Indiana Law Journal

Volume 20 | Issue 2 Article 10

Winter 1945

"Portal to Portal" Time Constitutes Work under the Fair Labor Standard Act

MASTER AND SERVANT

"PORTAL TO PORTAL" TIME CONSTITUTES WORK UNDER THE FAIR LABOR STANDARDS ACT.

Plaintiff iron ore company brought action against the defendant miners' union for a declaratory judgment that miners' travel time, (a) in the shafts, (b) getting to and from the actual face of the iron ore, and (c) time spent at the surface in obtaining and returning tools, checking in and out etc., should not be counted in the work week as

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24. In Tighe v. Ad Chong et al., 44 Cal. App. (2d) 164, 112 P. (2d) 20 (1941), cited supra note 22, where a delivery boy negligently bumped into and injured the plaintiff, the California Supreme Court, in disavowing the principle of the Missouri cases and following the Schediwy case, held that the negligent operation of some instrumentality was not essential in invoking "respondeat superior." "Quite to the contrary, the law is well settled that in determining the question of respondeat superior the real test to be applied is whether at the time the employee commits the negligent act resulting in the injuries to the third person, he is engaged in performing some duty within the scope of his employment." Id. at 22. However, it should be noted that the court attempts to distinguish the Missouri cases upon the grounds that in those cases the injury was the result of "rollicking" by the servant. In Hobba et ux. v. Postal Telegraph Co., —— Wash. ——, 141 P. (2d) 648 (1943), cited supra note 23, where the facts were very similar to those of the Phillips case, the Washington Supreme Court said that you would probably feel that you should make some distinction between those cases where the employee uses some instrumentality and where the employee travels on foot. However, the court continued by saying, "If the employer chooses to have the work done by another, he must be held responsible to others for the negligent conduct of his employee while doing the work, or else he should do the work himself. We think that if we try to draw a distinction between the different methods of locomotion that might result in injury to others, we not only misapply the doctrine of respondeat superior, but also forsake it entirely." Id. at 651.

25. See Cook v. Sanger, 110 Cal. App. 293, 293 Pac. 794, 800 (1930); Phillip Ryan v. Patrick F. Keane, 211 Mass. 543, 98 N. E. 590 (1912); Phillips v. Western Union Telegraph Co., 194 Mo. App. 458, 184 S. W. 958 (1916); Price v. Simon, 62 N.J.L. 151, 40 Atl. 689 (1898); Missouri, K. & T. Ry. v. Edwards, 22 Tex. Civ. App. 184, 67 S. W. 891 (1902). See also (1944) 32 Geo. L. J. 308.

26. Nicholas Farwell v. Boston & Worcester R. R., 4 Metc. 49, 55, 56 (Mass. 1842).

27. See (1944) 32 Geo. L. J. 308.

defined for overtime purposes under the Fair Labor Standards Act.[1] A judgment of the district court[2] in favor of the defendants was modified[3] as to the time spent checking in and out and affirmed as to time spent from "portal to portal."[4] Rehearing was denied[5] and plaintiffs brought certiorari. Held, affirmed. Time spent in traveling underground to and from the working face constituted work or employment for which compensation must be paid under the Fair Labor Standards Act. Tennessee Coal, Iron and Railroad Co. v. Muscoda Local Number 123, etc. et al., 64 Sup. Ct. 698 (1944). (Chief Justice Stone and Justice Roberts dissenting.)

This is a problem of construction of the Fair Labor Standards Act of 1938,[6] and the common law rules governing the master-servant relationship are not applicable to situations which fall within the ambit of this legislation.[7] The primary goal of Congress was that persons should not be permitted to take part in interstate commerce while working under sub-standard labor conditions.[8] If overtime pay might have the effect of protecting commerce from the injurious results of goods produced under sub-standard conditions, labor contracts made before or after such legislation cannot take these overtime transactions from the jurisdiction of the statute.[9]

