

PURCHASING AGENT. COAL MINES: Right of operator of truck line to bid wholesale prices to governmental agencies.

June 29, 1934.

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Mr. George C. Johnson
State Purchasing Agent
Capitol Building
Jefferson City, Missouri

Dear Mr. Johnson:

Your letter requesting an opinion of this office dated June 27, 1934, is as follows:

"On the purchase of coal for governmental agencies and departments of the State of Missouri, I, as State Purchasing Agent, am expecting to ask for bids.

"Please give me an opinion as follows: The code of fair competition for the retail solid fuel industry approved February 14, 1934, by President Roosevelt, Article #2, Sections two and three defining retailing and wholesaling and under the provisions of Article #3, Section 13 reading in part 'any business included in this definition of retailing in Article #2, Section Two of this code, which has been by custom served by the wholesale coal industry in any trade area, shall be included within the definition of wholesaling'. The Administrative order No. X-48, dated June 20, 1934, Release No. 5911, signed by Hugh S. Johnson, Administrator for industrial recovery, entitled, 'Granting Limited Exemption from provisions of codes of fair competition in connection with quotations made to governmental agencies' gives any person complying with a code the exemption from compliance with provisions of such codes governing quotations to governmental agencies, and any person may (a) 'quote prices in terms of sale to governmental agencies as favorable of those permitted to be quoted to any commercial buyer for like quantities.'

"It has been customary for governmental agencies in Missouri in the past to buy coal wholesale from truck mines and any purchase by retail has been the exceptional case. In fact these truck mines are not located on a railroad.

"Please advise whether the truck mines in Callaway County can bid wholesale prices rather than retail prices on coal for state institutions or political subdivisions of this state, under the provisions of the code and administrative order X-48 above set out."

The code of fair competition for the Retail Solid Fuel Industry approved by President Roosevelt, February 14, 1934, provides in part as follows on page 473, Article II, entitled "Definitions"::

"SECTION 1. 'Solid fuel' shall mean any anthracite, semi-anthracite, bituminous, semi-bituminous or lignite coal, brisquettes, boulets, coke, gas-house coke, petroleum coke, petroleum carbon or any other manufactured or patented fuel not sold by liquid or metered measure, and wood or wood-fuel products except charcoal.

"SECTION 2. 'Retailing' shall mean the selling or selling and delivering of solid fuel in other than railroad cars or cargo vessels, subject, however, to the provisions of Article III, Section 13, of this Code.

"SECTION 3. 'Wholesaling' shall mean the selling or selling and delivering of solid fuel in railroad cars or cargo vessels, subject, however, to the provisions of Article III, Section 13, of this Code.

The same code provides in part as follows on page 476 under Article III, entitled "Administration".

"SECTION 13. Any business included in the definition of 'wholesaling' in Article II, Section 3, of this Code, which has been by custom served by the Retail Solid Fuel Industry in any trade area, shall be included

within the definition of 'retailing', and any business included in the definition of 'retailing' in Article II, Section 2, of this Code, which has been by custom served by the wholesale coal industry in any trade area, shall be included within the definition of 'wholesaling'. Any dispute arising out of these provisions and involving any related industry or industries for which a Code of Fair Competition shall exist, shall be forthwith reviewed and determined by the procedure established in the last preceding Section, provided that no such determination shall prevent any retailer doing wholesale business, or the converse."

CONCLUSION.

There are so many codes approved by the President that it is an impossibility for this office to review all industrial codes approved by our President for the purpose of aiding in national recovery, and for the purpose of this opinion we confine ourselves to an interpretation of the above code, which is submitted by your letter as the code applicable to the coal industry in Missouri.

It is common knowledge that the definition of "Solid fuel" under Article II, Section 1, of said code, will include the kind of coal which is sold wholesale and retail in Missouri, and that it includes the kind of coal mined in Callaway County, Missouri/

Under the provisions of Article II, Sections 2 and 3, it is readily discernable that the "Retailing" as used by said code means selling and delivering coal in other than railroad cars, subject to the provisions of Article II, Section 13, of the code, and that the term "wholesaling" as used by the code means the selling and delivering of coal in railroad cars, subject to the provisions of Article II, Section 13, of the code. Hence, we must look to the provisions of Article II, Section 13, in order to fully apply the terms "wholesaling" and "retailing" as used in the Code, to a concrete state of facts.

Article III, Section 13, modified the clear cut distinction between "wholesaling" and "retailing" as used in the code whenever such a statutory distinction is contrary to the custom of the wholesale and retail industry serving any trade

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area. That is to say, that where the "Retail Solid Fuel Industry" by custom has been selling coal to the consumer in railroad cars, then he is not at all events to be treated as a "Wholesaler" while construing the code for the "Wholesale Solid Fuel Industry", and visa versa, when the owner of the mine by custom has been selling coal to the consumer in other than railroad cars, for instance in trucks, for in many Missouri mines the railroad facilities have not been provided but said mines have depended solely on motor vehicle transportation for delivering to the consumer, then said mine operator is not at all events to be treated as a "retailer", when construing the code for the "Retail Solid Fuel Industry." The custom by which a trade area has been served, by the provisions of the code itself, may determine whether one is a "wholesaler" or a "retailer" under the code of fair competition for the "Retail Solid Fuel Industry".

Your state in your letter that it has been customary for governmental agencies in Missouri to buy coal wholesale from truck mines. Such being the case, it is the opinion of this office that the operators of said truck mines are not subject to the provisions of the code regulating the "Retail Solid Fuel Industry", when supplying said governmental agencies with Missouri coal, and said mine operators can bid wholesale prices to the State Purchasing Agent, notwithstanding the provisions of the above set out code. The Administrative Order No. X-48, paragraph (a), which is set out in your request, which order applies to all administration codes, allows operators of any coded industry to quote prices to governmental agencies as favorable as prices quoted to commercial buyers for like quantities, and when the operator of a truck mine in Callaway County, or any other county in Missouri, who by custom has been selling coal to governmental agencies wholesale, submits a bid to you as favorable as his prices quoted to commercial buyers, and said bid is in all other respects in compliance with the code regulating the "Wholesale Solid Fuel Industry", then said bid should be considered as other bids are considered by your department.

Respectfully submitted

WM. ORR SAWYERS
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

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