The Autocratically Flexible Workplace

A History of Overtime Regulation in the United States

Marc Linder

Fǎnpìhuà Press
Iowa City
2002

Digitized by Google
Original from UNIVERSITY OF MICHIGAN
Generated for guest (University of Iowa) on 2012-04-18 14:19 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd

HD
5111
.U5
L56
2002

Copyright © 2002 by Marc Linder
All rights reserved
Printed in the United States of America

Cover illustration: Ralph Reichhold, "The Great Puzzle!" *The Pittsburgh Press*, Dec. 16, 1937, at 16, cols. 4-7, with permission of the *Pittsburgh Press-Gazette*. The cartoons by Ralph Reichhold, "Out of Order!" and "Just About Washed Up!" appeared in *The Pittsburgh Press* on Dec. 1, 1937, at 14, col. 4-7 and Dec. 6, 1937, at 14, col. 4-7, and are reprinted between pages 150 and 151 with permission of the *Pittsburgh Post-Gazette*.

Suggested Library of Congress Cataloging
Linder, Marc, 1946—
The Autocratically flexible workplace:
A History of overtime regulation in the
United States/by Marc Linder.
viii, 532; 23 cm.
Includes bibliographical references and index
ISBN 0-9673899-9-2
1. Overtime--United States. 2. Hours of labor--laws and legislation--United States--history. 3. United States. Fair Labor Standards Act of 1938.
HD5111.U5 L56 2002
331.2572—dc21 Library of Congress Preassigned Control Number: 2002105994

Generated for guest (University of Iowa) on 2012-04-18 14:19 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd

Digitized by Google
Original from
UNIVERSITY OF MICHIGAN

10

The Supreme Court Spreads Confusion Instead of Employment

The only reason that the administration did not recommend an arbitrary statutory prohibition against working over 40 hours, which is what they were seeking, was because there were certain cases, particularly in the seasonal industries, where it was desirable for short periods to work over 40 hours, and they didn't want to absolutely bar that, so they put in a penalty, and the purpose of the time and a half...was to create a competitive situation where one man could not abuse working overtime when all the rest of them were playing fair, because his costs would go up so high that in a competitive market he could not survive.[1]

At the time of the congressional debates over the FLSA in 1937-38, large employers in general, and especially those that had entered into collective bargaining agreements, had not anticipated that compliance with the law would be burdensome; after all, most of them were already paying time and one-half for overtime and more than the minimum wage.[2] For example, General Motors adopted time and a half for hours over eight per day and forty per week in November 1936, while Chrysler followed suit in 1937.[3] At the FLSA hearings that year the Commissioner of Labor Statistics told Congress that the industries, such as automobiles, steel, and agricultural implements, with the greatest employment were working more than 40 hours and were "for the most part paying overtime rates."[4]

Employers' position toward statutorily imposed overtime penalties, as the preceding chapter revealed, soon changed. Counsel for the NAM expressed large capital's exasperation with the WHD's early enforcement priorities when he urged

---

[1]*Hearings on H. R. 6790, to Permit the Performance of Essential Labor on Naval Contracts Without Regard to Laws and Contracts Limiting Hours of Employment, to Limit the Profits of Naval Contracts, and for Other Purposes Before the House Committee on Naval Affairs*, 77th Cong., 2d Sess. 2771 (1942) (testimony of Rep. Melvin Maas (Rep. Minn).

[2]*See* Dept. of Labor, *Fair Labor Standards in Wartime: Annual Report, Wage and Hour Division, Public Contracts Division, For the Fiscal Year Ended June 30, 1942*, at 5 (1943).

[3]*Overtime Penalty Pay Act of 1964: Hearings Held Jointly Before the General Subcommittee on Labor and Select Subcommittee on Labor of the House Committee on Education and Labor*, 88th Cong., 2d Sess. , Pt. 1 at 250 (1964) (statements of Louis Seaton, vice president for personnel, GM and William O'Brien, vice president for personnel, Chrysler Corp.)

[4]*Fair Labor Standards Act of 1937: Joint Hearings Before the Senate Committee on Education and Labor and the House Committee on Labor*, 75th Cong., 1st Sess. 343 (1937) (testimony of Isador Lubin).

