

New York Dispensation Act

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CURRENT LEGISLATION

NEW YORK LABOR DISPENSATION ACT.¹—The prosecution of the present war has given rise to the problem of meeting the need for increased production with an ever decreasing supply of labor. This difficulty did not appear to such an extent during the last World War; there was less of a drain on man-power; there was no “lend-lease” act; and legislation affecting labor had not reached its present level. In order to prevent peace time restrictions from interfering with the war effort, the Labor Dispensation Act, now part of the New York State War Emergency Act, was enacted. This Act provides, that upon proper application and investigation, the Industrial Commissioner may grant certain dispensations to firms engaged in war work. These dispensations may be granted to permit operation on seven days of the week for twenty-four hours a day, to permit dispensation with Section 201-a of the New York State Labor Law² and to permit employers engaged in war work to operate “under waiver of such other provisions of law as may restrict operation or hours of employment.”³ The Act further provides for appeals from the Commissioner’s rulings,⁴ and sets up a legislative standard to be followed in granting relief. No dispensation may be granted affecting minors under sixteen years of age;⁵ no dispensation may be allowed where the safety or health of the employees would be subject to peril;⁶ all dispensations must be shown to be absolutely necessary to the war effort.⁷ If a firm applying for relief under this Act has workers engaged in performing non-essential work, such workers must be transferred to a department doing war work before the application will be considered.⁸

The powers of the Commissioner under the Act are not well defined, and appear to be all-inclusive. Certain powers are expressly delegated. By the powers granted under subdivisions (a), (b), and part of (d) in Section 80 of the Act, the Commissioner may extend the hours constituting a work week and may permit women to be employed on night shifts.⁹ The Commissioner is also given the

¹ Originally N. Y. Laws 1942, c. 4. Repealed by and added to N. Y. Laws 1942, c. 544; amended N. Y. Laws 1942, c. 618; amended N. Y. Laws 1943, c. 315 (April 6, 1943).

² “Except as otherwise provided by law, no person, as a condition of securing employment, or of continuing employment, shall be required to be fingerprinted.”

³ N. Y. Laws 1942, c. 544, § 80(d).

⁴ *Id.* c. 618.

⁵ N. Y. Laws 1943, c. 315 (April 6, 1943).

⁶ N. Y. Laws 1942, c. 544, § 81(c).

⁷ *Id.* c. 544, § 81(c), (d), (f).

⁸ *Id.* c. 544, § 81(e).

⁹ Dispensation may be granted to permit operation and employment on a seven-day basis, on a multiple shift basis and to prevent restriction of operation due to hours of employment.

With the small number of men available it has become necessary for the

power to allow employers engaged in war work to require their employees, or prospective employees, to be fingerprinted as a condition of employment or continued employment.¹⁰ These facts are readily apparent. But there are also certain "latent" powers in the Act. The Commissioner is empowered to waive such "other provisions of law" as might interfere with a business engaged in war work. Acting under the authority granted by these words the Commissioner might well dispense with the minimum wage,¹¹ with regulations providing for comfort of the employers¹² and the provision of the New York Civil Practice Act requiring a formal complaint and a hearing as a prerequisite for the issuance of an injunction in any case involving a labor dispute.¹³

It is not beyond the realm of possibility that a claim might be made that the operation of the minimum wage in a particular case will hamper the production of war materiel. An employer might well contend that due to the shortage of labor it is necessary for his workers to put in many hours of overtime. The extra payment for such work, together with the high cost of raw materials and tools and other things essential to the running of the business, will render it impractical to continue the overtime work, thereby slowing up war production. The Commissioner might then dispense with that provision of law in order to remove the restriction of operation. The Minimum Wage Law in New York provides for a board of nine—three persons representing the interests of labor, three representing the interests of the employer, and three disinterested persons—to conduct hearings and set up a wage scale based on the facts obtained at the hearing.¹⁴ It might be within the scope of the Industrial Commissioner's authority under the Act to dispense with the minimum wage rate insofar as it pertains to overtime pay. He might also disregard the wage board's ruling and conduct a new hearing himself, or through a board of his own choosing. However, the Minimum Wage Law has a provision allowing the board to reconsider its findings at the end of a period of six months or more.¹⁵ It is, therefore, not likely that the Commissioner will take upon himself the burden of fixing a new wage level. He will, no doubt, recommend that the board reconsider its findings, or have the employer seeking relief apply to the wage board for permission to decrease compensation for overtime work.

