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the interstate movement of goods or persons.

(4) This does not mean, however, that in every case where employees produce such materials which are used within the State in the maintenance, repair, or reconstruction of an instrumentality of commerce, the production of such materials is necessarily considered as production ''for'' commerce. A material supply company may be engaged in an independent business which is essentially local in nature, selling its materials to the usual miscellany of local customers without any particular intent or purpose of supplying materials for the maintenance, repair, or reconstruction of instrumentalities of commerce, and without any substantial portion of its business being directed to such specific uses. Employees of such an ''essentially local business'' are not covered by the Act merely because as an incident to its essentially local business, the company, on occasion, happens to produce or supply some materials which are used within the State to meet the needs of instrumentalities of commerce.[25]

§ 776.28 Covered preparatory activities.

(a) *Before production begins.* (1) The United States Supreme Court has held that the Act is applicable to employees of a company which was engaged in preliminary oil well drilling, even though the holes were drilled to a specified depth which was short of where the oil was expected to be found.[26] The Act would also apply to drilling operations even though no oil was discovered.[27] Laborers employed in erecting drilling rigs would also be covered.[28] Other preparatory work before drilling begins in an oil field, such as staking oil claims, surveying, clearing the land, assembling materials and equipment, erecting sheds, derricks or dikes would also be within the scope of the Act.[29] Preliminary work such as the foregoing has the requisite close and immediate tie with the production of goods for commerce to be within the coverage of the Act.

(2) Similarly, coverage extends to employees engaged in the installation of machinery to be used in covered production in a new factory building, even though the construction of the building itself may not have been subject to the Act. Such installation is considered to be a preliminary production activity rather than simply part of the construction of the building.

(3) If the construction project is subject to the Act, preliminary activities, such as surveying, clearing, draining and leveling the land, erecting necessary buildings to house materials and equipment, or the demolition of structures in order to begin building the covered facility, are subject to the Act.[30]

(b) *Facilities used in aid of the covered construction.* The installation of facilities, and the repair and maintenance of trucks, tools, machinery and other equipment to be used by a contractor in the furtherance of his covered construction work, are activities subject to the Act.

§ 776.29 Instrumentalities and channels of interstate commerce.

(a) *Typical examples.* Instrumentalities and channels which serve as the media for the movement of goods and persons in interstate commerce or for interstate communications include railroads, highways, city streets; telephone, gas, electric and pipe line systems; radio and television broadcasting facilities; rivers, canals and other waterways; airports; railroad, bus, truck or steamship terminals; freight depots, bridges, ferries, bays, harbors, docks, wharves, piers; ships, vehicles and aircraft which are regularly used in interstate commerce.[31]

(b) *General character of an instrumentality of interstate commerce.* (1) An instrumentality of interstate commerce need not stretch across State lines but

[25] See §§ 776.19 (a) and (b) and 776.21(b)(3). See also cases cited in footnote 22 of this subpart.

[26] *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U.S. 8.

[27] *Culver* v. *Bell & Loffland*, 146 F. (2d) 20.

[28] *Devine* v. *Levy*, 39 F. Supp. 44.

[29] *Straughn* v. *Schlumberger Well Surveying Corp.*, 72 F. Supp. 511.

[30] Coverage of preparation of plans and designs is discussed in § 776.19(b) (2).

[31] General coverage bulletin, § 776.11.

may operate within a particular State as a link in a chain or system of conduits through which interstate commerce moves.[32] Obvious examples of such facilities are railroad terminals, airports which are components of a system of air transportation, bridges and canals. A facility may be used for both interstate and intrastate commerce but when it is so used it is nonetheless an interstate instrumentality. Such double use does not exclude construction employees from being engaged in commerce.

(2) The term instrumentality of interstate commerce may refer to one unit or the entire chain of facilities. An instrumentality such as a railroad constitutes a system or network of facilities by which the interstate movement of goods and persons is accomplished. Each segment of the network is integrally connected with the whole and must be viewed as part of the system as a whole, not as an isolated local unit.

