THE AUTOCRATICALLY FLEXIBLE WORKPLACE

A HISTORY OF OVERTIME REGULATION IN THE UNITED STATES

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Workers During World War II: From the Struggle Against Overtime Work to the Struggle for Overtime Premiums

[I]n the past...say 15 years ago, we didn't have any cases of suspensions or discharges for refusal to work overtime. In the past I'm told, and I find it hard to believe, but overtime at Chevron U.S.A. was a privilege.

If they had an employee that they felt was abusing sick time, had an absentee problem, they would tell him he couldn't work any more overtime. Now, it's reversed. Overtime is looked on by the company more or less as a duty. If you want to get out of it, you better have a damned good reason....¹

Ironically, the onset of the reversal of the secular decline in the length of the workweek coincided with the enactment of the FLSA and advent of World War II: "The goal of the 40-hour week had not yet been attained by 1940...when the defense program got underway" and working hours increased again. In this most tangible sense, the FLSA's mere financial disincentive to deter overtime work did not live up to the standard set by the nineteenth-century British factory laws, which, as even Marx admitted, by forcibly limiting the working day, curbed "capital's urge for boundless draining of labor power."

Whereas relatively few—and almost no organized—workers actually found their wages increased by the FLSA's minimum wage provision, many workers began receiving overtime pay by the time the militarization of the economy extended the normal workweek beyond forty hours. Of the 12.5 million employees covered by the FLSA in April 1939, the Department of Labor estimated that fewer than 700,000 were receiving less than the 30-cent minimum wage to go into effect on October 24, 1939; but of the 2,400,000 employees working overtime (more than forty-two hours weekly as of October), 1,664,000, or slightly more than two-thirds, were not receiving time and one-half pay. By far the largest industry that had to reduce its hours or pay overtime was sawmilling (which employed more than 100,000 such workers), followed by knit goods (47,000), cotton goods (42,300),

³Karl Marx, Das Kapital: Kritik der politischen Ökonomie, vol. 1, in Karl Marx [and] Friedrich Engels, Werke 23:253 (1962 [1867]).



¹[Califormia] Senate Committee on Industrial Relations, *Interim Hearing on AB 1295—Mandatory Overtime* 2:350 (testimony of Ruth Bennett, Local 1-5, Oil, Chemical, and Atomic Workers, Chevron U.S.A. Richmond, Cal. refinery).

²J. Frederic Dewhurst et al., America's Needs and Resources 568 (1947).

foundry and machine shops (41,000), and furniture manufacturing (35,400).4

Indeed, while the statutory minimum wage of thirty to forty cents per hour became moot during the war, when a tight labor market made fifty cents the de facto minimum,⁵ it was the longer workweek that largely sustained the increase in real weekly earnings.⁶ Thus the average workweek for production workers in manufacturing industries rose by one-fifth, from 37.7 hours in 1939 to 45.2 hours in 1945.⁷ Overtime compensation peaked at \$12 billion in 1943, \$3.6 billion of which represented premium rates. In the machinery industry, overtime wages accounted for 27 percent of total wages. At the end of the war it was estimated that if the 40-hour week were restored with no change in wage rates, wages would fall by 16 percent overall and by more than one-third in war industries with the longest hours.⁸

The transition from depression to a full-capacity war economy, characterized by the conversion to continuous, 168-hour per week production, also transformed the functioning and socio-economic purposes behind mandatory overtime payments. Whereas until 1940 the primary purpose of penalty premium rates was to discourage overtime, labor relations scholars have concluded that since World War II they have come to be regarded by most workers as a special form of compensation offering an attractive form of compensation for additional income rather than as a protection against long or undesirable hours. Automobile industry management before the war, for example, had felt that workers were becoming more eager for a chance to increase their annual earnings by working longer hours and that they would eventually be pressing for a mitigation of the restrictions on hours in the agreements and the act, but that the UAW's policy of permitting the

^{9&}quot;"Round the Clock," Bus. Wk., Jan. 10, 1942, at 61-64.



⁴First Annual Report of the Administrator of the Wage and Hour Division, United States Department of Labor, For the Calendar Year 1939, at 36-43, 158-60 (1940).

