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the next legislature will give careful consideration to the proposed corporation laws, with special emphasis on a remedy for the deadlock situation.

R. C. VAUGHN, JR.

Labor Law—Fair Labor Standards Act—Coverage of Maintenance Employees of Office Buildings

Maintenance employees in office buildings present a real problem under the Fair Labor Standards Act. Their employer is frequently a corporation whose sole business is that of renting space in local buildings, although the employer may be a manufacturing company or a bank using a part of the building for its own offices and renting the balance. Where all or part of the building is rented, the tenants may be engaged in purely local business, or in interstate commerce either on or off the premises, or in the production of goods for commerce either in the building or at another location. The maintenance employees themselves seldom have any direct contact with the carrying on of interstate commerce or with the physical production of goods for commerce. They clean the building, operate the elevators, make repairs, guard and heat the premises, and perform a variety of other activities admittedly essential to the successful operation of the modern office building. The question which arises in each case, however, is whether such activities are so closely related to commerce or production of goods for commerce as to bring the maintenance employees under the coverage of the Fair Labor Standards Act.

Coverage under the act is dependent on the activities of the employee rather than on the business of the employer. Thus the employees may be under the act even though the employer is a local real estate firm and therefore clearly not engaged in commerce or in the production of goods for commerce.¹ On the other hand, the employees may not be covered even though their employer is engaged in commerce.²

Any employee is covered who is engaged in commerce or in the production of goods for commerce,³ the latter including any closely related process or occupation directly essential to the production of goods for commerce.⁴ In this connection it is necessary to distinguish

¹ *Kirschbaum v. Walling*, 316 U. S. 517 (1942).

² *Carrigan v. Provident Trust Co.*, 153 F. 2d 74 (3rd Cir. 1946); *Building Service Employees International Union v. Trenton Trust Co.*, 142 F. 2d 257 (3rd Cir. 1944).

³ 52 STAT. 1062, 1063 (1938), 29 U. S. C. §§ 206, 207 (1946), as amended, 63 STAT. 912 (1949), 29 U. S. C. §§ 206, 207 (Supp. 1953). See LIVENGOOD, *THE FEDERAL WAGE AND HOUR LAW* (American Law Institute 1952); Tyson, *The Fair Labor Standard Amendments of 1949*, 28 N. C. L. REV. 161 (1950).

⁴ 52 STAT. 1060 (1938), 29 U. S. C. § 203(j) (1946), as amended, 63 STAT. 911 (1949), 29 U. S. C. § 203(j) (Supp. 1953).

between "engaged in commerce" on the one hand and "in the production of goods for commerce" on the other.

The courts have narrowly construed the phrase "engaged in commerce" and have not extended the act to cover maintenance employees whose only connection with interstate commerce is that they work in the same building in which tenants are engaged in commerce.⁵ Thus in the recent case of *Tobin v. Girard Properties, Inc.*⁶ where the major part of the building was rented to a telephone company for its executive offices, the court found that the maintenance employees were not engaged in commerce. Also, in the early bank cases the courts held that even though the employer-bank might be engaged in commerce, the work of the maintenance employees was not closely enough related to bring the employees under the act.⁷

The phrase "production of goods for commerce" has been given a much more liberal meaning. The basis for this distinction is in the act itself. As to production of goods for commerce, the act specifically states that it includes not only the employees who are employed in producing, manufacturing, mining, handling, transporting, or in any manner working on the goods, but also those employed in any closely related process or occupation directly essential to the production of goods,⁸ or, prior to the 1949 amendment, those necessary to the production of such goods. Commerce is defined as trade, commerce, trans-

