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Nov. 24, 1945

Hon. George B. Schwabe, M. C.
Washington, D. C.

Dear Mr. Schwabe:

The inclosed brief is submitted for your consideration, in the light of present conditions, and in the hope that it may prove as constructive as intended.

It is a good will factual plea to Congress: to free private enterprise from unilateral laws, as stretched by Bureaus, and sometimes by Courts; to repeal penalty laws that invite retroactive rackets; and to enact a one-year statute of limitation.

With best wishes,

Yours sincerely,

ZACH LAMAR COBB

ZLC:VDC
Inclosure

IN HEARINGS

Before The

COMMITTEE ON LABOR

HOUSE OF REPRESENTATIVES
SEVENTY-NINTH CONGRESS

FIRST SESSION

November 15, 1945

H. R. 3719, 3837, 3844, 3914, 3928, 4130, 4222

RE: WAGES AND HOURS

A PLEA FOR PRIVATE ENTERPRISE THAT FREEDOM MAY LIVE

Brief by

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To the House Committee on Labor:

This brief is respectfully presented with the request that it be printed in the record of the present hearings on H.R. 3719, 3837, 3844, 3914, 3928, 4130, 4222. It is submitted in the good will that is so needed in the period of reconversion, and with the confidence the author feels in a respectful address to a Committee of Congress.

INTRODUCTION

In all parts of the country men of good will, and good sense, irrespective of party, are uniting to preserve the American system of private enterprise. Men in business, from the little merchant on Main Street to those having the responsibility of great industries, joined by increasing numbers from labor, are awakening to the fact that human liberty here in the United States, under the guaranties of our Constitution, would become but an empty symbol if not sustained by private enterprise.

In this awakening, American common sense is being marshaled to resist unilateral laws and revolutionary philosophies. This resistance is based upon sound democracy.

Woodrow Wilson[1] said:

> "Liberty has never come from the government. * * * The history of liberty is a history of resistance. The history of liberty is a history of limitation of governmental power, not the increase of it."

The cry of liberty today is that our own government release its war-time shackles and let our own country be itself.

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[1]The author was a Texas delegate to the Baltimore convention that nominated Woodrow Wilson for President.

ARE GOVERNMENT BUREAUS AND AGENCIES OBSTRUCTING RECONVERSION?

At the hearing before the Complaint Committee of the Senate Small Business Committee, on October 24, 1945, Hon. Chester Bowles[2] testified that American families will need twelve and a half million new homes during the next ten years:

> "It is conservatively estimated that American families will need 12½ million new dwellings during the next 10 years."

and that the greatest demand will be during the next two years:

> "From all of this it is clear that a very large proportion of the demand for housing will be concentrated in the next two years."

With timber in our forests, with mills ready and willing to saw it into lumber, with contractors seeking the opportunity to build houses, the responsibility for the present construction bottle neck does not rest upon private enterprise. Are the government agencies responsible?

Mr. Bowles testified:

> "This means that we have a ready-made reservoir of demand which * * * can produce a steady flow of profitable business activity and employment for at least a decade."

Why spread construction over a decade that is needed now?

> "We are therefore extending the use of dollar-and-cent ceiling prices on all important building materials and contractors' services which are used in residential construction and repair."

Why peace time controls over material and labor?

> "These new dollar-and-cent prices will cover lumber, insulation, brick, soil pipe, as well as such millwork items as doors, windows and cabinets, and such plumbing items as bathtubs, septic tanks, and wash basins. Ceilings are also being placed wherever feasible upon such services as painting, papering, renewing of roofs, plumbing installation, and digging of cellars. Local wage rates are of course being taken into consideration in computing these ceilings."

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[2]The author of this brief is not concerned with personalities. The brief is respectfully presented as a discussion of principles.

How could Harold J. Laski's "revolution by consent"[3] be made more complete than by acquiescence in such regimentation?

> "I want to emphasize at this point that the OPA should not be called upon to do this job. We will have our hands full meeting our responsibility for effective control of building material and service prices and the other heavy burdens we are already carrying. Other agencies of the government have the experience and trained personnel to do the job.."

Who would want to make two blades of OPA to grow upon a spot of ground where only one grew before?

