

No. 299

STATE HIGHWAY COMMISSION—LABOR—**WAGES, prevailing rate, how determined**

Held: In determining the prevailing rate of wages to be paid employees of the State Highway in the several counties of the state, the commission should assemble the data concerning wages paid for like services by private employers and wages set by union regulations.

November 22, 1941.

State Highway Commission
Helena, Montana

Gentlemen:

You have submitted a scale which the Commission has used in determining the prevailing wage scale for maintenance work and force labor in Missoula County as an example, and request my opinion as to whether the Commission, in determining the prevailing wage scale, has taken into consideration industries which should not be considered and also whether the present method complies with the law.

The question presented is as to the proper legal method to be used in determining the prevailing rate of wages for workmen, laborers, and mechanics employed on highway work for the State in the absence of the Commission's setting up a state-wide scale of wages as a matter of policy, which policy it would undoubtedly have a legal right to pursue.

It is, of course, obvious in determining the prevailing rate of wages one must be governed by facts adduced after an investigation conducted on sound, legal and economic grounds. While I realize your Commission has the authority to determine what rate of wages will be paid to your employees, nevertheless, in light of your inquiry, I am giving you my opinion as to the legal and economic principles which should guide you in making your said determination.

The question to be determined here was quite fully considered by a former Attorney General in Opinion Number 246, Volume 16, Official Opinions of the Attorney General. In effect that opinion held the prevailing rate of wages in any county is the rate which is equal to the charge for or valuation of the daily toil of a laborer, workman or mechanic 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 performance.

Objections to the determination and adoption of a prevailing rate of wages to be paid on public works, as disclosed in numerous cases which have been before the state and federal courts, appear to be based upon the

claim wages are a variable quantity, uncertain, indefinite, and not susceptible of ascertainment. On this point, the Supreme Court of New York said:

"Learned judges have said (e. g., Haight, J., in *People ex. rel. Rogers v. Coler*, supra at page 42 (59 N. E. 730) that it (prevailing rate) is synonymous with market rate. This might not exclude altogether the possibility of fluctuations and diversities at a given day and place. * * * Other judges have believed that the range of variation is wider and less certain than any that is consistent with the standards of market value. Even so, a customary minimum might coexist with a customary maximum, however varying the number of intermediate gradations. A standard so indefinite, if effective for nothing else, would prevent the fall of wages below the customary minimum. A level would be established below which the rate could not descend and still be characterized as 'prevailing.' The Legislature may have thought that the statutory provision would not be wholly without value if it availed for this and nothing more. There would be no merciless exploitation of the indigent idle." See also the case of *McMahon v. Mayor, etc., City of New York*, 47 N. Y. Supp. 1018.

Campbell v. City of New York, 244 N. Y. 317, 155 N. E. 628, 50 A. L. R. 1474.

And the Supreme Court of Maryland, in the case of *Ruark v. International Union of Operating Engineers*, 146 Atl. 797, at page 800, said:

"Wages, particularly those of such numerous classes as laborers, workmen and mechanics, tend to a uniformity and stability and so to an average and ordinary rate, which varies somewhat from place to place, and which Adam Smith speaks of as the 'natural rates of wages' at the time and place in which they commonly prevail. (*Wealth of Nations*, c VII). Hence, to restrict the current rate of the wages paid to the standard of the 'locality' where the work is to be performed is an aid to certainty unless the word 'locality' is intrinsically incapable of a definite meaning when construed according to accepted canons."

It is quite generally accepted, in those jurisdictions having statutes providing for the payment of "the prevailing rate of wages," that such rate is that which is established in the county or locality by common consent, estimation, agreement or otherwise, for like services. (*Ruark v. International Union of Operating Engineers*, supra; *Campbell v. City of New York*, supra). Therefore, in determining the prevailing rate, the commission should obtain facts as to rates of wages paid for similar services in the county, by assembling actual wages paid for such similar services by private employers engaged in similar work, and in addition, wages established by recognized unions having jurisdiction over that particular class of work. It will commonly be found in many counties of this State the rate established by the union will be the prevailing rate, and as such should be accepted by the commission.

Most of the states of the Union, as well as the federal government, have enacted statutes similar to our Section 3043.1, Revised Codes of Montana, 1935, requiring employers doing public work to pay the prevailing rate of wages. While it may be said the aforesaid statute is not wholly in point here, nevertheless it does show, in my opinion, what the attitude of our Legislature is concerning what wages should be paid by your Commission. Should not the State itself set the example, by paying the prevailing rate to its employees, when doing public work for the State? I think it should. The State Highway Commission undoubtedly employs the largest number and the largest variety of classes of labor on public works. It is but fitting the Commission should set the pace in this regard and such a policy would be to the general welfare. Unless prevailing wages are paid by the Commission, employees, of course, will become dissatis-

fied and terminate their employment with the State. If this occurs, it will naturally result in a costly turn-over in employment as far as the State is concerned and will naturally hamper efficiency and good will among state employees.

With reference to the scales presented, I have carefully studied each of them and given the same considerable thought.

I find in many instances certain items which to my mind, because of many factors, should not be taken into consideration. For instance, you have included "Blackfoot Forest Protective Association," "U. S. Service," "Northern Pacific Ry. Co." and "C. M. St. P. & P. Ry. Co." To my mind, laborer employed in such classes of work are not generally considered as average, as far as determining the prevailing rate of wages for highway maintenance and force labor is concerned, especially those employed as section workers for the railroads. Your figures show a very wide difference in hourly rate in those instances from others, and hence prove this point. By including them in making up the average, these figures naturally pull down the average rate arrived at.

Sincerely yours,

JOHN W. BONNER
Attorney General