

BEFORE THE UNITED STATES DEPARTMENT OF LABOR  
WAGE AND HOUR DIVISION  
WASHINGTON, D. C.

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In the matter of	:	
APPLICATION	:	
for	:	
The exemption of the Western Pine	:	
Industry from the maximum hours	:	FINDING AND DETERMINATION
provisions of the Fair Labor	:	
Standards Act of 1938 as an	:	OF THE
industry of a seasonal nature,	:	
pursuant to Section 7(b)(3) of	:	PRESIDING OFFICER
the Act and Part 526 of the	:	
Regulations issued thereunder	:	October 4, 1939
_____	:	

## I. The Industry

The Western Pine Association having filed a petition with the Administrator for the exemption of the Western Pine industry 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 hearing to be held at the Hearings and Exemptions Section Hearing Room on the third floor of 939 D Street, N. W., Washington, D. C., 10 o'clock a.m., June 29, 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. By agreement no briefs or additional statements were to be filed subsequent to the hearing by petitioners and protestants except a statement from the Industrial Employees Union Inc., understood to be in transit on the date of the hearing.

The term "Western Pine industry" as used in the notice of hearing was defined to mean the logging and sawmilling of pine and allied species including white, red and Douglas fir, cedar, larch, and Engelmann spruce in the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, South Dakota, Utah, Washington and Wyoming exclusive of the Douglas fir region on the west side of Oregon and Washington and the Redwood region in Western California, including the operation of hauling from the forest to the sawmill and the delivery of lumber from the sawmill to a railroad or similar transportation agency. This definition of the industry was concurred in by all parties at the hearing. The application did not include the production of box shook or other fabricated wood products.

The question set for hearing was declared by the notice of hearing to be:

"whether the western pine industry as defined herein 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 the regulations issued thereunder".

The operations of the industry are for the most part located at the higher elevations. A great part of the area is subject to severe winter conditions, low temperatures and heavy snow. These conditions are often found in combination with steep, rough ground.

The annual volume of production during the past five years averaged approximately three and one-half billion board feet. In 1938, production reached almost four billion feet with an estimated F.O.B. mill value of about \$92,000,000.00. The product is shipped to all forty-eight states and the District of Columbia but more than 50 per cent of the production is used within the Western Pine area.

The exact total number of operators within the Western Pine region is not on record, but it was estimated that there are probably about a thousand mills in the region. However, about 95 per cent of the 1938 production in the area comes from approximately 275 mills. The balance of the production was deemed by representatives of the industry to be from "hundreds of very small more or less inaccessible mills", which generally ship only intrastate.

The total number of employees in 1938 was estimated by the Western Pine Association as varying from 14,000 in February to 55,000 in August. This estimate is based upon monthly operating statistics and on man-hours production studies in the Western Pine industry by the U. S. Department of Labor.

The Western Pine Association, applicant for the exemption, stated that its membership represents more than 60 per cent of the total shipments from the Western Pine region during the years 1937 and 1938 and submitted application in behalf of the whole industry. Testimony at the hearing developed that those operators not members of the Association are smaller operators and almost without exception "seasonal" operators, as the word "seasonal" is defined by the Association.<sup>1/</sup>

The average wage of employees of members of the Association was represented to be 70.4¢ per hour in April, 1939. The minimum or common labor rate is above 50¢ per hour. This rate "which applies to only 17 per cent or 18 per cent of the workers, varies from 36¢ in Arizona and Mexico ... to a high of 62½¢. The average hourly rate for the industry exceeds 70¢ per hour".<sup>2/</sup> The direct labor cost in the Western Pine industry was represented to exceed 60 per cent of the finished value of product.

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<sup>1/</sup> The formal application of the Western Pine Association dated March 25, 1939, states "it has become custom in the industry to consider any unit a seasonal operation, which, because of climatic factors, cannot nominally (normally) operate more than 9 months a year."

<sup>2/</sup> Official Report of Proceedings, pp. 51 and 52.

