

## § 784.128

circumstances may, as a practical matter, be directly and necessarily a part of the operations for which exemption was intended, in which event the exemption would apply to them.

### FIRST PROCESSING, CANNING, OR PACKING OF MARINE PRODUCTS UNDER SECTION 13(a)(5)

#### § 784.128 Requirements for exemption of first processing, etc., at sea.

A complete exemption from minimum and overtime wages is provided by section 13(a)(5) for employees employed in the operations of first processing, canning, or packing of marine products at sea as an incident to, or in conjunction with "such" fishing operations—that is, the fishing operations of the fishing vessel (S. Rep. 145, 87th Cong., first session, p. 33). To qualify under this part of the exemption, there must be a showing that: (a) The work of the employees is such that they are, within the meaning of the Act, employed in one or more of the named operations of first processing, canning or packing, (b) such operations are performed as an incident to, or in conjunction with, fishing operations of the vessel, (c) such operations are performed at sea, and (d) such operations are performed on the marine product specified in the statute.

#### § 784.129 "Marine products".

The marine products which form the basis of the exemption are the "fish, shellfish, crustaceas, sponges, seaweeds, or other aquatic forms of animal and vegetable life" mentioned in section 13(a)(5). The exemption contemplates aquatic products currently or recently acquired and in the form obtained from the sea, since the language of the exemption clearly indicates the named operations of first processing, canning, or packing must be performed "at sea" and "as an incident to or in conjunction with", fishing operations. Also, such "marine products" are limited to aquatic forms of "life."

#### § 784.130 "At sea."

The "at sea" requirement must be construed in context and in such manner as to accomplish the statutory ob-

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jective. The section 13(a)(5) exemption is for the "catching, taking, propagating, harvesting," etc., of "aquatic forms of animal and vegetable life." There is no limitation as to where these activities must take place other than, as the legislative history indicates, that they are "offshore" activities. Since the purpose of the 1961 amendments is to exempt the "first processing, canning, or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations," it would frustrate this objective to give the phrase "at sea" a technical or special meaning. For example, to define "at sea" to include only bodies of water subject to the ebb and flow of the tides or to saline waters would exclude the Great Lakes which obviously would not comport with the legislative intent. On the other hand, one performing the named activities of first processing, canning, or packing within the limits of a port or harbor is not performing them "at sea" within the meaning of the legislative intent although the situs of performance is subject to tidewaters. In any event it would not appear necessary to draw a precise line as to what constitutes "at sea" operations, for, as a practical matter, such first processing, canning, or packing operations are those closely connected with the physical catching of the fish and are performed on the fishing vessel shortly or immediately following the "catching" and "taking" of the fish.

#### § 784.131 "As an incident to, or in conjunction with", fishing operations.

The statutory language makes clear that the "first processing, canning, or packing," unlike the other named operations of "catching, taking, propagating, harvesting, cultivating, or farming" are not exempt operations in and of themselves. They are exempt only when performed "as an incident to, or in conjunction with such fishing operations" (see *Farmers Reservoir Co. v. McComb*, 337 U.S. 755). It is apparent from the context that the language "such fishing operations" refers to the principal named operations of "catching, taking, propagating, harvesting, cultivating, or farming" as performed by the fishermen or fishing vessel

(compare *Bowie v. Gonzales*, 117 F. 2d 11). Therefore to be “an incident to, or in conjunction with such fishing operations”, the first processing, canning, or packing must take place upon the vessel that is engaged in the physical catching, taking, etc., of the fish. This is made abundantly clear by the legislative history. In Senate Report No. 145, 87th Congress, first session, at page 33, it pointed out:

For the same reasons, there was included in section 13(a)(5) as amended by the bill an exemption for the “first processing, canning, or packing” of marine products “at sea as an incident to, or in conjunction with such fishing operations.” The purpose of this additional provision is to make certain that the Act will be uniformly applicable to all employees on the fishing vessel including those employees on the vessel who may be engaged in these activities at sea as an incident to the fishing operations conducted by the vessel.

In accordance with this purpose of the section, the exemption is available to an employee on a fishing vessel who is engaged in first processing fish caught by fishing employees of that same fishing vessel; it would not be available to such an employee if some or all of the fish being first processed were obtained from other fishing vessels, regardless of the relationship, financial or otherwise, between such vessels (cf. *Mitchell v. Hunt*, 263 F. 2d 913; *Farmers Reservoir Co. v. McComb*, 337 U.S. 755).

#### § 784.132 The exempt operations.

The final requirement is that the employee on the fishing vessel must be employed in “the first processing, canning or packing” of the marine products. The meaning and scope of these operations when performed at sea as an incident to the fishing operations of the vessel are set forth in §§ 784.133 to 784.135. To be “employed in” such operations the employee must, as previously explained (see §§ 784.106 and 784.121), be engaged in work which is clearly part of the named activity.

#### § 784.133 “First processing.”

Processing connotes a change from the natural state of the marine product and first processing would constitute the first operation or series of continuous operations that effectuate this

change. It appears that the first processing operations ordinarily performed on the fishing vessels at sea consist for the most part of eviscerating, removal of the gills, beheading certain fish that have large heads, and the removal of the scallop from its shell. Icing or freezing operations, which ordinarily immediately follow these operations, would also constitute an integral part of the first processing operations, as would such activities as filleting, cutting, scaling, or salting when performed as part of a continuous series of operations. Employment aboard the fishing vessel in freezing operations thus performed is within the exemption if the first processing of which it is a part otherwise meets the conditions of section 13(a)(5), notwithstanding the transfer by the 1961 amendments of “freezing”, as such, from this exemption to the exemption from overtime only provided by section 13(b)(4). Such preliminary operations as cleaning, washing, and grading of the marine products, though not exempt as first processing since they effect no change, would be exempt as part of first processing when done in preparation for the first processing operation described above including freezing. The same would be true with respect to the removal of the waste products resulting from the above described operations on board the fishing vessel.

#### § 784.134 “Canning.”

The term “canning” was defined in the legislative history of the 1949 amendments (House (Conference) Report No. 1453, 81st Cong., first session; 95 Cong. Rec. 14878, 14932-33). These amendments made the “canning” of marine products or byproducts exempt from overtime only under a separate exemption (section 13(b)(4), and subject to the minimum wage requirements of the Act (see § 784.136 *et seq.*). The same meaning will be accorded to “canning” in section 13(a)(5) as in section 13(b)(4) (see § 784.142 *et seq.*) subject, of course, to the limitations necessarily imposed by the context in which it is found. In other words, although certain operations as described in § 784.142 *et seq.* qualify as canning, they are, nevertheless, not exempt under section 13(a)(5) unless they are performed on marine