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employees like cooks, cookees, and bull cooks in isolated lumber camps or mining camps, where the operation of a cookhouse may in fact be ''closely related'' and ''directly essential'' or, indeed, indispensable to the production of goods for commerce.[90]

Some specific examples of the application of these principles may be helpful. Such services as watching, guarding, maintaining or repairing the buildings, facilities, and equipment used in the production of goods for commerce are ''directly essential'' as well as ''closely related'' to such production as it is carried on in modern industry.[91] But such services performed with respect to private dwellings tenanted by employees of the producer, as in a mill village, would not be ''directly essential'' to production merely because the dwellings were owned by the producer and leased to his employees.[92] Similarly, employees of the producer or of an independent employer who are engaged only in maintaining company facilities for entertaining the employer's customers, or in providing food, refreshments, or recreational facilities, including restaurants, cafeterias, and snack bars, for the producer's employees in a factory, or in operating a children's nursery for the convenience of employees who leave young children there during working hours, would not be doing work ''directly essential'' to the production of goods for commerce.[93]

[90] See *Brogan* v. *National Surety Co.*, 246 U.S. 257; *Consolidated Timber Co.* v. *Womack,* 132 F. 2d 101 (C.A. 9); *Hanson* v. *Lagerstrom,* 133 F. 2d 120 (C.A. 8); cf. H. Mgrs. St., 1949, pp. 14, 15 and Sen. St., 1949 Cong. Rec., p. 15372.

[91] H. Mgrs. St., 1949, p. 14; Sen. St., 1949 Cong. Rec., p. 15372; *Kirschbaum* v. *Walling,* 316 U.S. 517; *Borden Co.* v. *Borella,* 325 U.S. 679; *Walton* v. *Southern Package Corp.* 320 U.S. 540; *Armour & Co.* v. *Wantock,* 325 U.S. 126.

[92] H. Mgrs. St., 1949, pp. 14, 15; *Morris* v. *Beaumont Mfg. Co.,* 84 F. Supp. 909 (W.D. S.C.); cf. *Wilson* v. *Reconstruction Finance Corp.,* 158 F. 2d 564 (C.A. 5), certiorari denied, 331 U.S. 810. Cf. *Brogan* v. *National Surety Co.,* 246 U.S. 257; *Consolidated Timber Co.* v. *Womack,* 132 F. 2d 101 (C.A. 9); *Hanson* v. *Lagerstrom,* 133 F. 2d 120 (C.A. 8).

[93] Cf. H. Mgrs. St., 1949, pp. 14, 15.

§ 776.19 Employees of independent employers meeting needs of producers for commerce.

(a) *General statement.* (1) If an employee of a producer of goods for commerce would not, while performing particular work, be ''engaged in the production'' of such goods for purposes of the Act under the principles heretofore stated, an employee of an independent employer performing the same work on behalf of the producer would not be so engaged. Conversely, as shown in the paragraphs following, the fact that employees doing particular work on behalf of such a producer are employed by an independent employer rather than by the producer will not take them outside the coverage of the Act if their work otherwise qualifies as the ''production'' of ''goods'' for ''commerce.''

(2) Of course, in view of the Act's definition of ''goods'' as including ''any part or ingredient'' of goods (see § 776.20 (a), (c)), employees of an independent employer providing other employers with materials or articles which become parts or ingredients of goods produced by such other employers for commerce are actually employed by a producer of goods for commerce and their coverage under the Act must be considered in the light of this fact. For example, an employee of such an independent employer who handles or in any manner works on the goods which become parts or ingredients of such other producer's goods is engaged in actual production of goods (parts of ingredients) for commerce, and the question of his coverage is determined by this fact without reference to whether his work is ''closely related'' and ''directly essential'' to the production by the other employer of the goods in which such parts or ingredients are incorporated. So also, if the employee is not engaged in the actual production of such parts or ingredients, his coverage will depend on whether as an employee of a producer of goods for commerce, his work is ''closely related'' and ''directly essential'' to the production of the parts or ingredients, rather than on the principles applicable in determining the coverage of employees of an independent employer who does not

himself produce the goods for commerce.[94]

(3) Where the work of an employee would be ''closely related'' and ''directly essential'' to the production of goods for commerce if he were employed by a producer of the goods, the mere fact that the employee is employed by an independent employer will not justify a different answer.[95] This does not necessarily mean that such work in every case will remain ''closely related'' to production when performed by employees of an independent employer. It will, of course, be as ''directly essential'' to production in the one case as in the other. (See § 776.17(c)). But in determining whether an employee's work is ''closely'' or only remotely related to the production of goods for commerce by an employer other than his own, the nature and purpose of the business in which he is employed and in the course of which he performs the work may sometimes become important.

