Procedure—Fair Labor Standards Act—Enforceability of a Consent Judgment—[Federal].—The respondent consented to a judgment whereby it agreed to abide by the provisions of the Fair Labor Standards Act and to pay its employees the back wages due them under the act. The administrator of the act, alleging that the respondent failed to adhere to the stipulation in the judgment pertaining to the payment of back wages, applied for a rule directing the respondent to show cause why it should not be adjudged guilty of contempt of court. The court found that some of the respondent's employees had voluntarily waived their claims to the back pay when it had been offered to them, and that those who had not waived had received their pay and had not subsequently been discriminated against. *Held*, first, that since the stipulation failed to state the names of the employees to be benefited, it was void for want of certainty; but that if the stipulation were valid, it should be enforced by execution and not by contempt proceedings. Second, that in the absence of fraud or coercion, the employees had the power to waive their back pay and the respondent had the power to accept the waivers. Petition dismissed. *Fleming v. Warshawsky & Co.*[1]

Although the labor standards act grants the administrator the power to enjoin the transportation or sale in interstate commerce of goods made in violation of the act,[2] a desire to obtain a more direct method of enforcing the provisions of the act early led to the development and use of consent judgments.[3] Such a judgment binds the employer not to violate the act in the future and to pay the back wages due his employees, while the administrator agrees not to enjoin the sale or transportation of the employer's goods produced in violation of the act. It is the usual practice in enforcing the act through consent judgments not to specify in the stipulation the names of employees entitled to receive back pay,[4] this detail being informally agreed to by the administrator and the employer after the signing of the decree.[5] Specification in advance of

[1] 3 C.C.H. Lab. Law Serv. ¶ 60,146 (D.C. Ill. 1940).

[2] The so-called "hot goods" provision. 52 Stat. 1069 (1938), 29 U.S.C.A. § 217 (Supp. 1940); Fleming v. De Vera, 3 C.C.H. Lab. Law Serv. ¶ 60,175 (D.C. Puerto Rico 1940). The constitutionality of this power has been upheld by the Supreme Court. United States v. Darby Lumber Co., 61 S. Ct. 451 (1941).

[3] "The large number of consent decrees . . . . may be attributed to two factors: First the Act . . . . seems on relatively sound constitutional ground, [upheld by the Supreme Court: United States v. Darby Lumber Co., 61 S. Ct. 451 (1941)] second, fines imposed by the judges who have presided in the criminal cases are heavy." Herman, The Administration and Enforcement of the Fair Labor Standards Act, 6 Law & Contemp. Prob. 368, 388 (1939); cf. Donovan and McAllister, Consent Decrees in the Enforcement of Federal Anti-Trust Laws, 46 Harv. L. Rev. 885, 911 (1933).

[4] Cf. Fleming v. Sunbury Shirt Co., Inc., 3 C.C.H. Lab. Law Serv. ¶ 60,128 (D.C. N.Y. 1940). The Wages & Hours Reporter weekly summarizes the consent decrees obtained by the administrator. In the majority of these summaries neither the names nor the number of employees or the amounts due in back pay are mentioned.

[5] Although this method has been used since the beginning of the enforcement of the act, in only one case has the fairness of the administrator's determination of these details after entry of the judgment been challenged. In Fleming v. Sunbury Shirt Co., Inc., 3 C.C.H. Lab. Law Serv. ¶ 60,128 (D.C. N.Y. 1940), the court, while admitting that the stipulation could have been made more specific, refused to adopt the employer's contention that the provisions of the stipulation did not give the administrator the right to fix the amount due the employees.

judgment could easily be made, if necessary. In the instant case, however, not only was a schedule of the names of the employees and the amounts due to each compiled by the administrator, but the respondent agreed to the schedule and in fact paid some employees thereunder. Since employees thus entitled were ascertained, it seems that the stipulation was not so uncertain as to justify the court in holding it void.

In the principal case, the consent order, although called a "judgment,"[6] was in the nature of a decree in equity. The stipulation as to the back pay was incorporated by reference into the consent judgment.[7] Federal Rule 69(a) provides: "Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. . . ." It has been suggested that, under the Federal Rules, "a federal court should not . . . . enforce a money judgment by contempt or methods other than a writ of execution, except in the unusual case."[8] The courts, however, in similar cases under the labor standards act have held a contempt proceeding to be the proper method of enforcing a consent judgment.[9] Furthermore, the source of Rule 69(a) is Equity Rule 8 which allowed, in the discretion of the court, the use of a writ of execution if the decree be *solely* for the payment of money.[10] If Rule 69(a) substantially adopts prior practice, it seems that, as the judgment in the principal case consisted of more than a payment order, the stipulation should be enforced by contempt proceedings. But if the rule encompasses *all* orders for the payment of money, the court has discretion to determine the method of enforcing its order. As the rule clearly states that execution should be the method in the usual case, the decision in the present case would be correct in enforcing an ordinary money judgment.[11] Since, however, the primary purpose of the judgment was not the payment of back wages to employees but the enforcement of a federal statute, it would seem that contempt proceedings are proper.[12]

[6] According to Rule 54 of the Federal Rules a judgment "includes a decree and any order from which an appeal lies." This definition seems to remove any formal significance from the title of a court order.

