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Labor--Fair Labor Standards Act--Overtime Compensation--Bonuses Regularly Paid (Walling v. Richmond Screw Anchor Co. (154 F.2d 780 (2d Cir. 1946))

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stine,[6] where the Court of Appeals held: "Defendant's agreement without reservation to arbitrate in London according to the English statute necessarily implied a submission to the procedure whereby that law is there enforced. Otherwise the inference must be drawn that they never intended to abide by their pledge. They contracted that the machinery by which their arbitration might proceed would be foreign machinery operating from the foreign court." *Gilbert v. Burnstine* is similar to the instant case in that the defendant did not participate in the arbitration and was served without the territorial jurisdiction of the court. It differs in that the defendant agreed to be found by arbitration in London pursuant to the arbitration law of Great Britain. Whereas in the instant case the appellant agreed that judgment could be entered on an award in accordance with the practice of any court having jurisdiction.

The meaning of the latter clause is the real question involved in this case. If it means, as appellant contended, that a New York court could enter judgment against it only if that court could obtain personal jurisdiction after the arbitration award was made, then the judgment must be vacated. However, such a construction at its very best is extremely narrow and strained, and the clause, if such a construction were intended, might just as well have been omitted from the contract. It seems more logical to assume that the words had meaning and significance, and that the parties intended that if an award was made, the proper New York court would have jurisdiction by consent, and judgment could be entered thereon by such court. To hold otherwise frustrates the only purpose the clause could serve.

I. K.

LABOR—FAIR LABOR STANDARDS ACT—OVERTIME COMPENSATION—BONUSES REGULARLY PAID.—Defendant, engaged in the manufacture of building construction materials, employs some 65 employees who are admittedly covered by the Fair Labor Standards Act.[1] In April, 1942, defendant's board of directors adopted a resolution providing that, commencing in June, 1942, all of the company's employees, with the exception of certain finishers, should be paid a monthly bonus, in war stamps, of 10% of their weekly base salaries for the previous month. The finishers were placed on an incentive bonus plan. For some two and one-half years, the bonuses were received by the employees. The employer was not legally obligated to pay such bonus, and the employees knew that it was not contractual and that it could be discontinued had the company's finances so dictated. The defendant company always considered the bonus payments as wages for purposes of computing social security, unemployment insurance, with-

[6] 255 N. Y. 348, 174 N. E. 706 (1931).
[1] 52 STAT. 1060, 29 U. S. C. A. §§ 201-219 (1938).

holding and victory tax and in determining the firm's premiums on workman's compensation insurance policies. All of the firm's employees received base weekly salaries covering the first 40 hours of work in the workweek. When an employee worked in excess of the 40 hours per week, his base weekly salary was divided by 40, and he was paid one and one-half the resultant rate for each hour in excess of 40. Bonus payments were not included in computing an employee's regular rate of pay. Suit was instituted by the Administrator of the Wage and Hour Division of the Department of Labor, to enjoin the defendant from violating Section 7 of the Fair Labor Standards Act,[2] said violation arising from the failure of defendant to include the bonus as part of the base weekly earnings upon which overtime premiums were computed. The District Court found for the plaintiff, and defendant appealed. *Held,* affirmed. *Walling v. Richmond Screw Anchor Co.,* — F. (2d) — (1946).

The District Court, in holding that such bonus should be included as part of the base for the purpose of computing overtime premiums, answered defendant's contentions that such bonus was a mere gift or gratuity, and that there was no binding obligation to pay the bonus, by pointing to the fact that such bonus was part of the employee's regular and actual compensation, and that for some two and one-half years the employees had been credited with it regardless of how much or how little they produced. The sensible test, the court held, is not what the employer was legally bound to pay, but what regularly and actually reached the employee. To hold otherwise, would be to allow an employer to defeat the purposes of the Act. An employer could compensate his employees at any rate satisfactory to them (in this case, regular salary plus bonus) and at the same time, make overtime cheaper for himself by basing it on a weekly pay smaller than what is actually and regularly received.

In its holding, the court gave appropriate weight to a published interpretative statement of the Administrator of the Wage and Hour Division. This memorandum divided bonus plans into two categories: a bonus plan pursuant to which the employer pays a bonus solely at his own discretion, without having previously promised, agreed or arranged to pay such bonus, *e.g.,* a bonus based on a share of the profits, or a lump sum at Christmas time; and a bonus plan

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[2] 52 STAT. 1063, 29 U. S. C. A. § 207.
"Maximum Hours
(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 . . .
(3) for a workweek longer than forty hours 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."

under which the employer promises, agrees or arranges to pay an amount ascertainable by the application of a formula, *e.g.*, production bonus, or bonus paid to employee when certain types of merchandise are sold. The Administrator set forth in the memorandum that bonuses which fell into the latter category should be included in the computation of the regular rate. Speaking for the court, Judge Frank ruled that the bonus in this case fell into the latter category and should therefore be counted as a part of the "regular wage".

