

violation of the wage and hours standards established by the Act. (Exceptions are made subject to specified conditions for common carriers and for certain purchasers acting in good faith reliance on written statements of compliance. See footnote 53 to §776.15(a).) By defining “goods” in section 3(i) so as to exclude goods after their delivery into the actual physical possession of the ultimate consumer (other than a producer, manufacturer, or processor thereof) Congress made it clear that it did not intend to hold the ultimate consumer as a violator of section 15(a)(1) if he should transport “hot goods” across a State line.<sup>43</sup> Thus, if a person purchases a pair of shoes for himself from a retail store<sup>44</sup> and carries the shoes across a State line, the purchaser is not guilty of a violation of section 15(a)(1) if the shoes were produced in violation of the wage or hours provisions of the statute. But the fact that goods produced for commerce lose their character as “goods” after they come into the actual physical possession of an ultimate consumer who does not further process or work on them, does not affect their character as “goods” while they are still in the actual physical possession of the producer, manufacturer or processor who is handling or working on them with the intent or expectation that they will subsequently enter interstate or foreign commerce.<sup>45</sup> Congress clearly did not intend to permit an employer to avoid the minimum wage and maximum hours standards of the Act by making delivery within the State into the actual physical possession of the ultimate consumer who transports or ships the goods outside of the State. Thus, employees engaged in building a boat for delivery to the purchaser at the boatyard are considered within the coverage of the Act if the employer, at the time the boat is being built, in-

tends, hopes, or has reason to believe that the purchase will sail it outside the State.<sup>46</sup>

**§776.21 “For” commerce.**

(a) *General principles.* As has been made clear previously, where “goods” (as defined in the Act) are produced “for commerce,” every employee engaged in the “production” (as explained in §§776.15 through 776.19) of such goods (including any part or ingredient thereof) is within the general coverage of the wage and hours provisions of the Act. Goods are produced for “commerce” if they are produced for “trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.”<sup>47</sup> Goods are produced “for” such commerce where the employer intends, hopes, expects, or has reason to believe that the goods or any unsegregated part of them will move (in the same or in an altered form or as a part or ingredient of other goods) in such interstate or foreign commerce.<sup>48</sup> If such movement of the goods in commerce can be reasonably anticipated by the employer when his employees perform work defined in the Act as “production” of such goods, it makes no difference whether he himself, or a subsequent owner or possessor of the goods, put the goods in interstate or foreign commerce.<sup>49</sup> The fact that goods do move in interstate or foreign commerce is strong evidence that the employer intended, hoped, expected, or had reason to believe that they would so move.

Although it is generally well understood that goods are produced “for” commerce if they are produced for movement in commerce to points outside the State, questions have been

<sup>43</sup> *Hamlet Ice Co. v. Fleming*, 127 F. 2d 165 (C.A. 4), certiorari denied 317 U.S. 634.

<sup>44</sup> Note that the retail or service establishment exemption in section 13(a)(2) does not protect the retail store from a violation of the “hot goods” provision if it sells in interstate commerce goods produced in violation of section 6 or 7.

<sup>45</sup> See cases cited above in footnotes 41, 42, 43, this section.

<sup>46</sup> *Walling v. Lowe*, 5 W.H. Cases (S.D. Fla.), 10 Labor Cases (CCH) 63,033. See also *Walling v. Armbruster*, 51 F. Supp. 166 (W.D. Ark.); *Joshua Hendy Corp. v. Mills*, 169 F. 2d 898 (C.A. 9); *St. Johns River Shipbuilding Co. v. Adams*, 164 F. 2d 1012 S. (C.A. 5).

<sup>47</sup> Fair Labor Standards Act, section 3(b).

<sup>48</sup> *United States v. Darby*, 312 U.S. 100; *Warren-Bradshaw Drilling Co. v. Hall*, 371 U.S. 88; *Schulte Co. v. Gangi*, 328 U.S. 108.

