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WHISTLE BEFORE YOU WORK: DEFINING PAID LABOR IN THE NEW DEAL STATE,
1938-1947

A Thesis
presented in partial fulfillment of requirements
for the degree of Master of Arts
in the Arch Dalrymple III Department of History
University of Mississippi

by
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May 2019

ABSTRACT

This thesis traces the conceptualization of work from the passage of the 1938 Fair Labor Standards Act (FLSA) through the Portal-To-Portal Pay Act of 1947. I argue that the FLSA created a new framework for industrial laborers to define what constituted work. This enables an understanding of work as defined by those in mines and on the industrial plants floor, allowing those who were closest to toil and exertion to create their own definitions. By 1946, Congress heeded to the complaints of the military and capitalists and codified their definition of work and the work week. This restricted the broadly interpreted FLSA. I argue that with the implementation of the FLSA, industrial workers created projected their own definitions of work onto the law. As the FLSA was defined though the court system, industrial workers gained formal rights through the federal government. To show this, I look at “non-productive” labor, understood as the necessary steps taken by workers before they began or after they concluded “face-to-labor,” to ensure they could fulfill their job’s requirements. This includes but is not limited to exertion such as travel time, tool set up, dressing and showers after contact with hazardous materials. I also show that organized labor did create a uniform definition of work but was instead determined by union federations. Additionally, this research shows how capitalists and the federal government defined labor during this same time period.

DEDICATION

This thesis is dedicated to my parents Dawn and Steven, who have always encouraged my passion for history and taught me that people like us actually matter.

LIST OF ABBREVIATIONS

AFL	American Federation of Labor
CIO	Congress of Industrial Organizations
FLSA	Fair Labor Standards Act
GMMA	George Meany Memorial AFL-CIO Archive, Special Collections, R. Lee Hornbake Library, University of Maryland
NAM	National Association of Manufacturers
NIRA	National Industrial Recovery Act
NRA	National Recovery Administration
TCI	Tennessee Coal, Iron and Railroad Company
UMWA	United Mine Workers of America

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INTRODUCTION: WHISTLE BEFORE YOU WORK

Jessie Grace was a teenager when he started work for the Tennessee Coal, Iron and Railroad Company, and had followed a steady stream of family north from Alabama's Gulf Coast for work outside of Birmingham, where he began working in the Muscoda iron mines in February 1923. Muscoda was like other mining communities in Jefferson County, and Grace's path into the mines was not atypical. He received formal education through the fourth grade and left school to work in the iron mines to provide wages to his family. Work in the mines was physically grueling and dangerous, something that Grace experienced firsthand in 1934 when he lost his leg in a mining accident. Besides ever-present physical danger, working men in the mines were assaulted by company men, who took whatever troubles they had in the outside world into the mines with them.¹

Iron miners' days were long, often running from dawn until dusk. "We'd go to work I reckon about six o'clock in the morning, and we might be six o'clock when we come back," Grace recalled in the summer of 1984. His daily trip to work took him from the camp to the company-owned wash house, and then to the No. 6 Mine. Grace's journey took him on a two-mile walk from home to the worksite before he began his work day as a miner. From that point, Grace and the rest of the mining crew would take the "skiff" more than a mile inside of Red Mountain, before a half-mile walk awaited them to the mining face. Only then could Grace begin extracting iron from inside the mountain for Tennessee Coal, Iron and Railroad Company.²

¹ Jessie Grace, "Life in a Company Town – The mining camps of Birmingham, Alabama, 1900s-1950s," interview by Cliff Kuhn, *Working Lives Oral History Project* (1984). <http://purl.lib.ua.edu/54307>

² Ibid.

“We didn’t get paid for them hours until the union started in 1933. They didn’t pay for travelling time. Before then we [got] nothing” he remembered. “We didn’t ‘get no overtime, no pay for nothing” until the International Union of Mine, Mill and Smelter Workers organized the mines in the early-1930s. Grace’s recollection reveals the disconnect between work performed and paid labor that characterized many workers’ lives in the early twentieth century. Despite 12-hour workdays, Grace did not receive compensation for travel into or out of the iron mine until the miners got a union contract that recognized their travel time as labor. Grace insisted that he was at work, despite the fact he was not receiving wages for his work. For years, Grace’s conceptualization of “work” did not match that of his employer.

Grace’s recollection of work relied in large part on the changing definition of work. Within the context of the New Deal state, President Franklin Roosevelt’s National Industrial Recovery Act of 1933 (NIRA) and the Fair Labor Standards Act of 1938 (FLSA) represented a departure from the labor policies of decades prior, paving the way for industrial workers to create their own definitions of work. Beginning in 1938 with the passage of the FLSA, industrial workers began to battle capitalists over what kinds of labor would be considered worthy of pay as well as what constituted labor itself. At the center of this debate was the definition of work and the workweek. The FLSA provided a definition for neither, creating ideological space for workers and capitalists to spar. Industrial workers and miners claimed broad definitions of what constituted work, expanding their definition to include time on company property and travel time within the place of work as compensable labor. Workers argued that this non-waged labor was necessary and unavoidable for the workday and should be paid. Capitalist interests constructed a narrower view of what should be compensated, deeming industrial worker’s travel time and

preparatory work as “non-productive,” and thus not deserving of wages.³ Industrialists further contended that such labor should be unpaid because of “precedent and custom,” and if non-productive work became paid, it would bankrupt American industry and hurt the nation’s economy. Over the nine-year period between the implementation of the FLSA and the Passage of the Portal-to-Portal Act of 1947, industrial workers and capitalists battled to define work in the court system.

The Supreme Court decided the first battle between industrial workers and their employers in *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123* in 1944. Decided in favor of the miners, the court determined that travel time through iron mines to the place of labor constituted work because it caused “physical or mental exertion.” Because travel was for the benefit of the employer, the court considered this work covered by the FLSA.⁴ More broadly, the International Union of Mine, Mill and Smelter local in Muscoda, Alabama, argued that miners’ work and travel from the mine face to their work stations was controlled by the company and therefore worthy of compensation.⁵ The court, interpreting the local’s claims, noted no definition of “work” or “work week” in the FLSA and found the miners’ claims in line with prior legislation.⁶ Mine owners based their oppositional claims in the “custom” of mining, noting that miners had never been paid for their transportation to the “working face.”⁷ Instead, Tennessee Coal, Iron and Railroad Co. (TCI) advocated for paying miners only for their productive labor of drilling and loading iron ore. In the court’s opinion, Justice Frank Murphy wrote that employers

³ Thomas G. Andrews, *Killing for Coal: America’s Deadliest Labor War* (Cambridge: Harvard University Press, 2010), 139. See Andrews discussion of “dead work.”

⁴ *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944)

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

had only been negotiating in good faith since the FLSA, delegitimizing claims to customs since employers had never participated in collective bargaining.

Just a year later, in *Jewell Ridge Coal Corp. v. United Mine Workers of America*, the UMWA argued that compensation for travel and other non-productive activity should be included as paid labor for workers in coal mining, too. In *Jewell Ridge*, the court affirmed the *Tennessee* decision, agreeing that physical and mental exertion and non-productive labor done for the employer's benefit all constituted paid work. Like the company in the *Tennessee* case, the Jewell Ridge Coal Company, based in Virginia, argued that including pre-face tasks as payable labor interfered with collectively bargained agreements, overstepping the boundaries of the FLSA. Dissenting justices agreed, acknowledging the regulatory decision of the Wage and Hour Division and the long history of collective bargaining in the bituminous coal industry.⁸

By 1946, paid non-productive labor had legal precedent behind it. In *Anderson v. Mt. Clemens Pottery Co.* argued that same year, Steve Anderson, president of the United Pottery Workers-CIO Local 1083, claimed that time clocks in the pottery plant did not record the correct time for hours worked. Anderson charged that employees worked fourteen minutes prior to punching in for the start of their shifts. In those fourteen minutes, they collected tools needed for work, and they worked after they punched out when shutting down the plant. Including punching in and out for lunch, workers could work up to 56 uncompensated minutes traveling within the factory and engaging in small tasks, like opening windows, which was necessary for pottery production. Lawyers representing Mt. Clemens Pottery argued that workers were already given some paid time for travel and other non-productive labor within the plant, and therefore the company should not be required to compensate other work.⁹ The Supreme Court upheld the prior

⁸ *Jewell Ridge Coal Corp. v. United Mine Workers of America*, 325 U.S. 161 (1945)

⁹ *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)

rulings in *Tennessee* and *Jewell Ridge*. The *Mt. Clemens* decision expanded the pay for non-productive labor and travel time to all industrial workers. *Mt. Clemens* gave employees the ability to sue for back wages at an overtime rate as well, paving the way for several suits that followed.

Through 1945, the Roosevelt Administration and Congress had generally worked with representatives of labor during World War II to achieve industrial peace needed to sustain the domestic war effort. After the election of 1946, Congress began working against the interests of the broader labor movement, most notably passing the Labor Management Relations Act of 1947, better known as the Taft-Hartley Act. In that same session, Congress passed the Portal-to-Portal Act, aimed at curtailing rights enjoyed by labor. Congress argued that the expanded definition of work was not embedded in the FLSA. Rather, it was the result of the judiciary distorting Congress's original intent. Senator Homer Capehart steered the Portal-to-Portal Act through Congress with the intent of defining non-productive labor as outside of wage labor. For Capehart to be successful, it was necessary that he define labor. In yet another redefinition of work, Capehart interpreted the workweek as "time heretofore or hereafter spent by an employee performing work" and payable labor as "only the time during which such employee performed or shall perform work."¹⁰ Legislators in the Senate Judiciary Committee referred to payment of time-and-a-half overtime wages as "unearned wages," echoing the sentiments of business owners and military officials.¹¹ In the end Capehart failed, and Congress adopted the House's version of the bill. The House's version did not define what work was, as Capehart had hoped. Instead it

¹⁰ *Portal-to-Portal Wages: Hearings on S.70, Day 4, Before the Subcommittee of the Committee on the Judiciary, 80th Cong. 39 (1947) (Committee Print of S.70).*

¹¹ *Ibid, Day 1. 6 (Committee Print of H.R.89).*

worked in the negative, defining what could not be work. Conservatives in Congress were concerned over the effect paid back wages would have on American businesses and military.

Historians of labor and the New Deal have traced the relationship between organized labor and the state in important ways. Nelson Lichtenstein has written extensively on the formation of the New Deal state, emphasizing the CIO's commitment to industrial democracy and fairness in a capitalist system.¹² Likewise his edited volume with Elizabeth Tandy Shermer chronicles the challenges faced by organized labor during and after World War II, acknowledging the alliance forged between capital and the state committed to rolling back the New Deal and the influence of organized labor. The collection traces the intellectual and legal influence of conservative, anti-union forces and how they fought organized labor.¹³ Christopher Tomlin's *State and Unions* rejects the traditional role assigned to the Wagner Act and National Labor Relations Board as protective of workers' rights, and instead posits that they were beneficial to capital.

Nelson Lichtenstein's *A Contest of Ideas: Capital, Politics, and Labor* explains organized labor's failure in the postwar years. He contends that organized labor misjudged the determination of capitalist interests to destabilize the New Deal order.¹⁴ Much of Lichtenstein's scholarship has focused on the issue of fairness in a capitalist economic system. Despite significant communist and other leftist organizers in the CIO during the 1930s and 1940s, the CIO never intended to destroy or upend capitalism. Instead, as Lichtenstein argues in *State of the*

¹² Nelson Lichtenstein, *State of the Union: A Century of American Labor* (Princeton: Princeton University Press, 2002).

¹³ Nelson Lichtenstein and Elizabeth Tandy Shermer, eds. *The Right and Labor in America: Politics, Ideology and Imagination* (Philadelphia: University of Pennsylvania Press, 2012). Of specific relevance to my research is the second section of their edited volume with essays by Shermer, Tami Friedman and Michael Pierce, who gauge anti-labor reaction between 1943 and 1958. The essays focus on capital mobility, anti-labor populism, the origins of right-to-work legislation and anti-union conservatism.

¹⁴ Christopher Tomlin, *State and Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880-1960* (London: Cambridge University Press, 1985).

Union, the CIO's collective bargaining and organizing efforts were influenced in large part by notions of fairness in industrial democracy. This is true of portal-to-portal suits as well, as CIO locals looked not to crush their own employers, or to control them. Rather, locals sought equitable solutions with their employers.

The Portal-to-Portal Act has mostly been studied by legal scholars who have examined its legal effect and interpretation relating to the FLSA, with focus also on political and economic context. Portal-to-portal legislation, Marc Linder argues, was a political tool of the CIO and other unions to exert pressure on business.¹⁵ While this is a part of the broader story, this thesis does not aim to rehash the political goals of portal-to-portal litigation. I intend to explore how workers and unions conceptualized their own labor and how the government sought to restrict it. I seek to understand these workers and their unions on their own intellectual terms over a longer period.

How a society and its workers define productive and unproductive labor gets to the heart of determining the value of certain kinds of labor in a capitalist society. Eileen Boris's and Jennifer Klein's study of "home care" workers show the role of the state in determining wages, arguing in large part that because home care has been gendered and, historically, was done for "free," care workers' labor has been considered unskilled and of little worth. Boris and Klein's emphasis on the relationship between perceived exertion and wage serves a useful framework. While care labor is considered unproductive and therefore worthy of low or no wages, it is

¹⁵ Marc Linder, "Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947," *Buffalo Law Review* 39, no. 53 (1991): 53-180; Marc Linder, "*Moments Are the Elements of Profit*": *Overtime and the Deregulation of Working Hours Under the Fair Labor Standards Act* (Iowa City: F&P Press, 2000).

necessary for the continuation of capitalism.¹⁶ Like care work, payment for industrial labor has long been intertwined with what the state has categorized as valuable work.

Additionally, Katherine Turk's *Equality on Trial* serves as formative work. Writing on Title VII, Turk examines how women workers initially understood Title VII and sex equality as capacious. However, over time, as Title VII cases made their way into the courts and sex equality was formalized, legal definitions of sex equality narrowed. As Title VII became more deeply entrenched in the federal government and its limits more defined, women were unable to project their own experiences of discrimination onto the federal statute.¹⁷ In an earlier period, industrial workers faced a similar issue. They conceived of labor broadly and saw the newly-formed New Deal state potentially revising laws to reflect their own understandings of work. As industrial workers gained access to a codified, comprehensive definition of work, the possibilities of what could be projected onto the law shrunk. This was by no means an inevitable consequence, as the legislators and the court system, who had opened the door to these possibilities, could have protected workers' conceptualizations of paid labor, but ultimately did not. New, malleable labor legislation created a fluid intellectual space for the reconceptualization of work from the creation of FLSA through the Portal-To-Portal Pay Act of 1947.

This thesis traces the reconceptualization of work from the passage of the 1938 FLSA through the Portal-To-Portal Act of 1947. I argue that the FLSA created a new framework for industrial laborers to define what constituted work, and therefore what should be wage labor. To do this, I look at court decisions and workers' arguments concerning non-productive labor, including travel time, tool collection, tool set up, dressing, and showers after contact with

¹⁶ Eileen Boris and Jennifer Klein, *Caring For America: Home Health Workers in the Shadow of the Welfare State* (London: Cambridge University Press, 2012).

¹⁷ Katherine Turk, *Equality on Trial: Gender and Rights in the Modern American Workplace*, (Philadelphia: University of Pennsylvania Press, 2016).

hazardous materials. These efforts to define paid labor were expanded by interactions between the judiciary and organized labor. The CIO and UMWA brought three suits to the Supreme Court between 1944 and 1947, though initial litigation began in 1939. Opposite labor, business owners and military officials looked for ways to limit workers' new claims to wages. By late-1946, Congress heeded to the pressure brought by military and business leaders. Congress codified a more restrictive definition of work and the workweek into the Portal-To-Portal Act of 1947, restricting the FLSA. I argue that with the implementation of the FLSA, industrial workers created and projected their own definitions of work onto the law. As the FLSA was defined through the courts, industrial workers gained formal rights through the federal government. Additionally, this research will show how capitalists and the federal government defined labor throughout the same time span.

While industrial workers projected their own conceptions of labor onto the law, they did not unanimously agree on what those conceptions were. The UMWA and CIO shared similar language defining work, though the CIO was more willing to engage in portal-to-portal back pay suits. The AFL used conservative language and openly discouraged suits for back pay. Despite their less-than militant rhetoric, the AFL managed to build an imaginative, inclusive definition of work. These unions all operated under the notion of fairness with their industrial employers, aiming to avoid any jarring changes to the war and post-war industrial order.

In Chapter One, I argue that industrial workers primarily constructed their understanding of work through the battle for the eight-hour day. By looking at railroad workers and miners, however, we come to a different understanding of how work was defined. While these workers defined their labor against the number of hours worked, they based their arguments for shorter workdays and higher pay in claims to safety and fairness. I explore major changes in labor policy

by the federal government, including the National Industrial Recovery Act and Fair Labor Standards Act to see how labor unions conceptualized work. I then explore the Supreme Court's decision in *Tennessee Coal Co. v. Muscoda Local No. 123*, which awarded portal-to-portal time to metal miners in 1944. I argue that this court case established a major break for industrial workers because miners were conceptualizing work as pay for so-called unproductive labor, as opposed to pay for hours in productive labor.

In Chapter Two, I chart the different ways that organized labor responded to *Tennessee*, and *Jewell Ridge Coal Corp. v. United Mine Workers of America* which expanded travel time and non-productive pay to all miners. I look at UMWA, CIO, and AFL, arguing that organized labor created new conceptualizations of work to expand what labor could be paid. I contend, however, that conceptualizations were not uniform with notable differences between unions. In this chapter I also study the Supreme Court case *Anderson v. Mt. Clemens Pottery Co.*, which opened the door for wages to be earned for travel and non-productive work in all industrial labor.

In Chapter Three, I explore the responses of the state and the creation of the Portal-To-Portal Act of 1947. I show how pro-business and military interests presented portal-to-portal suits as a grave danger to American industry and prosperity. This spurred Congress to action, resulting in a bipartisan bill that prevented portal-to-portal wages and back pay, curtailing the definitions of work created by labor unions between 1938 and 1947. I argue that this shows the limit of organized labor's influence over the federal government which sought to protect the interests of capital over those of workers.

CHAPTER ONE: THE ORIGINS OF WORK

On April 1, 1937, the United Mine Workers of America opened the month with good news. After nearly two months of negotiation in New York City at the Appalachian Bituminous Joint Wage Conference, the miner's union hailed their new contract as the "best ever secured."¹⁸ In addition to higher wages, miners also secured a seven-hour workday, a 35-hour week, time and a half pay for overtime, and a joint commission to study mining issues related to mechanization for the next two years. The new agreement cemented a 10 percent pay increase for safety work, while also raising pay rates for pick miners and machine operators.

