THE UNIVERSITY OF CHICAGO LAW REVIEW

VOLUME 16 AUTUMN 1948 NUMBER 1

NOTES

OVERTIME ON OVERTIME: COLLECTIVE BARGAINING v. THE FAIR LABOR STANDARDS ACT

Another chapter in the conflict between the Supreme Court and Congress over the "correct" interpretation of the Fair Labor Standards Act has been initiated with the Court's decision in the "overtime-on-overtime" cases.[1] This

[1] Bay Ridge Operating Co., Inc. v. Aaron, 68 S. Ct. 1186 (1948).

decision on the perplexing problem of what constitutes the "regular rate of pay" for purposes of computing overtime compensation due under the Act seems destined to cause congressional repercussions similar to those which followed the Court's decision in *Anderson v. Mt. Clemens Pottery Co.*[2] Less than one year after the *Mt. Clemens* decision Congress passed the Portal to Portal Act of 1947,[3] flatly rejecting the Court's definition of "hours worked." The preamble to that Act contained a congressional warning that the Fair Labor Standards Act had been ". . . interpreted judicially in disregard of long established custom, practice and contract between employers and employees . . ."[4] which interpretation, if permitted to stand, would interfere with voluntary collective bargaining and create industrial disputes between employers and employees. Already before Congress are two bills whose passage would severely limit the effects of the present decision.[5]

The overtime controversy centers around Section 7(a) of the Fair Labor Standards Act, which provides that ". . . 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."[6] The problem presented is the proper method of computing the regular rate of pay for longshoremen under a collective bargaining agreement between waterfront employers in the port of New York and the International Longshoremen's Association covering the years 1943–45. The annual collective agreements made with this union since 1921 have provided for a "basic working day" of eight hours and a "basic working week" of forty-four hours. Beginning in 1918, these agreements fixed two sets of hourly rates: 1) Specified hourly rates were set for 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. 2) With minor exceptions, one and one-half times these rates were fixed for what the agreements called "all other time." In the fall of 1938, after the enactment of the Fair Labor Standards Act, the labels for these periods were changed to "straight time" and "overtime" respectively; but although compensation for work during the contract overtime periods continued at one and one-half times the straight time rates, no differential was provided for work in excess of forty hours in a week.[7]

Two suits were brought as class actions on behalf of all longshoremen em-

[2] 328 U.S. 680 (1946).

[3] 61 Stat. 84 (1947), 29 U.S.C.A. § 251 (Supp., 1948).

[4] Portal-to-Portal Act of 1947, 61 Stat. 84 (1947), 29 U.S.C.A. § 251(a) (Supp., 1948).

[5] S. 2728, 80th Cong. 2d Sess. (1948); H.R. 6534, 80th Cong. 2d Sess. (1948). The important provisions of these bills are found in note 50 infra.

[6] 52 Stat. 1063 (1938), 29 U.S.C.A. § 207 (1947).

[7] The straight time rates were well above the statutory minimum; they ranged from $1.25 to $2.50 an hour. For the exact provisions of the contract see 68 S. Ct. 1186, 1190 n. 5 (1948).

ployed by two stevedoring companies. An unusual alignment of interests manifested itself in this litigation. Throughout the proceedings the employers were represented by the Department of Justice, since the United States, under its cost-plus contracts with the employers covering the wartime years, was the real party in interest.[8] The validity of the collective bargaining agreements was also urged by the union itself, which opposed the bringing of these suits by a small minority of its members.

The plaintiffs maintained that their employers had violated the Act by not paying one and one-half times the "regular rate" for hours in certain workweeks in which they had worked in excess of forty hours. The employers had applied the terms of the above agreement in determining their employees' compensation. As a result, if in a given week one of the plaintiffs worked fifty hours, all within the so-called "overtime" period, he was paid for the additional ten hours at precisely the same rate per hour as for the first forty hours; that is, he received merely the contract rate—called the "overtime" rate in the contract—for the entire fifty hours. If in a given workweek he worked thirty hours during the so-called "straight time" period and twenty hours during the so-called "overtime" period, again he received merely the contract rates; that is, for the excess ten hours he received merely the contractually labeled "overtime" rate. The plaintiffs contended that their regular rate of pay under the contract for any workweek, within the meaning of Section 7 (a), was the average hourly rate arrived at by dividing the total number of hours worked for a single employer in that week into the total compensation received from that employer for the week. Thus they claimed that in weeks in which they had worked more than forty hours for one employer they became entitled by Section 7(a) to statutory excess compensation,[9] computed on the basis of that rate for all such excess hours.

