

THE AUTOCRATICALLY FLEXIBLE WORKPLACE

A HISTORY OF OVERTIME REGULATION IN THE UNITED STATES

Marc Linder

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On the Waterfront: Overtime on Overtime?

[T]he profit motive doesn't seem to be working to prevent the...use of a great deal of overtime....¹

Employers in certain industries, but especially longshore, stevedoring, and shipping, effectively deployed the press to depict another Supreme Court decision, issued in June 1948, as unleashing a multi-billion-dollar apocalypse just like the one they had conjured up with regard to the so-called portal-to-portal suits filed by unions in 1946-47 over firms' failure to count the time it took workers to walk from the factory gate to their work stations as compensable working time. As with the portal-pay dispute, employers succeeded in securing quick congressional action to resolve the matter in their favor.²

In *Bay Ridge Operating Company v. Aaron* the Court held that the statutory regular rate on which time-and-a-half overtime had to be paid included time-and-a-half premium wages that longshore-men were paid for working shifts outside the core daytime hours, regardless of how many hours they worked.³ The International Longshoremen's Association (ILA) joined forces with employers to denounce the lawsuits for overtime that had been brought by individual members of the ILA. As ILA president-for-life Joseph Ryan testified at trial, "our Council went on record as being opposed to trying to get time and a half on time and a half, as it might wipe out all of the gains we had made for our men over a period of 25 years."⁴

About 400 longshoremen and ILA members filed two test suits in October 1945 against two stevedoring companies (one of which, Huron Stevedoring Corporation, was a subsidiary of Grace Lines) for \$800,000 in back overtime. The nub of the complaint was that during World War II they had worked 66- to 70-hour weeks on the night shift in the Port of New York without receiving any overtime premium because the employers had taken the position that the \$1.875 night shift rate was 150 percent of the regular (day-shift) rate of \$1.25. A secondary issue involved day workers who worked a standard 44-hour week with no

¹[California] Senate Committee on Industrial Relations, *Interim Hearings on AB 1295—Mandatory Overtime* 1:180 (1977) (statement of Sen. Alan Sieroty).

²Marc Linder, "Moments Are the Elements of Profit": *Overtime and the Deregulation of Working Time Under the Fair Labor Standards Act* ch. 3 (2000).

³*Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, *reh'g denied*, 335 U.S. 838 (1948).

⁴Testimony of Joseph B. Ryan, Transcript of Record at 183, *Bay Ridge Operating Co.*

overtime for the last four hours.⁵

Initially the stevedoring companies prevailed at trial before federal judge Simon Rifkind, himself a New Deal insider.⁶ The trial was notable both for the extensive testimony of two prominent scholars about the history of overtime work and for the fact that U.S. government lawyers represented defendant-employers because the federal government would ultimately have been liable for any judgments since the longshoremen had loaded and unloaded ships operating under wartime cost-plus contracts. The federal government's interest in the outcome was intensified by the more than 200 additional suits that had been filed in the interim.⁷ At issue was the collective bargaining agreement between the ILA and the defendant employers, which provided for two classes of pay: a straight-time hourly rate of \$1.25 for all work performed between 8 a.m. and noon and from 1 p.m. to 5 p.m., Monday through Friday, and from 8 a.m. to noon Saturday, and a so-called overtime rate of \$1.875 for work performed at any other time regardless of how many hours the employees worked during those other times. This arrangement had been in effect for decades; the only change that the parties made after the FLSA went into effect was relabeling: wages for the core hours were called "straight time" and all others "overtime rates."⁸

Ryan testified at trial that:

we did not need the Fair Labor Standards Act. We were able to collective [sic] bargain, and by that bargaining made an eight-hour day and time and a half for overtime. ... We have that without the Fair Labor Act. The only place it helped us was if a fellow was

⁵"Dock Workers Sue for \$800,000 Pay," *N.Y. Times*, Oct. 5, 1945, at 14:6. Intriguingly, the plaintiffs' lawyers were members of the firm of Goldwater and Flynn; Edward J. Flynn was leader of the Bronx Democratic Party (1922-53), chairman of the Democratic National Committee (1940-42), and President Roosevelt's long-time confidant, while Ryan, the ILA president, had long been a leading figure in Tammany Hall. *Amendments to the Fair Labor Standards Act of 1938: Hearings Before the House Committee on Education and Labor*, 81st Cong., 1st Sess. 1:619 (1949) (testimony of Julius Bagley, attorney representing plaintiff-ILA members); Alfred Clark, "Monroe Goldwater Is Dead at 95," *N.Y. Times*, Nov. 24, 1980, at D11:1 (Lexis); Harold Faber, "Papers of Flynn Go to Hyde Park," *N.Y. Times*, May 20, 1984, sect. 1, pt. 2, at 48:4 (Lexis); Daniel Bell, "The Racket-Ridden Longshoremen: The Web of Economics and Politics," in *idem*, *The End of Ideology: On the Exhaustion of Political Ideas in the Fifties* 175-209 at 194 (rev. ed. 1966 [1960]). Much of Bell's essay, but not the material on the overtime issue, was taken from Daniel Bell, "Last of the Business Rackets," *Fortune* 43:89-91, 194-203 (June 1951).

⁶Rifkind had been legislative secretary to and later law partner of Senator Wagner. Eric Pace, "Simon Rifkind, Celebrated Lawyer, Dies at 95," *N.Y. Times*, Nov. 15, 1995, at D20:1 (Lexis). For a report on the decision, see "20 Longshoremen Lose Base-Pay Suit," *N.Y. Times*, Jan. 8, 1947, at 47:4.