Digitized by Google
Original from UNIVERSITY OF MICHIGAN
Generated for guest (University of Iowa) on 2012-04-18 14:20 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd

it to focus on sweatshops rather than on regular-rate cases "where the wages and employment conditions are far superior to anything remotely intended to be covered by the wage-hour law."[5] When large firms finally realized that relatively highly paid organized workers were also protected by the FLSA, they began to lobby Congress to cut back on the Supreme Court's expansive interpretations of the regular rate for overtime purposes. Yet while echoing the views of Supreme Court dissenters in a number of the FLSA cases to the effect that Congress never intended the Act to impinge on the outcomes of legitimate collective bargaining,[6] the NAM, unlike the Chamber of Commerce of the United States, apparently did not seek outright repeal of the FLSA.[7]

Capital's litigation strategy against statutory overtime premiums culminated in two U.S. Supreme Court cases decided on the same day in June 1942.[8] The most straightforward legal gambit was the ultimately unsuccessful claim that "the regular rate" on which overtime had to be paid was merely the minimum wage.[9] In *Missel v. Motor Overnight Transportation Co.*, Administrator Andrew's loose lips in his 1938 Birmingham talk came back to haunt workers as the press declared that the federal district court had adopted the "Birmingham Doctrine" when it ruled in 1941 that a salaried employee being paid considerably more than the minimum wage for indefinite hours was entitled only to time and one-half calculated on the statutory minimum wage. William Missel, a rate clerk and dispatcher for a trucking company between 1937 and 1940, had been paid a weekly salary of $25.50 and later $27.50 for a workweek varying between 40 and 75 hours. The trial court rejected Missel's claim that his regular rate was to be calculated by dividing his salary by the maximum number of non-overtime hours in effect at the time. The trial judge's reasoning was shaped by his unsubstan-

---

[5]*Regulating the Recovery of Portal-to-Portal Pay, and For Other Purposes: Hearings Before Subcomm. No. 2 of the House Comm. on the Judiciary*, 80th Cong., 1st Sess. 448 (1947) (statement of Raymond Smethurst). Smethurst co-edited a casebook on the FLSA; Raymond Smethurst and Reuben Haslam, *Cases on the Fair Labor Standards Act of 1938 (Federal Wage and Hour Law)* (1949). Haslam was also counsel for the NAM.

[6]In various cases, Justices Roberts, Jackson, Stone, Frankfurter, and Burton stressed this point repeatedly without success. See Marc Linder, *"Moments Are the Elements of Profit": Overtime and the Deregulation of Working Hours Under the Fair Labor Standards Act* ch. 3 (2000).

[7]In the course of testifying before Congress on the issue of portal pay in 1945, the NAM advocated furthergoing changes in the FLSA unrelated to that problem. *Limiting the Time for Bringing Certain Actions under the Laws of the United States: Hearing Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 79th Cong., 1st Sess. 21-23 (1945) (testimony of Raymond Smethurst, counsel, NAM); *Portal to Portal Wages: Hearings Before a Subcomm. of the Senate Comm. on the Judiciary*, 80th Cong., 1st Sess. 106-107 (1947) (testimony of Raymond Smethurst, counsel NAM).

[8]See generally, E. Merrick Dodd, "The Supreme Court and Fair Labor Standards, 1941-1945," 59 *Harv. L. Rev.* 321-75 (1946).

[9]E.g., Sunshine Mining Co. v. Carver, 41 F. Supp. 60, 66-67 (D. Idaho, 1941).

Digitized by Google Original from UNIVERSITY OF MICHIGAN

Generated for guest (University of Iowa) on 2012-04-18 14:20 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd

tiated interpretation of the FLSA's "underlying purpose" as merely to raise minimum wages gradually: "the overtime provisions...were not inserted...to discourage or limit overtime work, but merely as an essential part of a plan to raise substandard wages by providing definite pay for overtime work...."[10]

The amicus brief submitted by the American Trucking Associations had apparently persuaded the judge that the plaintiff-worker's position was a parade of horribles: "'According to plaintiff's contention, it would make no difference whether he was paid $27.50 or $1,000 a week, he would always be underpaid and the employer would always owe him money for every minute over straight-time hours that he might be required to be on duty.'"[11]

The widespread support in the press for employers' implausible claim that "the regular rate" on which the time and one-half premium had to be paid was merely the minimum wage rate seems especially odd in light of the fact that Representative Hartley, one of the most extreme northern opponents of the FLSA, had expressly declared during the House floor debates that the FLSA would not affect only the lower wage scales "inasmuch as requirement for payment of time and a half for overtime is based upon the regular rate of pay whether that be 40 cents an hour or $1 an hour."[12] Yet the NAM, through its general counsel, began, almost immediately after the enactment of the FLSA, propagating the position that employers were required to pay the 50 percent premium only on the minimum wage.[13]

As the principal test cases were pending in the Supreme Court in 1941, *Modern Industry*, a management magazine, observed that the Court "may soon decide whether the Fair Labor Standards Act is primarily a minimum wage law or a maximum hours law. ... The outcome is of interest to an estimated 1.5 million white-collar workers getting more than the statutory minimum. If the decision stands, the Wage and Hour Division contends, it will largely eliminate the law's benefits for them and will make it chiefly a minimum wage law."[14]

The Fourth Circuit—which asserted that the magazine was referring to *Missel* despite the article's express reference to *Walling v. A. H. Belo Corp.*, which was decided against the Wage and Hour Administrator without the predicted dire consequences[15]—cited this article as evidence of the importance of the question

---

[10]Missel v. Overnight Motor Transp. Co., 40 F. Supp. 174, 178-79 (D. Md. 1941).