The employers argued that the straight time rates were the regular rates, and that they had, therefore, with minor exceptions,[10] complied with the requirements of the Act. This argument was based on the contention that the contract overtime rates were intended to cover any earned statutory excess compensation and did cover it, because they were substantially one and one-half times the straight time rates. The district court's acceptance of the employer's position

[8] Any employer subject to liability for overtime pay as a result of the decision can recover a refund on income taxes paid for the years in question. Ruling of the Treasury Department concerning deductibility for income tax purposes of amounts paid under the Fair Labor Standards Act, 2 C.C.H. Lab. L. Serv. ¶33, 141 (1947).

[9] The phrase "statutory excess compensation" as used in this note means additional compensation required to be paid by § 7(a) of the Fair Labor Standards Act.

[10] Since the "straight time" hours totaled forty-four per week, the trial court held that where the employer failed to pay plaintiffs "... at a rate one and one-half times the 'straight time hourly rate' ... for hours worked in excess of 40 during any workweek, all during straight time hours," the employer was liable for excess statutory compensation for four hours per week. Addison v. Huron Stevedoring Corp., 69 F. Supp. 956, 961 (N.Y., 1947). This portion of the decision was not appealed.

that the contract straight time rates were the regular rates within the meaning of Section 7(a)[11] was reversed by the Circuit Court of Appeals.[12] The decision of the Circuit Court was affirmed with some modification by the Supreme Court.[13]

The problem of regular rate is not one of first impression. Seven cases presenting varying aspects of it have been before the Supreme Court[14] since 1942, when the Court first faced the question. There has, however, been no clear-cut determination of the meaning of these troublesome words. In applying the words "regular rate" to diverse fact situations, the Court has taken as a general guide the major congressional objectives in enacting Section 7(a):[15] to spread employment by forcing employers to pay a higher rate to employees working beyond a statutory maximum number of hours, to compensate employees for the burden of long workweeks, and to provide stability of wages for both employer and employee.[16]

While the Court has refrained from rigidly defining "regular rate,"[17] a fairly consistent pattern has emerged in past decisions. It has been said that "[t]he regular rate by its very nature must reflect all payments which the parties have agreed shall be received during the workweek, exclusive of overtime payments. It is not an arbitrary label chosen by the parties; it is an actual fact. Once the parties have decided on the amount of wages and the mode of payment the determination of 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."[18] The Court has approved a method of computation of

[11] Addison v. Huron Stevedoring Corp., 69 F. Supp. 956 (N.Y., 1947). The cases of Addison v. Huron Stevedoring Corp. and Aaron v. Bay Ridge Operating Co., Inc. were consolidated for trial by the district court.

[12] Aaron v. Bay Ridge Operating Co., Inc., 162 F. 2d 665 (C.C.A. 2d, 1947).

[13] Bay Ridge Operating Co., Inc. v. Aaron, 68 S. Ct. 1186 (1948). A petition for rehearing was filed by the Department of Justice, June 1948. 22 Lab. Rel. Rep. (Wages and Hours) 1271 (1948).

[14] 149 Madison Ave. Corp. v. Asselta, 331 U.S. 199 (1947); Walling v. Halliburton Oil Well Cementing Co., 331 U.S. 17 (1947); Walling v. Harnischfeger, 325 U.S. 427 (1945); Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419 (1945); Walling v. Helmerich & Payne, 323 U.S. 37 (1944); Walling v. Belo Corp., 316 U.S. 624 (1942); Overnight Motor Trans. Co. v. Missel, 316 U.S. 572 (1942).

[15] 81 Cong. Rec. 4893 (1937); 82 Cong. Rec. 11 (1937); 83 Cong. Rec. 9246, 9254 (1938); see also S. Rep. 884, 75th Cong. 1st Sess., at 2 (1937); H.R. Rep. 1452, 75th Cong. 1st Sess., at 14–15 (1937).

[16] See Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419, 424 (1945); Walling v. Helmerich & Payne, 323 U.S. 37, 40 (1944); Overnight Motor Trans. Co. v. Missel, 316 U.S. 572, 578 (1942).

[17] "We are asked to provide a rigid definition of 'regular rate' when Congress has failed to provide one. Presumably, Congress refrained from attempting such a definition because the employment relationships to which the Act would apply were so various and unpredictable. And that which it was unwise for Congress to do this Court should not do." Walling v. Belo Corp., 316 U.S. 624, 634 (1942); but cf. Reed, J., dissenting, ibid., at 635.

