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U.S. DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
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ADDRESS BY RUFUS G. POOLE, ASSISTANT GENERAL COUNSEL WAGE AND HOUR DIVISION, U. S. DEPARTMENT OF LABOR SCHEDULED FOR DELIVERY AT 3:30 P.M., FRIDAY, NOV. 18, 1938, AT SYRACUSE, N.Y., BEFORE THE ASSOCIATED INDUSTRIES OF NEW YORK AT ITS ANNUAL MEETING

ADDRESS BY RUFUS G. POOLE
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(R-97)

When I was told that the Associated Industries of New York had requested Administrator Andrews to furnish them a speaker to discuss the legal problems of the Fair Labor Standards Act, I was a little chagrinned—and queried my competence to take the assignment. I say this because it seemed to me that I had already by long distance telephone explained the Act—that is insofar as it can be explained—to most of the industrialists of New York. Then, too, I believe that the Wages and Hours Division dispatched a few letters and wires to you gentlemen up here, and, indeed, had conferred in person with droves of others seeking enlightenment. But as I reflected upon the stacks of still unanswered mail, much of which I suspect is from New York, I decided that your invitation was merely a humane gesture. You were giving us an opportunity to answer your inquiries in wholesale. This quest for knowledge on your part is most reassuring. It is clear that you do not intend to make ignorance of the law either a legal or moral excuse for noncompliance. And I trust that my discussion today may not only clarify your obligations under this statute, but also may lighten the administrative burdens of the Wage and Hour Division.

The passage of the Fair Labor Standards Act by the Congress at the last session undoubtedly was a surprise to many of you. Nearly all of the circular letters emanating from the smart political forecasters at Washington either predicted that this legislation would die on the calendar or meet with outright defeat. Their prediction was based on the fact that it had the organized opposition of several loud-voiced lobby groups who purported to speak for large segments of the population and who saw in this bill a dangerous threat to their existing economic positions. Their conclusion was influenced also by the truth that the division in the ranks of organized labor had weakened its strength as a political factor. What the predictors had failed to take into account was the ever-growing conviction of the general public that the national legislature should take steps to eliminate sweatshop conditions and oppressively low wages and to protect employers who want to pay living wages from the competition of those who cannot or will not.

As one who assisted in the preparation of this legislation and watched over it during its pendency in Congress, I know only too well that it traveled a stormy course before passage. It was not passed in haste. Few bills are ever considered with as much deliberation. It was debated for almost three full sessions. Nor did

the legislators limit their debates to the question of the relative benefits of the bill to labor and capital, but they discussed literally scores of incidental questions such as its effect upon protective tariffs, relative costs of production and marketing, and the stabilization of migrating industries. The battle over the question of sectional wage differentials even inspired some members of Congress to debate the cause and effects of the Civil War.

This legislation assumed many forms before enactment. To better appreciate one of our more complex problems, it would be well at the outset of my talk to sketch briefly the legislative history of the Act.

In response to a recommendation from the President to Congress to enact legislation providing minimum wage and maximum hour standards for industries operating in interstate commerce, bills were introduced in both the House and the Senate. The Senate acted first. The bill which it passed proposed to establish an independent commission which would have general powers to fix minimum wages and maximum hours of employment in accordance with certain enumerated guides, such as cost of living and value of services. While the Board could not establish a wage in excess of 40 cents an hour or a workweek less than 40 hours, it had complete freedom in fixing wage and hour standards within these lower and upper limits. Conceivably if the facts warranted, a wage could have been fixed at 5 or 10 cents an hour. All wage and hour standards were to be dependent upon administrative action. None were written into the bill itself.

Further, and more significant for our purposes, the bill provided that an order of the Board establishing minimum wages and maximum hours should show on its face the employees to whom it was applicable. Had the legislation been enacted in this form all employers and employees covered by the act could have been informed with reasonable certainty of such coverage by the Board's order—because without such orders no employers or employees were affected.