That the establishment of a picket line around the premises of a business will restrict operation is obvious. Indeed, that is the very purpose of a picket line. Union members and sympathizers, and others who do not wish to be seen crossing a picket line, will not

Commissioner to allow the employment of women at night. REPORT OF WAR EMERGENCY COMMITTEE, N. Y. STATE DEP'T OF LABOR (1942).

¹⁰ N. Y. LAWS 1942, c. 544, § 81(c).

¹¹ N. Y. LABOR LAW, art. 19.

¹² *Id.* §§ 150, 202, 241-a, 378, 379.

¹³ N. Y. CIV. PRAC. ACT § 876-a.

¹⁴ N. Y. LABOR LAW § 556.

¹⁵ *Id.* § 561.

report to work. A business cannot be operated without workers, and relief might be asked for on the ground that war production is being hampered.

Formerly,¹⁶ in New York State, it was possible to enjoin picketing with an *ex parte* order based upon affidavits.¹⁷ This procedure is now forbidden by law.¹⁸ To properly enjoin picketing today a formal hearing must be held by the court. The delay necessitated by the drawing up of a complaint and the holding of a hearing will slow down production for a considerable length of time. The employer will desire a quicker method of obtaining the injunction. By the terms of the Labor Dispensation Act, the Commissioner is allowed to dispense with "such other provisions of law as may restrict operation."¹⁹ This language might be construed as broad enough to include adjective law. Upon application, the Commissioner may grant dispensation, permitting an injunction to be issued on an *ex parte* order. It is not necessary for the Commissioner to hear the interested parties, since he may grant a provisional dispensation before conducting an investigation.²⁰ Although this dispensation might later be revoked, it will have served its purpose. This power is very significant in view of the outbreak of "wildcat" strikes.

The foregoing powers are proper objects of legislative control; neither the United States Constitution nor the New York Constitution is violated. By dispensing with any of these provisions of law there is no deprivation of property without due process of law.²¹ One interpretation of the prohibition against taking property without due process of law is that due process was meant to protect against arbitrary actions and refers to the nature of things at the time of the incorporation of the words into the Constitution.²² At the time of the signing of the United States Constitution there was no regulation of working hours, working conditions, or wages. At that period—and for many years later—a work day of eighteen hours was not uncommon, wages were small, and general conditions were most undesirable.²³ It would, therefore, appear that a deprivation of property might result from a regulation of employer-employee relations, rather than from a lack of restriction.²⁴ In fact, all laws regulating

¹⁶ Before 1935.

¹⁷ At one time the great majority of applicants for injunctive relief in labor disputes were granted injunctions *ex parte*. Note (1930) 30 Col. L. Rev. 1184, 1187.

¹⁸ N. Y. CIV. PRAC. ACT § 876-a; Note (1935) 22 VA. L. REV. 83.

¹⁹ N. Y. Laws 1942, c. 544, § 80(d).

²⁰ *Id.* c. 544, § 82.

²¹ U. S. CONST. AMEND. XIV, § 1; N. Y. CONST. Art. I, § 6.

²² *Atchison & N. R. v. Baty*, 6 Neb. 37 (1877); *Nelson Lumber Co. v. McKinnon*, 61 Minn. 219, 63 N. W. 630 (1895). In the latter case it was held that test as to constitutionality (in regard to due process) is "Was it due process of law under the Common Law, and did it remain so up to the time of the adopting of the Constitution?"

