NLRB BACK PAY AS A PROBLEM OF ADMINISTRATIVE INTERPRETATION UNDER THE SOCIAL SECURITY ACT

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FOR several years the question whether NLRB back pay should be deemed "wages" under various administrative aspects of the Social Security Act has been a recurring issue. It is one which is periodically tried in the administrative offices of the Bureau of Internal Revenue, of the Social Security Board, and of the various state unemployment compensation commissions. As far as this writer has been able to determine, the question has been taken to the courts in only one instance, the New York Supreme Court, on appeal from decision of the unemployment insurance administrative and appeal agencies of that state. The court held that back pay is "wages," but this decision has not been recognized as generally determinative.

Ordinarily the question occurs in connection with an individual claim for unemployment benefits (under a state unemployment compensation system), or for a federal social insurance pension (under the old-age and survivors insurance system). From time to time, labor organizations have raised the issue in order to gain "wage credits" for groups of their members. At still other times employers have raised the issue in order to gain exemption from tax levies.

The ultimate solution to the problem is important to the thousands of workers and their families who have present and future benefit.

* Any opinions expressed are those of the author and do not necessarily express the official attitude of the Social Security Board.

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3 The benefit features of the old-age and survivors insurance system are set forth in Title II of the Social Security Act, 42 U. S. C. (1940), § 402; the taxing features of this program are set forth in the Federal Insurance Contributions Act, Subchapter A of Chapter 9 of the Internal Revenue Code, as amended, 26 U. S. C. (1940), § 1400 et seq. The benefit features of each state's unemployment compensation system are set forth in its own law on the subject, together with state taxing provisions. Federal tax features relative to unemployment compensation are set forth in the Federal Unemployment Tax Act, Subchapter C of Chapter 9 of the Internal Revenue Code, as amended, 26 U. S. C. (1940), § 1600 et seq.
rights at stake. But it is also important to social security administration in seeking to develop a coherent body of policy appropriate to the purposes of social security legislation.

Before embarking upon a discussion of the problem, it may be well to remark that the social insurance system of the United States is unique in that an individual's rights to benefits is defined basically in terms of his employment and wages. This feature distinguishes it from comparable systems in practically all foreign countries. In the latter, benefit rights are usually based upon the periodic contributions paid by the workers participating in the system, and eligibility for benefits is based upon the aggregate or frequency of such contributions.

Since the American system makes use of employment and wages as the basic measure of an individual's social insurance rights, it is of crucial importance that administration should have at its disposal a completely developed concept of what are "employment" and "wages." Of course, in the majority of instances, a determination can be made prima facie upon a mere report of the facts. However, there is a significant area of problems in which a simple statement of fact does not lead to a self-evident determination, and administration must call upon the lawyers and economists to assist in determining whether an alleged wage payment shall be deemed "wages" within the meaning of the Social Security Act. One such problem is the back pay awarded to a worker pursuant to a reinstatement order of the National Labor Relations Board.4

Some idea of the material extent of the problem may be suggested by the fact that during the three fiscal years ending June 30, 1941, some 13,000 workers were reinstated in their jobs by reinstatement orders of the National Labor Relations Board, receiving an aggregate of $2,233,284 in back pay.5 In addition many states have their own "little Wagner Acts" which operate similarly; the number of reinstatements under these state acts and the back pay awarded by them has not been compiled. To the workers receiving them, the issue whether back pay awards shall be deemed "wages" may directly influence the amount of their unemployment benefits or old-age insurance benefits, or benefits to survivors in the event of a worker's premature death. Sometimes the issue is crucial as to eligibility for any benefits at all.

