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Labor Law: Regular Rate of Pay under Section 7(a) of the Fair Labor Standards Act of 1938

Albert Brundage

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situation; that Congress in addition provided for the deduction of expenses incurred in the “production or collection of income”, indicating that it was immaterial whether such expenses were incurred in a trade or business. The reasoning of the majority opinion in the Bingham decision appears to be in harmony with the dissent to the McDonald case on this point, rather than with the opinion of Mr. Justice Frankfurter. It seems, therefore, that the Supreme Court has adopted a broader view with respect to deductible expenses under the new provision, and in applying the new section will not hold itself strictly bound by the requirements of deductibility applicable to the old, notwithstanding the statement of the House and Senate committees and the Regulations.

Enid Weseman*

LABOR LAW: “REGULAR RATE” OF PAY UNDER SECTION 7(a) OF THE FAIR LABOR STANDARDS ACT OF 1938

What constitutes a “regular rate” of pay for the purpose of determining overtime compensation under section 7(a)1 of the Fair Labor Standards Act, and how this rate is to be computed, has been of concern to the courts, as well as to employers and employees operating under the Act. Two recent decisions2 of the Supreme Court, as well as the forecasts of our economic experts regarding future employment trends,3 makes timely a review and reappraisal of the action of the Court in respect to this vital section.

*On leave of absence from the third-year class.

1 “Sec. 7(a). No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,
(2) for a workweek longer than forty-two hours during the second year from such date, or
(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.” 52 Stat. (1938) 1063; 29 U.S.C. (1940) §207.


3 In the FOURTH REPORT TO THE PRESIDENT (p.13), submitted by the Director of War Mobilization and Reconversion on Oct. 1, 1945, Director John W. Snyder stated: “by spring unemployment may reach about eight million”.

Secretary of Labor Schwellenbach, testifying before the House Committee on Expenditures on Nov. 7, 1945, in regard to the Full Employment Act of 1945 stated that, based on studies of the Department of Labor, there will be from “six million to eight million unemployed in the nation by next spring”, which figure should drop by next fall to “about four million to six million”. HEARINGS BEFORE THE COMMITTEE ON EXPENDITURES, House of Representatives, 79th Congress, 1st Sess. (1945) 1092.
The Fair Labor Standards Act, more commonly referred to as the Federal Wage and Hour Law, was approved by the President on June 25, 1938. Its purposes were three-fold: (1) to place a floor on wages by providing for a statutory minimum wage rate for industries subject to the Act; (2) to eliminate gross abuses of child labor by prohibiting shipment in interstate commerce of goods whose manufacture involved oppressive child labor; and, (3) to induce work-sharing and spread employment by providing for penalty or overtime pay for all work in excess of a statutory maximum workweek.

The general constitutionality of the Act was sustained in an epoch-making decision, wherein the Supreme Court found it within the commerce powers of Congress to prohibit both the shipment in interstate commerce of goods produced in violation of the Act, as well as the actual production of such goods for interstate commerce. The Act was held not to be in violation of the Fifth and Tenth Amendments to the Constitution. A second decision by the Court approved the

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The New York Times of Dec. 13, 1945, reports that according to "government experts" previous estimates as to unemployment were too high, and that by next spring there will be five million unemployed, rather than eight million as previously estimated. 4 52 Stat. (1938) 1060, 29 U.S.C. (1940) §201.

5 Section 6 provides in effect that "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—

(1) during the first year from the effective date of this section, not less than 25 cents an hour;
(2) during the next six years from such date, not less than 30 cents an hour.
(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under Section 8, whichever is lower . . . ."

In addition to this general, gradually mounting wage floor, Section 6 provides for swifter acceleration of wages through wage orders issued by the Administrator under section 8 of the Act, upon the recommendations of industry committees appointed under section 5. Section 18 provides that no provision of the Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under the Act. Fair Labor Standards Act, supra note 4.

6 Section 12(a) renders the product of oppressive child labor "produced in an establishment situated in the United States" "hot goods" for purposes of the Act. "Oppressive child labor" is defined as (a) employment of children under 16, except employment of children between 14 and 16 years of age in such nonmining and nonmanufacturing occupations as the Chief of the Children's Bureau determines will not interfere with their schooling, health, or well-being; and (b) employment of children between 16 and 18 years of age, in occupations found, and by order declared, by the Chief of the Children's Bureau, to be particularly hazardous or detrimental to their health or well-being. Fair Labor Standards Act, supra note 4.


administered procedure for the fixing of industry's wage rates\textsuperscript{10} as not in violation of the due process requirement.

