

BEFORE THE UNITED STATES DEPARTMENT OF LABOR

WAGE AND HOUR DIVISION

WASHINGTON, D. C.

IN THE MATTER OF
APPLICATIONS OF

THE CALIFORNIA WALNUT GROWERS
ASSOCIATION, THE NORTH PACIFIC
NUT GROWERS COOPERATIVE AND
SUNDRY OTHER PARTIES

For exemption of the receiving,
grading and packing of unshelled
"English" walnuts in the States
of California, Oregon and Washing-
ton, and unshelled filberts in
the States of Oregon and Washing-
ton from the maximum hours pro-
visions of the Fair Labor Standards
Act of 1938 pursuant to Section
7(b)(3) and Part 526 of the Regula-
tions issued thereunder

FINDINGS AND DETERMINATION

OF THE

PRESIDING OFFICER

December 4, 1939

Findings on Hearing on the
Receiving, Grading and Packing of
Unshelled "English" Walnuts and Filberts

Applications having been filed by the California Walnut Growers Association and the North Pacific Nut Growers Cooperative on behalf of themselves and sundry other parties for exemption of the receiving, grading and packing of unshelled "English" walnuts in the States of California, Oregon and Washington from the maximum hours provisions of the Fair Labor Standards Act of 1938 as a branch of an industry of a seasonal nature within the meaning of Section 7(b)(3) of the Act and Part 526 of Regulations issued thereunder, on August 25, 1939, the Administrator issued a determination setting forth that a prima facie case had been shown for the granting of an exemption to the receiving, grading and packing of unshelled "English" walnuts.

Subsequent to the publication of this determination in the Federal Register on August 29, 1939, and within the fifteen day period allowed by Section 526.5(c) of the Regulations an objection was received by the Administrator. In accordance with the aforesaid Section of the Regulations, the Administrator thereupon published in the Federal Register on September 21, 1939, a Notice of Hearing before the undersigned as duly designated Presiding Officer in this matter. Furthermore, application having been received in the interim from the North Pacific Nut Growers Cooperative and sundry other parties for the exemption of the receiving, grading and packing of unshelled filberts in the States of Oregon and Washington from the maximum hours provisions of the Act as a branch of an industry of a seasonal nature within the meaning of Section 7(b)(3) and Part 526 of the Regulations issued thereunder and whereas it appeared that the two matters presented related issued of fact and law, the aforesaid Notice of Hearing included within its scope the receiving, grading and packing of both unshelled "English" walnuts and of unshelled filberts. The matter for determination was set as follows:

- (1) Whether either the receiving, grading and packing of unshelled "English" walnuts, or the receiving, grading or packing of unshelled filberts in an industry of a seasonal nature or branch thereof within the meaning of Section 7(b)(3) of the Fair Labor Standards Act of 1938 and Part 526 of the Regulations issued thereunder; and
- (2) Whether both the receiving, grading and packing of unshelled "English" walnuts, and the receiving grading and packing of unshelled filberts together constitute an industry of a seasonal nature or branch thereof within the meaning of Section 7(b)(3) of the Fair Labor Standards Act of 1938 and Part 526 of Regulations issued thereunder.

Pursuant to Notice the undersigned convened the hearing on September 28, 1939, in San Francisco, California. All interested persons were afforded an opportunity to present evidence and to be heard. Pursuant to permission various statements and briefs were filed subsequent to the hearing. From the record thus made it appears that:

The receiving, grading and packing of walnuts and filberts in the United States are performed only in the States of California, Oregon and Washington. The applicants represent the large majority of all walnut and filbert packers in these three states.^{1/} The total number of employees employed at the peak of the walnut packing season can be estimated as approximately 3,000. The total number of employees employed at the peak of the filbert packing season is approximately 125. The average employment in the walnut plants at the peak of the season is between 50 and 100 persons, but a number of plants employ between 100 and 200 persons and some are even larger. Average employment at the peak of the season in the plants packing filberts is only about twelve persons: in all instances these plants are also walnut packing plants, but the figure twelve refers only to the persons packing filberts.

