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THE Fair Labor Standards Act[1] was upheld by the Supreme Court as a valid exercise of the commerce power in *United States v. Darby*.[2] By expressly overruling *Hammer v. Dagenhart*[3] and limiting the application of *Carter v. Carter Coal Co.*,[4] the Court recognized that production is not to be divorced from commerce and extended greatly the range of Congressional control over substandard labor conditions through exercise of the commerce power. There remained, however, the determination of the coverage of the act, which is essentially a problem of statutory delineation in the application of the act to particular fact situations presented to the courts. The Supreme Court has indicated the nature of the problem in a recent case:

> "To search for a dependable touchstone by which to determine whether employees are 'engaged in commerce or in the production of goods for commerce' is as rewarding as an attempt to square the circle. The judicial task in marking out the extent to which Congress has exercised its constitutional power over commerce is not that of devising an abstract formula. Perhaps in no domain of public law are general propositions less helpful and indeed more mischievous than where boundaries must be drawn, under a federal enactment, between what it has taken over for administration by the central Government and what it has left to the States. ... The expansion of our industrial economy has inevitably been reflected in the extension of federal authority over economic enterprise and its absorption of authority previously possessed by the States. Federal legislation of this character cannot therefore be construed without regard to the implications of our dual system of government."[5]

The problem of statutory delineation is difficult because of the wide variety of organizational patterns under which modern business is car-

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

[2] 312 U. S. 100, 61 S. Ct. 451 (1941). See also Opp Cotton Mills v. Administrator, 312 U. S. 126, 61 S. Ct. 524 (1941).

[3] 247 U. S. 251, 38 S. Ct. 529 (1918).

[4] 298 U. S. 238, 56 S. Ct. 855 (1936).

[5] Kirschbaum Co. v. Walling, 316 U. S. 517 at 520, 62 S. Ct. 1116 (1942).

ried on, with the result that decisions covering a given situation may not be applicable to other situations which appear on the surface to be similar but which in substance differ because of the presence or absence of certain facts. The scope of the act can be defined only by the gradual process of inclusion and exclusion as applied to a wide variety of fact situations, and since the act has been in effect for only a relatively short period, it must be recognized that its coverage is still unsettled except as to certain situations upon which the Supreme Court has given opinions. However, certain general concepts, applicable to varying fact situations, have emerged from the decisions, and with these as guides, the general outlines of the act's coverage are becoming clearer.

The problem of statutory delineation involves consideration of (1) the legislative history of the act; and (2) its language, construed in light of the policy of Congress[6] and "the implications of our dual system of government."

I

LEGISLATIVE HISTORY AND LANGUAGE OF THE ACT

A. *Legislative History*

In one of its intermediate stages the bill incorporated the Shreveport[7] doctrine, being applicable to intrastate production under substandard labor conditions which competed with goods produced in other states.[8] But this provision was rejected and, as passed by the House, the bill applied to employers "engaged in commerce in any industry affecting commerce."[9] However, as recommended by the conference committee, it applied only to employers "engaged in commerce or in the production of goods for commerce."[10] An examination of Congressional debates on the measure indicates that it was not intended to extend to all employees of an industry which was engaged in interstate commerce but only to those employees who themselves were engaged either in interstate commerce or in the production of goods for interstate commerce.[11]

[6] See § 2 of the act, 52 Stat. L. 1060 (1938), 29 U. S. C. (1940), § 202.

[7] Houston, E. & W. Texas Ry. v. United States, 234 U. S. 342, 34 S. Ct. 833 (1914).

[8] S. 2475, § 8a, 75th Cong., 1st Sess. (1937).

[9] H. REP. 2182, 75th Cong., 3d Sess. (1938), p. 2.

[10] H. REP. 2738, 75th Cong., 3d Sess. (1938), pp. 29-30.

[11] See statement of Senator Pepper, 83 CONG. REC. 9168 (1938).

B. *Language of the Act*

The minumum 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."[12] The term "produced" as used in the act is defined [§ 3 (j)] as "produced, manufactured, mined, handled, or in any other manner worked on in any State; and . . . 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."[13] "Goods" [§ 3 (i)] means "goods . . . wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof."[14] It is made unlawful [§ 15 (a) (1)] for any person "to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7"[15] and [§ 15 (b)] "proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods."[16]

"Engaged in commerce or in the production of goods for commerce"[17] is narrower than the language employed in many other federal regulatory statutes—"current of commerce,"[18] "in restraint of

[12] 52 Stat. L. 1062, 1063 (1938), 29 U. S. C. (1940), §§ 206 (a), 207 (a).
[13] 52 Stat. L. 1061 (1938), 29 U. S. C. (1940), § 203 (j).
[14] 52 Stat. L. 1061 (1938), 29 U. S. C. (1940), § 203 (i).
[15] 52 Stat. L. 1068 (1938), 29 U. S. C. (1940), § 215 (a) (1).
[16] 52 Stat. L. 1069 (1938), 29 U. S. C. (1940), § 215 (b).
[17] The phrase "in commerce" or its equivalent was used in the Motor Carrier Act, § 202 (b), 49 Stat. L. 543 (1935), as amended by 54 Stat. L. 920 (1940), 49 U. S. C. (1940), § 302 (a); Interstate Transportation of Petroleum Products Act, §§ 3, 4, 49 Stat. L. 31 (1935), 15 U. S. C. (1940), §§ 715b, 715c; Cotton Standards Act, § 2, 42 Stat. L. 1517 (1923), 7 U. S. C. (1940), § 52; Naval Stores Act, § 5, 42 Stat. L. 1436 (1923), 7 U. S. C. (1940), § 95; Grain Standards Act, § 4, 39 Stat. L. 483 (1916), 7 U. S. C. (1940), § 76; Federal Trade Commission Act, § 5, 38 Stat. L. 719 (1914), as amended by 52 Stat. L. 111 (1938), 15 U. S. C. (1940), § 45.
[18] Tobacco Inspection Act, § 1 (i), 49 Stat. L. 731 (1935), 7 U. S. C. (1940),

commerce,"[19] "affecting commerce,"[20] and "burden and obstruct the normal channels of interstate commerce."[21] Therefore decisions as to the coverage of other federal regulatory statutes couched in broader language cannot be relied upon as controlling in determining the scope of the act.[22]

The power of Congress to regulate interstate commerce is plenary and may be extended to activities which, when isolated, are essentially local in character, but which injuriously affect interstate commerce or the free flow of goods in interstate commerce;[23] but when Congress has seen fit to regulate activities which in isolation are local in order to protect interstate commerce, its purpose has generally been stated explicitly.[24] Considering the language of the act, viewed in light of its legislative history, it is clear that its scope is not coextensive with the limits of Congressional power over commerce, since it does not extend to activities which merely "affect" commerce.[25] This has doubtless been in part the reason for a narrow interpretation of the language of the

§ 511 (i); Grain Futures Act, § 2(b), 42 Stat. L. 999 (1922), 7 U. S. C. (1940), § 3; Packers and Stockyards Act, § 2, 42 Stat. L. 160 (1921), 7 U. S. C. (1940), § 183.

[19] Sherman Anti-Trust Act, § 1, 26 Stat. L. 209 (1890), as amended by 50 Stat. L. 693 (1937), 15 U. S. C. (1940), § 1.

[20] Bituminous Coal Act, § 4A, 50 Stat. L. 83 (1937), 15 U. S. C. (1940), § 834; National Labor Relations Act, § 10 (a), 49 Stat. L. 453 (1935), 29 U. S. C. (1940), § 160; Federal Employers' Liability Act, § 1, 35 Stat. L. 65 (1908), as amended by 53 Stat. L. 1404 (1939), 45 U. S. C. (1940), § 51.

[21] Agricultural Marketing Agreement Act, § 1, 48 Stat. L. 31 (1933), as amended by 50 Stat. L. 246-247 (1937), 7 U. S. C. (1940), § 601.

[22] See Overstreet v. North Shore Corp., (U. S. 1943) 63 S. Ct. 494; Walling v. Jacksonville Paper Co., (U. S. 1943) 63 S. Ct. 332; Kirschbaum Co. v. Walling, 316 U. S. 517, 62 S. Ct. 1116 (1942).

[23] United States v. Wrightwood Dairy Co., 315 U. S. 110, 62 S. Ct. 523 (1942); United States v. Darby, 312 U. S. 100, 61 S. Ct. 451 (1941); National Labor Relations Board v. Fainblatt, 306 U. S. 601, 59 S. Ct. 668 (1939); Santa Cruz Fruit Packing Co. v. National Labor Relations Board, 303 U. S. 453, 58 S. Ct. 656 (1938); National Labor Relations Board v. Jones & Laughlin Steel Corp, 301 U. S. 1, 57 S. Ct. 615 (1937); Thornton v. United States, 271 U. S. 414, 46 S. Ct. 585 (1926); Board of Trade of Chicago v. Olson, 262 U. S. 1, 43 S. Ct. 470 (1923); Houston, E. & W. Texas Ry. v. United States, 234 U. S. 342, 34 S. Ct. 833 (1914).

[24] Federal Trade Commission v. Bunte Brothers, 312 U. S. 349, 61 S. Ct. 580 (1941). See National Labor Relations Act, § 2(7), 49 Stat. L. 450 (1935), 29 U. S. C. (1940), § 152 (7); Bituminous Coal Act, § 4A, 50 Stat. L. 83 (1937), 15 U. S. C. (1940), § 834; Federal Employers' Liability Act, § 1, 35 Stat. L. 65 (1908), as amended by 53 Stat. L. 1404 (1939), 45 U. S. C. (1940), § 51.