[11]"Minimum Wage As Overtime Base," 4 *Wage and Hour Reporter* 205, 206 (Apr. 28, 1941).

[12]83 *Cong. Rec.* 9258 (1938).

[13]"Salaried Employees: Overtime," in *Wage and Hour Reference Manual* 1:59 (1939) (BNA).

[14]"New Test for Wage-Hour Act," *Modern Industry*, Oct. 15, 1941, at 42.

[15]Walling v. A. H. Belo Corp., 316 U.S. 624 (1942); see below.

Digitized by Google Original from UNIVERSITY OF MICHIGAN

Generated for guest (University of Iowa) on 2012-04-18 14:20 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd

and the need for granting the Administrator amicus status.[16] The strongest policy argument that the appellate court devised in reversing the trial judge and refuting employers' claim that the "regular rate" meant the minimum wage was based on the underlying congressional intent to discourage excessively long hours: "Such a construction would wholly defeat this policy, for if an employee was getting a fairly high wage, one and one-half times the minimum would in such a case be less than the actual wage the employee was receiving.... This would encourage rather than discourage overtime, and the plain purpose of Congress...would be defeated."[17]

Despite this astute policy logic, the court's reasoning made no sense when it asserted: "That the overtime provisions of the Act are aimed at re-employment and designed for economic and social purposes, as well as to protect the health or welfare of the employees, seems obvious from the omission of any absolute limitation upon weekly hours of work if properly compensated, and the absence of any limitation upon daily hours."[18] On the contrary, all of these goals would be more straightforwardly achievable if the 40-hour-week were rigidly capped.

When employers finally appeared before the U.S. Supreme Court, the forum they had been seeking, the United States had already entered World War II and the work-sharing purposes born of the Depression had become largely irrelevant. The defendant and the American Trucking Associations as amicus curiae made the most of this turn of economic events. The association attacked the claim that premium overtime was designed to spread work for "all classes" by pointing out that although the FLSA was permanent legislation, Congress could not have "contemplated a permanent unemployment problem with respect to all classes of employees" as opposed to the unskilled.[19] Overnight Motor Transportation Company argued that the chief legal question was whether the Fourth Circuit had erred in ascribing "dual class coverage" to the FLSA by concluding that the overtime provision "went beyond the class scope of the minimum wage provisions and was intended to spread employment and raise wages among all classes of employees regardless of income."[20] The employer's overriding claim was that the FLSA without any doubt "was intended to be a 'poor man's' law."[21] (Ironically, the heads of the AFL and the CIO had also favored a FLSA bill that would have

---

[16]Missel v. Overnight Motor Transp. Co., 126 F.2d 98, 101 (4th Cir. 1942).

[17]Missel v. Overnight Motor Transp. Co., 126 F.2d at 106.

[18]Missel v. Overnight Motor Transp. Co., 126 F.2d at 104.

[19]Brief of American Trucking Associations, Inc., Amicus Curiae, at 22, Overnight Motor Transp. Co. v. Missel, 316 U.S. 572 (1942).

[20]Petition for Writ of Certiorari at 6, Overnight Motor Transp. Co. v. Missel, 316 U.S. 572 (1942).

[21]Brief for Petitioner at 21, Overnight Motor Transp. Co. v. Missel.

Digitized by Google Original from UNIVERSITY OF MICHIGAN

Generated for guest (University of Iowa) on 2012-04-18 14:20 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd

covered only low-paid and nonorganized workers.)[22] The employers association, too, harped on the theme that the FLSA was directed at "the underprivileged," but also tried out the ad absurdum argument that Congress could not possibly have meant to require employers to pay overtime to highly paid employees because such an obligation would perversely discourage them from paying more than the minimum wage.[23]

When asked by Justice Hugo Black, one of the authors of the FLSA, what his claim was, counsel for the association at oral argument responded: "'Section 7 is not meant to apply to employees who are paid more than the minimum rates. If Section 7 were applied to all upper bracket white-collar employees it would bring the Act into a field for which Congress never intended to legislate. Section 7 is to be construed in the light of Section 6 which refers primarily to the submerged classes....'"[24]

