No. 12-417

In The Supreme Court of the United States

CLIFTON SANDIFER, *et al.*,

Petitioners,

v.

UNITED STATES STEEL CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF

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INTRODUCTION

The respondent and the United States advance decidedly different interpretations of section 29 U.S.C. § 203(o). Respondent contends that the "clothes" to which section 203(o) applies encompass everything a worker wears to be ready for work. The government, on the other hand, insists that "not everything worn on, or attached to, one's body qualifies as clothing" (U.S.Br. 23); specifically, the United States maintains that "equipment" and "devices" that are worn on the body are not clothes. Although in this case the government interprets its standard to warrant a decision in favor of respondent, in most section 203(o) cases the differences between the two proposed standards would be of substantial importance. We set out in the appendix a list of the section 203(o) cases which we have been able to identify; in many of them the disputed items are the same as or similar to the items cited in the government's brief as examples of "equipment" or "devices" that are not "clothes."

I. SAFETY AND OTHER EQUIPMENT OR DEVICES ARE NOT "CLOTHES" UNDER SECTION 203(o)

(1) US Steel contends that any item is "clothes" within the meaning of section 203(o) if it is part of "the work outfit that the employee will wear so as to be ready for work." (R.Br. 37). This proposed standard includes many things that an English speaker would not call "clothes."

Respondent insists that under its standard the respirators, safety goggles and ear plugs in this case are "clothes." (R.Br. 30, 38, 65). It points to a referee's whistle as another example fitting within its definition of "clothes." (R.Br. 39 n.14; see R.Br. 66 n.22 (space suits and metal armor). In the poultry processing industry, an employee's work outfit may include a knife scabbard. "[T]o be ready for work" a police officer must be wearing his or her gun, and the gear on the belt the officer wears often includes a radio, a baton, and a pair of handcuffs. These and many other items a person could wear are, in the government's terminology, "equipment" or "devices." In addition, to be "ready for work" members of the band Kiss must be wearing their unusual makeup, and Captain Kangaroo wore a wig. But English speakers do not refer to makeup or wigs as "clothes," just as they do not use that term to refer to respirators, earplugs, whistles, knife scabbards, guns, radios, batons, or handcuffs.

Respondent insists these things are all "clothes" because "clothes" means "any 'covering for the human body.'" (R.Br. 17, 26, 23, 41, 62, 65). But as the government correctly notes, there are many things which are worn on the body – and which thus necessarily *cover* part of the body – that are not referred to as clothes. "Welding helmets, respirators, and scuba tanks, for instance, are all worn on the body but are not commonly regarded as 'clothes.'" (U.S.Br. 23).

(2) The context of section 203(o) provides no support for construing "clothes" to include everything a worker wears to do his or her job.

Section 203(o) refers to changing clothes "at the beginning or end of the workday." Because the statute refers to clothes changing related to the "workday," US Steel contends that "clothes" must mean anything an employee wears to be able to "work[ ]." (R.Br. 27-28). But the fact that section 203(o) is about "clothes" changing related to work does not mean that the statute applies to putting on and taking off anything and everything related to an employee's job. Respondent insists that "[t]he statutory text ... draws no distinction between donning and doffing ... specific parts of a work outfit." (R.Br. 18). Of course it does; the text distinguishes between "clothes" – which are covered by section 203(o) – and everything else, which is not.

Respondent insists that "clothes" means "work outfit." Respondent then notes that one dictionary defines "outfit" to mean "wearing apparel *with accessories* designed to be worn on a special occasion or in a particular situation or setting." (R.Br. 28) (emphasis added). But the language actually used in section 203(o) is "clothes" not "outfit."

The fact that the term "clothes" occurs in the phrase "changing clothes" is evidence that "clothes" does not include everything an employee might wear for work. The expression "changing clothes" refers to substituting certain clothes for others. The items that typically would be involved in such a substitution

would be a shirt or blouse, pants or a skirt, or a dress or coveralls. But safety gear, as the government has noted (U.S.Br. 26 n.8), generally is put on over or in addition to a worker's clothes, rather than being substituted for street clothes. Respondent sets out in its brief a list of safety items that were used at mid-century; virtually everything on this list would have been put on over or added to an employee's work clothes.[1] The photographs of safety gear reproduced at pages 45-46 of respondent's brief all depict items that would have been worn over or in addition to a worker's clothes, not things that could have been substituted for a worker's street clothes.

(3) There are a number of reasons why Congress would have chosen to apply section 203(o) only to clothes – in the ordinary sense – but not to safety or other equipment or devices.

First, there is often a dispute about whether changing clothes (in the ordinary sense) is a principal activity; putting on employer-required equipment and devices, on the other hand, would always be a principal activity. Employees at times prefer for reasons of personal convenience to do their jobs in work clothes, rather than their street clothes; in that situation, changing clothes would not be a principal activity.

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[1] Those items include goggles, safety hats, helmets, leggings, leather aprons, asbestos aprons, steel bradded aprons, hoods, gloves, spats, foot protectors, safety belts, mitts, masks, shields, and respirators. (R.Br. 29-30).

29 C.F.R. § 785.24(c). But when a worker puts on some equipment required by the employer or otherwise necessary to do the job – be it a poultry worker's knife scabbard, a police officer's gun, or a hard hat – that clearly would be a principal activity under the FLSA. Congress sensibly chose to apply section 203(o) only to cases – changing into and out of ordinary work clothes (and washing) – the compensability of which would frequently be at issue.

Second, in the era when section 203(o) was adopted, both collective bargaining agreements and decisions of the War Labor Board distinguished between changing clothes (in the ordinary sense) and putting on (and taking off) equipment and devices. Brief of the American Federation of Labor and Congress of Industrial Organizations, *et al.*, as *Amici Curiae*, 5-14.

Third, and most importantly, this distinction is necessary to prevent circumvention of the well-established rule that a worker engages in a principal activity when he or she carries tools or other needed materials to the location in a plant where work is to occur. The Department of Labor's 1947 policy guidance concluded that the preparatory act of bringing needed materials to work stations is a principal activity. 29 C.F.R. § 785.24(b)(2). Where an employee is required to carry tools to his or her work station from somewhere else in a plant, the period of time consumed is compensable under the FLSA. 29 C.F.R. § 785.38. In *Amos v. United States*, 13 Cl.Ct. 442 (Cl.Ct. 1987), corrections officers were required to

pick up their weapons at one portion of a prison before going to their posts; the court held that the guards were entitled to compensation for the period during which they were carrying their guns to their posts. The activity of transporting materials, tools or weapons in this manner within a plant, mine or prison is clearly outside the scope of section 203(o). That well-established principle applies as well to safety equipment or devices that a worker must have "to be ready for work." (R.Br. 37).

But that rule could be evaded if an employer could require a worker to *wear* the transported item, and then characterize the event as "changing clothes." In this case, for example, respondent suggests that a tool belt is "clothes" under section 203(o). (R.Br. 59). If that is correct, an employer could circumvent the law simply by directing a worker to "wear" a tool in a tool belt, rather than carrying it in his or her hand or pocket. And if wearing rather than holding a transported item is "changing clothes," an employee's right to compensation could vary depending on whether, for example, a guard put his or her gun in a holster, rather than holding it in his or her hand.

These problems of potential evasion and uneven application, on the other hand, are not posed by an employee changing into and out of regular work clothes – such as a shirt and pants. Unlike transporting tools or safety gear, a worker could not just carry his or her work pants and shirt to his or her work station, and then change there. Considerations of privacy would preclude a worker from disrobing in

the middle of the plant floor, and often there would be no place to store his or her street clothes.

(4) Respondent insists that at mid-century safety equipment and devices were widely worn by industrial employees, that Congress was well aware of that practice, and that the main purpose of section 203(o) must have been to apply to such equipment and devices. (R.Br. 19, 21, 34, 36, 44, 52). Even if such use of safety gear had been ubiquitous in industry and known to Congress, that would provide no support for respondent's contention that Congress intended "clothes" to cover equipment and devices. To the contrary, such use and knowledge would make Congress's choice of the narrower term "clothes" all the more deliberate.

Respondent's underlying premise is incorrect. At page 31 of its brief respondent asserts that "Congress enacted section 203(o) only two years after it had enacted the Portal to Portal Act.... As a result, Congress was familiar with the specialized and protective work outfits ... worn in heavy industries that gave rise to the portal to portal controversies in industries such as mining and manufacturing. *See supra* at 3-5." But respondent's summary of the background of the Portal-to-Portal Act notes only that in one of the cases which triggered that legislation the workers put on "aprons and overalls." (R.Br. 2) (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 783 (1946)). Potters' overalls and aprons are not "specialized and protective work outfits."