In the case of walnuts the major operations included within the application are receiving, sorting, bleaching, grading, blending and packing. Most of these operations are mechanized but a considerable amount of hand sorting and testing is required. In some cases, as will be seen below, some of the operations are performed at one plant and some at another. In the case of filberts, the operations are similar but simpler since there are only three commercial grades of filberts compared with the numerous commercial grades and sizes of walnuts.

Originally walnuts were graded, packed, and, if necessary, shelled on the farm but in the course of time, and with the increased use of commercial grades, it was found desirable to transfer the grading, packing and shelling operations to packing houses.^{2/} The drying operations which immediately succeed harvesting have remained the responsibility of the farmer although small farmers frequently take their walnuts to nearby farms for drying. In Oregon and Washington and in the California commercial (i.e., non-cooperative) packing houses all grading and packing operations and frequently storage as well are still conducted at the packing house where the walnuts are first received. In some cases the shelling operations are

^{1/} The dominant factor in walnut packing is the California Walnut Growers Association, hereinafter referred to as the "Association", which packs about 80 per cent of the California crop and about 75 per cent of the total United States crop. The Association is a cooperative, composed of about 26 local cooperative associations and 12 grower-packers.

^{2/} Less than 5 per cent of the total United States crop is now packed on the farm by growers who pack only their own walnuts.

also conducted at the same plant but in others independent shellers purchase culls^{3/} from the packers. In the case of the California Walnut Growers Association, however, it is now the universal practice for the local packing houses to perform only the preliminary sorting, grading, and bleaching operations and then to ship all their walnuts to the central association plant at Vernon, Los Angeles County, in service bags. In the Vernon plant the walnuts are repacked after blending, an operation which consists of making up lots of walnuts with the proper percentages of various types according to specifications. Some regrading, etc. may also take place before shipment. Thus the final packing of the walnuts is now completely centralized. Furthermore, the Association also has two shelling plants in Los Angeles County and all the culls from all the local packing houses are shipped to these plants for shelling. The shelling plants likewise operate on surplus walnuts which are received by the Association under its arrangements with the Walnut Control Board,^{4/} while the Association maintains warehousing facilities at the Vernon plant used largely for the walnut kernels but partly for the unshelled walnuts. Occasionally the Association, like other packers, holds walnuts in storage in the East on consignment.

In the case of filberts all packing operations are invariably performed at the original plant where the filberts are received, as well as such occasional shelling operations as may occur.

The record contains a description of the nature of the skills required by the employees in the above-mentioned operations. Although there is some conflict of testimony thereon, it appears that almost all the employees are either unskilled or only moderately skilled. Little, if any, of the work requires a high degree of skill or training. Approximately 70 per cent of the employees in the local cooperative plants are women. This percentage is apparently somewhat higher than in other walnut packing plants. Furthermore, the Vernon plant of the Association employs only men. Very few women are employed in filbert operations. Walnut shelling, on the other hand, is largely performed by women. The record also contains considerable material on the availability of suitable labor. Again there is a conflict of testimony but it was fairly generally agreed that in all instances it is not difficult to obtain sufficient women employees. The evidence supporting the claim of the unavailability of men was not convincing.

^{3/} The culls are walnuts which are unfit for sale unshelled; it is commercially feasible, however, to shell them and use the kernels.

^{4/} The Walnut Control Board is set up under the Agricultural Marketing Agreement Act of 1937. It sets a limitation on the total tonnage of walnuts that can be sold unshelled in the United States of America. It takes title to the balance of the merchantable crop and later releases this balance to the packers for use as shelling stock or for export.

