PART 776—INTERPRETATIVE BULLETIN ON THE GENERAL COVERAGE OF THE WAGE AND HOURS PROVISIONS OF THE FAIR LABOR STANDARDS ACT OF 1938

Contents

AUTHORITY: 52 Stat. 1060, as amended; 29 U.S.C. 201-219.

Subpart A—General

SOURCE: 15 FR 2925, May 17, 1950, unless otherwise noted.

§776.0 Subpart limited to individual employee coverage.

This subpart, which was adopted before the amendments of 1961 and 1966 to the Fair Labor Standards Act, is limited to discussion of general coverage of the Act on the traditional basis of engagement by individual employees "in commerce or in the production of goods for commerce". The 1961 and 1966 amendments broadened coverage by extending it to other employees on an "enterprise" basis, when "employed in an enterprise engaged in commerce or in the production of goods for commerce" as defined in section 3 (r), (s), of the present Act. Employees covered under the principles discussed in this subpart remain covered under the Act as amended; however, an employee who would not be individually covered under the principles discussed in this subpart may now be subject to the Act if he is employed in a covered enterprise as defined in the amendments. Questions of "enterprise coverage" not answered in published statements of the Department of Labor may be addressed to the Administrator of the Wage and Hour Division, Department of Labor, Washington, DC 20210 or assistance may be requested from any of the Regional or District Offices of the Division.

[35 FR 5543, Apr. 3, 1970]

INDIVIDUAL EMPLOYEE COVERAGE

§776.0a Introductory statement.

(a) *Scope and significance of this part.* (1) The Fair Labor Standards Act of 1938[1] (hereinafter referred to as the Act), brings within the general coverage of its wage and hours provisions every employee who is "engaged in commerce or in the production of goods for commerce."[2] What employees are so engaged must be ascertained in the light of the definitions of "commerce", "goods", and "produced" which are set forth in the Act as amended by the Fair Labor Standards Amendments of 1949,[3] giving due regard to authoritative interpretations by the courts and to the legislative history of the Act, as amended. Interpretations of the Administrator of the Wage and Hour Division with respect to this general coverage are set forth in this part to provide "a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it."[4] These interpretations with respect to the general coverage of the wage and hours provisions of the Act, indicate the construction of the law which the Administrator believes to be correct and which will guide him in the performance of his administrative duties under the Act unless and until he is otherwise directed by authoritative decisions of the courts or concludes, upon reexamination of an interpretation, that it is incorrect.

[1]Pub. L. 718, 75th Cong., 3d sess. (52 Stat. 1060), as amended by the Act of June 26, 1940 (Pub. Res. No. 88, 76th Cong., 3d sess., 54 Stat. 616); by Reorganization Plan No. 2 (60 Stat. 1095), effective July 16, 1946; by the Portal-to-Portal Act of 1947, approved May 14, 1947 (61 Stat. 84); and by the Fair Labor Standards Amendments of 1949, approved October 26, 1949 (Pub. L. 393, 81st Cong., 1st sess., 63 Stat. 910); by Reorganization Plan No. 6 of 1950 (15 FR 3174), effective May 24, 1950; and by the Fair Labor Standards Amendments of 1955, approved August 12, 1955 (Pub. L. 381, 84th Cong., 1st sess., C. 867, 69 Stat. 711).

[2]The requirement of section 6 as to minimum wages is: "Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—" (not less than $1.00 an hour, except in Puerto Rico and the Virgin Islands to which special provisions apply).

The requirement of section 7 as to maximum hours which an employee may work without receiving extra pay for overtime is: "no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

[3]Pub. L. 393, 81st Cong., 1st sess. (63 Stat. 910). These amendments, effective January 25, 1950, leave the existing law unchanged except as to provisions specifically amended and the addition of certain new provisions. Section 3(b) of the Act, defining "commerce", and section 3(j), defining "produced", were specifically amended as explained in §§776.13 and 776.17(a) herein.

[4]*Skidmore* v. *Swift & Co.,* 323 U.S. 134, 138.

(2) Under the Portal-to-Portal Act of 1947,[5] interpretations of the Administrator may, under certain circumstances, be controlling in determining the rights and liabilities of employers and employees. The interpretations contained in this bulletin are interpretations on which reliance may be placed as provided in section 10 of the Portal-to-Portal Act, so long as they remain effective and are not modified, amended, rescinded, or determined by judicial authority to be incorrect. However, the omission to discuss a particular problem in this part or in interpretations supplementing it should not be taken to indicate the adoption of any position by the Administrator with respect to such problem or to constitute an administrative interpretation or practice or enforcement policy.

[5]Pub. L. 49, 80th Cong., 1st sess. (61 Stat. 84), discussed in part 790 of this chapter.

(b) *Exemptions and child labor provisions not discussed.* This part does not deal with the various specific exemptions provided in the statute, under which certain employees engaged in commerce or in the production of goods for commerce and thus within the general coverage of the wage and hours provisions are wholly or partially excluded from the protection of the Act's minimum-wage and overtime-pay requirements. Some of these exemptions are self-executing; others call for definitions or other action by the Administrator. Regulations and interpretations relating to specific exemptions may be found in other parts of this chapter. Coverage and exemptions under the child labor provisions of the Act are discussed in a separate interpretative bulletin (§§570.101 to 570.121 of this chapter) issued by the Secretary of Labor.

(c) *Earlier interpretations superseded.* All general and specific interpretations issued prior to July 11, 1947, with respect to the general coverage of the wage and hours provisions of the Act were rescinded and withdrawn by §776.0(b) of the general statement on this subject, published in the FEDERAL REGISTER on that date as part 776 of this chapter (12 FR 4583). To the extent that interpretations contained in such general statement or in releases, opinion letters, and other statements issued on or after July 11, 1947, are inconsistent with the provisions of the Fair Labor Standards Amendments of 1949, they do not continue in effect after January 24, 1950.[6] Effective on the date of its publication in the FEDERAL REGISTER, subpart A of this interpretative bulletin replaces and supersedes the general statement previously published as part 776 of this chapter, which statement is withdrawn. All other administrative rulings, interpretations, practices and enforcement policies relating to the general coverage of the wages and hours provisions of the Act and not withdrawn prior to such date are, to the extent that they are inconsistent with or in conflict with the principles stated in this interpretative bulletin, hereby rescinded and withdrawn.

[6]Section 16(c) of the Fair Labor Standards Amendments of 1949 (63 Stat. 910) provides:

"Any order, regulation, or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor, and any agreement entered into by the Administrator or the Secretary, in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect as an order, regulation, interpretation, or agreement of the Administrator or the Secretary, as the case may be, pursuant to this Act, except to the extent that any such order, regulation, interpretation, or agreement may be inconsistent with the provisions of this Act, or may from time to time be amended, modified, or rescinded by the Administrator or the Secretary, as the case may be, in accordance with the provisions of this Act."

[15 FR 2925, May 17, 1950, as amended at 21 FR 1448, Mar. 6, 1956. Redesignated at 35 FR 5543, Apr. 3, 1970]

HOW COVERAGE IS DETERMINED

§776.1 General interpretative guides.

The congressional policy under which employees "engaged in commerce or in the production of goods for commerce" are brought within the general coverage of the Act's wage and hours provisions is stated in section 2 of the Act. This section makes it clear that the congressional power to regulate interstate and foreign commerce is exercised in this Act in order to remedy certain evils, namely, "labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency, and the general well being of workers" which Congress found "(a) causes commerce and the channels and instrumentalities of commerce to be used to perpetuate such labor conditions among the workers of the several States; (b) burdens commerce and the free flow of goods in commerce; (c) constitutes an unfair method of competition in commerce; (d) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce and (e) interferes with the orderly and fair marketing of goods in commerce." In carrying out these broad remedial purposes, however, the Congress did not choose to make the scope of the Act coextensive in all respects with the limits of its power over commerce or to apply it to all activities affecting commerce.[7] Congress delimited the area in which the Act operates by providing for certain exceptions and exemptions, and by making wage-hour coverage applicable only to employees who are "engaged in" either "commerce", as defined in the Act, or "production" of "goods" for such commerce, within the meaning of the Act's definitions of these terms. The Fair Labor Standards Amendments of 1949 indicate an intention to restrict somewhat the category of employees within the reach of the Act under the former definition of "produced" and to expand to some extent the group covered under the former definition of "commerce." In his interpretations, the Administrator will endeavor to give effect to both the broad remedial purposes of the Act and the limitations on its application, seeking guidance in his task from the terms of the statute, from authoritative court decisions, and from the legislative history of the Act, as amended.[8]

[7]*Kirschbaum* v. *Walling,* 316 U.S. 517; *Walling* v. *Jacksonville Paper Co.,* 317 U.S. 564; *10 East 40th St. Bldg. Co.* v. *Callus,* 325 U.S. 578; *A. H. Phillips, Inc.* v. *Walling,* 324 U.S. 490; *Fleming* v. *Hawkeye Pearl Button Co.,* 113 F. 2d 52 (C.A. 8); *Armstrong* v. *Walling,* 161 F. 2d 515 (C.A. 1); *Bowie* v. *Gonzalez,* 117 F. 2d 11 (C.A. 1).

[8]Footnote references to some of the relevant court decisions are made for the assistance of readers who may be interested in such decisions.

Footnote reference to the legislative history of the 1949 amendments are made at points in this part where it is believed they may be helpful. References to the *Statement of the Managers on the part of the House,* appended to the Conference Report on the amendments (H. Rept. No. 1453, 81st Cong., 1st sess.) are abbreviated: H. Mgrs. St. 1949, p. __. References to the *Statement of a majority of the Senate Conferees,* 95 Cong. Rec., October 19, 1949 at 15372-15377 are abbreviated: Sen. St., 1949 Cong. Rec. References to the Congressional Record are to the 1949 daily issues, the permanent volumes being unavailable at the time this part was prepared.

§776.2 Employee basis of coverage.

(a) The coverage of the Act's wage and hours provisions as described in sections 6 and 7 does not deal in a blanket way with industries as a whole. Thus, in section 6, it is provided that every employer shall pay the statutory minimum wage to "each of his employees who is engaged in commerce or in the production of goods for commerce." It thus becomes primarily an individual matter as to the nature of the employment of the particular employee. Some employers in a given industry may have no employees covered by the Act; other employers in the industry may have some employees covered by the Act, and not others; still other employers in the industry may have all their employees within the Act's coverage. If, after considering all relevant factors, employees are found to be engaged in covered work, their employer cannot avoid his obligations to them under the Act on the ground that he is not "engaged in commerce or in the production of goods for commerce." To the extent that his employees are so engaged, he is himself so engaged.[9]

[9]*Kirschbaum* v. *Walling,* 316 U.S. 517. See also *Walling* v. *Jacksonville Paper Co.,* 317 U.S. 564; *McLeod* v. *Threlkeld,* 319 U.S. 491; *Mabee* v. *White Plains Pub. Co.,* 327 U.S. 178.

(b) In determining whether an individual employee is within the coverage of the wage and hours provisions, however, the relationship of an employer's business to commerce or to the production of goods for commerce may sometimes be an important indication of the character of the employee's work.[10] It is apparent, too, from the 1949 amendment to the definition of "produced" and its legislative history that an examination of the character of the

employer's business will in some borderline situations be necessary in determining whether the employees' occupation bears the requisite close relationship to production for commerce.[11]

[10]*Borden Co.* v. *Borella,* 325 U.S. 679; *10 E. 40th St. Bldg. Co.* v. *Callus,* 325 U.S. 578; *Armour & Co.* v. *Wantock,* 323 U.S. 126; *Donovan* v. *Shell Oil Co.,* 168 F. 2d 229 (C.A. 4); *Hertz Driveurself Stations* v. *United States,* 150 F. 2d 923 (C.A. 8); *Horton* v. *Wilson & Co.,* 223 N.C. 71, 25 S.E. 2d 437.

[11]H. Mgrs. St., 1949, pp. 14, 15; Sen. St. 1949 Cong. Rec. 15372.

§776.3 Persons engaging in both covered and noncovered activities.

The Act applies to employees "engaged in commerce or in the production of goods for commerce" without regard to whether such employees, or their employer, are also engaged in other activities which would not bring them within the coverage of the Act. The Act makes no distinction as to the percentage, volume, or amount of activities of either employee or employer which constitute engaging in commerce or in the production of goods for commerce. Sections 6 and 7 refer to "each" and "any" employee so engaged, and section 15(a)(1) prohibits the introduction into the channels of interstate or foreign commerce of "any" goods in the production of which "any" employee was employed in violation of section 6 or section 7. Although employees doing work in connection with mere isolated, sporadic, or occasional shipments in commerce of insubstantial amounts of goods will not be considered covered by virtue of that fact alone, the law is settled that every employee whose engagement in activities in commerce or in the production of goods for commerce, even though small in amount, is regular and recurring, is covered by the Act.[12] This does not, however, necessarily mean that an employee who at some particular time may engage in work which brings him within the coverage of the Act is, by reason of that fact, thereafter indefinitely entitled to its benefits.

[12]*United States* v. *Darby,* 312 U.S. 100; *Mabee* v. *White Plains Pub. Co.,* 327 U.S. 178; *Schmidt* v. *Peoples Telephone Union of Maryville, Missouri,* 138 F. 2d 13 (C.A. 8); *New Mexico Public Service Co.* v. *Engel,* 145 F. 2d 636 (C.A. 10); *Sun Pub. Co.* v. *Walling,* 140 F. 2d 445 (C.A. 6), certiorari denied 322 U.S. 728; *Davis* v. *Goodman Lumber Co.,* 133 F. 2d 52 (C.A. 4).

§776.4 Workweek standard.

(a) The workweek is to be taken as the standard in determining the applicability of the Act.[13] Thus, if in any workweek an employee is engaged in both covered and noncovered work he is entitled to both the wage and hours benefits of the Act for all the time worked in that week, unless exempted therefrom by some specific provision of the Act. The proportion of his time spent by the employee in each type of work is not material. If he spends any part of the workweek in covered work he will be considered on exactly the same basis as if he had engaged exclusively in such work for the entire period. Accordingly, the total number of hours which he works during the workweek at both types of work must be compensated for in accordance with the minimum wage and overtime pay provisions of the Act.

[13]See *Gordon's Transports* v. *Walling,* 162 F. 2d 203 (C.A. 6), certiorari denied 332 U.S. 774; *Walling* v. *Fox-Pelletier Detective Agency,* 4 W.H. Cases 452 (W.D. Tenn.), 8 Labor Cases 62,219; *Walling* v. *Black Diamond Coal Mining Co.,* 59 F. Supp. 348 (W.D. Ky.); *Fleming* v. *Knox,* 42 F. Supp. 948 (S.D. Ga.); *Roberg* v. *Henry Phipps Estate,* 156 F. 2d 958 (C.A. 2). For a definition of the workweek, see §778.2(c) of this chapter.

(b) It is thus recognized that an employee may be subject to the Act in one workweek and not in the next. It is likewise true that some employees of an employer may be subject to the Act and others not. But the burden of effecting segregation between covered and noncovered work as between particular workweeks for a given employee or as between different groups of employees is upon the employer. Where covered work is being regularly or recurrently performed by his employees, and the employer seeks to segregate such work and thereby relieve himself of his obligations under sections 6 and 7 with respect to particular employees in particular workweeks, he should be prepared to show, and to demonstrate from his records, that such employees in those workweeks did not engage in any activities in interstate or foreign commerce or in the production of goods for such commerce, which would necessarily include a showing that such employees did not handle or work on goods or materials shipped in commerce or used in production of goods for commerce, or engage in any other work closely related and directly

essential to production of goods for commerce.[14] The Division's experience has indicated that much so-called "segregation" does not satisfy these tests and that many so-called "segregated" employees are in fact engaged in commerce or in the production of goods for commerce.

[14]See *Guess* v. *Montague,* 140 F. 2d 500 (C.A. 4).

§776.5 Coverage not dependent on method of compensation.

The Act's individual employee coverage is not limited to employees working on an hourly wage. The requirements of section 6 as to minimum wages are that "each" employee described therein shall be paid wages at a rate not less than a specified rate "an hour".[15] This does not mean that employees cannot be paid on a piecework basis or on a salary, commission, or other basis; it merely means that whatever the basis on which the workers are paid, whether it be monthly, weekly, or on a piecework basis, they must receive at least the equivalent of the minimum hourly rate. "Each" and "any" employee obviously and necessarily includes one compensated by a unit of time, by the piece, or by any other measurement.[16] Regulations prescribed by the Administrator (part 516 of this chapter) provide for the keeping of records in such form as to enable compensation on a piecework or other basis to be translated into an hourly rate.[17]

[15]Special exceptions are made for Puerto Rico, the Virgin Islands, and American Samoa.

[16]*United States* v. *Rosenwasser,* 323 U.S. 360.

[17]For methods of translating other forms of compensation into an hourly rate for purposes of sections 6 and 7, see parts 531 and 778 of this chapter.

[35 FR 5543, Apr. 3, 1970]

§776.6 Coverage not dependent on place of work.

Except for the general geographical limitations discussed in §776.7, the Act contains no prescription as to the place where the employee must work in order to come within its coverage. It follows that employees otherwise coming within the terms of the Act are entitled to its benefits whether they perform their work at home, in the factory, or elsewhere.[18] The specific provisions of the Act relative to regulation of homework serve to emphasize this fact.[19]

[18]*Walling* v. *American Needlecrafts,* 139 F. 2d 60 (C.A. 6); *Walling* v. *Twyeffort Inc.,* 158 F. 2d 944 (C.A. 2); *McComb* v. *Homeworkers' Handicraft Cooperative,* 176 F. 2d 633 (C.A. 4).

[19]See 6(a)(2); Sec. 11(d).

§776.7 Geographical scope of coverage.

(a) The geographical areas within which the employees are to be deemed "engaged in commerce or in the production of goods for commerce" within the meaning of the Act, and thus within its coverage are governed by definitions in section 3 (b), (c), and (j). In the definition of "produced" in section 3(j), "production" is expressly confined to described employments "in any State." (See §776.15 (a).) "Commerce" is defined to mean described activities "among the several States or between any State and any place outside thereof." (See §776.8.) "State" is defined in section 3(c) to mean "any State of the United States or the District of Columbia or any Territory or possession of the United States."