Upon facts very similar to the instant case, the Sunshine case[10] held that minors of silver ore were entitled to "portal to portal" pay, although the time spent in travel was in cages which were readily lowered and hoisted, and not in uncomfortable and dangerous ore skips[11] as in the principal case. However, it is to be noted that the court in the Sunshine case appeared to be greatly influenced by the fact that the miners were "within the scope of employment" in de-

1. Fair Labor Standards Act, 52 Stat. 1060, 1063, 29 U.S.C.A. §§203 (g,j,), 207 (a,3), (1938).
2. Tennessee Coal, Iron & Railroad Company v. Muscoda Local No. 123, 40 F. Supp. 4 (N.D. Ala. 1941).
3. Tennessee Coal, Iron & Railroad Company v. Muscoda Local No. 123, 135 F. (2d) 320 (C.C.A. 5th, 1943).
4. The "portal to portal" basis of pay, proposed by the respondents, includes time spent in traveling between the entrance or portal to the mine and the working face and the reutrn trip, as well as the time spent at the actual working face of the ore
5. Tennessee Coal, Iron & Railroad Company v. Muscoda Local No. 123, 137 F. (2d) 176 (C.C.A. 5th, 1943).
6. The Fair Labor Standards Act is a regulatory statute designed to implement a public, social, or economic policy through remedies often in derogation of the common law. Walling v. American Needlecraft, 139 F. (2d) 60 (C.C.A. 6th, 1943).
7. Walling v. American Needlecraft, 139 F. (2d) 60, 63 (C.C.A. 6th, 1943), sited supra note 6.
8. United States v. Darby, 312 U. S. 100, 115 (1941).
9. Overnight Motor Transport Company v. Missel, 316 U. S. 572, 577 (1942).
10. Sunshine Mining Company v. Carver, 41 F. Supp. 60 (Idaho 1941).
11. An ore skip is an ordinary four-wheeled ore box car. It is normally used in transporting ore and its floor is often covered with muck from such use. When men ride in it, it is called a "man skip trip."

ciding that travel time was hours worked.[12] It appears that there is a difference between actually working and being in the scope of employment. This court, in fact, decided that the miners' lunchtime was not hours worked, yet it has been almost uniformily held that a workman in a like situation was "within the scope of employment."[13]

Since many borderline cases have purportedly turned on the very few words appearing in the Fair Labor Standards Act, §207 (a) (3),[14] it is not surprising that opposite results have been reached. In the case of auxiliary firemen, time spent at the fire hall in recreation while subject to call has been held not to be "work."[15] In a similar situation another court held that such time was "work,"[16] distinguishing the cases on the ground that in the first-mentioned case the parties agreed to special separate pay in case of a fire call.[17]

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12. The court at 66 cited Bountiful Brick Co. v. Giles, 275 U.S. 154 (1928) and quoted from it: "The employment may begin in point of time before the work is entered upon and in point of space before the place where the work is to be done is reached. Probably, as a general rule, employment may be said to begin when the employee reaches the entrance of the employer's premises where the work is to be done; but it is clear that in some cases the rule extends to include adjacent premises used by the employee as a means of ingress and egress with the express or implied consent of the employer."

13. Employer's Mutual Insurance Co. v. Industrial Commission of Colorado, 76 Colo. 84, 230 P. 394 (1924); Bollard v. Engel, 4 N.Y.S. (2d) 363, 254 App. Div. 162 (1938); White v. E. L. Slattery Co., 236 Mass. 28, 127 N.E. 597 (1920); Thomas v. Proctor and Gamble Mfg. Co., 104 Kan. 432, 179 P. 372 (1919).

14. What did Congress mean when it said in the Fair Labor Standards Act, "No employer shall . . . employe any of his employees . . . for a workweek longer than forty hours . . . unless such employee receives compensation" for overtime at a specific rate?