5 National Labor Relations Board, Sixth Annual Report 17-18 (1942); Fifth Annual Report 17 (1941); Fourth Annual Report 23 (1940).
I. Present Status of the Problem

The question whether NLRB back pay should be deemed wages received considerable attention from various administrative agencies during the year 1939 and in the early part of 1940. The earliest ruling appears to be that of the Bureau of Internal Revenue, which in S. S. T. 359\(^6\) declared that for purposes of tax liability:

"Payments made to discharged employees of the M Company upon their reinstatement pursuant to an order of the National Labor Relations Board do not constitute wages within the meaning of titles VIII and IX of the Social Security Act."\(^7\)

Shortly thereafter the Social Security Board decided that it would not regard such back pay as constituting "wages" for purposes of wage credits and benefits under the old-age and survivors insurance system.

Decisions on this question were also issued by a number of state unemployment compensation authorities. Their conclusions are divided. Those which rule back pay is not "wages" generally follow the reasoning of the Bureau of Internal Revenue ruling, or simply stand upon it as a precedent.\(^8\) Those which rule that back pay is "wages" find arguments which to them are more forceful in reaching the opposite conclusion or even take issue with the reasoning of the Bureau of Internal Revenue.\(^9\)

In resume, the reasoning in the Bureau of Internal Revenue ruling may be stated as follows: Section 209(a) of the Social Security Act defines "wages" as "all remuneration for employment" and section 209(b) defines "employment" as "any service, of whatever nature, performed ... by an employee for the person employing him."\(^7\) The bureau therefore finds that back pay cannot be deemed "wages" because (1) the employee has performed no services for which such payments are made; (2) the employer has done all within his power to terminate the employment relationship, at least temporarily; (3) the employee has no right to demand compensation; and (4) back


\(^{8}\) E.g., California and Iowa. Cf. 4 Social Security Board, Unemployment Compensation Interpretation Service, State Series, No. 2, 2289 - Iowa 136; also, California Department of Employment, Codified Interpretative Opinion, Code No. 5011-47.

\(^{9}\) E.g., New York and New Jersey; see discussion following.
pay is payment to the employee on account of unemployment caused by an unfair labor practice of the employer.

Other administrative agencies, which have ruled that back pay is not "wages," have added the following arguments to support this conclusion: (1) that back pay is a "requirement imposed for violation of the statute"; (2) that the definition of "employee" contained in the Wagner Act is peculiar to that act; and (3) that the payment is not remuneration for employment but rather results from the power granted to the National Labor Relations Board in order to promote better relations between employers and employees.

The opposite conclusion, holding that back pay is "wages," was reached by certain of the unemployment compensation authorities. Of particular interest is the reasoning in leading cases in New York and New Jersey. The New York Appeal Board in July 1939 reviewed a claim for unemployment insurance benefits which had originally been disallowed. Its decision,\(^\text{10}\) which was afterwards affirmed by the New York Court of Appeals,\(^\text{11}\) is founded upon the "make whole" policy of the National Labor Relations Act, and reads in part as follows:

"Under the provisions of the consent decree the appellant was directed to 'make whole' the claimants for losses of pay sustained by reason of their discharge. The amounts awarded to each of the claimants for the year 1937 under the terms of the consent decree were computed upon their estimated earnings for that year and were intended to recompense them for the wages they would have earned had they not been wrongfully discharged. In the light of this can it be said that the amounts so awarded were in the nature of damages rather than wages? We believe not. To do so would be to negative the very basis upon which these awards were determined, and to deprive the employee of the benefits granted to him under the provisions of the Unemployment Insurance Law because of the wrongful act of the employer. The only basis provided in the Unemployment Insurance Law for the payment of benefits during periods of unemployment is wages earned. Therefore, to consider as damages the amounts awarded to these claimants would destroy their right to benefits based thereon."

\(^{10}\) 4 Social Security Board, Unemployment Compensation Interpretation Service, State Series, No. 2, 2301 - N. Y. R.

The appeal board and the court therefore concluded that the back pay should be added in to the total of wages for the computation of the claimant's benefits.

