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# Construction Workers in Interstate Transportation

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## STUDENT NOTE

CONSTRUCTION WORKERS IN INTERSTATE TRANSPORTION.—Under the aegis of the Federal Constitution's commerce clause,<sup>1</sup> the United States Congress has enacted several statutes regulating different phases of labor-management relations in the business of interstate transportation. The construction worker's place in these regulations has been one of exclusion as often as not; but such exclusion has obtained through a tortuous process of interpretation by the courts. The importance of this determination is vital to such workers, since the common law rights generally are far different from the statutory rights. A short review of several of the more important federal statutes as they apply to construction workers will serve as a guide to the litigant, as a view of the evolving liberality of judicial interpretation as well as Congressional concepts, and as a hint of decisions (and, possibly, amendatory statutes) to come. These statutes, from the construction worker's position, are of two types: in the first species, which includes as examples the Railway Labor Act<sup>2</sup> and the Labor-Management Re-

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<sup>1</sup>U. S. CONST. ART. I, § 8. "The Congress shall have the Power . . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ."

lations Act, 1947,<sup>3</sup> the occupation of the employer decides the issue; in the second, which embraces the Employers' Liability Act<sup>4</sup> and the Fair Labor Standards Act of 1938,<sup>5</sup> the work of the employee furnishes the key.

The Railway Labor Act, designed to prevent transportation breakdowns due to labor-management imbroglios, applies generally to all employees of any carrier "subject to chapter 1 of Title 49 (Interstate Commerce Act), and any company which is directly or indirectly controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with (services ancillary to transportation) by railroad."<sup>6</sup> The Labor-Management Relations Act, 1947, alias the Taft-Hartley Act, applies to all employers and employees of an "industry affecting commerce," *i. e.*, by Congressional definition, "any industry or activity in commerce, or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce," excepting generally federal or state government employees "or any person subject to the Railway Labor Act, as amended from time to time."<sup>7</sup> The National Labor Relations Act, predecessor of the Labor-Management Relations Act, was equally broad in scope;<sup>8</sup> the successor to the present stature (at this writing only imminent) will undoubtedly be just as comprehensive. The point, however, is that such statutes as these affect construction workers only as they affect all other employees of a particular employer: unless that employer is covered by the statute, no employee is within its terms.<sup>9</sup>

But this employee classlessness is not characteristic of statutes of the second class. The original provisions of the Employers' Liability Act made "every common carrier by railroad while engaging in (interstate or foreign) commerce" liable generally for injury

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<sup>2</sup> 54 STAT. 785 (1940), 45 U. S. C. §§ 151-188 (1946).

<sup>3</sup> 61 STAT. 136 (1947), 29 U. S. C. §§ 141-197 (Supp. 1948).

<sup>4</sup> 53 STAT. 1404 (1939), 45 U. S. C. §§ 51-60 (1946).

<sup>5</sup> 52 STAT. 1060 (1938), 29 U. S. C. §§ 201-219 (1946).

<sup>6</sup> 41 STAT. 577 (1926), 45 U. S. C. § 151 (1946).

<sup>7</sup> 61 STAT. 363 (1947), 29 U. S. C. § 142 (Supp. 1948).

<sup>8</sup> See the section of definitions, 49 STAT. 450 (1935).

<sup>9</sup> Lack of space prevents any discussion of the exact industries covered by these two acts. Other examples, where all employees of a certain employer class are covered, are the Railroad Retirement Act of 1937, 56 STAT. 209 (1942), as amended 60 STAT. 722, 45 U. S. C. §§ 228a-228s (1946), and the Hours of Service Act, 34 STAT. 1415 (1907), 45 U. S. C. §§ 61-66 (1946).

or death of any employee, "while he is employed by such carrier in such commerce," resulting from the negligence of any railroad agent or from a mechanical defect or insufficiency in any railroad equipment.<sup>10</sup> Whether a railroad company was "engaging in commerce," the Supreme Court decided, depended upon the nature of the work that the injured employee was performing at the time of his injury: "Was the employee at the time of his injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?"<sup>11</sup> This remained the test for the inclusion of a railroad worker within the Act;<sup>12</sup> the application of that test to construction workers, however, was not easy. Where the construction was an extension into new areas of service — with the company in question preparing to serve instead of improving existing services — the accepted rule was that such employees were not engaged in commerce within the Act. An excavation worker on a bridge as part of a new line, for example, had no standing;<sup>13</sup> an inspector for an extended track site, when the right of way had not even been secured, was not protected.<sup>14</sup> On the other hand, a worker performing routine maintenance work, including normal repairs, was so closely related to transportation as to be part of it.<sup>15</sup> From such extremes came the theory that, while repair and maintenance workers were within the Act, construction workers were not.

