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THE FAIR LABOR STANDARDS ACT

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I. *The Act and Its Enforcement*

The Fair Labor Standards Act[1] was enacted by the Congress in 1938 to regulate commerce among the several states, to correct and eventually to eliminate labor conditions detrimental to the maintenance of minimum standards of living necessary for health, efficiency, and general well-being of employees of private employers, by establishing minimum wages and maximum hours, and by deterring "oppressive child labor" through the prohibition of the shipment of any goods produced in any plant where any child has been employed within thirty days prior to the movement of such goods.

The term "commerce" is defined to mean trade, commerce, transportation, transmission, or communication among the several states or from any state to any place outside thereof.[2]

The Act provided for the payment of a minimum wage of 25¢ an hour for the first year after its effective date, 30¢ an hour for the next six years from such date, and after the expiration of seven years 40¢ an hour.[3] A maximum work week of 44 hours was provided for the first year, 42 hours for the second year, and 40 hours after the expiration of the second year from the effective date of the Act.[4] Work done in excess of the specified time is to be compensated at a rate

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1. 52 Stat. 1060 (1938), 29 U.S.C. §§ 201 et seq. (1940).
2. 52 Stat. 1060 (1938), 29 U.S.C. § 203(b) (1940).
3. 52 Stat. 1060 (1938), 29 U.S.C. §206 (1940).
4. 52 Stat. 1062 (1938), 29 U.S.C. § 207 (1940).

not less than one and one-half times the regular rate. The minimum wage and maximum hour provisions apply to any employee who is (1) *engaged in commerce, or* (2) *engaged in the production of goods for commerce.* The manufacture of goods by child labor was not prohibited, but its movement from any plant in which oppressive child labor had been employed within thirty days was prohibited.[5] Employees exempted from the Act included those employed in an executive, administrative, professional, or local retailing capacity (as defined by the administrator), any employee engaged in any retail or service establishment the greater part of whose selling is in intrastate commerce, seamen, fishermen, employees of an air carrier, agricultural employees, employees of certain newspapers other than dailies, employees of local electric railways or bus carriers, certain switchboard operators, employees whose qualifications and maximum hours can be established by the Interstate Commerce Commission, or employees such as learners, apprentices and handicapped workers, properly exempted under §14 of the Act.[6] The child labor section is not applicable to employees in agriculture while not legally required to attend school, nor to child actors.

A Wage and Hours Division was created, in the Department of Labor,[7] which is under the direction of an Administrator. The Administrator was empowered to appoint an industry committee for each industry (1) *engaged in commerce* or (2) *in the production of goods for commerce.* These committees had an equal number of employers, employees, and public members, one of the latter serving as chairman. These committees have in the past recommended minimum wages and reasonable classifications within each such industry to the Administrator.[8] The Administrator may compel the attendance of witnesses and production of records at any hearing or investigation.[9]

The powers of the Administrator are narrow. He has no power to hear and decide cases, but only the power to in-

5. 52 Stat. 1067 (1938), 29 U.S.C. § 212 (1940).
6. 52 Stat. 1067 (1938, 29 U.S.C. § 213 (1940). The exemption of employees whose qualifications and maximum hours may be established by the Interstate Commerce Commission is an exemption from the requirements of § 207 only (maximum hours).
7. 52 Stat. 1061 (1938), 29 U.S.C. § 204 (1940).
8. 52 Stat. 1062 (1938), 29 U.S.C. § 205 (1940).
9. 52 Stat. 1065 (1938), 29 U.S.C. § 209 (1940).

stitute suits for injunction in the courts. The result has been that the courts have found it necessary to determine the obscure meaning of the language of the Act without any basis or background of administrative experience to guide them. Since the seven year period has expired, the wage rates specified in § 6 prevail, and the industry rates set by orders under § 8 have, for all ordinary purposes, terminated.

The Act is enforced by the following methods:

1. Civil actions by employees for the amount of unpaid wages or overtime payments, with an equal amount as liquidated damages, and attorney fees.[10]

2. Suits for injunctive relief against violation by the Administrator.[11]

3. Criminal penalties where there is willful violation.[12]

The child labor provisions are enforced by actions for injunctive relief brought by the Chief of the Children's Bureau in the Department of Labor,[13] or by criminal penalties.[14]

In 1945, in 84 United States District Courts there were 435 civil cases brought in the name of the Administrator under the Fair Labor Standards Act. Of these 83% were disposed of by consent decrees; 8.4% by trial or during trial; 2.9% on motion before trial; .7% by default judgment; and .2% by dismissal for want of process. Except for cases involving the Office of Price Administration, this represented the highest percentage of consent decrees and the smallest percentage of trials in any type of litigation brought in the Federal Courts. During 1945 there were also 597 civil cases in which employees sought recovery of wages or overtime and damages. For comparison, in 1941, 1,706 such cases had been brought by the Administrator and 816 by employees in the same courts.[15] Both Government and private cases under the Act have declined materially, due to several factors, most important of which have been higher wages and better understanding and compliance with the Act.

It is important to notice the high percentage of consent

10. 52 Stat. 1069 (1938), 29 U.S.C. § 215(b) (1940).
11. 52 Stat. 1069 (1938), 29 U.S.C. § 217 (1940).
12. 52 Stat. 1069 (1938), 29 U.S.C. § 216(a) (1940).
13. 52 Stat. 1069 (1938), 29 U.S.C. § 217 (1940).
14. 52 Stat. 1069 (1938), 29 U.S.C. §§ 216, 215(4).
15. Annual Report of the Director of the Administrative Office of the United States Courts (1945) 51, 63.

decrees. Under the Act the Administrator has no power, as such, to compel the payment of unpaid wages or overtime, nor to bring an action therefor. The right to do this is in the employee; however, in an action by the Administrator where consent decrees are entered in addition to the decree enjoining violations of the Act, there has been added in most of the cases a stipulation in which the employer, in effect, agrees to pay the wages due the employees. Since once the consent judgment is entered it has exactly the same effect as a judgment entered after a trial on the merits, the consent decree has actually become a remedial device in addition to those provided expressly by the Act, and is enforceable in contempt proceedings.[16] Many employers probably agree to such stipulations in return for a stipulation that the Administrator will not exercise his power of seeking to enjoin the shipment of goods already manufactured contrary to the terms of the Act.

The principal problems raised by the Act are first to determine when an employee, (a) is engaged in commerce, or (b) is engaged in the production of goods for commerce, or (c) is exempted from the coverage of the Act, or (d) is within the provisions of the child labor section of the Act.

The question of coverage having been determined, there remain the problems involved in determining minimum wages and maximum hours in such situations where in the very nature of the work the hours are uncertain and irregular, or where piecework is involved, and the application of the Act to incentive plans and similar devices to encourage maximum efficiency, which raise the problems of what is the "regular" rate specified in § 7(3), and how the Act is applied to employment not based on "regular rate" per hour in the "workweek" specified and what constitutes working time.

The constitutionality of the Act was passed on in two cases which were decided during the October term of 1940. The objections that the sections of the Act imposing a minimum wage and maximum hours were not within the commerce power, and that they infringed the Tenth and Fifth amendments of the United States Constitution were discussed and rejected in *United States v. Darby*.[17] The additional

16. See Fleming v. Warshawsky, 123 F.(2d) 622 (C.C.A. 7th, 1941).
17. 312 U.S. 100 (1941).

question whether the Act was an unconstitutional delegation of the legislative power of Congress was decided in the negative in *Opp Cotton Mills, Inc.* v. *Administrator*,[18] which was decided on the same day. In the first case there was an appeal by the United States from the quashing of an indictment charging a violation of § 15(a)(1), which prohibited the shipment of goods produced in a manner not sanctioned by the Act, of § 15(a)(2) charging violation of the provisions of § 6 dealing with minimum wages, and of § 15(a)(5) charging violation in connection with the making of reports or records. The District Court had quashed the indictment in its entirety upon the broad grounds that the Act, which the court interpreted as a regulation of manufacture within the states, was unconstitutional. The Supreme Court after reviewing the facts alleged in the indictment (which recited that the defendant below was engaged in the business of acquiring raw materials, which he manufactured into finished lumber, with the intent when manufactured to ship it in interstate commerce, and that he did so ship a large part of the lumber produced) decided that the employees involved were producing goods for commerce. The Court observed that were it not for the decision in *Hammer* v. *Dagenhart*[19] which held that Congress was without power to exclude the products of child labor from interstate commerce, and which was expressly overruled, there would be little occasion for repeating the long recognized principles of constitutional interpretation as applicable to the commerce clause. In considering whether such restriction on the production of goods for commerce was a permissible exercise of the commerce power, it was observed by Mr. Justice Stone, writing the Court's opinion, that, "The power of Congress under interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate commerce." The Court also upheld the requirement concerning the making of reports and the keeping of records. In discussing the validity of the wage and hour provisions under the Fifth Amendment,

18. 312 U.S. 126 (1941).
19. 247 U.S. 251 (1919).

the opinion said, "Since our decision in *West Coast Hotel Company* v. *Parrish,* 300 U.S. 379, it is no longer open to question that the fixing of a minimum wage is within the legislative power . . . " The cited case had upheld the validity of a state minimum wage law under the Fifth Amendment.

In the case of *Opp Cotton Mills, Inc.* v. *Administrator,* the petitioner was questioning the validity of a minimum wage order made by the Administrator. In an opinion by Mr. Justice Stone it was said that, "The mandate of the constitution that all legislative powers granted 'shall be vested' in Congress has never been thought to preclude Congress from resorting to the aid of administrative officers or boards as fact-finding agencies, whose findings, made in conformity to previously adopted legislative standards or definitions of congressional policy, have been made prerequisite to the operation of its statutory command."