Respondent also relies on certain "Minimum Standards" for protective clothing established by the Department of Labor. (R.Br. 29). These standards were issued in March, 1935, under the National Industrial Recovery Act (NIRA). But two months later this Court invalidated the NIRA. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). The stillborn standards quoted by respondent would have had little if any impact on actual work conditions. The Department of Labor's paper "Practical Work Clothing for Women," which respondent also cites, is merely a set of suggestions, not a description of prevailing practice; in most instances the suggestions regarding protective gear refer to only a single plant that used one of the recommended items. The other recommendations in this 1941 publication included an end to wage discrimination on the basis of race or sex. United States Department of Labor, Bureau of Labor Statistics, Handbook of Labor Statistics, Vol. 1, 523 (1941). The 1914 magazine article which respondent refers to as *Work Clothes* was actually entitled *Work Clothes for Special Jobs*.[2]

The government asserts that when section 203(o) was adopted, workers in steel mills wore protective clothing "not different in kind" from that used at US Steel today. (U.S.Br. 23). That is not correct. We set out in the appendix photographs of steel mills, including from Gary Works, taken in that earlier era.

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[2] J.T. Carpenter, *Working Clothes for Special Jobs*, Factory, The Magazine of Management 402 (January 1914).

The workers generally have nothing protective over their torsos, arms and legs; they are wearing ordinary clothes or work clothes such as overalls or coveralls, and some men are bare-chested. Hard hats were uncommon; workers most often wore cloth caps or (in the case of women) kerchiefs. The only recurring safety items were dark goggles and gloves; many workers wore neither, and neither would have to be donned before work actually began. In photographs in an advertisement published by the steel industry in *Life* magazine, the foreman demonstrating the use of machinery at a steel plant is wearing a tie, a vest, and a fedora. A similar pattern is evident in movies taken at steel mills during this era.[3]

(5) Interpreting section 203(o) to exclude safety equipment and devices worn on the person would not, as respondent suggests, render that provision meaningless. Section 203(o) would still apply, for example, to tens of thousands of bakeries, the specific and indeed only industry cited by the sponsor of what became that provision. (See p. 17, *infra*). In 1949 bakeries were probably the most common employers at which changing clothes would have been a principal activity under the FLSA. Section 203(o) would apply as well to workers like those in *Steiner v. Mitchell*, 350 U.S. 247 (1956), who replaced their street clothes with old work clothes that had no specialized or protective function, but were substituted for street clothes

[3] See, e.g., the 1944 Movie about an Ohio Steel Plant at http://www.youtube.com/watch?v=hlqggGOZw.

because the corrosive chemicals at the plant involved quickly destroyed whatever was worn there.

II. THE UNITED STATES DOES NOT OFFER A CLEAR STANDARD DELINEATING WHAT CONSTITUTES EQUIPMENT OR DEVICES OUTSIDE THE SCOPE OF SECTION 203(o)

The government argues that in applying section 203(o) courts should distinguish between clothes and "equipment" or "devices." Utilizing these same categories, the AFL-CIO concludes that at least most of the items at issue in this case are equipment. Brief of the American Federation of Labor and Congress of Industrial Organizations, *et al*., as *Amici Curiae*, 15. The government, on the other hand, insists that at least almost all of the items in this case are clothes rather than equipment.[4] It is unclear how the government arrives at that conclusion or what standard – defining "equipment" and "devices" – it is proposing.

In one passage the government suggests that the distinction between clothes and equipment or devices turns on weighing two factors, form and function. "Lower courts ... have indicated that some types of items worn on the body are so distinctive in form and function that they are properly classified as equipment rather than clothes." (U.S.Br. 25). Elsewhere the government suggests that neither "the function"

[4] The government takes no position regarding the classification of ear plugs, goggles or hard hats.

of an item nor the "material out of which" it is made affect the applicability of section 203(o). (U.S.Br. 16). In yet a third passage, the government's brief states that "historical materials and modern case law indicate that some items of specialized equipment are so distinct in form and function" that they are not clothes within the meaning of section 203(o). (U.S.Br. 8). On this latter view certain equipment *is* "clothes": non-specialized equipment as well as some but not all specialized equipment. That standard might rule out classifying ear plugs or hard hats as equipment rather than clothes, because they may not be "specialized."

The government insists that virtually all of the items in this case are clothes rather than equipment, but it is unclear how the government arrived at that conclusion. After setting out the distinction between clothes and equipment, the government brief states without any elaboration that "as explained above, the items at issue here fall within the ordinary meaning of the term 'clothes.'" (U.S.Br. 26). But nowhere prior to this statement does the government explain why the disputed items would not be classified as equipment or devices. "Device" certainly seems to be the appropriate term, for example, to describe the contraption referred to as "leggings."

At page 10 of its brief the government asserts that some of the items in this case are "garments," but does not include the metatarsal boots in that grouping. At pages 10-11 it cites the court of appeals' statement that "any English speaker would say that

the model in our photo is wearing work clothes." But the court of appeals meant only that *some* of the items worn by the model would be described as clothes; it acknowledged the safety glasses and perhaps hard hat would not. And the model is not wearing either the leggings or the wristlets.

The Solicitor General twice notes that in the era when section 203(o) was adopted gloves were often characterized as equipment (U.S.Br. 25 and n.6), and yet insists that in this case gloves instead are clothes. (*Id*. at 10). The government cites with approval authorities which characterize "wrist guards" and "plexiglass armguards" as equipment (*id.* at 25), but asserts that Kevlar forearm coverings (wristlets) and ankle protectors (leggings) are clothes. (*Id*. at 10). "Metal guards" are apparently equipment (*id*. at 24), but the United States contends that the metatarsal boots in this case are clothes, even though those special boots are used precisely because they contain metal toe boxes, commonly referred to as "metal toe guards." (*Id.* at 10). A leather or chain link apron may be equipment (*id*. at 25 and n.6), but for some reason a Kevlar snood is not. (*Id.* at 10). The fact that an item is made of metal, chain link or perhaps leather may render it "equipment," but apparently the identical item made of Kevlar (which is stronger per ounce than metal, chain mail, or leather) would be clothes. The flame retardant jacket and pants – designed to protect against molten metal – could as fairly be described as "protective equipment for the[ ] arms, torsos, and legs" as the items used in

the meat industry to protect against knives and saws. (*Id*. at 25) (emphasis omitted).

III. CLOTHES WITHIN THE MEANING OF SECTION 203(o) DO NOT INCLUDE ITEMS USED TO PROTECT AGAINST A WORKPLACE HAZARD AND FASHIONED TO PROVIDE PROTECTION FROM HAZARDS

(1) In our opening brief we urged the Court to hold that the term "clothes" in section 203(o) "does not include items that both are worn to protect the user from workplace hazards and were designed for such a protective function." (Pet.Br. 57).

Respondent and the government object that excluding "protective" items from the scope of section 203(o) would be far too broad, because most clothes are intended to have some protective effect, such as protecting the wearer from the cold or the sun. (U.S.Br. 20; R.Br. 18, 21). But our brief could not have been more emphatic that our proposed standard refers only to protection from *workplace* hazards; we repeated that limitation consistently, and italicized it in the summary of argument.

The government argues that section 203(o) should not exclude an item merely because it was designed to have some special function, objecting that such a rule also would be unduly broad. But our proposed standard is limited to items with a single specific purpose – protection – and it also requires that the

item actually be used to protect the wearer from a workplace hazard.

In our opening brief we explained the impossibility of framing a single definition of clothes, noting that common usage is complex and inconsistent and turns on half a dozen different, sometimes ill-defined variables. (Pet.Br. 19-22). Referring to that portion of our brief, the government objects that this "array of factors does not provide reasonable certainty for employers and employees.... [P]etitioners do not explain how jurists could apply *their approach* with any consistency." (U.S.Br. 19) (emphasis added). But utilization of that array of factors was precisely the approach which we argued that the courts should *not* take.

(2) The United States in this case contends that section 203(o) is not subject to the general principle that statutory exemptions are to be narrowly construed. (U.S.Br. 28-29). In 1997 and 2010, the Department of Labor took the opposite position.[5] We agree with the government's earlier view.