Unfortunately, not all work on transportation facilities fitted easily into classifications of either repair and maintenance or construction. As long as the construction was to replace existing fixtures, the universal rule was that such replacement workers were not within the protection of the Act.<sup>16</sup> Workers on construction

<sup>10</sup> 35 STAT. 65 (1908).

<sup>11</sup> See *Shanks v. Delaware, L. & W. R. R.*, 239 U. S. 556, 558, L. R. A. 1916C 797 (1916).

<sup>12</sup> See, e. g., *Chicago & N. W. Ry. v. Bolle*, 284 U. S. 74 (1931).

<sup>13</sup> *Baxter v. Chicago, R. I. & P. Ry.*, 139 Kan. 443, 32 P. 2d 451 (1934).

<sup>14</sup> *Southern Pac. Co. v. Middleton*, 54 F. 2d 833 (C. C. A. 5th 1932).

<sup>15</sup> *Pederson v. Delaware, L. & W. R. R.*, 229 U. S. 146, Ann. Cas. 1914C 153 (1913). This repair doctrine covers routine and continual replacement of minor items of equipment, such as company telephone and telegraph poles as they rot out. *Coal & Coke Ry. v. Deal*, 231 Fed. 605 (C. C. A. 4th 1916), *writ of error dismissed*, 245 U. S. 681 (1917).

<sup>16</sup> This does not include the continual routine replacement mentioned in note 15, *supra*; obviously, questions of degree are raised.

of a new station<sup>17</sup> or a new warehouse<sup>18</sup> to replace outmoded structures, builders of new track layouts<sup>19</sup> and retaining walls<sup>20</sup> in the elimination of grade crossings, helpers on construction of cut-offs<sup>21</sup> and tunnels<sup>22</sup> in route-shortening operations, crewmen building new railroad bridges at or near the old sites,<sup>23</sup> and relocators of company telephone and telegraph lines in changes necessitated by trackage shifts<sup>24</sup> were not within the Act. Where the construction was an improvement of existing works, courts at first refused the flat distinction between construction and maintenance, most arguing that such improvement was maintenance of adequate service. These earlier liberals held that the Act applied when the employee was building abutments for a temporary bridge after destruction by a flash flood, with the abutments to serve for a later permanent bridge already on the company program,<sup>25</sup> building an addition to a freight shed,<sup>26</sup> installing an automatic electric block signal system by connection with existing tracks,<sup>27</sup> or attaching new cross-bars on company telephone and telegraph poles for additional wires.<sup>28</sup> But later decisions forbade benefits under the Act when the worker was building a new stairway in a station,<sup>29</sup> laying track parallel to the

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<sup>17</sup> *New York Cent. R. R. v. White*, 243 U. S. 188, Ann. Cas. 1917D 629, L. R. A. 1917D 1 (1917).

<sup>18</sup> *Matti v. Chicago, M. & St. P. Ry.*, 55 Mont. 280, 176 Pac. 154 (1918).

<sup>19</sup> *Dickinson v. Industrial Board*, 280 Ill. 342, 117 N. E. 438 (1917).

<sup>20</sup> *Walz v. Chicago, M. & St. P. Ry.*, 232 Ill. App. 398 (1924).

<sup>21</sup> *Bravis v. Chicago, M. & St. P. Ry.*, 217 Fed. 234 (C. C. A. 8th 1914).

<sup>22</sup> *Raymond v. Chicago, M. & St. P. Ry.*, 243 U. S. 43 (1917); *Jackson v. Chicago, M. & St. P. Ry.*, 210 Fed. 495 (W. D. Wash. 1914).

<sup>23</sup> *Baltimore & O. C. T. R. R. v. Industrial Commission*, 336 Ill. 223, 8 N. E. 2d 642 (1937); *McKee v. Ohio Valley E. Ry.*, 78 W. Va. 131, 88 S. E. 616 (1916). But where a bridge construction worker who was bulldozing earth into place had the added duty of keeping the approach to the old bridge clear of earth and rocks, he was allowed recovery under the Act because of his maintenance duties with respect to the old tracks. *Kinzell v. Chicago, M. & St. P. Ry.*, 250 U. S. 130 (1919).

<sup>24</sup> *Los Angeles & S. L. R. R. v. Industrial Commission*, 2 Cal. 2d 685, 43 P. 2d 282 (1935); *Chicago, R. I. & P. Ry. v. Lundquist*, 206 Iowa 499, 221 N. W. 228 (1928), *cert. denied*, 278 U. S. 658 (1929).

<sup>25</sup> *Columbia & P. S. R. R. v. Sauter*, 223 Fed. 604 (C. C. A. 9th 1915). This case is probably distinguishable from the rest because of the repair involved, but the court's discussion treats the repair and planned rebuilding as a single unit of work rather than as two separate operations.

