in composition with existing units. By the terms of the first two trust instruments the depositor could direct sales only upon the occurrence of a few specified events,[18] but under the other two trusts, the depositor could direct the sale of a stock whenever in its opinion it would "increase the sound investment character of the stock units." Again, there was no indication as to the actual practice in distributing the proceeds. As in the principal case, there was no power to reinvest. The court, holding this trust not taxable as an association, distinguished the two cases on the ground that in the *Chase* case there was no opportunity to improve the investment quality of the corpus by adding units, because the new units had to be identical with the old, whereas in the instant case the depositor, when creating new interests, could select any eligible bonds and thus take advantage of the market to improve the quality of the whole trust fund. If the North American Bond Tust was a quasi-corporate organization engaged in carrying on a business, it might be said that the two subsequently established trusts in the *Chase* case were also taxable as associations since the power to sell fluctuating securities gives the trustee and depositor considerable ability to take advantage of market fluctuations. Furthermore, even the terms of the two original trusts in the *Chase* case permitted certificate holders to realize a profit by surrendering their certificates when prices of the underlying securities were high. Although the profits realized by surrender would not accrue to the trust, nevertheless they were made possible by the terms of the trust agreement. Hence the almost equal profit-making opportunities of the trusts in these two cases would seem to put them in the same classification for taxation purposes.[19]

It would seem that greater attention should have been paid to the actual operation of the trusts and less to the formal set-up. While in theory reinvestment of earnings was not allowed, there is some indication that it was not unusual for the cestuis to purchase additional interests with proceeds received from the sale of securities.[20] The actual operations and purposes of the trusts in these cases should determine their tax status rather than apparent limitations on the trustee's powers which do not in fact curtail profit-making activities.[21]

Labor Law—Fair Labor Standards Act—Computation of Overtime Compensation—[Federal].—Prior to the passage of the Fair Labor Standards Act[1] the plaintiffs, five

[18] These events were designated in order to permit sales to preserve the liquidity, diversity and soundness of the investments. Ibid., at 542.

[19] From one standpoint, the Chase trusts bore an even greater resemblance to a corporate organization than did the North American Bond Trust. The certificates in the Chase trusts were assignable. Note 17 supra.

[20] During the taxable year the number of cestuis increased by 21.3 per cent while the number of new interests increased by 28.4 per cent. Data compiled from Abstract of Record, at 18, Com'r v. North American Bond Trust, 122 F. (2d) 545 (C.C.A. 2d 1941). While this greater increase in number of interests than in number of cestuis may be due to the fact that the new cestuis were buying on the average a greater number of interests than their predecessors, it may also be due to reinvestment by the old beneficiaries.

[21] Com'r v. Vandergrift Realty & Investment Co., 82 F. (2d) 387 (C.C.A. 9th 1936).

[1] 52 Stat. 1060 (1938), 29 U.S.C.A. §§ 201–19 (Supp. 1940).

watchmen employed by the defendant, worked 56 hours a week at the rate of 60 cents an hour. Two days before the act became effective, the defendant's superintendent informed the plaintiffs that adjustments were necessary in view of Section 7(a) of the new law which provides that work over the maximum hours[2] must be compensated by one and one-half times the regular rate. The men were to choose between a 40-hour week, in which case the employer would hire two additional workers,[3] or a change in hourly rates which seemingly would comply with the time and one-half for overtime requirement without increasing the defendant's labor costs or decreasing the plaintiffs' weekly earnings. On the condition that it was legal, the plaintiffs agreed to the latter proposal, which provided for $52\frac{1}{2}$ cents an hour for 40 hours and $78\frac{3}{4}$ cents an hour for 16 hours overtime. In an action under Section 16(b) of the act to recover unpaid overtime compensation and an equal amount of liquidated damages,[4] *held*, that the adjustment of wages, having been made so as to avoid the consequences of Section 7, was illegal. Judgment for the plaintiffs. *Williams v. General Mills, Inc.*[5]

What constitutes the regular rate to be used in computing overtime compensation under Section 7 of the act is not entirely clear. The interpretation urged by the Wage and Hour Division and adopted by the court in the principal case has not won universal support.[6] Other courts have held that the regular rate is that rate agreed upon by employer and employees as the basis for figuring overtime, and that any such rate which leads to earnings sufficient to satisfy the minimum requirements of the act is legal.[7]

[2] The maximum hours are: 44 hours a week during the first year the act is in effect, 42 hours a week during the second year, and 40 hours a week thereafter. 52 Stat. 1060, 1063 (1938), 29 U.S.C.A. § 207 (Supp. 1940).