Despite the good news, the cover of the *United Mine Workers Journal* held prognostications of doom. The cover showed a man holding a shovel with "Supreme Court" written across his suit jacket. He stands in a graveyard of buried New Deal protections and policies. Among the tombstones are Child Labor Law, Relief for Farmers, Legislation for Labor and the National Recovery Administration, among others. A man representing Congress stands by scratching his head. Hanging ominously above the two men, it simply says "NEXT?"¹⁹

Prior to Roosevelt's creation of the New Deal legislation, industrial workers had by and large attempted to organize without the aid of federal government, defining their labor through the battle for the eight-hour day. As David Roediger and Philip Foner have shown in *Our Own*

¹⁸ "NEXT?," *United Mine Workers Journal*, Apr. 1, 1937. The UMWA's disdain for the Supreme Court and support for New Deal legislation emphasizes the good relationship between Lewis and Roosevelt. This cartoon was published about three weeks after Roosevelt's 9th Fireside chat, in which he called for the "Reorganization of the Judiciary."

¹⁹ *Ibid*, 1.

Time, workers of the mid-to-late nineteenth century grounded their calls for the eight-hour workday in the rhetoric of economic and political independence, as well as calls for workers to have the opportunity to enjoy leisure. By the end of the century, calls for the eight-hour day increasingly became the norm. Labor's struggle for fewer, regulated hours crossed lines of craft, gender and ethnicity and called into question the relationship between classes in a different way than calls for better wages. Workers demanded shorter hours for the same daily wages earned, showing how workers attempted to control their labor and keep a certain quality of life.²⁰

This chapter will establish how industrial workers conceptualized their own labor in the century prior to the creation of the New Deal state. I argue that labor legislation introduced by President Franklin Roosevelt and Congress allowed industrial workers to imagine their own labor differently within the context of the passage of the Fair Labor Standards Act of 1938, which established definitions for terms related to work like employer and employee, but did not define work or the workweek. Without a definition of work, business owners assumed a definition of work based on custom and precedence. The FLSA offered industrial workers the opportunity to transition from defining work by the eight-hour day to defining it against literal labor performed. This led to early legal challenges, and the Supreme Court's affirmation of workers' definition of labor by 1944. By the 1940s, I argue that workers began to conceptualize their labor by acts performed instead of by comparing their work only to time. While workers built their own constructs, they were aided by the FLSA and the judiciary which created the

²⁰ David R. Roediger and Philip S. Foner, *Our Own Time: A History of American Labor and the Working Day*. (New York: Greenwood Press, 1989).

terms of engagement for business and labor. I contend that while workers were sometimes concerned with technical definitions of work, their demands were often couched in the danger and difficulty of work performed.

Working on the Railroad

In order to appreciate how miners understood their labor in the 1930s, it is first necessary to look backwards to nineteenth century railroad workers. Prior to labor legislation, railroad workers of the mid-nineteenth century observed 10-to-12-hour workdays, six days a week, regardless of task. Nineteenth century engineers were responsible for all maintenance of their locomotives, including but not limited to inspection, repair, reports and other miscellaneous labor that prevented stoppages.²¹ Brakemen were not only required to do their own duties. They often had to shovel coal, sweep snow off the tracks and even light the driver's cigar.²² While this was the relative norm for railroad workers, many employees were subjected to longer hours, and could work up to 40-hours straight.

An early victory came when Illinois adopted the eight-hour workday for railroad workers in 1867. A measure to limit consecutive workhours at 12-hours in a 14-hour period failed in Illinois almost two decades later. Forty years after Illinois' eight-hour legislation, Congress passed the Hours of Service Act which limited railroad workers to sixteen consecutive hours in a 24-hour period.²³ Railroad brotherhoods pushed for shorter workdays through political channels, which resulted in the Newlands Act shortly after the election of President Woodrow Wilson. The Newlands Act of 1913 created the Board of Mediation and Conciliation which was designed to

²¹ Walter Licht, *Working for the Railroad: The Organization of Work in the Nineteenth Century* (Princeton: Princeton University Press, 1983), 90.

²² *Ibid*, 90-91.

²³ *Ibid*, 174-178.

arbitrate issues between railroad operators and unionized railroad employees. The federal government empowered the mediation board to intervene over industry issues including hours, deepening the relationship between the state and labor.²⁴

Railroad workers, like many industrial laborers, desired an eight-hour day based on their desire for safety. Injury and death were frequent occurrences in the railroad industry due to boiler explosions, derailments, bridge collapses and poor communication. Between 1888 and 1889, the Interstate Commerce Commission reported that 1,972 railway workers had been killed on the job, and an additional 20,028 employees had been injured.²⁵ While railroad workers stressed wage rate differences between freight shipping and passenger service, they also emphasized the value of safer work conditions.²⁶ Work stoppages were determined by the ability of railroad workers to care for their riders and personal welfare. Rank-and-file railroad workers called for better conditions, threatening strike if their calls were not met.²⁷ The possibility forced Wilson to intervene, and ultimately spurred Congress to pass the Adamson Act in 1916 which established the eight-hour workday for railroad workers.²⁸

Workers safety was intertwined with that of the safety of the public, a quality unique to the nature of passenger rail service. W.S. Carter, the President of the Brotherhood of Locomotive Firemen and Enginemen, testified in support of the Adamson Act. Carter played on the anxieties of railroad travel before the Senate committee. Referring to the “Bliss of Ignorance,” Carter

²⁴ Paul Michel Taillon, *Good, Reliable, White Men: Railroad Brotherhoods, 1877-1917* (Urbana: University of Illinois Press, 2009), 171-172.

²⁵ Licht, *Working for the Railroad*, 181-190, 36-38. Licht cites *the Second Annual Report on the Statistics of Railways in the United States to the Interstate Commerce Commission for the Year Ending June 30, 1889* (Washington, D.C., 1890).

²⁶ W.S. Carter, “The Adamson Law: The Employees’ View Point” *Proceedings of the Academy of Political Science in the City of New York*, 7, no. 1 (January 1917): 170-178.

²⁷ *Threatened Strike of Railroad Employees: Hearings on Bills in Connection with Legislation Relative to the Threatened Strike of Railroad Employees, Day 1, Before the Senate Committee on Interstate Commerce, 64th Cong. 62 (1916)* (Statement of W.G. Lee, President of the Brotherhood of Railroad Trainmen).

²⁸ Licht, *Working for the Railroad*, 250.

described a restless traveler in a sleeping car, observant of the many rail signals and whistles, who only falls asleep once the association made between frequent whistles and the engineer's alertness is made. "But you didn't know that between you and your journey's end an army of sleepless men are employed," Carter continued, emphasizing how many men's labor needed to work in concert for the railroad to function safely. Otherwise, the railroad will "put you and your steel sleeper down a steep embankment" tossing riders from their seats to "rattle around like dry peas in a pod." Carter continued to stress safety, saying "the engineers, firemen, conductors, and brakemen are going to find a remedy for this dangerous evil." He continued, "When they secure for themselves rest and recuperation through their present eight-hour movement, they will incidentally secure increased safety for the travelling public," making explicit the connection between worker safety and the passengers well-being.²⁹

Carter called on his own work experience when testifying. Carter worked for sixty or seventy hour periods and knew that he operated locomotives in an unsafe state.³⁰ He argued that the railroad owners should reduce the number of hours required of employees per trip, "or else they will acquire a share in the profits resulting from unfair and unsafe long periods of continuous service"³¹ Carter called for a certain kind of fairness in railroad work that valued workers' lives. Speaking to railroad operators' treatment of employees, another railroad employee remarked they "could kill [workers] and hire them cheaper than they could equip [them]."³²

²⁹ Ibid, *Threatened Strike of Railroad Employees: Hearings on Bills in Connection with Legislation Relative to the Threatened Strike of Railroad Employees* 134-135 (Statement of W.S. Carter, President of the Brotherhood of Locomotive Enginemen and Firemen). The federal government had been involved in matters of safety on railways in the past, mandating airbrakes for railcars in the Safety Appliance Act of 1893.

³⁰ Ibid, 146.

³¹ Ibid, 139.

³² Ibid, Statement of A.B. Garretson, President of the Brotherhood of Railway Conductors, 152.

Wilson echoed railroad workers concerns over safety and fairness before Congress. Wilson spoke “in the interest of justice,” mentioning “justice” three more times in his address delivered to a joint session of Congress encouraging the passage of the Adamson Act.³³ In his address, Wilson championed the role of arbitration in establishing fairness, therefore placing himself and the federal government at the center of not only the railroads, but industrial relations for the sake of the public good.³⁴

Railroad workers compared forced hours work and lack of control over quitting time to chattel slavery in the Antebellum South. American Federation of Labor President Samuel Gompers stated before the Senate Committee on Interstate Commerce that the railroad workers had the right to strike and “assert passively their rights that they will not work, and that is the natural attribute of a freeman,” noting they could not be compelled to work once rail travel had ceased.³⁵ Gompers’ testimony included many references to “involuntary servitude,” plainly invoking the language of the Thirteenth Amendment.³⁶

“You would not undertake to revoke the thirteenth amendment to the Constitution,” Gompers continued, “nor would you revoke the proclamation of President Lincoln emancipating the 4 million black slaves in the United States. To say that these men shall perform compulsory labor in order that the railroad managers shall perform the obligations which they owe to society, is a question of the relation between the workers and the employers.”³⁷

³³ Address of the President of the United States Document No. 1340, “Hours of Service on Railroads,” (Aug. 29, 1916), 5, 3-8.

³⁴ Ibid, 3-4. Wilson paints a near apocalyptic image of what would happen if the railroad unions went on strike, describing unemployment and starvation because of stopped railroads.

³⁵ *Threatened Strike of Railroad Employees: Hearings on Bills in Connection with Legislation Relative to the Threatened Strike of Railroad Employees, Day 1, Before the Senate Committee on Interstate Commerce, 64th Cong.* 60 (1916) (Statement of Samuel Gompers, President of the American Federation of Labor).

³⁶ Ibid, 45, 60-61.

³⁷ Ibid, 60.

Gompers invoked self-determination and work choice as the right of the employee. He highlighted the role of employer's control in determining acceptable standards of work. Employer control was fundamental to work since individual freedom would be maligned. The worker, therefore, ought to control acceptable hours for work, since control would be surrendered for wages. The act defined eight-hours work as a full day's work for railroad workers (with a few, limited exceptions) on trips longer than 100 miles. The bill further created a commission to oversee the enforcement of the eight-hour day.³⁸

Railroad workers feared that shorter hours meant lower wages. Instead, railroad companies closed pay discrepancy gaps between freight and passenger rail service, especially among workers on southern and western railroad lines.³⁹ Still, a report issued a year later by the Commission on Standard Workday of Railroad Employees did not find it necessary to connect the eight-hour day with "the adequacy or in adequacy of wages" for railroad employees.⁴⁰

Since the start and end of work was not fixed as in factory labor, railroad employees often measured a day's work by the distance travelled. By using the eight-hour day and 100-mile mark as ways to identify a day's labor, an actual day's work was somewhere between the two metrics of measurement. By using distance, railroad employees established their own claims and resisted efforts by capitalists to take advantage of their labor in ways outside of hourly work.

Even after the Adamson Act passed, railroad operators were not pleased with the eight-hour day. Leaning on the precedence of collective bargaining that had taken place between railroad management and employees, capitalists argued that the state could not mandate the length of the workday. Frank Trumbull, Chairman of the Railway Executives Advisory

³⁸ Eight-Hour Commission on Report of the Eight-Hour Commission, Document No. 690, at 5-7 (1916)

³⁹ Ibid, 15-16.

⁴⁰ Ibid, 21.

Committee, expressed the anxiety of himself and other railroad owners by noting that if the Adamson Act was found constitutional, it would enable the federal government to become involved in the affairs of private business.⁴¹ Not surprisingly, Trumbull advocated for repeal of the law, arguing that congressional authority over wages would hurt business owners because industry would not be able to improve and remain competitive. He also argued that federal controls on wages would only serve to hurt the interests of workers themselves, implying that fixed prices would put a cap on what employees could earn.⁴² Such a statement was not based on a fixed moment in the past, but to play on the fears of railroad employees. Fear of government interference in private business matters would recur throughout the first half of the twentieth century. Railroad workers, however, defined their labor within a framework that did not entirely rely on hourly wages. This method of defining labor would later become a focus for miners, too.

Miners and the Workday

At the start of the twentieth century, metal and coal miners engaged in the fight for the eight-hour day. In 1897, the Western Federation of Miners in Idaho and Utah successfully passed one of the first eight-hour day laws in the United States. The WFM rolled momentum from collective bargaining into successful legislative change.⁴³ The 1890s and early 1900s saw a wave of eight-hour day guarantees across the West, with Arizona, South Dakota and California all passing legislation by 1909.⁴⁴

⁴¹ Frank Trumbull, "The Adamson Law: The Employers' Viewpoint," *Proceeding of the Academy of Political Science in the City of New York* 7 no. 3 (Jan. 1917): 180-181.

⁴² *Ibid.*, 179-184.

⁴³ William Haywood, *Bill Haywood's Book* (New York: International Publishers Company, 1929), 64-90; Mark Wyman, *Hard-Rock Epic: Western Miners and the Industrial Revolution, 1860-1910* (Los Angeles: University of California Press, 1979), 244-245.

⁴⁴ Wyman, 237-238, 224.

Mine labor was grueling. Subject to long workdays, miners were lowered into the mine in a company-owned cage which was often filled with men and equipment. After their journey from the surface (which could last up to an hour), miners would then be responsible for moving mining equipment, including explosives and mules to the site of work. Travel times to the worksite increased as miners dug deeper below the surface. Once at the mine, face miners were exposed to freezing cold water and toxic air, while also subject to the possibility of mine collapse and explosion. At the end of the workday, miners collected the material they brought into the mine and returned to the surface in the same cage which lowered them to start the shift.⁴⁵

Similar to the railroad workers of the late-nineteenth and early-twentieth century, miners also based their claims for the eight-hour day in arguments for safety. At the urging of miners, Utah had put the eight-hour work day into the state's original constitution for state workers and any employee working in an unsafe environment.⁴⁶ Historian Mark Wyman has shown that miners were able to use political means to achieve the eight-hour day by framing their arguments around the health of subterranean miners. Mining engineers who oversaw hoisting walked off the job to protect the lives of miners who took the cage into the mines, and those who worked directly below it. Engineers worked 12-hour shifts in the last third of the nineteenth century. Mill and smelter workers who joined the WFM in large numbers in the 1890s consistently worked with toxic arsenic, sulfur and lead 12-hours a day, too, and became targets for reform.⁴⁷ Metal miners emphasized the growing consensus that long hours underground were connected to health issues as the Western Federation of Miners worked towards securing the eight-hour day.

⁴⁵ Andrews, *Killing for Coal*, 124-133. Andrews provides a brief description of travel for hard rock miners, and some of the dangers they faced in his analysis of the "workscape."; Grace, "Life in a Company Town – The mining camps of Birmingham, Alabama, 1900s-1950s," *Working Lives Oral History Project*. <http://purl.lib.ua.edu/54307>

⁴⁶ Utah Const. art. XVI, Sect. 6.

⁴⁷ Wyman, *Hard Rock Epic*, 205-207.

Mine operators and conservative legislators opposed the eight-hour day, arguing that it would lead to a six-hour day and then a four-hour day, eventually making mining untenable.⁴⁸ Mine operators in Montana charged that eight-hour legislation ought to be called “a seven-hour bill” because travel into and out of the mine, in addition to lunch, were covered as paid time by custom.⁴⁹ Francis Jenkins, Republican floor leader of the Idaho House of Representatives, argued that a reduction in the ten-hour mining day was unnecessary since miners were doing “nothing” half of the time, while another representative argued on the grounds of vice prevention that less time in the mines meant more in the saloons.⁵⁰ Mine owners worked to paint WFM members as radicals, labeling them as anarchists or socialists in redbaiting attacks.

Mine operators attempted to use the eight-hour day in an exploitative manner. For example, William A. Clark, a former Senator from Montana, took the eight-hour day to mean eight-hours of productive labor, therefore requiring 9½ hour shifts from miners to include lunch and travel. The 9½ day allegedly saved Amalgamated (a subsidiary of Standard Oil) \$1,430 a day in costs for a short period of time before they were forced to reckon with the maximum hour law.⁵¹ Hard rock miners were able to base definitions of their work in safety, and literally choose their starting and stopping time (within a reasonable period of stretch) by the creation of an eight-hour day by the state.

Coal miners also defined their own labor and wages against the eight-hour day. The Anthracite Coal Wage Agreement of 1916 established the eight-hour day for anthracite miners, with hourly wage protections so the daily wage remained the same despite fewer hours. This

⁴⁸ Ibid, 217.

⁴⁹ Ibid, 211. Quote comes from the *Helena Independent*.

⁵⁰ Ibid, 220-221.

⁵¹ Ibid, 211-212. Clark resigned from his Senate seat after an investigation was launched into whether he had purchased his Senate seat from state legislators.

contract between anthracite operators and the United Mine Workers of America, agreed to “eight (8) hours of actual work all classes of labor” six days a week. Actual work included only face-to-face labor and did not include “time required in going to and coming from the place of employment about the mine,” specifically excluding travel time. The preparation of material needed for mining was also excluded from wage agreements, like tool collection or the stabling of mules.⁵²

Union miners fought for the eight-hour day at the state level, but it was not until 1933 that they found federal success. In 1933, the coal mining code would be reframed again at the start of President Franklin Roosevelt’s New Deal. Hugh Johnson of the National Recovery Administration led negotiations between coal mine owners and the UMWA President John L. Lewis to create working standards for the bituminous coal industry.⁵³ In the agreement the UMWA and mine owners agreed to minimum wage rates for “common labor” and “inside skilled labor” and maximum hours for bituminous coal miners. It also banned child labor, set overtime and set standards for fair practices.⁵⁴

Johnson justified the federal government’s intervention by citing a history of “unfair competitive practices, particularly in the payment of low wage” within the bituminous coal industry. While mining productivity had increased since the end of World War I, fewer miners were engaged in mining, and wages had increased by only a slim margin.⁵⁵ Johnson used the profit margins of coal operators to determine the appropriate wage for coal miners, noting that

⁵² “Anthracite Coal Wage Agreement of 1916,” *Monthly Review of the U.S. Bureau of Labor Statistics*, 2, no. 6 (June 1916): 40.

⁵³ *Ibid*, 190-191.

⁵⁴ Amendment to Code of Fair Competition for the Bituminous Coal Industry, “Bituminous Coal Code of Fair Competition” Approved Code No. 24 – Amendment No. 2 (1934).

⁵⁵ *Ibid*, vii, x. The total wages of miners as recorded by the Bureau of Mines increased \$2.37 between 1919 and 1932, not adjusted for inflation.

mining wages made up 60-65 percent of mining productions cost. The NRA's recommendation for the agreement reached between operators and the UMWA was based on the cost of coal.⁵⁶

Johnson's choice to define miners' labor may have been more practical than principled. Decreased employment, coupled with the start of the Great Depression depressed wages for miners over the half-decade prior. The basis for determining wages for work was imperfect. Hours worked per day and per week were inconsistent in 1933 as well, further adding to problems Johnson faced in determining paid work. Nonetheless, Johnson's metric for determining wages echoed past arguments for industrial fairness. Given the labor pool that existed in 1933, Johnson's minimum wage recommendation prevented wage gouging and based it upon the profitability of mine operators, with consideration given to buying power in different regions.

