Washington University Law Review

Volume 20 | Issue 1

January 1934

The Enforcement of Minimum Wage Provisions Under the NIRA

Evelyn Honigberg
Washington University School of Law

creditor, who can wait and attach the funds in the hands of the cestui. But in a forum which favors the rights of the creditor above the desire of the settlor to restrict alienation, and which accordingly wishes to give the creditor a lien on the funds before they reach the cestui, it would be well to supplement the remedy provided by *Pole v. Pietsch* with that of *Hamilton v. Drago.* Where these remedies thus are used in conjunction the creditor will be protected in both contingencies:—under the "split second" rule he can attach the sum about to be paid over, and, under the doctrine of *Pole v. Pietsch,* in the event that the trustee should fail properly to exercise his discretion, he can go to court to force reasonable payments to satisfy his claim.

These are not perfect solvents of the problem. Taking into account the complex and often diametrically conflicting factors of the settlor's intent, the public policy of the jurisdiction, the discretion of the trustee, the claim of the cestui to present support and the claim of the creditor for a debt perhaps incurred long before the creation of the trust, these two remedies, even though used in conjunction, appear woefully incomplete. More subtle and adequate methods may in time be devised. Meanwhile these tools, however blunt, have been fashioned by the courts and lie at hand; much can be done with these to extricate the creditor from his present unsatisfactory position.

CHRISTIAN B. PEPER '35.

THE ENFORCEMENT OF MINIMUM WAGE PROVISIONS UNDER THE NIRA

With the enactment of the NIRA there arose a great deal of speculation as to how effective its provisions would be and the extent to which the courts would enforce them. The purpose of the Act as stated in the Declaration of Policy is to eliminate unfair competitive practices, reduce and relieve unemployment, improve the standards of labor, and otherwise rehabilitate industry.[1] According to Senator Wagner the National Industrial Recovery Act has as its single objective the wide-spread and permanent reemployment of workers at wages sufficient to secure comfort and decent living. Business may not compete by reducing wages, by sweating labor, or by resorting to unfair practices.[2] The purpose of this discussion is to show the extent to which the courts have enforced minimum wage provisions under the NIRA.

The NIRA itself provides for several methods of enforcing the

---

[1] 48 Stat. L. 196, 15 U. S. C. Sec. 701.

[2] Hearings before Senate Committee on Finance, May 22 to June 1, 1933, p. 1.

various codes of fair competition.[3] Section 3 (b) declares that any violation of the standards set up in an approved code shall be deemed an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act, and gives the Federal Trade Commission power to proceed against such violation.[4] Section 3 (c) invests the district courts of the United States with jurisdiction to restrain violations of any code and makes it the duty of the United States district attorneys to institute proceedings in equity to restrain such violations.[5] In addition to injunctive proceedings the offender may be subjected to criminal proceedings and fined under section 3 (f) which makes such violation a misdemeanor.[6]

These methods of enforcing compliance with the codes are the only ones expressly provided for in the NIRA. No provision is made for a civil action against an employer by a private individual. Nevertheless the courts have generally recognized the right of an employee to bring a civil action against his employer to recover the difference between the wages received and the minimum wage standard for the industry. In considering the basis upon which the courts have allowed recovery in these cases a distinction must be made between suits brought under the President's Reemployment Agreement[7] and suits brought under the several codes of fair competition.

Where the employee has brought his suit for minimum wages under the PRA or blanket coke it has been held that the PRA constituted a contract between the President and the employer for the benefit of the employee.[8] In such a case recovery has

[3] For a discussion of this subject see, Ralph F. Fuchs, "The Constitutionality of the Recovery Program," (1933) 19 St. Louis Law Rev. 1.

[4] 48 Stat. L. 196, 15 U. S. C. Sec. 703 (b).

[5] 48 Stat. L. 196, 15 U. S. C. Sec. 703 (c).

