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COVERAGE OF THE FAIR LABOR STANDARDS ACT

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The writer published an article dealing with the coverage of the Fair Labor Standards Act[1] in the June, 1943 issue of the *Michigan Law Review*.[2] It is the purpose of this paper to consider the most important decisions since the preparation of that article (March, 1943) and to examine the applicability of the act to certain activities not there discussed.

The minimum wage [6(a)] and maximum hour [7(a)] provisions of the act apply to employees "engaged in commerce or in the production of goods for commerce."[3] No all-embracing formula has been laid down by the courts to determine when employees are so engaged. The act does not provide for blanket coverage of industries as a whole; the test of coverage is the relation of the activities of the individual employee to interstate commerce or to the production of goods for interstate commerce rather than the nature of the employer's business;[4] and since this test is related to the nature of the activities of the particular employee, some employees of a given industry or of a given employer may be covered and others may be outside the scope of the act. Similarly, some employees may be covered at one time but, when engaged in other activities, may not be within the act. In view of the employee test of coverage, any attempt to evolve an all-embracing formula would be futile because of the wide variety of organizational patterns and the multitudinous types of economic activity found in large segments of modern business. Rather the scope of the act can be determined only by the gradual process of inclusion and exclusion applied to a wide variety of fact situations.

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[1] 52 Stat. L. 1060 (1938), 29 U. S. C. (1940), § 201 et. seq.

[2] Davisson, Coverage of the Fair Labor Standards Act, 41 MICH. L. REV. 1060 (1943).

[3] 52 Stat. L. 1062, 1063 (1938), 29 U. S. C. (1940), §§ 206 (a), 207 (a).

[4] Overstreet v. North Shore Corp., 318 U. S. 125, 63 S. Ct. 494 (1943); Walling v. Jacksonville Paper Co., 317 U. S. 564, 63 S. Ct.. 332 (1943); Warren-Bradshaw Drilling Co. v. Hall, 317 U. S. 88, 63 S. Ct. 125 (1942); Kirschbaum v. Walling, 316 U. S. 517, 62 S. Ct. 1116 (1942).

I

EMPLOYEES "ENGAGED IN COMMERCE"

The act defines "commerce" [3(b)] as meaning "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."[5] This definition is narrower than that of "produced" [3(j)] which 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 process or occupation necessary to the production thereof, in any State.*"[6]

In *Overstreet v. North Shore Corporation*,[7] the Supreme Court said:

> ". . . In arriving at that [Congressional] intent it must be remembered that Congress did not choose to exert its power to the full by regulating industries and occupations which affect interstate commerce. . . . But the policy of Congressional abnegation with respect to occupations affecting commerce is no reason for narrowly circumscribing the phrase 'engaged in commerce.' We said in the *Jacksonville Paper Co. case*, . . . 'It is clear that the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce.'"[8]

The decision of the Supreme Court in *McLeod v. Threlkeld*[9] suggests, however, that the broad doctrine enunciated in the *Overstreet* case is to be qualified and that "engaged in commerce" is to be construed more narrowly than "production of goods for commerce."

In the *Overstreet* case, the question before the Supreme Court was whether employees engaged in maintaining or operating a toll road and a drawbridge over a navigable waterway which together constituted a medium for the interstate movement of goods and persons were "engaged in commerce" within the meaning of the act. The Court concluded that there was no persuasive reason why the scope of employed or engaged "in commerce" laid down in *Pedersen v. Delaware*,

[5] 52 Stat. L. 1060 (1938), 29 U. S. C. (1940), § 203 (b).

[6] 52 Stat. L. 1061 (1938), 29 U. S. C. (1940), § 203 (j). Italics are the author's.

[7] 318 U. S. 125, 63 S. Ct. 494 (1943).

[8] 318 U. S. 125 at 128, 63 S. Ct. 494 (1943).

[9] 319 U. S. 491, 63 S. Ct. 1248 (1943).

Lackawanna & Western Railroad Company[10] and related cases[11] arising under the Federal Employers' Liability Act[12] should not be applied to similar language in the Fair Labor Standards Act, especially when Congress in adopting the phrase "engaged in commerce" had those Liability Act cases called to its attention.[13] Among the related cases cited by the Court was *Philadelphia, Baltimore & Washington Railroad Company v. Smith*[14] in which a cook employed by a railroad transporting interstate shipments to prepare meals for a gang of carpenters repairing bridges along its lines was held to be employed in interstate commerce within the meaning of the Federal Employers' Liability Act. Following the test of the *Pedersen* and related cases, the Court construed the phrase "engaged in commerce" to include employees whose work was so intimately related to interstate commerce "as to be in practice and in legal contemplation a part of it" and held that employees maintaining or operating a toll road and a drawbridge over a navigable waterway which together constituted a medium for the interstate movement of goods and persons were "engaged in commerce" within the meaning of the act.

The *McLeod* case involved a cook employed by a commissary company to prepare meals for maintenance-of-way employees of an interstate railway carrier with which the commissary company had a contract to furnish meals. The facts were thus identical with those of the *Smith* case, except that the cook was employed by an independent contractor rather than by the railroad itself as in the *Smith* case. It was urged on behalf of McLeod that the Court had decided in the *Smith* case that an employee engaged in similar work was "in commerce" under the Federal Employers' Liability Act and that it was immaterial whether the employee was hired by the one engaged in the interstate business since it is the activities of the employee and not

[10] 229 U. S. 146, 33 S. Ct. 648 (1912).

[11] Philadelphia & R. R. Co. v. Di Donato, 256 U. S. 327, 41 S. Ct. 516 (1921); Southern Pac. Co. v. Industrial Accident Commission, 251 U. S. 259, 40 S. Ct. 130 (1920); Kinzell v. Chicago, M. & St. P. Ry. Co., 250 U. S. 130, 39 S. Ct. 412 (1919); Philadelphia, B. & W. R. Co. v. Smith, 250 U. S. 101, 39 S. Ct. 396 (1919); New York Cent. R. Co. v. Porter, 249 U. S. 168, 39 S. Ct. 188 (1919); Southern Ry. Co. v. Puckett, 244 U. S. 571, 37 S. Ct. 703 (1917).

[12] 35 St. L. 65 (1908), 45 U. S. C. (1934), § 51 et seq. Before amendment in 1939, 53 Stat. L. 1404 (1939), the act applied only where the injury was suffered while the carrier was engaging in interstate or foreign commerce and the injured employee was employed by the carrier in such commerce.

[13] 318 U. S. 125 at 131-132, 63 S. Ct. 494 (1943).

[14] 250 U. S. 101, 39 S. Ct. 396 (1919).

of the employer which are decisive.[15] The majority of the Court took the position that, while there is no single concept of interstate commerce which can be applied to every federal statute regulating commerce, the test of the Federal Employers' Liability Act that activities so closely related to interstate transportation as to be in practice and legal relation a part thereof are to be considered in that commerce is applicable to employments "in commerce" under the Fair Labor Standards Act. The majority opinion then stated that where the accident occurs on or in direct connection with the instrumentalities of transportation, interstate commerce has been used interchangeably with interstate transportation, citing the *Pedersen* case; but where the distinction between what a common carrier by railroad does while engaging in commerce between the states—i.e., transportation—and interstate commerce in general is important, the Federal Employers' Liability Act was construed prior to the 1939 amendment as applying to transportation only. The Court here cited *Shanks v. Delaware, Lackawanna & Western Railroad Company*[16] and subsequent cases following it. In the *Shanks* case, an employee in a machine shop operated by a railroad company for repair of locomotives used in both interstate and intrastate transportation was held not to be employed in interstate commerce within the meaning of the Federal Employers' Liability Act while putting into a new location a countershaft through which power was communicated to some of the machinery in the repair shop, since his work was too remote from interstate transportation to be practically a part of it. The reasoning of the *Shanks* case was followed subsequently in *Chicago & North Western Railway Company v. Bolle*,[17] *Chicago & Eastern Illinois Railroad Company v. Industrial Commission of Illinois*, and *New York, New Haven & Hartford Railroad Company v. Bezu*.[19]

The Court then referred to the holding in the *Smith* case that a

[15] 319 U. S. 491 at 494, 63 S. Ct. 1248 (1943).

[16] 239 U. S. 556, 36 S. Ct. 188 (1916).

[17] 284 U. S. 74, 52 S. Ct. 59 (1931). The Court held that a fireman on a locomotive engine attached to other engines which were taking on coal was not engaged in interstate commerce where his engine was used to generate steam to heat a depot and passenger coaches in yards.

[18] 284 U. S. 296, 52 S. Ct. 151 (1932). An employee injured while oiling an electric motor furnishing power to hoist coal into a chute from which it was taken by locomotives moving interstate freight was held not engaged in interstate commerce.

[19] 284 U. S. 415, 52 S. Ct. 205 (1932). An unskilled roundhouse laborer injured while working on a locomotive temporarily removed from service for repairs was held not engaged in interstate commerce.

cook employed by an interstate railroad to prepare meals for a gang of carpenters repairing bridges along its lines was employed in interstate commerce within the meaning of the Federal Employers' Liability Act and said:

> "Such a ruling under the Federal Employers' Liability Act, after the *Bolle*, *Industrial Commission*, and *Bezue* cases . . . should not govern our conclusions under the Fair Labor Standards Act. These three later cases limited the coverage of the Federal Employers' Liability Act to the actual operation of transportation and acts so closely related to transportation as to be themselves really a part of it. They recognized the fact that railroads carried commerce and were thus a part of it but that each employment that indirectly assisted the functioning of that transportation was not a part. The test under this present act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it. Employee activities outside of this movement, so far as they are covered by wage-hour regulation, are governed by the other phrase, 'production of goods for commerce.'"[20]

Applying this test, the majority concluded that the furnishing of board seemed as remote from commerce as in the cases where employees supply themselves, since in one instance the food would be as necessary for the continuance of their labor as in the other. Accordingly, it was held that the cook employed by a commissary company to prepare meals for maintenance-of-way employees of an interstate railway carrier was not "engaged in commerce" within the meaning of the Fair Labor Standards Act.

