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Administrative Law—Walsh-Healey Public Contracts Act—Minimum Wage Determination for Different Occupations Within an Industry Held Invalid.— Barber Coleman Co. v. Wirtz

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CASE NOTES

Administrative Law—Walsh-Healey Public Contracts Act—Minimum Wage Determination for Different Occupations Within an Industry Held Invalid.—*Barber Coleman Co. v. Wirtz.*[1]—In a suit instituted against the Secretary of Labor pursuant to Section 10(b) of the Walsh-Healey Act,[2] eleven manufacturers of machine tools sought a declaratory judgment that a final determination of the prevailing minimum wages in the machine tools industry, made by the Secretary under Section 1(b) of the Walsh-Healey Act,[3] was unlawful and void. A permanent injunction was also sought enjoining the Secretary and his agents from enforcing or applying that determination. By his final decision,[4] the Secretary had determined two *different* prevailing minimum wages for the machine tools industry; one in the amount of $1.65 an hour for blueprint machine operators and draftsmen, and another for $1.80 an hour for those employees engaged in other occupations within the same industry.[5] Notice of a hearing by the Labor Department to determine the prevailing minimum wages in the machine tools industry was published in the Federal Register.[6] It requested evidence to be submitted as to the prevailing minimum wages in the industry and the minimum wage paid to "covered workers."[7] This notice of hearing contained no suggestion that evidence be produced with respect to wages paid according to occupations and none was submitted. As a result of the hear-

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1 224 F. Supp. 137 (D.D.C. 1963).

2 66 Stat. 308 (1952), 41 U.S.C. § 43a(b) (1958). Known as the Fulbright Amendment, this section makes the provisions of the Administrative Procedure Act, 60 Stat. 237 (1946), 5 U.S.C. §§ 1001-1011 (1958), calling for judicial review, applicable to Sections 1-5 and 7-9 of the Walsh-Healey Act.

3 49 Stat. 2036 (1936), 41 U.S.C. § 35(b) (1958). Under this section, employers who manufacture or supply goods, materials, supplies, and equipment under government contracts for amounts exceeding $10,000, must stipulate to certain wage requirements:

> That all persons employed by the contractor . . . will be paid . . . *not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed* on similar work or in the particular or similar *industries* or groups of industries currently operating in the locality. . . . (Emphasis supplied.)

4 28 Fed. Reg. 4898 (1963).

5 A preliminary injunction had been granted previously to the companies' restraining the Secretary from enforcing the prevailing minimum wage determination on the basis of doubt as to the validity of such determination. Barber-Coleman Co. v. Wirtz, 16 WH Cases 120 (D.D.C. 1963).

6 26 Fed. Reg. 7550 (1961). See generally, 68 Dick. L. Rev. 74 (1963).

7 A government contractor's stipulation as to minimum wages under Section 1(b) of the Walsh-Healey Act applies not to all persons in his employ but only to those engaged in the manufacture or furnishing of the particular material or equipment called for by his contract. Those so engaged are called "covered workers." Thus, in the case of a company having a government contract to manufacture a machine tool, the receptionist in the office of the president of the company would not be subject to the minimum pursuant to the stipulation, or if that company were also engaged in enterprises other than the manufacture of machine tools, the wages of its employees would not be subject to that minimum since they would not be "covered workers." Perkins v. Endicott Johnson Corp., 128 F.2d 208 (2d Cir. 1942), aff'd, 317 U.S. 501 (1943).

