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REGULAR RATE AND THE BAY RIDGE CASE: A GUIDE TO LEGISLATIVE REVISION

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PORTAL-TO-PORTAL pay had hardly passed from the judicial spotlight before a new disruptive element appeared to complicate administration of the Fair Labor Standards Act.¹ This time the explosive subject of "overtime-on-overtime" occupied the center of the stage. Before the Court were the familiar provisions of Section 7(a) of the Act:

"No employer shall . . . employ any of his employees . . . for a workweek longer than forty hours . . . unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."²

The undefined statutory "regular rate" had been consistently interpreted as the rate actually paid for time normally or regularly worked.³ A considerable segment of American industry had based many of its overtime pay practices upon the generally accepted converse of that interpretation: that premium payments for time not normally or regularly worked were not part of the "regular rate" and were creditable to the overtime compensation required by the Act.⁴ With the advent of the Supreme Court's decision in *Bay Ridge Operating Co. v. Aaron*,⁵ however, the overtime pay structure based upon that proposition was rendered vestigial. As the sole standard for future overtime pay policy, the Court announced the criterion of excessiveness of hours: only payments made because of work in excess of a specified number of hours previously worked in the workday or workweek constitute true overtime payments.

Many types of wage payments, historically regarded as within the overtime pay category, may now have to be included in the regular

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1. 52 STAT. 1060 (1938), 29 U.S.C. §§ 201-219 (1940).

2. *Id.* at 1063, 29 U.S.C. § 207 (a) (1940).

3. See p. 354 and note 25 *infra*.

4. See p. 363 *infra*.

5. 334 U.S. 446 (1948), *rehearing denied*, October 11, 1948, *affirming* 162 F.2d 665 (2d Cir. 1947) *which had reversed* 69 F. Supp. 956 (S.D.N.Y. 1947) *reported sub nom.* Addison v. Huron Stevedoring Corp. See Note, 16 U. CHI. L. REV. 116 (1948).

rate upon which statutory overtime is computed. The result is that the much-discussed "overtime-on-overtime" must be paid by employers. Although interpretations of the Administrator of the Wage and Hour Division,⁶ operating within the limits permitted by the *Bay Ridge* case, may furnish temporary relief, a satisfactory solution of the problems created by the decision will be achieved only by legislative action. Much of the legislation proposed, however, is of doubtful value. A necessary prerequisite to appraisal of these measures is an examination of pre-*Bay Ridge* attempts to give content to "regular rate." Once the history has been traced, a proper focus will be provided for determining the exact nature of the problem raised by the case and the adequacy of legislative solutions already in process.

INTERPRETATION OF REGULAR RATE PRIOR TO THE BAY RIDGE CASE

Prior to the *Bay Ridge* case, Supreme Court decisions on the validity of wage payment practices under Section 7(a) of the Fair Labor Standards Act had followed a course from which the result but not the reasoning of the *Bay Ridge* case could have been foreseen. The Court had repeatedly emphasized that the statutory "regular rate" was the rate in fact received for the hours normally or regularly worked.⁷ Contractual attempts to specify a "regular rate" different from the one in fact received had, with only one exception,⁸ been consistently rebuffed.

The criteria which furnished the basis for subsequent interpretation of "regular rate" were established in the very first case which came before the court, *Overnight Transportation Co. v. Missel*.⁹ Confronted with a plaintiff-employee receiving a fixed weekly wage for a fluctuating work-week averaging sixty-five hours (with no provision for overtime compensation and no record of any ever having been paid), the Court

6. The Administrator has from time to time issued interpretations relative to the computation of statutory regular rate. Section 7(a), however, does not afford the Administrator express authority to prescribe rules and regulations for its administration. His interpretations are thus merely advisory of the construction of the law which the Administrator then believes to be correct, and are subject to contrary interpretations by the courts and to change by the Administrator if he subsequently decides them to be incorrect. See 29 CODE FED. REGS. § 775.1 (Supp. 1946); 29 CODE FED. REGS. § 778.2 (13 FED. REG. 4534 (1948)). Since passage of The Portal-to-Portal Act of 1947, 61 STAT. 84, 29 U.S.C.A. §§ 216, 251-262 (1947), effective May 14, 1947, these interpretations have increased in importance because of the so-called "good faith defense" provisions of that Act. See pages 364, and note 44 *infra*.

7. *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572 (1942); *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37 (1944); *United States v. Rosenwasser*, 323 U.S. 360 (1945); *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419 (1945); *Walling v. Harnischfeger Corp.*, 325 U.S. 427 (1945); *149 Madison Ave. Corp. v. Asselta*, 331 U.S. 199 (1947).

8. *Walling v. A.H. Belo Corp.*, 316 U.S. 624 (1942).

9. 316 U.S. 572 (1942).

ruled that the Act had been violated. Short shrift was made of the employer's contention that the requirements of the Act were met as long as the fixed weekly wage was at least equal to the statutory minimum rate plus one and one-half times that rate for the overtime hours. Instead, it held that payment for overtime at one and one-half times the regular pay is required—whether that pay is at, or above, the minimum. The Court then established the following guides for determining the statutory "regular rate": (1) the Act contemplates payment at an hourly rate, but payment by the week, to be reduced by some method of computation to hourly rates, is also covered; (2) the week is the unit of time under Section 7(a) within which to distinguish regular time from overtime; (3) where the employment contract is for a fixed weekly wage for regular contract hours and those are the actual hours worked, wages divided by hours equal regular rate; (4) where the employment contract is for a fixed weekly wage, with variable or fluctuating hours, the same method of computation produces the regular rate for each week.

The rule had hardly been formulated before an exception was carved out—on the very same day. In the *Belo* case,¹⁰ individual employment contracts provided for a guaranteed weekly wage for a fluctuating number of hours; the hourly rate was fixed at 1/60 of the weekly wage; and express provision was made for time-and-a-half for hours worked in excess of forty-four.¹¹ An employee was therefore required to work fifty-four and one-half hours before he became entitled to any pay in addition to the guaranteed weekly wage. Despite the *Belo* contract's apparent non-conformity with statutory prescriptions, the Court seemed to feel that contractual specification of an hourly rate of pay together with the time-and-a-half provision for overtime was sufficient ground for distinguishing the *Missel* case, where there were no such provisions. Technical distinctions aside, however, motivation for the exception created by the *Belo* case may well be traced to the desirability of the guaranteed weekly wage for employees engaged in industries where working-hours fluctuate from week to week and from day to day. Subsequent decisions which have limited the *Belo* exception to wage plans identical with those then under scrutiny would seem to confirm this view.¹²

10. 316 U.S. 624 (1942).

11. The maximum fixed by the statute at that time. The number of hours specified in § 7(a) was forty-four during the first year, forty-two during the second year and forty during the third and subsequent years from and after October 24, 1938, the effective date of the section.

12. The *Belo* exception was affirmed by the Court in *Walling v. Halliburton Oil Well Cementing Co.*, 331 U.S. 17 (1947) (employee worked more than eighty-four hours before he became entitled to any pay in addition to the weekly guarantee). But its application has been strictly limited to *Belo*-type wage plans. In *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 462, (1948), referring to the *Belo* case, the Court said: "Where the same

Judicial adherence to the principles enunciated in the *Missel* case has been steadfast except for the deviation permitted in the *Belo* and identical situations. Contracts attempting in various ways to specify a "regular rate" differing from that actually paid for the hours normally or regularly worked have been invalidated without regard to the parties' good faith in setting such rates.¹³ Illustrative of these contract-specified wage plans were the ones considered by the Court in *Walling v. Helmerich & Payne*.¹⁴ The individual employment contracts there involved (which were designed to maintain the wage levels existing prior to the Act) divided each daily shift of eight hours into two equal parts: the hourly wage rate specified for the first four hours was labelled the "base or regular rate," which, the contracts recited, should never apply to over forty hours in any workweek. The remaining four hours were then called "overtime" and, as such, were said to be subject to time-and-a-half. This split-day plan was held to violate Section 7(a). Its vice was that the contract "regular rate" did not represent the rate actually paid for normal, non-overtime hours, nor was extra compensation provided for true overtime hours. The contract "overtime" rate

type of guaranteed weekly wages were involved, we have reaffirmed that decision as a narrow precedent principally because of public reliance upon and congressional acceptance of the rule there announced."

After the *Belo* decision there were many attempts to designate a regular rate, which was not the actual rate paid, by contracts different from *Belo*-type agreements. Most of these were discredited by the lower courts and were not reviewed by the Supreme Court. They include: *Watkins v. Hudson Coal Co.*, 151 F.2d 311 (3rd Cir. 1945) (agreements whereby regular rate was to be found by dividing total compensation received by the hours worked plus 1½ the hours worked in excess of forty); *Walling v. Green Head Bit & Supply Co.*, 138 F.2d 453 (10th Cir. 1943) (oral employment contracts which designated a regular hourly rate subject to reduction, if the employee worked in excess of forty-two hours, so that compensation for all hours worked would equal the reduced rate for the first forty-two hours plus 1½ times that reduced rate for excess hours); *Walling v. Stone*, 131 F.2d 461 (7th Cir. 1942) (agreements for a fixed weekly wage for fluctuating hours, the parties having agreed that the fixed wage included compensation for overtime); *Webb v. Brady Transfer & Storage Co.*, 72 F.Supp. 170 (S.D. Ia. 1947) (arrangement providing a "basic rate" for the first forty hours plus 1½ times that rate for twenty hours each week, whether or not worked, but including no provision for additional pay in the event that overtime hours actually exceeded twenty per week); *Scott v. Atlas Press Co.*, 49 F.Supp. 260 (W.D.Mich. 1943) (agreement designating an hourly rate for straight-time hours, and providing for deduction of 5% from total compensation due if the employee worked during overtime hours). The courts have refused even to consider the validity of the contracts when practice did not conform to the contractual provisions. *149 Madison Ave. Corp. v. Asselta*, 331 U.S. 199 (1947); *McComb v. Sterling Ice & Cold Storage Co.*, 165 F.2d 265 (10th Cir. 1947); *Walling v. United Distillers Products Corp.*, 63 F. Supp. 474 (D.Conn. 1945).

13. *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37 (1944); *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419 (1945); *Walling v. Harnischfeger Corp.*, 325 U.S. 427 (1945); *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446 (1948), all discussed *infra*. See, also, *149 Madison Ave. Corp. v. Asselta*, 331 U.S. 199 (1947).