When the New Jersey unemployment compensation agency first considered the problem it ruled that back pay was damages rather than wages, but in April 1940, it reheard the same case and reversed itself on the ground that: (1) the National Labor Relations Board had determined that the discharge of the employee by the employer was invalid; (2) that the claimant had remained in the employ of the employer during the period in question; (3) that he had held himself ready throughout the period to perform services that might be assigned him by the employer; and (4) that the payment in question was for services rendered by the employee in holding himself ready to perform services assigned him by his employer.\(^\text{12}\)

Thus a variety of legal doctrines have been looked to and have been the basis of diametrically opposed conclusions. To gain orientation for re-examination of the problem, it may be valuable to review briefly the statutory elements and the background of administrative interpretation with respect to "wages" under the Social Security Act. In the following discussion, only the old-age and survivors insurance system will be treated for descriptive purposes; the content of the various state administered unemployment compensation laws on the points under discussion is quite similar, and the problems almost identical.

2. **Statutory Definition of "Wages"**

Section 209(a) of the Social Security Act reads:

"The term 'wages' means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include. . . ."

Then follows a listing of kinds and types of payments which an employer might make to or in behalf of his employee and which the Social Security Act will not deem "wages." This listing includes remuneration in excess of $3,000 per calendar year; benefits under certain types of private plans to meet an employee's expenses of sickness, accident, death or retirement; social security tax payments; dismissal wages

\(^{12}\) *Social Security Board, Unemployment Compensation Interpretation Service, State Series, No. 2, 2298 - N. J. R.*
under certain conditions; and any remuneration paid prior to the year
1937, when the act first went into effect.\textsuperscript{13}

Since the term "wages" is identified as "remuneration for employ-
ment," it is essential to examine also the definition of "employment"
in order to complete the concept. Section 209(b) of the act states that:

"The term 'employment' means . . . any service, of whatever
nature, performed . . . by an employee for the person employ-
ing him . . . except . . . ."

Then follows a list of fifteen exceptions of types of employment or
services which are not deemed "employment" for purposes of the So-
cial Security Act. Some of these exceptions are based upon the nature
of the occupation, some are based upon the family relationship of the
employer to the employee, some are based upon the legal character of
the employer.\textsuperscript{14}

While the statute thus defines "employment" and "wages," it must
be recognized that the determination of what constitutes employment
and wages does not purport to be an objective of the program. Quite
otherwise, the purpose of the legislation is "to provide for the general
welfare" and "to raise revenue," and, more specifically, the purpose of
the old-age and survivors insurance benefits program, title II, is that
of providing security for certain groups of the population, against the
economic hazards resulting from old age and death.\textsuperscript{15} To carry out
these purposes, the statute outlines, broadly, certain administrative
methodology. It is in this area that "wages" determinations function.

3. Function of "Wages" Determinations

"Wages" determinations fulfill a four-fold function: (1) to de-
termine which individuals shall be deemed eligible for benefits; (2)
to compute the amount of the benefit payable in each case; (3) to

\textsuperscript{13} Social Security Act, 42 U. S. C. (1940), § 409(a); "wages" is defined in
identical language, for old-age and survivors insurance tax purposes, in the Federal
Insurance Contributions Act, 26 U. S. C. (1940), § 1426(a). For purposes of inter-
pretation, relating to the employee's tax and the employer's tax under the contribu-
tions act, there has been issued Treasury Regulations 106 (1940). Interpretations with
respect to benefits have been published as Social Security Regulations No. 3 (1940).

\textsuperscript{14} Social Security Act, 42 U. S. C. (1940), § 409(b). Identical language appears
language also appears in the Federal Unemployment Tax Act, 26 U. S. C. (1940),
§ 1607(b) and (c).

