No. ~~11689~~

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

WEBSTER-BRINKLEY COMPANY, a corporation,

Appellant,

vs.

THOMAS R. BELFIELD,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

CATLETT, HARTMAN, JARVIS & WILLIAMS
Attorneys for Appellant.

1410 Hoge Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

No. 11689

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

WEBSTER-BRINKLEY COMPANY, a corporation,

Appellant,

vs.

THOMAS R. BELFIELD,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

CATLETT, HARTMAN, JARVIS & WILLIAMS
Attorneys for Appellant.

1410 Hoge Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

INDEX

	Page
Jurisdiction	1
Statement of the Case	4
Specifications of Error	6
Argument	7

TABLE OF CASES

Alaskan Juneau Goldmining Co. v. Robertson, 12 Lab. Cas. 51,252 (U.S. Sup. Ct., June 16, 1947)	47
Ashworth v. E. B. Badger & Sons Co., 63 F. Supp. 710	17, 35
Bender v. Crucible Steel Co. of America, 71 F. Supp. 420	38
Dolan v. Zimmerman, 65 F. Supp. 923	37
Henry v. Chemical Construction Co., 11 Lab. Cas. 63,442	37
Lasater v. Hercules Power Co., 13 Lab. Cas. 63,946 (U.S. Dist. Ct., E.D. Tenn., July 25, 1947)	47
Lassiter v. Atkinson Co., 13 Lab. Cas. 63,947 (C. C.A. 9, July 28, 1947)	47
Marion v. Lockheed Aircraft Corp., 65 F. Supp. 18	17
149 Madison Ave. Corp. v. Williams & Co., 12 Lab. Cas. 51,253 (U.S. Sup. St., June 16, 1947)	47

STATUTES

28 U.S. Code, §14(8)	3
Federal Fair Labor Standards Act, 52 St. 1069, 29 U.S.C., §216	2, 3, 4, 5, 7
Judicial Code, §24, as amended, 28 U.S.C., §41	4
Judicial Code, §128, as amended, 28 U.S.C., §225(a)	4

OTHER AUTHORITIES

Executive Order 9250	10
9328, Apr. 8, 1943	10
9381, Sept. 25, 1943	10
7 Fed. Reg. 8748	11
8820	12

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

WEBSTER-BRINKLEY COMPANY, a corporation, *Appellant*, vs. THOMAS R. BELFIELD, *Appellee*.	No. 11689

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

This is a suit for overtime under the Federal Fair Labor Standards Act, 52 St. 1069, 29 U.S.C. Sec. 216.

The complaint merely alleged that Thomas R. Belfield was employed by the defendant as Assistant Chief Inspector; that the defendant was engaged in making parts for the Maritime and Navy Services of the United States and for vessels constructed in connection with such Services; that the plaintiff was so employed from about November 20, 1944 to and including May 13, 1945, and that during said period he worked 591 hours overtime; that his pay per hour at the rate of time and a half would be $3.68 per hour; that the defendant was indebted to him in the

(*Figures in brackets refer to pages of the Transcript of Record*)

sum of $2,174.88; that under Federal statutes he was entitled to double the amount of wages earned, or a total of $4,349.76. Plaintiff also asked for a reasonable attorney's fee of $1,500.00 (2-6).

The defendant, in its answer (8-11), admitted the employment and that it was manufacturing steering devices and parts for the Maritime Commission and United States Navy. It denied the other allegations of the complaint. By way of a separate and affirmative defense, it alleged that in August, 1944, Webster-Brinkley Company commenced the reorganization and enlargement of its Inspection Department and on October 9, 1944, it filed an application to establish the proper salary for positions of Chief Inspector and Assistant Inspector of its Inspection Department with the Salary Stabilization Unit of the Bureau of Internal Revenue, which, under presidential order governing administration of the wage stabilization regulations, had jurisdiction over salaried employees occupying executive, administrative or professional positions and receiving salaries of more than $200.00 per month; that after investigation and in November, 1944, the Salary Stabilization Unit approved the application to fix the salary of the plaintiff, Thomas R. Belfield, in the position of Assistant Chief Inspector, at $425.00 per month and that on November 16, 1944, plaintiff, Thomas R. Belfield, entered upon his employment as Assistant Chief Inspector at the salary fixed; that the position of Assistant Chief Inspector was a supervisory position and classifiable as an executive or administrative position under the regulations of the Administrator of the Wage and Hour Di-

vision of the Department of Labor issued pursuant to Section 13(a) of the Fair Labor Standards Act enacted June 25, 1938, 29 U.S. Code, Secs. 201 to 219, and that plaintiff was therefore exempt from Provisions 6 and 7 of said Act.