The record shows that about 35 per cent of the Western Pine industry was operating under collective bargaining agreements as of June 15, 1939, approximately. The collective bargaining agreements differ as to maximum hours provisions. Prior to October 24, twenty-one contracts permitted 48 hours per week without payment of overtime. Seven contracts called for 40 hours per week. At the time of the hearing (or two weeks previous) nine agreements provided for a 48 hour week.<sup>3/</sup> Five make specific provision to take advantage of seasonal exemption if granted under the Act. Twenty-four permit a 44 hour workweek and ten specify a 40 hour workweek. The latter group of agreements, according to the testimony, covers "non-seasonal" operations.

## II. Operations

The industry is described in the application as including three different basic operations: logging - from stump to pond; sawmill production - from pond to pile; and shipping - from pile to car. The application further states that these are distinct and separate undertakings not necessarily conducted simultaneously and not carried on during exactly the same period of the year by many companies. There is, however, a close relation between the operating peaks of each activity. All three of these operations are usually carried on by the same employer. The application further states that the great bulk of Western Pine production from stump to lumber pile is a continuous straight line operation due to the necessity, once the tree is felled, of getting the product through the sawmill and ready for seasoning in order to avoid the development of stain, checking and other forms of deterioration. Further, bearing on the same point, the application states that, "the peak and low of employment are identical for all three, and separate crews are, therefore, required because of that fact and because different types and skill of employees are necessary in each operation."

The logging operation includes the felling and trimming of the tree, bucking into merchantable length, the moving of the logs from the forest to a central loading point by tractor or truck, and the transportation by truck, tractor or train to the mill pond or storage space.

The Western Pine Association estimates that in 1938 the number of employees engaged in logging operations within this region varied from a low of 4,000 in February to a peak of 25,000 in August. Among employees

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<sup>3/</sup> The representative of the Western Pine Association stated with respect to the number of agreements in force (p.51, Official Report of Proceedings) "it is impossible to keep a picture of this kind up-to-date from day to day. The conditions change and this is the latest data we have."

engaged in the logging operations are fellers, buckers, limbers and truckers. Most of the sawmill operators do their own logging and most sawmill operators usually own the stumpage from which they obtain their logs. The application also indicates that the 275 operators who produce 95 per cent of the Western Pine production do their own logging or contract their logs from their own stumpage.

Saw mill production includes the drawing of the log from the mill pond, the measuring and bucking of the log into lumber lengths, edging, trimming and gag sawing into lumber and the grading and transportation and piling of the green lumber in drying yard or drying kiln.

The number of employees engaged in this operation in 1938 was estimated to range from a low of 3,000 in January to a peak of 16,500 in August. Approximately 1,000 sawmills were in operation in the area according to the testimony but data are included only on 275 large mills.

Sawyers are the key men in the sawmill operations. These are highly skilled workers. Edgers, trimmers and graders are evidently among those employed in connection with sawmilling. Other than clean-up men classed as common labor, no other types of labor were mentioned although many others, undesignated in the testimony, are no doubt included in the sawmill crew.

The shipping operation includes the removal of the dried and seasoned lumber from the yard or the kiln, the surfacing or sizing of such lumber in a planing mill, the handling and grading of the product, and loading it on the car for shipment or storing it in sheds. In 1938, the number of employees engaged in shipping was estimated to range from 7,000 during the low month of January to a peak of 13,500 in August.

It was stated as normal practice for the sawmill operator to ship his own lumber. A few operators, not over a dozen, operate shipping plants only, buying their lumber dried or green from other mills. The 275 major sawmills evidently all operate their own shipping plants. There is little information in the record on the specific types of labor involved in shipping. The record indicates that there is little or no interchange of employees between the logging, sawmill production and shipping operations. One reason for this is the necessity for different types of skill in each operation. A further reason given is that the peak and the low of employment are about the same for all three operations.

