

1942

LABOR LAW - COVERAGE UNDER FAIR LABOR STANDARDS ACT OF SERVICE EMPLOYEES OF LOFT BUILDING WHOSE TENANTS ARE ENGAGED IN COMMERCE

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Recommended Citation

Lee B. Brody, *LABOR LAW - COVERAGE UNDER FAIR LABOR STANDARDS ACT OF SERVICE EMPLOYEES OF LOFT BUILDING WHOSE TENANTS ARE ENGAGED IN COMMERCE*, 41 MICH. L. REV. 340 (1942).

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LABOR LAW — COVERAGE UNDER FAIR LABOR STANDARDS ACT OF SERVICE EMPLOYEES OF LOFT BUILDING WHOSE TENANTS ARE ENGAGED IN COMMERCE — Defendant was a lessor of a loft building, portions of which were occupied by clothing manufacturers who shipped their products into interstate commerce. As part of its obligation under the lease, the defendant offered service and maintenance of the building, employing for that purpose elevator operators, watchmen, firemen, an engineer, a carpenter and his helper, and a porter. Defendant appealed from an injunction prohibiting it from further violating the wage provisions of the Fair Labor Standards Act of 1938.¹ The circuit court of appeals² affirmed the judgment of the district court granting the injunction. *Held*, on certiorari, one justice dissenting, that the decision of the circuit court of appeals be affirmed. The employees were engaged “in the production of goods for commerce” and did not fall within the statutory exemption for “service establishments.” *Kirschbaum v. Walling*, (U. S. 1942) 62 S. Ct. 1116.³

There is no doubt but that the character of the employee's work rather than that of the employer governs the applicability of the Fair Labor Standards Act.⁴

¹ 52 Stat. L. 1060 (1938), 29 U. S. C. (1940), § 201 et seq.

² *Fleming v. Kirschbaum Co.*, (C. C. A. 3d, 1941) 124 F. (2d) 567.

³ Another case with practically identical facts was decided simultaneously, *Arsenal Bldg. Corp. v. Walling*.

⁴ Sec. 6 (a), dealing with minimum wages, reads, for example, “Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates. . . .” 52 Stat. L. 1062 (1938), 29 U. S. C. (1940), § 206. That Congress recognized and rejected the possibility of requiring the employer to be “engaged in commerce or in an industry affecting commerce” is clearly indicated in the report of the Conference Committee, H. REP. 2738, 75th Cong., 3d sess. (1938) pp. 29-30, where a House of Representatives amendment to that effect was refused. See also the Congressional debate, 83 CONG. REC. 9168 (1938). Most of the cases follow this view: *Bowie v. Gonzalez*, (C. C. A. 1st, 1941) 117 F. (2d) 11; *Sunshine Mining Co. v. Carver*, (D. C. Idaho, 1940) 34 F. Supp. 274; *Contra: Killingbeck v. Garment Center Capitol*, 259 App. Div. 691, 20 N. Y. S. (2d) 521 (1940); *Gerdert v. Certified Poultry & Egg Co.*, (D. C. Fla. (1941) 38 F. Supp. 964; *Johnson v. Filstow, Inc.*, (D. C. Fla. 1942) 43 F. Supp. 930. The latter case involved the application of the act to a janitor in a building leased to a manufacturer engaged in commerce. The court mistakenly relied upon § 5 (a) which provides for “industry committees” to make more extensive regulations within any industry wholly apart from the minimum requirements of the statute.

Although usual, it is not necessary for the employer to be dealing in interstate commerce, and thus it is immaterial that the defendant in the principal case merely leased space to the manufacturers and was not himself engaged "in the production of goods for commerce." The statute offers no basis for any distinction based upon the nature of the employer's occupation. A contrary conclusion might lead to substantial evasion of the act by the use of independent contractors.⁵ The significant problem is whether the *employees* claiming protection of the act are "producing" for interstate commerce within the statutory definition of that term.⁶ In the principal case the court found that they were. "In our judgment, the work of the employees in these cases had such a close and immediate tie with the process of production for commerce, and was therefore so much an essential part of it, that the employees are to be regarded as engaged in an occupation 'necessary to the production of goods for commerce.'" ⁷ The result seems to give effect to the apparent intent of the framers of the act, since, to satisfactorily carry out its policy, i.e., the maintenance of an adequate minimum standard of living, it should be accorded a very extensive coverage.⁸ The Supreme Court in the *Darby* case ⁹ recognized the Congressional power to regulate production in order to protect the manufacturers of one state from having to lower wages and increase hours to be able to compete with goods produced under substandard

⁵ In *Warren-Bradshaw Drilling Co. v. Hall*, (C. C. A. 5th, 1941) 124 F. (2d) 42, the act was applied to members of a rotary drilling crew drilling oil wells for an independent contractor who was not the owner of any of the land worked upon. For the alternative view, see *Pedersen v. J. F. Fitzgerald Construction Co.*, 173 Misc. 188, 18 N. Y. S. (2d) 920 (1940), wherein the court held that the plaintiff, who was working for a contractor hired by a railroad to build abutments and substructures below bridges to be used in interstate commerce, was not covered. It was conceded, however, that had the plaintiff been employed by the railroad itself while it was using the bridges, he would have been covered.