The government argues that section 203(o) "does not function like a typical exclusion: it does not place

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[5] U.S. Dep't of Labor, Opinion Letter (Dec. 3, 1997), 1997 WL 998048 ("Since section 3(o) provides an exemption from the broad, remedial provisions of the FLSA, it must be read narrowly"); U.S. Dep't of Labor, Opinion Letter (FLSA 2010-2) (June 16, 2010), 2010 WL 2468195 ("§ 203(o) [is] an exemption that must be read narrowly").

changing clothes and washing-up time outside the Act as a categorical matter." (U.S.Br. 29). Unfortunately, that is as a practical matter precisely how section 203(o) often functions. The government assumes that under the FLSA (but for section 203(o)) workers have a clear right to compensation for clothes changing, and that employers know they may not escape their duty to pay that compensation without affirmative consent from the union. (U.S.Br. 18). In practice, however, whether an employer has to pay for clothes changing is often hotly disputed; in this very case, US Steel still insists that it need not do so (even if section 203(o) is inapplicable) because the time the clothes changing requires is *de minimis*. So, unlike provisions involving an indisputable right to compensation, an employer usually has little motivation to seek an express CBA provision permitting non-compensation; an employer would not give the union "something in return" for agreeing to non-compensation (U.S.Br. 18), because on the employer's view the union's agreement was not needed anyway.

In addition, application of section 203(o) is triggered by a "custom or practice" under a CBA. The lower courts have held that once an employer begins to require clothes-changing (or to require workers to wear any additional item) without compensation, the practice will become a custom or practice under the CBA within the meaning of section 203(o) unless the union can get the company to relent and provide compensation. The net effect of these factors has been that when an employer requires workers to wear

particular items, if the union fails to negotiate compensation for the work involved, the increased duties then become exempt from compensation as a de facto custom or practice.[6]

(3) The legislative history of section 203(o) is consistent with the standard we propose. The Portal-to-Portal Act of 1947 provided that employers were not required to compensate employees for "activities which are preliminary to or post-liminary to ... principal activity or activities." 29 U.S.C. § 254(a). The Department of Labor in 1947 issued an interpretative bulletin which concluded that principal activities included activities at the beginning and end of the work day that are integral and indispensable to its performance. See 12 Fed. Reg. 7655 (Nov. 18, 1947) (29 C.F.R. § 785.24(c)).

In 1949 House hearings, the Associated Retail Bakers of America objected to this interpretation of the Act. It maintained that the activities that are compensable under the FLSA should not include any work which is not compensable under prevailing industry custom or practice, or under a collective

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[6] *Hudson v. Butterball, LLC*, 2009 WL 3486780 at *3 (W.D.Mo. Oct. 14, 2009); *Burks v. Equity Group-Eufaula Division, LLC*, 571 F.Supp.2d 1235, 1245 (M.D.Ala. 2008); *In re Cargill Meat Solutions Wage and Hour Litigation*, 632 F.Supp.2d 368, 387 (M.D.Pa. 2008); *Gatewood v. Koch Foods of Mississippi*, 589 F.Supp.2d 687, 701 (S.D.Miss. 2008); *Anderson v. Pilgrim's Pride Corp.*, 147 F.Supp.2d 556, 564-65 (E.D.Tex. 2001); *Nardone v. General Motors, Inc.*, 207 F.Supp. 336, 349 (D.N.J. 1962).

bargaining agreement, regardless of the nature, importance or timing of that activity.[7] Neither the Bakers' statement nor the new statutory language that it proposed were directed at any particular type of employee activity.

The FLSA legislation reported by the House committee contained no provision related to this proposal. The House, however, adopted an amendment offered by Representative Herter which would have permitted compensable time to be limited by the terms of, or a custom and practice under, a collective bargaining agreement, but not merely by virtue of an industry custom. In explaining his amendment, Representative Herter referred to only a single specific example of the need for his proposal, bakeries.

> In the bakery industry, for instance, ... there are collective-bargaining agreements with various unions ... which define exactly what is to constitute a working day and what is not to constitute a working day. In some of those collective-bargaining agreements the time taken to change clothes and to take off clothes at the end of the day is considered a part of the working day. In other collective-bargaining agreements it is not so considered. But, in either case the matter has been carefully threshed out between the employer

[7] *Minimum Wage Standards and Other Parts of the Fair Labor Standards Act of 1938: Hearings Before Subcomm. No. 4 of the H. Comm. on Education and Labor*, 80th Cong., 1st Sess. 1565-69 (1947).

> and the employee and apparently both are completely satisfied with respect to their bargain agreements.

95 Cong. Rec. 11210 (Aug. 10, 1949). The terms of the language adopted by the House, however, were not limited to any particular type of activity; under it a collective bargaining agreement could have excluded from compensable time all work hours over 40 a week, all work done before 8 a.m., or all bread kneading. *Id.*

The Senate bill contained no comparable provision limiting the activities compensable under the FLSA. The conference committee agreed on the language currently in section 203(o), which unlike the Herter amendment is narrowly limited to only two activities: changing clothes and washing.

Our proposed interpretation of section 203(o) is entirely consistent with this legislative history. As the Department of Labor has correctly observed, "[t]he 'clothes' that Congress had in mind in 1949 when it narrowed the scope of § 203(o) [were] those 'clothes' that workers in the bakery industry changed into and 'took off' in the 1940s." U.S. Dep't of Labor, Opinion Letter (FLSA 2010-2) (June 16, 2010), 2010 WL 2468195. In 1949, as today, the clothes bakers wore at work were ordinary cloth pants, shirts and aprons, often white; they were used to assure the cleanliness of the baked goods, not to protect the workers. And the workers (if they "changed clothes" at work) substituted those work clothes for their street clothes; that substitution, often required by state law, assured

that the food was not contaminated by dirt or germs on those street clothes.

In arguing for a broader interpretation of section 203(o), respondent relies primarily on a statement by the National Association of Manufacturers (NAM), which referred to a passage in the Department of Labor 1947 policy guidance that mentioned the use of "special clothing" by workers at a chemical plant. (R.Br. 7, 19, 35-36, 50). Respondent insists that the House decision to adopt the Herter amendment was a "response" to the NAM statement. (*Id*. at 7, 35). But this is not a plausible account of the reason for the decision of the House to adopt the Herter amendment. The NAM statement was merely a document, one of many, placed in the record of a *Senate* hearing.[8] In the ordinary course of congressional business, members of the House would have no reason to be aware of such a minor event at a Senate committee hearing. It is likely that the transcript of the April 1949 Senate hearings, including the written statement now quoted by respondent, was not printed until after the House acted in August of that year.

(4) In our opening brief we noted that in common usage a protective garment is ordinarily referred to as "protective clothing" not "protective clothes."

[8] The passage on which respondent relies from the NAM statement consists of two sentences out of a 5,000 word document, the rest of which was devoted to other matters.

(Pet.Br. 48-50).[9] Respondent argues the distinction is meaningless, because a dictionary "define[s] 'clothes' to mean 'clothing.'" (R.Br. 47). But dictionaries are descriptive not prescriptive, an attempt to summarize how words are actually used. Where, as in this specific instance, two words demonstrably are used differently, it is irrelevant whether the authors of a dicdictionary concluded that in other situations (or even most of the time) those words can be used interchangeably.

Respondent suggests that the only reason Congress did not utilize the phrase "changing clothing" in section 203(o) is that it would have involved an awkward use of two neighboring words ending in "ing." (*Id*. and n.18). To illustrate the supposed literary convention of avoiding such usage, respondent notes that in federal cases in Westlaw "changing clothes" is used 274 times, far more than the 15 instances of "changing clothing." (*Id.*). But that has nothing to do with the suffix "ing"; the phrase "chang*ed* clothes" also appears far more often (420 times) than "chang*ed* clothing" (24 times).

Respondent asserts that reports and authorities in 1949 often used the term "clothes" to refer to protective items. But the only document which respondent cites for this claimed usage of the term "clothes"

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[9] There is a typographical error on p. 49 of that brief. The fourth line down should begin "protective clothes" not "work clothes."

is an article published 35 years earlier in a 1914 edition of a long defunct magazine. J.T. Carpenter, *Working Clothes for Special Jobs*, Factory, The Magazine of Management 402 (January 1914) (R.Br. 30). And the significance which respondent attaches to the title of this article is undermined by the fact that the article describes both protective and non-protective items.

(5) The government argues that

> [n]either Section 203(o)'s text nor its purpose suggests that its application should depend on the material out of which specialized clothing is made or the *function* such clothing serves (whether ... protection ... or something else).

(U.S.Br. 16) (emphasis added). This implies that whether an item worn by a worker has a protective function would be irrelevant to whether the item is clothes within the meaning of section 203(o).

But elsewhere the government apparently maintains that function does matter; it refers with evident approval to lower court decisions which "have indicated that some types of items worn on the body are so distinctive in *form* and *function* that they are properly classified as equipment rather than clothes." *Id*. at 25 (emphasis added). And in describing the facts of *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005), as involving "a variety of *protective equipment*" (*id*.), the government's brief italicized the term "protective" for emphasis. It is these latter passages which indicate the correct approach. The Court should hold that an

item is not "clothes" within the meaning of section 203(o) if its function is to protect the wearer from a workplace hazard, and its form (including the materials from which it is made) was fashioned to provide protection from hazards.