⁷*Aaron v. Bay Ridge Operating Co.*, 162 F.2d 665, 668 n.5 (2d Cir. 1947); Petition for Writs of Certiorari at 16.

⁸*Aaron v. Bay Ridge Operating Co.*, 162 F.2d at 672 (Finding of Fact No. 33).

fortunate enough to work eight hours a day, Monday, Tuesday, Wednesday, Thursday and Friday, that before the Fair Labor Act he had to work Saturday morning for four hours at the single rate of pay. After the Fair Labor Act came in, if a man could work those times—it is very seldom a man works five straight days of eight hours, but if we worked five days, previous to last October [1945], before the Fair Standards Act came in, Saturday morning, due to our 44-hour contract, we had to work four hours on Saturday at the straight pay. When the Fair Standards Act came in, if we worked one hour on Saturday morning..., we got time and a half, provided we had the 40 hours in the previous five days.⁹

In fact, however, as Ryan was forced to admit on cross-examination, for seven years the ILA had acquiesced in employers' refusal to pay such Saturday morning overtime.¹⁰ And the plaintiffs were also correct in charging that all that the ILA and the employers had "sought to do...from 1938 on was to perpetuate the prestatutory wage pattern without adjusting their employment relations in any wise to the statutory requirements."¹¹

The plaintiff-workers—whom the ILA president mischaracterized at trial as "non-union members who do not know anything about how our organization was built up"¹²—argued that since the higher rate was merely a shift differential for inconvenient night and weekend work, they were entitled to time and a half for any hours above 40. ILA president Ryan sought at trial to characterize the wage-hour structure as driven by anti-overtime sentiments:

Our objective was to de-casualize longshore work as much as possible, to have the work done in the daytime as much as possible, and make it as expensive for the employers as possible on Sunday. ... We wanted to work in the daytime. We figured we lived only once. We want the daytime when every man who wants to work wants it done in the daytime and not during overtime. The employers would say it cannot be done in the steamship industry. I think we have proven for them that after 30 years of negotiating many of the things they said could not be done in the industry, when they found it too expensive to do it any other way, have been done.¹³

Rifkind saw a "certain plausibility" in both positions: on the one hand, workers who worked only nights received no premium pay after 40 hours; on the other hand, the agreement established a regular rate, of which the employers paid time

⁹Testimony of Joseph B. Ryan, Transcript of Record at 189-90, Bay Ridge Operating Co.

¹⁰Testimony of Joseph B. Ryan, Transcript of Record at 190-95, Bay Ridge Operating Co.

¹¹Brief for Respondents at 76-77.

¹²Testimony of Joseph B. Ryan, Transcript of Record at 177, Bay Ridge Operating Co.

¹³Testimony of Joseph B. Ryan, Transcript of Record at 173, Bay Ridge Operating Co.

and a half both for hours beyond 40 and, although the FLSA did not even require it, also for certain shift work. In seeking to reconcile three national policies (the NLRA, FLSA, and the wartime need for maximum production), Rifkind put great store by Ryan's testimony about the ILA's goals as well as by his statement that the suit "'might wipe out all of the gains we have made for our men over a period of 25 years,'" during which there had been no strikes.¹⁴

Rifkind's decision was driven by his perception that the collectively bargained wage system was the "natural development of a long history" and "not an artificial rearrangement of pre-F.L.S.A. rates of compensation in order to avoid additional compensation."¹⁵ He offered examples of superior terms of employment embodied in other collective bargaining agreements to buttress his claim that application of the plaintiffs' approach "would create havoc with established labor relations, put collective bargaining in the category of a device for obtaining money under false pretenses and probably strain the resources of a substantial proportion of American industry."¹⁶ The first example involved a regular contractual workweek of 36 hours, although the actual workweek was longer than 40 hours. The workers therefore received time and a half for all hours beyond 36, although the FLSA overtime requirement did not kick in until they had worked 40 hours. Because the average rate for 40 hours included time and a half for four hours, the workers' overtime rate, which was calculated as 150 percent of the straight-time rate for 36 hours, did not include the contractual overtime for hours 36 to 40. Nevertheless, Rifkind saw nothing in the FLSA to foreclose such "bona fide" union contracts. In the other example, a collective bargaining agreement provided for daily time and one-half overtime for hours beyond eight regardless of whether the workers worked 40 hours during that week. In weeks in which they worked five ten-hour days, they therefore received overtime for eight hours included within the first 40 hours, and the rate for hours in excess of 40 (all worked on the fifth day) was less than 150 percent of the average rate for the first 40 hours because it was calculated on the basis of the straight-time rate excluding the contractual overtime premium. Again, Rifkind concluded that applying plaintiffs' approach would merely deter employers from entering into such agreements in the first place.¹⁷

Finally, Rifkind was persuaded by the voluminous expert testimony that the premium was not merely a shift differential, which traditionally ran to only 5 to 15 cents per hour and was not designed to deter employers from operating, but to attract workers to work during less desirable hours without inhibiting the work.

¹⁴Addison v. Huron Stevedoring Corp., 69 F. Supp. 956, 957, 958 (S.D.N.Y. 1947).

¹⁵Addison v. Huron Stevedoring Corp., 69 F. Supp. at 959-60.

¹⁶Addison v. Huron Stevedoring Corp., 69 F. Supp. at 959.