The proposals to extend regimentation into peace time is offered by war time agencies as a safeguard against inflation. How could peace time restrictions stop an inflation that has been going on under war time regimentation? Mr. Bowles further testified:

> "Construction costs have increased 34 percent since the beginning of the war in 1939. Building materials prices have increased 31 percent in the same period."

The percentages stated by Mr. Bowles will, of course, become higher as wages and costs of production are increased. It is respectfully submitted that production, and more production, as distinguished from higher wages accompanied by government restraints, is the only way to guard against run-away inflation.

CAN PRIVATE ENTERPRISE SURVIVE CONTINUED REGIMENTATION?

Wages and prices are so inseparably related that the answer to this question is taken from two experiences with the OPA.

FIRST: On September 24, 1943, Mr. Bowles, then General Manager of the OPA, wrote Hon. H. P. Fulmer, M. C., then Chairman of the House Committee on Agriculture, the letter of which a facsimile copy is inserted on page 6. In this letter Mr. Bowles stated frankly that "feed price adjustments" then in contemplation were "necessary in order to help alleviate the current squeeze on Southern California milk producers." That letter raises these questions:

Who created the "squeeze"? The OPA.

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[3]The author, by chance, heard Dr. Harold J. Laski launch his American revolution in an address before a large audience, including many government officials, in Constitution Hall, Washington, on the evening of March 25, 1937.

This is for your information. If I can be of further service do not hesitate to call on me. H. P. Fulmer, M.C.

OFFICE OF PRICE ADMINISTRATION

WASHINGTON, D. C.

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SEP 24 1943

The Honorable
H. P. Fulmer
House of Representatives

My dear Congressman:

Mr. Prentiss M. Brown has requested us to answer directly to you regarding the milk price situation in Los Angeles, California.

We are convinced that some assistance must be given to Los Angeles dairymen if they are to maintain their herds in the face of increased feed costs. We are currently drafting amendments to our regulations governing hay and feed concentrate prices in California. These amendments will provide authority for our San Francisco Office to make feed price adjustments which in its judgment are necessary in order to help alleviate the current squeeze on southern California milk producers.

In the matter of hay prices I believe we should point out that our decisions as to price must have the approval of the War Food Administration. Consequently we could not undertake to reduce hay prices without the consent of that Agency. In general, we attempt to fix maximum prices on items which enter as cost factors into the production of cost of living commodities as low as we can commensurate with our authority and the requirements of the Emergency Price Control Act of 1942, as amended.

We recognize that if the current cost-price relationship in the Los Angeles milk shed continues for an extended period milk production will decline substantially. We would regard such a development as serious and consequently are making every effort to secure a solution to the problem other than an increase in retail milk prices. We feel that the hold-the-line order issued by President Roosevelt April 6 has committed us to exhausting every feasible alternative to price increases in situations such as this. In discharge of this commitment we requested the War Food Administration to afford relief to Los Angeles dairymen in the form of reduced prices for hay. The reduction in hay prices was calculated to offset recent increases in costs of dairy feeds experienced by Los Angeles milk producers. We expect an early decision in the matter. We are glad to have had this opportunity of explaining our position to you.

Sincerely yours,

Chester Bowles

Chester Bowles
General Manager

How did the OPA create this "squeeze"? By placing a ceiling price on milk that was below the cost of production.

By what authority did the OPA establish this "squeeze"? None, it was in disregard and defiance of law.

For what purpose did the OPA make this "squeeze"? To force the private dairy industry under a system of feed price subsidies.

It is relatively unimportant now whether the subsidy theory and action of the OPA was to minimize milk prices or to magnify government controls. The important thing is that a bureau illegally and arbitrarily forced an industry from an independent private enterprise to a subsidy dependent status.

This illustration is given to show how a wartime agency acted in defiance of Congress, and how it used an illegal "squeeze" to enforce its will.