IV. "CHANGING CLOTHES" REFERS TO SUBTITUTING CLOTHES FOR OTHER CLOTHES

The meaning of the transitive verb "to change" depends on the direct object of that verb. We set out in our opening brief quotations from fifteen dictionaries; in every one of them the verb "change" refers to substitution when the direct object is "clothes." (Pet.Br. 24-25 and nn.17-18). Neither US Steel nor the government dispute our characterization of the definitions in those dictionaries, and neither has been able to identify a single dictionary that defines change, in this specific context, in any other way.

The government, however, asserts that the "ordinary" meaning of "change" is to "make different." (U.S.Br. 31). Similarly, US Steel argues that the "primary" or "ordinary" definition of "change" is "to render different, alter." (R.Br. 55). But that is merely to observe that when the verb "change" has a different direct object (as in "change a law"), it may have a different meaning. The meaning of "change" in any particular instance turns on the particular direct object with which it is being used, not on its meaning in other circumstances, however common they may be.

The government acknowledges that when the verb "change" is used with the direct object "diaper" or "tire," it refers to substitution. The government also concedes that "changing clothes" "typically implies removal of one outfit and substitution of another." (U.S.Br. 32). But it insists that "changing clothes" also has a second, widespread meaning. According to the United States, in ordinary usage "changing clothes" "commonly refers ... to placing new clothes on top of one's existing outfit." (U.S.Br. 32). The government, however, points to no actual example of that asserted usage. On the government's view, a person who puts on a scarf or a tie would be said to be "changing clothes"; that is not how the phrase is really used. Similarly, the government maintains that taking off an item of clothing is "changing clothes" (U.S.Br. 31) and that socks are clothes. (U.S.Br. 19). If that is correct, a person who takes off (and later puts back on) his or her socks to wade in the Reflecting Pool (or some other body of water) is "changing clothes." That is not how this common summertime activity is described.

The government argues that "change" could mean "alter" in the statement "one's set of clothes has changed." (U.S.Br. 32). The Solicitor General illustrates this hypothetical usage by observing that when a member of this Court put on a robe before taking the bench, the Justice's "set of clothes has changed." (*Id.*). But in this hypothesized sentence "set of clothes" has replaced "clothes," and it is the subject of the sentence, not the direct object. That sentence

reveals nothing about the meaning of the verb "change" when the direct object is diaper, tire or clothes. For example, if a parent put a cute sticker on a baby's diaper, it would be appropriate to say "the diaper has changed," but the parent who did so would not – except in jest – say that he or she had "changed the baby's diaper." Similarly, no one would describe the events that occur before and after oral argument as "the Justices changing clothes together in the robing room."

Respondent objects that, if "change" referred to substitution, section 203(o) would apply unpredictably in a case in which neither the employer nor the practicalities of the situation compel employees to disrobe before putting on required items; some workers might substitute work gear for street clothes while others do not. But that problem arises precisely because respondent seeks to expand "clothes" beyond its appropriate meaning. Traditional clothes – the white garments worn by bakers, the substitute clothes in *Steiner*, or a police officer's uniform – are invariably, and necessarily, substituted for street clothes. Respondent is compelled to insist on an implausible definition of "changing" because it wants to use an unduly expansive definition of "clothes." Or, in respondent's proposed terminology, because respondent wants to replace the actual statutory term "clothes" with "complete work outfit," it is required to insist on replacing the statutory term "changing"

with "donning and doffing." Neither departure from the actual language of the statute is appropriate.

The meaning of "changing" in section 203(o) is squarely within the scope of the question presented, "what constitutes 'changing clothes' within the meaning of section 203(o)." (Pet.Br. i). Both the petition and the petition reply brief[10] argued that the court of appeals had erred in concluding that section 203(o) applies to putting items on over and in addition to a worker's clothes. Petitioners clearly raised and briefed this argument in the court below,[11] and the court of appeals necessarily rejected it in directing dismissal of the complaint. Respondent argues, as do we, that the meaning of the term "changing" in section 203(o) sheds light on the proper interpretation of the word "clothes" in that provision.

[10] Pet. 24; Pet. Rep. 12-13.

[11] Amended Response of Plaintiff-Appellees/Opening Brief of Cross-Appellants, 34-36; Reply Brief for Cross-Appellant, 23-25.

CONCLUSION

For the above reasons, the decision of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted,

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Items Held To Be "Clothes"
Under Section 203(o)

Allen v. McWane, Inc., 593 F.3d 449, 451 (5th Cir. 2010) (safety glasses, ear plugs, hard hat, steel toe boots)

Anderson v. Cagle's, Inc., 2005 WL 3873160 at *5 (M.D.Ga. Dec. 8, 2005), *aff'd*, 488 F.3d 945 (11th Cir. 2007) (ear protection, hairnet, beard net, smock, non-slip shoes)

Anderson v. Pilgrim's Pride Corp., 147 F.Supp.2d 556, 561 (E.D.Tex. 2001) (ear plugs, safety glasses, hair-net, rubber boots, rubber gloves, smock, apron, kevlar or mesh gloves, plastic sleeves, dust mask)

Andrako v. United States Steel Corp., 632 F.Supp.2d 398, 410 (W.D.Pa. 2009) (safety glasses, hard hat, boots, flame retardant jacket and pants, snood, hood)

Arnold v. Schreiber Foods, Inc., 690 F.Supp.2d 672, 674-75 (M.D.Tenn. 2010) (safety glasses, ear plugs, steel toe safety boots, hard hat, bump cap, hairnet, beard net)

Atkinson v. House of Raeford Farms, Inc., 2011 WL 1526605 at *3 (Apr. 20, 2011) (ear plugs, safety glasses, safety gloves, arm guards, steel toe boots, apron, rubber gloves, hairnet, rubber sleeves)

Bejil v. Ethicon, Inc., 269 F.3d 477, 479 (5th Cir. 2001) (beard cover, shoe covers, lab coat, hair cover)

Burks v. Equity Group-Eufaula Division, LLC, 571 F.Supp.2d 1235, 1240 (M.D.Ala. 2008) (ear plugs, arm guards, steel mesh gloves, boots, smock, hairnet, beard net)

Castaneda v. JBS USA, LLC, 2011 WL 3294032 at *1 (Aug. 1, 2011) (ear plugs, safety glasses, hard hat, hairnet, scabbard, safety boots, arm guards, arm mesh, mesh apron, back mesh, mesh gloves, gaiters, weight belt, rubber apron, rubber gloves)

Curry v. Kraft Foods Global, Inc., 2012 WL 104626 at *1 (Jan. 12, 2012) (ear plugs, safety glasses, shoes, hairnet, beard net, shirt, work pants, bump cap)

Davis v. Charoen Pokphand (US), Inc., 302 F.Supp.2d 1314, 1317-19 (M.D.Ala. 2004) (ear plugs, hairnet, hat, smock, apron, rubber gloves, protective gloves, arm guards, boots, hard hat, cutting gloves, plastic sleeves)

Figas v. Horsehead Corp., 2008 WL 4170043 at *1 (W.D.Pa. Sept. 3, 2008) (hard hat, work shoes, flame retardant jacket, pants, coveralls)

Fox v. Tyson Foods, Inc., 2007 WL 6477624 (N.D.Ala. Aug. 31, 2007), 2002 WL 32987224 at *3 and n.3 (N.D.Ala. Feb. 4, 2002) (safety glasses, ear plugs, mesh or chain gloves, plastic sleeve guards, dust mask, hard plastic arm guards, hairnet, beard net, rubber outer gloves, safety shoes, boots)

Franklin v. Kellogg Co., 619 F.3d 604, 608 (6th Cir. 2010) (safety glasses, ear plugs, non-slip shoes, hairnet, beard net, bump cap)

Gatewood v. Koch Foods of Mississippi, LLC, 569 F.Supp.2d 687, 689-90 (S.D.Miss. 2008) (eye protection, plastic apron, rubber shoe covers, rubber or latex gloves, mesh gloves, plexiglass sleeves)

Guinan v. Boehringer Ingelheim Vetmedica, Inc., 803 F.Supp.2d 984, 988 (N.D.Iowa 2011) (safety glasses with side shields, face shield, safety goggles, hairnet,

beard net, scrubs or uniforms, coveralls, booties, steel toe boots)

Hudson v. Butterball, LLC, 2009 WL 3486780 at *1 n.2 (Oct. 14, 2009) (ear plugs, safety glasses, smock, bump cap, hairnet, coveralls, boots, mesh vest, plastic sleeves, apron, rubber gloves, mesh gloves, Kevlar gloves, mesh apron, arm guards, belly guard, scabbard, plastic gloves, knife holder)