The record is replete with information on the length of the season in which unshelled "English" walnuts and unshelled filberts are received, graded and packed. The season begins in September or October and ends in November or December. Any further packing of the unshelled nuts would appear to be unsubstantial in amount and negligible in comparison with the total operation, although about 10 per cent of the crop is shipped after the peak season is over. There is also no doubt that the new crops of walnuts and filberts mature regularly in the months of September and October and that it is not possible to obtain nuts from new crops prior to the maturing date. It is further clear that sound practice requires the farmer to harvest his nuts promptly and to dry them soon after harvesting. The nuts are then subject to deterioration if they are not removed from the farm or at least placed under cover. Thus, from the practical standpoint the receiving of the new crop of walnuts at the packing houses is an operation which is directly dictated by climatic and other natural factors, in other words, basically by the maturation of the walnuts. However, once the walnuts have been received in the packing houses, the situation changes. It was specifically and definitely admitted by the applicants that the reason for the extremely short grading and packing season is the existence of a heavy consumer demand for walnuts in the Christmas Holiday season. The attempt to relate this holiday demand for walnuts to climatic and other natural factors is, of course, too far fetched to warrant serious consideration. It was pointed out by the applicants that as their plants are at present constructed the storage facilities are not adequate to take the whole crop from the growers and keep it in storage until the work on the walnuts has been completed. However, it is clear that the reason why adequate storage facilities have not been constructed is the desire of the walnut operators to ship their walnuts to the great consuming markets before Christmas. It is reasonable to infer that demand for walnuts at a later date would cause a reconstruction of plant facilities and a different method of handling the walnuts.

What has been said in the preceding paragraph about walnuts applies with equal force to filberts. Here too the busy season in receiving the filberts at the plant is largely dictated by and closely related to natural factors but the rapidity with which the filberts are graded, packed and shipped is caused solely by consumer demand. In both cases deterioration of nuts that are stored under cover particularly in the winter months, is extremely slow, so slow in fact as to be negligible.

Assuming that the receiving, grading and packing of walnuts constitutes a branch of an industry it is clear that such a branch as a whole fails to conform to the requirements in Section 526.3 of the Regulations. While it is true that the receiving season is strictly limited by natural factors, the short packing and grading season (the primary reason for requesting the exemption according to the applicants,) differs in no

essential way from the short operating season in any trade supplying a holiday demand except that the opening of the season is delayed until the walnuts mature. Indeed this delay does not appear to be entirely uncontrollable inasmuch as there is under the present practice a large carry-over of walnuts from the previous year's crop. Most of this carry-over is under the control of the Walnut Control Board and has been diverted to the export market or to shelling operations for trade reasons, but some could be made available, if desired, to supply the unshelled trade.

Assuming again that the receiving, grading, and packing of filberts is a branch of an industry, it is clear that such a branch as a whole does not conform to the requirements in Section 526.3 of the regulations. Although the receiving season is limited by natural factors, the grading and packing season is limited only because of the holiday market demand for filberts.

In the preceding paragraphs it was assumed for the purpose of argument that the receiving, grading and packing of walnuts constitute a branch of an industry. This assumes a separation of the shelling and storing operations as another branch of the industry, but it has already been shown that the Association and many other operators engage in important shelling operations. In the case of the Association, the physical separation of the shelling plants from the packing houses is no more significant than the similar physical separation of the local Association packing houses from the Vernon packing plant. Confirmatory of a conclusion that the shelled and unshelled operations should be treated as a single industry, is the Industrial Welfare Commission Order No. 15A of the Division of Industrial Welfare of the Department of Industrial Relations of the State of California covering the "nut cracking and sorting industry." This has been defined and administered to include the operations on both shelled and unshelled walnuts. It thus appears that the State of California in its labor legislation and its regulatory functions thereunder considers the two groups of operations a single industry. It further appears that the State of California in its laws does not grant any exemption from its maximum hours provisions for walnut operations, as it does for operations on various other commodities. The status of the walnut industry under California law is not determinative of its status under the Fair Labor Standards Act, but it tends to confirm the appropriateness of the conclusions set forth below.

