For Release Saturday,
October 7, 1939

R-432

BEFORE THE UNITED STATES DEPARTMENT OF LABOR

WAGE AND HOUR DIVISION

WASHINGTON, D. C.

In the matter of APPLICATIONS OF ARTIC CIRCLE EXPLORATION COMPANY, AMERICAN COLLOID COMPANY, NATIONAL CRUSHED STONE ASSOCIATION, INC., NATIONAL SAND AND GRAVEL ASSOCIATION, NATIONAL INDUSTRIAL SAND ASSOCIATION, AND SUNDRY OTHER PARTIES For exemption of the mining of placer gold and clay, the quarrying of dimension stone and crushed stone and the dredging and excavating of sand and gravel and industrial sand, from surface or open cuts, from the maximum hours provisions of the Fair Labor Standards Act of 1938 as industries of a seasonal nature, pursuant to Section 7(b)(3) of the Act and Part 526 of Regulations issued thereunder. Bentonite Clay	FINDING AND DETERMINATION OF THE PRESIDING OFFICER October 4, 1939

(2167)

Findings on Hearing on Open-Cut Mining of Clay

I. Industry

The American Colloid Company and sundry other parties having filed petitions with the Administrator for the exemption of the mining of clay from surface or open-cuts from the maximum hours provisions of the Fair Labor Standards Act of 1938 as an industry of a seasonal nature pursuant to Section 7(b)(3) of the Act and Part 526 of the Regulations issued by the Administrator, the Administrator gave notice of a public combined hearing on several surface or open-cut mining industries to be held at the Raleigh Notel, 12th Street and Pennsylvania Avenue, N. W., Washington, D. C., to commence at 10 o'clock a.m., June 19, 1939, before the undersigned as Presiding Officer.

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 application and by agreement supplementary data on weekly man hours were filed by two of the applicants.

As used in this notice of hearing, the mining of clay from surface or open-cuts was defined to mean the extraction of such cla y from pit, bank, or marine deposits by hand or power methods but was not considered to embrace any underground operations.

The scope of this hearing was declared by the notice of hearing to include the taking of testimony, the hearing of argument, and the determining whether the surface or open-cut clay mining industry as defined therein or any subdivision thereof is an industry of a seasonal nature within the meaning of Section 7 (b)(3) of the Act and Part 526 of Regulations issued thereunder. The present findings relate solely to the open-cut mining of bentonite clay. Other findings will be made for mining operations involving other products.

Two appearances were made in support of the application. These two appearances represented three firms processing about 80 percent of the bentonite (swelling type) originating in the Black Hills region of Wyoming and South Dakota. The northern or Wyoming type of bentonite is produced chiefly in this region and is to be distinguished from the sub or meta-bentonite or southern (non-swelling) type which is mined chiefly in Arizona, Arkansas, California, New Mexico, Oklahoma, Texas and Utah. Accordingly, these findings are limited to a consideration of the open-cut or surface mining of the swelling or nothern type of bentonite clay originating in the Black Hills region of Wyoming and South Dakota.

The swelling type of bentonite enjoys more diversified use than perhaps any other clay. The clay is chiefly used, however, for rebuilding spent foundry sands, for synthetic foundry sands and for oil well drilling muds. Roughly, 60 percent of all nothern bentonite is employed in the first two above uses and the largest share of the remainder is used in oil well drilling. To some extent bentonite competes with fire clay or common red clay in the bending of moulding sands.

The industry is not a large one as shown by the Minerals Yearbook of the Bureau of Mines for 1939. Less than 195,000 short tons of both swelling and non-swelling bentonite combined were produced in the United States in 1937. Approximately 100,000 tons of this were produced in the Wyoming-Dakota region by the three petitioners and about a half a dozen small producers. The 1938 production of both swelling and non-swelling bentonite was approximately 192,000 short tons according to the Minerals Yearbook, of which the total production in Wyoming and South Dakota was less than 80,000 tons.

No adequate data are available on the number of employees engaged in extracting swelling bentonite in the Wyoming-South Dakota region. Two of the petitioners, the American Colloid Company and the Wyodak Chemical Company, representing approximately 55 percent of the production, directly employ in the neighborhood of from 35 to 65 men within the region. These men are engaged in stripping, excavating, hauling, and milling bentonite. In addition to the men employed directly by these two petitioners, independent contractors do much of the stripping of overburden and one of the companies contracts some hauling of clay to the stock pile. No employment figures were presented by the third firm represented at the hearing, the Silica Products Works. This firm engages only in the milling of bentonite which it purchases from small local contractors.

II. Operations

Within the Black Hills region the clay is found in beds ranging from one and one-half to three feet in thickness beneath an overburden ranging from two to twelve feet in thickness. The clay is excavated by gas or steam shovels in the larger operations and transported by truck to the mill or processing plant for processing or stock pile storage. In the plant operation it is crushed, dried, pulverized, and packed in bag containers ready for distribution. The trucking is largely over unimproved roads and the record shows that distances hauled by the petitioners range from three to fourteen miles.

As noted above, one of the three companies represented, the Silica Products Works, does not excavate clay but merely mills the clay purchased from independent producers. Although the record is not entirely clear, it

appears that the other two petitioners do their own digging and contract only for hauling and stripping of overburden.

Bentonite Exhibits Nos. 1 and 2 submitted by the American Colloid Company, together with the testimony of their representative, indicate that it is customary for at least some of those employees engaged in the removal of bentonite from the stock pile and in the milling of bentonite, also to engage in the excavation and the hauling of the clay to the stock pile or to the plant during the same workweek. The Wyodak Chemical Company, unlike the American Colloid Company, apparently strips overburden, excavate and haul clay with one group of men and to remove clay from the stock pile and mill it with another group of men.