The Supreme Court then ruled with only one dissent that the regular rate did not mean the minimum wage. Its supporting analysis has survived and flourished as the locus classicus of congressional intent on the overtime provision. In refutation of the employer's claim that it was unconstitutional to regulate the wages of workers whose pay equaled the minimum or whose hours were not injurious to health, the Court used the opportunity to hold constitutional the regulation of hours for purposes other than health:

> Long hours may impede the free interstate flow of commodities by creating friction between production areas with different length workweeks, by offering opportunities for unfair competition through undue extension of hours, and by inducing labor discontent apt to lead to interference with commerce through interruption of work. Overtime pay probably will not solve all problems of overtime work, but Congress may properly use it to lessen the irritations.[25]

Thus, although the Supreme Court agreed with the Fourth Circuit that work-sharing and combating unemployment was one of the law's main purposes, it did not share the appellate court's erroneous notion of the comparative efficacy of overtime penalties and absolute hours caps: "The existence of such a purpose is no less certain because Congress chose to use a less drastic form of limitation than outright prohibition." The Court, perhaps inadvertently, then revealed the specific conditions under which the premium might function adequately: "In a

---

[22]Jonathan Grossman, "Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage," *Monthly Lab.Rev.* 101(6):22-30 at 25-26 (June 1978).

[23]Brief of American Trucking Associations, Inc., Amicus Curiae, at 11 (quote), 9.

[24]"Argument Before High Court on Overtime Rate," *Wage and Hour Reporter* 5:265, 267 (Apr. 13, 1942).

[25]Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 576 (1942).

Digitized by Google Original from UNIVERSITY OF MICHIGAN

Generated for guest (University of Iowa) on 2012-04-18 14:20 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd

period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work."[26]

The Supreme Court had squelched employers' quest for a minimalist overtime premium[27]—nevertheless, more than 30 years later a federal judge dismissed an overtime suit filed by the Department of Labor on these same grounds[28]—but it approved their other favored construction of the statutory term "regular rate" on which the overtime premium was due. Where firms paid a fixed weekly wage for variable or fluctuating hours, the hourly regular rate was to be determined by dividing the wage by the total number of hours worked (rather than, for example, by 40 hours)—a procedure which the WHD had approved since 1939.[29] The Court conceded that using this method, "the longer the hours, the less the rate and the pay per hour," but, without offering reasons, it asserted that this outcome "is not an argument...against" the method.[30] In particular, the Court failed to justify a definition that "does not fully effectuate the legislative policy of making overtime cost half as much again per hour as straight time."[31]

In the other outstanding overtime test case of 1942 the employer, A.H. Belo Corporation, expressly argued that it had "never urged the interpretation many times put forward,...and sometimes sanctioned,...that 'regular rate' means the minimum legal rate specified in Section of the Act...."[32] Instead, the case involved the narrower issue of whether employers violated the FLSA when they paid workers far in excess of the minimum wage, but set a fictitious hourly wage for variable hours, and guaranteed a fixed weekly amount so that the overtime penalty did not kick in until workers had worked more than 54 hours. Belo, publisher of the *Dallas Morning News* and other periodicals, had been paying almost all of its employees as much as or more than the FLSA minimum wage for

---

[26]Overnight Motor Transp. Co. v. Missel, 316 U.S. at 578.

[27]Despite the clear holding in *Overnight Motor Transportation Company*, another employer raised the same defense before the Supreme Court later in 1942, which the Court ruled "merits but slight consideration." Warren-Bradshaw Drilling Co. v. Hall, 317 U.S. 88, 93 (1942).

[28]In Brennan v. Lauderdale Yacht Basin, Inc., 493 F.2d 188, 189 (5th Cir. 1974), the court of appeals had to reverse a judge who had held: "These people are not the people that [the FLSA] was designed to protect.... If Mr. Johnson had been paid the minimum wage, assuming he worked 50 hours a week, [for] 42 weeks out of the year, he was paid so far in excess of any standard hourly wage, at twice the minimum. His overtime was way over what the minimum overtime would be."

[29]WHD, Interpretative Bull. No. 4, § 12, in BNA, *Wage and Hour Manual* 95, 97 (1940 ed.).

[30]Overnight Motor Transp. Co. v. Missel, 316 U.S. at 580.

[31]Dodd, "The Supreme Court and Fair Labor Standards, 1941-1945" at 356.

[32]Brief for Respondent 32 n.14, Walling v. A. H. Belo Corp., 316 U.S. 624 (1942).