Such factors may prove decisive in particular situations where the employee's work, although ''directly essential'' to the production of goods by someone other than his employer, is not far from the borderline between those activities which are ''directly essential'' and those which are not. In such a situation, it may appear that his performance of the work is so much a part of an essentially local business carried on by his employer without any intent or purpose of aiding production of goods for commerce by others that the work, as thus performed, may not reasonably be considered ''closely related'' to such production.[96] In other situations, however, where the degree to which the work is directly essential to production by the producer is greater the fact that the independent employer is engaged in a business having local aspects may not be sufficient to negate a close relationship between his employees' work and such production.[97] And it seems clear that where the independent employer operates a business which, unlike that of the ordinary local merchant, is directed to providing producers with materials or services directly essential to the production of their goods for commerce, the activities of such a business may be found to be ''closely related'' to such production.[98] In such event, all the employees of the independent employer whose work is part of his integrated effort to meet such needs of producers are covered as engaged in work closely related and directly essential to production of goods for commerce.[99]

(b) *Extent of coverage under ''closely related'' and ''directly essential'' clause illustrated.* In paragraphs (b)(1) to (5) of this section, the principles discussed

[94] *Bracey* v. *Luray*, 138 F. 2d 8 (C.A. 4); *Walling* v. *Peoples Packing Co.*, 132 F. 2d 236 (C.A. 10), certiorari denied 318 U.S. 774; *Mid-Continent Pipe Line Co.* v. *Hargrave*, 129 F. 2d 655 (C.A. 10); *Walling* v. *W. D. Haden Co.*, 153 F. 2d 196 (C.A. 5).

[95] See *Kirschbaum Co.* v. *Walling*, 316 U.S. 517; *Roland Electrical Co.* v. *Walling*, 326 U.S. 657; *Farmers Reservoir Co.* v. *McComb*, 337 U.S. 755; H. Mgrs. St., 1949, p. 14. See also Sen. St., 1949 Cong. Rec., p. 15372.

[96] M. Mgrs. St., 1949, pp. 14, 15, *10 E. 40th St. Bldg. Co.* v. *Callus*, 325 U.S. 578.

[97] H. Mgrs. St., 1949, p. 14; *Kirschbaum Co.* v. *Walling*, 316 U.S. 517; *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U.S. 88.

[98] See H. Mgrs. St., p. 14, and *10 E. 40th St. Bldg. Co.* v. *Callus*, 325 U.S. 578.

[99] *Kirschbaum Co.* v. *Walling*, 316 U.S. 517 (Stationary engineers and firemen, watchmen, elevator operators, electricians, carpenters, carpenters' helper, engaged in maintaining and servicing loft building for producers); *Roland Electrical Co.* v. *Walling*, 326 U.S. 657 (foremen, trouble shooters, mechanics, helpers, and office employees of company selling and servicing electric motors, generators, and equipment for commercial and industrial firms); *Meeker Coop. Light & Power Assn.* v. *Phillips*, 158 F. 2d 698 (C.A. 8) (outside employees and office employees of light and power company serving producers); *Walling* v. *New Orleans Private Patrol Service*, 57 F. Supp. 143 (E. D. La.) (guards, watchmen, and office employees of company providing patrol service for producers); *Walling* v. *Thompson*, 65 F. Supp. 686 (S.D. Cal.) (installation and service men, shopmen, bookkeeper, salesman, dispatcher of company supplying burglar alarm service to producers).

