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The Problem of Coverage


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NOTES AND COMMENTS

THE PROBLEM OF COVERAGE

Old-Age and Survivors Insurance benefit payments and taxes are based on the workers status. The first requirement for covered employment is that an employment relation must exist between the worker and his employer. In addition, the worker must not come within any of the statutory exceptions in the Act. The first subsection below is a discussion of the former problem. Subsequent subsections deal with the more important statutory exceptions.¹

EMPLOYMENT

The Act reads "any service performed . . . by an employee for the person employing him . . ."² The exact scope of this term and the basis to determine when an employment relation exists are not found in the Social Security Act. But the Bureau of Internal Revenue³ and the Social Security Board⁴ have selected the common law control test⁵ as a basis to determine who are employees.⁶ The Federal district

¹ Exceptions not discussed in this issue are: Family service; service in connection with a foreign vessel, if employed outside the United States; service for religious, charitable, scientific, literary, or educational organization, if net earnings do not inure to the benefit of any private person, and no substantial part is for propaganda or to influence legislation; certain services as defined in the Internal Revenue Code; service in the employ of a foreign government or an instrumentality thereof; service as an interne or student nurse; service in connection with the fishing industry; and service by a person under eighteen in the distribution of newspapers. 49 STAT. 625 as amended 53 STAT. 1373 (1939), 42 U. S. C. A. §409 (Supp. 1940).

² 49 STAT. 625 as amended 53 STAT. 1373 (1939), 42 U. S. C. A. §409(b) (Supp. 1940). Employment must be within the United States or in connection with an American vessel under a contract of service which is entered into within the United States or during the performance of which the vessel touches at a port in the United States, if the employee is employed on and in connection with such vessel when outside the United States.

³ The Bureau of Internal Revenue determines the tax liability of employers and employees covered by the Act.

⁴ The Social Security Board is charged with the duty of certifying to the Treasury for payment Old-Age and Survivors Insurance Benefits to persons who meet the requirements set forth in the Act.

⁵ The "control test" was first adopted to determine the scope of vicarious liability under the doctrine of *respondeat superior* and to determine who were employees under the fellow-servant rule; more recently it has been used under workmen's compensation and unemployment compensation legislation. See Stevens, *The Test of the Employment Relation* (1939) 38 Mich. L. Rev. 188.

⁶ U. S. Treas. Reg. 106, §402.204, and Soc. Sec. Bd. Reg. 3, §403.804 state the control test as follows: "The relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which that result

courts, in the only cases litigated so far, have adopted the same test.⁷

There is authority, however, that the term employee in the act may have a more inclusive meaning than the term servant.⁸ Yet the use of the control test restricts the scope of employment to the common law master and servant relation.⁹ This test has been criticized as irrelevant in determining who are entitled to old age insurance benefits and as too narrow for use in social legislation.¹⁰ Sound as these criticisms may be, the control test is at least partially justified. It provides fair degree of certainty, appreciable standardization, and a high degree of familiarity to administrators, attorneys and courts.

The control test makes all persons rendering services either independent contractors or employees. The right to direct the manner, method and means by which work is done indicates an employee relation. The lack of such a right, with control only over the result to be accomplished, establishes an independent contractor relation.¹¹ The employer's right to inspect the work during progress does not put him in control of the independent contractor.¹²

The rulings of the Bureau of Internal Revenue and the Social Security Board, based on the regulations,¹³ are applications of the control test. They indicate the factual matters the Bureau and Board consider important in establishing the relation.¹⁴ If a person is customarily engaged in an independently established trade, occupation,

is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so."

⁷ See *Indian Refining Co. v. Dallman*, 31 F. Supp. 458 (S. D. Ill. 1940) where the court held that a bulk plant operator was not an employee of an oil company, but an independent contractor, because the company "had no control over the means, methods, and details of operation." The court expressly adopted the common law control test used to determine vicarious liability in *Jones v. Standerfer*, 196 Ill. App. 145, 15 N. E. (2d) 924 (1938) and stated at 460, "There is nothing in the Social Security Act which suggests that the terms 'employer' and 'employee' should receive anything but their ordinary construction"; *accord*, *Barnes v. Indian Refining Co.*, 280 Ky. 811, 134 S. W. (2d) 620 (1939); *Texas Co. v. Higgins*, 32 F. Supp. 428 (S. D. N. Y. 1940).

⁸ *Buscheck, Life Insurance Solicitors—Employees or Independent Contractors?* (1937) 25 Geo. L. J. 894; *McQuade, The Employment Relationship Under the Federal Social Security Act* (1938) 7 Brooklyn L. Rev. 480.

⁹ *Id.* at 482, and cases cited; *Buscheck, supra* note 8, at 895.

¹⁰ *Stevens, supra* note 5.

¹¹ *Marchand v. Russell*, 257 Mich. 96, 100, 241 N. W. 209 (1932); see note (1937) 35 Mich. L. Rev. 502.

¹² Note (1934) 9 Ind. L. J. 262, and cases cited.

¹³ See note 6 *supra*.

¹⁴ As a matter of policy, the Bureau of Internal Revenue will not make blanket rulings in dealing with the Social Security Act, and instead will in doubtful cases rule on the particular facts of each case. Note (1939) 23 Minn. L. Rev. 848, citing S. S. T. 4730, 1938-1 CUM. BULL. 404.

business or profession he is not an employee.¹⁵ The Bureau has ruled that a doctor, paid a regular monthly salary for treating a mining company's injured employees, but who also maintained a private practice, was not covered¹⁶ An attorney paid a regular retainer to defend suits to which a certain corporation was a party was not an employee.¹⁷ But if a person performing services which are usually professional is subject to complete control he is then an employee. Thus where a doctor was employed as full time company physician subject to the company's direction,¹⁸ or employed by a clinic and subject to the control of its owners,¹⁹ he was held to be an employee. So also a lawyer working for and controlled by a law firm is an employee of that firm, not an independent contractor.²⁰ A higher concentration of control is required, however, to make professional persons "employees."

Where the person for whom services are performed supplies the instrumentalities, tools, and place of work, an employment relation is created; if, on the other hand, the workman supplies them, that is evidence that he is not an employee.²¹ In this connection, the Bureau attaches importance to whether the employer furnishes the person performing the services with office or desk space, furniture, equipment, office and agency expenses, forms, stationary, advertising matter, telephone, and transportation or traveling expenses.²² For example, where

¹⁵ "Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees." U. S. Treas. Reg. 106, §402.204; Soc. Sec. Bd. Reg. 3, §403.804.

¹⁶ S. S. T. 240, 1937-2 CUM. BULL. 403.

¹⁷ S. S. T. 86, 1937-1 CUM. BULL. 462, which cites *Metcalf and Eddy v. Mitchell*, 269 U. S. 514 (1925) (consulting engineer held independent contractor by control test); *Blair v. Byers*, 35 F. (2d) 326 (C. C. A. 8th, 1929); and *Burnet v. McDonough*, 46 F. (2d) 944 (C. C. A. 8th, 1931) (attorneys rendering professional services for governmental sub-divisions held not employees of such sub-divisions for purpose of income tax exemptions). See also S. S. T. 212, 1937-2 CUM. BULL. 397; S. S. T. 217, *id.* at 398; S. S. T. 329, 1938-2 CUM. BULL. 288; S. S. T. 152, 1937-1 CUM. BULL. 382. Opinion of Counsel, Soc. Sec. Bd., Nov. 18, 1940, held a professional business-engineering consultant was not an employee, not being subject to control.

¹⁸ S. S. T. 291, 1938-1 CUM. BULL. 416.

¹⁹ S. S. T. 360, 1939-1 CUM. BULL. 291.

²⁰ S. S. T. 271, 1938-1 CUM. BULL. 409. See also S. S. T. 149, 1937-1 CUM. BULL. 380 (auctioneer held employee of firm of auctioneers for which he worked); compare S. S. T. 392, INT. REV. BULL. NO. 24, at 11 (1940) with S. S. T. 391, *ibid.* In an opinion of Nov. 27, 1940, a bookkeeper-accountant working for several firms was held an employee by Soc. Sec. Bd. Counsel; similarly S. S. T. 373, 1939-2 CUM. BULL. 275 (professional business analyst and consultant held employee, being subject to control).

²¹ See U. S. Treas. Reg. 106, §402.204; Soc. Sec. Bd. Reg. 3, §403.804; RESTATEMENT, AGENCY (1933) §220.

²² Information as to these matters is sought in questionnaires which the Bureau uses to gain specific facts in doubtful cases. See *Mim.* 4730, 1938-1 CUM. BULL. 404; *Mim.* 4767 (Rev.), 1939-2 CUM. BULL. 276.

a taxicab company furnished cabs to drivers on a lease plan, paid upkeep and repair of cabs, and furnished garage space, office, telephone, and an employee to receive calls, the drivers were the company's employees.²³ However, if the person performing the services supplies the tools and instrumentalities he is not an independent contractor if the employer retains the right to control the manner and means of performance. Where an individual, under contract with a cannery to harvest crops, furnished all his own trucks and laborers, yet was subject to control over the manner, means and place of performance, both he and all his laborers were held employees of the cannery.²⁴ But ordinarily if the individual hires his own assistants, he is an independent contractor.²⁵

The right to discharge a worker is strong evidence of an employer-employee relationship.²⁶ This right is inconsistent with the status of the independent contractor.²⁷ Thus, where coal truck drivers furnished their own trucks and all expenses, the fact that the coal company could terminate the contract at will without liability made the drivers employees, not independent contractors.²⁸ It was likewise held that a

²³ S. S. T. 157, 1937-1 CUM. BULL. 384. *But cf.* S. S. T. 241, 1937-2 CUM. BULL. 404, where cab drivers were held not employees of cab association which sold the cabs to the drivers on conditional sales contracts, took telephone orders for a fee, the association furnishing no other equipment or expenses and having no right to control or discharge. *See* S. S. T. 197, 1937-2 CUM. BULL. 392; S. S. T. 212, *id.* at 397; and S. S. T. 217, *id.* at 398.