Digitized by Google Original from UNIVERSITY OF MICHIGAN

Generated for guest (University of Iowa) on 2012-04-18 14:20 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd

a long time before 1938. Like many other employers, however, it too wished to avoid having to pay additional wages without violating the FLSA. The regional WHD office took the position that Belo's arrangement violated the act because the regular rate, on which overtime was due, by law had to be calculated by dividing the guaranteed weekly wage by the number of hours worked, whereas Belo failed to pay such overtime.[33]

The trial judge, as was not uncommon in the early years of the FLSA, was openly hostile to the anti-contractarian underpinnings of the statute and aggressively ideological: "I cannot conceive of a law...that would unsettle amicability between employer and employees by interfering with their agreement, provided such agreement is equal to, or, in excess of, the legal requirement with reference to pay." The judge justified his single-minded focus on the minimum wage by stripping the FLSA of its hours regulation aspect: "[T]his statute does not prevent overtime. It does not say that a full-grown man or woman employee shall not work overtime. It...merely pretends to be and is a statute against less than a minimum wage."[34] His syntax already frayed, the judge then descended into an at times incomprehensible rant without ever identifying the substance of the dispute between Belo and the WHD:

> I don't know that the court is concerned with this, but when...the government has a right to go and figure, even to go into the office of the employer and find out whether the employer is treating his employee correctly..., if and when that results, in an almost endless burden, to seek to put into effect a plan that has been detailed to the court, and which disappears if carried to excessive length, I cannot believe that that construction should be indulged in. It emasculates the right of contract. ... It makes vassals of employee and employer and leaves us hanging by the thumbs at the mercy of the construction of the government as to what we mean when we contract....
>
> These two suits spark from a clash in systems. Neither is perfect. One fixes the independent week for the sine quo [sic] non. The other fixes the will of the contracting parties, provided, such will is above the denials of the law, as the summum bonum. One includes the right to say when payrolls shall be made. The other views the regularity of pay checks as the most important. One is cumbersome and irregular. The other is simple and regular. One is the child of unauthorized regulation. The other is the child of liberty. One deals only in dollars and cents. The other with happiness of employer and employee, vacations, pay when sick, or, absent, as well as with dollars and cents. Neither system is fixed by statute.[35]

It was not until the case came before the Fifth Circuit, which agreed with the

---

[33]A. H. Belo Corp. v. Street, 35 F. Supp. 430 (N.D. Tex. 1940).

[34]Fleming v. A. H. Belo Corp., 36 F. Supp. 907, 908 (N.D. Tex. 1941).

[35]Fleming v. A. H. Belo Corp., 36 F. Supp. at 908-909.

Digitized by Google Original from UNIVERSITY OF MICHIGAN

Generated for guest (University of Iowa) on 2012-04-18 14:20 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd

trial court that Belo's payment plan carried out the letter and purpose of the statute, that the precise nature of the dispute became clear. The appellate judges appeared irritated by the WHD's hardline stance toward an employer which, if it merely "changed the form of its employment contracts to conform to [the WHD's] view,...could have paid its employees considerably less than it did, and still have been within the law...." Instead, the WHD "has brought this case and has stood throughout, upon the bold proposition, that where weekly salaries are paid, no matter how large the salary or how it was arrived at or agreed to, the 'regular rate'...must always, and can only, be determined, by dividing the weekly compensation, by the total number of hours the employee actually works during each week, and employer and employee cannot contract otherwise." Likewise, the Fifth Circuit looked askance at the WHD's inability to identify "words in the act" which prohibit employers from doing what Belo did, and at the WHD's insistence on supporting its position only by reference to the FLSA's purpose of penalizing and limiting overtime. The appeals court was offended by the administrator's view that Belo's pay scheme must be unlawful if it enabled the employer to continue to work its employees overtime without increasing wages above their pre-FLSA levels. For this very reason the court could not agree with the WHD that Belo "must be required to pay more than it agreed to pay and its employees agreed to receive, because the pay which by the agreement was fixed to cover both regular and overtime, must...be considered as covering only regular time, and for the overtime worked, there must be additional compensation."[36]

In contrast, the appellate court found that, because the statutory term "regular rate at which he is employed" was not ambiguous, it was unnecessary to examine the FLSA's purposes or legislative history. Rather, the Fifth Circuit thought the term straightforward: the WHD's approach was acceptable only in the absence of an express hourly rate within an agreement for a weekly salary; but when the contract established such a rate, it was erroneous to assume that the wage was not intended to cover the overtime as well. But even if the statutory term were ambiguous, resort to underlying policy would not aid the WHD's position because the FLSA's policy statement in section 2 "says nothing about spreading the work or reducing hours of working." The Fifth Circuit then virtually drained the overtime provision of any significance by asserting:

> the complete absence from the act of any prohibition against or limitation upon working extra hours, any prohibition against or limitation upon the making of agreements by employers with their employees, the expressions in Section 2, and particularly the provisions of Section 8, would compel us to conclude, that the purpose of the act is to establish and gradually raise minimum wages, that the overtime provisions in it are inserted not at all

[36]Fleming v. A. H. Belo Corp., 121 F.2d 207, 210-11 (5th Cir. 1941).