²³ 5 COMPTON'S ENCYCLOPEDIA (1934 ed.) 2.

²⁴ *Lochner v. People of the State of New York*, 198 U. S. 45, 49 L. ed.

maximum hours must have some provision for relaxation in cases of emergency²⁵—and certainly a war which involves the very existence of the nation is an emergency. The emergency provision is necessary because the interference with the right to contract can only be justified where the public welfare is at stake. The public comes first; the health and economic condition of the individual worker is a secondary matter.²⁶ All personal rights guaranteed by the Constitution must

937, 29 Sup. Ct. 539 (1905); *Adkins v. Children's Hospital*, 261 U. S. 525, 67 L. ed. 785, 43 Sup. Ct. 394 (1923).

²⁵ In holding a New York law limiting hours of work in bakeries unconstitutional, the Supreme Court gave as one of its reasons for so holding the fact that no provision was made for relaxation of the law in case of emergency. *Lochner v. People of the State of New York*, 198 U. S. 45, 49 L. ed. 937, 29 Sup. Ct. 539 (1905).

²⁶ *Owen v. Westwood Lumber Co.*, 22 F. (2d) 992 (D. Ore. 1927), writ of error dismissed, 278 U. S. 665, 73 L. ed. 571, 49 Sup. Ct. 184 (1928). In *State v. Bunting*, 71 Ore. 259, 139 Pac. 731 (1914), the court, in holding an act limiting hours of work constitutional said, "The right to labor and employ labor on terms stipulated by the parties is a property right guaranteed by the United States Constitution . . ." Any interference with this right can be sustained only on the theory of police power, and "The safety of a country depends upon the intelligence of its citizens and if our institutions are to be preserved the state must see to it that the citizen shall have some leisure which he may employ in fitting himself for those duties which are the highest attributes of good citizenship. As a voter, a juror, and in this state, a legislator, the best results can only be obtained by so limiting the hours of toil so that they may not be unduly prolonged to the extent of causing that mental deterioration that is sure to accompany undue and long continued physical exertion." *Affirmed*, 243 U. S. 426, 61 L. ed. 830, 37 Sup. Ct. 435 (1919). Reasoning similar to that used by the state court in this case was used by the Supreme Court in *West Coast Hotel Co. v. Parish*, 300 U. S. 379, 81 L. ed. 703, 57 Sup. Ct. 578 (1937). Cf. *State v. Henry*, 37 N. M. 536, 25 P. (2d) 204 (1937), where it was held that a law regulating hours of employment was unconstitutional where "The statute before us bears no evidence of a legislative purpose by it to safeguard public health, morals, or safety." *State v. Bunting, supra*, distinguished. On the authority of *State v. Henry, supra*, a law regulating hours was held void, although there was some showing that the health of the workers was involved. *Barry v. Compton*, 37 N. M. 599, 26 P. (2d) 359 (1933). In *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937, 29 Sup. Ct. 539 (1905), the Court held that the edible quality and nourishment of bread would not be affected by long hours of work on the part of the bakers. The law regulating hours of work was held unconstitutional.

The importance of public interest in such statutes is well recognized in New York. NEW YORK LABOR LAW § 550, which introduces the minimum wage law, declares in part, "In the absence of any effective minimum wage rates for women and minors, the constant lowering of wages by unscrupulous employers constitutes a serious form of unfair competition against other employers and employees, reduces the purchasing power of the employees, and threatens the stability of industry and in many instances requires such wages to be supplemented by public monies for relief or other public assistance." Thus the legislature justifies the act, not on its effect upon the women and minors, but upon the public as a whole.