In a vigorous dissenting opinion by Mr. Justice Murphy, joined in by Justices Black, Douglas, and Rutledge, it was argued that the activities of McLeod in cooking for a traveling maintenance crew of an interstate railroad were sufficient to satisfy the Overstreet test (derived from the *Pedersen* and *Smith* cases) of whether the activities of the employee are so closely related to interstate commerce "as to be in practice and in legal contemplation a part of it." The rejection of this test for the narrower one of whether the employee is engaged in interstate transportation or in work so closely related to it as to be practically a part of it laid down in the *Shanks*, *Bolle*, *Industrial Commission*, and

[20] 319 U. S. 491 at 496-497, 63 S. Ct. 1248 (1943).

Bezue cases was regarded as wrong, since the Fair Labor Standard Act extends to employees "engaged in commerce" and not merely to those engaged in transportation. Whatever basis there may have been for restricting coverage of the Federal Employers' Liability Act to employees actually engaged in transportation because of the fact that the act applied only to those working for employers engaged in interstate transportation by rail can have no bearing on interpretation of the Fair Labor Standards Act whose coverage is much more extensive. Nor did the dissenting members of the Court find anything in the latter act to suggest that it has a narrower application to employees whose work "in commerce" is transportation or work connected therewith than it has to employees engaged in commerce but whose work has nothing to do with transportation. "Such a construction is untenable because it would discriminate without reason between different types of employees, all of whom fall within the same general statutory classification of 'engaged in commerce.' The necessary effect of rejecting the *Smith* case for the restrictive concept of 'in commerce' which was used in the *Shanks, Bolle, Commission,* and *Bezue* cases is to introduce into the administration of the Fair Labor Standards Act that concededly undesirable confusion which characterized the application of the Federal Employers' Liability Act and prompted the 1939 amendment . . . which in effect repudiated the narrow test of the *Shanks* line of cases."[21]

While the majority opinion in the *McLeod* case does not state expressly that the test of whether an employee is engaged in commerce within the meaning of the act is more exacting than the test of whether an employee is engaged in production of goods for commerce, the language is such as to suggest that the former phrase is to be construed more narrowly than the latter. That the dissenting members of the Court so interpreted the majority opinion is suggested by the following language:

> ". . . The purpose of the 'production of goods for commerce' phrase was obviously not to cut down the scope of 'engaged in commerce,' but to broaden the Act's application by reaching conditions in the production of goods for commerce which Congress considered injurious to interstate commerce . . . The effect of the Court's decision to-day, however, is to recognize that federal power over commerce has been sweepingly exercised when an employee's work is in the production of goods for commerce, but to limit it, when the employee's activities are in transportation or

[21] 319 U. S. 491 at 499-500, 63 S. Ct. 1248 (1943).

connected therewith, to the narrow and legislatively repudiated view of the *Shanks, Bolle, Commission* and *Bezue* cases. Such an unbalanced application of the statute is contrary to its purpose of affording coverage broadly 'throughout the farthest reaches of the channels of interstate commerce' to employees 'engaged in commerce.'"[22]

Narrower construction of "engaged in commerce" is further indicated in the recent decision in *Armour & Co. v. Wantock*[23] involving auxiliary firemen employed by a soap manufacturer doing interstate business. The Court there said:

"*McLeod v. Threlkeld*, . . . which did exclude the employee from the scope of the Act, is not in point here because it involved application of the other clause of the Act, covering employees engaged 'in commerce,' and the test of whether one is in commerce is obviously more exacting than the test of whether his occupation is necessary to production for commerce."[24]

This position has significant implications for the large number of workers who are engaged neither in the physical processes of production of goods for interstate commerce nor in processes or occupations necessary to such production, but whose claim to the benefits of the act must rest on their being "engaged in commerce." Among this group are (1) employees in the distributive trades; (2) employees performing maintenance and service activities in buildings housing tenants engaged in interstate commerce but not producing goods for such commerce on the premises; and (3) employees constructing, operating, maintaining, and repairing instrumentalities of interstate commerce.

A. Employees in the Distributive Trades

Employees ordering, transporting, checking, and unloading goods imported from other states and employees who participate in the sale of goods to customers in other states and in the delivery of such goods from the employer's warehouse to out-of-state customers are "engaged in commerce" within the meaning of the act.[25] It is in connection with those employees whose contact with goods of out-of-state origin occurs between receipt at the employer's warehouse and subsequent delivery

[22] 319 U. S. 491 at 502, 63 S. Ct. 1248 (1943).

[23] (U. S. 1944) 65 S. Ct. 165.

[24] (U. S. 1944) 65 S. Ct. 165 at 167-168.

[25] See 41 MICH. L. REV. 1060 at 1067 (1943) for extensive citation of cases involving employees performing these activities.

to local customers or, in the case of a chain store organization, to the employer's own local retail outlets that the "twilight zone of uncertainty" exists; and it is with those employees that this section is concerned. In determining whether such employees are "engaged in commerce," the question is whether the goods they handle in the warehouse and prepare for local distribution, and in connection with which they do necessary clerical work, remain in the stream of interstate commerce until they reach their ultimate destination—the local retail outlet—or whether the goods complete their interstate journey when they come to rest in the warehouse of the independent wholesaler or chain store organization so that any subsequent activity in connection with them is purely intrastate and consequently outside the scope of the act. The majority of earlier decisions, following a "state of rest" or "prior order" theory, took the latter position.[26]

The cases coming before the courts involve principally two types of fact situations: (1) where goods are imported from other states by a wholesale distributor for subsequent local distribution to independent retail outlets and (2) where goods are imported from other states by a chain store organization for subsequent local distribution to its own retail outlets. A third type of situation which has arisen less frequently is where an out-of-state manufacturer or supplier delivers goods to his local distributing agency for subsequent sale to local customers.

1. *Employees of Independent Wholesalers*

The first type of fact situation, involving importation of goods from other states by an independent wholesaler for subsequent distribution to local customers, came before the Supreme Court in *Walling v. Jacksonville Paper Company*.[27] The act was held to cover employees a "substantial part" of whose activities involved (1) procurement or receipt of goods from other states; and (2) handling or delivering to local customers goods of out-of-state origin pursuant to either special orders or pre-existing contracts or understandings with customers. In the case of special orders, the Court argued that there was a practical continuity of movement of the goods until they reached the customers for whom they were intended and entry of goods into the warehouse interrupted but did not necessarily terminate their interstate journey. "A temporary pause in their transit does not mean that they are no longer 'in commerce' within the meaning of the Act . . . if the halt in

[26] See 41 MICH. L. REV. 1060 at 1067-1069 (1943).

[27] 317 U. S. 564, 63 S. Ct. 332 (1943). See also Higgins v. Carr Bros. Co., 317 U. S. 572, 63 S. Ct. 337 (1943).

the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain 'in commerce' until they reach those points."[28] In extending the "prior order" doctrine to include goods ordered pursuant to pre-existing contracts or understandings with customers, the Court argued that such transactions could not be distinguished from special orders—the former, like the latter, indicate where it is intended the terminal point of interstate movement should be. Nor here will a temporary break in physical continuity of transit at the wholesaler's warehouse be sufficient to end the interstate journey at the warehouse.

As to the balance of the goods not purchased on special orders from customers nor ordered pursuant to pre-existing contracts or understandings with customers, the Court rejected the Administrator's contention that, since most of the customers formed a fairly stable group and orders were recurrent as to kind and amount so that the needs of the trade could be estimated with considerable precision, business with these customers was "in commerce" within the meaning of the act. However, the Court said:

> ". . . We do not mean to imply that a wholesaler's course of business based on anticipation of needs of specific customers, rather than on prior orders or contracts, might not at times be sufficient to establish that practical continuity in transit necessary to keep a movement of goods 'in commerce' within the meaning of the Act. . . . We do not believe, however, that on this phase of the case such a course of business is revealed by this record. The evidence said to support it is of a wholly general character and lacks that particularity necessary to show that the goods in question were different from goods acquired and held by a local merchant for local disposition."[29]

The Court did not indicate further what course of business would be sufficient to establish "practical continuity in transit necessary to keep a movement of goods 'in commerce'" and it has not subsequently decided this question.[30]

A number of independent wholesaler cases[31] have been decided by

[28] 317 U. S. 564 at 568, 63 S. Ct. 332 (1943).
[29] 317 U. S. 564 at 570, 63 S. Ct. 332 (1943).
[30] See Walling v. James V. Reuter, Inc., 321 U. S. 671, 64 S. Ct. 826 (1944).
[31] Walling v. Silver Bros., (C. C. A. 1st, 1943) 136 F. (2d) 168; Schwarz v. Witwer Grocery Co., (C. C. A. 8th, 1944) 141 F. (2d) 341, cert. denied 322 U. S. 753, 64 S. Ct. 1265 (1944); Lorber v. Rosow, (D. C. Conn. 1944) 8 Wage and Hour Reporter 21 (hereafter cited as W. H. Rep.); Walling v. Bridgeport Tobacco

lower federal courts since the *Jacksonville Paper Company* case; but these cases either did not involve questions requiring consideration of what course of business on the part of an independent wholesaler would be sufficient to establish "practical continuity in transit necessary to keep a movement of goods 'in commerce'" when goods are not purchased pursuant to special orders or pre-existing contracts or understandings with customers or, if this was considered, the opinions give little indication of what factors bearing upon the wholesaler's course of business will be regarded as material.

An important segment of the independent wholesaler problem thus remains unsettled. In the absence of special orders or pre-existing contracts or understandings with customers, final determination of the status of employees of an independent wholesaler whose activities are performed in connection with goods of out-of-state origin between receipt at the wholesaler's warehouse and subsequent local distribution must await further clarification of what course of business will keep a movement of goods "in commerce" after receipt at the wholesaler's warehouse.

2. *Employees of Chain Store Organizations*

The Supreme Court has not as yet decided any cases involving the second type of fact situation where goods are imported from other states by a chain store organization for subsequent distribution to its own local retail outlets. However, a number of such cases have been decided by lower federal courts.

In *Walling v. Goldblatt Brothers*,[32] defendant owned and operated three warehouses in Chicago at which it received merchandise of out-of-state origin and from which it thereafter distributed goods to its own chain of department stores, located in Illinois and Indiana. After goods had been unloaded and checked, they were either moved immediately to the outgoing platform and from there sent to one of defendant's department stores or to customers or were placed in the appropriate department of the warehouse to be stored until ordered out to one of the retail stores. Some manufacturing operations were carried on in certain of the warehouses. The circuit court of appeals held within

Co., (D. C. Ill. 1944) 57 F. Supp. 429; Fellabaum v. Swift & Co., (D. C. Ohio 1944) 54 F. Supp. 353; Walling v. R. L. McGinley Co., (D. C Tenn. 1943) 7 W. H. Rep. 93; Ouendag v. Gibson, (D. C. Mich. 1943) 49 F. Supp. 379.