⁵ *Tobin v. Girard Properties, Inc.*, 206 F. 2d 524 (5th Cir. 1953); *Blumenthal v. Girard Trust Co.*, 141 F. 2d 849 (3rd Cir. 1944); *Johnson v. Masonic Building Co.*, 138 F. 2d 817 (5th Cir. 1943), *cert. denied*, 321 U. S. 780 (1943); *Rucker v. First National Bank of Miami*, 138 F. 2d 699 (10th Cir. 1943), *cert. denied*, 321 U. S. 769 (1943); *Rosenberg v. Semeria*, 137 F. 2d 742 (9th Cir. 1943), *cert. denied*, 320 U. S. 770 (1943); *Johnson v. Dallas Downtown Development Co.*, 132 F. 2d 287 (5th Cir. 1942), *cert. denied*, 318 U. S. 790 (1942); *Wideman v. Blanchard & Calhoun Realty Co.*, 50 F. Supp. 626 (S. D. Ga. 1943); *Hinkler v. Eighty-Three Maiden Lane Corp.*, 50 F. Supp. 263 (S. D. N. Y. 1943); *In re New York Title & Mortgage Co.*, 179 Misc. 789, 39 N. Y. S. 2d 893 (Sup. Ct. 1943); *Greene v. Anchor Mills Co.*, 224 N. C. 714, 32 S. E. 2d 341 (1944), *cert. denied*, 324 U. S. 880 (1945); *Robinson v. Massachusetts Mutual Life Ins. Co.*, 158 S. W. 2d 441 (Tenn. 1941).

⁶ *Tobin v. Girard Properties, Inc.*, 206 F. 2d 524 (5th Cir. 1953).

⁷ *Building Service Employees International Union v. Trenton Trust Co.*, 142 F. 2d 257 (3rd Cir. 1944); *Convey v. Omaha National Bank*, 140 F. 2d 640 (8th Cir. 1943), *cert. denied*, 321 U. S. 781 (1944); *Rucker v. First National Bank of Miami*, 138 F. 2d 699 (10th Cir. 1943), *cert. denied*, 321 U. S. 769 (1943); *Lofther v. First National Bank of Chicago*, 138 F. 2d 299 (7th Cir. 1943); *Brandell v. Continental Illinois National Bank & Trust Co.*, 43 F. Supp. 781 (N. D. Ill. 1941); *Fultz v. United States Trust Co.*, 302 Ky. 493, 195 S. W. 2d 87 (1946); *Stoike v. First National Bank*, 290 N. Y. 195, 48 N. E. 2d 482 (1943), *cert. denied*, 320 U. S. 762 (1943); *Connelly v. Hamilton National Bank*, 182 Tenn. 77, 184 S. W. 2d 173 (1944). *But cf.* *Walling v. Bank of Wanesboro*, 61 F. Supp. 384 (S. D. Ga. 1945) where janitor also served as messenger for the bank and was considered as engaged in interstate commerce.

⁸ 52 STAT. 1060 (1938), 29 U. S. C. § 203(j) (1946), as amended, 63 STAT. 911 (1949), 29 U. S. C. § 203(j) (Supp. 1953).

portation, transmission, or communication⁹ and no specific extension is made to occupations or processes directly essential thereto.

An interesting illustration of the difference in construction of the two phrases is afforded by the bank cases. Those cases in which the sole issue was whether the employees were engaged in commerce held that although the bank was engaged in commerce, the maintenance employees were not closely enough related to be brought under the act.¹⁰ In the later cases, however, where it was found that the bank was engaged in the production of goods for commerce, maintenance employees were found to be covered by the act.¹¹

Maintenance employees are almost never found to be actually producing or physically handling the goods being produced for commerce. The question is almost always one of whether they are engaged in activities "necessary to" or since 1949, "directly essential to" production of goods for commerce. In order to determine this, it is necessary to look not only at the activities of the employee but also at the activities of the employer and of the tenant, where these activities are performed, the number and nature of intervening processes between the activity and the actual physical production, and the characteristics and purposes of the employer's business.¹²

The cases involving maintenance employees allegedly engaged in the production of goods for commerce fall into three groups:

(1) Where a substantial part of the building is rented to tenants who are engaged in the production of goods for commerce in the building itself, the maintenance employees are covered, even though the employer is a local real estate firm. This was established by the U. S. Supreme Court in *Kirschbaum v. Walling* in 1942,¹³ and has been applied in numerous cases since.¹⁴ Even though the employees do not handle the

⁹ *Ibid*, § 203(b).

¹⁰ See note 7 *supra*.

¹¹ *Union National Bank of Little Rock v. Durkin*, 207 F. 2d 848 (8th Cir. 1953); *Bozant v. Bank of New York*, 156 F. 2d 787 (2d Cir. 1946).