In holding a New York act (N. Y. Laws 1892, c. 711) limiting the hours of labor for persons engaged in transit operations constitutional, the Court of Appeals said, "In view of the great danger to, and even destruction of life and property which might result from the attempt of men, who have become enfeebled from prolonged and exhausting effort to control engines and cars when

yield, in time of national emergency, to the public good; all personal rights are held subject to the reserve element of police power that rests in the State. As time moves on and new problems arise, application of police power may be used to meet the new public needs.²⁷

Regardless of precedent, an exercise of police power by the legislature will be upheld, provided principles of liberty and justice are not violated.²⁸ The powers of the Industrial Commissioner are not absolute. Proper investigation must be made²⁹ and appeals may be taken from his rulings to the New York State Board of Standards and Appeals and to the courts.³⁰ In this manner the principles of justice are maintained.

The United States Constitution requires that all citizens enjoy the equal protection of the laws.³¹ This part of the Constitution is not violated by the Labor Dispensation Act. The right to equal protection of the laws forbids unjust discrimination, but where legislation is aimed at hitting an evil (in this case to prevent possible defeat due to restrictions on war work) such an act is not to be upset if there is any justification for the finding of a difference in classification.³² If persons in similar circumstances are treated alike, the amendment is not violated.³³ A substantial distinction exists between

in motion . . . it was a reasonable exercise of the police power of the state." *People v. Phyfe*, 186 N. Y. 554, 32 N. E. 978 (1893).

²⁷ *People v. Chenango County*, — Misc. —, 39 N. Y. S. (2d) 785, 791 (Sup. Ct., Albany Co. 1943); *Kelly-Sullivan, Inc. v. Moss*, — Misc. —, 39 N. Y. S. (2d) 797, 800 (Sup. Ct., N. Y. Co. 1943).

²⁸ *Brown v. New Jersey*, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. 77 (1899); *Helvering v. Davis*, 301 U. S. 619, 81 L. ed. 1307, 37 Sup. Ct. 904 (1937).

²⁹ N. Y. Laws 1942, c. 544, §§ 80, 82.

³⁰ *Id.* c. 618.

³¹ U. S. CONST. AMEND. XIV, § 1.

³² *Louisville G. & E. Co. v. Coleman*, 277 U. S. 32, 72 L. ed. 770, 48 Sup. Ct. 423 (1928).

³³ In *People v. Creeden*, 281 N. Y. 413, 24 N. E. (2d) 105 (1939), it was held that the burden of proof was on the person claiming unjust discrimination to show that the distinction made between classes was arbitrary. In *Radice v. People of the State of New York*, 264 U. S. 292, 68 L. ed. 690, 44 Sup. Ct. 325 (1924), a statute limiting hours of employment of women in restaurants in first and second class cities, with the exception of singers and performers, attendants in ladies' cloak rooms and parlors and those employed in hotel dining rooms and restaurants conducted by employers solely for the benefit of their employees, was held not to deny the equal protection of the laws. Every selection of persons for regulation results in some inequality. To be violative of the equal protection clause the inequality produced by a statute must be palpably and actually unreasonable and arbitrary. In *Dominion Hotel v. State of Arizona*, 249 U. S. 265, 63 L. ed. 597, 39 Sup. Ct. 273 (1919), Mr. Justice Holmes stated that the Fourteenth Amendment does not require the impossible. "The equal protection of the laws does not mean that all occupations that are called by the same name must be treated the same way. The powers of the state 'may be determined by degrees of evil, as exercised in cases where detriment is especially experienced.'" *Armour and Co. v. North Dakota*, 240 U. S. 510, 517. It may do what it can to prevent what is deemed an evil and stop short of those cases in which the harm to the few concerned is less than the harm to the

a business engaged in turning out work merely to make life comfortable and one helping to preserve the nation.

