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THE SEARCH FOR FINALITY IN WAGE AND HOUR LITIGATION

L. METCALFE WALLING†

I THINK it a fair statement to say that few people, certainly few Congressmen, imagined that the relatively simple language of the Fair Labor Standards Act of 1938 providing for overtime standards and minimum wages would proliferate so many lawsuits. The amount of litigation in the Supreme Court alone, to say nothing of the lower courts where the appeal machinery was not utilized voluntarily or refused by the courts on application, is a not inconsiderable portion of the calendar. To be sure, other issues than rates of pay or hours of work were involved in many of these cases, since arguing the proper interpretation of the Commerce Clause of the Constitution has not suddenly ceased to have charms for the litigant.

There are various explanations of this litigiousness, both on the part of the Administrator and individual employees, because, unlike many regulatory statutes, private rights are conferred. The fact that a half million employers more or less, including the biggest in the country by and large, and twenty odd million workers are subject to its provisions certainly has not lessened the tendency to litigate. The failure of the Act always to define precisely what it means has bred lawsuits. The novel character of the legislation by which the Federal Government enters the field of hour and wage control in a way which sets a basis for the whole economy of the country made the stakes high. But, in my judgment, no other single factor contributed so much to the sheer necessity of litigation, as distinguished from any inherent tendency to litigiousness on the part of the Government, employers or employees, as the inability of anyone to say definitively what the Act means until the highest court has spoken.

Nowhere in the Act is the Administrator given any power to interpret it in a general way. To be sure Section 203 is devoted exclusively to defining terms used in the Act and various other sections specifically

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2. There were, e.g., 31 Supreme Court cases through 1945, which includes the earliest period when litigation was just being commenced in the district courts.
5. E.g., the long history of interpretation of the phrase "regular rate" of pay in § 207 dealing with overtime.
authorize the Administrator to breathe life into the bare flesh and bones of certain terms but these sections are responsible for a numerically small part of the cases. The important litigation, both in bulk and significance, has arisen on other points where the Administrator could legally take no position which would protect a future litigant or create rights.

The sheer pressure of events and the need of employers to know how to make up next week's payroll before the round of litigation to the high court could be completed, as well as the common sense of the situation, led the Administrator early to adopt the policy of advising what his enforcement position would be until the courts required him to change it. The situation is therefore not so completely chaotic as it seems on first blush. There is a long series of interpretative bulletins and press releases widely distributed which made up a comprehensive, although not authoritative, body of law. Furthermore, the courts, including the Supreme Court, have given "great weight" to the Administrator's interpretation and statements of his enforcement position so that litigants who relied on them were often protected in subsequent suits.

The scope of this article is limited to the interpretations and litigation arising under the sections dealing with hours and wages because we now have authoritative decisions by the Supreme Court which have pretty completely pricked out on a case by case basis the delimitations in this area of the statute. The recent decision of the Supreme Court in the Stevedore cases involving the so called "overtime on overtime" issues has spoken the last judicial word on the problem of "regular rate" of pay although the ink was hardly dry on the decision before there was talk of amending the law to cure what some regarded as judicial legislation.

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6. Section 206 (a) (5) authorizing the “Administrator, or his authorized representative...to make such regulations or orders as are necessary or appropriate...”; § 207 (b) (3) authorizing the Administrator to determine industries of a “seasonal nature”; § 207 (c) authorizing the Administrator to define the area of production; § 213 (a) (1) authorizing the Administrator to define and delimit by regulations the terms “bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesmen”; § 214 authorizing the Administrator to regulate the “employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages...and of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury....”

9. But see Jewell Ridge Coal Corp. v. Local 6167, 325 U.S. 161 (1945) where the reliance was futile and expensive.
11. H.R. 6534, 94 Cong. Rec. 5892 (May 12, 1948) and S. 2728, 94 Cong. Rec. 6472 (May 24, 1948). Both bills were intended to define and limit the jurisdiction of the courts to regulate actions arising under certain laws of the United States. They were aimed at the re-definition of “regular rate” of pay in order to help eliminate countless suits.
and unwarranted interference with the collective bargaining process.\textsuperscript{12} The decision was an important factor in the recent negotiations between the various maritime unions and shipping companies ending in an injunction against a strike by the international longshoremen under the Taft-Hartley Act following the breakdown of negotiations.\textsuperscript{13} Lawyers may now fairly confidently advise their clients in this narrow field of the Act and this article may be helpful in tracing the evolution as well as stating the situation employers and employees confront today.

Now to return to the statute itself. The provisions of Sections 206 and 207 of the Act provide rather simply (1) for a sliding scale upward of wages from \$25\textsuperscript{c} an hour the first year to \$30\textsuperscript{c} the second with the ultimate goal of \$40\textsuperscript{c} to be reached automatically by 1945 if not earlier by industry committee action, and (2) a sliding scale downward for hours from 44 the first year to 42 the second and 40 hours the third and subsequent years, after which hours work can be performed to an unlimited amount provided a penalty rate of 50\% is added to the "regular rate" for hours beyond the specified standard.\textsuperscript{14} The key word here is "regular rate."

