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THE FAIR LABOR STANDARDS AMENDMENTS OF 1949—WAGE AND HOUR COVERAGE

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Approximately 12,000 pages of transcript and appendices record the extensive Congressional hearings which have been held during the past four years on the various proposals to amend the Fair Labor Standards Act of 1938, more popularly known as the Wage and Hour Law. The Act, however, remained substantially unchanged[1] until October 26, 1949, when President Truman approved H.R. 5856, the "Fair Labor Standards Amendments of 1949," which had been passed by the Congress one week earlier. On January 25, 1950, the effective date of the new amendments, many new concepts, relationships and obligations will begin a life which will acquire meaning and stature through the nurturing of the judicial process.

It is obviously much too early at this time to attempt to assess the scope and full significance of the changes that have been incorporated into the Act by these recent amendments. To do so would be analogous to an attempt by a pediatrician to foretell definitely and completely the adult traits of a new-born infant. We would greet with ridicule such pomposity were it attempted, but, I venture to state, we would react quite differently to an essayed analysis of the problems evoked by the addition of another member to the existing family pattern. Perhaps we would even go so far as to accord a respectful audience to one who endeavored, with some knowledge of the infant's ancestry and future environment, to suggest broadly the nature of the adult likely to emerge.

In effecting several significant changes in the Act, the Congress introduced a number of new concepts whose impact on certain areas of the pattern which has evolved through more than a decade of litigation cannot now be fully or accurately measured or calculated. At once it is quite clear, however, that much of the certainty which that litigation had accorded to the scope and application of the Act in the affected areas no longer exists. It appears equally clear that the Con-

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[1] The amendments effected by the Portal-to-Portal Act of 1947 (61 STAT. 84, 29 U.S.C., Supp. II, 251) and the "overtime-on-overtime" amendments (63 STAT. 44) were directed toward alleviating the impact of the Act in specific and unusual situations rather than toward effecting any substantial change in its scope.

gress did not intend by these amendments to revise or eliminate completely the legal pattern which had been created.

In my opinion, the problem before us is thus not so much one of attempting to speculate upon the ultimate conclusions which the courts may eventually reach, but one of ascertaining as definitively as possible the areas which appear to remain untouched by the amendatory language and of clarifying the issues in those areas which appear to have been substantially altered. Obviously we cannot seek answers until we ascertain what are the questions for which answers should be sought. For reasons of time and space rather than of interest or significance, this article is limited to an examination of that aspect of the Act, as amended, which involves the scope of its wage and hour coverage.[2]

I

The Fair Labor Standards Act simply fixes a floor below which wages may not be forced by employer-employee bargaining or by the fluctuations of our economy. It provides that employees within its scope must be paid a minimum wage of 75 cents an hour.[3] It provides further that when employees entitled to its benefits work in excess of 40 hours a week, they shall receive for each hour in excess of 40 at least time and one-half their regular rate of pay. The "prime purpose of the legislation," as Justice Reed pointed out in *Brooklyn Savings Bank v. O'Neil*,[3a] "was to aid the unprotected, unorganized, and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage."

To effectuate this "prime purpose," the Act was made applicable generally to employees in interstate commerce, or in the production of goods for interstate commerce.[4] Though "the scope of the Act [has never been] coextensive with the limits of the power of Congress over commerce,"[5] it has nevertheless been held applicable to "an infinite

[2] It should be noted, however, that in addition to revision of the Act's wage-hour coverage, the amendments also broadened its child labor coverage so as to prohibit the employment of children in commerce or in the production of goods for commerce.

[3] Effective January 25, 1950. As this article is being written the minimum wage required to be paid under the law is 40 cents an hour.

[3a] 324 U.S. 697, 707 (1945).

[4] The pertinent provisions of the Act read as follows:

Sec. 6(a). 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—

. . . .

Sec. 7(a). Except as otherwise provided . . . , 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 . . . not less than one and one-half times the regular rate at which he is employed.

[5] Kirschbaum Co. v. Walling, 316 U.S. 517, 523 (1942).

variety of complicated industrial situations,"[6] as Justice Frankfurter noted in the *Kirschbaum* case. To a great extent this sweep of the Act is directly traceable to the definition of "produced" (sec. 3(j)) which, prior to the recent amendments, was defined to include processes or occupations "necessary" to the production of goods for commerce.