[25] Overstreet v. North Shore Corp., (U. S. 1943) 63 S. Ct. 494; Higgins v. Carr Bros. Co., (U. S. 1943) 63 S. Ct. 337; Kirschbaum Co. v. Walling, 316 U. S. 517, 62 S. Ct. 1116 (1942).

act by certain lower federal courts;[26] but recent decisions of the Supreme Court indicate that this is not a ground for excessive restriction of coverage. In *Overstreet v. North Shore Corporation*[27] the Court said:

> "...But the policy of Congressional abnegation with respect to occupations affecting commerce is no reason for narrowly circumscribing the phrase 'engaged in commerce.' ...'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.'"

II

GENERAL TEST OF COVERAGE

The act does not provide for blanket coverage of industries as a whole.[28] The test of coverage is the relation of the activities of the individual employee to interstate commerce or the production of goods for interstate commerce rather than the nature of the employer's business.[29] It is not enough that the employer himself be engaged in commerce or in the production of goods for commerce.[30] Under the employee test, some employees in a given industry may be covered and others not;[31] and some employees may be covered at one time but, when engaged in other activities, be outside the scope of the act.[32]

The application of the act is not dependent upon the size of the industry nor upon the amount of goods shipped in interstate com-

[26] These cases are discussed in succeeding sections.

[27] (U. S. 1943) 63 S. Ct. 494 at 496, quoting Walling v. Jacksonville Paper Co., (U. S. 1943) 63 S. Ct. 332 at 335.

[28] Foster v. National Biscuit Co., (D. C. Wash. 1940) 31 F. Supp. 552.

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

[30] Jax Beer Co. v. Redfern, (C. C. A. 5th, 1941) 124 F. (2d) 172; Wood v. Central Sand & Gravel Co., (D. C. Tenn. 1940) 33 F. Supp. 40; Foster v. National Biscuit Co., (D. C. Wash. 1940) 31 F. Supp. 552.

[31] See Interpretative Bull. 5, § 9, 1942 WAGE AND HOUR MANUAL 28 (hereafter cited W. H. MAN.). The act may apply to separate parts of an employer's business while other parts are exempt. Davis v. Goodman Lumber Co., (C. C. A. 4th, 1943) 133 F. (2d) 52; Fleming v. Hawkeye Button Co., (C. C. A. 8th, 1940) 113 F. (2d) 52.

[32] See Interpretative Bull. 5, § 9, 1942 W. H. MAN. 28. The Wage & Hour Division has taken the position that the workweek is the standard; if in any workweek an employee produces goods for commerce and also produces goods to be sold for local consumption, he is entitled to both the wage and hour benefits for all the time worked during that week. The proportion of the employee's time spent in each type of work is not material. Id.

merce;[33] nor is it material whether the goods so shipped constitute the principal product of the producer, since one employer may ship in commerce as a byproduct a volume of goods greatly exceeding the principal production of another employer.[34] The character rather than the size of an activity is determinative.[35] Congress, in attempting to suppress nationwide competition in interstate commerce by goods produced under substandard labor conditions, has recognized that the maintenance of such substandard conditions in a particular industry by a few employers is likely to lower standards for the whole industry[36] and that the competition of many small producers may, in the aggregate, be sufficient to depress labor conditions generally.[37]

A number of cases attempt to distinguish between a small producer who ships all of his product across state lines and a producer, large or small, who ships occasionally an inconsequential part of his total output in interstate commerce. If a "substantial" part of a concern's business is interstate, federal control may be exercised over the whole enterprise;[38] but if only a small part of a concern's output moves out-of-state, many courts have applied the *de minimis* doctrine.[39] There is no

[33] United States v. Darby, 312 U. S. 100, 61 S. Ct. 451 (1941); Walling v. Peoples Packing Co., (C. C. A. 10th, 1942) 132 F. (2d) 236, cert. denied (U. S. 1943) 63 S. Ct. 831; Wood v. Central Sand & Gravel Co., (D. C. Tenn. 1940) 33 F. Supp. 40.

[34] Walling v. Peoples Packing Co., (C. C. A. 10th, 1942) 132 F. (2d) 236, cert. denied (U. S. 1943) 63 S. Ct. 831.

[35] Davis v. Goodman Lumber Co., (C. C. A. 4th, 1943) 133 F. (2d) 52.

[36] H. REP. 2182, 75th Cong., 3d Sess. (1938), p. 7.

[37] United States v. Darby, 312 U. S. 100, 61 S. Ct. 451 (1941).

[38] Walling v. Peoples Packing Co., (C. C. A. 10th, 1942) 132 F. (2d) 236, cert. denied (U. S. 1943) 63 S. Ct. 831; Collins v. Kidd Dairy & Ice Co., (C. C. A. 5th, 1942) 132 F. (2d) 79; Snyder v. Casale, (D. C. N. Y. 1942) 5 WAGE & HOUR REPORTER 222 (hereafter cited W. H. REP.); Drake v. Hirsch, (D. C. Ga. 1941) 40 F. Supp. 290; Nelson v. Southern Ice Co., (D. C. Tex. 1941) 4 W. H. REP. 562; Wood v. Central Sand & Gravel Co., (D. C. Tenn. 1940) 33 F. Supp. 40. See note 60, infra, and the discussion, infra, of Walling v. Jacksonville Paper Co. (U. S. 1943) 63 S. Ct. 332.

[39] Gaston v. Dalton Ice Co., (D. C. Ga. 1943) 6 W. H. REP. 241; Zehring v. Brown Materials, (D. C. Cal. 1943) 48 F. Supp. 740; Patschke v. Murphy Butter & Egg Co., (D. C. Ill. 1943) 6 W. H. REP. 114; Brown v. Tracy Bottling Co., (D. C. Minn. 1942) 5 W. H. REP. 502; Adams v. Wewoka Brick & Tile Co., (D. C. Okla. 1942) 5 W. H. REP. 338; Baker v. Chapman Dairy Co., (D. C. Mo. 1942) 5 W. H. REP. 56; Goldberg v. Worman, (D. C. Fla. 1941) 37 F. Supp. 778; Owens v. Gifford-Hill Pipe Co., (D. C. Tex. 1941) 4 W. H. REP. 697; Morrow v. Lee Baking Co., (D. C. Ga. 1941) 4 W. H. REP. 458; Hooks v. Nashville Breeko Block & Tile Co., (D. C. Tenn. 1941) 39 F. Supp. 369; Kidd v. Royal Crown Bottling Co., (Tenn. App. 1942) 6 W. H. REP. 115; Whitson v. Wexler, (Tenn. Ch. 1941) 4 W. H. REP. 91.

objective test to determine the precise point at which interstate sales become "substantial" or when occasional sales become regular, with the result that there is considerable divergence among lower federal courts as to when the *de minimis* doctrine may appropriately be applied.

The impact upon interstate commerce, although it may vary in intensity, is still present whether products of substandard labor move from one producer in large lots or from many producers in small lots; hence the *de minimis* doctrine should be applied only in those cases of occasional interstate shipment where the effects on interstate commerce are reasonably certain to be slight in the aggregate.

III

EMPLOYEES "ENGAGED IN COMMERCE"

The Wage and Hour Division has defined employees "engaged in commerce" to include typically those employed in the telephone, telegraph,[40] radio, and transportation[41] industries which serve as actual instrumentalities and channels of interstate commerce and those who are an essential part of the stream of interstate commerce—e.g., employees of warehouses whose storage facilities are used in the interstate distribution of goods.[42]

The cases involving employees "engaged in commerce" are concerned principally[43] with (1) employees in distributive trades; and (2) employees maintaining, repairing, and operating instrumentalities of interstate commerce.

A. *Employees in Distribution Trades*[44]

The majority of cases distinguish between employees who participate in the receipt of goods from other states and those whose contact

[40] Moss v. Postal Telegraph-Cable Co., (D. C. Ga. 1941) 42 F. Supp. 807, holds that the branch manager of a company engaged in transmitting messages interstate, and whose duties included sending and receiving telegrams, was within the act.

[41] Sec. 13 (b) of the act provides that the provisions of § 7 shall not apply to any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours pursuant to the Motor Carrier Act of 1935 or to employees of any employer subject to Part I of the Interstate Commerce Act. 52 Stat. L. 1068 (1938), 29 U. S. C. (1940), § 213 (b).

[42] Interpretative Bull. 1, § 4, 1942 W. H. MAN. 23.

[43] See the discussion of building maintenance employees, infra.

[44] Sec. 13 (a) of the act provides that the minimum wage and maximum hour provisions shall not apply to any employee employed in a local retailing capacity or in the capacity of outside salesman or to any employee engaged in any retail or service establishment the greater part of whose selling or service is intrastate. 52 Stat. L. 1067 (1938), 29 U. S. C. (1940), § 213 (a).

with the goods comes only after receipt at the employer's warehouse. Employees ordering,[45] transporting,[46] checking,[47] and unloading[48] goods imported from other states are within the act. Likewise employees who participate in the sale and delivery of goods from the employer's warehouse to customers in other states are included.[49] The difficult problems have arisen with respect to employees whose contact with the goods occurs between receipt at the employer's warehouse and subsequent delivery to the customer. The cases involve two types of fact situations: (1) goods imported from other states by wholesale distributors for subsequent local distribution to independent retail establishments; and (2) goods imported from other states for subsequent local distribution, not in anticipation of retail demands of others, but to meet the requirements of the importer's own local retail outlets.

Two conflicting theories have been followed by lower federal courts in cases of the first type involving the independent wholesaler. With the *Schechter*[50] decision as a starting point, the majority of courts, fol-

[45] Walling v. Goldblatt Bros., (C. C. A. 7th, 1942) 128 F. (2d) 778, cert. denied (U. S. 1943) 63 S. Ct. 528; Walling v. Mutual Wholesale Food & Supply Co., (D. C. Minn. 1942) 46 F. Supp. 939; Eddings v. Southern Dairies, (D.C.S.C. 1942) 42 F. Supp. 664; Drake v. Hirsch, (D. C. Ga. 1941) 40 F. Supp. 290.