¹² 29 CODE FED. REGS. § 776.17(c) (1950).

¹³ 316 U. S. 517 (1942).

¹⁴ *D. A. Schulte v. Gangi*, 328 U. S. 108 (1946); *Brooklyn Sav. Bank v. O'Neil*, 324 U. S. 697 (1945); *Grant v. Bergdorf & Goodman Co.*, 172 F. 2d 109 (2d Cir. 1949); *Roberg v. Henry Phipps Estate*, 156 F. 2d 958 (2d Cir. 1946); *Baldwin v. Emigrant Industrial Trust Sav. Bank*, 150 F. 2d 524 (2d Cir. 1945), *cert. denied*, 326 U. S. 767 (1945); *Fleming v. Post*, 146 F. 2d 441 (2d Cir. 1944); *Merryfield v. F. M. Hoyt Shoe Corp.*, 128 F. 2d 452 (1st Cir. 1942); *Asselta v. 149 Madison Avenue Corp.*, 65 F. Supp. 385 (S. D. N. Y. 1945); *Frank v. McMeekan*, 56 F. Supp. 369 (E. D. N. Y. 1944); *Bittner v. Chicago Daily News Printing Co.*, 4 W. H. Cases (BNA) 837 (N. D. Ill. 1944); *Berry v. 34 Irving Place Corp.*, 52 F. Supp. 875 (S. D. N. Y. 1943); *Spaeth v. Washington University*, 213 S. W. 2d 276 (Mo. 1948); *Quest v. George A. Bowman, Inc.*, 64 N. Y. S. 2d 60 (N. Y. City Ct. 1946); *Rienzo v. City Bank Farmers Trust Co.*, 183 Misc. 153, 53 N. Y. S. 2d 68 (Sup. Ct. 1944); *Schineck v. 386 Fourth Ave. Corp.*, 182 Misc. 1037, 49 N. Y. S. 2d 872 (N. Y. City Ct. 1944); *Floyd v. 58-64 Fortieth Street Corp.*, 44 N. Y. S. 2d 422 (N. Y. City Ct. 1943).

goods produced, their maintenance work is considered to have such a close and immediate tie with the process of production that they are considered to be engaged in an occupation necessary to the production of goods for commerce. Although the *Kirschbaum* case was decided before the 1949 amendment which changed "necessary to" to "directly essential to" legislative history¹⁵ and administrative statements¹⁶ have indicated that no change was intended by this amendment. In the recent decision of *Union National Bank of Little Rock v. Durkin*¹⁷ the 8th Circuit expressly followed the *Kirschbaum* case and indicated that the 1949 amendment had made no change. *The Union National Bank* case, however, was a stronger case for coverage since the employer himself was found to be engaged in the production of goods for commerce in the building whereas in the *Kirschbaum* case it was the tenants who were producing the goods.

(2) Where the building is owned by a business which is engaged in the production of goods for commerce and is used at least in part for its executive offices, the maintenance employees are covered by the act. Thus in *Borden v. Borella*,¹⁸ although there was no physical production of goods in the office building itself, the court felt that since the employer-owner was himself engaged in the production of goods for commerce at another location and used this building for directing and controlling that production, the maintenance employees were engaged in an occupation necessary to such production. These employees, the court pointed out, would have been covered had the offices been in the same building with the manufacturing establishment. The office, even though at another location, was a part of an integrated effort for the production of goods and to make a distinction based on the mere fact that the office was physically separated from the plant was economically unjustifiable.

This case was followed and in fact extended by the recent case of *General Electric v. Porter*¹⁹ where the 9th Circuit held the act covered firemen employed by General Electric in a company-owned town in which the executive offices of the plant were located although the plant which was producing goods for commerce was several miles away. Whether the Supreme Court will uphold such an extension in the light of the 1949 amendments remains to be seen.

(3) In those buildings in which there is no substantial production of goods for commerce in the building but in which there are tenants,

¹⁵ H. R. REP. NO. 1453, 81st Cong., 1st Sess. 2253 (1949).

¹⁶ Adm. Statement (Dec. 8, 1953), WAGE & HOUR MANUAL (BNA) 10:295 (1953).