[7] "Further ordered, adjudged and decreed that the stipulation made this day between the parties hereto and filed herein be, and it hereby is incorporated in and made a part of this judgment, and that defendant do and perform each and every act and thing set forth in the said stipulation." Cited in principal case.

[8] 3 Moore and Friedman, Federal Practice § 69.02 (1938).

[9] Fleming v. De Vera, 3 C.C.H. Lab. Law Serv. ¶ 60,175 (D.C. Puerto Rico 1940); Fleming v. North Georgia Mfg. Co., 33 F. Supp. 1005 (Ga. 1940); Fleming v. Sunbury Shirt Co., Inc., 3 C.C.H. Lab. Law Serv. ¶ 60,128 (D.C. N.Y. 1940); 3 Wages & Hours Rep. col. 3, p. 321 (July 29, 1940); 3 Wages & Hours Rep., col. 1, p. 168 (April 29, 1940); cf. NLRB v. Carlisle Lumber Co., 108 F. (2d) 188 (C.C.A. 9th 1939).

[10] 3 Moore and Friedman, Federal Practice § 69.01 (1938).

[11] It may be suggested that the "unless" clause of the rule is meant to apply to morally shocking situations, such as Buck v. Buck, 60 Ill. 105 (1871), where the defendant was ruled in contempt of court in not complying with a decree ordering him to support and educate an adopted child.

[12] Cf. Agwilines, Inc. v. NLRB, 87 F. (2d) 146, 151 (C.C.A. 5th 1936), where, in upholding a reinstatement with back pay order of the NLRB, the court said, "A cease and desist order operating retrospectively is not a private award. . . . . It is a public reparation order, operating retrospectively . . . . as to unfair practices . . . . which . . . . Congress has the right to eradicate. . . . ."

It may be contended that it would be inequitable to subject the employer to contempt proceedings if he were financially unable to pay the back wages due. If an employer wishes to sign a consent judgment but is unable to pay the amount due, he may arrange for installment payments.[13] Indeed, the danger of hardship on the employer may be greater if an execution were levied against him, since it would then be necessary to pay at once the entire amount due.[14] Furthermore, the execution of judgments would be controlled by the laws of the respective states.[15] The result may be different degrees of enforceability among the several states, with a competitive advantage to those employers located in the more lenient states.

On the other hand, the administrator has no specific power under the act to sue on a consent judgment for back pay due the employees, and it is doubtful if a court would rule that an employee is the proper party to bring such an action.[16] If the decision in the instant case is not reversed,[17] the administrator may find it expedient to propose to Congress an amendment extending his powers under the act. If the amendment is not enacted, it would seem that stipulations as to back pay contained in consent judgments are unenforceable.[18] As the consent judgment is the most widely-used device to enforce the act,[19] the result of the present case is unfortunate.

The court also held that the employee's right to back compensation was a legal right which, in the absence of coercion, could be waived. Since an employee cannot

[13] In the instant case, the employer arranged for nine equal monthly installments.

[14] In New York, a judgment debtor may be allowed installment payments according to his ability to pay. N.Y. Civ. Prac. Ann. (Gilbert-Bliss, Supp. 1940) § 793. There is no analagous provision in Illinois.

[15] Rev. Stat. § 788 (1875), 28 U.S.C.A. § 504 (1928); Rev. Stat. § 916 (1875), 28 U.S.C.A. § 727 (1928); Ill. Rev. Stat. (1939) c. 22, § 47; Walsh, Equity 62 (1930).

[16] The question has not been decided under the Fair Labor Standards Act. Cf. Amalgamated Utility Workers v. Consolidated Edison Co. of New York, Inc., 309 U.S. 261 (1940), where it was held that the NLRB is the sole authority to institute proceedings for civil contempt of a decree of enforcement. The NLRB is given the power to order affirmative action, such as the reinstatement of employees with or without back pay (49 Stat. 453 (1935), 29 U.S.C.A. § 160(c) (Supp. 1940)), and the power to seek enforcement of their order in the courts (49 Stat. 453 (1935), 29 U.S.C.A. § 160(e) (Supp. 1940)); see 1 C.C.H. Lab. Law Serv. ¶ 5176 (1940). Cf. Federal Trade Commission Act, 38 Stat. 719 (1914), amended by 43 Stat. 939 (1925), 15 U.S.C.A. § 45 (1927); FTC v. Klesner, 280 U.S. 19, 25 (1929).