(3) A construction project which changes the interstate system as a whole, or any of its units, would have a direct bearing on the flow of interstate commerce throughout the network. Thus, the new construction of an alternate route or an additional unit which alters the system or any segment of it, would have such a direct and vital relationship to the functioning of the instrumentality of interstate commerce as to be, in practical effect, a part of such commerce rather than isolated local activity. For example, such construction as the maintenance, repair, replacement, expansion, enlargement, extension, reconstruction, redesigning, or other improvement, of a railroad system as a whole, or of any part of it, would have a close and intimate relationship with the movement of goods and persons across State lines. All such construction, therefore, is subject to the Act.

(4) The same would be true with respect to other systems of interstate transportation or communication such as roads, waterways, airports, pipe, gas and electric lines, and ship, bus, truck, telephone and broadcasting facilities. Consequently, construction projects for lengthening, widening, deepening, relocating, redesigning, replacing and adding new, substitute or alternate facilities; shortening or straightening routes or lines; providing cutoffs, tunnels, trestles, causeways, overpasses, underpasses and bypasses are subject to the Act. Furthermore, the fact that such construction serves another purpose as well as the improvement of the interstate facility, or that the improvement to the interstate facility was incidental to other non-covered work, would not exclude it from the Act's coverage.[33]

(c) *Examples of construction projects which are subject to the Act.* Coverage extends to employees who are engaged on such work as repairing or replacing abutments and superstructures on a washed out railroad bridge;[34] replacing an old highway bridge with a new one at a different location;[35] removing an old railroad bridge and partially rebuilding a new one; repairing a railroad roundhouse, signal tower, and storage building; relocating portions of a county road; erecting new bridges with new approaches in different locations from the old ones; widening a city street; relocating, improving or extending interstate telephone facilities including the addition of new conduits and new trunk lines.[36] Also within the scope of the Act are employees who are engaged in the construction, maintenance and repair of ships, barges and other vessels used for interstate commerce, including those belonging to the Government,[37] and facilities used in the production and transmission of electric, fuel, water, steam and other powers to

[32] *Mitchell* v. *Vollmer*, ante; *Bennett*. v. *V. P. Loftis*, 167 F. (2d) 286 (C.A. 4); *Overstreet* v. *North Shore Corp.*, ante; *Rockton & Rion R. R.* v. *Walling*, 146 F. (2d) 111, certiorari denied 324 U.S. 880; *National Labor Relations Board* v. *Central Missouri Tel. Co.*, 115 F. (2d) 563 (C.A. 8).

[33] *Tobin* v. *Pennington-Winter Const. Co.*, ante; *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508; *Cuascut* v. *Standard Dredging Corp.*, 94 F. Supp. 197.

[34] *Pedersen* v. *J. F. Fitzgerald*, 318 U.S. 740.

[35] *Bennett* v. *V. P. Loftis Co.*, 167 F. (2d) 286 (C.A. 4).

[36] *Walling* v. *McCrady Const. Co.*, ante.

[37] *Divins* v. *Hazeltine Electronics Corp.*, 163 F. (2d) 100 (C.A. 2); Cf. *Walling* v. *Haile Gold Mines, Inc.*, 136 F. (2d) 102 (C.A. 4).

instrumentalities of interstate commerce.[38]

(d) *Construction of new facilities.* (1) In a case before the United States Supreme Court, the question was presented whether the Act applied to the construction of a new canal at some distance from the one then in use. The new canal was to be an alternate route for entering the Mississippi River and would relieve traffic congestion in the existing canal. The latter would continue in operation but could not be widened because of its location in a highly developed industrial section of New Orleans. The Court in holding the construction of the new canal to be within the coverage of the Act stated that the new construction was as intimately related to the improvement of navigation on the Gulf Intercoastal Waterway as dredging in the existing canal would be and that the project was ''part of the redesigning of an existing facility of interstate commerce.''[39] Thus the construction of a new facility in a network of instrumentalities of interstate commerce, in order to serve the system, or to function as an alternate route, or to relieve traffic congestion in another unit, or to replace an outmoded facility, is subject to the Act.