For a second affirmative defense, defendant alleged, in addition to the allegations of the first affirmative defense, that Thomas R. Belfield fully understood that in the position of Assistant Chief Inspector he was acting in an executive or administrative capacity and would not be entitled to overtime; that he was fully informed of the application to the Stabilization Unit and its action thereon, and that he accepted the employment with the understanding that he would not be paid for overtime, and that he received his check semi-monthly in payment for his services, at the rate set forth, during the whole period of his employment, and that during such period he never claimed he was entitled to any overtime or asserted that his position was a non-exempt position; that because of such facts the defendant kept no record of the hours worked by Mr. Belfield, as it did not of any of its other executive and administrative employees, and that Mr. Belfield was estopped to claim he occupied a non-exempt position or to claim any overtime in connection therewith.

The Findings of Fact (13) assert that the jurisdiction of the lower court depended upon Section 14(8), 28 U.S. Code, and that suit was brought to recover compensation pursuant to Section 16(b) of the United States Fair Labor Standards Act of 1938. It is believed the Findings are erroneous as to the

statute upon which the jurisdiction of the lower court depended. In our judgment it depended upon Judicial Code Sec. 128, as amended, 28 U.S.C. Sec. 225(a) First, and (d), Sec. 24 Judicial Code, as amended, 28 U.S.C. Sec. 41, and the Fair Labor Standards Act, 52 Statutes 1069, 29 U.S.C. Sec. 216.

STATEMENT OF THE CASE

This is a suit by Thomas R. Belfield against the Webster-Brinkley Co., a corporation, for alleged overtime work performed between November 20, 1944, and May 13, 1945. It is admitted that plaintiff was employed as Assistant Chief Inspector of the Inspection Department of the company at a salary of $425.00 a month without overtime, that he was during this twenty-five week period paid his salary regularly by check every two weeks, that he made no claim for any overtime during his employment and not until about eleven months after he quit work for the company. The plaintiff claimed, however, that under the provisions of Sec. 7 of the Federal Fair Labor Standards Act, he was entitled to overtime for all time worked in excess of 40 hours a week at the rate of one and a half times the regular hourly rate arrived at by multiplying the monthly salary by 12 and dividing that, first by 52, and then by 40, and that under Sec. 16(b) of the Act, the total thus arrived at *must* be doubled as liquidated damages. The plaintiff further claimed that between the dates mentioned he worked 591 hours of overtime. The defendant conceded that the plaintiff worked at times more than eight hours a day but claimed that he was employed

as Assistant Chief Inspector on a guaranteed monthly salary, that he was expected to and understood that he would be called upon to work at times more than eight hours a day without further compensation, that he was employed to do a job and on the same basis as were all the other executive and administrative employees of the defendant. The defendant maintained that the plaintiff's job was classified by it, and properly, as an *administrative* position and that it was as such exempt, under Sec. 13(a)(1) of the Act, from the provisions of Sec. 7 of the Fair Labor Standards Act. It further contended that the plaintiff was employed for a fluctuating work week, that the defendant did not know and had no way of ascertaining what hours of overtime (using that word inexactly as meaning more than eight hours a day) the plaintiff might have worked, but denied emphatically that he ever worked any such amount as 591 hours. On the evidence produced by the plaintiff, the defendant also contended that he had failed to prove the performance of any certain amount of overtime work, that even if he had, since there was no testimony as to the hours he worked in any particular week, it was impossible to ascertain his regular rate per hour. On the evidence also, it must be admitted that there is not a particle of evidence that the employment was for a 40-hour week.

On these issues, the court found in favor of the plaintiff in strict accordance with the allegations of his complaint and awarded him a judgment in the full amount claimed, doubled, and for $500.00 in adtion as attorney's feets (17). After a motion for a

new trial (18-20) which was argued and denied (23), the defendant appealed to this court (21).