Calling for the payment of overtime at the rate of one and one-half times the regular rate of pay for all hours worked in excess of the statutory maximum workweek, section 7(a)\textsuperscript{11} was designed as one of the focal points of the Act. It provided for a gradual decrease in the statutory maximum workweek, viz., forty-four hours per week for the first year after the section went into effect (i.e., Oct. 24, 1938), forty-two hours per week for the next year, and forty hours per week thereafter (i.e., since Oct. 24, 1940). It was intended by this section to compensate employees for the burden of a workweek in excess of the hours fixed in the Act, and to accomplish the fundamental purpose of spreading employment by placing financial pressure on the employer through the overtime pay requirement.\textsuperscript{12}

Viewed in relation to business generally, this section, probably more than any other, has had the most widespread effect. Numerous plans and methods of work distribution and payment have been devised by management; in most cases to render compliance simpler and less expensive, in some cases to circumvent the purposes of the Act. Of the various problems which arise in the interpretation, administration and enforcement of section 7(a), they can, for the most part, be classified into two major categories: (1) what constitutes working hours for which employees must be compensated, and (2) how is the overtime compensation to be computed. It is with the latter that this comment is concerned.

In the first case to come before the Court involving an interpretation of "regular rate" under section 7(a), \textit{Overnight Motor Transportation Company v. Missel},\textsuperscript{13} it was settled that the regular rate of pay on which overtime compensation is to be computed, is not the minimum wage rate set in the Act, but is the employee's regular hourly rate of pay, even though this hourly rate exceeds the statutory minimum. This ruling clarified the term "regular rate" for the vast majority of collective bargaining agreements which provide for the payment of a specified straight-time hourly rate. Having decided this question, the Court was next faced with interpreting "regular rate" for the purpose of overtime computation when the contract called for the payment of a stated weekly wage.

The Court first observed that while neither sections 6\textsuperscript{14} nor 7 spoke specifically of any other method of paying wages except by the hourly

\textsuperscript{10} \textit{Supra} note 5.
\textsuperscript{11} \textit{Supra} note 1.
\textsuperscript{12} \textit{Overnight Motor Transportation Co. v. Missel} (1942) 316 U.S. 572.
\textsuperscript{13} \textit{Ibid}.
\textsuperscript{14} \textit{Supra} note 5.
rate, there could be no doubt that pay by the week was also covered by the Act; and such pay should be reduced by some method of computation to an hourly rate which would serve as a basis for calculating overtime pay. It then held that the proper method of ascertaining the regular hourly rate in the case at hand, which involved an employment contract providing a fixed weekly wage for employees working a variable or fluctuating number of hours per week, was to divide the weekly wage by the number of hours actually worked by the employee during the workweek. The Court conceded that an hourly rate computed in this manner would naturally vary from week to week, depending upon the number of hours worked; but found that such rate was "regular" in the statutory sense inasmuch as the rate per hour would not vary for the entire single week.

Since the contract provided a wage sufficiently large to cover both the statutory minimum rate plus one and one-half times such minimum rate for overtime hours, the defendant employer argued that he had not violated the provisions of the Act. He contended that there existed in the wage contract an implied agreement calling for the payment of the statutory minimum wage for the standard workweek and the allocation of the rest of the fixed salary to the overtime hours. He further maintained that so long as the amount allocated to overtime constituted at least one and one-half times the statutory minimum, the requirements of the Act were satisfied.

Thus, for example, under defendant's line of argument, were an employee to receive a salary of $30.00 per week and during a particular work fifty hours, it would first be necessary to determine the employee's minimum pay for the then standard forty-four hour workweek, by calculating forty-four hours at the then statutory minimum rate of 25 cents per hour, totalling $11.00. This would leave $19.00 ($30 minus $11) to be allocated to overtime hours worked. The minimum overtime compensation would then be ascertained by calculating the six overtime hours worked at the rate of 37 1/2 cents per hour (time and one-half the statutory minimum of 25 cents), totalling $2.25. Since the $19.00 allocable to overtime would exceed the $2.25 mini-

15 Thus, if an employee earns $23 per week and works 40 hours during the first week, 46 hours during the second week, and 50 hours during the third week, his regular hourly rate of pay is 57.5 cents for the first week ($23 ÷ 40), 50 cents for the second week ($23 ÷ 46), and 46 cents for the third week ($23 ÷ 50). In computing his total weekly compensation for each of these weeks under the present statutory maximum workweek of 40 hours, he would receive $23.00 for the first week, since no overtime hours were worked; $24.50 for the second week (40 hours at the straight-time rate of 50 cents per hour plus 6 hours at the time and one-half rate of 75 cents an hour); and $25.30 for the third week (40 hours at straight-time rate of 46 cents an hour plus 10 hours at the time and one-half rate of 69 cents per hour). See Wage and Hour Interpretative Bulletin No. 4.
mum overtime compensation payable, the employer would not be in violation of the Act. In brief, argued the defendant, so long as the weekly salary ($30 in this illustration) actually exceeded the minimum weekly wage computed in the above manner ($11.00 plus $2.25 or $13.25) the requirements of section 7(a) were satisfied.