II. *The Coverage of the Act*

A. *Employees Engaged in Commerce*

For the employee not engaged in "the production of goods for commerce," the importance of the interpretation of the phrase "engaged in commerce" is obvious. Prior to 1943, no case required the Supreme Court to interpret the coverage of the latter phrase. In 1942, in *Overnight Motor Co.* v. *Missel,*[20] a rate clerk for an interstates motor carrier was involved. The Court observed, without further comment, "It is plain that the respondent as a transportation worker was engaged in commerce within the meaning of the Act . . . . "

In suceeding cases, however, the Court has not been as assured in its application of the phrase "engaged in commerce." In 1943 the Supreme Court decided a case in which the employer received goods for its customers at various warehouses in Florida, shipped there from outside the state. Some of the goods were shipped directly to the customer; more were received at the employer's warehouse.[21] The Administrator

20. 316 U.S. 572 (1942).

21. Walling v. Jacksonville Paper Co., 317 U.S. 564 (1943). In Johnson v. Dallas Downtown Development Co., 132 F. (2d) 287 (C.C.A. 5th, 1942) the Circuit Court held that elevator operators and maintenance employees in a building, a substantial number of whose tenants were engaged in commerce were not "engaged in commerce," or the "production of goods for commerce." The Supreme

contended that the employees involved in receiving and handling the goods were engaged in commerce. The Court, however, decided that the goods were in "commerce" as defined by the Act until delivered to the customers, (1) when the employer secured them for the customer under a continuing order of business, but without an express individual order, and (2) when they were bought in accordance with an express individual order. The Court expressly declined to hold that every transaction of this kind, involving anticipated orders of customers, would be sufficient to establish the continuity in transit necessary to keep a movement of goods "in commerce" within the meaning of the Act.

But in a companion case, *Higgins* v. *Carr Bros. Co.*,[22] the employee was a shipping clerk for a Maine wholesale grocer, and prepared orders for delivery to Maine customers. Some of the produce prepared for delivery, however, came to the employer from without the state. The Supreme Court upheld the Supreme Judicial Court of Maine in its finding that when the merchandise "coming from without the state was unloaded at respondent's place of business, its interstate movement was ended," and no recovery was allowed.

Court denied certiorari in 318 U.S. 790 (1943). The Circuit Court had said, " . . . we do not think that Congress intended that the Act with respect to those who are only 'engaged in commerce' should be stretched and strained to cover every person whose labor is of some use or convenience, or whose labor in some fashion contributes to the comfort or convenience of one who is so engaged." Again, in Convey v. Omaha National Bank, 140 F. (2d) 640 (C.C.A. 8th, 1943), the Circuit Court held that interpretation of coverage under the Act must be broader for employees engaged in servicing of a building whose tenants were engaged in the "production of goods for commerce," than for employees so engaged where the tenants are only "engaged in commerce." The Supreme Court denied certriorari in 321 U.S. 781 (1944). The only question involved was whether the employees were "engaged in commerce."

22. 317 U.S. 572 (1943). In its finding that the employee was not "engaged in commerce," the Court also distinguished between the coverage of the classifications of employees under the Fair Labor Standards Act, and the National Labor Relations Act. It was argued that the employer in this case was in competition with wholesalers doing an interstate business, and that it could, by underselling, affect those businesses and their interstate activities. The Court said "that argument would be relevant if this Act had followed the pattern of the National Labor Relations Act (see 29 U.S.C. § 152(7), § 160(a) and extended federal control to business 'affecting commerce.' But as we pointed out in Kirschbaum v. Walling, 316 U.S. 517, this Act [Fair Labor Standards Act] did not go so far, but was more narrowly confined."

In *Overstreet* v. *North Shore Corp.*[23] the Court held that employees were "engaged in commerce" who (1) raised and lowered a bridge, (2) who maintained it, and (3) who collected tolls from users of the bridge, which was a part of a toll road used extensively by persons and vehicles traveling in interstate commerce, and which crossed a waterway used in interstate commerce. The Court referred as a guide to cases decided under the Federal Employers' Liability Act, where there is a similar question of coverage. In the opinion of the Court, Mr. Justice Murphy wrote, "The nature of the employer's business is not determinative, because as we have repeatedly said, the application of the Act depends upon the character of the employee's activities."

But in *McLeod* v. *Threlkeld,*[24] decided four months later than the preceding case, a divided Court held that an employee who prepared meals and served them to maintenance-of-way employees of an interstate railroad pursuant to a contract between his employer and the railroad company, is not "engaged in commerce" within the meaning of §§ 6 and 7 of the Act. Mr. Justice Reed, writing the Court's opinion, pointed out that "Congress did not intend that the regulation of hours and wages should extend to the furthest reaches of federal authority. The proposal to have the bill apply to employees' 'engaged in commerce in any industry affecting commerce' was rejected in favor of the language, now in the Act, 'each of his employees who is engaged in commerce or the production of goods for commerce.' "

The Court's opinion also held that the employee involved was not engaged in "the production of goods for commerce." However, Mr. Justice Murphy, in a dissent in which Justices Black, Douglas and Rutledge joined, contended that there was no sound reason for making a distinction between employees whose activities were in the field of transportation, and a rate clerk in the office of an interstate motor carrier,[25] or the

23. 318 U.S. 125 (1943). In Overnight Motor Co. v. Missel, n. 20 supra, it was "plain" that the rate clerk for the interstate carrier was "engaged in commerce" to all the Court except Mr. Justice Roberts, who dissented without opinion. In the Overstreet case, the status of the employees as "engaged in commerce," was equally plain to all the Court, although with more rationalization required, except to Mr. Justice Roberts and Mr Justice Jackson, who dissented without opinion.

24. 319 U.S. 491 (1943).

25. Overnight Motor Co. v. Missel, 316 U.S. 572 (1942).

seller of tickets on a toll bridge over which interstate traffic moves,[26] and that if the applicable provisions were "engaged in the production of goods for commerce," the decisions of the Court are clear that such employees as McLeod would be within the Act.[27]

The minority opinion pointed out that many years before the Court had decided that a cook employed by the railroad company to prepare food for maintenance workers was protected by the Employers' Liability Act.[28] While this case was never expressly overruled, the Court had retreated to a narrower interpretation of coverage in succeeding cases under that Act, the later cases limiting the coverage to employment so closely connected to interstate transportation as to be actually a part of it.

In *J. F. Fitzgerald Co.* v. *Pedersen*,[29] the employees involved were employed by an independent contractor who contracted with an interstate carrier to repair abutments on its bridges over which interstate trains crossed. A unanimous Court held in an opinion by Mr. Justice Reed that these employees were "engaged in commerce" within the meaning of the Act.

Again, in *Boutell* v. *Walling*,[30] the employees were mechanics hired by a partnership to service trucks of an interstate motor carrier corporation, in which the partners were the only stockholders. In the opinion of the Court, written by Mr. Justice Burton, it was said, "No claim is made that

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26. Overstreet v. North Shore Corp., 318 U.S. 125 (1942).
27. Cf. Kirschbaum Co. v. Walling, 316 U.S. 517 (1942); Warren-Bradshaw Co. v. Hall, 317 U.S. 88 (1942), which will be discussed in the succeeding section.
28. Philadelphia, B. & W. R.R. v. Smith, 250 U.S. 101 (1919).
29. 324 U.S 720 (1945).
30. 66 Sup. Ct. 631 (1946). A dissenting opinion by Douglas, J., in which Frankfurter and Rutledge, JJ., joined, did not question that the employees involved were "engaged in commerce," but dissented on the ground that they came within the exemption under §13(b)(1) because their hours of service could have been regulated by the Interstate Commerce Commission. The Court's opinion drew the fine distinction that the employees were not directly employed by the carrier. It is questionable whether the Court would have recognized this distinction had the Interstate Commerce Commission been endeavoring to regulate the qualifications and hours of such employees. In Clifton v. E. C. Schroeder Co., Inc., 153 F.(2d) 385 (C.C.A. 10th, 1946), cert. denied, 66 Sup. Ct. 1153 (1946) employees engaged locally in processing stone sold for roadbed of interstate railroad and highway were held not to be "engaged in commerce" or "production of goods for commerce."

these employees are not engaged in interstate commerce within the meaning of § 7 of the Fair Labor Standards Act. They are well within the requirement that they be 'actually in or so closely related to the movement of commerce as to be part of it.' "

But in *Borden Co.* v. *Borella*[31] the Court clearly inferred that porters, elevator operators, and night watchmen in a building owned by an interstate manufacturer and housing the administrative and elective offices of the owner-employer, were not "engaged in commerce" but were "engaged in the production of goods for commerce." And in *10 East 40th Street Building* v. *Callus*,[32] maintenance employees of an office building housing tenants at least 32.5% and probably 42% of whom were engaged in interstate commerce, were held by a divided Court to be engaged neither in commerce nor the production of goods for commerce, although there was no disagreement that such employees were not "engaged in commerce."

The numerous interpretations of the coverage of the phrase "engaged in commerce," by the lower courts, must, of course, be analyzed in accordance with the decisions of the Supreme Court. The lower court decisions add little to any discussion except as they state new problems of application of the coverage of the phrase "engaged in commerce" to varying types of employment.[33]

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31. 325 U.S. 679 (1945).

32. 325 U.S. 178 (1945). The Court's opinion said, "Obviously they are not engaged in commerce." The minority opinion did not dispute this. However, Mr. Justice Murphy contended in the dissenting opinion, in which he was joined by Justices Black, Reed and Rutledge, that the employees were engaged in the "production of goods for commerce."
See also Johnson v. Masonic Bldg. Co., 138 F.(2d) 817 (C.C.A. 5th, 1943, cert. denied, 321 U.S. 780 (1944).