⁵Amendments of the Fair Labor Standards Act of 1938: Hearings Before the Senate Committee on Education and Labor, 79th Cong., 1st Sess. chart V at 860 (1945) (statement of Chester Bowles showing straight-time hourly rates of factory workers in the summer of 1945). Whereas in 1942 7,500,000 employees were paid forty cents or less per hour, by the end of the war the National War Labor Board "automatically approved increases first up to 40 and later to 50 cents and hour." Joel Seidman, American Labor from Defense to Reconversion 129 (1976 [1953]).

⁶⁴Because most factory wage workers are working more intensely and for longer hours, they have been able to maintain their spendable earnings and to save." N. Arnold Tolles, "Spendable Earnings of Factory Workers, 1941-43," *Monthly Lab. Rev.* 58:477-89 at 478 (1944).

⁷Minimum 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. 4:2618 (1947) (supplementary statement of the Wage and Hour Administrator). See also H. M. Douty, "Review of Basic American Labor Conditions," in Labor in Postwar America 109-36 at 117-18 (Colston Warne ed. 1949).

⁸Labor Research Association, Labor Fact Book 7, at 137-38 (1945).

unemployed to retain membership created strong rank-and-file pressure for shorter hours and work-sharing.¹⁰ After the war, automobile collective bargaining agreements even came to safeguard a worker's right to overtime.¹¹ This transformation of overtime pay "into a means of increasing workers' earnings...took place during World War II, when workers started to rely on premium pay to keep pace with inflation."¹²

Perversely, the very "form of the limitation on hours" that Congress adopted "opened the way to hours far in excess of the standard...." Consequently, during the 1940s and 1950s, as George Brooks, the research director of the International Brotherhood of Pulp, Sulphite and Paper Mill Workers, explained to the Conference on Shorter Hours of Work sponsored by the AFL-CIO in 1957, "the basic meaning and purpose of the law was twisted and changed. It no longer was a standard for hours worked, but a means of increasing income through premium rates." The use of cost-plus contracts during World War II and the progressive reduction of labor costs as a proportion of total costs in the wake of capital intensification of manufacturing conspired to deprive premium rates of their deterrent effect: "Employers did not care. The war-time experience and collective bargaining...have combined to change the whole concept of overtime rates from the idea of a penalty to the idea of privilege. The typical senior worker or the worker 'fortunate' enough to get extra hours regards them as a plum.... In all industries...there has been a concerted effort to increase the...penalty payments, not with the idea of preventing longer hours...but...of increasing income during prosperous times." Indeed, Brooks reported that in his own industry, where paper mills established 36-hour schedules, employees worked 42 hours including six at overtime rates.¹³

Not surprisingly, some in Congress during the war sought to curtail the right that millions of workers had recently secured to premium pay for over-hours. ¹⁴ Statutory overtime could no longer fulfill the function of sharing work as full employment approached during rearmament in 1940-41, but the Wage and Hour Administrator devoted an extraordinary amount of space in his annual report for 1940 to refuting claims that the forty-hour week was inconsistent with national

¹⁴For a rhetorical description and denunciation of the anti-FLSA drive, see 93 *Cong. Rec.* 2266 (1947) (statement of Sen. Thomas, D. Ut.).



¹⁰William McPherson, Labor Relations in the Automobile Industry 71 (1940).

¹¹Robert Macdonald, Collective Bargaining in the Automobile Industry: A Study of Wage Structure and Competitive Relations 62 (1963).

¹²Ronald Schatz, A History of Labor at General Electric and Westinghouse 1923-60, at 159 (1983).