ings and after publishing a tentative decision,[8] the Secretary concluded that a determination providing for one prevailing minimum wage for blueprint machine operators and draftsmen, and another for all other minimum wage workers in the machine tools industry was both authorized by the Walsh-Healey Act and warranted by the evidence. The procedural infirmities alleged by plaintiffs were that the notice and hearing requirements of the Walsh-Healey Act and the Administrative Procedure Act were not complied with and that plaintiffs were not given a full hearing as required by both acts.[9] However, it was the determination of different minimum wages for workers in different occupations in the industry which was the substantive error alleged by plaintiffs.[10] The court HELD: Plaintiffs' motion for summary judgment granted. As a matter of law, the determination by the Secretary was not authorized by Section 1(b) of the Walsh-Healey Act under which the Secretary purported to act. Under the notice of hearing, the industry was entitled to proceed on the assumption that the hearing would relate to all covered workers and the minimum wages as determined would be based upon evidence of the actual minimum in the industry. However, the final determination was based upon evidence which did not include all covered workers. The failure to include blueprint machine operators and draftsmen, usually at the low side of the industry wage scale, as covered workers in determining the prevailing minimum wages for all other occupations within the industry, was prejudicial to the industry.

The Walsh-Healey Act provides that every contract with an agency of the United States for the manufacture or furnishing of supplies or equipment in an amount exceeding $10,000 shall include a stipulation as to minimum wages as determined by the Secretary of Labor.[11] Enacted in 1936,

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[8] 27 Fed. Reg. 898 (1962).

[9] Another procedural infirmity alleged by plaintiffs was that the defendant failed to make adequate findings and state sufficient reasons as required by Section 8(b) of the Administrative Procedure Act, 60 Stat. 242 (1946), 5 U.S.C. § 1007(b) (1958), which provides in part that:

> All decisions shall . . . include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record. . . .

It was further alleged that defendant's action in making the determination effective seven days after publication in the Federal Register without a finding of good cause did not comply with the requirement of Section 4(c) of the Administrative Procedure Act, 60 Stat. 238 (1946), 5 U.S.C. § 1003(c) (1958), which provides that an agency rule shall be published:

> . . . [N]ot less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

[10] Supra note 1, at 139.

[11] 49 Stat. 2036 (1936), as amended, 41 U.S.C. §§ 35-45 (1958). It should be noted that the Act does not provide that the Secretary fix minimum wages; he has no power analogous to that of a rate-making agency, such as the Interstate Commerce Commission, which is delegated broad discretion to fix reasonable freight rates. He merely makes the *determination of what is the prevailing minimum*. This is not a discretionary determination but a determination of a specific fact.

the purpose of the Act was to prevent use of public funds to depress working conditions and to use the leverage of the government's immense purchasing power to raise labor standards.[12] Unlike the Fair Labor Standards Act,[13] Walsh-Healey does not specify a blanket minimum for all industries. Instead, determinations of prevailing minimum wages are made for individual industries. Walsh-Healey provides that it will not apply to any contracts except those relating to such industries as have been the subject matter of a determination by the Secretary of Labor. The prevailing minimum wages determined by the Secretary may be considerably higher than the highest minimum permitted under the Fair Labor Standards Act.

Section 10(b) of Walsh-Healey provides: "All wage determinations under section 1(b) . . . shall be made on the record after opportunity for a hearing."[14] Thus the Secretary must make a factual determination of what is the actual prevailing minimum wage on the basis of evidence of wages actually paid, which evidence is to be "on the record after opportunity for a hearing." He must do so in a manner consistent with the requirements of the Administrative Procedure Act as to notice, hearing and other procedural matters, since the provisions of this Act govern conduct under Sections 1-5 and 7-9 of Walsh-Healey.[15] These provisions insure full disclosure of the basis for wage determinations and provide a delay in the effective date of the order to allow exceptions to be considered in judicial review proceedings brought by any manufacturer in the industry to which the determination is applicable.[16]

In Walsh-Healey hearings, the Labor Department's evidence of prevailing minimum wages is gathered and presented by representatives of the Department's Bureau of Labor Statistics (hereinafter BLS). Since the Act requires the minimum wages norm to be that existing in the industry at the time, the BLS attempts to secure information as to the minimum wages paid in all establishments in an industry. It sends a questionnaire to all known industry members, and its field representatives visit companies that do not respond to questionnaires. The answers to its inquiries are kept secret by the BLS, but it collates the information and introduces it in summary form into the record indicating which wages are at the lower end of the

[12] United States v. New England Coal and Coke Co., 318 F.2d 138 (1st Cir. 1963).