33. Wilson v. Shuman, 140 F.(2d) 644 (C.C.A. 8th, 1944). (clerical employee in radio station engaged in interstate broadcasting is "engaged in commerce"); Slover v. Wathen, 140 F.(2d) 258 (C.C.A. 4th, 1944) (night watchman of pier to which interstate barges were tied was "engaged in commerce"); Welling v. Patton-Tulley Transp. Co., 134 F.(2d) 945 (C.C.A. 6th, 1943) (employees engaged on dyke construction in navigable river under contracts of their employer with United States are "engaged in commerce"). Walling v. McCrady Const. Co., 156 F.(2d) 932 C.C.A. 3rd, 1946) (highway contractor's employees repairing roads and bridges for State, where roads and bridges were used by interstate traffic, were "engaged in commerce"). The Act applies to work under government contract notwithstanding that it does not apply directly to federal, state or local governmental bodies. Clyde v. Broderick, 144 F.(2d) 348 (C.C.A. 10th, 1944). The Act

To summarize briefly at this point, the Court has agreed on these propositions in principle, (a) that the scope of coverage under the phrase "engaged in commerce" is narrower than that of the phrase "engaged in the production of goods for commerce," and (b) that the scope of coverage under either phrase is narrower than that of the phrase "affecting commerce" as used in the National Labor Relations Act. There is obviously a sharp difference of opinion among the members of the Court concerning the scope of coverage of "engaged in commerce." The realities of these agreements and the extent of the differences of opinion can better be shown after a review of the cases determining the coverage of the phrase "engaged in the production of goods for commerce."

B. *Employees Engaged in the Production of Goods for Commerce*

The definition given by the Congress for the word "produced" as used in the Act[34] covers the employment of any employee who engages in *"any process or occupation necessary to the production"* of goods for commerce.

This qualification, in addition to the other express content of the definition, had no legislative and judicial background and history as the term "in commerce" has had. However, it must be remembered that the Court has taken judicial notice of the legislative history of these definitions,[35] and has found that the scope of coverage was more narrowly confined than that of the term "affecting commerce" as used in the National Labor Relations Act.

After having given a general definition of the area covered by "production of goods for commerce" in *United States* v. *Darby*,[36] the Court considered the coverage of the phrase as

does not exempt from its coverage employees whose activities relate to the movement in interstate commerce of personally owned goods of the employer or goods moving interstate for the convenience of the Government of the United States. Timberlake v. Day and Zimmerman, Inc., 49 F. Supp. 28 (S.D. Ia. 1943). Transportation of material by the United States to munitions plant of an independent contractor for processing and transportation of processed munitions to war zones is "commerce" within the meaning of the Fair Labor Standards Act, and the coverage of the Act is extended to the employees of such an independent contractor as employees engaged in the production of goods for commerce.

34. 52 Stat. 1060 (1938), 29 U.S.C. § 203(j) (1940).
35. Higgins v. Carr Bros. Co., 317 U.S. 572 (1943). See n. 21 supra.
36. 312 U.S. 100 (1941).

applied to maintenance employees of the owner of a building, the tenants of which directly engaged in the production of clothing which concededly was produced for interstato commerce.

In two cases considered together, *A. B. Kirschbaum Co. v. Walling,* and *Arsenal Building Corp. v. Walling,*[37] Mr. Justice Frankfurter writing the Court's opinion, discussed at length the proposition that the Congress had chosen "not to enter areas which it might have occupied" in the Fair Labor Standards Act. Notwithstanding the proposition which he stated in the Court's opinion, it was held that the Act covered maintenance employees of the buildings in which goods for interstate commerce were produced, because such employees were engaged in an occupation necessary to the production of goods for commerce, and because they "had such a close and immediate tie with the production of goods for commerce." This interpretation immediately leads to the question of how far the chain of causation in production can or will be applied. Shortly after the decision in the *Kirschbaum* case, the Court denied certiorari in a case involving an employer who made cigar boxes, which were sold exclusively to local cigar manufacturers, who distributed the cigars manufactured, in the boxes, in interstate commerce. The employees of the box manufacturer were held to be engaged in an occupation necessary to the production of goods for commerce.[38]

37. 316 U.S. 517 (1942).

38. Enterprise Box Company v. Fleming, 125 F.(2d) 897 (C.C.A. 5th, 1942), cert. denied, 310 U.S. 704 (1942), sub. nom. Enterprise Box Company v. Walling. By necessary implication the Court held the same, on very similar facts, in Dize v. Maddrix, 324 U.S. 697 (1945). This case was considered with Brooklyn Savings Bank v. O'Neil and Arsenal Building Corp. v. Greenberg. Similar rulings have been made where the goods were sold locally to another manufacturer, and lost their identity completely by processing before entering interstate commerce. Bracey v. Luray, 138 F.(2d) 8 (C.C.A. 4th, 1943), cited with approval in D. A. Schulte Co. v. Gangi, 66 Sup. Ct. 925, 931, n. 19 (1946), where the Court observed that it was not necessary to trace the identical goods into interstate commerce if there were reasonable grounds for believing that they would eventually enter interstate commerce; Walling v. People's Packing Co., 132 F.(2d) 236 (C.C.A. 10th, 1942), cert. denied, 318 U.S. 774 (1943); Southern Advance Bag and Paper Co. v. U.S., 133 F.(2d) 449 (C.C.A. 5th, 1943); Walling v. Amidon, 153 F. (2d) 159 (C.C.A. 10th, 1945). It has also been held that ice sold locally to users carrying on interstate commerce, for icing refrigerator cars, dining cars and the like, bring the employees of the local ice company within the scope of employment "necessary to the production of goods for commerce." Hamlet Ice Co. v. Fleming, 127 F.(2d) 165 (C.C.A. 4th, 1942), cert. denied, 317 U.S.

Shortly thereafter, in *Warren-Bradshaw Co.* v. *Hall*,[39] the employees of an independent contractor who operated oil drilling equipment, and, under contract with owners and lessees, drilled oil wells to an agreed depth short of oil sand stratum, were held to be engaged in a "process or occupation necessary to the production" of oil for interstate commerce. The wells were later "brought in" by other workmen. Some of the oil and gas, either in crude form or refined, later moved in interstate commorce.

In *Walton, Administratrix* v. *Southern Package Corp.*,[40] a night watchman in a plant manufacturing veneer which was destined for interstate commerce, was found to be engaged in an occupation necessary for the production of goods for commerce. Similarly, fireguards at plant of a manufacturer of goods for interstate commerce were held to be within the scope of the protection of employment necessary for the production of goods for commerce,[41] and the employees of a short line railroad, located entirely in one county, but which hauled

634 (1942); Chapman v. Home Ice Company, 136 F.(2d) 353 (C.C.A. 6th, 1943), cert. denied, 320 U.S. 761 (1943). In recent companion cases it was held in E. C. Schroeder Co., Inc. v. Clifton, 153 F.(2d) 385 (C.C.A. 10th, 1946), cert. denied, 66 Sup. Ct. 1353 (1946), that employees of an independent contractor quarrying and hauling stone used locally for construction of a dyke to protect an oil field producing oil that moved in interstate commerce, were engaged in an occupation necessary for the production of goods in commerce, but in Clifton v. E. C. Shroeder and Co., Inc., 153 F.(2d) 385 (C.C.A. 10th, 1946)), cert. denied, 66 Sup. Ct. 1351 (1946), it was held that similar workmen producing and hauling stone for the roadbed of an interstate railroad and an interstate highway, were neither "engaged in commerce" nor in the "production of goods for commerce." The distinction was made that the goods produced did not go into commerce and did not contribute to the production of any goods for commerce as the stone used in the dyke did.

39. 317 U.S. 88 (1942), Mr. Justice Roberts in a vigorous dissent observed, "It is but the application to the practical affairs of life of a philosophic and impractical test. It is but to repeat in another form the old story of the pebble thrown into the pool, and the theoretically infinite extent of the resulting waves, albeit too tiny to be seen or felt by the exercise of one's senses. The labor of the man who made the tools which drilled the well . . . that of him who mined the iron of which the tools were made, are all just as necessary to the ultimate extraction of oil, as the labor of respondents. Each is an antecedent of the consequent,—the production of goods for commerce."

40. 320 U.S. 540 (1944). A watchman at a refinery producing oil for interstate commerce had been held engaged in an occupation necessary to the production of goods for commerce in Mid-Continent Pipe Line Company v. Hargrave, 129 F.(2d) 655 (C.C.A. 10th, 1942).