Although railroad workers and miners were aided by the state and federal government, collective bargaining still formed the bedrock of union agreements. The UMWA emphasized "union agreements" and common hours and workweeks across professions, noting six-hour days for "motion picture operators" and newspaper employees. Similarly, the UMWA used the exception of barbers and taxi drivers, who worked longer than eight-hours per day due to their collective bargaining agreements to prove the rule.⁵⁷ The six-hour day momentarily became the goal for UMWA, so work could be distributed among more miners during the Depression. The UMWA justified the six-hour day due to various labor-saving devices and through claims that shorter days improved job safety.⁵⁸ After the passage of the NRA, the UMWA remained committed to the eight-hour day as the standard for mining. Though the NRA was eventually

⁵⁶ Ibid, xii.

⁵⁷ "Collective Working Agreements Provide Hours of Work in 1937," *United Mine Workers Journal*, Apr. 1, 1938.

⁵⁸ "The Six-Hour Day for the Coal Miner," *United Mine Workers Journal*, "May 15, 1938.

found unconstitutional, parts of the law such as minimum wage and maximum hours later appeared in the Fair Labor Standards Act of 1938.

The Fair Labor Standards Act provided industrial workers the ability to redefine their labor in broader terms. The FLSA defined many different terms like “employee,” “employ,” and so on, but did not define work, workday or workweek. Policymakers wrote these terms into the law and made assumptions about their relationship to wage and hours. For instance, the law established the eight-hour workday for many laborers but did not define the workday itself. Though eight-hour days and 40-hours weeks were provided as benchmarks, the policymakers’ inability to create an exact definition of “work” left room for industrial workers to read into the gray area. Moreover, guaranteed overtime provided the mechanism for workers to demand compensation, since the Wagner Act had guaranteed good faith collective bargaining.⁵⁹

Under the FLSA, the UMWA initially defined labor in relation to hours worked. During Appalachian Conference negotiations in March 1939, the union’s International Policy Committee recommended that the workday be shortened to a six-hour day and 30-hour week in bituminous coal mining. All work after 30 hours would be compensated as overtime. The new two-year agreement contained no verbiage of what constituted work, only that it be waged based on the hours that work was performed.⁶⁰

With the Fair Labor Standards Act firmly entrenched in law, mine workers began to broaden their conceptions of work beyond hours. The UMWA pressed the issue with a two-page spread in the *United Mine Workers Journal*, summed up by its headline “Suppose YOU got only 7 hour’s pay for 8½ hours in a coal mine!” The union reported: “Only in the coal industry,” did “a man report for work, stand in line to get his tools and equipment, check in, take his turn on the

⁵⁹ Fair Labor Standards Act, 29 U.S.C. § 203 (1938)

⁶⁰ “Miners Present Their Demands to the Appalachian Conference,” *United Mine Workers Journal*, Mar. 15, 1939.

cage to go down into the deep recesses of the mine, then walk long distances to the working place before his pay starts.” The paper estimated that for the 52-hours per week spent inside mines, they received only 35-hours’ worth of pay. These claims were wrapped in the patriotic fervor of World War II, asking “Must this go on in America?” while also claiming that miners were doing their part to support the war effort.⁶¹

Miner’s testimonials in the *United Mine Workers Journal* lent more to the UMWA’s claims. Three miners, William Dembosky, John Howard and Melvin Beckler, all described their workdays, which totaled between 9½ and 11-hours; much longer than what was agreed to through collective bargaining. Dembosky described his non-productive activities, including the collection of powder and his drill, while Howard described the time West Virginia miners spent waiting for transportation into the mines. Coal operators forced miners to wait in the elements below ground after hours spent in freezing water or sweat, while the continuous travel of coal from the face to the surface remained uninterrupted.

While the miners defined all of this work as necessary, they did not ask for it all to be paid for. Miners did not ask for their powder or charges to be paid for, only requesting the “most dangerous part of our day’s work, the time we spend in travel into the mine in the morning and coming out at night.”⁶² Miners based their arguments in their safety, much like the railroad and iron miners of the nineteenth century. They emphasized the unavoidable nature of transport and its necessity to mine labor.

Howard’s observation that mine-to-surface activity was indicative of the value placed on both human time and profit seeking, with the latter receiving the foremost attention. The flow of coal remained uninterrupted for his employer, making sure that profit-making productivity

⁶¹ “Suppose YOU got only 7 hour’s pay for 8½ hours in a coal mine!,” *United Mine Workers Journal*, May 1, 1943.

⁶² *Ibid.*

remained maximized. Their productivity already maximized, mine workers waited for the travel to the surface from the place of productive labor. Driven by profit, mine owners put the travel of coal before miners, since the starting and stopping time of work remained ill-defined. Eight-hour workdays could balloon because of travel, whereas the price of coal remained profitable during World War II, and therefore was prioritized.

The Miners Go to Court

Decided in 1944, *Tennessee Coal, Iron and Railroad Co. v. Muscoda Local No. 123* was the first major case to test FLSA and its (lack of a) definition of work. Muscoda, a local of the International Union of Mine, Mill and Smelter Workers local challenged TCI over what constituted work, successfully arguing that travel time constituted work under the FLSA. Associate Justice Frank Murphy stated in the Supreme Court's majority opinion that Mine Mill's claim to wages for travel time counted because work was "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business."⁶³

In the majority opinion, Murphy defined the conditions under which work occurs. Miners' travel constituted mental exertion because of attention to safety and the risk of injury and was for the benefit of TCI. Notably, however, Murphy did not necessarily define their travel as "burdensome." Neither did he determine that paid labor should be productive. Murphy said, "in a strict sense nonproductive, they are nevertheless engaged during such travel time in a 'process or occupation necessary to . . . production.'" In the eyes of the court, work was not synonymous with productive labor. Additionally, the principle of employer control over miners

⁶³ *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944).

(therefore limiting their freedom) made their non-productive labor worthy of pay. Murphy's decision echoed the decision of the district court, which held that travel time "bears in a substantial degree every indicia of worktime: supervision by the employer, physical and mental exertion, activity necessary to be performed for the employers' benefit, and conditions peculiar to the occupation of mining."⁶⁴ The higher and lower courts held that productive activity was necessary for wages to be earned. Both courts agreed that "work" was constituted by all those moments when employers controlled employees.

The court's opinion left room for the future revision of work. The Supreme Court, which now had opened the avenue to wider definitions of work, left the true meaning of work and the FLSA up to Congress. Murphy said, "We are not guided by any precise statutory definition of work or employment" in reference to the 1938 law, leaving room for Congress to further guide the expansive labor law. In case Murphy had not made it clear, he wrote "in the absence of a contrary legislative expression, we cannot assume that Congress here was referring to work or employment other than as those words are commonly used." He made sure to explain that work would be defined only to the extent that the court had interpreted work, allowing Congress the ability to build a definition of work and the workweek. Until then worker and employers alike would continue to use "work" colloquially and assume a shared meaning.

Yet workers and employers often did not share definitions of what constituted work. TCI defined work against its ability to make the company profit, arguing that only face-to-face labor, or work that advances the mine underground, was worthy of wages since that is where productive labor took place. Travel was non-productive, then, because it in and of itself did not produce anything that could be immediately profited from.

⁶⁴ Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944).

In line with TCI, Associate Justice Owen Roberts defined work in a more conservative fashion in his dissent. Roberts gave an informal definition saying that work meant “that which he does for his employer as the consideration of the wage he receives. The term is often used in a more general sense as when one is asked what he is doing and replies ‘I am working for Jones.’ Of course he does not mean that Jones is paying him for each hour of every week of his life.”⁶⁵ Work was not only constituted by a wage, but instead a relationship or condition held between worker and employee. Ultimately, in Roberts’ opinion, it was a relationship that embodied conservative notions of free enterprise between the individual and the employer.

He continued, “Men are not commonly paid for the time they sleep, the time they eat, or the time they take to go to, and return from, their employer's premises. Thus, although the phrase ‘work’ may refer to the calling pursued, or the identity of the employer.”⁶⁶ Roberts agreed with capitalist notions surrounding a narrower definition of work. Meal time and travel were not to be paid, regardless of the physically draining nature of coal mining. His interpretation was based in a wider understanding of what constituted labor. Although Roberts admitted that what can counted as “work” varied between professions, he nonetheless argued that the idea of work in the FLSA was meant to fit into already existing standards of work.

This was the exact premise that the court majority was looking to reject. With the implementation of the FLSA, and the NRA before it, policymakers formalized good faith collective bargaining in law. However, terms agreed upon in contracts before the FLSA and working norms could not be accepted at their face value. Murphy could not accept precedence and custom as equitable and natural developments because, in the past, because employers had

⁶⁵ Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944). (Associate Justice Owen Roberts, dissenting).

⁶⁶ Ibid.

not been required by law to negotiate in good faith with labor unions prior to the creation of the New Deal state.⁶⁷ They posited that good faith could not have existed prior to the FLSA because employee and employer had never been on equal ground to bargain fairly. By arguing that good faith did not exist, the court fully rejected nineteenth century belief that worker and owner operated on any level as equals. Justices were acknowledging that power was not evenly held in the relationship between employer and employee. Instead, in an industrial democracy, policy makers needed to acknowledge the lack of fairness that existed between owning and working classes.⁶⁸

While the Supreme Court had temporarily created a broader definition of what could be considered work, their decision in *Tennessee* only applied this interpretation of the FLSA to iron miners. Only a year later in 1945, the Supreme Court decided in *Jewell Ridge Coal Corp. v. United Mine Workers of America* that the newly minted definition of work could be applied to all miners, not just those in iron mining. Associate Justice Murphy wrote the majority opinion in *Jewell Ridge*, saying simply that the “sole issue in this case is whether any different result must be reached as regards underground travel in bituminous coal mines.”⁶⁹ For Murphy and the court’s majority, work was work, regardless of minor difference of the industry in question. Murphy reaffirmed the role of exertion in determining work as well as for whom the exertion would benefit. The ruling of the court overturned a prior decision by the Wage and Hour Division in 1940 which did not consider travel time worthy of pay because of “a long history of *bona fide* collective bargaining” between miners and coal operators. Murphy found this

⁶⁷ *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944).

⁶⁸ Nelson Lichtenstein and Howell John Harris examine different ideas surrounding industrial fairness in *Industrial Democracy in America: The Ambiguous Promise* (New York: Cambridge University Press, 1993).

⁶⁹ *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944).

definition “difficult and doubtful” in determining whether non-productive labor constituted work itself.⁷⁰

Justices Jackson and Roberts dissented, favoring collectively bargained agreements over continued government intervention.⁷¹ The FLSA in their view did not permit the collective bargaining agreements to be invalidated by the federal government. Though not explicitly stated, the dissenting justices’ decision hinged on whether the collective bargaining agreement had been made in good faith. In other words, they asked whether negotiations between the UMWA and the Jewell Ridge Coal Company had been made between two equal powers.

In *Jewell Ridge*, the UMWA embraced the framework and language Mine and Mill unionists had used in their decision against TCI. As early as 1943, when the *Muscoda* case had just been reviewed at the district court level, the UMWA claimed portal-to-portal pay as “a matter of justice.” They asked if metal miners and ore workers could be paid for travel time, then was this a “fair request for us coal miners to make?”⁷² As I will show in the next chapter, the UMWA used similar and often times the same arguments that the *Muscoda* local had used to justify their right to portal-to-portal wages.

The United Mine Workers had successfully used the courts to expand the definition of work. Though the UMWA imitated legal proceedings in the *Jewell Ridge* case, it sought to use legal action to make back wages payable. At the same time, the union used the power invested in the court system to continue to redefine the very definition of work. Without a standard workday, oftentimes workers could not claim “extra time,” or overtime wages with no legal standard to take advantage of.⁷³ Work was no longer necessarily tied to ideas of productivity. Instead, work

⁷⁰ Ibid.

⁷¹ *Jewell Ridge Coal Corp. v. United Mine Workers of America*, 325 U.S. 161 (1945). (Justice Jackson, dissenting).

⁷² “Suppose YOU got only 7 hour’s pay for 8½ hours in a coal mine!,” *United Mine Workers Journal*, May 1, 1943.

⁷³ Carter, “The Adamson Law: The Employees’ View Point,” 176.

was increasingly related to employers' control over the work, as well as worker exertion, regardless of whether that exertion created profit for the owner. Between the establishment of the New Deal in 1933 and the *Jewell Ridge* decision, the definition of work had grown significantly, echoing the claims that workers of the late-nineteenth century had made. The definition of work would continue to grow into 1946 at the start of the postwar era.

CHAPTER TWO: FROM THE MINE TO THE SHOP FLOOR

On a Saturday in January 1947, Stanley Mancheski was called before the Senate Subcommittee of the Committee on the Judiciary to describe his showers. Mancheski explained the necessity of his post-work showers to several senators and witnesses in the gallery. And Mancheski would not be the last to do so. Many industrial workers would describe their showers, and other tasks that took place before and after work, which were necessary for the successful completion of productive labor.⁷⁴

Mancheski was a core maker for the American Steel Foundry. His work required the use of chemically treated sand in gas fumes, which caused severe eye irritation and could drive him from his work. The odor of gas and coke fumes clung to Mancheski's skin and hair, requiring that he always take a shower before he left his place of employment. Throughout the late 1930s and 1940s, Mancheski and other Congress of Industrial Organizations members continued to expand definitions of work to include their pre- and post-productive work activities.

The United Mine Workers of America and CIO would take largely similar approaches to defining work during World War II and the first couple years after. Collective bargaining played a major role in winning wages for portal-to-portal and non-productive work, though the UMWA, AFL and CIO used other means to gain workers' pay as well. The UMWA took their early definition of work from *Tennessee Coal, Iron and Fuel Co. v. Muscoda Local No. 123*, and

⁷⁴ *Portal-to-Portal Wages: Hearings on S.70, Day 4, Before the Senate Subcommittee of the Committee on the Judiciary*, 80th Cong. 240 (1947) (Statement of Stanley Mancheski, core maker for the American Steel Foundry). Many others in industrial labor described the necessity of their showers before the committee, including workers in core making, machine operators, steel operations and other industrial arts.

expanded definitions of work for metal miners to all mine labor. This expansion included an exact definition of where and when work began for miners and other non-mining employers, as the union petitioned the National War Labor Board and Supreme Court to affirm portal-to-portal time. The CIO would continue to pursue expanded definitions of work through the courts by using miners' arguments. In *Anderson v. Mt. Clemens Pottery Co.* (1946), the Supreme Court ruled in favor of the CIO, ruling that the FLSA covered travel time and non-productive work for all industrial workers. Building on miners' arguments, CIO members complicated the idea of travel time, given that travel for plant and factory workers was often quite different than travel for miners. The AFL, however, expanded the definition of work to its most encompassing definition, through claims based in collective bargaining and the free market. Though the AFL was skeptical of lawmakers and their attempts to curtail portal-to-portal pay, the AFL favored maintaining gains won through the judiciary for labor. AFL leaders recognized the positive effects of these lawsuits on organized labor, but ultimately favored collective bargaining over intervention by the federal government.

In this chapter I examine how organized labor responded to rapid changes in legal and judicial definitions of work. Beginning with *Tennessee*, the federal government played an active role by determining the parameters of the debate over work's definition. As definitions of work increasingly went up for grabs, organized labor did not respond uniformly. The United Mine Workers acted cautiously, imitating the language of the *Tennessee* decision to expand their claims to work. The American Federation of Labor used the conservative language of "free enterprise" between 1938 and 1947 to claim the most extensive definition of what wages could cover as work. The CIO, which brought the first "portal-to-portal" suit to the Supreme Court via

the International Union of Mine, Mill and Smelter Workers used similar claims as the UMWA, but ultimately distinguished themselves by pursuing back pay suits in the courts.

The *Tennessee* Decision

The *Tennessee* decision decided the FLSA was “humanitarian in nature,” and therefore should be interpreted broadly.⁷⁵ By 1943, the UMWA had adopted the arguments used in *Tennessee* which had been upheld twice by the United States Court of Appeals. The UMWA, now separate from the CIO, embraced the language of the International Union of Mine Mill and Smelter Workers developed in *Muscoda*.⁷⁶ Miners used Mine Mills’ language because of the similar nature of coal and iron mining. They claimed travel time as work, based on the argument that it required exertion, control by the employer, and because the work was for the employer’s benefit.⁷⁷

The UMWA’s first chance to use that language came before the National War Labor Board in 1943. Colonel Crampton Harris, who represented Mine Mill in *Tennessee* also represented the UMWA and used the same argumentative framework. Harris’ goal was to argue in favor of the agreement negotiated between the UMWA and Illinois coal operators, which gave miners \$1.50 for 90 minutes for travel time, as well as standards for overtime pay and back pay. Ultimately Harris was unsuccessful, because the National War Labor Board determined that overtime pay earned for waiting time and non-productive labor paid for what would have been earned through waged travel time.⁷⁸

⁷⁵ *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944).

⁷⁶ “‘If the Hazards of the Travel Period are Not Work, I Don’t Know What Work Is’ -Col. Harris,” *United Mine Workers Journal*, Aug. 15, 1943.

⁷⁷ *Ibid*; *Jewell Ridge Coal Corp. v. United Mine Workers of America*, 325 U.S. 161 (1945).

⁷⁸ “WLB Pettifoggers Prove Case of Labor Against Board in Anthracite and Bituminous Decisions,” *United Mine Workers Journal*, Nov. 1, 1943.

Harris made plain the similarities between iron and coal mining. In front of the board, Harris cited the lower court's decision in *Tennessee* saying, "if the hazards of the travel period are not work, I don't know what work is," emphasizing the mental toil involved with travelling to the mine face as well as echoing past concerns over safety and wages. He also quoted the Supreme Court's decision in front of the board, stating that, since standing and waiting had already been deemed work, then it must also be applied to coal miners. In his argument, he compared the two industries—iron mining and coal mining—contending that, if the two professions are subject to the same type of labor and hazards, then they should be waged in the same way. UMWA President John Lewis stressed the danger present in long workdays, blaming increasing mechanization and fatigue, noting that "deaths and injuries in the mining industry since Pearl Harbor exceed all casualties in the military forces."⁷⁹

The United Miner Workers Journal described the strenuous nature of travel as well. "He must crouch down while riding in mine cars and stoop over while walking in order to escape injuries from low roofs. He runs the risk of electrocution from unprotected electric cables and wires," the paper described. "He carried a six-pound lamp, his lunch and his drinking water for the day and picks up his sticks of powder and sometimes some of his tools as he goes from the portal to the face. Thus burdened, he walks in a stooped and uncomfortable position for distances varying from a thousand feet to five miles."⁸⁰

Harris and Lewis both highlighted their desire to avoid conflict with mine operators and reach a reasonable agreement on pay for travel time. "Nobody wants to destroy the coal industry in America. If there is any way whereby these miners and these operators can get together, it's the saving of the industry," Harris noted. His goal was to make peace with capital. He ultimately

⁷⁹ Ibid.

⁸⁰ Ibid.

accepted a 54-minute standard for portal-to-portal travel, although this was much shorter than many miners' daily travel. The 54-minute basis had been determined in 1933 by the federal government, though Lewis felt it very conservative, especially since mining activity had exploded since the start of the war.⁸¹ Harris and Lewis together presented a less-than radical basis for portal-to-portal pay which accentuated industrial peace and a willingness to compromise.