SPECIFICATIONS OF ERROR

The court erred in making its Findings of Fact No. III and No. IV and in entering its Conclusion of Law No. II, in the following respects (14-15) (The "Transcript of Record" is erroneous in that it omits Finding of Fact III and numbers Finding of Fact IV as III):

1. In finding that the plaintiff was not exempt from the provisions of Sec. 7 of the Federal Fair Labor Standards Act but was subject to the provisions of Sec. 7 and entitled to overtime under it (14).

2. In finding that Thomas R. Belfield was employed upon the basis of 40 hours of work per week and in not finding that the employment was for no specific number of hours per week but for a fluctuating number of hours (14).

3. In finding that Thomas R. Belfield actually worked 591 overtime hours or any specific number of overtime hours (14).

4. In adopting the formula it adopted to calculate the overtime due Thomas R. Belfield, if any, and in the award to Thomas R. Belfield of the sum of $2,173.70.

5. In allowing to Thomas R. Belfield an additional equal amount of $2,173.70 as liquidated damages (14-15).

6. Since the decision of the lower court, there has been enacted into law the Portal-to-Portal Bill of 1947

approved May 14, 1947. That Act contains retroactive provisions applicable to this case. Under that Act, it is no longer mandatory upon the trial court to double the amount of overtime allowed as liquidated damages, but if it appears that the employer was acting in good faith, the court in its discretion may decline to award liquidated damages. Appellant believes the good faith of the employer in this case is undeniable under the evidence, and that the lower court, if it had had any discretion at the time of pronouncing judgment, would not have awarded double damages and that if it had done so, would have erred, and that this court would have set aside such an award as an abuse of discretion.

The above specification of errors is based upon the claim of appellant that the evidence was insufficient to support any one and all of the foregoing findings and conclusions.

ARGUMENT

I.

The primary question in this case is one of classification of employment. Was Thomas R. Belfield employed in an executive or administrative position during the period in question? If he was, he was exempt from the provisions of Sec. 7 of the Federal Fair Labor Standards Act as to overtime. If not, he was entitled to payment for such overtime as he could prove. Sec. 13(a) of the Federal Fair Labor Standards Act reads:

> "The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed

in a bona fide executive, administrative, professional * * * capacity * * * (as such terms are defined and delimited by regulations of the administrator)."

Under the authority of the latter provision, the Administrator has defined the terms "executive" and "administrative" as follows:

"EXECUTIVE.—The term 'employee employed in a bona fide executive * * * capacity' in section 13(a) (1) of the Act shall mean any employee

(a) whose primary duty consists of the management of the establishment in which he is employed or of a customarily recognized department or subdivision thereof, and

(b) who customarily and regularly directs the work of other employees therein, and

(c) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight, and

(d) who customarily and regularly exercises discretionary powers, and

(e) who is compensated for his services on a salary basis at not less than $30 per week (exclusive of board, lodging, or other facilities), and

(f) whose hours of work of the same nature as that performed by non-exempt employees do not exceed twenty per cent of the number of hours worked in the workweek by the non-exempt employees under his direction; provided that this subsection (f) shall not apply in the case of an employee who is in sole charge of an independent

establishment or a physically separated branch establishment.

"ADMINISTRATIVE.—The term 'employee in a bona fide * * * administrative * * * capacity' in section 13(a)(1) of the Act shall mean any employee

(a) who is compensated for his services on a salary or fee basis at a rate of not less than $200 per month (exclusive of board, lodging, or other facilities), and

(b) (1) who regularly and directly assists an employee employed in a bona fide executive or administrative capacity (as such terms are defined in these regulations), where such assistance is non-manual in nature and requires the exercise of discretion and independent judgment; or

(2) who performs under only general supervision, responsible non-manual office or field work, directly related to management policies or general business operations, along specialized or technical lines requiring special training, experience, or knowledge, and which requires the exercise of discretion and independent judgment; or

(3) whose work involves the execution under only general supervision of special non-manual assignments and tasks directly related to management policies or general business operations involving the exercise of discretion and independent judgment; or

(4) who is engaged in transporting goods or passengers for hire and who performs, under only general supervision, responsible outside work of a specialized or technical nature requiring special training, experience, or knowledge, and whose duties require the exercise of discretion and independent judgment.

The burden of proof of establishing the exemption is upon the employer, but the burden of proof of establishing the overtime is upon the employee.