[18] Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419, 424, 425 (1945).

regular rate which calls for dividing all wages paid during a given week by the number of hours actually worked. One and one-half times this regular rate for hours employed beyond the statutory maximum equals compensation for overtime hours.[19]

The one exception to this general rule is the so-called "Belo" contract. This type of wage agreement, approved in a five-to-four decision in 1942 in *Walling v. Belo Corp.*,[20] provided for a guaranteed weekly wage for a fluctuating number of hours worked per week. In addition the parties stipulated a specified hourly rate in the contract (one-sixtieth of the weekly guarantee) with not less than one and one-half times such rate to be paid for all hours in excess of the statutory maximum, providing further that in no event should the total weekly compensation be less than the guaranteed wage. As the hourly rate was kept low in relation to the guaranteed wage, statutory overtime plus the contract hourly rate did not amount to the guaranteed weekly wage until after fifty-four and a half hours were worked. Thus, any employee who worked between forty-four (then the statutory maximum) and fifty-four and a half hours per week received no additional compensation for this overtime work, and the employer sustained no increase labor costs.[21]

The *Belo* decision appeared to substitute completely an objective of stability of weekly wages for the broader congressional aims of spreading employment and increased compensation to the employee for a long workweek.[22] It produced widespread disapproval from legal writers[23] and from judges in lower federal courts, who viewed the result as sanctioning an artificial rate contrary to the purposes of the Fair Labor Standards Act.[24] In 1944 and 1945 the Supreme Court held invalid three wage plans which fixed the regular rate in a wholly

[19] This formula was adopted by the Court in the first "regular rate" case to reach it, Overnight Motor Trans. Co. v. Missel, 316 U.S. 572 ,580 (1942). The fact situation of this case did not require the Court to make explicit in its definition that a true overtime premium was not to be included in the determination of regular rate.

[20] 316 U.S. 624 (1942).

[21] In a typical Belo contract an employee received a basic rate of 67 cents per hour and a weekly guarantee of $40. Hence, it was necessary for him to work 54½ hours before receiving more than the guarantee. "44 hours at 67 cents equals $29.48; 10½ hours at the statutory maximum rate of $1.00 (150% times 67 cents) equals $10.50; $29.48 plus $10.50 equals $39.98." Ibid., at 628 n. 5.

[22] "When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the Act which finds no support in its text and which as a practical matter eliminates the possibility of steady income to employees with irregular hours." Ibid., at 635.

[23] Levy, Belo Revisited, 15 Geo. Wash. L. Rev. 39 (1947); Feldman, Algebra and the Supreme Court, 40 Ill. L. Rev. 489 (1946); Regular Rate of Pay under Section 7(a) of the Fair Labor Standards Act, 34 Calif. L. Rev. 227 (1946); Legality of Wage Readjustment Plans under the Overtime Provisions of the Fair Labor Standards Act, 13 Univ. Chi. L. Rev. 486 (1945).

[24] Asselta v. 149 Madison Ave. Corp., 156 F. 2d 139 (C.C.A. 2d, 1946); Walling v. Alaska Pacific Consolidated Mining Co., 152 F. 2d 812 (C.C.A. 9th, 1945); Walling v. Uhlman Grain Co., 151 F. 2d 381 (C.C.A. 7th, 1945).

artificial and unrealistic manner, though from a mathematical point of view similar to the plan approved in the *Belo* case.[25] However, in 1947 when the Court had an opportunity to overrule the *Belo* decision, a divided Court upheld its continued validity. This reaffirmation, in *Walling v. Halliburton Oil Well Cementing Co.*,[26] does not appear to be based primarily on the correctness of the original decision.[27] Instead, a majority of the Court adopted a view of statutory interpretation calling for hesitancy in reversing prior decisions which have proved of doubtful validity but which have resulted in public reliance upon and congressional acceptance of the rule announced. Justice Murphy, dissenting in the *Halliburton* case, felt that unless the *Belo* decision was overruled, the Court would ". . . be perpetuating and augmenting the unrealities and confusion which have marked the application of the doctrine of that case."[28] Such confusion is evident when it is considered that the trial court in the present case upheld the wage agreement partially in reliance on the *Belo* decision.[29] This reliance prompted the Supreme Court to point out that the *Belo* decision must be narrowly limited to agreements which contain a provision for a guaranteed weekly wage with a stipulation of an hourly rate, and that other types of agreements, whether or not the result of collective bargaining, cannot by their terms