The UMWA's concession, while a gesture towards fairness, may also have been influenced by the public relations disaster the UMWA faced in 1943 after the nationalization of the coal mines.⁸² Miners had gone on wildcat strikes as early as July 1942, and by January 1943 Lewis became impressed with the zeal of the illegal strikers. During World War II the federal government and labor agreed to a "No-Strike Pledge," which had grown unpopular by 1943. In a bold rejection of the "No-Strike Pledge," miners struck several times (sometimes as wildcats and other times supported by the UMWA) against government controls to reduce wartime inflation. Ultimately, President Franklin Roosevelt nationalized the industry in May and again in November. This finally forced Lewis to the bargaining table with the National War Labor Board, where the UMWA demanded wages for portal-to-portal time.⁸³

After substantial criticism from the press and conservative legislators, Lewis agreed to concessions but achieved waged travel time. Lewis ultimately accepted a pay decrease from \$8.50 a day to \$8.125 a day, but the workday was lengthened from 7 hours to 8½ to account for

⁸¹ Ibid.

⁸² Melvyn Dubofsky and Warren Van Time, *John L. Lewis: A Biography* (Urbana and Chicago: University of Illinois Press, 1986). Chapter 18 "'Damn His Coal Black Soul': The Wartime Strikes, 1943," lays out this series of events. Dubofsky and Van Time go into great detail, emphasizing the role of the "Little Steel Formula" and more broadly, Lewis' sour relationship with Roosevelt.

⁸³ Ibid.

travel time.⁸⁴ Lunch, however, would be waged for half of the 30-minute period.⁸⁵ The evolution of the UMWA's agreement with Illinois coal operators and, later, the federal government now "assumed 45 minutes of travel time in each day; *provided, however*, that one and one-half this special travel time rate shall be paid to the mine worker for all travel time after 40 hours have expired in the week." While miners did not receive pay for their literal travel time, they instead received an estimate for what differed by mine.⁸⁶

The 54-minute travel time settlement lacked the quantitative background to appease miners. In response, President Roosevelt created a panel of industry and union members to study portal-to-portal time. In order to grasp the true extent of miners' travel time, the committee created and mailed out questionnaires to all UMWA miners via the *United Mine Workers Journal*. Miners and mine superintendents were directed to fill out questionnaires, with the results to be used as data for miners and mine operators to reach a wage agreement.⁸⁷

The questionnaires primarily sought to acquire information on time spent travelling to the place of work. At the top of the questionnaire, the form asked for the type of mine, name of the coal producer, mine name, and location. The questionnaire was then split into two sections, with the first requesting "Minutes of travel time – "Portal to Portal"" and the second "Minutes of outside travel time." In the first, miners were asked to list the time from the portal to the place of employment, and then again from employment to the portal, noting the number of men who made the trip. In the second section, miners were asked to list the time spent the starting place to the portal, and again from the portal to the starting place. Below there was a place where miners

⁸⁴ Dubofsky and Van Tine, *John L. Lewis*, 320.

⁸⁵ "Premise of "Portal to Portal" Pay Becomes an Established Fact by U.S.-U.M.W. Agreement," *United Mine Workers Journal*, Nov. 15, 1943.

⁸⁶ "Official Interpretation of Contract Provisions, Wage Rates, U.S.-U.M.W. Wage Agreement," *United Mine Workers Journal*, Dec. 1, 1943.

⁸⁷ "'Portal to Portal' travel Time Study Committee Ready to Send Questionnaire," *United Miner Workers Journal*, December 1, 1943.

could add information about their mine operation that might make it unique. The form also included categories for miners to provide their employment classification as a mine worker. Miners could either be defined as production men, described as “Piece workers and Day workers,” or non-productive day workers. The second category was created to include professions whose work took place outside of mines, and thus whose portal time could not be measured by their entering the mine portal or journey to the face.⁸⁸

The panel is indicative of the change in definitions of work for three major reasons. First, the committee gave a definition for portal-to-portal pay, defining anew where work started for coal miners. According to the questionnaire aid published in the *United Mine Workers Journal*, “time commences at the time the man-trip enters the portal (goes underground).” For slope and shaft mines, miners began portal time when they entered the underground as well. Travel time ended when productive miners reached the place where they would leave their belongings on their journey to the face, and for other mine employees when they reached their regular workplace. This development, shown in Chapter One, displays the break from waged labor being defined against hours worked, which was now being defined as labor performed or controlled. The committee created a new understanding of the moment where labor began, regardless of capitalist notions of productivity or the punch clock.⁸⁹

Second, the committee attempted to expand paid travel time to workers who had not yet been brought under the control of the Fair Labor Standards Act. The questionnaire aid used the example of a repairman in the mining industry, noting that someone in that employment would not have a standard place where they would collect their tools to perform work. The

⁸⁸ “Questionnaire on ‘Portal to Portal’ Travel Time,” *United Mine Workers Journal*, Dec. 15, 1943.

⁸⁹ “Here’s Committee Instructions on Compiling ‘Portal to Portal’ Travel Time Questionnaire,” *United Mine Workers Journal*, Dec. 15, 1943.

questionnaire stated that “their travel time shall be measured to the center of the area in which they perform their work. A repairman working at an inside shop has his travel time start at the portal and end at the entrance to the shop.” Such a definition gave all mine employees the ability to earn wages for travel time, a broad interpretation of the judicial decisions still winding their way through the courts. The UMWA interpreted the lower court’s decisions as applying to the mining industry, not only to actual miners. This consideration moved away from the idea that travel was worthy of wages because of its danger, and toward the notion that it was a necessity of labor and under the control of the employer. Mine employees, like repairmen, were formally distinguished from miners in the survey and categorized as “Non-Productive Day Workers,” as opposed to the “Production Men” who were defined as piece miners.⁹⁰

Third, as noted in the definitions of labor types in travel time, the mine distinguished between productive and non-productive labor types. The questionnaire used the categories of “productive” and “non-productive” labor created by the Supreme Court in *Tennessee*, which compared miner’s work to its value according to capital accumulation. As an example, the questionnaire defined repairmen as non-productive laborers, despite the vital nature of their work maintaining equipment and transporting coal from the mine face to the surface where it could be sold. The UMWA’s attention to the distinct categories of productive and non-productive labor would continue as a tool for categorizing work. These categories would be adopted later by conservative legislators and businessmen to curtail expanded notions of work after the end of World War II, as I will show in Chapter Three.

The committee’s official findings varied widely. Nonetheless, it established an average travel time of 55.29 minutes, with travel times ranging from “below five minutes to 3 hours and

⁹⁰ Ibid.

3 minutes.” Travel time in early reports indicated the highest times occurred in Western Pennsylvania, with the average clocking in at 61.24 minutes. The lowest travel time was among Illinois miners, where just under 49 minutes was spent in transit.⁹¹ The committee finally reached a conclusion by mid-1944 on a portal-to-portal time of 57.29 minutes, though miners faced complications in receiving wages for the newly established travel time due to existing collective bargaining agreements.⁹²

By 1944, the UMWA watched carefully as the Supreme Court heard arguments for *Tennessee*. Crampton Harris repeated many of the arguments he made before the National War Labor Board for the UMWA, claiming that miners worked when they travelled, given the danger and injury suffered climbing into skiffs and during travel. Harris also argued that any calls to custom on the part of the employer were fundamentally flawed, because the FLSA had changed collective bargaining negotiations substantially. Collective bargaining agreements prior to the FLSA, one way or another according to Harris, were subject to coercion in some way.⁹³

Associate Justice Murphy agreed with Harris’s argument in the Supreme Court’s decision because custom had too “turbulent and discordant a history” for it to be the basis of collective bargaining. Murphy wrote that relying on custom could mean agreeing to terms of work that violated standards in the FLSA, like minimum wage, and therefore could not be the basis of collective bargaining.⁹⁴ The UMWA characterized the *Jewell Ridge* decision, which expanded portal-to-portal pay to coal miners as forced by the coal and steel industries. The UMWA filed

⁹¹ “Partial Travel-Time Report of Bituminous Mines Shows Average of 55.29 Minutes,” *United Mine Workers Journal*, Feb. 15, 1944.

⁹² “Final Report of Travel-Time Committee Shows Average Travel Time of 57.29,” *United Mine Workers Journal*, June 1, 1944.

⁹³ “Iron Ore ‘Portal to Portal’ Suit Argued Before Supreme Court; May Set Precedent for Coal,” *United Mine Workers Journal*, Feb. 1, 1944.

⁹⁴ *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944).

the suit as protection against the possibility of proactive legislation on the part of coal operators. Miners thought the declaratory judgement necessary in case the *Tennessee* decision favored the metal miners, that way coal operators could not prematurely snuff out portal-to-portal claims in coal fields.⁹⁵ Both mine owners and labor understood the wide-ranging effects that *Tennessee* could have.

UMWA Secretary Thomas Kennedy and member of the President's Committee, felt the *Tennessee* decision should be applied to the bituminous coal industry. In an open letter to President Roosevelt, Kennedy wrote, "Counsel advises us that the circumstances in the coal mining case parallel those of the iron ore case, and it is a safe assumption that the same principle should apply in the coal case."⁹⁶ When *Jewell Ridge* reached the Circuit Court of Appeals in July, the *United Mine Workers Journal* printed: "The U.M.W.A. argument was based upon the fact that travel time in a coal mine is the same thing as travel time in an ore mine and that U.S. Supreme Court in the *Tennessee Coal and Iron* case, had ruled that such time in ore mines must be counted as part of the work week under the Fair Labor Standards Act."⁹⁷ So similar were the arguments that the UMWA and their attorneys in *Jewell Ridge*, were proposing that they only need reiterate their similarity in profession to that of Muscoda's metal miners.

The UMWA and John Lewis were conflicted by how to balance collective bargaining strategies with litigation. The UMWA fully embraced the arguments successfully made by Mine Mill. Coal miners also echoed the same connections between danger and wages, which Mine Mill was arguing by May 1943. Still, the *United Mine Workers Journal* printed headlines like

⁹⁵ "Attorneys for the UWMA Ask Supreme Court For Writ of Certiorari to Speed the Decision in Jewell Ridge 'Portal' Case," *United Mine Workers Journal*, May 1, 1944.

⁹⁶ "Kennedy Protests Filing of Second Partial 'Portal' Time Study Based on 'Half-Truths,'" *United Mine Workers Journal*, May 1, 1944.

⁹⁷ "Jewell Ridge 'Portal to Portal' Case Before U.S. Circuit Court of Appeals," *United Mine Workers Journal*, July 15, 1944.

“Lewis Declares That No Other ‘Formula’ Can Succeed ‘Collective Bargaining’ in America” in 1945. Lewis still embraced the language of collective bargaining as the right of “free peoples,” although he had undeniably lent credence to using legal infrastructure. Lewis made collective bargaining a primary focus of his March 1946 address to the National Joint Wage Conference.⁹⁸

By 1945, the UMWA targeted an unpaid 15-minute period referred to as “lunch time,” on the grounds that the “employee is on the premises of the coal company.” In addition, miners argued that employees at lunch were still subject to the same hazardous physical and breathing conditions. Miners took their lunch below the surface, eating near the mine face. Miners argued for this paid time and compared their bodies to machines, saying that “they stop merely because the requirements of nature compel them to absorb some fuel, just the same as you feed the boiler...” To them lunch was not a convenience or a break but a necessity due to the exhausting nature of coal mining.⁹⁹ During the 1945 National Bituminous Coal Wage Conference, the UMWA received pay for lunch and travel time on an overtime basis for anthracite miners, and with bituminous miners achieving lunch pay later that year, thus expanding their definition past that of Mine Mill.¹⁰⁰

The UMWA’s relationship with litigation was conflicted. Prior to *Tennessee*, the UMWA had not openly voiced a desire for portal-to-portal pay. But through Mine Mill’s legal endeavors and the UMWA’s own in *Jewell Ridge*, the UMWA increasingly relied on means beyond collective bargaining to achieve greater benefits for their union. This is not to say that portal-to-

⁹⁸ “Lewis Declares That No Other ‘Formula’ Can Succeed ‘Collective Bargaining’ in America,” *United Mine Workers Journal*, Mar. 15, 1945; “Text of President Lewis’ Speech to Joint Conference in Support of UMWA Demands,” *United Mine Workers Journal*, Mar. 15, 1946.

⁹⁹ “Lewis Declares That No Other ‘Formula’ Can Succeed ‘Collective Bargaining’ in America,” *United Mine Workers Journal*, Mar. 15, 1945.

¹⁰⁰ “National Bituminous-Coal Wage Agreement Executed in Washington, D.C., April 11, 1945,” *United Mine Workers Journal*, Apr. 15, 1945; “Bituminous Contract Given Govt. Approval; Anthracite Disagreement Certified to W.L.B.,” *United Mine Workers Journal*, May 1, 1945; “Illinois Agreement on Disputed Wage Issues Accepted as Basis for Bituminous Industry,” *United Mine Workers Journal*, August 15, 1945.

portal was entirely won through the courts or federal government (in the case of the National War Labor Board). Portal-to-portal pay was still negotiated by Lewis and other UMWA officials in step with court ruling on non-productive pay. By March 1946 Lewis openly discouraged UMWA lawsuits after the Supreme Court heard *Jewell Ridge*. He argued that it was unfair to sue coal operators who engaged in collective bargaining since it would betray the good faith by which both sides had negotiated. Additionally, Lewis showed concern over the costs of portal-to-portal back pay.¹⁰¹

The CIO Claims “Work”

After the two labor victories in the Supreme Court for Mine Mill and the UMWA, the CIO United Pottery Workers local in Mt. Clemens, Michigan attempted to expand the definition of work further. Steve Anderson, President of UPW Local 1083, the plaintiff in *Anderson v. Mt. Clemens Pottery Co.*, worked in a pottery plant and claimed that wages for travel time and non-productive labor should be extended to all industrial workers. In a 5-2 decision, the court echoed the *Tennessee* and *Jewell Ridge* decisions and maintained that control over employees was paramount in determining whether an individual was at work or not.¹⁰²

The decision affirmed that travel time fell beneath the scope of control in manufacturing plants. Beyond reiterating the importance of employer control, the court recognized that Mt. Clemens Pottery expected their employees to “punch in, walk to their work benches, and perform preliminary duties during the 14-minute periods preceding productive work; the same activities in reverse occurred in the 14-minute periods subsequent to the completion of productive work.”

¹⁰¹ “Text of President Lewis’ Speech to Joint Conference in Support of UMWA Demands,” *United Mine Workers Journal*, Mar. 15, 1946.

¹⁰² *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

These activities counted as work worthy of compensation because of the necessity of this non-productive labor to a productive day's work.¹⁰³

Where the *Anderson* case diverged, however, was on the principle of travel time. Miners travelled in mines on lifts before the start of productive labor, while pottery workers took no such transport to get to the place of productive labor. Instead, pottery workers walked on the shop floor to their stations under their own power, giving them a small measure of control over their travel time. Nonetheless, the Supreme Court “recognized that time clocks do not necessarily record the actual time worked by employees,” creating room for travel time to be paid.¹⁰⁴ The pottery workers' travel time was included as work, despite workers traveling under their own power to work stations. Travel did not have to be physically controlled, as was the case with miners. It only had to be required from the punch-in location to the work station. Finally, the judiciary recognized that there could be an eight-minute difference between the first person to punch to operate the punch clock at the start of a shift and last during the 14-minute pre-work period. Eight-minutes at the beginning and end of shift, taken over an entire year's worth of labor totaled just over 69 hours of uncompensated time lost.¹⁰⁵

The courts also expanded the meaning of non-productive labor. In the case of the miners in *Tennessee* and *Jewell Ridge*, non-productive labor included travel time and the time necessary to set up equipment to make mining possible. This work was unavoidable for productive mining activities to take place, since without the proper setup of a drill, coal could not be extracted from the mine's face. The court in *Anderson* ruled that activities such as “putting on aprons and overalls, removing shirts, taping or greasing arms, putting on finger cots, preparing the

¹⁰³ Ibid.

¹⁰⁴ Numbers and math based on information given in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

¹⁰⁵ 16 minutes a day over 260 workdays comes to 69.33-hours of work. This assumes a five-day workweek.

equipment for productive work, turning on switches for lights and machinery, opening windows, and assembling and sharpening tools” was work as well through the same logic.¹⁰⁶ Non-productive labor was necessary for a productive workday, and extended to tasks as small as flipping light switches and opening windows.

The CIO was a relative latecomer to portal-to-portal conflicts. Though Mine Mill and the UMWA were members of the CIO when Muscoda Local No. 123 first engaged legal proceedings in 1939, the CIO did not pursue portal-to-portal pay with zeal. But by the end of 1946, after the *Anderson* decision and the midterm elections, the CIO became highly active. Previously, the CIO had dealt with portal-to-portal activity on more localized scales only.

The CIO primarily took their meaning of work first from Wage Administrators, later adopting the stance of court decisions. Beginning with the first interpretive ruling of the office in July 1939, the CIO recognized time on duty as payable time, regardless of when employees punched in to begin their shift. The Wage Administrator began to include specific activities around 1940, which included oiling machines, unloading materials from vehicles, transportation (if there was no alternate means of travel), and washup time for work with hazardous materials. By 1941, the CIO began to align themselves with the rulings of lower courts as *Tennessee* made its way through to the Supreme Court, later following rulings in *Jewell Ridge* and *Anderson*.¹⁰⁷ For example, workers of the Industrial Union of Marine and Shipbuilding Workers, a CIO union, were granted pay for travel time by August 1943, earning pay for an hour into and out of the workplace per the National War Labor Board.¹⁰⁸

¹⁰⁶ *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

¹⁰⁷ *Steve Anderson, et. al., v. Mt. Clemens Pottery Company*, Civil Action No. 2582. (E.D. Mich. 1946), *aff'd* S.C. 328 U.S. 680 (1946). GMMA, Information Department CIO, AFL-CIO 1937-1995, Series 1, Box 64, Folder Bound, p. 8-11.

¹⁰⁸ “U.M.W.A. Approach to Selling Idea of ‘Portal to Portal’ Pay May Be Faulty,” *United Mine Workers Journal*, Sept. 15, 1943.

Although the CIO officials wanted back pay in full, they expressed their desire to compromise in certain situations. Van A. Bittner, a UMWA member who remained with the CIO after the miner's union left, acknowledged in the public press that certain companies would be bankrupted if required to pay for travel and other types of non-productive labor, and that in those cases the CIO would compromise with businesses on what would be paid to union members.¹⁰⁹

After the *Anderson* decision, the CIO concluded portal-to-portal pay was not just for miners, but for all industrial workers. "Make-ready" time was covered, and this time was considered "hours worked," and therefore constituted a wage. Specifically, the time between punching in and walking to the work station was compensable time for industrial workers, though punching in did not need to occur before make-ready time. Lee Pressman, the general counsel of the CIO, interpreted the decision to mean that only time where workers were required to use a "substantial measure of his time and effort" should be waged, whereas menial tasks were ineligible.¹¹⁰ The CIO framed the *Anderson* decision as a natural extension of the prior decisions made by the Supreme Court in *Tennessee* and the National War Labor Board.¹¹¹

Stanley Mancheski described his make ready time as a core maker in detail for the Senate Subcommittee. The committee had begun to consider reforming portal-to-portal wages in early months of 1947, holding hearings to collect information from workers, business and lawyers. Mancheski described his labor, which began when he arrived at the plant at 6:15 a.m. and changed into his work clothes. He clocked in at 6:31 a.m. and then needed to find his foreman to find what his day's work would entail, necessitating he waited until receiving instructions before

¹⁰⁹ "Statement of Senator Homer E. Capehart of Indiana Before a Subcommittee of the Senate Judiciary Committee Holding Hearings on S.49," GMMA Legislative Reference Files, Box 18, Folder 39, 10.