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

The applicant Association alleges that each part of the industry logging, sawmill production, and shipping consists of two well-defined branches, "seasonal" and "non-seasonal". The "seasonal branch" of the industry as

defined by the applicant, includes all units which "because of climatic factors, cannot nominally (normally) operate more than nine months a year". This is a customary definition in the industry. It was formalized under the N. R. A. Lumber Code. The original application adds to this definition the provision that such operations must cease entirely due to climatic or other natural factors.

No estimate is furnished as to the number of employees in the "seasonal" as distinguished from the "non-seasonal branch". "Seasonal" units, however, were estimated to account for, approximately, 49 per cent of the log output of the region, 42 per cent of the sawmill production, and 13 per cent of the lumber shipping. The number of workers and value of the product for the "seasonal branch" were stated to be in about the same proportion as the volume.

The revised application, made a part of the record, specifies that the product and operations of the "seasonal" units are the same as those of the "non-seasonal" units of like size and type. It also indicates that the "seasonal" units of the industry are in general smaller and more isolated. It is further set forth that there is no significant difference in the distribution of the product by "seasonal" and "non-seasonal" units.

It was testified that during and subsequent to the N. R. A. Code, the "non-seasonal branch" was operated on a 40 hour week - the "seasonal branch" on a 48 hour week, but written evidence indicates that a 48 hour maximum workweek has not been universally adhered to. The representative of the applicant Association stated that a single shift is common to the industry. Two shifts are indicated by some of the individual operators whose communications were entered in evidence in support of the application. The wage scales of the two suggested branches were stated to be practically the same.

The exhibits presented by the Association indicated that many of the logging operations and sawmills ceased operation entirely at some period during the year. An expert from the U. S. Forest Service testified that certain logging operations within the territory are unquestionably "seasonal" because of climatic conditions (using the industry's definition of the term "seasonal"). He testified that sawmilling is similarly "seasonal" to a certain extent. He stated further that shipping is in few cases "seasonal" because of climatic conditions and in all cases because of demand.

A five year operating record for the industry was presented by the applicant. This record indicated that the low months of operation were January, February and March. In certain parts of the area, December and April were also low months.

The Association charted, for each of the three separate operations, the monthly percentage of annual production for those mills which operated nine months or less and which ceased operation during the remaining three or more months. These data were charted for various districts within the area. In most cases, these charts seem to indicate neither complete cessation nor cessation for a full three months or more, but this is caused by overlap in the individual operating seasons. It was categorically stated that each individual mill did cease operation for at least three months.

Also offered in the exhibits were an additional set of charts covering the five year operations of seven "seasonal" and seven "non-seasonal" mills. Logging, saw milling and shipping were charted for each mill. The logging operations of the "seasonal" mills cover periods ranging from 5-1/2 to 10-1/2 months. The saw milling operations of the seven "seasonal" mills cover periods ranging from 7 to 11 months. The shipping operations of these 7 mills were practically continuous throughout the five year period.

The specific factors which were cited as preventing year around operation were heavy snow, low temperatures and soft ground. In certain cases, it was stated, sawmill operations were curtailed because of lack of log supply which lack was in turn occasioned by weather or climatic factors.

It is physically possible to carry on all three of the separate operations during the entire twelve months period. However, the physical possibility is in some instances only a theoretical possibility and in all instances prohibitive costs incident to operations during periods of low temperatures, heavy snow and soft roads render it financially impractical for the "seasonal" units to operate during the entire twelve months. It was stated that the "seasonal" mills were in competition not only with the "non-seasonal" units of the industry but with all lumber producing regions and with an increasing number of wood substitutes. The high wages paid, the high proportion of direct labor cost to total cost and the low returns from the product were given as factors which made year around logging impractical.

It was also represented that competitive factors indicated above make it impossible to pay time and one-half for overtime and that additional skilled laborers could not be found who would work the short period of a second shift if such a shift was feasible. It was stated, moreover, that an extra crew was not practical because of the cost of additional quarters, equipment and other necessary facilities in relationship to the added production. Limitation in the effective use of the equipment and the impracticability of buying additional equipment to be charged against the

same amount of production, were given as reasons for not adding more men to the present crew in order to achieve greater production within a 44 hour workweek.