Before discussing the evidence in its application to the Administrator's definition, brief reference should perhaps be made to the salary and wage regulations in effect during the time covered in this case. The court will doubtless take judicial notice of such matters, but in fairness it should be pointed out that in October of 1942 Congress passed the wage stabilization law authorizing the President to issue a general order stabilizing wages and salaries and to promulgate such regulations as he considered necessary. Pursuant to that regulation, the President did issue executive order No. 9250, which was subsequently amended by executive order No. 9381 on September 25, 1943. It created an Office of Economic Stabilization and an Economic Stabilization Board with a director who served as chairman. Title II, Sec. 1 of the order provided that no increase in wage rates should be authorized unless notice was filed with the National War Labor Board and unless that Board had approved such increase. The National War Labor Board was authorized to designate the agency of the federal government to carry out the wage policies stated in the order. It did so, and among other things, provided: "Salaries and wages under this order shall include all forms of direct or indirect remuneration to an employee or officer for work or personal service performed for an employer or corporation, etc."

By executive order No. 9328 issued April 8, 1943, the President directed the National War Labor Board,

the Commissioner of Internal Revenue and other agencies to "authorize no further increase in wages or salaries except such as are clearly necessary to correct substandards of living, etc." This was the so-called "hold the line" order. Pursuant to the authority conferred upon him, the Economic Stabilization Director did issue extended regulations which may be found in 7 Fed. Reg. 8748. These regulations divided the authority to control wages from that controlling salaries. The jurisdiction of the National War Labor Board covered wage payments and covered salary payments not in excess of $5,000 per annum where such employee in his relations with his employer was represented by a duly recognized labor organization or where he was not employed in a bona fide executive, administrative or professional capacity. The control of salaries was placed under the Commissioner of Internal Revenue and covered all salaries except those previously referred to. The Commissioner of Internal Revenue created in his department what was known as the Stabilization Unit to handle the control of salaries. The Stabilization Unit did not have jurisdiction over wages and did not have jurisdiction over salaries under $5,000 if the employee was not employed in a bona fide executive, administrative or professional capacity. The National War Labor Board entrusted the administration of its portion of the wage stabilization program to the Wage, Hour and Public Contracts Division of the Department of Labor. This division had no jurisdiction over the salaries of executives or administrators.

This difference of jurisdiction is important in this

case. Mr. Belfield while an inspector was under the jurisdiction of the Wage, Hour and Public Contracts Division of the Department of Labor. When he was appointed Assistant Chief Inspector, he was classified by his employer as an executive or administrative employee. Consequently, his salary was fixed and controlled by the Stabilization Unit of the Bureau of Internal Revenue. In establishing any new position such as that of Assistant Chief Inspector, the Webster-Brinkley Co. was compelled to apply to the Stabilization Unit to fix a salary therefor and could not pay that salary until approval had been received. In addition, it could not change an hourly wage which was under the jurisdiction of the Wage, Hour and Public Contracts Division of the Department of Labor to a monthly salary which was under the jurisdiction of the Stabilization Unit of the Bureau of Internal Revenue until it had received the approval of the Stabilization Unit to the salary for the position. That is the reason why, in Mr. Belfield's case, he was told that the change to his salary rate could not take effect until approval had been secured from the Stabilization Unit and why, in the meantime, he had to be paid on his old hourly rate basis (72).

Pursuant to the power conferred upon him, the Commissioner of Internal Revenue on October 29, 1943, 7 Fed. Reg. 8820, issued his regulations governing salary administration. His definitions of "executive" and "administrative" followed those of the Administrator previously set forth. Sec. 1002.13 of those regulations provided that no increase in salary should be made by the employer except as provided in

Sec. 1002.14 without prior approval of such increase by the Commissioner, and later in the same section, subparagraph 4, it was provided:

> "Payment for overtime will constitute an increase in salary rate and thus will require the approval of the Commissioner unless the customary practice of the employer has been to pay for overtime and the rate and scheduled number of overtime hours of work have not been changed."

The Webster-Brinkley Co. was not paying any overtime to any of its administrative or executive personnel and had never done so. It could not, therefore, after the application and ruling of the Stabilization Unit in Mr. Belfield's case (def. Ex. A-9) have paid Mr. Belfield any overtime without violation of the regulations of the Commissioner.

Returning now to a consideration of the facts in this case and their application to the Administrator's definitions as previously set forth, the evidence is undisputed that Hal Fogman was Chief Inspector of the Inspection Department which was a recognized and established department of the Webster-Brinkley Co. It will hardly be denied that he clearly qualified as an executive under the Administrator's definition. He was Mr. Belfield's immediate superior.