(2) Similarly, the construction of a new unit, such as a new airport which is an addition to the entire interstate system of air transportation although not physically attached to any other unit, would, as a practical matter, necessarily expand, promote and facilitate the movement of interstate commerce over the airway system, and consequently, would be subject to the Act. In such a situation the interstate system, although composed of physically separate local units, is, as a whole, the instrumentality of commerce which is improved. In most cases such an addition would also directly enhance, improve or replace some particular nearby unit in the interstate network. The new addition would thus relieve traffic congestion and facilitate the interstate movement of commerce over the existing instrumentality as a whole, as well as at the particular nearby units. The same principle would apply to highways, turnpikes and similar systems of interstate facilities.

(3) In like manner, the reconstruction, extension or expansion of a small unit in a system of interstate facilities, such as the enlargement of a small airport which is regularly used for interstate travel or transportation, is covered, regardless of the relative sizes of the original unit and the new one. The construction in such situations facilitates and improves the interstate commerce served by, and is directly related to the continued, efficient and effective operation of, both the particular original unit and the interstate system as a whole. Also, the construction of facilities such as hangars, repair shops and the like at a covered airport, which are ''directly and vitally related to the functioning'' of the instrumentality of commerce, would be subject to the Act.[40]

(e) *Construction on waterways.* Courts have consistently held that the engagement in interstate commerce includes the maintenance, repair or improvement of navigable waterways even when the construction work is performed on the non-navigable parts of the instrumentality such as at the headwaters and watersheds or in tributary streams.[41]

Construction which improves rivers and waterways serving as instrumentalities of interstate commerce includes dredging; the building, maintenance, repair, replacement, reconstruction, improvement, or enlargement of dikes, revetments, levees, harbor facilities, retaining walls, channels, berths, piers, wharves, canals, dams, reservoirs and similar projects; also the removal of debris and other impediments in the

[38] *New Mexico Public Service Co.* v. *Engel*, ante; *Lewis* v. *Florida Light & Power Co.*, ante; *Mitchell* v. *Mercer Water Co.*, 208 F. (2d) 900 (C.A. 3); *Mitchell* v. *Brown Engineering Co.*, ante.

[39] *Mitchell* v. *Vollmer & Co.*, ante; see also *Bennett* v. *V. P. Loftis*, ante.

[40] *Mitchell* v. *Vollmer & Co.*, ante.

[41] *Tobin* v. *Pennington-Winter Const. Co.*, ante; *Oklahoma* v. *Atkinson Co.*, ante; *United States* v. *Appalachian Power Co.*, 311 U.S. 426.

waterway and flood control work in general.[42]

The Act applies to construction work which increases the navigability of a waterway, protects it from floods or otherwise improves or maintains its use as an instrumentality of interstate commerce. The courts have held that a program for controlling floods is inseparably related to the stabilization and maintenance of the navigable channel of the river, since levees, dams, dikes and like structures, which hold back the waters in time of flood, at the same time confine a more efficient body of water during other periods by increasing its velocity and scouring and deepening its channels.[43]

(1) *Flood control work in non-navigable parts of a waterway*. Both Congress and the courts have considered that watersheds and headwaters are keys to the control of floods on navigable streams and that the control over the non-navigable parts of a river is essential for the prevention of overflows on the navigable portions. It is also well settled that in order to control floods on a navigable stream it is necessary to take flood control measures on its tributaries.