¹⁷Addison v. Huron Stevedoring Corp., 69 F. Supp. at 958.

The longshoremen's 50 percent premium was designed to deter and largely succeeded in "curtailing...abnormal hours."¹⁸

Judge Rifkind had in fact been misled by the trial testimony of the eminent labor historian and economist Philip Taft. Testifying on behalf of the defendant employers, Taft, in response to a question as to whether "overtime" had had a generally accepted meaning before the FLSA, stated that it described "excess time...." After the judge sustained plaintiffs' objection to a follow-up question on the grounds that it was unclear, Rifkind himself intervened to help clarify the concept. Taft bluntly denied that "the idea of excessivity [was] an essential element of overtime" before the FLSA. Instead, he argued that it was "made up of two specific ideas, one arising in excess of a particular sequence, and the other may be a specific enumeration of hours." When Rifkind then asked him whether he meant that overtime before 1938 had meant "time in excess of a stipulated period, or...any time, whether in excess of not in excess, which was penalized...in the method of payment," Taft replied that the "two concepts were usually joined together." Yet when the judge asked whether the second concept was ever found without the first, Taft could not recall. But when Rifkind asked the logical follow-up question as to whether "excessivity was always an element of the overtime," Taft's replied incoherently: "Only in the sense that the definition was there."¹⁹ Rifkind nevertheless adopted Taft's opinion in his findings of fact, which stated that although "excess time" had generally been the meaning of "overtime" before the FLSA, the "idea of excessivity...was not an indispensable element of the concept of overtime as understood," which also included "hours outside of a specified clock pattern."²⁰

The plaintiffs identified the self-contradictory structure of the employers' and the ILA's rhetoric by underscoring that Ryan's testimony concerning the union's purpose in demanding higher rates for night and weekend work "contemplate[d] no deterrent against working long or excessive hours; it merely reflects the natural human desire to work by day and retire at night. But petitioners, following the line of their experts' testimony, urge that overtime as understood in American industry has always included, as an alternative concept, hours outside a basic clock pattern." But, the plaintiffs noted, contrary to Taft's testimony, "virtually all collective contracts include excessivity as an essential element in the computation of overtime."²¹ Although the workers argued forcefully that the 50-percent premium for night work was compensation for its "general undesirability" and not for

¹⁸Addison v. Huron Stevedoring Corp., 69 F. Supp. at 961. Philip Taft testified to this effect about shift premiums; Transcript of Record at 332, 338, Bay Ridge Operating Co.

¹⁹Transcript of Record at 325-27, Bay Ridge Operating Co.

²⁰Findings of Fact 28 (a), Transcript of Record at 604-605, Bay Ridge Operating Co.

²¹Brief for Respondents at 66-67.

excessivity of hours, they failed, as far as Judge Rifkind was concerned, to rebut the quantitative argument that 50 percent was otherwise never found as the hallmark of a mere shift premium.²² In fact, a BLS survey of collective bargaining agreements in effect in the second half of 1946 revealed no shift differentials remotely approaching those at issue in the longshore case: many amounted to only a few cents, and none exceeded 15 percent.²³

The unanimous Second Circuit decision in June 1947 reversing the district court, though written by the premier realist judge, Jerome Frank, oddly refrained from addressing any of Rifkind's real-world concerns about the potential for undermining collective bargaining and the negotiation of terms superior to those required by the FLSA. Instead, it bloodlessly ruled that the regular rate could not be determined by collective bargaining agreements, but only as an "actual fact";²⁴ the regular rate was therefore to be calculated by dividing total compensation by total hours worked.²⁵

After the Second Circuit panel handed down its decision, the workers' lawyers estimated that total back overtime claims for the industry could range between \$25 million and \$50 million.²⁶ Two months later, in August 1947, the same lawyers filed two additional suits against 60 stevedoring companies listing 3,000 stevedores as plaintiffs. They deviated from the usual procedure of waiting until the Supreme Court had ruled on the test cases because the Portal-to-Portal Act, which would go into effect on September 12, had cut the statute of limitations to two years and would have excluded all the world war claims.²⁷ In its amicus brief in *Bay Ridge Operating Company* before the Supreme Court, the NAM had asserted that if plaintiffs prevailed, the ensuing litigation might exceed the volume spawned by the *Mt. Clemens Pottery Company* portal-pay decision.²⁸

In June 1948, the Supreme Court upheld the workers' claims and rejected the position advocated by the United States and the ILA. The majority, agreeing with the Second Circuit on the regular rate as an actual fact, ruled that it can be calculated by dividing weekly compensation by hours worked unless the compensation

²²Brief for Respondents at 76.

²³"Premium Pay Provisions in Selected Union Agreements," *Monthly Lab. Rev.* 65(4):419-25 at 423-24 (Oct. 1947).

²⁴*Aaron v. Bay Ridge Operating Co.*, 162 F.2d at 668 (citing *149 Madison Avenue Co. v. Asselta*, 331 U.S. 199 (1947)).

²⁵*Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 458 (1948).

²⁶"Pier Men Upheld on Overtime Pay," *N.Y. Times*, June 8, 1947, at 27:1.

²⁷"3,000 Stevedores Sue for Millions," *N.Y. Times*, Aug. 17, 1947, at 16:7. See also Linder, "Moments Are the Elements of Profit" ch. 3.