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which were expected to be based on the Court's overtime on overtime interpretation. Both were referred to the Committee on the Judiciary in the last session of Congress and died there but they will undoubtedly be reintroduced.

\textsuperscript{12} On this point see the pungent dissenting opinion of Mr. Justice Frankfurter, 334 U.S. 446, 477 (1948).

\textsuperscript{13} N.Y. Times, Aug. 22, 1948, Sports, p. 8, col. 4.

\textsuperscript{14} "Minimum wages; effective date

(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 208 of this title, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 208 of this title,

(5) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including
the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers.

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of sections 201-219 of this title.

(c) The provisions of paragraphs (1), (2), and (3) of subsection (a) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands engaged in commerce or in the production of goods for commerce only for so long as and insofar as such employee is covered by a wage order issued by the Administrator pursuant to the recommendations of a special industry committee appointed pursuant to section 205(e) of this title." 52 Stat. 1062 (1938), 29 U.S.C. § 206 (1940).

"Maximum hours

(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks,

(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand and eighty hours during any period of fifty-two consecutive weeks, or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature, and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, whey, skimmed
Since the controversies arising out of the minimum wage provisions of Section 206 are far less numerous and troublesome than those arising under the overtime provisions of Section 207, let us dispose of them first.

The first attack on the minimum wage machinery was made by the Opp Cotton Mills, Inc.,16 challenging the validity of the first minimum wage order, issued under Section 208 of the Act, which established a uniform country wide minimum wage of $3.20 an hour for the cotton textile industry. Section 208 (b) provides for the appointment of an "industry committee" composed of equal numbers of representatives of management, labor and the public which "shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry." Section 208 (c) provides: "The industry committee shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification." This subdivision goes on to prohibit the committee from making classification within an industry and the minimum wage itself "solely on a regional basis" but the committee and the Administrator must consider "among other relevant factors the following: (1) competitive conditions as affected by transportation, living and production costs; (2) the wages established for

milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

(d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of sections 201-219 of this title." 52 STAT. 1063 (1938), as amended, 55 STAT. 756 (1941), 29 U.S.C. § 207 (Supp. 1946).

work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and (3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum wage standards in the industry. The committee is further prohibited from adopting a classification on the basis of age or sex.

The Supreme Court, speaking through Mr. Justice Stone, sweepingly vindicated the constitutionality of the Act and brushed aside such suggestions as (1) the invalidity of the industry committee machinery and its relation to the Administrator's ultimate fixing of the minimum wage based on improper delegation of legislative power, (2) the argument that the appointment of the industry committee was void because the Administrator after its appointment changed the definition of the industry by eliminating the woolen industry from the definition of the textile industry, and (3) the contention that "due regard to the geographical regions in which the industry was carried on" was not given by the Administrator in the appointment of the committee.

There has been no further doubt of the validity of the minimum wage sections of the Act but a unique contention was made in United States v. Rosenwasser16 that the Act did not apply to piece rates because of the difficulty of translating them into hourly rates for the purpose of finding whether the required minimum rate had been paid. The Court made short shrift of this novel and groundless claim with a brief opinion in which all the Justices concurred except Mr. Justice Roberts. The case is interesting chiefly because of the startling nature of the defense and because it involved a criminal indictment.

Section 208 (f) requires the Administrator to phrase his minimum wage orders in such a way and with such conditions that circumvention of their terms will be prevented.17 This is a necessary and proper power to prevent nullification of the Congressional intent. There had been a long history of abuse in certain hand industries where industrial homework or work performed away from the factory on the premises of the worker, was characteristic. Studies had been made over a period of years on the unhealthy, unsanitary conditions under which goods were turned out with the labor of young children in the family assisting their elders to the detriment of their health. It had been amply demonstrated, if

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17. 52 STAT. 1064 (1938), 29 U.S.C. § 208 (f) (1940). "Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein."
demonstration were needed, that control of the conditions of such homework, including the hours and wages and child labor, was virtually impossible, certainly not effective. Accordingly the Administrator as a condition in his minimum wage order for the embroidery industry prohibited homework on the ground that there would otherwise be “circumvention or evasion thereof.” This condition was challenged on the grounds among others that the power not being specifically delegated could not be implied and that the presence of specific language covering the industrial homework situation in one draft of the Bill before a Congressional Committee indicated Congress had rejected the idea of control or prohibition of industrial homework.\(^{18}\) The Supreme Court found little difficulty in overriding the protest and validating the Administrator’s wage order including the offensive part. Although a relatively strong showing was made that present wage scales were above the minimum and that the threat to the standard was therefore remote, the long history of low wage conditions in the homework industries and the competition with factory work where the full burden of taxes, plant and overhead had to be fully borne undoubtedly influenced the justices. “The posture of the case therefore compels acceptance of the Administrator’s position that, without the prohibition, the wage rate cannot be maintained, and that circumvention and evasion cannot be prevented. . . . In this light petitioners’ position is, in effect, that the statute cannot be applied to this industry. Their argument is not put in those terms. It comes to that. So to state it is to answer it. The industry is covered by the Act.”\(^{19}\)