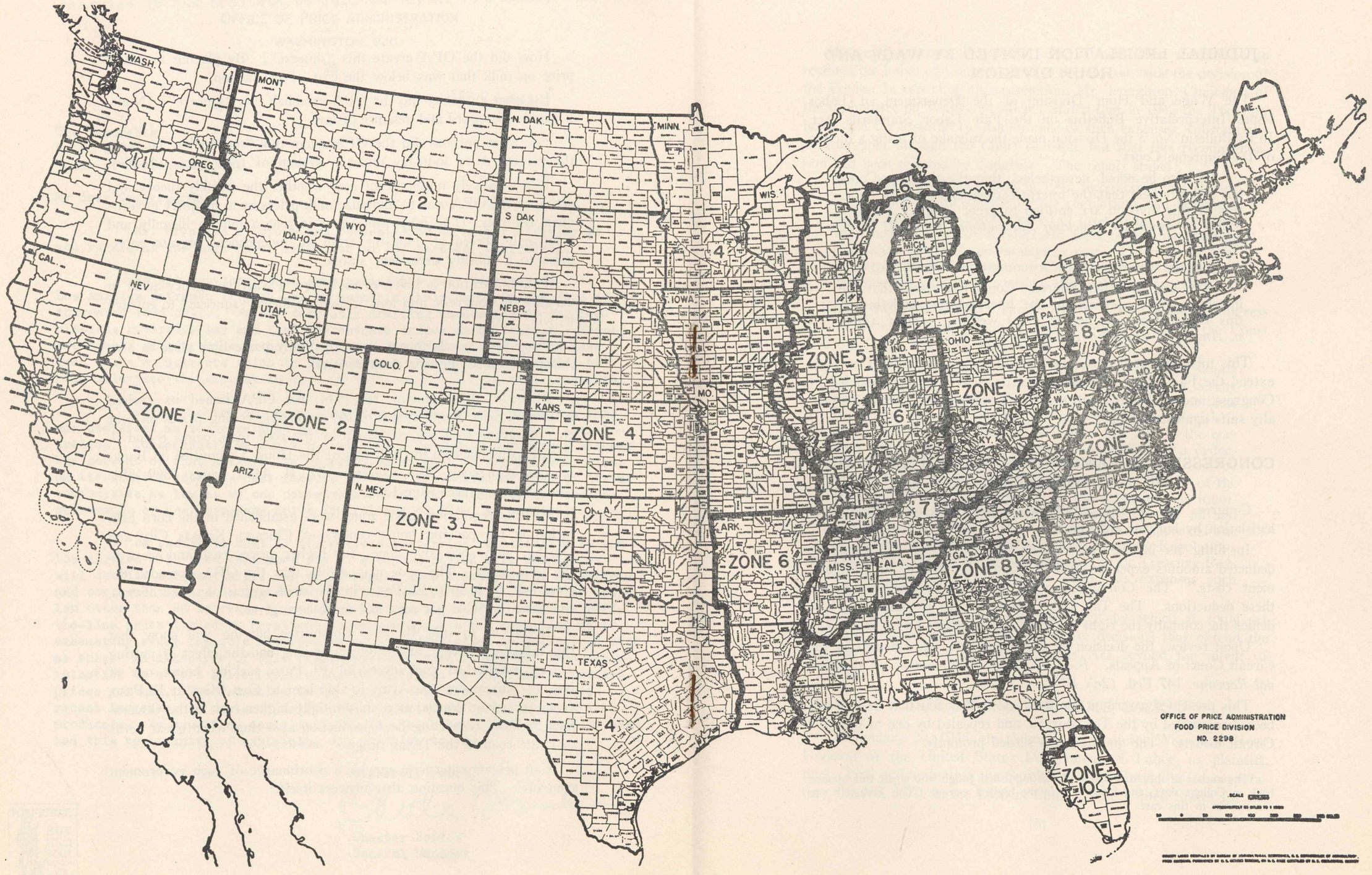
Have such revolutionary "squeezes" any peace time place in free America? The question answers itself.

SECOND: On January 28, 1944, the OPA issued its revised maximum price Regulation No. 169 governing ceiling prices on beef etc., according to zones, as shown by the zone map, pages 8 and 9. Reference is made to the hearings of the House Committee on Banking and Currency, 78th Congress, H. R. 4376, pages 1369-1381. The zone map faces page 1372.