In interpreting the statute, particularly in deciding cases involving coverage under the so-called "necessary" clause, the Supreme Court has pointed out that there is no "abstract formula," no "dependable touchstone by which to determine whether employees are 'engaged in commerce or in the production of goods for commerce.' "[7] The problem has been, as Justice Frankfurter pointed out, "one of drawing lines," but "not at all a problem in mensuration. There are no fixed points, though lines are to be drawn. The real question is how the lines are to be drawn—what are the relevant considerations in placing the line here rather than there."[8]

Bearing in mind these general considerations, the Supreme Court has held to be entitled to the benefits of the Act employees of a company which repairs motors for customers who are producing goods for interstate commerce,[9] members of a drilling crew digging wells to produce oil,[10] maintenance employees in buildings used for the production of goods for commerce,[11] employees of a local window-cleaning company whose customers are engaged in commerce or the production of goods for commerce,[12] fireguards employed by a manufacturer of goods for interstate commerce,[13] maintenance employees in a building owned by an interstate producer and predominantly occupied for its offices,[14] and the night watchman in a plant producing goods for interstate commerce.[15]

These decisions illustrate the scope of the Act's wage-hour coverage under the so-called "necessary" clause at the time of enactment of the recent amendments. It should be borne in mind, however, that many additional decisions interpreted the area of coverage embracing those engaged in commerce and those engaged directly in producing goods for commerce, that is, "producing, manufacturing, mining, handling, transporting, or in any other manner working on . . . goods" for commerce. But except for the minor revision of "in commerce" coverage

[6] *Ibid.* [7] *Id.* at p. 520.
[8] *Id.* at p. 523.
[9] Roland Electrical Co. v. Walling, 326 U.S. 657 (1946).
[10] Warren-Bradshaw Drilling Co. v. Hall, 317 U.S. 88 (1942).
[11] Kirschbaum Co. v. Walling, 316 U.S. 517 (1942); Schulte, Inc. v. Gangi, 328 U.S. 108 (1946).
[12] Martino v. Michigan Window Cleaning Co., 327 U.S. 173 (1946).
[13] Armour & Co. v. Wantock, 323 U.S. 126 (1944); Skidmore v. Swift & Co., 323 U.S. 134 (1944).
[14] Borden Co. v. Borella, 325 U.S. 679 (1945).
[15] Walton v. Southern Package Corp., 320 U.S. 540 (1944).

noted hereinafter, it is solely in the area of the so-called "necessary" clause that significant revision of the Act's coverage was effected.[16]

As indicated above, coverage under the minimum wages and maximum hours provisions of the Act (secs. 6 and 7), is predicated upon being engaged either in commerce or in the production of goods for commerce. The recent amendments effected no change in this respect, but the terms "commerce" and "produced" were redefined in such a manner as to effect changes in the scope of such coverage.[17] As redefined, these terms read as follows:

Sec. 3 . . .

> (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.
>
> . . . .
>
> (j) "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 redefinition of "commerce" did not effect a significant revision. As originally defined in section 3(b) of the Act, "commerce" covered outgoing foreign commerce "from any State to any place outside thereof" and interstate commerce "among the several States." It did not cover incoming foreign commerce. As a consequence, inequalities arose under the Act between employees engaged in foreign commerce based on whether the flow of such commerce was out of a State rather than into it. The amendment was intended to correct this situation. As it now reads, the definition covers foreign commerce "between any State and any place outside thereof." As a result, employees of importers are

[16] As pointed out in the statement of a majority of the Senate conferees, "The change in the language of section 3(j) relates only to those employees . . . whose coverage under the act has depended in the past on whether their work was "necessary" to the production of goods for . . . commerce." 95 Cong. Rec. 15372, Oct. 19, 1949.

[17] As originally set forth in section 3(b) of the Act, "commerce" was defined to include commerce, "from any State to any place outside thereof." The House bill amended the definition by substituting the word "between" for the word "from" and the word "and" for the word "to." The Senate amendment did not contain any amendatory provision and the conference agreement adopted the House version.