The other minimum wage problems such as whether overtime can be paid on the bare minimum as the “regular rate” or actual earning rate of the employee are bound up with the overtime problems, which of course ultimately resolve themselves into a question of wages, so we can pass on to Section 207. We shall have to give our attention not only to the problem of how to compute overtime and what is “regular time” and “overtime” but what goes into time worked for which the employer is obligated to pay.

As the automatic sliding scale of statutory hours began to drop from the original 44 to 40, the shoe began to pinch. It became worthwhile to devise schemes to cut down the cost of overtime and to try to avoid an increase in the wage cost as was obviously intended by the statute.\(^{20}\)

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19. Id. at 255.
20. Section 218 of the Act reads in part: “No provision [of this Act] shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under [this Act] . . . or justify any employer in increasing hours of employment
The pious declaration of intent, however, carried no penalties for its violation so that in practice an employer has never been restrained by court action from making a wage cut so long as he did not go below the minimum.

One of the best known and most popular of the various plans devised to provide stability of earnings was the *Belo* plan$^{21}$ adopted by a Dallas newspaper. This ingenious plan resulted in a weekly guaranty of $40 regardless of the number of hours actually worked, although the basic rate of pay was recited to be 67¢ per hour. In order to earn more than $40 the employee would have to work at least 54 1/2 hours. This of course had the effect of rendering inapplicable the so-called regular rate of 67¢ in any week where the employee worked less than 44 hours (at that time the maximum before the overtime penalty). In such short work weeks the employee would receive more than 67¢ an hour (that is the quotient obtained by dividing the hours actually worked into $40). If the hours exceeded 44, the amount in excess of 67¢ an hour could be denominated overtime but would be based not on the regular rate provision of the contract (67¢) but on the guaranty. If the theory of the statute is that hours worked beyond the statutory work week are designed to be more costly to the employer, fifty per cent more costly, as the Court said in a subsequent case$^{22}$ was the intent, then it seemed reasonable to conclude that this plan under which there was no greater expense to the employer for the forty-fifth hour than for the forty-fourth must fail. The Court however upheld the plan by a 5-4 decision, Mr. Justice Byrnes for the majority saying that the regular rate may be established by contract.$^{23}$ It was held not to be objectionable that the intent may have been to permit, insofar as possible, the payment of the same weekly wage as that paid prior to the Act.$^{24}$

The majority were not worried by any inconsistency between a $40 guaranty and a 67¢ "regular rate." They were obviously influenced by the security value to the employee of a regular weekly income, well above the then minimum of $10 and the assumption that the unorganized employees who assented to the new arrangement by not protesting the employer's letter outlining it in fact welcomed it. The majority emphasized, as pointed out in the dissenting opinion, that "Congress has said nothing to prevent maintained by him which are shorter than the maximum hours applicable [under this Act]. . . ."

$^{21}$ Walling v. A. H. Belo Corp., 316 U.S. 624 (1942). The Supreme Court specifically refused to regard the plan as an evasion of the Act and gave it its 5-4 blessing.


$^{23}$ But cf. Bay Ridge Operating Co. v. Aaron, 334 U.S. 446 (1948), where it was held that the Court will go behind the contract to find the reality.

$^{24}$ Section 218 of the Act to the contrary notwithstanding.
this desirable objective" and that "employer and employees have agreed upon an arrangement which has proven mutually satisfactory." It is to be noted that the case was brought by the Administrator to enjoin the employer's practice, not by an employee to recover underpayment of wages, and it is an interesting speculation whether the result would have been the same had the record been explicit that the employees were dissatisfied as would have been the case had they brought suit themselves. At any rate, Mr. Justice Reed who wrote the companion decision handed down the same day refused to accept the majority's premise and vigorously contended in his dissenting opinion that it could not be reconciled with his opinion in the *Missel* case in which all the Court joined except Mr. Justice Roberts who dissented without opinion, the Chief Justice concurring in the result, equally without opinion.