[13] 52 Stat. 1060 (1938), 29 U.S.C. §§ 201-219 (1958), as amended, 29 U.S.C. §§ 203-217 (Supp. IV, 1959-62). This Act is the principal federal law regulating wages, hours of work, and the employment of child labor. The minimum wage regulation, when determined, applies to all employees, not specifically exempt, who are engaged in interstate commerce or the production of goods for commerce, or who are employed by an enterprise engaged in commerce or the production of goods for commerce.

[14] 66 Stat. 308 (1952), 41 U.S.C. § 43a(b) (1958).

[15] Ibid.

[16] To obtain standing for judicial review, a manufacturer, although not under government contract, must be in the industry affected by the determination. He must also be able to show, by direct and immediate injury, to have been affected or aggrieved by the Secretary's determination. Mitchell v. Covington Mills, 229 F.2d 506, 511 (D.C. Cir. 1955); cert. denied, 350 U.S. 1002 (1956).

industry's wage scale, how many workers receive lower wages, what the occupational groupings are, and other information of a similar nature which will throw light on the minimum wage structure of the industry.[17]

The legislative history of Walsh-Healey and its administrative interpretation indicate that the Secretary has no power under section 1(b) to impose minimum wages for each occupation or groups of occupations, but only a single minimum for all of the regular covered employees of the contractor.[18] In 1937, the very next year after the adoption of the Walsh-Healey Act, a case arose before Secretary of Labor Perkins in which the unions argued that the Act empowered the secretary to determine different minimum wages for different occupations when making a wage determination for a particular industry.[19] At the hearing, evidence was submitted by the unions indicating several definite occupational classifications of workers within the men's hat and cap industry. The unions urged the establishment of different minimum wages for each such classification. The Secretary rejected the contention, emphasizing that her view was taken on advice from her Solicitor's office that, "[T]he Act authorizes the fixing of only *one* minimum wage in an industry and does not permit the establishment of occupational minima."[20] (Emphasis supplied.) Such a contention as that of the union failed to consider that the Secretary has not been given the power to *regulate* minimum wages, but merely to make a factual determination of the prevailing minimum wages that actually exist in the industry.

As the court indicated in the present case, Secretary Perkins' application of Walsh-Healey at the outset of its twenty-eight year history has been

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[17] Att'y Gen. Nat'l Comm. Administrative Procedure Rep. 24 (1940). Only BLS has the means for securing such information on the most comprehensive basis. Sometimes a trade association conducts a questionnaire survey of its own, from which it derives similar information, and introduces this information into the record in order to provide a check on the BLS data. But, it is apparent that the BLS data provide not only the point of departure for the evidentiary hearing but also the most extensive and important evidence produced. For a detailed analysis of early wage determinations, see Comment, 48 Yale L.J. 610 (1939).

[18] Congressman Healey explained that the wage provision in Section 1(b) of the House Committee Bill (identical with the Act as finally adopted) did not provide for establishing different minimum wages for different occupational classes of employees within an industry but only for a single minimum wage figure for all employees. His remarks were:

> This bill does not set the standard for minimum wages by reference to the codes that obtained under N.R.A., but definitely sets it as the *prevailing minimum wage* for similar work or in the industries operating in the locality in which the contract is to be performed. The bill merely provides for a proper determination by the Secretary of Labor with respect to *such prevailing wage*. After that determination has been made the *figure* will be included in the stipulations in these contracts. (Emphasis supplied.)

80 Cong. Rec. 10002 (1936) (remarks of Congressman Healey). See Comment, 48 Yale L.J. 610, 627 (1939).

[19] Determination of the Prevailing Minimum Wages in the Men's Hat and Cap Industry, 2 Fed. Reg. 1335 (1937).