III. "Seasonal" and "Non-seasonal" Operations.

The applicants claim that a portion of their operations are "seasonal" in nature. They claim that the excavation of clay from the pit and the hauling of the clay from the pit to the stock pile is an operation which does not and cannot take place during the entire 12 months period. The milling of clay, on the other hand, is an all the year round operation. The Wyodak Chemical Company claims in addition, that the removal of overburden is "seasonal" in nature although a portion is removed by independent contractors. The American Colloid Company contracts for the removal of all of its overburden.

The excavation of bentonite takes place during the spring, summer and fall months. During the 1937 season, the American Colloid Company excavated and hauled clay to the stock pile of its Wyoming plant during a period of four and one-half months and to the stock pile of its South Dakota plant during a period of six and one-half months. In the same year, the Wyodak Chemical Company stripped overburden, excavated, and hauled clay to the stock pile of its Wyoming plant during eight and one-half months. During the year 1938, the American Colloid Company excavated and hauled to the stock pile of its Wyoming plant over a four months' period and to the stock pile of its South Dakota plant over a five and one-half months' period. In this same season, the Wyodak Chemical Company performed these same operations and in addition removed some overburden, for a period of seven months. 1/

The American Colloid Company and the Wyodak Chemical Company claim to cease excavating operations apart from work such as maintenance, repair, clerical and sales work in the remainder of the year, i.e., during a period ranging from three and one-half to eight months. Such cessations are stated

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1/ The Silica Products Works presented figures to indicate that 51 to 69 percent of the bentonite which was delivered to their mill was delivered during the three months of July, August and September.

to be because of the fact that owing to the climate or other natural conditions, the materials handled and extracted in the form in which such materials are handled and extracted are not available in the remainder of the year.

In support of the above, these petitioners testified that during the wet weather it is impossible to excavate and haul the clay from the pit because of the slippery nature of such pit and that during low temperatures the extraction of clay in the frozen state is so difficult as to be impracticable. However, testimony introduced by the applicants as to the number of days worked indicates that there is little lost time due to weather during the operating season.

IV. Conclusion

The American Colloid Company and the Wyodak Chemical Company, together representing most of the production of bentonite within the Wyoming-South Dakota area, claim that the stripping or removal of overburden, the excavation of clay from the pit, and the hauling of such clay to the stock pile or the plant constitute a branch of the surface or open-cut mining of bentonite which is "seasonal" in nature as defined by Section 526.3 of the Regulations. It is not claimed that the removal of bentonite from the stock pile and the subsequent processing of bentonite are operations of a "seasonal" nature. In fact, these operations are specifically disclaimed to be "seasonal".

As noted above, the Wyodak Chemical Company generally maintains a segregation of employees engaged in milling operations from those engaged in excavating operations. Since the Silica Products Works engages only in milling operations, it may be assumed that its employees engage only in milling operations. The American Colloid Company, on the other hand, apparently maintains no such segregation. It is customary for some employees of this company who are engaged in the excavation and hauling of clay to the stock pile and the plant also to engage in the removal of clay from the stock pile and the milling of clay. In the case of this employer at least, it would appear to create an artificial division if the mining operations were defined as a branch of an industry separate from what would be the milling branch. Furthermore, if the two were taken together as one branch, the branch obviously could not be described as "ceasing operations".

The segregation of employees and even the performance of operations by independent contractors are not in themselves adequate determinants of a separate branch of an industry. For example, the stripping of overburden from the bentonite deposits, although frequently performed by contractors, seems clearly to be so closely allied with the other excavating operations that a denomination of this operation as a separate branch of an industry would be totally artificial. Thus the performance of excavating operations by contractors is in no sense conclusive that these operations constitute a separate branch of an industry. On the other hand, the fact that one of the largest producers in the industry, the American Colloid Company, finds it

feasible to shift its employees from milling to excavating is a strong indication that the two sets of operations form one and not two branches of the industry and should be so classified.

It further appears that the excavating operations are, like the milling, much affected by demand. Thus, operating in the same territory and affected by the same climatic and other natural factors, the American Colloid Company at its Wyoming plant excavated for four and one-half months in 1937 and four months in 1938, while the Wyodak Chemical Company excavated for eight and one-half months in 1937 and seven months in 1938. 2/ This variation can be explained only by the assumption that excavating is closely related to milling, shipments, and sales. Again it appears reasonable to conclude that milling and excavating comprise a single branch of an industry. In the light of these facts and other relevant data and in the absence of any strong positive evidence to the contrary I do so find. And finally, since milling, by admission of the applicants, is continuous throughout the year, and is not of a "seasonal" nature, this single branch comprising both excavating and milling does not cease production and is not of a "seasonal" nature.

DETERMINATION

On the basis of the whole record, I determine:

(1) that the excavating and hauling of swelling bentonite is not a separate industry but is integral with the milling of swelling bentonite; and

(2) assuming that the operations of excavating, hauling and milling swelling bentonite constitute a branch of an industry within the meaning of Sections 7(b)(3) and 3(h) of the Fair Labor Standards Act of 1938 and Section 526.2 of Regulations issued thereunder, the said branch of an industry operates continuously throughout the year and does not at any time cease production (as the term "production" is used in Regulations, Part 526, and is defined in Section 3(j) of the Act), and is therefore not an industry of a "seasonal" nature within the meaning of Section 7(b)(3) of the Act and Section 526.3 of the Regulations.

2/ Payroll records of Wyodak (Bentonite Ex. Nos. 3 and 5 revised) indicate the loss of very few working days throughout the whole operating season.

The application is, therefore, denied.

Harold Stein

Harold Stein
Presiding Officer

Dated October 4, 1939