\textsuperscript{15} Cf. Social Security Board, What is Social Security? p. 9 (1940)
(pamphlet, I. S. C. 1).
measure the tax or contribution assessment levied upon individuals for purposes of financing the program; and (4) as a technique of control, to prevent the enjoyment of benefits by those deemed not to be in need of them. In explanation of this functional view:

(1) "Wages" determine if an individual shall be deemed eligible for benefits, by virtue of the requirement that benefits shall be payable to an individual only if he is—or is the close relative of—a "fully insured individual" or a "currently insured individual." To have "fully insured" status, generally speaking, a worker must have a work history showing at least $50 of wages paid in half as many calendar quarters as have elapsed between January 1, 1937, and the time of his death or attainment of age 65.16 To have "currently insured" status, the worker must have a recent work history showing at least $50 of wages received for employment in at least six of the twelve calendar quarters immediately preceding the quarter in which he died.17

(2) "Wages" determine the amount of benefits payable by serving as the basis of computations. A series of formulae are set forth in the statute, the basic one being for determining a worker's "average monthly wage." Generally speaking, this average is found by dividing the worker's aggregate wages, paid to him while in covered employment, by the number of months which have elapsed after January 1, 1937.18 If any substantial wage payment is omitted from the wages credited to a worker the average will be reduced, and benefit amounts computed on the basis of such average will be reduced.

(3) "Wages" are the measure of taxes assessed upon workers and their employers. The tax is a stated percentage of the wages paid to each worker; the employer pays an amount equal to that collected from all his employees.19

(4) "Wages" are a control device, in that the amount of one month's benefit is deducted for each month in which a beneficiary works for wages of $15 or more.20

It will be observed that while taxes are geared to the aggregate of "wages" paid to the individual, benefits are geared to his "average

16 Social Security Act, 42 U. S. C. (1940), § 409(g).
17 Id., § 409(h).
18 Id., § 409(f). The formula for the retired worker's, or "primary insurance," benefit is set forth in § 409(e); formulae for other benefits appear in § 402 (b), (c), (d), (e), (f), and (g).
20 Social Security Act, 42 U. S. C. (1940), § 403(d)(1).
monthly wage. In principle, the system provides benefit amounts for each individual roughly in proportion to the wage income he enjoyed from his own employment, or in the case of dependents and survivors, from the employment of a spouse, parent or child.\textsuperscript{21}

This inference as to principle seems to be confirmed, not only by reports of the Congressional committees, but also by the general context of the statute. For example, section 209(a) states that "wages" means not only remuneration in cash, but also the "cash value of all remuneration paid in any medium other than cash," so that workers receiving wages in kind shall not be at a disadvantage. Further, the statute dismisses from its purview those workers who ordinarily receive earnings which in amount or frequency are not likely to bring them within the requirements of eligibility for benefits. The earnings of such workers are specifically excluded from consideration and taxation by the definition of "wages." The group thus excluded comprises college students, newsboys, spare-time officials of fraternal and labor organizations who receive nominal remuneration, and workers who do casual labor not in the course of the employer's business.\textsuperscript{22}

4. Interpretation of Term "Wages"

As would be expected, day-to-day operations have required application of the statutory definitions to a wide variety of specific situations which do not fit in an obvious manner into or outside the category of "wages." The Social Security Board is required to make interpretations with respect to situations which arise under the old-age and survivors insurance program, and state unemployment compensation agencies must make decisions on situations which relate to their systems. In addition, the Bureau of Internal Revenue makes decisions on situations which arise under both types of program on questions of tax liability.\textsuperscript{23} A large body of regulations, rulings, interpretations

\textsuperscript{21} Cf. S. REP. 734, 76th Cong., 1st sess. (1939), p. 10: "An average wage formula will relate benefits more closely to normal wages during productive years. Since the object of social insurance is to compensate for wage loss, it is imperative that benefits be reasonably related to the wages of the individual." Also: "The monthly benefits payable to these survivors are related in size to the deceased individual's past monthly benefit or the monthly benefit he would have received on attaining age 65." Id. 11. Similar statements appear in the companion report of the House Ways and Means Committee. H. REP. 728, 76th Cong. 1st sess. (1939).

\textsuperscript{22} S. REP. 734, 76th Cong., 1st sess. (1939), p. 19.