[6] 48 Stat. L. 196, 15 U. S. C. Sec. 703 (f). The NIRA also vested the President with authority to enforce the code in any industry which is acting contrary to the policy of the code by declaring that it is essential to license business enterprise in order to make effective a code of fair competition and by refusing to issue such license or revoking it unless the terms and conditions of the code are carried out. 48 Stat. L. 196, 15 U. S. C. Sec. 704 (b). However this power was never used and has now expired.

[7] The President's Reemployment Agreement or Blanket code as it is sometimes called was sent to every employer with a request that he sign, by President Roosevelt on July 27, 1933, as part of a nation wide plan to raise wages, create employment and thus increase purchasing power and restore business. The agreement related to hours of employment, wages, employment of minors, and patronage of establishments which had signed it and were listed as members of the N. R. A.

[8] The following cases have upheld the employee's right to recover back wages in a civil action against his employer under the PRA. Beaton v. Avondale (Oct. 1933) Dist. Ct. Denver, Colo., I Prentice Hall "Trade and Commerce" Sec. 8017; Mesloh v. Schulte, (May 1934) Mun. Ct., City of Borough of Queens, 273 N. Y. S. 699; Hovens v. Peterson, Mun. Ct., Iowa (Dec. 1933), Vol. 2, NO. 5 U. S. Law Week p. 23; Johnson v. Ben Shrago

been allowed under the third-party-beneficiary theory as set forth in *Lawrence v. Fox.*[9] Objection has been made to this theory on the ground that a third party is entitled to recover on a contract only if the consideration upon which the right is claimed was furnished by the promisee with the intent that it secure such benefit to the third party, and that no intent on the part of the promisee, the President, to give him a right of action clearly appears.[10] But it may be argued to the contrary that the agreement was intended to benefit the employee since the main purpose of the NIRA was to improve conditions of labor and put people back to work. Also it has been denied that the employer received sufficient consideration for his promise to make the PRA a valid contract. The answer which the courts have made to this argument is that there is sufficient consideration to the employer in the agreement to eliminate unfair competitive practices, increase purchasing power, raise prices and in the authority conferred to display the Blue Eagle.[11] The right of the employee to take advantage of the contract as one made for his benefit receives support in the case of collective labor agreements where a somewhat similar situation is involved. Where an agreement between the employer and the labor union is recognized as a valid contract a member of the union is allowed, in several jurisdictions, to bring suit under such agreement as one for whose benefit it was made.[12]

---

and Sons, (June 1934) City Ct., Hammond, Ind., Vol. 2 No. 5 U. S. Law Week p. 24; Taylor v. Joe O. Frank Co., (June 1934) Mun. Ct., Dayton, Ohio, Vol. 2 No. 5 U. S. Law Week p. 24; Morrison v. Gentler, (Sept. 1934) Mun. Ct., Brooklyn, 273 N. Y. S. 922; Saranita v. Imbrosciano, (June 1934) Mun. Ct., Cleveland, Ohio, Vol 2, No. 5 U. S. Law Week p. 24; Fuldi v. Wysocki (June 1934) City Ct. East St. Louis, Ill; Tedford v. Taylor (Jan. 1934) J. P., Kansas City, Mo.; Bethel v. Karras (Nov. 1933) Common Pleas Ct., Detroit, Mich.; Rush v. Somers (Nov. 1933) Common Pleas Ct., Detroit, Mich.; Chipa v. Regas (Nov. 1933) J. P. Tucson, Ariz.

[9] (1859) 20 N. Y. 268.

[10] See note in 33 Col. Law Rev. 394, "Some Problems in the Application of Contract Doctrine to Recovery Agreements and Codes." (1933).

[11] The PRA does not expressly make such promises but the courts have implied them. See cases cited in f. n. 8 supra. In Petruska v. Farina, (June 1934) County Ct., Allegheny Co., Pa. the employer was estopped to deny the applicability and efficacy of the PRA by displaying the Blue Eagle. (2 U. S. Law Week No. 5 p. 24); Nagel v. Mader (May 1934) Mun. Ct., Mitchell, S. D. held that the display of the Blue Eagle was sufficient consideration. 2 U. S. Law Week No. 5 p. 24.

