Michigan Law Review

Volume 45 | Issue 8

1947

# LABOR LAW-FAIR LABOR STANDARDS ACT-DETERMINATION OF "REGULAR RATE" FOR COMPUTATION OF OVERTIME PAY

John A. Huston S.Ed.
*University of Michigan Law School*

LABOR LAW—FAIR LABOR STANDARDS ACT—DETERMINATION OF "REGULAR RATE" FOR COMPUTATION OF OVERTIME PAY—Previous to the enactment of the Fair Labor Standards Act,[1] respondent had paid its employees monthly

[1] 52 Stat. L. 1060 (1938), 29 U.S.C. (1940), § 201 et seq. The act became effective in October, 1938. The provisions pertinent to this note are § 6, fixing mini-

salaries for work schedules which fluctuated from week to week according to the demands of business. After the effective date of the act, respondent sought to comply with section 7 (a), requiring the payment of one and one half times the "regular rate" of compensation for hours worked above the statutory maximum, by adopting new employment contracts which guaranteed weekly salaries equivalent to the former compensation and fixed an hourly rate which, multiplied by the maximum hours permitted by the act and by one and a half times the normal number of overtime hours, would approximate the guaranteed figure. If in any week an employee should work more hours than would be covered by the guarantee, the additional hours were to be compensated at time and a half the basic rate.[2] In a suit filed by the Administrator of the Wage and Hour Division to enjoin respondent's use of its contracts on the theory that the stated hourly rate could not qualify as the "regular rate" for the purposes of the overtime provisions of the act, the federal district court dismissed the complaint [3] on the authority of *Walling v. A. H. Belo Corp.*[4] The circuit court of appeals affirmed.[5] On certiorari to the Supreme Court, *held*, affirmed. The "regular rate" as determined in respondent's contracts satisfies the requirements of section 7 (a). Justices Murphy and Black dissented. *Walling v. Halliburton Oil Well Cementing Co.*, (U.S. 1947) 67 S. Ct. 1056.

One of the purposes of the Fair Labor Standards Act was to spread employment by increasing the cost to employers of hours worked in excess of the statutory maximum per week.[6] This was sought to be accomplished by requiring in section 7 (a), that overtime hours be compensated at time and a half the "regular rate." The problem presented in the principal case results from the employer's attempt to comply with the provisions of section 7 (a) while neither reducing work schedules to the statutory maximum nor increasing the total compensation of the employees.[7] The way to achieve this result is to fix the hourly rate of employment at a figure which multiplied by the allowable number of straight-time hours and by time and a half the usual number of overtime

mum wages at $.25 for the first year of the act, $.30 for the next six years, and $.40 thereafter, and § 7, limiting the number of hours permissible without payment of overtime to 44 hours per week for the first year, 42 for the second, and 40 thereafter.

[2] In the example given by the Court, respondent fixed the hourly rate at $.40 and guaranteed a weekly pay of $42.69. Since 40 straight-time hours, the statutory maximum, compensated at this rate and 44 overtime hours at time and a half this rate equal $42.40, it would be necessary for an employee under this arrangement to work more than 84 hours in any week before he would be entitled to more than the guaranteed figure. Principal case at 1057, note 4.

[3] (D.C. Cal. 1944) 57 F. Supp. 408.

[4] 316 U.S. 624, 62 S. Ct. 1223 (1942).

[5] (C.C.A. 9th, 1945) 152 F. (2d) 622, noted in 44 MICH. L. REV. 866 (1946).

[6] The Supreme Court subscribed to this interpretation in Overnight Motor Transp. Co. v. Missel, 316 U.S. 572 at 578, 62 S. Ct. 1216 (1942). An extended discussion of the legislative purpose is contained in 52 YALE L. J. 159 (1942).