[46] Walling v. Sanders, (D. C. Tenn. 1942) 48 F. Supp. 9; Gerdert v. Certified Poultry & Egg Co., (D. C. Fla. 1941) 38 F. Supp. 964; Fleming v. Alterman, (D. C. Ga. 1941) 38 F. Supp. 94.

[47] Walling v. American Stores Co., (C. C. A. 3d, 1943) 133 F. (2d) 840; Walling v. Goldblatt Bros., (C. C. A. 7th, 1942) 128 F. (2d) 778, cert. denied (U. S. 1943) 63 S. Ct. 528; Walling v. Mutual Wholesale Food & Supply Co., (D. C. Minn. 1942) 46 F. Supp. 939.

[48] Walling v. American Stores Co., (C. C. A. 3d, 1943) 133 F. (2d) 840; Walling v. Goldblatt Bros., (C. C. A. 7th, 1942) 128 F. (2d) 778, cert. denied (U. S. 1943) 63 S. Ct. 528; Super-Cold Southwest Co. v. McBride, (C. C. A. 5th, 1941) 124 F. (2d) 90; Walling v. Mutual Wholesale Food & Supply Co., (D. C. Minn. 1942) 46 F. Supp. 939; Walling v. Sanders, (D. C. Tenn. 1942) 48 F. Supp. 9; Klotz v. Ippolito, (D. C. Tex. 1941) 40 F. Supp. 422; Fleming v. Alterman, (D. C. Ga. 1941) 38 F. Supp. 94. In Gerdert v. Certified Poultry & Egg Co., (D. C. Fla. 1941) 38 F. Supp. 964, it was held that title and possession vested in the wholesaler upon delivery by the carrier and any movement thereafter was purely intrastate; therefore employees hauling goods from a depot and those unloading goods from interstate trucks into the store were not engaged in interstate commerce. Cf. Rauhoff v. Gramling & Co., (D. C. Ark. 1941) 42 F. Supp. 754.

[49] Walling v. Goldblatt Bros., (C. C. A. 7th, 1942) 128 F. (2d) 778, cert. denied (U. S. 1943) 63 S. Ct. 528; Walling v. Mutual Wholesale Food & Suppy Co., (D. C. Minn. 1942) 46 F. Supp. 939; Lewis v. Nailling (D. C. Tenn. 1940) 36 F. Supp. 187; Gibson v. Glasgow, 178 Tenn. 273, 157 S. W. (2d) 814 (1942). In Walling v. Jacksonville Paper Co., (U. S. 1943) 63 S. Ct. 332, it was not contended that delivery employees at branch warehouses delivering goods to customers in other states were not within the act. 63 S. Ct. 332 at 334.

[50] Schechter Poultry Corp. v. United States, 295 U. S. 495, 55 S. Ct. 837

lowing a "state of rest" theory, have argued that the goods complete their interstate journey when they come to rest in the wholesaler's warehouse, becoming intermingled with the mass of property subject to state control. Any subsequent activity in connection with such goods is purely intrastate and employees engaged in warehousing,[51], selling,[52] and distributing[53] to local customers consequently are outside the scope of the act. The "prior order" doctrine has also been used to reach the same conclusion, the act applying only where goods are imported pursuant to specific orders received by the wholesaler from his retail customers. Without such prior orders, the goods being ordered merely to meet anticipated future demands, interstate commerce ceases when the goods come to rest in the state and does not continue until demand eventuates in the form of an order and delivery is made to the retailer. The mere fact that an anticipated local transaction sets in motion a movement in interstate commerce is not sufficient to constitute the local transaction a part of interstate commerce.[54]

The Wage and Hour Division has opposed the "prior order" doctrine, arguing that the wholesaler, even in the absence of prior orders or contracts, attains a relatively high degree of certainty in his antici-

(1935). The Court said, "The mere fact that there may be a constant flow of commodities into a state does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the state and is there held solely for local distribution and use." 295 U. S. 495 at 543.

[51] Walling v. Mutual Wholesale Food & Supply Co., (D. C. Minn. 1942) 46 F. Supp. 939; Eddings v. Southern Dairies, (D. C. S. C. 1942) 42 F. Supp. 664; Hall v. Smith, (D. C. Ky. 1942) 5 W. H. REP. 637; Walling v. Sanders, (D. C. Tenn. 1942) 48 F. Supp. 9; Drake v. Hirsch, (D. C. Ga. 1941) 40 F. Supp. 290; Bock v. Hoffman, (Colo. 1942) 130 P. (2d) 691.

[52] Jax Beer Co. v. Redfern, (C. C. A. 5th, 1941) 124 F. (2d) 172; Eddings v. Southern Dairies, (D. C. S. C. 1942) 42 F. Supp. 664; Klotz v. Ippolito, (D. C. Tex. 1941) 40 F. Supp. 422; Abadie v. Cudahy Packing Co., (D. C. La. 1941) 37 F. Supp. 164.

[53] Swift & Co. v. Wilkerson, (C. C. A. 5th, 1941) 124 F. (2d) 176; Jax Beer Co. v. Redfern, (C. C. A. 5th, 1941) 124 F. (2d) 172; Moses v. McKesson & Robbins, (D. C. Tex. 1942) 43 F. Supp. 528; Walling v. Mutual Wholesale Food & Supply Co., (D. C. Minn. 1942) 46 F. Supp. 939; Walling v. Silver Bros. (D. C. N. H. 1942) 5 W. H. REP. 533; Porter v. Wilson & Co., (D. C. Tex. 1942) 5 W. H. REP. 152; Gerdert v. Certified Poultry & Egg Co., (D. C. Fla. 1941) 38 F. Supp. 964; Gibson v. Glasgow, 178 Tenn. 273, 157 S. W. (2d) 814 (1942).

Employees engaged in distributing "drop shipments" are within the act. Drake v. Hirsch, (D.C. Ga. 1941) 40 F. Supp. 290.

[54] Walling v. Goldblatt Bros., (C.C.A. 7th, 1942) 128 F. (2d) 778, cert. denied (U.S. 1943) 63 S. Ct. 528; Jewel Tea Co. v. Williams, (C.C.A. 10th, 1941) 118 F. (2d) 202; Walling v. Mutual Wholesale Food & Supply Co., (D.C. Minn. 1942) 46 F. Supp. 939; Rauhoff v. Gramling & Co., (D.C. Ark. 1941) 42 F. Supp. 754; Bock v. Hoffman, (Colo. 1942) 130 P. (2d) 691.

patory ordering. He does not buy to accumulate local stocks to meet demands as they arise but rather adjusts his orders to the anticipated demands of his usually stable clientele; therefore he knows with considerable certainty where goods are going without prior orders or contracts.[55] The "state of rest" and "prior order" doctrines in their rigid forms, while providing convenient rules-of-thumb, appear overly artificial and mechanical. In the present system of distribution, the distributor's warehouses are not necessarily the ultimate destination contemplated when interstate commerce is set in motion; but often there is a flow of goods into and through warehouses to retail stores in anticipation of recurring demands either from independent retail stores or from the distributor's own outlets. Therefore, any mechanical tests divorced from the methods of distribution followed by the particular distributor would seem unsatisfactory.

In conflict with the "state of rest" and "prior order" doctrines is the theory that the goods remain in the stream of interstate commerce until they reach their ultimate destination—the 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 wholesaler when he set in motion the interstate shipment.[56] Under this theory the wholesaler occupies an intermediate rather than a terminal position in the flow of goods in interstate commerce from manufacturers to retailers.

Walling v. Jacksonville Paper Co.,[57] the first independent wholesaler case to be decided by the Supreme Court, involved employees at branch warehouses receiving goods on interstate shipments and distributing them to local customers.[58] Some goods were shipped direct from mills to the company's customers; some were purchased on special orders from customers, consigned to branches for checking, and then delivered to the customers; but the bulk of the goods passed through the branch warehouses before delivery to customers. The evidence indi-

[55] 5 W. H. REP. 906–907 (1942).

[56] Fleming v. Alterman, (D.C. Ga. 1941) 38 F. Supp. 94; Gavril v. Kraft Cheese Co., (D.C. Ill. 1941) 42 F. Supp. 702. The act has been held applicable on the continuity of movement theory to employees of tobacco warehouses handling tobacco part of which came from out-of-state and most of which was shipped by purchasers to other states. Walling v. Lincoln Loose Leaf Warehouse Co., (D.C. Tenn. 1943) 6 W. H. REP. 68; Fleming v. Kenton Loose Leaf Tobacco Co., (D.C. Ky. 1941) 41 F. Supp. 255.

[57] (U.S. 1943) 63 S. Ct. 332.

[58] It was not contended that the act did not apply to delivery employees at other warehouses delivering goods to customers out-of-state. 63 S. Ct. 332 at 334.

cated that the company's customers constituted a fairly stable group whose orders were recurrent as to volume and kind of goods. Some items carried in stock were ordered only in anticipation of the needs of particular customers on the basis of a contract or understanding; and there was some evidence that branch managers, before placing orders for stock items, had a fair idea when and to whom the goods would be sold and could estimate with reasonable accuracy the immediate needs of customers, even in the absence of contracts calling for future deliveries. The circuit court of appeals, in reversing a district court holding that the act did not cover any of the branch house employees, held (1) that employees engaged in procuring and receiving goods across state lines were "engaged in commerce" within the meaning of the act; and (2) that where the wholesaler took an order from a customer, purchased the goods outside of the state, and shipped them in interstate commerce "with the definite intention that those goods be carried at once to that customer, and they are so carried, the whole movement is interstate" and those employees engaged in handling the goods to their final destination were "engaged in commerce."[59] The Supreme Court modified the strict interpretation of the circuit court of appeals, but at the same time rejected the contention of the adminisrator that all employees of wholesalers engaged in local distribution of goods of out-of-state origin whose customers form a stable group with orders recurrent as to volume and kind of goods should be brought within the coverage of the act. 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 preexisting contracts or understandings with customers.[60] It would appear that by implication employees delivering goods to customers from

[59] Fleming v. Jacksonville Paper Co., (C.C.A. 5th, 1942) 128 F. (2d) 395 at 398.