The Court rejected this contention, holding that since a fixed sum was to be paid weekly whatever the hours worked, the regular hourly rate was to be computed by dividing the weekly sum by the hours worked in each week. Thus, in the above illustration, the employee receiving a $30 weekly salary for a fluctuating workweek, who worked fifty hours during a particular week, would have a regular hourly rate of 60 cents ($30/50) and would be entitled to a weekly compensation of forty-four hours at 60 cents or $26.40, plus six hours at 90 cents (time and one-half the regular hourly rate of 60 cents) or $5.40, or a total of $31.80 per week. Since the employer failed to provide for the payment of time and one-half an hourly rate computed in this manner for all hours worked in excess of the statutory maximum workweek, the Court found him in violation of the Act.

In Walling v. Belo Corporation, decided on the same day, the Court was again faced with an employment contract providing for a guaranteed weekly wage and a fluctuating number of work hours per week. Unlike the Missel case, however, the parties here had in addition stipulated a specified hourly rate in the contract, with not less than one and one-half times the contract rate to be paid for all work in excess of the statutory maximum, and a further proviso that the total weekly compensation should not be less than the stated contract weekly wage.

The facts show that prior to the effective date of the Act, the employees of defendant company had been working a varying number of hours per week for a fixed weekly salary. Desiring to maintain the same weekly wage and to work his employees the approximate same number of hours without having to increase their compensation, the employer, after the Act's enactment but prior to its effective date,

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16 In restating this aspect of defendant's argument, the district court noted: "For example, defendant asserts that with respect to each of the two work weeks during the period from October 24, 1938 to October 23, 1939, that plaintiff claims he was on duty for eighty hours, for the purpose of determining whether the requirements of the Act have been satisfied, his minimum pay is to be determined by computing the wage for forty-four hours at 25 cents per hour or $11.00, and then by computing the wage for the additional hours, namely, thirty-six, at 37½ cents per hour (one and one-half times 25 cents) or $13.50, making a total of $24.50 which is less than the weekly salary ($27.50) actually paid at all times during the period here involved." The district court found for the defendant, holding that he had met the requirements of the Act. Missel v. Overnight Motor Transportation Co. (D.C. Md., 1941) 40 F. Supp. 174 at 178.

17 (1942) 316 U.S. 624.
negotiated contracts with each of his employees, which provided, as a typical example, for a base rate of 67 cents per hour for the first forty-four hours each week (at that time the statutory maximum workweek), time and one-half such base rate for all hours worked in excess of forty-four per week, and a guaranteed weekly wage for regular time and overtime of not less than $40.00 per week.

In all cases, the amount of the weekly guarantee, i.e., the $40 per week in the above example, was identical with the weekly salary which had been paid to the employee prior to the effective date of the Act. For the most part, the employees had apparently been working in the neighborhood of 54½ hours per week for their weekly salary, for the hourly rate was usually fixed in the contract at 1/60th of the guaranteed weekly wage; at such an hourly rate, i.e., 67 cents in the above example, 44 hours at straight time and 10½ hours at time and one-half equalled the weekly guarantee. The employee, of course, received his weekly guarantee whether he worked the full 54½ hours or not; and if he worked in excess of 54½ hours per week, he received compensation in addition to his weekly guarantee. No similar provision existed in the employment contracts in the *Missel* case.

The Court recognized that the sole purpose of the above contractual arrangement in the *Belo* case was to permit the employer, as far as possible, to continue to work his employees the same number of hours after the Act's enactment as before, without any change in their weekly compensation. Despite this, the Court, by a five to four decision, upheld the agreement as not in violation of section 7(a) of the Act.

In deciding the case, the Court was faced with a dual problem of construction; it was first necessary to interpret the contract itself to establish the intention of the parties, and then to interpret the law to decide whether the contract thus interpreted, conformed to a proper construction of the statute. In connection with the former, the Administrator contended that the intention of the parties to set a rate of 67 cents per hour was inherently inconsistent with the intention to guarantee the $40 per week; that the latter therefore overruled the

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18 44 hours at 67 cents equals $29.48; 10½ hours at the statutory minimum overtime rate of $1.00 (150% X $ .67) equals $10.50; $29.48 plus $10.50 equals $39.98.

19 The court in the Missel case stressed this lack of provision for payment in excess of the weekly wage however long the workweek as being fatal to the employer's contention of the implied agreement. It is worth remarking, however, that from a practical standpoint, the omission was of little import as a workweek of over 88 hours would have been required to call for more than the weekly salary of $27.50 on the basis of the then statutory minimum of 25 cents per hour. *Supra* note 16.

20 As posed by the minority, the question to be decided in this connection is: "[Is] the contract here involved for weekly wages with variable hours, or for hourly rates with time and a half of such rates for overtime?" *Supra* note 17 at 637.
former; and that the agreement was in effect for a weekly salary of $40.00, without regard to fluctuations in the number of hours worked each week; in other words a duplication of the Missel case. The regular hourly rate for any single week, he therefore maintained, should be ascertained in the same manner as in the Missel case, viz., by dividing the $40 weekly guarantee by the number of hours actually worked in the week.