[20] Ibid. See also, Determination of the Prevailing Minimum Wages in the Tobacco Industry, 4 Fed. Reg. 1664 (1939).

consistently adhered to by the Department.[21] The establishment of multiple minima for an industry would be a departure from this record. Evidence of this pattern of uniform interpretation is to be found in a very recent case announced by the Secretary just as the present case reached the court on the motion for a preliminary injunction.[22] In pending proceedings for the engine and turbine industry, the union had advocated that two levels of prevailing minimum wages be established—one for the lowest paid occupations and another for the rest of the occupations in the industry. In his tentative decision, the Secretary rejected the union's proposal and plainly recognized its wholly unprecedented nature by characterizing it as—"the innovation suggested."[23]

If the determination of different minimum wages for different occupations is not authorized by Section 1(b) of Walsh-Healey, the question remains whether such a determination is authorized by Section 1(b) read in conjunction with Section 6 of the same Act, which provides in part:

> The Secretary of Labor may provide reasonable limitations and may make rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any and all provisions of this Act respecting minimum rates of pay . . . .[24]

This was the position taken by the government at trial. The court rejected such a contention because the government had not, at any time during the determination hearings, purported to be acting under the provisions of Section 6 of Walsh-Healey.[25] It is submitted, however, that such a contention is so inherently untenable and contrary to the legislative intent in making the Administrative Procedure Act applicable to the administration of Walsh-Healey, that whether the Secretary purported to act under section 6 would be irrelevant.

Section 6 is designed to permit the Secretary to "make rules and regulations allowing *reasonable* variations, tolerances and exemptions to and from any and all provisions of Walsh-Healey respecting minimum rates of pay."[26] When acting under section 6, the Secretary is not required to base the rate of minimum wages on a finding of the prevailing minimum wages for the

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[21] See, e.g., Tentative Decision Determining Prevailing Minimum Wages, Electronics Equipment Industry, 27 Fed. Reg. 11282-83 (1962) (there can be only one lowest or minimum wage in any one plant); Pumps and Compressors Industry, 27 Fed. Reg. 12962-63 (1962); Tires and Related Products Industry, 24 Fed. Reg. 8741-46 (1959).

[22] Tentative Decision Determining Prevailing Minimum Wages, Engine and Turbine Industry, 28 Fed. Reg. 6989 (1963).

[23] Id. at 6991.

[24] 49 Stat. 2038 (1936), 41 U.S.C. § 40 (1958).

[25] Supra note 8, at 900. In this tentative decision, the Secretary provided: "[T]he exemptive authority provided for by Section 6 of the Act, under which a tolerance for beginners or probationary workers may be granted, will not be exercised."

[26] Supra note 24. (Emphasis supplied.) Illustrative of the Regulations promulgated are: 41 C.F.R. § 50-201.1102 (1963) (tolerance for handicapped workers); § 50-201.1103 (1963) (tolerance for apprentices); § 50-202.3 (1963) (learners employed at less than the minimum wage).

workers covered by the tolerance such as he is required to make under section 1(b).[27] The formal rule-making procedures such as notice and statement of findings, as well as provisions for judicial review, of the Administrative Procedure Act were not made applicable to section 6 by the Fulbright Amendment of 1952.[28] Since the enactment of Walsh-Healey, the provisions of section 6 have been invoked by the Secretary only with respect to employees who were not regular workers or who were beginners, probationary workers, helpers or auxiliary workers.[29] Even in those instances, the Secretary is limited to a reasonable variation or tolerance. Can it be said that a determination of an additional prevailing minimum wage such as was entered in the instant case is a *reasonable* variation? It is submitted that the very reasons for making the Administrative Procedure Act applicable in the administration of Walsh-Healey would be thwarted if the Secretary could employ section 6 to substantiate his determination of different mini- Section 10(b) of Walsh-Healey only makes reference to section 1(b), if the mum wages for different occupations. Because the hearing provision of Secretary were able to make a determination under section 6, then the hearing provision would not be applicable to such determination. It could be made without notice of hearing, without a hearing, and without a statement of the reasons or basis for such determination. To sanction such a determination would be to invite arbitrariness and capriciousness. Indeed, if the government's contention in this case were allowed to stand, it may well have deprived plaintiffs of property without due process of law for these very reasons. The manufacturers would have been confined to a wage determination made on a record which did not include rebuttal evidence because there would be no "opportunity for hearing."[30]