[60] In Ouendag v. Gibson, (D.C. Mich. 1943) 6 W. H. REP. 305, the act was held inapplicable to a salesman, office employee, store clerk, and maintenance employee whose employer operated a store and warehouse, selling within the state at retail and wholesale merchandise obtained from outside the state. The Court referred to the statement in the Jacksonville case that a "substantial part" of the work of the distributor's employees must be related to interstate commerce to bring them within the act, but found that the merchandise came to rest upon being unloaded at the warehouse and that the employees' activities in unloading goods from interstate trucks, placing orders for merchandise by mail, and making occasional trips outside the state to purchase merchandise did not constitute a "substantial part" of the work of the employees. Cf. Walling v. Reuter, (D.C. La., 1943) 6 W. H. REP. 385.

regular stocks maintained by wholesalers without any pre-existing contract or understanding would not be within the act.

In meeting the administrator's contention that under the decision of the circuit court any pause at the warehouse is sufficient to deprive the remainder of the journey of its interstate character, the Court said:

> "... The opinion of the Circuit Court of Appeals is susceptible of the interpretation that such a pause at the warehouse is sufficient to make the Act inapplicable to the subsequent movement of the goods to their intended destination. We believe, however, that the adoption of that view would result in too narrow a construction of the Act. 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. There is no indication . . . that, once the goods entered the channels of interstate commerce, Congress stopped short of control over the entire movement of them until their interstate journey was ended. No ritual of placing goods in a warehouse can be allowed to defeat that purpose. The entry of the goods into a warehouse interrupts but does not necessarily terminate their interstate journey. ...if the halt in the movement of goods is a convenient intermediate step in getting them to their final destinations, they remain 'in commerce' until they reach those points."[61]

In expanding the transactions covered by the act to include those carried on pursuant to pre-existing contracts or understandings with customers, the Court argued that such contracts or understandings, like special orders, indicate where it is intended the terminal point of interstate movement should be. Here again a temporary break in physical continuity of transit at the wholesaler's warehouse is not sufficient to end the interstate journey at the warehouse; nor will the fact that the wholesaler may treat the goods as stock in trade during an interval before their ultimate delivery to the customer or that title to the goods may pass to the wholesaler on intermediate delivery have this effect.

The Court rejected the argument that since wholesalers doing a local business are in competition with wholesalers whose business is interstate, the latter will be prejudiced if competitors are not required to meet the same labor standards, arguing that such a consideration would be pertinent only if the act extended to transactions "affecting" commerce. Likewise it rejected the administrator's contention that the act should apply whenever the wholesaler's customers constitute a stable group

[61] (U.S. 1943) 63 S. Ct. 332 at 335.

whose orders are recurrent as to volume and kind so that the needs of the trade can be estimated with precision. In rejecting this contention, however, the Court used this significant language,

> "... 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 the 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."[62]

Since the Court did not indicate what course of business would be sufficient to establish "practical continuity of transit necessary to keep a movement of goods 'in commerce'," the implications of the statement are not clear and the decision leaves still open an important segment of the independent wholesaler problem.

In a companion case, *Higgins v. Carr. Bros. Co.*,[63] the Supreme Court affirmed a holding of the Supreme Judicial Court of Maine,[64] denying application of the act to an employee of a wholesale produce firm distributing locally goods of out-of-state origin on the ground that interstate movement ended when the imported goods were unloaded at the wholesaler's warehouse. This decision, in view of the meager record of the distributor's course of business, adds little to solution of the independent wholesaler problem.

With respect to warehouse employees of distributors importing goods to meet the requirements of their own retail outlets—the typical chain store method of operation—the Supreme Court's refusal to review the decision in *Walling v. Goldblatt Bros.*[65] leaves in effect the

[62] (U.S. 1943) 63 S. Ct. 332 at 336.

[63] (U.S. 1943) 63 S. Ct. 337.

[64] Higgins v. Carr Bros., (Me. 1942) 25 A. (2d) 214.

[65] (C.C.A. 7th, 1942) 128 F. (2d) 778, cert. denied (U.S. 1943) 63 S. Ct. 528. Certiorari was denied subsequent to the decisions in Walling v. Jacksonville Paper Co. and Higgins v. Carr Bros., supra. The Goldblatt case was followed in Walling v. Wiemen Co., (D.C. Wis. 1943) 6 W. H. REP. 348. The district court in its opinion in the Goldblatt case held, with respect to shipments from warehouses in Illinois to the distributor's retail outlets in Indiana, that "The activities ... constitute intrastate commerce in every sense, save only for the physical presence of the state line between Illinois and Indiana. While the region where the activities are carried on embraces

holding of the circuit court of appeals that the line between coverage and noncoverage is the unloading platform of the warehouse. Employees ordering and procuring goods from other states, those who unload them at the distributor's warehouse, and those who check them before they are deposited on the unloading platform are within the act. But employees moving the goods into the warehouse, storing them, and making deliveries to the distributor's local retail outlets are excluded from coverage.[66] The reasoning with respect to chain store warehouse employees is analogous to that applied by the majority of lower federal courts in the independent wholesaler cases, and here too the "prior order" doctrine is followed.

In *Walling v. American Stores Co.*,[67] decided by the Circuit Court of Appeals for the Third Circuit subsequent to the decision of the Supreme Court in the *Jacksonville Paper Co.* case, it was held that the act applied to all employees at warehouses maintained by a chain store system for distribution of out-of-state goods to its local retail stores, such merchandise being ordered in anticipation of the regular and con-

portions of two states, nevertheless the activities themselves comprise a continuous and integrated business and economic unit, local in character. . . ." Fleming v. Goldblatt Bros., (D.C. Ill. 1941) 39 F. Supp. 701 at 705. The circuit court rejected this theory. Cf. Collins v. Kidd Dairy & Ice Co., (C.C.A. 5th, 1942) 132 F. (2d) 79, where a single town was divided by a state line.

[66] The "state of rest" theory was applied with respect to goods coming into a retailer's warehouse in Veazey Drug Co. v. Fleming, (D.C. Okla. 1941) 42 F. Supp. 689 at 696, where the court said, "If the edge of the dock and the rear end of the truck constituted this line [between intrastate and interstate commerce] and the driver of the truck and his helpers removed the goods to this line and they were received onto the dock side of the line by the defendant employees, to contend that said employees were acting in interstate commerce is certainly 'pushing' the construction of the statute to an extent not contemplated by the legislative body." The act has been held inapplicable on the "state of rest" theory to: (1) employees of branch warehouses of a company distributing out-of-state goods, Fleming v. McGehee, (D.C. Fla. 1941) 4 W. H. REP. 444; (2) employees in warehouses operated by a sugar company for storage of sugar pending subsequent distribution to its retail outlets, Rivera v. Central Aguirre Sugar Co., (D.C. P.R. 1941) 4 W. H. REP. 272; (3) truck drivers of a retail grocer making local deliveries of out-of-state goods from the company's warehouse to its retail stores, Fitzgerald v. Kroger Grocery & Baking Co., (D.C. Kan. 1942) 45 F. Supp. 812; (4) truck drivers of a dairy company making local deliveries of out-of-state goods, Walling v. Bridgeman-Russell Co., (D.C. Minn. 1942) 6 W. H. REP. 132; (5) tank-wagon salesmen making local deliveries of gasoline from employer's bulk plant, Riley v. Standard Oil Co., (Tenn. App. 1942) 6 W. H. REP. 47; (6) office and warehouse employees handling out-of-state goods for pharmacy company operating retail outlets, White v. Jacobs Pharmacy Co., (D.C. Ga. 1942) 47 F. Supp. 298. The act has been held applicable to employees of a power and light company engaged in local transmission, distribution, and sale of current manufactured in other states, Barker v. Georgia Power & Light Co., (D.C. Ga. 1942) 5 W. H. REP. 540.

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

tinuous requirements of the retail outlets. This decision, applying the "practical continuity of movement" doctrine of the *Jacksonville Paper Co.* case, carries coverage considerably beyond the limits set by the *Goldblatt* case.[68] As indicated above, the Supreme Court in the *Jacksonville Paper Co.* case stated that a wholesaler's course of business based on anticipation of needs of specific customers, rather than on prior orders or contracts, might at times be sufficient to establish that practical continuity of movement necessary to keep goods in commerce but found that the evidence in the record before it, of a wholly general character, did not indicate such a course of business. The court in the *American Stores* case stresses the fact that the evidence goes far beyond that of the *Jacksonville Paper Co.* case and that it is not dealing with the problem of an independent wholesaler, as was the Supreme Court in the latter case; rather the entire operation from purchase of the goods to ultimate sale is conducted by the chain store and the maintenance of the warehouse is not to break the continuity of movement but to make it even, economical, and uninterrupted.

The mechanical test of the *Goldblatt* case, applied without reference to the course of business with respect to the goods after they reach the unloading platform of the warehouse, appears questionable. The case of the chain store maintaining warehouses to serve its own retail outlets does not appear to differ so fundamentally from the case of the independent wholesaler maintaining warehouses to serve retail stores owned by others as to require the application of a different test of coverage. The basic issue in both cases should be whether, in a given fact situation, the evidence indicates continuity of movement through the warehouse to retail outlets or whether there is in fact such a break in the interstate journey as will reasonably warrant dividing the transaction into interstate and instrastate activities. Under the *Goldblatt* decision, this type of analysis is precluded by application of a mechanical test without reference to the evidence of the course of business followed by the distributor; while the method of approach of the *American Stores* case forms a basis for analysis of the evidence to determine whether or not it establishes practical continuity of movement.