¹¹⁰ Congress of Industrial Organizations, "For Release 6:00 P.M., EST, Saturday, January 4, 1947," January 4, 1947. GMMA, Information Department CIO, AFL-CIO 1937-1995, Series 1, Box 64, Folder Bound, 30.

¹¹¹ Lee Pressman, "New Congress Threatens to Knife Portal Claims," *Union News Service*, December 30, 1946. GMMA, Information Department CIO, Union News Service, reel 1.

he could set up his machinery and tools. This required that he oil machinery, ready air hoses, collect rods, nails and spray all before 7 a.m. when the whistle blew, and paid work began. When questioned by the committee if he could come at 7 a.m. at the beginning of the waged day, Mancheski replied that he could, but that he had to arrive at 6:15 a.m. in order to be ready to begin “productive labor” with the rest of the plant at 7 a.m. when the workday officially started.

Mancheski worked with silica flour, pitch, and linseed oil as a coremaker, which he described as “dirty and greasy” in an environment “full of gas and coke fumes so that I take a shower when I go off the clock.” Throughout his testimony, Mancheski emphasized the unpleasant and toxic nature of core making, describing instances where he had to leave his place of work because of his inability to stand the fumes.¹¹²

The CIO further backed their claims to wages for non-productive labor more generally by comparing industrial work to other modes of employment where wages were earned while not actively engaged in productive activity. In a more pointed example, the *Union News Service* pointed out that “Members of Congress get 20 cents a mile, in addition to salary, while travelling all over the country to and from work.” The CIO even pointed to corporate executives, who received salary “even while on the golf links or in Florida.”¹¹³

Unlike Congressional travel or a day at the golf course for CEO’s, CIO members expressed that their non-productive labor was not innocuous or pleasurable. The United Steel Workers described travel through a steel plant not as a “pleasant and leisurely stroll.” Instead, it was a place dominated by “overhead cranes and cables, railroad and dinky crossings... a world

¹¹² *Portal-to-Portal Wages: Hearings on S.70, Day 4, Before the Senate Subcommittee of the Committee on the Judiciary*, 80th Cong. 240-242 (1947) (Statement of Stanley Mancheski, core maker for the American Steel Foundry).

¹¹³ Len De Caux, “Looking Ahead,” *Union News Service*, January 27, 1947. GMMA, Information Department CIO, Union News Service, reel 1.

of hazards,” all of which was time where steel workers were subject to company rules.¹¹⁴ United Steel’s emphasis on attention in the workplace and the mandatory nature of following company policy within those spaces harkened back to claims miners had used with regard to the connection between dangers of work and wages. The CIO further used the language of “employer liability” to bolster their claims to wages in these spaces.¹¹⁵ The CIO argued pay for non-productive labor had wide scale precedent.

Even still, travel time for CIO workers was especially amorphous compared to portal-to-portal travel in mines. In mines, employees would be lowered by skiff, transported by conveyance or cage with few alternatives. Factory and plant jobs required different ways of travel into the workplace, and complicated judicial precedent. The experience of J.J. Pickeral, a member of the Textile Workers Union of America is representative of the varied nature of industrial plant travel. Pickeral and his local had attempted to negotiate portal-to-portal pay for a mandatory 5/8th of a mile walk from the company parking lot, across a local highway, to the company gate which totaled 12-minutes of travel at a “fair pace.”¹¹⁶ During World War II, Pickeral and the local had attempted to get the employer to build a parking lot closer to the company gate (on company owned property) or to have buses drop-off employees there, but both proposals were rejected. Pickeral travelled without pay for 24 minutes a day, to and from company property. Though not exactly the hazardous travel described by steel workers in their plants, Pickeral noted that travel time along with other mandatory activity, like changing clothes and mandatory conversations with workers from the shift prior (so that production of rayon

¹¹⁴ “Dry Those Portal Tears,” *Union News Service*, February 10, 1947. GMMA, Information Department CIO, Union News Service, reel 1.

¹¹⁵ *Ibid*, Steve Anderson, et. al., v. Mt. Clemens Pottery Company, Civil Action No. 2582. (E.D. Mich. 1946), *aff’d* S.C. 328 U.S. 680 (1946), 2.

¹¹⁶ *Portal-to-Portal Wages: Hearings on S.70, Day 4, Before the Senate Subcommittee of the Committee on the Judiciary*, 80th Cong. 269-275 (1947) (Statement of J.J. Pickeral, Representing the Textile Workers Union of Front Royal, VA.).

would not be interrupted) added up to more than the eight-hours waged. When told by Senator Homer Capehart of Indiana, one of the authors of the Portal-to-Portal Act of 1947, that Pickeral should be thankful for his job and the employment the plant brings, he replied, “we do not see why we should suffer undue hardship.”¹¹⁷

In addition to defending wages for unproductive labor, the CIO challenged the definition of non-productive labor all together. Lee Pressman rhetorically asked Senate Subcommittee, “Are the men who sharpen and repair the tools in any establishment to be regarded as doing work which is less ‘productive’ than the men who use the tools?” Pushing his point further, he argued, “If we are in agreement that the men who repair the tools do a category of work which is directly contributive to the ultimate output of the factory, then what difference can possibly be contended to exist between the work of these men and the situation where the employer fails to hire separate and special tool sharpeners and tool repairmen but requires the user of the tools to come to work ahead of his normal shift to prepare and sharpen his own tools.”¹¹⁸

Pressman’s comparison of task to job displayed in stark terms how employers were able to require extra work from employees without paying them for that labor, a framework that enabled business owners to require unpaid labor of their employees. If an employer hired a repairman, their labor would undoubtedly be paid, yet, if the employer required a worker to come in and do the same labor to prepare for the individual’s productive workday, that labor had not been compensable until *Anderson*.

¹¹⁷ *Portal-to-Portal Wages: Hearings on S.70, Day 4, Before the Senate Subcommittee of the Committee on the Judiciary*, 80th Cong. 273 (1947) (Statement of J.J. Pickeral, Representing the Textile Workers Union of Front Royal, VA.).

¹¹⁸ Congress of Industrial Organizations, “Testimony of Lee Pressman, General Counsel, Congress of Industrial Organizations, Before Subcommittee of Senate Judiciary Committee on S. 49 and S. 70, To Be Presented January 18, 1947,” GMMA, Information Department CIO, AFL-CIO 1937-1995, Series 1, Box 64, Folder Bound, 5.

Where the CIO differed from the UMWA and AFL was through the mass use of litigation by affiliated unions. The United Steelworkers made heavy use of litigation, distributing literature to union members encouraging them to “SAVE YOUR PORTAL-TO-PORTAL BACK PAY.” Published in December 1946, the literature urged steelworkers to sign “authorization for suit to be filed for the recovery of Back Pay for Portal to Portal Time you have earned since 1938.” The United Steelworkers emphasized that back pay suits were a union action, asserting that if authorization was given to the union to pursue legal action then back pay could be saved.

The language was crafted by Al Whitehouse, the USA-CIO director for District 25 and deviated from the UMWA and AFL. Whitehouse encouraged workers to file suit not only to secure back pay and damages, but also with a sense of urgency given the incoming, conservative 80th Congress. Whitehouse asserted that “‘make ready’ work and the travel time must now be accounted for as hours worked in excess of the lawful work-week, and therefore, must be paid for at the rate of time and one half.” The Steelworkers portal-to-portal literature highlighted both the supposed ease of qualifying for back pay and the implication that it “must now be accounted for.”¹¹⁹ The Steelworkers open courting of union members to file portal-to-portal suits stands in stark contrast to the UMWA, which utilized the language of *Tennessee* and favored only limited legal action. In front of the House Subcommittee on the Judiciary Committee in February 1947, the United Steelworkers attempted to explain their attempts to gather back pay as simply informing union members of their right to sue for back pay. The Secretary-Treasurer David J.

¹¹⁹ United Steelworkers of America, USA-CIO, “ACTION NOW WILL SAVE YOUR PORTAL-TO-PORTAL BACK PAY.” Eastland Collection, Box 2. December 21, 1946. 1-2. Archives and Special Collections, University of Mississippi, James O. Eastland Collection, File Series 4, Subseries 9, Box 2, Folder 1.

McDonald told the Subcommittee the union would have been remiss to not advise Steelworkers of their rights.¹²⁰

The United Steelworkers made good on their threats of litigation. By February 1947, the steel industry faced around one billion dollars in suits for portal-to-portal and non-productive pay.¹²¹ One billion dollars made up one quarter to one fifth of the entirety of portal-to-portal suits nationwide and totaled more the entire industry's current holdings, according to members of the steel industry.¹²²

Collective Bargaining and the American Federation of Labor

While the United Mine Workers embraced the language of *Tennessee* in collective bargaining and the CIO pursued litigation, the American Federation of Labor grappled with portal-to-portal pay in an entirely different way. In order to grasp this change, and the unique way the AFL came to understand the changing definition of work, it is necessary to begin with the AFL's response to the Fair Labor Standards Act.

With the passage of the Fair Labor Standards Act in 1938, the AFL remained firmly entrenched in the rhetoric of the eight-hour day. The AFL approved of the 40-hour workweek in 1938, and supported a minimum wage with reservations surrounding who could dictate that wage

¹²⁰ *Portal-to-Portal Wages: Hearings on H.R. 584 and H.J. Res. 91, Day 3, Before the House Subcommittee No. 2 on the Committee on the Judiciary*, 80th Cong. 101-103 (1947) (Statement of David J. McDonald, Secretary-Treasurer, United Steelworkers of America).

¹²¹ Judiciary Committee (1947), Fair Labor Standards Act. Box 1, Folder 8. Charles R. Hook testimony, James. E. Eastland Collection. P. 5

¹²² *Portal-to-Portal Wages: Hearings on H.R. 584 and H.J. Res. 91, Day 1, Before the House Subcommittee No. 2 on the Committee on the Judiciary*, 80th Cong. 10 (1947) (Statement of Milton Smith, Assistant General Counsel of the United States Chamber of Commerce); *Portal-to-Portal Wages: Hearings on H.R. 584 and H.J. Res. 91, Day 3, Before the House Subcommittee No. 2 on the Committee on the Judiciary*, 80th Cong. 146 (1947) (Statement of Lee Pressman, General Counsel, CIO).

from the federal government.¹²³ The AFL commented “it is no longer safe to permit a Government Board of that kind or a similar administrator to make the many determinations necessary in the administration of Fair Pay legislation,” feeling more comfortable to leave such action in the hands of collective bargaining. Therefore, the AFL recommended Congress set a maximum workweek of 40-hours but allow collective bargaining to dictate the minimum workweek.¹²⁴ Such an uneasy relationship with the growing New Deal state would define the AFL when it came to determining work and changing conceptions of work.

The AFL’s Information and Publicity Service defined work in a limited capacity in their recommendation to Congress and the President. The only type of work defined was “Emergency Work,” which was conceived as “any work necessary for the protection or preservation of life or health.” Further provisions included protection and prevention of damage to property so to avoid disruption of business. Still, the AFL version of the bill codified the eight-hour day, 40-hour week and a 40 cent an hour minimum wage. Work for the AFL was still very much tied to the premise of the productive labor that occurred during the eight-hour day.¹²⁵

Despite a more conservative reputation, AFL representatives supported early portal-to-portal victories. In 1943, George Meany (who became President of the AFL in 1952) and another AFL representative dissented after the War Labor Board rejected a waged travel time agreement between the UMWA and Illinois coal operators. They agreed that double-standard between metal

¹²³ American Federation of Labor Information and Publicity Service, “Bill for Wages and Hours Recommended by American Federation of Labor (together with analysis thereof),” 3-4. GMMA, Artificial Collections, Box 16, Folder 3, Fair Labor Standards Act, 1937-1969.

¹²⁴ *Ibid*, 7-9.

¹²⁵ Fair Labor Standards Act, S.2475, 75th Cong. (1938), 3-4. GMMA, Artificial Collections, Box 16, Folder 3, Fair Labor Standards Act, 1937-1969.

mining and coal mining ought to be ended, and that during “‘portal to portal’ time a miner was at work.”¹²⁶

AFL representatives argued that the UMWA had a right to portal-to-portal pay, but not because of the Fair Labor Standards Act as miners had argued. Instead, they rested their dissenting opinion on the idea that travel pay was “a right.”¹²⁷ AFL representatives based this upon the precedent set in *Tennessee*, condemning the notion that iron miners could receive wages for travel when other miners could not. The AFL representatives likewise cited the presence of employer control of the employee as a fundamental principle in determining wages and stressed the role of hazards miners faced.¹²⁸

The AFL further argued that travel was working time in the union’s dissent, rhetorically asking, “Does the proposed wage result in the workers’ receiving more money for the same amount of work?”¹²⁹ The AFL stated, “All travel time is work time. All work time is ‘productive’ time.” The AFL came to this conclusion because the agreement was collectively bargained. The AFL based its opinion on the agreement’s validity, and therefore the definition of work on the presence of collective bargaining. Comparatively, the CIO’s dissent from the majority opinion was based their claims on the work’s productive capacity, and not in the sanctifying powers of collective bargaining.

AFL representatives claimed that coal mining was more dangerous than metal mining and drew on international comparisons. They argued that coal miners faced more hazardous conditions because of the risk of gas explosions in coal mines. The AFL further backed the cause

¹²⁶ “Woll, Meany Condemn “Double Standard” System, Insist Miners Be Paid for Travel Time” *United Mine Workers Journal*, October 1, 1943.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ “Woll, Meany Condemn “Double Standard” System, Insist Miners Be Paid for Travel Time,” *United Mine Workers Journal*, October 1, 1943.

of miners citing international precedent for portal-to-portal pay, as wages for travel existed in Great Britain, Belgium, New Zealand and Poland existed. In France, Czechoslovakia and India travel time was included as a part of the workday. From both the AFL's description of miner's labor and their international perspective on the mining industry, the craft union had begun to change from associating work with hours to tasks performed.

Looking backwards from 1950, the AFL justified their stance on the legislative developments of the 1940s. Writing in *The American Federationist*, AFL legal counsel argued that "Although union efforts over the years have been directed primarily to securing improvements in wages through the process of collective bargaining, and although most of the advances in that direction have come through that method, labor has actively supported legislation when such action would serve to strengthen the collective bargaining process."¹³⁰ The AFL's legal counsel interpreted the federal government's role as setting the floor for negotiations on the shop floor for collective bargaining agreements.¹³¹

The AFL staked out a tenuous position on portal-to-portal wages when Congress began to seriously consider legislation in early 1947. With both the House of Representatives and Senate considering bills to curb claims to back pay, the AFL found space between the CIO and UMWA's understanding of work and the conservative position of Congress. The 80th Congress, seated in January 1947, was part of the postwar wave of conservative political leadership best known for passing Taft-Hartley and the Marshall Plan, and rejecting President Harry Truman's Fair Deal.

¹³⁰ J. Albert Woll, James A. Glenn and Herbert S. Thatcher, "The New Wage and Hour Law," *American Federationist*, April 1950, 14,28. GMMA, Artificial Collections, Box 16, Folder 3, Fair Labor Standards Act, 1937-1969.

¹³¹ *Ibid.*

The AFL emphasized collective bargaining as the essential remedy for back pay claims. “Most A.F. of L. affiliates have preferred to present their claims directly to the employers concerned,” the union’s research service found, noting that many affiliated unions had “successfully negotiated these questions” with management. According to the AFL, the issue of portal-to-portal wages first came to their attention when the United Mine Workers first agreed to travel wages through collective bargaining. Prior to that, “time worked” was generally held to mean productive labor.¹³²

Due to the *Anderson* decision, the AFL expanded wage labor to include physical exertion, mental exertion, and exertion controlled for the benefit of the employer. The Supreme Court included travel time, changing clothes, checking equipment, medical examinations, the generation of reports for the employer as well as “preparatory and finishing-up” time needed to begin and end a shift.¹³³ Paid lunch could be expected after 10-hours of work (with the lunch paid for by the company), time when inventory of tools occurs, voting time, pay for time between split shifts, jury duty and draft board visits.¹³⁴ This covered many different occupations organized by the AFL, like carpenters who needed time to share and sharpen tools, travel to dark rooms in photographic work, and bus operators who must prepare buses for travel.¹³⁵ Most of the provisions for what could be waged as work were built of off concepts of necessity, like jury duty, or control by the employer in the case of split time pay.

¹³² Research and Information Services, American Federation of Labor “Statement on Travel Time,” January 14, 1947. GMMA, Artificial Collections, Box 46, Folder 9, Fair Labor Standards Act, 1937-1969.

¹³³ *Ibid.*, 2.

¹³⁴ *Portal-to-Portal Wages: Hearings on H.R. 584 and H.J. Res. 91, Day 3, Before the House Subcommittee No. 2 on the Committee on the Judiciary*, 80th Cong. 93-100 (1947) (Statement of Walter J. Mason, National Legislative Representative, American Federation of Labor).

¹³⁵ “Statement of Walter J. Mason, National Legislative Representative of the American Federation of Labor Before the Senate Judiciary Committee Washington D.C.,” January 17, 1947, 5-6. GMMA Legislative Reference Files, Box 18, Folder 39.

Wages for controlled time, where the controlling entity was the government, necessitated the AFL reconsider its relationship with the federal government and work. The AFL quickly understood what legal decisions meant for labor and realized that the AFL needed a working relationship with state. The concept of “control” became more wide-ranging for the AFL. Tasks like jury duty, voting or draft board service which did not benefit the employer were considered payable because they controlled the employee during time where they would otherwise be at work.¹³⁶

The AFL likewise considered the power these decisions carried about back pay. *Jewell Ridge* had given miners the ability to sue for back wages going back as far back as was legal in each individual state. UMWA members, for example, sued for back pay from Dow Chemical in Midland, Michigan, and received \$34,656,000, which the UMWA estimated would be \$2,000 per employee for the period between 1940 to 1946. Such a figure, embedded in an AFL legal report serves as marker within the rest of the abstract statement that the impact of a settlement could have not only on workers, but on capital as well. These wages, to be paid at time-and-a-half, could be settled through collective bargaining when agreements expired between unions and management, according to the AFL.¹³⁷

Interestingly, the AFL left room for their own workers to bring suits, despite their emphasis on collectively bargained agreements. Employees who received back wages through collective bargaining, which did not constitute the whole of what the employee was owed by the company, did not legally bind the employee from suing for the remainder. AFL union members could indeed sue for back wages. While unions bargained for the collective good, they did not

¹³⁶ *Portal-to-Portal Wages: Hearings on S.70, Day 3, Before the Senate Subcommittee of the Committee on the Judiciary*, 80th Cong. 147-153 (1947) (Statement of Walter J. Mason, National Legislative Representative of the American Federation of Labor).