In this case, the notice of hearing contained no suggestion that evidence be produced with respect to wages paid according to occupations. It called for the minimum wages paid according to "covered workers."[31] It follows that if the stipulation as to minimum wages is to cover all of the workers of the industry, save any tolerance for beginners or helpers, the evidence as to wages on the basis of which the Secretary is to make his determination of the prevailing minimum must include information as to wages paid to workers

[27] 22 Fed. Reg. 6226 (1957). Pursuant to section 6, the Secretary added a tolerance for apprentices.

[28] 66 Stat. 308 (1952), 41 U.S.C. § 43a(b) (1958).

[29] Comment, 48 Yale L.J., supra note 17, at 627. For such special categories it is well understood in industry that the normal prevailing minimum rate of wages is not intended to be applicable. Where these categories exist to any significant extent, industry usually provides subminimum wages. See 3 Fed. Reg. 224 (1938) (tolerance established for auxiliary workers).

[30] A party who has a sufficient interest or right at stake in a determination should be entitled to an opportunity to know and to meet unfavorable evidence of adjudicative facts with the weapons of rebuttal evidence, cross-examination, and argument. This trial-type hearing is what the Administrative Procedure Act calls a determination on the record after opportunity for a hearing. 1 Davis, Administrative Law § 7.02 (1958).

[31] Supra note 1, at 139.

of all types. In short, the "covered workers" to whom the minimum wage determination is to apply must also be the "covered workers" as to whose wages evidence is secured by the Secretary in order to determine what is in fact the prevailing minimum. But the BLS data in this case were inadequate in precisely this respect.[32] In the evidence presented on the record, data concerning the wages paid to blueprint machine operators and draftsmen were excluded.[33] The determination of the $1.80 an hour prevailing minimum wage did not include the actual wages paid to blueprint machine operators and draftsmen—occupations in which, as has been earlier suggested, the wages are usually low.[34] Failure to include these wage figures in the determination resulted in a higher minimum wage for all other occupations in the machine tools industry than would have been determined had the wages of these occupations been included.[35] Rather than correcting this error by a redetermination, the Secretary saw fit to mend the defective BLS survey by making a different determination for blueprint machine operators and draftsmen.[36] If such a determination were to be held valid under Section 6 of Walsh-Healey, then the plaintiffs might well be deprived of property without due process since the notice, hearing, and finding requirements of Walsh-Healey and the Administrative Procedure Act would not have been satisfied. In order to continue government business, the plaintiffs would have to pay higher minimum wages without having been afforded the opportunity to present objections and contrasting or other relevant data.

This case represents an authoritative pronouncement that a determination of different minimum wages for different occupations within an industry is not authorized by Section 1(b) of the Walsh-Healey Act. However, its future importance rests upon the necessary conclusion that a deter-

[32] The BLS questionnaire defined "covered workers" for whom plaintiff manufacturers were to provide wage information to include only all working foremen, other workers engaged in processing, fabricating, assembling, handling, or shipping, and all janitors working around machines while in operation. Plaintiffs were directed to exclude other plant workers not mentioned under workers covered and office, sales, executive, administrative and professional personnel. As a result, the wages paid to blueprint machine operators and draftsmen, working in offices, were excluded from the questionnaire. Brief for Plaintiff, pp. 14-15.

[33] Brief for plaintiff, pp. 14-15.

[34] At the hearing, a Labor Department official testified that the BLS questionnaire's definition of "covered workers" was an abbreviated standard definition and that its origin dated back before 1940. However, in the intervening twenty-four years, the Secretary's rulings had expanded the concept of "covered workers" to include draftsmen and blueprint machine operators. Id. at 16.