[32] (C. C. A. 7th, 1942) 128 F. (2d) 778, cert. denied 318 U. S. 757, 63 S. Ct. 528 (1943). Certiorari was denied subsequent to the decisions in Walling v. Jacksonville Paper Co. and Higgins v. Carr Bros. Co., 317 U. S. 564, 63 S. Ct. 332 (1943).

the scope of the act employees whose activities related to procurement of extrastate goods, unloading of such goods at the warehouses, checking of such goods prior to the time they came to rest on the unloading platforms, manufacture of goods for shipment out-of-state, shipment of goods out-of-state, and maintenance and operation of warehouses where production for commerce occurred. As to employees moving goods from unloading platforms into the warehouses, storing them, delivering them to defendant's local stores, and doing clerical work involved in such storage and delivery, the court rejected the argument that these activities were merely part of the "stream of commerce" from the place of origin of the goods to defendant's retail stores and held that once the goods reached the warehouses, they assumed a wholly local character so that employees concerned solely with subsequent moving and storing of goods in the warehouses and shipment of goods from warehouses to local stores were not "engaged in commerce." The Court argued that while defendant knew in advance from its records, in a general way, the needs of the retail stores and ordered accordingly, it did not rely upon existing orders from its stores or customers. In the absence of prior orders, imported goods, not destined for any specific customer or store, came to rest upon arrival at the warehouses.[33]

A different result was reached by another circuit court of appeals in *Walling v. American Stores Company*[34] involving a large chain store organization operating approximately 2,300 retail stores in several states supplied from warehouses which received and stocked products manufactured and processed by the company itself, private label items produced and packed expressly for it, and items of other manufacturers. Four of the warehouses made deliveries only to defendant's stores in the state where the warehouse was located. The lower court held that certain employees of these warehouses who did not participate in handling of out-of-state goods nor in shipment of goods to defendant's subsidiaries were not engaged in commerce. The circuit court of appeals reversed, holding that there was such a "practical continuity of movement" as to bring these warehouse employees within the act. The court pointed out that there was a fairly even flow of goods through the warehouses and that it was defendant's policy to avoid overstocking. Buyers ordered in anticipation of regular and continuous requirements of the retail stores, guided by past experience with allowance for seasonal factors and merchandising programs. The evidence, the Court

[33] See Walling v. Goldblatt Bros., (D. C. Ill. 1944) 56 F. Supp. 255, discussed supra at p. 876.

[34] (C. C. A. 3d, 1943) 133 F. (2d) 840.

argued, went beyond that of a "wholly general character" involved in the *Jacksonville Paper Company* case. It stressed, further, that the problem here was not (as in the *Jacksonville Paper Company* case) that of an independent wholesaler; rather the entire operation from the purchase, processing, or manufacture of goods to the ultimate sale to retail purchasers was that of the American Stores Company. There was nothing comparable, therefore, to "goods acquired and held by a local merchant for local disposition" referred to in the *Jacksonville Paper Company* case. The warehouses here were maintained not to break the continuity of movement of goods until they reached defendant's retail stores, but rather to make it even, economical, and uninterrupted. In referring to the narrower view of the *Goldblatt* case, the court said:

> ". . . This conclusion may go somewhat beyond that . . . in Walling v. Goldblatt Bros. . . . But the court in that case did not have the advantage of the guidance given by the Supreme Court decisions of Walling v. Jacksonville Paper Co. and Higgins v. Carr Bros. Co." [35]

Courts deciding subsequent cases involving employees of warehouses operated by chain store organizations have divided between the positions of the *Goldblatt* [36] and the *American Stores Company* [37]

[35] 133 F. (2d) 840 at 846.

[36] In Walling v. L. Wiemann Co. (C. C. A. 7th, 1943) 138 F. (2d) 602, cert. denied 321 U. S. 785, 64 S. Ct. 782 (1944), decided by the same court deciding the Goldblatt case, employees in a warehouse maintained for receipt and storage of merchandise for later distribution to defendant chain of retail stores were held not to be engaged in commerce. After referring to the contrary holding of the American Stores case, the court said: "If the decision in the American Stores case be construed as supporting the broad doctrine that after goods in interstate commerce have come to rest within the state of destination, they remain, nevertheless, in interstate commerce merely because they are intended to be moved again at some time to retail stores in the same state, it would seem that the case stands alone without support of other authority." 138 F. (2d) 602 at 605. Employees engaged in delivering goods to local customers after they were stored in the warehouses of a chain store organization were held not engaged in commerce in Allesandro v. C. F. Smith Co., (C. C. A. 6th, 1943) 136 F. (2d) 75. See also Vogelpohl v. Lane Drug Co., (D. C. Ohio 1944) 55 F. Supp. 564; Walling v. Ward's Cut-Rate Drugs, (D. C. Tex. 1944) 54 F. Supp. 41.

[37] A. H. Phillips, Inc. v. Walling, (C. C. A. 1st, 1944) 144 F. (2d) 102, cert. granted (U. S. 1944) 65 S. Ct. 268. In Walling v. Mutual Wholesale Food & Supply Co., (C. C. A. 8th, 1944) 141 F. (2d) 331, a wholesale grocery firm (Mutual) was organized to serve a chain of retail grocery stores (Thomas) which were required by contract to secure all their merchandise from this wholesale firm. The court found that the great bulk of Mutual's business was carried on to meet the needs of one customer (Thomas) and that a very substantial portion of that business consisted of interstate

cases. There is still uncertainty, therefore, as to coverage of such employees. The "practical continuity of movement" test of the *Jacksonville Paper Company* case, although there stated with respect to an independent wholesaler, would seem equally applicable to the chain store situation. Whether the warehouse is operated by a wholesaler, with goods moving to independent retail outlets, or by a chain store organization, with goods moving to its own retail outlets, would not by itself seem to be controlling; the basic question in both situations is whether the "course of business" is such as to establish continuity of movement of goods through the warehouse to local retail outlets or whether there is such a break in the interstate journey as will reasonably warrant a holding that the goods have come to rest even though they are intended to be moved again at some time to retail stores in the same state.

Determination of whether there is "practical continuity of movement" necessary to keep goods of out-of-state origin "in commerce" within the meaning of the act is complicated by variations in the "course of business" among independent wholesalers and among integrated chain store organizations. Among the factors of importance in the case of the independent wholesaler are the kinds of goods carried; the nature of the clientele; the geographical area over which the wholesaler operates; the extent to which the wholesaler himself carries surplus stocks instead of buying from suppliers on a "hand-to-mouth" basis; the type of enterprise—whether the wholesaler operates as a service wholesaler whose salesmen call upon the retail trade and who extends credit to retail customers or as a cash and carry wholesaler or whether he has contractual arrangements with independent retailers

shipped goods ordered for and distributed to that customer. In this situation, interstate shipments of goods remained in the channels of interstate commerce until delivered at the Thomas stores and all employees who devoted a substantial part of their time to ordering, receipt, care, and distribution of such interstate goods to Thomas stores were engaged in commerce. "We are not to be understood as determining generally that all operators of warehouses come within the Act if a substantial part of the goods cared for by them for others are received from, held or sent out (on orders of owners) into interstate commerce. The problem of independent warehousemen is not here involved. We confine our decision to the situation here which is that this warehouse was the wholesale link in an integrated business moving interstate goods from manufacturers or other wholesalers to the stores of a particular contract customer who retailed those goods. It was created to be and was an agency in the course of and to effectuate this movement in interstate commerce within the Act." 141 F. (2d) 331 at 339. See also Walling v. Block, (C. C. A. 9th, 1943) 139 F. (2d) 268, cert. denied 321 U. S. 788, 64 S. Ct. 787 (1944); Ackerman v. Baltimore Markets, (D. C. Pa. 1944) 7 W. H. Rep. 168.

to supply their needs on a planned basis; and the procedure of the wholesaler as to ordering—whether he follows a relatively routine procedure of placing orders with suppliers when stock on hand, as indicated by the stock control system, reaches a certain point or whether he gears his ordering more nearly to the anticipatory demands of his clientele. In the case of the integrated chain store organization, the clientele is a controlled group—the organization's own retail outlets—and generally the destination of out-of-state goods would appear to be known in advance with a reasonable degree of certainty. But here too variations as to procedure with respect to accumulation of surplus stocks and ordering exist, so that no one "course of business" can be regarded as typical.

In the absence of prior orders or pre-existing contracts or understandings with customers, the reasoning of the courts in cases dealing with warehouse employees of independent wholesalers and chain store organizations, based upon the physical concepts involved in the "state of rest" and "prior order" doctrines as modified by the *Jacksonville Paper Company* case, would appear to require analysis of the "course of business" presented by each fact situation to determine whether there is that particularity of evidence necessary to show that the goods in connection with which the employees' activities are performed are different from "goods acquired and held by a local merchant for local disposition." The determination of coverage on such a case-by-case basis precludes laying down any all-embracing rule, at least until a large number of different courses of business have been considered by the courts.

The status of employees in the nonretail selling units of a chain store organization—e.g. employees in warehouses and central offices—is further complicated by the exemption provisions of the act.[38] The act provides that the minimum wage and maximum hour provisions of the act shall not apply with respect to any employee employed in a bona fide local retailing capacity [13(a) (1)] or any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce [13(a) (2)].[39] Under

[38] 52 Stat. L. 1067 (1938), 29 U. S. C. (1940) § 213. While there is a distinction, technically, between coverage of the act and exemption from specific provisions of the act, certain of the exemptions provided in § 13(a) are discussed here to indicate further the complications involved in the chain store cases.