[12] The third-part-beneficiary theory has not been widely adopted and has been criticized by William Gorham Rice, Jr., "Collective Labor Agreements in American Law" 44 Harvard Law Rev. 572. For support of the theory see, "Theories of Enforcement of Collective Labor Agreements," 41 Yale Law Journal 1221, and the following cases: Blum and Co. v. Landau, 23 Ohio App. 426, 155 N. E. 154 (1926); Johnson v. Amer. Ry. Express Co. (1931) 163 S. C. 191, 161 S. E. 573; Gulla v. Barton (1924) 164 App. Div. 293, 149 N. Y. S. 952; Yazoo and M. V. Ry. Co. v. Sideboard, (1931) 161 Miss. 4, 133 So. 669.

From the cases which have been decided to date it appears that only one court has refused to allow an employee to sue to recover the wages which the employer promised to pay when he signed the PRA.[13] The Tennessee district court held that the remedies provided for by the Recovery Act itself are exclusive and that neither state nor federal courts have jurisdiction of such a suit. However, there is nothing in the NIRA which declares that violators can be proceeded against only by the methods expressly provided therein. If the PRA is recognized as a contract there should be no difficulty in recognizing the jurisdiction of the state court where the cause of action arises out of its breach.[14] The court also declares that where the employee did not complain at the time he received his wages he cannot later sue under the PRA. But in those cases allowing recovery it has been pointed out that acceptance of less wages than the PRA scale does not constitute a waiver by the employee of his right to receive the minimum wage.[15]

Where the employee brings his suit for wages under a code of fair competition a somewhat different situation exists. A code, unlike the President's Reemployment Agreement, does not purport to create a contractual relationship. As stated in one case, "The code, when approved by the President, becomes the law of the industry and is binding upon all those engaged in that industry, whether or not they participate in its formation or formally assented to its adoption. Its provisions are summarily imposed upon the members of a particular industry; as any statute passed by a Legislature affects all of the population."[16] In the case cited the court denied the employee the right to bring suit against his employer for wages according to the Code of Fair Competition for the Dress Manufacturing Industry on the theory that he was a beneficiary of a contract, and stated that such claim should be made to the code authority.

This case stands alone however; and other cases allow an employee to bring a civil suit to recover back wages due under a code. In *Laux v. Smith*[17] a filling station operator who refused to sign the Petroleum Code, but who displayed the Blue Eagle and accepted the benefits therefrom was held bound by the terms

---

[13] McCormack v. Betty Lou Bakeries, (Oct. 1934) Tenn. Cir. Ct., County of Davidson, 2 U. S. Law Week No. 12 p. 8; James Jacob v. Betty Lou Bakeries (Oct. 1934) Cir. Ct., Co. of Davidson, Tenn. 1 Prentice Hall, "Trade and Commerce" 8489.

[14] See 33 Col. Law Rev. 394, supra, for criticism of the theory that the PRA is a valid contract for the reasons that there is no promise by the President and that the element of duress may be found.

[15] DeVries v. Mid-West Walkathon Ass'n, Inc. et. al., (May 1934) Mun. Ct., Black Hawk Co., Iowa. 2 U. S. Law Week No. 5 p. 23.

[16] Abramovitz v. Trolman (July 1934) 273 N. Y. S. 243.