¹³George Brooks, "Historical Background," in AFL-CIO, *The Shorter Work Week* 7-19 at 16-17 (1957).

defense preparedness,¹⁵ and two years later continued to defend the overtime provision as "attracting labor in a democratic way, without compulsion, to the war industries where it was needed."¹⁶ President Roosevelt's insistence during one of his fireside chats in 1940 that the emergency did not "justify making the workers of our nation toil for longer hours than now limited by statute"¹⁷ was unintentionally ambiguous since, as Secretary Perkins explained in 1942 to a congressional panel considering a wartime ban on overtime rates for naval contractors, the FLSA "permits unlimited hours per day and per week...."¹⁸ Little wonder that the *Times* was amused by the flip-flop executed during the war by liberals who, in response to proposals for a longer 48-hour week, argued that the overtime provisions did not regulate or limit hours at all, but merely prevented exploitation.¹⁹

Ideologically, then, the war was a propitious time for employers to urge that "the penalty for overtime should be canceled during the emergency to encourage a longer work week." The chairman of General Motors, Alfred P. Sloan, Jr., advocated this course: "[I]f we increase the work week and pay a penalty, the result is to increase wages about 8 per cent. We get nothing for this 8 per cent because efficiency, manifestly, is not increased, therefore the result is a step toward inflation. ... Frankly, I do not believe in "something for nothing"...." The Wage and Hour Administrator heaped ridicule on Sloan's proposal by focusing on the ratio between GM's most recent annual profit of \$183,000,000 and payroll of \$386,000,000: "Which is the more inflationary, an 8 per cent increase for the workers or profits almost half as large as total payroll?"²⁰

A number of bills were introduced in 1942 to relieve employers (and ultimately the Treasury, which was paying the bills submitted by war contractors) of the burden of premium pay.²¹ Senator O'Daniel of Texas seized the initiative in March with a bill that would have eliminated all restrictions on hours of labor and

²¹For a brief and uninspired account, see Roland Young, Congressional Politics in the Second World War 59-61 (1956).



¹⁵U.S. Dept. of Labor, WHD, Annual Report for the Fiscal Year Ended June 30, 1940, at 1-72.

¹⁶U.S. 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 3-4 (1943).

¹⁷Fireside Chat of May 26, 1940, in *The Public Papers and Addresses of Franklin D. Roosevelt: 1940 Volume: War—And Aid to Democracies* 230-40 at 237 (1941).

¹⁸Hearings 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. 2627 (1942).

¹⁹"The Forty-Hour Week," N.Y. Times, June 14, 1942, sect. IV, at 10:2 (editorial).

²⁰ Fleming Defends Overtime Pay Rate," N.Y. Times, Jan. 9, 1941, at 17:7.

provided the same wage for all hours.²² In explaining a later version of the bill, the senator may not have been indulging in hyperbole when he stated: "The change would please practically every employer of labor in America. They would rejoice at having the legislative shackles of premium pay for so-called overtime removed."²³ O'Daniel's explanation of the effect of the elimination of premium pay was novel: while the bill neither compelled workers to work overtime nor dealt with hourly wages at all, it did

embrace the age-old, time tested, true economic philosophy that an employee should be paid the full amount per hour that his services are worth for each and every hour that he works, instead of being paid less per hour for earlier hours of the day when he is most efficient and productive, and more per hour for the later hours, when he may be fatigued and less productive, as our present 40-hour workweek law provides.²⁴

O'Daniel failed to explain why workers would willingly work overtime hours when their productivity was lower and thus employers should have paid them less or why employers prior to the FLSA voluntarily paid premium wages to induce workers to work additional hours during which both knew that their productivity declined. As a stevedoring company president observed just a few years later, although he "quite assuredly" would work his employees more overtime if the premium were only five cents an hour, "we basically want to work the maximum amount of straight time.... [I]f we are working men for eight hours and have to lap into overtime, we get less work performed. There is a fatigue proposition which you cannot escape. The productivity after a certain number of hours is on the downhill."²⁵

Labor relations realpolitik under the special balance of forces created by world war compelled employers to approach the issue of overtime undogmatically. After all, as *Business Week* noted, even nonunion employers "might hesitate to abandon policies shaped by the 40-hour law" because they feared that such a reversion to longer hours without premium pay would merely provoke

²⁵Testimony of Frank W. Nolan, Transcript of Record at 124, Bay Ridge Operating Co. v. Aaron, 334 U.S. 446 (1947).



²²88 Cong. Rec. 2380 (1942) (S. 2373).