(2) *Basis of coverage*. (i) The construction of a levee, dam or other improvement in any part of a river or its tributaries for the purpose of preventing floods or aiding navigation must be considered as an integral part of a single comprehensive project for improvement of the river system. Even though a particular levee or dike, by itself, may not effect an improvement, the courts have made it clear that the combined effect of a chain of such structures serves as the basis for determining coverage. The construction of a particular river structure may, therefore, be subject to the Act simply because it is part of a comprehensive system of structures, whose combined effect will achieve the improvement of the navigable channel. Thus, it has been held that site clearance work in the construction of a multiple-purpose dam on a non-navigable stream is covered by the Act where the work is an integral part of a comprehensive system for the control of floods and the betterment of navigation on the Arkansas and Mississippi Rivers.[44] Similarly, the enlargement of a set-back levee, located from two to six miles from the banks of the Mississippi, was held to be covered because it was part of the Mississippi levee system even though the set-back levee, when viewed separately, was not directly related to the functioning of the Mississippi as an instrumentality of commerce.[45]

(ii) The principle involved applies also to other instrumentalities of interstate commerce. As in the case of covered waterway projects, individual additions or improvements to other instrumentalities of interstate commerce may for coverage purposes be considered as part of a whole program rather than separately. The Act will apply to the construction in such situations if the unit, considered by itself or as part of a larger program, promotes the efficient or effective operation of the instrumentality of interstate commerce.

(3) *Construction of wharves, piers and docks*. The Act also applies to the construction of new piers, wharves, docks and other facilities if they are integrated with the interstate commerce functions of an existing harbor. Similarly, the new construction of such facilities in other locations along the waterway is subject to the Act if they are regularly used by vessels carrying goods or persons in interstate commerce.

(f) *Highways, county roads and city streets*—(1) *Typical examples*. As a generic term highways includes bridges, underpasses, overpasses, bypasses, county roads, access roads, city streets and alternate roads, draw bridges, toll bridges, toll roads and turnpikes, but does not include roads or parking facilities on privately owned land and

[42] *Walling* v. *Patton-Tulley Transportation Co.*, 134 F. (2d) 945 (C.A. 6); *Ritch* v. *Puget Sound Bridge & Dredging Co.*, 156 F. (2d) 334.

[43] *Tobin* v. *Pennington-Winter Const. Co.*, ante; *Tobin* v. *Ramey*, 206 F. (2d) 505 (C.A. 5) certiorari denied, sub nom *Hughes Construction Co.* v. *Secretary of Labor*, 346 U.S. 925; *Jackson* v. *U.S.*, 230 U.S. 1.

[44] *Tobin* v. *Pennington-Winter Const. Co.*, ante.

[45] *Tobin* v. *Ramey*, 205 F. (2d) 606, rehearing denied 206 F. (2d) 505 (C.A. 5) certiorari denied, sub nom *Hughes Construction Co.* v. *Secretary of Labor*, 346 U.S. 925.

which are not for use by the general public for interstate traffic.

(2) *Basis of coverage*. The general rules for determining the coverage of employees engaged in the construction of other instrumentalities of interstate commerce apply to highway construction work. The United States Supreme Court has stated that in applying the Act to highway construction as to other coverage problems, practical rather than technical constructions are decisive.[46] After the Court remanded the Overstreet case to the district court, the latter held that the employees engaged in maintaining and repairing the facilities regularly used and available for interstate commerce were engaged in commerce, regardless of the extent of the interstate traffic.[47] The court recognized that although the amount of the interstate commerce in the Overstreet case was very small it was regular and recurring and not occasional nor incidental. Thus, under the authoritative decision a percentage test is not regarded as a practical guide for ascertaining whether a particular facility is an instrumentality of interstate commerce.[48] Employees who are engaged in the repair, maintenance, extension, enlargement, replacement, reconstruction, redesigning or other improvement of such a road are subject to the Act. The fact that the road is owned or controlled by the State or Federal Government or by any subdivision thereof would not affect the applicability of the Act. The same would be true if State or Federal funds were used to finance the construction. It should be noted, however, that if the employees are actually employees of a State, or a political subdivision thereof, they are excepted from coverage of the Act under section 3(d).

(3) *City streets*. The construction, reconstruction or repair of a city street, whether residential or not, which is part of an interstate highway or which directly connects with any interstate highway is so closely related to the interstate commerce moving on the existing highway as to be a part of it. Construction of other streets, which are not a part of a public road building program and are constructed on private property as a part of a new residential development, will not be considered covered until further clarification from the courts.

