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WAGE AND HOUR DIVISION
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WAGE-HOUR LITIGATION SHOWS SHARP INCREASE AS 18-MONTH PERIOD CLOSES

Three times as many court actions were begun and successfully concluded in the six months period ending April 24, as in the entire first year of the Fair Labor Standards Act, it was announced today by Colonel Philip B. Fleming, Administrator of the Wage and Hour Division, U. S. Department of Labor.

Colonel Fleming cited figures submitted to him by George A. McNulty, General Counsel of the Wage and Hour Division, showing the results of cases in litigation over the third six-months period since the Act went into effect on October 24, 1938. These figures show:

On April 24, 231 civil suits for injunction had been filed against a total of 45 last October 24, the first anniversary of the effective date of the Act. At the same time, 88 criminal prosecutions had been entered on April 24, against 48 for the entire first year of the Act.

Of the 231 suits for civil injunction, 208 were granted, 3 were denied and 20 are yet pending, Colonel Fleming said. In criminal proceedings, 50 employers have pleaded guilty to violation of the Act against whom a total of $266,862 in fines were imposed.

Restitution to employees resulting from litigation exceeds $500,000, Colonel Fleming said, in quoting from the litigation report from Mr. McNulty, prepared by Irving J. Levy, Assistant General Counsel in charge of the Litigation Section.

"It appears that the time has now come when we can take stock of the points determined in contested litigation," Colonel Fleming said. "In almost every case the language of the Act, as construed for enforcement by the Wage and Hour Division, has been sustained by the courts. Some of those decisions are significant.

(4183)

"Every Federal District Court before which the constitutionality of the Act has been challenged has sustained it as a valid regulation of interstate commerce by Congress.

"The most important decision rendered since the Act was enacted was the decision of the U. S. Circuit Court of Appeals for the Fifth Circuit (New Orleans) in the case of Opp Cotton Mills, et al, who sought to enjoin the application of the 32½-cent minimum wage order for the textile industry. The court decision upheld both the wage order and the procedure set up by the Division for industry committees. It also upheld the constitutionality of the Act as brought into question by the cotton mills."

Cases in other courts in which the constitutionality of the Act has been upheld, cited by Colonel Fleming, were:

Bowie et al. v. Claiborne, et al., District Court, Puerto Rico, Cooper, District Judge, September 26, 1939;

Andrews, Administrator, etc. v. Montgomery Ward & Co., Inc., et al., District Court, Northern District, Illinois , Holly, District Judge, November 21, 1939, 30 F. Supp. 3801;

United States v. Feature Frocks, Inc., et al., District Court, Northern District, Illinois , Woodward, District Judge, December 27, 1939;

United States v. Chicago Macaroni Co. et al., District Court of Northern District, Illinois, Barnes, District Judge, December 4, 1939;

United States v. Florida Fruit and Produce, Inc., et al., September 20, 1939;

United States v. Walters, et al., July 13, 1939;

United States v. Harry Gendzier, District Court Southern District Fla., Strum, District Judge, February 9, 1940;

Williams et al. v. Atlantic Coast Line R. R., District Court Eastern District N. C., Meekins, District Judge, February 19, 1940.

The same Circuit Court of Appeals has passed upon another issue regarded by Wage and Hour officials as important. An injunction issued against the Government was unanimously reversed in the case of Lake Wales Citrus Growers, et al v. Janes, et al. The court held that the District Court had no jurisdiction to enjoin the

application of the area of production regulations by bringing suit against subordinate Federal officials. The appellate court likewise held the District Court to have no power in such cases to render declaratory judgments defining the accuracy of the regulation challenged.

"This type of injunction proceeding has been a common device attempted in the past to tie up the enforcement of and nullify new legislation," Mr.Levy said in his report to Mr. McNulty.

Injunctions and declaratory judgments have likewise been denied by several District Courts in similar cases, Mr. Levy reported, citing F. W. Maurer & Sons v. Andrews, Eastern District Pa., December 7, 1939, 30 Fed. Supp. 637; Redlands Foothill Groves v. Jacobs, Eastern District Calif., January 25, 1940, 30 Fed. Supp. 995; Mushroom Cooperative Canning Company v. Administrator, Eastern District Pa., January 26, 1940.

"In the Eastern District of North Carolina," the litigation report stated, "Judge Isaac M. Meekins sustained the Division's interpretation stated in its first Interpretative Bulletin that watchmen were covered by the Act as employees necessary for the production of goods for commerce (Jacobs v. W. B. Coppersmith & Sons, Inc., District Court, Eastern District of North Carolina, Jan. 30, 1940). In an employee suit against the Atlantic Coast Line Railroad, in which the Division intervened (Williams, et al. v. Atlantic Coast Line Railroad), the same court sustained the regulations of the Administrator, Part 531, promulgated under Section 3(m) of the Act, defining the reasonable cost of facilities furnished employees. A judgment against the Company was rendered in favor of five employees for deductions made for the arbitrary assignment of uninhabitable and uninhabitated 'company houses'."

