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Fair Labor Standards Act -- Wage and Hour -- Coverage of New Construction

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for the court's decision. In another case, embodying the same issues and similar facts, the court held against the state, saying that: "... in the enactment of this statute the legislature did not have in mind the acquisition of access rights ..." Legislative intent was recognized and acknowledged by this court in that their legislature had previously failed to pass a proposed bill similar to our 1951 highway bill.

With regard to the issue in the Hedrick case, the 1957 General Assembly has eliminated the problem of statutory construction by passage of a new highway bill authorizing the Commission to restrict access. Yet the broader and more important problem still remains: has the court changed its rule of long standing that eminent domain statutes will be strictly construed?

Boyd B. Massagee

Fair Labor Standards Act—Wage and Hour—Coverage of New Construction

Plaintiff-workers were engaged in building a $37,000,000 causeway, twenty-five miles long, across Lake Pontchartrain immediately north of New Orleans. This was a new project designed to relieve traffic congestion on old highways around the east and west shores of the lake. It was physically separated from existing highways, but when completed, it would be an integral part of the state and federal highway systems, with four-lane approach roads connecting with east-west and north-south U. S. highways. Plaintiffs were also engaged in building a field plant at the job site, which, when completed, would house the casting of huge concrete pillars and deck slabs which were to serve as the base of the causeway. Plaintiffs brought an action under the Fair Labor Standards Act for penalties and overtime compensation. The construction company defended on the ground that this was new construction and that therefore the act was inapplicable to these operations.

21 Minn. Stat. Ann. § 161.03 Subd. 1 (West 1945). The Commissioner is authorized "to acquire by purchase, gift or condemnation ... all necessary right of way needed in laying out and constructing the trunk highway system ..."
22 State v. Superior Court for Cowlitz County, 33 Wash. 2d 638, 206 P. 2d 1028 (1949).
23 Id. at 645, 206 P. 2d at 1032.
24 N. C. Sess. Laws 1957, c. 993. Section 5 of this law is as follows: "Acquisition of property and property rights. For the purposes of this Act, the Commission may acquire private or public property and property rights for controlled-access facilities and service or frontage roads, including rights of access, air, view and light, by gift, devise, purchase, or condemnation in the same manner as now or hereafter authorized by law to acquire such property or property rights in connection with highways ..."
The Court of Appeals for the Fifth Circuit held that the employees were "engaged in commerce" and applied the act.\(^2\)

Whether "new construction" is covered by the FLSA has long been a source of confusion. The act itself is silent. It simply provides that an employee "engaged in commerce or in the production of goods for commerce"\(^3\) is covered by the act and is entitled to the minimum wage and overtime compensation specified therein.\(^4\) The act defines the word "produced" as "... manufactured, mined, handled, or in any other manner worked on..."\(^5\) "Fringe" employees are deemed to be covered if their work is "closely related" or "directly essential" to production.\(^6\)

Shortly after the passage of the FLSA, the Administrator expressed the view that:

The employees of local construction contractors generally are not engaged in interstate commerce and do not produce any goods which are shipped or sold across state lines. Thus, it is our opinion that the employees engaged in the original construction of buildings are not generally within the scope of the Act, even if the buildings when completed will be used to produce goods for commerce.\(^7\)

The adoption of such a limitation of what is "in commerce" was a reiteration of the "new construction" doctrine adopted long before the enactment of the FLSA in *Raymond v. Chicago M. & St. P. R. R.*\(^8\) In that case, plaintiff-employee sued under the Federal Employee's Liability Act for injuries sustained, as he alleged, "in commerce." When the injury occurred, plaintiff was working on a new railroad tunnel which was to serve, when completed, as a cut-off through which trains carrying interstate commerce would be re-routed. The Supreme Court reasoned that the tunnel was not "in commerce" until it was actually used for such and denied recovery under the act.

Following the administrator's interpretation of the FLSA, the courts adopted the new construction rule in cases arising under the FLSA.\(^9\) Thus, it was clear that the construction of a new plant was not "in commerce."
commerce” although the plant, when completed, would produce goods for interstate commerce.\(^{10}\) In *Koepfle v. Garavaglia*,\(^ {11}\) the plaintiff-employee was employed in the construction of a new highway. He contended that he was either “engaged in commerce,” or in the “production of goods for commerce.” The court held that the highway retained its local character until finished and denied recovery.

The confusion in this area of the law has centered around a well established exception to the “new construction” idea: if the work was deemed to be reconstruction, improvement or repair of an *existing facility* of commerce, it was covered by the Act. Such work was so closely related to interstate commerce as to be in practice and legal contemplation a part of it.\(^ {12}\)

The line of demarcation between new construction and repair or reconstruction of an existing facility of commerce has not been an easy one to draw. It has resulted in apparently conflicting decisions in the circuit courts.\(^ {13}\) With the advent of a large volume of highway construction enlarging a great network of national and state roads, the status of such construction under the Act has become increasingly uncertain.