Loud and persistent objection was heard to this proposed grant of broad discretionary powers to a governmental agency. Objection came from persons who proposed to speak for both capital and labor. Capital contended that the bill gave the Board a life-and-death power over industry. Labor groups insisted that the Congress itself establish a floor for wages and a ceiling for hours. Acquiescing to these demands, the House amended the bill, establishing rigid minimum wage floors graduated over a period of 3 years from 25 cents an hour to 40 cents an hour, and fixing a ceiling

or the hours of employment in a workweek at 44 which over a term of 2 years was reduced to 40.

The House and Senate conferees in drafting a compromise bill worked out the resent law. They placed the administration of the act under a single Administrator in the Department of Labor. As to hours they decided to follow the philosophy of the House bill and fix the hour standards by statute. As to wages they adopted in part the philosophies of both bills, fixing by statute minimum wage standards which would be self-executing and at the same time permitting these rates to be altered, within limitations, by administrative action. To make the wage and hour standards operative independent of administrative action, it became necessary to write into the statute language defining the employees sought to be covered by the Act. So Congress said the Act shall apply to employees engaged in commerce or in the production of goods for commerce. These are the critical words in determining the applicability of the act to any employee or group of employees.

The conferees also decided to eliminate, with certain expressly stated exceptions, all general regulatory powers which had been proposed for the administrative gency.

A Nation-wide question now arises: What employees are engaged in commerce or in the production of goods for commerce? The Wage and Hour Division is receiving hundreds of such inquiries. What reply can we make? The Administrator was given no power to determine the application of the Act by regulation or otherwise. Only the courts can define the language which determines coverage. It cannot be extended or contracted by administrative interpretation. This does not mean that we shall not interpret the statute for purposes of administration, or, insofar as we can safely do so, advise employers of their obligations. But it does mean that the opinions and interpretations which we render are advisory at best and will not estop an employee who disagrees with us from challenging our advice in a suit for wages believed to be due him. Of course, insofar as the Wage and Hour Division is concerned, employers may rely upon such opinions until they are changed by the Division overruled by the courts.

And so this statute—much fought over and much compromised—became law. It did not satisfy the hopes of everyone. For some, the wages are too low, the hours too igh, the administration provisions too inflexible. But this at least may be said—the Act does form a working basis for the elimination of sweatshops and the reduction of hours. Indeed, I believe that this statute, less drastic in its effect than many

other proposals for a wage and hour law, may yet, intelligently administered by capital, labor and the Wage and Hour Division, serve best the needs of the entire people.

The statute finally passed by Congress fairly exudes reasonableness. First, consider the wage provisions—25 cents an hour until October 24, 1939, and then 30 cents until October 24, 1945, save only that industry committees represented by the employers, the employees and the public, together with the Administrator and subject to review by the courts, may increase that wage to 40 cents an hour. No government official, in his unrestrained discretion, is given authority to raise the minimum wage by edict. Indeed, the Administrator has no power at all in this direction until another important procedure has been followed. If he thinks the minimum wage for a given industry should be increased beyond that fixed by the self-executing provisions of the statute, he must first appoint and convene an industry committee composed of a number of disinterested persons representing the public, of whom one shall be designated as chairman, and a like number of persons representing employees in an industry and a like number of persons representing employers in an industry. The statute defines in considerable detail the economic factors which an industry committee must consider as the basis of recommending a minimum wage rate. If this committee, representing the three great interests involved does not, after a requisite study, recommend an increase of the minimum wage in the industry, the Administrator cannot proceed to issue a wage order. The Administrator, representing the authority of the Government, is thus not empowered to act until, in the judgment of the industry committee, the economic conditions in the industry warrant an increase of the minimum wage.

Even if an industry committee recommends an increase of the minimum wage, still a further procedure is required by statute. The Administrator, before putting the recommendation into effect by a wage order, must hold a public hearing and give interested persons an opportunity to be heard, and must find that the industry committee's recommendations are made in accordance with the law, are supported by the evidence produced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purpose of the statute.

Even after the committee and the Administrator have both acted, the wage order is subject to review by a Circuit Court of Appeals of the United States.