In Bowie v. Claiborne, the Federal District Court in Puerto Rico upheld the Government's position on the coverage of employees engaged in Puerto Rican sugar mills. The court in that case construed more narrowly than did the Administrator the exemption in Section 13(a)(6) for "agricultural workers". (4183)

"The right of the Administrator under Sections 11(a) and 11(c) of the Act to examine and subpoena necessary records of employers has been sustained - Andrews v. Reade Manufacturing Company, Eastern District Missouri, August 11, 1939 - ; Andrews v. Standard Trouser Company, Northern District W. Va., May 6, 1939 defendant jailed for contempt of court for refusal to produce records; and Andrews v. Montgomery Ward et al., Northern District Ill., August 23, 1939, 30 Fed. Supp. 38. In the latter case, Judge Holly sustained the right of the Administrator to make routine inspections, even in the absence of complaint, and to subpoena all necessary records. An appeal from that determination is now pending in the Circuit Court of Appeals."

In a criminal prosecution Judge Welsh of the District Court for the Eastern District of Pennsylvania ruled that employers' records required to be kept by the Act may be used as evidence by the government without violating the constitutional guarantee against self-incrimination (U. S. v. Fulginite, Eastern District of Pennsylvania, April 11, 1940).

Injunctions entered without contest have covered numerous significant aspects of the Act, Mr. Levy reported. Among the important questions thus determined in the last six months are: Homeworkers are employees subject to the provisions of the Act; such homeworkers are covered by the Act in spite of attempts to make them independent contractors by spurious purchase and sale agreements even when such agreements are formulized in written "contracts". Wholesalers, selling goods in the stream of interstate commerce, are subject to the Act, even though their customers are located in the same state; crate manufacturers selling crates locally for packing produce to be shipped outside the state are engaged in the production of goods for interstate commerce. Companies selling "watchman and patrol service" to employers engaged in the production of goods for commerce, have been enjoined. Various types of wage rate manipulations to avoid the payment of overtime under Section 7 have been restrained by injunction. These cases have included the use

of "sliding scales of wages, bonuses" and other "book-keeping" manipulations.

Other items in Mr. Levy's report include:

The Division has continued to enjoin "kick-back" devices, particularly those schemes to deduct employee "contributions" to pay for the cost of factories, etc.

- By the injunction the re-employment, with back pay, of workers discharged for filing complaint has been effected.

By continued inspection the Division has checked to see that injunctions are obeyed, and only recently an employer was fined $1,000 and ordered to pay $2,000 in restitution after being held in contempt of court for violations repeated after the entry of a consent decree. One other such contempt action is pending.

The Division has instituted numerous suits in which other disputed points will be determined. Among the cases now pending is one against Swift and Company, packers, in which the Company questions the Division's interpretation of the maximum hour exemption in Section 7(c) (Northern District of Illinois). The suit is brought also to enjoin other violations not involving that Section. In a Federal Court in South Carolina, there is pending a suit in which the Administrator's definition of the area of production in Section 13(a)(10) is challenged. (Fleming v. Sumter Packing Company, Eastern District, South Carolina). Other pending suits involve the coverage of maintenance workers employed by building corporations in which are manufactured goods for interstate commerce (Fleming v. Arsenal Building Corp., Southern District of New York); the use of "scrip" by a lumber company in payment of wages, the scrip being redeemable at less than par to the profit of the company. In the same case against a large lumber company the issue is raised whether the company may make deductions for purchases by employees at a company store operated at a substantial profit, and the deduction of rent for company houses from which the company realizes a profit in excess of the return of investment permitted by regulation, Part 531 (Jacobs v. Peavy-Wilson Co., Western District, Louisiana). Contested suits are pending involving the coverage of

wholesalers receiving goods from without the state and distributing them within (Fleming v. Alterman Bros., Northern District, Georgia), and also cases involving so-called wage rate manipulations to escape payment of time and a half the regular rate of pay (Fleming v. Carleton Screw Products, Minn.; Fleming v. B. Nash Tailoring Co., Southern District, Ohio),

The Division sustained some reverses in the District Courts during this per A three-judge court in the District of Columbia held that Section 13(b)(1) included employees of common and contract carriers other than drivers, and requires the Interstate Commerce Commission, contrary to its determination, to prescribe maximum hours of service for such employees (The American Trucking Association, et al v. U. S., 31 Federal Supp. 35, District of Columbia, December 4, 1939). An appeal has been taken from this decision to the United States Supreme Court, and is to be heard this month. The District Court in Iowa has held employees of manufacturers of fresh water pearl buttons to be within the exemption of the wage and hour provisions conferred by Section 13(a)(5) to employees employed by fishermen and related industries (Andrews v. Hawkeye Pearl Button Co., Southern District, Iowa). One of the Division's suits, against railroad terminals involvi failure to pay "red caps" the specified minimum wage and the falsification of records, was held by the Federal court to be moot after the Terminal Company abandoned the tipping system and inaugurated a straight wage and fee for service system (Jacobs v. Cincinnati Terminal Co., Southern District, Ohio). The Division is appealing from all these decisions.

Numerous employee suits have been filed in both the State and Federal courts. While the Government normally does not participate in these suits brought to enforce the employee's independent right conferred by Section 16(b) for double damages the Division and the Department of Justice have intervened in cases

raising constitutional or interpretative points of general interest. The Division has intervened when the question of jurisdiction of the court to entertain such suits has been raised, or when constitutional issues are considered, or where the Regulations of the Administrator have been disputed. In many such cases jurisdictional points have been raised. Contentions have been advanced in the Federal courts by employers that there was no jurisdiction to bring such action in those courts, and similar objections have been made against the jurisdiction of the state courts. While the decisions have been conflicting, a majority of the courts have found that Congress intended to confer jurisdiction upon the Federal court to hear such suits, regardless of the amount in controversy, and similarly, State courts have held that they were courts of "competent jurisdiction", for the trial in these actions.

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