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GENERAL FLEMING ASKS HIGH COURT TO REVIEW RED CAP CASE

The Supreme Court has been asked to review the question of whether tips are wages under the Fair Labor Standards Act in a memorandum filed by the Solicitor General in behalf of General Philip B. Fleming, Administrator of the Wage and Hour Division, Department of Labor.

The Administrator, as a friend of the court, has intervened in the suit brought by red caps employed at the Union Terminal Company, Dallas, Texas, against the terminal company for restitution of wages under the Wage and Hour Law. The Circuit Court of Appeals for the Fifth District last month found that the tips received by red caps constituted wages paid to them, reversing the judgment of the court below which had found in favor of the red caps and awarded them \$77,753.98 in back pay and liquidated damages.

The memorandum was submitted in support of a petition for a writ of certiorari which seeks to bring this case before the Supreme Court as a test case and thus judicially settle a question which affects the method of compensation of the more than 6,000 red caps employed in railroad terminals throughout the country. Over fifteen suits by red caps against railroads on this question involving several million dollars are now pending.

Indirectly affected are all workers who receive all or part of their remuneration in the form of tips. A recent government survey estimates their number throughout the country to be approximately 888,500. Most of these are waiters, who are not covered by the Wage and Hour Law. Many of them are under state minimum wage orders.

The red caps maintain that tips cannot be considered as part of wages paid, but that the statutory minimum wage of 30 cents an hour should be paid by the terminals without regard to tips. The terminals on the other hand take the position that tips can be considered part of the 30 cents minimum wage. Under a so-called

accounting and guarantee plan the Dallas Terminal had required the red caps to report the amount of tips received and the number of hours worked and at the end of the week had paid the difference if tips did not equal the minimum wage.

This accounting and guarantee plan was put into operation by the Dallas Terminal Company at the time the Wage and Hour Law became effective in October 1938. Similar plans were used by numerous terminal companies to pay their red caps. These plans have since been abandoned in favor of a ten cents a parcel plan utilizing tickets.

The memorandum points out that from the beginning the plan was a source of dissatisfaction and that it violates the Wage and Hour Law. It cites the interest of Congress in the question of tips as wages as shown by a resolution passed by the Senate authorizing an investigation by the Administrator of this question.

The memorandum states that "in view of the long-continued administrative concern with the problem, the evident interest of Congress in its solution, and the large number of pending suits which involve the same issue as that here presented, the importance of a determinative decision of this case by this Court seems manifest."

It contends that the duty imposed by the Wage and Hour Law upon the Terminal Company to pay wages to the red caps is not discharged by permitting the red caps to retain the tips they receive from passengers. Such tips are not the property of the terminal company, but belong to the red caps, it is argued. It points out that the red caps themselves had never consented to this accounting and guarantee plan of compensation, nor had they by continuing to work under this plan waived their original right to ownership of tips; and furthermore, the passenger who pays the tip intends such tip to be the property of the red cap.

The Solicitor General contends that the action of the terminal company in allowing the red caps to keep their property did not constitute the payment of wages within the meaning of the Wage and Hour Law.

The accounting and guarantee system "could not prevent the tips, when given, from becoming the property of the red caps in the first instance, for the passengers who gave the tips were not made aware of the agreement and consequently still intended their gratuities to belong to the red caps. Accordingly, when given to the red caps, the tip money became their property, even though they were under a contractual obligation to account to the terminal company for the amount received. . .

"Since the tips became the property of the red caps when given, the accounting and guaranteed system amounted at most to an agreement whereby the red caps turned over some of their own property to their employer and received that property back from the employer as 'wages.' This is not, we submit, a compliance with the Act. The Act requires the actual payment of the minimum wage, not an agreement that the employer will pay the minimum wage provided that the employee gives to the employer, not only his services, but some of his property as well."

The memorandum includes for the court's consideration a report prepared last November by the Administrator for Senator Elbert D. Thomas, chairman of the Senate Committee on Education and Labor, in which he reviewed the problem of wages and other conditions of employment of red caps at various terminals.

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