¹⁷ 207 F. 2d 848 (8th Cir. 1953).

¹⁸ 325 U. S. 679 (1945).

¹⁹ 208 F. 2d 805 (9th Cir. 1953).

as distinguished from the owner, who are engaged in the production of goods for commerce at another location, the maintenance employees are not covered. In *Ten East 40th Street Bldg., Inc. v. Callus*²⁰ the U. S. Supreme Court by a five to four decision held that the employees were too far removed from the actual production of goods for commerce to be included even within that phrase "necessary to the production." Renting office space in a building devoted to an unrestricted variety of office work, said the majority of the court, spontaneously satisfied common understanding of what is local business and made the employees of such a building engaged in local business. The dissent felt that the connection with the production of goods here was as close as that in the *Borden* case which was decided on the same day, that coverage depended on the work of the employees which in the two cases was the same, and that the mere chance of whether the employee was employed by the producer of the goods or by the independent owner of the building should make no difference.

As the 1949 amendment was intended to restrict the coverage of the act and these employees were excluded even before that amendment, the amendment cannot, of course, further restrict coverage in these cases.

Since whether maintenance employees in these cases are covered by the act depends on the production of goods for commerce either by the owner or the tenants, it is necessary to examine just what activities are considered by the courts to be production.

The act defines "produced" as "produced, manufactured, mined, handled, or in any other manner worked on,"²¹ and "goods" as "goods, wares, products, commodities, merchandise, or subjects of commerce of any character, or any part or ingredient thereof."²² The actual manufacture of such tangible items as women's clothes, watches, or jewelry is, of course, clearly production of goods.²³ "Produced," however, has also been held to cover the process of issuing insurance policies,²⁴ mimeographing news bulletins,²⁵ preparing advertising plates

²⁰ 325 U. S. 578 (1945).

²¹ 52 STAT. 1060 (1938), 29 U. S. C. § 203(j) (1946), as amended, 63 STAT. 911 (1949), 29 U. S. C. § 203(j) (Supp. 1953).

²² *Ibid.* § 203(i); 29 CODE FED. REGS. § 776.20 (1950).

²³ *D. A. Schulte v. Gangl*, 328 U. S. 108 (1946); *Kirschbaum v. Walling*, 316 U. S. 517 (1942); *Roberg v. Henry Phipps Estate*, 156 F. 2d 958 (2d Cir. 1946).

²⁴ *Union National Bank of Little Rock v. Durkin*, 207 F. 2d 848 (8th Cir. 1953) (branch office); *Darr v. Mutual Life Ins. Co.*, 169 F. 2d 262 (2d Cir. 1948), *cert. denied*, 335 U. S. 871 (1948). *Contra*: *Hinkler v. Eighty-Three Maiden Lane Corp.*, 50 F. Supp. 263 (S. D. N. Y. 1943).

²⁵ *Ullo v. Smith*, 177 F. 2d 101 (2d Cir. 1949); *Baldwin v. Emigrant Industrial Trust Sav. Bank*, 150 F. 2d 524 (2d Cir. 1945), *cert. denied*, 326 U. S. 767 (1945); *Berry v. 34 Irving Place Corp.*, 52 F. Supp. 875 (S. D. N. Y. 1943).

and copy,²⁶ editing and proofreading scripts for books and motion pictures,²⁷ and publishing a newspaper.²⁸ The more recent cases have held that banks by issuing or authenticating bonds, stocks, notes, or drafts are engaged in the production of goods for commerce.²⁹ Lawyers or brokers, however, are not producing goods merely because they draw deeds or write letters that are sent through the mails into another state.³⁰

Production of goods also includes handling. Repacking and re-labeling goods have been held to be production,³¹ as have receiving and shipping them.³² Other cases have held that repacking or shipping by a jobber who did not manufacture the goods is not production.³³

A tenant may be producing goods for commerce even though he sell to local concerns. It is enough if he knows or has reason to know that his products are to be shipped in interstate commerce.³⁴

The amount of production for commerce in the building must be substantial for the maintenance employees to be covered by the act. The statute gives no definition of "substantial," but the administrator and most of the courts adopted 20 per cent as a rough guide; that is, where the tenants producing goods for commerce occupied more than 20 per cent of the floor space, the maintenance employees were covered,³⁵ and

²⁶ *Asselta v. 149 Madison Avenue Corp.*, 65 F. Supp. 385 (S. D. N. Y. 1945); *Schneck v. 386 Fourth Ave. Corp.*, 182 Misc. 1037, 49 N. Y. S. 2d 872 (N. Y. City Ct. 1944).