The *Missel* case was brought by a rate clerk of a motor transportation company for statutory overtime pay and it was abundantly clear that he had not acquiesced in his constant wage of $27.50 a week regardless of the hours he worked. As a matter of fact they fluctuated dizzily, running as high as 80 hours a week and averaging 65. The Court invalidated the constant wage plan pointing out that the statutory objective of making it costly to work employees long weeks was not beyond the constitutional power and that the obligation was to pay the premium not on the statutory minimum as base, or the "regular rate" but on the rate found by dividing the hours worked each week into the weekly wage. This was exactly the Administrator's interpretation which he had uniformly followed in his enforcement activities and of which he had failed to convince the requisite five justices in the *Belo* case. The inconsistency was readily apparent to almost everyone and the Administrator solved his dilemma of interpretation and implementation of the decision by construing narrowly the *Belo* doctrine and limiting its application to situations which fitted within its four corners and where all elements were present. As a practical matter, if not also a legal one, no other solution was possible in view of the generality of the holding in *Missell*, the narrowness of the holding in *Belo*, and the necessity for rule of thumb guidance of laymen, employers trying to know how to figure their payrolls, employees to know their rights, and government inspectors to know their duties. The language of the Court: "We have no doubt that pay by the week, to be reduced by some method of computation to hourly rates, was also covered by the Act" is a prophetic foreshadowing of the holding later in the *Rosenwasser* case that piece rates are equally covered. The problem of whether the additional amount plus the withheld wages

is true liquidated damages or a penalty was solved in favor of the former. There was no violation of due process regardless of the bona fides or reasonableness of the employer's assumption that his weekly wage scheme had been authorized by the statute.

In some ways the victory was a hollow one for employees because there is a kind of "Alice in Wonderland" situation with the hourly rate decreasing the longer the employee works. Since the wage remains constant the quotient is bound to be smaller as the divisor increases. We shall never know whether the Court would have sustained an arbitrary "regular rate" to be determined by dividing the statutory hours into the weekly wage on a non-fluctuating basis since the Administrator had never so interpreted the statute and that possibility was not before the Court.

Subsequent pronouncements of the Court, particularly in two cases, strongly hinted that the Belo doctrine was not a strong reed for an employer to lean on, that it was no longer good law and would be specifically overruled in a case squarely raising the question, if indeed it had not already been so weakened as not to represent the Court's current view. The first of these two cases, decided the same day, *Walling v. Youngerman-Reynolds Hardwood Co.*²⁷ involved the validity of a wage plan under which the basic or regular rate was recited to be 35¢ an hour although the incentive plan coupled with it actually resulted over the six month period before the trial of the case in earnings for the stackers of lumber under the guaranteed piece rates of 70¢ and 80¢ per thousand averaging 59¢ an hour including the hours beyond the statutory maximum. The Court brushed aside the employer's contention that its contract "regular rate" held despite the higher earnings from the piece rates and that it was complying with the Act since it was in fact paying overtime on at least the then minimum hourly rate. The irrelevance of the contract rate in these circumstances surprised many lawyers and employers who had been following the Belo doctrine but was firmly stated by the Court: "The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments. It is not an arbitrary label chosen by the parties; it is an actual fact. Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts. . . . The 35-cent per hour 'regular rate' fixed by the contracts is obviously an artificial one, however bona fide it may have been in origin. Except in the extremely unlikely situation of the piece

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²⁷. 325 U.S. 419 (1945).
work wages falling below a 35-cent per hour figure, this ‘regular rate’ is never actually paid.”28 Then came the stunning blow: “This Court’s decision in Walling v. Belo Corp., 316 U. S. 624, lends no support to respondent’s position. The particular wage agreements there involved were upheld because it was felt that in fixing a rate of 67¢ an hour the contracts did in fact set the actual regular rate at which the workers were employed. The case is no authority, however, for the proposition that the regular rate may be fixed by contract at a point completely unrelated to the payments actually and normally received each week by the employees.”29

One has to confess that the facts in Belo seemed to indicate that the “regular rate” was nearly as “completely unrelated to the payments actually and normally received each week by the employees” as in the case at bar. Walling v. Harnischfeger Corp.30 seemed to complete the nailing of the coffin on poor Belo and provide as decent an interment as was possible under the embarrassing circumstances. Here there was a collective bargaining contract excluding incentive earnings from the “regular rate” for the purpose of figuring overtime pay specifically but also for all purposes.31 Had not the Belo doctrine been carefully observed in the framing of the agreement? The Court said, however: “No contract designation of the base rate as the ‘regular rate’ can negative the fact that these employees do in fact regularly receive the higher rate. To compute overtime compensation from the lower and unreceived rate is not only unrealistic but is destructive of the legislative intent. A full 50% increase in labor costs and a full 50% wage premium, which were meant to flow from the operation of § 7(a), are impossible of achievement under such a computation. . . . The conclusion that only the minimum hourly rate constitutes the regular rate opens an easy path for evading the plain design of § 7(a). We cannot sanction such a patent disregard of statutory duties. . . . Until that premium [for overtime hours] is 50% of the actual hourly rate received from all regular sources § 7(a) has not been satisfied.”32 Obviously the only conclusion to draw is that a plan which does not include bonuses is “unrealistic” and “artificial” and therefore “evasive” but a plan which has no bonuses but still does not reflect the employee’s earning capacity where his hours vary although his weekly guaranty does not is not “evasive.”