Finally in considering the integral character of shelled and unshelled operations account must be taken of the practices of the Walnut Control Board. As set forth above, this Board takes possession of a certain percentage of the unshelled crop. It later releases its holdings for diversion, in accordance with its instructions, to the export market and to the shelling trade. It is obvious that the relationship between unshelled and shelled operations is thus controlled by the Board which acts in accordance

with the state of the whole walnut market.^{5/}

It appears from the foregoing that there is a single industry involved—the walnut industry. This industry has materials available and operates throughout the year. Its fluctuations are caused primarily by fluctuation in demand and it is evidently not of a seasonal nature.

Some of the foregoing considerations apply to filberts as well as walnuts, but the same question need not be resolved because the record shows that filbert operations are invariably carried on in the same plant as walnut operations. Thus while many walnut operators do not handle filberts, all filberts are handled by walnut operators. It happens that the two operating seasons are almost coincidental, so that separate crews of packers must be employed, but there seems to be no doubt that the same clerical and shipping employees take care of both walnuts and filberts. It follows inevitably that the receiving, grading and packing of filberts and the receiving, grading and packing of walnuts are merely different operations in a single industry.

It is appropriate at this point to analyze the recital of facts in the Administrator's prima facie determination in respect to walnuts, dated August 25, 1939. The statements of fact with reference to the states where walnuts are grown, the time that they are harvested, and the length of the packing season conform to the findings herein. However, in the third clause of the recital appears the following statement:

"such walnuts can be and are received into packing houses, graded and packed only during a regularly recurring season, September to December, running nearly concurrently but lagging somewhat after the harvest,"

From what has been set forth above it is clear that this particular statement in the recital is incorrect. It would be true to state that such walnuts, i.e., walnuts from the new crop, "can be and are received in the packing houses only during a regularly recurring season," but it is incorrect to state that such walnuts "can be and are received into packing houses, graded and packed only during a regularly recurring season." The grading and packing do not necessarily occur at the time of the receiving season and their performance at that time is dictated solely by market demand and not by the natural factors affecting the receiving of the walnuts into the packing houses. The conclusions of the prima facie determination were naturally affected by the error in the recital.

^{5/} The description of the operations of the Board set forth herein is given in general terms; it is not intended to give a precise legal definition of the Board's operations.

Findings and Determination

Upon the whole record I find that:

1. Walnuts and filberts mature and are harvested and dried in the States of California, Oregon and Washington in the months of September, October and November; and
2. Walnuts and filberts are delivered to packing houses as soon as they are dried and must be received at that time in these (or other) facilities; and
3. Walnuts and filberts are customarily graded and packed in the months of September, October, November and December and the bulk of such walnuts and filberts are shipped to consumers at that time; and
4. The length of the packing season is controlled solely by market demand and is not caused by any unavailability of the materials used by the industries; and
5. Filberts are invariably received, graded and packed in the same plants as walnuts; and
6. Filbert packing and walnut packing are merely different operations within the same industry; and
7. The shelling of walnuts and the handling of walnut kernels are largely performed by the employers who also receive, grade and pack unshelled walnuts; and
8. The shelling of walnut culls is directly and immediately connected with the grading and packing of unshelled walnuts, while the shelling of surplus walnuts is determined by the Walnut Control Board, representing all walnut growers and is closely related to the packing and sale of unshelled walnuts; and
9. The receiving, grading and packing of walnuts is not a separate branch of an industry but is part of the whole walnut industry which includes the shelling of walnuts and the handling of walnut kernels; and
10. The shelling of walnuts and the handling of walnut kernels continues throughout most of the year and is not of a seasonal nature within the meaning of Section 7(b)(3) of the Act and part 526 of Regulations issued thereunder; and

11. The walnut industry including shelling operations, operations on unshelled nuts, and operations on filberts, is not of a seasonal nature; and

12. Neither the receiving, grading and packing of walnuts, nor the receiving, grading and packing of filberts, nor both taken together 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 applications are denied.

Signed at Washington, D. C. this 4th day of December, 1939.

Harold Stein

Harold Stein
Presiding Officer