[39] 52 Stat. L. 1067 (1938), 29 U. S. C. (1940), § 213 (a). In the case of independent concerns, the application of the exemption provisions of §§ 13 (a) (1) and 13(a) (2) have also created troublesome questions, since a clear-cut distinction between

the retail or service establishment exemption,[40] the criterion used is the nature of the establishment in which the employee is engaged, so that if the exemption is applicable because the greater part of the selling or servicing of the retail or service establishment is in intrastate commerce, all employees engaged in the establishment are exempted from the minimum wage and maximum hour provisions of the act.[41]

The Administrator[42] has taken the position that a retail establishment is characterized by numerous small sales, typically of consumer goods, to private individuals for personal or family consumption and not for resale or redistribution in any form.[43] It is patronized regularly by the general consuming public in contrast to a wholesale establishment which characteristically excludes the general consuming public and confines its sales to other wholesalers, retailers, and large-scale industrial or business purchasers. Distribution of goods from a chain store warehouse to its retail outlets is not regarded as retail distribution and the warehouse is not a retail establishment; nor will the fact that distribution from the warehouse to the retail stores does not involve a "sale" in the strict legal sense alter the nonretail character of the distribution.[44]

The Administrator has interpreted the word "establishment" as meaning ordinarily a physical place of business and it is not regarded

wholesaling and retailing is not always easy. See Harris v. Hammond, (C. C. A. 5th, 1944) 145 F. (2d) 333; Cron v. Goodyear Tire and Rubber Co., (D. C. Tenn. 1943) 49 F. Supp. 1013; Petway v. Dobson, (D. C. Tenn. 1942) 43 F. Supp. 277; Wood v. Central Sand & Gravel Co., (D. C. Tenn. 1940) 33 F. Supp. 40.

[40] The exemption with respect to any employee employed in a bona fide local retailing capacity [13(a) (1)] has been involved less frequently. See, however, Walling v. Goldblatt Bros., (D. C. Ill. 1944) 56 F. Supp. 255. This exemption will not be considered further.

[41] The Administrator has taken the position that the greater part of the selling or servicing of an establishment will be considered in intrastate commerce for purposes of § 13(a) (2) if more than 50 per cent of the total gross receipts of the establishment is derived from intrastate sales or services. Selling or servicing is in intrastate commerce if all the elements of the sale or service take place in the state in which the establishment is located, irrespective of the source of the goods and the retail or nonretail character of the transaction. 1942 W. H. Man. 338-339.

[42] The exemption for retail or service establishments [§ 13(a) (2)] does not provide for definition of terms by the Administrator. The interpretations of the Wage and Hour Division are merely intended to guide the Administrator until authoritative rulings to the contrary are issued by the courts. Interpretative Bull. 6, 1942 W. H. Man. 327.

[43] See White Motor Co. v. Littleton, (C. C. A. 5th, 1941) 124 F. (2d) 92; Super-Cold Southwest Co. v. McBride, (C. C. A. 5th, 1941) 124 F. (2d) 90; Zehring v. Brown Materials Ltd., (D..C. Cal. 1943) 48 F. Supp. 740.

[44] Interpretative Bull. 6, 1942 W. H. Man. 328-330.

as synonymous with the words "business" or "enterprise" as applied to multi-unit companies. In the case of chain store systems, branch stores, groups of independent retailers organized to carry on business in a manner similar to chain store systems, and retail outlets of large manufacturing or distributing concerns, ordinarily each physically separated unit is to be considered a separate establishment. In the view of the Administrator, the exemption does not apply to warehouses, central executive offices, manufacturing or processing plants, or other non-retail selling units distributing to or serving retail stores.[45]

In the *American Stores Company* case, involving an integrated organization operating retail stores, warehouses, canneries, a coffee roasting plant, and a food processing and manufacturing plant, it was urged that employees not employed in retail stores were exempt within the meaning of section 13(a) (2) of the act. In rejecting this contention, the Court argued that "from the standpoint of business integration, it might conceivably be assumed that this whole enterprise is an 'establishment.' However, it is quite another thing to say that it is a retail establishment when it engages in so many important operations other than retailing, even though the retail sale is the event from which the defendant's income is derived."[46] After reviewing the legislative history of section 13(a) (2), the court said:

> ". . . A multi-state business structure engaged in manufacturing and processing food products, warehousing and distribution of food items to over 2000 retail stores is not at all comparable to the intrastate 'local' or 'corner grocery man,' 'druggist,' 'meat dealer,' 'filling station man' or even 'department store' about whom the legislators were concerned. They are totally dissimilar whether the standards of comparison be economic, functional, or physical."[47]

A similar result was reached in *A. H. Phillips, Inc. v. Walling*.[48] It was there held, in answer to the contention that "establishment" meant the entire business organization of the chain store system, that the central office and warehouse was a different type of place than the retail stores, since no sales were made there and there was no direct contact with customers. Each retail store constituted a separate estab-

[45] Interpretative Bull. 6, 1942 W. H. Man. 335-338.

[46] 133 F. (2d) 840 at 842-843.

[47] 133 F. (2d) 840 at 844.

[48] (C. C. A. 1st, 1944) 144 F. (2d) 102, cert. granted (U. S. 1944) 65 S. Ct. 268.

lishment where final disposition of merchandise was made by sale to customers. The central office and warehouse also constituted a separate establishment where the managerial activities of the whole enterprise were carried on. They were distinct and separate units, although together they made up the entire organization. The court concluded that when a chain store system not only operates retail stores but also buys in large quantities with a central point of receipt and distribution in the nature of a wholesaler, it can no longer be considered a retail establishment within the meaning of section 13(a) (2).

The Administrator's contention has been rejected, however, in a number of cases[49] which have held that the retail stores of a chain system together with its general offices and warehouses constitute a single retail establishment. The reasoning of these cases appears to be that warehousing, servicing, or processing of goods, together with clerical activities, are merely incidental operations necessary to large-scale distribution at retail and that the "retail establishment" includes the warehouses and central offices which are but adjuncts, regardless of whether the retailer operates one retail store or a multi-unit establishment with segregated warehouses. Several of the cases[50] distinguish the *American Stores Company* case on the ground that there the company was operating canneries, a bottling works, manufacturing and processing plants, a dairy, and a coffee plantation, so that the warehouses and other activities were not mere adjuncts of a retail establishment but rather separate businesses.

In the case of employees of an integrated chain store organization whose activties in connection with imported goods occur between receipt at the warehouse and subsequent distribution to the chain's retail outlets, if it is determined that the goods remain "in commerce" so as to

[49] Walling v. L. Wiemann Co., (C. C. A. 7th, 1943) 138 F. (2d) 602, cert. denied 321 U. S. 785, 64 S. Ct. 782 (1944); Allesandro v. C. F. Smith Co., (C. C. A. 6th, 1943) 136 F. (2d) 75. In Walling v. Block, (C. C. A. 9th, 1943) 139 F. (2d) 268, cert. denied 321 U. S. 788, 64 S. Ct. 787 (1944), the court said, "Whether appellee's stores constitute a single establishment or whether each, in appropriate circumstances, is to be regarded as a separate establishment, is a question we need not consider. All we decide is that the services involved were a mere incident to and an integral part of the operation of each store in the group. Since the selling of no store was substantially interstate, the employees in question [warehouse and central office employees] are excluded from coverage by § 13(a) (2) of the Act." 139 F. (2d) 268 at 270. See also Walling v. Goldblatt Bros., (D. C. Ill. 1944) 56 F. Supp. 255; Vogelpohl v. Lane Drug Co., (D. C. Ohio 1944) 55 F. Supp. 564; Walling v. Fred Wolferman, Inc., (D. C. Mo. 1944) 54 F. Supp. 917.

[50] Allesandro v. C. F. Smith Co., (C. C. A. 6th, 1943) 136 F. (2d) 75; Walling v. Goldblatt Bros., (D. C. Ill. 1944) 56 F. Supp. 255.

warrant a holding that the employees are "engaged in commerce" within the meaning of the act, the further question arises as to whether they are exempt as engaged in a retail establishment the greater part of whose selling is in intrastate commerce. The final answer to this question must await decision by the Supreme Court.

3. *Employees of a Manufacturer's or Supplier's Distributing Agency*

The third type of fact situation where an out-of-state manufacturer or supplier delivers goods to his local distributing agency for subsequent sale to local customers has arisen less frequently.

In *De Loach v. Crowley's Inc.*,[51] the defendant purchased milk and milk products for distribution at wholesale to local retail dairies. Most of these products were purchased from an out-of-state concern of which defendant was a corporate subsidiary with the same officers, stockholders, and management as the parent corporation. Products were delivered by truck to defendant and containers were transferred to defendant's trucks as quickly as possible and delivered to its local customers. The employees involved, who unloaded containers, reloaded them on defendant's trucks, and drove the latter's trucks in making deliveries to local customers, contended that defendant was merely an agent of the parent corporation in making deliveries. The court, determining that whether plaintiffs were employed to a substantial extent in commerce under the act was a question deserving trial, said:

> "... If it [defendant] be a mere distributing agency of Crowley's Dairy Products [parent corporation], its customers are the customers of its principal, and so is its business of local distribution. Transmission of the goods from New York to the customers would not be broken by their receipt and handling by the distributing agency."[52]

[51] (C. C. A. 5th, 1942) 128 F. (2d) 378. See also Lorber v. Rosow, (D. C. Conn. 1944) 8 W. H. Rep. 21, where the employer engaged in the wholesale drug and liquor business in addition to purchasing goods on his own account acted as a factor for suppliers in other states. The goods dealt with as a factor were mingled with and handled in the same manner as goods purchased and sold by the employer except as to method of payment. The court argued that there was no reason to hold that transactions which would be intrastate in character under the Jacksonville case—sales within the state from stocks of goods which have come to rest in the warehouse—if made by a local principal, should become interstate in nature because made by a factor or agent of an out-of-state principal. The test would appear to be whether the interstate journey has come to an end before the sale is made.

[52] 128 F. (2d) 378 at 379.

The court here cited *Binderup v. Pathé Agency*,[53] a decision under the anti-trust act, in which it was held that delivery of films by an out-of-state supplier to its own distribution agency for delivery to lessees in the same state did not put an end to the interstate character of the transaction, since the intermediate delivery to the agency did not end and was not intended to end the movement of the commodity.