28. Id. at 424.
29. Id. at 426.
31. Id. at 430. “. . . ‘the parties agree that, for all purposes, the regular rate of pay at which each employee who participates in an incentive plan is employed, is the base rate of each such employee.’”
32. 325 U. S. 427, 430 (1945).
The corpse proved surprisingly vital and came fully back to life when the Court expressed surprise that anyone could have thought Belo was not good law by validating another wage guaranty plan under which 84 hours had to be worked before the overtime rate had any reality. The Court was squarely asked to overrule Belo but the Chief Justice blandly stated for the Court: "There is nothing here to suggest different treatment of the two cases." Indeed it would seem that the Court's opinions in these cases [Walling v. Harnischfeger Corp., Walling v. Youngerman-Reynolds Hardwood Co. and Overnight Motor Transportation Co. v. Missel supra] far from undermining Belo, showed an affirmative concern that language appropriate to the situations then before us should not be extended to the different situation involved in this and the Belo case.

Although the Court made it clear it had considered the "substantially same" argument in Belo and rejected it, it did give a clue to its thinking: "Moreover, our holding in Belo has been a rule of decision in this Court for five years, and recognized as such on each appropriate occasion. Knowing of the Belo decision, the Congress has permitted § 7(a) to stand unmodified and the courts have applied it as so construed. Employers and employees (including those involved in this case) have regulated their affairs on the faith of it. Even if we doubted the wisdom of the Belo decision as an original proposition, we should not be inclined to depart from it at this time."

Perhaps a new Chief Justice took judicial notice of the criticism of the Court's changeableness in some of its decisions in recent years and thought it wise judicial statesmanship to invoke the doctrine of stare decisis. Three of his brethren however were unconvinced. Mr. Justice Rutledge would "restrict the effects of that decision [Belo] narrowly to the factual situation presented" but went along with the Court reluctantly because the "parties . . . and no doubt . . . others [had relied upon it] in making their arrangements."

He found the facts indistinguishable from those in Belo. Mr. Justice Murphy and Mr. Justice Black flatly said it was "impossible" to square the Halliburton wage scheme with Section 7; that Belo was "erroneous" and "irreconcilable" and "should therefore be overruled. Otherwise we shall be perpetuating and augmenting the unrealities and confusion which have marked the application of the doctrine of that case."
The majority view would seem to be the last act in the "regular rate" drama but there was to be an epilogue. It would seem almost impossible for still another new situation to arise but the stevedore industry provided it. Since 1916 the longshoremen have had an agreement providing for a higher rate of pay, frequently but by no means universally, 50% more than the "day rate." As a matter of fact since 1887 some premium rate for night work has been paid and the motive for so doing was admittedly to discourage night work. The contracts in question provided a basic work week of 44 hours (at the time the statutory standard) with "overtime" at the rate of a 50% premium for hours worked after 5 p.m. and before 8 a.m. on weekdays and after 12 noon on Saturday, and all day Sunday. Meal hours and designated holidays were to be considered "overtime," to which the special rate attached. There is no question that originally and up until the war period work at these hours was abnormal. For instance from 1932 to 1937, 80% of all time worked was in the straight time hours and only 2 1/2% of the time worked after 5 p.m. was worked by men who had worked no previous straight time. During the war years, however, only 55% of the total work fell within the contract straight time hours. Unfortunately for the companies in this litigation many of the workweeks showed time exclusively outside "regular" hours. The companies were in the embarrassing position of having to pitch their case on these facts wholly or partially present: (1) as to particular claimants, no regular hours were worked; (2) all time for the first 40 hours was outside the "regular" hours, that is between 5 p.m. and 8 a.m. or Saturday afternoons or Sundays; (3) the contract rate and actual rate were the same for the 1st hour as for the 41st; in short, overtime and straight time were the same. This was obviously flying in the face of the congressional intent and the earlier decisions making it clear that overtime was designed to be a penalty to discourage hours beyond 40, an added expense in the labor cost, and a 50% higher rate than the straight time regular hours up to 40. As the Court rephrased what it had said in previous cases, overtime is simply "Extra pay for work because of previous work for a specified number of hours in the workweek or workday whether the hours are specified by contract or statute."41

Here again the question was whether the contract itself would govern or whether the Court would look behind its terminology. It is not enough to call compensation "overtime"; it must meet the test of being hours beyond the normal regular working hours or the "actual and regular work week," as the Court expressed it in Walling v. Helmerich & Payne

