RECENT CASES

Constitutional Law—Searches and Seizures—Record Inspection under Fair Labor Standards Act—[Federal].—The respondent, a corporation engaged in a national merchandising business, operates a branch in Kansas City, Missouri, the employees of which are engaged in interstate commerce within the terms of the Fair Labor Standards Act of 1938.[1] In the course of an investigation of the branch, the administrator issued a subpoena duces tecum ordering the respondent under Section 11(c)[2] of the act to produce its records which contained information as to wages and hours of employees at the branch.[3] Upon the respondent's refusal to comply with the subpoena on the ground that it constituted an unreasonable search and seizure in the absence of a showing of reasonable cause to suspect a violation of the act, the administrator applied to the district court for an enforcement order which was granted.[4] Upon appeal, *held*, that routine inspection of records, required by the act to be kept, does not constitute an unreasonable search and seizure. Order affirmed. *Fleming v. Montgomery Ward & Co.*[5]

It seems clear that the intention of Congress was to give the administrator of the Fair Labor Standards Act the power to engage in routine inspections for purposes of enforcement.[6] If, however, his investigatory power should be limited to cases in which he can show reasonable cause to suspect violations, it would probably be necessary to base investigations almost entirely on employee complaints. This restriction would hamper enforcement in two respects. First, the Wage and Hour Division's policy of conducting inspections on an industry-wide basis regardless of complaints would be frustrated; and the fact that only some employers would be affected by non-uniform

[1] 52 Stat. 1060 (1938), 29 U.S.C.A. § 203 (Supp. 1939).

[2] "Every employer subject to any provisions of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him . . . . and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order. . . . ." 52 Stat. 1066 (1938), 29 U.S.C.A. § 211(c) (Supp. 1939).

[3] The records demanded by the petitioner were: (1) the records of a six-months period showing wages paid to, and time-clock cards of, employees in the mail order branch at Kansas City; (2) the records showing the number of hours scheduled for each department of the mail order branch for the same period; and (3) the records of the actual number of hours worked by each of the departments during such period. The petitioner's application for an enforcement order omitted the last item, in reliance upon the statement of respondent that it did not have such a record.

[4] Andrews v. Montgomery Ward & Co., 30 F. Supp. 380 (Ill. 1940).

[5] 114 F. (2d) 384 (C.C.A. 7th 1940), cert. den. 61 S.Ct. 71 (1940).

[6] 52 Stat. 1066 (1938), 29 U.S.C.A. § 211(a) (Supp. 1939): "The Administrator . . . . may investigate and gather data regarding the wages, hours . . . . and may enter and inspect such places and such records . . . . and investigate such facts, conditions, practices or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter. . . . ."

enforcement would lead to inequality in competitive conditions, in respect to wages and hours, among different employers. Second, while enforcement was being thus reduced to dependence on the initiative of employees in revealing probable violations of the act,[7] the employees would be discouraged from activity when they realized that their complaints, instead of being kept confidential under the division's present policy, might have to be used at hearings to make a showing of probable cause.

Despite Congressional intent and administrative expediency, the administrator's power of inspection must obviously remain within the limits of the Fourth Amendment. On this point the cases interpreting the Fourth Amendment do not support the respondent's contention.[8] In *Hale v. Henkel*,[9] a contempt proceeding for failure to produce the company's books under a subpoena duces tecum issued in the course of a grand jury investigation, the Supreme Court uttered a dictum which has been accepted as stating the law. The Court said that although a corporation is entitled to the protection of the Fourth Amendment,[10] the Federal Government has the same power over state corporations, in administration of its own laws, as if the corporation had a federal charter; hence an examination of the corporate books, if duly authorized by an act of Congress, does not constitute an unreasonable search and seizure.[11]

Furthermore, the fact that the administrator did not prescribe forms on which respondent's records were to be kept does not make it possible to resist the subpoena on the ground that the records are private papers.[12] In *Wilson v. United States*,[13] which involved facts similar to those in the *Hale* case, Mr. Justice Hughes said: "The principle [of no immunity from search] applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of govern-

[7] See House Committee Report No. 2182, April 21, 1938, C.C.H. Lab. Law Serv. ¶ 4136.2 (1938). It may be doubted whether employees have in fact been reluctant to complain to the Wage and Hour Division.

[8] Implicit in the respondent's objection is the fear of a reversion to a form of general warrant. For more than a century and a half there has been no doubt that general warrants are forbidden. FTC v. Baltimore Grain Co., 284 Fed. 886 (D.C. Md. 1922). Note that in the cases cited in notes 9 and 13 infra, "probable cause" for suspecting a violation may have been present, although the necessity for it was not discussed.

[9] 201 U.S. 43 (1906).