[3] The employer suggested the 40-hour week immediately, rather than the 44-hour week, because the rest of his plant was on the former basis. Had the plaintiffs accepted, the employer could have hired two additional men to work 40 hours each without increasing his labor costs. For the sake of simplicity, all the figures used in this note are based on a 40-hour week.

[4] 52 Stat. 1060, 1069 (1938), 29 U.S.C.A. § 216 (Supp. 1940).

[5] 39 F. Supp. 849 (Ohio 1941).

[6] Wage and Hour Div., U.S. Dept. of Labor, Interpretive Bull. No. 4 (1940); Williams v. General Mills, Inc., 39 F. Supp. 849 (Ohio 1941); cf. Fleming v. Carleton Screw Products Co., 37 F. Supp. 754 (Minn. 1941) (agreement providing for a 10-cent-an-hour cut and a bonus to bring the weekly wage up to a guaranteed total held illegal); St. John v. Brown, 38 F. Supp. 385 (Tex. 1941) (weekly wage sufficient to cover minimum requirements of act held not to satisfy § 7); Fleming v. Atlantic Co., 3 C.C.H. Lab. Law Serv. ¶ 60,565 (D.C. Ga. 1941) (agreement seeking mathematical compliance with act but not changing the weekly wage when hours worked fluctuate held illegal); Boylan v. Liden Mfg. Co., 3 C.C.H. Lab. Law Serv. ¶ 60,464 (Mich. Cir. Ct. 1941); Angel v. Dayton Veneer & Lumber Mills Corp., 3 C.C.H. Lab. Law Serv. ¶ 60,529 (D.C. Ga. 1941); Floyd v. Du Bois Soap Co., 3 Labor Cases ¶ 60,318 (Ohio Ct. Com. Pleas 1941); Haddad v. Berkerman Shoe Corp., 3 C.C.H. Lab. Law. Serv. ¶ 60,577 (Pa. Ct. Com. Pleas 1941); Hargrave v. Mid-Continent Petroleum Corp., 3 C.C.H. Lab. Law Serv. ¶ 60,572 (D.C. Okla. 1941); Wilkerson v. Swift & Co., 3 C.C.H. Lab. Law Serv. ¶ 60,518 (D.C. Tex. 1941); Fleming v. Pearson Hardwood Flooring Co., 39 F. Supp. 300 (Tenn. 1941); McLendon v. Bewley Mills, 3 Labor Cases ¶ 60,247 (D.C. Tex. 1940); Emerson v. Mary Lincoln Candies, Inc., 173 Misc. 531, 17 N.Y.S. (2d) 851 (S. Ct. 1940).

[7] Fleming v. Belo Corp., 121 F. (2d) 207 (C.C.A. 5th 1941), cert. granted 10 U.S.L. Week 3137 (1941) (agreement providing basic rate for figuring overtime plus extra overtime when wage not

According to the interpretation of regular rate followed in the principal case, earnings are computed by multiplying the existing hourly rate, that is, the regular rate, by 40 hours, plus one and one-half times that rate for all hours worked overtime. For example, the plaintiffs worked 56 hours a week for $33.60; the regular rate is therefore 60 cents an hour. To work 56 hours under the act, they must receive 60 cents an hour for 40 hours and 90 cents an hour for 16 hours, or a weekly salary of $38.40.

In contrast to this, which may be termed the regular rate method of determining overtime earnings, is the total compensation method, which the defendant in the principal case attempted to employ.[8] Not wishing to change the weekly wage of $33.60, he carefully calculated that 52½ cents should be the basic rate. Since this rate resulted in a $33.60 weekly wage, the defendant doubtless thought he had complied more nearly with the requirements of the act than he would have had a bonus been needed to avoid reducing weekly wages. Some employers have utilized the bonus device.[9] Under this system the defendant might have offered the men 50 cents an hour straight time and 75 cents an hour overtime, and in addition a bonus of $1.60 each week to maintain the previous weekly wage of $33.60.