¹³⁷ “Regulating the Recovery of Portal-to-Portal Pay Suits, And For Other Purposes,” 2-3.

have a right to take away an individual's right to use litigation, leaving room for individual employees to claim pay. Not surprisingly, the AFL encouraged locals to get employees to sign settlements to make them legally binding.¹³⁸

The internal research report generally approved of the achievements made by portal-to-portal suits. Higher pay would undoubtedly improve the material conditions of workers, and if employers wanted to remain profitable, they would find ways to reduce travel and other necessary non-productive labor. Using the language of the free market, higher wages would force employers to “compete in efficiency of management, thus securing for society at large the many advantages of constantly improved methods of production.” Portal-to-portal pay, although won in large part through the court system, would benefit the American worker, according to the AFL, because it demanded higher efficiency and competition among industrial employers.¹³⁹

While the internal reports on travel time approved of gains won through the courts, the AFL President William Green publicly embraced collective bargaining. In a January 1947 letter from Green to the presidents of all AFL national and international unions, he acknowledged that many back-pay suits were currently working their way through the court system, although few belonged to the AFL. According to Green, “what constitutes time worked for the purpose of figuring straight-time and overtime compensation can be determined by labor and management over the bargaining table,” determining that whatever work was it was to be decided by labor and business through collective bargaining. To go to court, and favor litigation would be “inconsistent with the mutual rights and responsibilities established by employers and unions

¹³⁸ Research and Information Service, American Federation of Labor, “Travel Time: What Is It? Statement on Travel Time,” *International Molders' and Foundry Workers' Journal*, 76. GMMMA Legislative Reference Files, Box 18, Folder 39.

¹³⁹ *Ibid.*, 4.

through private contract and free society.”¹⁴⁰ John Frey, President of the Metal Trades Department, released a statement the day prior to Green’s also claiming that lawsuits “violate a basic principle of collective bargaining,” emphasizing that “existing collective agreements must not be dishonored.”¹⁴¹ Both Green and Frey had penned letters to AFL unions formally discouraging the use of suits, with Frey acknowledging that when employers entered into agreements with labor, they had planned pay with a certain profit margin in mind that could be entirely erased by new demands while under a bargaining agreement.¹⁴²

The AFL heavily embraced the language of collective bargaining. In front of the House Subcommittee, the union’s National Legislative Representative Walter J. Mason reiterated Green’s public comments, submitting parts of Green’s letter into the Congressional record. Without collective bargaining, there would be industrial chaos Green argued, pointing to collective bargaining agreements which included non-productive labor as waged work as being the product of those agreements.¹⁴³

Still, Green walked a fine line between supporting the gains won by workers, and what should be owed to industrial workers out of fairness and obligation to them. His overarching argument was that wage labor had to flow through collective bargaining. When directly questioned by Representative John Gwynne of Iowa on whether he agreed with the *Jewell Ridge*

¹⁴⁰ William F. Green, “To Presidents of All National and International Unions,” January 14, 1947, 1. GMMA, Artificial Collections, Box 46, Folder 9, Fair Labor Standards Act, 1937-1969.

¹⁴¹ *Portal-to-Portal Wages: Hearings on H.R. 584 and H.J. Res. 91, Day 3, Before the House Subcommittee No. 2 on the Committee on the Judiciary*, 80th Cong. 74 (1947) (Statement of Walter J. Mason, National Legislative Representative, American Federation of Labor).

¹⁴² John P. Frey and William Green, “Suits for Portal-to-Portal Pay Violates a basic Principle of Collective Bargaining,” January 13, 1947. GMMA Legislative Reference Files, Box 18, Folder 39. The pages in the is letter are listed as 1, 2 and 2 but are three distinct pages.

¹⁴³ *Ibid*, *Portal-to-Portal Wages: Hearings on H.R. 584 and H.J. Res. 91, Day 3, Before the House Subcommittee No. 2 on the Committee on the Judiciary*, 80th Cong. 75-76 (1947) (Statement of Walter J. Mason, National Legislative Representative, American Federation of Labor).

decision, Mason admitted that while a minute or two of non-productive labor might not deserve to be waged, travel time of 15 or 25 minutes should be given “some consideration.”¹⁴⁴

Additionally, AFL officials disconnected the battle over to portal-to-portal suits and the effect of legislation on broader ideas of what could be claimed as work. Telegrams to Green from union officials carried warnings such as “Thousands of AF of L workers are in danger of losing back pay even though their claims have no conceivable connection to portal to portal pay.”¹⁴⁵ Green similarly expressed this point to President Harry Truman, pointing out that if the concerns of the Portal-to-Portal Act was simply to address pay of this nature, the AFL would have no issue with it. Instead, the bill went “far beyond its stated purpose,” because it would make “very substantial changes in the country’s wage-hour laws.”¹⁴⁶

Ultimately, Mason rejected Congressional attempts to pass portal-to-portal legislation. Mason and the AFL brass were not comfortable with the idea of using the judiciary as a tool for winning benefits for organized labor, and similarly disliked the interference of Congress in portal-to-portal matters. Passage of a narrow definition of work would “deprive millions of workers of fair and just conditions of work already established,” according to Mason, denying industrial workers without collective bargaining the fruits of industrial citizenship. According to Mason, new legislation would interfere “with collective bargaining by excluding of certain activities now considered as compensable working time in thousands of collective-bargaining agreements in its definition under the act.”¹⁴⁷ For Mason and the AFL, preserving current

¹⁴⁴ Ibid, 76.

¹⁴⁵ Telegram from Wilbur Duberstein to William Greene [sic]. 10 May 1947. GMMA Legislative Reference Files, Box 18, Folder 40. Fair Labor Standards – Portal-to-Portal, 1947-02 – 1947-07; “DUBERSTEIN, William,” SF Gate, 21 February 2002 <https://www.sfgate.com/news/article/DUBERSTEIN-Wilbur-2871016.php>

¹⁴⁶ William Green to President Harry Truman, 9 May 1947, 1. GMMA Legislative Reference Files, Box 18, Folder 39.

¹⁴⁷ Ibid, *Portal-to-Portal Wages: Hearings on H.R. 584 and H.J. Res. 91, Day 3, Before the House Subcommittee No. 2 on the Committee on the Judiciary*, 80th Cong. 79, 83 (1947) (Statement of Walter J. Mason, National Legislative Representative, American Federation of Labor).

practice was of the utmost importance, since using custom as a standard could reach back to pre-Fair Labor Standards Act practices. This was important as well for AFL members engaged in efforts to reclaim pay for non-productive labor because, if the law changed what was eligible for back pay, the definition of work in the present could be altered. Additionally, by framing the bill as attacking collective bargaining, the AFL could support broader definitions of work won through litigation while at the same time championing collective bargaining as ideal way for workers and management to reach industrial agreements.

Collective bargaining was central to the approach of the UMWA and AFL to gain portal-to-portal pay, while the CIO embraced litigation as a strategy as well. The UMWA carefully followed Mine Mill's case in *Tennessee* and applied the ruling successfully in *Jewell Ridge*. The UMWA successfully defined work with their questionnaires to miners and pushed the applicability of travel time from miners to workers employed elsewhere, which the CIO saw to its conclusion in *Anderson*. With the inclusion of plant and factory labor, travel time was complicated, with the CIO framing their arguments in a similar fashion to those of miners yet pursuing claims in back pay suits. On one hand, the AFL expanded the concept of employee "control" into new territory, utilizing conservative, pro-business language and an emphasis on collective bargaining to cement their claims. While skeptical of lawmakers and their attempts to amend the Fair Labor Standards Act by the start of 1947, the AFL was clear that they had played no role in portal-to-portal lawsuits.

While the UMWA, CIO and AFL built their own definitions of work from the language of the Supreme Court, their time to imagine work was coming to a close. As labor continued to redefine what it meant to work, the National Association of Manufacturers, military officials and conservative legislators began to craft their own definitions in response. Capitalist leaders feared

that back wages paid at time-and-a-half would bankrupt industry and bring the post-war economy to its knees. With the possibility that billions of dollars could be taken from industry, conservatives felt pressure to respond, and to codify that response into law through the Portal-to-Portal Act of 1947

CHAPTER THREE: STATE, CAPITAL, AND CONSERVATISM: THE END OF WORK AS THEY KNEW IT

As workers filed suits for back pay travel time in 1946, the federal government found itself in a bind with employers who received government contracts during the Second World War. During the war, the United States government awarded contracts to businesses based on the principle of “cost-plus-fixed-fee.” Contracts and capital were awarded to pay for raw materials and labor, with a fixed payment attached so that the employer could enjoy profit without gouging the federal government. This relationship served business and the federal government well, until the flood of portal-to-portal suits that came after the *Anderson v. Mt Clemens Pottery Co.* decision. Procurement Judge Advocate for the War Department Colonel Ernest Brannon reflected on the impact of portal-to-portal suits impact on business and the government alike before the Senate Subcommittee in early 1947. When asked by Republican Senator Forrest Donnell of Missouri whether the government or private business would be liable for back wages on war contracts, Brannon replied that the responsibility belonged to the government alone. The federal government was responsible for repaying wages back to employees at a time-and-a-half rate, with damages. Donnell’s line of questioning then shifted from liability, to the cost of repaying wages.

“And the total of those contracts of that type, I understand . . ., is from \$40 billion to \$45 billion; is that correct?” Donnell asked Brannon, to understand the scope of the awarded agreements.

“I believe that is correct, sir,” he replied.

Brannon estimated that with an estimated average of 20-minutes compensable travel time, the War Department would owe industrial workers approximately \$1.2 billion to \$1.4 billion.¹⁴⁸

And Brannon's estimate only included War Department-affiliated industries. The Subcommittee's chair, Republican Senator Alexander Wiley of Wisconsin estimated the entire cost of suits to be over four billion dollars, with certain business and labor leaders estimating costs as high as 4.5 or five billion dollars in cost. By their estimation, portal-to-portal claims exceeded the entire worth of many businesses' capital if industrial labor unions or individuals collected their claims.¹⁴⁹ In the press and before Congress in early 1947, business interests, legislators and military officials expressed their concerns over the chilling effect portal-to-portal pay would have on the postwar economy in stark terms.

Their fears were further stoked by the judiciary. Industrial unions interpreted past judicial decisions to mean that portal-to-portal back wages could be negotiated down from the court awarded total. Conversely, anti-union forces interpreted judicial decisions to mean that no negotiations could take place. In sum, conservatives argued that back pay compensation could only be awarded in full, therefore making union gestures of negotiation to save business useless. In response to these worries Congress passed the Portal-to-Portal Act of 1947 in order to establish a more limited definition of work. While organized labor shaped their own definitions of work within the framework provided by the FLSA and the Supreme Court, Congress would severely limit the scope of debate as they ended "portal-to-portal" pay and amended the FLSA.

¹⁴⁸ *Portal-to-Portal Wages: Hearings on S.70, Day 6, Before the Senate Subcommittee of the Committee on the Judiciary*, 80th Cong. 446-447, 450 (1947) (Statement of Kenneth C. Royall, Undersecretary of War, Accompanied by Brig. Gen. Maurice Hirsch, Chairman, War Contracts Price Adjustment Board, and Col. Ernest M. Brannon, JAGD, Procurement, Judge Advocate).

¹⁴⁹ *Ibid*, 10, 126.

For the sake of clarity in this chapter, reference to “portal-to-portal” refers to both travel time and all non-productive labor. This usage is consistent with the use of the term in Congressional hearings on the Portal-to-Portal Act, when legislators purposefully used the phrase to include both travel time and non-productive work activity.

Christopher Tomlin’s *State and the Unions* presents a framework to understand overwhelming Congressional support for the Portal-to-Portal Act. Tomlin argues that the federal government created the National Labor Relations Board as an instrument for industrial peace. The NLRB, with other New Deal institutions, placated labor on certain issues in order to achieve economic stability.¹⁵⁰ If we consider the role of the federal government as merely placating organized labor, then it is understandable why Democrats did not unite around some of the more transformative aspects of the New Deal, and would not be willing to embrace a broad expansion of work.¹⁵¹ Conservative Democrats and newly elected postwar conservative Republicans created a powerful political base, which stepped into an anti-labor framework already built by anti-New Deal voices. As historian Kim Phillips-Fein has shown, these voices included the Liberty League and National Association of Manufacturers which sought to combat the New Deal and improve the image of American businesses.¹⁵²

Since the late 1930s, business organizations had lobbied for the curtailment of the Fair Labor Standards Act and portal-to-portal pay. In 1937, John W. O’Leary, President of the Machinery and Allied Products Institute expressed concern that the FLSA would increase the cost of living for Americans, consequently hurting industrial workers’ standard of living.

¹⁵⁰ Christopher Tomlin, *State and Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880-1960* (London: Cambridge University Press, 1985).

¹⁵¹ For more pockets of resistance in Roosevelt’s New Deal state, consider Alan Brinkley, *Liberalism and Its Discontents* (Cambridge: Harvard University Press, 1998).

¹⁵² Kim Phillips-Fein, *Invisible Hands: The Making of the Conservative Movement from the New Deal to Reagan*. (New York: W. W. Norton. 2009).

O’Leary and the Machinery and Allied Products Institute used information provided to them by the Brookings Institution to compare the FLSA to the National Recovery Administration’s shortcomings. He argued that the NRA hurt production in industry and reduced the total number of hours worked. While ambitious in intention, the NRA did not mend issues related to “long hours, low wages and other conditions” since in many cases pay and conditions were better than NRA minimum standards. O’Leary argued that shorter workweeks would lead to higher prices, and subvert industrial workers’ buying power. Shorter workweeks would also prevent more workers employment in industrial labor.¹⁵³

Organized labor’s interaction with federal bureaucracy was limited. The notable exception within the federal government to this rule was the UMWA’s continuing conflict with the National War Labor Board in 1943 in which the UMWA achieved portal-to-portal pay. Although the miners were willing to make certain concessions with government negotiators after the UMWA’s failed wartime strike, both sides were able to come to an agreement over portal pay and non-productive labor.¹⁵⁴

Though the courts had largely been kind to workers, the judiciary had complicated the efforts of portal-to-portal pay seekers. At the same time *Tennessee* was heard by the Supreme Court in 1944, *Jewell Ridge* was heard at the circuit court level. Circuit Judge A.D. Barksdale ruled against the UMWA in February 1944, arguing that the FLSA did not explicitly include travel time as a part of the workweek, so it could not be claimed as paid labor.¹⁵⁵ Although this decision was later overturned, it does highlight lack of judicial uniformity. The CIO, which

¹⁵³ John O’Leary, “The Proposed ‘Fair Labor Standards Act of 1937,’” Machinery and Allied Products Institute, 2-3, 6-7. GMMA, Artificial Collections, Box 16, Folder 3, Fair Labor Standards Act, 1937-1969.

¹⁵⁴ Melvyn Dubofsky and Warren Van Time, *John L. Lewis: A Biography* (Urbana and Chicago: University of Illinois Press, 1986). Chapter 18 deal with this in depth.

¹⁵⁵ “Judge Barksdale Becomes First Judge To Rule Against ‘Portal to Portal’ Pay,” *United Miner Workers Journal*, February 1, 1944.

became involved nationally with portal-to-portal suits in *Anderson*, also faced complications due in part to the decisions of the judiciary. After *Anderson* was decided by the Supreme Court in 1946, the Court sent *Anderson* down to the Federal District Court to determine the amount of time travel and non-productive labor consumed before the start of the productive workday. The lower court was encouraged to consider the “de minimis doctrine,” which meant that some activity could be considered inconsequential and therefore unworthy of wages. The lower court found that much of plant travel was de minimis, and therefore should only be waged in large plants where travel time was significant. The district court’s decision kept portal-to-portal suits alive but lessened the influence suits would have on business. The de minimis ruling came in February 1947 and was immediately appealed, though no decision was reached due to Congress’s actions in the weeks that followed.¹⁵⁶

The Business of America is Pro-Business

Pro-business organizations played a major role in influencing Congress to act in early 1947. Raymond Smethurst who represented the National Association of Manufacturers (NAM) made plain the errors of courts before the Subcommittee of the Judiciary. Smethurst claimed that travel in industrial plants had no relationship to travel in mines because plant workers were not subject to the same kind of employer control as miners. Miners travelled in cages which were controlled by the company, whereas plant workers walked to their place of labor and therefore could travel under their own power. Smethurst argued (incorrectly) that walking time was outside the purview of these cases because waged walking time had not appeared as a concept

¹⁵⁶ The Bureau of National Affairs, Inc., “TEXT AND ANALYSIS OF JUDGE FRANK A. PICARD In the Case of ANDERSON V. MOUNT CLEMENS POTTERY COMPANY,” February 8, 1947, 2-3. GMMA, Artificial Collections, Box 46, Folder 9.

until *Mt. Clemens* was before the Supreme Court in 1946, despite the suit having been initiated in 1942. The ruling in *Mt. Clemens* consequently subverted the original intent of the justices in cases prior, as well the Wage Administrator and the National War Labor Board during the late-1930s and World War II.¹⁵⁷

The NAM provided immediate solutions to Congress. The NAM recommended that Congress pass legislation that would move the burden of proof to those “asserting claims in court,” or employees. On behalf of the NAM, Smethurst argued that legislation could be enacted to erase portal-to-portal claims based on labor already performed, while also preventing any future portal-to-portal claims. The NAM’s interpretation paved the way for employers to erase portal-to-portal claims, providing a roadmap for legislation.¹⁵⁸ The NAM also endorsed the good-faith defense which industrial unions had vehemently opposed. Pro-business interests wanted portal-to-portal legislation to place the burden of proof in back pay cases on the employee, therefore drastically reducing the number of cases that could be brought to court.¹⁵⁹

Manager of the Manufacture Department Thomas Howard represented the United States Chamber of Commerce, and likewise business interests. Howard’s strongly worded introduction implied that employers were now looking to evade the law because of the oppressive operating conditions forced on businesses. Within the first few minutes of his testimony he casually called for the repeal of the Fair Labor Standards Act, stating later that he only found issue with the definition of workweek provided for the FLSA. Howard argued that businesses large and small desired honesty in negotiations, stating that he could not think of a single case from prior to the

¹⁵⁷ *Portal-to-Portal Wages: Hearings on S.70, Day 2, Before the Senate Subcommittee of the Committee on the Judiciary*, 80th Cong. 101-104 (1947) (Statement of Raymond S. Smethurst, Counsel, National Association of Manufacturers).

¹⁵⁸ *Ibid*, 121.

¹⁵⁹ *Ibid*, 114.

present “where the employer wished to evade the law.” Howard’s argument before the Senate Subcommittee moved on to two other points. First, he claimed portal-to-portal pay endangered not just large businesses, but businesses of all sizes. His second argument, made of his own “responsibility,” was that it was in Congress’s best interest to “get rid of all this tomfoolery.”¹⁶⁰

Howard used his testimony as a chance to invoke the destructive effect portal-to-portal suits could have over business. He shared stories of construction typewriter and bakery companies of differing sizes, all with suits claiming backpay beyond the worth of the businesses themselves.¹⁶¹ To rectify the unfair position employers found themselves in, Howard recommended that Congress take action to repeal the overtime provision in the FLSA, and that new legislation should allow the courts to mitigate punishment under the existing wage and hours agreement if employers had acted in good faith with their workers. Most importantly, Howard proposed that Congress undertake defining work itself, and specifically acknowledge “custom, practice, or agreement,” as a way to work around the FLSA.¹⁶² The Supreme Court had decided that custom could not be relied on in *Tennessee* and *Jewell Ridge* because the FLSA had so significantly altered the environment collective bargaining took place in. Congress could therefore codify work and therefore remove labor’s ability to define work. To work around the FLSA, he suggested that legislators reach back to recognize custom or practice in industry. Legislators would be able to reach back before the FLSA for a pre-1938 conceptualization of work if they relied on the premise of custom.