In the *Jacksonville Paper Company* case, the Supreme Court said:

> ". . . As in the case of an agency (cf. *De Loach v. Crowley's Inc.* . . .) if the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain 'in commerce' until they reach those points. Then there is a practical continuity of movement of the goods until they reach the customers for whom they are intended." [54]

The "practical continuity of movement" test of the *Jacksonville Paper Company* case would thus appear applicable to the distributing agency situation. In the *De Loach* case, the halt in the movement of the goods was short in duration because of their perishable nature. Whether a longer halt would break the interstate journey would be judged presumably by the standards discussed above with respect to goods imported by independent wholesalers and chain store organizations.

B. *Employees in Building Service and Maintenance Activities*

The Supreme Court in *Kirschbaum v. Walling* [55] held that building maintenance employees of a landlord whose tenants were principally engaged in production of goods for interstate commerce were within the act, since the work of the employees had such a close and immediate tie with the process of production by the tenants and was such an essential part of it that they were engaged in an occupation "necessary to the production of goods for commerce." But the Court has not decided a case involving employees performing similar activities in buildings housing tenants "engaged in commerce" but not producing goods for such commerce on the premises.

Lower courts have decided a large number of such cases, however, and the decisions are virtually unanimous that building maintenance employees, such as janitors, porters, elevator operators, and engineers,

[53] 263 U. S. 291, 44 S. Ct. 96 (1923).
[54] 317 U. S. 564 at 568, 63 S. Ct. 332 (1943).
[55] 316 U. S. 517, 62 S. Ct. 1116 (1942).

and watchmen are not within the scope of the act where no production of goods for interstate commerce takes place in the building, even though tenants may be engaged in interstate commerce.[56] This position, distinguishing the Kirschbaum holding, is based upon the view that a narrower construction is to be given to "engaged in commerce" than to "production of goods for commerce," because the act's definition of the former, in contrast with its definition of the latter, does not include "necessary" processes or occupations; hence coverage is broader for employees engaged in servicing buildings in which production for interstate commerce is carried on than for employees servicing buildings in which tenants are engaged in interstate commerce but not in production for such commerce. The later cases[57] cite the Supreme Court holding

[56] Building Service Employees International Union v. Trenton Trust Co., (C. C. A. 3d, 1944) 142 F. (2d) 257; Blumenthal v. Girard Trust Co., (C. C. A. 3d, 1944) 141 F. (2d) 849; Convey v. Omaha Nat. Bank, (C. C. A. 8th, 1943) 140 F. (2d) 640, cert. denied 321 U. S. 781, 64 S. Ct. 638 (1944); Johnson v. Masonic Bldg. Co., (C. C. A. 5th, 1943) 138 F. (2d) 817, cert. denied 321 U. S. 780, 64 S. Ct. 621 (1944); Rucker v. First Nat. Bank of Miami, (C. C. A. 10th, 1943) 138 F. (2d) 699, cert. denied 321 U. S. 769, 64 S. Ct. 524 (1944); Lofther v. First Nat. Bank of Chicago, (C. C. A. 7th, 1943) 138 F. (2d) 299; Rosenberg v. Semerio, (C. C. A. 9th, 1943) 137 F. (2d) 742, cert. denied 320 U. S. 770, 64 S. Ct. 82 (1942); Tate v. Empire Bldg. Corp., (C. C. A. 6th, 1943) 135 F. (2d) 743, cert. denied 320 U. S. 766, 64 S. Ct. 71 (1943); Cochran v. Florida Nat. Bldg. Corp., (C. C. A. 5th, 1943) 134 F. (2d) 615; Bozant v. Bank of New York, (D. C. N. Y. 1944) 8 W. H. Rep. 68; Prescott v. Broadway & Franklin St. Corp., (D. C. N. Y. 1944) 7 W. H. Rep. 1022; Baldwin v. Emigrant Industrial Sav. Bank, (D. C. N. Y. 1943) 7 W. H. Rep. 147; Hinkler v. Eighty-Three Maiden Lane Corp., (D. C. N. Y. 1943) 50 F. Supp. 263; Cullen v. Stone & Webster Bldg. Inc., (D. C. N. Y. 1943) 7 W. H. Rep. 147; Wideman v. Blanchard & Calhoun Realty Co., (D. C. Ga. 1943) 50 F. Supp. 626; Rieck v. Iowa Guarantee, Inc., (D. C. Iowa 1943) 6 W. H. Rep. 502; Greene v. Anchor Mills Co., (N. C. 1944) 8 W. H. Rep. 41; Stoike v. First Nat. Bank, 290 N. Y. 195, 48 N. E. (2d) 482 (1943), cert. denied 320 U. S. 762, 64 S. Ct. 50 (1943); Burke v. Hide & Leather Realty Co., 182 Misc. 319, 48 N. Y. S. (2d) 594 (1944); Belies v. Penn. Bldg., Inc., 180 Misc. 1062, 45 N. Y. S. (2d) 6 (1943). For earlier cases see 41 MICH. L. REV. 1060 at 1080 (1943).

In some of these cases maintenance workers were employed by an independent contractor who supplied service on a contractual basis rather than by the landlord, but this would not seem to be controlling, since the test of coverage is the relation of the activities of the individual employee to interstate commerce or to the production of goods for interstate commerce. See note 4, supra.

For the position of the Wage and Hour Division regarding application of the act to maintenance and service workers in office buildings occupied by tenants engaged in interstate commerce see 6 W. H. Rep. 1121-1122 (1943).

[57] Blumenthal v. Girard Trust Co., (C. C. A. 3d, 1944) 141 F (2d) 849; Convey v. Omaha Nat. Bank, (C. C. A. 8th, 1943) 140 F. (2d) 640, cert. denied 321 U. S. 781, 64 S. Ct. 638 (1944); Rucker v. First Nat. Bank of Miami, (C. C. A. 10th, 1943) 138 F. (2d) 699, cert. denied 321 U. S. 769, 64 S. Ct. 524 (1944); Rosenberg v. Semeria, (C. C. A. 9th, 1943) 137 F. (2d) 742, cert. denied 320 U. S. 770, 64 S. Ct. 82 (1943).

in the *McLeod* case that "engaged in commerce" encompasses only activities actually in the movement of commerce or so closely related thereto as to be a part of it and conclude that employees performing such activities as are here being considered cannot meet this test.[58]

It has been urged that the establishment of a dual standard under which employees performing similar work may be treated differently depending upon whether tenants are engaged in interstate commerce or in the production of goods for such commerce is not in consonance with the economic realities which prompted the act; but where this contention has been advanced, courts have met it by arguing that they cannot disregard the definitive language employed by Congress in framing the act.[59]

C. *Employees Constructing, Operating, Maintaining, and Repairing Instrumentalities of Interstate Commerce*

In *Walling v. Patton-Tulley Transportation Co.*,[60] the act was held applicable to employees engaged in construction of dikes and revetments in a river carrying interstate traffic. The lower court had relied on *Raymond v. Chicago, Milwaukee, & Saint Paul Railway Company*[61] in which it was decided that an employee of an interstate railroad injured while engaged in cutting a tunnel was not employed in commerce within the meaning of the Federal Employers' Liability Act, since the tunnel, being only partly completed, was not in use as an instrumentality of interstate commerce. The circuit court rejected this position, however, on the ground that the river had long been a highway of interstate commerce and the reasoning that construction upon a highway not yet utilized for interstate commerce is not work in interstate commerce, therefore, did not apply. In a recent district court decision,[62] the *Raymond* case was relied on to exclude from the

[58] In a dissenting opinion in Rosenberg v. Semerio, (C. C. A. 9th, 1943) 137 F. (2d) 742, it is argued that "The question is whether the services are a direct aid to interstate commerce. . . . I can see no difference between the 'porters [who] keep the buildings clean and habitable' for the men and processes for the production of goods for commerce held within the Act in Kirschbaum Co. v. Walling. . . and the janitor who keeps the buildings clean and habitable for the men and processes in interstate banking. I do not believe that McLeod v. Threlkeld overruled, sub silentio, Kirschbaum Co. v. Walling." 137 F. (2d) 742 at 744.

[59] Convey v. Omaha Nat. Bank, (C. C. A. 8th, 1943) 140 F. (2d) 640, cert. denied 321 U. S. 781, 64 S. Ct. 638 (1944).

[60] (C. C. A. 6th, 1943) 134 F. (2d) 945.

[61] 243 U. S. 43, 37 S. Ct. 268 (1917).

[62] Nieves v. Standard Dredging Co., (D. C. P. R. 1944) 7 W. H. Rep. 896. See also Hewlett v. Del Balso Const. Corp., 180 Misc. 81, 43 N. Y. S. (2d) 650 (1943); Shannon v. Boh Bros. Const. Co., (La. Ct. App. 1942) 5 W. H. Rep. 362; Woolfolk v. Orino (D. C. Ore. 1942) 5 W. H. Rep. 132.

act's coverage dredging employees engaged in original construction of a channel never previously used to facilitate interstate commerce.[63] The decided cases involving employees engaged in original construction of instrumentalities of interstate commerce, as distinct from maintenance and repair of such instrumentalities, have been too few, however, to settle the question of where the courts will draw the line between original construction and maintenance and repair of existing facilities and what principles will govern as to coverage in situations involving original construction.

The act has been held applicable to employees engaged in operating facilities, such as a toll road and drawbridge, a railroad line, and telephone lines, which constitute media for interstate movement of goods and persons and communications and to employees maintaining such facilities.[64] The activities of operation and maintenance employees are actually in or so closely related to interstate movement of commerce as to be a part of it. But the furnishing of board is too remote from interstate commerce to bring within the scope of the act a cook employed by a commissary company to serve meals to maintenance-of-way employees of an interstate railway carrier.[65]

The Circuit Court of Appeals for the Tenth Circuit has held the act applicable to a maintenance employee of a power company engaged in

[63] "If the dredging here had been for the purpose of deepening a channel already used for navigation or otherwise improving the facilities already in use a different conclusion might be reached." 7 W. H. Rep. 896.