41. Armour and Company v. Wantock, 323 U.S. 126 (1944).

a substantial amount of granite which was all shipped from various points along the line into interstate commerce, were held to be both "engaged in commerce" and the "production of goods for commerce."[42] Employees of a water association which maintains an irrigation system and operates electrical pumps which cause electricity, originating outside the state, to flow through the association's lines, are engaged in an occupation necessary for the productions of good for commerce.[43]

In 1945, in two cases decided on the same day, *Borden Co.* v. *Borella*[44] and *10 East 40th St. Building* v. *Callus*,[45] the extent of the difference in opinion of the Court concerning the problem of the scope of application of the phrase, "necessary to the production of goods for commerce," was clearly shown. In the *Borden Co.* case, the employees involved were porters, elevator operators and night watchmen in a building owned by an interstate manufacturer, and more than half of which was used for housing the administrative and executive offices of the owner-manufacturer. The majority of the Court, while inferring that these employees were not "engaged in commerce," found that they were engaged in an employment necessary for "the production of goods for commerce."[46] The late Chief Justice, with Mr. Justice Roberts concurring, dissented vigorously.[47] But in the *Callus* case, the majority of the Court found that maintenance employees of a forty-eight story building occupied by a miscellany of tenants engaged in

42. Rockton and Rion Railroad v. Walling, 146 F.(2d) 111 (C.C.A. 4th, 1944), cert. denied, 324 U.S. 880 (1945).

43. Reynolds v. Salt River Valley Water Users' Association, 143 F.(2d) 863 (C.C.A. 9th, 1944), cert. denied, 323 U.S. 764 (1945). See also New Mexico Public Service Co. v. Engel, 145 F.(2d) 636 (C.C.A. 10th, 1944). Walling v. Haile Gold Mines, Inc., 136 F.(2d) 102 (C.C.A. 4th, 1943). "Goods for commerce" include gold mined for the government and shipped to a mint in another state.

44. 325 U.S. 679 (1945).

45. 325 U.S. 578 (1945).

46. Mr. Justice Murphy said in the opinion of the Court in the Borden case, "In an economic sense, production includes all activity directed to increasing the number of scarce economic goods .... Such labor is but an integral part of the co-ordinated productive pattern of modern industrial organizations."

47. The late Chief Justice said in his dissenting opinion, "The services rendered in this case would seem to be no more related and no more necessary to the process of production than the services of the cook who prepares the meals of the President of the company, or the chauffeur who drives him to his office. All are too remote from the physical process of production to be said to be in any practical sense, a part of, or necessary to it."

the production of goods for commerce, to the probable extent of 42% of the total occupancy, were not engaged in an occupation necessary to the "production of goods for commerce."[48] Mr. Justice Murphy, joined by Justices Black, Reed and Rutledge, dissented strongly.[49] The position of the dissenting Justices was at least consistent with their position in the *Borden Co.* case. Taking the definition of Mr. Justice Murphy in that case literally,[50] the scope of coverage of employees necessary "for the production of goods for commerce" is almost unlimited, and approximates, if it does not exceed, the scope of the coverage of the phrase, "affecting commerce."

Succeeding cases indicate that the tendency of the Court is to extend the scope more in conformity with the *Kirschbaum* case, than to restrict it as in the *Callus* case.

In *Roland Electric Co.* v. *Walling*[51] the employees involved were those of an independent contractor engaged in the repair and reconditioning of electric motors, and in the installation and repair of wiring in industrial establishments which were used in the production of goods for commerce. These employees were held to be engaged in an occupation necessary for the production of goods for commerce.

Again in *Martino* v. *Michigan Window Cleaning Company*,[52] the employees in question were those of an independent contractor whose principal occupation was washing windows in industrial plants, which were producing goods for commerce. Mr. Justice Burton, writing the opinion of the Court, held that these employees were within the scope of the Act as engaged in an occupation necessary to the production of goods for commerce.

However, in *Mabee* v. *White Plains Publishing Co., Inc.*[53]

48. The late Chief Justice writing a concurring opinion to that of Mr. Justice Frankfurter stated his position thus, "The views I expressed in my dissent in Borden Co. v. Borella would, if accepted, control the decision in this case. If those views have been rejected by the court, I join in the Court's opinion in this case."

49. Mr. Justice Murphy pointed out that at least 32.5% and probably 42% of the occupancy was thus engaged in the production of goods for commerce. He observed "clearly a 32.5% occupancy is so substantial as to remove any doubt that the maintenance employees devote a large part of their time to activities necessary to the production of goods for commerce; hence they are covered by the Act."

50. See n. 46 supra.

51. 326 U.S. 657 (1946).

52. 325 U.S. 849 (1946).

53. 66 Sup. Ct. 511 (1946).

the employees were those of a newspaper with one half of one per cent. interstate circulation. The New York Court of Appeals had affirmed a reversal by the Appellate Division of a judgment for the plaintiffs. The Supreme Court reversed the New York Court. The Court, with Mr. Justice Douglas writing the opinion, held that the employer was engaged in the "production of goods for commerce," but the Court expressly did not decide whether the particular employees involved were covered by the Act. Mr. Justice Murphy restricted the application of the definitions which he had given in the *Jacksonville Paper Co.* and *Borden Co.* cases and dissented, contending that Congress by fair implication excluded commerce of small volume from the coverage of the Act, and that the Company producing 99½% of its products locally is essentially and realistically a local business which Congress "plainly excluded from this Act."

To compare the decisions defining the scope of coverage of the two phrases in question, it is obvious that the nature of the employer's business is not the basis for any distinction between the cases. As Mr. Justice Murphy, writing the Court's opinion, observed in the *Overstreet* case and as the Court has frequently reiterated, "the application of the Act depends upon the character of the employee's activities."

Congress has exercised its power over interstate commerce to legislate against numerous specific problems which have arisen, which necessarily, in the light of the historical background of the legislation, has made for apparent differences of interpretation, as pointed out by Mr. Justice Frankfurter in the *Kirschbaum* case.[54] Nevertheless it must

54. In that case, 316 U.S. 517 (1942), Mr. Justice Frankfurter writing for the Court, said at pages 520 and 521, "The body of Congressional enactments regulating commerce reveals a process of legislation which is strictly empiric. The degree of accommodation made by Congress from time to time in the relations between federal and state governments has varied with the subject matter of the legislation, the history behind the particular field of legislation, the specific terms in which the new regulatory legislation has been cast, and the procedures for its administration . . . . Thus while a phase of industrial enterprise may be subject to control under the National Labor Relations Act, a different phase of the same enterprise may not come within the 'commerce' protected by the Sherman Law . . . . Similarly, enterprise subject to federal industrial regulation may nevertheless be taxed by the States without putting an unconstitutional burden on interstate commerce." Again, on page 523, he observes, "Unlike the Interstate Commerce Act and the National Labor Relations Act and other legislation, the Fair Labor Standards Act puts upon the courts the independ-

be recognized that, allowing for the known purposes of regulation, rules of statutory construction have been used to explain the boundary drawn in determining whether an employee was engaged "in commerce." Unless one adopts the absolute literal statement of Mr. Justice Murphy in the *Borden Co.* case[55] and applies it in its broadest possible implication, (applying it to the phrase, "in commerce," as well as to the phrase, "production of goods for commerce,") it is not unreasonable to look to the limitations of definition of "in commerce" which have been used and applied in other situations such as the Federal Employers' Liability Act. It was Mr. Justice Murphy who first used the analogy of the Employers' Liability Act cases in the *Overstreet* case,[56] but who disagreed with the comparison when Mr. Justice Reed used those authorities in the *McLeod case.*[57]

It may be contended that the cases cited as definitive authority under the Federal Employers' Liability Act (45 U.S.C., Section 51, et seq.) have been discredited by the 1939 amendment (53 Stat. 1404, 1939) in which the report of the Senate Committee of the Judiciary (Report 661) expressly said that the aim of the amendment was to clarify and broaden the law and to eliminate the uncertainty created by the varied decisions, which the Court now uses to define the scope of coverage of the phrase, "engaged in commerce," under the Fair Labor Standards Act. The 1939 amendment of the Federal Employers' Liability Act expressly changed the language of that Act from "engaged in commerce" to cover any employee "whose duties . . . in any way directly or closely, and substantially affect such commerce . . . . " At the same time that the Congress was considering the necessity of such an amendment to *broaden* the scope of the Employers' Liability Act, and having used, in 1935, the phrase, "affecting commerce," in the National Labor Relations Act (29 U.S.C., Section 151, et seq.), it rejected the language of the bill which was to become the Fair Labor Standards Act, as introduced,—

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ent responsibility of applying ad hoc the general terms of the statute to an infinite variety of complicated industrial situations. Our problem is, of course, one of drawing lines. But it is not at all a problem in mensuration. There are not fixed points, though lines are to be drawn."

55. See n. 46 supra.
56. See n. 23 supra.
57. See n. 24 supra.

"engaged in commerce in any industry affecting commerce,"—in favor of, "engaged in commerce or the production of goods for commerce." With this background of legislative awareness, the acceptance by the majority of the Court of the prior definitions of the phrase, "engaged in commerce," and the making of distinctions between the scope of its coverage and that of the phrase, "engaged in the production of goods for commerce," is reasonable. To do otherwise might reopen questions of the scope of the phrase, "engaged in commerce," as used in other statutes, where that scope has been reasonably well defined by the Court and acquiesced in by the Congress.