[25] In Walling v. Helmerich & Payne, the Court invalidated a so-called "split-day plan" whereby a base hourly rate was paid for the first four hours worked each day, so long as the hours did not exceed forty a week, and the remaining hours were paid for at one and one-half times the basic rate. "The vice of the plan lies in the fact that the contract regular rate does not represent the rate which is actually paid for ordinary, non-overtime hours . . . ," with the result that an employee would have to work over 80 hours a week to obtain excess compensation. 323 U.S. 37, 41 (1944). A year later in Walling v. Youngerman-Reynolds Hardwood Co., the Court held invalid a wage contract calling for a basic wage of 35 cents an hour (then the minimum wage) for the first forty hours with 50% additional for overtime, plus a guarantee that the employee should receive weekly a sum figured on the basis of the amount of work done at piece rates. "Except in the extremely unlikely situation of the piecework wages falling below 35 cents an hour . . . ," this "regular rate" never actually controlled the wages paid. 325 U.S. 419, 425 (1945). The other wage plan which failed to meet the approval of the Court was considered in Walling v. Harnischfeger. Under this so-called "straight time plan" employees were guaranteed a basic wage, ranging for different employees, from 55 cents to $1.05 an hour, with 50% additional for overtime. Various jobs were "time studied" and a price was assigned to each job. If at the end of the week the prices earned from the various time studied jobs exceeded the base pay (as was true in 98½% of the cases) the employee received his base pay plus the difference between the two. "A full 50% increase in labor costs and a full 50% wage premium, which were meant to flow from the operation of § 7(a), are impossible of achievement under such a computation." 325 U.S. 427, 431 (1945). An able analysis of the similarity between these three wage plans tried and found wanting under the Act and the Court-approved Belo plan is found in Feldman, Algebra and the Supreme Court, 40 Ill. L. Rev. 489 (1946).

[26] 331 U.S. 17 (1947).

[27] The concluding sentence of the Halliburton decision states, "Even if we doubted the wisdom of the Belo decision as an original proposition, we should not be inclined to depart from it at this time." Ibid., at 26 (1947); see Horack, Congressional Silence, A Tool of Judicial Supremacy, 25 Tex. L. Rev. 247 (1947).

[28] Walling v. Halliburton Oil Well Cementing Co., 331 U.S. 17, 28 (1947).

[29] Addison v. Huron Stevedoring Corp., 69 F. Supp. 956, 959 (N.Y., 1947); cf. Aaron v. Bay Ridge Operating Co., Inc., 162 F. 2d 665, 668 (C.C.A. 2d, 1947).

determine the regular rate under the Act. Obviously, the Court was embarrassed by the inconsistency of the *Belo* decision, apparently feeling that there an agreement of the parties had been permitted to supersede the usual judicial formula in a way not dissimilar to the result contended for by the defendants in the present case.

When the wage provisions in the longshoremen's agreement are considered in the light of past interpretations of regular rate, apart from *Belo*, it is evident that the contract straight time rates cannot be termed the "regular rates" for purposes of computing statutory excess compensation. The record discloses that four of the twenty plaintiffs worked no straight time hours and that their total compensation was computed at contract "overtime" rates. Thus, regardless of whether these employees worked twenty or sixty hours in a given workweek, no additional wages were paid to compensate them for the burden of work in excess of forty hours in one week.[30] This results from the fact that no definite relationship exists under the contract between the number of hours worked and the compensation received by an individual employee, as the statute requires.[31] The Court therefore concluded that ". . . the regular rate of pay must be found by dividing the weekly compensation by the hours worked *unless the compensation paid to an employee contains some amount that represents an overtime premium.*"[32]

This definition recognizes that to allow a "true overtime premium" to be included in the computation of the regular rate of pay would be to allow ". . . overtime premium on overtime premium—a pyramiding that Congress could not have intended."[33] Thus, the crucial issue in the case becomes the definition of a true overtime premium. The employers, the union, and the Government have urged that the fifty per cent additional overtime rates provided for in the contract were inserted in order to concentrate the work of longshoremen in the daytime hours and that this concentration contributed to a spread of employment in the industry, one of the congressional objectives in enacting the Fair Labor Standards Act. Furthermore, under the peculiar conditions of the industry, longshoremen often work short periods for several different employers within a single week. It was urged that the contract "overtime" provisions were better adapted in this instance to achieve the Act's objective of extra compensation for long hours than the Act itself. The Fair Labor Standards Act does not entitle an employee who works over forty hours per week for several employers,

[30] In Walling v. Youngerman-Reynolds Hardwood Co. the Court interpreted § 7(a) as requiring an increase of fifty per cent in the employer's labor cost at the end of the forty hour week and a fifty per cent premium to the employee for all excess hours. 325 U.S. 419, 423 (1945).