The act is not unambiguous. The phrase "one and one-half times the regular rate at which he [the employee] is employed"[10] does not prevent the parties from agreeing upon a rate; nor does Section 18, which states that nothing in the act shall justify an employer in reducing a wage "which is in excess of the applicable minimum."[11] One need not argue, however, that the act was meant to freeze existing wage rates in order to support the holding in the principal case. The regular rate was clearly intended to be a base figure actually used for calculating earnings. The total compensation method,

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equal to guaranteed weekly total); Reeves v. Howard County Refining Co., 33 F. Supp. 90 (Tex. 1940) (agreement providing monthly wage for stated number of hours and overtime for additional hours); cf. Fleming v. Stone & Sons, 3 C.C.H. Lab. Law Serv. ¶ 60,697 (D.C. Ill. 1941) (fixed weekly wage regardless of hours worked held legal where minimum requirements of the act were covered); Gurtov v. Volk, 170 Misc. 322, 11 N.Y.S. (2d) 604 (N.Y. Munic. Ct. 1939).

[8] For applications of these methods to complicated situations, such as where a salaried employee works a different number of hours each week, consult Wage and Hour Div., U.S. Dept. of Labor, Interpretive Bull. No. 4 (1940).

[9] This method has been held a violation of § 7. Fleming v. Carleton Screw Products Co., 37 F. Supp. 754 (Minn. 1941); McLendon v. Bewley Mills, 3 Labor Cases ¶ 60,247 (D.C. Tex. 1940); cf. St. John v. Brown, 38 F. Supp. 385 (Tex. 1941); Fleming v. Atlantic Co., 3 C.C.H. Lab. Law Serv. ¶ 60,565 (D.C. Ga. 1941); Angel v. Dayton Veneer & Lumber Mills Corp., 3 C.C.H. Lab. Law Serv. ¶ 60,529 (D.C. Ga. 1941). The method was upheld where the amount needed to maintain the weekly wage was labeled extra overtime rather than a bonus. Fleming v. Belo Corp., 121 F. (2d) 207 (C.C.A. 5th 1941), cert. granted 10 U.S.L. Week 3137 (1941); cf. Fleming v. Stone & Sons, 3 C.C.H. Lab. Law Serv. ¶ 60,697 (D.C. Ill. 1941).

[10] 52 Stat. 1060, 1063 (1938), 29 U.S.C.A. § 207 (Supp. 1940).

[11] 52 Stat. 1060, 1069 (1938), 29 U.S.C.A. § 218 (Supp. 1940). In Remer v. Czaja, 36 F. Supp. 629 (Md. 1941), the court said that § 18 would prevent employers from reducing wages above the minimum established in labor contracts but could not prevent reductions in other cases. Cf. Fleming v. Belo Corp., 121 F. (2d) 207 (C.C.A. 5th 1941), cert. granted 10 U.S L. Week 3137 (1941).

however, makes of it only a bookkeeping device intended to satisfy the requirements of the act. Interpreting regular rate together with the language of Section 18 it is reasonable to assert that Congress intended that the regular rates initially utilized at the time the act took effect be those at which the employees had normally been employed. In this light an unjustifiable reduction of wages in excess of the minimum which violates Section 18 is also a violation of Section 7, because it involves using a rate other than the proper regular rate for figuring overtime.

The question naturally arises whether the method of computation used is important so long as a definite rate is established and actually adhered to in figuring overtime. Clearly the regular rate method assists enforcement of the act by facilitating the determination of the actual rate employed and by spotlighting any reductions. If the defendant in the principal case had reduced the rate of pay after the act went into effect and had produced evidence showing that there was justification for the reduction, it is questionable whether his case would have been weakened merely because he had used the total compensation method. In such a situation, however, the court would be called upon to weigh the economic arguments presented to justify the reduction. If courts must take cognizance of alleged justifications for wage cuts, they will be entering a field into which previous New Deal labor legislation has not forced them since the legislative aim has heretofore been to encourage collective bargaining. Such court review of the results of collective bargaining would constitute a definite limitation on the freedom of employers and employees to contract.

Except in extreme cases courts will probably be reluctant to pass upon these economic questions. Nonetheless, the very policy of the act limits the freedom to contract. Section 7 was intended to help spread employment as well as to protect employees from working excessive hours.[12] To effectuate this policy some limitations must be imposed on contracts that neither create more employment nor provide additional pay for employees working overtime. Courts emphasizing the freedom to contract argument consequently fail to give full weight to the policy of the act. In *Fleming* v. *Belo Corp.*[13] the court upheld an agreement in which the employer had in effect used the total compensation method, as in the principal case, but in addition had guaranteed a weekly amount equal to the previous income of the employees, regardless of the number of hours worked. If the holding of the *Belo* case is correct, any employee who is working overtime and is receiving compensation above the minimum wages required by Section 6 could, by such an agreement with the employer, virtually nullify Section 7. While advantageous to the employees concerned, agreements of this sort would neither increase the total compensation paid to existing employees nor require the employment of additional workers. Doubt has been expressed as to whether the act had any purpose other than the raising of substandard conditions,[14] but there is some indication that the spreading of employment and the increase of purchasing power were also objectives.[15] Other courts have upheld salaries which had never been reduced to hourly