The majority, speaking through Justice Byrnes, rejected these contentions. It found the contract susceptible of the interpretation that the parties intended the stipulated hourly rate rather than the weekly salary to govern and to establish the regular rate of pay. It reached this conclusion on the following grounds: first, because the guaranty became inoperative after a certain number of overtime hours and the hourly rate fixed by the contract then controlled; and secondly, because the parties might reasonably be said to have intended that the entire amount of the difference between the guarantee and the compensation earned at the agreed hourly rate for the first forty-four hours should be overtime compensation. The minority disented vigorously, holding that the "guaranty was the heart of the arrangement," the "dominating feature of the contract," and that in such circumstances the regular rate of pay should be determined by dividing the guaranteed wages by the maximum hours which could be worked under the contract without extra pay.

A study of the majority opinion suggests a recognition on its part of the ambiguous nature of the contract, but no indication is given as to whether the majority resorted to extrinsic evidence to resolve this ambiguity and more clearly ascertain the true intent of the parties. No evidence is cited in the opinion which would suggest that the parties did not intend the $40 guarantee to continue even should the hours fall below the then statutory maximum of forty-four per week,

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21 The guarantee was a minimum, not a maximum, and when 67 cents per hour and time and one-half for overtime exceeded the weekly guarantee, additional compensation was to be paid.

22 As noted in the majority opinion: "In the first place, when an employee works more than 54½ hours in a single week, he is admittedly entitled to more than the $40 guarantee .... In the second place, although it is perfectly true that when the employee works less than 54½ hours during the week his pay is determined by the $40 guaranty, it does not dispose of the problem simply to say this. The question remains whether the $40 contemplates compensation for overtime as well as basic pay. The contract says that the employee is to receive 67 cents an hour for the first 44 hours and 'not less than one and one-half times such basic rate' for each hour over 44. Consequently, if an employee works 50 hours in a given week, it might reasonably be said that his $40 wage consists of $29.48 for the first 44 hours (44 × $.67) plus $10.52 for the remaining six hours (6 × $1.753)." Supra note 17 at 631, 632.

23 Justices Reed, Black, Douglas, Murphy.

24 Note, for example, in note 22 supra, the use of such phrases as "it might reasonably be said".
thus resulting in a straight time hourly rate substantially in excess of the 67 cents provided.\(^{25}\) The contract was silent as to any exception as to the guarantee and it must be concluded that this short week pay was not sufficiently stressed by the Administrator—probably because the theory of the majority decision was not anticipated—for no reference was made to it by Justice Byrnes. It is difficult to understand how the contract hourly rate could be considered the "heart of the arrangement" when it would become completely meaningless if the workweek hours should drop below the statutory maximum.

It would appear that the dissenters had a truer appreciation of the realities of the situation and the intent of the parties, for as the minority opinion points out, "without the guaranty, the adoption of a low hourly rate would have encountered the full weight of employee bargaining power," and it seems clear that only because the existence of this minimum guaranteed weekly wage made the stipulated hourly rate ineffectual, that the conflict was avoided.

While the majority's questionable interpretation of the contract might be justified on the ground that the Administrator failed to meet sufficiently his burden of proving the true intent of the parties, little defense can be offered for the faulty construction placed by the majority on section 7(a) of the Act. The familiar maxim that in construing a statute the courts will give effect to the intention of Congress appears to have been ignored; little consideration seems to have been afforded the fundamental legislative intent of spreading employment by making it economically disadvantageous for employers to work their employees in excess of the standard workweek.\(^{20}\)

Answering the Administrator's contention that the inconsistency of the contractual hourly rate and weekly guaranty was apparent in the fact that when an employee worked less than \(54\frac{1}{2}\) hours per week, his overtime rate was in excess of 150% or time and one-half the straight time hourly rate, the majority stated:

"... the Act does not prohibit paying more; it requires only that the overtime rate be 'not less than' 150% of the basic rate. It is also true that under this formula the overtime rate per hour may vary from week to week. But nothing in the Act forbids such fluctuation.\(^{25}\)

It is clear that the majority recognized that under this formula,

\(^{25}\) If the employee were to work 40 hours during the week, for example, his hourly rate would be $1.00, \text{i.e.,} $40 divided by 40 hours.

\(^{20}\) At the time the Belo contract took effect, the statutory maximum workweek under second 7(a) was 44 hours per week; since Oct. 24, 1940, the statutory maximum workweek has been 40 hours per week.

\(^{25}\) Supra note 17 at 632.
wherein the entire amount of the difference between the guarantee and the compensation earned at the agreed hourly rate for the first forty-four hours was treated as overtime compensation, that this resulted mathematically in an overtime rate which fluctuated from week to week; it is not so clear, however, at least no mention was made of it in the majority opinion, that the Court recognized the crucial fact that this fluctuating ratio between the regular rate and overtime rate decreased as the number of overtime hours worked increased. As shown mathematically in Table I, the ratio of the overtime rate to the regular rate in a 45 hour week was 1570%, which ratio decreased hour by hour to 150% when a 54½ hour week was worked. In other words, the person employed at the $40 weekly guarantee, received, when he worked 54½ hours per week, $1.00 or 150%—time and one-half—his 67 cent contract hourly rate for each overtime hour worked in excess of the forty-four hour statutory maximum; when, however, he worked only 45 hours per week, he received the same $40 weekly guarantee and was thus paid for the one hour overtime worked at the rate of $10.52 per hour or 1570% of his 67 cent contract straight-time hourly rate.