Although Mr. Belfield's duties certainly included some, and perhaps all, the requirements for an "executive" position, it is believed that his job as a whole is more accurately classified as "administrative." Indeed, it may be said with even greater accuracy that his job was at *least* an administrative job under the

definition of the Administrator. The requirements of that classification are (1) A salary of not less than $200 a month (Mr. Belfield received $425 a month); (2) Either one of four other requirements. For our purposes, let us take (b) (1), an employee "who regularly and directly assists an employee in a bona fide executive or administrative capacity where such assistance is nonmanual in nature and requires the exercise of discretion and independent judgment."

With these requirements in mind, what does the evidence show the facts to be concerning Mr. Belfield's employment? We emphasize the word "employment," because we believe the lower court went astray in endeavoring to classify the man instead of the job. The lower court said that in its judgment, Mr. Belfield did not have the "quality of mind or ability that calls for great discretion." That, however, is not the test fixed by the statute. During the war period, there were thousands of cases where men of perhaps insufficient training or capacity were occupying jobs for which they were not perfectly fitted. The question was not whether Mr. Belfield was *fitted* for an administrative job but whether the job was *administrative in character under the Administrator's definition.*

What does the evidence establish as to the character of this job? Admittedly, Mr. Belfield was Assistant Chief Inspector. The Webster-Brinkley Co. was engaged entirely in war work for the Navy and Maritime Commission. It manufactured steering gears, capstans, windlasses, and, during the period in question in this case, was largely engaged in the manufacture of cargo winches for ships. It built these

articles to government specifications and its product was subject to final and rigid government inspection. It was obviously vital to the very existence of the defendant that its own Inspection Department function efficiently and accurately.

The Webster-Brinkley Co. Inspection Department was a recognized department under and responsible to the Works Manager. It consisted of a Chief Inspector, Hal Fogman, an Assistant Chief Inspector, Tom Belfield, from 10 to 15 inspectors (34), and one or two clerical employees. It had a central separate office occupied by Fogman, Belfield and the clerical employees. The inspectors were posted by assignment to various stations or inspection areas in the plant. A very large proportion of the defendant's operation was assembling parts manufactured elsewhere into the complete product. To avoid loss through the transfer of unsuitable and defective parts, outside inspectors were placed in or visited these outside suppliers. The inspectors carried blueprints prepared by the engineering Department. The articles being built by Webster-Brinkley required great precision in construction and were being fabricated under the constant pressure of the war's demands. The inspectors had to be machinists and had to have the skill to read accurately the blueprints, interpret them, and apply them to the parts being produced. The inspector had to determine whether the part complied with the specifications and requirements of the blueprint in its measurements and was in every respect satisfactory in size and quality. "An assembly inspector," Mr. Belfield said, "watches these different machines being

assembled and sees that they are assembled right and work free" (33). It is difficult to see how anyone could conclude that the performance of such duties did not require constantly the exercise of discretion and judgment. If the exercise of discretion and judgment were the only requirement, every one of the inspectors could have been properly classified as administrative.

But admittedly, Mr. Belfield did more. He was Mr. Fogman's "right hand man." There is no doubt that Mr. Belfield regularly and directly assisted an employee in a bona fide executive capacity. He supervised or assisted in the supervision of from 14 to 16 persons (34). He assigned the stations or inspection areas to all of the inspectors in the *assembly* plant and, in the absence of his chief, Fogman, to all of the inspection areas in the *whole* plant (92). Fogman was absent a large part of the time through alleged sickness. Even Belfield said he was absent about 20% of the time (108). Defendant's Ex. A-10 shows 35 days out of 180 when Fogman approved no inspection reports; this would indicate he was absent for entire days 20% of the time. As all witnesses agreed he was frequently hours late in arriving at work, his total hours absent would greatly exceed 20%. During Fogman's absence, Belfield, as Assistant Chief, was the top man in the department. Undoubtedly, Belfield participated in some conferences of executives to thresh out difficulties in inspections and to establish standards (90). Admittedly, he did review and approve many of the first inspections (57). It is evident that throughout his testimony he played down the importance of his job. Judges dealing with this

type of case have frequently remarked that this is the common attitude of the plaintiff. In *Ashworth v. Badger*, 63 Fed. Supp. 710, for instance, Judge Ford of the District Court of Massachusetts said:

> "In this case, there was a tendency on the plaintiff's part to 'talk down his job' to avoid the exemption."