14. 323 U.S. 37 (1944).

was in reality a part of the "regular rate" because it was payment for a portion of the normal work-day.¹⁵

Another major area for interpretation of the "regular rate" concept is that involving incentive earnings and piece-work rates. Such payments are part of the statutory regular rate when paid pursuant to an agreed plan,¹⁶ or when paid so regularly that the employee-recipients consider them part of their regular compensation, rather than a gratuity.¹⁷ It is immaterial that the wage depends upon market-place contingencies and therefore cannot be determined until after the work week.¹⁸ Of course, the fact that such payments have been treated as

15. In the *Bay Ridge* case, the Court was careful to note that it did not disturb its decision in the *Helmerich & Payne* case—which it dismissed as involving a "palpable evasion of the statutory purposes." 334 U.S. 446, 466 (1948). The rule of the *Helmerich & Payne* decision was applied by lower courts in invalidating other plans under which an employer sought to split the actual workweek or workday into straight-time and overtime segments. In *Robertson v. Alaska Juneau Gold Mining Co.*, 157 F.2d 876 (9th Cir. 1946), *cert. denied*, 331 U.S. 823 (1947), the court struck down a plan under which the first seven hours of a regular eight-hour daily shift were designated as "straight-time" and the last hour of the shift as "overtime." *Walling v. Alaska Pacific Consolidated Mining Co.*, 152 F. 2d 812 (9th Cir. 1945), *cert. denied*, 327 U.S. 803 (1946), involved a plan which split the regular eight-hour daily shift into six "straight-time" hours and two "overtime" hours. Splitting of the workweek was disapproved in *Walling v. Arctic Circle Exploration, Inc.*, 56 F.Supp. 944 (W.D. Wash. 1944), in which the employer adopted the practice of designating the first hour of the week as straight-time and all subsequent hours as overtime.

16. *Walling v. Wall Wire Products Co.*, 161 F.2d 470 (6th Cir. 1947), *cert. denied*, 331 U.S. 828 (1947) (monthly and year-end bonuses based on straight-time hours worked); *Carlton Screw Products Co. v. Fleming*, 126 F.2d 537 (8th Cir. 1942), *cert. denied*, 317 U.S. 634 (1942) ("bonus or gratuity" amounting to the difference between the employee's weekly compensation at new hourly rates and his old weekly wage).

17. *McComb v. Shepherd Niles Crane and Hoist Corp.*, 8 WH CASES 384, 15 LABOR CASES ¶ 64,851 (2nd Cir. Dec. 1, 1948) (quarterly "prosperity" bonuses); *Bibb Mfg. Co. v. Walling*, 164 F.2d 179 (5th Cir. 1947), *cert. denied, sub nom.*, *Bibb Mfg. Co. v. McComb*, 333 U.S. 836 (1948) (attendance bonuses); *Walling v. Garlock Packing Co.*, 159 F.2d 44 (2nd Cir. 1947), *cert. denied*, 331 U.S. 820 (1947) (payments equal to the dividends payable on shares of stock varying in number according to the length of service); *Walling v. Richmond Screw Anchor Co.*, 154 F.2d 780 (2nd Cir. 1946), *cert. denied*, 328 U.S. 870 (1946) (production bonuses based on a percentage of the employee's straight-time earnings).

18. *Walling v. Wall Wire Products Co.*, note 16 *supra*. On the other hand, bonus and profit-sharing payments paid as a gratuity in the discretion of the employer at irregular times and not in accordance with an agreed plan are not part of the "regular rate." *Walling v. Frank Adam Electric Co.*, 163 F.2d 277 (8th Cir. 1947) (bonus based on a percentage of each employee's straight-time earnings). See also *Roland Electrical Co. v. Black*, 163 F.2d 417 (4th Cir. 1947), *cert. denied*, 333 U.S. 854 (1948) (year-end bonuses based on a percentage of each employee's gross earnings). In *De Waters v. Macklin Co.*, 167 F.2d 694 (6th Cir. 1948), *cert. denied*, 69 S.Ct. 48 (1948), monthly bonuses based upon the employee's total earnings, including overtime, were held allocable as between regular rate and overtime, and, so allocated, satisfied the requirements of § 7(a). These statements are in accord with the interpretations of the Administrator. 3 CCH LAB. LAW REP. (Wages and Hours) ¶¶ 25,520 (.65 to .786, inclusive), 29,008 (1948), 1944-1945 WH MAN. 167, 1502; 1947 WH MAN. 65. Until June 1947 it had been the Administrator's enforce-

wages for workmen's compensation, unemployment compensation, social security and income tax purposes has been persuasive.¹⁹

Two leading cases dealing with incentive earnings illustrate these generalized propositions. In the *Youngerman-Reynolds* case,²⁰ the wage contracts guaranteed that work would be paid for at not less than fixed piece-work rates—in addition to a guaranteed "basic or regular" hourly rate. Under the piece-work rates, however, employees normally earned substantially more than under the so-called "regular rate." As a result, the Court held the latter rate inapplicable for overtime pay purposes, asserting that:

"The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the work week, exclusive of overtime payments. It is not an arbitrary label chosen by the parties; it is an actual fact. Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts."²¹

A similar view was expressed in the *Harnischfeger* case.²² There, about 98.5% of the employees doing certain incentive work earned wages in addition to the hourly rate fixed by a collective bargaining agreement. Such incentive bonuses constituted 22% of their total compensation, exclusive of overtime payments. In those instances when an incentive worker was temporarily assigned to non-incentive work, he was paid at least 20% more than the illusory basic hourly rate. However, when incentive employees worked more than the statutory maximum, they received only a premium of 50% of the basic rate.²³ Once again, the Court found solution of the problem simple: since the incentive bonuses were regularly earned, they were to be added to the basic rate; together, these comprised the statutory regular rate. In addition, the higher hourly rate received by incentive workers for non-incentive work was the regular rate for such work—since, quite obviously, it was the rate normally paid.

ment policy not to require inclusion in the regular rate of any payments distributed less frequently than quarterly. 1944-1945 WH MAN. 1502. This enforcement policy was withdrawn by an order of the Administrator. 12 FED. REG. 3915 (1947). See 3 CCH LAB. LAW REP. (Wages and Hours) ¶25,520 (.77) (1948). WH MAN. 50:439, note, 50:470, note.

19. See *McComb v. Shepherd Niles Crane & Hoist Corp.*, *Walling v. Richmond Screw Anchor Co.*, note 17 *supra*.

20. 325 U.S. 419 (1945). The Court had already held that wage payments on a piece-work basis must be translated into an hourly rate and must meet the requirements of §7(a). *U.S. v. Rosenwasser*, 323 U.S. 360 (1945).

21. 325 U.S. 419, 424-5 (1945).

22. 325 U.S. 427 (1945).

23. Vacation pay was also based on the incentive employee's average hourly straight-time earnings over a three month period, not on his basic rate.

The clear line of decision, having its origin in the *Missel* case and incorporated into the official interpretations of the Wage and Hour Division,²⁴ keyed "regular rate" under section 7(a) to the regularity or normalcy of the employment. Thus, the converse became a criterion of true overtime pay: if a rate was paid for time only occasionally worked—i.e., *not* normally or regularly worked—then it could quite easily be labeled an overtime rate.²⁵ Within the scope of this rule were drawn such diverse payments, among others, as those made for work (1) on Saturdays, Sundays and holidays, (2) before or after stated hours, (3) for work outside of an employee's regular shift.²³ In contrast, a higher rate of pay for undesirable hours or for dirty or dangerous work—although a premium payment—was in reality the regular rate for such work and therefore to be included in the statutory regular rate.²⁷

Wage practices in a very substantial portion of industry were the outgrowth of reliance upon the above-outlined guides to "regular rate" determination. It was, therefore, not surprising that the *Bay Ridge* case, with its revamping of overtime pay criteria, should have effects reminiscent of the portal-to-portal pay controversy.

THE BAY RIDGE CASE

Employment in the longshore industry has always been casual and sporadic. Its complete dependence upon the number of ships in port

24. Interpretative Bulletin No. 4, §§ 69, 70, 3 CCH LAB. LAW REP. (Wages and Hours) ¶ 24, 478 (1948), 1944-1945 WH MAN. 167-172; rescinded to the extent that these paragraphs are inconsistent with the *Bay Ridge* case, Wage and Hour Division Release PR 161, note 46 *infra*; Opinion Letters of the Wage and Hour Division, 3 CCH LAB. LAW REP. (Wages and Hours) §§ 25,520 (.26, .272, .562, .563), 25,540 (.46, .565, .58, .651) (1948), 1944-1945 WH MAN. 225, 226 (daily overtime); *id.* at 226-7 (premium pay under union contracts); *id.* at 227 (offsetting premium rates); 1947 WH MAN. 65 (crediting night shift pay toward overtime due); *id.* at 69 (crediting premium pay under union contracts against overtime compensation); *id.* at 88 (night-work bonus); *id.* at 91 (night-work overtime rate).

25. This test had apparently been accepted by the Administrator in his Interpretative Bulletin No. 4, ¶ 69, 3 CCH LAB. LAW REP. (Wages and Hours) ¶ 24, 478 (1948), 1944-1945 WH MAN. 167, which provides: ". . . in determining whether he has met the overtime requirements of Section 7 the employer may properly consider as overtime compensation paid by him, for the purpose of satisfying these requirements, only the extra amount of compensation—over and above straight time—paid by him as compensation for overtime work—that is, for hours worked outside the normal or regular working hours—regardless of whether he is required to pay such compensation by a union or other agreement." Paragraph 69 has been rescinded by the Administrator to the extent that it is inconsistent with the *Bay Ridge* decision. Wage and Hour Division Release PR 161, note 46 *infra*.

26. For indication of the practice in industry generally, see the surveys cited in notes 42 and 43 *infra*; for practice in the longshore industry see Findings of Fact Nos. 14, 19, 30 by the District Court in the *Bay Ridge* case set forth in the appendix to the opinion of the Circuit Court of Appeals, 162 F.2d 665, 670-2 (2d Cir. 1947).