²⁸Brief of the National Association of Manufacturers as Amicus Curiae at 7, *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446 (1948). See also "Overtime-on-Overtime—Administrative Interpretations," *N.A.M. Law Digest* 10:57 (1948).

includes an overtime premium since “Congress could not have intended” a pyramiding of overtime on overtime, which would have “expanded extravagantly” the scope of liability contemplated by Congress.²⁹ Without any reasoning, the Court rejected Rifkind’s conclusion that the night premium was too large to have been merely a shift premium; it found that the size of the differential “cannot change the fact that large wages were paid for work in undesirable hours...or because the contracting parties wished to compress the regular working days into the straight time hours as much as possible.” They therefore did not fall under the rubric of an overtime premium, which the majority held to be “an additional sum received by an employee for work because of previous work for a specified number of hours in the workweek or workday” whether specified by statute or contract.³⁰

In an adroitly argued dissent, Felix Frankfurter, joined by Justices Jackson and Burton, provided the sociological underpinning for Judge Rifkind’s view that employers should not be deterred from entering into legitimate collective bargaining agreements that offered workers terms superior to those of the FLSA by fears of back overtime liability for wages neither party had ever contemplated paying. Having learned the recent lesson of the portal-pay dispute, Frankfurter warned that Congress would not suffer yet “another doctrinaire construction by the Court of the Fair Labor Standards Act in disregard of industrial realities.” Accusing the majority of abstractly treating the FLSA’s words “as though they were parts of a cross-word puzzle” rather than “the means by which Congress sought to eliminate specific industrial abuses,” Frankfurter charged that the Court had totally disregarded the struggle of a “strong union” against “anarchic exploitation of the necessities of casual labor....” Instead, the majority, getting an arithmetical answer to its own arithmetical question, “substitute[d] an arrangement rejected both by the union and the employers as inimical to the needs of their industry and subversive” of collective bargaining.³¹

Frankfurter argued that since the collective bargaining agreement’s objectives of discouraging overwork and underemployment were congruent with the FLSA’s, Congress did not authorize the courts to weaken a strong union by undermining its contracts. The dissent also criticized the majority for subjecting collective contracts “to the hazards of self-serving individualism” of a few union members in the absence of any judicially established evidence that the union officials had ignored or betrayed their responsibility and negotiated a sham con-

²⁹Bay Ridge Operating Co. v. Aaron, 334 U.S. at 464, 465.

³⁰Bay Ridge Operating Co. v. Aaron, 334 U.S. at 469, 475, 471.

³¹Bay Ridge Operating Co v. Aaron, 334 U.S. at 478, 479, 484 (Frankfurter, J., dissenting).

tract that did not serve the interests of the union as a whole.³²

These barbs resembled the reproach that the ILA's amicus brief had directed at the plaintiffs for wanting to repudiate what the collective bargaining agreement had established as regular and overtime rates, which were "far higher than those required" by the FLSA. The plaintiffs were then cast in the role of selfish and self-destructive ingrates: "Without collective bargaining these very plaintiffs who now seek overtime and overtime rates ranging up to \$3.75 per hour...might, like millions of other American workers, still be working at the \$.40 per hour minimum provided by the Act."³³

Curiously, neither Frankfurter nor the majority nor the Second Circuit judges ever alluded to the ILA's extremely undemocratic structure. The entire sociological edifice of Frankfurter's critique should have collapsed under revelation of the fact that the ILA was autocratically run by Joseph Ryan—also known as "King Ryan" after he had himself made president for life in 1943³⁴—a corrupt right-winger in cahoots with mobsters and employers.³⁵ Only the plaintiffs in their Supreme Court brief, and even then only indirectly, hinted at the ILA's less than militant democracy. But even while citing secondary authorities that criticized the central institution of longshore industrial relations, the shape-up, as propagating "'favoritism, bribery, and demoralization,'" the plaintiffs rushed to disavow any "purpose...to advance social reform...."³⁶

Evidence establishing the ILA's undemocratic structure and policies was abundantly available. Studying the ILA for *Fortune* in 1951, future Harvard University sociology professor Daniel Bell, concluded that the union was one of few in the United States to "encourage cutthroat competition among men for jobs or tolerate a condition of job insecurity."³⁷ From World War I until the end of World War II, the ILA had engaged in a "pattern of economic accommodation...which worked to the benefit of the shipowners and the union barons and against the interest of the men."³⁸ Ryan could truthfully boast at trial that there

³²Bay Ridge Operating Co v. Aaron, 334 U.S. at 485-87, 492-93 (Frankfurter, J., dissenting).

³³Brief on behalf of ILA as Amicus Curiae in Support of Petitioners' Petition for Writs of Certiorari at 8-9.

³⁴"Longshoremen Plan Fight on Labor Bill," *N.Y. Times*, July 12, 1947, at 2: 6; 95 *Cong. Rec.* 1446 (1948) (Rep. Vito Marcantonio). On Ryan's dictatorial methods, see 1 *Amendments to the Fair Labor Standards Act of 1938: Hearings Before the House Committee on Education and Labor*, 81st Cong., 1st Sess. 605-608 (1949) (testimony of Julius Bagley, attorney representing plaintiff-ILA members in overtime suits).

³⁵Walter Galenson, *The CIO Challenge to the AFL: A History of the American Labor Movement 1935-1941*, at 436, 448 (1960).

³⁶Brief for Respondents at 18-19.

³⁷Bell, "The Racket-Ridden Longshoremen," at 181.