Numerous communications from individual operators of "seasonal" mills within the territory were received in evidence as exhibits. A large number of those communications referred to the welfare of the employees as well as the welfare of the employers. Longer hours are necessary, it was stated, in order to provide the employee with an adequate annual wage, but it may be noted that the unions are in favor of the shorter workweek and opposed to the application.

As a group, the "seasonal" units as defined by the applicant, were not distinguished in the record from the "non-seasonal" units except as to the extent or existence of the normal annual shut-down. The burden of the entire record was to the effect that it is not feasible to differentiate "seasonal" units from "non-seasonal" units by exact or general geographic location. The seasonality of an individual operation was said to depend upon the climatic and topographic conditions peculiar to its own location. Altitude, latitude, slope, availability of timber, stand of timber, kind of roads, method of transportation, nature of operation and size of operation were all mentioned as factors which caused one mill to operate "seasonally" and another "non-seasonally."

Thus the basis for differentiating the "seasonal branch" from the "non-seasonal branch," according to the testimony offered, was the actual past operations of each of the individual units which would collectively comprise the two branches. The grouping of the "seasonal" and "non-seasonal" units might be accomplished, it was suggested, by a certified record of operation during a suitable number of past operating seasons. In other words, the basis for distinguishing a "seasonal" from a "non-seasonal" branch would reside in factors peculiarly applicable to the individual location or circumstance. No geographic or other general external criteria were afforded by which a "seasonal branch," as a whole, could be described.

The record does not indicate the average length of the operating season. It was testified that the average operating period of the "seasonal" units, is probably between eight and nine months. No data were furnished to indicate the proportion of the mills which operate, five, six, seven, etc., months. Thus the record fails to show that there is any substantial number of units in any of these various possible groups. It should also be noted that in some instances the record suggests that the "seasonal" operation of an individual unit is conditioned upon its camp, transportation, and milling and drying facilities. A substantial number of letters from various operators



within the territory suggest that small operators are at a disadvantage as compared to large operators under like climatic or other natural conditions because they lack the facilities and equipment to operate economically under more or less adverse climatic or natural conditions. It appears, therefore, that under any given set of climatic or natural factors, the length of operation is to some extent conditioned by the operator's balancing of increasing operating costs with the proportionate increase of fixed costs for a shorter operating season with a smaller volume of production; but it is clear that from a practical standpoint the length of the operating season is primarily determined by climatic factors.

#### IV. Conclusion

The applicant has failed to provide a criterion or a set of criteria other than records of past performance by which the group of "seasonal" operators may be distinguished from the group of "non-seasonal" operators. This lack, the applicant alleges, is of no importance because the applicant proposes that exemption be granted only to those operators whose operations are "seasonal" on the basis of past performance. However, in reference to past performance the record does show that a substantial number of logging and sawmill units with a substantial volume of production and employment habitually operate for less than nine months and it also shows that their cessation of operation is primarily caused by climatic and other natural factors which make the industry's materials unavailable in practice. But in the case of shipping units that similarly cease operation for three months or more, whatever their number, their output and production is not substantial. Therefore, if shipping is not considered a separate branch of the industry, it must follow that no group of plants with any substantial output ceases production for even three months a year. Thus if the three operations are considered together as a single industry, no branch can be found that ceases production even for three months a year.

If, however, each of the three phases of Western Pine production is considered a branch of an industry, both the logging and sawmill branches contain a large number of units with a substantial proportion of the employees and output of the industry, which fall within the industry's own special and technical definition of "seasonal." As has been set forth above, the record contains no other descriptive criteria. Whether the fact of normal cessation of operations by the various units each year, is in itself adequate to define an individual sub-branch of these two branches, need not be determined herein for reasons that will be apparent below.

