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restriction on the extent to which section 301(a) of the Taft-Hartley Act confers federal jurisdiction. Legislative history does not indicate that such a distinction was intended. Further, this distinction was the result of the Court's wanting to avoid constitutional issues which have now been resolved. Be this as it may, when this distinction is applied to the arbitration situation, the courts should find that there is a "uniquely personal" right of the employee only after there has been submission to arbitration and compliance with the award of the arbitrator. The result of the Kornman case seems preferable to that of the Cone Mills case.

JAMES W. KIRKPATRICK, JR.

Labor Law—FLSA—Extending "In Commerce" Coverage

In Mitchell v. Lublin, McGAughy & Associates,1 the respondent was an architectural and consulting engineering firm engaged in the preparation of plans and specifications for repair and construction of various interstate facilities, including air bases, roads, turnpikes, bus terminals, and radio and television installations. Also, it was engaged in the preparation of plans for the construction of homes, shopping centers, and commercial buildings. These plans and specifications consist of drawings and information needed for the estimation of cost and guidance to contractors in their bidding and in actual construction. The information is gathered by fieldmen at the sites of the projects and transmitted to the offices of the respondent. From this information draftsmen prepare the plans under the supervision of professional engineers. In addition to the draftsmen, clerks and stenographers also participate in the mechanical process of preparing the plans.

The U.S. Court of Appeals for the Fourth Circuit2 held that the draftsmen, fieldmen, clerks, and stenographers, as a group, were neither "engaged in the production of goods for commerce" nor, because of the local nature of the business, "engaged in commerce" so as to come within the provisions of the Fair Labor Standards Act.3 Under an almost identical set of facts the Eighth Circuit in Mitchell v. Brown4 had held that the employer's draftsmen, fieldmen, clerks, and stenographers, as a group, were "engaged in commerce" and thus covered by the act. It was

1 358 U.S. 207 (1959).
2 250 F.2d 253 (4th Cir. 1957).
   "Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rate. . . ."
4 244 F.2d 359 (8th Cir. 1955), cert. denied, 350 U.S. 875 (1955). Apparently the only factual difference in the two cases was that in the Brown case an agent of the defendant inspected the work of the contractor.
because of this apparent conflict of circuits that the Supreme Court granted certiorari.

The Court confined itself to the issue of whether the employees were “engaged in commerce” and did not go into the question of whether or not they were “engaged in the production of goods for commerce.” Whether an employee is covered by the Act is determined by his activity and not by the nature of the business of the employer. The question was whether the activities of the employees in the Lublin and Brown cases were of a sort that facilitated the operation of instrumentalities of commerce. The Court deemed the employees to be “so closely related to commerce as to be a part of it,” in the language of McLeod v. Threlkeld, and concluded that they were covered.

The court of appeals in the Lublin case had found the employer’s business to be of a local nature, thereby giving color to the activities of the subordinates, the draftsmen, fieldmen, clerks and stenographers and had said that the court in the Brown case had ignored this element. The Brown court had considered the work of these same employee categories to be not “isolated local activity” but “directly and vitally related” to interstate commerce. The fact that an agent of the employer was materially aiding the employer’s clients by checking materials and workmanship of the contractor on interstate jobs was afforded considerable weight. These two cases point up the difficulty of determining coverage in the fringe area of the “engaged in commerce” clause.