40. See note 10 supra.
41. 334 U.S. 446, 449 n. 2 (1948).
This last case involved the "Paxon split day plan" under which the day was arbitrarily divided in two and the first half of the day was arbitrarily called straight time and the second half overtime. This had the simple merit of maintaining the same labor cost after as before the statutory overtime requirements and involved merely a bookkeeping entry. The Court again pointed out that "Only in the extremely unlikely case where an employee's tours [shifts] totaled more than 80 hours in a week did he become entitled to any pay in addition to the regular tour wages that he would have received prior to the adoption of the split-day plan. . . . Hence, since the wages under the old system and under the split-day plan were identical, the original tour rates could be used as the simple method of computing wages for each pay period. The actual and regular workweek was accordingly shorn of all significance." That overtime is not the same as straight time and that the 41st hour must cost the employer more than the 1st had been once more emphasized in dismissing the split day plan as obviously an evasive device.44

"But respondent's plan made no effort to base the regular rate upon the wages actually received or upon the hours actually and regularly spent each week in working. Nor did it attempt to apply the regular rate to the first 40 hours actually and regularly worked. Instead the plan provided for a fictitious regular rate consisting of a figure somewhat lower than the rate actually received. This illusory rate was arbitrarily allocated to the first portion of each day's regular labor; the latter portion was designated 'overtime' and called for compensation at a rate one and one-half times the fictitious regular rate."45

The vice in the Bay Ridge case was not so much that the regular rate was fictitious as that it failed to take into account that the simple answer to the dilemma of the regular rate and contract overtime rate being the same is that the "overtime rate" is really a premium rate for night and weekend work, what the Court called "disagreeable hours."44 To the argument that the parties had made an honest agreement as equals which arose out of long standing industrial practice and which should not therefore be disturbed, a point strongly stressed by Mr. Justice Frankfurter for the minority of three, the Court merely said that the parties can not substitute their concept of overtime for the congressional one (as interpreted by the Court of course). There is no gainsaying the power of Mr. Justice Frankfurter's dissenting opinion and his moral

42. 323 U.S. 37 (1944).
43. Id. at 39.
44. See note 42 supra.
45. 323 U. S. 37, 41 (1944).
46. 334 U.S. 446, 475 (1948).
fervor in upholding the sacredness of collective bargaining. He was on strong practical ground in pointing out the disruptive effects of prohibiting what a strong union had not only ascquiesced in but took the extraordinary position of fighting for alongside the employer-respondent despite the financial interest of its members in benefiting by any additional overtime pay the Court might order if the contract were nullified on this point. They were fighting however not only a losing battle but a lost battle. Mr. Justice Jackson had put everyone on ample notice in his dissent several years ago in the Jewell Ridge case following the earlier Tennessee Coal, Iron & R.R. case that collective bargaining was crimped insofar as it conflicted with what the Court said the statute meant. It should have been abundantly clear that union agreements had to conform to the letter as well as the spirit of the law and that good intentions or the approval of the Administrator were not enough. In the Jewell Ridge case it was emphasized that the United Mine Workers Union had bargained for years on the basis of wages fixed on a face-to-face basis rather than a portal-to-portal basis. Historically, the American coal miner had obtained a proportionately higher rate for his productive work at the face of the mine than he would have obtained had his contract covered his travel from the portal to the face or working place and return as is the custom in the European mines. This was undisputed and was emphasized in the now famous Houck letter written by the United Mine Workers to the Administrator asking him not to upset collective bargaining by requiring portal-to-portal pay under the Act instead of merely face-to-face. The Administrator replied that such an interpretation of the Act would not be "unreasonable" and generally gave the impression that his administrative policy would be to keep hands off and allow the parties long standing arrangements to be undisturbed. Notwithstanding the Court brushed this defense aside and made it clear that the language of the Act as interpreted by the Court was what prevailed, not the contract of the parties or the enforcement policy of the Administrator or his view of what was "reasonable." This had been clearly foreshadowed in the earlier Tennessee Coal, Iron & R.R. case where the factual situation was much less compelling. There the Court found no evidence of "immemorial custom" by collective bargaining as there had been no bona fide independent unions previously; but even if there had, said the Court, such evidence was immaterial. "The Fair Labor Standards Act was not designed to codify or perpetuate those customs and contracts which allow an employer to claim all of an employee's time while compensating him for only a part of it. . . .

Any custom or contract falling short of that basic policy, like an agree-
ment to pay less than the minimum wage requirements, cannot be utilized
to deprive employees of their statutory rights. . . . This does not fore-
close, of course, reasonable provisions of contract or custom governing
the computation of work hours where precisely accurate computation is
difficult or impossible." 49 This last accounting assurance was cold comfort
to the mining companies.