The Conference Committee of the Senate and House, reporting on these provisions of the statute, truly said:

"This carefully devised procedure has a double advantage. It ensures on the one hand that no minimum wage rate will be put into effect by administrative action that has not been carefully worked out by a committee drawn principally from the industry itself and on the other hand that no minimum wage rate will be put into effect by administrative action which has not been found by an administrative official of the Government, exercising an independent judgment on the evidence, and responsible to Congress for his acts, to be in accordance with law."

I wish to emphasize the significance of fixing wages by the procedure of an industry committee composed of labor, capital and the public with the Government acting as arbiter. This procedure inaugurates a comparatively new and novel method of industrial regulation. But in principle it follows our oldest traditions. It is the application of the democratic process to a new field. The three great interests concerned are given representation on the regulating agency. At last, labor and capital have been given a common meeting ground. At the council table labor and capital and government officials will obtain a more sympathetic understanding and a deeper appreciation of their common problems and responsibilities. This cannot but make for closer cooperation. Conflicting interests will be more easily harmonized than would be possible were a government agency in which labor and capital had no voice to fix wage rates based only upon its own investigations.

This method will also enable industry itself to restrain and control the unreasonable and injurious demands of its own minorities.

It is to your interest that the industry committee experiment prove successful. For, if it is, it may well establish a general pattern which would be followed in the future in harmonizing other conflicting interests of our industrial society. This is your opportunity.

Within the last few weeks numerous employer representatives have filed into the Administrator's office seeking the appointment of industry committees for their industries and a higher wage scale for their employees. There is nothing strange in this desire of the forward-looking men in industry to take the floor under wages out of the cellar. For they know that higher minimum wages will bring benefits to capital as great as to labor. As the President said in his message to Congress proposing wage and hour legislation:

"Enlightened business is learning that competition ought not to cause bad social consequences, which inevitably react upon the profits of business itself. All but the hopelessly reactionary will agree that to conserve our primary resources of manpower, Government must have some control over maximum hours, minimum wages, the evil of child labor, and the exploitation of unorganized labor."

Today we know that labor better paid is better labor. Forty years ago, a great economist who now sits in the House of Lords put this point in words deserving of repetition:

"The existence of Negro slavery in the southern States of America made, while it lasted, any other method of carrying on industry economically impossible; but it was not really an economic advantage to cotton-growing. The 'white slavery' of the early factory system stood, so long as it was permitted, in the way of any manufacturer adopting more humane conditions of employment; but when the Lancashire mill owners had these more humane conditions forced upon them, they were discovered to be more profitable than those which unlimited freedom of competition had dictated. There is much reason to believe that the low wages to which, in the unregulated trades, the stream of competitive pressure forces employers and operatives alike, are not in themselves any more economically advantageous to the industry than the long hours and absence of sanitary precautions were to the early cotton mills of Lancashire. To put it plumply, if the employers paid more, the labor would quickly be worth more."

Then there is another factor of equal importance. American business leaders frequently say that the most important resource which this country has is its own great market unmarred by tariff walls. Some overlook only too often the invisible tariff barriers resulting from differentials in cost and differentials in purchasing power. The problems of the matured capitalism of today which seeks above all to distribute its abundant produce, call for the leveling of these invisible tariff barriers. They call for administrative uniformity which can be provided only by national legislation.

That is why it is not strange that so many men in industry are seeking higher minimum wages. And as soon as the Administrator can get the necessary money and staff there will be industry committees to get just that.

The controversy—if indeed there has been any controversy—over the administration of the statute has had little to do with wages. The controversy, if any, has been over the question of hours. This did not have to be, for the statute is moderate in extreme here, as well as in the minimum wages which it sets. The Act does not even satisfy that perennial demand of labor--the 8-hour day. It does not tell the employer what hours in any week he may work his men. It simply says to him that in seven consecutive days he shall not work his employees more than 44 hours without paying them extra compensation and permits him to work out those hours to suit his own convenience and efficiency.