Early cases held that employees who operated facilities of interstate commerce were covered by FLSA. In Overstreet v. North Shore Corp., coverage was extended to include employees who maintained and repaired a toll road and draw bridge that connected with an interstate highway. The maintenance and repair of a facility of interstate commerce was deemed to be so closely related to such commerce as to be a part of it. In J. F. Fitzgerald Constr. Co. v. Pedersen, it was held that employees of an independent contractor who helped repair and replace washed out bridge abutments for a railroad were “engaged in commerce” and cited as authority the Overstreet case. Thus Fitzgerald

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6 Supra note 5. In a five to four decision the Court held that a cook hired by an independent contractor to move with and feed the maintenance gang of a railroad was not covered. The dissent in McLeod put up a vigorous protest that commerce covers a whole field of which transportation is only a part and felt that to hold the cook not covered was to construe the “engaged in commerce” clause too narrowly.
7 224 F.2d at 363.
9 318 U.S. 125 (1943).
10 324 U.S. 720 (1945).
extended coverage to the employees of independent contractors where the work involves replacing or repairing the instrumentality of interstate commerce.\(^1\)

A guidepost case in delineating the fringe area of coverage under the "engaged in commerce" clause is *McLeod*. In that case coverage was denied; however, under the "production of goods for commerce" clause it has been held in a similar fact situation that the employee in question was covered.\(^2\) A further study of the cases points up the broader interpretation given to the "production of goods for commerce" clause.\(^3\) And this is true despite the fact, pointed out by the *McLeod* dissent, that the relevant tests for determining scope of coverage of the two clauses in the act are cast in similar language. Thus under the "production" clause, in *Kirschbaum v. Walling*, it is work which has "such a close and immediate tie with the process of production for commerce as to be an essential part of it." Under the "in commerce" clause, in *Overstreet v. North Shore Corp.* work that "is so intimately related to interstate commerce as to be in practice and in legal contemplation a part of it" brings the employee under coverage as "engaged in commerce."

In *Mitchell v. C. W. Vollmer & Co.*,\(^4\) the court found the employees covered under the "in commerce" clause where they were engaged in the

\(^{11}\) But see Nieves v. Standard Dredging Corp., 152 F.2d 719 (1st Cir. 1945), where a lapse in the general extension of coverage occurred with the "new construction" theory. There, the employees were performing dredging operations for a graving dock and entrance channel site where previously there had been a swampy, uninhabited wilderness. The employees were held not covered because their project had never been used as an instrumentality of interstate commerce and thus they were deemed to be neither in commerce nor its movement so as to be a part thereof. The original construction was felt to be of a local nature until it is made a part of an instrumentality of interstate commerce.

\(^{12}\) A. B. Kirschbaum Co. v. Walling, 316 U.S. 517 (1942) (Employees engaged in the operation and maintenance of a loft building in which quantities of goods were manufactured and sold in interstate commerce were held to have such a "close and immediate tie with the process of production for commerce" as to be regarded as "necessary to the production of commerce."); Borden Co. v. Borella, 325 U.S. 679 (1945) (Maintenance employees of an office building where only administrative work was done by a firm, who owned the building but rented out part of it, were covered because the work was necessary to production of goods for commerce.). The Court said it did not make a difference whether the goods are actually produced in the building or production administered, managed, and controlled in the building. *But see 10 East 40th St. Bldg., Inc. v. Callus*, 325 U.S. 578 (1942) (The maintenance employees of the owner of an office building which rented office space to all comers were not covered because the renting of office space was considered of a local nature.)

\(^{13}\) 349 U.S. 427 (1954).
construction of an alternate waterway to relieve congestion of an existing interstate waterway. By finding that the construction of the alternate waterway was in effect a redesigning of an existing facility of interstate commerce, the court removed the local activity tag of new construction.\textsuperscript{15} The practical effect of this case, in the light of the cases previously discussed, was to enlarge the "engaged in commerce" clause.

The holding in the \textit{Lublin} case has expanded the coverage of the FLSA by further enlarging the scope of the "engaged in commerce" section. The test used by the Court is the same one used in \textit{Mitchell v. Vollmer}, namely "whether the work is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce so as to be, in practical effect, a part of it rather than isolated local activity"\textsuperscript{16}—practically the same test used in \textit{McLeod} and \textit{Kirschbaum}.