²³88 Cong. Rec. 8705 (1942) (S. 2884).

²⁴88 Cong. Rec. 8705 (1942). Decades earlier, Alfred Marshall, who codified Anglo-American neoclassical economics, had offered an inverted subjectivist last-hour fable: "[M]ost persons...are glad when the hour for stopping arrives: perhaps they forget that the earlier hours of work have not cost them as much as the last: they are rather apt to think of nine hours' work as costing them nine times as much as the last hour; and it seldom occurs to them to think of themselves as reaping a producer's surplus or rent, through being paid for every hour at a rate sufficient to compensate them for the last, and most distressing hour." Alfred Marshall, *Principles of Economics* 438 (8th ed. 1969 [1890]).

unionization efforts.²⁶ While testifying in 1942 before the House Naval Affairs Committee on these FLSA bills, William Witherow, the president of the NAM, "the most influential ideological holding company for American industry,"²⁷ revealed what was at stake if equilibrium were disturbed:

One provision of the bill...would deal with one of the Nation's most vexing problems—one that has caused the most vehement, spontaneous outpouring of public resentment for many years—the questions of overtime pay after 40 hours of work.

It is obviously impossible to reconcile the spirit of the law that admittedly was designed to discourage utilization of manpower for more than 40 hours each week with a Nation-wide demand for all-out production effort. All the rhetoric in the world cannot disguise the fact that the two ideas just do not "jibe" with each other. ... And there is no question that of the two the public prefers the all-out production effort....²⁸

Nevertheless, Witherow had to concede that, given "the practical realities of employment relations," neither he nor anyone else could unambiguously answer the question as to whether abandoning the overtime premium would speed production.²⁹ The NAM president finally fleshed out the reason for his reluctance to attack overtime pay:

For many months employees in many industries have been used to weekly pay checks considerably higher than before, primarily because of high overtime rates. To decrease this weekly pay check by the amount of overtime in it—without simultaneously freezing wage rates at their existing levels—would have one definite tendency. In all probability, there would be a widespread demand by unions throughout the country for an increase in basic hourly rates to a point off-setting the loss of overtime. This would normally stimulate increased labor difficulties and even if it did not increase strikes, it would increase the time management would be forced to take from our all-important projection job in order to sit around the negotiation table. I cannot believe that this would help production.³⁰

The NAM's forthright acknowledgment that the campaign to suspend overtime premiums might easily turn into a Pyrrhic victory—an acknowledgment that the chairman of the War Production Board and the president of the CIO also made,

³⁰Hearings on H.R. 6790 at 2844.



²⁶"40-Hour Fight?" Bus. Wk., May 17, 1941, at 45, 47.

²⁷Clark Kerr, "Employer Policies in Industrial Relations, 1945 to 1947," in *Labor in Postwar America* 43-76 at 47 (Colston Warne ed. 1949). A sampling of radical contemporary opinion about the NAM may be gleaned from "Messiahs of Feudalism," *Christian Century* 52:1615 (1935); "The NAM through the Ages," *New Republic* 93:184 (1937); Alfred Hirsh, "What is Big Business Up to?" *Forum*, July 1938, at 3.

²⁸Hearings on H.R. 6790 at 2843.

²⁹Hearings on H.R. 6790 at 2843.

albeit indirectly³¹—was in large part dictated by the fact that Congress rather than millions of individual consumers was footing the bill for war production. That employers did not, however, intend to play dead was obvious from Witherow's remark before the Naval Affairs Committee that "abandoning the 40-hour overtime is far less important at this time as a step to speed up production than several other constructive measures," chief among which was eliminating the closed shop.³² Large corporations' reluctance to force the issue of overtime was probably also dictated by the realization that premium overtime payments were more than compensated for by the savings inherent in operating expensive capital equipment longer workweeks. Eighty years after Karl Marx had recognized this positive impact of longer hours, even at higher overtime wages, on the rate of profit, ³³ the Bureau of Labor Statistics published the results of its study of large corporations producing war-related output revealing the profit-enhancing effect of overtime.³⁴