As passed by the House, the definition of "produced" in section 3(j) was amended by inserting the words "closely related" before the words "process or occupation" and substituting the word "indispensable" for the word "necessary" which appeared immediately after the words "process or occupation." The Senate amendment left the definition of "produced," as contained in the original Act, unchanged. In conference, it was agreed to follow the House bill except that the words "directly essential" were substituted for the word "indispensable."

granted the same protection under the commerce definition as employees of exporters.[18]

Otherwise the scope of the "commerce" coverage of the Act remains unchanged. As before, any employee is engaged in interstate commerce if he participates in the interstate movement of goods or facilitates or contributes to such movement. Thus, employees in the telephone, telegraph, radio, and transportation industries normally are engaged in interstate commerce since these industries function as actual instrumentalities and channels of interstate commerce.[19] Also, employees engaged in the maintenance, repair or reconstruction of instrumentalities of interstate commerce continue to be entitled to the benefits of the Act because their activities facilitate and contribute to the interstate movement carried on by the instrumentality.[20] And, as prior to the recent amendments, employees who purchase, order, or receive goods or materials from other states are engaged in interstate commerce within the meaning of the Act.[21]

Thus, except for the expansion noted above, the area of "in commerce" coverage remains virtually unchanged. Equally untouched is the "production" area which envelops those employed in the the specific activities which may be described as actual production activities—"producing, manufacturing, mining, handling, transporting, or in any other manner working on . . . goods." Serious questions concerning the Act's application to these activities have not been extensively raised. Where there are decisions, such as *Western Union Telegraph Co. v. Lenroot,*[21a] analyzing the extent to which handling constitutes production, they will undoubtedly remain undisturbed, since the amendments did not effect any change in this first part of the definition of "produced."[22]

It is in interpreting the second part of the definition of "produced," covering any employee employed in "any closely related process or occupation directly essential to the production [of goods]," that difficulty is encountered in ascertaining the nature and extent of the re-

[18] See H.R. REP. No. 1453, 81st Cong., 1st Sess., pp. 13-14.

[19] Western Union v. Lenroot, 323 U.S. 490 (1945); Williams v. Jacksonville Terminal, 315 U.S. 386 (1942); McComb v. Western Union Tel. Co., 165 F. 2d 65 (6th Cir. 1947), *cert. denied,* 333 U.S. 862 (1948); Schmidt v. Peoples Telephone Union of Maryville, Mo., 138 F. 2d 13 (8th Cir. 1943).

[20] Ritch v. Puget Sound Bridge & Dredging Co., 156 F. 2d 334 (9th Cir. 1946); Pederson v. Fitzgerald, 324 U.S. 720 (1945); Overstreet v. North Shore Corp., 318 U.S. 125 (1943); Walling v. McCrady Const. Co., 156 F. 2d 932 (3rd Cir. 1946), *cert. denied,* 329 U.S. 785 (1946).

[21] Walling v. Jacksonville Paper Co., 317 U.S. 564 (1943); Cudahy Packing Co. of Ala. v. Bazanos, 15 So. 2d 720 (S. Ct. Ala. 1943); Mid-Continent Corp. v. Keen, 157 F. 2d 310 (8th Cir. 1946).

[21a] 323 U.S. 490 (1945).

[22] See Statement of a majority of the Senate conferees on the Fair Labor Standards Amendments of 1949, 95 Cong. Rec. 15372, Oct. 19, 1949.

vision of the scope of the statute. The Supreme Court has made clear in the *Kirschbaum* and other cases that the courts had to determine the meaning of "necessary to production" on an *ad hoc* basis. Undoubtedly the courts will continue to use this interpretative process, and conceivably the change in terminology could result in a reexamination of all the previous decisions holding employees covered as "necessary" to production to ascertain whether they are also "closely related" and "directly essential" to production. That this may actually occur, however, is hardly likely. Indeed, the courts may well conclude that though the revision of this area of the Act's coverage has resulted in some restriction and curtailment of its scope, many areas covered under the original "necessary" clause remain unaffected by the new language. This was plainly indicated by the explanations given during the debates in the present Congress as to the effect of the new amendments.[23]

An analysis of the legislative history of the amendments indicates quite clearly that underlying the action taken by the Congress was the concern of many of its members about the intrusion of Federal authority, as a result of what they considered some extreme applications of the so-called "necessary" clause, into the area of authority historically reserved to the States.[24] This concern is reflected in a statement contained in the Statement of the Managers on the part of the House of Representatives to the effect that the "production" coverage of the Act under the so-called "necessary" clause has been interpreted "to cover

[23] As noted in the Statement of a majority of the Senate Conferees:

"The language of the conference agreement should provide more certainty in this field. It adopts the standard of closely related which the Supreme Court has supplied in most of its decisions interpreting coverage." (95 Cong. Rec. 15372, Oct. 19, 1949).