(b) Under the definitions in paragraph (a) of this section, employees within the District of Columbia; Puerto Rico; the Virgin Islands; Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (ch. 345, 67 Stat. 462, 43 U.S.C. 1331); American Samoa; Guam; Wake Island; Enewetok Atoll; Kwajalein Atoll; Johnston Island; and the Canal Zone are dealt with on the same basis as employees working in any of the 50 States.[20] Congress

did not exercise the national legislative power over the District of Columbia or the Territories or possessions referred to by extending the Act to purely local commerce within them.

[20]An amendment to the Fair Labor Standards Act of 1938, 71 Stat. 514 (approved Aug. 30, 1957) provides that no employer shall be subject to any liability or punishment under the Act with respect to work performed at any time in work places excluded from the Act's coverage by this law or for work performed prior to Nov. 29, 1957, on Guam, Wake Island, or the Canal Zone; or for work performed prior to the establishment, by the Secretary, of a minimum wage rate applicable to such work in American Samoa. Work performed by employees in "a work place within a foreign country or within territory under the jurisdiction of the United States" other than those enumerated in this paragraph is exempt by this amendment from coverage under the Act. When part of the work performed by an employee for an employer in any workweek is covered work performed in any State, it makes no difference where the remainder of such work is performed; the employee is entitled to the benefits of the Act for the entire workweek unless he comes within some specific exemption. The reference in 71 Stat. 514 to liability for work performed in American Samoa is an extension of the relief granted by the American Samoa Labor Standards Amendments of 1956 (29 U.S.C. Supp. IV, secs. 206, 213, and 216).

[15 FR 2925, May 17, 1950, as amended at 35 FR 5543, Apr. 3, 1970]

ENGAGING "IN COMMERCE"

§776.8 The statutory provisions.

(a) The activities constituting "commerce" within the meaning of the phrase "engaged in commerce" in sections 6 and 7 of the Act are defined in section 3(b) as follows:

Commerce means trade, commerce, transportation, transmission, or communication among the several States, or between any State and any place outside thereof.[21]

[21]As amended by section 3(a) of the Fair Labor Standards Amendments of 1949.

As has been noted in §776.7, the word "State" in this definition refers not only to any of the fifty States but also to the District of Columbia and to any Territory or possession of the United States.

(b) It should be observed that the term *commerce* is very broadly defined. The definition does not limit the term to transportation, or to the "commercial" transactions involved in "trade," although these are expressly included. Neither is the term confined to commerce in "goods." Obviously, "transportation" or "commerce" between any State and any place outside its boundaries includes a movement of persons as well as a movement of goods. And "transmission" or "communication" across State lines constitutes "commerce" under the definition, without reference to whether anything so transmitted or communicated is "goods."[22]

[22]"Goods" is, however, broadly defined in the Act. See §776.20(a).

The inclusion of the term "commerce" in the definition of the same term as used in the Act implies that no special or limited meaning is intended; rather, that the scope of the term for purposes of the Act is at least as broad as it would be under concepts of "commerce" established without reference to this definition.

§776.9 General scope of "in commerce" coverage.

Under the definitions quoted above, it is clear that the employees who are covered by the wage and hours provisions of the Act as employees "engaged in commerce" are employees doing work involving or related to the movement of persons or things (whether tangibles or intangibles, and including information and intelligence) "among the several States or between any State and any place outside thereof."[23] Although this does not include employees engaged in activities which merely "affect" such interstate or foreign commerce, the courts have made it clear that coverage of the Act based on engaging in commerce extends to every employee employed "in the channels of" such commerce or in activities so closely related to such commerce, as a practical matter, that they should be considered a part of it.[24] The courts have indicated that the words "in commerce" should not be so limited by

construction as to defeat the purpose of Congress, but should be interpreted in a manner consistent with their practical meaning and effect in the particular situation. One practical question to be asked is whether, without the particular service, interstate or foreign commerce would be impeded, impaired, or abated;[25] others are whether the service contributes materially to the consummation of transactions in interstate or foreign commerce[26] or makes it possible for existing instrumentalities of commerce[27] to accomplish the movement of such commerce effectively and to free it from burdens or obstructions.[28]

[23]"Any place outside thereof" is not limited in meaning to another State or country. Any movement between a State and a place "outside thereof" is "commerce" for purposes of the Act, such as ship-to-shore communication, or transportation out of a State by ship of food, fuel, or ice to be consumed at sea before arrival at another port.

[24]*Walling* v. *Jacksonville Paper Co.,* 317 U.S. 564; *Overstreet* v. *North Shore Corp.,* 318 U.S. 125; *McLeod* v. *Threlkeld,* 319 U.S. 491; *Boutell* v. *Walling,* 327 U.S. 463; *Pedersen* v. *J. F. Fitzgerald Constr. Co.,* 318 U.S. 740 and 324 U.S. 720.

[25]*Republic Pictures Corp.* v. *Kappler,* 151 F. 2d 543 (C.A. 8), affirmed 327 U.S. 757; *New Mexico Public Service Co.* v. *Engel,* 145 F. 2d 636 (C.A. 10).

[26]*Walling* v. *Sondock,* 132 F. 2d 77 (C.A. 5), certiorari denied 318 U.S. 772. See also *Horton* v. *Wilson & Co.,* 223 N.C. 71, 25 S.E. 2d 437, in which the court stated that an employee is engaged "in commerce" if his services—not too remotely but substantially and directly—aid in such commerce as defined in the Act.

[27]For a list of such instrumentalities, see §776.11.

[28]*Overstreet* v. *North Shore Corp.,* 318 U.S. 125; *J. F. Fitzgerald Constr. Co.* v. *Pedersen,* 324 U.S. 720; *Ritch* v. *Puget Sound Bridge & Dredging Co.,* 156 F. 2d 334 (C.A. 9); *Walling* v. *McCrady Constr. Co.,* 156 F. 2d 932 (C.A. 3); *Bennett* v. *V. P. Loftis,* 167 F. 2d 286 (C.A. 4); *Walling* v. *Patton-Tully Transp. Co.,* 134 F. 2d 945 (C.A. 6).

§776.10 Employees participating in the actual movement of commerce.

(a) Under the principles stated in §776.9, the wage and hours provisions of the Act apply typically, but not exclusively, to employees such, as those in the telephone,[29] telegraph,[30] television, radio,[31] transportation and shipping[32] industries, since these industries serve as the actual instrumentalities and channels of interstate and foreign commerce. Similarly, employees of such businesses as banking, insurance, newspaper publishing,[33] and others which regularly utilize the channels of interstate and foreign commerce in the course of their operations, are generally covered by the Act.

[29]*Schmidt* v. *Peoples Telephone Union of Maryville, Mo.,* 138 F. 2d 13 (C.A. 8); *North Shore Corp.* v. *Barnett,* 143 F. 2d 172 (C.A. 5); *Strand* v. *Garden Valley Telephone Co.,* 51 F. Supp. 898 (D. Minn.).

[30]*Western Union Telegraph Co.* v. *Lenroot,* 323 U.S. 490; *Western Union Telegraph Co.* v. *McComb,* 165 F. 2d 65 (C.A. 6), certiorari denied 333 U.S. 862; *Moss* v. *Postal Telegraph Cable Co.,* 42 F. Supp. 807 (M.D. Ga.).

[31]*Wilson* v. *Shuman,* 140 F. 2d 644 (C.A. 8); *Wabash Radio Corp.* v. *Walling,* 162 F. 2d 391 (C.A. 6).

[32]*Overnight Motor Co.* v. *Missel,* 316 U.S. 572; *Hargis* v. *Wabash R. Co., 163 F. 2d 607 (C.A. 7); Rockton & Rion R.R.* v. *Walling* 146 F. 2d 111 (C.A. 4), certiorari denied 334 U.S. 880; *Walling* v. *Keansburg Steamboat Co.,* 162 F. 2d 405 (C.A. 3); *Knudsen* v. *Lee & Simmons,* 163 F. 2d 95 (C.A. 2); *Walling* v. *Southwestern Greyhound Lines,* 65 F. Supp. 52 (W.D. Mo.); *Walling* v. *Atlantic Greyhound Corp.,* 61 F. Supp. 992 (E.D. S.C.).

[33]*Sun Pub. Co.* v. *Walling,* 140 F. 2d 445 (C.A. 6), certiorari denied 322 U.S. 728. See also *Oklahoma Press Pub. Co.* v. *Walling,* 327 U.S. 186, and *McComb* v. *Dessau,* 9 W.H. Cases 332 (S.D. Calif.) 17 Labor Cases, 65, 643.

(b) Employees whose work is an essential part of the stream of interstate or foreign commerce, in whatever type of business they are employed, are likewise engaged in commerce and within the Act's coverage. This would include, for example, employees of a warehouse whose activities are connected with the receipt or distribution of

goods across State lines.[34] Also, since "commerce" as used in the Act includes not only "transmission" of communications but "communication" itself, employees whose work involves the continued use of the interstate mails, telegraph, telephone or similar instrumentalities for communication across State lines are covered by the Act.[35] This does not mean that any use by an employee of the mails and other channels of communication is sufficient to establish coverage. But if the employee, as a regular and recurrent part of his duties, uses such instrumentalities in obtaining or communicating information or in sending or receiving written reports or messages, or orders for goods or services, or plans or other documents across State lines, he comes within the scope of the Act as an employee directly engaged in the work of "communication" between the State and places outside the State.

[34]*Phillips Co.* v. *Walling,* 324 U.S. 490; *Clyde* v. *Broderick,* 144 F. 2d 348 (C.A. 10).

[35]*McComb* v. *Weller,* 9 W.H. Cases 53 (W.D. Tenn.); *Yunker* v. *Abbye Employment Agency,* 32 N.Y.S. 2d 715; (Munic. Ct. N.Y.C.); *Phillips* v. *Meeker Coop. Light & Power Asso.,* 63 F. Supp. 733 (D. Minn.); *Anderson Bros. Corp.* v. *Flynn,* 218 S.W. 2d 653 (C.A. Ky.).

[15 FR 2925, May 17, 1950, as amended at 22 FR 5684, July 18, 1957]

§776.11 Employees doing work related to instrumentalities of commerce.

(a) Another large category of employees covered as "engaged in commerce" is comprised of employees performing the work involved in the maintenance, repair, or improvement of existing instrumentalities of commerce. (See the cases cited in footnote 28 to §776.9. See also the discussion of coverage of employees engaged in building and construction work, in subpart B of this part.) Typical illustrations of instrumentalities of commerce include railroads, highways, city streets, pipe lines, telephone lines, electrical transmission lines, rivers, streams, or other waterways over which interstate or foreign commerce more or less regularly moves; airports; railroad, bus, truck, or steamship terminals; telephone exchanges, radio and television stations, post offices and express offices; bridges and ferries carrying traffic moving in interstate or foreign commerce (even though within a single State); bays, harbors, piers, wharves and docks used for shipping between a State and points outside; dams, dikes, revetments and levees which directly facilitate the uninterrupted movement of commerce by enhancing or improving the usefulness of waterways, railways, and highways through control of water depth, channels or flow in streams or through control of flood waters; warehouses or distribution depots devoted to the receipt and shipment of goods in interstate or foreign commerce; ships, vehicles, and aircraft regularly used in transportation of persons or goods in commerce; and similar fixed or movable facilities on which the flow of interstate and foreign commerce depends.

(b) It is well settled that the work of employees involved in the maintenance, repair, or improvement of such existing instrumentalities of commerce is so closely related to interstate or foreign commerce as to be in practice and in legal contemplation a part of it. Included among the employees who are thus "engaged in commerce" within the meaning of the Act are employees of railroads, telephone companies, and similar instrumentalities who are engaged in maintenance-of-way work;[36] employees (including office workers, guards, watchmen, etc.) engaged in work on contracts or projects for the maintenance, repair, reconstruction or other improvement of such instrumentalities of commerce as the transportation facilities of interstate railroads, highways, waterways, or other interstate transportation facilities, or interstate telegraph, telephone, or electrical transmission facilities (see subpart B of this part); and employees engaged in the maintenance or alteration and repair of ships[37] or trucks[38] used as instrumentalities of interstate or foreign commerce. Also, employees have been held covered as engaged in commerce where they perform such work as watching or guarding ships or vehicles which are regularly used in commerce[39] or maintaining, watching, or guarding warehouses, railroad or equipment yards, etc., where goods moving in interstate commerce are temporarily held,[40] or acting as porters, janitors, or in other maintenance capacities in bus stations, railroad stations, airports, or other transportation terminals.[41]

[36]*Davis* v. *Rockton & Rion R.R.,* 65 F. Supp. 67 affirmed in 159 F. 2d 291 (C.A. 4); *North Shore Corp.* v. *Barnett,* 143 F. 2d 172 (C.A. 5); *Palmer* v. *Howard,* 12 Lab. Cas. (CCH) par. 63, 756 (W.D. Tenn.); *Williams* v. *Atlantic Coast Lines R.R. Co.,* 1 W.M. Cases 289 (E.D. N.C. 1940), 2 Labor Cases (CCH) par. 18, 564.

[37]*Slover* v. *Wathen,* 140 F. 2d 258 (C.A. 4); *Walling* v. *Keansburg Steamboat Co.,* 162 F. 2d 405 (C.A. 3).

[38]*Boutell* v. *Walling,* 327 U.S. 463; *Morris* v. *McComb,* 332 U.S. 422; *Skidmore* v. *John J. Casale, Inc.,* 160 F. 2d 527 (C.A. 2), certiorari denied 331 U.S. 812; *Hertz Drivurself Stations* v. *United States,* 150 F. 2d 923 (C.A. 8); *Walling* v. *Sturm & Sons, Inc.,* 6 W.H. Cases 131 (D.N.J.) 10 Labor Cases (CCH) par. 62, 980.

As to exemptions from the overtime requirements for mechanics employed by motor carriers, see part 782 of this chapter. For exemptions applicable to retail or service establishments, see part 779 of this chapter.

[39]*Slover* v. *Wathen,* 140 F. 2d 258 (C.A. 4); *Agosto* v. *Rocafort,* 5 W.H. Cases 176 (D.P.R.), 9 Labor Cases (CCH) par. 62, 610; *Cannon* v. *Miller,* 155 F. 2d 500 (S. Ct. Wash.).

[40]*Engebretson* v. *E. J. Albrecht Co.,* 150 F. 2d 602 (C.A. 7); *Mid-Continent Petroleum Corp.* v. *Keen,* 157 F. 2d 310 (C.A. 8); *Walling* v. *Mutual Wholesale Food & Supply Co.,* 141 F. 2d 331 (C.A. 8); *Walling* v. *Sondock,* 132 F. 2d 77 (C.A. 5); certiorari denied 318 U.S. 772; *Reliance Storage & Insp. Co.* v. *Hubbard,* 50 F. Supp. 1012 (W.D. Va.); *Walling* v. *Fox-Pelletier Detective Agency,* 4 W.H. Cases 452 (W.D. Tenn. 1944); 8 Labor Cases (CCH) par. 62, 219; *McComb* v. *Russell Co.,* 9 W.H. Cases 258 (D. Miss. 1949), 17 Labor Cases (CCH) par. 65, 519.

[41]*Mornford* v. *Andrews,* 151 F. 2d 511 (C.A. 5); *Hargis* v. *Wabash R. Co.* 163 F. 2d 607 (C.A. 7); *Walling* v. *Atlantic Greyhound Corp.,* 61 F. Supp. 992 (E.D. S.C.); *Rouch* v. *Continental Oil Co.,* 55 F. Supp. 315 (D. Kans.); see also *Williams* v. *Jacksonville Terminal Co.,* 315 U.S. 386.

(c) On the other hand, work which is less immediately related to the functioning of instrumentalities of commerce than is the case in the foregoing examples may be too remote from interstate or foreign commerce to establish coverage on the ground that the employee performing it is "engaged in commerce." This has been held true, for example, of a cook preparing meals for workmen who are repairing tracks over which interstate trains operate,[42] and of a porter caring for washrooms and lockers in a garage which is not an instrumentality of commerce, where trucks used both in intrastate and interstate commerce are serviced.[43]

[42]*McLeod* v. *Threlkeld,* 319 U.S. 491.

[43]*Skidmore* v. *John J. Casale, Inc.,* 160 F. 2d 527, certiorari denied 331 U.S. 812 (use in interstate commerce of trucks serviced was from 10 to 25 percent of total use).

(d) There are other situations in which employees are engaged "in commerce" and therefore within the coverage of the Act because they contribute directly to the movement of commerce by providing goods or facilities to be used or consumed by instrumentalities of commerce in the direct furtherance of their activities of transportation, communication, transmission, or other movement in interstate or foreign commerce. Thus, for example, employees are considered engaged "in commerce" where they provide to railroads, radio stations, airports, telephone exchanges, or other similar instrumentalities of commerce such things as electric energy,[44] steam, fuel, or water, which are required for the movement of the commerce carried by such instrumentalities.[45] Such work is "so related to the actual movement of commerce as to be considered an essential and indispensable part thereof, and without which it would be impeded or impaired."[46]

[44]*New Mexico Public Service Co.* v. *Engel,* 145 F. 2d 636 (C.A. 10); *Walling* v. *Connecticut Co.,* 154 F. 2d 552 (C.A. 2).

[45]Such employees would also be covered as engaged in the production of goods for commerce. See *Lewis* v. *Florida Power & Light Co.,* 154 F. 2d 751 (C.A. 5); *Walling* v. *Connecticut Co.,* 154 F. 2d 552 (C.A. 2); also §776.21(b).

[46]*New Mexico Public Service Co.* v. *Engel,* 145 F. 2d 636, 640 (C.A. 10).

§776.12 Employees traveling across State lines.