The problem of coverage in the field of wholesale distribution is difficult of solution because of variations in patterns of distribution between kinds of goods, types of enterprises, and stages of the business

[68] "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." 133 F. (2d) 840 at 846.

cycle. Patterns of distribution will vary as between a service wholesaler whose salesmen call upon the retail trade and who extends credit to retail customers and a cash and carry enterprise or a voluntary chain in which independent retail dealers enter into contractual arrangements with wholesalers to supply their needs on a planned basis. Moreover, the internal operation of the particular enterprise may be of significance. Some enterprises may employ a relatively routine procedure in ordering—when the stock on hand, as indicated by the stock control system, reaches a certain point, orders will be placed to maintain inventory at a particular level—while other enterprises may gear their ordering more nearly to the anticipatory demands of their clientele. In the former case, the procedure provides little indication of the destination of goods moving through the warehouse. Finally, the extent to which wholesalers will order in anticipation of the demands of their retail customers will tend to vary through the stages of the business cycle, the number of transient customers, as distinct from regular customers whose orders can be estimated with reasonable accuracy as to volume and kind of goods, varying with changes in economic activity. In light of these considerations, the application of any mechanical test would appear highly questionable.[69]

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

The Wage and Hour Division has taken the position that employees of contractors engaged in maintaining, repairing, or reconstructing railroads, ships, highways,[70] bridges, pipe lines,[71] navigable waters of the United States, or other essential instrumentalities of interstate or foreign commerce would seem to be engaged in commerce and subject to the act.[72]

[69] The writer has received valuable suggestions with respect to wholesaling practices from Dean E. T. Grether of the College of Commerce, University of California. Dean Grether is in no way responsible, however, for opinions expressed herein.

[70] In Shannon v. Boh Bros. Constr. Co., (La. App. 1942) 5 W. H. REP. 362, the act was held inapplicable to employees constructing and repairing city streets used by vehicles in interstate commerce.

[71] In Crawford v. Campbell, (Okla. Ct. Com. Pleas, 1943) 6 W. H. REP. 156, the act was held applicable to laborers hired by an independent contractor to lay, take up, and repair pipe lines for an oil company doing interstate business. It was held inapplicable to laborers laying, taking up, and repairing local pipelines for a natural gas company selling gas to local customers some of whom used the fuel in processing goods moving interstate.

[72] Interpretative Bull. 5, § 13, 1942 W. H. MAN. 29. The division has not taken a definite position with respect to employees engaged in original construction of essential instrumentalities of interstate commerce. 1942 W. H. MAN. 45.

In *Overstreet v. North Shore Corporation*[73] the Supreme Court held, two justices dissenting, that the act covered employees engaged in maintaining or operating a toll road and a drawbridge over a navigable waterway. Roads and bridges used by persons and goods passing from state to state were held to be instrumentalities of commerce and those who maintain or operate them "engaged in commerce." The corporation, relying upon two tax cases,[74] in which the Supreme Court had held that companies owning and operating bridges used for interstate and international traffic but not themselves carrying goods or persons across the bridges were not engaged in interstate or foreign commerce, contended that it was not engaged in commerce, but only in providing facilities for the use of others carrying on commerce; therefore its maintenance employees, whose activities merely affected commerce, were not within the act. This contention was rejected on the grounds: (1) that the fact that the corporation may be subject to state taxation does not imply that it is free from federal control or that its road and drawbridge are not instrumentalities of interstate commerce; and (2) that, even assuming the corporation was not engaged in interstate commerce, it is the nature of the employee's activities rather than the employer's business which is controlling. The Court relied on the practical tests as to the meaning of "engaged in interstate commerce" evolved in cases arising under the Federal Employers' Liability Act[75] in reaching its conclusion that the employees' activities were "so closely related to . . . interstate movement as a practical matter that . . . they must be regarded . . . as 'engaged in commerce.'"[76]

In *Pedersen v. Fitzgerald Construction Co.*,[77] the Supreme Court

[73] (U.S. 1943) 63 S. Ct. 494. The circuit court, affirming the decision of the district court [(D.C. Fla. 1941) 43 F. Supp. 445], refused to extend coverage to what it considered activities merely affecting commerce and argued that if the employer was not engaged in interstate commerce by virtue of owning and operating the toll road and bridge, the employees whose duties consisted in executing the business of the company were not so engaged. (C.C.A. 5th, 1942) 128 F. (2d) 450.

[74] Detroit International Bridge Co. v. Corporation Tax Appeal Board, 294 U.S. 83, 55 S. Ct. 332 (1935); Henderson Bridge Co. v. Kentucky, 166 U.S. 150, 17 S. Ct. 532 (1897).

[75] "The Federal Employers' Liability Act and the Fair Labor Standards Act are not strictly analogous, but they are similar. . . . We see no persuasive reason why the scope of employed or engaged 'in commerce' laid down in . . . [cases arising under the Federal Employers' Liability Act] should not be applied to the similar language of the Fair Labor Standards Act, especially when Congress in adopting the phrase 'engaged in commerce' had those Federal Employers' Liability Act cases brought to its attention." 63 S. Ct. 494 at 498.

[76] (U.S. 1943) 63 S. Ct. 494 at 499.

[77] (U.S. 1943) 63 S. Ct. 558, rehearing denied 11 U.S.L.W. 3273 (1943).

reversed per curiam on the authority of the *Overstreet* case a New York holding that an independent contractor employed by an interstate railroad to construct abutments and repair substructures was performing work local in character and distinct from interstate commerce so that his employees were not within the scope of the act.[78]

These cases support the position taken by the division and are a further indication of the Supreme Court's liberal interpretation of the statutory language.

IV

EMPLOYEES "ENGAGED IN THE PRODUCTION OF GOODS FOR COMMERCE"

A. *Employees in the Physical Process of Production*

The act clearly applies to employees engaged in actual physical production of goods which, at the time of production, the employer in the normal course of business intends or expects to move across state lines, although because of the demand situation all of the goods may not subsequently actually enter interstate commerce.[79] The facts at the time of production determine whether the employee is engaged in the production of goods for commerce and not any subsequent acts of the employer or of third parties.[80] Thus the test of the application of the act to the producer is knowledge that his product will move interstate when produced; but knowledge is not a matter of the intent or expectation of the producer with respect to particular goods. It is sufficient that goods are intended or expected in the normal course of business to move interstate; and if the normal course of business, determined by the facts at the time of production, does not prove in fact to be the actual course of business, the act is still applicable.[81] Conversely, if the intention or expectation at the time of production is that in the normal course of business the goods will be sold locally, the subsequent fact that the actual course of business involves some interstate movement would appear not to operate retroactively to make the act applicable.[82]

[78] Pedersen v. Fitzgerald Constr. Co., 173 Misc. 188, 18 N.Y.S. (2d) 920 (1940), affd. 262 App. Div. 665, 30 N.Y.S. (2d) 989 (1941), affd. 288 N.Y. 687, 43 N.E. (2d) 83 (1942).

[79] United States v. Darby, 312 U.S. 100, 61 S. Ct. 451 (1941). See H. REP. 2738, 75th Cong., 3d Sess. (1938), p. 17.

[80] Interpretative Bull. 5, § 3, 1942 W. H. MAN. 25. This view appears to be adopted, implicitly or explicitly, in the majority of cases. The division takes the position that the fact that the goods do move in commerce is strong evidence that the employer intended or had reason to believe the goods would so move. Id.

[81] United States v. Darby, 312 U.S. 100, 61 S. Ct. 451 (1941).

[82] See note 80, supra.

The situations so far considered involve production before interstate commerce has begun. But production or processing may take place after goods have entered the state from outside sources with subsequent sale of the finished product locally. Such production or processing operations could not be included in "production for commerce" and the only theory upon which coverage could be based would be that such operations occur while the imported goods remain a part of the flow of interstate commerce. The Wage and Hour Division has indicated that employees engaged in production of goods for local consumption would seem to be excluded from the act, even though raw materials going into the finished product are of out-of-state origin. Their work is done after the materials have come to a state of rest within the state.[83] The division thus appears to distinguish this situation from that of the wholesaler purchasing goods outside the state for local distribution, where it contends that the stream of commerce continues until the goods reach their final destination.[84] If, however, in the normal course of business, imported raw materials, after processing, will cross state lines before reaching the ultimate consumer, the act applies.[85]

The act does not extend to employees working on raw materials of local origin where none of the finished product is intended or expected in the normal course of business to move interstate.[86] Such products made and sold intrastate may come into direct competition in local markets with similar products manufactured outside the state and shipped in interstate commerce, and if produced under substandard labor conditions may involve the very evils which gave rise to demands for control measures; but since the act does not extend to transactions merely "affecting" interstate commerce, there would seem to be no way to reach such production under the existing statute.

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

In defining "produced," 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

[83] Interpretative Bull. 5, § 10, 1942 W. H. MAN. 28. See Jones v. Springfield Missouri Packing Co., (D.C. Mo. 1942) 45 F. Supp. 997. The division indicates, however, that other employees in the same plant, such as those purchasing or unloading raw materials from out-of-state sources, may be "engaged in commerce." 1942 W. H. MAN. 28.

[84] Interpretative Bull. 5, § 15, 1942 W. H. MAN. 29–30.

[85] Fleming v. Tidewater Optical Co., (D.C. Va. 1940) 35 F. Supp. 1015.