Turning to the Supreme Court decisions for a determination of what constitutes regular wages, the court relied on three cases: *Walling v. Helmerich & Payne, Inc.*,[3] *Walling v. Youngerman-Reynolds Hardwood Co.*[4] and *Walling v. Harnischfeger Corp.*[5] In the first of these, the employer, after the passage of the Fair Labor Standards Act, signed a contract with its employees whereby the split-day or "Poxon" plan was adopted, which provided for splitting the regular eight-hour day worked previous to the Act into two four-hour shifts and paying overtime on the last four hours. The rate thus set for overtime was lower than the rate which would have resulted from a division of the weekly wage by the number of hours worked. The court there said, "While the words 'regular rate' are not defined in the Act, they obviously mean the hourly rate actually paid for the normal, non-overtime workweek." [6] The court further held in this case that the freedom to contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purpose.

In *Walling v. Youngerman-Reynolds,* piece-rate workers, prior to the enactment of the Act, had been receiving approximately fifty-nine cents per hour. Under a new contract their straight time rate was set at thirty-five cents per hour, which, the court held, was "completely unrelated to the payments actually and normally received each week by the employees." [7] The third case, *Walling v. Harnischfeger,* presents a case similar in many respects to the present one, since it involved the part which bonuses play in computing the regular rate. The distinguishing feature, as indicated above, is that in the present case the company was not legally bound to pay, while in the *Harnischfeger* case the bonus was part of the contract of employment. Significant in the light of the present decision is the court's statement that "When employees do earn more than the basic hourly rates because of the operation of the incentive bonus plan, the basis rates lose their significance in determining the actual rate of compensation."[8]

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[3] 323 U. S. 37, 89 L. ed. 29 (1944).
[4] 325 U. S. 419, 89 L. ed. 1705 (1945).
[5] 325 U. S. 427, 89 L. ed. 1711 (1945).
[6] Walling v. Helmerich & Payne, Inc., 323 U. S. 37, 40, 89 L. ed. 29, 33 (1944).
[7] Walling v. Youngerman-Reynolds Hardwood Co., 325 U. S. 419, 89 L. ed. 1705 (1945).
[8] Walling v. Harnischfeger Corp., 325 U. S. 427, 89 L. ed. 1711 (1945).

As stated by the Supreme Court in an earlier decision,[9] the Congressional intent in enacting the legislation was to foster the distribution of employment opportunities among a greater number of individuals by making it costly for employers to work employees beyond 40 hours in any one week. The present decision supports this intent and the firm stand which the courts have taken on overtime practices has been retained. This policy will undoubtedly prove important in the employment picture of the post-reconversion period.

E. M. F.

MASTER AND SERVANT—SOLICITING FORMER EMPLOYER'S CUSTOMERS.—Plaintiff sued to recover percentage of the profits allegedly due him under a contract of employment to manage defendant's department store. He admitted that he was paid a salary but stated that he had not received any of the percentage of the profits due him. Defendant denied plaintiff's claim for a percentage of the profits and set up several counterclaims. In the first counterclaim the defendant asserted that plaintiff had obtained names of defendant's customers during his period of employment and had solicited trade from them in competition with his master for a company in which the plaintiff held a financial interest. This counterclaim stated that by reason of such misconduct, the plaintiff forfeited his right to retain the weekly wages he received for his employment, which wages totalled $10,065. The second counterclaim sought an injunction to prevent plaintiff from using the information which he had obtained in the course of his former employment. Plaintiff made a motion to dismiss defendant's counterclaims as insufficient in law. The Supreme Court, New York County, denied plaintiff's motion to dismiss and he appealed to the Appellate Division, First Department. *Held,* order of Supreme Court modified by striking out the counterclaims. *Kleinfeld v. Roburn Agencies,* — App. Div. —, 60 N. Y. S. (2d) 485 (1st Dep't 1946).

As to the first counterclaim that, because of his misconduct, plaintiff had forfeited the weekly wages he had received, defendant did not assert that there was any special agreement on which he based his claim for recovery of the wages already paid. The mere relationship of master and servant is not enough to constitute the servant as a fiduciary accountable for the wages he has received.[1] In the absence of a special agreement rendering the employee liable for wages received, an employer cannot recover back such wages or equivalent drawings paid during a period of completed employment.[2] It would

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[9] Overnight Motor Transportation Co., Inc. v. Missel, 316 U. S. 572, 86 L. ed. 1682 (1942).

[1] American Stay Co. v. Delaney, 211 Mass. 229, 97 N. E. 911 (1912).

[2] Pease Piano Co. v. Taylor, 197 App. Div. 468, 189 N. Y. Supp. 425 (1st Dep't 1921).