15. Skidmore et al. v. Swift and Co., 136 F. (2d) 112 (C.C.A. 5th, 1943).

16. Wantock at al. v. Armour and Co., 140 F. (2d) 356 (C.C.A. 7th, 1944).

17. The court at 357 expressed its uncertainty as to whether or not the distinction between the two cases was material by saying: "It seems to us that the question is one which only the court of last resort can answer finally, and our conclusion affords but a resting place, as it were, for the passage of this question on its flight from the court of original jurisdiction to the Supreme Court." The fact that the employer furnished the means of transportation would not appear to make the time spent in travel "time worked" since, when the employer furnished a motor boat to ride employees to and from that place of work, it was not "time worked." Bulot et al. v. Freeport Sulphur Co., 45 F. Supp. 380 (E.D. Louisiana 1942). Opposite results have been reached in the case of oil pumpers as to whether time spent when subject to call is time worked. In the case holding that it was time worked, the decision was based on the pumper's obligation to carry out his responsibility. Fleming v. Rex Oil and Gas Co., 43 F. Supp. 951 (W.D. Michigan 1941). In the other case he was entitled to pay only for time actually worked. Thompson v. Loring Oil Co., 50 F. Supp. 213 (W.D. Louisiana 1943). A porter who was required to sleep on the premises was held not entitled to overtime compensation when, in the course of ordinary events, he was indulging in relaxation and entirely private pursuits. Muldowney v. Seaberg

In the case of coal miners a different holding than that of the instant case is to be noted. Bituminous coal miners' travel-time has been held not to be work-time under the statute.[18] The coal miners ride in "man-trips" which are slightly larger than those used by ore-miners.[19] The supervision during the trip would appear to be about the same. Both groups find it necessary to bend over where the roof is low. It does not appear reasonable that the difference in difficulty of travel should lead to the distinction between hours worked and non-hours worked. As a practical matter the decision in the instant case will operate by way of sudden penalty in that the employer will not only be forced to pay for all back time in travel, but also to pay at the rate of time and one-half.[20] Older mines, whose travel time amounts to one and one-half hours daily, can hardly meet the competitive situation.[21] Due to the peculiar travel situation and labor shortage a reduction in hours and a spread of employment would appear impractical, and thus two of the intended ends of the Fair Labor Standards Act[22] are thwarted.

In the face of these disadvantageous reactions and the opposing prior decisions, it is submitted that the court found a matter of public policy to be controlling. An excerpt from the brief of counsel for the ore miners might reveal this policy: "In coal mining we find a union which has been strong and powerful and which as a union has been engaged in collective bargaining with the coal operators over a long period of years. In our case we find the efforts of the men to organize their union presents a pitiable picture of helplessness against the domination of the mining companies."[23] Noting that the court said, "But these provisions, like the other portions of the Fair Labor Standards Act, are remedial and humanitarian in purpose,"[24] might strengthen this conclusion. In perfect harmony with this reasoning is the fact that the coal miners, through collective bargaining agreements, are now receiving "portal to portal" pay.

Elevator Co., 39 F. Supp. 275 (E.D. New York 1941). Radio engineers are entitled to compensation for periods on duty between half-hourly readings of meters while they are responsible for the operation of the equipment in their charge. Walling v. Sun Publishing Co., 47 F. Supp. 180 (W.D. Tennessee 1942).

18. Jewell Ridge Coal Corporation v. Local No. 6167, United Mine Workers of America, 53 F. Supp. 935 (Virginia 1944).
19. Man-trips used by the coal miners are about twelve feet long and seven feet wide. Not more than eight men riding in these cars ordinarily sit on a bench furnished for that purpose or, where the ceiling of the shaft is low, in the bottom of the car. Man-trips used by ore miners are about eight feet long and ten men ride on each one.
20. See Mr. Justice Sibley dissenting in Tennessee Coal Iron and Railroad Company v. Muscoda Local No. 123, 135 F. (2d) 320, 323.
21. Ibid.
22. Overnight Motor Transport Co. v. Missel, 316 U. S. 573, 576 (1942).
23. Judge Barksdale was quoting from the brief of counsel for the ore miners in the principal case in Jewell Ridge Coal Corporation v. Local No. 6167, United Mine Workers of America, 53 F. Supp. 935, 948 (Virginia 1944).
24. Instant case at 703.