[31] An employee who worked 60 hours in a given week would receive by contract $37.50 ($1.87½ per hour times 20 hours) for his 20 hours of work above the statutory maximum. Another employee who merely worked 20 hours during the "overtime period," but who performed no previous work during the week, would receive identical compensation.

[32] Bay Ridge Operating Co., Inc. v. Aaron, 68 S. Ct. 1186, 1196 (1948) (italics added).

[33] Ibid., at 1197.

but not more than forty hours for any one of them, to any overtime pay. A study of wages and hours for longshoremen in the port of New York between 1932 and 1945 demonstrates that the "normal or regular working hours" coincided with the designated straight time hours.[34] Thus, there is no suggestion that the agreement mislabeled the true circumstances of the employment relationship in any unrealistic or artificial manner, and the good faith of the employer is illustrated by the fact that the union which made the contract appeared to defend it. The opposition of the International Longshoremen's Association to any decision invalidating the collective bargaining agreement stems from its anticipation of disastrous effects on an industry which has had labor peace for over thirty years.[35]

The Court, however, refused to conclude from the above facts that the contract straight time pay was the regular rate of pay and that the contract overtime pay included a true overtime premium. Although admitting that the pressure of the contract overtime rates tended to concentrate work in the daytime hours, it found that this concentration of work had no effect on the regular rate of pay of individual employees. The Court refused to consider as pertinent the question of "regular working hours," on the ground that regular working hours under a contract, even for an individual, had no significance in determining the rate of pay under the statute. Employees working twenty hours during the contract "overtime" period received the same respective compensation for these hours regardless of the number previously worked.[36] Since work was in fact done outside straight time hours, the employer could use men who had previously worked in straight time hours in contract overtime hours without additional cost. Thus, the Court found that the contract overtime pay did not actually compensate an employee for excess work but served rather as increased compensation for work during undesirable hours. In holding the contract overtime pay to be effectively a shift differential rather than a true overtime premium, the Court was uninfluenced by the size of the shift differential, fifty per cent more than the straight time rate.[37]

[34] The figures as stipulated by the parties or as found as facts by the district court are compiled in Justice Frankfurter's dissenting opinion. Bay Ridge Operating Co., Inc. v. Aaron, 68 S. Ct. 1186, 1209 n. 8 (1948).

[35] Mr. Joseph B. Ryan, president of the International Longshoremen's Association, testified before the trial court that the union was opposed to the suit ". . . as it might wipe out all of the gains we had made for our men over a period of 25 years." Addison v. Huron Stevedoring Corp., 69 F. Supp. 956, 958 (N.Y., 1947). After the Supreme Court invalidated the overtime provisions of the contract in the present case, the union found it necessary to bargain for a 50 cent an hour wage increase, since the employers were unwilling to pay the "overtime" rates to any employee not previously performing forty hours' work in a given workweek. N.Y. Times, § 2, p. 41, col. 2 (July 13, 1948). The breakdown of these wage negotiations led to a threatened strike of all East Coast longshoremen. On President Truman's order, the Attorney General secured an injunction under the "national health or safety" provision of the Labor Management Relations Act of 1947, 61 Stat. 140 (1947), 29 U.S.C.A. § 208(a) (Supp., 1948).

[36] Note 31 supra.

[37] The district court's Finding of Fact 28, as cited by the Supreme Court, states that a shift differential ". . . is an amount added to the normal rate of compensation which is large

A true overtime premium was defined as ". . . any additional sum received by an employee 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."[38] Only a premium paid under these conditions may be deducted from the total weekly compensation in computing the regular rate of pay.[39] This definition of "overtime premium" is the most controversial part of the Court's decision. It has become a widespread practice in industry to pay time and one-half or double time for all work performed on Sundays and holidays without taking this additional pay into consideration in computing an employee's regular rate of pay.[40] Thus the decision casts a shadow of illegality over this practice under contracts in many other industries. Prior to the present decision, the Administrator of the Wage and Hour Division had interpreted the Act so as to sanction the exclusion of Sunday and holiday pay from the computation of regular rate.[41] This construction was based on the importance attributed to work performed outside of "normal or regular working hours."[42] Since the Court has held that regularity of working hours has no significance in

enough to attract workers to work during what are regarded as less desirable hours of the day, and yet not so large as to inhibit an employer from the use of multiple shifts. A safe guide for distinguishing between the shift differential and the overtime premium is by the degree of spread between the normal rate and the penalty rate. Whereas a shift differential is usually 5 or 10 cents per hour, the overtime premium is generally 50% of the normal rate." Bay Ridge Operating Co., Inc. v. Aaron, 68 S. Ct. 1186, 1209 (1948). Compare the Directives of the Economic Stabilization Director dated March 8, 1945 and April 24, 1945, limiting the shift differentials which the National War Labor Board could approve to four cents per hour for the second shift and six or eight cents an hour for the third shift. 1A C.C.H Lab. L. Serv. ¶¶ 10,034.11, 10,462 (1945); 1944–1945 Wage & Hour Manual (cum. ed.) 1468.