Questions are frequently asked as to whether the fact that an employee crosses State lines in connection with his employment brings him within the Act's coverage as an employee "engaged in commerce." Typical of the employments in which such questions arise are those of traveling service men, traveling buyers, traveling construction crews, collectors, and employees of such organizations as circuses, carnivals, road shows, and

orchestras. The area of coverage in such situations cannot be delimited by any exact formula, since questions of degree are necessarily involved. If the employee transports material or equipment or other persons across State lines or within a particular State as a part of an interstate movement, it is clear of course, that he is engaging in commerce.[47] And as a general rule, employees who are regularly engaged in traveling across State lines in the performance of their duties (as distinguished from merely going to and from their homes or lodgings in commuting to a work place) are engaged in commerce and covered by the Act.[48] On the other hand, it is equally plain that an employee who, in isolated or sporadic instances, happens to cross a State line in the course of his employment, which is otherwise intrastate in character, is not, for that sole reason, covered by the Act. Nor would a man who occasionally moves to another State in order to pursue an essentially local trade or occupation there become an employee "engaged in commerce" by virtue of that fact alone. Doubtful questions arising in the area between the two extremes must be resolved on the basis of the facts in each individual case.

[47]The employee may, however, be exempt from the overtime provisions of the Act under section 13(b)(1). See part 792 of this chapter.

[48]*Reck* v. *Zarmocay*, 264 App. Div. 520, 36 N.Y.S. 2d 394; *Colbeck* v. *Dairyland Creamery Co.*, 17 N.W. 2d 262 (S. Ct. S.D.).

§776.13 Commerce crossing international boundaries.

Under the Act, as amended, an employee engaged in "trade commerce, transportation, transmission, or communication" between any State and any place outside thereof is covered by the Act regardless of whether the "place outside" is another State or is a foreign country or is some other place. Before the amendment to section 3(b) which became effective January 25, 1950, employees whose work related solely to the flow of commerce into a State from places outside it which were not "States" as defined in the Act were not employees engaged in "commerce" for purposes of the Act, although employees whose work was concerned with the flow of commerce out of the State to such places were so engaged.[49] This placed employees of importers in a less favorable position under the Act than the employees of exporters. This inequality was removed by the amendment to section 3(b).[50] Accordingly, employees performing work in connection with the importation of goods from foreign countries are engaged "in commerce" and covered by the Act, as amended. The coverage of such employees, as of those performing work in connection with the exportation of goods to foreign countries, is determined by the same principles as in the case of employees whose work is connected with goods procured from or sent to other States.

[49]The definition of "commerce" previously referred to commerce "from any State to any place outside thereof." The amendment substituted "between" for "from" and "and" for "to" in this clause.

[50]H. Mgrs. St., 1949, pp. 13, 14.

ENGAGING IN "THE PRODUCTION OF GOODS FOR COMMERCE"

§776.14 Elements of "production" coverage.

Sections 6 and 7 of the Act, as has been noted, cover not only employees who are engaged "in commerce" as explained above, but also "each" and "any" employee who is engaged in the "production" of "goods" for "commerce". What employees are so engaged can be determined only by references to the very comprehensive definitions which Congress has supplied to make clear what is meant by "production", by "goods," and by "commerce" as those words are used in sections 6 and 7. In the light of these definitions, there are three interrelated elements of coverage to be considered in determining whether an employee is engaged in the production of goods for commerce: (a) There must be "production"; (b) such production must be of "goods"; (c) such production of goods must be "for commerce"; all within the meaning of the Act.[51] The three elements of "production" coverage are discussed in order in the sections following.

[51]These elements need not be considered if the employee would be covered in any event because engaged "in commerce" under the principles discussed in preceding sections of this part.

§776.15 "Production."

(a) *The statutory provisions.* The activities constituting "production" within the meaning of the phrase "engaged in * * * production of goods for commerce" are defined in the Act[52] as follows:

[52]Act, section 3(j). This definition is also applicable in determining coverage of the child labor provisions of the Act. See part 4 of this title.

Produced means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

The Act bars from interstate commerce "any" goods in the production of which "any" employee was employed in violation of the minimum-wage or overtime-pay provisions,[53] and provides that in determining, for purposes of this provision, whether an employee was employed in the production of such goods:

[53]Act, section 15(a)(1). The only exceptions are stated in the section itself, which provides that "it shall be unlawful for any person—(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of the Act, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful;"

* * * proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.[54]

[54]Act, sec. 15(b).

(b) *General scope of "production" coverage.* The statutory provisions quoted in paragraph (a) of this section, show that for purposes of the Act, wherever goods are being produced for interstate or foreign commerce, the employees who are covered as "engaged in the production" of such goods, include, in general, all those whose work may fairly be said to be a part of their employer's production of such goods,[55] and include those whose work is closely related and directly essential thereto,[56] whether employed by the same or a different employee. (See §§776.17 to 776.19.) Typically, but not exclusively, this includes that large group of employees engaged in mines, oil fields, quarries, and manufacturing, processing, or distributing plants where goods are produced for commerce. The employees covered as engaged in "production" are not limited, however, to those engaged in actual physical work on the product itself or to those in the factories, mines, warehouses, or other place of employment where goods intended for commerce are being produced. If the requisite relationship to production of such goods is present, an employee is covered, regardless of whether his work brings him into actual contact with such goods or into the establishments where they are produced, and even though his employer may be someone other than the producer of the goods for commerce.[57] As explained more fully in the sections following, the Act's "production" coverage embraces many employees who serve productive enterprises in capacities which do not involve working directly on goods produced but which are nevertheless closely related and directly essential to successful operations in producing goods for interstate or foreign commerce. And as a general rule, in conformity with the provisions of the Act quoted in paragraph (a) of this section, an employee will be considered to be within the general coverage of the wage and hours provisions if he is working in a place of employment where goods sold or shipped in interstate commerce or foreign commerce are being produced, unless the employer maintains the burden of establishing that the employee's functions are so definitely segregated from such production that they should not be regarded as closely related and directly essential thereto.[58]

[55]*Borden Co.* v. *Borella,* 325 U.S. 679; *Armour & Co.* v. *Wantock,* 323 U.S. 126. See also paragraph (c) of this section.

[56]*Kirschbaum* v. *Walling,* 316 U.S. 517; *Roland Electrical Co.* v. *Walling,* 326 U.S. 657; H. Mgrs. St., 1949, p. 14; Sen. St. 1949 Cong. Rec. p. 15372.

[57]*Borden Co.* v. *Borella,* 325 U.S. 679; *Roland Electrical Co.* v. *Walling.* 326 U.S. 657; *Kirschbaum* v. *Walling,* 316 U.S. 517; *Walton* v. *Southern Package Corp. 320 U.S. 540.*

[58]*Guess* v. *Montague,* 140 F. 2d 500 (C.A. 4). *Cf. Armour & Co.* v. *Wantock,* 323 U.S. 126.

§776.16 Employment in "producing, * * * or in any other manner working on" goods.

(a) *Coverage in general.* Employees employed in "producing, manufacturing, mining, handling, or in any other manner working on" goods (as defined in the Act, including parts or ingredients thereof) for interstate or foreign commerce are considered actually engaged in the "production" of such goods, within the meaning of the Act. Such employees have been within the general coverage of the wage and hours provisions since enactment of the Act in 1938, and remain so under the Fair Labor Standards Amendments of 1949.[59]

[59]H. Mgrs. St., 1949, p. 14; Sen. St., 1949 Cong. Rec., p. 15372.

(b) *Activities constituting actual "production" under statutory definition.* It will be noted that the actual productive work described in this portion of the definition of "produced" includes not only the work involved in making the products of mining, manufacturing, or processing operations, but also includes "handling, transporting, or in any other manner working on" goods. This is so, regardless of whether the goods are to be further processed or are so-called "finished goods." The Supreme Court has stated that this language of the definition brings within the scope of the term "production," as used in the Act, "every step in putting the subject to commerce in a state to enter commerce," including "all steps, whether manufacture or not, which lead to readiness for putting goods into the stream of commerce," and "every kind of incidental operation preparatory to putting goods into the stream of commerce."[60]

[60]*Western Union Tel. Co.* v. *Lenroot,* 323 U.S. 490. See, to the same effect, *Walling* v. *Friend,* 156 F. 2d 429 (C.A. 8); *Walling* v. *Commet Carriers,* 151 F. 2d 107 (C.A. 2); *Phillips* v. *Star Overall Dry Cleaning Laundry Co.,* 149 F. 2d 416 (C.A. 2); certiorari denied 327 U.S. 780; *Walling* v. *Griffin Cartage Co.,* 62 F. Supp. 396, affirmed in 153 F. 2d 587 (C.A. 6). For examples, see paragraphs (c) and (d) of this section. Employees who are not engaged in the actual production Activities described in section 3(j) of the Act are not engaged in "production" unless their work is "closely related" and "directly essential" to such production. See §§776.17-776.19.

However, where employees of a common carrier, by handling or working on goods, accomplish the interstate transit or movement in commerce itself, such handling or working on the goods is not "production." The employees in that event are covered only under the phrase "engaged in commerce."[61]

[61]*Western Union Tel. Co.* v. *Lenroot,* 323 U.S. 490. For examples, see paragraph (c) of this section.

(c) *Physical labor.* It is clear from the principles stated in paragraphs (a) and (b) of this section, that employees in shipping rooms, warehouses, distribution yards, grain elevators, etc., who sort, screen, grade, store, pack, label, address or otherwise handle or work on goods in preparation for shipment of the goods out of the State are engaged in the production of goods for commerce within the meaning of the Act.[62] The same has been held to be true of employees doing such work as handling ingredients (scrap iron) of steel used in building ships which will move in commerce;[63] handling and caring for livestock at stockyards where the livestock are destined for interstate shipment as such[64] or as meat products;[65] handling or transporting containers to be used in shipping products interstate;[66] transporting, within a single State, oil to a refinery[67] or lumber to a mill,[68] where products of the refinery or mill will be sent out of the State; transporting parts or ingredients of other types of goods or the finished goods themselves between processors, manufacturers, and storage places located in a single State, where goods so transported will leave the State in the same or an altered form;[69] and repairing or otherwise working on ships,[70] vehicles,[71] machinery,[72] clothing,[73] or other goods which may be expected to move in interstate commerce.

[62]*McComb* v. *Wyandotte Furn. Co.,* 169 F. 2d 766 (C.A. 8); *Walling* v. *Mutual Wholesale Food & Supply Co.,* 141 F. 2d 331 (C.A. 8); *West Kentucky Coal Co.* v. *Walling,* 153 F. 2d 582 (C.A. 6); *Walling* v. *Home Loose Leaf Tobacco Warehouse Co.,* 51 F. Supp. 914 (E.D. Ky.); *Walling* v. *Yeakley,* 3 W.H. Cases 27, modified and affirmed in 140 F. 2d 830 (C.A. 10); *Shain* v. *Armour & Co.,* 50 F. Supp. 907 (W.D. Ky.); *Walling* v. *McCracken County Peach Growers Assn.,* 50 F. Supp. 900 (W.D. Ky). See also *Clyde* v. *Broderick,* 144 F. 2d 348 (C.A. 10).

[63]*Bracey* v. *Luray,* 138 F. 2d 8 (C.A. 4).

[64]*Walling* v. *Friend,* 156 F. 2d 429 (C.A. 8).

[65]*Fleming* v. *Swift & Co.,* 41 F. Supp. 825, affirmed in 131 F. 2d 249 (C.A. 7); *McComb* v. *Benz Co.,* 9 W.H. Cases 277 (S.D. Ind.).

[66]*Walling* v. *Villaume Box & Lbr. Co.,* 58 F. Supp. 150 (D. Minn.).

[67]*Mid-Continent Pipe Line Co.* v. *Hargrave,* 129 F. 2d 655 (C.A. 10); *Boling* v. *R. J. Allison Co., Inc.,* 4 W.H. Cases 500 (N.D. Okla.).

[68]*Hanson* v. *Lagerstrom,* 133 F. 2d 120 (C.A. 8).

[69]*Walling* v. *Griffin Cartage Co.,* 62 F. Supp. 696, affirmed in 153 F. 2d 587 (C.A. 6); *Walling* v. *Comet Carriers,* 151 F. 2d 107 (C.A. 2).

[70]*Slover* v. *Walthen,* 140 F. 2d 258 (C.A. 4).

[71]*Hertz Drivurself Stations* v. *United States,* 150 F. 2d 923 (C.A. 8); *Walling* v. *Armbruster,* 51 F. Supp. 166 (W.D. Ark.); *McComb* v. *Weller,* 9. W.H. Cases 53 (W.D. Tenn.), 17 Labor Cases (CCH) par. 65, 332; *Walling* v. *Strum & Sons,* 6 W.H. Cases 131 (D. N.J.), 11 Labor Cases (CCH) par. 63, 249.

[72]*Engebretson* v. *Albrecht,* 150 F. 2d 602 (C.A. 7); *Guess* v. *Montague,* 140 F. 2d 500 (C.A. 4).

[73]*Walling* v. *Belikoff,* 147 F. 2d 1008 (C.A. 2); *Campbell* v. *Zavelo,* 243 Ala. 361, 10 So. 2d 29; *Phillips* v. *Star Overall Dry Cleaning Laundry Co.,* 149 F. 2d 416 (C.A. 2), certiorari denied 327 U.S. 780.

These examples are, of course, illustrative rather than exhaustive. Some of them relate to situations in which the handling or working on goods for interstate or foreign commerce may constitute not only "production for commerce" but also engaging "in commerce" because the activities are so closely related to commerce as to be for all practical purposes a part of it.[74] However, as noted in paragraph (b) of this section, handling or working on goods constitutes engagement in "commerce" only and not engagement in "production" of the goods when it is done by employees of a common carrier and is itself the means whereby interstate transit or movement of the goods by the carrier is accomplished. Thus, employees of a telegraph company preparing messages for interstate transmission, television cameramen photographing sports or news events for simultaneous viewing at television receiving sets in other State, and railroad train crews or truck drivers hauling goods from one State to another are not engaged in the "production" of goods by virtue of such activities, but are covered by the Act only as employees "engaged in commerce."

[74]*Slover* v. *Walthen,* 140 F. 2d 258 (C.A. 4); *Hertz Drivurself Stations* v. *United States,* 150 F. 2d 923 (C.A. 8); *Engebretson* v. *Albrecht,* 150 F. 2d 602 (C.A. 7); *Walling* v. *Strum & Sons,* 6 W.H. Cases 131 (D. N.J.).

(d) *Nonmanual work.* The "production" described by the phrase "producing * * * or in any other manner working on" goods includes not only the manual, physical labor involved in processing and working on the tangible products of a producing enterprise, but equally the administration, planning, management, and control of the various physical processes together with the accompanying accounting and clerical activities.[75] An enterprise producing goods for commerce does not accomplish the actual production of such goods solely with employees performing physical labor on them. Other employees may be equally important in actually producing the goods, such as

employees who conceive and direct policies of the enterprise; employees who dictate, control, and coordinate the steps involved in the physical production of goods; employees who maintain detailed and meticulous supervision of productive activities; and employees who direct the purchase of raw materials and supplies, the methods of production, the amounts to be produced, the quantity and character of the labor, the safety measures, the budgeting and financing, the labor policies, and the maintenance of the plants and equipment. (For regulations governing exemption from the wage and hours provisions of employees employed in a bona fide executive, administrative, or professional capacity, see part 541 of this chapter.) Employees who perform these and similar activities are an integral part of the coordinated productive pattern of a modern industrial organization. The Supreme Court of the United States has held that from a productive standpoint and for purposes of the Act the employees who perform such activities "are actually engaged in the production of goods for commerce just as much as are those who process and work on the tangible products" in the manufacturing plant or other producing facilities of the enterprise.[76]

[75]*Borden Co.* v. *Borella,* 325 U.S. 679; *Hertz Drivurself Stations.* v. *United States,* 150 F. 2d 923 (C.A. 8); *Callus* v. *10 E. 40th St. Bldg.,* 146 F. 2d 438 (C.A. 2), reversed on other grounds in 325 U.S. 578.

[76]*Borden Co.* v. *Borella,* 325 U.S. 679, 683.

§776.17 Employment in a "closely related process or occupation directly essential to" production of goods.

(a) *Coverage in general.* Employees who are not actually "producing * * * or in any other manner working on" goods for commerce are, nevertheless, engaged in the "production" of such goods within the meaning of the Act and therefore within its general coverage if they are employed "in any closely related process or occupation directly essential to the production thereof, in any State."[77] Prior to the Fair Labor Standards Amendments of 1949, this was true of employees engaged "in any process or occupation necessary to the production" of goods for commerce. The amendments deleted the word "necessary" and substituted the words "closely related" and "directly essential" contained in the present law. The words "directly essential" were adopted by the Conference Committee in lieu of the word "indispensable" contained in the amendments as first passed by the House of Representatives. Under the amended language, an employee is covered if the process or occupation in which he is employed is both "closely related" and "directly essential" to the production of goods for interstate or foreign commerce.

[77]If coverage of an employee is determined to exist on either basis, it is, of course, not necessary to determine whether the employee would also be covered on the other ground. See *Warren-Bradshaw Drilling Co.* v. *Hall,* 124 F. 2d 42 (C.A. 5), affirmed in 317 U.S. 88.

The legislative history shows that the new language in the final clause of section 3(j) of the Act is intended to narrow, and to provide a more precise guide to, the scope of its coverage with respect to employees (engaged neither "in commerce" nor in actually "producing or in any other manner working on" goods for commerce) whose coverage under the Act formerly depended on whether their work was "necessary" to the production of goods for commerce. Some employees whose work might meet the "necessary" test are now outside the coverage of the Act because their work is not "closely related" and "directly essential" to such production; others, however, who would have been excluded if the indispensability of their work to production had been made the test, remain within the coverage under the new language.[78]

The scope of coverage under the "closely related" and "directly essential" language is discussed in the paragraphs following. In the light of explanations provided by managers of the legislation in Congress[78] including expressions of their intention to leave undisturbed the areas of coverage established under court decisions containing similar language,[79] this new language should provide a more definite guide to the intended coverage under the final clause of section 3(j) than did the earlier "necessary" test. However, while the coverage or noncoverage of many employees may be determined with reasonable certainty, no precise line for inclusion or exclusion may be drawn; there are bound to be borderline problems of coverage under the new language which cannot be finally determined except by authoritative decisions of the courts.