²⁴ S. S. T. 351, 1939-1 CUM. BULL. 286. And where a dairy company required its route drivers to furnish their own trucks, suitable to the company, and to purchase from the company the milk to be re-sold to route customers, the fact that the company retained full control over the manner of performance established an employment relation. S. S. T. 259, 1938-1 CUM. BULL. 397; *accord*, Jack and Jill v. Tone, 126 Conn. 114, 9 A. (2d) 497 (1939); Creameries of America, Inc. v. Industrial Comm., 98 Utah 571, 102 P. (2d) 300 (1940). *See* S. S. T. 403, INT. REV. BULL. NO. 42, at 3 (1940) (coal truck drivers who furnished their own trucks and expenses ruled employees because subject to control).

²⁵ Lazarus v. Scherer, 92 Ind. App. 90, 174 N. E. (2d) 293 (1930); note (1941) 25 Marq. L. Rev. 109; S. S. T. 360, 1939-1 CUM. BULL. 290 (foreman of a rather permanently organized sheep-shearing crew which he furnished on contract with wool growers, held an independent contractor and not an employee of the wool growers). *See* Beaverdale Memorial Park, Inc. v. Danaher, 15 A. (2d) 17 (Conn. 1940).

²⁶ U. S. Treas. Reg. 106, §402.204; Soc. Sec. Bd. Reg. 3, §403.804. *See* questionnaires, Mim. 4730, 1938-1 CUM. BULL. 404; Mim. 4767 (Rev.), 1939-2 CUM. BULL. 276. *See* Layman, *Distinction Between Salesmen, Agents, and Independent Contractors* (1937) 15 TAX. MAG. 409; note (1939) 23 Minn. L. Rev. 848. *See* Schomp v. Fuller Brush Co., 12 A. (2d) 702 (N. J. 1940).

²⁷ Singer Mfg. Co. v. Rahn, 132 U. S. 518 (1889); note (1941) 25 Marq. L. Rev. 109; Fidel Association v. Miller, 20 N. Y. Supp. 381 (1940) (unemployment compensation case—bond salesman, not controlled as to how he performed, nor subject to discharge for the way the work was done, not an employee).

²⁸ S. S. T. 403, INT. REV. BULL. NO. 42, at 3 (1940). *See* S. S. T. 396, *id.* No. 30, at 5 (1940); S. S. T. 411, *id.* No. 10, at 9 (1940); S. S. T. 350, 1939-1 CUM. BULL. 285; S. S. T. 170, 1937-2 CUM. BULL. 382.

doctor who was employed full time but subject to discharge at will, was an employee.²⁹

Services performed as a part of the regular business of the employer tend to establish an employer-employee relation.³⁰ Thus the Bureau has segregated casual labor and employment within the Act on this basis.³¹ State courts and legislatures likewise have made this an important factor in determining the employment relation under Unemployment Compensation statutes.³²

The fact that the parties believe they are or are not creating a master and servant relationship and manifest such an intent is given little weight.³³ The use of the terms "independent contractor" or "employee" in the contract is not determinative if inconsistent with the actual facts of the case.³⁴ The Bureau and Board have similarly minimized its effect.³⁵ Thus, a contract to do the janitor work in an apartment building, to make minor repairs and furnish materials, and the worker was expressly designated an independent contractor, not an employee, evidence that he was reimbursed for all expenses, in addition to his wages, and that he was subject to control and to discharge on notice was sufficient to make him an employee.³⁶

The length of time for which the person is employed has some weight.³⁷ If the contract is of short duration and for a specific job it is less likely that an employment relation will be established than if the service is to extend over a longer period during which more control over manner of performance is likely to be exercised.

²⁹ Opinion of Counsel, Soc. Sec. Bd., June 24, 1940.

³⁰ RESTATEMENT, AGENCY (1933) § 220.

³¹ See subsection on Casual Labor, p. 503 *infra*.

³² This factor is especially important in the type of statutes which assume that all services performed constitute "employment" unless the employer has no control over the manner and means of performance, unless the service is outside the usual course and place of the business for which it is performed, and unless the performer is engaged in an independently established trade, business, or profession. Compare *Industrial Comm. v. Northwestern Mutual Life Ins. Co.*, 103 Colo. 550, 88 P. (2d) 560 (1939) (decided under the above type of statute) with *Northwestern Mutual Life Ins. Co. v. Tone*, 125 Conn. 183, 4 A. (2d) 640, 121 A. L. R. 993 (1939) (decided under regular master and servant test). The former statute is much more liberal. Note (1934) 9 Ind. L. J. 262, citing *Domer v. Castator*, 82 Ind. App. 574, 174 N. E. 517 (1930), a workmen's compensation case using this factor in holding a carpenter-contractor an employee.

³³ Layman, *supra* note 26, at 439.

³⁴ See note (1941) 26 Iowa L. Rev. 419; *Nesseth v. Skelly Oil Co.*, 176 Minn. 273, 223 N. W. 608 (1929); *Jack and Jill v. Tone*, 126 Conn. 114, 9 A. (2d) 497 (1939) (note how the court goes behind the terms of the contract to establish an employment relation).

³⁵ U. S. Treas. Reg. 106 § 402.204; Soc. Sec. Bd. Reg. 3, §403.804.

³⁶ Opinion of Counsel, Soc. Sec. Bd., July 26, 1940.

³⁷ Notes (1941) 26 Iowa L. Rev. 419, (1934) 9 Ind. L. J. 262; RESTATEMENT, AGENCY (1933) § 220. See S. S. T. 212, 1937-2 CUM. BULL. 397, and S. S. T. 217 *id.* at 398.

The method of payment may be given some consideration.³⁸ Questionnaires issued by the Bureau indicate that if the pay is by the job rather than by the hour, or solely by commissions rather than by wages, that is evidence that the workman is an independent contractor.³⁹ The regulations, however, place this at a minimum saying, "The measurement, method, or designation of compensation is . . . immaterial if the relationship of employer and employee in fact exists."⁴⁰

The nature of the occupation, whether it requires great skill,⁴¹ and whether it is usually performed in a particular locality under the direction of the employer, or by a specialist without supervision, may be considered in determining the relationship existing in a particular situation.⁴² The degree of control required to establish an employment relation may thus vary with the character of the occupation. Very little control can be exercised over the manner in which cab drivers perform, yet they are generally held to be employees.⁴³ So also life insurance agents and solicitors must operate relatively independently but may be classed as employees if other factors are present.⁴⁴

³⁸ Layman, *loc. cit. supra* note 26; RESTATEMENT, AGENCY (1933) §220; S. S. T. 212, 1937-2 CUM. BULL. 397; S. S. T. 217, *id.* at 398.

³⁹ Mim. 4730, 1938-1 CUM. BULL. 404; Mim. 4767 (Rev.), 1939-2 CUM. BULL. 276.

⁴⁰ U. S. Treas. Reg. 106, §402.204; Soc. Sec. Bd. Reg. 3, §403.804.

⁴¹ S. S. T. 212, 1937-2 CUM. BULL. 397; S. S. T. 217, *id.* at 398; RESTATEMENT, AGENCY (1933) § 220. But if subject to sufficient control, the most skilled workman may be an employee; thus instructors in a private law school were employees of that school, being subject to control and direction, and while teaching, not practicing an independent profession. S. S. T. 341, 1938-2 CUM. BULL. 297.

⁴² RESTATEMENT, AGENCY (1933) § 220; *see* S. S. T. 344, 1938-2 CUM. BULL. 299, where agents of a bonding company performed as specialists without supervision and were therefore independent contractors.

⁴³ S. S. T. 157, 1937-1 CUM. BULL. 384; *see* Kaus v. Huston, 35 F. Supp. 327 (N. D. Iowa, 1940), where cab drivers who leased cabs from the company under contracts which revealed little right to control were held employees. The court said that from the very nature of the employment the drivers had to exercise very complete control, but that there was "no discretion vested in the drivers inconsistent with the relation of master and servant." The court very practically turned the issue on the fact that it was the company, not the individual drivers, who operated the "line of taxicabs as a common carrier of passengers."

⁴⁴ For facts the Bureau considers, *see* questionnaires on status of life insurance general agents and subagents, Mim. 4730, 1938-1 CUM. BULL. 404. A ruling written by Morrison Shafroth, formerly Chief Counsel, Bureau of Internal Revenue, indicates that by the strict control test soliciting agents will generally be held independent contractors. G. C. M. 18705, 1937-2 CUM. BULL. 379. *Cf.* Buscheck, *loc. cit. supra* note 8. Does this indicate a failure of the control test as applied by the Bureau to include a large class of employees who should be covered by the Act? The counsel in G. C. M. 18705, 1937-2 CUM. BULL. 379, cites cases arising under *respondent superior*, holding insurance solicitors not employees: American Savings Life Insurance Co. v. Replinger, 249 Ky. 8, 60 S. W. (2d) 115 (1933); and Neece v. Lee, 129 Neb. 561, 262 N. W. 1 (1935).

Other information is important in determining the existence of an employment relation.⁴⁵ Thus, it is significant that the person must work certain hours; must canvass a certain route or territory; has exclusive rights to a territory; must call on customers or prospects as directed; must keep records and reports; is required to perform other services, such as collecting accounts, making adjustments, investigating credit ratings, etc.; is required to attend staff meetings, conferences, or training schools; must refrain from engaging in other business. These factors all indicate whether the employer exercises or has the power to exercise sufficient control to make the performer his employee under the act.

Certain classes of persons, not ordinarily thought of as independent contractors, but who are in control of businesses and perform services therefor, do not fall within the employment relation as contemplated by the Act. The Bureau has ruled that partners of a bona fide partnership, performing services in the regular course of the partnership business, are not employees of the partnership under the Act.⁴⁶ But it must be a true common law partnership, not a "partnership association" authorized only by statute.⁴⁷ Generally it must meet the requirements that it be a "voluntary contract of association for the purpose of sharing the profits, as such, which may arise from the use of labor or skill in a common enterprise; and an intention of the parties to form a partnership for that purpose."⁴⁸ Thus the Board ruled that salesmen were still employees in spite of a so-called partnership agreement whereby the employer received 94% of the profits and the three employees 2% each in form of a base wage, the employer owning all the capital and retaining virtual exclusive control of the enterprise.⁴⁹ But

But see the following cases awarding unemployment compensation to life insurance solicitors as employees: *Unemployment Compensation Comm. v. Jefferson Standard Life Ins. Co.*, 215 N. C. 479, 2 S. E. (2d) 584 (1939); *Equitable Life Ins. Co. v. Industrial Comm.*, 105 Colo. 144, 95 P. (2d) 4 (1939); *Industrial Comm. v. Northwestern Mutual Life Ins. Co.*, 103 Colo. 550, 88 P. (2d) 560 (1939). *But see* *Northwestern Mutual Life Ins. Co. v. Tone*, 125 Conn. 183, 4 A. (2d) 640, 121 A. L. R. 993 (1939).