[64] Overstreet v. North Shore Corp., 318 U. S. 125, 63 S. Ct. 494 (1943) (employees operating and maintaining toll road and drawbridge over navigable waterway which together constituted a medium for interstate movement of goods and persons); Pedersen v. Fitzgerald Construction Co., 318 U. S. 740, 63 S. Ct. 558 (1943) (employees of independent contractor constructing new abutments and repairing substructures of bridges of interstate railroad); Rockton & Rion R. v. Walling, (C. C. A. 4th, 1944) 8 W. H. Rep. 12 (operation and maintenance employees of short line railroad operating wholly within a state but hauling goods shipped in interstate commerce); Schmidt v. Peoples Telephone Union, (C. C. A. 8th, 1943) 138 F. (2d) 13 (operation employees of telephone company providing interstate communication); Smith v. Public Utilities Co., (D. C. Ark. 1944) 7 W. H. Rep. 1090 (telephone switchboard operator handling interstate messages); Rouch v. Continental Oil Co., (D. C. Kans. 1944) 7 W. H. Rep. 428 (employee at public airport maintained by aviation gasoline company servicing airplanes operated on interstate flights); Walling v. Craig, (D. C. Minn. 1943) 53 F. Supp. 479 (employees of highway construction company engaged under contracts with states in reconstruction, repair, and maintenance of public roads which were part of interstate highway network); Strand v. Garden Valley Telephone Co., (D. C. Minn. 1943) 51 F. Supp. 898 (operation and maintenance employees of telephone company providing interstate communication).

Western Union Telegraph Co. v. Lenroot, (U. S. 1945) 13 U. S. L. W. 4106, involved the child labor provisions of the act.

[65] McLeod v. Threlkeld, 319 U. S. 491, 63 S. Ct. 1248 (1943).

generation of power and local sale to customers some of whom were engaged in operating instrumentalities of interstate transportation and communication.[66] The court concluded that, while the employee was not engaged in the actual movement of commerce, he performed work so closely related thereto as to be "engaged in commerce" within the test of the *McLeod* case.

> ". . . Closeness depends upon the essentiality and indespensability of the particular work or services performed to the actual movement of commerce. . . . If a cessation of the services of the employee causes an interruption or interference with the free movement of commerce, it is ordinarily regarded as an essential and indispensable part thereof."[67]

The status of employees actually operating and maintaining the media for interstate transportation and communication is thus reasonably clear; but there is still uncertainty as to what activities, if any, beyond actual work upon the facilities for transportation and communication will be regarded as so closely related to the movement of interstate commerce as to be a part of it.[68]

In several cases involving employees operating, maintaining, and repairing instrumentalities of interstate commerce, it has been urged that the *de minimis* doctrine should apply where only a small portion of the transactions over such instrumentalities is interstate in character. After the Supreme Court remanded the *Overstreet*[69] case to the district

[66] New Mexico Public Service Co. v. Engel, (C. C. A. 10th, 1944) 145 F. (2d) 636. See also Allen v. Arizona Power Corp., (D. C. Arizona, 1943) 7 W. H. Rep. 395.

[67] 145 F. (2d) 636 at 638. The court also pointed out that the electrical energy was not used to supply personal needs of employees, as was the food prepared by the cook in the McLeod case, but was used in operating instrumentalities of interstate commerce.

[68] In his dissent in the McLeod case, Justice Murphy said: "We have held that a rate clerk employed by an interstate motor carrier [Overnight Motor Transp. Co. v. Missel, 316 U. S. 572, 62 S. Ct. 1216 (1942)] and a seller of tickets on a toll bridge over which interstate commerce moves [Overstreet v. North Shore Corp., 318 U. S. 125, 63 S. Ct. 494 (1943)] are both 'engaged in commerce' within the meaning of the Fair Labor Standards Act. Yet, in the view of the majority of the Court, when the employees' activities are in the field of transportation, the Act apparently will not cover those who work in an interstate carrier's repair shop on facilities to supply power for machinery used in repairing instrumentalities of transportation, [Shanks v. Del., L. & W. R. Co., 239 U. S. 556, 36 S. Ct. 188 (1916)] or who heat cars and depots used by interstate passengers, [Chicago & N. W. R. Co. v. Bolle, 284 U. S. 74, 52 S. Ct. 59 (1931)] or who store fuel for the use of interstate vehicles, [Chicago & E. I. R. Co. v. Industrial Comm. of Ill., 284 U. S. 296, 52 S. Ct. 151 (1932)] or who work on such vehicles when withdrawn for the moment from commerce for repairs [N. Y., N. H. & H. R. Co. v. Bezue, 284 U. S. 415, 52 S. Ct. 205 (1932)]." 319 U. S. 491 at 500-501, 63 S. Ct. 1248 (1943).

[69] 318 U. S. 125, 63 S. Ct. 494 (1943).

court for further proceedings in accordance with its opinion, the latter court determined that the employees engaged in maintaining and operating facilities over which interstate commerce moved were "engaged in commerce" irrespective of the extent of interstate traffic.[70] The circuit court, affirming the lower court, argued that the Supreme Court holding was based upon the fact of interstate use rather than upon the extent of such use and held that employees operating and maintaining a toll road and parallel telephone system, open at all times to interstate traffic, the use of which by interstate traffic was neither occasional nor accidental, were engaged in commerce within the meaning of the act and that the amount of interstate traffic was immaterial.[71] In meeting defendant's contention that the "substantial part" formula of the *Jacksonville Paper Company* case should be applied, the court argued that the law as laid down there is applicable to that class of cases which deals with employees whose duties relate in part to interstate shipments, but it is not applicable to cases dealing with employees having to do with maintenance or operation of instrumentalities of commerce. Employees of the first class engage during the same work-week in activities strictly interstate in character and in activities strictly intrastate in character; employees of the second class engage in the same type of activities throughout the work-week. Employees operating and maintaining a toll road and telephone system are not concerned with goods or persons moving between states by means of instrumentalities of interstate and intrastate transportation. Rather they are concerned with maintaining and operating instrumentalities of transportation and communication over which goods and persons in interstate and intrastate movements alike are being transported and over which messages in interstate and intrastate transactions alike are being transmitted. The toll road and telephone line are links in national transportation and communication systems, open and available at all times for interstate use. "If the application of the Fair Labor Standards Act to employees engaged in maintaining the one and in maintaining and operating the other depends on the extent of the use of each in interstate commerce, then such use

[70] Overstreet v. North Shore Corp., (D. C. Fla. 1943) 52 F. Supp. 503.

[71] North Shore Corp. v. Barnett, (C. C. A. 5th, 1944) 143 F. (2d) 172. The Supreme Court granted certiorari. (U. S. 1944) 65 S. Ct. 72. Subsequently the judgment of the circuit court was vacated and the judgment of the district court was modified in accordance with stipulations signed by counsel for the parties. (U. S. 1944) 65 S. Ct. 275. But since the stipulation modified the judgment of the district court solely by reducing the amount of recovery of each plaintiff to two-thirds of the amount awarded, the action of the Supreme Court would not appear to deprive the circuit court decision of its weight as authority.

would make coverage often depend on adventitious and remote factors, at times even the weather."[72]

II

EMPLOYEES "ENGAGED IN THE PRODUCTION OF GOODS FOR COMMERCE"

A. *Employees in the Physical Process of Production*

In *United States v. Darby*,[73] the Supreme Court stated that the obvious purpose of the act was not only to prevent the interstate transportation of the proscribed product but also to stop the initial step toward such transportation—production with the purpose of so transporting it. Congress, it argued, was not unaware that most manufacturing businesses shipping their products in interstate commerce make such products in their shops without reference to their ultimate destination and then after manufacture select some for interstate and some for intrastate shipment according to the daily demands of their business. It would be practically impossible, without disrupting manufacturing business, to restrict the prohibited kind of production to the particular items which later move in interstate rather than intrastate commerce. "Production of goods for commerce," the Court held, includes at least production of goods which, at the time of production, the employer, according to the normal course of his business, intends or expects to move in interstate commerce, although because of the demand situation all of the goods may not subsequently actually enter interstate commerce. It is thus the facts at the time of production which determine whether an employee is engaged in the production of goods for commerce and not any subsequent acts of the employer or of third parties.

The doctrine of the *Darby* case was stated with reference to production of goods which, at the time of production, the employer in the normal course of business intends or expects will move subsequently in interstate commerce. But what of production or processing which takes place after materials have entered the state from outside sources with subsequent sale of the finished product locally? In this situation, coverage could be predicated only on the theory that production or processing operations occur while the imported goods remain a part of the flow of interstate commerce. In light of the reasoning of the courts with reference to goods of out-of-state origin, the act would seem inappli-

[72] 143 F. (2d) 172 at 174-175. In accord with the principal case on this point are New Mexico Public Service Co. v. Engel, (C. C. A. 10th, 1944) 145 F. (2d) 636; Strand v. Garden Valley Telephone Co., (D. C. Minn. 1943) 51 F. Supp. 898.

[73] 312 U. S. 100, 61 S. Ct. 451 (1941).

cable in situations of this type on the ground that the imported goods have come to rest within the state before activities of employees incident to production or processing occur.[74] Coverage would extend, of course, to employees whose activities involved procurement and receipt of goods of out-of-state origin, since such employees would be "engaged in commerce."

The discussion above has considered only employees whose activities involve actual participation in the physical process of production; but in addition to such employees, an enterprise typically will hire clerical workers, janitors, watchmen, and others whose activities involve no direct contact with physical production itself.

B. *Employees not in the Physical Process of Production*

The act provides that "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 process or occupation necessary to the production thereof, in any State."[75] There is no requirement, therefore, that employees must themselves participate in the physical process of production of goods before they can be regarded as engaged in their production.[76] It is sufficient that the activities of employees constitute a "process or occupation necessary to the production."

But what activities are "necessary" to production of goods for interstate commerce? In *Armour & Co. v. Wantock*,[77] it was urged that the word "necessary" should be limited to the highly restrictive sense of "indispensable," "essential," and "vital" and that a distinction must be made between those processes and occupations which an employer finds advantageous in his own plan of production and those without which he could not practically produce at all. In rejecting this contention, the Supreme Court said:

> "The argument would give an unwarranted rigidity to the application of the word 'necessary,' which has always been recognized as a word to be harmonized with its context. . . . No hard and fast rule will tell us what can be dispensed with in 'the production of goods'. . . . What is required is a practical judgment as to whether the particular employer actually operates the work as part of an integrated effort for the production of goods."[78]

[74] West v. Aristocratic Dairy Products Co., (D. C. Ga. 1943) 6 W. H. Rep. 645.
[75] Sec. 3(j), 52 Stat. L. 1061 (1938), 29 U. S. C. (1940), § 203 (j).
[76] Kirschbaum v. Walling, 316 U. S. 517, 62 S. Ct. 1116 (1942).
[77] (U. S. 1944) 65 S. Ct. 165, rehearing denied 13 U. S. L. W. 3268 (1945).
[78] 65 S. Ct. 165 at 167.