²⁷ *Roberg v. Henry Phipps Estate*, 156 F. 2d 958 (2d Cir. 1946); *Baldwin v. Emigrant Industrial Trust Sav. Bank*, 150 F. 2d 524 (2d Cir. 1945), *cert. denied*, 326 U. S. 767 (1945).

²⁸ *Bittner v. Chicago Daily News Printing Co.*, 4 W. H. Cases (BNA) 837 (N. D. Ill. 1944).

²⁹ *Union National Bank of Little Rock v. Durkin*, 207 F. 2d 848 (8th Cir. 1953); *Bozant v. Bank of New York*, 156 F. 2d 787 (2d Cir. 1946). *But cf.*: *Holmes v. Elizabeth Trust Co.*, 72 F. Supp. 182 (D. N. J. 1947).

³⁰ *Bozant v. Bank of New York*, 156 F. 2d 787 (2d Cir. 1946); *Wideman v. Blanchard & Calhoun Realty Co.*, 50 F. Supp. 626 (S. D. Ga. 1943).

³¹ *Ullo v. Smith*, 177 F. 2d 101 (2d Cir. 1949); *Roberg v. Henry Phipps Estate*, 156 F. 2d 958 (2d Cir. 1946); *Baldwin v. Emigrant Industrial Trust Sav. Bank*, 150 F. 2d 524 (2d Cir. 1945), *cert. denied*, 326 U. S. 767 (1945); *Spaeth v. Washington University*, 213 S. W. 2d 276 (Mo. 1948); *Schneck v. 386 Fourth Ave. Corp.*, 182 Misc. 1037, 49 N. Y. S. 2d 872 (N. Y. City Ct. 1944).

³² *Fleming v. Post*, 146 F. 2d 441 (2d Cir. 1944); *Holmes v. Elizabeth Trust Co.*, 72 F. Supp. 182 (D. N. J. 1947).

³³ *Ullo v. Smith*, 177 F. 2d 101 (2d Cir. 1949); *Blumenthal v. Girard Trust Co.*, 141 F. 2d 849 (2d Cir. 1944); *Prescott v. Broadway & Franklin Street Corp.*, 57 F. Supp. 272 (S. D. N. Y. 1944); *Burke v. Hide & Leather Realty Co.*, 182 Misc. 319, 48 N. Y. S. 2d 594 (Sup. Ct. 1944).

³⁴ 328 U. S. 108 (1946).

³⁵ *Roberg v. Henry Phipps Estate*, 156 F. 2d 958 (2d Cir. 1946) (48%); *Baldwin v. Emigrant Industrial Trust Sav. Bank*, 150 F. 2d 524 (2d Cir. 1945), *cert. denied*, 326 U. S. 767 (1945) (39%); *Fleming v. Post*, 146 F. 2d 444 (2d Cir. 1944) (25%); *Frank v. McMeehan*, 56 F. Supp. 369 (E. D. N. Y. 1944) (76%); *Bittner v. Chicago Daily News Printing Co.*, 4 W. H. Cases (BNA) 837 (N. D. Ill. 1944) (46%); *Asselta v. 149 Madison Avenue Corp.*, 65 F. Supp. 385 (S. D. N. Y. 1945) (24%); *Quest v. George A. Bowman, Inc.*, 64 N. Y. S. 2d 60 (N. Y. City Ct. 1946) (more than 20%); *Schneck v. 386 Fourth Ave. Corp.*, 182 Misc. 1037, 49 N. Y. S. 2d 872 (N. Y. City Ct. 1944) (50%).

where such tenants occupied less than 20 per cent, maintenance employees were not covered.³⁶ Other courts said little or nothing about percentages.³⁷ Under the new 1953 Administrative Statement, the 20 per cent rule has been retained for buildings where tenants are "manufacturing" on the premises.³⁸