⁴⁵ Questionnaires, Mim. 4730, 1938-1 CUM. BULL. 404; Mim. 4767 (Rev.), 1939-2 CUM. BULL. 276.

⁴⁶ S. S. T. 23, XV-2 CUM. BULL. 405 (1936).

⁴⁷ S. S. T. 116, 1937-1 CUM. BULL. 374.

⁴⁸ *In re Zeitz*, 31 N. E. (2d) 209 (Ind. 1940) (owners of manufacturing corporation entered into "partnership" agreement with employees, which set up a board consisting of four owners as senior partners and two representatives of the junior partners, the employees. The "partnership" leased the equipment and buildings of the corporation, and the employee-partners were paid an hourly wage plus 10% of profits. All control of the business remained in the board, which itself was dominated by the owners of the corporation. Held, the workers were employees, hence entitled to unemployment compensation; notes (1939) 37 Mich. L. Rev. 986, (1939) 14 St. John's L. Rev. 134. If the employment relation in fact exists, "It is of no consequence that the employee is designated as a partner, coadventurer, agent, or independent contractor." U. S. Treas. Reg. 106, §402.204; Soc. Sec. Bd. Reg. 3, §403.804.

⁴⁹ Opinion of Counsel, Soc. Sec. Bd., March 22, 1940.

if the partners are under a contract of employment by which the employer reserves the right to control and direct the manner and means of performance, they will be considered as employees.⁵⁰

Trustees, receivers, guardians, executors, administrators, and liquidators are not employees under the Act.⁵¹ But if they perform services for the trust, estate, etc., outside the scope of their official duties, they may be employees for such services.⁵²

Directors of corporations are not employees as to the services they perform as directors.⁵³ But a director may be an employee if he performs services for the corporation other than those required by attendance at and participation in meetings of the board.⁵⁴ Corporate officers, however, are expressly included as employees.⁵⁵

Where a person performs service for more than one employer, the taxable employer is the one who has the right to control the performance of the work, the right to discharge, and the obligation to pay for the service.⁵⁶ Persons rendering services as independent contractors are generally the employers of the workers they hire to assist them and over whom they exercise control.⁵⁷ Persons hired by employees are employees of the principal employer.⁵⁸ A person contracting to supply a group of workmen is usually "middle-man" and the person for whom services are performed, is the employer.⁵⁹ If however the first party retains the right to control the performance of the services, and is not himself the employee of the second party, he remains the employer under the Act.⁶⁰ The distinction is illustrated in the difference between "non-name" and "name" orchestras. In the former, the leader contracts with the purchaser of the services to supply a certain number of musicians, whereupon the purchaser gains the right of control and discharge and is liable to pay them as individuals or through the

⁵⁰ S. S. T. 239, 1937-1 CUM. BULL. 374.

⁵¹ S. S. T. 120, *id.* at 375; S. S. T. 181, 1937-2 CUM. BULL. 387; S. S. T. 254, 1938-1 CUM. BULL. 395.

⁵² S. S. T. 136, 1937-1 CUM. BULL. 377; S. S. T. 254, 1938-1 CUM. BULL. 395; S. S. T. 408, INT. REV. BULL. NO. 53, at 15 (1940).

⁵³ S. S. T. 310, 1938-2 CUM. BULL. 284; U. S. Treas. Reg. 106, §402.204; Soc. Sec. Bd. Reg. 3, §403.804.

⁵⁴ U. S. Treas. Reg. 106, §402.204; Soc. Sec. Bd. Reg. 3, §403.804.

⁵⁵ FEDERAL INSURANCE CONTRIBUTIONS ACT, INT. REV. CODE §1426 (1939); 26 U. S. C. A. § 1426 (d).

⁵⁶ S. S. T. 15, XV-2 CUM. BULL. 401 (1936); S. S. T. 370, 1939-2 CUM. BULL. 274.

⁵⁷ S. S. T. 17 XV-2 CUM. BULL. 402 (1936); S. S. T. 153, 1937-1 CUM. BULL. 390.

⁵⁸ S. S. T. 35, XV-2 CUM. BULL. 407 (1936); S. S. T. 70, 1937-1 CUM. BULL. 387; S. S. T. 336, 1938-2 CUM. BULL. 295.

⁵⁹ S. S. T. 69, 1937-1 CUM. BULL. 386; S. S. T. 260, 1938-1 CUM. BULL. 399; S. S. T. 333, 1938-2 CUM. BULL. 291; S. S. T. 350, 1939-1 CUM. BULL. 285; S. S. T. 388, INT. REV. BULL. NO. 21, at 194 (1940).

⁶⁰ S. S. T. 296, 1938-1 CUM. BULL. 418; S. S. T. 360, 1939-1 CUM. BULL. 290; S. S. T. 377, 1939-2 CUM. BULL. 288.

leader.⁶¹ In the second situation, the leader retains the right to control and the members of his orchestra are his employees.⁶²

The Bureau has ruled that bankruptcy trustees are employers of the assistants which they personally hire.⁶³ The officers of a subsidiary corporation were ruled to be its employees although they were in fact paid by the parent corporation; but accountants controlled by the parent and rendering services to the subsidiary for a flat fee were ruled employees of the parent corporation.⁶⁴

It seems clear from the cases and the rulings that the agency control test is the primary standard to determine who are employees within the Act. The other criteria are merely supplementary aids. There seems no sound reason to disregard common law principles now being applied in this matter as long as proper emphasis is given to the character of the legislation and the purpose of Old-Age and Survivors Insurance.

CASUAL LABOR

Casual labor is occasional labor not in the course of the employer's trade or business.⁶⁵ This exemption is necessary for administrative convenience and efficiency.⁶⁶ The Act attempts to limit the exception by using the narrowest of the several provisions excepting casual labor in workmen's compensation statutes.⁶⁷ Two requirements are necessary for exemption: the service of the employee must constitute "casual labor;" and the service must not be in the course of the employer's trade or business.⁶⁸ The exemption considers the scope of the whole enterprise for which the service is performed as well as the quantity of the individual employment.⁶⁹

⁶¹ *Mim.* 4651, 1937-2 CUM. BULL. 389; S. S. T. 375, 1939-2 CUM. BULL. 280. See *In re Rogavin's Claim*, 18 N. Y. S. (2d) 302; *aff'd.*, 20 N. Y. S. (2d) 413 (1940); *Ajello v. Savarin's Management, Inc.*, 19 N. Y. S. (2d) 886 (1940).

⁶² *Mim.* 4651, 1937-2 CUM. BULL. 389; S. S. T. 375, 1939-2 CUM. BULL. 280.

⁶³ S. S. T. 124, 1937-1 CUM. BULL. 389; and where an executor hired an assistant to help him carry out his official duties, the executor, not the estate, was the employer. S. S. T. 255, 1938-1 CUM. BULL. 396.

⁶⁴ S. S. T. 154, 1937-1 CUM. BULL. 391.

⁶⁵ 49 STAT. 622 (1935) as amended 53 STAT. 1400 (1939), 42 U. S. C. A. §§409b (3), 1011 (3) (Supp. 1940).

⁶⁶ Stevens, *Coverage of the Old Age Benefit Provisions of the Social Security Act* (Unpublished thesis in University of Michigan Law Library, 1939) at 56.

⁶⁷ All "casual labor" is excluded in some states, IDAHO CODE ANN. (1932) §43-904; in others all services "not in the course of the employer's trade or business, are excluded, OHIO GEN. CODE ANN. (Page, 1937) §1465-68; a third type excludes "casual labor not in the usual course of the employer's trade or business," IND. STAT. ANN. (Burns, 1933) §40-1701(b).

⁶⁸ U. S. Treas. Reg. 106, §402.210; Soc. Sec. Bd. Reg. 3, §403.810; Soc. Sec. Bd., Claims Manual (1940) §1203.

⁶⁹ Since a corporation is without legal authority to employ service which is not in the course of the corporation's business, service for a corporation is always within the Act. Soc. Sec. Bd., Claims Manual (1940) §1203 (e); U. S. Treas. Reg. 106, §402.210.

The Bureau of Internal Revenue and the Social Security Board have no general rule but only determine when labor is "casual" as cases arise.⁷⁰ The basic test is that the work must be occasional, incidental, or irregular.⁷¹ In addition to the duration of the service, actual or expected, the nature of the employment⁷² as well as the size of the project⁷³ is considered. Thus "extra-help" employed only when the business requires additional employees,⁷⁴ a carpenter who worked for approximately 8 days,⁷⁵ and a yardman who levelled ground and set out grass,⁷⁶ were held to be "casual laborers."⁷⁷ On the other hand services performed by different carpenters for periods varying from 12 days to two months,⁷⁸ a three weeks job by a stone mason,⁷⁹ and a laborer who hauled logs for 28 days⁸⁰ were held not within the exception.

For convenience the agencies use two presumptions to⁸¹ determine whether the services are casual.⁸² Services to come within the exception must not be performed on more than ten calendar days, consecutive, or

⁷⁰ Soc. Sec. Bd. Memorandum, Oct. 12, 1938, at 3.

⁷¹ U. S. Treas. Reg. 106, §402.210; Soc. Sec. Bd. Reg. 3, §403.810; Soc. Sec. Bd. Claims Manual (1940) §1203.

⁷² Soc. Sec. Bd. Memorandum, Oct. 12, 1938, at 7, 12.

⁷³ Soc. Sec. Bd. Memorandum, Nov. 3, 1938, at 13.

⁷⁴ "Extra" chauffeurs, pall bearers and singers employed by an undertaker, S. S. T. 178, 1937-2 CUM. BULL. 421; extra-clerks in department stores, U. S. Treas. Reg. 106, §402.210.

⁷⁵ Soc. Sec. Bd. Memorandum, Nov. 3, 1938, at 13.

⁷⁶ *Id.* at 2.