27. *Cabunac v. National Terminals Corp.*, 139 F.2d 853 (7th Cir. 1944); *Ferrer v.*

at any given time and the length of their stay have caused the amount of work available to vary from day to day, week to week and season to season. In an attempt to compress the work into normal daytime hours, both labor and management agreed, as long ago as 1887, that the rate for night and holiday work should be higher than the day rate.²⁸ And since 1916, collective bargaining agreements between employers and the International Longshoremen's Association have consistently included a differential of 50%.

When the Fair Labor Standards Act was enacted, the parties rephrased their agreement in an attempt to satisfy its requirements. Thus, when some longshoremen defied their union heads and sued their employers in the *Bay Ridge* case,²⁹ the controverted provision of the collective bargaining agreement drawn into question read:

"(a) Straight time rate shall be paid for any work performed from 8 A.M. to 12 Noon and from 1 P.M. to 5 P.M., Monday to Friday inclusive, and from 8 A.M. to 12 Noon Saturday. (b) All other time, including meal hours and the Legal Holidays specified herein, shall be considered overtime and shall be paid for at the overtime rate."³⁰

The issue was sharply drawn: did the "straight-time rate" specified in the agreement constitute the statutory "regular rate" of section 7(a)? The trial court, strongly influenced by the fact that the rates were the outcome of the collective bargaining process in an unusual industry, answered in the affirmative, thereby holding, as a corollary, that the contract overtime rates were true overtime.³¹ Upon appeal, the Circuit Court reversed, holding that the contract overtime rates were to be included in computing "regular rate" since the hours involved, although casual and sporadic, were part of the normal workday of the longshoreman.³²

Waterman S. S. Corp., 70 F.Supp. 1 (D. Puerto Rico 1947); see *Roland Electrical Co. v. Black*, 163 F.2d 417 (4th Cir. 1947) *cert. denied*, 333 U.S. 854 (1948).

28. 162 F.2d 665, 670-2 (2d Cir. 1947).

29. The section was defended by the United States Department of Justice because of ultimate liability of the Government for any amounts recovered under wartime cost-plus contracts. The suit was opposed by the International Longshoremen's Association, whose president testified as a witness for the employers.

30. 334 U.S. 446, 452 (1948).

31. *Addison v. Huron Stevedoring Corp.*, 69 F. Supp. 956 (S.D.N.Y. 1947).

32. *Aaron v. Bay Ridge Operating Co.*, 162 F.2d 665 (2d Cir. 1947). Although the Wage and Hour Administrator took no formal position during the trial of the *Bay Ridge* case, he later expressed his views as in accord with the Circuit Court. Thus, the Department of Justice in its petition for certiorari to the Supreme Court stated that the Administrator "believes that proper consideration was given by the court below [Circuit Court] to his interpretations of Section 7 of the Fair Labor Standards Act and that the decision below is correct." Daily Labor Report No. 193, F-1, F-10 (1947). The highly

Confronted with antithetical reasoning by the lower courts, the Supreme Court traced its own path out of the maze.³³ It saw the central problem as one of sifting out the true overtime premiums from the ordinary wage payments, since "to permit overtime premium to enter into the computation of the regular rate would be to allow overtime premium on overtime premium—a pyramiding that Congress could not have intended."³⁴ The Court then proceeded to define "overtime premium" as "extra pay for work because of previous work for a specified number of hours in the workweek or workday whether the hours are specified by contract or statute."³⁵ Obviously, the "overtime" rate stipulated in the collective bargaining agreement did not satisfy this definition because it did not depend for its application upon any previous work at all. The mere fact of work within the contract overtime hours entitled the employee to premium pay.

As guides for the future, the Court pointed out that neither statutory excess compensation paid for work in excess of forty hours, nor similar contract excess compensation for work in excess of prior work should be used in calculating statutory regular rate. Such extra pay by contract because of longer hours than the standard fixed by the contract for the day or week was said to have the same purpose as statutory excess compensation and must likewise be excluded.³⁶ Taking issue with the District Court, which had held that the 50% premium was the earmark of true overtime, rather than of a shift differential, the

informal nature of this opinion to the Department of Justice was later indicated, but the position taken was affirmed by the Administrator. *Hearings before Subcommittee No. 4 of the Committee on Education and Labor, House of Representatives, on Proposed Amendments of the Fair Labor Standards Act of 1938*, 80th Cong., 1st Sess. 2368-71, 2591 2734-7, (1947).

33. *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446 (1948). The Supreme Court affirmed the Circuit Court but based its conclusion upon different reasons.

34. *Id.* at 464.

35. *Id.* at 450 n. 3. "The higher rate must be paid because of the hours previously worked for the extra pay to be an overtime premium." *Id.* at 466. The Court repeated its rule that, where there are no overtime premium payments, statutory regular rate is determined by dividing the wages actually paid by the hours actually worked in any work week. It declared that any overtime premium included in the weekly pay check must be deducted before the division.

36. The Court was careful to note that the holding in *Walling v. Helmerich & Payne* "is not contrary to this position." 334 U.S. 446, 466 n. 22 (1948). This may indicate the result that a premium rate actually paid for hours fewer than eight per day or forty per week is part of the regular rate when such hours are regularly or normally worked. *Cf. Robertson et al. v. Alaska Juneau Gold Mining Co.*, 157 F.2d 876 (9th Cir. 1946) and *Walling v. Alaska Pacific Consolidated Mining Co.*, 152 F.2d 812 (9th Cir. 1945). See discussion note 15 *supra*. The Court's omission of any reference to regularity in defining overtime premium and its statement that "this case presents no problems that involve determination of the regular hours of work" (334 U.S. 446, 473 (1948)) can be reconciled with that result on the ground that the sporadic nature of employment in the *Bay Ridge* case made any regularity test inapplicable to the contract before the Court.

Supreme Court contended that "a mere higher rate paid as a job differential or as a shift differential, or for Sunday or holiday work," is not an overtime premium. Nor is it material in determining the character of the extra pay that an employee actually has worked at a lower rate earlier in the workweek prior to the receipt of the higher rate.

Examples of the proper application of these principles were given by the Court:³⁷

"(1) The employment contract calls for an overtime premium for work beyond thirty-six hours. Such extra pay should not be included as weekly wages in any computation of the regular rate at which a man works."³⁸

"(2) A contract provides for payment of time and a half for work in excess of eight hours in a single workday. An employee who works five ten-hour days would have no claim for statutory excess compensation if paid the amount due by the contract."³⁹

"(3) A contract provides for a rate of \$1 an hour for the first 40 hours and \$1.50 for all excess hours; an employee works 48 hours and receives \$52. To find his regular rate of pay, the overtime premium of \$4 should be deducted and the resulting sum divided by 48 hours.⁴⁰ On the other hand, a man might be employed as a

37. 334 U.S. 446, 467-8 (1948). The Court's footnotes are omitted.

38. The Court does not state whether thirty-six hours is the normal or regular workweek. It would seem, however, that this example must be predicated on the fact that the employee regularly or normally works a thirty-six hour week and no longer. If the employee regularly or normally worked, for example, more than forty hours, the premium rate paid for the four hours regularly worked between thirty-six and forty hours per week would seem to be part of the regular rate under *Walling v. Helmerich & Payne*. 323 U.S. 37 (1944).

39. Hours in excess of eight a day have been generally regarded as true overtime even though the employee regularly works a longer day. See notes 42 and 43 *infra*. This is consistent with practice under the Walsh-Healey Act, 49 STAT. 2036 (1936), as amended, 41 U.S.C. §§35-45 (Supp. 1946), which requires that premium pay for hours in excess of eight in any one day be paid employees of those contractors who furnish equipment to the Government valued in excess of \$10,000. Since the *Bay Ridge* decision, the Administrator has approved such practice if premium pay after eight hours is required by federal or state law, or eight hours is the employee's regular or normal work day, Opinion Letter, Acting Administrator, 22 BNA LAB. REL. REP. (Wages and Hours) 1399 (1948); 3 CCH LAB. LAW REP. (Wages and Hours) ¶ 29,006 (1948). There has, however, been no decision or authoritative ruling that such payments may be treated as true overtime when not required by federal or state law and a longer day is regularly or normally worked. A contrary view had been expressed prior to the *Bay Ridge* case in an opinion letter issued by the Wage and Hour Division, 1944-1945 WH MAN. 225, 226. The Act at present requires premium pay only for work in excess of forty hours. Undoubtedly, the legislators were thinking in terms of five eight-hour days. The Act should, however, be clarified to make such result explicit.

40. This is in refutation of the statement of the District Court in the *Bay Ridge* case that a logical extension of a decision for plaintiffs would require that premium pay for hours regularly worked in excess of forty be included in the computation of regular rate. *Addison v. Huron Stevedoring Corp.*, 69 Fed. Supp. 956, 958-9 (S.D.N.Y. 1947).

night watchman on an eight-hour shift at time and a half the wage rate of day watchmen. This would be extra pay for undesirable hours. It is a shift differential. It would not be overtime premium pay but would be included in the computation for determining overtime premium for any excess hours."

Three justices dissented, strongly urging that the Act should not be construed to prevent the parties to a collective bargaining agreement, dealing at arms length, from establishing a regular rate which honestly reflects industrial conditions. This faith in the collective bargaining process was soon to be reflected in some of the legislative attempts to remedy the problems raised by the *Bay Ridge* case.

The decision of the majority can hardly be criticized from the standpoint of the semantics involved. The Act itself is worded in terms of extra compensation for hours in excess of the statutory standard; the very word "overtime" implies excessiveness. Indeed, had this "doctrinaire approach" been enunciated ten years earlier, it might have materially assisted in the development of the administration of the Act. But despite the *Bay Ridge* decision's apparent semantic soundness and its adherence to the statutory purposes of spreading employment and of compensating employees for the burden of a long work week,⁴¹ it nevertheless requires an important departure from a long established body of administrative interpretations which had ample support in judicial precedent and which was reflected in a considerable proportion of industrial overtime pay practices. Thus, premium payments had been made for work on certain days of the week or hours of the day without regard to whether such work was performed in excess of prior work; and such payments had generally been regarded as true overtime premium payments for purposes of the Act.