[78]H. Mgrs. St., 1949, p. 14; Sen. St., 1949 Cong. Rec. p. 15372; Statement of the Chairman of the Committee on Education and Labor explaining the conference agreement to the House of Representatives, 1949 Cong. Rec., p. 15135; colloquy between

Representatives McConnell and Javits, 1949 Cong. Rec., p. 15129; of statements of Representative Barden (1949 Cong. Rec. p. 15131), Representative Brehm (1949 Cong. Rec. p. 15132), and Senator Taft (1950 Cong. Rec., p. A-1162).

[79]*See Kirschbaum Co.* v. *Walling,* 316 U.S. 517.

(b) *Meaning of "closely related" and "directly essential".* The terms "closely related" and "directly essential" are not susceptible of precise definition; as used in the Act they together describe a situation in which, under all the facts and circumstances, the process or occupation in which the employee is employed bears a relationship to the production of goods for interstate or foreign commerce: (1) Which may reasonably be considered close, as distinguished from remote or tenuous, and (2) in which the work of the employee directly aids production in a practical sense by providing something essential to the carrying on in an effective, efficient, and satisfactory manner of an employer's operations in producing such goods.[80]

[80]See H. Mgrs. St. 1949, pp. 14, 15; Sen. St., 1949 Cong. Rec., p. 15372; cf. *Kirschbaum Co.* v. *Walling,* 316 U.S. 517.

Not all activities that are "closely related" to production will be "directly essential" to it, nor will all activities "directly essential" to production meet the "closely related" test. For example, employees employed by an employer in an enterprise, or portion thereof, which is devoted to the production of goods for interstate or foreign commerce will, as a general rule, be considered engaged in work "closely related" to such production, but some such employees may be outside the coverage of the Act because their work is not "directly essential" to production of the goods. (For a discussion of this point and specific illustration, see §776.18(b).) Similarly, there are some situations in which an employee performing work "directly essential" to production by an employer other than his own may not be covered because the kind of work and the circumstances under which it is performed show the employee's activities to be so much a part of an essentially local business operated by his employer that it would be unrealistic to consider them "closely related" to the productive activities of another. (For a more detailed discussion and specific illustrations see §776.19.)

(c) *Determining whether activities are "closely related" and "directly essential".* (1) The close relationship of an activity to production, which may be tested by a wide variety of relevant factors, is to be distinguished from its direct essentiality to production, which is dependent solely on considerations of need or function of the activity in the productive enterprise. The words "directly essential" refer only to the relationship of the employee's work to production. Work "directly essential" to production remains so no matter whose employee does it and regardless of the nature or purpose of the employer's business. It seems clear, on the other hand, that the criteria for determining whether a process or occupation is "closely related" to production cannot be limited to those which show its closeness in terms of need or function.[81] It may also be important to ascertain, for instance, whether the activity of the employee bears a relationship to production which is close in terms either of the place or the time of its performance, or in terms of the purposes with which the activity is performed by the particular employer through the employee, or in terms of relative directness or indirectness of the activity's effect in relation to such production, or in terms of employment within or outside the productive enterprise. (Examples of the application of these principles may be found in §§776.18 and 776.19.)

[81]Of course, if the need of function of the activity in production is such that the tie between them is both close and immediate (cf. *Kirschbaum Co.* v. *Walling,* 316 U.S. 517), as for example, where an employee is employed to repair electric motors which are used in factories in the production of goods for commerce, this fact may be sufficient to show both the direct essentiality and the close relationship of the employee's work to production. See *Roland Electrical Co.* v. *Walling,* 326 U.S. 657. See also §776.19 and H. Mgrs. St., 1949, pp. 14, 15.

(2) The determination of whether an activity is closely or only remotely related to production may thus involve consideration of such factors, among others, as the contribution which the activity makes to the production; who performs the activity; where, when and how it is performed in relation to the production to which it pertains; whether its performance is with a view to aiding production or for some different purpose; how immediate or delayed its effect on production is; the number and nature of any intervening operations or processes between the activity and the production in question; and, in an appropriate case, the characteristics and purposes of the employer's business.[82] Moreover, in some cases where particular work "directly essential" to production is performed by an employer other than the producer the degree of such essentiality may be a significant factor in determining

whether the work is also "closely related" to such production. (See §776.19.) No one of the factors listed in this paragraph is necessarily controlling, and other factors may assume importance. Some may have more significance than others in particular cases, depending upon the facts. They are merely useful guides for determining whether the total situation in respect to a particular process or occupation demonstrates the requisite "close and immediate tie"[83] to the production of goods for interstate or foreign commerce. It is the sum of the factors relevant to each case that determines whether the particular activity is "closely related" to such production. The application of the principles in this paragraph is further explained and illustrated in §§776.18 and 776.19.

[82]Cf. *Kirschbaum Co.* v. *Walling,* 316 U.S. 517; *10 E. 40th St. Bldg.* v. *Callus,* 325 U.S. 578; *Schulte Co.* v. *Gangi,* 328 U.S. 108; *Borden Co.* v. *Borella,* 325 U.S. 679; *Armour & Co.* v. *Wantock,* 323 U.S. 126.

[83]See *Kirschbaum Co.* v. *Walling,* 316 U.S. 517.

(3) In determining whether an activity is "directly essential" to production, a practical judgment is required as to whether, in terms of the function and need of such activity in successful production operations, it is "essential" and "directly" so to such operations. These are questions of degree; even "directly" essential activities (for example, machinery repair, custodial, and clerical work in a producing plant) (for other examples, see §§776.18(a) and 776.19) will vary in the degree of their essentiality and in the directness of the aid which they provide to production. An activity may be "directly essential" without being indispensable in the sense that it cannot be done without; yet some activities which, in a long chain of causation, might be indispensable to production, such as the manufacture of brick for a new factory, or even the construction of the new factory itself, are not "directly" essential.[84] An activity which provides something essential to meet the immediate needs of production, as, for example, the manufacture of articles like machinery or tools or dies for use in the production of goods for commerce (see §776.19(b)) will, however, be no less "directly" essential because intervening activities must be performed in the distribution, transportation, and installation of such products before they can be used in production.[85] The application of the principles in this paragraph is further explained and illustrated in §§776.18 and 776.19.

[84]Cf. 10 *E. 40th St. Bldg.* v. *Callus,* 325 U.S. 578; Sen. St. 95 Cong. Rec., October 19, 1949, at 15372.

[85]See *Walling* v. *Hamner,* 64 F. Supp. 690 (W.D. Va.).

§776.18 Employees of producers for commerce.

(a) *Covered employments illustrated.* Some illustrative examples of the employees employed by a producer of goods for interstate or foreign commerce who are or are not engaged in the "production" of such goods within the meaning of the Act have already been given. Among the other employees of such a producer, doing work in connection with his production of goods for commerce, who are covered because their work, if not actually a part of such production, is "closely related" and "directly essential" to it,[86] are such employees as bookkeepers, stenographers, clerks, accountants and auditors, employees doing payroll, timekeeping and time study work, draftsmen, inspectors, testers and research workers, industrial safety men, employees in the personnel, labor relations, advertising, promotion, and public relations activities of the producing enterprise, work instructors, and other office and white collar workers; employees maintaining, servicing, repairing or improving the buildings,[87] machinery, equipment, vehicles, or other facilities used in the production of goods for commerce,[88] and such custodial and protective employees as watchmen, guards, firemen, patrolmen, caretakers, stockroom workers, and warehousemen; and transportation workers bringing supplies, materials, or equipment to the producer's premises, removing slag or other waste materials therefrom, or transporting materials or other goods, or performing such other transportation activities, as the needs of production may require. These examples are intended as illustrative, rather than exhaustive of the group of employees of a producer who are "engaged in the production" of goods for commerce, within the meaning of the Act, and who are therefore entitled to its wage and hours benefits unless specifically exempted by some provision of the Act.

[86]See H. Mgrs. St., 1949, p. 14; Sen. St., 1949 Cong. Rec., p. 15372. See also *Borden Co.* v. *Borella,* 325 U.S. 679.

[87]No distinction of economic or statutory significance can be drawn between such work in a building where the production of goods is carried on physically and in one where such production is administered, managed, and controlled. *Borden Co.* v. *Borella,* 324 U.S. 679.

[88]Such mechanics and laborers as machinists, carpenters, electricians, plumbers, steamfitters, plasters, glaziers, painters, metal workers, bricklayers, hod carriers, roofers, stationary engineers, their apprentices and helpers, elevator starters and operators, messengers, janitors, charwomen, porters, handy men, and other maintenance workers would come within this category.

(b) *Employments not directly essential to production distinguished.* Employees of a producer of goods for commerce are not covered as engaged in such production if they are employed solely in connection with essentially local activities which are undertaken by the employer independently of his productive operations or at most as a dispensable, collateral incident to them and not with a view to any direct function which the activities serve in production. It is clear, for example, that an employee would not be covered merely because he works as a domestic servant in the home of an employer whose factory produces goods for commerce, even though he is carried on the factory payroll. To illustrate further, a producer may engage in essentially local activities as a landlord, restauranteur, or merchant in order to utilize the opportunity for separate and additional profit from such ventures or to provide a convenient means of meeting personal needs of his employees. Employees exclusively employed in such activities of the producer are not engaged in work "closely related" and "directly essential" to his production of goods for commerce merely because they provide residential, eating, or other living facilities for his employees who are engaged in the production of such goods.[89] Such employees are to be distinguished from employees like cooks, cookees, and bull cooks in isolated lumber camps or mining camps, where the operation of a cookhouse may in fact be "closely related" and "directly essential" or, indeed, indispensable to the production of goods for commerce.[90]

[89]H. Mgrs. St., 1949, pp. 14, 15; see also *Brogan* v. *National Surety Co.,* 246 U.S. 257. Cf. Sen. St., 1949 Cong. Rec., p. 15372.

[90]See *Brogan* v. *National Surety Co.,* 246 U.S. 257; *Consolidated Timber Co.* v. *Womack,* 132 F. 2d 101 (C.A. 9); *Hanson* v. *Lagerstrom,* 133 F. 2d 120 (C.A. 8); cf. H. Mgrs. St., 1949, pp. 14, 15 and Sen. St., 1949 Cong. Rec., p. 15372.

Some specific examples of the application of these principles may be helpful. Such services as watching, guarding, maintaining or repairing the buildings, facilities, and equipment used in the production of goods for commerce are "directly essential" as well as "closely related" to such production as it is carried on in modern industry.[91] But such services performed with respect to private dwellings tenanted by employees of the producer, as in a mill village, would not be "directly essential" to production merely because the dwellings were owned by the producer and leased to his employees.[92] Similarly, employees of the producer or of an independent employer who are engaged only in maintaining company facilities for entertaining the employer's customers, or in providing food, refreshments, or recreational facilities, including restaurants, cafeterias, and snack bars, for the producer's employees in a factory, or in operating a children's nursery for the convenience of employees who leave young children there during working hours, would not be doing work "directly essential" to the production of goods for commerce.[93]

[91]H. Mgrs. St., 1949, p. 14; Sen. St., 1949 Cong. Rec., p. 15372; *Kirschbaum* v. *Walling,* 316 U.S. 517; *Borden Co.* v. *Borella,* 325 U.S. 679; *Walton* v. *Southern Package Corp.* 320 U.S. 540; *Armour & Co.* v. *Wantock,* 325 U.S. 126.

[92]H. Mgrs. St., 1949, pp. 14, 15; *Morris* v. *Beaumont Mfg. Co.,* 84 F. Supp. 909 (W.D. S.C.); cf. *Wilson* v. *Reconstruction Finance Corp.,* 158 F. 2d 564 (C.A. 5), certiorari denied, 331 U.S. 810. Cf. *Brogan* v. *National Surety Co.,* 246 U.S. 257; *Consolidated Timber Co.* v. *Womack,* 132 F. 2d 101 (C.A. 9); *Hanson* v. *Lagerstrom,* 133 F. 2d 120 (C.A. 8).

[93]Cf. H. Mgrs. St., 1949, pp. 14, 15.

§776.19 Employees of independent employers meeting needs of producers for commerce.

(a) *General statement.* (1) If an employee of a producer of goods for commerce would not, while performing particular work, be "engaged in the production" of such goods for purposes of the Act under the principles heretofore stated, an employee of an independent employer performing the same work on behalf of the producer

would not be so engaged. Conversely, as shown in the paragraphs following, the fact that employees doing particular work on behalf of such a producer are employed by an independent employer rather than by the producer will not take them outside the coverage of the Act if their work otherwise qualifies as the "production" of "goods" for "commerce."

(2) Of course, in view of the Act's definition of "goods" as including "any part or ingredient" of goods (see §776.20 (a), (c)), employees of an independent employer providing other employers with materials or articles which become parts or ingredients of goods produced by such other employers for commerce are actually employed by a producer of goods for commerce and their coverage under the Act must be considered in the light of this fact. For example, an employee of such an independent employer who handles or in any manner works on the goods which become parts or ingredients of such other producer's goods is engaged in actual production of goods (parts of ingredients) for commerce, and the question of his coverage is determined by this fact without reference to whether his work is "closely related" and "directly essential" to the production by the other employer of the goods in which such parts or ingredients are incorporated. So also, if the employee is not engaged in the actual production of such parts or ingredients, his coverage will depend on whether as an employee of a producer of goods for commerce, his work is "closely related" and "directly essential" to the production of the parts or ingredients, rather than on the principles applicable in determining the coverage of employees of an independent employer who does not himself produce the goods for commerce.[94]

[94]*Bracey* v. *Luray,* 138 F. 2d 8 (C.A. 4); *Walling* v. *Peoples Packing Co.,* 132 F. 2d 236 (C.A. 10), certiorari denied 318 U.S. 774; *Mid-Continent Pipe Line Co.* v. *Hargrave,* 129 F. 2d 655 (C.A. 10); *Walling* v. *W. D. Haden Co.,* 153 F. 2d 196 (C.A. 5).

(3) Where the work of an employee would be "closely related" and "directly essential" to the production of goods for commerce if he were employed by a producer of the goods, the mere fact that the employee is employed by an independent employer will not justify a different answer.[95] This does not necessarily mean that such work in every case will remain "closely related" to production when performed by employees of an independent employer. It will, of course, be as "directly essential" to production in the one case as in the other. (See §776.17(c)). But in determining whether an employee's work is "closely" or only remotely related to the production of goods for commerce by an employer other than his own, the nature and purpose of the business in which he is employed and in the course of which he performs the work may sometimes become important.

[95]See *Kirschbaum Co.* v. *Walling,* 316 U.S. 517; *Roland Electrical Co.* v. *Walling,* 326 U.S. 657; *Farmers Reservoir Co.* v. *McComb,* 337 U.S. 755; H. Mgrs. St., 1949, p. 14. See also Sen. St., 1949 Cong. Rec., p. 15372.

Such factors may prove decisive in particular situations where the employee's work, although "directly essential" to the production of goods by someone other than his employer, is not far from the borderline between those activities which are "directly essential" and those which are not. In such a situation, it may appear that his performance of the work is so much a part of an essentially local business carried on by his employer without any intent or purpose of aiding production of goods for commerce by others that the work, as thus performed, may not reasonably be considered "closely related" to such production.[96] In other situations, however, where the degree to which the work is directly essential to production by the producer is greater the fact that the independent employer is engaged in a business having local aspects may not be sufficient to negate a close relationship between his employees' work and such production.[97] And it seems clear that where the independent employer operates a business which, unlike that of the ordinary local merchant, is directed to providing producers with materials or services directly essential to the production of their goods for commerce, the activities of such a business may be found to be "closely related" to such production.[98] In such event, all the employees of the independent employer whose work is part of his integrated effort to meet such needs of producers are covered as engaged in work closely related and directly essential to production of goods for commerce.[99]

[96]M. Mgrs. St., 1949, pp. 14, 15, *10 E. 40th St. Bldg. Co.* v. *Callus,* 325 U.S. 578.

[97]H. Mgrs. St., 1949, p. 14; *Kirschbaum Co.* v. *Walling,* 316 U.S. 517; *Warren-Bradshaw Drilling Co.* v. *Hall,* 317 U.S. 88.

[98]See H. Mgrs. St., p. 14, and *10 E. 40th St. Bldg. Co.* v. *Callus,* 325 U.S. 578.

[99]*Kirschbaum Co.* v. *Walling,* 316 U.S. 517 (Stationary engineers and firemen, watchmen, elevator operators, electricians, carpenters, carpenters' helper, engaged in maintaining and servicing loft building for producers); *Roland Electrical Co.* v. *Walling,* 326 U.S. 657 (foremen, trouble shooters, mechanics, helpers, and office employees of company selling and servicing electric motors, generators, and equipment for commercial and industrial firms); *Meeker Coop. Light & Power Assn.* v. *Phillips,* 158 F. 2d 698 (C.A. 8) (outside employees and office employees of light and power company serving producers); *Walling* v. *New Orleans Private Patrol Service,* 57 F. Supp. 143 (E. D. La.) (guards, watchmen, and office employees of company providing patrol service for producers); *Walling* v. *Thompson,* 65 F. Supp. 686 (S.D. Cal.) (installation and service men, shopmen, bookkeeper, salesman, dispatcher of company supplying burglar alarm service to producers).

In H. Mgrs. St., 1949, p. 14 it is said, "Employees engaged in such maintenance, custodial and clerical work will remain subject to the Act, notwithstanding they are employed by an independent employer performing such work on behalf of the manufacturer, mining company, or other producer for commerce. All such employees perform activities that are closely related and directly essential to the production of goods for commerce."

(b) *Extent of coverage under "closely related" and "directly essential" clause illustrated.* In paragraphs (b)(1) to (5) of this section, the principles discussed above are illustrated by reference to a number of typical situations in which goods or services are provided to producers of goods for commerce by the employees of independent employers. These examples are intended not only to answer questions as to coverage in the particular situations discussed, but to provide added guideposts for determining whether employees in other situations are doing work closely related and directly essential to such production.