Activities, although not indispensable or essential to production of goods, are "necessary" within the meaning of the act if they contribute to economy or continuity of production. ". . . More is necessary to a successful enterprise than that it be physically able to produce goods for commerce. It also aims to produce them at a price at which it can maintain its competitive place, and an occupation is not to be excluded from the Act merely because it contributes to economy or to continuity of production rather than to volume of production."[79]

In *Kirschbaum v. Walling*,[80] holding the act applicable to building maintenance employees of landlords whose tenants were principally engaged on the premises in production of goods for interstate commerce, the Supreme Court construed broadly the statutory provisions with respect to "production of goods for commerce." This broad construction was followed by the Supreme Court in later cases holding within the scope of the act a watchman guarding a plant a substantial portion of whose output was destined for shipment in interstate commerce[81] and auxiliary firemen of a private fire-fighting staff main-

[79] 65 S. Ct. 165 at 167.

[80] 316 U. S. 517, 62 S. Ct. 1116 (1942). The same result has been reached in a large number of cases where production of goods for interstate commerce takes place on the premises: Post v. Fleming, (C. C. A. 2d, 1944) 7 W. H. Rep. 1206; Bittner v. Chicago Daily News Printing Co., (D. C. Ill. 1944) 7 W. H. Rep. 1123; Cahn v. Butler Bldg. Corp., (D. C. Ill. 1944) 7 W. H. Rep. 1086; Simmons v. Straight Improvement Co., (D. C. N. Y. 1944) 7 W. H. Rep. 1060; Frank v McMeekan, (D. C. N. Y. 1944) 7 W. H. Rep. 828; Schmidt v. Emigrant Industrial Savings Bank, (D. C. N. Y. 1944) 7 W. H. Rep. 623; Berry v. 34 Irving Place Corp., (D. C. N. Y. 1943) 52F. Supp. 875; Rienzo v. City Bank Farmers Trust Co., (N. Y. 1944) 7 W. H. Rep. 718; Gelles v. Newburgh Sav. Bank, (N. Y. 1944) 7 W. H. Rep. 431; O'Donnell v. City Bank Farmers Trust Co., (N. Y. City Ct. 1944) 7 W. H. Rep. 932; Schineck v. 386 Fourth Ave. Corp., (N. Y. City Ct. 1944) 49 N. Y. S. (2d) 872; Floyd v. 58-64 Fortieth Street Corp., (N. Y. City Ct. 1943) 44 N. Y. S. (2d) 422. In Martino v. Michigan Window Cleaning Co., (C. C. A. 6th, 1944) 145 F. (2d) 163, cert. applied for 13 U. S. L. W. 3294 (1945), the court refused to accept the contention that employees of a window cleaning company who washed windows of manufacturing establishments were engaged in production of goods for commerce.

[81] Walton v. Southern Package Corp., 320 U. S. 540, 64 S. Ct. 320 (1944). The Supreme Court of Mississippi had held that the watchman was not engaged in production of goods for commerce nor in an occupation necessary thereto since he was engaged in no manual activities connected with production which was carried on when he was not on duty; he performed no duties other than those of watchman; and he was not specially employed to guard goods assembled for manufacture or awaiting shipment in interstate commerce. Southern Package Corp. v. Walton, 194 Miss. 573, 11 S. (2d) 912 (1943). The Supreme Court held that under its decision in the Kirschbaum case, no one of these facts, nor all of them together, could support the conclusion reached below. See also Cushway v. Stork Engineering Co. Inc., (C. C. A. 6th, 1944) 142 F. (2d) 463; Deutsch v. Heywood-Wakefield Co., (D. C. N. Y. 1943) 6 W. H. Rep. 546. For earlier cases, see 41 MICH. L. REV. 1060 at 1079 (1943). The same result has been reached where the watchman is employed by an independent contractor

tained by a manufacturer doing interstate business.[82] The activities of these employees were regarded as having a sufficiently "close and immediate tie with the process of production" to be "necessary" to such production within the meaning of the act.

As indicated earlier, lower courts generally have limited the doctrine of the *Kirschbaum* case to those employees whose maintenance activities are performed in buildings housing tenants producing on the premises goods for interstate commerce and have refused to extend coverage to maintenance workers in buildings housing tenants engaged in interstate commerce. The refusal of the Supreme Court to review a number of such cases[83] has left in effect these holdings, with the result that there is a dual standard depending upon whether tenants are engaged in commerce or in the production of goods for such commerce.

The question of whether maintenance workers in buildings housing only the executive staff of a company producing elsewhere goods for interstate commerce are within the act was presented in *Borella v. Borden Co.*,[84] recently decided by the Circuit Court of Appeals for the Second Circuit. No actual production took place in the building where the maintenance workers were employed[85] and administrative and executive officers housed in the building did not come into physical contact with the goods at any stage of their production. Under the doctrine of the *McLeod* case, these employees were not engaged in interestate commerce and coverage, therefore, had to be predicated upon

supplying watch service to customers engaged in production of goods for interstate commerce. Walling v. New Orleans Private Patrol Service, Inc., (D. C. La. 1944) 57 F. Supp. 143; Walling v. Lum, (D. C. Miss. 1944) 7 W. H. Rep. 570; Walling v. Fox-Pelletier International Detective Agency, Inc., (D. C. Tenn. 1944) 7 W. H. Rep. 553; Haley v. Central Watch Service, (D. C. Ill. 1944) 7 W. H. Rep. 144; Walling v. Wattam, (D. C. Tenn. 1943) 6 W. H. Rep. 1119. In Noonan v. Fruco Construction Co., (C. C. A. 8th, 1943) 140 F. (2d) 633, the act was held inapplicable to watchmen employed to guard a plant under construction which was "specially designed" for the manufacture of munitions to be shipped in interstate commerce on the ground that the watchmen's activities were in an occupation necessary to the production of the plant rather than to the production of munitions for commerce. Similarly in Lyons v. H. K. Ferguson Co., (La. Ct. App. 1944) 7 W. H. Rep. 240, the act was held inapplicable to a watchman employed by an engineering company engaged in construction of buildings to be used in processing raw materials intended to be shipped in interstate commerce.

[82] Armour & Co. v. Wantock, (U. S. 1944) 65 S. Ct. 165, rehearing denied 13 U. S. L. W. 3268 (1945).

[83] See note 56, supra.

[84] (C. C. A. 2d, 1944) 145 F. (2d) 63, cert. granted 13 U. S. L. W. 3268 (1945).

[85] The portion of the building not occupied by the administrative staff of the Borden Co. was leased to others who did not produce goods for interstate commerce on the premises.

their being engaged in production of goods for such commerce. The court, after pointing out that under the Kirschbaum holding these employees would be engaged in production of goods for interstate commerce when they cared for quarters of those manufacturing or handling goods because those who make or handle goods are so engaged and caretakers' work is "necessary" to their activities, argued that these employees were nearer to "production" in one respect than those in the *Kirschbaum* case in that they were employed directly by the manufacturer instead of by the manufacturer's lessor; but they were farther from "production" if that term must be confined to actual contact with the raw material or the finished product. ". . . But it seems to us that the circumstance that administrative officials do not come in physical contact with the goods at any stage of their production, could not have been thought relevant to the object to be attained. We can conjure up no reason that could have induced Congress, having included employees who made tenantable the quarters of artisans and shipping clerks, to exclude those who made tenantable the quarters of the president, the managers, the cashiers, superintendents and the rest."[86] Accordingly, the court concluded that persons who comprise management as well as those physically engaged in the manufacture of goods are so engaged in production as defined by the act to bring maintenance employees of the office building in which management is located within the scope of the act. The same court subsequently concluded that, in determining whether a substantial portion of tenants were engaged in production of goods for commerce, executive and sales offices of concerns carrying on elsewhere mining and manufacturing businesses were to be regarded as occupied by those engaged in production of goods for commerce.[87]

Circuit courts of appeals in two circuits have held within the scope of the act cooks engaged in preparing food for logging and pulpwood cutting crews where products subsequently manufactured from the logs and pulpwood moved in interstate commerce.[88] The work of the cooks was regarded as a process or occupation necessary to the production of lumber and pulpwood products destined to move interstate. As indicated above, a cook serving meals to a maintenance-of-way crew of

[86] 145 F. (2d) 63 at 65.

[87] Callus v. 10 E. 40th St. Bldg., (C. C. A. 2d, 1944) 7 W. H. Rep. 1208, cert. applied for, 13 U. S. L. W. 3289 (1945). Cf. Rucker v. First Nat. Bank of Miami, (C. C. A. 10th, 1943) 138 F. (2d) 699, cert. denied 321 U. S. 769, 64 S. Ct. 524 (1944); Cullen v. Stone & Webster Bldg., Inc., (D. C. N. Y. 1943) 7 W. H. Rep. 147.

[88] Hanson v. Lagerstrom, (C. C. A. 8th, 1943) 133 F. (2d) 120; Consolidated Timber Co. v. Womack, (C. C. A. 9th, 1942) 132 F.(2d) 101.

an interstate railroad was held to be outside the act in the *McLeod* case on the ground that his activities were not actually in or so closely related to the movement of commerce as to be a part of it. But "the test of whether one is in commerce is obviously more exacting than the test of whether his occupation is necessary to production for commerce."[89] In a recent district court decision,[90] the act was held inapplicable to employees of an independent contractor operating eating places located at manufacturing plants to serve only workers there employed. The court argued that furnishing of food was not necessary to production of goods in the plants, but rather the employees were supplying personal needs of the workers. The case was distinguished from the two cases involving cooks preparing food for crews engaged in lumbering operations on the ground that there the cookhouses were an integral part of the business of the employer and maintained as a part of its business. Here, on the other hand, the eating places were operated for profit by an independent contractor as separate establishments; the food was sold not as a company service but for the convenience of the plant employees; and there was no showing that the services rendered by these independent establishments were a means whereby the manufacturer accomplished the purpose of its existence. "The court is convinced that in cases where the production of goods is in an isolated spot where board cannot be readily obtained by employees, that it would be necessary for the company to furnish board to its employees, and in such cases the furnishing of the board would be a necessary part of the production of the goods. But where an independent contractor furnishes and makes available a service to employees of a plant and it is not shown that this service is a part of the manufacturer's business, then the service in furnishing food and refreshments is for the convenience but not necessity of the employees of the manufacturer, and service is not bound by such a close tie as makes the service thus made available to the plant employees necessary to the production of the goods."[91] There is no sound basis upon which the act's coverage can be extended to employees whose services satisfy needs of workers engaged in production of goods for interstate commerce when such needs are entirely personal and arise independently of the production process rather than in connection with that process, but in practice this distinction is sometimes difficult to draw.[92]

[89] Armour & Co. v. Wantock, (U. S. 1944) 65 S. Ct. 165 at 167-168.