⁷⁷ Services performed in repairing a private roadway for a "brief period," Soc. Sec. Bd. Memorandum, at 15, services of a person hired to paint a house who "just painted as he felt like it," *Id.* at 19, and the temporary services performed by a nurse in a private home S. S. T. 71, 1937-1 CUM. BULL. 407, were also classified as "casual" services.

⁷⁸ One carpenter employed for a 12 day period, Soc. Sec. Bd. Memorandum, Nov. 3, 1938, at 27; two carpenters who were to be employed for about one month, Soc. Sec. Bd. Memorandum, Oct. 12, 1938, at 9; several carpenters to be employed about 40 or 50 days, *id.* at 8; and one carpenter employed for 2 months, Soc. Sec. Bd. Memorandum, Nov. 3, 1938, at 2, 25. A carpenter who worked for an undetermined length of time but who was paid \$423 "probably" was not a casual laborer, the amount indicating that the services were unlikely to be occasional, incidental or irregular. *Id.* at 18.

⁷⁹ Soc. Sec. Bd. Memorandum, Nov. 3, 1938, at 12. Similarly services performed for a five-week period by a repairman was held not excepted. Soc. Sec. Bd. Memorandum, Oct. 12, 1938, at 10.

⁸⁰ Soc. Sec. Bd. Memorandum, Nov. 3, 1938, at 17. Also a laborer employed for three months in grading a private roadway was not within the exception. *Id.* at 7.

⁸¹ These rules were promulgated late in 1938 and appeared after most of the above-mentioned cases were decided.

⁸² Mim. 5121, INT. REV. BULL. NO. 45, at 6 (1940); Mim. 4847, 1938-2 CUM. BULL. 310; Soc. Sec. Bd. Memorandum, Oct. 12, 1938, at 11; Soc. Sec. Bd., Claims Manual (1940) §1203 (a). It is emphasized that these are only rules of presumption and may be rebutted by any employer or employee affected, or by the Bureau or Board.

otherwise, during a period of one calendar month or any two consecutive calendar months.⁸³ Service performed on 11 days or more within the prescribed period is not "casual labor," and all the service, including the first ten days, is taxable. The duration of the service in any one day is of no importance.

According to the second presumption, if the total number of hours of service performed by all individuals on a particular job or project⁸⁴ is more than 200, none of the service is "casual." The length of service of any one person is not material.⁸⁵ In computing total hours, service performed by *all* individuals must be included even though some are exempted or are not technically employees. Thus services performed by a child under 21 in the employ of his father, although exempt, must be included in the total hours of labor on the project.

The interpretation of the phrase "not in the course of employer's trade or business" is determined by two tests. First, the employer must be engaged in a trade or business; and second, the services must promote or advance the employer's trade or business.⁸⁶

Thus, service performed in the employ of a political candidate does not constitute service in the course of a trade or business. Candidacy is not a business carried on for profit but is only preparatory to the deriving of income from a subsequent holding of office, if elected.⁸⁷

The Bureau has ruled that "extra-help" does not meet the second test, for although "casual," it is in the course of the employer's trade or business and hence not exempt.⁸⁸ Similarly an employee hired to save goods after a fire was employed in the course of the employer's trade or business.⁸⁹ Also building a barn,⁹⁰ levelling ground in corrals,⁹¹ digging a pit for platform scales,⁹² and carpentry work for cottages occupied by ranch employees⁹³ are services not within the exception.

⁸³ In one case the fact that there was an interval of 25 days between the first period of the employment and the remainder was deemed immaterial. Soc. Sec. Bd. Memorandum, Oct. 12, 1938, at 13.

⁸⁴ "The phrase 'particular job or project' applies to the entire job such as the construction of a house and not to the integral jobs thereof, such as those performed by carpenters, bricklayers, masons, etc." Soc. Sec. Bd., Claims Manual (1940) § 1203 (c).

⁸⁵ If the presumption raised by either of the two rules indicates that the service is to be included within "employment," the service should not be treated as excepted until the employer is advised in writing by the Commissioner of Internal Revenue (or, presumably, the Board) that the presumption has been rebutted. This is true even though under the other rule the service is presumptively casual.

⁸⁶ U. S. Treas. Reg. 106, §402.210; Soc. Sec. Bd. Reg. 3, §403.810.

⁸⁷ S. S. T. 312, 1938-2 CUM. BULL. 309.

⁸⁸ See note 74 *supra*.

⁸⁹ Soc. Sec. Bd. Memorandum, Nov. 3, 1938, at 1. Cleaning up a new building into which the employer thereafter moved his food store, also, is not excepted. *Id.* at 6.

⁹⁰ Soc. Sec. Bd. Memorandum, Nov. 3, 1938, at 3. Also building a tobacco barn. *Id.* at 8.

⁹¹ *Id.* at 15.

⁹² *Ibid.*

⁹³ *Id.* at 11.

The Supreme Court of Maine in an Unemployment Compensation case held that contracting for repairs and alterations to real estate acquired by a Savings Bank by foreclosure was not contracting for work which was a part of the bank's usual trade or business.⁹⁴

Considering the reasons for the Social Security Act, and for this provision "not in the course of the employer's trade or business," it would seem that any activity which can be conveniently handled under the present administrative machinery and which in *any way* promotes or furthers the employer's trade or business should be included in "employment."

AGRICULTURAL LABOR

The original Social Security Act exempted "agricultural labor" without any definition of the term.⁹⁵ The committee report gave administrative difficulties as a reason for the exemption.⁹⁶ The difficulties alleged were: the territorial expanse of the United States; the seasonal character of the industry; the high degree of mobility of the workers; and the problem of records when cash wages are only a part of the remuneration. Other important factors were the large number of farm operators, unpaid family workers, and share croppers.⁹⁷

The regulations of both the Treasury Department and the Social Security Board,⁹⁸ however, distinguished agricultural services more by the nature of the service, than by any test of administrative impracticability.⁹⁹ Services exempted were of two types—those directly connected with activities admittedly agricultural such as the cultivation of the soil, raising and harvesting agricultural commodities, and those performed in handling, packing, storing, and preparing in their raw and natural state agricultural products. Services were limited to those performed by an employee of the owner or tenant of the farm on which the materials were produced, and then only if such services were carried

⁹⁴ *Maine Unemployment Comp. Comm. v. Maine Savings Banks*, 136 Me. 136, 3 A. (2d) 897 (1937). Note that the test here was "usual trade or business."

⁹⁵ Social Security Act, 49 STAT. 620, 625, 639, 653 (1935) as amended 53 STAT. 1373, 1400 (1939), 42 U. S. C. A. §409, 1011, 1107 (Supp. 1940).

⁹⁶ SEN. REP. NO. 628, 74th Cong., 1st Sess. (1935).

⁹⁷ *Altmeier, Social Security in Relation to Agricultural and Rural Areas*, 3 SOC. SEC. BULL. NO. 7, at 3 (1940).

⁹⁸ Soc. Sec. Bd. Reg. 2, Art. 6 is practically identical with U. S. Treas. Reg. 90, Art. 6, and Reg. 91, Art. 206 (1).

⁹⁹ S. S. T. 55, XV-2 CUM. BULL. 416 (1936); S. S. T. 85, 1937-1 CUM. BULL. 393; S. S. T. 131 *id.* at 400; S. S. T. 118, *id.* at 397. This test was inevitable to a considerable extent because of the statutory basis of the exemption. The Bureau of Internal Revenue at first held to a narrow interpretation of the term. S. S. T. 118, *id.* at 397; S. S. T. 131, *id.* at 400; S. S. T. 142, *id.* at 403; S. S. T. 158, *id.* at 404; S. S. T. 166; *id.* at 406; S. S. T. 195, 1937-2 CUM. BULL. 408. But in S. S. T. 203, *id.* at 409, the Bureau reversed several earlier rulings and considerably broadened the exemption. Later rulings were in conformity with the new policy of broadening the "agricultural labor" concept. S. S. T. 218, *id.* at 412; S. S. T. 219, 1937-2 *id.* at 412; S. S. T. 220, *id.* at 414; S. S. T. 231, *id.* at 417.

on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operation.¹⁰⁰ The term "farm" was used in its ordinary sense.¹⁰¹

From its experience the Social Security Board recommended to Congress that the act be extended to cover large scale farming operations.¹⁰² Despite this recommendation, the Social Security Act Amendment of 1939 not only retained the exemption but broadened it to include services which under the ruling of the Bureau of Internal Revenue had been considered taxable employment.¹⁰³ This extension was justified in the committee report on grounds that it had been difficult to "delimit the application of the term with the certainty required for administration and for general understanding by employers and employees affected."¹⁰⁴

Thus to the exempted services performed on a farm, were added services performed in connection with the operation, management, conservation, improvement, and maintenance of the farm if the major part of these services are performed on a farm.¹⁰⁵ Some of the services constituted employment under the original act under some circumstances, but not under others.¹⁰⁶ The term farm was extended to include fur-bearing animal farms, nurseries, and greenhouses and other similar structures used primarily for the raising of agricultural commodities. Greenhouses and other similar structures used primarily for other purposes (*e.g.*, displays and fabrication of wreaths and corsages) do not constitute farms.¹⁰⁷ Services performed in connection with certain operations¹⁰⁸ which were held taxable as employment under the original

¹⁰⁰ Soc. Sec. Bd. Reg. 2, Art. 6.

¹⁰¹ Soc. Sec. Bd. Reg. 2, Art. 6. The term included stock, dairy, poultry, fruit and truck farms; plantations; ranches; ranges; and orchards. Forestry and lumbering were not included within the exemption.

¹⁰² REP. SOC. SEC. BD. (1939). The Board states, "The Board believes that . . . the inclusion of large scale farming operations, often of a semi-industrial character, probably would reduce rather than increase administration difficulties"

¹⁰³ Opinion of Counsel, Soc. Sec. Bd. Oct. 8, 1940. H. R. REP. NO. 728, 76th Cong., 1st Sess. (1939). *Cf.* U. S. v. Turner Co., 111 F. (2d) 400 (C. C. A. 5th, 1940).

¹⁰⁴ H. R. REP. NO. 728, 76th Cong. 1st Sess. (1939).