However, it is apparent that there is conflict within the Court as to the extent of the scope properly to be given the phrase. Referring directly to the phrase, "engaged in commerce," Mr. Justice Murphy said in the *McLeod case*[58] in his dissenting opinion, "The phrase 'engaged in commerce' should be broadly construed. In the words of one of the Act's sponsors, the phrase extends to 'employees who are a necessary part of carrying on' a business operating in interstate commerce."[59] Again in the *Jacksonville Paper Co.* case[60] Mr. Justice Murphy said, "In using the phrase, 'engaged in commerce,' Congress meant to extend the benefits of the Act to employees throughout the farthest reaches of the channels of interstate commerce." In spite of the broad statements, it is evident from the decisions that the members of the Court holding those views have made a distinction between the scope of the coverage of the two phrases and have restricted that of the phrase, "engaged in commerce." The dissent of Mr. Justice Murphy in the *Mabee* case[61] indicates that he placed some limitations upon his definitions of the scope of coverage of the Act which definitions were taken even more literally by other members of the court.[62] The implications of the definitions heretofore given might be unlimited in re-

58. Id.

59. Senator Borah speaking for the Senate Conferees on the Conference Report, 83 Cong. Rec. 9170 (1938).

60. See n. 21 supra.

61. See n. 53 supra.

62. In his dissent in the Callus case, Mr. Justice Murphy quoted with approval the definition of the term "produced" in Western Union Telegraph Co. v. Lenroot, 323 U.S. 490 (1945), in which the term had been defined as including "every kind of incidental operation preparatory to putting goods into the stream of commerce."

spect to the scope of coverage of the phrase "the production of goods for commerce" and could even be applied to defining the scope of "engaged in commerce." However, the broader the scope of coverage given to employment necessary to "the production of goods for commerce," the less important becomes the problem of the scope of coverage of the phrase "engaged in commerce." It might be contended that in the light of the complex pattern of our labor system, employment of every employee is necessary to the "production of goods for commerce." In that event, the classification of employees "engaged in commerce" would be useless, because all employees would fall within the other classification. We must then assume either that Congress did a useless thing in creating the coverage for those "engaged in commerce," or that Congress intended definite limitations on the classification of those "engaged in or necessary to the production of goods for commerce." The language used by Mr. Justice Murphy and concurred in by his colleagues,—in some cases by a majority,—could be used as a basis for unlimited coverage. The dissenting opinion of the late Chief Justice in the *Borden* case forecast that possibility.[63]

In any event, the present tendency of the Court seems to be to restrict the scope of coverage of the phrase, "engaged in commerce," but with a strong minority believing in at least some extension of the coverage, although apparently not to the extent of placing it on a parity with the increasing scope of coverage which is being given to the phrase, "engaged in the production of goods for commerce," a scope which is approaching if not exceeding that given to the phrase "affecting commerce," the words of the Court notwithstanding.

The legislative history of the Act and its general purposes are well known. In a number of opinions, the Court has reviewed this history in detail. The difficulties of the Court, collectively and individually, are difficulties of the

63. The late Chief Justice said, "No doubt there are philosophers who would argue, what is implicit in the decision now rendered, that in a complex modern society there is such interdependence of its members that the activities of most of them are necessary to the activities of most others. But I think that Congress did not make that philosophy the basis of the coverage of the Fair Labor Standards Act. It did not, by a 'house-that-Jack-built' chain of causation bring within the sweep of the statute the ultimate causa causarum which result in the production of goods for commerce."

application of the Act to the individual fact situations in effectuating purposes which are more restricted than the purposes of the National Labor Relations Act, when at the same time the Court is endeavoring to give effect to the broad policy of this remedial legislation, as it was originally conceived by its sponsors.

C. *Exemptions from the Act*

Several cases have involved the interpretation of the exemptions under § 13 of the Act. In 1943, two cases, decided together, *Southland Gasoline Co. v. Bayley* and *Richardson v. James Gibbons Co.*,[64] came before the Supreme Court upon the interpretation to be given the exemption by § 13(b)(1) of employees "with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours . . . . " In the *Southland* case the Circuit Court of Appeals for the Eighth Circuit held this to exempt employees of private carriers from the requirements of the Fair Labor Standards Act only after the Interstate Commerce Commission found need to establish maximum hours for such employers. In the *Gibbons* case the Fourth Circuit held that "power" in § 13(b) meant the existence of the power and not its actual exercise. The Supreme Court held that these employees were exempted even though the Interstate Commerce Commission had not seen fit to exercise its power to establish maximum hours.

However, In *Boutell* v. *Walling*,[65] the employees involved were hired by a partnership to service trucks of a corporation in which the partners were the only stockholders. It was conceded that the employees were engaged in interstate commerce. The employers claimed exemption under section 13(b)(1). In the opinion of the Court, by Mr. Justice Burton, these employees were held not to be exempted from the scope of the Fair Labor Standards Act, because they were not employees of the carrier corporation. In a dissenting opinion by Mr. Justice Douglas, in which Justices Frankfurter and Rutledge concurred, it was pointed out that the exemption is not based on the exercise, but the existence of the power of the Interstate Commerce Commission to regulate, and the dissenting Justices observed that it was questionable whether

64. 319 U.S. 44 (1943).
65. 66 Sup. Ct. 631 (1946).

the Court would deny the right of the Interstate Commerce Commission to exercise its power in this case.[66]

In 1945, a more troublesome question was presented to the Court in *Addison* v. *Holly Hill Fruit Products, Inc.*[67] The important question in this case involved section 13(a)(10), which exempts from the minimum wage and overtime requirements persons employed "within the area of production (as defined by the Administrator)" in canning agricultural commodities for market. The Administrator's definiton of area of production brought within the exemption employees of canneries which obtained "all of their farm products from within ten miles and had not more than seven employees." A judgment of the District Court allowing recovery under the Act was reversed by the Circuit Court of Appeals on the ground that the Administrator's definition based on the number of employees was invalid, and that the cannery was exempt under the remainder of the Administrator's definition. The Supreme Court held that the Administrator's discrimination between canneries having seven or less employees and those having more, was not authorized by the Act and remanded the case to the District Court, with directions to retain jurisdiction until the Administrator made a valid definition within the authority granted him by Congress. In a dissenting opinion, Mr. Justice Rutledge, with Justices Black and Murphy concurring, said that in his opinion the definition of "area of production" was valid and that no purely geographical definition could be made which would carry out the major legislative policies announced in the statute. Mr. Justice Douglas concurred in this portion of the dissent. Mr. Justice Rutledge, however, said that if the definition was invalid, then the exemption should be inoperative. It is difficult to justify this portion of the dissenting opinion because to say that the exemption was entirely inoperative when and because the Administrator had exceeded his power would certainly defeat Congressional intent.

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66. In Rockton and Rion R.R. v. Walling, 146 F.(2d) 111 (C.C.A. 4th, 1944), cert. denied, 324 U.S. 880 (1946), employees of railroad located entirely in a single county, but which carried granite to different points along its line, from which it entered interstate commerce, were held to be engaged both in commerce, and the production of goods for commerce under the Fair Labor Standards Act and not within the exemption.

67. 322 U.S. 607 (1944).

Several cases have arisen under the exemption in § 13 (a) (2), which exempts any employee engaged in any retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce. It was pointed out in *Walling* v. *Jacksonville Paper Co.*[68] that the purpose of excluding retailers was to eliminate those retailers near state lines making some interstate sales.

In *A. B. Kirschbaum Co.* v. *Walling,*[69] the Court rejected the contention that building maintenance workers were engaged in service, and that the buildings should be regarded as service establishments within the exemption of § 13(a) (2). The Court said that selling space in a building is not the equivalent of selling services to consumers, and in any event, the greater part of the servicing done by the employer was not in intrastate commerce.

In *A. H. Phillips, Inc.* v. *Walling,*[70] employees in the central office and warehouse from which the employer's chain of retail grocery stores, a minority of which were in another state, were supplied, and at which goods shipped in interstate commerce were received, were held not to be a retail establishment within the meaning of the exemption.

In *Martino* v. *Michigan Window Cleaning Co.,*[71] the Court held that employees of an independent contractor, who washed windows of industrial plants, engaged in the production of goods for commerce, were not within the exemption of § 13 (a) (2).

In *Roland Electric Co.* v. *Walling,*[72] the employees were employed by an independent contractor locally engaged in commercial and industrial wiring and installation of electrical equipment in industrial plants engaged in the production of

68. 317 U.S. 564, 571 (1943).

69. 316 U.S. 517 (1942).

70. 324 U.S. 490 (1945). In the Court's opinion written by Mr. Justice Murphy it was said, "The Fair Labor Standards Act was designed 'to extend the frontiers of social progress by insuring to all our able-bodied working men and women a fair day's pay for a fair day's work' . . . . To extend an exemption to other than those plainly and unmistakably within its terms and spirit would be to abuse the interpretative process and to frustrate the announced will of the people . . . . It is quite apparent from the sparse legislative history of § 13(a)(2) that Congress did not intend to exempt, as a retail establishment, the warehouse and central office of an interstate chain store system."

71. 325 U.S. 849 (1946).

72. 326 U.S. 657 (1946).

goods for commerce. The Court held that such employees were not engaged in retail sales and services as contemplated by the Act.[73]

The tendency of the Court has been to restrict the scope of the exemptions of the Act and this tendency is reflected in numerous cases in the lower courts in interpreting the exemptions.[74] It has also been held that a newspaper publishing company, whose employees would otherwise be covered by the Act, is not exempt on the ground that the application of the Act constitutes an abridgment of "freedom of the press."[75]

D. *Child Labor Provisions*

As has been said before, the Act does not prohibit "oppressive child labor" but does prohibit the shipment in commerce of any goods produced in an establishment in the United States, in or about which within thirty days prior to the removal of such goods therefrom, any "oppressive child labor" has been employed. The Chief of the Children's Bureau in the Department of Labor is authorized to administer

73. In the opinion of the Court written by Mr. Justice Burton, it was said, "The word 'retail' because of its ready contrast with 'wholesale' is generally more restrictive than the word 'service.' The two, however, are used so closely together in this statute as to require them to be interpreted similarly. This makes it appropriate to restrict the broad meaning of 'service' to a meaning comparable to that given the narrower term 'retail.' The words are put on a like level especially by their use in the alternative with the single word 'establishment' in the phrase, 'any *retail or service establishment,*' the greater part of whose *selling or servicing* is not intrastate commerce (italics supplied). Accordingly in proportion, as the meaning of the word 'retail' is restricted to sales made in small quantities to ultimate consumers, personal rather than commercial and industrial uses of those articles, so it is correspondingly appropriate to restrict the word 'service' to services to ultimate users of them for personal rather than commercial purposes."