In H. Mgrs. St., 1949, p. 14 it is said, ''Employees engaged in such maintenance, custodial and clerical work will remain subject to the Act, notwithstanding they are employed by an independent employer performing such work on behalf of the manufacturer, mining company, or other producer for commerce. All such employees perform activities that are closely related and directly essential to the production of goods for commerce.''

above are illustrated by reference to a number of typical situations in which goods or services are provided to producers of goods for commerce by the employees of independent employers. These examples are intended not only to answer questions as to coverage in the particular situations discussed, but to provide added guideposts for determining whether employees in other situations are doing work closely related and directly essential to such production.

(1) Many local merchants sell to local customers within the same State goods which do not become a part or ingredient (as to parts or ingredients, see § 776.20(c)) of goods produced by any of such customers. Such a merchant may sell to his customers, including producers for commerce, such articles, for example, as paper towels, or record books, or paper clips, or filing cabinets, or automobiles and trucks, or paint, or hardware, not specially designed for use in the production of other goods.

Where such a merchant's business is essentially local in nature, selling its goods to the usual miscellany of local customers without any particular intent or purpose of aiding production of other goods for commerce by such customers, the local merchant's employees are not doing work both ''closely related'' and ''directly essential'' to production, so as to bring them within the reach of the Act, merely ''because some of the customers * * * are producing goods for interstate [or foreign] commerce.''[1] Therefore, if they do not otherwise engage ''in commerce'' (see §§ 776.8 to 776.13) or in the ''production'' of goods for commerce, they are not covered by the Act.

In such a situation, moreover, even where the work done by the employees is ''directly essential'' to such production by their employer's customers, it may not meet the ''closely related'' test. But the more directly essential to the production of goods for commerce such work is, the more likely it is that a close and immediate tie between it and such production exists which will be sufficient, notwithstanding the local aspect of the employer's business, to bring the employees within the coverage of the Act on the ground that their work is ''closely related'' as well as ''directly essential'' to production by the employer's customers.

Such a close and immediate tie with production exists, for example, where the independent employer, through his employees, supplies producers of goods for commerce with things as directly essential to production as electric motors or machinery or machinery parts for use in producing the goods of a manufacturer, for mining operations, or for production of oil, or for other production operations or the power, water, or fuel required in such production operations, to mention a few typical examples.[2] The fact that these needs of producers are supplied through the agency of businesses having certain local aspects cannot alter the obvious fact that the employees of such businesses who supply these needs are doing work both ''closely related'' and ''directly essential'' to production by the employer's customers. As the United States Supreme Court has stated: ''Such sales and services must be immediately available to * * * [the customers] or their production will stop.''[3]

It should be noted that employees of independent employers providing such essential goods and services to producers will not be removed from coverage because an unsegregated portion of their work is performed for customers other than producers of goods for commerce. For example, employees of public utilities, furnishing gas, electricity or water to firms within the State engaged in manufacturing, mining, or otherwise producing goods for

[1] H. Mgrs. St., 1949, pp. 14, 15.

[2] See H. Mgrs. St., 1949, p. 14; Sen. St., 95 Cong. Rec., October 19, 1949, at 15372; Statement of the Chairman of the Committee on Education and Labor explaining the conference agreement to the House of Representatives, 1949 Cong. Rec., p. 15135; *Roland Electrical Co.* v. *Walling*, 326 U.S. 657; *Reynolds* v. *Salt River Valley Water Users Assn.*, 143 F. 2d 863 (C.A. 9); *Meeker Coop. Light & Power Assn.* v. *Phillips*, 158 F. 2d 698 (C.A. 8); *Walling* v. *Hammer*, 64 F. Supp. 690 (W.D. Va.); *Holland* v. *Amoskeag Machine Co.*, 44 F. Supp. 884 (D. N.H.); *Princeton Mining Co.* v. *Veach*, 63 N.E. 2d 306 (Ind. App.).