[17] Appeal filed February 14, 1941.

[18] The unenforceability of such a stipulation would not mean that the employer is absolved from the duty to pay his employees the back wages due. Under the provisions of the act, the employee is given the right of action granting him double indemnity for unpaid compensation plus costs and reasonable attorney's fees. 52 Stat. 1069 (1938), 29 U.S.C.A. § 216(b) (Supp. 1940). This cause of action is available to the employee even though he was employed under a contract executed prior to the enactment of the act, fixing his wages and hours below the standard set by the act. Emerson v. Mary Lincoln Candies, Inc., 173 Misc. 531, 17 N.Y.S. (2d) 851 (S. Ct. 1940).

The employer may also be subjected to a criminal prosecution for failure to observe the provisions of the act. 52 Stat. 1069 (1938), 29 U.S.C.A. § 216(a) (Supp. 1940).

[19] The Wages & Hours Reporter weekly summarizes the legal activity of the administrator. The number of consent decrees is always several times all other types of legal proceedings combined.

waive his right to be presently compensated according to the standards set by the act,[20] he should likewise be unable to waive his back pay. Furthermore, subtle forms of coercion difficult to prove[21] may be used by the employer. Even if the employer is financially unable immediately to pay the back wages due, waiver of back pay should not be allowed because the administrator will agree to lenient installment payments in the consent judgment,[22] or the courts, upon proof of financial incapacity, will arrange amicable settlements.[23]

Procedure—Federal Rules of Civil Procedure—Applicability to Enforcement of Administrative Subpoena—[Federal].—The National Labor Relations Board applied to a federal district court for an order requiring the respondent corporation to obey subpoenas duces tecum issued by the board.[1] The company, alleging that the Federal Rules of Civil Procedure govern these proceedings, moved to dismiss for lack of jurisdiction because no complaint had been filed nor summons issued as required by the rules.[2] *Held*, inter alia, that the Federal Rules are inapplicable.[3] *NLRB v. Goodyear Tire & Rubber Co.*[4]

Proceedings to enforce administrative subpoenas are not specifically excepted from the operation of the Federal Rules by Rule 81. Hence, an inference may be drawn that they are within the scope of the rules as "suits of a civil nature . . . . cognizable as cases at law or in equity" under Rule 1.

It may be argued, however, that the enabling act, which empowers the Supreme Court to prescribe rules for "civil actions at law"[5] as well as for "suits in equity,"[6] does not authorize the Court to dictate the practice in these statutory proceedings. The

[20] Cf. Emerson v. Mary Lincoln Candies, Inc., 173 Misc. 531, 17 N.Y.S. (2d) 851 (S. Ct. 1940).

[21] The danger of the widespread use of "kickback" methods has been recognized by the Federal Government (46 Stat. 1494 (1931), as amended by 49 Stat. 1011 (1935), 40 U.S.C.A. § 276(a) (Supp. 1940)) and by New York (N.Y. Cons. Laws (McKinney, 1938) c. 39, § 962). See also Fleming v. North Georgia Mfg. Co., 33 F. Supp. 1005, 1006 (Ga. 1940); Wage & Hour Rel. No. R-99 (Nov. 21, 1938); 2 C.C.H. Lab. Law Serv. ¶ 33,119 (1940); 2 C.C.H. Lab. Law Serv. ¶ 33,253 (1940).

[22] Cf. principal case. See note 16 supra.

[23] Fleming v. Phipps, 35 F. Supp. 627 (Md. 1940); Fleming v. North Georgia Mfg. Co., 33 F. Supp. 1005 (Ga. 1940).

[1] 49 Stat. 456 (1935), 29 U.S.C.A. § 161(2) (Supp. 1940).

[2] Federal Rules 3, 4.

[3] In general see Applicability of the Federal Rules to Enforcement of Administrative Subpoenas, 2 Fed. Rules Serv. 1.511 (1940).

[4] 7 Lab. Rel. Rep. 363 (D.C. Ohio 1940). In issuing the enforcement order the court held also that the evidence demanded relates to the matter under investigation before the board. Cf. Cudahy Packing Co. v. NLRB, 34 F. Supp. 53 (Kan. 1940), aff'd 3 C.C.H. Lab. Law Serv. ¶ 60,242 (C.C.A. 10th 1941); SEC v. Mallory (D.D.C. March 16, 1939), reported in Pike, Cases on New Federal and Code Procedure 31–32 (1939).

[5] 48 Stat. 1064 (1934), 28 U.S.C.A. § 723(b) (Supp. 1940).

[6] 48 Stat. 1064 (1934), 28 U.S.C.A. § 723(c) (Supp. 1940).