¹⁰⁵ Soc. Sec. Bd. Reg. 3 §403.808 (c). Under this language services which are not directly concerned with the cultivation of soil, etc., may be exempted as agricultural labor, as for example, services performed by carpenters, painters, and bookkeepers which contribute to the proper conduct of the farms. Also in this group are services performed in salvaging timber or clearing land of brush and other debris left by hurricane.

¹⁰⁶ S. S. T. 125, 1937-1 CUM. BULL. 397.

¹⁰⁷ Soc. Sec. Bd. Reg. 3 §403.808 (b).

¹⁰⁸ These services include the ginning of cotton, the hatching of poultry, the raising or harvesting of mushrooms, the operation or maintenance of ditches, canals, reservoirs or waterways used exclusively for supplying or storing water for farming purposes, the production or harvesting of maple sap, or the processing of maple sap into maple syrup or sugar, or the production of crude (oleoresin) from a living tree or the processing such crude gum into gum spirits of turpentine and gum rosin, provided such processing is carried on by the original producer of such crude gum.

Act are exempted in the amendment because ordinarily the services are performed on a farm or are of such a character as to warrant no different treatment.¹⁰⁹ In order to come within the exemption these services must be rendered directly in connection with one of the operations named. Mere connection with the business of which the operation is a part is not enough. Thus, a bookkeeper of a company engaged in ginning cotton would not be performing services in connection with the ginning of cotton.¹¹⁰

The amendment widened the scope of processing and handling activities which came under the original exception. Services performed in the handling and processing¹¹¹ of any agricultural commodity, other than fruits and vegetables, are exempted as agricultural labor if such services are performed as an incident to ordinary farming operations. The Bureau of Internal Revenue defines such services as services incidental to ordinary farming operations if performed by an employee of a farmer or farmers' cooperative organization in connection with commodities produced by the farmer or farmers' group, and if they are services of the character ordinarily performed by the employees of a farmer or farmers' cooperative organization in the unmanufactured state of such commodities.¹¹² Factors indicating that particular operations are carried on as incidental are: (1) the same employees who engage in admittedly agricultural activities also perform services in the handling of farm products; (2) the equipment used and the methods employed in handling the farm products are dissimilar to the equipment and methods used in similar commercial or manufacturing operations; (3) the employer handles products produced on his own farm exclusively; (4) the place of handling is located on the farm; (5) the product handled is sold exclusively at wholesale; (6) it is the general custom and practice to perform the handling operations in question; (7) the capital invested in the handling equipment does not constitute the greater part of the investment in the enterprise as a whole.¹¹³ These factors are not conclusive, but assist in determining whether the service is carried on as an incident to ordinary farming operations or whether it is a part of manufacturing or commercial operations.

Similar services performed in connection with fruits and vegetables may be exempt whether performed in the employ of a farmer, farmers' cooperative, or a commercial handler even though not performed as an incident to ordinary farming operations, provided they are rendered as an incident to the preparation of fruits and vegetables for market.¹¹⁴ Services performed in connection with commercial canning or freezing or in connection with any agricultural commodity after its delivery to a terminal market for distribution for consumption are not agricultural

¹⁰⁹ H. R. REP. NO. 728, 76th Cong. 1st Sess. (1939).

¹¹⁰ S. S. T. 394, INT. REV. BULL. NO. 28 (1940).

¹¹¹ This includes handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market of agricultural commodities.

¹¹² U. S. Treas. Reg. 106 §402.208 (e).

¹¹³ S. S. T. 125, 1937-1 CUM. BULL. 397.

¹¹⁴ U. S. Treas. Reg. 106 §402.208 (e).

labor. Since these services must be rendered in the actual handling of the commodity, office employees are exempt.

Agricultural labor, as now defined, clearly includes persons who are working under industrial conditions where the administrative difficulties mentioned above do not apply.¹¹⁵ The class of workers involved are as much in need of coverage as those receiving benefits.¹¹⁶ Thus, several bills have been introduced in Congress to limit the agricultural exemption.¹¹⁷ In view of the position of the Social Security Board, the agitation of exempted employees, and the fact that other countries have devised coverage for agricultural labor,¹¹⁸ it is not unlikely that the Act may in the future include these services.

DOMESTIC SERVICE

Domestic service is restricted to service in a private home, local college club, or local chapter of a college fraternity or sorority.¹¹⁹ The regulations of the Bureau of Internal Revenue¹²⁰ and of the Social Security Board¹²¹ provide that domestic service means "services of a household nature." This phrase in turn is defined as those services which are ordinarily and customarily performed as an integral part of household or home duties.¹²² For this reason a resident "handy-man" employed on a full-time basis who performed such services as firing the furnace, washing windows, and mending furniture was held by the Bureau to come within "domestic service."¹²³ Likewise, such services as planting flowers and cutting grass performed by an applicant around the residence of three different employers comes within the exception.¹²⁴ However, services not customarily a part of household duties or which involve the use of skilled or specialized training are not exempted.¹²⁵ Hence, a bookbinder,¹²⁶ a museum assistant,¹²⁷ and a social secretary¹²⁸ were held not to be domestic service. Similarly, the Board held that services performed by an odd-job man in building a rock wall and

¹¹⁵ 47 AM. FEDERATIONIST NO. 2 at 15 (1940); Altmeyer, *Soc. Sec. in Relation to Agric. and Rural Areas*, 3 SOC. SEC. BULL. NO. 7 at 3 (1940).

¹¹⁶ *Ibid.*

¹¹⁷ 47 AMERICAN FEDERATIONIST NO. 2 at 15 (1940).

¹¹⁸ Blaisdell, *Old-Age Insurance for Agricultural Workers in Western Europe*, 1 SOC. SEC. BULL. NO. 4 at 19 (1938).

¹¹⁹ 49 STAT. 622 (1935) as amended 53 Stat. 1400 (1939), 42 U. S. C. A. §409b (2), 1011 (2) (Supp. 1940).

¹²⁰ U. S. Treas. Reg. 106, §402.209.

¹²¹ Soc. Sec. Bd. Reg. 3, §403.809.

¹²² Typical examples of services of a household nature are services rendered by cooks, maids, butlers, laundresses, gardeners and chauffeurs.

¹²³ S. S. T. 242, 1937-2 CUM. BULL. 420.

¹²⁴ Soc. Sec. Bd. Memorandum, Oct. 13, 1938, at 12.

¹²⁵ S. S. T. 242, 1937-2 CUM. BULL. 420.

¹²⁶ *Id.* at 421.

¹²⁷ *Id.* at 420.

¹²⁸ *Id.* at 421.

a patio,¹²⁹ and those performed by a laborer grading a road on the private estate of his employer¹³⁰ were services in a covered employment, and hence taxable.¹³¹

A "private home" as stated in the Act is defined by the regulations as a "fixed place of abode of an individual or family."¹³² A home used primarily as a business enterprise open to the public is not a private home within this exception.¹³³ A caretaker of an apartment,¹³⁴ a gardener of a nursing home,¹³⁵ and a cook in a private boarding house¹³⁶ are not, therefore, excluded from the Act.¹³⁷ Services performed in the home of a deceased employer during the administration of the estate constitute domestic service only if the house is maintained as a private home for the decedents family. If the home is merely held by the estate pending the distribution of the property, services in connection with the care and maintenance of the house do not come within this exception.¹³⁸

For the most part the regulations discussed above are applicable to local college clubs and local chapters of a college fraternity or sorority.¹³⁹ Domestic service for such organizations are those household services that are ordinarily performed in such clubs. Waiters and housemothers, therefore, come within the exception as well as those services mentioned before.¹⁴⁰ But if the club rooms or chapter houses are used primarily for supplying board or lodging to the public as a business enterprise, services performed therein are not within this exception. To qualify as a college club or fraternity the membership must be limited to individuals enrolled in or directly connected with the university. Thus a women's club open not only to students, faculty members, and administrative employees, but also to alumni, former faculty members and their families was held to be within the Act.¹⁴¹

¹²⁹ Soc. Sec. Bd. Memorandum, Oct. 13, 1938, at 5.

¹³⁰ *Ibid.*

¹³¹ A resident carpenter and a resident painter employed on a full time basis for repairing and maintaining a private home, S. S. T. 242, 1937-2 CUM. BULL. 421; Soc. Sec. Bd., Claims Manual (1940) §1202a, and a carpenter building a private home for his employer, Soc. Sec. Bd. Memorandum, Oct. 13, 1938, at 6, are not excepted.

¹³² U. S. Treas. Reg. 106, §402.209; Soc. Sec. Bd. Reg. 3, §403.809.

¹³³ S. S. T. 174, 1937-2 CUM. BULL. 418; Soc. Sec. Bd., Claims Manual (1940) §1202b.

¹³⁴ Soc. Sec. Bd. Memorandum, Oct. 13, 1938, at 1.

¹³⁵ *Id.* at 4.

¹³⁶ *Id.* at 6.

¹³⁷ Other persons not exempted were a maid in a hotel, Soc. Sec. Bd. Memorandum, Oct. 13, 1938, at 6 and a yard man for tourist homes, *Id.* at 7.

¹³⁸ S. S. T. 121, 1937-1 CUM. BULL. 406.

¹³⁹ Service in a local college club or local chapter of a college fraternity or sorority was not exempted under the 1935 Act. S. S. T. 76, *id.* at 366. The 1939 Amendment, however, expressly exempted such service.

¹⁴⁰ U. S. Treas. Reg. 106, §402.209; Soc. Sec. Bd. Reg. 3, §403.809.

¹⁴¹ S. S. T. 407, INT. REV. BULL. NO. 49, at 8 (1940).

Exempted services must be *both* domestic and be performed in a private home or local college club. If both elements are not present such services are not exempted. For this reason a cook on a "dude ranch" although clearly performing "domestic services" was held to be in covered employment.¹⁴²

EMPLOYMENT COVERED BY THE RAILROAD RETIREMENT ACT

The Social Security Board faces an important problem of cooperation with the Railroad Retirement Board. The jurisdictions of the two agencies are contiguous but the Social Security Act does not include those services covered by the Railroad Retirement Act.¹⁴³ At present, coordination between the two Boards has been made difficult because of vital differences in legal opinion of the two agencies.