And, as pointed out by Congressman Lesinski, in explanation of the conference agreement:

"The amended section gives the courts a more specific guide as to the intention of Congress; it does not, however, radically revise the coverage of the act as it has been interpreted by the courts in the past." (95 Cong. Rec. 15135, Oct. 18, 1949).

[24] The problem of construing the Act with regard "to the implications of our dual system of government" (*Kirschbaum* case, *supra*, at p. 520) has been one about which the Supreme Court has been concerned virtually since the inception of the Act in 1938. As Justice Frankfurter stated in the *Kirschbaum* decision:

"Perhaps in no domain of public law are general propositions less helpful and indeed more mischievous than where boundaries must be drawn, under a federal enactment, between what it has taken over for administration by the central government and what it has left to the States. To a considerable extent the task is one of accommodation as between assertions of new federal authority and historic functions of the individual States." (316 U.S. at p. 520).

That the problem was not merely of academic interest to the Court is demonstrated by its subsequent decision in 10 East 40th St. Corp. v. Callus, 325 U.S. 578 (1945), in which the conclusion was reached that maintenance employees of an office building housing a miscellany of business enterprises were not covered on the ground that the operation of such a building was a "local business." (325 U.S. at p. 583). The Court distinguished maintenance workers in such a building from those working in a loft building in which actual manufacturing occurred.

employees of many local merchants, because some of the customers of such merchants are producing goods for interstate commerce."[25] And, the Statement of a majority of the Senate conferees pointed out that "The definition in the present Act [prior to the amendments] provides no clear cut-off preventing extension of the coverage of the Act to employees of an enterprise purely local in nature who may incidentally perform some work having a remote or tenuous relationship to the operations of a producer of goods for interstate commerce."[26]

A further indication of the apprehension on the part of the House Managers over the Act's extension to what they believed to be local concerns is to be found in their listing of examples of cases in which the Act will no longer be applicable under the revised definition of "produced." Such cases include a local fertilizer company engaged in selling all of its fertilizer to local farmers within the State, as in *McComb, Administrator v. Super-A Fertilizer Works;*[26a] employees of a quarry engaged in mining and processing stone for local use in the construction of a dike located in the same State where such construction would have the effect of preventing an oil field that produced oil for commerce from being flooded, as in *Schroeder v. Clifton;*[26b] employees of a local window-cleaning company doing business wholly within the State but many of whose customers are engaged in interstate commerce or in the productions of goods for interstate commerce, as in *Martino v. Michigan Window Cleaning Co.*[26c]

It is perhaps in the light of this Congressional concern over the broad application of the law in the areas referred to that an explanation for the particular words chosen by the Congress to effect the redefinition of "produced" is to be found.

In seeking terminology to define the coverage of the Act, the House bill substituted the word "indispensable" for the word "necessary." But apparently the substitution accomplished considerably more than the Congress desired, in that to some members of the Congress, it appeared to limit this area of coverage too severely. For example, the word "indispensable" was referred to in the debates in the House as "a remarkably restrictive word."[27] Nevertheless, the bill as it initially passed in the House contained that term. It seems fair to assume, however, in view of the substitution of the words "directly essential" in lieu of "indispensable" in the bill agreed to by the conferees that they were opposed to the incorporation of so restrictive a term in the

[25] H.R. REP. No. 1453, 81st Cong., 1st Sess. p. 14.
[26] 95 Cong. Rec. 15372, Oct. 19, 1949.
[26a] 165 F. 2d 824 (1st Cir. 1948).
[26b] 153 F. 2d 385 (10th Cir.), *cert. denied,* 328 U.S. 858 (1946).
[26c] 327 U.S. 173 (1946).
[27] 95 Cong. Rec. 11440, Aug. 10, 1949. See, also, 95 Cong. Rec. 15129, Oct. 18, 1949.