Before the passage of the law forbidding such practices, it was not uncommon for an employer to require his employees to be fingerprinted. Such actions did not violate any constitutional right, since an employer may impose such conditions of employment as he sees fit to insure the honesty of those who work for him. However, because of its effectiveness as a means of identification it was used as a means of "blacklisting" those who participated in union activities. It was at this practice that the prohibition was aimed. Where a law or ordinance permits an employer to require those who would work for him to be fingerprinted as necessary for the protection of the public, such a law will be upheld.³⁴ It is important that certain persons be kept from gaining information that would aid the enemy. A positive system of identification is needed, and this need is supplied by the examination of fingerprints. A waiver of the fingerprint prohibition in such a case would be valid.

Before the enactment of Section 876-a of the Civil Practice Act, a court having equity jurisdiction could validly issue an *ex parte* order restraining picketing, or other conduct in a labor dispute. This method of obtaining relief often resulted in irreparable harm, and, therefore, this practice was stopped.³⁵ Under the state constitution, New York courts may exercise those functions formerly possessed by courts of equity.³⁶ Since at common law equity could enjoin any conduct arising out of a labor dispute without holding a hearing,³⁷ it would not seem to be unconstitutional for the legislature to dispense with the statute requiring a hearing in such cases.

It has been demonstrated that the legislature could constitutionally dispense with provisions of the law affecting labor. The Act does not, however, provide for dispensation to be granted by a legislative, but by an administrative body. The problem then arises as to the validity of such a grant of power. In the Act the legislature set down certain standards, and then said that when these rules are met by the applicant dispensation may be granted, and not otherwise. The legislature would have the power to conduct hearings in each case and by statute grant dispensations to meet each case. Such a practice would take up so much of the time of the legislature that essential work would be neglected. It has been held that a legislative body has, in addition to the power of making laws, the power to see that these laws are enforced. Where it is necessary to examine

public . . . The only question is whether we can say in our judicial knowledge . . . that there were . . . public considerations for the distinction . . ."

³⁴ Friedman v. Valentine, 177 Misc. 437, 30 N. Y. S. (2d) 891 (Sup. Ct., N. Y. Co. 1941).

³⁵ N. Y. Laws 1935, c. 477, § 1.

³⁶ N. Y. CONST. Art. VI, § 1. "The authority given includes all cases which may properly be comprehended by established and existing legal principles." Youngs v. Carter, 11 Hun 194 (N. Y. 1877).

³⁷ Note(1930) 30 Col. L. Rev. 1184.

closely the facts of the individual case to determine how to use its regulatory powers in a given instance, it is proper for the legislature to set forth a method of procedure and delegate the mechanical work of applying the facts to the legislative rules.³⁸ It is necessary that the rules be clear.³⁹ The rules in the Act are set by the legislature, and the standard to be applied is made clear; all that remains for the administrator is to determine what persons are to benefit by the Act. This is a proper delegation of authority.⁴⁰

The definition of "war work", at first vague,⁴¹ is not clearly defined. It includes in its scope any employer who can satisfy the

³⁸ It was held in *People v. Morehead*, 156 Misc. 522, 282 N. Y. Supp. 576 (1935), that it is not unconstitutional for the legislature to delegate some of its power to an administrative body, where the act authorizing the delegation does not leave unlimited discretion in the hands of the agency, but sets up a standard which must be followed. *Reversed on other grounds*, 270 N. Y. 233, 200 N. E. 799 (1936); 298 U. S. 587, 80 L. ed. 1347, 56 Sup. Ct. 918 (1936). Compare the latter decision with *West Coast Hotel Co. v. Parish*, 300 U. S. 379, 81 L. ed. 703, 57 Sup. Ct. 578 (1937).

In *Locke's Appeal*, 72 Pa. 491 (1873), quoted in *Carstens v. DeSelbem*, 82 Wash. 643, 144 Pac. 934 (1914), it was said that "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend." And in *Williams v. Evans*, 139 Minn. 32, 165 N. W. 495 (1917), "The legislature may, however, delegate to a commission the power to do some things which it might properly, but cannot advantageously do itself." The Supreme Court agrees with this rule. Mr. Chief Justice Taft in *Hampton, Jr. Co. v. United States*, 276 U. S. 394, 72 L. ed. 584, 48 Sup. Ct. 348 (1928), stated that "Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent upon future conditions, and it may leave the determination of such time to the decision of an Executive. . . . If Congress shall lay down by legislative act an intelligible principle to which the person or body . . . is directed to conform, such legislative action is not a forbidden delegation of legislative power."