Israel v. Raeford Farms of Louisiana, LLC, 784 F.Supp.2d 653, 656 (W.D.La. 2011) (ear plugs, plastic sleeves, apron, smock, hairnet, beard net, cutting glove)

Johnson v. Koch Foods, Inc., 670 F.Supp.2d 657, 660 (E.D.Tenn. 2009) (ear plugs, safety glasses, smock, hairnet, beard net, rubber boots, hard hat, bump cap, Kevlar gloves, mesh gloves, arm guards, plastic apron, plastic sleeves)

Kassa v. Kerry, Inc., 487 F.Supp.2d 1063, 1066 (D.Minn. 2007) (safety glasses, hairnet, beard net, shirt, pants, smock)

Marshall v. Amsted Rail Co., 817 F.Supp.2d 1066, 1069, 1074 (S.D.Ill. 2011) (goggles, ear plugs, fire retardant plants or jacket, protective sleeves, hood, helmet with shield, respirator, gloves, metatarsal boots, apron, face shield, thermal gloves)

McDonald v. Kellogg Co., 740 F.Supp.2d 1220, 1227 (D.Kan. 2010) (safety glasses, bump cap, shirt, smock, jacket, pants, work shoes)

Mitchell v. JCG Industries, 2013 WL 887985 at *1 (March 8, 2013) (ear plugs, plastic sleeves, guards, hairnet, lab jacket, plastic apron, cut resistant gloves)

Salazar v. Butterball, LLC, 644 F.3d 1130, 1134 (10th Cir. 2011) (ear plugs, safety glasses, mesh gloves, knife holders, arm guards, frock, apron, plastic sleeves, gloves, cotton glove liners, boots, hard hats)

Saunders v. John Morrell & Co., 1991 WL 529542 at *1 (Dec. 24, 1991) (goggles, steel mesh gloves, helmet, arm guards, belly guard, knife and cut resistant gloves, knife guard, steel toe shoes, rubber boots, rubber gloves, rubber apron, steel mesh apron)

Sepulveda v. Allen Family Foods, Inc., 591 F.3d 209, 212 (4th Cir. 2009) (safety glasses, ear plugs, bump cap, steel toe shoes, sleeves, arm shields, USDA required smock, USDA required plastic apron, USDA required rubber gloves, hairnet)

Sisk v. Sara Lee Corp., 590 F.Supp.2d 1001, 1003 (W.D.Tenn. 2008) (ear plugs, hard hat, belly guard, arm guards, scabbards/knife pouches, cut resistant gloves, rubber gloves, white coats, rubber steel toe boots, hairnet, beard net, cut resistant sleeves)

In re Tyson Foods, Inc., 694 F.Supp.2d 1358, 1362 (M.D.Ga. 2010) (ear plugs, plastic sleeves, hand and wrist protection, boots, smock, hairnet, beard net, gloves)

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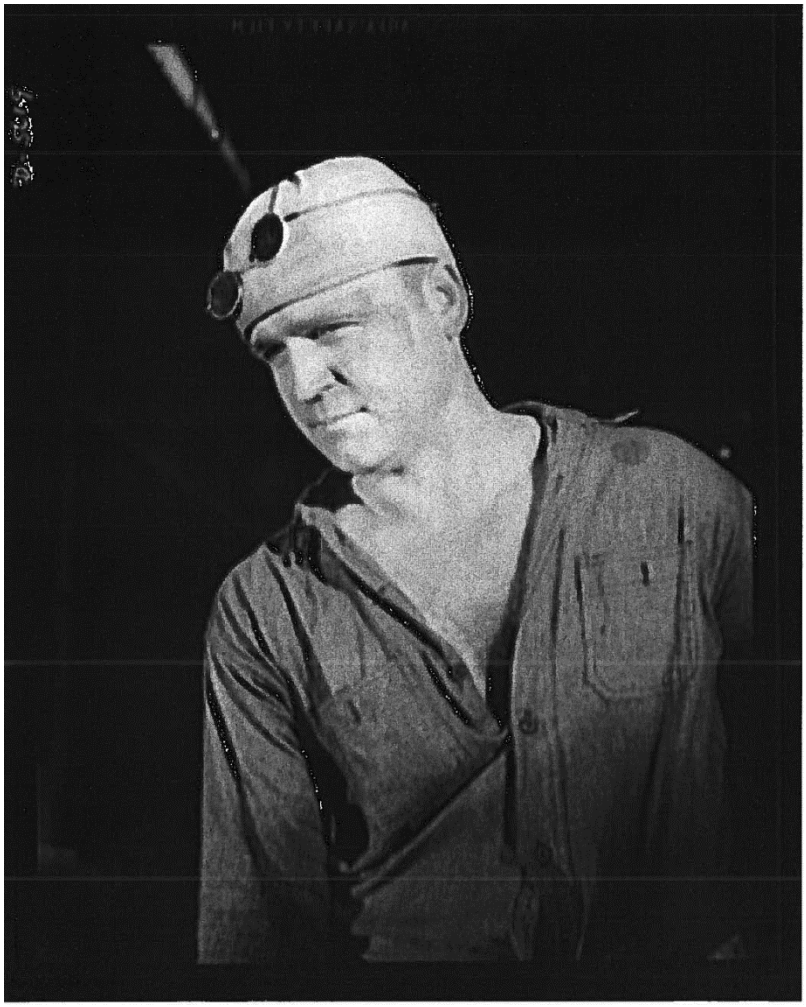

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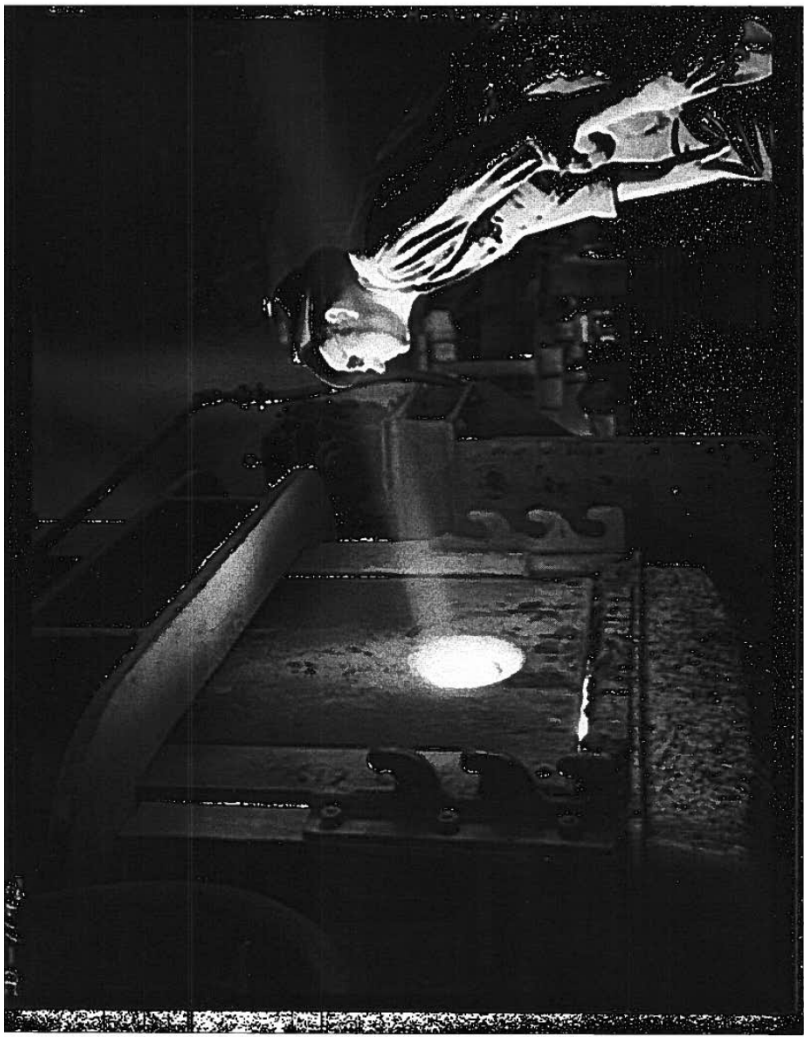