[12] Senator Barkley of Kentucky and Representative Healy of Massachusetts in supporting the bill emphasized that it would help spread employment. One of the main objectives was to increase purchasing power. 81 Cong. Rec. 7941, 7848 (1938).

[13] 121 F. (2d) 207 (C.C.A. 5th 1941), cert. granted, 10 U.S.L. Week 3137 (1941).

[14] Fleming v. Belo Corp., 121 F. (2d) 207, 211–12, 214 (C.C.A. 5th 1941), cert. granted 10 U.S.L. Week 3137 (1941).

[15] Note 12 supra.

rates because they were sufficient to cover the minimum rates of Section 6 plus one and one-half times those rates for overtime.[16]

The principal case may seem harsh because the employees, whom the employer could legally have required to work but forty hours for a lower total compensation than they had been receiving, are allowed to recover the difference between what they were paid and what they would have been paid on the basis of a 60-cent regular rate plus an equal amount as liquidated damages.[17] The court expressly admits, however, that nothing in the act prevents the reduction of wages.[18] It objects to the wage transaction here involved primarily because the employer was only too obviously endeavoring to avoid the necessity of effecting the very wage and employment adjustments the act was passed to produce.

Labor Law—New York Anti-Injunction Act—Legality of Strike against Use of Labor-Saving Device—[New York].—The plaintiff, a traveling grand opera company, employed live singers but used recordings to produce the musical accompaniment traditionally supplied by an orchestra of instrumental musicians. The American Federation of Musicians, fearing the widespread use of the mechanical reproduction of recorded music, induced the Stagehands' Union to order its members to refuse to work for the plaintiff. The six stagehands in the plaintiff's permanent employ struck, and because of the almost universal closed-shop conditions existing in theaters with respect to the Stagehands' Union the plaintiff was forced to discontinue operating. In a suit to enjoin the musicians' and stagehands' unions, a decree of the special term granting the injunction[1] was reversed by the appellate division in a three to two decision.[2] On appeal to the New York Court of Appeals, *held*, that the anti-injunction act does not apply where union activity is for an unlawful objective, and "for a union to insist that machinery be discarded in order that manual labor may take its place and thus secure additional opportunity of employment" is such an objective. Judgment of the appellate division reversed and judgment of the special term reinstated, two judges dissenting. *Opera on Tour, Inc. v. Weber*.[3]

The New York Anti-Injunction Act, Section 876-a of the New York Civil Practice Act, provides that no court shall issue an injunction in a "labor dispute" except after a

[16] Fleming v. Stone & Sons, 3 C.C.H. Lab. Law Serv. ¶ 60,697 (D.C. Ill. 1941); Reeves v. Howard County Refining Co., 33 F. Supp. 90 (Tex. 1940); Gurtov v. Volk, 170 Misc. 322, 11 N.Y.S. (2d) 604 (N.Y. Munic. Ct. 1939) (employers paying above minimum wages said to appear "to be exempt from the operation of the statute").

[17] The back pay and damages were figured as follows: what each employee actually received was subtracted from the sum of 60 cents times the number of regular hours worked plus 90 cents times the number of hours worked overtime; to this figure was added an equal amount as "liquidated damages."

[18] Williams v. General Mills, Inc., 39 F. Supp. 849 (Ohio 1941). Senator, now Associate Justice, Black, co-sponsor of the bill, stated that it was not intended to freeze wages above the minimum. 81 Cong. Rec. 7808 (1938).

[1] Opera on Tour, Inc. v. Weber, 170 Misc. 272, 10 N.Y.S. (2d) 83 (S. Ct. 1939).

[2] Opera on Tour, Inc. v. Weber, 258 App. Div. 516, 17 N.Y.S. (2d) 144 (1940), noted in 39 Mich. L. Rev. 665 (1941), 53 Harv. L. Rev. 1054 (1940), and 11 Air L. Rev. 172 (1940).

[3] 285 N.Y. 348, 34 N.E. (2d) 349 (1941).