The extent to which pre-*Bay Ridge* wage practice differed from the standard enunciated by the Supreme Court is indicated by a 1947 survey of collective bargaining contracts.⁴² Of 437 agreements covering over 2 million employees, almost 50% specified premium pay for Saturday work; 60% for Sunday work; and 80% for holiday work. Frequently, double-time (an extra day's pay in addition to the straight-time rate) was required for Sunday and holiday work. Many contracts contained agreements like the one in the *Bay Ridge* case, requiring

41. See *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572, 577-S (1942); *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 40 (1944); *Jewell Ridge Coal Corp. v. Local No. 6167*, 325 U.S. 161, 167 (1945); *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 423-4 (1945); *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 460 (1948).

42. *Premium Pay Provisions in Selected Union Agreements*, MONTHLY LABOR REVIEW 419 (Oct. 1947). This study covered over two million workers in thirty-one manufacturing and non-manufacturing industries. The agreements in question were in effect in the latter half of 1946.

premium pay for hours worked outside of a designated clock pattern. Others required a premium rate for work outside of an employee's regular shift. And in a considerable number of agreements, provision was made for premium pay after a specified number of hours fewer than eight per day or forty per week—despite the fact that the employees regularly worked more than the number of daily or weekly hours specified in such agreements. Other more recent surveys of labor contracts confirm the widespread use of premium pay provisions such as those described above.⁴³

Wage payments pursuant to all such contract provisions must be examined and tested by the rule of the *Bay Ridge* case. Are such extra payments true overtime premiums? If not, can such provisions be revised to permit employees to retain their benefits without subjecting the employer to increased labor costs—resulting from such premium payments being made part of the employee's "regular rate"?

Although such overtime pay practices fall within the scope of *Bay Ridge*, employers who used them may, nevertheless, escape retroactive liability. Under the Portal-to-Portal Act of 1947, defenses to actions under the Fair Labor Standards Act are granted those employers who fixed their wage payment practices in good faith—in conformity with and in reliance on any written regulation, order, ruling, approval or interpretation of the Wage and Hour Administrator with respect to the class of employers to which an employer belongs.⁴⁴ Since most of these practices were based upon prior official interpretations of the Wage and Hour Administrator, the danger that employers will be

43. *Basic Patterns in Collective Bargaining Contracts*, BNA COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS SERVICE, p. 15:25. This survey analyzes over 1,800 typical contracts executed between September 1947 and July 1948. See also report of survey conducted by committee of employer associations representing 5,055 employers in all branches of industry, reported in Daily Labor Report No. 21,6, B-1 (1948), 22 BNA LAB. REL. REP. (Wages and Hours) 1481 (1948).

44. 61 STAT. 84 (1947), 29 U.S.C.A. §§ 216, 251-62, (Supp. 1948). Section 10 of the Act operates prospectively to afford a "good faith" defense. The constitutionality of §§ 9 and 11 of the Act, which operate retroactively to permit a "good faith" defense to causes of action which accrued prior to the effective date of the Act, have been upheld by three circuit courts of appeal. *Day & Zimmerman, Inc. v. Reid*, 168 F.2d 356 (8th Cir. 1948); *Rogers Cartage Co. v. Reynolds*, 166 F.2d 317 (6th Cir. 1948); *Darr v. Mutual Life Insurance Company of New York*, 169 F.2d 262 (2d Cir. 1948), *cert. denied*, November 22, 1948. See *Lasater v. Hercules Powder Co.*, 8 WH CASES 417, 15 LABOR CASES ¶ 64,857 (6th Cir. 1948). The constitutionality of § 2 of the Portal-to-Portal Act, 61 STAT. 84, § 2; 29 U.S.C.A. § 252 (1947), which operates retroactively to bar claims not based on custom and practice has been upheld in *Atallah v. B. H. Hubbert & Son*, 168 F. 2d 993 (4th Cir. 1948) *cert. denied*, November 15, 1948; *Seese v. Bethlehem Steel Co.*, 168 F.2d 58 (4th Cir. 1948); *Battaglia v. General Motors Corp.*, 169 F.2d 254 (2d Cir. 1948) *cert. denied*, Dec. 6, 1948; *Bateman v. Ford Motor Co.*, 169 F. 2d 266 (6th Cir. 1948), *cert. denied*, Jan. 3, 1949.

retroactively liable as a result of the new judicial interpretation is substantially eliminated.⁴⁵

A similar situation exists in regard to possible future liability of employers who fix wage payment practices in good faith relying upon new interpretations of the administrator in which he has sought to apply the rule of the *Bay Ridge* case.

WAGE AND HOUR ADMINISTRATOR'S APPLICATION OF THE BAY RIDGE RULE

Within a month of the decision in the *Bay Ridge* case, the Wage and Hour Administrator responded to employer pleas for guidance in interpreting and revising employment contracts to accord with the new criteria. In a statement of general principles,⁴⁶ followed by opinion letters directed to specific problems, the Administrator sought to salve the impact of novelty.

The most important factors which run through the Administrator's opinion letters are (1) his willingness to find that premium payments are paid for time in excess of a bona fide standard in circumstances where, without the Administrator's insight, the standard is not readily apparent and (2) his acceptance of the pattern of employment of a particular plant or of a group within a plant as indicative of the regular or normal employment pattern of individual employees within such plant or group. Keeping in mind these factors, the Administrator's pronouncements present the following results with respect to specific wage payment practices.

Premium Pay for Work in Excess of a Bona Fide Standard

Premium pay for work in excess of a specified number of hours or days established as a bona fide daily or weekly standard is a true overtime premium; such pay need not be included in the computation of the statutory regular rate and may be offset against the overtime

45. The *Bay Ridge* case, itself, and several other cases involving the longshore industry are presently being prepared for trial on the "good faith defense" issue.

46. Wage and Hour Division Release PR 161, July 11, 1948; 3 CCH LAB. LAW REP. (Wages and Hours) ¶29,006 (1948); WH MAN. 50:646. This statement amplified the principles previously announced by the Administrator in Wage and Hour Division Release PR 153, June 11, 1948; 3 CCH LAB. LAW REP. (Wages and Hours) ¶29,004 (1948); WH MAN. 50:645. The interpretations announced in PR 161, *supra*, were codified and published as Title 29, Labor, c. V, sub. c. B, pt. 778, §§778.1-3 of the Code of Federal Regulations, 13 FED. REG. 4534, 4535 (Aug. 6, 1948), 3 CCH LAB. LAW REP. (Wages and Hours) ¶24,104; WH MAN. 50:647.

compensation required by statute.⁴⁷ The normal pattern of the plant or group, not of the individual employee, is the criterion for determining whether a premium rate is paid for time in excess of a bona fide standard.⁴⁸ Such a pattern is not affected by occasional absences because of recognized holidays, illness or other excuses which accord with a bona fide plant practice;⁴⁹ nor is it affected by infrequent or temporary plant shutdowns of short duration.⁵⁰

Even though an employer follows a regular practice of operating on a workweek longer than forty hours, premium pay for hours in excess of forty constitutes statutory overtime compensation.⁵¹ And the same is true when premiums are paid in conformity with federal or state laws for hours in excess of eight daily, despite the fact that the employer frequently operates on a schedule of more than eight hours a day.⁵²

Premium pay for work on the sixth and seventh consecutive days of the workweek also falls within the true overtime compensation category.⁵³

47. Wage and Hour Division Release PR 161, note 46, *supra*. See also 3 CCH LAB. LAW REP. (Wages and Hours) ¶¶ 29,007, 29,011, 29,026, 29,028, 29,031 (1948), 22 BNA LAB. REL. REP. (Wages and Hours) 1313, 1339, 1373, 1394, 1397 (1948). However, in Wage and Hour Division Release PR 161, *supra*, the Administrator declared: "In situations where the normal or regular working hours are artificially divided into a 'straight-time' period . . . followed by an 'overtime' period . . . the so-called 'straight-time' period will not be regarded as the bona fide standard working period of the employee . . ." citing *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37 (1944) and *Robertson v. Alaska Juncau Gold Mining Co.*, 157 F.2d 876 (9th Cir. 1946) *cert. denied*, 331 U.S. 823 (1947), discussed note 15 *supra*.

48. 3 CCH LAB. LAW REP. (Wages and Hours) ¶¶ 29,012, 29,026, 29,027, 29,028, 29,030, 29,031, 29,036 (1948), 22 BNA LAB. REL. REP. (Wages and Hours) 1341, 1373, 1392, 1394, 1395, 1397, 1389 (1948). If the employment is covered by a master contract for an industry, the practice of a particular employer, not the whole group of employers, will determine the practice with respect to his employees or any distinguishable group thereof, 3 CCH LAB. LAW REP. (Wages and Hours) ¶ 29,026 (1948), 22 BNA LAB. REL. REP. (Wages and Hours) 1373 (1948).

49. 3 CCH LAB. LAW REP. (Wages and Hours) ¶¶ 29,027, 29,028, 29,030, 29,031 (1948), 22 BNA LAB. REL. REP. (Wages and Hours) 1392, 1394, 1395, 1397 (1948).

50. 3 CCH LAB. LAW REP. (Wages and Hours) ¶ 29,028 (1948), 22 BNA LAB. REL. REP. (Wages and Hours) 1394 (1948). See also 3 CCH LAB. LAW REP. (Wages and Hours) ¶ 29,029 (1948), 22 BNA LAB. REL. REP. (Wages and Hours) 1395 (1948).

51. 3 CCH LAB. LAW REP. (Wages and Hours) ¶ 29,032 (1948), 22 BNA LAB. REL. REP. (Wages and Hours) 1399 (1948).

52. *Ibid.*

53. Wage and Hour Division Release PR 161, note 46 *supra*. See also 3 CCH LAB. LAW REP. (Wages and Hours) ¶ 29,031 (1948), 22 BNA LAB. REL. REP. (Wages and Hours) 1397 (1948). The Supreme Court defined overtime premium as extra pay for work in excess of a specified number of *hours* in the workweek or workday. This caused speculation as to whether the definition excluded extra pay for work in excess of a specified number of *days* in the workweek. See, *e.g.*, Brief of American Federation of Labor, as *amicus curiae*, in support of motion for rehearing in the *Bay Ridge* case, Daily Labor Report No. 193, D-1 (1948).