But even the plaintiff, in the course of his testimony, disclosed important facts, and other testimony and undisputable documentary evidence show overwhelmingly that Mr. Belfield's job did involve the constant exercise of judgment and discretion, and that it was nonmanual in its nature. To be sure, inspection does require the use of the hands in making measurements and in lifting and moving parts for purposes of examination, but the manual work, as has been so often said by the courts, is incidental to the main job; *Marion v. Lockheed Aircraft Corp.*, 65 Fed. Supp. 18. It is a necessary prerequisite to the exercise of the judgment and discretion, which is the important part of the work and the part which justifies the high salaries paid.

We have said that Mr. Belfield played down his job. It is worth while referring to his testimony in that respect. He testified that he did the same work as the inspectors under him (37), except for looking over the inspection reports which came into his office in the morning (39). When asked if it was "manual," he said, "*Yes, it was inspecting tools*" (35). As to the reports, he said he had absolutely no independent discretionary authority as to them (35), that he merely separated the reports that were O.K. from the ones

that were rejected, and that the rejected ones eventually went to Fogman, the Chief Inspector (35); that "he had the final say-so on all of them"; that the sorting of the reports probably took a half an hour to one hour in the morning, and that then he went out into the plant and worked with the rest of the inspectors in the assembly line, in the shop and in the warehouse, that he spent 90% of his day in doing "the work of the other regular inspectors in the shop" (36), that there was no difference between the work he did as inspector prior to reorganization and what he did afterwards. "It was the same type of work outside of sitting there in the office for about an hour in the morning or half hour to one hour" (39).

This testimony received some support from two other witnesses. Lloyd M. Burdge, who was a leadman, thought that Belfield spent possibly 10% of his time with him between November and May on outside jobs (45), but Mr. Burdge later said, "My testimony was concerned with the time he was *inspector*" (46). Robert S. Edmisten, who was a mechanic, testified that he worked for Belfield a part of the period between November 15, 1944, and May, 1945, while he was a leadman, and that he saw Mr. Belfield engaged in the same work as an assembly inspector, and that he never had seen him walk through the shop that he didn't have some work of this type before he went through and that, when he was working in the plant on the days the witness was there, "he would be doing the same class of work that I would be doing, which would be *accepting or rejecting* parts that went into the machinery" (51), that while the witness was in

the plant, Belfield would be engaged in that kind of work about 75% of the time, as near as he could figure (51). The witness had never had an order from Belfield. He got his instructions from Fogman.

On the other hand, Belfield testified that he was a machinist by trade, that his life's occupation was in the machinery business, and that he had acquired "all the knowledge and skill for a rating in that department," and that prior to the war, he had been a journeyman machinist for fourteen years (33). He started to work as a shop inspector for Webster-Brinkley Co. some time in January, 1943. His experience as an inspector, therefore, covered more than a year and a half before he was chosen as Assistant Chief Inspector. At first, he was an inside assembly inspector, but was later transferred to the outside as an outside inspector. As assembly inspector, he watched the different machines being assembled and saw that "they were assembled right and that they worked free" (33). On the outside, he inspected parts being made in machine shops and foundries in Tacoma, Portland, Aberdeen and Hoquiam, Port Angeles, Port Townsend, Shelton and Everett. In August of 1944, the Inspection Department of the Webster-Brinkley Co. was reorganized. Belfield testified he "was brought in from the outside to help Mr. Fogman reorganize the Inspection Department and to acquaint him with the procedure" (34). He says that his primary basic duties in the plant were more or less to look over the inspection reports in the morning when they came in and to work with the other inspectors inside the plant and outside the plant. He