(1) Many local merchants sell to local customers within the same State goods which do not become a part or ingredient (as to parts or ingredients, see §776.20(c)) of goods produced by any of such customers. Such a merchant may sell to his customers, including producers for commerce, such articles, for example, as paper towels, or record books, or paper clips, or filing cabinets, or automobiles and trucks, or paint, or hardware, not specially designed for use in the production of other goods.

Where such a merchant's business is essentially local in nature, selling its goods to the usual miscellany of local customers without any particular intent or purpose of aiding production of other goods for commerce by such customers, the local merchant's employees are not doing work both "closely related" and "directly essential" to production, so as to bring them within the reach of the Act, merely "because some of the customers * * * are producing goods for interstate [or foreign] commerce."[1] Therefore, if they do not otherwise engage "in commerce" (see §§776.8 to 776.13) or in the "production" of goods for commerce, they are not covered by the Act.

[1]H. Mgrs. St., 1949, pp. 14, 15.

In such a situation, moreover, even where the work done by the employees is "directly essential" to such production by their employer's customers, it may not meet the "closely related" test. But the more directly essential to the production of goods for commerce such work is, the more likely it is that a close and immediate tie between it and such production exists which will be sufficient, notwithstanding the local aspect of the employer's business, to bring the employees within the coverage of the Act on the ground that their work is "closely related" as well as "directly essential" to production by the employer's customers.

Such a close and immediate tie with production exists, for example, where the independent employer, through his employees, supplies producers of goods for commerce with things as directly essential to production as electric motors or machinery or machinery parts for use in producing the goods of a manufacturer, for mining operations, or for production of oil, or for other production operations or the power, water, or fuel required in such production operations, to mention a few typical examples.[2] The fact that these needs of producers are supplied through the agency of businesses having certain local aspects cannot alter the obvious fact that the employees of such businesses who supply these needs are doing work both "closely related" and "directly essential" to production by the employer's customers. As the United States Supreme Court has stated: "Such sales and services must be immediately available to * * * [the customers] or their production will stop."[3]

[2]See H. Mgrs. St., 1949, p. 14; Sen. St., 95 Cong. Rec., October 19, 1949, at 15372; Statement of the Chairman of the Committee on Education and Labor explaining the conference agreement to the House of Representatives, 1949 Cong. Rec., p. 15135; *Roland Electrical Co.* v. *Walling,* 326 U.S. 657; *Reynolds* v. *Salt River Valley Water Users Assn.,* 143 F. 2d 863 (C.A. 9);

Meeker Coop. Light & Power Assn. v. *Phillips,* 158 F. 2d 698 (C.A. 8); *Walling* v. *Hammer,* 64 F. Supp. 690 (W.D. Va.); *Holland* v. *Amoskeag Machine Co.,* 44 F. Supp. 884 (D. N.H.); *Princeton Mining Co.* v. *Veach,* 63 N.E. 2d 306 (Ind. App.).

[3] *Roland Electrical Co.* v. *Walling,* 326 U.S. 657, 664.

It should be noted that employees of independent employers providing such essential goods and services to producers will not be removed from coverage because an unsegregated portion of their work is performed for customers other than producers of goods for commerce. For example, employees of public utilities, furnishing gas, electricity or water to firms within the State engaged in manufacturing, mining, or otherwise producing goods for commerce, are subject to the Act notwithstanding such gas, electricity or water is also furnished to consumers who do not produce goods for commerce.[4]

[4] *Meeker Coop. Light & Power Assn.* v. *Phillips,* 158 F. 2d 698 (C.A. 8); H. Mgrs. St., 1949, p. 14. For another illustration see H. Mgrs. St., 1949, p. 26, with reference to industrial laundries.

(2) On similar principles, employees of independent employers providing to manufacturers, mining companies, or other producers such goods used in their production of goods for commerce as tools and dies, patterns, designs, or blueprints are engaged in work "closely related" as well as "directly essential" to the production of the goods for commerce;[5] the same is true of employees of an independent employer engaged in such work as producing and supplying to a steel mill, sand meeting the mill's specifications for cast shed, core, and molding sands used in the production by the mill of steel for commerce.[6] Another illustration of such covered work, according to managers of the bill in Congress, is that of employees of industrial laundry and linen supply companies serving the needs of customers engaged in manufacturing or mining goods for commerce.[7]

[5] H. Mgrs. St., 1949, p. 14; Sen. St., 1949 Cong. Rec., p. 15372.

[6] *Walling* v. *Amidon,* 153 F. 2d 159 (C.A. 10); Sen. St., 95 Cong. Rec., October 19, 1949, at 15372.

[7] H. Mgrs. St., 1949, p. 26; Sen. St., 95 Cong. Rec., October 19, 1949, at 15372. See also *Koerner* v. *Associated Linen Laundry Suppliers,* 270 App. Div. 986, 62 N.Y.S. 2d 774.

On the other hand, the legislative history makes it clear that employees of a "local architectural firm" are not brought within the coverage of the Act by reason of the fact that their activities "include the preparation of plans for the alteration of buildings within the State which are used to produce goods for interstate commerce." Such activities are not "directly essential" enough to the production of goods in the buildings to establish the required close relationship between their performance and such production when they are performed by employees of such a "local" firm.[8] Of course, this result is even more apparent where the activities of the employees of such a "local" business may not be viewed as "directly essential" to production. It is clear, for example, that Congress did not believe "employees of an independently owned and operated restaurant" should be brought under the coverage of the Act because the restaurant is "located in a factory." To establish coverage on "production" grounds, an employee must be "shown to have a closer and more direct relationship to the producing * * * activity" than this.[9]

[8] H. Mgrs. St., 1949, p. 15. See also *McComb* v. *Turpin,* 81 F. Supp. 86, 1948 (D. Md.).

[9] H. Mgrs. St., 1949, p. 14. Cf. *Bayer* v. *Courtemanche,* 76 F. Supp. 193 (D. Conn.). See also §776.18(b).

(3) Some further examples may help to clarify the line to be drawn in such cases. The work of employees constructing a dike to prevent the flooding of an oil field producing oil for commerce would clearly be work not only "directly essential" but also "closely related" to the production of the oil. However, employees of a materialman quarrying, processing, and transporting stone to the construction site for use in the dike would be doing work too far removed from production of the oil to be considered "closely related" thereto.[10] Similarly, the sale of sawmill equipment to a producer of mine props which are in turn sold to mines within the same State producing coal for commerce is too remote from production of the coal to be considered "closely related" thereto, but production of the mine props, like the manufacture of tools, dies, or machinery for use in producing goods for commerce, has such

a close and immediate tie with production of the goods for commerce that it meets the “closely related” (as well as the “directly essential”) test.[11]

[10]See *E. C. Schroeder Co.* v. *Clifton,* 153 F. 2d 385 (C.A. 10) (opinion of Judge Phillips) and H. Mgrs. St., 1949, p. 15.

[11]See *Wailing* v. *Hamner,* 64 F. Supp. 690 (W.D. Va.), and statement of the Chairman of the Committee on Education and Labor explaining the conference agreement to the House of Representatives, 1949 Cong. Rec., p. 15135.

(4) A further illustration of the distinction between work that is, and work that is not, “closely related” to the production of goods for commerce may be found in situations involving activities which are directly essential to the production by farmers of farm products which are shipped in commerce. Employees of an employer furnishing to such farmers, within the same State, water for the irrigation of their crops, power for use in their agricultural production for commerce, or seed from which the crops grow, are engaged in work “closely related” as well as “directly essential” to the production of goods for commerce.[12] On the other hand, it is apparent from the legislative history that Congress did not regard, as “closely related” to the production of farm products for commerce, the activities of employees in a local fertilizer plant producing fertilizer for use by farmers within the same State to improve the productivity of the land used in growing such products.[13] Fertilizer is ordinarily thought to be assimilated by the soil rather than by the crop and, in the ordinary case, may be considered less directly essential to production of farm products than the water or seed, without which such production would not be possible. Probably the withdrawal from coverage of such employees (who were held “necessary” to production of goods for commerce under the Act prior to the 1949 amendments[14]) rests wholly or in part on the principles stated in paragraph (a)(3) of this section and paragraph (b)(1) of this section. Heretofore the Department has taken the position that producing or supplying feed for poultry and livestock to be used by farmers within the State in the production of poultry or cattle for commerce was covered. The case of Mitchell v. Garrard Mills[15] has reached a contrary conclusion as to a local producer of such feed in a situation where all of the feed was sold to farmers and dealers for use exclusively within the State. For the time being, and until further clarification from the courts, the Divisions will not assert the position that coverage exists under the factual situation which existed in this case.

[12]See *Farmers Reservoir Co.* v. *McComb,* 337 U.S. 755; *Reynolds* v. *Salt River Valley Water Users Assn.,* 143 F. 2d 863 (C.A. 9); *Meeker Coop. Light & Power Assn.* v. *Phillips,* 158 F. 2d 698 (C.A. 8).

Reference should be made to section 13 (a) (6) of the Act providing an exemption from the wage and hours provisions for employees employed in agriculture and for certain employees of nonprofit and sharecrop irrigation companies.

[13]H. Mgrs. St. 1949, p. 15.

[14]*McComb* v. *Super-A Fertilizer Works,* 165 F. 2d 824 (C.A. 1).

[15]241 F. 2d 249 (C.A. 6).

(5) Managers of the legislation in Congress stated that all maintenance, custodial, and clerical employees of manufacturers, mining companies, and other producers of goods for commerce perform activities that are both “closely related” and “directly essential” to the production of goods for commerce, and that the same is true of employees of an independent employer performing such maintenance, custodial, and clerical work “on behalf of” such producers.

Typical of the employees in this covered group are those repairing or maintaining the machinery or buildings used by the producer in his production of goods for commerce and employees of a watchman or guard or patrol or burglar alarm service protecting the producer's premises.[16] On the other hand, the House managers of the bill made it clear that employees engaged in cleaning windows or cutting grass at the plant of a producer of goods for commerce were not intended to be included as employees doing work “closely related” to production on “on behalf of” the producer where they were employed by a “local window-cleaning company” or a “local independent nursery concern,” merely because the customers of the employer happen to include producers of goods for commerce.[17] A similar view was expressed with respect to employees of a “local exterminator service firm” working wholly within the State

exterminating pests in private homes, in a variety of local establishments, "and also in buildings within the State used to produce goods for interstate commerce."[17]

[16]See H. Mgrs. St., 1949, p. 14; Sen. St. 1949 Cong. Rec. p. 15372; *Kirschbaum Co.* v. *Walling,* 316 U.S. 517; *Roland Electrical Co.* v. *Walling,* 326 U.S. 657; *Walling* v. *Sondock,* 132 F. 2d 77 (C.A. 5); *Holland* v. *Amoskeag Machine Co.,* 44 F. Supp. 884 (D.N.H.).

[17]H. Mgrs. St., 1949, page 15.

[15 FR 2925, May 17, 1950, as amended at 22 FR 9692, Dec. 4, 1957]

§776.20 "Goods."

(a) *The statutory provision.* An employee is covered by the wage and hours provisions of the Act if he is engaged in the "production" (as explained in §§776.15 through 776.19) "for commerce" (as explained in §776.21) of anything defined as "goods" in section 3(i) of the Act. This definition is:

Goods means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(b) *"Articles or subjects of commerce of any character."* It will be observed that "goods" as defined in the Act are not limited to commercial goods or articles of trade, or, indeed, to tangible property, but include "articles or subjects of commerce of *any character* (emphasis supplied).[18] It is well settled that things such as "ideas, * * * orders, and intelligence" are "subjects of commerce." Telegraphic messages have, accordingly, been held to be "goods" within the meaning of the Act.[19] Other articles or subjects of commerce which fall within the definition of "goods" include written materials such as newspapers, magazines, brochures, pamphlets, bulletins, and announcements;[20] written reports, fiscal and other statements and accounts, correspondence, lawyers' briefs and other documents;[21] advertising, motion picture, newspaper and radio copy, artwork and manuscripts for publication;[22] sample books;[23] letterheads, envelopes, shipping tags, labels, check books, blank books, book covers, advertising circulars and candy wrappers.[24] Insurance policies are "goods" within the meaning of the Act;[25] so are bonds, stocks, bills of exchange, bills of lading, checks, drafts, negotiable notes and other commercial paper.[26] "Goods" includes gold;[27] livestock;[28] poultry and eggs;[29] vessels;[30] vehicles;[31] aircraft;[32] garments being laundered or rented;[33] ice;[34] containers, as, for example, cigar boxes or wrapping paper and packing materials for other goods shipped in commerce;[35] electrical energy or power, gas, etc.;[36] and by-products,[37] to mention only a few illustrations of the articles or subjects of "trade, commerce, transportation, transmission, or communication among the several States, or between any State and any place outside thereof" which the Act refers to as "goods." The Act's definitions do not, however, include as "goods" such things as dams, river improvements, highways and viaducts, or railroad lines.[38]

[18]As pointed out in *Lenroot* v. *Western Union Tel. Co.,* 141 F. 2d 400 (C.A. 2), the legislative history shows that the definition was originally narrower, and that subjects of commerce were added by a Senate amendment.

[19]*Western Union Tel. Co.* v. *Lenroot* 323 U.S. 490.

[20]*Mabee* v. *White Plains Pub. Co.,* 327 U.S. 178; *Yunker* v. *Abbye Employment Agency,* 32 N.Y.S. 2d 715; *Berry* v. *34 Irving Place Corp.,* 52 F. Supp. 875 (S.D. N.Y.); *Ullo* v. *Smith,* 62 F. Supp. 757, affirmed in 177 F. 2d 101 (C.A. 2); see also opinion of the four dissenting justices in *10 E. 40th St. Bldg.* v. *Callus,* 325 U.S. at p. 586.

Waste paper collected for shipment in commerce is goods. See *Fleming* v. *Schiff,* 1 W.H. Cases 893 (D. Colo.), 15 Labor Cases (CCH) par. 60,864.

[21]*Phillips* v. *Meeker Coop. Light & Power Asso.,* 63 F. Supp. 733, affirmed in 158 F. 2d 698 (C.A. 8); *Lofther* v. *First Nat. Bank of Chicago,* 48 F. Supp. 692 (N.D. Ill.) See also *Rausch* v. *Wolf,* 72 F. Supp. 658 (N.D. Ill). There are other cases (e.g., *Kelly* v. *Ford, Bacon & Davis,* 162 F. 2d 555 (C.A. 3) and *Bozant* v. *Bank of New York,* 156 F. 2d 787 (C.A. 2) which suggest

that such things are "goods" only when they are articles of trade. Although the Supreme Court has not settled the question, such a view appears contrary to the express statutory definitions of "goods" and "commerce".

[22]*Robert* v. *Henry Phipps Estate,* 156 F. 2d 958 (C.A. 2); *Baldwin* v. *Emigrant Industrial Sav. Bank,* 150 F. 2d 524 (C.A. 2), certiorari denied 326 U.S. 757; *Bittner* v. *Chicago Daily News Ptg. Co.,* 4 W.H. Cases 837 (N.D. Ill.), 29 Labor Cases (CCH) par. 62,479; *Schinck* v. *386 Fourth Ave. Corp.,* 49 N.Y.S. 2d 872.

[23]*Walling* v. *Higgins,* 47 F. Supp. 856 (E.D. Pa.).

[24]*McAdams* v. *Connelly,* 8 W.H. Cases 498 (W.D. Ark.), 16 Labor Cases (CCH) par. 64,963; *Walling* v. *Lacy,* 51 F. Supp. 1002 (D. Colo.); *Tobin* v. *Grant* 8 W.H. Cases 361 (N.D. Calif.). See also *Walling* v. *Sieving,* 5 W.H. Cases 1009 (N.D. Ill.), 11 Labor Cases (CCH) par. 63,098.

[25]*Darr* v. *Mutual Life Ins. Co.,* 169 F. 2d 262 (C.A. 2), certiorari denied 335 U.S. 871.

[26]*Bozant* v. *Bank of New York,* 156 F. 2d 787 (C.A. 2).

[27]*Walling* v. *Haile Gold Mines,* 136 F. 2d 102 (C.A. 4); *Fox* v. *Summit King Mines,* 143 F. 2d 926 (C.A. 9).

[28]*Walling* v. *Friend,* 156 F. 2d 429 (C.A. 8).

[29]*Walling* v. *DeSoto Creamery & Produce Co.,* 51 F. Supp. 938 (D. Minn).

[30]*Slover* v. *Wathen,* 140 F. 2d 258 (C.A. 4).

[31]*Hertz Drivurself Stations* v. *United States,* 150 F. 2d 923 (C.A. 8).

[32]*Jackson* v. *Northwest Airlines,* 75 F. Supp. 32 (D. Minn.).

[33]*Phillips* v. *Star Overall Dry Cleaning Laundry Co.,* 149 F. 2d 416 (C.A. 2).

[34]*Hamlet Ice Co.* v. *Fleming,* 127 F. 2d 165 (C.A. 4); *Atlantic Co.* v. *Walling,* 131 F. 2d 518 (C.A. 5).

[35]*Enterprise Box Co.* v. *Fleming,* 125 F. 2d 897 (C.A. 5), certiorari denied, 316 U.S. 704; *Fleming* v. *Schiff,* 1 W.H. Cases 883 (D. Colo.), 5 Labor Cases (CCH) par. 60,864.

[36]*Walling* v. *Connecticut Co.;* 62 F. Supp. 733 (D. Conn.), affirmed 154 F. 2d 552 (C.A. 2).

[37]*Walling* v. *Peoples Packing Co.,* 132 F. 2d 236 (C.A. 10), certiorari denied 318 U.S. 774.

[38]*Engebretsen* v. *Albrecht,* 150 F. 2d 602 (C.A. 7); *Kenny* v. *Wigton-Abbott Corp.,* 80 F. Supp. 489 (D. N.J.).

(c) *"Any part or ingredient."* Section 3(i) draws no distinction between goods and their ingredients and in fact defines goods to mean "goods" * * * or any part or ingredient thereof." The fact that goods are processed or changed in form by several employers before going into interstate or foreign commerce does not affect the character of the original product as "goods" produced for commerce. Thus, if a garment manufacturer sends goods to an independent contractor within the State to have them sewn, after which he further processes and ships them in interstate commerce, the division of the production functions between the two employees does not alter the fact that the employees of the independent contractor are actually producing ("working on") the "goods" (parts or ingredients of goods) which enter the channels of commerce.[39]

[39]*Schulte Co.* v. *Gangi,* 328 U.S. 108.