[35] This failure would result in substantial injury to plaintiffs unless set aside, since the wages of workers would have to be raised considerably. Id. at 24.

[36] In the tentative decision, supra note 8, Secretary Goldberg (the present Secretary's predecessor) recognized that the BLS survey had improperly omitted blueprint machine operators and draftsmen from its coverage. Rather than reopening the record for the introduction of additional evidence of the wages of the omitted workers (a relatively common and effective practice in administrative hearings) he expediently determined occupational minima. Nearly a year and a half went by before the issuance of the final decision, supra note 4, which was made by the present Secretary and which steadfastly adhered to the former Secretary's method of mending the defective BLS survey without reasoning to its conclusion. Id. at 17-18.

mination of different minimum wages for different occupations, although purportedly made under sections 1(b) and 6 as read in conjunction, will be held invalid. Such determination would thwart legislative intent in providing for an opportunty for a hearing, notice requirements and a statement of findings before a valid wage determination could be reached. It would also result in an infringement upon fundamental standards of due process in failing to provide an opportunity to introduce evidence and to make argument.[87]

GEORGE M. FORD

Communications Law—Communications Act of 1934—Right of a Party in Interest to a Trial-type Hearing upon a Challenge to a License Application.—*Interstate Broadcasting Co. v. FCC.*[1]—Interstate (hereinafter referred to as WQXR), a class I-B AM radio station operating at 50 kilowatts on 1560 kc in New York City, challenged the applications for broadcasting permits made by intervenors Patchogue and Grossco.[2] The Commission

[87] Londoner v. Denver, 210 U.S. 373 (1908); Morgan v. United States, 304 U.S. 1 (1938).

[1] 323 F.2d 797 (D.C. Cir. 1963).

[2] In 1957, Patchogue applied for a construction permit to operate a new AM station at Riverhead, Long Island, on 1570 kilocycles with a power of 1 kilowatt, to broadcast daytime only. In 1959 the application was granted without a hearing. WQXR filed a protest under § 309(c) of the Communications Act of 1934, 48 Stat. 1085, as amended, ch. 879, § 7, 66 Stat. 715 (1952), ch. 1, 70 Stat. 3 (1956), which then provided:

> When any instrument of authorization is granted by the Commission without a hearing . . . such grant shall remain subject to protest . . . for a period of thirty days. . . . Any protest . . . shall contain such allegations of fact as will show the protestant to be a party in interest, and shall specify with particularity the facts relied upon by the protestant as showing that the grant was improperly made or would otherwise not be in the public interest. The Commission shall . . . render a decision making findings as to the sufficiency of the protest in meeting the above requirements; and, where it so finds, shall designate the application for hearings upon issues relating to all matters specified in the protest . . . except with respect to such matters as to which the Commission, after affording protestant an opportunity for oral argument, finds, for reasons set forth in the decision, that, even if the facts alleged were to be proven, no grounds for setting aside the grant are presented.

In 1959, Grossco applied for its permit to establish a 1 kilowatt, daytime only station on 1550 kilocycles in the Hartford, Conn., area. WQXR petitioned to intervene under § 309(b) of the Communications Act of 1934, 48 Stat. 1085, as amended, ch. 879, § 7, 66 Stat. 715 (1952), which then provided:

> If upon examination of any such application the Commission is unable to make the finding specified in subsection (a), it shall forthwith notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. . . . The parties in interest, if any, who are not notified by the Commission of its action with respect to a particular application may acquire the status of a party . . . by filing a petition for intervention showing the basis for their interest. . . . Any hearing subsequently held upon such application shall be a full hearing in which the applicants and all other parties in interest shall be permitted to participate . . . .

Both § 309(b) and (c) were amended in 1960, 74 Stat. 889, 47 U.S.C. § 309 (Supp. IV, 1959-62).