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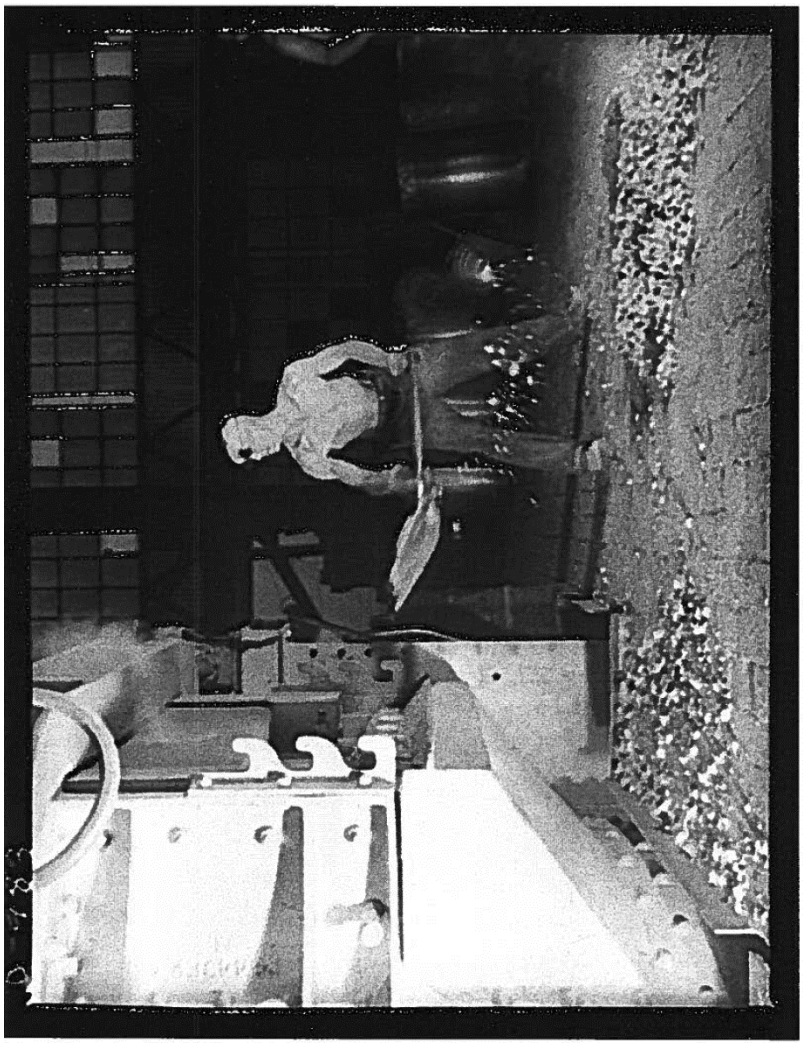

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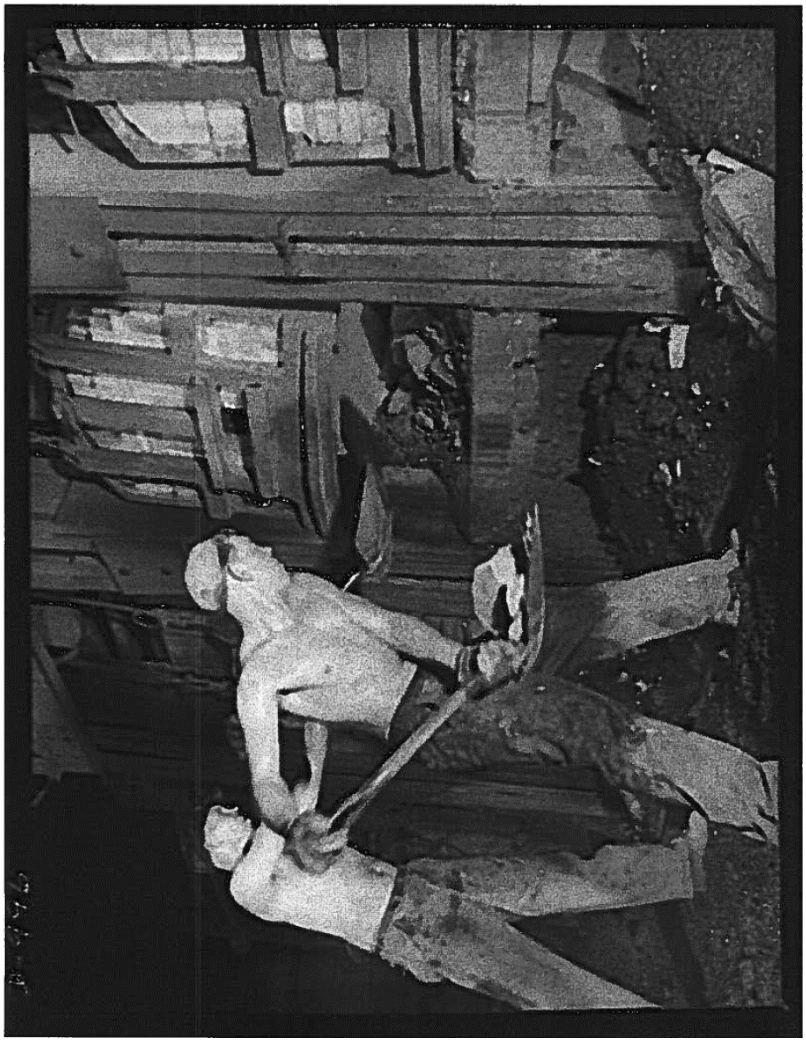

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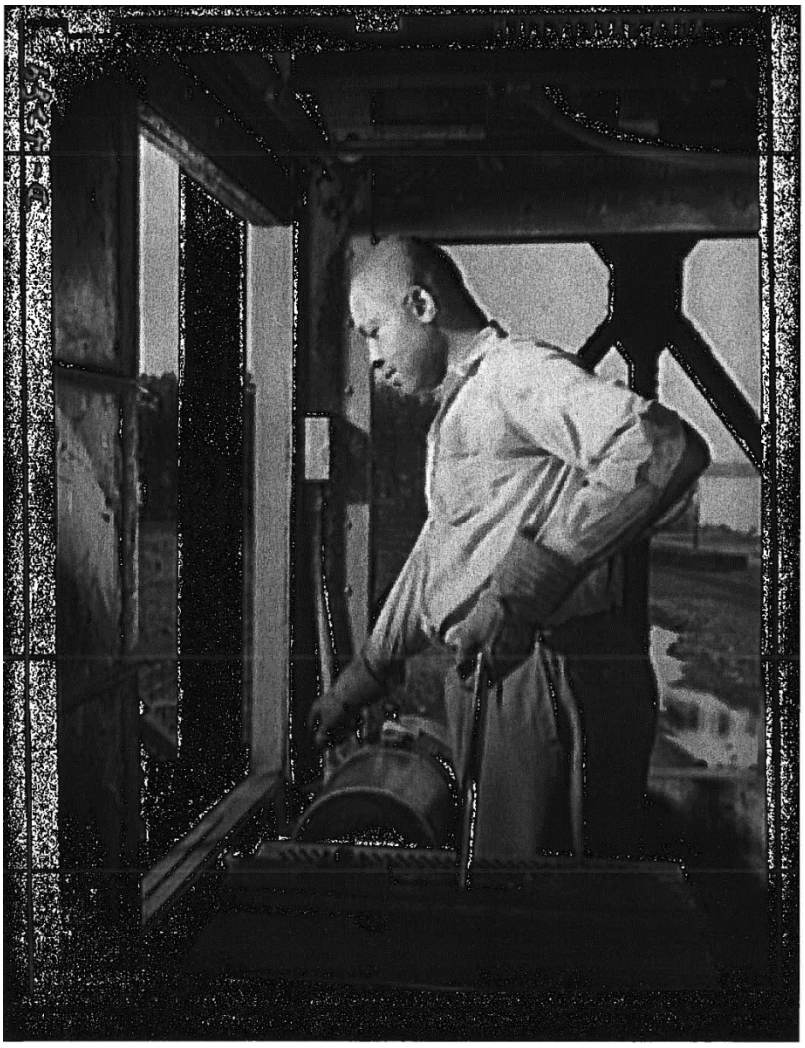

