Opinion No. 397

Highways—Contractors—Labor—Eight Hour Day—Wages—Penalty for Violation.

HELD: Section 3, Chapter 102, Laws of 1931, provides for a "penalty" and does not require a showing of actual damage even though the wording "liquidated damages" is used in connection therewith.

The penalty may not be avoided nor the offense cured by subsequent payment in full for time employees were required to work in violation of Chapter 102, Laws of 1931.

It is the duty of the contractor to see that his sub-contractors are responsible and that they carry out the terms of his contract; he may not evade responsibility therefor.

November 25, 1933

We have your request for an opinion on the following facts:

"After the completion of the project our engineer began to receive complaints from a number of the laborers who had been employed on the work that they had not been paid in full. Upon investigation we found that these men had been shown on the payrolls for thirty hours per week at the proper rate per hour. We found however, that in many cases they had worked more than thirty hours per week, with the understanding between themselves, the subcontractor and his time-keeper and apparently with the knowledge of the contractors' superintendent, that they would be paid the balance due them at a later date.

"The reason for the payment of only a part of the time actually worked by these men was that the rules of the emergency relief highway work, as incorporated in the contract, were that no man was to be permitted to work over thirty hours per week. In order to avoid trouble, therefore, the subcontractor prepared payrolls showing these men at thirty hours per week, only paid them in accordance with such payrolls and furnished our engineer with certified copies of the payrolls. The superintendent, who was on the job throughout most of the construction work, admits that he knew this practice was going on. The senior member of the firm of contractors, claims that he knew nothing about this practice, although his superintendent claims that he was told of it.

"Since our investigation was made a supplementary payroll has been prepared, showing all of the overtime worked by these employees and the contractors have paid these employees in full.

"The question upon which the Commission would like your opinion is whether or not the contractor in this case has violated Chapter 102 of the Statutes enacted by the 22nd Session of the Legislature in not paying the standard prevailing rate of wages. Paragraph 3 of Chapter 102 makes it mandatory upon the Commission to withhold $500.00 as liquidated damages, in cases where this law is violated. In this case the rate of wages was fixed in the contract and the proper wage scale was shown on the payrolls. The question, therefore, is whether the contractor violated the law in attempting to pay the men for a smaller number of hours than they actually worked, showing their rate per hour as fixed by the contract, but actually paying an average rate per hour for the whole number of hours worked which was less than the prevailing rate of wages at the county seat; also, if the contractor violated the law in attempting to pay the men for fewer number of hours than were actually worked, is he still guilty after having paid such employees in full, when requested to do so by our engineer."

CONCLUSIONS

In my opinion this was an inexcusable breach of good faith and a specific violation of Chapter 102, Laws of 1931.

A prime purpose of the act is to compel payment of wages at the standard prevailing rate. The fact that Section 3 refers to the penalty as "liquidated damages" does not, in my opinion, require that some actual damage to the state be shown. The so-called liquidated damages is not intended to compensate, but is intended as a penalty. The marginal notes in the Session Laws refer to it as a "penalty." In the title, the author of the bill uses the word "forfeiture." Taken as a whole, the bill compels the belief that a penalty is intended.

I can see no reason why the penalty should not be enforced in this instance. Besides punishing the wilful offender, it will serve notice to others that this law, designed to protect the agreed wages of labor, must not be trifled with.

In this case there is more than a mere attempt to violate the law. The offense actually was committed. The fact that later, upon complaint and after investigation, the contractors were compelled to pay for the additional time does not make it less an actual offense. To contend otherwise would be no more logical than to contend that a thief is absolved of his guilt simply because he has been apprehended and compelled to disgorge the profits of his theft.

And what is the defense of the contractors? They state it was done by

a subcontractor as a subterfuge under the cloak of which to evade the 30 hour provision of their contract.

The regulations of the United States Government, which furnished the money for the work, and the express terms of the contract, require that no man shall work more than 30 hours per week. This requirement is part of a great program designed to decrease unemployment by spreading the work among more men thus creating more jobs. Our nation is in the throes of a great economic crisis; the creation of employment is an integral factor in the program designed to pull us through this crisis. Patriotic employers throughout the nation, many of them facing bankruptcy, uncomplainingly suffer losses in order to aid this program.

But the contractors here involved, aware of this crisis, aware of this program, aware of the regulations of the Government, having bid upon the work with this knowledge in mind, having solemnly promised to assist in this program, tolerated a conspiracy surreptitiously to evade the 30 hour provision, and have thus done their little share to defeat this great program. In the accomplishment of this purpose they permitted sworn payrolls to be filed, falsely stating the number of hours worked by each man.

The defense convicts the contractors of permitting misrepresentation, bad faith and an inexcusable violation of a specific provision of the contract. No court will permit them to hide behind and to claim the benefit of their wrong.

It is said that the offense has been cured, that the men eventually received their full wages, that the state lost no money, that the United States lost no money, that no one has been harmed. Conceding the premises, is it true that no one has been harmed? As heretofore pointed out, the 30 hour week was designed to decrease unemployment by creating more jobs. Five —ten—twenty, perhaps more men (I have not seen the figures) have been deprived of employment by reason of this breach of faith. These men will go forever unidentified, but of a certainty they exist. Some of them now may be living in the jungles, some begging on the streets, some subsisting on organized relief, some committing robbery that their families may eat. Are not these men harmed by failure to keep a solemn pact intended to create jobs for them? It not the public zeal affected by the pauperism of these men and national recovery retarded, even though inappreciably? And, if this thing is permitted to go unpunished and for that reason to repeat and multiply, will it not ultimately defeat the whole program?

The senior member of the firm states this was done without his knowledge. However, his superintendent admits knowledge and states that the senior member knew also. Whether or not he did is immaterial. It was his duty to see that his contract was carried out, and if he let his work to an irresponsible sub-contractor, he may not evade responsibility for the subcontractor's defaults.

I advise that the penalty be enforced.