Opinion No. 246.

State Highway Commission—Labor—Prevailing Rate of Wages—Highway and Bridges—Contractors.

HELD: 1. It is incumbent upon the State Highway Commission to penalize contractors who fail to pay the prevailing rate of wages to workmen employed on highway construction, maintenance and repair.

2. "Prevailing rate of wages" is defined and a method suggested for facilitating the determination of that rate by the State Highway Commission.

February 3, 1936.

Mr. D. A. McKinnon
State Highway Engineer
The Capitol

In regard to the requirement of Section 1, Chapter 102, Laws of Montana, 1931, that contracts let by the State Highway Commission for the construction, maintenance and repair of highways must contain a provision to the effect that the contractor must pay "the standard prevailing rate of wages in effect as paid in the county seat of the county in which the work is being performed," you have asked us to advise you "as to the method by which the standard prevailing rate of wages in effect, as paid in the county seat of any county may be determined, and, likewise, under what authority such determination is to be made, at what time and by whom the same is to be made."

Section 3 of the Act provides: "If any person, firm or corporation shall fail to comply with the provisions of this Act the state, county, municipal or school officers who have executed the contract shall retain five hundred dollars ($500.00) of the contract price as liquidated damages for the violation of the terms of the contract and said money shall be credited to the proper funds of the state, county, municipal or school districts. In all contracts entered into under the provisions of this Act at least five hundred dollars ($500.00) of the contract price shall be withheld at all times until the termination of the contract."

Under this section, it is clear that the State Highway Commissioners, being the state officers who have executed the contract, must determine what the standard prevailing rate of wages in the county seat is during the time that the contract is being performed and if the highway commission finds that the contractor has not paid what it finds to be the standard prevailing rate of wages, it is mandatory upon the commission to retain $500 of the contract price as liquidated damages. (Ryan v. City of New York, 177 N. Y. 271, 278, 69 N. E. 599; Wright v. State of New York, 223 N. Y. 44, 119 N. Y. 83; Morse v. Delaney, 218 N. Y. S. 571, 128 Misc. Rep. 317.)

How is the standard prevailing rate of wages in effect as paid in the county seat of the county in which the work is being performed to be determined? It must be determined upon the facts which it is incumbent upon the State Highway Commission, as an administrative board, to investigate. All that this office may do is suggest certain legal principles for the commission's guidance and which will assist in properly determining the matter.

The term "prevailing rate of wages" has come to have a definite connotation, or, as Mr. Justice Cardozo once said: "One finds it hard to believe that a cliche so inveterate is devoid of meaning altogether." (Campbell v. New York City, 244 N. Y. 317, 155 N. E. 628, reported in 50 A. L. R. 1474 and there annotated.) It is equally true, however, that wages, particularly those of such numerous classes as laborers, workmen and mechanics tend to uniformity and stability and so to an average or ordinary rate, which varies somewhat from place to place and which Adam Smith speaks of (Wealth of Nations, Chapter VII) as the "natural rates in wages" at the time and place in which they commonly prevail. (Ruark v. International Union of Operating Engineers (1929), 157 Md. 587, 146 Atl. 801.)

Accordingly, I think you will be well within both the letter and the spirit of the statute if you insist that

the contractor pay his employees at a rate equal to the charge for or valuation of the daily toil of a laborer, workman or mechanic, as the case may be, at a given labor, in a given industry, according to the scale or standard of money compensation generally received or established by common consent or estimation in the county seat in which the work is performed, at the time of its performance. (Ruark v. International Union, supra.)

The fact that this charge or valuation fluctuates does not make the definition given less operative. The courts have held that labor has its market value, and that market is subject to economic pressures just like the market for commodities. The rise or fall in these markets is one of the risks which the contractor takes when he submits his bid. As the Maryland Court of Appeals put it, in the Ruark case, supra: "It is not unreasonable to impute to a contractor the knowledge which the nature of his business, and its prosecution, require him to possess, or which might have been obtained by reasonable investigation."