\textsuperscript{23} In addition to general regulations published by the Social Security Board (Regulations No. 3) and the Bureau of Internal Revenue (Regulations No. 106 and 107), the latter has issued numerous precedent rulings, published as the "S. S. T. Series." Precedent rulings of the Social Security Board have to date not been published.
and decisions has already grown up and will continue to increase. Experience has led to the evolution of a technique of attack on this whole class of problems, and although it has never been crystallized or reduced to writing, it can be used as a framework for the solution of the back pay problem. The technique is a process of examining any payment alleged to be "wages," and of seeking to identify three elements in it:

1. An employer-employee relationship;
2. Receipt of payment by the employee from the employer, in the form of cash or something other than cash; and
3. Services by the employee for the employer.24

For the vast majority of wage and salary payments, crediting as "wages" is an automatic procedure. Ordinarily, payments are reported quarterly by the employer to the tax collection agency, the Bureau of Internal Revenue, on a prescribed form, accompanied by transmission of sufficient funds to cover both the employer's and all his employees' taxes. The employer is authorized to withhold from each employee's pay envelope the amount of the tax assessed against the employee's wages. The report forms, identifying each employee, and listing the amount of wages paid during the calendar quarter to each, is forwarded to the Social Security Board.25 The board transfers each quarterly wage item to a ledger account maintained for each employee, thus automatically crediting the reported payment as "wages."26 This procedure has the effect of an administrative determination that the reported items are "wages" in the large majority of instances. There are additional procedures whereby the Social Security Board may challenge the inclusion of particular reported items, and other procedures whereby a worker may make representations that he received certain payments that were not reported but which should be credited to his ledger account as "wages."27

Ordinarily, then, the three elements which are required for a determination of "wages" are presumed to exist prima facie upon an employer's report that they were paid. However, supporting evidence may be required whenever the Social Security Board considers it neces-

necessary to question the recording of an alleged payment as "wages," or
the worker may offer evidence on one or more of these elements in
support of an allegation that more "wages" were received by him than
are entered on his wage record.

Note, however, that the board does not take account of wages
earned but not paid. The statute uses the term paid to the individual,
and this has been strictly construed to mean the physical transfer of
money or other remuneration. A limited exception to this rule has
been formulated to allow the crediting of wages constructively paid,
that is, retained by the employer but in a separate account and under
conditions which permit the employee to take possession of the money
upon demand and without restriction.28

Note, similarly, that the board does not concern itself with the
wage rate or the value of the services in relation to the amount of the
wage reported. For example, if an employer violates the Fair Labor
Standards Act and pays his employee below the minimum rate estab­
lished by law, the board will credit to the employee's wage record only
those amounts actually paid to him. If, however, an action is insti­
tuted which results in an award to the employee of the difference
between the wages paid and the legal minimum, the board will credit
the amount awarded to the employee's wage record as soon as pay­
ment is made. In other words, the board does not look behind the
wage payment as reported, being satisfied with the finding that the
employer made an actual payment, that the payment related to "ser­
vices," and that there was an employer-employee relationship.

With these considerations in mind, the NLRB back pay question
can be examined in the light of the three elements enumerated above.

(a) Employer-Employee Relationship

It is a firmly established principle that a reinstatement order of the
National Labor Relations Board operates retrospectively; it ordinarily
re-establishes the employee's status as of the beginning of the unfair
labor practice.29 With respect to the employment relationship, this
means that the employee is as if he had never been separated from his
employment; he regains whatever seniority rights, pension or other
rights he would have had but for the employer's illegal act in dis­
charging him. Furthermore, the existence of the employment relation­

28 Social Security Board, Regulations No. 3, § 403.801 (m).
F. (2d) 146.
ship is deemed to have been continuous during the entire period designated in the reinstatement order. This is brought out in the opinion of the Circuit Court of Appeals for the Third Circuit on a Republic Steel case. In this case, the issue was as to vacation rights of certain employees previously reinstated upon order of the National Labor Relations Board. The company had a vacation plan under which a set number of days of vacation with pay were given to employees who had a requisite number of years of continuous service.

