

SUPREME COURT UNITED STATES

Mabee et al.

Vs.

White Plains Pub. Co., Inc.

No. 57.

Argued Dec. 5, 1945.

Decided Feb. 11, 1946.

[Syllabus from pages 178-180 intentionally omitted]

Mr. David H. Moses, of Suffern, N.Y., for petitioners.

Mr. Jeter S. Ray, of Nashville, Tenn., for Administrator of the Wage & Hour Division, Department of Labor, as amicus curiae, by special leave of Court.

Mr. Elisha Hanson, of Washington, D.C., for respondent.

Mr. Justice DOUGLAS delivered the opinion of the Court.

Respondent publishes a daily newspaper at White Plains, New York. During the period relevant here, its daily circulation ranged from 9,000 to 11,000 copies. It had no desire for and made no effort to secure out-of-state circulation. Practically all of its circulation was local. But about one-half of 1 per cent was regularly out-of-state.¹ Petitioners are some of respondent's employees. They brought this suit in the New York courts to recover overtime compensation, liquidated damages and

counsel fees pursuant to § 16(b) of the Fair Labor Standards Act of 1938, 52 Stat. 1069, 29 U.S.C. § 216(b), 29 U.S.C.A. § 216(b). The Supreme Court gave judgment for the petitioners. 179 Misc. 832, 38 N.Y.S.2d 231; 180 Misc. 8, 41 N.Y.S.2d 534. The Appellate Division reversed and ordered the complaint to be dismissed. 267 App.Div. 284, 45 N.Y.S.2d 479. That judgment was affirmed by the Court of Appeals without opinion. 293 N.Y. 781, 58 N.E.2d 520; 294 N.Y. 701, 60 N.E.2d 848. The case is here on a petition for a writ of certiorari which we granted because of the probable conflict between the decision below and those from the federal courts.

The Appellate Division applied the maxim de minimis to exclude respondent from the provisions of the Act. We think that was error. The Court indicated in *National Labor Relations Board v. Fainblatt*, [1939] USSC 83; 306 U.S. 601, 607[1939] USSC 83; , 59 S.Ct. 668, 672[1939] USSC 83; , 83 L.Ed. 1014, that the operation of the National Labor Relations Act (49 Stat. 449, 29 U.S.C. § 151, 29 U.S.C.A. § 151) was not dependent on 'any particular volume of commerce affected more than that to which courts would apply the maxim de minimis.' That Act,³ unlike the present one (*Walling v. Jacksonville Paper Co.*[1943] USSC 25; , 317 U.S. 564, 570, 571[1943] USSC 25; , 63 S.Ct. 332, 336[1943] USSC 25; , 87 L.Ed. 460), regulates labor disputes 'affecting' commerce. 49 Stat. 450, 29 U.S.C. § 152, 29 U.S.C.A. § 152. We need not stop to consider what different scope, if any, the maxim de minimis might have in cases arising thereunder. Here, Congress had made no distinction on the basis of volume of business. By § 15(a)(1) 29 U.S.C.A. § 215(a)(1) it has made unlawful the shipment in commerce of 'any goods in the production of which any employee was employed in violation of' the overtime and minimum wage requirements of the Act. Though we assume that sporadic or occasional shipments of insubstantial amounts of goods were not intended to be included in that prohibition, there is no warrant for assuming that regular shipments in commerce are to be included or excluded dependent on their size. That has been the consistent position of the Administrator. Interpretative Bull. No. 5, par. 9 (1939), 1944—45 Wage Hour Man. 21. His rulings and interpretations 'while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' *Skidmore v. Swift & Co.*, [1944] USSC 129; 323 U.S. 134, 140[1944] USSC 129; , 65 S.Ct. 161, 164.

We stated in *United States v. Darby*, [1941] USSC 49; 312 U.S. 100, 123[1941] USSC 49; , 61 S.Ct. 451, 461[1941] USSC 49; , 85 L.Ed. 609, 132 A.L.R. 1430, 'Congress, to attain its objective in the suppression of nationwide competition in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer. It recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great.' And see *Warren-Bradshaw Co. v. Hall*, [1942] USSC 141; 317 U.S. 88, 91[1942] USSC 141; , 63 S.Ct. 125, 126[1942] USSC 141; , 87 L.Ed. 83. That view is borne out by the legislative history of the Act. Earlier drafts had embodied the 'substantial' standard.⁴ These were omitted from the coverage provisions of the one which became the law. Moreover, one of the exemptions written into the Act extends to 'any employee employed in

connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published.' § 13(a)(8), 29 U.S.C.A. § 213(a)(8). Representative Creal of Kentucky proposed this exemption. He stated that 'under this bill, because 1 or 2 per cent of a paper's circulation goes outside to people who want to get the home-town paper to see whether or not Lucy got married, or whether Sally's baby has been born yet, because that infinitesimal bit of their business is with people outside the county, these publishers fall under the provisions of this bill, when on each side of this little printshop are the butcher and the baker, who are exempt and who are financially better fixed than he is.' 83 Cong.Rec. p. 7445. No such exemption for daily newspapers was granted.⁵ No exemption on the basis of volume of out-of-state circulation was written into the Act. Rather the exemption of the small weeklies or semi-weeklies seems to have been adopted on the assumption that without it a newspaper with a regular out-of-state circulation, no matter how small, would be under the Act. The choice Congress made was not the exemption of newspapers with small out-of-state circulations but the exemption of certain types of small newspapers. We would change the nature of the exemption which Congress saw fit to grant if we applied the maxim de minimis to this type of case. We would also disregard the plain language of § 15(a)(1) prohibiting the shipment in commerce of 'any goods' in the production of which 'any employee' was employed in violation of the overtime and minimum wage requirements of the Act.