[86] Interpretative Bull. 1, § 6, 1942 W. H. MAN. 24.

any process or occupation necessary to the production thereof, in any State."[87] It is not necessary, therefore, that employees actually participate in the physical process of producing goods to be deemed engaged in their production.[88] It is sufficient that the activities of the employees constitute a "process or occupation necessary to the production." The act has been held applicable by lower federal courts to clerical and office employees not directly engaged in physical production;[89] to employees preparing and serving meals to workers engaged in production of goods for interstate commerce;[90] and to watchmen[91] whose employers were

[87] Sec. 3 (j), 52 Stat. L. 1061 (1938), 29 U. S. C. (1940), § 203 (j).

[88] Kirschbaum Co. v. Walling, 316 U.S. 517, 62 S. Ct. 1116 (1942); Mid-Continent Pipe Line Co. v. Hargrave, (C.C.A. 10th, 1942) 129 F. (2d) 655.

[89] Fleming v. Swift & Co., (D.C. Ill. 1941) 41 F. Supp. 825; Berger v. Clouser, (D.C. Pa. 1940) 36 F. Supp. 168. In Murray v. Noblesville Milling Co, (C.C.A. 7th, 1942) 131 F. (2d) 470, cert. denied (U. S. 1943) 63 S. Ct. 832, the act was held applicable to employees of a milling company shipping grain and flour interstate who purchased at the elevator grain brought by farmers from nearby points, sent the wheat by conveyor to the mill, and kept the machinery in running condition. Such activities were held to be necessary for production of goods for commerce.

[90] 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. Contra: McLeod v. Threlkeld, (C.C.A. 5th, 1942) 131 F. (2d) 880, affd (U. S. 1943) 11 U.S.L.W. 4457; Ikola v. Snoqualmie Falls Lumber Co., 12 Wash. (2d) 341, 121 P. (2d) 369 (1942). Cf. Woolfolk v. Orino, (D.C. Ore. 1942) 5 W. H. REP. 132. In Labates v. Interstate Co., (D.C. Tenn. 1941) 4 W. H. REP. 91, the act was held inapplicable to cooks in a restaurant located in a railroad station operated by the owner under lease from an interstate railroad.

[91] Mid-Continent Pipe Line Co. v. Hargrave, (C.C.A. 10th, 1942) 129 F. (2d) 655; Shepler v. Crucible Fuel Co., (D.C. Pa. 1943) 6 W. H. REP. 185; Timberlake v. Day & Zimmerman, (D.C. Iowa, 1943) 6 W. H. REP. 208; Green v. Riss & Co., (D.C. Mo. 1942) 45 F. Supp. 648; Holland v. Amoskeag Mach. Co., (D.C. N.H. 1942) 44 F. Supp. 884; Batt v. Spector, (D.C. Tex. 1942) 5 W. H. REP. 357; Fleming v. Swift & Co., (D.C. Ill. 1941); 41 F. Supp. 825; Williams v. General Mills, (D.C. Ohio, 1941) 39 F. Supp. 849; Flores v. Baetjer, (D.C. P.R. 1941) 4 W. H. REP. 471; Steger v. Beard & Stone Elec. Co., (D.C. Tex. 1941) 4 W. H. REP. 411; Lefevers v. General Export Iron & Metal Co., (D.C. Tex. 1940) 36 F. Supp. 838; Berger v. Clouser, (D.C. Pa. 1940) 36 F. Supp. 168. See also Acme Lumber Co. v. Shaw, (Ala. 1942) 10 So. (2d) 285; Johnson v. Phillips-Buttorff Mfg. Co., 178 Tenn. 559, 160 S.W. (2d) 893 (1941), cert. denied (U.S. 1943) 63 S. Ct. 43; Robertson v. Oil Well Drilling Co., (N. M. 1942) 131 P. (2d) 978; McMilan v. Wilson & Co., 212 Minn. 142, 2 N. W. (2d) 838 (1942); Pruett v. Carruthers & Son Lumber Co., (Tenn. App. 1942) 5 W. H. REP. 192; Niehaus v. Greenspon's Son Pipe Corp., (Mo. App. 1942) 164 S.W. (2d) 180; Robinson & Co. v. Larue, 178 Tenn. 197, 156 S.W. (2d) 432 (1941); Atkocus v. Terker, (N.Y. City Mun. Ct. 1941) 30 N.Y.S. (2d) 628. In another group of cases where the act was held applicable, watchmen performed services other than guarding property—e.g., tending furnaces or boilers; Muldowney v. Seaberg Elevator Co., (D.C. N.Y. 1941) 39 F. Supp. 275; Wood v. Central Sand & Gravel Co., (D.C. Tenn. 1940) 33 F. Supp. 40; Spinner v. Waterways Fuel & Dock Co., 70 Ohio App. 121, 41 N. E. (2d) 144

engaged in the production of goods for commerce. In the *Kirschbaum* and *Arsenal Building Corporation* cases[92] the Supreme Court held, one justice dissenting, that building maintenance employees of landlords whose tenants were principally engaged in production of goods for interstate commerce were within the scope of the act, since the work of the employees had such a close and immediate connection with the process of production and was such an essential part of it that their occupation was necessary for the production of goods for commerce. With respect to maintenance workers in office buildings that house tenants engaged in interstate commerce but who do not produce goods for commerce, the recent refusal of the Supreme Court to review the decision in *Johnson v. Dallas Downtown Development Co.*[93] leaves in

(1942); Hanson v. Queensboro Farm Products, (N.Y. 1942) 5 W. H. REP. 255; Milam v. Texas Spring & Wheel Co., (Tex. Civ. App. 1941) 157 S. W. (2d) 653; Crompton v. Baker, 220 N.C. 52, 16 S.E. (2d) 471 (1941). Contra: Waller v. Humphreys, (C.C.A. 5th, 1943) 133 F. (2d) 193; Swanzy v. Safety Convoy Co., (D.C. Tex. 1942) 5 W. H. REP. 472; Truitt v. Neuhoff Bros., (D.C. Tex. 1942) 5 W. H. REP. 461; Brown v. Carter Drilling Co., (D.C. Tex. 1941) 38 F. Supp. 489; Rogers v. Glazer, (D.C. Mo. 1940) 32 F. Supp. 990. See also Carter v. Royal Crown Bottling Co., (Tenn. Cir. Ct. 1943) 6 W. H. REP. 66; Carpenter v. Waxahachie Cotton Warehouse, (Tex. Civ. App. 1942) 162 S. W. (2d) 139; Hart v. Gregory, 220 N.C. 180, 16 S.E. (2d) 837 (1941); Killingbeck v. Garment Center Capitol, 259 App. Div. 691, 20 N.Y.S. (2d) 521, appeal denied, 259 App. Div. 1076, 21 N.Y.S. (2d) 610 (1940). Cf. Southern Package Corp. v. Walton, (Miss. 1943) 11 So. (2d) 912. In many of these cases holding the act inapplicable the facts are distinguishable and the same result could have been reached on other grounds.

With respect to watchmen furnished by independent agencies to customers engaged in commerce or in the production of goods for commerce, the act was held applicable in Walling v. Sondock, (C.C.A. 5th, 1942) 132 F. (2d) 77, cert. denied Sondock v. Walling, (U.S. 1943) 63 S. Ct. 769. Contra: Bartholome v. Baltimore Fire Patrol Co., (D.C. Md. 1942) 48 F. Supp. 98; Farr v. Smith Detective Agency, (D.C. Tex. 1941) 38 F. Supp. 105; Schrieber v. Kane Service, (D.C. Ill. 1940) 3 W H. REP. 459. See also Walling v. Allied Messenger Service, (D.C. N.Y. 1942) 47 F. Supp. 773.

[92] Kirschbaum Co. v. Walling, Arsenal Building Corp. v. Walling, 316 U.S. 517, 62 S. Ct. 1116 (1942). These two cases involving similar fact situations were decided together.

[93] Johnson v. Dallas Downtown Dev. Co. (C.C.A. 5th, 1942) 132 F. (2d) 287, cert. den. (U.S. 1943) 63 S. Ct. 994. Accord: Cochran v. Florida Nat. Bldg. Corp., (D.C. Fla. 1942) 45 F. Supp. 830; Johnson v. Filstow, (D.C. Fla. 1942) 43 F. Supp. 930; Lofther v. First Nat. Bank of Chicago, (D.C. Ill. 1942) 48 F. Supp. 692; Johnson v. Masonic Bldg. Co., (D.C. Ga. 1942) 6 W. H. REP. 19; Tate v. Empire Bldg. Corp., (D.C. Tenn. 1942) 5 W. H. REP. 475; Brandell v. Continental Ill. Bank & Trust Co., (D.C. Ill. 1941) 43 F. Supp. 781; Patterson v. Memphis Cotton Exchange Realty Co., (Tenn. Ch. 1943) 6 W. H. REP. 308; In re Liquidation of New York Title & Mortgage Co., (N.Y. 1943) 6 W. H. REP. 152; Robinson v. Mass. Mutual Life Ins. Co., (Tenn. 1941) 158 S. W. (2d) 441; Cecil v. Gradison, (Ohio App. 1941) 40 N.E. (2d) 958; Stoike v. First Nat. Bank, (N.Y. 1943) 6 W. H.

effect the holding of the circuit court of appeals that the act does not extend to such workers. Courts taking this position have refused to apply the reasoning of the *Kirschbaum* case on the ground that the act's definition of interstate commerce does not include "necessary occupations" as does the definition of production for interstate commerce. Under this view, the doctrine of the *Kirschbaum* case would be limited to those employees of landlords whose tenants produced on the premises goods for interstate commerce. The division has contended, in opposition to this dual standard, that no distinction should be drawn between maintenance service for tenants producing goods for commerce or services in commerce, since in both cases the maintenance of safe and habitable buildings is indispensable to the tenants' occupations, and the labor cost of such service, reflected in rentals, is an item in the cost of the tenants' interstate business with a direct effect on prices of goods and services.[94] The division's position has been upheld by several courts.[95]

An examination of the cases involving employees whose activities have been considered "necessary" to the production of goods for interstate commerce indicates that in general the term "necessary" has not been construed as "indispensable"; rather it appears to be sufficient that the activities be convenient or useful in the production of goods for commerce. No formula can be laid down as to when the relation of an activity to production of goods for interstate commerce will be sufficiently tenuous to prevent extension of coverage, but it seems clear that in general the courts are inclined to liberal construction of the statutory language here involved.