³⁸Bell, "The Racket-Ridden Longshoremen" at 197.

was “never a strike since 1907 until 1945,”³⁹ but the collective bargaining agreements that the union secured “brought few benefits other than miniscule [sic] hourly wage increases for the men. ... The few rebellions...where the Communists sought to gain a foothold...were dealt with summarily.”⁴⁰ Rebellious members often “get conked on the head.”⁴¹ The ILA, as a sociological study of the longshore unions found, “distinguished itself as one of the least effective unions in the country. Judged even by the minimal standards of business unionism, the ILA was an abject failure....”⁴²

This cozy relationship was, according to Bell, threatened by the overtime lawsuits, which “scared the steamship operators” not only on account of the potentially large back-wage liability, but because the need to open the books to determine who was owed how much in wages “might reveal the extent of payroll padding, duplicate hiring, and other practices which, since the government was paying all bills during this period on a cost-plus basis, could only have been conducted on a collusive basis. The shipping companies demanded, therefore, that the union waive all claims for overtime pay.” After several twists and turns, including the first strike in the ILA’s history in 1948, the union and the employers agreed to urge Congress to overrule the Supreme Court’s *Bay Ridge Operating Company*: “It was a rare act of ‘sacrifice’ on the part of a union: abandoning several millions of dollars of legally entitled back pay...to ensure labor-management ‘harmony.’”⁴³ A few years later even the conservative AFL could no longer ignore the overwhelming evidence and expelled the ILA for its connections to mobsters and acceptance of bribes from employers.⁴⁴

Representative Angier Goodwin (R. Mass.) quickly became the chief congressional sponsor of amending the FLSA to wipe out any liability for the shipping companies. In July 1947, just a few weeks after the Second Circuit had issued its decision, Goodwin introduced a bill whose long preamble was taken

³⁹Testimony of Joseph Ryan (1946), Transcript of Record at 174, *Bay Ridge Operating Co.*

⁴⁰Bell, “The Racket-Ridden Longshoremen” at 197.

⁴¹Matthew Josephson, “Red Skies over the Water Front,” *Colliers* 118:17, 88-90 at 89 (Oct. 5, 1946).

⁴²Howard Kimeldorf, *Reds or Rackets? The Making of Radical and Conservative Unions on the Waterfront* 15 (1988).

⁴³Bell, “The Racket-Ridden Longshoremen” at 199-201. For a more benign account of the ILA’s position, stressing that the contract gave longshoremen more than the FLSA would have given them, and that the ILA’s cooperation with employers in opposing the suits and urging congressional amendment of the FLSA was merely an effort to preserve the integrity of its collective bargaining agreements along the same lines pursued by other unions, see Vernon Jensen, *Strife on the Waterfront: The Port of New York Since 1945*, at 54-64 (1974).

⁴⁴Kimeldorf, *Reds or Rackets?* at 15.

verbatim from the Portal-to-Portal Act, which had been enacted two months earlier, replete with references to “immense” liabilities, serious impairment of capital resources, “financial ruin of many employers,” “windfall payments,” “champertous practices,” and “Nation-wide industrial conflict.”⁴⁵ Without making any reference to longshoremen, Goodwin’s bill would have disposed of “pyramided overtime compensation” simply by entitling “employers and their employees” to fix regular and overtime rates “individually” or through collective bargaining and then prohibiting the use of such a contractual overtime rate in computing the FLSA regular rate.⁴⁶ Goodwin would also have wiped out liability retroactively by depriving the courts of jurisdiction over any actions not in conformity with the new definition of “regular rate,” even if those cases had been filed before the new law’s effective date.⁴⁷

After Congress had taken no action on Goodwin’s bill in the first session of the Eightieth Congress, on April 20, 1948, before the Supreme Court had decided the case, Goodwin, conjuring up exactly the same astronomical figure that he and others had bandied about a year earlier during the portal-pay hysteria,⁴⁸ declared to the House of Representatives that (unnamed) “[s]tatisticians have calculated” that a potential liability of “\$6,000,000,000. I repeat, \$6,000,000,000” loomed like a “monstrous and destructive Frankenstein,” bringing with it “ruin and bankruptcy for management in many lines of business.” Certifying the correctness of each other’s figures, he and Representative Rankin (D. Miss.) engaged in a colloquy creating the “astounding” factoid that \$6 billion exceeded the value of the entire wheat and cotton crops.⁴⁹

At a joint conference in New York two weeks later, which urged Congress to intervene to ward off a “catastrophe of national proportions,” Representative Goodwin announced that more than fifty industries were threatened by the \$6-billion liability. The ILA’s lawyer, Louis Waldman, sermonized that the “whole commercial and social structure of the country...was based upon the concept of freedom of contract, which could not be had without good faith. ... He contended that ‘the good faith of American labor in dealing with its employers has been thwarted as a result’” of WHD interpretations and court decisions.⁵⁰

Even before the Supreme Court published its *Bay Ridge Operating Company* decision, legislators had initiated the process to relieve employers of past and future liability. Although Senator Ball’s omnibus FLSA revision bill, which in-

⁴⁵H.R. 4387, § 1, 80th Cong., 1st Sess. (1947).

⁴⁶H.R. 4387, § 2.

⁴⁷H.R. 4387, § 4.

⁴⁸93 *Cong. Rec.* 1497 (1947).

⁴⁹94 *Cong. Rec.* 4652-54 (1948).