Digitized by Google Original from UNIVERSITY OF MICHIGAN

Generated for guest (University of Iowa) on 2012-04-18 14:20 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd

to discourage or limit overtime work but as a part of the scheme to raise substandard wages by providing a definite pay for overtime work when such work is required; and that nothing in it purports to or does at all impair the right of employer and employee to contract as they have done here.[37]

Ultimately the Fifth Circuit lapsed back into the trial judge's libertarian rhetoric, accusing the Wage and Hour Administrator of construing the FLSA so as to place employers and employees in tutelage vis-à-vis him:

It may be admitted that there is a section of opinion in this country and in the Congress, sufficiently collectivistic to prefer the tutelary system for which the administrator contends, and that if they had had sufficient voting power, they would have so provided in the law. It must be conceded however on the other hand that there is another section of opinion both in the nation and in the Congress, which is not so collectivistic and still believes in reasonable freedom of contract. It is just because of this fact, that legislation is compromise, that the views of the proponents and of the opponents, as to the purposes and effect of the legislative act, are never regarded as of value in a construction of it, and that it is settled law that statutes must be construed in accordance with the intent of the legislature as expressed in the language of the act as a whole. Its meaning may not be sought by the courts in the vague penumbrae of the wishes and desires of its proponents or its opponents as these are expressed in debates.[38]

When the Supreme Court docketed the case, Colonel Philip Fleming, the Wage and Hour Administrator,[39] calling it the most important test yet of the FLSA, warned that if Belo prevailed, employers all over the United States would use the arrangement to evade overtime obligations.[40] Before the Supreme Court Belo sought to contextualize the purposes of the overtime law during world war. The employer accused the WHD of seeking to achieve an objective "square in the face of the needs of national defense upon which our very existence as a free people depends. Such supposed objective is to discourage or prohibit work over 40 hours a week, with design to 'spread' employment, although the nation's interest cries out for more production, more work and longer hours, to the fullest

---

[37]Fleming v. A. H. Belo Corp., 121 F.2d at 211-12.

[38]Fleming v. A. H. Belo Corp., 121 F.2d at 213.

[39]Fleming, who had been a district engineer in the U.S. Army working on the construction of locks and dams, "had not been in any way active, or even interested, to be frank about it, in the long legislative fight that led to the enactment" of the FLSA prior to his appointment in 1939. *Minimum Wage Standards and Other Parts of the Fair Labor Standards Act of 1938: Hearings Before Subcommittee No. 4 of the House Committee on Education and Labor,* 80th Cong., 1st Sess. 751-52 (1947). After leaving the WHD in 1941, Fleming (1887-1955) was federal works administrator until 1949. *Who Was Who in America (1951-1960)* at 3:288 (1966).

[40]"Wage-Hour Loses," *Bus. Wk.*, June 13, 1942, at 88.

Digitized by Google Original from UNIVERSITY OF MICHIGAN

Generated for guest (University of Iowa) on 2012-04-18 14:20 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd

extent consistent with the maintenance of the standards of health and pay prescribed by the Act...."[41]

Moreover, even in the depressed economy of the 1930s, Belo argued, Congress expected work-spreading to be "kept within very modest limits" and to

> take place principally in the lowest paid and unskilled employments, where the labor product in dollar value is so low that the employer cannot afford the added overtime wage. It was known that in the skilled employments...overtime rates would be paid in lieu of curtailing hours. Indeed, it was known that in the skilled employments overtime pay, and even the precise formula of time and one-half, had already become a traditional policy.[42]

The Supreme Court's five to four decision was the first to explain precisely what Belo had in fact done. In anticipation of the FLSA, Belo informed its employees that "[i]n order to conform our employment arrangements to the scheme of the Act without reducing the amount of money which you receive each week, we advise you that from and after October 24, 1938, your basic rate of pay will be" 67 cents per hour for the first 44 hours and not less than time and a half for additional hours, "with a guaranty on our part that you shall receive weekly, for regular time and for such overtime as the necessities of the business may demand," not less than $40. Belo thus set the hourly rate at 1/60th of the guaranteed weekly wage, as a result of which employees had to work more than 54.5 hours before their wages would exceed the guarantee. The Supreme Court conceded that the point of Belo's plan was to "permit as far as possible the payment of the same total weekly wage after the Act as before. But nothing in the Act bars an employer from contracting with his employees to pay them the same wages that they received previously, so long as the new rate equals or exceeds the minimum required by the Act."[43]

After in effect rejecting the WHD's position that Congress had intended to require employers to pay more for exercising their privilege to work their employees overtime than they had before the FLSA went into effect, the Court relegated to a footnote its relegation of section 18 to the dust heap of legal history: "Whatever the legal effect of this language, it is certainly not a prohibition and the Administrator does not rely upon it." The court then further tweaked the Administrator by asserting that the Fifth Circuit's finding that Belo's effort to maintain employees' weekly incomes (or, more realistically, Belo's wage costs) at pre-FLSA levels "gains support" from the fact that Belo was formulating the

---

[41]Position of Respondent with respect to the Petition for Certiorari Herein at 5, Fleming v. A. H. Belo Corp., 316 U.S. 624 (1942).