[7] The history of this problem in terms of the leading cases concerned with it is traced in 41 MICH. L. REV. 543 (1943) and 44 MICH. L. REV. 886 (1946). Longer discussions are contained in 13 UNIV. CHI. L. REV. 486 (1946); Feldman, "Algebra and the Supreme Court," 40 ILL. L. REV. 489 (1946); Dodd, "The Supreme Court and Fair Labor Standards, 1941-1945," 59 HARV. L. REV. 321 (1946).

hours will equal the former total pay.[8] The act does not forbid revising existing rates so long as they remain at or above the minimum fixed in section 6.[9] In the case of employees paid by the hour, an attempt to reduce the hourly rate encounters the full force of employee bargaining power and for this reason is not often successful; though it has occasionally succeeded under a threat to reduce working schedules to the maximum permitted in the statute.[10] Salaried workers do not, however, attach the same importance to their average hourly earnings. An hourly rate has the appearance of a technicality, and it is relatively easy for the employer to place it at a figure which will enable him to continue his pre-statutory working schedules at his pre-statutory costs. In *Overnight Motor Transportation Co. v. Missel*,[11] a simple case of salaried employment, the Supreme Court decided that the "regular rate" was the average hourly compensation. At the same time, however, in *Walling v. A. H. Belo Corp.*,[12] the Court approved employment contracts which provided the model for those upheld in the principal case, distinguishing the facts from those in the *Missel* case on the ground that the parties had specifically contracted for an hourly rate above the minimum set by the act and that the employees had actually been paid that rate for straight-time hours and at least time and a half that rate for hours worked overtime. The *Belo* rule has been much criticized on the theory that it opens the door to evasion of the overtime provisions of the act by means of the verbalism of a "contract rate" and to this extent defeats the spread-work objective of the legislation.[13] The scope of the rule has been limited in a series of decisions following the *Belo* case where the Court, speaking through Justice Murphy, disallowed several wage plans which in the case of hourly wage earners,[14] or pieceworkers,[15] sought to incorporate the principle of the *Belo* contracts by

[8] This scheme was identified in an early article on the act as the "most glaring possibility of evasion." 52 HARV. L. REV. 646 at 665 (1939).

[9] Although § 18 of the act warns that none of its provisions should be construed as authorizing a reduction of existing rates to the minimum wages specified in § 6, this has been interpreted as merely declarative of Congressional purpose in the absence of any enforcement provision. Walling v. A. H. Belo Corp., 316 U.S. 624 at 630, note 6, 62 S. Ct. 1223 (1942).

[10] See, for example, Siegal v. S. Blechman & Sons, Inc., (N.Y. S. Ct. 1946) 60 N.Y.S. (2d) 116. An arbitrary reduction of hourly rates to avoid the effect of § 7(a) was disallowed, however, in Anuchick v. Transamerican Freight Lines, Inc., (D.C. Mich. 1942) 46 F. Supp. 861 and Walling v. Utica Knitting Co., (D.C. N.Y. 1946) 11 Lab. Cas. ¶ 63.051.

[11] 316 U.S. 572, 62 S. Ct. 1216 (1942).

[12] 316 U.S. 624, 62 S. Ct. 1223 (1942).

[13] See the dissent in the Belo case, 316 U.S. 624 at 635, 62 S. Ct. 1223 (1942), and the articles cited in note 7, supra. Thus, in the facts of the Belo case itself, the employer avoided any increase in labor costs until 54½ hours had been worked in any particular week, while in the principal case, as is indicated in note 2, supra, no increase was encountered until 84 hours had been worked.

[14] Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 65 S. Ct. 11 (1944). See also Walling v. Alaska Pacific Consolidated Mining Co., (C.C.A. 9th, 1945) 152 F. (2d) 812; Robertson v. Alaska Juneau Gold Mining Co., (C.C.A. 9th, 1946) 157 F. (2d) 876; Castle v. Walling, (C.C.A. 5th, 1946) 153 F. (2d) 923.