<sup>49</sup> *Schulte Co. v. Gangi*, 328 U.S. 108; *Warren-Bradshaw Drilling Co. v. Hall*, 417 U.S. 88. See paragraph (d) of this section.

raised as to whether work done on goods may constitute production “for” commerce even though the goods do not ultimately leave the State. As is explained more fully in the paragraphs following, there are certain situations in which this may be true, either under the principles above stated (see paragraph (c) of this section), or because it appears that the goods are produced “for” commerce in the sense that they are produced for use directly in the furtherance, within the particular State, of the actual movement to, from, or across such State or interstate or foreign commerce. (See paragraph (b) of this section).

(b) *Goods produced for direct furtherance of interstate movement.* (1) The Act’s definition of “commerce,” as has been seen, describes a movement, among the several States or between any State and any outside place, of trade, commerce, transportation, transmission, or communication.” Whenever goods are produced “for” such movement, such goods are produced “for commerce,” whether or not there is any expectation or reason to anticipate that the particular goods will leave the State.<sup>50</sup>

(2) The courts have held that particular goods are produced “for” commerce when they are produced with a view to their use, whether within or without the State, in the direct furtherance of the movement of interstate or foreign commerce. Thus, it is well settled that ice is produced “for” commerce when it is produced for use by interstate rail or motor carriers in the refrigeration or cooling of the equipment in which the interstate traffic actually moves, even though the particular ice may melt before the equipment in which it is placed leaves the State.<sup>51</sup> The goods (ice) produced for such use “enter into the very means of transportation by which the burdens of

traffic are borne.”<sup>52</sup> The same may be said of electrical energy produced and sold within a single State for such uses as lighting and operating signals on railroads and at airports to guide interstate traffic, lighting and operating radio stations transmitting programs interstate, and lighting and message transmission of telephone and telegraph companies.<sup>53</sup> Similar principles would apply to the production of fuel or water for use in the operation of railroads with which interstate and foreign commerce is carried on; the production of radio or television scripts which provide the basis for programs transmitted interstate; the production of telephone and telegraph poles for use in the necessary repair, maintenance, or improvement of interstate communication systems; the production of crushed rock, ready-mixed concrete, cross-ties, concrete culvert pipe, bridge timbers, and similar items for use in the necessary repair, maintenance, or improvement of railroad roadbeds and bridges which serve as the instrumentalities over which interstate traffic moves.

Similarly, in the case of highways, pipe lines, and waterways which serve as instrumentalities of interstate and foreign commerce, the production of goods for use in the direct furtherance of the movement of commerce thereon would be the production of goods “for commerce.” The production of materials<sup>54</sup> for use in the necessary maintenance, repair, or improvement of the instrumentality so that the flow of commerce will not be impeded or impaired is an example of this. Thus, stone or ready-mixed concrete, crushed rock, sand, gravel, and similar materials for bridges or dams; like materials or bituminous aggregate or oil for road surfacing; concrete or galvanized

<sup>52</sup> *Hamlet Ice Co. v. Fleming*, 127 F. 2d 165 (C.A. 4).

<sup>53</sup> *Lewis v. Florida Power & Light Co.*, 154 F. 2d 751 (C.A. 5); see also *Walling v. Connecticut Co.*, 154 F. 2d 552 (C.A. 2).

<sup>54</sup> *Walling v. Staffen*, 5 W.H. Cases 1002 (W.D. N.Y.), 11 Labor Cases (CCH) par. 63, 102; *McCombs v. Carter*, 8 W.H. Cases 498 (E.D. Va.), 16 Labor Cases (CCH) par. 64, 964. *Contra, McComb v. Trimmer*, 85 F. Supp. 565 (D. N.J.). Cf. *Engebretson v. Albrecht*, 150 F. 2d 602 (C.A. 7).

<sup>50</sup> *Fleming v. Atlantic Co.*, 40 F. Supp. 654, affirmed in 131 F. 2d 518 (C.A. 5).