[42]Brief for Respondent at 29, Fleming v. A. H. Belo Corp., 316 U.S. 624 (1942).

[43]Walling v. A. H. Belo Corp., 316 U.S. 624, 628-30 (1942).

Digitized by Google Original from UNIVERSITY OF MICHIGAN

Generated for guest (University of Iowa) on 2012-04-18 14:20 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd

plan at the very time that Andrews made his ill-fated Birmingham faux pas.[44]

The focus of the Court's statutory interpretation was "the regular rate" for overtime purposes, which Congress had failed to define. Whereas Belo argued that the regular rate was clearly 67 cents per hour, the WHD called that rate meaningless; instead, it viewed the agreement as one for a fixed weekly salary of $40 regardless of fluctuations in hours (up to 55 hours). The WHD therefore argued that the regular rate in fact had to be recalculated weekly by dividing the $40 guaranty by the number of hours worked; for any hours worked beyond 44, employees would then be entitled to 150 percent of that rate. Belo's $30,000 to $60,000 back overtime wage liability can be exemplified this way: if a worker worked 50 hours, his regular rate that week would be 80 cents; for the first 44 hours, his wage would have amounted to $35.20, while his six hours of overtime would have entitled him to an additional $7.20, for a total of $42.40, leaving him underpaid by $2.40. The Court agreed that the difficulty in the case stemmed from the guarantee, but it rejected the WHD's argument that the guarantee was inconsistent with and overrode the 67-cent hourly calculation. The majority reasoned, first, that indisputably real overtime kicked in again after 55 hours; and second, even with regard to the hours between 44 and 55, when wages were determined by the guarantee, if 67 cents was considered the regular rate, then the worker was actually being paid more than 150 percent overtime; however, neither such overpayments nor fluctuations in the overtime premium were prohibited by the FLSA, provided that the rate never fell below 150 percent. The Court did not deny the force of the WHD's view that the 67-cent wage was artificial, but the parties may well have intended the "flexibility" that it generated in the overtime rate "[i]f it was the only means of securing uniformity in weekly income." Moreover, since weekly hours fluctuated drastically, the "regular rate" would always have been "'irregular'" both arithmetically and with respect to the parties' ability to foresee or plan on it.[45]

Ultimately, the majority was swayed by the perception that the arrangement was "mutually satisfactory" to Belo and its employees, whereas the WHD's approach "as a practical matter eliminates the possibility of steady income to employees with irregular hours." Presuming that Congress had intentionally refrained from defining "the regular rate" precisely because employment relationships were so manifold and "unpredictable," the majority revealed its bias in favor of promoting consumer instalment buying and against the statute's anti-contractualism:

> Where the question is as close as this one, it is well...to afford the fullest possible scope

[44]Walling v. A. H. Belo Corp., 316 U.S. at 630 n.6.

[45]Walling v. A. H. Belo Corp., 316 U.S. at 631-33.

Digitized by Google Original from UNIVERSITY OF MICHIGAN

Generated for guest (University of Iowa) on 2012-04-18 14:20 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd

to agreements among the individuals who are actually affected. This policy is based upon a common sense recognition of the special problems confronting employer and employee in businesses where the work hours fluctuate from week to week and from day to day. Many such employees value the security of a regular weekly income. They want to operate on a family budget, to make commitments for payments on homes and automobiles and insurance.[46]

Little wonder that Belo received 10,000 inquiries for copies of its contract the month the Supreme Court handed down its decision.[47]

The four dissenters regarded the contracts as agreements for weekly wages for variable hours with additional hourly compensation once the employees worked more than an ascertainable number of hours—namely, the number needed for the wages to reach the weekly guarantee, which was the "dominating feature," without which "the adoption of a low hourly rate would encounter the full weight of employee bargaining power. The guaranty avoids this conflict by fixing the minimum weekly wage." In effect, Belo paid 73 cents an hour for hours up to 54.5 and $1.00 an hour thereafter "expressed in the circumlocution of time and a half 67 cents...." So long as the weekly guarantee and the real overtime rate remained unchanged, the base hourly rate, the hours for which that rate was paid, and the alleged overtime premium were mere bookkeeping conveniences that could vary without affecting total earnings. Consequently, the number of hours that employees had to work to earn the guarantee could be increased by manipulating the other variables: "By such a verbal device, astute management may avoid many of the disadvantages of ordinary overtime, chief of which is a definite increase in the cost of labor as soon as the hours worked exceed the statutory workweek. If the intention of Congress is to require at least time and a half for overtime work beyond a fixed maximum...40, 42 or 44 hours..., that intention is frustrated by today's holding. ... Because there is no increase in labor cost between the statutory maximum and the hours contracted for (54 ½), the employer has a financial inducement to require hours beyond the statutory maximum."[48]