The process of identifying covered service under the Retirement Act is predominantly a process of identifying the "employer" as defined by that Act.¹⁴⁴ The Retirement Board has classified "employers" into four groups.¹⁴⁵

Carriers by Railroad: A company is a carrier by railroad¹⁴⁶ if it meets all of the following requirements: (1) carriage of freight or passengers; (2) carriage over tracks; (3) offer of carriage to the general public; (4) carriage in interstate commerce; (5) carriage within the confines of the United States, Alaska, or Hawaii; (6) and not owned and operated by the United States.¹⁴⁷

¹⁴² S. S. T. 174, 1937-2 CUM. BULL. 418.

¹⁴³ 53 STAT. 1373 (1939), 42 U.S.C.A. §409(b) (9) (Supp. 1940); 50 STAT. 317 (1937); 45 U.S.C.A. §228(q) (Supp. 1940). The problem is further complicated because the Bureau of Internal Revenue collects taxes under the Federal Insurance Contributions Act, 53 STAT. 1387 (1939), 26 U.S.C.A. §1601(a), and the Carriers' Taxing Act, 54 STAT.—(Aug. 13, 1940), 45 U.S.C.A. §261 (Supp. 1940), and while in legal theory there is no connection between *benefits payable under Social Security and taxes collectible under the Contributions Act or between benefits payable under Railroad Retirement and taxes collectible under the Carriers' Act*, in the public mind they are quite naturally linked together in a general scheme of social insurance. The harmonizing of the decisions of both Boards with each other, and of each Board with the Bureau, and of the Retirement Board with those under the Railway Labor Act 54 STAT.—(Aug. 13, 1940), 45 U.S.C.A. §151 (Supp. 1940), the Railroad Unemployment Insurance Act, *ibid.*, 45 U.S.C.A. §351 (Supp. 1940), and the Carriers' Taxing Act, which have identical coverage provisions, has proved a delicate task.

¹⁴⁴ *Ibid.*, 45 U.S.C.A. §228a (Supp. 1940). See also Regulations under the Railroad Retirement Act of 1937, 4 FED. REG. 1477, (1939).

¹⁴⁵ Much of this material have been taken from the ANNUAL REPORTS OF THE RAILROAD RETIREMENT BOARD for 1938, 1939, and 1940 and from the RETIREMENT BOARD LAW BULLETIN, December, 1939; other material is taken from Opinions of Counsel, Soc. Sec. Bd., October 23, 1940 and December 19, 1940.

¹⁴⁶ 54 STAT.—(Aug. 13, 1940), 45 U.S.C.A. §288a (Supp. 1940). "The term 'employer' means any carrier (including an express company, sleeping-car company, or carrier by railroad, subject to Chapter 1 of Title 49)."

¹⁴⁷ "Carriers by railroad," it will be noted, are simply those subject, as such, to part I of the Interstate Commerce Act, 41 STAT. 474,

Electric railways involve special consideration, since they are exempted if predominantly local in character.¹⁴⁸ In order to be an "employer", an electric railroad must not only come within part I of the Interstate Commerce Act as a carrier by railroad,¹⁴⁹ but also it must be more than a street, interurban or suburban railway,¹⁵⁰ or be a part of a general steam-railroad system of transportation, as used in a national sense.¹⁵¹ The principles by which to determine whether an electric railway is exempt are well-established;¹⁵² at least there is no conflict on this point between the two Boards.

Railroad Associations and Labor Organizations: The second and third general types of "employer" under the Act consist of (1) railroad associations which are engaged in services of that phase of transportation which may be generally described as that which carriers cooperatively perform for their mutual benefit;¹⁵³ and (2) railroad labor organizations¹⁵⁴ national in scope and organized in accordance with the Railway Labor Act. In the former case, although the facts may be difficult to ascertain, the control and maintenance by the carrier, or lack of it, is usually apparent. Labor organizations under the Act present no great problem.

Carrier Affiliates: The fourth class includes, in the words of the Retirement Board, those employers "who function as an integral part of railroad transportation but who are not directly responsible for the discharge of the obligation to carry for the public, and who, accordingly are not included in the regulation of obligations to shippers."¹⁵⁵ To determine if a company falls within this class, it is necessary to

(1920) 49 U.S.C. §1 (1934), and problems hereunder are fairly simple in the light of the facts and previous decisions of the Interstate Commerce Commission.

¹⁴⁸ 54 STAT.—(Aug. 13, 1940), 45 U.S.C.A. §228a (Supp. 1940).

¹⁴⁹ See note 147 *supra*.

¹⁵⁰ Texas Electric Ry., 208 I.C.C. 193, (1935) *pet. for reconsideration denied*, May 13, 1935, *denial sustained* Texas Electric Ry. v. Eastus, 25 F. Supp. 825 (1938), *aff'd*, 308 U.S. 512 (1940); Rules for Testing Other Than Steam Locomotives, 122 I.C.C. 414 (1927); Hudson and M. R. Co. v. Hardy, 103 F. (2d) 327 (1939), *cert. denied*, 307 U.S. 640 (1939), enunciate the principles.

¹⁵¹ Indiana Railroad, 229 I.C.C. 48 (1938); Chicago N.S. and M. R. R., 234 I.C.C.13(1939); Cincinnati and L. E. Ry., 229 I.C.C. 187 (1938); Cincinnati and L. E. R. Co., 232 I.C.C. 267 (1939).

¹⁵² Other leading cases are Shields v. Utah Idaho C. R. R., 305 U.S. 177 (1938); Piedmont & Northern Ry. v. Commission, 286 U.S. 299 (1932); Chicago S.S. & S.B. R. R. v. Fleming, 109 F. (2d) 419 (1940). Of special recent significance are Denver & Intermountain R. R., 237 I.C.C. 641 (1940); San Francisco & N.V.R.R., 237 I.C.C. 675 (1940); and Portland Traction Co., 237 I.C.C. 647 (1940).

¹⁵³ 54 STAT.—(Aug. 13, 1940), 45 U.S.C.A. §228a (Supp. 1940), "traffic associations, tariff bureaus, demurrage bureaus, weighing and inspection bureaus, collection agencies and other associations, bureaus, agencies, or organizations controlled and maintained wholly or principally by two or more employers as hereinbefore defined and engaged in the performance of services in connection with or incidental to railroad transportation."

¹⁵⁴ *Ibid*.

¹⁵⁵ (1938) ANNUAL REP., RAILROAD RETIREMENT BD., c. X., p. 149.

determine whether the company is controlled by or under common control with a carrier. Control exists wherever one or more carriers have the right or power by any means, irrespective of stock ownership, to direct the policies of a company, and in any case in which a carrier is in fact exercising the direction of the policies and business of a company. Control has generally been predicated upon control of the majority of voting securities, or where there are none, a majority of the governing body of the company. In three exceptions, all involving hospital associations, control was found to exist on the basis of three factors: large carrier minority representation on the associations governing body; carrier domination of the officer-management; and a substantial dependence upon the carrier for financial contribution, either in money or valuable property and services.¹⁵⁶

When control is established, it must be determined whether the company performs services "in connection with" transportation which will bring it within the Act. It is here that the divergence in legal opinion of the Social Security and Retirement Boards is found. The Retirement Board takes the position that this provision is more inclusive than "transportation" as defined by section 1(3) of the Interstate Commerce Act; the Social Security Board, on the other hand, is of the opinion that section 1(a) as to carrier affiliates in the Retirement Act was not intended to include more than those companies engaged in "transportation" under section 1(3) of the Interstate Commerce Act.

On the classification of some companies as carrier affiliates, there is no dispute between the two agencies. Where the controlled company is subject to section 1(3) of the Interstate Commerce Act as determined by the Interstate Commerce Commission,¹⁵⁷ both Boards agree that it is covered by the Retirement Act. Likewise services "in connection with the receipt, delivery, elevation, transfer in transit, refrigeration, or icing, storage, or handling of property transported by railroad" are under the Retirement Act.¹⁵⁸

Thereafter, legal opinion differs. The Retirement Board has gone beyond section 1(3) of the Interstate Commerce Act in defining service "in connection with transportation." Any service "reasonably related directly, functionally or economically, to the performance of railroad common-carrier obligations" is held covered by the Retirement

¹⁵⁶ Recently, the Board has found control to exist solely through contracts which insured that operations of the company would be in the interests of the carrier's employer. It is the fact of control which is important, rather than the particular instrumentality through which it is exercised. (1940) *id. c. X11*, p. 179.

¹⁵⁷ In general, these are within the Act: operation of a freight terminal for receipt and delivery of property transported by railroad; operation of a passenger station or terminal; switching cars for a carrier; operation of stockyards for transfer of cattle to be transported by railroad; and operation of a wharf for transfer of shipments from railroad to water carrier.

¹⁵⁸ In general, these are included: storage of property received for a carrier and awaiting transfer by the carrier; operation of a grain elevator for receipt of grain for transportation by railroad; icing and refrigerating services which the carrier holds itself out to perform for the public as part of its common carrier obligations.

Act. Thus, the Retirement Board held that a car-works company, engaged solely in the manufacture of equipment parts, was an "employer" performing service "in connection with transportation." In that case the examiner's report stated that the performance of a service was "not restricted to operation or services which constitute transportation or practically transportation;" and that "services in connection with transportation;" although inclusive of transportation services covered by section 1(3) of the Interstate Commerce Act, was not limited to such transportation services.

Following the precedent of this case, the Retirement Board included within its coverage: a coal company, supplying all of its coal to its parent railroad company;¹⁵⁹ a company which exclusively supplies water; one exclusively supplying oil for fuel; one operating an eating-house service for railroad passengers and employees; and a company maintaining and operating a railroad office building. Later decisions included a company which negotiates contracts for the furnishing of cars, containers and other equipment to railroads; one maintained for the purpose of acquiring and holding title to various properties of a railroad; and an athletic association operated to promote the welfare of a railroad's employees. Even motorbus companies engaged in the transportation of passengers may be "employers" under the carrier-affiliate provision if its operations are "reasonably directly related, functionally or economically," to the performance of railroad common-carrier obligations.¹⁶⁰ Such a relationship is generally said to exist when the bus company is substantially engaged in operations "coordinated" with rail operations as, for example, when it performs service the dominant objective of which is to permit abandonment of less profitable rail operations, the extension of rail service, or the enlargement of rail traffic. Likewise, water carriers may be "employers" under the Retirement Act if they operate equipment or facilities or perform services "in connection with railroad transportation."