This illustrates the simple but decisive fact that not one cent increase in payroll costs was incurred by the employer in working his employees a 54½ rather than a 45 hour week, nor was one cent increase in “take-home” pay enjoyed by the employee in working a 54½ instead of a 45 hour week. Contracts such as this neither induce employers to hold the workweek of their employees to the statutory maximum, nor deter them from working the same personnel up to, at least, 10½ hours overtime per week. Such plans would seem to defeat the Congressional intent of spreading work by the placing of an extra cost burden on every overtime hour so that the resulting pressure might dissuade the employer from demanding hours of work above the statutory maximum.

<table>
<thead>
<tr>
<th>Weekly Hours</th>
<th>Overtime Rate Per Hour</th>
<th>Ratio of Overtime Rate to Regular Rate</th>
<th>Total Overtime Compensation</th>
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The majority rested its construction of section 7(a) on the ground that the fluctuation of the overtime rate to the regular rate in this manner was permitted by the inclusion in that section of the phrase "not less than." But how can it be said that Congress, by the use of the phrase "not less than one and one-half times the regular rate" intended to permit fluctuations in the overtime rate which would totally defeat the "spread-work" purpose of the Act? Such an interpretation of section 7(a) was not required by the incorporation of this phrase and since such construction did totally defeat the Congressional purpose in passing the statute, it would appear that the majority erred in so construing it.

The majority further justified its holding on the ground that Congress had failed to provide a definition of "regular rate," stating:

"When employer and employees have agreed upon an arrangement which has proved mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the Act which finds no support in its text ..."

This is indeed a novel doctrine. To permit the section to be circumvented and rendered meaningless merely because the parties had agreed to do so, is hardly in accord with sound statutory construction. Particularly, in view of the past recognition by the Court of the inequality in the relative bargaining positions of the parties. By such a device, astute management, in a superior economic bargaining position, may legally avoid all extra cost for overtime worked.

The Belo case was distinguished from the Missel case on the ground that the Belo guarantee contract specified a basic hourly rate of pay and not less than time and one-half that rate for every hour of overtime beyond the maximum hours fixed by the Act, while the Missel contract contained neither a stated hourly rate nor a provision for the payment of overtime. Under the typical Belo contract the employee received additional compensation after he worked 54½ hours while under the Missel agreement there was no contractual limit on the number of hours which could be demanded of the employee for

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29 The converse of the Belo situation is shown in the provisions of the minimum wage orders of the Commission of Industrial Welfare of California in the canning industry and industries handling farm products (No. 3NS, Feb. 8, 1943; 8NS, Aug. 27, 1943) wherein overtime rates increase from time and one-half to double time as the number of daily overtime hours increases. It would be in harmony with the purpose of overtime statutes to construe them to allow the ratio between the overtime and regular rates to increase as the overtime hours increase, and not to decrease.

30 Supra note 17 at 635.

the same fixed wage. Certainly the cases are distinguishable on their facts.

Furthermore, the majority found that the parties in the *Belo* case intended the employment to be at the stated hourly rate as distinguished from a weekly salary. Such a finding would, of course, be impossible under the facts of the *Missel* case. It is to be noted that nowhere in the *Belo* opinion was it intimated that an employee could be employed at an hourly and a weekly rate at one and the same time, nor was it suggested by the majority that if it had found the contract were in fact one for a weekly salary, that it would not have applied the same formula employed in the *Missel* case. But while the cases may be reconciled on this basis, there can be no question that they present inconsistent points of view. Moreover, the *Missel* case reflects the legislative "spread-work" intent while the *Belo* decision ignores this Congressional purpose of the Act.

In *Walling v. Helmerich & Payne*, the Court was again faced with an employment contract requiring an interpretation of the term "regular rate" under section 7(a). Here, prior to the effective date of the Act, certain employees of defendant oil and gas company had been working eight, ten and twelve hour daily shifts and had been receiving a specified wage for each shift. The wages were in excess of the minimum required by the Act, though the number of shifts per week often caused the employee to work more than the maximum hours allowed by the Act without overtime pay being required.

In order to perpetuate the pre-statutory wage scale and workweek of his employees after the effective date of the Act, and to avoid the necessity of increasing their wages or decreasing their hours of work, the employer entered into agreements with these employees whereby each regular workshift was arbitrarily divided into two parts for purposes of calculating and applying hourly wage rates. The first four hours of each eight-hour shift, and the first five hours of each ten-hour and twelve-hour shift were assigned a specified hourly rate, described as the "base or regular" rate; the remaining hours of each shift were treated as overtime and paid for at the rate of one and one-half times the "base or regular rate." The contracts provided that the base rate should never apply to more than forty hours in any workweek.