In the Tennessee Coal, Iron & R.R. case the Court had laid down
definite criteria for deciding what is working time: "And, in the absence
of a contrary legislative expression, we cannot assume that Congress
here was referring to work or employment other than those words are
commonly used—as meaning physical or mental exertion (whether bur-
densome or not) controlled or required by the employer and pursued
necessarily and primarily for the benefit of the employer and his
business." 50

But it does not require even "physical or mental exertion" in all cases.
In Armour & Co. v. Wantock 51 and Skidmore v. Swift & Co. 52 jointly
considered by the Court the following year idleness is enough if it is
for the employer’s "benefit" and so treated by the parties. The Court
refused to be biased by its own language in the Tennessee Coal, Iron &
R.R. case about "mental or physical exertion" in its application to "other
facts." " . . . an employer, if he chooses, may hire a man to do nothing,
or to do nothing but wait for something to happen. Refraining from
other activity often is a factor of instant readiness to serve, and idleness
plays a part in all employment in a standby capacity [private company
firemen hired to be available if fire broke out were involved]. Readiness
to serve may be hired, quite as much as service itself, and time spent
lying in wait for threats to the safety of the employer’s property may
be treated by the parties as a benefit to the employer." 53 To be sure the
Court was guided by the Administrator’s Interpretative Bulletin No. 13 54
which had suggested certain standards for guidance in employment where
waiting time was customary and required by the nature of the job itself
and that the agreement of the parties would be an important consider-
ation. In stating that the Administrator’s "policies and standards" are
"entitled to respect" even though they are "not reached by trial in
adversary form" the Court indicated that "the rulings, interpretations,

49. Id. at 602.
50. Id. at 598.
51. 323 U.S. 126 (1944).
52. 323 U.S. 134 (1944).
53. 323 U.S. 126, 133 (1944).
54. Hours Worked (Wage and Hour and Contracts Division, U.S. Dep’t Labor, Nov.
1940).
and opinions of the Administrator under the Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.\textsuperscript{55}

It therefore becomes important to see what the Administrator has said he thinks the \textit{Bay Ridge} decision means. But before we do that, it will be interesting to review the procedure under which cost plus contracts of the sort involved in the Stevedore cases were handled by the various agencies of the Government. Although the Administrator, as we have seen, can give only an advisory opinion, it has become customary for the courts, labor and management, and most agencies of the Government as a matter of comity and courtesy to follow the Administrator's interpretation unless they thought it patently wrong. From time to time, however, the War and Navy Departments, the War Shipping Administration, and other agencies disagreed with the Administrator and followed a contrary rule. This of course they were legally entitled to do and their lawyers could make their own prognostications without binding in any way the Administrator. This was done to a considerable extent in the field of cost plus contracts. The Department of Justice, as the legal arm of the Government, was frequently faced with the dilemma, where the Government was divided, of defending a suit by employees against a cost plus contractor where the Government would have to pay the bill and so was the real defendant. The War Department, for example, might contest coverage of the contract in question under the Act while the Administrator was asserting it. Even more embarrassing might be a situation where the Department of Justice bringing criminal action at the request of the Administrator on one theory was asked by a war agency to assert precisely the opposite in a civil action where the government would have to foot any additional labor cost resulting from the contractor's failure to observe the law. The contractor's lot might even be the unenviable one of being told one thing by the Administrator and the opposite by another agency of government as was precisely the case in the stevedore litigation. The War Shipping Administration chose to ignore the Administrator's interpretation for which it substituted its own that the contracts in the longshoreing industry squared with the Act. It was obviously unseemly that the Government's own dirty linen should be washed in public and the inability of its officers to agree exposed.

The solution of the dilemma adopted was an interdepartmental agreement\textsuperscript{56} among certain war agencies, the Wage and Hour Division, and

\textsuperscript{55} Armour & Co. v. Wantock, 323 U.S. 126 (1944).

\textsuperscript{56} Unfortunately the text of this agreement has not been made public and so is not available.
the Department of Justice. Under this, the Department of Justice decided which one of the conflicting interpretations it would adopt for the purpose of defending the claim against the cost plus contractor and in reality the Government itself. The several agencies would then be bound only for the purposes of the particular lawsuit and could assert their views in other matters. All the agencies agreed not to participate directly in the lawsuit, the Service agencies, for instance, through their counsel in uniform, or the Wage and Hour Administrator through \textit{amici} briefs. This meant that the Department of Justice was free to test out in a court action a different theory of coverage than the Administrator had been asserting but it did not remove from the Administrator his statutory right and duty to administer the law, a function which he could not abdicate to the Department of Justice or any other agency even had he been so disposed. In the \textit{Bay Ridge} case the Administrator’s guess and advice that the Court would hold as it did and suggestion that the contracts be revised to conform indubitably with the law were not heeded and it was decided to contest the claims on the theory that the contracts in question provided true overtime and not premium or night shift differential pay. Since large amounts of back pay were involved and potential claims in the Atlantic, Pacific, Gulf and Caribbean areas under similar contracts the decision was not easy for the Department of Justice. They had a duty to save money for the Government wherever they felt the claim was invalid as well as to support the proper interpretation of the statute. To their credit as lawyers it must be said that they persuaded three justices to agree with them. In the lawsuit there was the unusual lineup of the Department of Justice, the War Shipping Administration and the International Longshoremen’s Union, which took the unprecedented step of testifying in favor of the employer’s position and asking the Court to honor the contracts as complying with the Act, on one side and the actual employee litigants on the other.