new legislation. This view is supported by the Statement of a majority of the Senate conferees that the reference in the language of the conference agreement "to activities directly essential to production does not, as did the House bill, require that the activities be indispensable to production."[28]

Accordingly, though the Congress desired and sought language which would both preclude the application of the Federal authority over local business and curtail that authority in the several instances in which the Congress believed it had been unduly extended in the past, apparently it was not intended that this was to be accomplished at the expense of a severe restriction of the scope of the Act's coverage. The desired language appears to have been found in the language of the *Kirschbaum* decision. The Supreme Court in that case found that the maintenance work described therein had a "close and immediate tie" with the process of production for commerce and was an "essential part of it."[29] This sounds very similar to the "closely related" and "directly essential" language which was finally incorporated into the Act. In view of the Congress' obvious desire to uphold the validity of the *Kirschbaum* decision, it seems reasonable to conclude that it considered that decision as correctly defining the proper scope for the application of the final clause of section 3(j). Its utilization of language so similar to that used in the *Kirschbaum* case thus suggests the view that the Congress believed that the language used in that decision represented a spelling out of terms which, when expressed in legislative language, would accomplish the confinement of the Federal authority to the area it deemed desirable.

To aid in accomplishing this purpose, both branches of the legislature took pains to illuminate the signposts along the permitted path as well as the warning signals surrounding the forbidden areas. As a general proposition, the Congress appears to have adopted "the standard of closely related which the Supreme Court has supplied in most of its decisions interpreting coverage."[30] What type of case is beyond the compass of that standard and within the forbidden areas, in the judgment of the Congress, is illustrated by the cases specifically alluded to as constituting an intrusion into the sphere of local business.[31] Similarly, the type of case within that standard has been reasonably clearly illustrated by the cases discussed below. Between these clearly defined areas of non-coverage and coverage, as delineated by the Congress, lies

[28] 95 Cong. Rec. 15372, Oct. 19, 1949.
[29] 316 U.S. at pp. 525, 526 (1942).
[30] 95 Cong. Rec. 15372, Oct. 19, 1949.
[31] See McComb v. Super-A Fertilizer Works, *supra;* Schroeder v. Clifton, *supra;* Martino v. Michigan Window Cleaning Co., *supra.*

a twilight zone in which the greatest difficulty in ascertaining coverage will be encountered.[32]

As the Statement of the Managers on the part of the House pointed out,[33] "the proposed changes are not intended to remove from the act maintenance, custodial, and clerical employees of manufacturers, mining companies and other producers for commerce." Moreover, those "employed by an independent employer performing such work on behalf of the manufacturer, mining company, or other producer for commerce," are also entitled to the Act's protection. It is admittedly difficult to reconcile this statement with the specific reference in the Statement to employees of a local window-cleaning company, many of whose customers are engaged in interstate commerce or in the production of goods for commerce, as being beyond the pale of the Act.[34] It may be that an answer to this dilemma is not to be found so much in the nature of the employment relation as in the degree of relationship to the productive activities in that particular situation after considering all the factors there involved, particularly what the Congress apparently considered to be the strictly local nature of the business of this concern.

The Statement further notes that the new language "does not affect the coverage under the Act of employees who repair or maintain buildings in which goods are produced for commerce (*Kirschbaum v. Walling*, 316 U.S. 517) or who make, repair, or maintain machinery or tools and dies used in the production of goods for commerce . . . [or] employees of public utilities, furnishing gas, electricity or water to firms within the State engaged in manufacturing, producing, or mining goods for commerce. . . ."[35]

Similarly, the Statement of a majority of the Senate conferees, in presenting a number of "illustrative" examples of employees who would remain covered by the Act as engaged in activities "closely related" and "directly essential" to production,[36] includes "office or white-collar workers,"[37] "employees repairing, maintaining, improving or enlarging the buildings, equipment, or facilities of producers of goods" for com-

[32] The Administrator of the Wage and Hour Division is charged with the responsibility of initially determining coverage under the Act. Interpretative bulletins are now being prepared which will contain statements of the Administrator's position with respect to the Fair Labor Standards Amendments of 1949. It is expected that these bulletins will be issued prior to the effective date of the new amendments, which is January 25, 1950. The interpretations contained in these bulletins will form the basis upon which the Administrator will conduct his enforcement program.