74. Fleming v. Hawkeye Pearl Button Co., 113 F.(2d) 52 (C.C.A. 8th, 1940) (makers of pearl buttons from shells are not exempted under § 13(a)(5) exempting employees engaged in fishing or processing of acquatic life); Schmidt v. Emigrant Industrial Savings Bank, 148 F.(2d) 294 (C.C.A. 2d, 1945) (building superintendent who performed janitor's work and had few duties of supervision was not exempt as an executive or administrative employee); Bracey v. Luray, 138 F.(2d) 8 (C.C.A. 4th, 1943) (employees of scrap metal dealer selling scrap metal to wholesalers are not exempt under § 13(a)(2) as employees of a retail establishment); Murphy v. Georgia Aero-Tech, 49 F. Supp. 982 (D.C.Ga. 1943) (employees of private school for training air pilots are not employees of a service establishment).

75. Sun Publishing Co. v. Walling, 140 F.(2d) 445 (C.C.A. 6th, 1944), cert. denied, 322 U.S. 728 (1944).

the provisions of the Act relating to oppressive child labor. In *Western Union Telegraph Co.* v. *Lenroot*,[76] in a 5-4 decision, the Court held that the employment of children within the restricted age limits of the Act did not apply to a telegraph company. In the majority opinion it was conceded that telegrams are "goods" within the meaning of the Act, but it was concluded that the telegraph company did not "produce" the goods. While conceding that the definition of the word "produced" included employees who "handle," or in any other manner "work on goods," the Court's opinion recognized a distinction between handling in transportation and producing. The word "ship" was not defined in the Act and the Court's opinion observed that "ship" as used in the Act does not apply to intangible messages.

In a dissenting opinion by Mr. Justice Murphy, in which Justices Black, Douglas and Rutledge joined, it was pointed out that prior to the introduction of the messages into interstate commerce, the telegraph company employees "worked on" and "handled" the messages by aiding in the composition of them, writing them on blanks, transforming them into electrical impulses and performing numerous other incidental tasks, and that in a very real and literal sense they handled and worked on a message before it entered the channels of interstate commerce. While the Court, in the majority opinion, is convinced that the Act did not contemplate its application to such a situation, the Court concedes that "it is to indulge in a fiction to say that it (Congress) had a specific intention on a point which never occurred to it." As pointed out in the minority opinion, any difficulty which the Court feared over a thirty day suspension of telegraph messages as harmful to the public interest could have been handled easily by a stay of the mandate, or injunction, until at least thirty days elapsed, during which no "oppressive child labor" had been employed by the telegraph company. When the majority opinion conceded that telegrams were "goods" within the meaning of the Act, it is difficult to follow its reasoning that the telegraph company was not a "producer" or "shipper."[77]

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76. 323 U.S. 490 (1945).

77. In two cases considered together, Lenroot v. Kemp and Lenroot v. Hazlehurst Mercantile Co., 153 F.(2d) 153 (C.C.A. 5th, 1946), it was recognized that the handling of tomato packing crates by

III. *Wages and Hours under the Act*

A. *Determination of Overtime*

1. *The "Regular Rate" at which Employee is Employed*

As Mr. Justice Murphy said in writing one of the Court's opinions,[78] "The keystone of § 7(a) is the regular rate of compensation. On that depends the amount of overtime payments which are necessary to effectuate the statutory purpose. The determination of that rate is, therefore, of prime importance."

In *Overnight Motor Transportation Company* v. *Missel*[79] the rate clerk of an interstato motor carrier, paid on a weekly basis, but who worked varying hours, sued for overtime pay. No hourly rate had been fixed, but the salary was sufficient to cover regular and overtime work as based on the minimum hourly rate as fixed by the statute. The Court found that this plan did not comply with the statute because the minimum rate fixed by the statute was not necessarily the regular rate, the regular rate being the result of dividing the total wage by the hours which were really worked. The Court found this construction necessary to make the Act effectual. The Court said, "We agree that the purpose of the Act was not limited to a scheme to raise substandard wages first by a minimum wage and then by increased pay for overtime work . . . . The provision of § 7(a) requiring this extra pay for overtime is clear and unambiguous . . . ; by this requirement, although overtime was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage . . . . " The Court also held that the good faith of the employer was immaterial.[80]

However, on the same day the Court decided the case of *Walling* v. *A. H. Belo Corporation*,[81] in which the employer,

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children employed by tomato packers whose goods entered commerce, constituted manufacturing and processing occupation within the protection of the Act.

78. Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419 (1945).

79. 316 U.S. 572 (1942).

80. Mr. Justice Reed delivering the opinion of the Court said, "Perlexing as petitioner's problem may have been, the difficulty does not warrant shifting the burden to the employee . . . . The liquidated damages for failure to pay the minimum wages under §§ 6(a) and 7(a) are compensation, not a penalty by the government."

81. 316 U.S. 624 (1942).

by contract, had changed a straight weekly for varying hours of work into an hourly wage. Under the facts the contract base rate was in every case in excess of the statutory minimum wage. In a 5-4 decision the Court upheld this contract rate as the "regular rate." The broad statements in the two cases are difficult of reconciliation because the plan in the *Missel* case could have been legalized without difficulty under the legal conclusions of the *Belo* case. As a forecast the Court cited in the *Missel* case the Circuit Court opinions of *Warren Bradshaw Drilling Co.* v. *Hall*,[82] and suggested comparison with *Carleton Screw Products Co.* v. *Fleming*.[83]

In the same year *Warren Bradshaw Company* v. *Hall* came before the Court, and the Court gave but slight consideration to the contention that the "regular rate" had been complied with. The employees involved received fixed wages per day and there was no agreement providing for an hourly rate, or that the weekly salary included additional compensation for overtime hours. The employer urged that it had complied with the overtime requirements because the employees received wages in excess of statutory minimum wage, including time and a half of that minimum wage for all overtime hours. The Court observed in the majority opinion that a similar argument had been squarely rejected in the *Missel* case.

In 1944 the case of *Walling* v. *Helmerich and Payne, Inc.*[85] was decided by the Court. This case involved a so-called "split-shift plan." The first hours of work were paid for at a specified hourly rate which was termed the regular rate, and the remaining hours were treated as overtime, for which the rate was calculated as one and one half times the designated "regular rate." Under this plan the total wages would be the same as before the Act. The District Court and the Circuit Court of Appeals had both held that this split-day plan did not violate the provision of § 7(a) of the Act under

82. 124 F.(2d) 42 (C.C.A. 5th, 1941).

83. 126 F.(2d) 537 (C.C.A. 8th, 1942). The Circuit Court of Appeals had indicated that bonuses were subject to overtime payments under §7(a). The Supreme Court later denied certiorari on this case in 317 U.S. 634 (1942) because the application was not made in time. The Warren-Bradshaw case was later to come before the Supreme Court to be affirmed.

84. 317 U.S. 88 (1942).

85. 323 U.S. 37 (1944).

the *Belo* case. The Supreme Court pointed out that while the words "regular rate" were not defined, they specifically meant the hourly rate actually paid, and that the rate fixed here by contract as the regular rate was an artificial one, and observed that no contract plan could be approved which really computed the regular rate in an artificial manner which violated the Act itself.

Shortly after, in *United States* v. *Rosenwasser*,[86] the question arose concerning whether the Act applied to piece work and the Supreme Court held that the Act did apply, and that a worker is as much an employee when paid by the piece, as he is when paid by the hour.[87]

In *Walling* v. *Youngerman-Reynolds Hardwood Co.*[88] the employer before the Act had paid the employees, who were lumber stackers, on a piece work basis. After the Act the parties had contracted on a specified hourly rate which was less than the actual hourly rate they had received on the piece work basis in the six months period preceding the trial. It was stipulated that if the piece work earnings under the previous plan were greater than the new wage earned under the contract, the employees would receive those. At the same time the Court also considered another case, *Walling* v. *Harnischfeger Corporation*,[89] which involved employees producing electrical products, who had entered into a collective bargaining agreement whereby they were to be paid a basic hourly rate plus an incentive bonus. Some of the jobs involved had been "time-studied" by the management; others had not. When a worker was assigned to a "non-incentive" job he was paid at least 20% more than his basic hourly rate. This plan

86. 323 U.S. 360 (1944).

87. In delivering the opinion of the Court Mr. Justice Murphy observed, "The fact that §6(a) speaks of a minimum rate of pay 'an hour,' while §7(a) refers to a 'regular rate' which we have defined to mean 'the hourly rate actually paid for the normal, non-overtime week . . . does not preclude application of the Act to piece workers. Congress necessarily had to create practical and simple measuring rods to test compliance with the requirements as to minimum wages and overtime compensation. It did so by setting the statutes in terms of hours and hourly rates. But other measures of work and compensation are not thereby voided or placed outside the reach of the Act. Such other modes must merely be translated or reduced by computation to an hourly basis for the sole purpose of determining whether the statutory requirements have been fulfilled."

88. 325 U.S. 419 (1945).

89. 325 U.S. 427 (1945).

was similar to the plan in the *Youngerman-Reynolds* case except that it was more nearly in accord with what the previous piece work arrangement had been. The Court held both of these plans in violation of the Act and returned to its definition of the regular rate in the *Missel* case, as determined by dividing the actual weekly earnings by the number of hours which had been worked during the period in question.[90]

The *Missel* case and the *Belo* case were distinguished originally on the basis that the former did not have an agreed on "regular rate." Therefore, there was no presumption that the regular rate was the minimum statutory rate. On the other hand, the *Belo* case had an express contractual "regular rate." However, succeeding cases make it apparent that this is not the distinction which the Court has been making, and that the Court has been attempting to look to the reality of what had been the actual rate during the period in question. Since all of these cases involve variable working hours and varying facts, this distinction based upon a mathematical computation of the actual working period, necessarily brings different and varying results.