[17] Mun. Ct. of Marion Co., Indianapolis, Ind. (June 1934). 1 Prentice Hall, "Trade and Commerce" 8250.

of the code and estopped to deny liability thereon. Similarly in *Grelech v. Amsterdam* an employee was allowed to recover minimum wages although the employer had not signed the Modified Restaurant Act.[18] In those cases the employers had not consented to be bound by the code so that there is no basis for holding that they are liable on a contract unless consent can be implied from the display of the Blue Eagle. But express refusal to sign seems to negative any theory of implied assent. In *Canton v. The Palms, Inc.*[19] an employee was awarded wages according to the minimum rates prescribed by the Restaurant Industry Basic Code. Here the employer had signed the code and the court based its decision on the theory that the Code was a contract for the benefit of third persons and that an employee could sue as the beneficiary of such a contract. These cases evidently overlook the compulsory character of the codes.

Although the opinion in the case of *Abramowitz v. Trolman*[19a] is right in saying that a statutory duty rather than a contractual relationship is raised by the codes, it does not necessarily follow that an employee has no right to bring a civil action. The action may be allowed on the theory that where a statutory duty is imposed upon one for the direct benefit or protection of another and the latter is damaged because this duty is not performed a cause of action arises in his favor based upon the statute.[20] An analogy may also be made to those cases which give to one who is injured through the violation of a criminal statute or ordinance a civil action against the wrongdoer for damages.[21] The decisions under the Federal Safety Appliance Act and the Adamson Eight-Hour Law are more in point. These federal acts impose certain duties upon the employer but do not expressly give to an employee the right to sue his employer for failing to comply with these provisions. Nevertheless the decisions have recognized and supported such right.[22]

---

[18] Mun. Ct., Philadelphia, Pa., (Jan. 1934). 1 Prentice Hall, "Trade and Commerce" 8156.

[19] City Ct. of Buffalo (July 1934) 273 N. Y. S. 239.

[19a] Supra note 16.

[20] Amberg v. Kinley (1915) 214 N. Y. 531, 108 N. E. 239; Strong v. American Fence Constr. Co. (1927) 245 N. Y. 48, 156 N. E. 92. Cases where suit is brought on a contractor's bond are closely related to the cases under discussion. In Mankin v. U. S. (1910) 215 U. S. 533, 30 S. C. T. 174 a bond given by a contractor to make payments to persons supplying him with labor was held to inure to the protection of laborers and materialmen employed by subcontractors so that they could sue on the bond.

[21] See discussion in 27 Harvard Law Rev. 317, "Public Wrong and Private Action," Ezra Ripleu Thayer.

[22] The relation of the decisions under these acts to the present situation are discussed in an article by Thomas C. Billing, J. A. Fridinger, and Philip F. Herrick, "The Worker's Day in Court; Employee's Right to Code Wages," 3 George Washington Law Rev. 1. (1934)

In addition to actions at law to recover wages due, proceedings have been brought in equity to restrain violation of the codes. In the case of *Wisconsin State Federation of Labor v. Simples Shoe Manufacturing Co.* the employees sought to enjoin violation of the PRA. The Wisconsin court, in granting the injunction, held that the employees were beneficiaries under a contract and could therefore enjoin its violation.[23] Where labor unions have sought to enjoin violation of the provisions of a code of fair competition rather than of the PRA the cases hold that a private citizen may not sue to restrain such violation and that the complaint should be brought by the United States acting through its district attorney.[24] Likewise, the right of a competing employer to bring such a suit has been denied.[25] In *Sherman v. Ables* the New York court granted a demand for an injunction brought by the Moving Picture Machine Operators' Union against the employers' association to restrain violation of the Moving Picture Industry Code.[26] But this case was based on an express statute which invested the Supreme Court of New York with jurisdiction to prevent and restrain violations of any code of fair competition at the instance of any party whose interests are or may be adversely affected by such violation.

At the present time only two of the methods set out in the NIRA to enforce the codes have been used to any extent. Fines have been imposed where proceedings have been instituted by the federal district attorney and in many of these cases the employer has been ordered to restore back wages.[27] The federal courts have also issued injunctions upon complaint of the federal district attorney.[28] The right to bring such proceedings cannot

[23] (Oct. 13, 1933) C. C. Wisconsin, Milwaukee Co., 1 Prentice Hall "Trade and Commerce" 8004.