Forty-four hours is a fair standard and has been generally accepted by the public. We know today the effects of a longer workweek. One has but to read the figures compiled on unemployment to know that a man in his forties is no longer able to compete with the youth of 25 in search of a job. Indeed, one does not have to go out of our own Wage and Hour Division. A few courageous employers or their counsel have gone so far as to file with the Administrator applications that employees in their forties be considered handicapped workers compensable at less than the minimum required by the Act. They seek to make use of what is the fact today, that a worker may be handicapped by years of excessive toil in industry. Parenthetically I should point out that the word "handicapped" in Section 14 of the statute does not cover so extreme a case. Impairment by age must be something akin to impairment by physical or mental deficiency or injury.

There has been much talk about the hour provisions of the law, and about ways and means of an employer working his men more than 44 hours without paying them any more than they were being paid prior to October 24.

A week before the Act went into effect, an employer wired the Wage and Hour Administration that he was reducing the hourly wage of every worker in his place, from president to office boy, to 25 cents an hour for the first 44 hours with 37½ cents overtime pay for hours in excess thereof. He also stated that he was guaranteeing to each worker a weekly amount not less than the amount paid prior to October 24th. He sought the General Counsel's legal blessing for all this. Obviously this cannot work. The regular hourly rate upon which overtime compensation would be based in such a case would be determined by dividing the guaranteed weekly amount by the number of hours regularly worked.

Take another example. An employer pays 50 cents an hour for a customary workweek of 44 hours. In anticipation of a peak period of 2 or 3 weeks' duration during

which he would be obliged to pay time and one-half for overtime, he reduces the hourly rate which he later restores after the rush has subsided. This, too, is a clear violation of law. The regular rate of pay is the customary rate of 50 cents per hour, rather than any lesser amount announced for certain weeks of overtime employment in order to circumvent the hour provisions of the Act. If this could be done, the only time an employer would be under any legal duty to pay time and one-half overtime compensation would be in weeks when there was no overtime.

The case about which our opinion has most often been asked is this: An employer works his employees 50 hours a week at an hourly rate well in excess of the statutory requirements. Before October 24, intending to continue his 50-hour week, he reduces the hourly wage rate to an amount, still above the statutory minimum, which, calculating wages for 44 hours at the lower rate and at time and one-half for the six excess hours, will maintain the employees' weekly earnings exactly as they were prior to the effective date of the overtime compensation provisions. In other words, the employer seeks to continue his workweek in excess of the statutory maximum without paying a cent of extra compensation for the six hours in excess of 44.

I will not attempt to give a complete interpretation of Section 7, the hour provisions, or of Section 18 which provides that the Act shall not justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage. Yet it is not safe for anyone to assume that this or any other Congressional provision is meaningless. Nor is it safe—nor wise, it seems to me—to gamble that the courts will hold that the basis on which time and a half overtime compensation is to be calculated in such a case is the lower rate affected by the purported reduction. Every employer who takes this chance should keep in mind that the Act provides that a worker employed in violation of this law may bring civil suit and, if judgment be given in his favor, may recover in damages double the amount due him. An employer who would not give two-to-one odds on a Rose Bowl football game should not blandly give them here.

I doubt that Congress intended such a thing as regular overtime work except where the peculiar and unusual nature of the work performed by an employee necessitated a longer workweek. Is there not something of the paradox in "regular overtime work?"

But, on the other hand, it is not the intention of this law to freeze wages in industry at existing levels. There can be no quarrel with employers who for business reasons are forced to reduce workers' earnings. Nor can there be any quarrel with the employer who cuts working schedules and thus decreases total wages. Congress wanted to spread work. It wanted a 44-hour week. Where an employer grants this 44-hour week to his employees, he is carrying out the intent of Congress.

Some lawyers take great delight in finding ways to circumvent statutes. But here such circumvention may have a boomerang effect. One of the objectives of Congress was to put more people back to work by limiting the workweek and if this expectation is defeated - by whatever means - there will be a demand for more drastic measures. Business is getting better all around. This is a chance to put more men to work. If this chance is not taken, if the extra work is taken up by longer hours rather than by spreading the work, I do not believe that Congress will fail to meet the challenge. I will not attempt to predict the shape that such action might take, yet the record shows that previous to the National Industrial Recovery Act a 30-hour work-week bill passed the Senate of the United States.