Respondent argues that to bring it under the Act, while the small weeklies or semi-weeklies are exempt by reason of § 13(a)(8), is to sanction a discrimination against the daily papers in violation of the principles announced in *Grosjean v. American Press Co.*, [1936] USSC 33; 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660. Volume of circulation, frequency of issue, and area of distribution are said to be an improper basis of classification. Moreover, it is said that the Act lays a direct burden on the press in violation of the First Amendment. The *Grosjean* case is not in point here. There the press was singled out for special taxation and the tax was graduated in accordance with volume of circulation. No such vice inheres in this legislation. As the press has business aspects it has no special immunity from laws applicable to business in general. *Associated Press v. National Labor Relations Board*, [1937] USSC 77; 301 U.S. 103, 132, 133[1937] USSC 77; , 57 S.Ct. 650, 655, 656[1937] USSC 77; , 81 L.Ed. 953. And the exemption of small weeklies and semi-weeklies is not a 'deliberate and calculated device' to penalize a certain group of newspapers. *Grosjean v. American Press Co.*, supra, 297 U.S. page 250, 56 S.Ct. page 449[1936] USSC 33; , 80 L.Ed. 660. As we have seen, it was inserted to put those papers more on a parity with other small town enterprises. 83 Cong.Rec. 7445. The Fifth Amendment does not require full and uniform exercise of the commerce power. Congress may weigh relative needs and restrict the application of a legislative policy to less than the entire field. *Steward Machine Co. v. Davis*, [1937] USSC 113; 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279, 109 A.L.R. 1293; *Currin v. Wallace*, [1939] USSC 26; 306 U.S. 1, 13, 14[1939] USSC 26; , 59 S.Ct. 379, 386[1939] USSC 26; , 83 L.Ed. 441.

We hold that respondent is engaged in the production of goods for commerce. That, of course, does not mean that these petitioners, its employees, are covered by the Act. The applicability of the Act to them is dependent on the character of their work. *Kirschbaum Co. v. Walling*, [1942] USSC 118; 316 U.S. 517, 524[1942] USSC 118; , 62 S.Ct. 1116, 1120[1942] USSC 118; , 86 L.Ed. 1638; *Walling v. Jacksonville Paper Co.*, supra, 317 U.S. pages 571, 572, 63 S.Ct. pages 336, 337[1943] USSC 25; , 87 L.Ed. 460. We express no opinion on that phase of the case, as the New York

appellate courts did not pass on it. Since the judgment below must be reversed, the question whether the Act is applicable to these employees will be open on the remand of the cause.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice MURPHY, dissenting.

I agree that to print approximately 10,000 newspapers a day and regularly to send 45 of them, or 1/2 of 1%, out of the state is to produce goods for interstate commerce. But I cannot agree that Congress meant to include a business of that nature within the ambit of the Fair Labor Standards Act of 1938, 29 U.S.C.A. § 201 et seq.

This Court, in *National Labor Relations Board v. Fainblatt*, [1939] USSC 83; 306 U.S. 601, 606[1939] USSC 83; , 59 S.Ct. 668, 672[1939] USSC 83; , 83 L.Ed. 1014, stated that 'The amount of the commerce regulated is of special significance only to the extent that Congress may be taken to have excluded commerce of small volume from the operation of its regulatory measure by express provision or fair implication.' Concededly, Congress has not excluded commerce of small volume from the coverage of the Fair Labor Standards Act by 'express prohibition.' But certainly the 'fair implication' is one of exclusion. On numerous occasions we have pointed out that Congress in this Act did not exercise the full scope of its commerce power, *Kirschbaum Co. v. Walling*, [1942] USSC 118; 316 U.S. 517, 522, 523[1942] USSC 118; , 62 S.Ct. 1116, 1119, 1120[1942] USSC 118; , 86 L.Ed. 1638, and that Congress plainly indicated its purpose to leave local business to the protection of the states so far as wage and hour problems were concerned, *Walling v. Jacksonville Paper Co.*, [1943] USSC 25; 317 U.S. 564, 570[1943] USSC 25; , 63 S.Ct. 332, 336[1943] USSC 25; , 87 L.Ed. 460; *Phillips Co. v. Walling*, [1945] USSC 58; 324 U.S. 490, 497[1945] USSC 58; , 65 S.Ct. 807, 810, 157 A.L.R. 876.

In my opinion, a company that produces 99 1/2% of its products for local commerce is essentially and realistically a local business. True, 1/2 of 1% of its production is for interstate commerce, thus subjecting it to the constitutional power of Congress when and if exercised. But that fact does not make it any less a local business, which we have said Congress plainly excluded from this Act.

I would therefore affirm the judgment below in this respect.