⁵⁰“Overtime Revision by Congress Urged,” *N.Y. Times*, May 4, 1948, at 51:1.

cluded an anti-overtime-on-overtime provision, had been introduced earlier in the session,⁵¹ on May 12, 1948, Goodwin introduced a bill devoted exclusively to this issue. It would have redefined “regular rate” to exclude any overtime premium, which was defined to include payment “because the employee has previously worked a specified number of hours during a specified period or because of the time of day or the day of the week or year the work is performed.”⁵² A week later Goodwin availed himself of yet another forum at a hearing on his bill before a subcommittee of the House Judiciary Committee apparently attended only by Representative John Gwynne, the leading House figure in the previous year’s enactment of the Portal-to-Portal Act. Having learned the value of rhetorical overkill in winning that battle, Goodwin, who stressed the “disturbing parallel” to the portal-pay litigation, declared: “There is no more important problem facing American industry today than that raised by a recent judicial interpretation” of the FLSA.⁵³ Senator Wiley, who had also played a leading role in the portal-pay legislation in 1947, filed the companion bill in the Senate.⁵⁴

Pro-labor congressmen belittled Goodwin’s legal analysis, predictions, and data. On May 20, Representative Francis Walter (D. Pa.)—just beginning his career as a leading red hunter with the House Committee on Un-American Activities⁵⁵—expressed surprise before the House that anyone could argue that longshoremen’s wages fell under the overtime rubric. Moreover, the Portal Act, which Congress had just passed the previous year, would considerably reduce any liabilities by virtue of its short statute of limitations and the defense it offered employers who relied in good faith on the Administrator’s interpretation. In addition to pointing out that, since the longshoremen’s wage system was unique, other industries were unaffected, Walter stressed that Goodwin’s bill and others

⁵¹S. 2386, 80th Cong., 2d Sess. (Mar. 25, 1948). Ball’s bill inserted a very lengthy definition of “regular rate” into the definitions section of the FLSA, which would have excluded from “normal, straight-time compensation and...credited to overtime compensation...overtime premiums paid for work performed in excess of the normal weekday or workweek scheduled in good faith by established practice or a collective-bargaining agreement” as well as overtime premiums for work performed on weekends and holidays. *Id.* § 2(n). Ball’s bill never got out of committee, and Ball, a Republican from Minnesota, lost his seat in the 1948 election.

⁵²H.R. 6534, § 4. 80th Cong., 2d Sess. (1948). The overtime rate also had to be at least one and a 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 include[] any other true overtime rate.”

⁵³Transcript of Proceedings, House Committee on the Judiciary, Subcommittee No. 2, H.R. 6534, at 10, 6-7 (May 20, 1948) (unpublished).

⁵⁴S. 2728, 80th Cong., 2d Sess. (May 24, 1948). Senator Butler filed an identical bill, S. 2832, on June 8.

⁵⁵David Cate, *The Great Fear: The Anti-Communist Purge Under Truman and Eisenhower* 92, 377, 386 (1979), discusses Walter’s efforts to undermine the left-wing United Electrical Workers.

were in reality designed to “stampede[]” Congress into adopting legislation that “would deprive 20,000,000 workers of the overtime benefits” of the FLSA by permitting employers to “select...anything you wish to be called the regular rate of pay so long as it is 40 cents or more an hour.”⁵⁶

In July 1948, employers “breathed a little easier” when the WHD issued an official interpretation indicating that *Bay Ridge Operating Company* “wasn’t as far-reaching as many had feared at first.” Under the new interpretation—good-faith reliance on which would protect employers under the Portal-to-Portal Act—if premium pay for weekend, holiday, or night work was paid only after workers had already worked a specified number of hours or days under some bona fide standard, it qualified as overtime compensation and could be excluded from the calculation of the regular rate.⁵⁷ By August 1948, Ryan appeared even more eager to resolve the issue than the employers. Quoting Representative Fred Hartley, Jr., whose infamous anti-labor bill had just been enacted, he called for a special session of Congress to resolve the question of overtime rates for night workers.⁵⁸

The CIO unions took a different approach than the ILA and the AFL to the “smear campaign...coined ‘overtime on overtime,’ which is deliberately designed to mislead and confuse the issue.”⁵⁹ Whereas the AFL supported the proposed amendment of the FLSA as “forestall[ing] a chaotic situation in many industries,”⁶⁰ the UAW, though deciding not to file any suits, at the same time declared that it would contest any moves by employers to use *Bay Ridge Operating Company* as a pretext for eliminating premium pay for weekends or holidays or shift differentials.⁶¹ The CIO also attacked AFL unions like the ILA by observing that “we do not believe that unions should be able to trade away time and a half for work after 40 hours in order to get some other benefit. ... We believe that the undermining of uniform overtime standards will again encourage chiselers to gain a competitive advantage at the expense of their employees’ wages and living

⁵⁶94 *Cong. Rec.* 6204 (1948). Lawyers for the plaintiff-stevedores had stated at the time they filed two additional suits in 1947 that “virtually no overtime is accumulated by longshoremen during peace times.” “3,000 Stevedores Sue for Millions.”

⁵⁷“New Premium-Pay Rules,” *Bus. Wk.*, July 24, 1948, at 94.

⁵⁸“Pier Pay Dispute May Go to Truman,” *N.Y. Times*, Oct. 2, 1948, at 31:5.

⁵⁹*Amendments to the Fair Labor Standards Act of 1938: Hearings Before the House Committee on Education and Labor*, 81st Cong., 1st Sess. 1:260 (1949) (resolution adopted by the CIO, Portland, Ore., Nov. 1948).