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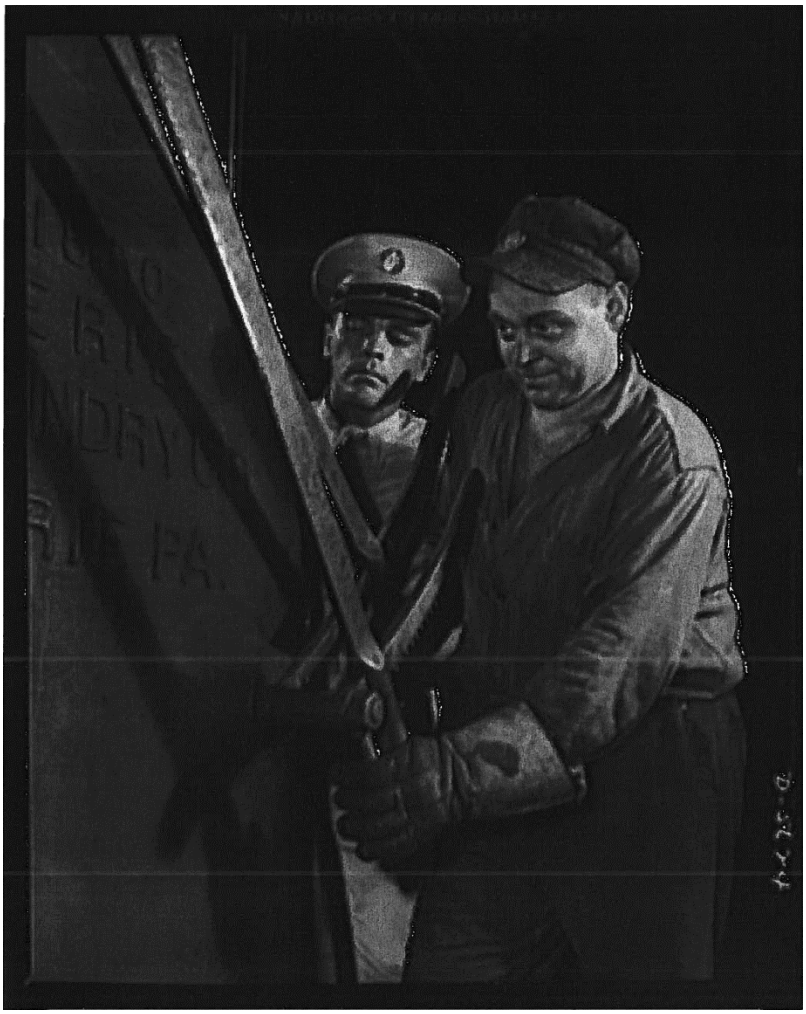

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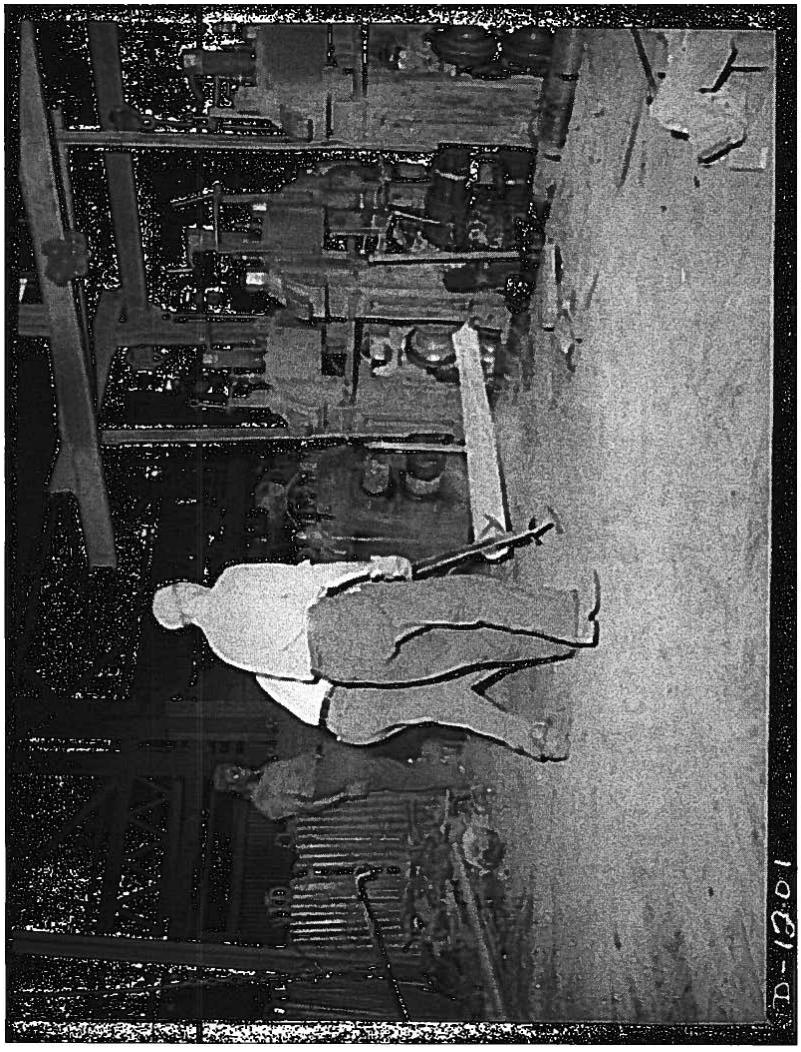

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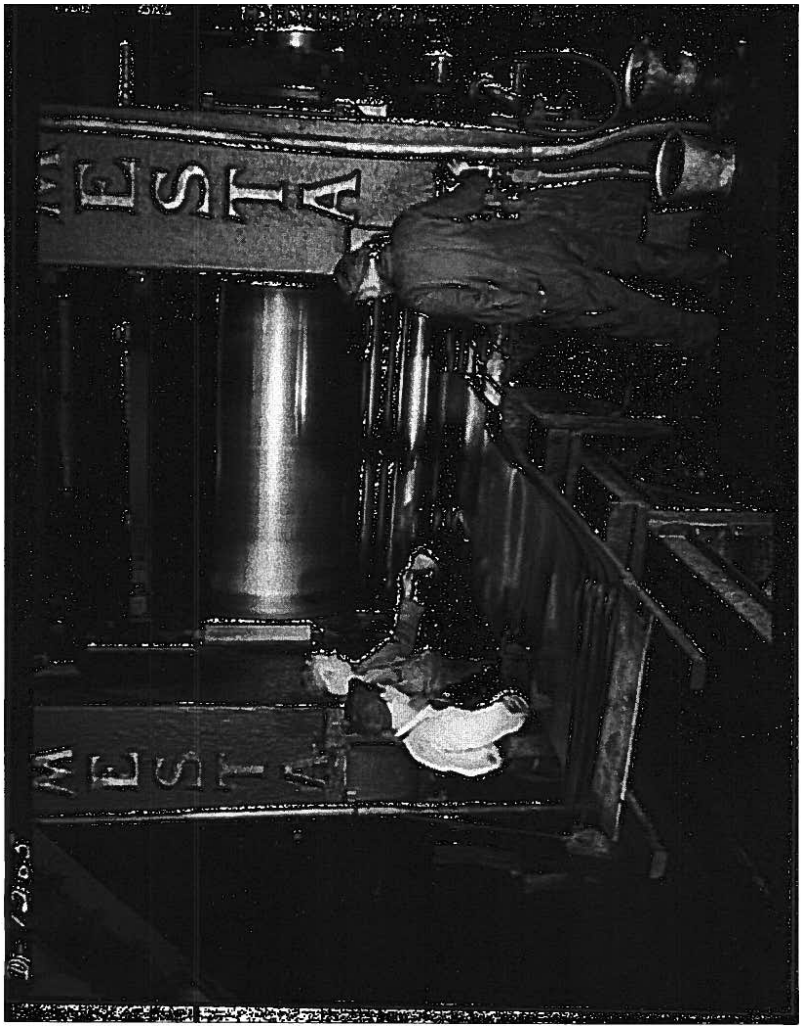

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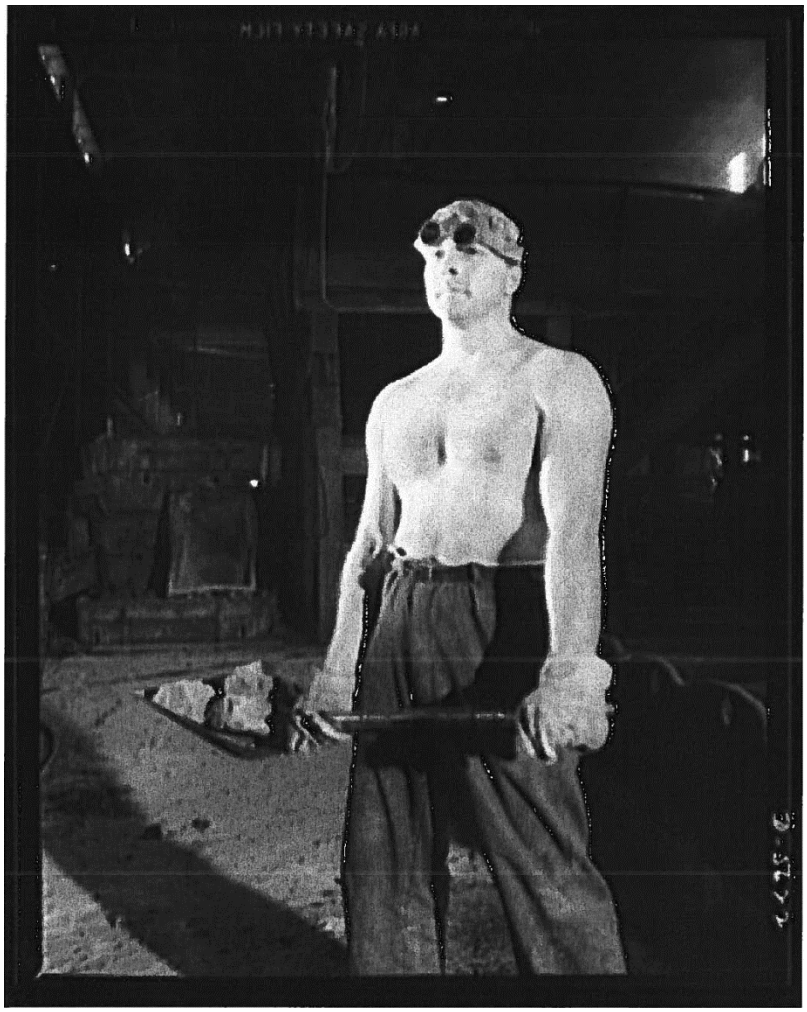