[38] Bay Ridge Operating Co., Inc. v. Aaron, 68 S. Ct. 1186, 1201 (1948).

[39] Under this definition, the following could clearly not be applied to overtime pay due under the Act: 1) premium rates paid for night work or any other special shift; 2) premium rates paid for particular jobs such as those which are hazardous or undesirable for other reasons; 3) premium rates paid for work on holidays, as such; 4) premium rates paid for work on Saturday or Sunday, as such. The following, however, appear to satisfy the definition of an overtime premium and thus could be credited against overtime due under the Act: 1) premium rates paid for work in excess of eight or some other specified number of hours during a work day; 2) premium rates paid for work in excess of 36, 40, 48, or some other specified number of hours in a workweek; 3) premium rates paid for work on the sixth or seventh consecutive day of the week (such a premium would presumably be for work in excess of a specified number of hours a week); 4) premium rates paid for Saturday or Sunday work if the employee is required to work a specified number of hours before Saturday or Sunday in order to be eligible for the premium.

[40] 65 Monthly Labor Rev. 183, 419 (1947).

[41] 1944–1945 Wage and Hour Manual (cum. ed.) 170, 227; cf. Wage and Hour Division, Interpretative Bulletin No. 4, issued Nov. 1938, revised Nov. 1940; 1944–1945 Wage and Hour Manual (cum. ed.) 167.

[42] ". . . 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 and regular working hours. . . .*" Wage and Hour Division, Interpretative Bulletin No. 4 § 69, op. cit. supra note 41.

determining the overtime pay required by statute, the Wage and Hour Division has revised its past interpretation and advised employers to conform their present and future wage plans to the Court's decision.[43] It has been predicted that the Court's refusal to classify these large differentials as true overtime premiums will result in the imposition of substantial liability upon employers, but this prediction seems to rest on an inadequate consideration of the "safeguards" of the Portal to Portal Act of 1947.[44] The Act will limit severely the retroactive effects of the decision. Most employers should be able to prove with little difficulty that their practice of excluding extra pay for Sundays and holidays from the computation of regular rate was based in good faith on the past interpretations of the Wage and Hour Division.[45] Such reliance, if pleaded and proved, will serve as a complete defense to any action to recover excess statutory compensation.[46] This defense will eliminate a substantial portion of the financial liability imposed on employers as a result of the decision.[47] Any employee claim

[43] The new interpretation by the Wage and Hour Administrator of a true overtime premium, although generally in accord with the Court's decision, appears to be questionable in one particular. It states that ". . . a contract may provide for payment of time and one-half compensation for Saturday work, and also for overtime compensation at the same rate for hours worked in excess of 40 in the week or in excess of any bona fide daily or weekly contractual standard. In such a situation, where it appears that Saturday work normally falls within the contractual overtime hours, this will ordinarily be a sufficient showing that time and one-half paid for work on Saturday during the contractual overtime hours is actually paid because of excessive hours of work. In such event the 50% premium . . . need not be included in the regular rate. . . ." 22 Lab. Rel. Rep. (Wages and Hours) 3083, 3085 (1948). This interpretation of premium pay with a "double aspect" is open to the objection that it allows an employer to work an employee on Saturday, even though the employee has previously performed forty hours of work in the week, without increasing the employer's labor costs, because any other employee would have to be paid the same wages for Saturday work. Compare Bay Ridge Operating Co., Inc. v. Aaron, 68 S. Ct. 1186, 1200 (1948). Because so many employers and unions have indicated that they would need more time to conform their overtime pay practices to the new requirements set by the Supreme Court, the Wage and Hour Division postponed enforcement of the new rules until September 15, 1948. 22 Lab. Rel. Rep. (Wages and Hours) 1278 (1948). This postponed enforcement in no way affects the rights of employees to bring suit for overtime compensation for Sunday or holiday work.