Howard’s testimony shared similarities with many of the business owners who spoke before the Senate and those who spoke before the House of Representatives. The Western

¹⁶⁰ Ibid, 124.

¹⁶¹ Ibid, 126-127.

¹⁶² Ibid, 124, 131.

Woods Employers, the Associated Industries of Kentucky, American Zinc, Lead, and Smelting Company, the Associated Industries of Missouri and St. Louis Chamber of Commerce all supported Howard's position in their testimonies on issues of custom, as well as the burdensome nature of portal-to-portal pay.

Howard's argument was contradictory. He asked the Congress to define work, but he also argued that work should be defined by custom. The latter argument had been attempted by lawyers for the Republic Steel Corporation in *Tennessee*, when they stated that since Congress had not defined work or the workweek, "parties have the right to contract as to what is working time." However, the Supreme Court had left the door open for Congress to affirm a definition of work in *Tennessee*, therefore allowing them to reach back and acknowledge custom as it was prior to the FLSA. Negotiation took place within the confines set by courts and the adjudicatory process. While those who argued against Muscoda Local No. 123 in 1944 had not considered the possibility that Congress could redefine the term, they did acknowledge the role agreement and custom had played in past negotiations.¹⁶³

The Benevolent Capitalist

Business owners built an image of themselves as benevolent and fair employers before the Senate Subcommittee. In a prepared statement for the committee, Herbert Stockham, President and General Manager of the Stockham Pipe Fittings Company did exactly this. Stockham described the good faith collective bargaining he had engaged in with the United Steelworkers to foster a wartime collective bargaining agreement in May 1945. He was later sued for portal-to-portal pay by the CIO's Secretary and Treasurer R.E. Farr without any notice.

¹⁶³ "Iron Ore 'Portal to Portal' Suit Argued Before Supreme Court; May Set Precedent for Coal," *United Mine Workers Journal*, February 1, 1944.

Stockham's testimony developed an image of himself as a fair boss who was treated unfairly by the union. He described the parking lot he provided for employees; the employee cafeteria and other amenities, like company showers, lockers, and dental and medical plans which were provided to plant employees without cost to them. He then depicted the CIO as aggressors. Legal action was not on behalf of rank-and-file union members since they expressed their desire to avoid suits. He claimed that some union members had been forced into pursuing legal battles by CIO leaders. Stockham's argument attributed the portal-to-portal problem to the union (specifically CIO) leadership. This framework allowed for blame to be shouldered by the CIO, and not its membership. Stockham's argument underscores the larger goal of curbing union power, given that his attacks did not place fault at the feet of workers but on a supposedly coercive union.¹⁶⁴

Stockham's testimony is remarkable for the employer's unwillingness to engage in meaningful dialogue over the definition of work and what constituted compensable labor. Stockham conceded briefly that walking, changing and bathing time were understood by employees to be waged through a "base pay" of 74½ cents an hour negotiated in the collective bargaining agreement. But he quickly pivoted to make light of an undescribed incentive plan for employees to keep unproductive work restricted to a short period of time.¹⁶⁵ Stockham's pivot from discussion of travel time and non-productive labor to incentivized work served the same purpose as his emphasis on the amenities provided by the company: to create the image of the benevolent capitalist.

¹⁶⁴ Statement of Herbert Stockham before the Senate Subcommittee of the Judiciary, 1947. James. E. Eastland Collection. Archives and Special Collections, University of Mississippi, James O. Eastland Collection, File Series 4, Subseries 9, Box 1, Folder 8.

¹⁶⁵ *Ibid*, 3.

Other businesses made similar claims. F.L Driver, President of The Driver-Harris Company, which manufactured electric appliances, industrial furnaces, and other metal castings, painted the company as generous towards the United Steelworkers of America. Driver made clear before the House Subcommittee that he had always sought to do well by his employees because the company “had a union to deal with.” He explained that the company had left the plant gates unlocked prior to starting time as a courtesy so employees could enter the plant early and prepare for the start of the work prior to clocking in. This was a convenience, Driver argued, because employees took varied modes of transportation to work and would therefore arrive at different times, meaning that workers would not have to wait outside should their bus arrive early. Driver indicated that preparation time was not as vital, because instead of taking time at the end of the shift to prepare for the next day’s labor, workers left the plant “out of there like a shot.” His claim that workers managed to leave quickly at the end of their shifts undermined an argument that they should be paid for time required to complete non-productive labor.¹⁶⁶

Stockham and Driver’s testimony attempted to make allies of the Senate and House committee members. If employers had been acted upon in bad faith by unions despite compassionate actions on the part of capital, then unions could easily be painted as callous aggressors. Driver described union demands for portal-to-portal pay as a surprise because demands were sudden and lacked detail besides accusations that the company had “violated the Wage and Hours Act.”¹⁶⁷ Without detailed accusations, Driver could paint the Steelworkers’ actions as hasty and greedy, in stark contrast to his good-natured company. Stockham also

¹⁶⁶ *Portal-to-Portal Wages: Hearings on H.R. 584 and H.J. Res. 91, Day 5, Before the House Subcommittee No. 2 on the Committee on the Judiciary, 80th Cong. 286 (1947) (Statement of F.L. Driver, President of the Diver-Harris Co.).*

¹⁶⁷ *Ibid.*

described the suit against him in negative terms. He said it was filed without “any prior notice,” and he attempted to undercut organized labor’s claims to good faith, collective bargaining.¹⁶⁸

Bolstering the claims of business were the size of lawsuits. Stockham Pipe Fittings faced a claim from their United Steelworkers local exceeding one million dollars, for plants that employed 2,000 across six states and Washington, D.C.¹⁶⁹ The Driver-Harris Company, for example, faced a larger suit of four million dollars, a total more than the entire company’s physical and net worth according to Driver.¹⁷⁰

According to business interests, suits for back wages endangered more than individual businesses. Owners also feared what suits would do to entire industries. Charles Hook, the President of the American Rolling Mill Company, found himself at the center of controversy in the steel industry. American Rolling employed more than 20,000 people in the production of integrated steel, particularly steel ingots. Hook claimed that by January 1947, not even one calendar year since *Anderson*, portal-to-portal suits totaling over 20 million dollars had been filed at a minimum of four of the company’s eight plants. The totals described included back wages and liquidated damages due to employees, with no consideration yet given to fees for legal counsel. Though not speaking on behalf of the steel industry during the Senate Judiciary Subcommittee’s meeting, Hook nonetheless shared his concerns as representative of the industry’s.¹⁷¹

¹⁶⁸ Statement of Herbert Stockham before the Senate Subcommittee of the Judiciary, 1947, 1. James. E. Eastland Collection. Archives and Special Collections, University of Mississippi, James O. Eastland Collection, File Series 4, Subseries 9, Box 1, Folder 8.

¹⁶⁹ *Ibid.*, 2.

¹⁷⁰ *Ibid.*, *Portal-to-Portal Wages: Hearings on H.R. 584 and H.J. Res. 91, Day 5, Before the House Subcommittee No. 2 on the Committee on the Judiciary*, 80th Cong. 284, 287 (1947) (Statement of F.L. Driver, President of the Diver-Harris Co.).

¹⁷¹ *Ibid.*, Statement of Herbert Stockham before the Senate Subcommittee of the Judiciary, 1947, 1. James. E. Eastland Collection. Archives and Special Collections, University of Mississippi, James O. Eastland Collection, File Series 4, Subseries 9, Box 1, Folder 8; *Portal-to-Portal Wages: Hearings on S.70, Day 2, Before the Senate*

By February 1947 the steel industry claimed portal-to-portal suits of approximately one billion dollars filed against companies. The total of one billion dollars was “a considerably larger amount than the amount of cash which the entire industry has on hand and in banks,” Hook stated, noting the “cash position of the combined industry was less than \$700 million” at the end of 1945. One billion totaled more than entire earnings of the steel industry from 1942 through 1946, according to Hook, further underscoring the damaging effect back pay and damages would have on the industry.¹⁷²

Hook offered a doomsday warning for the committee: he feared that unless portal-to-portal suits were ended by Congressional action, the “entire nation would be thrown into an economic tailspin.” “As I see it,” he continued, “the Capehart Bill provides a solution to this portal to portal mess which unless speedily corrected, threatens to lay ruinous penalties on production, and thus endanger our whole economy.”¹⁷³ The Capehart Bill referenced by Hook was one of the bills considered by the Subcommittee on the Judiciary for rectifying portal-to-portal issues. Capehart’s bill played a significant role in the Congress’s codification of work.

Paying for War

While private business and supporting organizations had concerns over their industries, the United States government was in a precarious situation itself. The federal government provided a great many war contracts to private businesses, beginning in earnest with formal entry into World War II at the end of 1941. Portal-to-portal claims could reach as far back as the implementation of the FLSA in 1938. Some workers were able to reach back eight years to the

Subcommittee of the Committee on the Judiciary, 80th Cong. 64-66 (1947) (Statement of Charles R. Hook, President, American Rolling Mill Co., Middletown, Ohio)

¹⁷² *Ibid*, 5.

¹⁷³ *Ibid*, 6.

FLSA in the case of Wyoming, although in a majority of states, workers could only file suit for the past three to six years.¹⁷⁴

Most portal-to-portal suits were filed after *Anderson* and statute of limitations of up to six years. Industrial workers had the ability to sue for work time encompassing the entire period of the Second World War, including industries where overtime was generous. Military expenditures had been so great that a 20-minute recovery of wages would leave the War Department owing between \$1.2 billion to \$1.4 billion, as General Brannon pointed out before a Subcommittee of the Judiciary.¹⁷⁵

Brannon's testimony also highlights the relationship between private business and the federal government. The War Department guaranteed a certain percentage of profit for employers on war contracts and therefore left themselves liable for portal-to-portal suits since the War Department was continuously involved in private business. Lump sum contracts proved a different challenge. Lump sum contracts had been provided to businesses during the war with no guarantee of profit from the War Department, with total value of contracts nearing 100 billion dollars.¹⁷⁶ Since these contracts were given to business and not representative of a continual relationship between the War Department and private business, the financial burden of portal-to-portal pay belonged to employers.

Since the War Department funded the private production of war goods, the Senate Subcommittee sought to establish whether claims of travel time were inflated by military regulations. Brig. Gen. B. A. Bryan, the Provost Marshal General, United States Army testified

¹⁷⁴ Research and Information Service, American Federation of Labor, "Statement on Travel Time," January 14, 1947, 5. GMMMA, Artificial Collections, Box 46, Folder 9.

¹⁷⁵ *Portal-to-Portal Wages: Hearings on S.70, Day 6, Before the Senate Subcommittee of the Committee on the Judiciary*, 80th Cong. 446-447, 450 (1947) (Statement of Kenneth C. Royall, Undersecretary of War, Accompanied by Brig. Gen. Maurice Hirsch, Chairman, War Contracts Price Adjustment Board, and Col. Ernest M. Brannon, JAGD, Procurement, Judge Advocate).

¹⁷⁶ *Ibid*, 447-448.

that fencing was required for munitions and arms plants, so to keep saboteurs from “the throwing of incendiaries” and, in the case of evacuation, if the plant caught fire or was in danger of explosion.¹⁷⁷ Related to the distance between fence and factory, Bryan had impressed the importance of minimizing entry points to plants. For plants essential to the war effort, military regulations mandated certain distances between a plant and the surrounding fence for safety and security reasons. Bryan’s testimony convinced the committee that military regulations had not unnecessarily affected travel time.¹⁷⁸ Since travel time had not been increased by War Department regulations, then private business became liable for portal-to-portal back pay in the case of lump sum contracts.

The Subcommittee sought to understand the obligation between business and the War Department. The Senate Subcommittee’s questioning of military officials over the relationship between the War Department and private business sought to establish liability in a literal and figurative sense. Brannon’s testimony concerned the nature of contractual agreements and the different kind the War Department had awarded, calling into question who would have to pay back wages if portal-to-portal suits proceeded without the interference of the state. Bryan’s testimony established that long travel times, like those described by plant workers in Chapter Two, were a consequence of decisions made by the employer and therefore not the result of War Department regulations. Consequently, the onus was on private business to pay workers for their travel and non-productive labor.

¹⁷⁷ *Portal-to-Portal Wages: Hearings on S.70, Day 8, Before the Senate Subcommittee of the Committee on the Judiciary*, 80th Cong. 663-666 (1947) (Statement of Brig. Gen. B. M. Bryan, the Provost Marshal General, War Department).

¹⁷⁸ *Ibid*, 667-668.

Giving Work a (Vague) Definition

Overwhelming costs of portal-to-portal pay to private business and the military were made clear and moved politicians in Washington to action. The 1946 midterm election saw the House of Representatives and Senate return to the Republican Party and anti-labor conservatives. The 80th Congress is perhaps best known in labor history for passing Taft-Hartley in 1947, but in the months before, Congress crafted the Portal-to-Portal Act of 1947. The bill that passed both houses and was signed into law by President Harry Truman is a combination of two Senate versions, introduced by Republicans Senator Homer Capehart of Indiana and Senator Alexander Wiley of Wisconsin, and the House version introduced by Republican Representative John Gwynne of Iowa. Since court rulings and definitions of work had been based on the Fair Labor Standards Act, legislation passed would amend the 1938 act.

Wiley and Gwynne considered many legal options to stem the tide of portal-to-portal pay. Wiley identified the problem faced by business and the federal government alike was due to the FLSA, since “neither the term ‘work’ nor the term ‘work week’ is defined” within the law. The courts had created the categories of “productive” and “non-productive” work, Gwynne said, further noting that no definition of those terms existed. Gwynne supported definitions for both types of work but felt that Congress should also consider prohibiting courts from hearing portal-to-portal cases and should standardize the statute of limitations on backpay claims made under the FLSA.¹⁷⁹ All versions, however, were intended to amend the Fair Labor Standards Act of 1938.

¹⁷⁹ “Statement of Honorable Alexander Wiley (R. Wis) before Judiciary Subcommittee on Portal-to-Portal Pay Legislation, Wednesday, January 15,” 3. James. E. Eastland Collection. Archives and Special Collections, University of Mississippi, James O. Eastland Collection, File Series 4, Subseries 9, Box 2, Folder 1.

Early drafts of the Senate bill attempted to define the work week. A January 6, 1947 copy of the proposed Senate bill defined the term “work week” as “only the time during which an employee is engaged in productive work, unless such time is compensable in pursuance of an agreement between an employer and his employee or employees or is considered compensable working time according to established custom in the industry or part thereof involved.” The definition concluded by denying workers the right to sue for back wages or damages under the provision for any labor “other than productive work,” thus eliminating all claims to waged non-productive labor.¹⁸⁰

A day later, Gwynne introduced H.R. 584., a House version of the Portal-to-Portal bill. The bill echoed the concerns of business and emphasized the dire straits American industry found itself in because of portal suits. Gwynne used the high-end figure of \$5 billion owed to workers through portal-to-portal suits to support his prognostication that the suits would ruin employers.¹⁸¹ Gwynne’s version limited the recovery of portal-to-portal wages to one year, a sharp decrease from state standards of up to six years. It also released employers from liability if the employer complied with the law as interpreted at the time, and it enabled the settlement of suits between the employer and the employee who sued. The bill draft put the burden of proof on the suing party (the employee) such that the employer would not have to prove they had been compensating workers fairly. The proposal concluded with a brief statement acknowledging that the bill was not written to aid the “willful violator,” but instead “prevent chaos.”¹⁸²

¹⁸⁰ “Portal-to-Portal Wages,” January 6, 1947, 18. James. E. Eastland Collection. Archives and Special Collections, University of Mississippi, James O. Eastland Collection, File Series 4, Subseries 9, Box 2, Folder 1.

¹⁸¹ “Summary of Statement by Honorable John W. Gwynne of Iowa,” 1. James. E. Eastland Collection. Archives and Special Collections, University of Mississippi, James O. Eastland Collection, File Series 4, Subseries 9, Box 2, Folder 1.

¹⁸² *Ibid.*, 2.

Capehart's Senate bill addressed portal-to-portal pay in a different way. Capehart argued that the courts had misinterpreted the intent of Congress and the FLSA by expanding the definition of compensable work, justifying the present actions of Congress. According to Capehart, when legislators had written and passed the FLSA in 1937 and 1938, the work had been conceptualized broadly so it "might reasonably be adapted to a variety of conditions."¹⁸³ Capehart also acknowledged the sum of 5 billion dollars currently claimed through suits, and the destabilizing effect the suits could have if courts decided in favor of suing unions and workers. Since unions would be signing new collective bargaining agreements soon, he added, there was a necessity on the part of Congress to act with urgency on portal-to-portal wage claims.

What made Capehart's bill unique was his definition of work. In a January 6th bill draft, he defined work as activities paid by the employer, related to custom at the place of work or by collective bargaining agreement. Practice or custom would apply to work practice but could not be applied to portal-to-portal wages. Capehart's bill emphasized the inconsistency of the judiciary and other positions like the Wage Administrator who ruled on portal-to-portal wage issues. He also ended claims to travel time specifically by disallowing pay for new categories of work.¹⁸⁴ Capehart's draft likewise defined the workweek, which he described as "only the time spent by an employee performing work."¹⁸⁵

Wiley's Senate version gave a more specific definition of the "work week." Wiley's bill defined it as "time during which an employee is engaged in productive work, unless such time is compensable in pursuance of an agreement between an employer and his employee...or is

¹⁸³ "Summary of Statement by Senator Homer E. Capehart of Indiana," 1-2. James. E. Eastland Collection. Archives and Special Collections, University of Mississippi, James O. Eastland Collection, File Series 4, Subseries 9, Box 2, Folder 1.

¹⁸⁴ To amend the Fair Labor Standards Act of 1938, S.49, 80th Cong. (1947), 3-4. James. E. Eastland Collection. Archives and Special Collections, University of Mississippi, James O. Eastland Collection, File Series 4, Subseries 9, Box 2, Folder 1.

¹⁸⁵ *Ibid*, 4.

considered compensable working time according to established custom.” In addition, Wiley’s bill further detailed “no action for the recovery of wages, penalties, or other damages...shall be instituted or continued...in any court by reason of any time spent by such employee in other than productive work”¹⁸⁶

Moreover, Senate drafts included a section that defined what was not compensable worktime. It included “walking, riding or traveling time to or from the actual place of work of the employee” and “incidental work activities of an employee, and time spent in such activities, prior to the commencement of and after the termination of such employee’s scheduled work period, which within any one work day total less than twenty (20) minutes.”¹⁸⁷ A later draft of Capehart’s bill further specified that waged time included time only where employees “performed or shall perform work.”¹⁸⁸

Conservative attorneys attempted to push Congress towards pursuing a stricter definition of productive labor. Milton Black submitted a brief before the Senate Subcommittee when he appeared on behalf of the firm of Souser, Schumacker & Taylor, which represented bakers. Sent to Senator James Eastland of Mississippi, Black advised that the definition of work be fundamentally altered. He suggested that “‘Work’ ...shall not include any act, activity or non-activity of, or time spent by, an employee (whether or not occurring or spent on the premises of the employer and whether or not involving burdensome or nonburdensome mental or physical exertion for the benefit and under the control of the employer).” Black’s definition was like

¹⁸⁶ “Portal-to-Portal Wages,” January 6, 1947, 18. James. E. Eastland Collection. Archives and Special Collections, University of Mississippi, James O. Eastland Collection, File Series 4, Subseries 9, Box 2, Folder 1.