Assuming for the purpose of argument, that there are "seasonal" logging and sawmill branches of Western Pine industry, the evidence of the existence of a substantial number of units and volume of production and employment on which such a finding would rest is limited to a distinction between a less than nine months group and a more than nine months group.

For, though the record does disclose the existence of logging and sawmill units that normally operate for less than nine months, in fact for as little as five and one-half months, it fails to disclose or indicate the number of the units involved or their production or employment at any point other than the nine months' dividing line proposed by the applicants. 4/

The present determination, for the foregoing reasons, must be made on the assumption that the branches under consideration operate up to, although not in excess of, the applicants' self-established nine months limit. 5/ It is therefore necessary to consider whether or not an operating period of between eight and nine months would justify a seasonal finding. In this connection it was argued by the applicants that "it seems entirely reasonable that Congress in setting the 40-hour workweek felt that 2000 hours of employment per year was justified and this thought is further strengthened by its provision regarding the exceptions under union agreements where again the 2000 hour maximum is specified. From this, it can logically be reasoned that any industry which is limited by climatic conditions to an annual period of operation which, with the fourteen-week exemption from the maximum hours, can still give less than 2000 hours of annual employment should be considered seasonal." 6/ This argument, however, cannot be given serious consideration. If this was the Congressional intent, the exemptions provided by Sections 7(b)(1) and 7(b)(2) of the Act would be idle. Such nullification of sections of the Act would be clearly improper. It may also be pointed out that Section 7(b)(3) considered by itself clearly indicates the limitation of the finding to industries whose operating season is not completely irrelevant to the 14 week period of the exemption. Thus, without setting an absolute limit, it is apparent that a nine month operating period, such as exists herein, is inappropriate and that no finding of seasonality may reasonably be based thereon.

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4/ The Presiding Officer endeavored unsuccessfully to elicit information on these points.

5/ That this is not a mere logical construction is shown by the admission that the average operating season of the "seasonal" units is between eight and nine months.

6/ Official Report of Proceedings, p. 57.

### V. Findings of Fact and Determination

Upon the basis of the whole record, I find that:

1. The Western Pine industry, as defined in the Notice of Hearing, includes the major operations of logging, sawmilling, and shipping, together with ancillary operations.
2. If it is assumed that logging, sawmilling and shipping appropriately constitute separate branches of the Western Pine industry:
  - (a) Some units in each of these three branches cease operation annually for three months or more primarily because the materials used are not available on account of climatic and other natural factors.
  - (b) The volume of production and employment of such units is substantial in logging and sawmilling but is not substantial in shipping.
  - (c) There is no substantial sub-branch of the shipping branch of the industry that ceases operation annually for three months or more.
  - (d) Data in the record on which any such sub-branch of logging and sawmilling might be defined are limited to data distinguishing between groups of units operating more than nine months and less than nine months respectively.
  - (e) Any sub-branches of logging and sawmilling that operate annually for as long as (even though not in excess of) nine months can not be found to be of a seasonal nature within the meaning of Section 7(b)(3) of the Act and Part 526 of Regulations issued thereunder.
  - (f) No criteria exist in the record on which it can be found that there are sub-branches of any logging or sawmill branches of the Western Pine industry whose operations are limited to a period in such relation to the fourteen workweek exemption period provided by Section 7(b)(3) of the Act as to justify a finding that any such sub-branch is of a seasonal nature within the meaning of Section 7(b)(3) of the Act and Part 526 of regulations issued thereunder.
3. If it is assumed that logging, sawmilling, and shipping do not constitute separate branches but together constitute a single industry:
  - (a) Such industry as a whole does not at any time cease operation.

- (b) No group of plants with any substantial output ceases production for even three months during the year.
- (c) The group of plants which may cease production for even three months during the year do not have a sufficiently substantial output to constitute a branch of an industry.

The application is therefore denied.

Harold Stein  
/s/ Harold Stein  
Presiding Officer

Dated at Washington, D. C.  
October 4, 1939