The Court of Appeals in \textit{Lublin} also cited the \textit{Vollmer} case, but distinguished it on the grounds that the employees in \textit{Vollmer} were employees of the construction contractor, whereas the employees in \textit{Lublin} were employees of an architectural engineering contractor who were more distantly removed from the interstate instrumentality. In effect, the Supreme Court has ruled that it makes no difference who the employer of the employees was in these two situations, and that the nature of the work of the employees would bring them within the "engaged in commerce" section in either case. The Supreme Court said:

\begin{quote}
[S]uch work is directly and vitally related to the functioning of these facilities because, without the preparation of plans for guidance, the construction could not be effected and the facilities could not function as planned. In our modern, technologically oriented society, the elements which combine to produce a final product are diffuse and variegated. Deciding whether any one element is so directly related to the end product as to be considered vital is sometimes a difficult problem. But plans, drawings and specifications have taken on greater importance as the complexities of design and bidding have increased. Under the circumstances present here, we have no hesitancy in concluding that the preparation of the plans and specifications was directly related to the end products and that the employees whose activities were intimately related to such preparation were 'engaged in commerce.'\textsuperscript{17}
\end{quote}

The \textit{Lublin} case would seem to be a new guidepost in the fringe area of coverage under the "engaged in commerce" clause. The activities of the draftsmen, fieldmen, clerks, and stenographers here are not such that they directly facilitate the functioning of an interstate instrumentality by doing the work that improves or maintains these instrumentalities. These

\textsuperscript{15} See note 11 \textit{supra}.

\textsuperscript{16} 349 U.S. at 429.

\textsuperscript{17} 358 U.S. at 212.
employees work on the blueprints and drawings which are used by contractors to improve such facilities of interstate commerce, one step removed. The work of these employees is so directly and vitally related to the functioning of a facility of interstate commerce, however, as to be, in practical effect, a part of it rather than isolated local activity. The clerks and stenographers were as much an aid in preparing the blueprints and drawings as were the fieldmen and draftsmen because all were necessary for the final product.

While enlarging the "in commerce" section, the Court refused to deal with the "production of goods" question presented to them by the Fourth Circuit. From this refusal, a negative implication may be drawn that the Court is restricting the "production of goods" section in conformity with the intentions of the 1949 Amendments. 18

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Railway Labor Act—Rights of Minority Groups to Membership in Labor Union Acting as Statutory Bargaining Agent

Several Negro firemen employed by various southern railroads brought a class action in federal court, seeking admission to membership in the Brotherhood of Locomotive Firemen and Enginemen, their statutory bargaining representative under the Railway Labor Act. Negro firemen are excluded from membership in the Brotherhood because its constitution limits membership to applicants "white born." Held, that the action be dismissed. The Brotherhood is a private association whose membership policies are not subject to judicial control; the plaintiffs have failed to show that an agency of the federal government is responsible for their plight. 1

The great majority of unions in this country do not practice racial discrimination in membership. 2 At least thirty-nine union constitutions,

18 These changed the words "necessary" to "closely related and directly essential" as a limitation upon the "fringe area" under the production clause. 29 C.F.R. § 776.17(a) (1958) (The Administrator of the Wage and Hour Division of the U.S. Department of Labor has accepted this legislative history to the effect that the 1949 amendment is intended to narrow the scope of coverage under the "engaged in production of goods for commerce" clause.) See 95 Cong. Rec. 14880 (1949) (remarks of Senator Taft). 95 Cong. Rec. 11001 (1949) (remarks of Congressman Lucas).

2 Summers, Admission Policies of Labor Unions, 61 Q.J. Econ. 66-107 (1946). See generally, Northrup, Organized Labor and the Negro (2d ed. 1944). As one of its "Objects and Principles," the AFL-CIO in its constitution undertakes "to encourage all workers without regard to race, creed, or color or national origin to share in the full benefits of union organization." AFL-CIO Const. Art. II, § 4. This provision was criticized on the grounds that it did not recognize the right of all persons to "full membership" in trade unions. Handbook of Union Govern-