⁶⁰*Amendments to the Fair Labor Standards Act of 1938: Hearings Before the House Committee on Education and Labor*, 81st Cong., 1st Sess. 1:328 (1949) (statement of Walter Mason, national legislative representative, AFL).

⁶¹“Easy on Overtime,” *Bus. Wk.*, Nov. 13, 1948, at 108.

standards.”⁶²

During negotiations to settle the East Coast dock strike in late 1948, Secretary of Labor Tobin promised stevedoring employers that the Truman administration would submit legislation to Congress overruling the Supreme Court’s decision.⁶³ Expediting its passage as a separate FLSA amendment ahead of enactment of a long overdue increase in the minimum wage, Democrats early in the Eighty-First Congress, control of which had passed back to them with Truman’s election, filed a bill in the House to overrule *Bay Ridge Operating Company*. Limited to long-shore and construction work, and also purely prospective, H.R. 858 was passed by the House in February.⁶⁴ Executing the Truman administration’s position that quick action was necessary “to remove serious difficulties in the maintenance of desirable labor standards arrived at through collective-bargaining agreements, and in order to prevent labor disputes,”⁶⁵ the Senate Labor Committee, amended the bill both to extend its reach to all of industry and to make it retroactive,⁶⁶ as Congress had done with the portal-pay claims two years earlier.⁶⁷

Significantly, one of the reasons Congress adduced for treating the two disputes similarly was the fact that “in both cases, the filing of suits was deplored by responsible A. F. of L. officials....”⁶⁸ The electricians unions, for example, declared that it would not oppose employers’ efforts to override *Bay Ridge Operating Company* “because it is not our policy to seek gains beyond our agreements.”⁶⁹ Indeed, the ILA’s general counsel coyly testified before Congress that the union did not sponsor retroactivity, but “if the employers can persuade Congress to incorporate retroactivity...we do not oppose it.”⁷⁰ The CIO, in con-

⁶²*Fair Labor Standards Act Amendments: Hearings Before a Subcommittee of the Senate Committee on Labor and Public Welfare*, 80th Cong., 2d Sess., Pt. 2 at 1026 (1948) (statement of Food, Tobacco, Agricultural and Allied Workers of America, CIO).

⁶³“Help on Overtime,” *Bus. Wk.*, Dec. 18, 1948, at 112; *Amendments to the Fair Labor Standards Act of 1938: Hearings Before the House Committee on Education and Labor on H.R. 2033*, 81st Cong., 1st Sess. at 16.

⁶⁴H.R. 858, 81st Cong., 1st Sess. (1949).

⁶⁵*To Clarify the Overtime Compensation Provisions of the Fair Labor Standards Act of 1938, as Amended: Hearings Before a Subcommittee of the Senate Committee on Labor and Public Welfare*, 81st Cong., 1st Sess. 2 (1949) (letter from Secretary of Labor Maurice Tobin to Sen. Elbert Thomas, Feb. 18, 1949).

⁶⁶S. 336, 81st Cong., 1st Sess. (1949), from the beginning had applied to all industries, but not retroactively.

⁶⁷See Linder, “*Moments Are the Elements of Profit*” ch. 3.

⁶⁸*Clarifying Overtime Compensation Under the Fair Labor Standards Act of 1938, as Amended*, S. Rep. No. 402, 81st Cong., 1st Sess. 9 (1949).

⁶⁹*To Clarify the Overtime Compensation Provisions of the Fair Labor Standards Act of 1938, as Amended* at 638 (letter from D. Tracy, pres., IBEW, to Sen. Elbert Thomas).

⁷⁰*To Clarify the Overtime Compensation Provisions of the Fair Labor Standards Act of 1938, as Amended* at 40 (testimony of Louis Waldman).

trast, did not support the bill because “there was no reason why this overtime problem should be dealt with in advance of modernizing the Wage and Hour Act generally to give relief to the millions of workers who were denied adequate wage and hour protection.” The CIO would not have objected to a purely prospective bill limited to longshoring, but it also stressed that the impact of *Bay Ridge Operating Company* had been vastly exaggerated: the Portal-to-Portal Act would wipe out some claims anyway, while others would not stand up because relatively few longshoremen were employed for more than 40 hours by the same employer.⁷¹

The Senate passed the so-called overtime-on-overtime bill in May and the customarily choreographed bombastic debates were staged in the House. Proponents of the bill accused some of the lawyers behind the litigation of being communists and characterized the suits themselves as “one of the largest and most vicious rackets in the history of the country and the legal profession.”⁷² After differences were resolved in conference, President Truman signed it into law in August.⁷³ The amended FLSA provided that with respect to overtime payable to an employee who is paid for work on weekends, holidays, or the sixth or seventh day of a workweek at a premium rate not less than 1.5 times “the rate established in good faith for like work performed in nonovertime hours on other days,” or who is paid for work outside the basic, normal, or regular workday (up to eight hours) or workweek (up to 40 hours), at a premium rate at least 1.5 times the rate established for like work performed during such workday or -week, the additional compensation of such a premium rate does not count as part of the regular rate.⁷⁴ The amendment also eliminated employers’ liability in any FLSA suits filed before or after the new law went into effect alleging a failure to pay compensation for overtime work performed before the law into effect, provided that the compensation paid met the new standard.