says that when he first came into the office in the morning, he looked over the inspection reports and sorted out the ones that were in question and "chased some of them down for Engineering or handed them in to Mr. Fogman." He admits that he was furnished with blueprints to guide him as to the way to inspect and what allowance should be made. He says that an inspector was furnished with a manual and required to be able to use it. He says the inspectors would merely go around in the outside plants and inspect the parts with the drawings. When he went out with Mr. Burdge, for instance, and they arrived at a plant, they got out their tools and inspected the parts with the drawing. Belfield took some parts and Burdge took others. But he admitted that he did sign reports of rejections and exceptions (57). He denied that when he was away from the plant with Burdge, he told him what to accept or what to reject. But on cross-examination, Belfield admitted that there were two types of inspection reports, that some were typed and some pencilled, that he did not personally make reinspection reports when he reinspected parts unless the part was pretty bad, that generally he would get the Engineering Department in on it or the Chief Inspector. He says the original inspectors generally signed their reports and that when he made an ordinary inspection report, he signed it and that the files and records ought to contain the ordinary inspection reports which he made during this period of time (57). (As we shall point out later, there is *not one* inspection report which is signed by Belfield as the original inspector). He admitted that the reports

which were O.K. and came in in pencil were sent through to the girl to be typed but that if the part were rejected, those reports were gone over by Mr. Fogman or himself and Engineering at different times (57). The favorable reports typed up by the girl were signed by her as a mere formality. He admitted that he signed all of the *rejection* reports when Mr. Fogman was absent (58). He insisted that there were other inspectors who signed them too, but later, he stated that he was then referring to the O.K.'d reports (58). He admitted that it was the function of Mr. Fogman and himself to determine whether or not rejected parts could be reworked or whether anything could be done with them or whether they should be simply cast aside (58). He grudgingly admitted that he did go out sometimes and reinspect those parts himself to see if he thought the original inspection was in error (59). He at first denied that any disputes ever arose between the Webster-Brinkley inspectors and the government inspectors, but he later admitted that there were differences of opinion and that these differences at times, especially in Mr. Fogman's absence, came up to him (59). He denied that Inspection had the final word on the matter but claimed that it would be up to Engineering. He admitted only one conference with the General Manager and the Works Manager or the heads of other departments in connection with some of these difficulties (60).

But the evidence as to the character of his duties, as it may be gleaned from the testimony of his own witnesses and the witnesses for the defendant, adds much to Mr. Belfield's admissions and disproves many of

his assertions. Mr. Burdge, one of the plaintiff's witnesses, testified in answer to a question how they inspected, that they had prints, tolerances were given on the prints that the parts were to conform to. The inspectors would measure with the micrometers for the sizes to determine if they were within the specifications. Lots of the pieces were large and it wouldn't be possible for one man to turn them over, to pick them up, or to do any handling that one would have to do to check them (46).

> "Mr. Belfield was engaged in the same kind of work that I did, in lifting or turning these parts around. When I was handling a large, cumbersome piece, he helped me in turning or twisting it. He followed that practice during all of the time when we would be on the job together." (46)

He also testified as to the reports that were made on rejected material. He placed them in the office where there was a basket to receive them.

> "On rejected materials, they were usually next considered by Mr. Belfield. So far as I know, he checked them over to see if they were made out correctly, that is, whether I had made an error in my pencil work on them."

When asked whether questions didn't frequently arise as to whether or not materials should be rejected or were usable, he said:

> "Yes, sometimes, if they were very near to the tolerances on the print, the discussion would come up as to whether they could be used or passed."

Then he was asked:

"When you say that your judgment on the matter was final, isn't it true, as a matter of fact, that many cases did go beyond you to Mr. Belfield or to his superior for further action?

A. That is true, if it was a questionable part." (47)

He also testified that the inspections he made were original inspections, that is, the first inspection made by anyone connected with the Webster-Brinkley Co. He admitted that they occasionally had trouble over defective parts that did not come up to specifications. When asked whether he ever saw Mr. Belfield come down to reinspect parts, he said:

"I believe I have asked him to come down. We used to get castings sometimes that were faulty —that had cracks or were poor castings, and I was doubtful as to whether they could be used. I used to ask Mr. Belfield to come down and look at it." (48).

In that testimony, Mr. Burdge has clearly indicated that he was not only responsible to Mr. Belfield but that Mr. Belfield was called upon to exercise a judgment and discretion superior to that of the ordinary inspectors. He also expressly admitted that he was supervised entirely by Mr. Belfield and Mr. Fogman (49). Mr. Edmisten in like fashion inadvertently showed Mr. Belfield's function. He was asked (52):

"If a novel question came up and you requested Mr. Belfield, what did he do about it?"

A. "Well, he would say, 'Well, let's go over and take a look at it,' and he would take his prints and tools required. He would look at it and say, 'Well, maybe we had better make a re-

port on it and have Fogman or Engineering come down and take a look at it, or the Maritime inspectors'."