A tenant either is or is not engaged in the production of goods for commerce; that is, either all or none of his floor space is counted. In determining whether any single tenant is producing goods for commerce, the trial courts have considered the percentage of space, the percentage of employees actually engaged on the premises in physical production of goods, and the relation of production for interstate commerce to the total production.³⁹

Some courts have interpreted the 20 per cent rule as applying to this determination of whether the tenant is engaged in commerce.⁴⁰ Other courts have held that it is not necessary to have 20 per cent,⁴¹ the 2nd Circuit court holding in one case that 2 per cent of the income of one tenant and 5 per cent of the floor space of another were sufficient to classify these tenants as engaged in the production of goods for commerce.⁴² Thus if 20 per cent of the total floor space of the building is being occupied by firms producing goods for commerce but each of those firms is devoting only 5 percent of its own floor space to that production it would be possible for the maintenance employees to be covered even though only 1 per cent of the total floor space in the building were actually devoted to production.

Where a building owned by a producer of goods for commerce is occupied as its executive offices, the courts have simply indicated that if maintenance employees are to be covered by the act the building must be "predominantly" occupied for its offices.⁴³ In the *Borden* case this requirement was met where 58 per cent of the area was so used, al-

³⁶ *Ullo v. Smith*, 177 F. 2d 101 (2d Cir. 1949) (15%); *Hunter v. Madison Avenue Corp.*, 174 F. 2d 164 (6th Cir. 1949), *cert. denied*, 338 U. S. 836 (1949) (3%); *Johnson v. Great National Life Insurance Co.*, 166 S. W. 2d 935 (Tex. Civ. App. 1942) (8%); *In re New York Title & Mortgage Co.*, 179 Misc. 789, 39 N. Y. S. 2d 893 (Sup. Ct. 1943) (10%).

³⁷ *Berry v. 34 Irving Place Corp.*, 52 F. Supp. 875 (S. D. N. Y. 1943); *Hinkle v. Frank Nelson Bldg. Inc.*, 245 Ala. 679, 18 So. 2d 374 (1944); *Baum v. A. C. Office Bldg. Co.*, 157 Kan. 558, 143 P. 2d 417 (1943); *Spaeth v. Washington University*, 213 S. W. 2d 276 (Mo. 1948).

³⁸ Adm. Statement (Dec. 8, 1953) WAGE & HOUR MANUAL (BNA) 10:295 (1953).

³⁹ *Ullo v. Smith*, 177 F. 2d 101 (2d Cir. 1949); *Roberg v. Henry Phipps Estate*, 156 F. 2d 958 (2d Cir. 1946); *Berry v. 34 Irving Place Corp.*, 52 F. Supp. 875 (S. D. N. Y. 1943).

⁴⁰ *Fleming v. Post*, 146 F. 2d 441 (2d Cir. 1944); *Asselta v. 149 Madison Ave. Corp.*, 65 F. Supp. 385 (S. D. N. Y. 1945).

⁴¹ *Ullo v. Smith*, 177 F. 2d 101 (2d Cir. 1949); *Roberg v. Henry Phipps Estate*, 156 F. 2d 958 (2d Cir. 1946).

⁴² *Roberg v. Henry Phipps Estate*, 156 F. 2d 958 (2d Cir. 1946).

⁴³ *Borden Co. v. Borella*, 325 U. S. 679 (1945).

though there was no discussion as to what percentage would be considered "predominantly" occupied.

Where a bank occupies part of the building, the courts have indicated that the maintenance employees will be covered if the proportion of goods produced is enough to "color the activities of the employees as a whole."⁴⁴ Here again the courts have not interpreted "enough to color" but have held 50 per cent in one case⁴⁵ and 80 per cent in another sufficient.⁴⁶ The new administrative rulings on the latter two points are not wholly clear.⁴⁷

Until 1949, coverage of the act had gradually spread to include more and more maintenance employees. The *Kirschbaum* case in 1942 extended it to maintenance employees of independent real estate companies if the tenants were engaged in the production of goods for commerce. The *Borden* case in 1945 brought within the coverage of the act maintenance employees in office buildings owned by producers of goods for interstate commerce and used by them for their executive offices. The *Martino* case⁴⁸ in 1946 extended coverage to employees of a local window washing firm who worked only temporarily on the premises of a plant producing goods for interstate commerce. The *Gangi* case⁴⁹ in the same year made it clear that employees in buildings where the tenants produced goods which were not sold directly in interstate commerce but which the tenant had reason to believe would go into interstate commerce were within the act.