<sup>26</sup> *Eng v. Southern Pac. Co.*, 210 Fed. 92 (D. Ore. 1913); *see Thompson v. Cincinnati, N. O. & T. P. Ry.*, 165 Ky. 256, 261, 176 S. W. 1006, 1008 (1915).

<sup>27</sup> *Saxton v. El Paso & S. W. R. R.*, 21 Ariz. 323, 188 Pac. 257 (1920).

<sup>28</sup> *Ross v. Sheldon*, 176 Iowa 618, 154 N. W. 499 (1915).

<sup>29</sup> *Clemence v. Hudson & M. R. R.*, 8 F. 2d 317 (S. D. N. Y. 1925).

prior single track,<sup>30</sup> enlarging a motor platform to permit installation of a larger motor in a train-watering unit,<sup>31</sup> enlarging a turntable,<sup>32</sup> or building another cross-over between two switch-yard tracks.<sup>33</sup> By the mid-twenties, at least, all building operations that could be classified as an improvement of the company's status quo were, by a settled rule, not engagements in commerce under the Employers' Liability Act.

In 1939, Congress added a paragraph to the first section of the Act: "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely or substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."<sup>34</sup> So far, only two cases concerning construction workers have construed this new paragraph,<sup>35</sup> both of them state court decisions. The Arkansas court, believing that the addition was a considerable extension of the Act's coverage, held that a worker building a new track parallel to an existing track and intended eventually to replace the latter was within the Act by reason of the amendment;<sup>36</sup> the Idaho court dismissed the paragraph with two sentences, and, citing pre-1939 decisions, held that the Act did not protect a worker on a trackage extension project in a company switching yard.<sup>37</sup> A reading of the new paragraph in the light of the history of the original section would seemingly indicate that the Arkansas decision is closer to the intent of Congress.

The Fair Labor Standards Act of 1938, which established minimum wages and maximum hours for the employees within its scope, covered a far greater number of industries than the Employers' Liability Act. The Act benefits all employees who are "en-

<sup>30</sup> *Louisville & N. R. R. v. Morgan's Adm'r*, 225 Ky. 447, 9 S. W. 2d 212 (1928).

<sup>31</sup> *Boyer v. Pennsylvania R. R.*, 162 Md. 328, 159 Atl. 909 (1932).

<sup>32</sup> *Seaver v. Director General*, 234 N. Y. 590, 138 N. E. 458 (1922), *cert. denied*, 261 U. S. 620 (1932).

<sup>33</sup> *Connors v. Delaware & Hudson Co.*, 259 N. Y. Supp. 496 (3d Dep't 1932).

<sup>34</sup> 53 STAT. 1404 (1939), 45 U. S. C. § 51 (1946).

<sup>35</sup> A third case, *Gulf M. & N. R. R. v. Madden*, 190 Miss. 374, 200 So. 119 (1941), completely overlooked the addition to the section in denying statutory recovery to a worker on a grade crossing elimination crew.

<sup>36</sup> *Missouri Pac. R. R. v. Fisher*, 206 Ark. 705, 177 S. W. 2d 725 (1944).

<sup>37</sup> *Moser v. Union Pac. R. R.*, 65 Idaho 479, 147 P. 2d 336 (1944).

gaged in commerce or in the production of goods for commerce.”<sup>38</sup> Workers constructing transportation facilities fall, if at all, into the category of workers “engaged in commerce,” with the Congressional definition of commerce being “trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.”<sup>39</sup> Almost at once, the Supreme Court expressly rejected the apothegm devised for the Employers’ Liability Act;<sup>40</sup> perhaps influenced by its earlier decision that the occupation of the employer was irrelevant, and that only the character of the employee’s work was material in deciding whether such worker was employed in commerce or in the production of goods for commerce,<sup>41</sup> the Court stated, “The test . . . is not whether the employee’s activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it.”<sup>42</sup>

With the abandonment of the exact wordage of the original Employers’ Liability Act test, the lower courts have adopted a more liberal policy toward construction workers in respect to the Fair Labor Standards Act than they had been allowed in the railroaders’ statute. As long as the construction is clearly new work in an undeveloped area, the accepted view is that workers thereon are not engaged in commerce. Thus, where the work is construction of a new airport,<sup>43</sup> or a new highway,<sup>44</sup> or a new harbor . . . that must

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<sup>38</sup> This is the phrase used in the sections setting the minimum wages, 52 STAT. 1062 (1938), 29 U. S. C. § 206 (1946), and maximum hours, 52 STAT. 1063 (1938), as amended, 29 U. S. C. § 207 (1946).