Where the work is on an *existing* highway or related facility of commerce, the courts have applied the “existing instrumentality” exception. Thus, in *Alstate Constr. Co. v. Durkin*,\(^ {14}\) the first group of employees were engaged in repairing and maintaining interstate highways and the second group in producing paving mixture at a place removed from the site of the road work. In granting an injunction against violations of the act, the court held that the workers in the first group were doing a service indispensable to commerce and were therefore “engaged in commerce.” Employees in the second group were deemed to be producing goods for commerce because their work was inseparable from reconstruction and repair of the existing facilities.\(^ {16}\)

\(^ {10}\) *Kelley v. Ford, Bacon & Davis, Inc.*, 162 F. 2d 555 (3d Cir. 1947) ; *Noonan v. Fruco Constr. Co.*, 140 F. 2d 633 (8th Cir. 1943).

\(^ {11}\) *Kelley v. Ford, Bacon & Davis, Inc.*, supra.


In the area of highway reconstruction and repair, the employee is most often deemed to be “engaged in commerce” rather than in the “production of goods for commerce.” The cases do not recognize a clear distinction between the two categories. *Compare Walling v. McCrady Constr. Co.*, *supra*, with *Overstreet v. North Shore Corp.*, *supra*. See *Engelbreten v. E. J. Albrecht Co.*, 150 F. 2d 602 (7th Cir. 1945), where it was held that viaducts, bridges, etc., are not “goods” within the meaning of the act. However, if the employee produces the “ingredients” for road repair, and it is found that the road is an existing instrumentality of commerce, the employee is deemed to “produce goods for commerce.” *Alstate Constr. Co. v. Durkin*, 345 U. S. 13 (1953).


\(^ {14}\) 345 U. S. 13 (1953).

\(^ {16}\) *Overstreet v. North Shore Corp.*, 318 U. S. 125 (1943) (maintenance work on
In *Walling v. McCrady Constr. Co.*, the employer was engaged in, *inter alia*, the construction of a new conduit for a telephone company and foundations for a new railroad signal tower. It had also done repair work on highway and railroad bridges. Regarding the repair work, the court repeated the rule that work on existing facilities of commerce is "so vital to the functioning of all of the . . . instrumentalities of commerce as to be for practical purposes part of interstate commerce itself." In holding that the new construction was also covered, the court concluded that the "conduit and the signal tower, while not reconstruction jobs were so closely allied, the first to the existing telephone system and the second to the railroad . . ." as to be "in commerce."

In *Moss v. Gillios Constr. Co.*, the plaintiff-employee was employed in the construction of a new bridge across the Arkansas River. The bridge, when finished, was to serve a main east-west highway and relieve congestion over an existing bridge. The court held that this was new construction not covered under the act. The difference between the *Moss* and *McCrady* cases would appear to lie in the divergent views as to what constitutes an existing facility.

This was the uncertain state of the law when the United States Supreme Court decided the perplexing case of *Mitchell v. C. W. Vollmer & Co.* In that case, the employees were building a new lock on the Gulf Intracoastal Waterway which would provide an alternate route for boats traveling the waterway and would relieve congestion in other areas of the waterway. The defendant argued that this was new construction and in the same category as the tunnel being constructed in *Raymond v. Chicago M. St. P. R. R.*, the parent case of the "new construction" doctrine. In allowing an injunction against violations of the act, the

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16 156 F. 2d 932 (3d Cir. 1946).
18 *Ibid.* The court relied on Pederson v. J. F. Fitzgerald Constr. Co., 318 U. S. 740 (1943), where the employees were engaged in building new abutments for a railroad bridge carrying interstate trains. It was held that the employees were engaged in commerce.
19 206 F. 2d 819 (10th Cir. 1953).
20 "The line of demarcation between new construction . . . and repairs and improvement of existing facilities of commerce . . . becomes more vague and indistinct as we enter the twilight zone separating these two classifications. We ultimately reach a point where it cannot be said with that finality or certainty of conviction which is desirable that an activity falls within one or the other of these two classifications." *Ibid.* at 822 (concurring opinion). *Accord*, *Van Klavern v. Killian-House Co.*, 210 F. 2d 510 (5th Cir. 1954).
Court pointed out that the *Raymond* case arose under the FELA and stated that:

We are dealing with a different Act of another vintage—one that has been given a liberal construction. . . . The question whether an employee is engaged "in commerce" within the meaning of the present Act is determined by practical considerations, not by technical conceptions. . . . The test is whether the work is so directly and vitally 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.\(^2\)

This language might be taken as a rejection of the new construction idea. Had the court stopped there, the import of the decision might have been quite clear. But the court then stated:

Repair of facilities of interstate commerce is activity "in commerce" within the meaning of the Act. . . . And we think the work of improving existing facilities of interstate commerce, involved in the present case, falls in the same category.\(^3\)