Section 220 of the 1921 Labor Law of New York is similar to our Chapter 102, Laws of Montana, 1931. In order to assist your commission in determining this matter and to make it easier for you to arrive at decisions that are reasonable and within the spirit and letter of the law, we recommend that you insert in your contracts a provision similar to that used in the State of New York, and approved by the courts of that state. (Campbell v. City of New York, supra.) Such a provision might read as follows:

"It is distinctly understood and agreed, as one of the principal moving considerations to the said Highway Commission for entering into this contract that the contractor shall pay the standard prevailing rate of wages in effect in the city of ————, being the county seat of the county in which the work is being performed. It is further so understood and agreed between the parties of this contract that the said 'standard prevailing rate of wage' shall be that rate paid to a majority of the laborers, workmen or mechanics engaged in the same trade or occupation in the city of ————. In the event that there is not a majority in the same trade or occupation in the city of ———— paid at the same rate, then the rate paid to the greater number of such trade or occupation in the city of ———— shall be the prevailing rate, provided that such greater number constitute at least 40 per centum of the laborers, workmen, or mechanics engaged in such trade or occupation in the city of ————; in the event that there is less than 40 per centum of the laborers, workmen, or mechanics engaged in the same trade or occupation in the city of ———— paid the same rate, then the average rate paid to such laborers, workmen, or mechanics in the same trade or occupation, shall be the prevailing rate. For the purpose of determining the number of laborers, workmen, or mechanics engaged in any such trade or occupation, all the laborers, workmen, or mechanics engaged in the performance of work under this contract and all other laborers, workmen, or mechanics in the city of ———— engaged on similar work to that required under this contract, whether highway construction or otherwise, shall be included in such total number. The contractor hereby, as one of the inducements to the State Highway Commission to enter into this contract, particularly agrees to the provisions of this article with respect to the 'standard prevailing rate of wages' for the purposes of this contract, and shall not make or have any claim that any of the provisions of this article are void or ultra vires in any respect or for any purpose."

In this era of trade unionism and collective bargaining, such a provision in the contract would have this practical effect:

1. In those county seats where most, if not all, of the men employed in a given trade or occupation are members of a trade union, the "union scale" would then be "the standard prevailing rate of wages."

2. Even in those county seats where the members of trade unions do not constitute a majority of the persons

employed at a given trade nevertheless the "union scale" may still be the "prevailing rate," especially if those members constitute as much as 40% of the total.

3. In those county seats where there are no unions or where the members of such unions constitute only a small number of the total employed at a given trade, then the "average rate" shall be the "prevailing rate."

That such a solution is both legal and practicable is fully sustained by the decision in Morse v. Delaney, supra, wherein the Supreme Court of New York said: "If industrial groups, both of labor and capital, which have established wage agreements, largely dominate their particular industry, the probable effect will be that a majority of all the workmen in that particular line of endeavor will be paid the rate fixed by the group convention, even though only a minority belong to the trade union which has succeeded in bringing about such wage agreement. But, if the organized groups are not sufficiently controlling to influence a rate that will serve the majority they may still constitute such a large factor in the industry as to entitle their scale to be regarded as the prevailing rate; and this would certainly be true if the proportion controlled by such factor constituted as high a number as 40 per cent of the total. Finally, if there are no group agreements in the particular locality in relation to wages, or the workers within such agreement compose only a small portion of the working body, an average can be struck between the various rates paid, and such average may constitute the fair market rate or the prevailing rate."

As the Supreme Court of California said in a recent case construing a similar statute: "There may be, as there usually is in charter provisions and ordinances affecting the matter before us, rough edges and inconsistencies and irregularities which can be composed or ironed out by the exercise of co-operative efforts on the part of all persons upon whom the law may operate. * * * The questions of law being settled, there should be no trouble in applying it in such manner as to accomplish the manifest purpose of the charter." (Hague v. Cleary, 48 Pac. (2d) 5.)

Chapter 102 of the Laws of Montana, 1931, is not in its concept the sudden creation of our lawmaking body but the manifestation of an economic movement extending over many years. Progressive legislatures throughout the world have come to realize that the state should be the first to prevent the exploitation of human labor, the first to insure the toiler a decent standard of living, and the first to give an example to private employers. Our legislature has dealt realistically with the problem in Chapter 102, and in doing so, Montana marches abreast with at least five other states that we know of where the same high standards have been raised for public contracts.

In addition to the authorities cited above, we have considered Atkin v. Kansas, 191 U. S. 207; Connally v. General Construction Company, 269 U. S. 385; Hague v. Cleary, 39 Pac. (2) 219; State v. Anklam, 31 Pac. (2) 888; In re Rate of Wages, 160 Atl. 408; State v. Blaser, 26 Pac. (2) 593; Dunphy and Hannan v. State, 264 N. Y. 429; McCaffrey v. State, 259 N. Y. 159; Carder Realty Corporation v. Perkins, 261 N. Y. S. 819.