³⁹ *Mutual Film Corp. v. Industrial Commission of Ohio*, 236 U. S. 230, 59 L. ed. 552, 35 Sup. Ct. 387 (1915). "Undoubtedly the legislature must declare the policy of the law and fix the legal principles which are to control . . . an administrative body may be invested with power to ascertain the facts and conditions to which the policy and principles apply. . . ." The statute must furnish a general standard, and where appeal to the courts is allowed, there is no danger of arbitrary action.

⁴⁰ Many cases have come before the Supreme Court and the state courts in which it was held that administrative bodies may grant dispensation from prohibitions set by law, provided there was a general legislative standard. *Intermountain Rate Cases*, 234 U. S. 476, 58 L. ed. 1048, 34 Sup. Ct. 986 (1914); *People v. Klinick Packing Co.*, 214 N. Y. 121, 108 N. E. 278 (1915); *Doscher v. Sisson*, 222 N. Y. 387, 118 N. E. 789 (1918).

⁴¹ At first, "war work" was defined as "work in producing articles or materials on or for contracts for the United States army or navy, or for any other agency of the United States, or work in performing other services related thereto and necessary for the successful waging of the present war." N. Y. Laws 1942, c. 544, § 79. This was added to, enlarging the scope of the definition, by N. Y. Laws 1943, c. 315 (April 6, 1943), and now reads—in addition—work in producing materials for "noncombatant service performed in connection with any other occupation, activity, or employment essential to the effective prosecution of the war or necessary to protect the public health and welfare."

Commissioner that he is, however indirectly, helping to win the war. A business that would raise morale of war workers, or aid them to be better fit to work by improving their health, would come within the Act. This classification, while very clear, is far too broad. The legislature would do well to consider the requirement for the granting of dispensation from provisions of law restricting operation set forth by the state of California. In that state an employer wishing to obtain relief must produce a statement from Army or Navy officials to the effect that the employer is engaged in essential war work and that a relaxation of the rules is necessary to maintain production.⁴² Under the sweeping definition of war work in the New York act it is indeed difficult to say that any employer is not engaged in war work. For the public good it should be necessary for the employer to show that his work is absolutely essential in the war effort. It seems that the original purpose of the Act is being lost sight of, and the present emergency is being used as an excuse to lower the standards of labor legislation.⁴³

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⁴² Regulations of the California Industrial Commission as quoted in C. C. H. Labor Law Service, vol. 2A, paragraph 45,000, State of California.

⁴³ Two amendments to the Act have come to the attention of the author after the Law Review went to the press. New York Laws 1943, c. 171, § 7 changes the provisions for appeals. Appeal may be taken from the ruling of the Industrial Commissioner to the Board of Standards and Appeals. The Board's rulings on questions of fact are conclusive; appeal to the appellate divisions on questions of law is permitted. The appellant has twenty days from the time of the Board's decision in which to file notice of appeal with the clerk of the court. New York Laws 1942, c. 618 is repealed by New York Laws 1943, c. 171, § 16.

New York Laws 1943, c. 171, § 5 amends the Labor Dispensation Act to allow certain dispensations in relation to public works. This amendment seems to bear out our contention that the Commissioner might dispense with minimum wage provisions of the Labor Law. "Conditions . . . with respect . . . wages may be imposed in connection with such dispensations." This amendment is made § 81 of the Labor Dispensation Act. Former § 81 *et seq.* are renumbered accordingly by New York Laws 1943, c. 171, § 6.