Holiday Pay

Premium pay for work on certain holidays designated by contract or practice (e.g., New Year's or Christmas) is part of the employee's regular rate since the payment is not contingent upon the employee's having previously worked a specified number of hours or days within the week.⁵⁴

If straight-time pay is received for an *idle* holiday, such payment is not part of the employee's regular rate since it is paid for time not worked; conversely, since it is not paid for time in excess of a bona fide standard, such pay may not be credited toward statutory required overtime compensation.⁵⁵ But when the employee receives straight-time pay for *work* on the holiday and in addition, the straight-time pay due for the *idle* holiday, (a total of double time), the result is different: the idle holiday pay may be excluded from the employee's regular rate while the straight-time pay for the holiday work must be included in the regular rate.⁵⁶ If the employee receives less than double time for work on a holiday, the whole payment received is part of the regular rate, despite the fact that had he not worked at all, he would have received straight-time pay.⁵⁷

In the case of work performed on that part of a regular shift which cuts into a scheduled day-off, the premium pay is not true overtime unless that portion of the day for which the premium is paid normally falls during overtime hours.⁵⁸

54. 3 CCH LAB. LAW REP. (Wages and Hours) §§ 29,011, 29,014, 29,026, 29,027, 29,031, 29,033, 29,040 (1948), 22 BNA LAB. REL. REP. (Wages and Hours) 1339, 1343, 1373, 1392, 1397, 1405 (1948). 23 BNA LAB. REL. REP. (Wages and Hours) 1479 (1948).

55. 3 CCH LAB. LAW REP. (Wages and Hours) §§ 29,011, 29,026, 29,027 (1948), 22 BNA LAB. REL. REP. (Wages and Hours) 1339, 1373, 1392 (1948). See also Wage and Hour Division Release PR 161, note 46 *supra*, wherein the Administrator declared that the principles announced in the *Bay Ridge* case do not relate to payments that are made for hours not worked, such as payments made to employees for idle holidays or for occasional absences due to vacation or illness or other similar causes, and that such payments may be excluded from the computation of an employee's regular rate; they cannot be credited toward statutory required overtime compensation. This is in accord with past interpretations. Interpretative Bulletin No. 4, § 70(7), (8), 3 CCH LAB. LAW REP. (Wages and Hours) § 24,478 (1948), 1944-1945 WH MAN. 170, 171. Opinion Letters of Wage and Hour Division, 3 CCH LAB. LAW REP. (Wages and Hours) § 25,520 (.60 to .64) (1948), 1944-1945 WH MAN. 188, 232, 1504, and 1947 WH MAN. 57, 93.

56. 3 CCH LAB. LAW REP. (Wages and Hours) §§ 29,026, 29,027 (1948), 22 BNA LAB. REL. REP. (Wages and Hours) 1373, 1392 (1948).

57. This opinion is predicated on the proposition that if a portion of the holiday pay equal to straight-time were regarded as pay for an idle holiday, it would lead to the unrealistic assumption that work performed on the holiday was being compensated at less than the straight-time rate. 22 BNA LAB. REL. REP. (Wages and Hours) 1418 (1948).

58. 3 CCH LAB. LAW REP. (Wages and Hours) § 29,027 (1948), 22 BNA LAB. REL. REP. (Wages and Hours) 1392 (1948).

Weekend Premiums

Premium pay for Saturdays and Sundays is part of the regular rate of pay,⁵⁹ unless the time worked on those days is normally in excess of a bona fide standard; in the latter case, such premium pay may be regarded as true overtime compensation.⁶⁰ In determining whether Saturday and Sunday work does exceed a bona fide standard, the Division will look not only at the terms of the applicable contract, but also at the actual practice of the parties under the contract.⁶¹ If such work is normally in excess of a bona fide standard, the fact that individual employees may receive premium payments without necessarily having worked the number of hours or days in that standard (because of occasional illness or other bona fide excused absence) does not prevent the Saturday and Sunday pay from being true overtime.⁶² For example, when a regular or normal workweek of five eight hour days starts on Monday, the Saturday and Sunday work will normally fall within excess hours and therefore, premium pay for Saturday and Sunday work can be considered true overtime compensation.⁶³ If, however, the workweek starts on any other day, premium pay for work on Saturday and Sunday is part of the regular rate since it is not paid for work in excess of a bona fide standard.⁶⁴

But when the employment pattern is actually so casual or sporadic that Saturday and Sunday work does not normally fall within overtime hours, premiums paid for work on those days are part of the

59. 3 CCH LAB. LAW REP. (Wages and Hours) §§ 29,012, 29,014 (1948), 22 BNA LAB. REL. REP. (Wages and Hours) 1341, 1343 (1948).

60. Wage and Hour Division Release PR 161, note 46 *supra*. 3 CCH LAB. LAW REP. (Wages and Hours) §§ 29,011, 29,012, 29,013, 29,026, 29,028, 29,030, 29,032, 29,036 (1948), 22 BNA LAB. REL. REP. (Wages and Hours) 1339, 1340, 1341, 1373, 1389, 1394, 1395, 1399 (1948).

61. Wage and Hour Division Release PR 161, note 46 *supra*. The actual practice of the parties may override the terms of the contract itself in determining the overtime status of the premium pay. For example, if a collective bargaining agreement requires premium pay for work on Saturdays and Sundays, as such, but contains no provision requiring premium pay for work in excess of a bona fide standard, premiums paid for Saturday and Sunday may be true overtime compensation if, in actual practice, such premiums are paid for work in excess of a bona fide standard. 3 CCH LAB. LAW REP. (Wages and Hours) §§ 29,012, 29,040 (1948), 22 BNA LAB. REL. REP. (Wages and Hours) 1341 (1948), 23 BNA LAB. REL. REP. (Wages and Hours) 1479 (1948). The start of the workweek designated in payroll records must coincide with that designated in the contract of employment. 3 CCH LAB. LAW REP. (Wages and Hours) § 29,032 (1948), 22 BNA LAB. REL. REP. (Wages and Hours) 1399 (1948).

62. See note 49 *supra*.

63. 3 CCH LAB. LAW REP. (Wages and Hours) §§ 29,011, 29,030, 29,031 (1948), 22 BNA LAB. REL. REP. (Wages and Hours) 1339, 1395, 1397 (1948).

64. 3 CCH LAB. LAW REP. (Wages and Hours) § 29,014 (1948), 22 BNA LAB. REL. REP. (Wages and Hours) 1343 (1948). This ruling particularly affects cases in which plant operations necessitate a staggered workweek so that some employees begin their

regular rate—despite a designation as overtime in the applicable employment contract.⁶⁵

Pre-shift and Post-shift Work

In those situations where premiums are paid for work performed before the start of an employee's regular shift (without regard to the employee's having previously worked a specified number of hours according to a bona fide standard) the payments do not fall within the true overtime compensation category.⁶⁶

However, if the employee's normal work day is designated as a specified number of hours in a twenty-four hour period, overtime pay for such pre-shift hours may be true overtime compensation—if the employee normally or regularly works a specified number of hours within the twenty-four hour period in which the pre-shift time falls.⁶⁷ For example, a contract designates twenty-four consecutive hours, beginning 8 A.M., as the work day and schedules a regular shift of eight hours to start at that time. The employee is called in to work at 6 A.M.,—two hours before the start of his regular shift. Since these two hours are in excess of the eight hours regularly scheduled during the preceding work day of twenty-four consecutive hours, premium pay for such hours may be treated as true overtime.⁶⁸

Premium payments for work after hours designated as the regular shift may be treated as true overtime if the designated regular shift corresponds to the normal employment pattern of the plant or group; occasional deviations by individual employees from the group work pattern do not affect the general criterion.⁶⁹

Work at Different Rates of Pay

Where an employee, during the same week, performs work for which different rates are paid, the regular rate of the employee is the weighted average of the rates received during the week.⁷⁰

workweek on other days of the calendar week. See statement 22 BNA LAB. REL. REP. (Wages and Hours) 1362 (1948).

65. 3 CCH LAB. LAW REP. (Wages and Hours) ¶¶ 29,026, 29,030 (1948), 22 BNA LAB. REL. REP. (Wages and Hours) 1373, 1395 (1948).

66. 3 CCH LAB. LAW REP. (Wages and Hours) ¶ 29,026, Example III (1948), 22 BNA LAB. REL. REP. (Wages and Hours) 1373, Example III (1948).

67. 3 CCH LAB. LAW REP. (Wages and Hours) ¶¶ 29,026, Example III, 29,027 (1948), 22 BNA LAB. REL. REP. (Wages and Hours) 1373, Example III, 1392 (1948).

68. 3 CCH LAB. LAW REP. (Wages and Hours) ¶ 29,027 (1948), 22 BNA LAB. REL. REP. (Wages and Hours) 1392 (1948).

69. *Ibid.* See also 3 CCH LAB. LAW REP. (Wages and Hours) ¶ 29,040 (1948), 23 BNA LAB. REL. REP. (Wages and Hours) 1479 (1948).

70. 3 CCH LAB. LAW REP. (Wages and Hours) ¶ 29,014 (1948), 22 BNA LAB. REL. REP. (Wages and Hours) 1343 (1948). This is in accord with the Administrator's

THE LEGISLATIVE REMEDY

Employers and a considerable part of organized labor have voiced their dissatisfaction with the effects of the *Bay Ridge* case.⁷¹ Premium pay agreements arrived at in good faith must now be revised to accord with the new requirement of excessiveness. Such revision may well be complicated by the fact that many of the pre-*Bay Ridge* contracts specified premium payments more generous than those required by the Act. Employees will be jealous of these generous premiums and, quite understandably, will seek to retain them. On the other hand, maintenance of such contracts results in substantial increases in the labor costs of the employer because such premiums will now be included in "regular rate" and will not be credited to the overtime required by the Act; in addition, there is imposed the administrative expense of computing varying regular rates for each employee when contract overtime does

original interpretation. Interpretative Bulletin No. 4, ¶ 14, 3 CCH LAB. LAW REP. (Wages and Hours), ¶ 24,478 (1948), 1944-1945 WH MAN. 157. This original position had been modified by the Administrator, however, to permit the employer to elect to compute the overtime compensation due in such cases either on the basis of (1) the average hourly rate or (2) the basis of straight-time rate applicable to the work performed during the overtime hours. 3 CCH LAB. LAW REP. (Wages and Hours), ¶ 25,520 (.24 and .248) (1948), 1944-1945 WH MAN. 183, 229. This was in accord with practice permitted under the Walsh-Healey Act, 49 STAT. 2036 (1936), 41 U.S.C. § 35-45 (1946), which relates to employment by Government contractors. According to the recent opinion letter, *supra*, the election has not been permitted since June 17, 1947 when the Wage and Hour Division announced that enforcement policies of the Department of Labor (as they relate to the Fair Labor Standards Act and the Walsh-Healey Act) would be carried out on the basis that all employers subject to the Acts are responsible for strict compliance. 13 FED. REG. 3915 (1947). However, Administrator McComb referred to this practice in a report submitted on November 25, 1947 to House Subcommittee No. 4 with no implication that this policy had been rescinded. *Hearings before Subcommittee No. 4 of the Committee on Education and Labor, House of Representatives, on Proposed Amendments of the Fair Labor Standards Act of 1938*, 80th Cong., 1st Sess. 2617 (1947). Regulations under the Walsh-Healey Act were revised, effective October 22, 1948, to require the averaging method only, thus establishing uniform practice under two Acts. 13 FED. REG. 6214, 23 BNA LAB. REL. REP. (Wages and Hours) 3105 (1948).