These so-called "regular" and "overtime" hourly rates were calculated so as to insure that the total wages for each shift would continue to total the wage paid under the original contracts, thereby avoiding the necessity of either increasing wages or decreasing hours of work when the statutory maximum workweek became effective.
Thus, for example, a rotary helper who had formerly received $7.00 for each eight-hour shift, under this split-day plan, received a "regular rate" of 70 cents an hour for the first four hours of each shift and an "overtime" rate of $1.05 for each of the remaining four hours, totalling $7.00 for the shift. Under such a plan, the employee would not be entitled to any pay in excess of the wage he had received prior to the effective date of the Act unless he worked in excess of 80 hours per week.\(^\text{33}\)

The unanimous Court, reversing both the district court and circuit court of appeals\(^\text{34}\) which had upheld the plan under the decision of the Belo case, ruled that the split-day plan satisfied neither the purpose nor the mechanics of section 7(a) since it provided a fictitious "regular rate" rather than the employee's actual regular hourly rate. The Court held that it was derived not from wages actually received or hours actually and regularly worked by the employees but from "ingenious mathematical manipulations" whose sole purpose was the perpetuation of the pre-statutory wage scale.

The opinion of Justice Murphy speaking for the Court in the instant case, unlike that of Justice Byrnes in the Belo case, called specific attention to the dual purpose of Congress in passing section 7(a), pointing out that a plan such as this thwarted both the objectives of compensating employees for the burden of a workweek in excess of the hours fixed in the Act and of spreading employment by placing financial pressure on the employer through the overtime pay requirement.

In reply to the contention that the artificial regular rate was a product of a contract and was in excess of the statutory minimum, the Court answered:

"... The Act clearly contemplates the setting of the regular rate in a bona fide manner through wage negotiations between employer and employee, provided that the statutory minimum is respected. But this freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes. Even when wages exceed the minimum prescribed by Congress, the parties to the contract must respect the statutory policy of requiring the employer to pay one and one-half

\(^{33}\) For an employee working on twelve-hour shifts, it would be necessary to work at least 96 hours per week before becoming entitled to increased wages under the split-day plan.

\(^{34}\) (C.C.A. 10th, 1943) 138 F. (2d) 705.

\(^{35}\) Supra note 32 at 42.
times the regular hourly rate for all hours actually worked in excess of 40 . . . .

Distinguishing the Belo case from the Helmerich case, Justice Murphy pointed out that nothing in the Belo decision sanctioned the use of the split-day plan. The controversy there, he observed, centered about the question of whether the regular rate was the hourly rate set forth in the employment contract or should be computed from the guaranteed weekly wage.

Clearly the facts of the Belo and Helmerich cases are not materially the same. One questions, however, whether an application of the criteria enunciated in the Murphy opinion in the Helmerich case to the facts of the Belo case would not have there induced a different result.

At the same term as that in which the Helmerich case was decided, the Court, in United States v. Rosenwasser, held that piece rate employees who are engaged in commerce or in the production of goods for commerce are within the coverage of the Act. Applying the same reasoning as in the Missel case wherein weekly wage contract labor was found subject to the Act, the Court held that the Act, in speaking of a minimum rate of pay "an hour," refers merely to a "regular rate" of pay and does not preclude the application of the Act to piece workers nor place outside the reach of the Act, labor compensated according to other than hourly measures of work. It reiterated the Missel case doctrine that such other modes must be translated or reduced by computation to an hourly basis for the sole purpose of determining whether the statutory requirements have been fulfilled.

With this background, the Court was faced at the last term with two cases wherein both basic hourly rates and weekly guarantees were provided in the contracts of employees who were working on (1) piece-rate and (2) basic hourly rate plus "incentive bonus" systems. In Walling v. Youngerman-Reynolds Hardwood Co., the defendant corporation was engaged in the manufacture of lumber for shipment in interstate commerce. Various men were employed by the Company to pick up and stack boards and, prior to the commencement of the trial, the stackers were compensated at agreed piece rates of 60 cents per thousand board feet ricked, and 70 cents per thousand board feet stacked. The Administrator brought suit to enjoin alleged violations of the overtime and record-keeping provision of the Act in connection with these stackers and, on the day before the commencement of the

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30 (1945) 323 U.S. 360.
37 The Court referred to the Helmerich case wherein the "regular rate" was defined as "the hourly rate actually paid for normal, non-overtime workweek." Ibid.
38 Supra note 2.
trial in the district court, the company ceased to use the allegedly illegal mode of piece rate compensation and entered into new wage agreements with the stackers. These provided that the basic or regular rate of pay was to be 35 cents per hour for the first forty hours each week, and that for time over forty hours each week the pay should be not less than one and one-half times such basic or regular rate above-mentioned, with a guarantee that the employee should receive weekly, for regular time and for such overtime as the employee might work, a sum arrived at by computing the amount of stacking done by the employee on the basis of 70 cents per thousand board feet of lumber ricked and 80 cents per thousand board feet of lumber for flat stacking.