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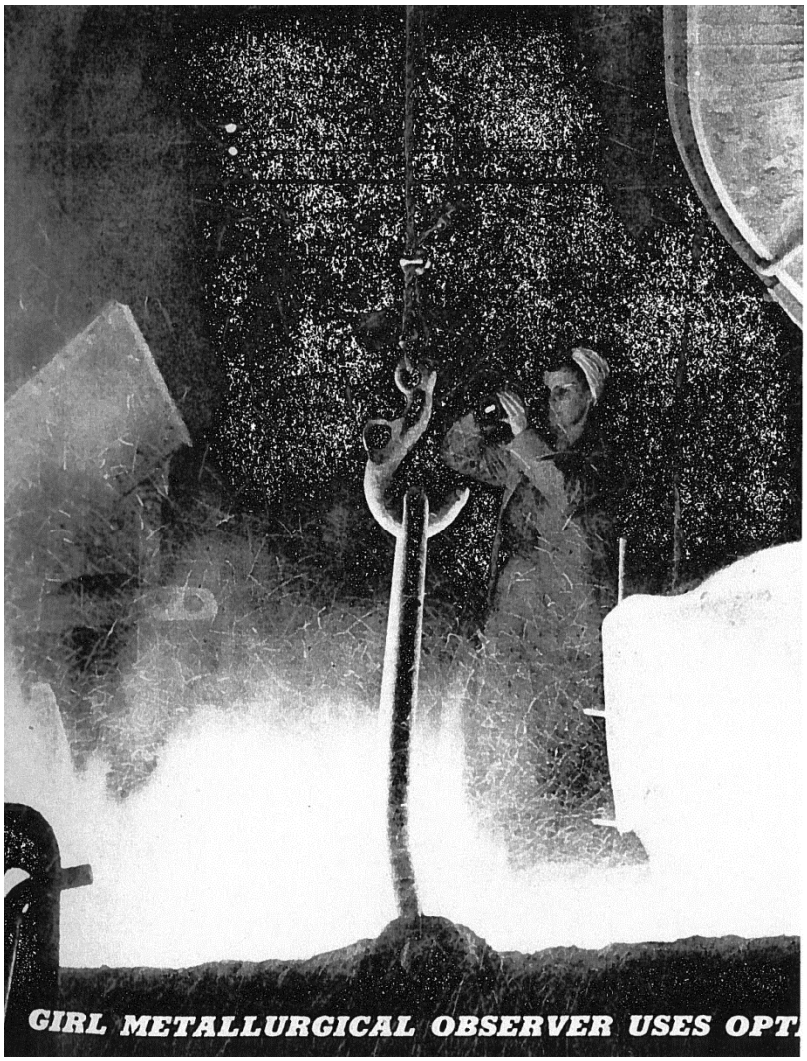
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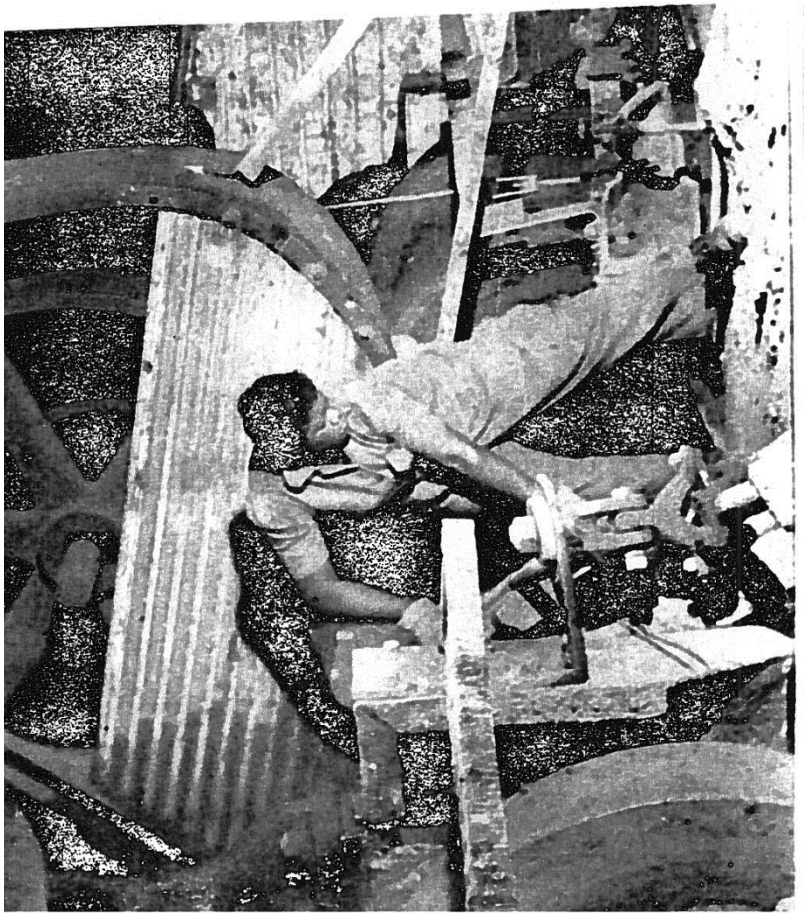

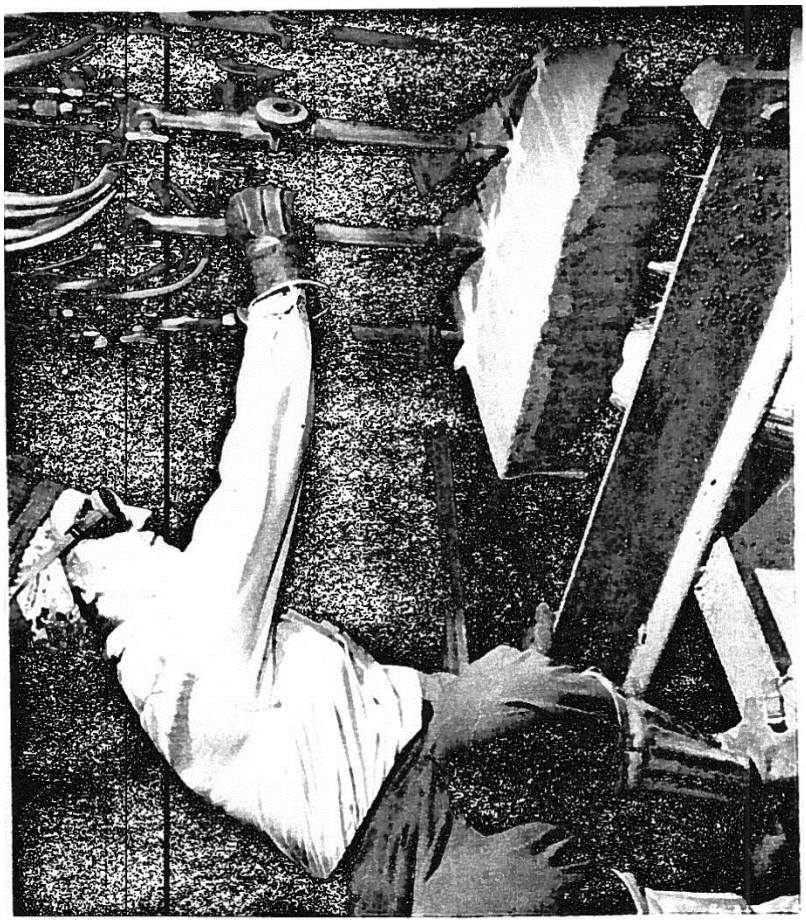

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