¹⁸⁷ To amend the Fair Labor Standards Act of 1938, S. ___, 80th Cong. (1947), 6-7. James. E. Eastland Collection. Archives and Special Collections, University of Mississippi, James O. Eastland Collection, File Series 4, Subseries 9, Box 2, Folder 1.

¹⁸⁸ “Intended to be proposed by MR. CAPEHART to the bill (S. 70) to exempt employers from liability for portal-to-portal wages in certain cases, S. 70, 80th Cong. (1947), 4. James. E. Eastland Collection. Archives and Special Collections, University of Mississippi, James O. Eastland Collection, File Series 4, Subseries 9, Box 2, Folder 1.

Capehart's, although more specific so that it would summarily exclude exertion performed for the benefit of the employer, instead of relying on *de minimis* rulings.

Black's definition also invalidated past collective bargaining agreements. He argued that regardless of what was included as paid labor through agreements between business and organized labor, new legislation needed to remove back pay for such activities. He described the limits of what work should be, saying, "specifically paid for certain activities which prior thereto were not specifically paid for by such employer."

This definition of work left room for pay on a rate basis so long as it was different than the rate for productive labor. Likewise, it contained a provision that portal-to-portal time could remain if paid travel time was counted outside of the 40-hour workweek. This opened a potential backdoor for workers to continue to earn portal-to-portal time, although it was not an option available to many industrial workers. Suits claiming backpay counted travel time as productive labor, and therefore against the 40-hour workweek. When industrial workers had worked 40-hour weeks, with FLSA guiding overtime, suits alleged that travel time was compensable, consequently pushing the number of hours worked well over 40-hours for the week. Few workers were paid for portal-to-portal time on a rate basis, except for some UMWA locals who had contracted travel time on a rate basis through collective bargaining during World War II.¹⁸⁹

With three versions of the bill in consideration, Capehart's proposal earned the attention of Senate leaders and became the chamber's main version of the Portal-to-Portal Act of 1947. The House version, H.R. 2157, focused on preventing lawsuits related to portal-to-portal, implementing a "good faith clause" for employers to rely on, and justifying the constitutionality

¹⁸⁹ A Bill to exempt employers from liability for portal-to-portal wages in certain cases, S.70, 80th Cong. (1947), 1. James. E. Eastland Collection. Archives and Special Collections, University of Mississippi, James O. Eastland Collection, File Series 4, Subseries 9, Box 2, Folder 1.

of the bill under the 5th Amendment due to its retrospective nature. H.R. 2157 did not include a provision explicitly defining work and its nature, as Capehart's drafts in the Senate had.¹⁹⁰

A clear definition of "work" was ultimately hard even for Capehart to determine. While surprising, given the recommendations of pro-business advocates and conservative legislators alike, a definition of work was unsurprisingly hard for Capehart to determine.¹⁹¹ Though he did not explicitly say why the passage concerning the definition was removed, a brief exchange with L. Metcalfe Walling, the Administrator of the Wage and Hour and Public Contracts Divisions, point to Capehart's reticence to codify work. When he asked Walling if there might be a return to a broad agreement as to what work was, and if work could be defined, Walling replied with a less than comforting answer: "it is extremely difficult, Senator, to spell out a definition in a congressional statute which will take into account all of the manifold variations of practice and custom and agreement and which will recognize the changing conditions which constantly occur in modern American industry in a way that will be satisfactory." Walling's spoke bluntly about the problem of defining work; it was a concept that lacked uniformity. While certain constants existed, many of which were noted by the Supreme Court decisions in *Tennessee* and *Anderson*, how productive labor was carried out and the steps necessary for its undertaking lacked clear boundaries that could be applied similarly to steel making, miners and car manufacturers. To create definition that would be broad enough to fit every industrial activity yet excluded travel time and other pre-work activities was beyond the ability of Capehart and Walling.

When Congress voted, it chose Wiley's bill over Capehart's. H.R. 2157 passed Congress and was signed into law by President Harry Truman on May 14, 1947.¹⁹² With little controversy,

¹⁹⁰ Comm. on the Judiciary, S. Rep. No. 37, at 43-44 (1947).

¹⁹¹ *Ibid.*, 7.

¹⁹² Marc Linder, "Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947," *Buffalo Law Review* 39, no. 53 (1991): 156.

the Portal-to-Portal Act of 1947 passed both houses of Congress with overwhelming majorities. AFL President William Green asked Truman to veto the act. Green reasoned that employers would use the act to fight labor law and fall back on a defense that they had acted in good faith. According to the AFL, the abridgement of work, as defined by the court and a reliance on “practice and custom,” would allow employers to take advantage of employees.¹⁹³ Truman replied only to say he had received Green’s letter. Truman signed the bill, and wrote a three-page letter to Congress, supporting the Portal-to-Portal Act, restating the bill’s purpose, and reaffirming his support for the legislation.¹⁹⁴

In the final version, Congress defined working time under the Portal-to-Portal Act as a contract (written or expressed between employer and employee), a custom or practice covering the activity which was worthy of pay “only when it was engaged in during the portion of the day with respect to which it was so made compensable.”¹⁹⁵ Work, therefore, could literally only occur within the hours designated by the employer. Labor that took place outside of this time had to be something else; since work was paid and this labor was not.

The bill’s final draft reconciled disagreement over non-productive labor. H.R. 2157 stated that no employer could be subject to liability or punishment under the FLSA for failing to pay for non-productive labor. This included “walking, riding, or traveling to and from the actual place or performance” and excluded pay for “activities which are preliminary to or postliminary to said principal activity.” The bill’s language specifically eliminated travel time from paid time and eliminated the possibility of compensation for non-productive labor.¹⁹⁶

¹⁹³ William Green to Harry Truman, 9 May 1947, 2. GMMA, Legislative Reference Files, Box 18, Folder 40

¹⁹⁴ Harry Truman to Congress, “His Approval of H.R. 2157, The Portal-to-Portal Act of 1947,” 14 May 1947, 1-3.

¹⁹⁵ Portal-to-Portal Pay Act of 1947, 29 USC §§251-262.

¹⁹⁶ Ibid.

The Act also denied compensation in other ways. It denied portal-to-portal pay based on custom or practice even if the agreement existed because of collective bargaining. The language therein was remarkably similar to the language proposed by that of the United States Chamber of Commerce during testimony regarding the provision to allow work to be defined by custom. Congress did not include a provision defining when custom began, allowing employers to reach beyond 1938 and the New Deal state.

The new legal definition of work drew its inspiration from its productive capacity for business. The new and more exclusive definition of work provided a blanket exclusion for certain work regardless of its nature and made no effort to define its productivity or necessity. The limited nature of what could be considered payable work fell strictly into a conceptualization that was productive for the employer. This definition did not consider labor performed, or the labor that enabled productivity to take place. The Portal to Portal Act of 1947 divorced wages from work performed and allowed work to again be defined by hours. The second clause gave control of the workday to the employers, allowing them the ability to determine arbitrary beginning and end points. This meant that employers could require workers to perform non-productive labor outside of paid time. Workers could not show up when it was time to clock in and begin non-productive labor then. The law put a two-year limitation on employee claims for those treated in bad faith by the employer, creating language for a good faith defense which had concerned organized labor immensely in the period preceding the bill's passage. The version that passed both houses based claims in the legislative branch's belief that the judiciary had misrepresented the intent of the FLSA because of the "disregard of long-established customs,

practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities” which put American industry at risk.¹⁹⁷

Congressional leaders felt they had saved American business and stopped labor unions from taking advantage of the FLSA, while simultaneously limiting pay owed to industrial workers. Considering the fear conjured by five billion dollars’ worth of lawsuits, and the full-throated attack on portal wages by pro-business and conservative legislative forces, the uproar caused by the Portal-to-Portal Act of 1947 faded away rather quickly. Organized labor turned from portal-to-portal suits and legal fights over what work was and to engaging with a new monster that had two names: Taft-Hartley.

The master narrative of post-World War II labor history has been dominated by Taft-Hartley. However, as legal scholar Marc Linder has argued, portal-to-portal issues were not overshadowed contemporaneously by Taft-Hartley as they have been by historians.¹⁹⁸ Why then has the Portal-to-Portal Act been relegated to obscurity? Perhaps it is seen as dry compared to arguments over free speech and communist influence that dominated discussion over Taft-Hartley. Perhaps Truman’s veto drew additional attention to Taft-Hartley which portal-to-portal legislation did not receive. Linder has argued that Truman essentially saved his veto for Taft-Hartley, not wanting to antagonize Congress when their support was needed for other political goals.¹⁹⁹ Likewise, Truman did not feel the public opposed the Portal-to-Portal Act enough for him to use veto power.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid, Linder, “Class Struggle at the Door,” 55.

¹⁹⁹ Ibid, 160.

EPILOGUE

The year 1947 was undoubtedly a bad year for organized labor. The Portal-to-Portal Act was passed in May and restricted worker's pay by redefining work. Less than six weeks later, Congress passed the Taft-Hartley Act over President Harry Truman's veto. Despite Taft-Hartley's provisions limiting closed shops, strikes, campaign donations and questionable free speech stipulations, portal-to-portal concerns were not entirely overwhelmed.

The National Legislative Representative for the American Federation of Labor, Walter Mason, went out of his way to mention portal-to-portal pay at the end of a hearing on minimum wage in October 1947. At the very end of his testimony in front of the House Committee on Education and Labor, Mason reiterated some of the claims AFL representatives made during portal-to-portal hearings. He reminded the committee that the AFL "explicitly condemned" portal-to-portal back pay suits made by individual unions and workers. Quoting the AFL executive committee, Mason stated that the Portal-to-Portal Act "constitutes an attack upon the country's basic wage and hour standards and strips the worker receiving substandard wages of much of the protection he previously had enjoyed." He concluded his aside on portal-to-portal wages by reasserting the stance of the AFL. "We urge repeal of this Act by Congress at the earliest possible opportunity." Unfortunately for Mason and AFL, the Act would not be repealed.²⁰⁰

²⁰⁰ The American Federation of Labor Information and Publicity Service, "Statement Presented by Walter Mason National Legislative Representative, American Federation of Labor Before the House Committee on Education and Labor on the Fair Labor Standards Act," October 29, 1947, 9. GMMA, Legislative Reference Files, Box 18, Folder 41.

Prior to the late-1930s, workers primarily defined their labor by the hours spent performing work. Certain industries like mining and railroads employed this framework as well, pushing the definition of work in new directions through their calls for safety on the job. The Fair Labor Standards Act of 1938 allowed for a new conceptualization of work to take place. Only a year after its passage, the International Union of Mine, Mill and Smelter Workers used litigation to broaden what could be included as wage labor to include travel time. Though Mine Mill did not win *Tennessee Coal, Iron and Railroad Co. v. Muscoda Local No. 123* until 1944, decisions at the lower courts spurred other unions to action.

The United Mine Workers of America, Congress of Industrial Organizations and AFL all adopted their own strategies for expanding work based on early court decisions and the Fair Labor Standards Act. The UMWA adopted the language created by Mine Mill in *Tennessee* and crafted an understanding of work for coal miners based on claims made by metal miners. The UMWA tested these arguments in *Jewell Ridge Coal Corp. v. United Mine Workers of America*, which the Supreme Court decided in favor of the miners. The CIO utilized a similar strategy because of Mine Mill's affiliation with the CIO. The CIO differed in approach from other industrial unions because of their reliance on litigation as a means for winning back pay. The AFL used more conservative language than the UMWA and CIO to claim portal-to-portal wages and back pay, ultimately building the broadest definition of what it means to work through their interpretation of control.

Organized labor's expansion of waged work did not go unnoticed, or unpunished. The CIO in *Anderson v. Mt. Clemens* took the principle of travel time and non-productive labor and applied it to plant workers. Alarmed at the quantity and cost of portal-to-portal back pay suits, conservative legislators curbed labor's gains. Backed by military officials, businessmen and

business advocacy groups, Congress listened to the fears of industry and limited the definition of what could be paid for work. The Portal-to-Portal Pay Act of 1947 ended the possibility of paid travel and non-productive time. The curtailed version of work passed by Congress in May 1947 only compensated workers for their labor that directly produced profit for employers.

Rapid changes over what constituted paid work for industrial workers between 1938 and 1947 asks bigger questions of historians considering the New Deal state. First, why has the Portal-to-Portal Pay Act been obscured in labor historiography? Organized labor's increased number of strikes in 1946, as well as general discord between business owner and labor makes the Portal-to-Portal Pay Act a battleground worth exploring. During the House and Senate hearings in early-1947, conflict between the interests of capital and labor were on full display. Business interests claimed the entire steel industry was under siege due to impending portal-to-portal suits.

The Portal-to-Portal Act did not inspire the same theatrics the passage of Taft-Hartley did. There was no red baiting attached to portal claims, nor did President Truman veto the Portal-to-Portal Act. The Portal-to-Portal Act did not find itself wrapped up in the same Constitutional questions as Taft-Hartley and was therefore subject to less attention.

The portal-to-portal debate remains unclear when viewed through a short-term analytical lens. Portal-to-portal action by Congress in 1947 was a logical reaction to suits by the United Steelworkers. According to business interests, liability for back pay and damages posed a threat to American industry. In turn, they prompted conservative legislators to limit organized labor's definition of work. However, this does not adequately explain the response of Congress. If Congress were concerned with only the threat portal-to-portal pay posed to industry, it would have eliminated portal-to-portal back pay prior to the *Anderson* decision, and allowed

collectively bargained agreement including travel time to remain going forward. The wide-ranging effects of the Portal-to-Portal Act effected more than claims to back pay, indicating another line of conservative reasoning was afoot in 1947.

Congress's reaction to the portal-to-portal suits makes it necessary to consider this conflict within the broader context of anti-New Deal politics. Congress' decision to nix back pay and the definition of work makes sense as a well-considered response to the growing power of organized labor. The Portal-to-Portal Pay Act was not just the consequence of actions taken during and after 1946: it was a response to labor's place in the New Deal political order. Congress decided to eliminate portal-to-portal pay and go beyond the immediate problem presented by business, and therefore struck a blow against organized labor's growing power. Consequently, the Portal-to-Portal Act and labor's expanded definition of work needs to be considered over a longer period.

This thesis project was not without its limitations. In the prospectus for this project, I stated my intention to visit the National Archives for information on the three Supreme Court cases which make up a substantial portion of this thesis. Simply put, the 2018-2019 Federal Government Shutdown prevented my visit. While I don't know exactly what I might have come across, I believe that a visit to the NARA would have benefited the analysis of *Tennessee* the most. By visiting NARA, my thesis would have benefited from greater depth by providing the voices of Mine Mill members. This source material would have allowed me to better bridge the gap between the Fair Labor Standards Act of 1938 and early reconstitutions of work in 1939. This was a present source issue, given that Mine Mill's paper did not include reports related to *Tennessee* in 1939. Even by looking at Mine Mill's legal arguments in greater depth, or amicus curie briefs, I would have gathered a better understanding of those connections.

Additional time at NARA would have allowed me to add greater depth to *Jewell Ridge* and *Anderson* as well. While these were placed within their proper context, NARA records would have provided additional insight into how the UMWA and CIO were making arguments for the expansion of work. As this project moves forward, I intend to make use of NARA to include rank-and-file voices.

I see many ways this project can develop. First, more attention should be paid to conservative and anti-New Deal politicians. An analysis of these figures will better affirm whether the response to portal-to-portal pay was reactionary, or part of a broader attack on the New Deal. Additionally, I hope to put the Portal-to-Portal Act in conversation with Taft-Hartley to understand why portal-to-portal debates have not played a larger role in the subsequent historiography on labor in the twentieth century. Finally, I intend to look to the origins of the portal-to-portal pay by giving more attention to the formation of New Deal legislation and policies. The National Recovery Administration is a logical place to begin with questions of this nature.

I hope that a future version of the thesis will be able to address questions of who belonged in the New Deal and postwar order. The FLSA did not give nearly the same organizing rights to agricultural workers as it did industrial ones. After the war, the federal government created new opportunities for American citizens through legislation like the G.I. Bill but did not allow all G.I.'s access to the benefits of the expanding government. This thesis could transition to further argue about who should “belong” in post-World War II United States.

The question of “belonging” returns us to the workplace. In the *United Mine Workers Journals* of the late 1930s and 1940s, the UMWA understood the effect of labor-saving devices and mechanization in mines. The UMWA reasoned that better industrial technology would mean

shorter work days while workers still received the same wages as the eight-hour day. Miners who fought to expand their paid labor were not only looking to the near future to determine what work could be in the next collective bargaining agreement but were imagining the “long future” of work as well. The UMWA foresaw a six-hour day, noting how the work day had been reduced from 12 to 10-hours, and then down to eight. Quoting President Franklin Roosevelt in the *United Mine Workers Journal*, the miners’ union argued that there ought to be a connection between higher wages and higher productivity given growing mechanization in mines.²⁰¹

Miners clearly understood the negative aspects that could come with mechanization. A 1938 *United Mine Workers Journal* article captured the downside with the succinct article title “Machines Displace Men.”²⁰² This is an anxiety which has carried over to the present.

Considerable worry exists as mechanization and automation threaten jobs long thought stable, like sales clerking or truck driving. For example, a 2013 study by the University of Oxford found that half of jobs held by Ohioans (2.5 million) faced a 70 percent chance of disruption due to automation and computerization.²⁰³

Modern questions about work are not limited to mechanization or automation. Silicon Valley company’s like Uber and Lyft now embody the gig economy. For the second half of the twentieth century, work was seemingly fixed at eight-hours with “occupation” supplanted by “career.” As historian Louis Hyman has shown in his scholarship on the history of temp work, even these seemingly fixed notions never quite were.²⁰⁴ Questions about the future of work - both then and now - abound.

²⁰¹ “The Six-Hour Day for the Coal Miner,” *United Mine Workers Journal*, May 15, 1938.

²⁰² “Machines Displace Men,” *United Mine Workers Journal*, July 15, 1939.

²⁰³ Doug Caruso and Mark Williams, “Nearly half of Ohio workers hold jobs likely to be automated in the future,” *The Columbus Dispatch* February 6, 2018. <https://www.dispatch.com/news/20180206/nearly-half-of-ohio-workers-hold-jobs-likely-to-be-automated-in-future>

²⁰⁴ Louis Hyman, *Temp: How American Work, American Business, and the American Dream Became Temporary*. (New York: Viking, 2018)

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Associate Tour Guide, Preservation Society of Newport County, Newport R.I.
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- Gave tours at four Gilded Age mansions including The Breakers, Marblehouse and The Elms, including the Servant Life Tour

Volunteer Research Team Coordinator, Museum of Work and Culture, Woonsocket, R.I.
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- Guided a team of volunteers to create an interactive exhibit displaying interactive, historical maps of the city.

UNIVERSITY WORK EXPERIENCE

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