[3] *Roland Electrical Co.* v. *Walling*, 326 U.S. 657, 664.

commerce, are subject to the Act notwithstanding such gas, electricity or water is also furnished to consumers who do not produce goods for commerce.[4]

(2) On similar principles, employees of independent employers providing to manufacturers, mining companies, or other producers such goods used in their production of goods for commerce as tools and dies, patterns, designs, or blueprints are engaged in work ''closely related'' as well as ''directly essential'' to the production of the goods for commerce;[5] the same is true of employees of an independent employer engaged in such work as producing and supplying to a steel mill, sand meeting the mill's specifications for cast shed, core, and molding sands used in the production by the mill of steel for commerce.[6] Another illustration of such covered work, according to managers of the bill in Congress, is that of employees of industrial laundry and linen supply companies serving the needs of customers engaged in manufacturing or mining goods for commerce.[7]

On the other hand, the legislative history makes it clear that employees of a ''local architectural firm'' are not brought within the coverage of the Act by reason of the fact that their activities ''include the preparation of plans for the alteration of buildings within the State which are used to produce goods for interstate commerce.'' Such activities are not ''directly essential'' enough to the production of goods in the buildings to establish the required close relationship between their performance and such production when they are performed by employees of such a ''local'' firm.[8] Of course, this result is even more apparent where the activities of the employees of such a ''local'' business may not be viewed as ''directly essential'' to production. It is clear, for example, that Congress did not believe ''employees of an independently owned and operated restaurant'' should be brought under the coverage of the Act because the restaurant is ''located in a factory.'' To establish coverage on ''production'' grounds, an employee must be ''shown to have a closer and more direct relationship to the producing * * * activity'' than this.[9]

(3) Some further examples may help to clarify the line to be drawn in such cases. The work of employees constructing a dike to prevent the flooding of an oil field producing oil for commerce would clearly be work not only ''directly essential'' but also ''closely related'' to the production of the oil. However, employees of a materialman quarrying, processing, and transporting stone to the construction site for use in the dike would be doing work too far removed from production of the oil to be considered ''closely related'' thereto.[10] Similarly, the sale of sawmill equipment to a producer of mine props which are in turn sold to mines within the same State producing coal for commerce is too remote from production of the coal to be considered ''closely related'' thereto, but production of the mine props, like the manufacture of tools, dies, or machinery for use in producing goods for commerce, has such a close and immediate tie with production of the goods for commerce that it meets the ''closely related'' (as well as the ''directly essential'') test.[11]

[4] *Meeker Coop. Light & Power Assn.* v. *Phillips*, 158 F. 2d 698 (C.A. 8); H. Mgrs. St., 1949, p. 14. For another illustration see H. Mgrs. St., 1949, p. 26, with reference to industrial laundries.

[5] H. Mgrs. St., 1949, p. 14; Sen. St., 1949 Cong. Rec., p. 15372.

[6] *Walling* v. *Amidon*, 153 F. 2d 159 (C.A. 10); Sen. St., 95 Cong. Rec., October 19, 1949, at 15372.

[7] H. Mgrs. St., 1949, p. 26; Sen. St., 95 Cong. Rec., October 19, 1949, at 15372. See also *Koerner* v. *Associated Linen Laundry Suppliers*, 270 App. Div. 986, 62 N.Y.S. 2d 774.

[8] H. Mgrs. St., 1949, p. 15. See also *McComb* v. *Turpin*, 81 F. Supp. 86, 1948 (D. Md.).

[9] H. Mgrs. St., 1949, p. 14. Cf. *Bayer* v. *Courtemanche*, 76 F. Supp. 193 (D. Conn.). See also § 776.18(b).

[10] See *E. C. Schroeder Co.* v. *Clifton*, 153 F. 2d 385 (C.A. 10) (opinion of Judge Phillips) and H. Mgrs. St., 1949, p. 15.

[11] See *Wailing* v. *Hamner*, 64 F. Supp. 690 (W.D. Va.), and statement of the Chairman of the Committee on Education and Labor explaining the conference agreement to the House of Representatives, 1949 Cong. Rec., p. 15135.

