

## § 776.9

would be under concepts of “commerce” established without reference to this definition.

### § 776.9 General scope of “in commerce” coverage.

Under the definitions quoted above, it is clear that the employees who are covered by the wage and hours provisions of the Act as employees “engaged in commerce” are employees doing work involving or related to the movement of persons or things (whether tangibles or intangibles, and including information and intelligence) “among the several States or between any State and any place outside thereof.”<sup>23</sup> Although this does not include employees engaged in activities which merely “affect” such interstate or foreign commerce, the courts have made it clear that coverage of the Act based on engaging in commerce extends to every employee employed “in the channels of” such commerce or in activities so closely related to such commerce, as a practical matter, that they should be considered a part of it.<sup>24</sup> The courts have indicated that the words “in commerce” should not be so limited by construction as to defeat the purpose of Congress, but should be interpreted in a manner consistent with their practical meaning and effect in the particular situation. One practical question to be asked is whether, without the particular service, interstate or foreign commerce would be impeded, impaired, or abated;<sup>25</sup> others are whether the service contributes materially to the consummation of transactions in interstate or foreign com-

<sup>23</sup> “Any place outside thereof” is not limited in meaning to another State or country. Any movement between a State and a place “outside thereof” is “commerce” for purposes of the Act, such as ship-to-shore communication, or transportation out of a State by ship of food, fuel, or ice to be consumed at sea before arrival at another port.

<sup>24</sup> *Walling v. Jacksonville Paper Co.*, 317 U.S. 564; *Overstreet v. North Shore Corp.*, 318 U.S. 125; *McLeod v. Threlkeld*, 319 U.S. 491; *Boutell v. Walling*, 327 U.S. 463; *Pedersen v. J. F. Fitzgerald Constr. Co.*, 318 U.S. 740 and 324 U.S. 720.

<sup>25</sup> *Republic Pictures Corp. v. Kappler*, 151 F. 2d 543 (C.A. 8), affirmed 327 U.S. 757; *New Mexico Public Service Co. v. Engel*, 145 F. 2d 636 (C.A. 10).

## 29 CFR Ch. V (7-1-10 Edition)

merce<sup>26</sup> or makes it possible for existing instrumentalities of commerce<sup>27</sup> to accomplish the movement of such commerce effectively and to free it from burdens or obstructions.<sup>28</sup>

### § 776.10 Employees participating in the actual movement of commerce.

(a) Under the principles stated in § 776.9, the wage and hours provisions of the Act apply typically, but not exclusively, to employees such, as those in the telephone,<sup>29</sup> telegraph,<sup>30</sup> television, radio,<sup>31</sup> transportation and shipping<sup>32</sup> industries, since these industries serve as the actual instrumentalities and channels of interstate and foreign commerce. Similarly, employees of such businesses as banking, insurance, newspaper publishing,<sup>33</sup> and

<sup>26</sup> *Walling v. Sondock*, 132 F. 2d 77 (C.A. 5), certiorari denied 318 U.S. 772. See also *Horton v. Wilson & Co.*, 223 N.C. 71, 25 S.E. 2d 437, in which the court stated that an employee is engaged “in commerce” if his services—not too remotely but substantially and directly—aid in such commerce as defined in the Act.

<sup>27</sup> For a list of such instrumentalities, see § 776.11.

<sup>28</sup> *Overstreet v. North Shore Corp.*, 318 U.S. 125; *J. F. Fitzgerald Constr. Co. v. Pedersen*, 324 U.S. 720; *Ritch v. Puget Sound Bridge & Dredging Co.*, 156 F. 2d 334 (C.A. 9); *Walling v. McCrady Constr. Co.*, 156 F. 2d 932 (C.A. 3); *Bennett v. V. P. Loftis*, 167 F. 2d 286 (C.A. 4); *Walling v. Patton-Tully Transp. Co.*, 134 F. 2d 945 (C.A. 6).

<sup>29</sup> *Schmidt v. Peoples Telephone Union of Maryville, Mo.*, 138 F. 2d 13 (C.A. 8); *North Shore Corp. v. Barnett*, 143 F. 2d 172 (C.A. 5); *Strand v. Garden Valley Telephone Co.*, 51 F. Supp. 898 (D. Minn.).

<sup>30</sup> *Western Union Telegraph Co. v. Lenroot*, 323 U.S. 490; *Western Union Telegraph Co. v. McComb*, 165 F. 2d 65 (C.A. 6), certiorari denied 333 U.S. 862; *Moss v. Postal Telegraph Cable Co.*, 42 F. Supp. 807 (M.D. Ga.).

<sup>31</sup> *Wilson v. Shuman*, 140 F. 2d 644 (C.A. 8); *Wabash Radio Corp. v. Walling*, 162 F. 2d 391 (C.A. 6).