If this act were to serve no other purpose, it has certainly been a boon to one business - Mr. Farley's Post Office. The mail comes to the Wage and Hour Division in truck loads - about 1,100 letters a day - presenting every conceivable question. Let me tell you of a few of the queries we have received.

One of our most recurring inquiries comes from those whose businesses are characterized by peaks and valleys of activity. They want to know what they can do to take advantage of the provisions of the act which permit work up to 56 hours in any workweek without paying time and one-half.

A man writes in and asks how he can secure the exemption provided in the collective bargaining provisions of Section 7(b). Well, first he must make a collective bargaining agreement with his employees - an agreement providing either that they shall not work more than 1,000 hours in any period of 26 consecutive workweeks or, more than 2,000 hours in any period of a year, and, secondly, the collective agreement must have been made by bona fide representatives of the employees duly certified by the National Labor Relations Board. The practical effect of the latter requirement is to prevent recognition of such agreement if made with a company union. The method of certification has not yet been worked out. That is a problem child of the National Labor Relations Board and we aregoing to let them take care of it. We have enough headaches of our own.

Then there is the problem of what constitutes an industry of a seasonal nature within the meaning of the statute. A bank in Florida writes in that pursuant to Section 7(b) (3) of the Act, they want a seasonal exemption for their employees during the winter months. After all, they say, nothing is as seasonal as the climate and it is Florida's climate that brings the tourists and increased business. The bank was certainly correct in assuming that the word "seasonal" has to do with natural conditions and is not related to periods of peak activity in any industry. No matter how high the peak nor how low the valley, that does not make an industry "seasonal." The industry must annually cease production during part of the year. Moreover, to be a seasonal industry, as contemplated by the statute and our regulations, the cessation of business must be due to the fact that the raw materials upon which it operates cannot be obtained during part of the year because of natural conditions. And so the bank in Florida, which really is not connected with the production of goods at all, is not a seasonal industry. I should also state, that a single employer would hardly ever constitute an industry. The act requires that the industry or a recognized branch of it be seasonal rather than any particular business.

Other troublesome questions are raised by Section 13(a) which, in general terms, exempts certain employees from the wage and hour provisions of the Act. A newspaper asks whether its boxing columnist and commentator is a professional and therefore exempt from the provisions of the Act under Section 13(a) (1). Have you ever tried to define a professional? That is hard enough, but engaged in a "bona fide professional capacity" is even harder. The dictionaries do not give us the answer. They indicate that sometimes the word "professional" is used to mean a person engaged in one of the learned professions--that is medicine, law and the ministry. Then, the dictionaries talk about education and skill and even about one who engages in sports for money. We had to define this term so that employers and employees could use it; so that they could know whether any particular employee was entitled to overtime compensation if he or she worked more than 44 hours in a week. This definition and definitions of employees employed in an executive, administrative, local retailing or outside selling capacity were worked out in conference with representatives of employers and employees. The only one that has been seriously questioned to date is our definition of the term professional capacity. Even here, those who did not like out definition did not take the view that they could write a better definition. There is a statutory duty on the Administrator to promulgate a definition. So we put out the best definition we could. We said that the work had to be discretionary, intellectual and varied as distinguished from routine work whether mental or manual. We said that the work had to be based upon educational training in a specially organized body of knowledge. And we said that any aggrieved person could petition for a hearing to have the definition fixed up and if the Administrator found that there was justification in the petition, a hearing would be held. We tried to be fair to everyone.

Coming back to our boxing commentator, I do not believe that he is engaged in a professional capacity as his work is hardly based upon educational training in a specially organized body of knowledge. And this is not just a grudge against columnists who seem to make bad predictions every time there is a big fight.

A dental laboratory writes in and asks whether or not their employees are engaged "in any retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce" and thus exempt from the Act under Section 13(a)(2). They apparently manufacture parts to the order of the dentists who do the ultimate oral installation. This is clearly not a retail establishment because it does not sell directly to the consumer. And I do not believe it is a service establishment as those words are used in the Act. I think the term "service establishment" refers to something similar to a retail establishment, such as a barber shop or a beauty parlor, laundry or hotel. In Section 13, Congress set out very specifically in a dozen or so different subdivisions just who and what it wanted to exempt. I do not believe that in the two words "service establishment" it meant to cover a multitude of situations which it could more properly have covered specifically as it did numerous other situations.