<sup>39</sup> 52 STAT. 1060 (1938), 29 U. S. C. § 203 (1946).

<sup>40</sup> See notes 11 and 12, *supra*.

<sup>41</sup> *Kirschbaum v. Walling*, 316 U. S. 517 (1942).

<sup>42</sup> See *McLeod v. Threlkeld*, 319 U. S. 491, 497 (1943).

<sup>43</sup> *Maitrejean v. Metcalfe Construction Co.*, 165 F. 2d 571 (C. C. A. 8th 1948) (by implication); *Laudadio v. White Construction Co.*, 163 F. 2d 383 (C. C. A. 2d 1947); *Soderberg v. S. Birch & Sons Construction Co.*, 163 F. 2d 37 (C. C. A. 9th 1947), *cert. denied*, 332 U. S. 816 (1947). *Contra*: *Curtis v. McWilliams Dredging Co.*, 78 N. Y. S. 2d 317 (N. Y. City Ct. 1948); *O’Riordan v. Nick F. Helmers, Inc.*, 73 N. Y. S. 2d 428 (N. Y. City Ct. 1947). These New York cases are the only ones to dispute the theory in respect to original construction in a new field of operations. All of the cases cited in this footnote share an unusual distinction in that, although they involved military airports constructed for the Government, no decision explains that military transportation suffices as well as commercial transportation to render the facilities “in commerce”. *Cf. Murphy v. Reed*, 69 Sup. Ct. 105 (1948), *reversing* 168 F. 2d 257 (C. C. A. 5th 1948); *Kennedy v. Silas Mason Co.*, 68 Sup. Ct. 1031 (1948).

<sup>44</sup> *Crabb v. Welden Bros.*, 164 F. 2d 797 (C. C. A. 8th 1947) (Alcan Highway); *Preston v. Louis Des Cognets & Co.*, 292 Ky. 646, 167 S. W. 2d 863 (1943); *Hewlett v. Del Balso Construction Co.*, 43 N. Y. S. 2d 650 (Sup. Ct. 1943).

be dredged out of a former swamp and thus actually created by man,<sup>45</sup> the Act is not operative. But reconstruction or replacement work, and construction that is fairly an improvement of existing facilities, is definitely engaging in commerce from the contemporary courts' standpoint. Workers on reconstruction of highways<sup>46</sup> and bridges,<sup>47</sup> on relocation of a highway,<sup>48</sup> and on construction of a new bridge to replace another one 200 feet downstream<sup>49</sup> have been allowed recovery under the Act. An unusual line of cases has evolved the notion that navigable streams and harbors are in the same class as man-made arteries of commerce, so that improvements such as the building of dikes, levees and revetments,<sup>50</sup> the construction of piers,<sup>51</sup> and the deepening of channels<sup>52</sup> place the laborers thereon within the Act. The cases as a whole demonstrate a tendency to extend the benefits of federal legislation ever further, in keeping with the general expansion of federal power under the commerce clause.

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<sup>45</sup> *Nieves v. Standard Dredging Corp.*, 152 F. 2d 719 (C. C. A. 1st 1945).

<sup>46</sup> *Walling v. McCrady Construction Co.*, 165 F. 2d 932 (C. C. A. 3rd 1946), *aff'g* 60 F. Supp. 243 (W. D. Pa. 1945); *Walling v. Craig*, 53 F. Supp. 479 (D. Minn. 1943) (by implication).

<sup>47</sup> *Fitzgerald Construction Co. v. Pedersen*, 324 U. S. 720 (1945).

<sup>48</sup> *Walling v. McCrady Construction Co.*, 156 F. 2d 932 (C. C. A. 3d 1946), *aff'g* 60 F. Supp. 243 (W. D. Pa. 1945).

<sup>49</sup> *Bennett v. V. P. Loftis Co.*, 167 F. 2d 286 (C. C. A. 4th 1948).

<sup>50</sup> *Walling v. Patton-Tulley Transp. Co.*, 134 F. 2d 945 (C. C. A. 6th 1943).

<sup>51</sup> *Ritch v. Puget Sound Bridge & Dredging Co.*, 156 F. 2d 334 (C. C. A. 9th 1946). *Cf. Brue v. J. Rich Steers, Inc.*, 60 F. Supp. 668 (S. D. N. Y. 1945), where a new dry dock in conjunction with a harbor was deemed to be a separate entity from the harbor, thus making the workers thereon engaged in original construction, and not within the Act.

<sup>52</sup> *Ritch v. Puget Sound Bridge & Dredging Co.*, 156 F. 2d 334 (C. C. A. 9th 1946). *Cf. Brue v. J. Rich Steers, Inc.*, 60 F. Supp. 668 (S. D. N. Y. 1945), 1946).