Extension took place also in another form. More and more types of activities were considered by the courts as production of goods for commerce. Banking activities, for example, which at first were assumed to be merely interstate commerce were later held to be production of goods for commerce. In the later cases, too, there is a great deal more judicial investigation into the activities of the tenants.

The 1949 amendment by changing "necessary" to "directly essential" was intended to restrict coverage under the act. The House Conference Report⁵⁰ indicated, however, that the changes were not intended to remove from the act the maintenance employees of manufacturers and other producers of goods for commerce and that employees engaged in such maintenance work would remain subject to the act even though

⁴⁴ *Bozant v. Bank of New York*, 156 F. 2d 787 (2d Cir. 1946).

⁴⁵ *Ibid.*

⁴⁶ *Union National Bank of Little Rock v. Durkin*, 207 F. 2d 848 (8th Cir. 1953).

⁴⁷ Adm. Statement (Dec. 8, 1953) WAGE & HOUR MANUAL (BNA) 10:295 (1953).

⁴⁸ *Martino v. Michigan Window Cleaning Co.*, 327 U. S. 173 (1946).

⁴⁹ *D. A. Schulte v. Gangi*, 328 U. S. 108 (1946).

⁵⁰ H. R. REP. NO. 1453, 81st Cong., 1st Sess. 2253 (1949); Sanders, *Basic Coverage of the Amended Federal Wage and Hour Law*, 3 VAND. L. REV. 175 (1950).

they were employed by an independent employer. Such activities were closely related and directly essential to the production of goods for commerce. Maintenance employees like those in the *Martino* case, however, were to be removed from the act.

The first Interpretative Bulletin issued after the 1949 amendment was in such general terms that it threw little light on the policies to be followed with regard to maintenance employees.⁵¹ A more detailed administrative policy was announced in a statement dated December 8, 1953.⁵² The statement expressly excluded consideration of maintenance employees of manufacturers, processors, mining companies, banks, or insurance companies engaged in producing goods for interstate commerce since, according to the statement, it is well established that they are covered by the act.

The statement indicates that:

Employees of office buildings housing the usual miscellany of offices, including doctors, dentists, lawyers, etc., and also various small enterprises such as local watch repair, branch telegraph offices, etc., as well as executive and sales offices of manufacturing and mining companies where these offices are a part of the general miscellany are not considered covered by the act. This is apparently the situation that existed in the *Callus* case and represents no change.

Employees of loft buildings occupied exclusively by tenants engaged on the premises in manufacturing goods for interstate commerce are considered covered by the act. This is the strongest type of *Kirschbaum* case.

Employees of buildings occupied partly by producers and partly by offices will be covered or not depending on the percentage of certain activities in the buildings. If 20 per cent or more of the rentable area is used by tenants engaged on the premises in the manufacture of goods for commerce, the maintenance employees of the building will be covered by the act. This is the usual *Kirschbaum* situation with the same 20 per cent rule previously used.

If 50 per cent or more of the rentable area of the building is occupied by the executive offices of a manufacturer or mining company, the maintenance employees of the building will be covered. This statement in its ambiguity raises several questions. Does this 50 per cent policy apply only to buildings where the manufacturer owns the building but occupies only part of it as its executive offices, as in the *Borden* case where the manufacturer occupied 58 per cent of the floor space but the court in holding the employees under the act made no point of the

⁵¹ 29 CODE FED. REGS. §§ 776.0-776.21.

⁵² Adm. Statement (Dec. 8, 1953) WAGE & HOUR MANUAL (BNA) 10:295 (1953).

percentage involved? Or does it apply only to buildings owned by an independent real estate firm and occupied by a manufacturer for its executive offices, as in the *Callus* case where 26 per cent of the building was used for executive offices but the majority of the court in denying coverage did not base its decision on the percentage of the space so used? Or is the administrator announcing that ownership of the building is immaterial and that he views the distinction between the *Borden* and the *Callus* case as one of percentages and not one of ownership of the building? In the light of the language of the statement it would appear that the administrator is saying that if 50 per cent of the building is rented by a tenant for executive offices from which he controls his manufacturing of goods for commerce, then those offices are not a part of the "usual miscellany" and thus are not within the rule of the *Callus* case.