71. The National Ass'n of Manufacturers, the International Longshoremen's Ass'n and the American Federation of Labor all participated in the *Bay Ridge* case as *amici curiae* opposing judgment for the employee plaintiffs. The Chamber of Commerce of the United States has announced support of remedial legislation. Daily Labor Report No. 196 (1948). The Administrator of the Wage and Hour Division has stressed the need for legislative action, 22 BNA LAB. REL. REP. (Wages and Hours) 1457 (1948), Daily Labor Report No. 206, A-4 (1948), and has proposed a specific amendment. See note 90 *infra* and text thereto. Since the *Bay Ridge* decision, the I.L.A. has urged labor and industry to unite in support of legislation to permit collective bargaining agreements to determine statutory regular rate, 22 BNA LAB. REL. REP. (Wages and Hours) 1459 (1948), Daily Labor Report No. 205 F-1 (1948), Daily Labor Report No. 212, A-14 (1948). The C.I.O. has not yet indicated support for any legislation. See 23 BNA LAB. REL. REP. (Wages and Hours) 1491 (1948), Daily Labor Report No. 228, A-1 (1948). But see statement on behalf of CIO, Daily Labor Report No. 21, F-1 (1949).

not meet the test of "overtime premium" laid down by the Court. Negotiation of new contracts after the expiration of such agreements will likewise be hampered, and, in some instances, work stoppages may result.⁷²

The fundamental changes wrought by the Court in the concept of overtime pay, with its attendant disruption of wage payment practices under a very large percentage of labor contracts, point the need for swift legislative action. The need for legislation is further illustrated by the inequitable results produced by the completely artificial distinctions which the Administrator has had to make in his attempts to mitigate the effect of the *Bay Ridge* decision. For example, premium payments for Saturdays and Sundays may both be treated as a true overtime premium if the workweek starts on Monday, but not if the workweek starts on any other day of the week.⁷³ And a premium payment for pre-shift time may not be treated as a true overtime premium—unless the employment contract designates the workday as twenty-four consecutive hours and such pre-shift time exceeds a bona fide daily standard within such a twenty-four hour period.⁷⁴ Needless to say, in most cases, it is pure happenstance whether existing labor contracts contain such magical clauses.

But even if the Administrator's interpretations did satisfactorily resolve the various problems, they are purely advisory and subject to contrary interpretations by the courts.⁷⁵ Employers may naturally hesitate to enter into agreements calling for premium payments presently regarded by the Administrator as true overtime, when the

72. Such results were forecast by the Department of Justice in its petition for rehearing in the *Bay Ridge* case, Daily Labor Report No. 122, D-1 (1948), and the American Federation of Labor, as *amicus curiae*, in its brief in support of the petition for rehearing, Daily Labor Report No. 193, D-1 (1948). This is exemplified by the longshoremen's strike on the Atlantic Coast in November, 1948, which resulted at least in part from disagreement between stevedoring companies and the International Longshoremen's Ass'n as to contract provisions to take the place of the premium pay provision before the Court in the *Bay Ridge* case. See the statement of the stevedoring companies, N.Y. Times, Nov. 24, 1948, p. 10, col. 3. The longshore strike was eventually settled upon the basis of a temporary contract utilizing the provisions of §7(b) of the Act which permit employment up to twelve hours daily or fifty-six hours weekly without statutory overtime, subject to a limit of 1,000 hours in any period of twenty-six consecutive weeks. Both parties contemplate an early revision of the law to permit operation under the traditional form of contract, and have received assurance of support for such a revision from the Secretary of Labor. Daily Labor Report No. 228, A-1 (1948). See also statements submitted to the House Committee on Education and Labor of the 81st Congress (which started hearings last Jan. 27, 1949) by Walter Mason, AFL national legislative representative and Louis Waldman, general counsel to AFL's International Longshoremen's Ass'n, which appear in Daily Labor Report No. 21, G-1, H-1 (1949).

73. See notes 63 and 64, *supra*.

74. See notes 66 and 67, *supra*.

75. See note 6, *supra*.

basis for the Administrator's position is doubtful.⁷⁶ Nevertheless, an employer's refusal to grant premium pay on this ground may well be criticized by employee-representatives who wish to continue old or to obtain new contract provisions calling for extra pay.

Amendment of the overtime provisions of the Fair Labor Standards Act to meet the problems raised by the *Bay Ridge* case has been the subject of increasing Congressional attention since the District Court's decision in early 1947. Subcommittees of the House and Senate, conducting hearings on proposed amendments of the Fair Labor Standards Act during the Eightieth Congress, devoted a substantial portion of their time to testimony concerning the so-called "overtime on overtime" problem.⁷⁷ Both subcommittees adjourned, however, without any agreement as to either the form or the objects of such an amendment.

All of the proposals introduced in the Eightieth Congress sought to solve the problem in whole or in part by amending section 7(a) to permit parties to collective bargaining agreements or employment contracts to establish regular or overtime rates for use in computation of overtime pay. However, the latitude to be permitted the parties varied considerably in each proposal. *H. R. 2230*⁷⁸ required only that the designated regular rate be "not less than" the minimum wage specified in section 6 of the Act. *H. R. 4387*⁷⁹ added the requirement that the rate be designated by a "bona fide" labor or employment contract.

76. For example the Administrator has ruled that in determining the practice of the parties to a contract, the practice of the plant or group of which an employee is a member, not the practice of an individual employee, governs. See p. 365 *supra*. Compare the statement of the Court in the *Bay Ridge* case, 334 U.S. 446, 473 (1948), "If the government means that any extra pay to an employee for work outside regular working hours of the group of employees is to be excluded from the computation of the regular rate, we do not think that contention sound. . . . The work schedule of other individuals in the same general employment is of no importance in determining regular working hours of a single individual. . . ." See, also, 149 *Madison Ave. Corp. v. Asselta*, 331 U.S. 199 (1947), in which, referring to the practice of paying overtime to employees who were absent during the workweek for excusable cause, the Court declared at page 205: "The payment of 'overtime' compensation for non-overtime work raises strong doubt as to the integrity of the hourly rate upon the basis of which 'overtime' compensation is calculated."

77. *Hearings before Subcommittee No. 4 of the Committee on Education and Labor, House of Representatives, on Proposed Amendments to the Fair Labor Standards Act of 1938*, 80th Cong., 1st Sess. (1947) *passim*. *Hearings before a Subcommittee of the Committee on Labor and Public Welfare, United States Senate, on Bills to Amend the Fair Labor Standards Act*, 80th Cong., 2d Sess. (1948) *passim*. The House Subcommittee held hearings during November and December 1947, the Senate Subcommittee during April 1948.

78. 93 CONG. REC. 1480 (Feb. 26, 1947) (by Mr. Plumley, R., Vermont).

79. 93 CONG. REC. 10284 (July 25, 1947) (by Mr. Goodwin, R., Mass.).

The approach followed in *H. R. 6534*⁸⁰ couples provisions defining certain types of payments as "overtime premiums"⁸¹ (to be excluded from the statutory regular rate and creditable to statutory overtime compensation) with recognition of "overtime rates" established by custom or individual labor contract.⁸² In this last bill, such an "overtime rate" must be at least one and one-half times any lower rate, "not proved to be a fictitious rate" established by custom or individual labor contract, payable for the same work at other hours of the day or on other days.

In *S. 2386*,⁸³ contractual designation of "overtime" by collective bargaining agreement is permitted subject only to the limitation that "basic wage payments" and certain production bonuses and other incentive payments must be included in computing regular rate.⁸⁴ In

80. 94 CONG. REC. 5892 (May 12, 1948) (by Mr. Goodwin, R., Mass.), to supersede *H.R. 4387*, note 79 *supra*. Identical with *H.R. 6534*, except for minor variations in punctuation, are *S. 2728*, 94 CONG. REC. 6476 (May 24, 1948) (by Sen. Wiley, R., Wis.), and *S. 2832*, 94 CONG. REC. 7546 (June 8, 1948) (by Sen. Butler, R., Neb.). Sen. Wiley introduced a bill identical with *S. 2728*, *supra*, at the start of the 81st Congress. *S. 252*, 95 CONG. REC. 85 (Jan. 6, 1949). All of these bills were referred to the Committee on the Judiciary in the House and Senate, respectively, since they would deprive the courts of jurisdiction to entertain suits for overtime compensation except as provided therein, and thus would have retroactive application. This approach was taken in the Portal-to-Portal Act.

81. In *H.R. 6534*, *supra* note 80, the term "overtime premium" means "that portion of any overtime rate that is paid because the employee has previously worked a specified number of hours during a specified period or because of the time of day or the day of the week or year the work is performed."

82. In *H.R. 6534*, *supra* note 80, the term "overtime rate" includes "any rate of at least one and one-half times any lower rate, not proved to be a fictitious rate established by custom or individual labor contract, payable for the same work at other hours of the day or on other days, and includes any other true overtime rate."

83. 94 CONG. REC. 3559, 3560 (March 25, 1948) (by Sen. Ball, R., Minn.). *S. 2386* contains a long and detailed definition of "regular rate" with variations for employers covered by collective bargaining agreements and those who are not. It is otherwise generally amendatory of the entire Act.

84. *S. 2386*, § 3(n)(3), *supra* note 83, provides in part: "In computing the 'regular rate of pay' of an employee employed under a bona fide collective bargaining agreement—

"(A) there shall be included in normal, straight-time compensation—

"(1) basic wage payments, whether at an hourly rate, day rate, piece rate, or salary;

"(2) production bonuses and other incentive payments distributed not less frequently than monthly . . .