The company contended that the reinstated employees must start as new employees in their accumulation of service credits to entitle them to vacation under the plan. The opinion of the court on this question reads in part as follows:

"The striking employees were ordered by the Board and by this court to be reinstated 'without prejudice to their seniority or other rights or privileges.' We think it was the intention of the Board, as it was of this court, to provide that upon reinstatement the striking employees were to be treated in all matters involving seniority and continuity of employment as though they had not been absent from work. It follows that the reinstated strikers are entitled to the benefits of Republic's vacation plan for the year in which they are reinstated and all subsequent years upon a basis of continuity of service computed as though they had been actually at work during the entire period from May 25, 1937 to the date of reinstatement. Thus an employee who had continuous service with Republic for twelve years prior to May 1, 1937 and who went out on strike in that month and was reinstated in January, 1940, would be entitled in 1940 to the vacation of 10 days granted by the vacation plan to employees having 15 years continuous service." 30

It seems clear that an employee who is awarded back pay together with reinstatement must be deemed to have been in an employment relationship with his employer during the period between discharge and reinstatement.

(b) Payment

According to section 10(c) of the National Labor Relations Act, the board may in its discretion order the employer to give the employee back pay for the period since his discharge. However, this discretion is limited, since in computing the amount of the back pay the board takes

into account such elements as customary wage rates, the customary continuity and amount of employment the individual would have had, and any factors which would have reduced his total earnings had the normal situation not been interrupted, such as payless vacations and work for other employers. In other words, the board takes into account precisely those factors which would under normal circumstances have determined the amount of wages the employee would have earned in the course of the restored employment relationship.\textsuperscript{81}

However, the fact that the amount of the payment is computed in the manner of wages does not necessarily imply that the payment is wages. The ruling of the Bureau of Internal Revenue, for example, contains language which seems to imply that the payment is a type of damages when it says that these are "payments to the employees on account of unemployment caused by an unfair labor practice of the employer."\textsuperscript{82}

Reference might also be made to the 1937 Jones & Laughlin case before the Supreme Court. Chief Justice Hughes' opinion for the Court in this case has a sentence which might be interpreted as meaning that back pay is inferred to be a type of penalty: "Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement."\textsuperscript{83}

However more recent cases have given specific consideration to the problem of the status of back pay. The "damages theory" seems to have been ruled out by the decision in Agwilines v. National Labor Relations Board.\textsuperscript{84} The court was asked to pass upon the question whether a back pay award constituted an award of damages without a jury trial, and stated in part:

"... The procedure the statute outlines is not designed to award, the orders it authorizes do not award, damages as such. ... A cease and desist order operating retrospectively is not a private award, operating by way of penalty or of damages."\textsuperscript{85}

As to whether or not a back pay award might be construed to be a penalty, the Supreme Court decision in the Republic Steel Corporation case seems to have ruled upon this point. This was the case in which

\textsuperscript{81} E.g., Matter of Atlas Mills, 3 N. L. R. B. 10 at 23 (1937).
\textsuperscript{82} S. S. T. 359, 1939-1 INT. REV. BULL. 305 at 307.
\textsuperscript{83} National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1 at 48-49, 57 S. Ct. 615 (1937).
\textsuperscript{84} (C. C. A. 5th, 1936) 87 F. (2d) 146.
\textsuperscript{85} Id. 150, 151.
the discharged employees had obtained employment on a government work-relief project while waiting for reinstatement. The Labor Board, in order to prevent the employer from gaining the advantage of not having to make back payments in the amount that the employees had earned on work-relief projects, ordered the corporation to pay to the government work-relief agencies an amount equal to the work-relief wages of the reinstated employees. The Court ruled this to be illegal. In its majority decision the Court stated:

"The payments to the Federal, State, County, or other governments are thus conceived [by the labor board order] as being required for the purpose of redressing, not an injury to the employees, but an injury to the public... So conceived, these required payments are in the nature of penalties imposed by law upon the employer,—the Board acting as the legislative agency in providing that sort of sanction by reason of public interest. We need not pause to pursue the application of this theory of the Board's power to a variety of circumstances where community interests might be asserted. The question is,—Has Congress conferred the power upon the Board to impose such requirements.