[44] The effects of the Portal-to-Portal Act of 1947 on the Fair Labor Standards Act are analyzed in Fair Labor Standards under the Portal to Portal Act, 15 Univ. Chi. L. Rev. 352 (1948).

[45] For example, note Wage and Hour Division Interpretations cited in notes 41 and 42 supra.

[46] No employer shall be subject to any ". . . liability or punishment [under the Fair Labor Standards Act] for or on account of the failure of the employer to pay minimum wages or overtime compensation . . . if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval or interpretation . . . of the Administrator of the Wage and Hour Division of the Department of Labor." Portal-to-Portal Act of 1947, 61 Stat. 89 (1947), 29 U.S.C.A. § 259 (Supp., 1948).

[47] Prior to the Circuit Court of Appeals decision in the present case, 118 suits had been instituted on behalf of longshoremen, and up to June 1948, approximately 100 new complaints had been filed. 68 S. Ct. 1186, 1191 (1948). It has been estimated that liability on longshoremen's contracts alone might run as high as $300,000,000. Hearings before Subcommittee No. 4 of the House Committee on Education and Labor, 80th Cong. 1st Sess., at 1198, 2469 (1947).

not barred by the "good faith" provisions of the Portal Act will be subject to the two year statute of limitations, now a part of the Fair Labor Standards Act.[48] To further mitigate the effects of the Court's definition of an "overtime premium," two identical bills are before Congress to obtain revision of the Fair Labor Standards Act's overtime provisions.[49] These measures operate to deprive the courts of jurisdiction over certain types of overtime pay suits in a manner reminiscent of the Portal to Portal Act. The heart of these proposals is contained in the section defining an "overtime premium" which may be credited against overtime pay due under the Fair Labor Standards Act.[50] The effect of the enactment of this proposed legislation would be to nullify completely the Court's definition of "overtime premium," thus severely limiting the "spread work" philosophy of the Fair Labor Standards Act.

Rarely has the Supreme Court invalidated a wage agreement supported by both management and labor. This peculiar alignment of interests brings squarely into focus the role of collective bargaining in relation to wage and hour standards. Although the Court has recognized that the Fair Labor Standards Act was enacted primarily ". . . to aid the unprotected, unorganized and lowest paid of the nation's working population . . . ,"[51] in the present case it rejected any argument that an agreement reached or administered through collective bargaining by a strong and powerful union ". . . is any more persuasive in defining regular rate than individual contracts."[52] Perhaps the difficulty of the present situation points to a conflict between two of our basic labor policies. The Wagner Act[53] looks toward harmonious labor relations by encouraging a union of all economic forces in an industry through collective bargaining. "Unless the collective agreement is held to determine the incidents of the employment of the entirety for whom it was secured . . . ," Justice Frankfurter declared in his dissent, ". . . it ceases to play its great role as an instrument of industrial democracy."[54] The Fair Labor Standards Act, on the other hand, was

[48] Portal to Portal Act of 1947, 61 Stat. 85 (1947), 29 U.S.C.A. § 255 (Supp., 1948).

[49] Note 5 supra.

[50] Section 4 of the two identical bills provides: "(a) 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 the day or the day of the week or year the work is performed. (b) 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." S. 2728, 80th Cong. 2d Sess. (1948); H.R. 6534, 80th Cong. 2d Sess. (1948); see 22 Lab. Rel. Rep. (Wages and Hours) 1267, 1268 (1948).

[51] Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707 n. 18 (1945).

[52] Bay Ridge Operating Co., Inc. v. Aaron, 68 S. Ct. 1186, 1196 (1948).

[53] National Labor Relations Act, 49 Stat. 449 (1935), 29 U.S.C.A. § 151 (1947).

[54] Bay Ridge Operating Co., Inc. v. Aaron, 68 S. Ct. 1186, 1211 (1948). A vigorous argument that a collectively obtained and administered agreement should be effective in determining the regular rate of pay is presented in the amicus curiae brief filed by the International Longshoremen's Association; see ibid., at 1196 n. 19 (1948).

enacted to protect the working conditions of individual employees, and in interpreting the Act the Court has always tested the effect of a contract from the point of view of the individual rather than from the point of view of the industry as a whole.[55] This conflict comes to the fore particularly in a case like the present one, in which the industry agreement works to the detriment of a small minority of union members.