By this regulation, basic zones were established in the corn belt, including the packing house centers of Chicago, Kansas City and Omaha, with successive zones for higher prices east and west to the two coasts. The zone map shows that the OPA extended the corn belt to include El Paso, in the arid region of West Texas, where neither God nor man had made corn grow.

Reference to said Banking Committee hearing will show that this unnatural, illegal, and arbitrary zoning had the effect of putting a long established and successful El Paso packing house out of business, of causing the Army to ship beef to Fort Bliss, at El Paso, from far away Seattle, at a substantially higher cost to the Government, and of restricting beef production at a time when great herds of cattle roamed the Texas range.

Can private enterprise survive a continuance of such government controls? This question also answers itself.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FOOD PRICE DIVISION
NO. 2298

JUDICIAL LEGISLATION INVITED BY WAGE AND HOUR DIVISION

The Wage and Hour Division of the Department of Labor issues Interpretative Bulletins on the Fair Labor Standards Act. In its Bulletin No. 3 the Division made the mistake of using a dictum of the Supreme Court:

> "It is to be noted, nevertheless, that the Supreme Court has recently held that the interpretations expressed in bulletins of this division are entitled to great weight. (*United States v. American Trucking Associations, Inc.,* 310 U. S. 534.)"

This mistake was repeated in a footnote to Bulletin No. 6:

> "The United States Supreme Court has stated that the interpretations expressed in the interpretative bulletins of this Division are entitled to great weight. *United States v. American Trucking Ass'ns,* 310 U. S. 534."

This mistaken procedure has been an invitation to the Courts to extend the Fair Labor Standards Act to a coverage not intended by Congress, and to thereby open the door to unjustified retroactive penalty suits against industry.

CONGRESSIONAL REMEDY FOR BUREAU AND COURT LEGISLATION

Congress has recently established a precedent for setting aside legislation by bureaus and courts.

In filing its income tax returns, the F. H. E. Oil Company deducted amounts expended by it in "intangible drilling and development costs." The Commissioner of Internal Revenue disallowed these deductions. The Tax Court sustained the Commissioner and denied the company the right to deduct this expense. (3 C. T. 13, 30.)

Upon review, the decision of the Tax Court was affirmed by the Circuit Court of Appeals. *F. H. E. Oil Co. v. Commisioner of Internal Revenue,* 147 Fed. (2d) 102.[4]

This presented a serious question. Congress felt that its law had been disregarded by the Tax Bureau, and repealed by one of our best Circuit Courts. The question was settled promptly.

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[4]The author of this brief knew the distinguished Judge who wrote this opinion back in College days, and holds him in the highest esteem. The Treasury was responsible in this case.

House Concurrent Resolution No. 50 was then introduced to reaffirm the intent of Congress, and to thereby set aside the decision of the Court. In reporting this resolution, Mr. Doughton, Chairman of the Committee on Ways and Means, stated that in 1942 the Treasury had asked for a statutory disallowance of such expenses, substantially as attempted through the Court decision, but that this recommendation had been rejected by Congress. The report stated:

> "The Treasury Department in 1942 recognizing that the interpretation of the statute by the regulations had become a part of the statute, recommended in the revenue bill of 1942 that the expensing of development costs be eliminated from the statute for 1942 and subsequent years. Congress was unwilling to adopt this recommendation of the Treasury and expressed its desire to continue the regulation in effect."

Upon this report, and a similar report in the Senate, Congress passed the concurrent resolution and in effect set aside the Court decision, in the following language:

> *"Resolved by the House of Representatives (the Senate concurring),* That in the public interest the Congress hereby declares that by the reenactment, in the various revenue Acts beginning with the Revenue Act of 1918, of the provisions of section 23 of the Internal Revenue Code and of the corresponding sections of prior revenue Acts allowing a deduction for ordinary and necessary business expenses, and by the enactment of the provisions of section 711(b)(1) of the Internal Revenue Code relating to the deduction for intangible drilling and development costs in the case of oil and gas wells, the Congress has recognized and approved the provisions of section 29.23(m)-16 of Treasury Regulations 111 and the corresponding provisions of prior Treasury Regulations granting the option to deduct as expenses such intangible drilling and development costs."