Similarly, if a manufacturer of buttons sells his products within the State to a manufacturer of shirts, who ships the shirts in interstate commerce, the employees of the button manufacturer would be engaged in the production of goods for commerce; or, if a lumber manufacturer sells his lumber locally to a furniture manufacturer who sells furniture in interstate commerce, the employees of the lumber manufacturer would likewise come within the scope of the Act. Any employee who is engaged in the "production" (as explained in §776.15) of any part or ingredient of goods produced for trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof is engaged in the production of "goods" for commerce within the meaning of the Act.[40]

[40]*Roland Electrical Co.* v. *Walling,* 326 U.S. 657; *Bracy* v. *Luray,* 138 F. 2d 8 (C.A. 4); *Walling* v. *W. J. Haden Co.,* 153 F. 2d 196 (C.A. 5); *Mid-Continent Pipe Line Co.* v. *Hargrave,* 129 F. 2d 655 (C.A. 10); *Boiling* v. *Allison,* 4 W. H. Cases 500 (N.D. Okla.); *Hanson* v. *Lagerstrom,* 133 F. 2d 120 (C.A. 8); *Walling* v. *Comet Carriers,* 151 F. 2d 107 (C.A. 2); *Walling* v. *Griffin Cartage Co.,* 62 F. Supp. 396, affirmed in 153 F. 2d 587 (C.A. 6); *Walling* v. *Kerr,* 47 F. Supp. 852 (E.D. Pa.).

(d) *Effect of the exclusionary clause.* The exclusionary clause in the definition that excepts "goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof," is intended to protect ultimate consumers other than producers, manufacturers, or processors of the goods in question[41] from the "hot goods" provisions of section 15(a)(1) of the Act.[42] Section 15(a)(1) makes it unlawful for any person "to transport * * * (or * * * ship * * * in commerce * * * any goods" produced in violation of the wage and hours standards established by the Act. (Exceptions are made subject to specified conditions for common carriers and for certain purchasers acting in good faith reliance on written statements of compliance. See footnote 53 to §776.15(a).) By defining "goods" in section 3(i) so as to exclude goods after their delivery into the actual physical possession of the ultimate consumer (other than a producer, manufacturer, or processor thereof) Congress made it clear that it did not intend to hold the ultimate consumer as a violator of section 15(a)(1) if he should transport "hot goods" across a State line.[43] Thus, if a person purchases a pair of shoes for himself from a retail store[44] and carries the shoes across a State line, the purchaser is not guilty of a violation of section 15(a)(1) if the shoes were produced in violation of the wage or hours provisions of the statute. But the fact that goods produced for commerce lose their character as "goods" after they come into the actual physical possession of an ultimate consumer who does not further process or work on them, does not affect their character as "goods" while they are still in the actual physical possession of the producer, manufacturer or processor who is handling or working on them with the intent or expectation that they will subsequently enter interstate or foreign commerce.[45] Congress clearly did not intend to permit an employer to avoid the minimum wage and maximum hours standards of the Act by making delivery within the State into the actual physical possession of the ultimate consumer who transports or ships the goods outside of the State. Thus, employees engaged in building a boat for delivery to the purchaser at the boatyard are considered within the coverage of the Act if the employer, at the time the boat is being built, intends, hopes, or has reason to believe that the purchase will sail it outside the State.[46]

[41]*Southern Advance Bag & Paper Co.* v. *United States,* 183 F. 2d 449 (C.A. 5); *Phillips* v. *Star Overall Dry Cleaning Laundry Co,* 149 F. 2d 485 (C.A. 2), certiorari denied 327 U.S. 780.

[42]*Jackson* v. *Northwest Airlines,* 70 F. Supp. 501.

[43]*Hamlet Ice Co.* v. *Fleming,* 127 F. 2d 165 (C.A. 4), certiorari denied 317 U.S. 634.

[44]Note that the retail or service establishment exemption in section 13(a)(2) does not protect the retail store from a violation of the "hot goods" provision if it sells in interstate commerce goods produced in violation of section 6 or 7.

[45]See cases cited above in footnotes 41, 42, 43, this section.

[46]*Walling* v. *Lowe,* 5 W.H. Cases (S.D. Fla.), 10 Labor Cases (CCH) 63,033. See also *Walling* v. *Armbruster,* 51 F. Supp. 166 (W.D. Ark.); *Joshua Hendy Corp.* v. *Mills,* 169 F. 2d 898 (C.A. 9); *St. Johns River Shipbuilding Co.* v. *Adams,* 164 F. 2d 1012 S. (C.A. 5).

§776.21 "For" commerce.

(a) *General principles.* As has been made clear previously, where "goods" (as defined in the Act) are produced "for commerce," every employee engaged in the "production" (as explained in §§776.15 through 776.19) of such goods (including any part or ingredient thereof) is within the general coverage of the wage and hours provisions of the Act. Goods are produced for "commerce" if they are produced for "trade, commerce, transporation, transmission, or communication among the several States or between any State and any place outside thereof."[47] Goods are produced "for" such commerce where the employer intends, hopes, expects, or has reason to believe that the goods or any unsegregated part of them will move (in the same or in an altered form or as a part or ingredient of other goods) in such interstate or foreign commerce.[48] If such movement of the goods in commerce can be reasonably anticipated by the employer when his employees perform work defined in the Act as "production" of such goods, it makes no difference whether he himself, or a subsequent owner or possessor of the goods, put the goods in interstate or foreign commerce.[49] The fact that goods do move in interstate or foreign commerce is strong evidence that the employer intended, hoped, expected, or had reason to believe that they would so move.

[47]Fair Labor Standards Act, section 3(b).

[48]*United States* v. *Darby,* 312 U.S. 100; *Warren-Bradshaw Drilling Co.* v. *Hall,* 371 U.S. 88; *Schulte Co.* v. *Gangi,* 328 U.S. 108.

[49]*Schulte Co.* v. *Gangi,* 328 U.S. 108; *Warren-Bradshaw Drilling Co.* v. *Hall,* 417 U.S. 88. See paragraph (d) of this section.

Although it is generally well understood that goods are produced "for" commerce if they are produced for movement in commerce to points outside the State, questions have been raised as to whether work done on goods may constitute production "for" commerce even though the goods do not ultimately leave the State. As is explained more fully in the paragraphs following, there are certain situations in which this may be true, either under the principles above stated (see paragraph (c) of this section), or because it appears that the goods are produced "for" commerce in the sense that they are produced for use directly in the furtherance, within the particular State, of the actual movement to, from, or across such State or interstate or foreign commerce. (See paragraph (b) of this section).

(b) *Goods produced for direct furtherance of interstate movement.* (1) The Act's definition of "commerce," as has been seen, describes a movement, among the several States or between any State and any outside place, of trade, commerce, transportation, transmission, or communication." Whenever goods are produced "for" such movement, such goods are produced "for commerce," whether or not there is any expectation or reason to anticipate that the particular goods will leave the State.[50]

[50]*Fleming* v. *Atlantic Co.,* 40 F. Supp. 654, affirmed in 131 F. 2d 518 (C.A. 5).

(2) The courts have held that particular goods are produced "for" commerce when they are produced with a view to their use, whether within or without the State, in the direct furtherance of the movement of interstate or foreign commerce. Thus, it is well settled that ice is produced "for" commerce when it is produced for use by interstate rail or motor carriers in the refrigeration or cooling of the equipment in which the interstate traffic actually moves, even though the particular ice may melt before the equipment in which it is placed leaves the State.[51] The goods (ice) produced for such use "enter into the very means of transportation by which the burdens of traffic are borne."[52] The same may be said of electrical energy produced and sold within a single State for such uses as lighting and operating signals on railroads and at airports to guide interstate traffic, lighting and operating radio stations transmitting programs interstate, and lighting and message transmission of telephone and telegraph companies.[53] Similar principles would apply to the production of fuel or water for use in the operation of railroads with which interstate and foreign commerce is carried on; the production of radio or television scripts which provide the basis for programs transmitted interstate; the production of telephone and telegraph poles for use in the necessary repair, maintenance, or improvement of interstate communication systems; the production of crushed rock, ready-mixed concrete, cross-ties, concrete culvert pipe, bridge timbers, and similar items for use in the necessary repair, maintenance, or improvement of railroad roadbeds and bridges which serve as the instrumentalities over which interstate traffic moves.

[51]*Hamlet Ice Co.* v. *Fleming,* 127 F. 2d 165 (C.A. 4), certiorari denied 317 U.S. 634; *Atlantic Co.* v. *Walling,* 131 F. 2d 518 (C.A. 5); *Chapman* v. *Home Ice Co.*; 136 F. 2d 353 (C.A. 6) certiorari denied 320 U.S. 761; *Southern United Ice Co.* v. *Hendrix,* 153 F. 2d 689 (C.A. 6); *Hansen* v. *Salinas Valley Ice Co.,* 62 Cal. App. 357, 144 F. 2d 896.

[52]*Hamlet Ice Co.* v. *Fleming,* 127 F. 2d 165 (C.A. 4).

[53]*Lewis* v. *Florida Power & Light Co.,* 154 F. 2d 751 (C.A. 5); see also *Walling* v. *Connecticut Co.,* 154 F. 2d 552 (C.A. 2).

Similarly, in the case of highways, pipe lines, and waterways which serve as instrumentalities of interstate and foreign commerce, the production of goods for use in the direct furtherance of the movement of commerce thereon would be the production of goods "for commerce." The production of materials[54] for use in the necessary maintenance, repair, or improvement of the instrumentality so that the flow of commerce will not be impeded or impaired is an example of this. Thus, stone or ready-mixed concrete, crushed rock, sand, gravel, and similar materials for bridges or dams; like materials or bituminous aggregate or oil for road surfacing; concrete or galvanized pipe for road drainage; bridge planks and timbers; paving blocks; and other such materials may be produced "for" commerce even though they do not leave the State.

[54]*Walling* v. *Staffen,* 5 W.H. Cases 1002 (W.D. N.Y.), 11 Labor Cases (CCH) par. 63, 102; *McCombs* v. *Carter,* 8 W.H. Cases 498 (E.D. Va.), 16 Labor Cases (CCH) par. 64, 964. *Contra, McComb* v. *Trimmer,* 85 F. Supp. 565 (D. N.J.). Cf. *Engebretson* v. *Albrecht,* 150 F. 2d 602 (C.A. 7).

(3) This does not, however, necessarily mean that the production of such materials within a State is always production "for" commerce when the materials are used in the same State for the maintenance, repair, or improvement of highways or other instrumentalities carrying interstate traffic. In determining whether the production is actually "for" commerce in a situation where there is no reason to believe that the goods will leave the State, a practical judgment is required. Some illustrations may be helpful.

On the one hand, there are situations where there is little room for doubt that the goods are produced "for" commerce in the sense that the goods are intended for the direct furtherance of the movement of commerce over the instrumentalities of transportation and communication. The most obvious illustration is that of special-purpose goods such as cross-ties for railroads, telephone or telegraph poles, or concrete pipe designed for highway use. Another illustration is sand and gravel for highway repair or reconstruction which is produced from a borrow pit opened expressly for that purpose, or from the pits of an employer whose business operations are conducted wholly or in the substantial part with the intent or purpose of filling highway contracts. (The fact that a substantial portion of the employer's gross income is derived from supplying such materials for highway repair and reconstruction would be one indication that a substantial part of his business is directed to the purpose of meeting such needs of commerce.)

On the other hand, there are situations where materials or other goods used in maintaining, repairing, or reconstructing instrumentalities of commerce are produced and supplied by local materialmen under circumstances which may require the conclusion that the goods are not produced "for" commerce. Thus, a materialman may be engaged in an essentially local business serving the usual miscellany of local customers, without any substantial part of such business being directed to meeting the needs of highway repair or reconstruction. If, on occasion, he happens to produce or supply some materials which are used within the State to meet such highway needs, and he does so as a mere incident of his essentially local business, the Administrator will not consider that his employees handling or working on such materials are producing goods "for" commerce. This is, rather, a typically local activity of the kind the Act was not intended to cover. The same may be said of the production of ice by an essentially local ice plant where the only basis of coverage is the delivery of ice for the water cooler in the community railroad station. The employees producing ice in the ice plant for local use would not by reason of this be covered as engaged in the production of goods "for" commerce.

Other illustrations might be given but these should emphasize the essential distinction which must be kept in mind. Borderline cases will, of course, arise. In each such case the facts must be examined and a determination made as to whether or not the goods may fairly be viewed as produced "for" use in the direct furtherance of the movement of interstate or foreign commerce, and thus "for" commerce.

(c) *Controlling effect of facts at time "production" occurs.* (1) Whether employees are engaged in the production of goods "for" commerce depends upon circumstances as they exist at the time the goods are being produced, not upon some subsequent event. Thus, if a lumber manufacturer produces lumber to fill an out-of-State order, the employees working on the lumber are engaged in the production of goods for commerce and within the coverage of the Act's wage and hours provisions, even though the lumber does not ultimately leave the State because it is destroyed by fire before it can be shipped. Similarly, employees drilling for oil which the employer expects to leave the State either as crude oil or refined products are engaged in the production of goods for commerce while the drilling operations are going on and are entitled to be paid on that basis notwithstanding some of the wells drilled may eventually prove to be dry holes.[55]

[55]*Culver* v. *Bell & Loffland,* 146 F. 2d 29 (C.A. 9); see also *Warren-Bradshaw Drilling Co.* v. *Hall,* 317 U.S. 88.

(2) On the other hand, if the lumber manufacturer first mentioned produces lumber to fill the order of a local contractor in the expectation that it will be used to build a schoolhouse within the State, the employees producing the lumber are not engaged in the production of goods "for" commerce and are not covered by the Act. This would remain true notwithstanding the contractor subsequently goes bankrupt and the lumber is sold to a purchaser who moves it to another State; the status of the employees for purposes of coverage cannot in this situation, any more than in the others, be retroactively changed by the subsequent event.

(d) *Goods disposed of locally to persons who place them in commerce.* It is important to remember that if, at the time when employees engage in activities which constitute "production of goods" within the meaning of the Act, their employer intends, hopes, expects, or has reason to believe that such goods will be taken or sent out of the State by a subsequent purchaser or other person into whose possession the goods will come, this is sufficient to establish that such employees are engaged in the production of such goods "for" commerce and covered by the Act. Whether the producer passes title to the goods to another within the State is immaterial.[56] The goods are produced "for" commerce in such a situation whether they are purchased f.o.b. the factory and are taken out of the State by the purchaser, or whether they are sold within the State to a wholesaler or retailer or manufacturer or processor who in turn sells them, either in the same form or after further processing, in interstate or foreign commerce. The same is true where the goods worked on by the producer's employees are not owned by the producer and are returned, after the work is done, to the possession of the owner who takes or sends them out of the State.[57] Similarly, employees are engaged in the production of goods "for" commerce when they are manufacturing, handling, working on, or otherwise engaging in the production of boxes, barrels, bagging, crates, bottles, or other containers, wrapping or packing material which their employer has reason to believe will be used to hold the goods of other producers which will be sent out of the State in such containers or wrappings. It makes no difference that such other producers are located in the same State and that the containers are sold and delivered to them there.[58]

[56]*Hamlet Ice Co.* v. *Fleming,* 127 F. 2d 165 (C.A. 4). certiorari denied 317 U.S. 634; *Bracey* v. *Luray,* 138 F. 2d 8 (C.A. 4).

[57]*Schulte Co.* v. *Gangi,* 328 U.S. 108; *Warren-Bradshaw Drilling Co.* v. *Hall,* 317 U.S. 88; *Walling* v. *Kerr,* 47 F. Supp. 852 (E.D. Pa.).

[58]*Enterprise Box Co.* v. *Fleming,* 125 F. 2d 897 (C.A. 5), certiorari denied 316 U.S. 704; *Dize* v. *Maddrix,* 144 F. 2d 584 (C.A. 4), affirmed 324 U.S. 697; *Walling* v. *Burch,* 5 W. H. Cases 323 (S.D. Ga.); 9 Labor Cases (CCH) par. 62, 613; *Fleming* v. *Schiff,* 1 W.H. Cases 893 (D. Colo.), 5 Labor Cases (CCH) par. 60, 864.

It should be noted that where empty containers are purchased, loaded, or transported within a single State as a part of their movement, as empty containers, out of the State, an employee engaged in such purchasing, loading, or transporting operations is covered by the Act as engaged "in commerce." *Atlantic Co.* v. *Weaver,* 150 F. 2d 843 (C.A. 4); *Klotz* v. *Ippolito,* 40 F. Supp. 422 (S.D. Tex.); *Orange Crush Bottling Co.* v. *Tuggle,* 70 Ga. App. 144, 27 S.E. 2d 769.

Subpart B—Construction Industry

SOURCE: 21 FR 5439, July 20, 1956, unless otherwise noted.

§776.22 Subpart limited to individual employee coverage.

This subpart, which was adopted before the amendments of 1961 and 1966 to the Fair Labor Standards Act, is limited to discussion of the traditional general coverage of employees employed in activities of the character performed in the construction industry, which depends on whether such employees are, individually, "engaged in commerce or in the production of goods for commerce" within the meaning of the Act. The 1961 and 1966 amendments broadened coverage by extending it to other employees of the construction industry on an "enterprise" basis, as explained in §776.22a. Employees covered under the principles discussed in this subpart remain covered under the Act as amended; however, an employee who would not be individually covered under the principles discussed in this subpart may now be subject to the Act if he is employed in an enterprise engaged in covered construction as defined in the amendments.

[35 FR 5543, Apr. 3, 1970]

ENTERPRISE COVERAGE

§776.22a Extension of coverage to employment in certain enterprises.

