

San Francisco and Cleveland, Detroit and Milwaukee. With the exception of the Up-State New York and Connecticut area, estimates of the distribution of average hourly earnings for "non-productive" employees in these areas were made.^{85/}

In the Up-State New York and Connecticut area there were only 8 firms in business at least 11 months of 1937 and 1938, and these firms employ only 2.5 percent of the total employees and make only 3.6 percent of the total net sales.^{86/} Since the wages in this area are relatively high^{87/} and the number of "non-productive" employees who receive less than 40 cents an hour must of necessity be small,^{88/} there is obviously sufficient data from which it can reasonably be anticipated that no substantial

^{84/} For Massachusetts, the coverage was 87.3, for Texas 58.2, and for the South Atlantic area, 96.5. See Industry Committee Exhibit 3, p. 48.

^{85/} R.p. 694-714. Estimates of the distribution of wage-earnings by hourly earnings for "non-productive" employees ("other workers") in the four incomplete areas were obtained by taking "the percent distribution of the total number of other workers for the 6 complete areas" and applying this distribution "to the totals obtained for the other four incomplete areas for this occupational class." Industry Committee Exhibit 3, pp. 43-44. That the estimates accurately reflect the distribution of "non-productive" employees or "other workers," as they are alluded to, by hourly earnings in the areas for which estimates were made, is borne out by the record.

^{86/} See footnote 7, supra.

^{87/} See Industry Exhibit 1, Table XXVII, p. 76; R., pp. 723-724.

^{88/} See Section IV A, supra.

curtailment of employment in the industry as a whole, in Upper New York State and Connecticut, or among the "non-productive" employees in those areas, will result from the adoption of a 40 cent ^{89/} minimum.

It was also contended that the week of March 28, 1938, which was used by the Women's Bureau in the compilation of the average hourly earnings data, was not representative. ^{90/} The record, however, establishes that this week was selected only after consultation with a number of employers, ^{91/} was considered representative by economic experts, ^{92/} and was not a peak week, or a slack period. ^{93/} ^{94/}

^{89/}See R., p. 722. It should be noted, moreover, that areas comparable to Upper New York State and Connecticut were included within the sample.

^{90/}The data on average hourly earnings for the week of March 28, 1938, were based upon records kept by the employees themselves. This procedure was adopted because the Women's Bureau found that many plants did not keep records of hours worked for piece workers. Hence a schedule was drawn up for employees to fill out for the designated week to show hours worked and earnings. Many employers and the labor union in the industry cooperated to make this survey both accurate and comprehensive. In this way, hourly earnings were obtained for 7525 workers in 434 millinery factories. Industry Committee Exhibit 1, pp. 74, 75 and 123.

^{91/}R., p. 846.

^{92/}R., p. 845, 714.

^{93/}R., 843, 847. A period of relatively full work must be selected because of the marked seasonality prevailing in the industry and the variation from week to week of the amount of work available for employees.

^{94/}R., p. 834.

Even if the week selected was a peak week, it was properly selected for the purpose of determining average hourly earnings, since it shows the earnings of workers when the flow of work was sufficiently great to call for normal productive efforts. I conclude that the week of March 28, 1938 was a representative week upon which to base a study of average hourly earnings in the millinery industry.

I further find that the wage data presented before the Industry Committee and received in evidence at the hearing are an adequate reflection of the wage structure prevailing in the millinery industry.

C. Adequacy of the report by the Industry Committee.

The decision of the Administrator is based upon the recommendation of the Industry Committee, not its report.^{95/} The report serves only to inform interested parties concerning the issues involved in the proceeding. The Millinery Industry Committee, while convened, made its recommendation and notified the Administrator accordingly. The Committee's report was prepared by a duly appointed subcommittee composed of three Committee members and circulated to Committee members for signature and thereafter filed with the Administrator. Any Committee member disagreeing with the majority report could have filed a supplementary report stating his

^{95/} Fair Labor Standards Act, Section 8.

grounds of disagreement.^{96/} No particular purpose would have been served in reconvening the Committee to sign its report. I find that the Millinery Industry Committee has filed its report with the Administrator in accordance with law.

D. Improper Influence of the Industry Committee.

While I do not consider that the deliberations of the Industry Committee and the method by which it arrived at its recommendation is properly before me, nevertheless I believe that the charge that the Committee was improperly influenced by a member of the Wage and Hour Staff should be disposed of. It is alleged that members of the Industry Committee were dissuaded from insisting upon a separate classification for "non-productive" employees by the statements of the Committee's counsel, an employee of the staff of this Division, that occupational classifications were of doubtful validity.^{97/} It is readily apparent from an examination of the Minutes^{98/} of the Executive Session of the Industry Committee that counsel for the Committee merely expressed his personal opinion about matters concerning which he was interrogated by members of the Committee. No attempt to influence the judgment of any member of the Committee by counsel for the Committee can be imputed from the record.^{99/}

^{96/} Title 29, Chapter V, Code of Federal Regulations, Section 511.19.

^{97/} R., p. 655, et seq.

^{98/} Thompson's Exhibit 3.

After due consideration of all the contentions and the evidence I conclude that the Committee has investigated and considered conditions in the Millinery Industry and has reached its recommendation in accordance with law.

VI. Posting of the Wage Order.

Section 8(f) of the Act provides that Wage Orders issued under Section 8 "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 purpose of such order, to prevent the circumvention and evasion thereof, and to safeguard minimum wage rates established therein."

99/ On pp. 19-20, Thompson's Exhibit 3, appears the following exchange typical of the reserve exercised by counsel for the Industry Committee in his response to questions addressed to him by members of the Committee:

"Mr. Marcus: 'I would like to ask the counsel a question again. As I understood from yesterday, there is nothing to prevent this Committee recommending a differential on the basis of non-productive and productive labor, although you say the Administrator is discouraging that because of his doubts as to the legality.'

"Mr. Schlesinger: 'I did not say the Administrator, but the Legal Division. There is nothing to prevent this Committee from doing that. A classification for non-productive labor would be an occupational classification. We have had that problem up several times and, as I said yesterday, I think that there is serious doubt as to whether an occupational classification would be upheld in the courts. It is a question on which we cannot give a positive answer.'" See also Ibid, pp. 20-26, and 32.

In order to carry out the purpose of the Wage Order issued herein and to prevent its circumvention and evasion, I find it necessary that a Notice of the Order, in a form supplied by the Wage and Hour Division, be posted and kept posted in a conspicuous place in each department in every firm employing any employees who are subject to the provisions of the Wage Order.

VII. Conclusion.

Upon reviewing all the evidence adduced in this proceeding and giving consideration to provisions of the Act and the same factors required to be considered by the Industry Committee, I conclude that the Industry Committee's recommendation for the millinery industry, as defined in Administrative Order Number 23, is made in accordance with law, is supported by the evidence adduced at the hearing, and will carry out the purposes of Section 8 of the Act.

The Wage Order issued pursuant to this opinion shall become effective on January 15, 19~~39~~⁴⁰. *(see Enstat page)*
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Signed at Washington, D. C. this 15th day of December, 1939.

Harold D. Jacobs
Harold D. Jacobs, Administrator
Wage and Hour Division
United States Department of Labor