Commenting on the inconsistencies between *Overnight Motor Transportation* and *Belo*, the editors of *The New York Times* once again lambasted the law for creating absurdities by extending to higher-paid employees an overtime provision "designed to protect submarginal workers," and called for revision of the FLSA.[49] In the wake of these twin decisions, some defendant-employers sought to justify

---

[46]Walling v. A. H. Belo Corp., 316 U.S. 634-35.

[47]*Fair Labor Standards Act Amendments: Hearings Before a Subcommittee of the Senate Committee on Labor and Public Welfare*, 80th Cong., 2d Sess., Pt. 1 at 506 (1948) (testimony of Irving Levy, counsel, UAW).

[48]Walling v. A. H. Belo Corp., 316 U.S. at 637-39 (dissent).

[49]"Wage-Hour Interpretations," *N.Y. Times*, June 12, 1942, at 30:3, 4.

Digitized by Google Original from UNIVERSITY OF MICHIGAN

Generated for guest (University of Iowa) on 2012-04-18 14:20 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd

their overtime practices of paying fixed weekly wages for fluctuating hours as governed by *Belo*, while the WHD and aggrieved workers argued that *Overnight Motor Transportation* was controlling. In the event, only employers that failed to include an hourly rate or to indicate an upper limit on the length of the workweek and to repeat the talismanic words that the employee was to be paid time and a half the regular rate for overtime (or stated a contractual regular rate "completely unrelated to the payments actually and normally received each week") wound up owing back overtime wages.[50]

In 1947, in the midst of congressional turmoil over making significant revisions to the FLSA, the Supreme Court upheld the vitality of *Belo* against another challenge by the WHD. The Halliburton Oil Well Cementing Company, which before enactment of the FLSA had paid its oil well service workers fixed monthly salaries, adopted a weekly guarantee like Belo's, which the Wage and Hour Administrator pressured it to abandon in 1942 , but which it reinstated later that year after the Supreme Court upheld Belo's plan. Halliburton issued contracts agreeing to pay the workers a regular basic hourly rate for the first 40 hours, and guaranteeing a specified weekly amount for regular time and such overtime as the business required. Although the regular rate exceeded the minimum wage, it "was always so related to the guaranteed flat sum that the employee became entitled to more than the guarantee only in weeks in which he worked more than 84 hours."[51]

Despite the fact that the wage plan was more egregious than Belo's, not only because the real overtime threshold was 30 hours higher, but because in 20 percent of the workweeks, the employees worked more than 84 hours, the Court upheld Halliburton's arrangement because it did not differ materially from Belo's and Congress had never intervened to modify the overtime provision during the five years since that case had been decided.[52]

---

[50]E.g., Walling v. Stone, 131 F.2d 461 (7th Cir. 1942); Seneca Coal & Coke Co., v. Lofton, 136 F.2d 359 (10th Cir. 1943); Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419, 425 (1945) (quote). In this last case, the employer contractually specified an hourly rate above the statutory minimum, but below the workers' actual regular rate based on their guaranteed piece rates. James Durkin, national representative of the United Office and Professional Workers of America, testified at a FLSA hearing in 1945 that under a "monstrous formula" sanctioned by WHD Interpretative Bulletin No. 4, an office worker with a fixed weekly salary of $40 for a fluctuating work week would find his hourly rate plummeting from $1 to 66.6 cents when his hours rose from 40 to 60. *Proposed Amendments to the Fair Labor Standards Act: Hearings Before the House Committee on Labor*, 79th Cong., 1st Sess. 413 (1945). This outcome was lawful only if the employer placed an upper limit on the number of weekly hours.

[51]Walling v. Halliburton Oil Well Cementing Co., 331 U.S. 17, 19 (1947).

[52]Walling v. Halliburton Oil Well Cementing Co., 331 U.S. at 21 n.8, 25.

Digitized by Google Original from UNIVERSITY OF MICHIGAN

Generated for guest (University of Iowa) on 2012-04-18 14:20 GMT / http://hdl.handle.net/2027/mdp.39015066123715
Creative Commons Attribution-NonCommercial-NoDerivatives / http://www.hathitrust.org/access_use#cc-by-nc-nd