Two recent cases have raised the same problems inherent in the cases discussed. In *Walling* v. *Alaska Pacific Consolidated Mining Company*[91] the employer contracted on another split-shift plan to pay the employees six hour in each shift on regular time and two hours overtime at a lower contractual rate. The result was that the payment for six hours under the contractual rate and time and a half for the two overtime hours was the same as the previous daily wage. In this case the Circuit Court held that the contractual rate was not a true "regular rate" in contemplation of the Act.

In the same Circuit Court in the case of *Walling* v. *Halli-*

90. In a dissent the late Chief Justice distinguished between these two cases and the Helmerich and Payne case and pointed out that in that case no attempt was made by the employer to apply the asserted regular rate to the first 40 hours of work and observed, "All this is in flat contradiction to Walling v. A.H. Belo Corporation, 316 U.S. 624, in which we held that nothing in the Fair Labor Standards Act bars an employer from contracting to pay his employees minimum hourly rates for time plus one and one-half times those rates for overtime in excess of the minimum statutory rates with a lump sum guarantee, which in some weeks exceeds the wage at the stipulated hourly rate . . . . That case is controlling here."

91. 152 F.(2d) 812 (C.C.A. 9th, 1945), cert. denied, 66 Sup. Ct. 960 (1946).

burton Oil Well Cementing Co.,[92] the employer had been paying a monthly salary for variable hours of employment. The employer, after the passage of the Act, contracted with the employees for a weekly wage at a rate so that the payment for the straight time hours and time and a half for overtime hours worked out approximately to the amount of the guaranteed sum. The Circuit Court of Appeals in this case held that the contract was not sufficiently distinguishable from that in the *Belo* case and held that case controlling. The Supreme Court has granted certiorari but has not yet given its opinion. While the Supreme Court has not actually overruled the *Belo* case, it has restricted its application to such an extent that it seems doubtful that it will be applied to any other case whose facts are in the slightest degree different.[93]

While the Supreme Court, in the cases involving express contractual rates, has purported to find what was the actual rate based upon an actual period, nevertheless it is reasonable to suppose that in computing the "regular rate" in that way there would be a continual variance in the regular rate as additional facts of working time would be added to the figures from which any computation is made, and that the "regular rate" would not only vary in general, but would continually vary as to individuals.[94]

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92. 152 F.(2d) 622 (C.C.A. 9th, 1945), cert. granted, 66 Sup. Ct. 1021 (1946).

93. Walling v. Uhlman Grain Co., 151 F.(2d) 381 (C.C.A. 7th, 1945) This was the same Court which had been reversed in the Harnischfeger case. The Circuit Court of Appeals observed that if the Supreme Court had not overruled the Belo case it had so restricted its application that it was no authority except for an identical state of facts. In the dissenting opinion in the Circuit Court of Appeals in the Halliburton Oil Well Cementing Co. case, it was contended that the Belo case was not reliable authority. In Asselta v. 149 Madison Avenue Corp., 156 F.(2d) 139 (C.C.A. 2nd, 1946) a contract whereby employees were employed at a weekly wage for the work week in excess of the statutory hours and for overtime at one and one-half times the hourly rate, compnted by dividing the weekly wage by the number of hours employed plus one-half of the hours actually employed over forty, was held invalid under the overtime compensation provisions.

94. In Green Head Bit and Supply Co. v. Hendricks, 49 F. Supp. 698 (D.C. Okla. 1943) provision was made in the contract for an adjusted rate based upon hours worked and total earnings to be determined each week. The District Court upheld this under the Belo case. It might be suggested that this contract fulfills the requirements of computation laid down by the Supreme Court in the cases which apparently repudiate the Belo case, provided, of course, the weekly "regulate rate" so arrived at is never less than the minimum rate fixed by the Act.

While the personnel of the Court has changed since the opinion in the *Belo* case, it would appear that the present tendency of the Court is to restrict materially its application, and that succeeding cases have created an unsettled situation as evidenced by the decisions of the lower courts in deciding essentially the same problems.

2. *What Constitutes Compensable Working Time.*

A companion problem to determining the "regular rate" is inevitably the problem which may arise concerning what constitutes time for which the employee actually should be compensated by the employer.

In *Tennessee Coal, Iron and Railroad Company* v. *Muscoda Local 123*[95] the Court held that iron ore miners were at work within the meaning of the Act while they were engaged in underground travel in reaching the point where they actually started their work of mining. The Court found that there was no real agreed-upon custom that the miners were to be paid only from the time they reached the "working face" of the mine, and that no bona fide collective bargaining had ever been practiced by these employers, so that a valid contention could be made that it was a custom agreed upon by the employees that they were not to be paid until they reached the workings.

However, the suggestion that the result in the *Muscoda Local* case was based upon any real lack of custom or contract arrived at by genuine collective bargaining was negatived in the case of *Jewell Ridge Coal Corporation* v. *Local 6167, United Mine Workers of America.*[96] This case involved the workers in coal mines and in a 5-4 decision the Court held that miners were entitled to pay and credit for working time from the time they entered the mine until they left, irrespective of custom or contract.[97]

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95. 321 U.S. 590 (1944).

96. 325 U.S. 161 (1945).

97. In the minority opinion by Mr. Justice Jackson, in which the late Chief Justice and Justices Roberts and Frankfurter concurred, it was objected that the Court's decision either invalidated or ignored the explicit terms of a collectively bargained agreement between the parties involved, based on a half century's custom in the industry, and it was pointed out that in the Senate debate on the bill it had been expressly asserted by one of the Senators, who at the time of this decision was a member of the Supreme Court who had concurred in the majority opinion, that the Act would not affect bargaining agreements already made, and that both employers

In *Anderson* v. *Mt. Clemens Potteries Co.*[98] a situation which the Court considered comparable to the "portal to portal" facts was considered. The employees involved were piece workers who entered at an outside gate and changed clothes before reporting to their working places. Fourteen minutes prior to the scheduled starting time the employees were permitted to punch the clocks and prepare for their work, although it was found that it did not take them this long to do so. The case was heard before a Master who found that the time spent in walking from time clocks to the places of work was not compensable working time, in view of the established custom, and that the time consumed in preliminary duties after arriving at the place of work was not compensable. The Master also found that the time spent in waiting before and after shift periods was not compensable, because the employees failed to prove that they were not free to spend such time on their own behalf. The District Court accepted the Master's findings and conclusions with one exception. The Court established a formula in which all minutes over seven as shown by the time cards in the morning and all over five at the beginning of the afternoon were to be computed as compensable working time. No reason was given for the two minute differential between the morning and afternoon "punch-ins." The Sixth Circuit Court of Appcals reversed the District Court's decision for failing to accept the finding of the Master, that productive work did not start until the scheduled time and that the formula of the District Court was based upon surmise. The Supreme Court reversed the Circuit Court by placing emphasis on the fact that it was the duty of the employer under the Act to keep the necessary records of these variable times in which employees were preparing for work, and the case was remanded for the determination of the amount of walking time involved, and the amount of preliminary activities performed. Although the Master had taken voluminous evidence he had been unable to deter-

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and employees had joined in a letter to the Wage and Hour Administrator in 1940 asking that the agreements between the parties as to the "usual working places" be respected, and that on July 18, 1940, in response to this, the Administrator had ruled that working time on a "face to face basis" was not unreasonable. The philosophy of the Court as to collective bargaining in this case is difficult to reconcile with that which it expressed in the Belo case.

98. 66 Sup. Ct. 1187 (1946).

mine these facts in the first instance. This case indicates the possibility that the Court is entering administrative areas which it cannot handle adequately, and is dealing with problems which might be handled more satisfactorily in collective bargaining processes, or by the increasing experience of the Administrator, without impairing the purposes of the Act.

In two other cases which were decided on the same day, *Armour and Company* v. *Wantock*[99] and *Skidmore* v. *Swift and Co.*,[100] the employees involved were private fire guards at the plants of manufacturers of goods for interstate commerce. In the first case the employer had been held liable for overtime for time spent on the employer's premises by fire guards, subject to call, who otherwise spent their duty time in sleeping or recreation. The Supreme Court held that such time was compensable time, and consequently overtime payments and liquidated damages were involved. The Court observed that the parties were competent to agree that an employee could resort to amusements provided by the employer without a violation of his agreement. In the second case, the Court observed that the Administrator believed the problems presented by inactive duty required a flexible solution, and that while the rulings, interpretations, and opinions of the Administrator were not controlling on the Courts, they constituted a body of experience and informed judgment to which Courts and litigants could properly resort for guidance.

B. *The Power to Contract Concerning Wages and to Waive Rights under the Wage and Hour Provisions.*

In *Williams* v. *Jacksonville Terminal Co.*[101] a majority of the Supreme Court held that an agreement by "red caps" with the employer to turn over tips which would be counted as part of the minimum wage was binding upon them, no matter how reluctantly the employees had made the agreement. The court's opinion reasoned that if the "red caps" were employees, the employer was entitled to receive the tips, and if they were not employees they were not entitled to any contractual wage at all. Justices Black, Douglas and Murphy dissented.

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99. 323 U.S. 126 (1944).
100. 323 U.S. 134 (1944).
101. 386 U.S. 38 (1942).