<sup>51</sup> *Hamlet Ice Co. v. Fleming*, 127 F. 2d 165 (C.A. 4), certiorari denied 317 U.S. 634; *Atlantic Co. v. Walling*, 131 F. 2d 518 (C.A. 5); *Chapman v. Home Ice Co.*; 136 F. 2d 353 (C.A. 6) certiorari denied 320 U.S. 761; *Southern United Ice Co. v. Hendrix*, 153 F. 2d 689 (C.A. 6); *Hansen v. Salinas Valley Ice Co.*, 62 Cal. App. 357, 144 F. 2d 896.

pipe for road drainage; bridge planks and timbers; paving blocks; and other such materials may be produced “for” commerce even though they do not leave the State.

(3) This does not, however, necessarily mean that the production of such materials within a State is always production “for” commerce when the materials are used in the same State for the maintenance, repair, or improvement of highways or other instrumentalities carrying interstate traffic. In determining whether the production is actually “for” commerce in a situation where there is no reason to believe that the goods will leave the State, a practical judgment is required. Some illustrations may be helpful.

On the one hand, there are situations where there is little room for doubt that the goods are produced “for” commerce in the sense that the goods are intended for the direct furtherance of the movement of commerce over the instrumentalities of transportation and communication. The most obvious illustration is that of special-purpose goods such as cross-ties for railroads, telephone or telegraph poles, or concrete pipe designed for highway use. Another illustration is sand and gravel for highway repair or reconstruction which is produced from a borrow pit opened expressly for that purpose, or from the pits of an employer whose business operations are conducted wholly or in the substantial part with the intent or purpose of filling highway contracts. (The fact that a substantial portion of the employer’s gross income is derived from supplying such materials for highway repair and reconstruction would be one indication that a substantial part of his business is directed to the purpose of meeting such needs of commerce.)

On the other hand, there are situations where materials or other goods used in maintaining, repairing, or reconstructing instrumentalities of commerce are produced and supplied by local materialmen under circumstances which may require the conclusion that the goods are not produced “for” commerce. Thus, a materialman may be engaged in an essentially local business serving the usual miscellany of local customers, without any sub-

stantial part of such business being directed to meeting the needs of highway repair or reconstruction. If, on occasion, he happens to produce or supply some materials which are used within the State to meet such highway needs, and he does so as a mere incident of his essentially local business, the Administrator will not consider that his employees handling or working on such materials are producing goods “for” commerce. This is, rather, a typically local activity of the kind the Act was not intended to cover. The same may be said of the production of ice by an essentially local ice plant where the only basis of coverage is the delivery of ice for the water cooler in the community railroad station. The employees producing ice in the ice plant for local use would not by reason of this be covered as engaged in the production of goods “for” commerce.

Other illustrations might be given but these should emphasize the essential distinction which must be kept in mind. Borderline cases will, of course, arise. In each such case the facts must be examined and a determination made as to whether or not the goods may fairly be viewed as produced “for” use in the direct furtherance of the movement of interstate or foreign commerce, and thus “for” commerce.

(c) *Controlling effect of facts at time “production” occurs.* (1) Whether employees are engaged in the production of goods “for” commerce depends upon circumstances as they exist at the time the goods are being produced, not upon some subsequent event. Thus, if a lumber manufacturer produces lumber to fill an out-of-State order, the employees working on the lumber are engaged in the production of goods for commerce and within the coverage of the Act’s wage and hours provisions, even though the lumber does not ultimately leave the State because it is destroyed by fire before it can be shipped. Similarly, employees drilling for oil which the employer expects to leave the State either as crude oil or refined products are engaged in the production

of goods for commerce while the drilling operations are going on and are entitled to be paid on that basis notwithstanding some of the wells drilled may eventually prove to be dry holes.<sup>55</sup>

(2) On the other hand, if the lumber manufacturer first mentioned produces lumber to fill the order of a local contractor in the expectation that it will be used to build a schoolhouse within the State, the employees producing the lumber are not engaged in the production of goods “for” commerce and are not covered by the Act. This would remain true notwithstanding the contractor subsequently goes bankrupt and the lumber is sold to a purchaser who moves it to another State; the status of the employees for purposes of coverage cannot in this situation, any more than in the others, be retroactively changed by the subsequent event.