We have had many questions about learners. Section 14 of the Act which deals with learners as well as with apprentices and messengers, provides for their employment under regulations or orders of the Administrator at less than the minimum wage to the extent that this is necessary, to prevent curtailment of opportunities for employment. This section is one more illustration of the Congressional intent to safeguard the rights of all and to prevent this Act from curtailing employment except in the truly sweated industries.

We know what the word apprentice means. It has a definite meaning in labor agreements, in State statutes and in common parlance. But learners is something else again. That term could apply to each of us. At present, I am learning how to take a long distance telephone call, review outgoing mail and carry on a conference with visiting delegations simultaneously. The term learners seems to have gotten its start in the NRA days and there they were able to deal with it by codes, industry by industry. And in the same manner we must deal with it under the Act. The problem of new men in industry cannot be dealt with in one fell swoop of a regulation, without breaking down the wage standards of the statute. It must be dealt with by individual industries with special

consideration being given to new establishments. That is why our regulations provide for hearings on learners and then we will fix the rules for any individual employer or group of employers or industry or group of industries. A hearing has been set for learners in the textile industry on November 28th and that will provide a start.

A few days ago I was asked by an employer if it would not be possible to classify 1,200 persons in a small town as mentally deficient and thereby employ tham as handicapped. Their only deficiency, it appeared, was the fact that they were slow and did not adapt themselves readily to the routine of machine labor. Obviously the statute would not countenance this. In the same vein, a garment manufacturer asked that five different learning periods be permitted for the making of an ordinary man's shirt, one for cutting, another for making of the button holes, another for sewing on buttons, and two more for stitching. And if, for example, a learning period of 6 weeks were allowed with a wage rate of 18½ cents an hour, he sought permission to shift the learner from one process to another, thereby working him for an aggregate period of 30 weeks at the lower wage. Such request is hardly deserving of serious consideration.

A word about the enforcement provisions of the Act. We are hoping that you will help enforce the act by reporting violations where you see them and thus protect yourselves against illegal and unfair competition. Involuntarily, too, you will help enforce the statute for the Act provides in Section 15(a)(1) that it is unlawful for any person to transport, ship or sell in commerce, or with knowledge that shipment or delivery or sale in commerce is intended, any goods produced in violation of the act, i.e., "hot goods". This provision was not meant to terrify or put an undue burden on anybody. Anyone who buys goods sincerely believing that

they have been lawfully produced would not be a "wilful" violator when he later sold the goods and therefore would not be subject to penalties unless, of course, he had found out in the meantime that the goods were "hot goods". The Administrator hopes that you will make an effort to see that the people from whom you purchase your goods are complying. This will safeguard you against the case where you might buy in good faith but later discover that the goods had been produced in violation of the Act.

As to compliance certificates or compliance provisions in invoices, that question is entirely up to you. The Act does not require that such certificates or invoices be written and the Wage and Hour Division does not feel that it should pass on any form of words for such invoices or certificates where they are used. That is a matter of private contract between the buyer and seller.

The Act does not rely upon employers alone for its enforcement. There are criminal penalties for those who skilfully flaunt the law and there may be injunction suits to restrain impending violations. In addition, and possibly the most important remedy of all, is the right of an employee or group of employees to recover double what has been withheld from them under the standards of the Act. That is why I said before that every violator was gambling two for one. That is sufficient reason for the Administrator's oft-stated advice - when in doubt, comply.

I have attempted to show you a few of our problems and in so doing to answer a few of yours, I have attempted, too, to show you that the statute is the very quintessence of reasonableness. It is worthy of and it needs your cooperation.

We pride ourselves on the highest standard of living in the world. The objective of this Act is to keep that pride from being more than a boastful illusion by seeing that every man and woman works under conditions at which decent people need not shudder. The chance of making this tatute work is an opportunity that industry at the crossroads cannot afford to miss. We ask for your cooperation in making this statute work. We promise you ours in return.