"(3) such other payments . . . as are not excluded by designation as 'overtime' payments in the provisions of such agreement or by an express provision thereof;

"(B) there shall be excluded from normal straight-time compensation and shall be credited to overtime compensation—

"(1) payments which are creditable under the provisions of section 3(n)(1)(B),

"(2) payments designated as 'overtime' payments or otherwise made creditable to overtime by the provisions of such agreement . . ."

addition, certain types of "overtime payments" are to be excluded from statutory regular rate and credited to statutory overtime pay.⁸⁵

Generalized provisions permitting contractual specification of regular or overtime rates would certainly eliminate the problems occasioned by the *Bay Ridge* case. A fundamental shortcoming of such proposals, however, is that they do much more; they permit almost complete nullification of the statutory purposes. If the purposes of spreading employment and providing extra compensation for long hours still justify the retention of the overtime provisions of the Act,⁸⁶ it would seem inadvisable to permit parties to labor contracts to thwart them in almost any way they wish.

The implications of completely unrestricted power are apparently recognized by the authors of *H. R. 6534* and *S. 2386*, for those measures contain restrictions upon its exercise. Thus, *H. R. 6534* requires that a contractual overtime rate be one and one-half times any lower rate "not proved to be a fictitious rate." The latter phrase, however, would seem to beg the question completely. "Fictitious rate" is undefined. Presumably, it might result in the rate being tested under the standards developed in the *Helmerich & Payne*, *Youngerman-Reynolds*, and *Harnischfeger* cases; any rate different from that actually paid for hours normally or regularly worked might then be considered fictitious. Such a test applied to the facts of the *Bay Ridge* case would produce precisely the same result as was there achieved, although the reasoning would be that of the Circuit Court of Appeals in that case. Since the bill was conceived with the facts of the *Bay Ridge* situation in mind, it is doubtful that its author intended such a result. Another possible test of "fictitious rate" might be whether the rate was in fact paid for any hours worked, without regard to their normalcy or regularity. If this is intended, there is virtually unlimited freedom to contract and any assumed safeguard is quite illusory. At best, undefined "fictitious

85. *S. 2386*, § 3(n)(1)(B), *supra* note 83, provides: "there shall be excluded from normal, straight-time compensation and shall be credited to overtime compensation for the purpose of section 7—

"(1) overtime premiums paid for work performed in excess of the normal week day or workweek scheduled in good faith by established practice or a collective-bargaining agreement, and

"(2) overtime premiums paid for work performed outside of the normal workday or workweek scheduled in good faith by established practice or a collective-bargaining agreement, including premium payments for work performed on Saturdays, Sundays, and holidays;"

86. The economic desirability of repealing the overtime provisions of the Act was considered by House Subcommittee No. 4. See particularly testimony of Paul H. Nyström, Professor of Marketing, School of Business, Columbia University, *Hearings before Subcommittee No. 4 of the Committee on Education and Labor, House of Representatives, on Proposed Amendments to the Fair Labor Standards Act of 1938*, 80th Cong., 1st Sess. 799-837 (1947).

rate" would probably lead to litigation comparable to that caused by undefined "regular rate."⁸⁷

The provisions of *S. 2386* give rise to similar ambiguities and problems of interpretation. Under that bill, "basic wage payments," to be included within the statutory regular rate computation, is undefined, and, therefore, hardly more illuminating than the term "regular rate" itself. There is also considerable question as to the wisdom of that particular measure's establishment of separate standards for employers who are parties to collective bargaining agreements and those who are not.⁸⁸

Attempts to meet the danger that statutory revision will nullify the statutory purposes by introducing such generalized terms as "fictitious rate" or "basic wage payments" will at best create new problems of interpretation. In dealing with the complicated situations which are involved, some permissive provision leaving discretion to those framing the collective bargaining agreement is probably needed. But such permission must be limited. It would seem that the most desirable course would be to grant the requisite statutory permission only in terms of the specific situations to be corrected.⁸⁹

Another useful statutory technique is to define certain specific types of payments as overtime payments, as was done to a limited degree in *H. R. 6534* and *S. 2386*. This approach enables the legislator to limit the scope of such provisions to the precise situation which he wishes to remedy. The best illustration of this particular technique is the bill submitted by the Wage and Hour Administrator to the House and Senate Committees shortly after adjournment of the last regular ses-

87. Compare statement of California State Brewers Institute suggesting the addition of the word "fictitious" to *S. 2386*, *Hearings before a Subcommittee of the Committee on Labor and Public Welfare, United States Senate, on Bills to Amend the Fair Labor Standards Act*, 80th Cong., 2d Sess. 1116, 1117 (1948).

88. Representatives of organized labor almost without exception criticized this portion of the bill. *Id.*, at 128, 154, 478, 510, 523, 864, 865, 888, 1026, 1243, 1252. The Secretary of Labor voiced similar criticism. *Id.*, at 168. See also the analysis of *S. 2386* submitted by the Department of Labor. *Id.*, at 176. The International Longshoremen's Ass'n, however, supports such proposals. *Id.*, at 1069, 1070, and see statements of Louis Waldman, I.L.A. general counsel, reported in 22 *BNA LAB. REL. REP. (Wages and Hours)* 1459 (1948), *Daily Labor Report* No. 21, H-1 (1949).

89. Of the various problems presented by the *Bay Ridge* decision, the only one which seems incapable of practical solution by specific statutory language alone is the problem presented by casual or sporadic employment—where there are no hours of the day or days of the week normally or regularly worked. To cope with that situation, some permission to designate overtime rates by contract, custom or practice seems necessary. The permission can and should be worded in terms of that situation only. Compare the statement on behalf of the C.I.O. by Irving J. Levy, general counsel of the U.A.W., to the House Committee on Education and Labor, 81st Congress, February 1, 1949, reported in *Daily Labor Report* No. 21, F-1, F-6 (1949).

sion of the Eightieth Congress.⁹⁰ The Administrator's bill is a comprehensive amendment of section 7(a) and is designed to remedy not only *Bay Ridge* problems but various other questions which have arisen in connection with the interpretation of statutory regular rate.⁹¹ The scheme of the bill is to define statutory regular rate as including all remuneration paid to or on behalf of an employee, except certain enumerated payments. These enumerated payments relate to such matters as gifts, time not worked, bonuses, pension plan contributions and overtime; creditable toward statutory required overtime are:

"Extra amounts paid as overtime compensation for hours worked, in any day or workweek, in excess of eight in a day or 40 in a workweek or the employee's normal working hours or regular working hours, as the case may be . . ."

and also:

"Amounts paid as extra compensation for hours worked, on Saturday or Sunday or on a recognized holiday, or on the sixth or seventh day of the workweek, or for hours worked outside the employee's normal working hours or regular working hours where work at such times is paid for at a rate of at least 50% in excess of the bona fide rate applicable to the same work performed at other times."⁹²

Although the overtime pay provisions in the Administrator's proposal solve most of the problems raised by the *Bay Ridge* case, they fail to remedy the precise situation there involved—the determination of overtime payments where, because of the casual or sporadic nature of employment, there are in fact no hours of the day normally or regularly

90. 3 CCH LAB. LAW REP. (Wages and Hours) ¶29,009 (1948); 22 BNA LAB. REL. REP. (Wages and Hours) 1317 (1948). The bill is also set forth and fully discussed by the Administrator in his 1948 annual report. ANN. REP. OF WAGE AND HOUR PUBLIC CONTRACT DIVISIONS, U. S. DEPT. OF LABOR 61 *et seq.* (1948). The provisions of the Administrator's bill form the basis of several proposals introduced in the 81st Congress which are discussed *infra*.

91. Particular attention is given to clarification of the status of bonuses, profit-sharing payments, and employer contributions to employee benefit plans in the computation of statutory regular rate. The Wage and Hour Division takes the position that modification of the term "regular rate" is necessary to permit "certain types of profit-sharing plans and arrangements for time and one-half pay or better for work during specified hours of the day, or days of the week. The very purpose and desirability of such pay arrangements are frequently defeated by the requirement that such payments must be included in the regular rate of pay in computing overtime compensation." ANN. REP. OF WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS, DEPT. OF LABOR 52 (1947).

92. See note 90 *supra*.

worked.⁹³ Nor does the bill contain any provision authorizing the use of the group rather than the individual pattern in determining normal or regular hours.

An additional question arises with regard to the provision that no payment for work on designated days or outside of normal or regular hours can be credited to statutory required overtime unless it is at least 50% more than the bona fide rate for the same work performed at other times. This sort of limitation introduces an extraneous factor. It is undoubtedly true that, in the past, the 50% premium has often been cited as indicative of a true overtime rate, as distinguished from a mere differential paid for a less desirable shift.⁹⁴ If, however, the basic tests of an overtime rate are to be whether the rate is paid for hours in excess of, or outside of other hours, or on certain designated days, there seems little reason for adding the 50% ratio to the already existing tests of what constitute overtime rate.⁹⁵ It would seem quite enough to rely on the basic provision that time in excess of forty hours must be paid for at one and one-half times the regular rate; that proviso insures that any payments which are recognized as overtime premiums must average 50% higher than the regular rate.

The Administrator's bill, as did S.2386, poses the problem of whether it is advisable at this time to enact a general definition of statutory "regular rate" into the law. Both bills seek to deal with other problems in addition to those raised by the *Bay Ridge* case. In so doing, however, only a portion of existing law is to be changed. This being so, a generalized definition apparently codifying the long line of case law would be undesirable. It would introduce the not inconsiderable variables of statutory construction, both as to language and intent. Codification of regular rate would also limit the ability of the courts to keep the Act flexible so that it can be applied to new situations. Unless wholesale changes are intended in the meaning of statutory regular rate, and, certainly, such are not required to correct only *Bay Ridge* case problems, a general definition of statutory regular rate at this time would seem

93. The Administrator himself acknowledges this omission, stating that he is preparing another proposal for the solution of the problem. ANN. REP. OF THE WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS, U.S. DEPT. OF LABOR 71 (1948).

94. For example, one of the major premises of the defense in the *Bay Ridge* case was that a 50% differential is indicative of true overtime. This argument was accepted by the District Court. 69 F.Supp. 956, 960 (S.D.N.Y. 1947).