(d) *Goods disposed of locally to persons who place them in commerce.* It is important to remember that if, at the time when employees engage in activities which constitute “production of goods” within the meaning of the Act, their employer intends, hopes, expects, or has reason to believe that such goods will be taken or sent out of the State by a subsequent purchaser or other person into whose possession the goods will come, this is sufficient to establish that such employees are engaged in the production of such goods “for” commerce and covered by the Act. Whether the producer passes title to the goods to another within the State is immaterial.<sup>56</sup> The goods are produced “for” commerce in such a situation whether they are purchased f.o.b. the factory and are taken out of the State by the purchaser, or whether they are sold within the State to a wholesaler or retailer or manufacturer or processor who in turn sells them, either in the same form or after further processing, in interstate or foreign commerce. The same is true where the goods worked on by the producer’s employees are not owned by the producer and are re-

turned, after the work is done, to the possession of the owner who takes or sends them out of the State.<sup>57</sup> Similarly, employees are engaged in the production of goods “for” commerce when they are manufacturing, handling, working on, or otherwise engaging in the production of boxes, barrels, bagging, crates, bottles, or other containers, wrapping or packing material which their employer has reason to believe will be used to hold the goods of other producers which will be sent out of the State in such containers or wrappings. It makes no difference that such other producers are located in the same State and that the containers are sold and delivered to them there.<sup>58</sup>

### Subpart B—Construction Industry

SOURCE: 21 FR 5439, July 20, 1956, unless otherwise noted.

#### §776.22 Subpart limited to individual employee coverage.

This subpart, which was adopted before the amendments of 1961 and 1966 to the Fair Labor Standards Act, is limited to discussion of the traditional general coverage of employees employed in activities of the character performed in the construction industry, which depends on whether such employees are, individually, “engaged in commerce or in the production of goods for commerce” within the meaning of the Act. The 1961 and 1966

<sup>57</sup> *Schulte Co. v. Gangi*, 328 U.S. 108; *Warren-Bradshaw Drilling Co. v. Hall*, 317 U.S. 88; *Walling v. Kerr*, 47 F. Supp. 852 (E.D. Pa.).

<sup>58</sup> *Enterprise Box Co. v. Fleming*, 125 F. 2d 897 (C.A. 5), certiorari denied 316 U.S. 704; *Dize v. Maddrix*, 144 F. 2d 584 (C.A. 4), affirmed 324 U.S. 697; *Walling v. Burch*, 5 W. H. Cases 323 (S.D. Ga.); 9 Labor Cases (CCH) par. 62, 613; *Fleming v. Schiff*, 1 W.H. Cases 893 (D. Colo.), 5 Labor Cases (CCH) par. 60, 864.

It should be noted that where empty containers are purchased, loaded, or transported within a single State as a part of their movement, as empty containers, out of the State, an employee engaged in such purchasing, loading, or transporting operations is covered by the Act as engaged “in commerce.” *Atlantic Co. v. Weaver*, 150 F. 2d 843 (C.A. 4); *Klotz v. Ippolito*, 40 F. Supp. 422 (S.D. Tex.); *Orange Crush Bottling Co. v. Tuggle*, 70 Ga. App. 144, 27 S.E. 2d 769.

<sup>55</sup> *Culver v. Bell & Loffland*, 146 F. 2d 29 (C.A. 9); see also *Warren-Bradshaw Drilling Co. v. Hall*, 317 U.S. 88.

<sup>56</sup> *Hamlet Ice Co. v. Fleming*, 127 F. 2d 165 (C.A. 4), certiorari denied 317 U.S. 634; *Bracey v. Luray*, 138 F. 2d 8 (C.A. 4).