V

INTERSTATE COMMERCE ONCE REMOVED

Employees engaged in the production of goods which move out of the state of production are within the scope of the act even though the

REP. 415. Cf Johnson v. Great Nat. Life Ins. Co., (Tex. Civ. App. 1942) 166 S.W. (2d) 935.

[94] 5 W. H. REP. 889 (1942). The division has indicated that it will not seek to enforce the act if less than 20% of the building space is devoted to interstate commerce activities. 5 W. H. REP. 813 (1942).

[95] Merryfield v. Hoyt Shoe Corp., (C.C.A. 1st, 1942) 128 F. (2d) 452; Lorenzetti v. American Trust Co., (D.C. Cal. 1942) 45 F. Supp. 128. In the Lorenzetti case, supra, the act was held to cover janitors furnished under contract by an independent building maintenance company to state banks.

employer does not himself ship the goods to out-of-state destinations,[96] and it is not determinative that title passes from the original producer to the purchaser within the state of production.[97] The purpose of the act is the protection of commerce without regard to the ownership of goods moving in it.[98] Thus sale of the product by the original producer at the place of production does not necessarily constitute a transaction complete in itself without reference to subsequent activities of purchasers so as to insulate the producer from application of the act;[99] and whether the manufacturer is himself responsible for subsequent movement in interstate commerce or whether his activities with respect to the goods are terminated by local delivery to purchasers who thereafter ship them in interstate commerce in their original or changed form is not material.[100] The test for application of the act is whether the pro-

[96] Walling v. Peoples Packing Co., (C.C.A. 10th, 1942) 132 F. (2d) 236, cert. denied (U.S. 1943) 63 S. Ct. 831; Enterprise Box Co. v. Fleming, (C.C.A. 5th, 1942) 125 F (2d) 897, cert. denied 316 U.S. 704, 62 S. Ct. 1312 (1942); Tucker v. Hitchcock, (D.C. Fla. 1942) 44 F. Supp. 874; Walling v. Higgins, (D.C. Pa. 1942) 47 F. Supp. 856; Walling v. Kerr, (D.C. Pa. 1942) 47 F. Supp. 852; Walling v. Pine, (D.C. Okla. 1942) 5 W. H. REP. 518; Divine v. Levy, (D.C. La. 1941) 39 F. Supp. 44; Fleming v. Hitchcock, (D.C. Fla. 1941) 38 F. Supp. 358; St. John v. Brown, (D.C. Tex. 1941) 38 F. Supp. 385; Fleming v. Schiff, (D.C. Colo. 1941) 5 W. H. REP. 43; Allen v. Moe, (D.C. Idaho, 1941) 39 F. Supp. 5; Whigham v. Tucker Oil Co., (D.C. Tex. 1941) 4 W. H. REP. 274; Wood v. Central Sand & Gravel Co., (D.C. Tenn. 1940) 33 F. Supp. 40. *Contra*: Bagby v. Cleveland Wrecking Co., (D.C. Ky. 1939) 28 F. Supp. 271. The act has been held inapplicable to: (1) a company buying gas and selling it to a local refinery which sold the refined products to purchasers who shipped some of them interstate, Ligon v. United Gas Pipe Line Co., (D.C. Tex. 1941) 4 W. H. REP. 422; (2) a company producing oil on a leasehold estate for sale in tanks on the estate to a pipe line company, Dupree v. Bay-Tex Oil Corp., (D.C. Tex. 1940) 4 W. H. REP. 8; (3) an employee of a tire service company who engaged in repairing tires for individuals who put them on vehicles which at some time or other went out of the state, Hayes v. General Tire Service, (D.C. Tex. 1941) 4 W. H. REP. 459. The act was held applicable to maintenance employees of a lessor of trucks where a substantial number of lessees used the trucks to transport goods interstate, Snyder v. Casale, (D.C. N.Y. 1942) 5 W. H. REP. 222.

[97] Hamlet Ice Co. v. Fleming, (C.C.A. 4th, 1942) 127 F. (2d) 165, cert. denied (U.S. 1942) 63 S. Ct. 29.

[98] Fleming v. Alterman, (D.C. Ga. 1941) 38 F. Supp. 94.

[99] United States v. Darby, 312 U.S. 100, 61 S. Ct. 451 (1941); Enterprise Box Co. v. Fleming, (C.C.A. 5th, 1942) 125 F. (2d) 897, cert. denied 316 U.S. 704, 62 S. Ct. 1312 (1942); Divine v. Levy, (D.C. La. 1941) 39 F. Supp. 44; St. John v. Brown, (D.C. Tex. 1941) 38 F. Supp. 385; Sunshine Mining Co. v. Carver, (D.C. Idaho, 1940) 34 F. Supp. 274. Contra: Bagby v. Cleveland Wrecking Co., (D.C. Ky. 1939) 28 F. Supp. 271.

[100] Enterprise Box Co. v. Fleming, (C.C.A. 5th, 1942) 125 F. (2d) 897, cert. denied 316 U.S. 704, 62 S. Ct. 1312 (1942); Walling v. Higgins, (D.C. Pa. 1942) 47 F. Supp. 856; Walling v. Kerr, (D.C. Pa. 1942) 47 F. Supp. 852.

ducer knows or has reason to know that his product will be shipped across state lines by himself or others when it is produced.[101] Where the local purchaser further processes the goods before shipment interstate, the act applies to him and as well to the original producer and to intermediate processors.[102] In this case the goods of the original producer and the intermediate processors form a "part or ingredient"[103] of the finished product moving interstate, and employees of those producers or processors are performing the first steps in a series of operations that produce articles going into commerce.[104] Coverage has also been extended to workers whose employer was engaged in processing goods owned and used by local manufacturers in the production of finished products shipped across state lines.[105]

The act clearly applies to employees of ice producers who sell some of their product locally to interstate carriers for refrigerating products moving in interstate commerce.[106] The Wage and Hour Division has

[101] In the majority of cases it is expressly stated that the producer knew or had reason to know that his product would move interstate when produced. In other cases where there is no express statement, examination of the facts indicates that the original producer could not well have been unaware that his product, after local sale, would move interstate. Courts in general appear to have been reluctant to permit producers to defend by contending that they did not know their products would move interstate. In St. John v. Brown, (D.C. Tex. 1941) 38 F. Supp. 385 at 388, the court said, "They [local oil producers] must be held to know that which is of such common knowledge that the courts may take judicial knowledge of it, viz., that the greater percentage of all crude oil products in Texas . . . goes out of our State, though it may be in the form of by-products, for ultimate consumption." See also Walling v. Pine, (D.C. Okla. 1942) 5 W. H. REP. 518.

[102] Walling v. Pine, (D.C. Okla. 1942) 5 W. H. REP. 518; Divine v. Levy, (D.C. La. 1941) 39 F. Supp. 44; Sunshine Mining Co. v. Carver, (D.C. Idaho, 1940) 34 F. Supp. 274; Sykes v. Lochmann, (Kan. 1943) 132 P. (2d) 620, cert. denied, 11 U.S.L.W. 3354 (1943); Crompton v. Baker, 220 N.C. 52, 16 S.E. (2d) 471 (1941). The act has been held inapplicable to employees of mining companies required under the Gold Reserve Act to deliver gold bullion to a United States mint in another state. Fox v. Summit King Mines, (D.C. Nev. 1943) 48 F. Supp. 952; Holland v. Haile Gold Mines, (D.C. S.C. 1942) 44 F. Supp. 641. In the Haile case it was argued that there is a single market and one price fixed by governmental order, with the result that the absence of competition insulates each producer and his wages from every other producer and his wages; therefore the act cannot apply to intrastate wages in noncompetitive production.

[103] See § 3 (i) of the act, 52 Stat. L. 1061 (1938), 29 U.S.C. (1940), § 203 (i).

[104] Walling v. Peoples Packing Co., (C.C.A. 10th, 1942) 132 F. (2d) 236, cert. denied (U.S. 1943) 63 S. Ct. 831; Divine v. Levy, (D.C. La. 1941) 39 F. Supp. 44; Sunshine Mining Co. v. Carver, (D.C. Idaho, 1940) 34 F. Supp. 274.

[105] Walling v. Kerr, (D.C. Pa. 1942) 47 F. Supp. 852.