The decision is susceptible to two interpretations. In the first place, it can be interpreted as abolishing the new construction idea. The broad language used by the Court and its reference to an act of "another vintage" would seem to sustain this view. To support this argument is the later case of *Southern Pacific Co. v. Gileo*,\(^4\) a case arising under the FELA, which held that a 1939 amendment to the FELA in effect supplanted the *Raymond* decision. Thus, it would seem to follow, that if the case which first adopted the new construction idea is overruled, then the rule itself is abolished and should no longer be applied to cases arising under the FLSA—an act of "another vintage." In referring to the *Vollmer* case, the Court stated: "This Court recently rejected the 'new construction' doctrine in determining whether an employee is 'engaged in commerce' within the meaning of the Fair Labor Standards Act."\(^5\) Although this was *dictum*, it becomes significant when taken with the rejection of the *Raymond* decision.

The *Vollmer* case may also be interpreted as merely enlarging the scope of what is to be included within the meaning of "an existing facility of commerce"; that a network of national and state highways will now be regarded as an existing facility and therefore construction of new highways or bridges is merely improvement of an existing facility. This seems to be the view of the circuit courts which have attempted to interpret the *Vollmer* case.

\(^2\) *Id.* at 429.  
\(^3\) *Ibid.*  
\(^4\) 351 U. S. 493 (1956).  
\(^5\) *Id.* at 500.
In the principal case, the Fifth Circuit refused to say that Vollmer had abolished the new construction doctrine, but did say that before Vollmer there would be "some doubt" as to coverage because the causeway was physically removed from existing highways. The court stressed, however, the importance of "practical considerations rather than technical conceptions" in determining coverage under the act. Since the work of the employees actually working on the causeway was "so directly and vitally related to the functioning of a facility of commerce, it was within the meaning of "engaged in commerce."

Regarding the workers building the field plant which was to be used to build concrete pillars and deck slabs used in the causeway, the court held that they were also "engaged in commerce." The basis of the holding was that the plant was built solely to facilitate the construction of the causeway, and as a practical matter, the employees building the plant were also building a causeway. The operation was an integral part of the whole project. The court recognized, however, that the mere fact that a new building is to be used for commerce when completed will not ordinarily be considered "in commerce" while being constructed.

In Chambers Constr. Co. v. Mitchell, the employees were constructing a new water line which was to replace an existing line. When finished, it would furnish water for commerce purposes. The court held that the project fell within the text expounded in the Vollmer case and granted an injunction. In referring to the Vollmer case, the court refused to say that it abolished the new construction rule but stated: "In our opinion, the Vollmer decision infers that the 'new construction rule' is not applicable to the repair or replacement of existing facilities. This is not a change in the law." The case is factually indistinguishable from the Raymond case. Thus, it will be observed that the fact situation which gave rise to the "new construction" doctrine, has now become an exception to it.

An analysis of the circuit court cases following Vollmer indicate a
hesitancy to say that Vollmer abolished the "new construction" doctrine as the Supreme Court said it did in the Gileo case. However, the recent emphasis on "practical considerations" would lead to the conclusion that the new construction rule has been affected. Specifically, in the field of construction, the courts seem willing to label such things as existing national highway or railroad systems "facilities of commerce" and therefore, construction of additional roads or bridges, even though "new," are additions or improvements of an existing facility. This is but a broadening of the exception to the new construction rule and serves to substantially erode the rule itself.

Developments in this area have done little to clarify the status of the construction of a new building which is to be used to produce goods for commerce when completed. If the building is to serve as a supplementary part of an existing assembly line system of production, it would seem that the construction is covered, even though the new plant is physically removed from other plants in the operation. This is on the theory that in such case, the new building is but an improvement of an existing facility. However, if the building is to house a completely new business, it would seem that its construction is not covered, even though it will produce goods for commerce when completed.\[^{31}\]

Shortly after the Chambers decision, the Administrator issued a new interpretative bulletin.\[^{32}\] He now takes the view that:

Coverage of any construction work depends upon how closely integrated it is with, and how essential it is to the functioning of, existing covered facilities. Neither the mere fact that the construction is "new construction" nor the fact that it is physically separated from an existing covered plant, is determinative.\[^{33}\]

However, construction of a new factory building to be used in commerce when completed, unless integrated with an existing facility, "will not ordinarily be considered covered."\[^{34}\] This appears to affirm the views of the circuit courts. While the administrator's interpretations do not have the effect of law they are entitled to weight.\[^{35}\] The question of whether the "new construction" doctrine is in fact abolished or still hangs on by a weakening thread will await a more positive statement from the United States Supreme Court.

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\[^{31}\] Mitchell v. Hodges Contracting Co., 238 F. 2d 380 (5th Cir. 1956).


\[^{33}\] 29 C. F. R. § 776.26 (1956).

\[^{34}\] 29 C. F. R. § 776.27(c) (1956).