[90] Kuhn v. Canteen Food Service, (D. C. Ill. 1944) 8 W. H. Rep. 12.

[91] 8 W. H. Rep. 12 at 15.

[92] See Castaing v. Puerto Rican American Sugar Refinery, (C. C. A. 1st, 1944) 145 F. (2d) 403.

The cases so far discussed, while indicating the factors regarded as material in particular situations, do not yield any all-embracing formula to determine when the relation of an activity to production of goods for interstate commerce is sufficiently tenuous to preclude employees from the benefits of the act. But it is clear that courts in general have inclined to liberal construction of the phrase "production of goods for commerce," laying down less exacting tests than in the case of employees where coverage is predicated upon their being "engaged in commerce," because of the inclusion of necessary processes or occupations in the statutory definition of production.

C. *Interstate Commerce Once Removed*

The test of coverage where the employee's work is necessary for production of goods for commerce is not whether the goods are shipped interstate by the employer but whether the goods are intended for interstate commerce directly or through an intermediary.[93] Thus sale of a product by the original producer at the place of production does not necessarily constitute a transaction complete in itself without reference to activities of purchasers so as to insulate the producer from application of the act. The question is whether the producer knows or has reason to know that his product will be shipped interstate by himself or by others. In the event that further processing takes place after local sale by the original producer, the goods of the original producer form a "part or ingredient"[94] of the finished product moving interstate and his employees are performing the first steps in a series of operations that produce articles going into commerce.

On the basis of this reasoning, the act has been held applicable to employees of concerns making containers destined to be used by local purchasers for shipment of their products interstate;[95] to employees of companies supplying electricity and water to local customers who are engaged in production of goods for interstate commerce;[96] and to em-

[93] Dize v. Maddrix, (C. C. A. 4th, 1944) 7 W. H. Rep. 827; cert. granted 13 U. S. L. W. 3204 (1944), but limited to questions not material to this point; Wagner v. American Service Co., (D. C. Iowa 1944) 7 W. H. Rep. 1121.

[94] The act [§ 3(i)] defines goods as meaning "goods, . . . wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof. . . ." 52 Stat. L. 1061 (1938), 29 U. S. C. (1940), § 203(i).

[95] Dize v. Maddrix, (C. C. A. 4th, 1944) 7 W. H. Rep. 827, cert. granted 13 U. S. L. W. 3204 (1944) but limited to questions not material to this point; Walling v. Villaume Box & Lumber Co., (D. C. Minn. 1943) 6 W. H. Rep. 544. For earlier cases, see 41 MICH. L. REV. 1060 at 1082 (1943).

[96] Reynolds v. Salt River Valley Water Users Ass'n., (C. C. A. 9th, 1944) 143 F. (2d) 863, cert. denied (U. S. 1944) 65 S. Ct. 117; Allen v. Arizona Power Corp.,

ployees of companies manufacturing ice for local sale to customers for refrigeration of interstate shipments of perishable products.[97]

III

CONSTRUCTION AND REPAIR OF FACILITIES USED IN PRODUCTION OF GOODS FOR COMMERCE

A. *New Construction*

Courts generally have taken the position that employees engaged in new construction are not within the scope of the act, even though building materials used in the construction have come from out-of-state sources.[98] The reasoning here seems to be that the local construction project is not yet in use for the production of goods for interstate commerce and any out-of-state materials used in construction come to rest upon delivery at the building site. The act has been held to apply, however, to employees engaged in shipping, transporting and unloading building materials, tools, and equipment moving in interstate or foreign commerce.[99] Such employees are concerned with the movement of goods which have acquired an interstate situs and consequently they are "engaged in commerce."

B. *Maintenance and Repair*

Employees engaged in repairing buildings and machinery used in producing goods for interstate commerce appear to be within the act.[100] Maintenance and repair of buildings and equipment actively in use in production of goods for interstate commerce are clearly occupations necessary to the production of goods for interstate commerce. The more troublesome case is where it is not clear that plant facilities presently not in use are to be used after repair for production of goods

(D. C. Arizona 1943) 7 W. H. Rep. 395; Richardson v. Delaware Housing Ass'n., (D. C. Fla. 1943) 6 W. H. Rep. 473.

[97] Chapman v. Home Ice Co., (C. C. A. 6th, 1943) 136 F. (2d) 353, cert. denied 320 U. S. 761, 64 S. Ct. 72 (1943); Wagner v. American Service Co., (D. C. Iowa 1944) 7 W. H. Rep. 1121; Anderson v. Atlantic Co., (D. C. Ga. 1943) 6 W. H. Rep. 671.

[98] Wells v. Ford, Bacon & Davis, (C. C. A. 6th, 1944) 7 W. H. Rep. 1174; Barbe v. Cummins Const. Corp., (C. C. A. 4th, 1943) 138 F. (2d) 667; Scott v. Ford, Bacon & Davis Inc., (D. C. Pa. 1944) 55 F. Supp. 982; Trefs v. Foley Bros., (D. C. Mo. 1943) 6 W. H. Rep. 921. See also Noonan v. Fruco Const. Co., (C. C. A. 8th, 1943) 140 F. (2d) 633.

[99] Clyde v. Broderick, (C. C. A. 10th, 1944) 144 F. (2d) 348; Simpkins v. Elmhurst Contracting Co., 181 Misc. 791, 46 N. Y. S. (2d) 26 (1944); Steiner v. Pleasantville Constructors, (N. Y. 1944) 7 W. H. Rep. 1126.

[100] Walling v. Roland Electrical Co., (C. C. A. 4th, 1945) 8 W. H. Rep. 82. See 6 W. H. Rep. 122; 41 MICH. L. REV. 1080 at 1086 (1943).

for interstate commerce rather than for purposes purely local in characatcer.[101]

CONCLUSIONS

No all-embracing formula has been laid down by the courts to determine when employees are within the scope of the act. In view of the employee test of coverage, the scope of the act can be determined only by the gradual process of inclusion and exclusion applied to a wide variety of fact situations. This process of blocking out the area of federal wage and hour regulation under the act on a case-by-case basis requires decision of a large number of cases before the act's coverage is fully determined. The status of certain types of employees under the act is now settled; the status of others must await future decisions.

Courts generally have applied a more exacting test in determining whether employees are engaged in commerce than in determining whether they are engaged in production of goods for commerce because of the inclusion processes or occupations in the statutory definition of the latter phrase. The test laid down in the *McLeod* case limits employments in commerce to activities actually in or so closely related to the movement of commerce as to be a part of it. Where it has been urged upon courts that the establishment of a dual standard leads to results which are unsatisfactory from an economic standpoint, the answer generally has been that the courts cannot disregard the definitive language of Congress and indulge in an "expansion of meaning which properly deserves the stigma of judicial legislation."

The act reaches production of goods before interstate movement has begun, extending backward to employees of the producers of goods intended in the normal course of business to move immediately in interstate commerce and to employees of the producers of goods which are a part or ingredient of the goods of another or whose goods are further processed by another who in the normal course of business would ship them interstate It applies to those actually engaged in the physical processes of production; to those whose activities are necessary to production; and to those who actually operate and maintain essential instrumentalities by which interstate commerce is conducted. No hard and fast rule can be laid down to determine what is necessary to production of goods for interstate commerce; rather what is required is a practical judgment as to whether the particular employer actually operates the work as part of an integrated effort for the production of goods.

[101] Cf. Weaver v. Pittsburgh Steamship Co., (D. C. Ohio, 1944) 8 W. H. Rep. 16, and Walling v. Craig, (D. C. Minn. 1943) 53 F. Supp. 479, where this question is raised with respect to employees "engaged in commerce."

The act reaches forward to the distributive functions, covering at least employees of independent wholesalers a substantial part of whose activities involve procurement or receipt of goods from out of state and handling or delivering to local customers goods of out-of-state origin pursuant to either special orders or pre-existing contracts or understandings with customers and warehouse employees of chain stores engaged in ordering and procuring goods from other states and unloading and checking them before they are deposited on the unloading platform of the warehouse. There is still uncertainty, however, as to the status of warehouse employees of independent wholesalers and chain store organizations whose activities are performed in connection with goods of out-of-state origin between receipt at the warehouse and subsequent local distribution either to independent retailers or to the chain's own retail outlets. The Supreme Court has indicated that, in the absence of special orders or pre-existing contracts or understandings with customers, the course of business of an independent wholesaler might be such as to establish that practical continuity in transit necessary to keep a movement of goods in commerce within the meaning of the act; but what evidence would be necessary to establish such a course of business is not clear. This practical continuity in transit test, although stated by the Supreme Court with respect to an independent wholesaler, would seem equally applicable to the chain store situation or to the distributing agency. It may be argued that, from an economic standpoint, "wholesale distribution is, by its very nature, in the stream of commerce running from manufacturers and producers through wholesaling channels to retailers or to industrial consumers [and] to hold that commerce ceases when the goods received from outside the state are unloaded, to stay in the warehouse temporarily, is to set up legal fiction without relation to economic realities."[102] Acceptance of the theory that goods of out-of-state origin remain in the stream of interstate commerce until they reach their ultimate destination—the independent local retail outlet or the importer's own local retail outlet —and employees handling such goods are within the scope of the act until the goods reach this ultimate destination intended or contemplated by the importer when he set in motion the interstate shipment would avoid the necessity of examining the course of business of the importer and would extend the benefits of the act to all employees performing substantially similar work. But the courts have not been willing to lay down any such all-embracing rule.

[102] Weiss, "Economic Coverage of the Fair Labor Standards Act," 58 Q. J. Econ. 460 at 474 (1944).