Now what did the Court hold? “Each respondent is entitled to receive compensation for his hours worked in excess of forty at one and a half times his regular rate, computed as the weighted average of the rates worked during the week.” Simply stated, this means the so-called overtime or shift differential and premium rate, as the Court found it to be, can not be credited to wipe out statutory overtime but must itself become a part of the “regular rate” on which overtime is to be computed. Herein lies the basis for the charge that “overtime on overtime” is being required by the Court. This is so only if one has begged the question by refusing to accept the Court’s finding that this is not premium pay for “disagreeable hours” or dangerous work such as explosives.

\footnote{35 U.S. 446, 476 (1948).}
Although the Administrator has twice postponed the effective date of his enforcement policy\textsuperscript{58} pending consideration by the Court of the petition to reopen the case, the Supreme Court on October 11, 1948 rejected the petition and the Administrator has announced he will enforce his new position on October 18, 1948,\textsuperscript{60} so his view is helpful and important to people who will live under the decision and is "entitled to respect." In the first place the Administrator stated June 8, 1948 that "the effect will not be as far reaching as some employer representatives have claimed" and "Except for the matter of Saturday, Sunday, and holiday pay . . . the problem is largely restricted to the stevedoring business,"\textsuperscript{61} a view which the author independently took in an article prepared shortly after the decision.\textsuperscript{61} The Administrator "withdrew" his "interpretations (expressed in paragraphs 69 and 70 of Interpretative Bulletin No. 4 and elsewhere) insofar as such extra payments are made because of the undesirable hours when the work is performed rather than because the hours are in excess of a specified standard."\textsuperscript{62} He emphasized however that "extra pay . . . for hours worked in any day or week in excess of a bona fide standard is not part of the base wages on which overtime must be computed under the Fair Labor Standards Act, and can be credited toward the extra compensation required by the Act for work beyond 40 hours in a workweek."\textsuperscript{63} This allows crediting for daily or weekly overtime paid under a seven hour day 35 hour week collective bargaining agreement. This conclusion seems sound.

If one may venture further into the realm of prophecy with no guide save his instincts as a lawyer and his experience as Administrator before the courts during the major part of the period when the final Supreme Court decisions came down, it can be predicted:

(1) The courts will narrowly limit the application of the Bay Ridge doctrine (as I have tried to show far from a novel one) to the same or closely similar facts.

(2) Saturday, Sunday and holiday pay "as such" are no longer creditable against statutory overtime.

\textsuperscript{58} DEP'T LABOR PRESS RELEASE No. 157, June 28, 1948 and No. 167, Sept. 14, 1948 (Wage and Hour and Contracts Division).
\textsuperscript{59} Ibid. See also DEP'T LABOR PRESS RELEASE No. 169, Oct. 11, 1948 (Wage and Hour and Contracts Division).
\textsuperscript{60} DEP'T LABOR PRESS RELEASE No. 152, June 8, 1948 (Wage and Hour and Contracts Division).
\textsuperscript{61} Walling, The Penalty of Guessing in Dockmen's Pay Case, PM, June 15, 1948, p. 11, col. 1.
\textsuperscript{62} DEP'T LABOR PRESS RELEASE No. 153, June 11, 1948 (Wage and Hour and Contracts Division).
\textsuperscript{63} Ibid.
(3) They must follow time previously scheduled and worked and be therefore in excess of straight time and not just "disagreeable hours."

(4) Workweeks should begin if possible on Monday so that Saturday and Sunday work will be in fact overtime periods at the end of the workweek rather than in the middle as in a workweek beginning Thursday.

(5) Daily overtime agreements with special rates should follow not precede the regular work day and the premium should be for exceeding the normal or working hours rather than for work before a special time, e.g., 8 a.m.

(6) The contract should be as explicit as possible in conforming to the simple requirements laid down by the Supreme Court and the practice under it should not vary significantly from the contract.

(7) Finally, all contracts and oral understandings should be carefully examined by counsel and revised where necessary, bearing in mind, too, the importance of making no admissions by implication of previous failure to comply, which might invite a lawsuit for back wages under Section 216 (b).

Although we shall probably hear more about the Bay Ridge case and overtime pay problems, these precautions ought to prevent future trouble. Unless Congress changes the law, it seems reasonable, despite the years of litigation on two seemingly simple statutory provisions dealing with minimum wages and maximum hours, to conclude that almost the final word, that finality we have been pursuing throughout this article, has in fact been spoken.

64. See note 11 supra.