"We think that the theory advanced by the Board proceeds upon a misconception of the National Labor Relations Act. The act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes. The act does not prescribe penalties or fines in vindication of public rights or provide indemnity against community losses as distinguished from the protection and compensation of employees. Had Congress been intent upon such a program we cannot doubt that Congress would have expressed its intent and would itself have defined its retributive scheme." 86

These decisions seem to set aside the thought that NLRB back pay can be construed as either damages or a penalty. Inevitably, it seems, the payment must be related back to the employment and the employment contract which the employer had unsuccessfully attempted to interrupt by dismissal.

(c) Services

The third element in the characterization of "wages" is that which relates it to "services" by the employee for the employer. In the ordinary sense of the term it is obvious that an employee cannot have performed any useful work for his employer during the period of his

discharge, whether or not such discharge were legal. Common observation is the strongest argument against finding that the worker performed "services." One can only ask if services may properly be construed for the period covered by the back pay.

It has been noted above that a theory of "constructive services" served as a basis upon which the New Jersey Unemployment Compensation Commission Board of Review ruled back pay to be "wages." This body declared that payment was in consideration of services rendered by the worker in "holding himself ready" to perform services assigned him by the employer.

There is an old "constructive service" doctrine in English law, dating back to the early nineteenth century. It has been adopted by the courts of a number of American jurisdictions, and some jurisdictions have enacted statutes which recognize or restate it. On the other hand, later English decisions have repudiated the doctrine, and in the majority of American jurisdictions the courts which have passed upon the question have also definitely rejected or repudiated it. This doctrine contemplates situations in which an employee, under a contract of employment for a specific term, is dismissed by his employer without sufficient cause. Those who uphold the doctrine maintain that by holding himself ready and willing to perform the service contracted for, the employee should be regarded in law as having actually performed the services, and that he may therefore recover the compensation agreed upon in the contract of employment. Those who reject the doctrine do so on the ground that it is irreconcilable with the rule that a person discharged from service must not remain idle but must accept employment elsewhere if offered.\(^87\)

Without attempting further inquiry into the constructive service doctrine, it may be observed that the situations covered by this doctrine are distinguishable from situations in which the dismissal of an employee is declared an unfair labor practice under the Wagner Act. In the former type of situation, the employer has succeeded in his intent to terminate the contract of employment by dismissing his employee, whereas in the latter, the discharge is deemed to be without effect; and since reinstatement is made retrospectively, the employment relationship is deemed to have been continuously in operation throughout the period following attempted discharge.

This seems to have been the thought in the recent decision by the Circuit Court of Appeals for the Eighth Circuit in the Hamilton-
Brown Shoe Company case. A back pay order had been issued against the company, but before the order was complied with, the company went bankrupt, and the question before the court was whether the back pay order constituted a prior claim against the assets of the company. Under bankruptcy law, wages earned by the company’s employees would ordinarily be considered as entitled to a priority. The court ruled that NLRB back pay is wages whose status is exactly the same as unpaid wages earned by other employees in the normal course of the employer’s operation. The court’s decision reads in part:

“We have declared above that a back pay allowance, under the provisions of the National Labor Relations Act, is intended as, and constitutes, wages which a workman has constructively earned by reason of his continued status as an employee. This view clearly brings it within the operation of § 64a(2), 11 U. S. C. A. § 104a(2), governing wage priorities. If the act had authorized such an allowance to be made in the nature of damages, a different situation would perhaps be presented. Congress has, however, specifically made it ‘back pay’ in a continued employment status and this sufficiently constitutes it ‘wages earned’ to eliminate legal shadows.”

It may be urged in opposition to this thought that the Social Security Act has adopted a usage of the term “services” which is peculiar to itself. It may be argued that the use of the term “services” coupled with the term “employment” is a statutory directive implying that more than a mere contract of employment was contemplated. If this extreme view were accepted, it would place upon the Social Security Board an administrative burden unique in character and far flung in its implications. At any rate, this view has not been advanced and need not detain us.