<sup>32</sup> *Overnight Motor Co. v. Missel*, 316 U.S. 572; *Hargis v. Wabash R. Co.*, 163 F. 2d 607 (C.A. 7); *Rockton & Rion R.R. v. Walling*, 146 F. 2d 111 (C.A. 4), certiorari denied 334 U.S. 880; *Walling v. Keansburg Steamboat Co.*, 162 F. 2d 405 (C.A. 3); *Knudsen v. Lee & Simmons*, 163 F. 2d 95 (C.A. 2); *Walling v. Southwestern Greyhound Lines*, 65 F. Supp. 52 (W.D. Mo.); *Walling v. Atlantic Greyhound Corp.*, 61 F. Supp. 992 (E.D. S.C.).

<sup>33</sup> *Sun Pub. Co. v. Walling*, 140 F. 2d 445 (C.A. 6), certiorari denied 322 U.S. 728. See also

## Wage and Hour Division, Labor

## § 776.11

others which regularly utilize the channels of interstate and foreign commerce in the course of their operations, are generally covered by the Act.

(b) Employees whose work is an essential part of the stream of interstate or foreign commerce, in whatever type of business they are employed, are likewise engaged in commerce and within the Act's coverage. This would include, for example, employees of a warehouse whose activities are connected with the receipt or distribution of goods across State lines.<sup>34</sup> Also, since "commerce" as used in the Act includes not only "transmission" of communications but "communication" itself, employees whose work involves the continued use of the interstate mails, telegraph, telephone or similar instrumentalities for communication across State lines are covered by the Act.<sup>35</sup> This does not mean that any use by an employee of the mails and other channels of communication is sufficient to establish coverage. But if the employee, as a regular and recurrent part of his duties, uses such instrumentalities in obtaining or communicating information or in sending or receiving written reports or messages, or orders for goods or services, or plans or other documents across State lines, he comes within the scope of the Act as an employee directly engaged in the work of "communication" between the State and places outside the State.

[15 FR 2925, May 17, 1950, as amended at 22 FR 5684, July 18, 1957]

### § 776.11 Employees doing work related to instrumentalities of commerce.

(a) Another large category of employees covered as "engaged in commerce" is comprised of employees performing the work involved in the maintenance, repair, or improvement of existing instrumentalities of commerce. (See the

*Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, and *McComb v. Dessau*, 9 W.H. Cases 332 (S.D. Calif.) 17 Labor Cases, 65, 643.

<sup>34</sup>*Phillips Co. v. Walling*, 324 U.S. 490; *Clyde v. Broderick*, 144 F. 2d 348 (C.A. 10).

<sup>35</sup>*McComb v. Weller*, 9 W.H. Cases 53 (W.D. Tenn.); *Yunker v. Abbye Employment Agency*, 32 N.Y.S. 2d 715; (Munic. Ct. N.Y.C.); *Phillips v. Meeker Coop. Light & Power Asso.*, 63 F. Supp. 733 (D. Minn.); *Anderson Bros. Corp. v. Flynn*, 218 S.W. 2d 653 (C.A. Ky.).

cases cited in footnote 28 to § 776.9. See also the discussion of coverage of employees engaged in building and construction work, in subpart B of this part.) Typical illustrations of instrumentalities of commerce include railroads, highways, city streets, pipe lines, telephone lines, electrical transmission lines, rivers, streams, or other waterways over which interstate or foreign commerce more or less regularly moves; airports; railroad, bus, truck, or steamship terminals; telephone exchanges, radio and television stations, post offices and express offices; bridges and ferries carrying traffic moving in interstate or foreign commerce (even though within a single State); bays, harbors, piers, wharves and docks used for shipping between a State and points outside; dams, dikes, revetments and levees which directly facilitate the uninterrupted movement of commerce by enhancing or improving the usefulness of waterways, railroads, and highways through control of water depth, channels or flow in streams or through control of flood waters; warehouses or distribution depots devoted to the receipt and shipment of goods in interstate or foreign commerce; ships, vehicles, and aircraft regularly used in transportation of persons or goods in commerce; and similar fixed or movable facilities on which the flow of interstate and foreign commerce depends.

(b) It is well settled that the work of employees involved in the maintenance, repair, or improvement of such existing instrumentalities of commerce is so closely related to interstate or foreign commerce as to be in practice and in legal contemplation a part of it. Included among the employees who are thus "engaged in commerce" within the meaning of the Act are employees of railroads, telephone companies, and similar instrumentalities who are engaged in maintenance-of-way work;<sup>36</sup> employees (including office workers, guards, watchmen, etc.) engaged in

<sup>36</sup>*Davis v. Rockton & Rion R.R.*, 65 F. Supp. 67 affirmed in 159 F. 2d 291 (C.A. 4); *North Shore Corp. v. Barnett*, 143 F. 2d 172 (C.A. 5); *Palmer v. Howard*, 12 Lab. Cas. (CCH) par. 63, 756 (W.D. Tenn.); *Williams v. Atlantic Coast Lines R.R. Co.*, 1 W.M. Cases 289 (E.D. N.C. 1940), 2 Labor Cases (CCH) par. 18, 564.