(4) A further illustration of the distinction between work that is, and work that is not, ''closely related'' to the production of goods for commerce may be found in situations involving activities which are directly essential to the production by farmers of farm products which are shipped in commerce. Employees of an employer furnishing to such farmers, within the same State, water for the irrigation of their crops, power for use in their agricultural production for commerce, or seed from which the crops grow, are engaged in work ''closely related'' as well as ''directly essential'' to the production of goods for commerce.[12] On the other hand, it is apparent from the legislative history that Congress did not regard, as ''closely related'' to the production of farm products for commerce, the activities of employees in a local fertilizer plant producing fertilizer for use by farmers within the same State to improve the productivity of the land used in growing such products.[13] Fertilizer is ordinarily thought to be assimilated by the soil rather than by the crop and, in the ordinary case, may be considered less directly essential to production of farm products than the water or seed, without which such production would not be possible. Probably the withdrawal from coverage of such employees (who were held ''necessary'' to production of goods for commerce under the Act prior to the 1949 amendments[14]) rests wholly or in part on the principles stated in paragraph (a)(3) of this section and paragraph (b)(1) of this section. Heretofore the Department has taken the position that producing or supplying feed for poultry and livestock to be used by farmers within the State in the production of poultry or cattle for commerce was covered. The case of Mitchell v. Garrard Mills[15] has reached a contrary conclusion as to a local producer of such feed in a situation where all of the feed was sold to farmers and dealers for use exclusively within the State. For the time being, and until further clarification from the courts, the Divisions will not assert the position that coverage exists under the factual situation which existed in this case.

(5) Managers of the legislation in Congress stated that all maintenance, custodial, and clerical employees of manufacturers, mining companies, and other producers of goods for commerce perform activities that are both ''closely related'' and ''directly essential'' to the production of goods for commerce, and that the same is true of employees of an independent employer performing such maintenance, custodial, and clerical work ''on behalf of'' such producers.

Typical of the employees in this covered group are those repairing or maintaining the machinery or buildings used by the producer in his production of goods for commerce and employees of a watchman or guard or patrol or burglar alarm service protecting the producer's premises.[16] On the other hand, the House managers of the bill made it clear that employees engaged in cleaning windows or cutting grass at the plant of a producer of goods for commerce were not intended to be included as employees doing work ''closely related'' to production on ''on behalf of'' the producer where they were employed by a ''local window-cleaning company'' or a ''local independent nursery concern,'' merely because the customers of the employer happen to include producers of goods for commerce.[17] A similar view was expressed with respect to employees of a ''local exterminator service firm'' working wholly within the State exterminating pests in private homes, in a

[12] See *Farmers Reservoir Co.* v. *McComb*, 337 U.S. 755; *Reynolds* v. *Salt River Valley Water Users Assn.*, 143 F. 2d 863 (C.A. 9); *Meeker Coop. Light & Power Assn.* v. *Phillips*, 158 F. 2d 698 (C.A. 8).

Reference should be made to section 13 (a)(6) of the Act providing an exemption from the wage and hours provisions for employees employed in agriculture and for certain employees of nonprofit and sharecrop irrigation companies.

[13] H. Mgrs. St. 1949, p. 15.

[14] *McComb* v. *Super-A Fertilizer Works*, 165 F. 2d 824 (C.A. 1).

[15] 241 F. 2d 249 (C.A. 6).

[16] See H. Mgrs. St., 1949, p. 14; Sen. St. 1949 Cong. Rec. p. 15372; *Kirschbaum Co.* v. *Walling*, 316 U.S. 517; *Roland Electrical Co.* v. *Walling*, 326 U.S. 657; *Walling* v. *Sondock*, 132 F. 2d 77 (C.A. 5); *Holland* v. *Amoskeag Machine Co.*, 44 F. Supp. 884 (D.N.H.).

variety of local establishments, ''and also in buildings within the State used to produce goods for interstate commerce.''[17]

[15 FR 2925, May 17, 1950, as amended at 22 FR 9692, Dec. 4, 1957]

§ 776.20 "Goods."

(a) *The statutory provision*. An employee is covered by the wage and hours provisions of the Act if he is engaged in the ''production'' (as explained in §§ 776.15 through 776.19) ''for commerce'' (as explained in § 776.21) of anything defined as ''goods'' in section 3(i) of the Act. This definition is:

Goods means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(b) ''*Articles or subjects of commerce of any character*.'' It will be observed that ''goods'' as defined in the Act are not limited to commercial goods or articles of trade, or, indeed, to tangible property, but include ''articles or subjects of commerce of *any character* (emphasis supplied).[18] It is well settled that things such as ''ideas, * * * orders, and intelligence'' are ''subjects of commerce.'' Telegraphic messages have, accordingly, been held to be ''goods'' within the meaning of the Act.[19] Other articles or subjects of commerce which fall within the definition of ''goods'' include written materials such as newspapers, magazines, brochures, pamphlets, bulletins, and announcements;[20] written reports, fiscal and other statements and accounts, correspondence, lawyers' briefs and other documents;[21] advertising, motion picture, newspaper and radio copy, artwork and manuscripts for publication;[22] sample books;[23] letterheads, envelopes, shipping tags, labels, check books, blank books, book covers, advertising circulars and candy wrappers.[24] Insurance policies are ''goods'' within the meaning of the Act;[25] so are bonds, stocks, bills of exchange, bills of lading, checks, drafts, negotiable notes and other commercial paper.[26] ''Goods'' includes gold;[27] livestock;[28] poultry

[17] H. Mgrs. St., 1949, page 15.

[18] As pointed out in *Lenroot* v. *Western Union Tel. Co.*, 141 F. 2d 400 (C.A. 2), the legislative history shows that the definition was originally narrower, and that subjects of commerce were added by a Senate amendment.

[19] *Western Union Tel. Co.* v. *Lenroot* 323 U.S. 490.

[20] *Mabee* v. *White Plains Pub. Co.*, 327 U.S. 178; *Yunker* v. *Abbye Employment Agency*, 32 N.Y.S. 2d 715; *Berry* v. *34 Irving Place Corp.*, 52 F. Supp. 875 (S.D. N.Y.); *Ullo* v. *Smith*, 62 F. Supp. 757, affirmed in 177 F. 2d 101 (C.A. 2); see also opinion of the four dissenting justices in *10 E. 40th St. Bldg.* v. *Callus*, 325 U.S. at p. 586.

Waste paper collected for shipment in commerce is goods. See *Fleming* v. *Schiff*, 1 W.H. Cases 893 (D. Colo.), 15 Labor Cases (CCH) par. 60,864.

[21] *Phillips* v. *Meeker Coop. Light & Power Asso.*, 63 F. Supp. 733, affirmed in 158 F. 2d 698 (C.A. 8); *Lofther* v. *First Nat. Bank of Chicago*, 48 F. Supp. 692 (N.D. Ill.) See also *Rausch* v. *Wolf*, 72 F. Supp. 658 (N.D. Ill). There are other cases (e.g., *Kelly* v. *Ford, Bacon & Davis*, 162 F. 2d 555 (C.A. 3) and *Bozant* v. *Bank of New York*, 156 F. 2d 787 (C.A. 2) which suggest that such things are ''goods'' only when they are articles of trade. Although the Supreme Court has not settled the question, such a view appears contrary to the express statutory definitions of ''goods'' and ''commerce''.

[22] *Robert* v. *Henry Phipps Estate*, 156 F. 2d 958 (C.A. 2); *Baldwin* v. *Emigrant Industrial Sav. Bank*, 150 F. 2d 524 (C.A. 2), certiorari denied 326 U.S. 757; *Bittner* v. *Chicago Daily News Ptg. Co.*, 4 W.H. Cases 837 (N.D. Ill.), 29 Labor Cases (CCH) par. 62,479; *Schinck* v. *386 Fourth Ave. Corp.*, 49 N.Y.S. 2d 872.

[23] *Walling* v. *Higgins*, 47 F. Supp. 856 (E.D. Pa.).

[24] *McAdams* v. *Connelly*, 8 W.H. Cases 498 (W.D. Ark.), 16 Labor Cases (CCH) par. 64,963; *Walling* v. *Lacy*, 51 F. Supp. 1002 (D. Colo.); *Tobin* v. *Grant* 8 W.H. Cases 361 (N.D. Calif.). See also *Walling* v. *Sieving*, 5 W.H. Cases 1009 (N.D. Ill.), 11 Labor Cases (CCH) par. 63,098.

[25] *Darr* v. *Mutual Life Ins. Co.*, 169 F. 2d 262 (C.A. 2), certiorari denied 335 U.S. 871.

[26] *Bozant* v. *Bank of New York*, 156 F. 2d 787 (C.A. 2).

[27] *Walling* v. *Haile Gold Mines*, 136 F. 2d 102 (C.A. 4); *Fox* v. *Summit King Mines*, 143 F. 2d 926 (C.A. 9).

[28] *Walling* v. *Friend*, 156 F. 2d 429 (C.A. 8).