Another important question which has arisen is whether an employee may waive his right to liquidated damages as a right separate and apart from his right to statutory wages. In *Brooklyn Savings Bank* v. *O'Neil*[102] the Court, in an opinion by Mr. Justice Reed, held that the employee could not waive his right to the liquidated damages, and that to permit him to do so would defeat the purpose of the Act. The Court reiterated its position that in spite of the fact that many of these cases arose without any intent on the part of the employer at the time to violate the Act, by reason of the uncertain coverage of the Act, harshness of the application of the statutory liability, enabling the employee to recover an amount far in excess of any damage which he has in fact suffered, cannot be considered under the express terms of the Act itself. The considerations involved in this argument were brought out in a dissenting opinion by the late Chief Justice in which Justices Roberts and Frankfurter concurred.

In *D. A. Schulte, Inc.* v. *Gangi*,[103] the employees were maintenance employees of a building whose tenants produced goods delivered to local distributors and which were by them subsequently placed in interstate commerce. After the ruling in the *Kirschbaum*[104] case, the employees claimed overtime pay and liquidated damages. A bona fide dispute developed as to whether the tenants were engaged in production of goods for commerce since the goods were delivered to local distributors and producers. To avoid litigation and in consideration of a release in full, the employer paid a sum to each employee concededly equal to the amount of overtime due each of the employees if he were within the coverage of the Act. Subsequently, the action was brought by the employees for overtime pay and liquidated damages. In the Court's opinion delivered by Mr. Justice Reed, the Court declined to determine whether the liability for unpaid wages and liquidated damages

102. 324 U.S. 697 (1945) (decided with Dize v. Maddrix and Arsenal Building Corp. v. Greenberg). In Southern Package Corporation v. Walton, 18 So. (2d) 458 (Miss. 1944) the Supreme Court of Mississippi held that liquidated damages authorized under the Fair Labor Standards Act constituted a penalty within the state statute requiring actions for a penalty to be commenced within one year. The Supreme Court of the United States denied certiorari in 323 U.S. 762 (1944). The position taken by the Mississippi court seems untenable now in view of the language used by the Court in Brooklyn Savings Bank v. O'Neil.

103. 66 Sup. Ct. 925 (1946).

104. 316 U.S. 517 (1942).

created by §16(b) was divisible, but expressly held that the remedy of liquidated damages cannot be bargained away by bona fide settlements of disputes over coverage. It must be noted that once the Court determines that the employee is within the coverage of the Act, the cases presented have then involved no dispute as to the amount of actual wages due. No case has yet come before the Court where there has been a release given in the case of a bona fide dispute as to the amount of wages due when the question of coverage had already been settled. For example, if the employee contended that he had worked longer than the records of the employer showed and there was a good faith dispute as to the actual amount of time worked and the consequent amount of overtime due, the Court has not held that a settlement of such a claim could not be made under the Act.

IV. *The Powers of the Administrator and Administrative Problems.*

In *Gemsco Inc.* v. *Walling*,[105] the question involved was the power of the Administrator to prohibit home work in the embroideries industry under §8(f) of the Act as a necessary means of making effective a minimum wage order for that industry. The opinion of the Court, by Mr. Justice Rutledge, pointed out that in §8(f) Congress had provided that orders issued under this section, "shall contain such terms and conditions as the Administrator finds necessary to carry out the purpose of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein." In §8(e) it was provided that no order issued under this section prior to the expiration of seven years from the effective date of §6 shall remain in effect after such expiration. The latter section obviously refers to the procedure set up for the fixing of minimum wage rates during the first seven years from the effective date of the Act. The Administrator's power to issue an order such as the one involved here, after the expiration of such seven years, must come from §8(f). Since it is as important for the Administrator to have that enforcement power after the statutory minimum has become fixed as it was during the years when the minimums were being set by the Industry Committees,

105. 324 U.S. 244 (1944) (decided with Maretzo v. Walling and Giuseppi v. Walling).

it is not an unreasonable construction of Congressional intent that this power was intended to be a permanent power. In the present case, however, the wages involved were committee wages, so the Court in upholding the action of the Administrator did not actually answer the more important question involved, although the Court observed that there were possibilities for the issuance of wage orders by the Administrator after the expiration of the seven year period.[106]

In *Cudahy Packing Co.* v. *Holland*[107] the Court held that the Administrator was not authorized under §4(c) of the Act to delegate to regional directors his power to sign and issue subpoenaes. The Chief Justice pointed out that the entire history of the legislation controlling the use of subpoenaes indicates a Congressional purpose not to authorize by implication the delegation of the subpoena power, and that there is nothing in the history of this Act or in the Act itself from which an intent to give the Administrator this power could be properly inferred. In a dissenting opinion by Mr. Justice Douglas, in which Justices Black, Byrnes and Jackson joined, it was urged that the Court was imposing technical difficulties which would materially retard the accomplishments of the purpose of the Act. The subsequent history of the administration of the Act offers no substantial evidence to support this contention.

In *Walling* v. *Reuter Co.*[108] the District Court had enjoined violations of the Act. This had been reversed by the Circuit Court of Appeals. After the Supreme Court had assumed jurisdiction by granting certiorari, a motion was filed to recall the writ for the reason that the employer corporation had been dissolved for the avowed purpose of securing tax advantages, although the business was continued. It was ar-

106. In Walling v. Wolff, 65 F.Sup. 532 (E.D. N.Y. 1946), the District Judge observed, "I cannot believe that Congress intended any such result. I cannot think that Congress believed that after the lapse of seven years all of the conditions which brought about the Fair Labor Standards Act would suddenly right themselves and administrative controls, such as prohibition of home work, would be no longer necessary. The Act was designed to remedy abuses of great antiquity . . . . Viewed in this light the difficulties about the exact wording of the statute diminish in importance." See also Walling v. Cimi Embroidery & Novelty Co., Inc., 65 F. Supp. 389 (S.D. N.Y. 1945) and Guiseppi v. Walling, 144 F.(2d) 608 (C.C.A. 2nd, 1944).

107. 315 U.S. 357 (1942).

108. 321 U.S. 671 (1944).

gued that since under Louisiana law the life of the corporation was not prolonged, even for the purpose of continuing pending litigation against it, the case had become moot. The Supreme Court conceded that it could not render an effective judgment on the merits because of the dissolution, but observed that the judgment of the District Court was entered before dissolution and was binding on the employer *and on others who in appropriate circumstances may be brought within its reach.* The Supreme Court, therefore, vacated the judgment of the Circuit Court and the cause was remanded to the District Cort where the petitioner would be free to take such proceedings for its enforcement as would be proper. Since the employer corporation had dissolved itself, it had now placed itself in a position that it could not contest the validity of the District Court's judgment.

In *Oklahoma Press Publishing Co.* v. *Walling,*[109] the employer urged that in order for the Administrator to be entitled to the issuance of subpoenaes *duces tecum* to secure records to determine the question of coverage, that question should first be adjudicated before the subpoenaes could be enforced. The Circuit Court of Appeals refused to sustain this position, and held that the Administrator was entitled to enforcement on a showing of probable cause. The Court, in an opinion by Mr. Justice Rutledge, rejected both contentions, holding that the Administrator's investigative function in searching out violations with a view to enforcing the Act is essentially the same as that of a grand jury, or of a Court in issuing other pre-trial orders for the discovery of evidence. In a dissenting opinion, Mr. Justice Murphy urged the abandonment of the policy that Congress could permit administrative agencies to issue subpoenaes.[110]

V. *Conclusion.*

To summarize briefly, it appears that the Court has not yet reached agreement on the extent of the coverage of the

109. 66 Sup. Ct. 494 (1946).

110. Mr. Justice Murphy observed in his dissent, "To allow a non-judicial officer, unarmed with judicial process, to demand the books and papers of an individual is an open invitation to abuse of that power. It is no answer that the individual may refuse to produce the material demanded. Many persons have yielded solely because of the air of authority with which the demand is made, a demand that cannot be enforced without subsequent judicial aid. Many invasions of private rights thus occur without the restraining hand of the judiciary ever intervening."

Act to employees either "engaged in commerce" or "the production of goods for commerce"; that there is a tendency to restrict the coverage of the former phrase more than that of the latter, and that there is also a tendency to increase the scope of coverage of the latter phrase until it approximates that of the phrase, "affecting commerce," although the Court still asserts that the coverage of neither phrase is that broad.

From a review of the cases involving the determination of overtime and compensable working time, it seems possible that the Court has been seeking a formula where no exact formula is available, in order to meet the variations of the infinite number of fact situations, and that it has attempted an administrative role which might better be left to the fact finding powers of lower courts, to the recommendations of the Administrator based upon increasingly greater experience, or to collective bargaining between the employer and employee. It is obvious that the employer and employee could not contract that the employee should not be paid for what is concededly working time, because that would be contracting in violation of the Act. However, there are innumerable acts of employees which are only work for which they are entitled to compensation because the Court so holds. Where the parties themselves have agreed on the definition of work in these situations where the definition is one in which judgments may differ, it is not unreasonable to suggest that the definition be left to genuine collective bargaining. The avowed purpose of the Act is to spread employment. Some of the decisions establishing liability for compensable time and overtime seem to have slight connection with that purpose. The popular conception of the implications of the so-called "portal to portal" cases is probably greatly exaggerated. It is doubtful that the asserted liability of employers in this connection is as great as has been predicted, when fully considering the decisions under which the claims are made. It must be remembered that the Court has been forced into an administrative role because the Congress gave the Administrator only advisory powers to suggest to employers what his best judgment is concerning how the Court will interpret the Act. Thus the burden of administration was placed upon the Court by the Act itself. The Court seems to be groping for reasonable formulae for orderly societal evolution within the framework of legislation and established jurisprudence, but without having fully mastered the dialectic of change.