Congress has established this precedent by which it could set aside any interpretative bulletins or court decisions that extend the coverage of the Fair Labor Standards Act beyond the intent of Congress.

ORGEON TRAVEL TIME CASE

On January 29, 1945, the Administrator of the Wage and Hour Division of the United States Department of Labor, as plaintiff, filed a civil action against the Smith Wood-Products, Inc., a corporation, file No. 2670, in the District Court of the United States for the

District of Oregon, to enjoin and restrain the defendant, its officers, agents, servants, employees, and attorneys, and all persons acting or claiming to act in its behalf or interest, from violating the provisions of Sections 15(a)(1), 15(a)(2), and 15(a)(5) of the Act by:

> "(b) failing to record and to count as hours of employment all of the time which each of defendant's employees, employed in or about its logging operations in Douglas County, Oregon, spends in being transported or walking to and from defendant's camp near Coon Creek bridge and his work place in the woods and in waiting for such transportation;"

On June 27, 1945, a pretrial order was made in which the issues were defined as follows:

> "2. Whether the time spent by defendant's employees, employed in or about its logging operations in Douglas County, Oregon, in traveling between the camp located on defendant's property and the various places in the woods where the cutting, yarding and loading operations in which they engage are performed, constitutes hours of employment within the meaning of section 7(a) of the Act.
>
> "3. What is the effect of the employment contract in effect between defendant and its employees engaged in logging operations in Douglas County, Oregon on issue No. 2.
>
> "a. Defendant contends that under the terms of said agreement the time spent in traveling between defendant's camp and the woods is excluded from the time recognized and paid for as work time, and that the contract as so interpreted is valid and enforceable under the Fair Labor Standards Act.
>
> "b. Plaintiff contends that under the terms of said agreement the time spent in traveling between defendant's camp and the woods is not excluded from the time recognized and paid for as work time, and that payment under the contract as interpreted by defendant does not constitute compliance with Section 7(a) of the Act."

On July 12, 1945, an order was made allowing the author of this brief to file a brief as *amicus curiae*.

On July 27, 1945, however, before any briefs were filed, the Court ordered the case dismissed, with a memorandum opinion which is here set forth in full (Italics ours):

> *"From the outbreak of the war until now the Wages and Hours Administrator refrained from raising the Travel Time issue in the lumber industry because of the abnormal*

conditions created by the war. I stated at the trial that the same reasons made me hesitate to employ the injunctive power to unsettle a situation which up until now it had been thought best to leave undisturbed until war time restrictions were removed.

> "Now it appears that whatever is done, particularly if a decision favoring travel time is rendered, will have to be submitted to the War Labor Board, acting through the West Coast Lumber Commission, to determine the effect of the decision on the Government's wage stabilization policy and other war time policies. What the Commission might feel was true travel time, it is indicated, the Commission will allow, what it might feel was not true travel time, it will disallow.
>
> *"I think the courts are entitled to have some administrative exploration of this difficult field before being called on to decide a test case which everyone seems to feel will have enormous consequences throughout the industry.* The Wages and Hours Administrator is the moving party here. He is acting in his statutory capacity as representative of the public, and it entirely accords with modern practice to ask him to have the important practical questions here involved of effect on other national policies studied with care by the government agencies to whom such questions have been committed by the war time statutes and regulations. In short, I suggest that the effect of Travel Time on the national government's wage policy and allied policies be considered before I pass on the purely legal question raised instead of afterwards. It is not uncommon for courts to stay their hands until pertinent administrative investigations are completed and determinations made. Indeed we are enjoined not to act until administrative remedies have been exhausted.
>
> "Aside from all other considerations I feel the personal need of thorough administrative exploration of the field. What will be the effect on wage stabilization, the effect on labor supply, the effect on price control only lately undertaken in this field by the Office of Price Administration, and perhaps equal in importance to anything else, what will be the effect on needed production of logs and lumber and lumber products in this new crisis of the war?
>
> *"The lumber industry does not present the simple problem of passage from entrance to entrance of a mine. The distances to forest and mill, and the means of getting there, are as varied as the wide range of topography and climate in the five western states involved.*

"The injunction will be denied and the complaint dismissed, both without prejudice.

"Dated at Portland, Oregon, this 27th day of July, 1945.