If 50 per cent or more of the rentable area is occupied by a bank or insurance company, the maintenance employees will be covered. This raises the same question, that is, whether this applies to situations where the bank or insurance company owns the building or to situations where an independent real estate company owns the building or to both situations.

Of the three Circuit court cases decided since the 1949 amendment, no restriction of coverage has been indicated. The *Girard* case in denying coverage to employees in a building the major part of which had been rented for offices by a company engaged in commerce simply followed the earlier cases denying coverage because there was not a sufficiently close connection with interstate commerce. That part of the statute relating to "engaged in commerce" was not changed by the amendment. The *Union National Bank* case in holding the maintenance employees covered by the act relied on the *Kirschbaum* case and indicated that no change was intended by the amendment. The case, however, was a stronger one for coverage than the *Kirschbaum* case because the employer was himself engaged in the production of goods for interstate commerce. The *General Electric* case extended rather than restricted the doctrine of the *Borden* case. None of these cases, however, has been passed upon by the Supreme Court. The only district court case pointing toward a possible restriction held that the act did not cover a watchman employed to guard the outside of buildings rented to tenants producing goods for commerce.⁵³ No cases, of course, have reached the courts since the announcement of the 1953 Administrative Statement.

Judging from the limited number of court decisions and from the

⁵³ *Tobin v. Famous Realty, Inc.*, 111 F. Supp. 659 (E. D. N. Y. 1953).

administrative interpretations it would appear that little restriction of coverage of maintenance employees was effected by the 1949 amendment. The real effect of the amendment will not be known definitely until some case in these borderline areas reaches the Supreme Court. Until then it is probable that coverage under the act will not only be materially restricted but that it will continue to be extended in spite of the amendment.

JEANNE OWEN

Sales—Warranties—Implied in Sale of Food for Human Consumption

In the recent case of *Draughon v. Maddox*¹ the North Carolina Supreme Court held that in the sale of a cow at auction on a public market to a retail dealer there was an implied warranty that it was fit for human consumption. The court relied on two earlier North Carolina cases in which it was held (1) that there was an implied warranty that the article sold was suitable for the purpose intended² and (2) that there was an implied warranty in the sale of food for human consumption that it was wholesome and fit for that purpose.³ Relying on the statute requiring a health certificate with a cow if not sold for immediate slaughter,⁴ the court found that this cow, sold without a health certificate, must have been intended for immediate slaughter and therefore for human consumption.

The North Carolina cases on implied warranty of fitness for the purpose intended are not wholly consistent. In the early case of *Dickson v. Jordan*⁵ the court had held that there was no implied warranty of quality even where the seller knew the purpose for which the article was to be used, basing the decision on the fact that since the same price was paid by the one who did not reveal his purpose as by the one who did, there was no consideration to support a warranty of fitness.

Some doubt must have been cast on this rule by the decision in *Thomas v. Simpson*⁶ where the seller who contracted to furnish shingles was denied recovery because they were not fit for the purpose intended. The court did not mention the earlier case. Then in a dictum in a much later case, the court again said that if there was a sale for a particular purpose, the seller warranted the article to be fit for that purpose.⁷

One year after that dictum, however, there was a direct holding

¹ 237 N. C. 742, 75 S. E. 2d 917 (1953).

² *McConnell v. Jones*, 228 N. C. 218, 44 S. E. 2d 876 (1947).

³ *Davis v. Radford*, 233 N. C. 283, 63 S. E. 2d 822 (1951).

⁴ N. C. GEN. STAT. § 106-409 (1952).

⁵ 33 N. C. (11 Ired.) 166, 53 Am. Dec. 403 (1850).

⁶ 80 N. C. 4 (1879).

⁷ *W. F. Main Co. v. Field*, 144 N. C. 307, 311, 56 S. E. 943, 944 (1907).