That actual physical or mental labor is immaterial for a finding that “services” were performed, seems to be a well established principle. In Re B. H. Gladding Co. the federal district court was asked to determine whether an employee had a valid priority claim for wages with respect to a vacation with pay under a plan established by the employer. The employee took the full vacation, but before he could obtain the pay, the employer went into bankruptcy and the referee in bankruptcy disallowed the claim, on the ground that the bankruptcy

38 National Labor Relations Board v. Killoren, (C. C. A. 8th, 1941) 122 F. (2d) 609 at 614 (italics supplied).
39 (D. C. R. I. 1903) 120 F. 709.
statute provided priority for wages earned and in this case the alleged wages had not been earned. The court contradicted the referee’s determination and stated in part:

"...To attempt distinctions between wages due which are earned and wages due which are not earned, by an inquiry into the amount of work done by the wage earner, would be entirely impractical. If we disallow claims for a week's vacation, we must also disallow claims for half days when stores are closed, and for days and hours when there is nothing to do. Wages are 'earned,' in the sense in which that term is used in the bankruptcy act, so long as a bona fide contract of hiring exists, and the clerk or servant continues in the master's employment and does all that he is required to do. The practice of giving vacations with continued pay is very general in all departments of business. Vacation wages cannot be regarded as a mere gratuity, given in recognition of past or present services. By continuing the relation of employer and employee during a dull season, the employer holds his working force in readiness for the active season. The relation of the employer and employed is as strictly a business relation as it is during the working season, and there is full legal consideration for the master's promise to pay wages during this period." 40

The social security statute itself clearly departs from any principle that a showing of services in the form of actual physical or mental labor must be made. The following types of payments have been deemed to be "wages" although they arise in situations in which actual labor has obviously not been performed: 41

(a) Vacation pay;
(b) Sick pay, disability pay, medical and hospital expenses, when such payments are not a part of an established plan;
(c) Pay while on state National Guard duty; 42
(d) Retainer fees to consultants, etc.

5. Towards a Solution of the Problem

Thus, in spite of the uncertain status of the question as it has been handled by various administrative agencies, there seems to be a weight of argument in favor of ruling that NLRB back pay is "wages" within the meaning of the Social Security Act. But more than this, the effect

40 Id. 711.
41 Cf. Social Security Board, Regulations No. 3, § 403.827.
of an affirmative ruling would seem to be in conformity with national labor and social policy as reflected in the two statutes set side by side.

One of the stated purposes of the Wagner Act is that of removing labor strife from among the causes of interruption of industrial operation. There seems to be a warranted inference from this and other legislation that national labor policy also favors the stability of employment and the continuity of workers' wage incomes. This inference reasonably includes all elements of economic security incidental to uninterrupted employment, as well as immediate remedies under the Wagner Act. It seems clear that the "make whole" doctrine attributed to the National Labor Relations Act easily includes the security for the worker and his family which was created under the Social Security Act.

As previously stated, it is a fundamental principle of the old-age and survivors insurance system that the individual's right to benefits is established if he exhibits a specified regularity of wage income in an industry which is covered by the law; and that the amount of those benefits are a certain proportion of his average wage income during the period which the system takes into consideration. The spouse or children or parents of a worker may enjoy similar rights by derivation from the worker who has himself established entitlement. The function of "wages" is thus conceived as a convenient device for measuring the wage history by which an individual worker shall have his right to benefits determined, and by which the amount to which he is entitled shall be computed.

A back pay award may be considered a reflection of the worker's normal wage history for the period of illegal discharge, and as such should be taken into account in measuring his social security benefit rights. To do otherwise results in allowing principles of the Social Security Act to be thwarted by an employer's illegal act. It is precisely against the effects of such acts that national labor and social legislation has been created for the protection of the worker and his family.