Counsel for Social Security, on the other hand, contend that Congress expressed an intention to confine this special system of insurance to the "railroad industry;"¹⁶¹ and that a company is not under the Retirement Act unless it performs services constituting a part of "transportation" by

¹⁵⁹ After this holding, the Retirement Act was amended so that the Act "shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to an employer where delivery is not beyond the mine tipple." 54 STAT.—(Aug. 13, 1940), 45 U.S.C.A. 228a (Supp. 1940).

¹⁶⁰ With respect to motor transportation, it should be borne in mind that bus and trucking companies are subject to Part I of the Interstate Commerce Act only to the extent that they perform railroad terminal services as distinguished from line-haul service. 91 I.C.C. 539 (1924); 182 I.C.C. 263 (1932); 206 I.C.C. 436 (1935); 218 I.C.C. 441, 471 (1936).

¹⁶¹ H. R. REP. NO. 2668, 75th Cong., 3rd Sess. (1938) 1 (R. R. Unemployment Insurance Act); SEN. REP. NO. 1363, 74th Cong., 1st Sess. (1935) 2 (Railroad Retirement Act); SEN. REP. NO. 697, 75th Cong., 1st Sess. (1937) 2 (Railroad Retirement Act of 1937); *Hearings before Committee on Ways and Means on H. R. 8652*, 74th Cong., 1st Sess. (1935) 6, 9. (testimony of Congressman Crosser on Carriers Taxing Act of 1938).

railroad, *i.e.* a common carrier by railroad as defined by the Interstate Commerce Act.¹⁶² Similarly they assert that the phrase "in connection with" transportation, by comparison with other transportation statutes using the same phrase, means "a necessary part of the actual rail transportation."¹⁶³ Further, they contend that the coverage provision is so similar to the one in the Railway Labor Act, the original draft of which expressly stated that the terms were used as defined in the Interstate Commerce Act,¹⁶⁴ that there was no intent to broaden the coverage.¹⁶⁵

The Social Security Board has taken the position that a steamship company, operating port-to-port, owned by a railroad, participating in through routes and joint rates with its parent and other railroads, and transshipping freight to and from the railroads with which it makes connections, was not an "employer" under the Retirement Act. The Retirement Board previously had held that it was.

Following this precedent, the Social Security Board later held that a painter employed by a bus company owned by a railroad, was an "employee" under the Social Security Act because the bus company was not subject to section 1(a) of the Retirement Act.¹⁶⁶

The intent of Congress was to confine the scope of the Railroad Retirement act to "railroads" and "transportation" as defined in the Interstate Commerce Act. The Railroad Retirement Board advances two reasons for its broader coverage: first, it prevents exclusion of

¹⁶² See note 160 *supra*. That the Railway Labor Act, from which the Railroad Retirement Coverage provision was taken, was not intended to broaden this coverage as to motor transportation, see *Hearings before Committee on Interstate and Foreign Commerce on H. R. 7650*, 73rd Cong., 2d Sess. (1933) 20; see also *id.* *H. R. 6956*, 75th Cong., 1st Sess., (1937) 134; *id.* *S. 2395*, 75th Cong., 1st Sess., (1937) 12-13.

¹⁶³ Section 1, INTERSTATE COMMERCE ACT, 24 STAT. 379; 30 STAT. 424; 38 STAT. 103; 39 STAT. 412, 425; 35 STAT. 584; Sections 1 (5), 6(7), and 15(13), INTERSTATE COMMERCE ACT; *Lehigh Valley R.R. v. U. S.* 243 U. S. 444 (1917); *I.C.C. v. Diffenbaugh*, 222 U. S. 42 (1911); *U. S. v. Baltimore & Ohio R. R.*, 231 U. S. 274 (1913); *Warehouse Co. v. U. S.*, 283 U. S. 501 (1931). In a subsequent part of the "employer" definition, 45 U. S. C. A. §228a it is provided that employer shall include certain organizations "engaged in the performance of services in connection with or incidental to railroad transportation." The omission from the earlier part of "incidental to" indicates that "in connection with" was not to be so construed.

¹⁶⁴ *Hearings before Committee on Interstate and Foreign Commerce on Sen. 3266*, 73rd Cong., 2d Sess., (1933) 10-11.

¹⁶⁵ *Id.*, at 11,57-58, 145-146; *Hearings before Committee on Interstate and Foreign Commerce on H. R. 7650*, 73rd Cong., 2d Sess., (1933) 17-18.

¹⁶⁶ See note 160 *supra*. "Trucking service" is a specific statutory exception in the carrier-affiliate provision; and the Retirement Board has not yet held any company engaged exclusively in trucking operations to be an employer under the "carrier by railroad" provision. It may yet do so, however, in view of the remarks in *Scott Bros., Inc.*, 4 M. C. C. 551 (1938), that a pickup and delivery trucking service for a railroad within a railroad terminal area might be a carrier by railroad subject to part I of the Interstate Commerce Act. SEE (1939) ANNUAL REF., RAILROAD RETIREMENT BD., c. IX, p. 168.

entities legally distinct from the carrier though performing functions "intimately associated" with transportation; second, it protects the covered field from excision of its parts through devices calculated to avoid employer obligations. These reasons may be questioned because they assume that which they purport to prove, *i.e.*, that the entities *are* "intimately associated" with transportation or that they *are* "parts" of the covered field. Moreover, pertinent as these considerations may have been in other matters (*e.g.*, assumption of federal control during the World War, and permission to the parent to guarantee bonds of the subsidiary) they are not shown to have any bearing on the proper allocation of a company for purposes of social insurance. A subsidiary does not escape its "employer obligations" by falling without the provisions of the Retirement Act, but simply owes those obligations to a different governmental agency, which was also constituted to accomplish the general scheme of social insurance. The basis for the extended coverage has been the words "in connection with," and the extension was made in the face of settled interpretations of the same words as used in other federal statutes dealing with transportation.¹⁶⁷

Aside from the above considerations, uniform interpretation of section 1(a) of the Retirement Act and section 1(3) of the Interstate Commerce Act, would achieve certainty and clarity in the application of the several acts involved. It may be that such a result can only be reached by additional amendments establishing the lines of coverage.¹⁶⁸

GOVERNMENT EMPLOYMENT

Service in the employ of government instrumentalities is exempt.¹⁶⁹ This exemption was included largely because of constitutional limitations on the taxing power.¹⁷⁰ Thus it would seem that the term "instrumentality"¹⁷¹ should include only those persons or organizations that cannot be taxed constitutionally.

¹⁶⁷ "If Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice, it would be arbitrary to refuse to consider that fact when we come to interpret a statute." *Boston Sand Co. v. United States*, 278 U. S. 41, 48 (1928).

¹⁶⁸ This was done previously when the Retirement Board included coal companies. See note 159 *supra*.

¹⁶⁹ The exception in the 1935 act includes instrumentalities of the Federal government, a state or states, and political subdivisions thereof. 49 STAT. 622 (1935), 42 U. S. C. A. §§410 (5) (6), 1011 (6) (7) (Supp. 1940).

¹⁷⁰ Stevens, *Coverage of the Old Age Benefit Provisions of the Social Security Act* (Unpublished thesis in University of Michigan Law Library 1939) at 43.

¹⁷¹ This discussion is limited to government instrumentalities. Whether a person is an employee of the Federal or State government is purely a problem of the employment relation and is discussed p. 495 *supra*. Also whether a district is a political subdivision of a State is dependent in every case by the statutory and constitutional provisions creating the district and is determined by the law of that particular state. Due to the relative unimportance of the problem, it is not considered here. For Bureau of Internal Revenue decisions on this question see: S. S. T. 159, 1937-1 CUM. BULL. 430; S. S. T. 98, *id.* at 416; S. S. T. 94, *id.* at 415

The Bureau of Internal Revenue, however, did not follow this interpretation. Instead it ruled that if an organization acted for the government and executed some governmental power it was exempt.¹⁷² No distinction was made between so-called "governmental functions" and "proprietary functions."¹⁷³ As long as the organization performed or could be required to perform some function of government, even though incidental to its business as a private enterprise, it was classified as a government instrumentality.¹⁷⁴ Thus all national banks¹⁷⁵ and state member banks of the Federal Reserve System¹⁷⁶ are exempted since they can be employed as fiscal agents of the Federal government. Such decisions unnecessarily extended the scope of the exemptions¹⁷⁷ and are difficult to reconcile with the reason for the exceptions.

State courts, in interpreting unemployment compensation statutes, refused to follow this interpretation.¹⁷⁸ Their decisions held that the term "government instrumentality" was not applicable to a private corporation existing primarily for profit even though it was granted certain incidental duties and privileges by the government.¹⁷⁹

The Social Security Board likewise extended the exception. Although national banks¹⁸⁰ and state member banks of the Federal Reserve System¹⁸¹ were evidently exempted from the Act, the Board distinguished between "banking functions" and the banks activities as a trustee in managing private property for another.¹⁸² Thus a janitor

¹⁷² S. S. T. 43, XV-2 CUM. BULL. 387 (1936); Bridewell, *Liability of Ass'ns for Unemployment Comp.* (1940) 6 John Marshall L. Q. No. 1, at 54.

¹⁷³ U. S. Treas. Reg. 90, Art. 206 (5), 206 (6).

¹⁷⁴ Whether the organization was wholly owned or controlled by the government, whether it was engaged primarily in a public function or for private benefit, or whether the tax would impose an economic burden on the government were evidently deemed immaterial. S. S. T. 44, XV-2 CUM. BULL. 388 (1936); Bridewell, *supra* note 172, at 59.

¹⁷⁵ S. S. T. 16, XV-2 CUM. BULL. 386 (1936).

¹⁷⁶ S. S. T. 44, *id.* at 388. The same result was reached as to state building and loan associations, savings banks, etc. members of the Federal Home Loan Bank System. S. S. T. 109, 1937-1 CUM. BULL. 421.

¹⁷⁷ This is a broader taxation immunity than given for other types of taxes. *Helvering v. Gerhardt*, 304 U. S. 405 (1933).

