to serve a particular farming area. Therefore, it is usually safe to assume that a long haul indicates a haul out of the area of production, so that an analysis of normal farm to packing house hauls can be relied on as an index to normal fresh fruit and vegetable movements within areas of production.

A liberal and practical index can be established by an analysis of the farm to packing house movement of California citrus fruit, because (1) citrus fruit is not highly perishable and (2) the radius of citrus fruit haul-

age over the excellent California roads is longer on the average than the haul of other commodities in California or elsewhere, except where the hauls are affected by location of packing houses with reference to access to consuming markets, labor supply, etc. 18/

Exhibit A-11 shows the shortest, the longest, and the average haul to each of the 188 California citrus packing houses. 19/ One hundred eighty have a maximum haul of under 50 miles, and only eight have a maximum haul of over 50 miles. Evidence previously cited 20/ confirms the conclusion that it is proper to question whether a packing house receiving any kind of fresh fruit or vegetable from more than 50 miles is within the area of production of such produce. However, since there may be an occasional situation where the application of an arbitrary 50 mile rule would be arbitrary in fact, some flexibility appears desirable. It will therefore be recommended that no establishment, otherwise eligible, be considered within the area of production that draws its produce from a distance greater

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18/ For these and other reasons cited above the average hauls of citrus fruit in Florida may be somewhat longer.

19/ The list includes two Arizona houses.

20/ See pp. 10, 11.



than 50 miles unless such establishment shows by individual application that the rule should properly be relaxed for it.

#### VIII Size of Cities

For reasons set forth above, the analysis of the actual location of packing houses can furnish a practical guide in defining "area of production." Using Exhibit No. A-11 once more for illustration, it appears that 173 are located in cities or towns of less than 25,000 population and only 15 in cities of more than 25,000 population. In any event, the frequent use by Congressman Biermann and his colleagues of terms like "open country" and "small town," makes it unreasonable to include in the area of production cities with a greater population than 25,000. However as in the case of distances, some flexibility is desirable. It will therefore be recommended that, with the same provision for exception on individual application, no establishment, otherwise eligible, be considered within the area of production if it is located in a city of 25,000 or greater population (Census of 1930). 21/

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21/ It may be noted that "Consumer Incomes in the United States" issued by the National Resources Committee, of which cognizance is taken herein, describes cities of 2,500 to 25,000 as small cities, and those of 25,000 or over as middle-sized cities, large cities, and metropolises. The Bureau of the Census lists communities of under 2,500 as rural.



IX Preparation and Processing For the Farmer's Account

As set forth above, increased labor costs in establishments preparing or processing fresh fruits and vegetables may be reflected in greater or less degree in lower net prices received by the farmer for his produce. The extent to which such increased costs might be passed back to producers, absorbed by establishments preparing or processing the produce, or passed on to consumers is not readily determinable. In general, the increased cost will be felt more by the farmer when he retains title to the produce that is prepared or processed for market. In some instances the farmer may sell his products outright to a cannery, for example, in which case he loses direct interest in the price which will be obtained for these products from other buyers, while in other instances he may have the products prepared or processed on a custom basis in which case he is directly interested in the price that can be obtained for the prepared or processed products. From the standpoint of the farmer, the establishment which buys his produce may be considered to be his market. The chief intent of Congress in adopting the area of production concept was to free the farmer from any increased burden under the Fair Labor Standards Act. It will therefore be recommended that employees in estab-

lishments engaged in handling, packing, storing, drying, preparing in their raw or natural state, or canning of perishable or seasonal fresh fruits or vegetables for market shall not be considered as so engaged within the area of production if these establishments do not prepare or process the products for the farmer's account.

X. Relation of Findings to Other Agricultural Commodities

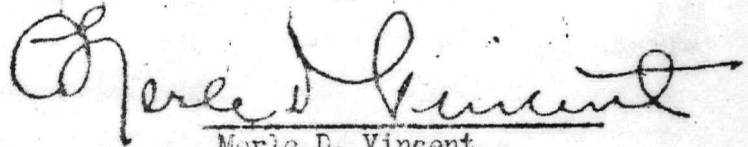
The recommendations which follow arise out of the facts, practices and circumstances that characterize fresh fruit and vegetable packing houses, canneries, dry yards, and warehouses. It therefore appears both appropriate and necessary to say that these findings of fact and recommendations cannot be taken or treated as precedents which necessarily apply to other operations and employment which may also become a subject of administrative action under Section 13 (a)(10).

Recommendations

Upon the whole record the undersigned concludes and recommends that Section 536.2 as amended of Regulations issued under the authority of Section 13(a)(10) of the Fair Labor Standards Act of 1938 be further amended by the addition thereto of the following subsection lettered (e):

(e) With respect to perishable or seasonal fresh fruits and vegetables, if he is engaged in handling, packing, drying, storing, preparing in their raw or natural state, or canning\* such products for market in an establishment which is

located in the open country or a rural community and obtains its products from farms in its immediate locality and performs such operations for the account of the grower of such products. As used in this subsection (e) "open country or a rural community" shall not include any city of 25,000 or greater population according to the 15th United States Census, 1930 and "immediate locality" shall not include any distance of more than 50 miles, provided, however, that if the establishment is located in a somewhat larger city or obtains the products from a somewhat greater distance, and the nature of the business and the type of operations are similar to those in competitive establishments included within the "area of production" under this subsection, the Administrator may determine that such establishment is also in the "area of production" on the basis of an individual application.



Morio D. Vincent  
Presiding Officer