February 8, 1968

Madge Ames, Director — Minimum Wage & Child Labor
Warren E. Winslow, Jr., Asst. — Labor & Industry
Attorney General

Overtime Compensation under 26 M.R.S.A. § 664

FACTS:

Business A was a sole proprietorship owned by X. Business B was a corporation, the President/Treasurer of which was X. The 3 directors of the corporation were X, a member of X's family, and the corporation clerk, a lawyer. The two businesses were a garage at which repairs were made on automobiles and a used car business at which retail sales took place.

There was one time clock, located at the garage, and all employees of both businesses used that clock. At the end of the week, the time was divided at the bottom of a card, part charged to the garage, part to the retail business. Job sheets at the garage determined how much time was charged to each.

There were separate payroll record books and separate check books. Checks for both were signed by X.

Most of the instances involving time charged to both establishments were occasioned by repairs to the used cars from the retail business. When they needed repairs to get them ready to sell, the repairs were either done at the garage and time charged to the retail business or a mechanic went over to the used car lot and did the repairs there.

The same employees worked back and forth between the two businesses, often working more than 48 hours in one week. For this they were paid straight time.

QUESTION:

Whether the above employment relationship can be considered one for the purpose of overtime compensation under 26 M.R.S.A. § 664.

ANSWER:

Yes.

Madge Ames February 8, 1968

OPINION:

26 M.R.S.A. § 664 provides in part that: "it is declared unlawful for any employer to employ any employee . . . . more than 48 hours in 1 week, unless 1 1/2 times the regular hourly rate is paid for all work done over 48 hours in 1 week."

Although there is no Maine law interpreting this particular section, we can argue by analogy to a similar area in Federal Law. The Fair Labor Standards Act of 1938, specifically 29 U.S.C.A. § 207 (a) (1), uses essentially the same language as the Maine Statute in referring to employers paying overtime compensation:

> ". . . no employer shall employ any of his employees who in any work week is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce, or in the production of goods for commerce, for a work week longer than 40 hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than 1 1/2 times the regular rate in which he is employed."

Federal cases decided under this section of the Fair Labor Standards Act can be used to argue that overtime compensation should be paid the employees in our factual situation. In Walling v. Friend, 156 F. 2d 429 (8th Cir. 1946), the court cites Interpretive Bulletin #13, paragraph 17, issued July 1939, by the Administrator of the Wage and Hour Division of the Department of Labor, with approval and adopts the following statement from this Bulletin:

> "In some cases, however, an employee may work 40 hours for company A and 15 additional hours during the same week on a different job for company B. In this case it would seem that if A and B are acting entirely independently of each other with respect to the employment of the particular employee both A and B, in ascertaining their obligations under the Act, would be

> privileged to disregard all work performed by the employee for the other company. If, on the other hand, employment by A is not completely disassociated from the employment of B, the entire employment of the employee for both A and B should be considered as a whole for the purposes of the statute . . ." (Emphasis supplied)

In the Walling case the facts showed that employees worked as clerical workers for a broker and the owners of a horse and mule market who were in partnership with said broker. The two firms shared a common office in which all the work was done. Each paid the workers a salary. The workers performed entirely different services, though of a similar nature. The services to one employer were of no benefit to the other. Under these facts no violation of 29 U.S.C.A. § 207 (a) (1), quoted above, was found.

We can distinguish the Walling case from the one we have before us on the character of the employers alone. In the Walling case there was no more connection between the two respective employers than the fact that they were in partnership together. In our case, X was in control of the corporation as well as the sole proprietorship. This fact alone is sufficient to distinguish this case.

In a case with facts very close to those which we have before us now, the Court decided that a joint employment relationship did exist. In Macombe v. Midwest Rust Proof Co., 16 Labor Cases 64, 953 (E.D. Mo. 1949), the Court looked for common control of the employees. The two businesses involved were a corporation and a d/b/a/. The corporation was a rust proofing and cleaning business, the d/b/a/ an enameling business. H. S. was President/Treasurer of the corporation and directed its operations. J.R.S. supervised directly the enameling business. H.S. and J.R.S. were related. The two businesses employed a joint general manager. Some workers were paid jointly, some separately. The Court found that these facts were sufficient to constitute a joint employment relationship.

In Mitchell v. Thompson Materials & Construction Co., 27 Labor Cases 68, 888 (D.C. Cal. 1954) the two businesses involved were a corporation and a sole proprietorship. The sole proprietor owned 97 1/2% of the stock in the corporation. The workers worked back and forth between the corporation and the sole proprietorship, repairing equipment. Although separate books and records were kept in each entity, the Court held a joint employment relationship.

It would appear that under the facts submitted there would be a joint employment relationship which could be considered one for the purposes of overtime compensation. However, this is a factual determination which we cannot make absolutely. It is a close case. In other words, in our best judgment this relationship should be termed a joint employment relationship, yet a Court might find otherwise. Many of the cases which have been cited appear to rest on stronger factual situations that we have before us.

The factors weighing most heavily in favor of a joint employment relationship are:

1. That X was in actual control of both businesses.
2. That the character of the businesses was interrelated, one depending to a great extent on the other.

Warren E. Winslow, Jr.
Assistant Attorney General

WEW,Jr.
mf