Whether or not individually covered on the traditional basis, an employee is covered on an "enterprise" basis by the Act as amended in 1961 and 1966 if he is "employed in an enterprise engaged in commerce or in the production of goods for commerce" as defined in section 3 (r), (s), of the Act. "Enterprise" is defined generally by section 3(r) to mean "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." If an "enterprise" as thus defined is an "enterprise engaged in commerce or in the production of goods for commerce" as defined and described in section 3(s) of the Act as amended, any employee employed in such enterprise is subject to the provisions of the Act to the same extent as if he were individually engaged "in commerce or in the production of goods for commerce", unless specifically exempt, section 3(s), insofar as pertinent to the construction industry, reads as follows:

> Enterprise engaged in commerce or in the production of goods for commerce means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which:
>
> * * * * *
>
> (3) Is engaged in the business of construction or reconstruction, or both.

Questions of "enterprise coverage" in the construction industry which are not answered in published statements of the Department of Labor may be addressed to the Administrator of the Wage and Hour Division, Department of Labor, Washington, DC 20210, or assistance may be requested from any of the Regional or District Offices of the Division.

[35 FR 5543, Apr. 3, 1970]

INDIVIDUAL EMPLOYEE COVERAGE IN THE CONSTRUCTION INDUSTRY

§776.22b Guiding principles.

(a) *Scope of bulletin and general coverage statement.* This subpart contains the opinions of the Administrator of the Wage and Hour Division with respect to the applicability of the Fair Labor Standards Act to employees engaged in the building and construction industry. The provisions of the Act expressly make its application dependent on the character of an employee's activities, that is, on whether he is engaged "in commerce" or in the "production of goods for commerce including any closely related process or occupation directly essential to such production." Under either of the two prescribed areas of covered work, coverage cannot be determined by a rigid or technical formula. The United States Supreme Court has said of both phases that coverage must be given "a liberal

construction" determined "by practical considerations, not by technical conceptions."[1] The Court has specifically rejected the technical "new construction" concept, as a reliable test for determining coverage under this Act.[2]

[1]*Mitchell* v. *Vollmer & Co.,* 349 U.S. 427; *Kirschbaum Co.* v. *Walling,* 316 U.S. 517; *Alstate Construction Co.* v. *Durkin,* 345 U.S. 13.

[2]*Mitchell* v. *Vollmer & Co.,* ante.

So far as construction work specifically is concerned, the courts have cast the relevant tests for determining the scope of "in commerce" coverage in substantially similar language as they have used in construing the "production" phase of coverage. Thus the Act applies to construction work which is so intimately related to the functioning of interstate commerce as to be, in practical effect, a part of it, as well as to construction work which has a close and immediate tie with the process of production.[3]

[3]*Mitchell* v. *Vollmer & Co.,* ante; Cf. *Armour & Co.* v. *Wantock,* 323 U.S. 126.

(b) *Engagement in commerce.* The United States Supreme Court has held that the "in commerce" phase of coverage extends "throughout the farthest reaches of the channels of interstate commerce," and covers not only construction work physically in or on a channel or instrumentality of interstate commerce but also construction work "so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated, local activity."[4]

[4]*Mitchell* v. *Vollmer & Co.,* ante; *Walling* v. *Jacksonville Paper Co.,* 317 U.S. 564; *Overstreet* v. *North Shore Corp.,* 318 U.S. 125.

(c) *Production of goods for commerce.* The "production" phase of coverage includes "any closely related process or occupation directly essential" to production of goods for commerce. An employee need not be engaged in activities indispensable to production in order to be covered. Conversely, even indispensable or essential activities, in the sense of being included in the long line of causation which ultimately results in production of finished goods, may not be covered. The work must be both closely related and directly essential to the covered production.[5]

[5]*Armour & Co.* v. *Wantock,* ante; *Kirschbaum* v. *Walling,* 316 U.S. 417; Cf. *10 E. 40th St. Co.* v. *Callus,* 325 U.S. 578.

(d) *State and national authority.* Consideration must also be given to the relationship between state and national authority because Congress intended "to leave local business to the protection of the State."[6] Activities which superficially appear to be local in character, when isolated, may in fact have the required close or intimate relationship with the area of commerce to which the Act applies. The courts have stated that a project should be viewed as a whole in a realistic way and not broken down into its various phases so as to defeat the purposes of the Act.[7]

[6]*Walling* v. *Jacksonville Paper Co.,* ante; *Kirschbaum* v. *Walling,* ante; *Phillips Co.* v. *Walling,* 324 U.S. 490, 497.

[7]*Walling* v. *Jacksonville Paper Co.,* ante; *Bennett* v. *V. P. Loftis Co.,* 167 F. (2d) 286 (C.A.4); *Tobin* v. *Pennington-Winter Const. Co.,* 198 F. (2d) 334 (C.A.10), certiorari denied 345 U.S. 915; See General Coverage Bulletin, §§776.19 (a), (b), and 776.21(b).

(e) *Interpretations.* In his task of distinguishing covered from non-covered employees the Administrator will be guided by authoritative court decisions. To the extent that prior administrative rulings, interpretations, practices and enforcement policies relating to employees in the construction industry are inconsistent or in conflict with the principles stated in this subpart, they are hereby rescinded and withdrawn.

[21 FR 5439, July 20, 1956. Redesignated at 35 FR 5543, Apr. 3, 1970]

§776.23 Employment in the construction industry.

(a) *In general.* The same principles for determining coverage under the Fair Labor Standards Act generally apply to employees in the building and construction industry. As in other situations, it is the employee's activities rather than the employer's business which is the important consideration, and it is immaterial if the employer is an independent contractor who performs the construction work for or on behalf of a firm which is engaged in interstate commerce or in the production of goods for such commerce.[8]

[8]*Mitchell* v. *Joyce Agency,* 348 U.S. 945, affirming 110 F. Supp. 918; *Fleming* v. *Sondeck,* 132 F. (2d) 77 (C.A. 5), certiorari denied 318 U.S. 772; *Kirschbaum* v. *Walling,* ante; *Walling* v. *McCrady Construction Co.,* 156 F. (2d) 932. certiorari denied 329 U.S. 785; *Mitchell* v. *Brown Engineering Co*., 224 F. (2d) 359 (C.A. 8), certiorari denied 350 U.S. 875; *Chambers Construction Co. and L. H. Chambers* v. *Mitchell,* decided June 5, 1965 (C.A. 8).

(b) *On both covered and non-covered work.* If the employee is engaged in both covered and non-covered work during the workweek he is entitled to the benefits of the Act for the entire week regardless of the amount of covered activities which are involved. The covered activities must, however, be regular or recurring rather than isolated, sporadic or occasional.[9]

[9]See General Coverage Bulletin, §§776.2 and 776.4

(c) *On covered construction projects.* All employees who are employed in connection with construction work which is closely or intimately related to the functioning of existing instrumentalities and channels of interstate commerce or facilities for the production of goods for such commerce are within the scope of the Act. Closely or intimately related construction work includes the maintenance, repair, reconstruction, redesigning, improvement, replacement, enlargement or extension of a covered facility.[10] If the construction project is subject to the Act, all employees who participate in the integrated effort are covered, including not only those who are engaged in work at the site of the construction such as mechanics, laborers, handymen, truckdrivers, watchmen, guards, timekeepers, inspectors, checkers, surveyors, payroll workers, and repair men, but also office, clerical, bookkeeping, auditing, promotional, drafting, engineering, custodial and stock room employees.[11]

[10]*Walling* v. *McCrady Const. Co.,* 156 F. (2d) 932, certiorari denied 329 U.S. 785; *Chambers Construction Co. and L. H. Chambers* v. *Mitchell,* decided June 5, 1956 (C.A. 8); *Tobin* v. *Pennington-Winter Const. Co.* ante; *Mitchell* v. *Vollmer & Co.,* ante.

[11]*Mitchell* v. *Brown Engineering Co.,* ante; *Chambers Construction Co. and L. H. Chambers* v. *Mitchell,* ante; *Ritch* v. *Puget Sound Bridge & Dredging Co.,* 156 F. (2d) 334 (C.A. 9).

(d) *On non-covered construction projects.* (1) A construction project maybe purely local and, therefore, not covered, but some individual employees may nonetheless be covered on independent ground by reason of their interstate activities. Under the principle that coverage depends upon the particular activities of the employee and not on the nature of the business of the employer, individual employees engaged in interstate activities are covered even though their activities may be performed in connection with a non-covered construction project. Thus, the Act is applicable to employees who are regularly engaged in ordering or procuring materials and equipment from outside the State or receiving, unloading, checking, watching or guarding such goods while they are still in transit. For example, laborers on a non-covered construction project who regularly unload materials and equipment from vehicles or railroad cars which are transporting such articles from other States are performing covered work.[12]

[12]*Clyde* v. *Broderick,* 144 F. (2d) 348 (C.A. 10); *Durnil* v. *J. E. Dunn Construction Co.* 186 F (2d) 27 (C.A. 8), *Donahue* v. *George A. Fuller Co.,* 104 F. Supp. 145; Cf. *Mitchell* v. *Royal Baking Co.,* 219 F. (2d) 532 (C.A. 5).

(2) Similarly, employees who regularly use instrumentalities of commerce, such as the telephone, telegraph and mails for interstate communication are within the scope of the Act, as are employees who are regularly engaged in preparing, handling, or otherwise working on goods which will be sent to other States. This includes the preparation of plans, orders, estimates, accounts, reports and letters for interstate transmittal.

§776.24 Travel in connection with construction projects.

The Act also applies to employees who regularly travel across State lines in the performance of their duties, even though the construction project itself is not covered.[13] If an employee regularly transports persons, materials, or equipment between jobs across State lines, or to a covered project, even within the State, as part of his duties for the contractor, he would be covered. As in other situations, the Act would not apply if crossing State lines or transporting persons, materials or equipment by the employee was isolated or sporadic rather than regular and recurring. Also, ordinary home-to-work travel, even across State lines, is not covered.

[13]*Reck v. Zarmacay,* 264 App. Div. 520, 36 N.Y.S. (2d) 394; *Colbeck* v. *Dairyland Creamery Co.,* 17 N.W. (2d) 262 (S. Ct. S.D.).

§776.25 Regular and recurring activities as basis of coverage.

Regular and recurring may mean a very small amount and is not to be determined by volume or percentages. Coverage depends on the character rather than the volume of the employee's activities. For example, if an employee in the course of his duties regularly engages in covered work even though the covered work constitutes only a small part of his duties, he would be covered in any week when he performs such covered work.[14]

[14]*Walling* v. *Jacksonville Paper Co.,* ante; *Mabee* v. *White Plains Publishing Co.,* 327 U.S. 178.

§776.26 Relationship of the construction work to the covered facility.

Unless the construction work is physically or functionally integrated or closely identified with an existing covered facility it is not regarded as covered construction because it is not closely enough related to or integrated with the production of goods for commerce or the engagement in commerce. For this reason the erection, maintenance or repair of dwellings, apartments, hotels, churches and schools are not covered projects.[15] Similarly the construction of a separate, wholly new, factory building, not constructed as an integral part or as an improvement of an existing covered production plant, is not covered (Cf. §776.27(c)). Coverage of any construction work, whether new or repair work, depends upon how closely integrated it is with, and how essential it is to the functioning of, existing covered facilities. Neither the mere fact that the construction is “new construction” nor the fact that it is physically separated from an existing covered plant, is determinative. Moreover, the court decisions make it clear that the construction project itself need not be actually employed in commerce or in the production of goods for commerce during the time of its construction in order to be covered.[16] Such factors may be considered in determining whether as a practical matter the work is directly and vitally related to the functioning of the covered facility but would not be decisive.

[15]Cf. §776.18(b).

[16]*Mitchell* v. *Vollmer,* ante; *Bennett* v. *V. P. Loftis Co.,* ante; *Mitchell* v. *Chambers Const. Co.,* 214 F. (2d) 515 (C.A. 10); *Walling* v. *McCrady Const. Co.,* ante; *Tobin* v. *Pennington-Winter Const. Co.,* 198 F. (2d) 334 (C.A. 5), certiorari denied, 345 U.S. 915.

§776.27 Construction which is related to covered production.

(a) *Existing production establishments.* (1) Covered production facilities within the concept of the Act include mines, oil wells, banks, manufacturing, packing and processing plants, filtration, sewage treatment, electric power and water plants, shipyards, warehouses in which goods are broken down, packed or handled preparatory to being sent in interstate commerce, and similar establishments.

(2) The repair or maintenance of a covered production unit is essential for its continued operation and has a close and immediate tie with the production of goods for commerce.[17] The Act is also applicable to other construction which is an integral part of a covered production unit, such as the replacement, enlargement, reconstruction, extension or other improvement of the premises, the buildings, the machinery, tools and dies and other equipment. Functionally such work is like maintenance and repair and is necessary for the continued, efficient and effective operation of the facility as a unit. Thus the construction of new appurtenances of a covered production

establishment such as parking aprons, access roads, railroad spurs, drainage ditches, storm, waste and sanitary sewers or adjacent integrated buildings is subject to the Act. Similarly, the Act applies to the installation of telephone, electric, gas and water lines, machinery and other equipment on the premises of such a facility.

[17]*Kirschbaum Co.* v. *Walling,* ante; *Walling* v. *McCrady Const. Co.,* ante.

(3) On the other hand, the production and furnishings, within the State, of construction materials, such as sand, gravel, brick and other construction materials produced for general local use, is not covered even if the producer also supplies such materials to construction companies which use them within the State in the repair, maintenance or improvement of facilities for the production of goods for commerce. Employees of the materialman in such a situation would not have such a close and immediate tie to the production of goods for commerce as to be considered "closely related" and "directly essential" to such production.[18]

[18]See General Coverage Bulletin, §776.19(b)(3); but see §776.19 (b) (1), (2) and (3); on coverage of furnishing materials "specially designed", or meeting particular specifications, for use in production of particular kinds of goods for commerce; and paragraph (d) of this section, on coverage of producing and furnishing materials for use in construction work on instrumentalities of commerce.

(b) *Utilities which serve production establishments.* The Act applies to employees of public utilities which furnish gas, electricity, water or fuel to firms engaged within the same State in manufacturing, processing, producing, or mining goods for commerce.[19] Construction work performed upon the plant and facilities of such a utility is covered as in the case of any other covered production establishment.[20] The extension of the lines or other facilities of a covered utility for the first time to the premises of an establishment which produces goods for commerce would be subject to the Act, because such extension is simply an improvement or enlargement of an existing covered utility.[21] Furthermore, the maintenance or repair of the wires, pipes, or other conduits of a covered utility which serves business and manufacturing as well as residential areas would also be within the Act. On the other hand, extension or repair of lines or other facilities serving only residential areas would not be covered unless the electricity, gas, fuel, or water comes from out of the State.

[19]House Manager's Statement, 1949 Amendments.

[20]See decisions cited in footnotes 10 and 11, of this subpart.

[21]*Meeker Cooperative Light & Power Ass'n* v. *Phillips,* 158 F. (2d) 698 (C.A. 8); Cf. *New Mexico Public Service Co.* v. *Engel,* 145 F. (2d) 636 (C.A. 10); *Lewis* v. *Florida Power & Light Co.,* 154 F. (2d) 75 (C.A. 5).

(c) *New construction which is not integrated with existing production facilities.* (1) Construction of a new factory building, even though its use for interstate production upon completion may be contemplated, will not ordinarily be considered covered. However, if the new building is designed as a replacement of or an addition or an improvement to, an existing interstate production facility, its construction will be considered subject to the Act.

(2) If the new building, though not physically attached to an existing plant which produces goods for commerce, is designed to be an integral part of the improved, expanded or enlarged plant, the construction, like maintenance and repair, it would be subject to the Act.[22]

[22]*Walling* v. *McCrady Const. Co.,* ante.

(d) *Production of materials for use in construction work on interstate instrumentalities.* (1) The Act applies to employees who are engaged, at the job site or away from it, in the production of goods to be used within the State for the maintenance, repair, extension, enlargement, improvement, replacement or reconstruction of an instrumentality of interstate commerce. The goods need not go out of the State since the Act applies to the production of goods "for" commerce, including for use in commerce, and is not limited to "production of goods for transportation in commerce," that is, to be sent across State lines.[23]

[23]*Alstate Construction Co.* v. *Durkin,* 345 U.S. 13; *Tobin* v. *Johnson,* 198 F. (2d) 130 (C.A. 8); *Mitchell* v. *Emulsified Asphalt Products Co.,* 222 F. (2) 913 (C.A. 6).

(2) The Act would also apply to the production of such items as electricity, fuel or water, for use in the operation of railroads or other instrumentalities of commerce.[24] Therefore, as in the case of other production units, the maintenance, repair or other improvement of the premises or buildings or the appurtenances, including the machinery, tools and dies and equipment, of the facilities which are used to produce such goods, are subject to the Act.

[24]Sections 776.19(b)(2) and 776.21. See also paragraph (b) of this section.

(3) Coverage also extends to employees who produce sand, gravel, asphalt, cement, crushed rock, railroad ties, pipes, conduits, wires, concrete pilings and other materials which are to be used in the construction of instrumentalities which serve as the means for the interstate movement of goods or persons.

(4) This does not mean, however, that in every case where employees produce such materials which are used within the State in the maintenance, repair, or reconstruction of an instrumentality of commerce, the production of such materials is necessarily considered as production "for" commerce. A material supply company may be engaged in an independent business which is essentially local in nature, selling its materials to the usual miscellany of local customers without any particular intent or purpose of supplying materials for the maintenance, repair, or reconstruction of instrumentalities of commerce, and without any substantial portion of its business being directed to such specific uses. Employees of such an "essentially local business" are not covered by the Act merely because as an incident to its essentially local business, the company, on occasion, happens to produce or supply some materials which are used within the State to meet the needs of instrumentalities of commerce.[25]

[25]See §§776.19 (a) and (b) and 776.21(b)(3). See also cases cited in footnote 22 of this subpart.

§776.28 Covered preparatory activities.