⁶ It is defined in § 3 (j) as, "produced, manufactured, mined, handled, or in any other manner worked upon in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State." 52 Stat. L. 1060 (1938), 29 U. S. C. (1940), § 203.

⁷ Principal case, 62 S. Ct. at 1121. The Supreme Court repudiates the suggestion of the circuit court of appeals to the effect that since the employees were doing essentially the same work as if employed by the manufacturer himself, they were "producing" for interstate commerce.

⁸ *Divine v. Levy*, (D. C. La. 1941) 39 F. Supp. 44. The Wages and Hours Division has declared that, ". . . Congress intended the widest possible application of its regulatory power over interstate commerce; and the Administrator, in interpreting the statute for the purpose of performing his administrative duties, should properly lean toward a broad interpretation of the key words 'engaged in commerce or in the production of goods for commerce.'" Interpretative Bulletin No. 1 (1938), 1941 WAGE AND HOUR MANUAL 27 at 28.

It should be noted that Justice Roberts dissented in the principal case on the ground that he did not feel Congress had meant to control such local activity as that here involved.

⁹ *United States v. Darby*, 312 U. S. 100, 61 S. Ct. 451 (1941).

labor conditions in other states.¹⁰ To say that Congress intended to extend its power only to those employees who have physical contact with the goods intended for interstate commerce appears to be an unwarranted assumption.¹¹ The act has been applied to bookkeepers,¹² lumber camp cooks,¹³ and dead-season employees,¹⁴ none of whom actually handle the product or come within the dictionary meaning of "production" employees. The principal case is in harmony with this policy.¹⁵

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¹⁰ "The motive and purpose of the present regulation are plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows." 312 U. S. at 115.

¹¹ *Mid-Continent Pipe Line Co. v. Hargrave*, (C. C. A. 10th, 1942) 5 WAGE & HOUR REP. 275. On the basis of the circuit court decisions in the principal case and in the case of *Fleming v. Arsenal Building Corp.*, (C. C. A. 2d, 1941) 125 F. (2d) 278, the Wages and Hours Division indicated that the act will be extended to "employees engaged in producing fuel, power, or other goods or facilities for use or consumption entirely within the state by essential instrumentalities of interstate commerce" and by "manufacturers . . . within the state in the production of other goods for interstate commerce." 5 WAGES & HOUR REP. 289 (1942).

¹² *Wilkerson v. Swift & Co.*, (D. C. Tex. 1941) 4 LABOR CASES, ¶ 61,522; *Fleming v. Atlantic Co.*, (D. C. Ga. 1941) 40 F. Supp. 654. Contra: *Abadie v. Cudahy Packing Co. of Louisiana*, (D. C. La. 1941) 37 F. Supp. 164 (ledger clerk necessary to the business but not to production).

¹³ *Ikola v. Snoqualmie Falls Lumber Co.*, (Wash. 1942) 121 P. (2d) 369. Contra: *Womack v. Consolidated Timber Co.*, (D. C. Ore. 1941) 43 F. Supp. 625 (cookhouse employees exempt because in a "service establishment").

¹⁴ *Bowie v. Gonzalez*, (C. C. A. 1st, 1941) 117 F. (2d) 11 (repair and maintenance of sugar mill facilities during dead season); but note *Gill v. Electro Manganese Corp.*, 177 Tenn. 81, 146 S. W. (2d) 352 (1941), rehearing denied, 4 WAGE & HOUR REP. 110 (1941) (employee of employer experimenting with product he intends to ship into interstate commerce was held not covered). To the effect that watchmen are benefited by the act, *Wood v. Central Sand & Gravel*, (D. C. Tenn. 1940) 33 F. Supp. 40; *Lefevers v. General Export Iron & Metal Co.*, (D. C. Tex. 1941) 36 F. Supp. 838. Contra: *Farr v. Smith Detective Agency & Night Watch Service*, (D. C. Tex. 1941) 38 F. Supp. 105. Some courts refuse coverage unless the watchman has other duties, such as firing the furnace, *Hart v. Gregory*, 220 N. C. 180, 16 S. E. (2d) 837 (1941).

¹⁵ The defendant also contended that his workers were exempt because they were employed in a "service establishment." The court rejected this, saying, "Selling space in a loft building is not the equivalent of selling services to consumers." Moreover, the court pointed out that the greater part of the "servicing" was not in intrastate commerce. Principal case, 62 S. Ct. at 1121. See *Wood v. Central Sand and Gravel Co.* (D. C. Tenn. 1940) 33 F. Supp. 40 at 47; *Fleming v. Arsenal Building Corp.*, (C. C. A. 2d 1941) 125 F. (2d) 278; *Fleming v. Hawkeye Pearl Button Co.*, (C. C. A. 8th, 1940) 113 F. (2d) 52.

The section of the act involved is the following: "The provisions of sections 6 and 7 of this title shall not apply with respect to . . . (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." 52 Stat. L. 1067 (1938), 29 U. S. C. (1940), § 213.