(Signed) CLAUDE MCCOLLOCH,
Judge.

"Having determined to make this disposition of the case, it seemed unnecessary to await the filing of briefs on the merits."

Judge McColloch is entitled to great credit for his judicial action in dismissing the suit brought by the Wage and Hour Administrator, and in calling upon the Bureau for more thorough study and exploration of the questions involved, because of the character of the lumber industry as stated in the last paragraph of his opinion.

The action of the Government in filing an appeal from this wise decision of the District Court presents a serious question for the consideration of Congress.

SERIOUS QUESTIONS INVOLVED

The Oregon case involves serious questions.

FIRST: The pretrial order, as hereinbefore quoted, presents the issue of whether the time spent by defendant's employees, employed in or about its logging operations, in traveling between the camp located on the defendant's property and the various places in the woods where the cutting, yarding, and loading operations in which they engage are performed, constitutes hours of employment within the meaning of Section 7(a) of the Act.

If and when the Wage and Hour Division is able to state a definition of travel time that would sustain itself in a statute, that definition should be submitted to Congress for consideration.

SECOND: The pretrial order, as hereinbefore set forth, states the additional question of the effect of the existing employment contract between the employer and its employees engaged in logging operations. This is, indeed, a serious question.

Labor has gained much by collective bargaining. Congress has done much to advance collective bargaining. The very phrase shows, however, that collective bargaining is bargaining for a contract. If the contract is not respected, by both employer and employee, and is not held binding as contemplated by the Constitution and laws of our country, then collective bargaining would lose its very purpose.

THIRD: The retroactive penalties provided by 19 U.S.C.A. 216, present a serious problem. If Congress extends the Fair Labor Standards Act to cover travel time, proper adjustments can be made. If, however, travel time should be legislated by the bureau and courts, it would be made retroactive, and industry would be subjected to penalties. It is submitted that Congress never intended to burden industry with racket suits.

FOURTH: Another very important question is involved. States growing restive under penalty suit harassments of industry, in cases never contemplated by Congress, are turning to the enactment of their own statutes of limitation to protect their own citizens from this burden. There should be a uniform statute, that is, a federal statute, provided its period of limitations is not for a longer period than prevailing sentiment is calling for in the various States. It is submitted that the period of the statute should not exceed one year.

TRIBUTE TO SECRETARY SCHWELLENBACH

This brief is presented with great confidence, for consideration by the Committee, because of the statesmanship shown by Secretary Schwellenbach in his inaugural statement as Secretary of Labor:

"I am issuing this order now before any specific instance arises so as not to subject any one to embarrassment. Perhaps because my previous experience has been in legislative and judicial branches of the Government, I am peculiarly sensitive to the importance of this question.

"I must insist that in this Department there is given full recognition to the fact that it is the function of this Department to execute the laws. The duty of an officer in this Department is to accept the laws as Congress has written them and as the courts have interpreted them.

"The fact that he may think the Congress should have written, or the court should have interpreted a law differently, in no case justifies him in ignoring or attempting to circumvent the law. I will expect full cooperation in this policy."

CONCLUSION

This brief is submitted in the spirit of good will that is so essential in this period of reconversion, and in full appreciation of the inaugural statement of Secretary Schwellenbach, with the respectful suggestion:

1. That the Committee give prompt consideration to the foregoing opinion and suggestions of Judge McColloch, in the light of the policy announced in the foregoing statement of Secretary Schwellenbach, and consider a Concurrent Resolution declaring that it was not the intent of Congress, in the enactment of the Fair Labor Standards Act, to cover travel time in the lumber industry.

2. In the event the Committee considers that travel time should be covered by Congressional amendment of the Act, for future effect and operation, that the Committee call upon the Wage and Hour Division to submit for consideration a definition of such travel time that would sustain itself in legislation.

3. That in any event the Committee consider amendments to the Fair Labor Standards Act:

(a) To repeal the penalties provided in 19 USCA 216 as against the interests of both labor and management; and

(b) To provide a statute of limitation of suits arising under the Act for a period not to exceed one year, subject to any shorter period provided in State statutes.

Respectfully submitted,

ZACH LAMAR COBB.