[24] Staley v. Peabody Coal Co. (Dec. 1933) 5 Fed. Supp. 612.

[25] Western Powder Mfg. Co. v. Interstate Coal Co. (Jan. 1934) 2 F. Supp. 619; Purvis v. Bazemeor (Dec. 1933) U. S. Dist. C. S. D. Fla. 1 Prentice Hall, "Trade & Commerce" 8008.

[26] (Jan. 1934) Sup. Ct., N. Y. Co. 1 Prentice Hall, "Trade and Commerce" Sec. 8010. An injunction was also granted on the same set of facts in Brodsky v. Sharbu Operating Co., Inc., (Feb. 1934) Sup. Ct. N. Y. 1 Prentice Hall, "Trade and Commerce" 8105.

[27] U. S. v. Sley System Garages et al., D. C. E. D. Pa. (June 1934) 2 U. S. Law Week No. 5 p. 23; U. S. v. Mascott (June 1934) D. C. D. Maine, 2 U. S. Law Week No. 5 p. 23; U. S. v. Clyde Mills, Inc. (June 1934) D. C. D. R. I., 2 U. S. Law Week No. 5 p. 23; U. S. v. Katz (June 1934) D. C. Maine, 2 U. S. Law Week No. 5 p. 23; U. S. v. Perfect Coat and Suit Co. (May 1934) U. S. D. C. N. J., 1 Prentice Hall 8181; U S. v. Sanderowitz et al., D. C. E. D. Pa. (Oct. 1934) 2 U. S. Law Week No. 12 p. 3.

[28] U. S. v. Liss et al. (Sept. 1934) D. C. E. D. Pa. 2 U. S. Law Week No. 8 p. 3; U. S. v. Loma Dress Co. (Sept. 1934) D. C. S. D. N. Y., 2 U. S. Law Week No. 8 p. 3; U. S. v. Wifam et. al. (Sept. 1934) D. C. E. D. Pa. 2 U. S. Law Week No. 8, p. 3; U. S. v. Sereni (Oct. 1934) D. C. E. D. Pa. 2 U. S. Law Week No. 12 p. 3; U. S. v. Perloff et. al. (Oct. 1934) D. C.

be questioned since they are expressly authorized by statute. The few cases which have denied relief have done so on the ground that the NIRA itself is unconstitutional.[29] However most of the courts have either assumed or expressly upheld the constitutionality of the NIRA and have not only given effect to its express provisions but have also recognized an implied right in the employee to enforce its minimum wage provision by a civil action.

EVELYN HONIGBERG '35.

E. D. Pa. 2 U. S. Law Week No. 12 p. 3; U. S. v. Sharp Motor Co. (Oct. 1934) D. C. M. D. Tenn., 2 U. S. Law Week No. 12 p. 3; U. S. v. French (Sept. 1934) D. C. W. D., Mich., 2 U. S. Law Week No. 8 p. 3.

[29] In Anderson, Pros. Att'y v. Killen (Oct. 1934) Cir. Ct., McDowell Co., 1 Prentice Hall, "Trade and Commerce" 8423, the court denied an injunction to restrain wage and hour violations of the Lumber and Timber Products Code on the ground that they are unconstitutional because they violate the due process clauses of the Federal and State constitutions. The right of an employer and employee to obtain from each other the best terms they can as the result of private bargaining was held to be a property right protected by the due process clause; U. S. v. Juvenile Mfg. Co. (Oct. 1934) D. C. W. D., Texas, 2 U. S. Law Week No. 12, p. 3 held the NIRA and the Children's and Infants' Wear Code unconstitutional because they were designed not to regulate interstate commerce but rather to regulate industry in each state; U. S. v. Belcher (Oct. 1934) D. C. N. D. Ala., 2 U. S. Law Week No. 12, p. 3.