[15] Walling v. Youngerman-Reynolds Hardwood Co., Inc., 325 U.S. 419, 65 S. Ct. 1242 (1945); Walling v. Harnischfeger Corp., 325 U.S. 427, 65 S. Ct. 1246 (1945).

specifying a contract rate sufficiently lower than the hourly average to avoid any increase in total pay for workweeks exceeding the statutory maximum. The Court termed the rates fixed in these contracts "artificial" and designated the average hourly rate as the "regular rate" for purposes of computing overtime compensation.[16] Any doubt as to the continued vitality of the *Belo* case on its specific facts is dispelled, however, by the express approval of that decision in the principal case. It is noteworthy that of the four justices who dissented from the *Belo* decision, all still on the bench, two shifted their ground to vote with the majority.[17] Perhaps the most undesirable consequence of the *Belo* holding and the decisions which limited it is the uncertainty which surrounds any employment plan designed to meet the minimum requirements of section 7 (a).[18] The simple reaffirmance of the rule in the principal case cannot be expected to resolve this uncertainty.[19] It is possible to state with some assurance, however, that the use of a "contract rate" lower than the average hourly compensation will not be sustained in the case of employees whose compensation is calculated in good faith on some basis such as hourly wages or piece rates. The device can be safely utilized in the case of salaried employees if it appears "bona fide," if it is consistently applied, and if it is a real element of the contract in the sense that, as a result of its relation to the work schedules and the weekly guarantee, it actually

[16] "No contract designation of the base rate as the 'regular rate' can negative the fact that these employees do in fact regularly receive the higher rate. To compute overtime compensation from the lower and unreceived rate is not only unrealistic but is destructive of the legislative intent." Walling v. Harnischfeger Corp., 325 U.S. 427 at 430-31, 65 S. Ct. 1246 (1945). In his dissent to the Youngerman-Reynolds and Harnischfeger cases, Chief Justice Stone argued that they overruled the Belo decision. 325 U.S. 427 at 434. The doubtful treatment the Belo decision came to be accorded as a precedent in the lower federal courts is exemplified in Walling v. Uhlmann Grain Co., (C.C.A. 7th, 1945) 151 F. (2d) 381; Walling v. Richmond Screw Anchor Co., (C.C.A. 2d, 1946) 154 F. (2d) 780; Houtenbrink v. General Cigar Co., (D.C. N.Y. 1946) 11 Lab. Cas. ¶63, 198.

[17] Justices Reed and Douglas. The majority opinion notices the extent to which employers and employees have relied on the Belo rule (principal case at 1060) and it is possible that this factor influenced the former dissenters.

[18] Compare the results reached in the following recent cases: Castle v. Walling, (C.C.A. 5th, 1946) 153 F. (2d) 923; Houtenbrink v. General Cigar Co., (D.C. N.Y. 1946) 11 Lab. Cas. ¶ 63, 198; Glowienke v. Hawaiian Dredging Co., (D.C. Ill. 1946) 12 Lab. Cas. ¶ 63, 495; Walling v. Sterling Ice & Cold Storage So., (D.C. Colo. 1947) 69 F. Supp. 669; Watson v. Hightower, 50 N.M. 322, 176 P. (2d) 670 (1947). Walling v. Utica Knitting Co., (D.C. N.Y. 1946) 11 Lab. Cas. ¶ 63, 051, is especially interesting in this connection. There the court felt compelled to disallow the same employment plan in the case of some employees and sustain it in the case of others depending on whether they had been previously employed under another arrangement or had been hired for the first time under the plan in question. In the case of some of those employed earlier, the plan was upheld where it resulted in an increase over their former compensation.

[19] Since the decision in the principal case, the Court has already had occasion to consider another "regular rate" problem in 149 Madison Ave. Corp v. Asselta, (U.S. 1947) 67 S. Ct. 1178.

will be used in a substantial proportion of the cases to compute overtime pay earned above the guaranteed figure.[20]

*John A. Huston, S.Ed.*

[20] See the discussion in the principal case at 1058 and in 149 Madison Ave. Corp. v. Asselta, id. at 1183.