[33] H.R. REP. No. 1453, 81st Cong., 1st Sess., p. 14.

[34] *Id.* at pp. 14, 15.

[35] *Ibid.*

[36] 95 Cong. Rec. 15372, Oct. 19, 1949.

[37] Borden Co. v. Borella, 325 U.S. 679 (1945); Roland Electrical Co. v. Walling, 326 U.S. 657 (1946); Meeker Cooperative v. Phillips, 158 F. 2d 698 (8th Cir. 1946); Walling v. Friend, 156 F. 2d 429 (8th Cir. 1946); Hertz Drivurself Stations v. United States, 150 F. 2d 923 (8th Cir. 1945).

merce,[38] "plant guards, watchmen, and other employees performing protective or custodial services" for producers,[39] employees engaged in the "production of tools, dies, designs, patterns, machinery, machinery parts, mine props, industrial sand, or other equipment used by [the] purchaser in producing goods for commerce,"[40] employees engaged in "producing and supplying fuel, power, water or other goods for customers using such goods in the production of different goods for interstate commerce,"[41] and employees performing "industrial laundry work for customers engaged in manufacturing, mining, or other production of goods for interstate commerce."[42]

In these extensive citations of cases in both the Statement of the Managers on the part of the House and the Statement of a majority of the Senate conferees, the Congress appears to have been primarily concerned with indicating the type of activities having a "close and immediate tie"[43] to the production of goods for commerce which it intends the Federal Government to regulate under the provisions of the statute —and, conversely, the absence of such regulation (because the activity is likely to be a matter of local concern and jurisdiction) where the relationship between production for commerce and the activity in question is remote and tenuous.

II

From the foregoing, does it appear that any guides for the future interpretation of the scope of the Act's coverage have been established? Is it possible to draw any tentative conclusions?

Although the courts have consistently held, and the Congress has not indicated an intention to overrule them in this respect, that the activity in which an employee is engaged determines coverage under the Act, nevertheless it seems likely that the courts may in the future

[38] Roland Electrical Co. v. Walling, 326 U.S. 657 (1946); Walling v. McCrady Construction Co., 156 F. 2d 932 3rd Cir. 1946); Kirschbaum v. Walling, 316 U.S. 517 (1942); Borden Co. v. Borella, 325 U.S. 679 (1945); Walling v. Mid-Continent Pipe Line Co., 143 F. 2d 308 (10th Cir. 1944); Bowie v. Gonzales, 117 F. 2d 11 (1st Cir. 1941); Bozant v. Bank of New York, 156 F. 2d 787 (2d Cir. 1946).

[39] Walton v. Southern Package Corp., 320 U.S. 540 (1944); Wantock v. Armour & Co., 323 U.S. 126 (1944); Walling v. Sondock, 132 F. 2d 77 (5th Cir. 1942); Engebretsen v. Albrecht, 150 F. 2d 602 (7th Cir. 1945); Slover v. Wathen, 140 F. 2d 258 (4th Cir. 1944); Shepler v. Crucible Steel Co., 140 F. 2d 371 (3rd Cir. 1944); Walling v. Thompson, 65 F. Supp. 686 (D. Cal. 1946).

[40] Holland v. Amoskeag Machine Co., 44 F. Supp. 884 (D. N.H. 1942); Tormey v. Kiekhaefer Corp., 76 F. Supp. 557 (E. D. Wis. 1948); Walling v. Amidon, 153 F. 2d 159 (10th Cir. 1946); Walling v. Hamner, 64 F. Supp. 690 (W. D. Va. 1946); Roland Electrical Co. v. Walling, 326 U.S. 657 (1946).

[41] Reynolds v. Salt River Valley Water Users Ass'n., 143 F. 2d 863 (9th Cir. 1944); Phillips v. Meeker Coop. Light and Power Ass'n., 158 F. 2d 698 (8th Cir. 1946); Lewis v. Florida Power and Light Co., 154 F. 2d 751 (5th Cir. 1946); West Kentucky Coal Co. v. Walling, 153 F. 2d 582 (6th Cir. 1946).