Justice Frankfurter, speaking for a minority of the Court, characterized the present decision as ". . . heedless of a long-standing and socially desirable collective agreement . . . calculated to foster disputes in an industry which has been happily at peace for more than thirty years. . . ."[56] Pointing to the fact that Congress left undefined the words "regular rate" in contrast to its explicit definition of thirteen other phrases used in the Act, he concluded that ". . . the 'regular rate' in a given industry must be interpreted in the light of the customs and practices of that industry."[57] He refused to admit that a contract entered into by a powerful union, familiar with the needs of its members and the peculiar conditions of the industry, should not be persuasive in setting a "regular rate" for the industry. If employers and employees cannot by contract fix a regular rate suited to the needs of a particular industry, their attempt, when "squared" with the provisions of Section 7(a), may produce results which neither party contemplated and which both oppose. The emergence of such a result from the present decision is evidenced by the fact that less than one month after the decision was handed down the Department of Justice filed a petition for rehearing before the Court.[58] This petition states, in part, that the Court's insistence that weekend and holiday pay must be considered as part of the regular rate, thus increasing statutory overtime pay, will result in a ". . . wage increase that many employers cannot afford, which so far the unions are not seeking, and which in our opinion, Congress had no thought of imposing."[59]

The reasoning of Justice Frankfurter's opinion would require that an exception be read into the terms of Section 7(a) excluding from the overtime requirements of the Act an agreement reached through the process of collective bargaining, provided that the regular rate is not computed in a wholly unrealistic and artificial manner. The statute does partially exempt from the overtime provisions those collective bargaining agreements which stipulate either an annual or a semi-annual wage.[60] Perhaps it would be more in accord with "industrial reality" to follow Justice Frankfurter's opinion. However, it has never been envisioned as the role of the courts in interpreting legislation to bring specific provisions of a congressional enactment "up to date." The charge of

[55] Cases cited note 14 supra.

[56] Bay Ridge Operating Co., Inc. v. Aaron, 68 S. Ct. 1186, 1203 (1948).

[57] Ibid., at 1206.

[58] 22 Lab. Rel. Rep. (Wages and Hours) 1271 (1948).

[59] Ibid., at 1273.

[60] 52 Stat. 1063 (1938), as amended 55 Stat. 756 (1941), 29 U.S.C.A. § 207(b) (1947).

"judicial legislation" has been leveled at less obvious and calculated decisions of the Court. Ten years of experience under the Fair Labor Standards Act have demonstrated that some of its provisions require revision. The minimum wage of forty cents an hour, for example, is clearly not in accord with our present financial structure.[61] But if the present decision is out of line with the best interests of the nation today, the fault is with the statute, not the Court; and the agency to effect a change is the Congress.

GOVERNMENTAL IMMUNITIES—A STUDY IN MISPLACED SOLICITUDE

There cannot be a stronger proof of that genuine freedom, which is the boast of this age and country, than the power of discussing and examining, with decency and respect, the limits of the king's prerogative. A topic, that in some former ages was thought too delicate and sacred to be profaned by the pen of a subject. It was ranked among the secrets of the empire and, like the mysteries of the good goddess, was not suffered to be pried into by any but such as were initiated in its service: because perhaps the exertion of the one, like the solemnities of the other, would not bear the inspection of a rational and sober inquiry.

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Although the nation's judiciary has transplanted the king's prerogative in the United States under the name of government immunities, a recent case before the Supreme Court fails to give evidence that the enlightened approach to the subject which prevailed in the era of the Great Commentator has taken root here.

On a 1945 contract between Merrill, an Idaho farmer, and the Federal Crop Insurance Corporation, the latter refused to pay for the loss of Merrill's wheat crop because the acreage involved was not insurable according to the government corporation's regulations.[1] The local agent, to whom Merrill had given full details concerning the nature of the crop, had assured him that his crop was insurable. On the strength of this information Merrill planted his crop and refrained from taking out other insurance.[2] The application blank required no description which would have shown that the crop involved was spring wheat reseeded on winter wheat acreage, a fact which would have revealed to an agent with knowledge of the regulations that the crop was not insurable. Accordingly, the application for insurance was approved in routine fashion upon being submitted by the local agent in Idaho to the regional office in Denver. The regional office forwarded to plaintiff an acceptance stating: "The insurance contract consists of the accepted application and the Wheat Crop Insurance Regula-

[61] Embodied in the message of the President to Congress accompanying his approval of the Portal-to-Portal Act of 1947 was a recommendation that the minimum wage be raised to at least 65 cents an hour. H.R. Doc. 247, 80th Cong. 1st Sess. (1947).

[1] Wheat Crop Insurance Regulations, Sec. 414.1, 10 Fed. Register 1586 (1945).

[2] Merrill's brief in the Idaho Supreme Court at 22, 26 (1946).