The NAM's logic also implicitly raised the larger inverse question: Does the introduction of overtime work and pay tend to depress basic wage rates? This same question was raised at the same hearings by Secretary of Labor Perkins. whose testimony impressively resembled Witherow's. She argued that if Congress eliminated overtime premiums and thus reduced total weekly wages, "[i]t will be just as natural as getting up in the morning to increase basic wage rates if this little extra, which comes in the form of overtime pay and which has been just about enough to meet the increases in the cost of living, is taken away from them at this time." Indeed, Perkins went far beyond employers in her idiosyncratic praise of overtime, warning that if labor markets and unions reacted by pushing up basic wage rates, "the country would be left with a rigid structure of high wages...instead of the present flexible system which now exists where a man makes more money if he works longer, and less when he works less." Perkins saw overtime premiums as stabilizing wartime employment and combating dysfunctional turnover by enabling workers with "rather comfortable incomes" to reassure themselves: "Well, I make out pretty well where I am with the overtime." The Labor Secretary's testimony culminated in her inadvertent confirmation of the nineteenth-century labor movement's critique of systematic overtime's Sisyphean character: "It is unfortunate for those workers who are able to maintain a subsistence substandard of living only by virtue of getting some overtime pay, if the trend to inflation is

³⁴"Overtime Pay in Relation to Costs and Profits," *Monthly Lab. Rev.* 53(1):9-17 (July 1941).



³¹Hearings on H.R. 6790 at 2576, 2770 (statement of Donald Nelson and testimony of Philip Murray).

³² Hearings on H.R. 6790 at 2845.

³³3 Karl Marx, Das Kapital: Kritik der politischen Ökonomie, in Karl Marx [and] Friedrich Engels, Werke 25:87 (1964 [1894]). See also Karl Marx, Ökonomische Manuskripte 1863-1867, in Karl Marx [and] Friedrich Engels, Gesamtausgabe (MEGA) 2:4, Pt. 2:50, 111 (1992).

attacked primarily by eliminating those premium rates for overtime."35

Perkins's 1942 testimony was astounding in another respect as well: while Belo and Overnight Motor Transport were pending before the Supreme Court, she furnished employers with high authority for their campaign to downgrade the FLSA to a statute in aid of marginal workers. When asked whether the theory behind the law was work-spreading, she replied that her congressional testimony in 1937 "was primarily that it was a minimum-wage law. It was a minimum-wage law which had features which regulated the hours, in order that your minimum wages might not become maximum wages." Secretary Perkins went on not only to emphasize that "we all were very careful to urge Congress not to put any absolute daily or weekly limitation upon the number of hours,"36 but to refabricate an entirely new economic policy basis for this effort to avoid undue rigidity that in fact she had never articulated at the 1937 hearings:

We also pointed out that this type of legislation, providing only for time and a half for overtime, and not limiting the hours of labor, would be extremely useful in case we had one of those high production periods by which American industry has been characterized, where there was a shortage of labor; and that it would be stabilizing because of the fact that it would permit for those brief periods working overtime and paying extra money, and at the same time would provide a natural ladder through which to ascend from the high income levels to the lower income levels that were necessary in a depressed period.³⁷

After hearing this claim for the first time, Carl Vinson, chairman of the House Committee on Naval Affairs, reminded Perkins that "the theory upon which we enacted the bill was that that would penalize the employer and spread employment, and therefore if he did not spread the employment, he would be penalized to the extent of time and a half for overtime," and added that she "was proceeding on a different theory, in that the time and a half overtime supplements the weekly pay envelope." Trapped by her own opportunistic ad hoc support for overtime premiums at a time when they could no longer help spread work, the Secretary of Labor sought refuge in feigned ignorance of congressional intent: "I do not know, of course, what was the prevailing view in the mind of the Members of Congress who voted for the bill," and asseverated ("I am sure that I presented that point of view at that time") that even in 1937 she had advocated passage also on the grounds that the bill would "increase wages in proportion to the increase in work without creating a rigid wage structure."38

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³⁵Hearings on H.R. 6790 at 2631-32.

³⁶Hearings on H.R. 6790 at 2637-38.

³⁷Hearings on H.R. 6790 at 2638.