[10] Ibid., at 76. But see concurring opinions of Harlan, J., and McKenna, J.

[11] Ibid., at 77.

[12] The protection given to private papers is illustrated by FTC v. American Tobacco Co., 264 U.S. 298 (1924), where an attempt to subpoena all correspondence between the defendant and several other named companies for a one-year period failed on the grounds that this action was a "fishing expedition," the purpose of which was an attempt to find evidence of a possible violation of the Sherman Anti-Trust Law. The decision may be limited to the proposition that the United States Government may demand only records and papers which are relevant to a lawful inquiry.

In this respect see Code of Federal Regulations tit. 29, c. 5, § 516.2 (Oct. 1939, amended Feb. 1940): "No particular order or form is prescribed for these records, provided that the information required . . . . is easily obtainable for inspection purposes." The reason for this section is the policy of the Wage and Hour Division not to add to business expense by prescribing official forms.

[13] 221 U.S. 361 (1911).

mental regulations and the enforcement of restrictions validly established. There the privilege, which exists as to private papers, cannot be maintained."[14] Thus the contentions of the executive branch of the government and the semi-independent administrative agencies have often been upheld by the courts when their power to inspect records has been questioned.[15]

The fact that precedents involving the power of administrative agencies to examine records were cases concerning public utility regulation[16] is not significant. It was said in *ICC v. Brimson*[17] that the power of Congress to regulate public carriers comes not from the fact that the carriers are public but from the federal plenary power over interstate commerce.[18] Furthermore, no distinction between public and private business appears in the commerce clause. Thus, in *NLRB v. Jones & Laughlin Steel Corp.*[19] it was pointed out that the basis of the Congressional power to regulate private business is the interstate character of business.[20]

Although only employees engaged in interstate commerce or in the production of goods for interstate commerce are, with some exceptions,[21] subject to the provisions of the act, the employer cannot resist the subpoena on the ground that the records of some possibly exempt employees would be included.[22] The determination of employees covered by the act is not a matter for the employer, but for the administrator and ultimately, of course, for the courts.[23]

[14] Ibid., at 380.

[15] Bartlett, Frazier Co. v. Hyde, 56 F. (2d) 245 (D.C. Ill. 1932), aff'd 65 F. (2d) 350 (C.C.A. 7th 1933), cert. den. 290 U.S. 654 (1933); NLRB v. New England Transportation Co., 14 F. Supp. 497 (Conn. 1936); NLRB v. Cudahy Packing Co., 34 F. Supp. 53 (Kan. 1940); Ryan v. Amazon Petroleum Corp., 7 F. (2d) 1 (C.C.A. 5th 1934), rev'd on other grounds 293 U.S. 388 (1935); Electric Bond & Share Co. v. SEC, 303 U.S. 419 (1938); ICC v. Goodrich Transit Co., 224 U.S. 194 (1912); Brown v. United States, 276 U.S. 134 (1928); McMann v. SEC, 87 F. (2d) 377 (C.C.A. 2d 1937); United States v. First Nat'l Bank of Mobile, 295 Fed. 142 (D.C. Ala. 1924), aff'd 267 U.S. 576 (1925).

[16] ICC v. Goodrich Transit Co., 224 U.S. 194 (1912); United States v. Clyde Steamship Co., 36 F. (2d) 691 (C.C.A. 2d 1929); Electric Bond & Share Co. v. SEC, 303 U.S. 419 (1938).

[17] 154 U.S. 447 (1894).

[18] Ibid., at 474. [19] 301 U.S. 1 (1937).

[20] In the instant case, the scope of this Congressional power is explained. The court, at p. 391, says: "But in the case of a private corporation which is subject to regulation by Congress only for the protection of interstate commerce, the potential scope of valid regulation is not as great as in the case of a public carrier engaged in interstate commerce; and the scope of inspection of books and records will be correspondingly limited."

[21] See 52 Stat. 1063, 1067 (1938), 29 U.S.C.A. §§ 207(c), 213 (Supp. 1939), for a description of exempted employees.

[22] Cf. the rule of evidence that the witness cannot withhold the documents demanded upon his mere assertion that they are not relevant. 8 Wigmore, Evidence § 2200(5) (3d ed. 1940). Administrative agencies have been allowed to examine documents which contain information of a possibly intrastate nature on the plea that this information is necessary in order for Congress to legislate intelligently. FTC v. Nat'l Biscuit Co., 18 F. Supp. 667 (N.Y. 1937).

[23] The administrator is given the power to define and delimit the exemption provisions of the act. 52 Stat. 1067 (1938), 29 U.S.C.A. § 213 (Supp. 1939). The difficulties of this task are fully realized. C.C.H. Lab. Law Serv. ¶4105.04, 4105.50–60 (1937–40).