The district court, noting that the defendant had entered into a new contract with its stackers providing for time and overtime, with a guarantee of additional pay based on the amount of lumber stacked, dismissed the case. The decision was affirmed by the circuit court of appeals. The Supreme Court, by a seven to two decision, reversed the holdings of the lower courts and ruled that the new wage agreement was in violation of the requirements of section 7(a) of the Act.

The employer corporation contended that the contract provisions satisfied section 7(a) since they provided for a "regular rate" of 35 cents an hour and for payment of one and one-half times that rate, or $52\frac{1}{2}$ cents for all overtime hours, and that, since the Act does not forbid incentive pay or compensation above and beyond the statutory requirements, the additional payments resulting from the operation of the guaranteed piece rates are unaffected in any way by section 7(a). The majority rejected this contention, citing the Helmerich and Rosenwasser cases to the effect that the regular rate refers to the hourly rate actually paid the employee for the normal, non-overtime workweek for which he is employed. The majority, speaking through Justice Murphy again referred to the Congressional purposes of section 7(a) noting that to effectuate these ends, there must be a proper determination of the "regular rate" for purposes of ascertaining the correct amount of overtime compensation. In connection therewith, the majority held:

"... the regular rate must by its very nature reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments. It is not an arbitrary label chosen by the parties; it is an actual fact. Once the parties have decided upon the amount of wages

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30 At the time these contracts were made the minimum wage for the timber products industry had been fixed at 35 cents an hour in an order issued by the Administrator.

40 (C.C.A. 5th, 1944) 145 F. (2d) 349.
and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary ‘regular rate’ in the wage contracts.”

The proper “regular rate” for piece workers, concluded the majority, is the quotient of the amount received during the week divided by the number of hours worked.

By the same vote as in the Youngerman case, the Court, in Walling v. Harnischfeger Corporation, reached an identical conclusion. Here, about one-half of defendant’s production employees were incentive or piece workers, and, through their unions, entered into collective bargaining agreements with the defendant electrical company whereby they were paid a basic hourly rate, plus an “incentive bonus”. The various jobs performed by the incentive workers were “time studied” and priced, and the worker received his agreed base or hourly rate for the time which he took to perform the job and, in addition he received the difference between this amount and the job price where the latter was greater. When the job price was smaller than the hourly earnings, the employee received only the hourly rate for the time worked. On the jobs which had not been “time studied” the corporation paid each incentive worker an hourly rate at least 20% higher than his basic hourly rate when temporarily assigned to “non-incentive” work.

The incentive employees frequently worked in excess of the statutory maximum workweek, and for these extra hours they received 150% of the stipulated “basic hourly rate”, i.e., 150% of a rate which did not take account of the incentive bonuses received. Furthermore, when employed on jobs that had not been “time studied”, they likewise received overtime pay on the basis of the basic hourly rate rather than on the 20% higher hourly rate actually paid them during the non-overtime hours. The defendant corporation justified this on the ground that the collective bargaining agreements provided that “the parties agree that, for all purposes, the regular rate of pay at which each employee who participates in an incentive plan is employed, is the base rate of each such employee.”

In rejecting the employer’s contentions, the majority held that to discover the “regular rate”, the Court does not look to the contract nomenclature but to the actual payments, exclusive of those paid for overtime, which the parties have agreed shall be paid during each workweek. The incentive bonus, which was to be received by the em-

41 Supra note 2 at 424, 425.
42 Supra note 2.
ployee in addition to his guaranteed hourly wage as compensation for work performed in the workweek, was found by the Court to be a normal and regular part of the employee's earnings and, once agreed upon, automatically entered into the computation of the employee's "regular rate" of pay. In consequence, overtime compensation, regardless of any contract provision to the contrary had to be computed upon this hourly rate of pay. By failing to include in the computation of overtime, the incentive bonus and the 20% additional pay on the non-incentive jobs, the defendant corporation was therefore in violation of section 7(a) of the Act.

Chief Justice Stone, in a vigorous dissent, concurred in by Justice Roberts, held that as to the piece workers, the decisions of the majority in the Youngerman and Harnischfeger cases were in "flat contradiction to Walling v. Belo Corp." and that the Belo decision should be controlling in the two instant cases. The majority made little reference in its opinion to the Belo case other than to hold that the wage agreements there were upheld because "it was felt that in fixing a rate of 67 cents an hour the contracts did in fact set the actual rate at which the workers were employed", and that the Belo decision was no authority for the proposition that the regular rate may be fixed by contract at a point completely unrelated to the payments actually and normally received each week by the employees."