³⁸Hearings on H.R. 6790 at 2638. For Perkins' 1937 statement and testimony, see Fair Labor Standards Act of 1937: Joint Hearings at 173-211. Original from Digitized by GOOGLE

For wholly unrelated reasons *The New York Times* editors persisted in attacking overtime premiums during the war:

What possible defense, other than a cynically political one, can be made for retaining the legally mandatory time-and-a-half rates beginning at forty hours, now that employers are virtually ordered to work men a minimum of forty-eight hours? The present time-and-a-half provisions cannot be defended even on grounds of "social justice." ... Their result is to give the smallest increases to those who already have the smallest wages, and the biggest increases to those who already have the biggest wages.³⁹

Ultimately neither Senator O'Daniel's proposed amendment of section 7 of the FLSA⁴⁰ nor any competing proposal was adopted in 1942⁴¹ or later,⁴² but in 1942 President Roosevelt did issue an executive order—which did not affect the overtime provision of the FLSA—banning premium pay for work performed on Saturday or Sunday, "except where such work is performed by the employee on the sixth or seventh day worked in his regularly scheduled workweek." And in early 1943 the president issued another executive order stating that no place of employment would be deemed making an effective utilization of manpower if its workweek was less than 48 hours. In spite of the fact that the order required employers faced with labor shortages not to hire new workers when they could meet their labor needs by working their current employees 48-hour weeks, the federal government enforced an overtime law originally designed to spread em-

⁴⁵War Manpower Commission Reg. 3, § 903.1, in Fed. Reg. 8:7225 (1943).



³⁹"Inflation Wins Again," N.Y. Times, Feb. 13, 1943, at 18:1, 2.

⁴⁰See 88 Cong. Rec. 8706 (1942) (text of proposed S. 2884).

⁴¹Under S. 2232, submitted by Senator Reed of Kansas, premium pay would not have been mandatory until after forty-eight hours. 88 Cong. Rec. 1328 (1942). Many of the other bills introduced in 1942 would have suspended all hours limitations for the duration of the war. H.R. 6616 (Smith, Va.); H.R. 6823 (Peterson, Ga.); H.R. 7731 (Ramspeck); H.R. 6689 (Lambertson); H.R. 6795 (Boren); H.R. 6796 (Wickersham); H.R. 6826 (Colmer); H.R. 6835 (Thomas, Tx.); H.R. 7054 (Cole, N.Y.).

⁴²Senator O'Daniel continued to introduce his bill for several sessions as did other Congressmen. In the first session of the Seventy-Eighth Congress (1943) the following bills were offered: S. 190 (O'Daniel); S. 237 (Reed); H.R. 992 (Colmer); H.R. 1804 (Smith); H.R. 2071 (Russell); H.R. 2107 (Curtis); in the first session of the Seventy-Ninth Congress (1945): S. 369 (O'Daniel); H.R. 1194 (Russell); in the second session of the Seventh-Ninth (1946): H.R. 6647 (Dondero); and in the first session of the Eightieth Congress: S. 160 (O'Daniel).

⁴³Exec. Order No. 9240 (Sept. 9, 1942). For a discussion of the conflict over non-statutory premium time for weekend work, see Nelson Lichtenstein, *Labor's War at Home: The CIO in World War II*, at 96-108 (1987 [1982]); "Premium Pay Provisions in Selected Union Agreements," *Monthly Lab. Rev.* 65:419-25 (1947).

⁴⁴Exec. Order No. 9301 (Feb. 9, 1943), in *Fed. Reg.* 8:1825 (1943). President Truman revoked this order by Exec. Order No. 9607 (Aug. 30, 1945), in *Fed. Reg.* 10:11191 (1945).

ployment.⁴⁶ Looking back in 1946, ex-Secretary of Labor Perkins was completely justified in remarking that the overtime provision had been "flexible enough to make it possible to work more than forty hours when necessary, as it was during the war."⁴⁷

⁴⁶Harold Metz, Labor Policy of the Federal Government 218-19 (1945).

⁴⁷Frances Perkins, *The Roosevelt I Knew* 266 (1946).