[42] Koerner v. Ass'n. Linen Suppliers Laundry, 279 App. Div. 986, 62 N. Y. S. 2d 774 (1946).

[43] 316 U.S. at p. 525 (1942).

examine more closely into the nature of the business conducted by the employer. However, this does not mean that coverage will be precluded in all situations in which the employer is engaged in a business which generally appears to be local in character. That the "local business" factor alone is not intended to be controlling is made manifest by the "illustrative" enumeration of employees who remain entitled to the Act's benefits. For example, employees who "make, repair, or maintain machinery or tools and dies used in the production of goods for commerce" and "employees of public utilities, furnishing gas, electricity, or water to firms within the State engaged in manufacturing, producing, or mining goods for commerce," as well as many other similarly situated, are, as demonstrated above, within the coverage of the Act.[44] Yet many of these employees are employed by firms which may be regarded as having many aspects characteristic of local business. Nevertheless, in solving the problem of whether a process or occupation in which an employee is engaged is "closely related" and "directly essential" to production for commerce, the closeness and essentiality of the type of business in which he is employed to the production for commerce that is within the ambit of the Act may become extremely significant and at times even decisive.[45]

Coupled with the factor of the employer's business, as a determinant, is the relationship between the work actually performed by the employee and the production for commerce subject to the Act. In the course of discussion on the floor of the House, it was suggested that "Employees engaged in activities which are several degrees or stages removed from the production of goods for commerce cannot be said to be engaged in a process or occupation closely related thereto."[46] As an example of employee activities which they had in mind, an illustration was there presented of "employees of a dealer who sells sawmill equipment to a producer of mine props, which are sold to a mine within the same State producing coal for commerce."[47] But, as stated in the same discussion, "On the other hand, the employees of the mine prop producer, in such a situation, would be covered" and thus entitled to the protection of the Act.[48] There is, accordingly, support for the view that generally activities several steps removed from the final production for commerce may not be within the purview of the Act, as amended.

It is not likely that the greatest difficulty will be found in problems involving activities which are an ascertainable number of stages removed from production for commerce. Such problems lend themselves

[44] H.R. REP. No. 1453, 81st Cong., 1st Sess., p. 14.
[45] *Cf.* Wantock v. Armour & Co., 323 U.S. 126 (1944); 10 East 40th Street Corp. v. Callus, 325 U.S. 578 (1945).
[46] 95 Cong. Rec. 15135, Oct. 18, 1949.
[47] *Ibid.* [48] *Ibid.*

more readily to mathematical solutions. But neither mathematics nor logic will afford much comfort to one seeking to resolve the issue of coverage in a type of case which falls somewhere between the window washing involved in the *Martino* case and the maintenance activities described in the *Kirschbaum* case. Difficult questions may also be presented in situations involving employees other than those employed by the actual producer, as to whether their activities which in varying degrees relate to the comfort, social needs or morale of the employees actually engaged in production "directly aid production in a practical sense by providing something essential to the carrying on, in an effective, efficient, and satisfactory manner, of operations which are part of an integrated effort for the production of goods."[49]

To engage in more than "scientifically guessing" at this time would be the height of folly. Coverage under the Fair Labor Standards Act of 1938 has in some respects been curtailed by the new amendments. Precisely to what extent and in what manner cannot be definitively stated. In reply to those who request a precise solution to all of the problems raised by these amendments, I can only point to the statement of Justice Frankfurter in the *Kirschbaum* case in which he repeated as to the Fair Labor Standards Act what Chief Justice Hughes had said of the National Labor Relations Act:

> ". . . the criterion is necessarily one of degree. . . . This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution such as 'interstate commerce,' 'due process,' 'equal protection.' In maintaining the balance of the constitutional grants and limitations, it is inevitable that we should define their applications in the gradual process of inclusion and exclusion. *Santa Cruz Fruit Packing Co. v. National Labor Relations Board,* 303 U.S. 453, 467 (1938)."[50]

[49] Statement of a majority of the Senate conferees, 95 Cong. Rec. 15372, Oct. 19, 1949.

[50] 316 U.S. 517, 526 (1942).