On this point, the view of the minority appears more convincing; it must be conceded that if the Belo decision is given its full effect, there is little real basis for distinguishing it from the Youngerman and Harnischfeger cases. The Belo contract provided for a specified hourly rate with not less than one and one-half times that rate for all overtime worked; the Youngerman and Harnischfeger cases likewise provided contract hourly rates with time and one-half for all overtime worked. The contracts in each of the three cases provided in addition for weekly guarantees. The mere fact that the Belo contract specified a particular sum as the weekly guarantee, while the Youngerman and Harnischfeger contracts provided the method for determining the weekly guarantees, seems a tenuous basis for drawing a distinction.

43 This reference is in the majority opinion in Walling v. Youngerman-Reynolds Hardwood Co., supra note 2. No reference to the Belo case is made in Walling v. Harnischfeger Corp., supra note 2.

44 It might be noted that the Belo contract used the phrase "not less than one and one-half times such basic rate" for overtime worked; the Youngerman contract likewise used the phrase "not less than one and one-half times such basic or regular rate" for overtime worked; the Harnischfeger contract, however, used the phrase "with time and one-half, computed for incentive workers on their base rate" for overtime worked. No reference was made by the Court to the similarities or differences in the wording of the contracts.
The majority found in the *Youngerman* case that the 35 cent per hour "regular rate" fixed by the contract was obviously an artificial one, having no relation to the hourly rate actually received either before or after the negotiation of the contract. This appears justified by the facts. As noted by the Court, a study of the work actually done by the stackers shows they would earn an average of about 59 cents per hour under the new contract piece rates, and "except in the extremely unlikely situation of the piecework rates falling below a 35 cent per hour figure", what the contract termed the "regular rate" was never actually paid. However, in the *Belo* case it would likewise seem that the 67 cent contract hourly rate was an obviously artificial one; for only by the unrealistic rationale of holding that the parties intended the overtime rate to fluctuate from 150% to 1570% of the straight time hourly rate for a 44 to 54½ hour workweek could it be maintained that the 67 cent hourly rate was actually paid. Moreover, since there was no indication in the opinion of the Court that the $40 weekly guarantee would not be paid should the workweek drop below forty-four hours, which inevitably would result in an hourly rate in excess of 67 cents, by no method of logic or "ingenious mathematical devices" could it be said that the 67 cent hourly rate would actually be paid under all circumstances.

The seven justices who constituted the majority in the *Youngerman* and *Harnischfeger* cases, consisting of the four dissenters in the *Belo* case and three subsequently appointed justices, did not see fit specifically to overrule the *Belo* decision. It would appear, however, that here is another illustration of the Court's now familiar practice of "whittling away" and confining a decision to its peculiar facts. At least one circuit court has already taken the cue holding that "if the Supreme Court has not repudiated its holding in the *Belo* case, it has come so close as to leave no room for its application except upon an identical set of facts."47

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45 This was based on a six months study of work actually done by the stackers when they were working at a rate of 60 and 70 cents per thousand board feet ricked and stacked which showed they earned an average of 51 cents per hour. At the new piece rate of 70 and 80 cents per thousand, they would earn an average of about 59 cents per hour.

46 *Supra* note 25.

47 In *Walling v. Uhlmann Grain Co.* (C.C.A. 7th, 1945) 151 F. (2d) 381, the defendant's employees, prior to the effective date of the Act, were paid on a weekly salary basis for a fluctuating workweek. Shortly before the Act became effective, each employee received a notice stating what his weekly salary had been, and that he would be subject to call for 60 hours each week. The notice stated further that the employee's "normal rate of pay is........cents per hour" and that the employee would be paid overtime "at the rate of one and one-half times this normal rate of pay". The hourly rate was based on the number of hours during which they were supposedly subject to call in each week. The time actually worked by most of the employees each week averaged about 15 hours fewer than those to which they were subject to call. The seventh circuit court, in revers-
In summary, it should be emphasized that the Belo case stands alone in an otherwise consistent series of cases. In each of the other cases requiring a determination of “regular rate” under section 7(a), the Court has construed the section to conform to the Congressional purpose of spreading employment through the overtime pay requirement. Whether the method of spreading work adopted by Congress accords with orthodox economic theory, and whether it is the soundest economic device to achieve the desired end, may be debatable; but this is for the Congress and not for the courts to decide.

There are those who may contend that the Belo case coming at the time it did—in June of 1942 when our surplus labor force was beginning to shrink—represented a far-sighted “statesmanship” on the part of the majority. It is to be remembered, however, that even during that period of the war when our labor shortage was most acute, Congress did not see fit to repeal this piece of legislation. As to the current employment outlook, while the prognostications of certain of the economists may be overly pessimistic, it is clear that the period of the so-called “tight” labor market is at an end. Sound policy would seem to dictate that every device which in any way contributes to the elimination of overtime employment should be utilized.

Should collective bargaining agreements or individual employment contracts involving the use of the Belo formula again be presented to the Court for interpretation under section 7(a), it is to be expected