95. "The principle involved is that the purpose and nature—and not the quantity—of the payment warrants the exclusion." Committee on Labor and Social Security Legislation of the Ass'n of the Bar of the City of New York, REP. ON WAGE AND HOUR LEGISLATION WITH SPECIFIC REFERENCE TO THE OVERTIME-ON-OVERTIME PROBLEM 5 (Jan. 18, 1949). It should be noted that the Supreme Court, in the *Bay Ridge* case, imposed no such restriction in announcing its test of excessiveness, nor does the Administrator propose to apply the 50% ratio to payments computed with reference to excessiveness.

unwise; the content given to "regular rate" should be left to its case-by-case development.

Whether it is sought to solve only *Bay Ridge* case problems, or other problems as well, it would seem that the statutory technique of simply enumerating certain types of payments which are to be excluded from regular rate, and some of which may be credited to overtime, will most satisfactorily do the job. However, the coupling of such an enumeration with the provision that all remuneration other than the enumerated types is to be part of the regular rate, as in the Administrator's bill, introduces an unnecessary and undesirable rigidity in the law.

In the opening weeks of the Eighty-first Congress several measures dealing with the "overtime on overtime" problem have been advanced by the Chairmen of the House and Senate Committees. The earliest of these, *H.R. 858*,⁹⁶ recites in its preamble an intention to clarify the overtime provisions of the Fair Labor Standards Act as applied in the stevedoring and building construction industries. It makes no attempt to define "regular rate"; instead, it would exclude from the statutory regular rate computation and make creditable to overtime, premium pay for: (1) work on Saturdays, Sundays, or holidays, or on the sixth or seventh day of the workweek; (2) work outside of the hours "established in good faith" by the applicable employment contract or collective bargaining agreement as the basic, normal or regular workday or workweek. To qualify, such premiums must be at least 50% more than the rate established in good faith by such contract or agreement for like work performed during non-overtime hours.⁹⁷

96. 95 CONG. REC. 77 (January 5, 1949) (by Mr. Lesinski, D. Mich.). It was drawn at the Department of Labor after consultation with interested labor and industry groups. Daily Labor Report No. 4, A-3 (1949). See also 23 BNA LAB. REL. REP. (Wages and Hours) 1529 (1948). Its counterpart in the Senate is S. 336, 95 CONG. REC. 181 (January 13, 1949) (by Sen. Thomas, D. Utah).

97. *H.R. 858*, note 96 *supra*, provides for the addition of a new subsection 7(e) to read:

"(e) For the purpose of computing overtime compensation payable under this section to an employee—

"(1) who is paid for work on Saturdays, Sundays, or holidays, or on the sixth or seventh day of the workweek, at a premium rate not less than one and one-half times the rate established in good faith for like work performed in non-overtime hours on other days, or

"(2) who, in pursuance of an applicable employment contract or collective bargaining agreement, is paid for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding forty hours), at a premium rate not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek, the extra compensation provided by such premium rate shall not be deemed part of the regular rate at which the employee is employed and may be credited toward any premium compensation due him under this section for overtime work."

This proposal is subject to several serious objections. First in view of the acknowledged effect of the *Bay Ridge* decision upon all industry, there seems little justification for limiting corrective legislation only to the stevedoring and building construction industries except, possibly, in a temporary measure. In addition, like some of the other measures already discussed, *H.R. 858* permits the parties to labor contracts too general a discretion to designate regular and overtime rates by contract. The effect of limiting the permission to the "good faith" of the parties in establishing a basic or normal workday or workweek would seem no different from the "fictitious rate" proposals in the Eightieth Congress. Either the measure may be completely ineffective because a basic workday or workweek different from that in fact worked might not be regarded by the courts as "established in good faith" under the decisions heretofore noted; or the parties will be able to thwart the purposes of the overtime provisions of the Act by establishing any workday or workweek agreed upon in good faith. The inadequacy of this "good faith" requirement rests primarily in the fact that the interests of the particular parties involved may often be served best by ignoring that which Congress would protect—the spreading of employment via premium pay.⁹⁸ As to the requirement that the premium must be at least 50% in order to qualify as true overtime, the reasons for its undesirability have already been indicated in the discussion of the bill drawn by the Wage and Hour Administrator.

A second proposal which has achieved prominence in the Eighty-first Congress, *S. 653*,⁹⁹ is a general revision of the Fair Labor Standards Act which would amend section 7 with provisions which combine *H.R. 858* and a somewhat revised Administrator's bill. Like the Administrator's proposal, it defines "regular rate" as including all remuneration received for employment except certain enumerated types of payments.¹⁰⁰ The enumerations are similar to the Administrator's except

98. For example, there would seem no safeguard at all against a strong and comparatively closed union from establishing in perfect good faith a minimum "basic" workweek or workday while in fact working long hours at high rates, with resultant high earnings for its limited membership—all at completely cross purposes with the statutory aim of spreading employment. Compare the statement of Irving J. Levy, general counsel to the U.A.W., on behalf of the C.I.O., to the House Committee, Daily Labor Report No. 12, F-1, F-6 (1949).

99. 95 CONG. REC. 568 (Jan. 27, 1949) (by Sen. Thomas, D. Utah).

100. *S. 653*, note 99 *supra*, provides in § 7(d) :

"(d) As used in this section the 'regular rate' at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include * * * —

"(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess

that there is added the provision of *H.R. 858* excluding premium compensation for hours outside of a basic workweek or workday "established in good faith" provided such premium is at least 50%. This proposal, while including some of the desirable features of the Administrator's bill, fails to eliminate the serious objection to a general definition of "regular rate," and adds the objectionable device of a general permission to designate overtime rates by contract without an effective limitation.

Criticism of the type of permission to designate rates granted by *H.R. 858* and *S. 653* is met to some degree by *H.R. 2033*.¹⁰¹ The overtime provisions of this measure, which is also a general revision of the Act, are, for the most part, similar to *S. 653*. However, in the section permitting the exclusion from regular rate computation and credit to overtime of premium payments for hours outside a basic, normal, or regular work week or work day "established in good faith," there is added the requirement that the basic, normal or regular work day or workweek be "established in good faith in accordance with regulations" issued by the Secretary of Labor.¹⁰² Under the proposal,

of eight in a day or forty in a workweek or in excess of the employee's normal working hours or regular working hours, as the case may be;

"(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, or holidays, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;

"(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal or regular workday (not exceeding eight hours) or workweek (not exceeding forty hours), where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek."

§ 7(f) provides:

"(f) Extra compensation paid as described in paragraphs 5, 6, and 7 of subsection (d) shall be creditable toward overtime compensation payable pursuant to this section."

The principle point of difference from the Administrator's bill is the elimination of amounts paid as extra compensation for "hours worked outside the employees' normal working hours or regular working hours" in § 7(d)(5). It is presumably intended to cover such types of payments by the provisions of § 7(d)(7), which is new.

101. 95 CONG. REC. 758 (Jan. 31, 1949) (by Mr. Lesinski, D. Mich.).

102. Section 7 (d) (7) of *H.R. 2033*, note 101 *supra*, excludes from regular rate and makes creditable to overtime:

"(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith, in accordance with regulations issued by the Secretary under Section 4(c), by the contract or agreement as the basic, normal or regular workday (not exceeding eight hours) or workweek (not exceeding forty hours), where such premium rate is not less than one and one-half times the rate established in

authority is conferred upon the Secretary to issue appropriate regulations to carry out and prevent evasion of the provisions of the Act.¹⁰³

It is probable that under such a provision, the difficulties heretofore envisaged in connection with a general permission to designate overtime rates by contract would be avoided. Nevertheless, there would seem to be serious doubt as to the wisdom of making the Secretary of Labor the general arbiter of all overtime provisions in collective bargaining and employment contracts. The magnitude of the task and complexity and cost of administering substantive regulations of such general applicability render the proposal of dubious value. It may well be, however, that if the power to issue regulations in regard to permission to contract (whether vested in the Secretary of Labor or the Wage and Hour Administrator) were in connection with a permission to contract limited to specific situations incapable of being otherwise dealt with, it would serve a useful purpose. But once again, the vice of a too general permission to contract is evident.

A PROPOSED REVISION OF SECTION 7(a)

Legislative efforts to remedy the situation created by the *Bay Ridge* case should be directed toward the objective of legalizing those specific wage payment practices generally accepted as in compliance with the Act prior to the decision. Care should be exercised, in so doing, to retain effective safeguards against contractual attempts to evade the recognized purposes of the overtime provisions of the Act. The injection of unnecessary rigidity in the administration and interpretation of the Act by a statutory definition of the term "regular rate" should be avoided. It is submitted that the following proposed amendment to section 7(a) of the Fair Labor Standards Act would satisfy these criteria:

"The Fair Labor Standards Act of 1938, as amended, is amended by adding at the end of subsection (a) of section 7 of such Act the following:

'In determining the regular rate at which an employee is employed, payments of the following types shall be excluded from the regular rate and may be credited to the compensation required to be paid by this subsection:

'(1) premium payments for work done on Saturdays, Sundays, holidays, or on the sixth or seventh days of the workweek of such employee;

'(2) premium payments for work in excess of eight hours daily or forty hours weekly, or for work in ex-

good faith by contract or agreement for like work performed during such workday or workweek."

103. *H.R. 2033*, § 4(c), note 101 *supra*.

cess of a lesser number of hours daily or weekly where such lesser number of hours is the number of hours normally or regularly worked by such employee;

'(3) premium payments for work during hours of the day or on days of the week outside the hours of the day or the days of the week normally or regularly worked by such employee;

'(4) premium payments for work during hours of the day designated as overtime hours pursuant to contract, custom or practice; *provided*, that by reason of the casual or sporadic nature of the employment covered by such contract, custom or practice, there are in fact no hours of the day normally or regularly worked by such employee; and, *provided further*, that such designation of hours of the day as overtime hours shall be in accordance with regulations which the Administrator is hereby authorized to issue for determining the casual or sporadic nature of employment contemplated by this subparagraph.

The pattern of employment of the group, if any, of employees employed by an employer of which an employee is a member shall be determinative of the number of hours and the hours of the day normally or regularly worked by such employee. The enumeration of the foregoing types of payments is not intended to be exclusive of any other types of payments which may properly be so excluded or so credited, or both.' "