¹⁷⁸ State bank, member of the Federal Reserve System not instrumentality: *Western Bank and Trust Co. v. Atkinson*, 9 L. W. 349 (Ohio 1940); *Fidelity-Philadelphia Trust Co. v. Hines*, 8 L. W. 76 (Pa. 1940); state building and loan association and savings bank, member of Federal Home Loan Bank System not instrumentality: *Metropolitan Bldg. & Loan Assn. v. Tex. Unemp. Comp. Com.*, 139 S. W. (2) 309 (Tex. 1940), *cert. denied*, 61 S. Ct. 140 (1940); *Waterbury Savings Bank v. Donohoe*, 9 L. W. 2334 (Conn. 1940); *Capital Bldg. & Loan Assn. v. Kan. Comm'n. of Labor & Industry*, 148 Kan. 446, 83 P. (2d) 106 (1938).

¹⁷⁹ *Unemployment Comp. Com. v. Jefferson Stand. Life Ins. Co.*, 215 N. C. 479, 2 S. E. (2) 584 (1939).

¹⁸⁰ Opinion of Counsel, Soc. Sec. Bd., Sept. 10, 1938.

¹⁸¹ *Id.*

¹⁸² Soc. Sec. Bd., Claims Manual (1940) §1205e.

employed in buildings owned by a national bank as trustee for the benefit of creditors was held to be within the benefit provisions of the Act even though he had been exempted from the taxing provisions.¹⁸⁸ Furthermore, the Board points out that the mere fact an organization is designated a fiscal agent of the government does not necessarily make it a government instrumentality.¹⁸⁴

The 1939 amendments limited the original exceptions.¹⁸⁵ Only those organizations (1) wholly owned by the federal or state governments, (2) exempt from taxation by other provision of law, or (3) immune under the Constitution were exempted.¹⁸⁶ Thus national banks and state member banks of the Federal Reserve System are no longer excepted from the Act.¹⁸⁷ The amendment is more in conformity with the general purposes of the Act and simplifies to a great extent the problems caused by the original non-definitive exemptions.

Except for the cases mentioned above the amendment did not otherwise change materially the ruling of the Bureau¹⁸⁸ under the original Act. The many banking and other similar corporations created by the Federal Government were previously held within the exception and they remained so under 1939 amendments.¹⁸⁹ State banks, building and loan associations, savings and loan associations and the like whose accounts were insured by the Federal Deposit Insurance Corporation¹⁹⁰ or the Federal Savings and Loan Insurance Association¹⁹¹ were never exempted.¹⁹²

¹⁸⁸ Opinion of Counsel, Soc. Sec. Bd., Sept. 10, 1938. However a mill purchased by a national bank at a receivers sale and operated by the bank for its own benefit was exempt from the Act. Opinion of Counsel. Soc. Sec. Bd.

¹⁸⁴ *Id.* Feb. 27, 1941. Also a state savings and loan association termed a "lending agency" of the commodity credit corporation by the Act creating the credit corporation is not exempt. The decision was based on the fact that the credit corporation had no control over or management of the state organization and that the association did not in fact loan money as agent of the corporation. Opinion of Counsel Soc. Sec. Bd., April 22, 1939.

¹⁸⁵ H. R. REP. NO. 728, 76th Cong., 1st Sess; SEN. REP. NO. 734, 76th Cong. 1st Sess. (1939).

¹⁸⁶ 53 STAT. 1400 (1939), 42 U. S. C. A. (Supp. 1940) §§409b (6) and (7), 1011 (6) and (7).

¹⁸⁷ Mim. 5003, 1940-1 CUM. BULL. 203. Also state organizations members of the Federal Home Loan Bank System. *Id.* at 208.

¹⁸⁸ Most of the remaining discussion is from decisions and rulings of the Bureau of Internal Revenue.

¹⁸⁹ For example: Federal Home Loan Banks; Federal Land Banks; Joint Stock Land Banks; Central Bank for Cooperatives; and Home Owners Loan Corporation. Compare S. S. T. 61, 1937-1 CUM. BULL. 409 and S. S. T. 62, *ibid.* with Mim. 5003, 1940-1 CUM. BULL. 203; Soc. Sec. Bd., Claims Manual (1940) 1205b. In at least one case, however, the reason for exempting the corporation had to be modified. Compare S. S. T. 140, 1937-1 CUM. BULL. 428 with Mim. 5003, 1940-1 CUM. BULL. 203.

¹⁹⁰ S. S. T. 79, 1937-1 CUM. BULL. 411.

¹⁹¹ S. S. T. 115, *id.* at 424.

¹⁹² Nor was the fact that a state bank was a depository for postal savings funds sufficient to make it an instrumentality. S. S. T. 126,

A private contractor engaged in the performance of contracts in connection with Federal Relief activities is not an instrumentality of the United States.¹⁹³ Likewise, the exemption does not include persons working directly for or under a contract with the government,¹⁹⁴ *i.e.* carrying the mail,¹⁹⁵ constructing a building,¹⁹⁶ or operating a federal reclamation project.¹⁹⁷

Even under the original Act, the Bureau included as many state created organizations as possible. Of course, if the service performed is some direct function of the state, whether governmental or proprietary, the service is exempt;¹⁹⁸ but a state created organization to foster a particular activity even though it benefits the whole State is not exempt. And this is true even though the State supervises, controls, and finances it.¹⁹⁹

The same interpretation is applied to organizations created by counties and municipalities. Hence a county tuberculosis camp was

1937-1 CUM. BULL. 425. Also a clearing house association, S. S. T. 101, *id.*, at 418, and a Safe Deposit Company, S. S. T. 108, *id.* at 420, created and owned by state banks members of the Federal Reserve System were not classified as government instrumentalities.

¹⁹³ S. S. T. 26 XV-2 CUM. BULL. 414 (1936); S. S. T. 14, *id.* at 398.

¹⁹⁴ The Social Security Board has a like ruling. Soc. Sec. Bd., Claims Manual (1940) §1205(d). The U. S. Supreme Court held a private corporation operating a bathhouse on land leased from the Secretary of Interior within a Government Reservation and subject to regulations of the Federal Government was not a government instrumentality within the Arkansas Unemployment Compensation Act. *Buckstaff Bathhouse Co. v. McKinley*, 308 U. S. 358 (1940). The Bureau has reached similar results as to operators of concessions in national parks, S. S. T. 31, XV-2 CUM. BULL. 400 (1936) and services performed in the employ of a lessee of restricted Indian Lands, S. S. T. 175, 1937-2 CUM. BULL. 435. Army post exchanges are instrumentalities of the United States even under the 1939 amendments. S. S. T. 385, 1940-1 CUM. BULL. 292.

¹⁹⁵ S. S. T. 205, 1937-2 CUM. BULL. 438.

¹⁹⁶ S. S. T. 412, INT. REV. BULL. NO. 11, at 5 (1941).

¹⁹⁷ S. S. T. 38, XV-2 CUM. BULL. 400 (1936). Somewhat comparable to this decision is a Social Security Board opinion that a water users Association formed mainly for the purpose of facilitating dealings between the Secretary of the Interior and the water users of a federal reclamation project was not an instrumentality of the United States before the 1939 amendment. Opinion of the Soc. Sec. Bd., Feb. 27, 1941.

¹⁹⁸ S. S. T. 228, 1937-2 CUM. BULL. 444 (state motor vehicle agents appointed by Commissioner of Motor Vehicles); S. S. T. 200, *id.* at 437 (race track inspectors appointed by the State Racing Commission); S. S. T. 171, *id.* at 433 (State Board of Law Examiners); S. S. T. 100, 1937-1 CUM. BULL. 418 (State Liquor Control Commission and its employees). *Cf.* *Boston Elevated Ry. Co. v. Welch*, 25 F. Supp. 809 (D. C. 1939) (street railway taken over by State appointed trustees having complete control over management and operation not exempt).

¹⁹⁹ S. S. T. 347, 1938-2 CUM. BULL. 319 (horticultural society created, partially supported, and regulated to a limited extent by the State not exempt); S. S. T. 169, 1937-2 CUM. BULL. 432 (services performed for a private business during vocational training period, state reimbursing employer for one-half of wages paid during such period not exempt).

exempted from the Act.²⁰⁰ And a municipal league organized by a group of municipalities and supported by taxation of member cities was held to be an instrumentality of a political subdivision.²⁰¹ A municipally owned but privately operated gas plant, however, was held not within the exception.²⁰²

The present exceptions of government instrumentalities from the Act seem to limit the exceptions as much as is constitutionally permissible. A further limitation can come only by means of a narrowed tax immunity of government instrumentalities.

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SOCIAL SECURITY WAGE RECORDS

Three parties primarily are concerned with Social Security wage records—the employer, the employee, and the Social Security Board.¹

Wages are defined as "all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash."² Remuneration for services which do not constitute "employment" within the coverage of the Act is excluded from "wages."³ Likewise, remuneration in excess of \$3,000 paid in any one year is exempt. Prior to the 1939 amendments the tax was assessed on the wages up to \$3,000 paid by each employer, even though the employee had more than one employer during the year. After the 1939 amendments, any amount in excess of \$3,000 paid in any calendar year to one employee, whether it was received from one or several employers, is exempt.

In the absence of evidence to the contrary or unless they were

²⁰⁰ The camp was located on land deeded by a city and was supported by county funds. S. S. T. 168, *id.* at 431.

²⁰¹ The league assists the cities with finance and personnel problems and serves as a fact finding body in connection with proposed legislation affecting the municipalities. S. S. T. 211, 1937-2 CUM. BULL. 440. Also a company owned jointly by a city and county operating ferries between cities in the State is within the exception. S. S. T. 74, 1937-1 CUM. BULL. 475.

²⁰² S. S. T. 89, *id.* at 476. Municipally owned and operated lighting plant, water works, and cemetery are within the exception. S. S. T. 2, XV-1 CUM. BULL. 473 (1936).

¹ While this although a system of account numbers and wage records was not required by the original Act, the Social Security Board immediately ordered such registration. The amended Act, 53 STAT. 1369 (1939), 42 U. S. C. A. §405 (Supp. 1940), makes it the specific duty of the Board to establish and maintain records of the amount of wages paid to each individual.

² 53 STAT. 1373 (1939), 42 U. S. C. A. § 409 (Supp. 1940).

³ For a discussion of the meaning of "employment" see p. 495 *supra*.