

are the other express conditions set forth in the section. A natural reading of the statutory language suggests that the employee as well as the enterprise must be so engaged in order for the exemption to apply (see *Porto Rico Light Co. v. Mor*, 253 U.S. 345). To the extent that its employees are engaged in the described distribution, the enterprise is itself so engaged (see *Kirshbaum v. Walling*, 316 U.S. 517; and see § 794.104). Also, whenever an enterprise is so engaged, any of its employees will be considered to be “employed by an * * * enterprise * * * engaged in the wholesale or bulk distribution of petroleum products” if the duties of his employment require him to perform any operations or provide any services in carrying on such activities of his employer, and if the employee is not engaged in a substantial portion of his workweek in other activities which do not provide a basis for exemption under section 7(b)(3). Such an interpretation of the quoted language is believed necessary to give effect to the intended scope of the exemption as explained in § 794.101. Where an enterprise is exclusively engaged in the wholesale or bulk distribution of petroleum products and meets all the other requirements of section 7(b)(3), all of its employees who are paid for their hours of work in accordance with section 6 of the Act and the special pay provisions of section 7(b)(3) (see §§ 778.602 of this chapter and §§ 794.135 through 794.136) will be exempt from the overtime pay requirements of the Act under the principles stated above. What products are included in the term “petroleum products” and what constitutes the “bulk distribution” of such products within the meaning of section 7(b)(3) are discussed in §§ 794.132 through 794.133.

§ 794.104 Enterprises engaged in described distribution and in other activities.

An enterprise may be engaged in the wholesale or bulk distribution of petroleum products, within the meaning of section 7(b)(3), without being exclusively so engaged. Such engagement may be only one of the several related activities, performed through unified operation or common control for a common business purpose, which con-

stitute the enterprise (see § 794.106) under section 3(r) of the Act. If engaging in such distribution is a regular and significant part of its business, an enterprise which meets the other tests for exception under section 7(b)(3) will be relieved of overtime pay obligations with respect to employment of its employees in such distribution activities, in accordance with the intended scope (see § 794.101) of the exemption. The same will be true with respect to employment of its employees in those related activities which are customarily performed as an incident to or in conjunction with the wholesale or bulk distribution of petroleum products in the enterprises of the industry engaged in such distribution. There is no requirement that engaging in such activities constitute any particular percentage of the enterprises’s business. However, in the case of an enterprise engaged in other activities as well as in the wholesale or bulk distribution of petroleum products (including related activities customarily performed in the enterprises of the industry as an incident thereto or in conjunction therewith), an employee employed in such other activities of the enterprise is not engaged in employment which the exemption was intended to reach (see § 794.101). Such an employee is not brought within the exemption by virtue of the fact that the enterprise by which he is employed is engaged with other employees in the distribution activities described in section 7(b)(3). This accords with the judicial construction of other exemptions in the Act which are similarly worded. See *Connecticut Co. v. Walling*, 154 F. 2d 522, Certiorari denied, 329 U.S. 667; *Northwest Airlines v. Jackson*, 185 F. 2d 74; *Davis v. Goodman Lumber Co.*, 133 F. 2d 52; *Fleming v. Swift & Co.*, 41 F. Supp. 825, aff’d 131 F. 2d 249.

§ 794.105 Other requirements for exemption.

The limited overtime pay exemption provided by section 7(b)(3) applies to any employee compensated in accordance with its terms who is “employed * * * by an * * * enterprise * * * engaged in the wholesale or bulk distribution of petroleum products” as explained in §§ 794.103 through 794.104 if

the enterprise which employs him meets all of the following requirements: (a) It is a "local" enterprise; (b) it is "independently owned and controlled"; (c) it has an annual gross volume of sales of less than \$1 million exclusive of excise taxes; (d) it makes more than 75 percent of its annual dollar volume of sales within the State in which it is located; and (e) not more than 25 percent of such annual dollar volume of sales is to customers who are engaged in the bulk distribution of petroleum products for resale. In order to determine whether all these requirements are met, it is necessary to know what constitutes the "enterprise" to which reference is made, the meaning of "the wholesale or bulk distribution of petroleum products" in which engagement is required as a prerequisite to exemption, what is meant by a "local" enterprise and what characterizes it as "independently owned and controlled", and the criteria for application of the dollar volume tests. These matters will be discussed in some detail in the sections following.

THE "ENTERPRISE"

§794.106 Statutory definition of "enterprise."

The term "enterprise" is defined in section 3(r) of the Act. That definition (insofar as it affects a wholesale or bulk petroleum distributor) is as follows:

"Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor: *Provided*, That within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement (1) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (2) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (3)

that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments.

§794.107 "Establishment" distinguished.

The "enterprise" referred to in the section 7(b)(3) exemption is to be distinguished from an "establishment". As used in the Act, the term "establishment", which is not specially defined therein, refers to a "distinct physical place of business" rather than to "an entire business or enterprise" which may include several separate places of business. (See *Phillips v. Walling*, 324 U.S. 490; *Mitchell v. Bekins Van & Storage Co.*, 352 U.S. 1027; 95 Congressional Record 12505, 12579, 14877; H. Rept. No. 1453, 81st Cong., first session, p. 25.) It will be noted from the definition of "enterprise" in section 3(r), as set forth in §794.106, that the activities of the enterprise may be "performed in one or more establishments," and section 7(b)(3) specifies that the enterprises to which its exemption requirements are applicable will include "an enterprise with more than one bulk storage establishment."

§794.108 Scope of enterprise must be known before exemption tests can be applied.

The scope of the "enterprise" as defined by section 3(r) of the Act must be ascertained before it is possible to apply the tests for exemption contained in section 7(b)(3) which are based on the dollar volume of sales of the "enterprise". The activities included in the enterprise must be known, and any activities not a part of the enterprise must be excluded before the dollar volume of sales derived from the activities of the enterprise can be computed.

§794.109 Statutory basis for inclusion of activities in enterprise.

The "enterprise" for purposes of enterprise coverage under section 3(s) and the exemption provision in section 7(b)(3), is defined in section 3(r) (§794.106) in terms of the activities in which it is engaged. All the "related