[106] Hamlet Ice Co. v. Fleming, (C.C.A. 4th, 1942) 127 F. (2d) 165, cert. denied, (U.S. 1942) 63 S. Ct. 29; Atlantic Co. v. Walling, (C.C.A. 5th, 1942) 131 F. (2d) 518; Nelson v. Southern Ice Co., (D.C. Tex. 1941) 4 W. H. REP. 562;

indicated that it will not assert coverage in the case of employees engaged in production of ice for refrigerating cars in the state of production of the ice and final destination of the goods shipped in the cars,[107] thus distinguishing between production of ice for this purpose in the state of final destination of the goods and in other states along the interstate route. It has been contended that ice is not "goods" within the meaning of the act, since upon delivery to the interstate carrier it passes into the actual physical possession of the ultimate consumer; but this contention has been rejected on the ground that the exclusion of goods in the actual physical possession of the ultimate consumer[108] does not extend to goods considered with reference to production.[109]

It would seem essential, if federal regulation of substandard labor conditions is to be effective, that the coverage of the act should reach backward to the original producer whose goods move immediately in interstate commerce and to those who either produce goods which are a part or ingredient of the goods of another or further process goods which in the normal course of business would move in interstate commerce. Otherwise the provisions of the act as to production employees could be evaded by the expedient of selling to out-of-state purchasers f.o.b. the producer's factory or selling locally to distributors or processors who, in turn, would sell the goods in interstate commerce. So too it would seem essential that coverage be extended to workers whose activities, though not strictly manufacture or distribution of goods in

Gordon v. Paducah Ice Co., (D.C. Ky. 1941) 41 F. Supp. 980. *Contra*: Chapman v. Home Ice Co., (D.C. Tenn. 1942) 43 F. Supp. 424. The act was held inapplicable in Gaston v. Dalton Ice Co., (D.C. Ga. 1943) 6 W. H. REP. 241, on the *de minimis* doctrine. Coverage was denied to a night engineer operating machinery producing ice sold to interstate carriers, Couch v. Ward, (Ark. 1943) 168 S.W. (2d) 822, and to employees of a cold storage company operating machinery for refrigeration of space leased to tenants who were local distributors of products some of which originated outside of the state, Cliett v. Miami Crystal Ice & Storage Co., (D.C. Fla. 1942) 5 W. H. REP. 587. On the theory that stoppage by storage of interstate shipments intended later to go forward in continuation of such commerce, does not remove the goods from commerce, employees of a cold storage warehouse where a substantial amount of goods originated out-of-state and, after storage, were reshipped to out-of-state points, were held within the act by the district court in Fleming v. Atlantic Co., (D.C. Ga. 1941) 40 F. Supp. 654. This part of the decision was not appealed from. Atlantic Co. v. Walling, (C.C.A. 5th, 1942) 131 F. (2d) 518 at 520.

[107] 5 W. H. REP. 293 (1942).

[108] Sec. 3 (i), 52 Stat. L. 1061 (1938), 29 U.S.C. (1940), § 203 (i).

[109] Hamlet Ice Co. v. Fleming, (C.C.A. 4th, 1942) 127 F. (2d) 165, cert. denied (U.S. 1942) 63 S. Ct. 29; Atlantic Co. v. Walling, (C.C.A. 5th, 1942) 131 F (2d) 518. Ice was held not to be "goods" in Chapman v. Home Ice Co., (D.C. Tenn. 1942) 43 F. Supp. 424, and Couch v. Ward, (Ark. 1943) 168 S.W. (2d) 822.

interstate commerce, are essential to the carrying on of interstate commerce—e.g., workers producing ice for refrigeration.

VI

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

A. *New Construction*

The Wage and Hour Division has taken the position that new construction usually is not to be considered subject to the act unless such construction is "an integral part of the production of a specific type of goods for commerce."[110] It argues that the utility of a factory building is not limited to the production of the commodity originally contemplated, therefore employees engaged in erecting a building in which goods are to be produced for commerce are to be regarded as a step removed from actual productive operations.[111] The few cases involving this situation have held that employees engaged in new construction are not within the act.[112]

As an example of construction which is "an integral part of the production of a specific type of goods for commerce," which it contends is covered by the act, the division cites the original construction of oil derricks or related construction activities which are carried on solely to the end of conducting subsequent drilling operations resulting directly in the production of oil and cannot serve, as can a factory, any other productive purpose.[113] This general problem was involved in *Warren-Bradshaw Drilling Co. v. Hall.*[114] Petitioner, an independent contractor, owned and operated rotary drilling equipment, contracting with owners or lessees of oil lands to drill to an agreed-upon depth short of the oil sand stratum, the well then being "brought in" or shown to

[110] 1942 W. H. MAN. 44. Employees transporting or unloading materials from out-of-state may, however, be "engaged in commerce."

[111] 1942 W. H. MAN. 45.

[112] Carter v. Pritchard & Co., (D.C. Mo. 1943) 6 W. H. REP. 162, new trial denied 6 W. H. REP. 307 (1943); Belzano v. Williams, (D.C. Cal. 1942) 6 W. H. REP. 113; Walling v. Snellings, (D.C. Ala. 1942) 5 W. H. REP. 795.

[113] 1942 W. H. MAN. 45.

[114] 317 U.S. 88, 63 S. Ct. 125 (1942). The act was held applicable to oil drilling employees where the employer drilled wells for other parties and itself, substantially all the oil and gas moving interstate. Walling v. Helmerich & Payne, (D.C. Okla. 1942) 6 W. H. REP. 159; Burgess v. Phillips Petroleum Co., (Kan. Dist. Ct. 1942) 5 W. H. REP. 606. Cf. Zehring v. Brown Materials, (D.C. Cal. 1943) 48 F. Supp. 740, and Corbett v. Schlumberger Well Surveying Corp., (D.C. Tex. 1942) 43 F. Supp. 605.

be a dry hole by a separate cable drilling crew. Petitioner was neither owner nor lessee of any of the lands on which drilling was undertaken and was not shown to have any interest in the lands or in the oil produced. Respondents were members of the rotary drilling crew working on wells in the Panhandle field of Texas. The Supreme Court held, one justice dissenting, that respondents were within the scope of the act, being engaged in a process or occupation necessary to the production of oil. The Court rejected the contention of petitioner that, as an independent contractor not financially interested in the wells, it had no intention, expectation or belief that any oil produced would move interstate, saying in answer:

> "...Petitioner, closely identified as it is with the business of oil production, cannot escape the impact of the Act by a transparent claim of ignorance of the interstate character of the Texas oil industry."[115]

Nor was it material that the contractor itself was not engaged in producing oil for interstate commerce, since the test is the character of the employees' activities.

Thus the Court applies once more the broad interpretation of coverage laid down in the *Kirschbaum* case.

B. *Maintenance and Repair*

Employees engaged in repairing buildings and machinery used in producing goods for interstate commerce appear to be within the scope of the act as engaged in a process or occupation necessary to the production of goods for commerce.[116] Without itself producing goods for interstate commerce, a firm may be subject to the act if the work of its employees contributes to the interstate operations of other companies.[117] If a plant is shut down temporarily in order that necessary repairs may be made conveniently and future production is contemplated after the repair work is completed, the act would appear to be applicable, although the building or machine is not presently being used to produce goods for commerce;[118] and the same is true of repair work undertaken during the dead season of a seasonal industry.[119] If, however, the plant

[115] 317 U.S. 88 at 92–93, 63 S. Ct. 125 (1942).

[116] Holland v. Amoskeag Mach. Co., (D.C. N.H. 1942) 44 F. Supp. 884; Suarez v. Bowie, (D.C. P.R. 1942) 5 W. H .REP. 403.

[117] Holland v. Amoskeag Mach. Co., (D.C. N.H. 1942) 44 F. Supp. 884. See also Crawford v. Campbell, (Okla. Ct. Com. Pleas, 1943) 6 W. H. REP. 156.

[118] See 1942 W. H. MAN. 46.

[119] Bowie v. Gonzalez, (C.C.A. 1st, 1941) 117 F. (2d) 11; Suarez v. Bowie, (D.C. P.R. 1942) 5 W. H. REP. 403.

is permanently shut down and no future production for interstate commerce is contemplated, employees doing repair work to fit the building for some nonproductive purpose appear not to be covered.[120]

CONCLUSION

The general outlines of the act's coverage are relatively clear. It reaches production of goods before interstate commerce 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 producer 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 across state lines. It applies to those engaged directly in the physical processes of production and as well to those whose activities are necessary to the processes of production and to those who maintain and operate essential instrumentalities by which interstate commerce is conducted.

The Supreme Court's refusal to review the decision in *Johnson v. Dallas Downtown Development Co.*[121] leaves in effect the holding of the circuit court of appeals that the act does not extend to maintenance workers whose services are performed for tenants engaged in interstate commerce but not in production of goods for such commerce. While it is arguable that there is warrant in the statutory language for such a distinction, the establishment of a dual standard seems unfortunate since in terms of economic effects there is no ground for distinguishing between maintenance service for tenants producing goods for commerce or services in commerce.

The act reaches forward to the distributive functions, covering at least warehouse employees of independent wholesalers a substantial part of whose activities involve procurement or receipt of goods of out-of-state origin and handling or delivering to local customers of goods from other states 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. The applications of the "state of rest" and "prior order" doctrines in their most rigid forms would seem to be precluded by the *Jacksonville Paper Co.* decision; but in the absence of special orders or pre-existing contracts or understandings

[120] 1942 W. H. MAN. 46.

[121] (C.C.A. 5th, 1942) 132 F. (2d) 287, cert. den. (U.S. 1943) 63 S. Ct. 994.

with customers, it is not clear as to what course of business on the part of the independent wholesaler will be sufficient to establish the continuity of movement necessary to keep goods "in commerce" as they pass through the warehouse to retail stores. With respect to the chain store, the Supreme Court's refusal to review the *Goldblatt* case leaves in effect the lower court holding that the unloading platform is the dividing line between coverage and noncoverage. The *American Stores* case, on the other hand, applies the "practical continuity of movement" test of the *Jacksonville Paper Co.* case and lays the basis for a more satisfactory approach to the chain store situation.

Attempts to remedy substandard labor conditions by state action have proved in large measure ineffective, in part because of the fear that local producers required to comply with minimum wage and maximum hour requirements would be placed at a disadvantage in competition with producers from other states subject to lower standards or no standards. Congress, doubtless aware of the abortive attempts at remedial action by the individual states, nevertheless refrained from exercising to the fullest extent its constitutional powers under the commerce clause and indicated its intention that certain segments of industrial activity should be excluded from the coverage of the act and left to state regulation. In light of the traditional theory as to the judicial function, courts cannot well write into the act that which Congress itself did not see fit to put there; but in view of the broad economic and social objectives of the act, manifested by its declaration of policy, the tendency of courts in general to extend coverage to the fullest extent within the limits of the statutory language seems desirable.