(4) *New highway construction*. Although a number of appellate court decisions have held that the construction of new highways is not within the coverage of the Act, these decisions relied upon the technical ''new construction'' concept which the United States Supreme Court has subsequently held to be inapplicable as the basis for determining coverage under this Act.[49] Under the principles now established by that Court's decision, which require determination of coverage on the basis of realistic, practical considerations, the construction of new expressways and highways that will connect with an interstate highway system is so ''related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated, local activity.''[50] Such highways and expressways not only are so designed as necessarily to become a part of or additions to an existing interstate highway system, but their construction is plainly of a national rather than a local character, as evidenced by the Federal financial contribution to their construction. And neither the fact that they are not dedicated to interstate use during their construction, nor the fact that they will constitute alternate routes rather than replacement of existing road, constitute sufficient basis, under the controlling court decisions, for excluding them from the coverage of the Act.[51] Accordingly, unless and

[46] *Overstreet* v. *North Shore Corp.*, ante.

[47] 52 F. Supp. 503.

[48] *North Shore Corp.* v. *Barnett*, 143 F. (2d) 172 (C.A. 5); *Schmidt* v. *Peoples Telephone Union of Maryville, Mo.*, 138 F. (2d) 13 (C.A. 8).

[49] Compare *Mitchell* v. *Vollmer*, ante, with *Koepfie* v. *Garavaglia*, 200 F. (2d) 191 (C.A. 6); *Moss* v. *Gillioz Const. Co.*, 206 F. (2d) 819 (C.A. 10); and *Van Klaveren* v. *Killian House*, 210 F. (2d) 510 (C.A. 5). The Vollmer decision specifically rejected the applicability of the decision construing the Federal Employer's Liability Act, on which the cited appellate court decision relied.

[50] *Mitchell* v. *Vollmer*, ante; *Walling* v. *Jacksonville Paper Co.*, ante; and *Overstreet* v. *North Shore Corp.*, ante.

[51] *Mitchell* v. *Vollmer & Co.*, ante; *Tobin* v. *Pennington-Winter Const. Co.*, 198 F. (2d) 334,

Continued

until authoritative court decision in the future hold otherwise, the construction of such new highways and expressways will be regarded as covered.

§ 776.30 Construction performed on temporarily idle facilities.

The Act applies to work on a covered interstate instrumentality or production facility even though performed during periods of temporary non-use or idleness.[52] The courts have held the Act applicable to performance of construction work upon a covered facility even though the use of the facility was temporarily interrupted or discontinued.[53] It is equally clear that the repair or maintenance of a covered facility (including its machinery, tools, dies, and other equipment) though performed during the inactive or dead season, is subject to the Acts.[54]

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certiorari denied 345 U.S. 915; and *Bennett* v. *V. P. Loftis Co.*, 167 F. (2d) 286.

[52] *Walton* v. *Southern Package Corp.*, 320 U.S. 540; *Slover* v. *Wathen & Co.*, 140 F. (2d) 258 (C.A. 4); *Bodden* v. *McCormick Shipping Corp.*, 188 F. (2d) 733; and *Russell Co.* v. *McComb*, 187 F. (2d) 524 (C.A. 5).

[53] *Pedersen* v. *J. F. Fitzgerald Construction Co.*, ante; *Bennett* v. *V. P. Loftis*, ante; *Walling* v. *McCrady Const. Co.*, ante; and *Bodden* v. *McCormick Shipping Corp.*, 188 F. (2d) 733.

[54] *Maneja* v. *Waialua Agricultural Co.*, 349 U.S. 254; *Bowie* v. *Gonzalez*, 117 F. (2d) 11; *Weaver* v. *Pittsburgh Steamship Co.*, 153 F. (2d) 597, certiorari denied 328 U.S. 858; *Walling* v. *Keensburg Steamship Co.*, 462 F. (2d) 405.