(a) *Before production begins.* (1) The United States Supreme Court has held that the Act is applicable to employees of a company which was engaged in preliminary oil well drilling, even though the holes were drilled to a specified depth which was short of where the oil was expected to be found.[26] The Act would also apply to drilling operations even though no oil was discovered.[27] Laborers employed in erecting drilling rigs would also be covered.[28] Other preparatory work before drilling begins in an oil field, such as staking oil claims, surveying, clearing the land, assembling materials and equipment, erecting sheds, derricks or dikes would also be within the scope of the Act.[29] Preliminary work such as the foregoing has the requisite close and immediate tie with the production of goods for commerce to be within the coverage of the Act.

[26]*Warren-Bradshaw Drilling Co.* v. *Hall,* 317 U.S. 8.

[27]*Culver* v. *Bell & Loffland,* 146 F. (2d) 20.

[28]*Devine* v. *Levy,* 39 F. Supp. 44.

[29]*Straughn* v. *Schlumberger Well Surveying Corp.,* 72 F. Supp. 511.

(2) Similarly, coverage extends to employees engaged in the installation of machinery to be used in covered production in a new factory building, even though the construction of the building itself may not have been subject to the Act. Such installation is considered to be a preliminary production activity rather than simply part of the construction of the building.

(3) If the construction project is subject to the Act, preliminary activities, such as surveying, clearing, draining and leveling the land, erecting necessary buildings to house materials and equipment, or the demolition of structures in order to begin building the covered facility, are subject to the Act.[30]

[30]Coverage of preparation of plans and designs is discussed in §776.19(b) (2).

(b) *Facilities used in aid of the covered construction.* The installation of facilities, and the repair and maintenance of trucks, tools, machinery and other equipment to be used by a contractor in the furtherance of his covered construction work, are activities subject to the Act.

§776.29 Instrumentalities and channels of interstate commerce.

(a) *Typical examples.* Instrumentalities and channels which serve as the media for the movement of goods and persons in interstate commerce or for interstate communications include railroads, highways, city streets; telephone, gas, electric and pipe line systems; radio and television broadcasting facilities; rivers, canals and other waterways; airports; railroad, bus, truck or steamship terminals; freight depots, bridges, ferries, bays, harbors, docks, wharves, piers; ships, vehicles and aircraft which are regularly used in interstate commerce.[31]

[31]General coverage bulletin, §776.11.

(b) *General character of an instrumentality of interstate commerce.* (1) An instrumentality of interstate commerce need not stretch across State lines but may operate within a particular State as a link in a chain or system of conduits through which interstate commerce moves.[32] Obvious examples of such facilities are railroad terminals, airports which are components of a system of air transportation, bridges and canals. A facility may be used for both interstate and intrastate commerce but when it is so used it is nonetheless an interstate instrumentality. Such double use does not exclude construction employees from being engaged in commerce.

[32]*Mitchell* v. *Vollmer*, ante; *Bennett*. v. *V. P. Loftis*, 167 F. (2d) 286 (C.A. 4); *Overstreet* v. *North Shore Corp.*, ante; *Rockton & Rion R. R.* v. *Walling*, 146 F. (2d) 111, certiorari denied 324 U.S. 880; *National Labor Relations Board* v. *Central Missouri Tel. Co.*, 115 F. (2d) 563 (C.A. 8).

(2) The term instrumentality of interstate commerce may refer to one unit or the entire chain of facilities. An instrumentality such as a railroad constitutes a system or network of facilities by which the interstate movement of goods and persons is accomplished. Each segment of the network is integrally connected with the whole and must be viewed as part of the system as a whole, not as an isolated local unit.

(3) A construction project which changes the interstate system as a whole, or any of its units, would have a direct bearing on the flow of interstate commerce throughout the network. Thus, the new construction of an alternate route or an additional unit which alters the system or any segment of it, would have such a direct and vital relationship to the functioning of the instrumentality of interstate commerce as to be, in practical effect, a part of such commerce rather than isolated local activity. For example, such construction as the maintenance, repair, replacement, expansion, enlargement, extension, reconstruction, redesigning, or other improvement, of a railroad system as a whole, or of any part of it, would have a close and intimate relationship with the movement of goods and persons across State lines. All such construction, therefore, is subject to the Act.

(4) The same would be true with respect to other systems of interstate transportation or communication such as roads, waterways, airports, pipe, gas and electric lines, and ship, bus, truck, telephone and broadcasting facilities. Consequently, construction projects for lengthening, widening, deepening, relocating, redesigning, replacing and adding new, substitute or alternate facilities; shortening or straightening routes or lines; providing cutoffs, tunnels, trestles, causeways, overpasses, underpasses and bypasses are subject to the Act. Furthermore, the fact that such construction serves another purpose as well as the improvement of the interstate facility, or that the improvement to the interstate facility was incidental to other non-covered work, would not exclude it from the Act's coverage.[33]

[33]*Tobin* v. *Pennington-Winter Const. Co.*, ante; *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508; *Cuascut* v. *Standard Dredging Corp.*, 94 F. Supp. 197.

(c) *Examples of construction projects which are subject to the Act.* Coverage extends to employees who are engaged on such work as repairing or replacing abutments and superstructures on a washed out railroad bridge;[34]

replacing an old highway bridge with a new one at a different location;[35] removing an old railroad bridge and partially rebuilding a new one; repairing a railroad roundhouse, signal tower, and storage building; relocating portions of a county road; erecting new bridges with new approaches in different locations from the old ones; widening a city street; relocating, improving or extending interstate telephone facilities including the addition of new conduits and new trunk lines.[36] Also within the scope of the Act are employees who are engaged in the construction, maintenance and repair of ships, barges and other vessels used for interstate commerce, including those belonging to the Government,[37] and facilities used in the production and transmission of electric, fuel, water, steam and other powers to instrumentalities of interstate commerce.[38]

[34]*Pedersen* v. *J. F. Fitzgerald,* 318 U.S. 740.

[35]*Bennett* v. *V. P. Loftis Co.,* 167 F. (2d) 286 (C.A. 4).

[36]*Walling* v. *McCrady Const. Co.,* ante.

[37]*Divins* v. *Hazeltine Electronics Corp.,* 163 F. (2d) 100 (C.A. 2); Cf. *Walling* v. *Haile Gold Mines, Inc.,* 136 F. (2d) 102 (C.A. 4).

[38]*New Mexico Public Service Co.* v. *Engel,* ante; *Lewis* v. *Florida Light & Power Co.,* ante; *Mitchell* v. *Mercer Water Co.,* 208 F. (2d) 900 (C.A. 3); *Mitchell* v. *Brown Engineering Co.,* ante.

(d) *Construction of new facilities.* (1) In a case before the United States Supreme Court, the question was presented whether the Act applied to the construction of a new canal at some distance from the one then in use. The new canal was to be an alternate route for entering the Mississippi River and would relieve traffic congestion in the existing canal. The latter would continue in operation but could not be widened because of its location in a highly developed industrial section of New Orleans. The Court in holding the construction of the new canal to be within the coverage of the Act stated that the new construction was as intimately related to the improvement of navigation on the Gulf Intercoastal Waterway as dredging in the existing canal would be and that the project was "part of the redesigning of an existing facility of interstate commerce."[39] Thus the construction of a new facility in a network of instrumentalities of interstate commerce, in order to serve the system, or to function as an alternate route, or to relieve traffic congestion in another unit, or to replace an outmoded facility, is subject to the Act.

[39]*Mitchell* v. *Vollmer & Co.,* ante; see also *Bennett* v. *V. P. Loftis,* ante.

(2) Similarly, the construction of a new unit, such as a new airport which is an addition to the entire interstate system of air transportation although not physically attached to any other unit, would, as a practical matter, necessarily expand, promote and facilitate the movement of interstate commerce over the airway system, and consequently, would be subject to the Act. In such a situation the interstate system, although composed of physically separate local units, is, as a whole, the instrumentality of commerce which is improved. In most cases such an addition would also directly enhance, improve or replace some particular nearby unit in the interstate network. The new addition would thus relieve traffic congestion and facilitate the interstate movement of commerce over the existing instrumentality as a whole, as well as at the particular nearby units. The same principle would apply to highways, turnpikes and similar systems of interstate facilities.

(3) In like manner, the reconstruction, extension or expansion of a small unit in a system of interstate facilities, such as the enlargement of a small airport which is regularly used for interstate travel or transportation, is covered, regardless of the relative sizes of the original unit and the new one. The construction in such situations facilitates and improves the interstate commerce served by, and is directly related to the continued, efficient and effective operation of, both the particular original unit and the interstate system as a whole. Also, the construction of facilities such as hangars, repair shops and the like at a covered airport, which are "directly and vitally related to the functioning" of the instrumentality of commerce, would be subject to the Act.[40]

[40]*Mitchell* v. *Vollmer & Co.,* ante.

(e) *Construction on waterways.* Courts have consistently held that the engagement in interstate commerce includes the maintenance, repair or improvement of navigable waterways even when the construction work is performed on the non-navigable parts of the instrumentality such as at the headwaters and watersheds or in tributary streams.[41]

[41]*Tobin* v. *Pennington-Winter Const. Co.*, ante; *Oklahoma* v. *Atkinson Co.*, ante; *United States* v. *Appalachian Power Co.,* 311 U.S. 426.

Construction which improves rivers and waterways serving as instrumentalities of interstate commerce includes dredging; the building, maintenance, repair, replacement, reconstruction, improvement, or enlargement of dikes, revetments, levees, harbor facilities, retaining walls, channels, berths, piers, wharves, canals, dams, reservoirs and similar projects; also the removal of debris and other impediments in the waterway and flood control work in general.[42]

[42]*Walling* v. *Patton-Tulley Transportation Co.,* 134 F. (2d) 945 (C.A. 6); *Ritch* v. *Puget Sound Bridge* & *Dredging Co.,* 156 F. (2d) 334.

The Act applies to construction work which increases the navigability of a waterway, protects it from floods or otherwise improves or maintains its use as an instrumentality of interstate commerce. The courts have held that a program for controlling floods is inseparably related to the stabilization and maintenance of the navigable channel of the river, since levees, dams, dikes and like structures, which hold back the waters in time of flood, at the same time confine a more efficient body of water during other periods by increasing its velocity and scouring and deepening its channels.[43]

[43]*Tobin* v. *Pennington-Winter Const. Co.*, ante; *Tobin* v. *Ramey,* 206 F. (2d) 505 (C.A. 5) certiorari denied, sub nom *Hughes Construction Co.* v. *Secretary of Labor,* 346 U.S. 925; *Jackson* v. *U.S.*, 230 U.S. 1.

(1) *Flood control work in non-navigable parts of a waterway.* Both Congress and the courts have considered that watersheds and headwaters are keys to the control of floods on navigable streams and that the control over the non-navigable parts of a river is essential for the prevention of overflows on the navigable portions. It is also well settled that in order to control floods on a navigable stream it is necessary to take flood control measures on its tributaries.

(2) *Basis of coverage.* (i) The construction of a levee, dam or other improvement in any part of a river or its tributaries for the purpose of preventing floods or aiding navigation must be considered as an integral part of a single comprehensive project for improvement of the river system. Even though a particular levee or dike, by itself, may not effect an improvement, the courts have made it clear that the combined effect of a chain of such structures serves as the basis for determining coverage. The construction of a particular river structure may, therefore, be subject to the Act simply because it is part of a comprehensive system of structures, whose combined effect will achieve the improvement of the navigable channel. Thus, it has been held that site clearance work in the construction of a multiple-purpose dam on a non-navigable stream is covered by the Act where the work is an integral part of a comprehensive system for the control of floods and the betterment of navigation on the Arkansas and Mississippi Rivers.[44] Similarly, the enlargement of a set-back levee, located from two to six miles from the banks of the Mississippi, was held to be covered because it was part of the Mississippi levee system even though the set-back levee, when viewed separately, was not directly related to the functioning of the Mississippi as an instrumentality of commerce.[45]

[44]*Tobin* v. *Pennington-Winter Const. Co.*, ante.

[45]*Tobin* v. *Ramey,* 205 F. (2d) 606, rehearing denied 206 F. (2d) 505 (C.A. 5) certiorari denied, sub nom *Hughes Construction Co.* v. *Secretary of Labor,* 346 U.S. 925.

(ii) The principle involved applies also to other instrumentalities of interstate commerce. As in the case of covered waterway projects, individual additions or improvements to other instrumentalities of interstate commerce may for coverage purposes be considered as part of a whole program rather than separately. The Act will apply to

the construction in such situations if the unit, considered by itself or as part of a larger program, promotes the efficient or effective operation of the instrumentality of interstate commerce.

(3) *Construction of wharves, piers and docks.* The Act also applies to the construction of new piers, wharves, docks and other facilities if they are integrated with the interstate commerce functions of an existing harbor. Similarly, the new construction of such facilities in other locations along the waterway is subject to the Act if they are regularly used by vessels carrying goods or persons in interstate commerce.

(f) *Highways, county roads and city streets*—(1) *Typical examples.* As a generic term highways includes bridges, underpasses, overpasses, bypasses, county roads, access roads, city streets and alternate roads, draw bridges, toll bridges, toll roads and turnpikes, but does not include roads or parking facilities on privately owned land and which are not for use by the general public for interstate traffic.

(2) *Basis of coverage.* The general rules for determining the coverage of employees engaged in the construction of other instrumentalities of interstate commerce apply to highway construction work. The United States Supreme Court has stated that in applying the Act to highway construction as to other coverage problems, practical rather than technical constructions are decisive.[46] After the Court remanded the Overstreet case to the district court, the latter held that the employees engaged in maintaining and repairing the facilities regularly used and available for interstate commerce were engaged in commerce, regardless of the extent of the interstate traffic.[47] The court recognized that although the amount of the interstate commerce in the Overstreet case was very small it was regular and recurring and not occasional nor incidental. Thus, under the authoritative decision a percentage test is not regarded as a practical guide for ascertaining whether a particular facility is an instrumentality of interstate commerce.[48] Employees who are engaged in the repair, maintenance, extension, enlargement, replacement, reconstruction, redesigning or other improvement of such a road are subject to the Act. The fact that the road is owned or controlled by the State or Federal Government or by any subdivision thereof would not affect the applicability of the Act. The same would be true if State or Federal funds were used to finance the construction. It should be noted, however, that if the employees are actually employees of a State, or a political subdivision thereof, they are excepted from coverage of the Act under section 3(d).

[46]*Overstreet* v. *North Shore Corp.,* ante.

[47]52 F. Supp. 503.

[48]*North Shore Corp.* v. *Barnett,* 143 F. (2d) 172 (C.A. 5); *Schmidt* v. *Peoples Telephone Union of Maryville, Mo.,* 138 F. (2d) 13 (C.A. 8).

(3) *City streets.* The construction, reconstruction or repair of a city street, whether residential or not, which is part of an interstate highway or which directly connects with any interstate highway is so closely related to the interstate commerce moving on the existing highway as to be a part of it. Construction of other streets, which are not a part of a public road building program and are constructed on private property as a part of a new residential development, will not be considered covered until further clarification from the courts.

(4) *New highway construction.* Although a number of appellate court decisions have held that the construction of new highways is not within the coverage of the Act, these decisions relied upon the technical "new construction" concept which the United States Supreme Court has subsequently held to be inapplicable as the basis for determining coverage under this Act.[49] Under the principles now established by that Court's decision, which require determination of coverage on the basis of realistic, practical considerations, the construction of new expressways and highways that will connect with an interstate highway system is so "related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated, local activity."[50] Such highways and expressways not only are so designed as necessarily to become a part of or additions to an existing interstate highway system, but their construction is plainly of a national rather than a local character, as evidenced by the Federal financial contribution to their construction. And neither the fact that they are not dedicated to interstate use during their construction, nor the fact that they will constitute alternate routes rather than replacement of existing road, constitute sufficient basis, under the controlling court decisions, for excluding them

from the coverage of the Act.[51] Accordingly, unless and until authoritative court decision in the future hold otherwise, the construction of such new highways and expressways will be regarded as covered.

[49]Compare *Mitchell* v. *Vollmer,* ante, with *Koepfie* v. *Garavaglia,* 200 F. (2d) 191 (C.A. 6); *Moss* v. *Gillioz Const. Co.,* 206 F. (2d) 819 (C.A. 10); and *Van Klaveren* v. *Killian House,* 210 F. (2d) 510 (C.A. 5). The Vollmer decision specifically rejected the applicability of the decision construing the Federal Employer's Liability Act, on which the cited appellate court decision relied.

[50]*Mitchell* v. *Vollmer,* ante; *Walling* v. *Jacksonville Paper Co.,* ante; and *Overstreet* v. *North Shore Corp.,* ante.

[51]*Mitchell* v. *Vollmer & Co.,* ante; *Tobin* v. *Pennington-Winter Const. Co.,* 198 F. (2d) 334, certiorari denied 345 U.S. 915; and *Bennett* v. *V. P. Loftis Co.,* 167 F. (2d) 286.

§776.30 Construction performed on temporarily idle facilities.

The Act applies to work on a covered interstate instrumentality or production facility even though performed during periods of temporary non-use or idleness.[52] The courts have held the Act applicable to performance of construction work upon a covered facility even though the use of the facility was temporarily interrupted or discontinued.[53] It is equally clear that the repair or maintenance of a covered facility (including its machinery, tools, dies, and other equipment) though performed during the inactive or dead season, is subject to the Acts.[54]

[52]*Walton* v. *Southern Package Corp.,* 320 U.S. 540; *Slover* v. *Wathen & Co.,* 140 F. (2d) 258 (C.A. 4); *Bodden* v. *McCormick Shipping Corp.,* 188 F. (2d) 733; and *Russell Co.* v. *McComb,* 187 F. (2d) 524 (C.A. 5).

[53]*Pedersen* v. *J. F. Fitzgerald Construction Co.,* ante; *Bennett* v. *V. P. Loftis,* ante; *Walling* v. *McCrady Const. Co.,* ante; and *Bodden* v. *McCormick Shipping Corp.,* 188 F. (2d) 733.

[54]*Maneja* v. *Waialua Agricultural Co.,* 349 U.S. 254; *Bowie* v. *Gonzalez,* 117 F. (2d) 11; *Weaver* v. *Pittsburgh Steamship Co.,* 153 F. (2d) 597, certiorari denied 328 U.S. 858; *Walling* v. *Keensburg Steamship Co.,* 462 F. (2d) 405.