Later, in 1949, when the FLSA was comprehensively revised, this first amendment was repealed⁷⁵ and subsumed within the new subsection of the act defining “regular rate” for the first time. Henceforward employers could lawfully exclude from the regular rate and credit against their statutory overtime liability

⁷¹To Clarify the Overtime Compensation Provisions of the Fair Labor Standards Act of 1938, as Amended at 201-202 (statement of Irving Levy, general counsel, UAW, representing the CIO).

⁷²95 Cong. Rec. 9491-92 (1949) (Rep. Werdel, R. Cal.).

⁷³See *Clarifying Overtime Compensation in Certain Industries Under the Fair Labor Standards Act*, H. Rep. No. 121, 81st Cong., 1st Sess. (1949); *Clarifying Overtime Compensation Under the Fair Labor Standards Act of 1938, as Amended*, S. Rep. No. 402.

⁷⁴Act of July 30, 1949, §§ 1-2 ch. 352, 63 Stat. 446, 447.

⁷⁵Fair Labor Standards Amendments of 1949, Pub. L. No. 393, § 16(f) 63 Stat. 910, 920.

the following categories of premium wages:

extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) or in excess of the employee's normal working hours or regular working hours...;

extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or

extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a)[]), where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek.⁷⁶

The longshoremen's litigation and its congressional consequences raised the same issues that the portal-pay dispute had generated in 1947: what happens when highly paid unionized workers take the initiative in pushing back the outer limits of labor standards legislation the primary beneficiaries of which Congress had never intended them to be?⁷⁷ Like the workers demanding to be paid for the time they had to devote to their employers' enterprise in walking to and from their work benches, the longshoremen had a compelling case: they could plausibly argue that they were being deprived of their statutory premium for the double burden of working extra-long hours at night. Their "regular rate" was manifestly the night rate at which they worked and not the lower day rate at which they did not work; under the FLSA, therefore, they seemed squarely entitled to the overtime premium on the night rate.⁷⁸ Nevertheless, their congressional opponents had little rhetorical difficulty in lumping them together with portal-pay litigants as pursuing claims totally lacking in "moral substance."⁷⁹

In contrast, the dispute over Belo plan wages for salaried employees working

⁷⁶Fair Labor Standards Amendments of 1949, § 7(d)(5-7), 63 Stat. at 914 (codified at 29 U.S.C. § 7(e) (5-7)).

⁷⁷See Linder, *"Moments Are the Elements of Profit"* ch. 3.

⁷⁸The Supreme Court faulted the U.S. government's argument for treating "of the entire group of longshoremen instead of the individual workmen.... The straight time hours can be the regular working hours only to those who work in those hours." *Bay Ridge Operating Co. v. Aaron*, 334 U.S. at 473.

⁷⁹95 *Cong. Rec.* at 9493 (Rep. Werdel citing magazine article).

irregular hours did not appear politically misguided. It not only focused on a perceived injustice to overtime workers, but was not confined to union workers; moreover, the campaign to prohibit or at least limit such plans was undertaken primarily not by unions, but by the Labor Department, which supported the shipping employers (and the ILA) in the longshoremen cases. That the Labor Department and workers also lost this battle does not undermine the judgment that, unlike the portal-pay dispute, it was not a self-destructive contest.

What New Deal insider-judges Rifkind and Frankfurter were really saying was that the longshoremen and their lawyers underrated the importance of Realpolitik: not only had the Congress in 1937-38 not intended the FLSA to give such additional legislative leverage to strong unions, but neither the Republican Eightieth Congress nor, as it turned out, the Eighty-First, governed by a Republican-Southern Democratic coalition, would ever put up with such legalistic readings. Because a quasi-monopolistic (albeit undemocratic and corrupt) union had cut a long-term and stable deal with employers to secure relatively high wages for their members, Rifkind and Frankfurter were willing to bend the FLSA to avoid a super-contractual wage their political sense told them Congress had never contemplated. They may also have speculated that the litigation strategy would have been futile in any event since employers, had they been forced to pay significant additional sums in the future for night-overtime, might merely have bargained for lower base rates to hold themselves harmless. Ironically, however, unlike the portal-pay plaintiffs, the longshoremen's judicial victory would have been less costly to their employers since night-overtime was largely a creature of World War II and did not represent a major future liability.

The most untoward consequence of the longshoremen's litigation was the political space that it fruitlessly occupied that could otherwise have been devoted to more vital struggles to expand the FLSA for workers for whom the FLSA was clearly designed. Two of the most important efforts that were crowded out of the legislative agenda in 1949 were raising the minimum wage to \$1.00 (instead of 75 cents), for which, for example, the Americans for Democratic Action was lobbying,⁸⁰ and which Congress did not enact for another six years,⁸¹ and extending minimum wage coverage to farmworkers in so-called industrial agriculture⁸²—a measure that did not become law until 1966.⁸³

⁸⁰*Amendments to the Fair Labor Standards Act of 1938: Hearings Before the House Committee on Education and Labor*, 81st Cong., 1st Sess. 2:1014-15 (1949) (testimony of Joseph Rauh, chairman of exec. comm., ADA).

⁸¹Fair Labor Standards Amendments of 1955, Pub. L. No. 381, § 3, 69 Stat. 711.

⁸²*Amendments to the Fair Labor Standards Act of 1938: Hearings Before the House Committee on Education and Labor*, 81st Cong., 1st Sess. 1:435 (1949) (testimony of Lazare Teper, research director, International Ladies Garment Workers Union).

⁸³Fair Labor Standards Amendments of 1966, Pub. L. No. 601, 80 Stat. 830.