Again, he said (54):

"When seeing Mr. Belfield on the floor a lot of times I would ask his advice—*should we use it or shouldn't we use it.* That would be about all.

On this matter, Warren D. Thacker, who was at one time employed by the Webster-Brinkley Co. to organize the paper work and procedure of the Inspection Department but who is not now employed by the company, testified at length. He was an independent, disinterested, intelligent and well informed witness, who was in a superior position to observe Mr. Belfield's work. He was friendly to Mr. Belfield. The court can rely on his testimony as accurate. Mr. Thacker's particular duty when employed was to ascertain just exactly what the various individuals in the Inspection Department were doing and to assist in the reorganization of the department and to prepare a manual (73). He spent some four months in the department. He sat at the very same desk occupied by Tom Belfield. He discussed with him personally the manual which he was preparing (74). This manual outlined the duties of the Chief Inspector, his Assistant, and all the inspectors in the department. He says that for the first six weeks of his work, he was with Belfield almost constantly (74). Belfield went with him to each of the inspectors and introduced him. He and Belfield went about the plant for the purpose of investigating the duties of the inspectors and Belfield's duties as well. Belfield approved

the manual, and many of the things that were included as a part of his duties in the manual were suggested by Belfield himself (75). Thacker accompanied Belfield on his inspection trips outside the plant. He explains the inspection procedure. So far as original inspections and approvals were concerned, inspectors were stationed throughout the plant at strategic spots where inspection work might be required. Each of these inspectors was given a supply of forms which he filled out as he inspected the various lots and parts. There were three classes of inspection. There were those parts that were outright rejections, those parts that were complete acceptances, and then there were borderline cases. In cases of outright rejection where a part obviously could not be worked to dimension or it was not to dimension, the inspector was entitled to put a rejection tag on it. If it was obviously within the limits, the inspector was empowered to accept it. If it was a borderline case, he had to use his judgment. If he found it impossible or difficult to decide, he could and did call upon either Belfield or Fogman for a final decision on the matters within their discretion. It it was beyond their discretion, they sometimes called on other higher employees of the company—the Engineering Department (76).

The original inspector made out the reports of the original inspection in his own handwriting and had them at his work place in the plant. When he handed in his conclusions on the pencilled copy of the inspection report, he turned it in to the Inspection office at 4:00 o'clock in the afternoon. The following morning, the pencilled copy was checked by Mr. Belfield. Those

that were approved were laid in one pile and those that were rejections were laid in another pile. The *rejected* reports would be very carefully read and checked by Belfield and initialled by him and turned over to the girl for typing (76). The accepted reports went on to her and were typed by her without further comment or signature or checking. Then there were what were known as *rework orders*. If obviously the part could be reworked, that might be handled by a leadman. The other type of rework was determined by the mechanical engineer and was handled as a rejection. Mr. Belfield had actually to approve the rework orders because they were a rejection (77). Mr. Thacker also very fully described Mr. Belfield's duties. He said that he would meet Belfield at the office in the morning at 8:02 o'clock when he came in. The first thing Belfield would do would be to go through the pencilled copies of the reports.

> "The normal course of things was for Tom to check the reports, approve them as to being correct or not correct. On these reports, in many cases, the actual dimensions themselves that were at fault were mentioned. Tom's duty, there, was to determine that the inspector was right in rejecting." (83)

He also went through the formal copies, that is, the typewritten copies that were for general distribution, in Mr. Fogman's absence, but if Fogman was there, Belfield went over the pencilled copies and then made a tour of the plant.

> "We would drop into the Warehouse Department, go from there over to Assembly, around through the machine shop, consult with the var-

ious inspectors. They very frequently had borderline inspection problems that they didn't feel competent to decide which were left up to Mr. Belfield's judgment or Mr. Fogman's judgment, if he could be reached. Mr. Fogman was absent very much of the time. He was almost always late from one to three hours. He was away for two or three days at a time when he simply didn't show up for work. It had to be handled and was handled by his assistant. The acting Chief of the Department during Mr. Fogman's absence was Mr. Belfield (78). The reports were signed by Belfield if Fogman was not in. After the tour of inspection, we would return to the office ordinarily. Belfield was subject to call throughout the plant. You couldn't make a regular routine out of your calls. An inspector might call in and ask for Tom and ask for him to come and determine what was to be done—a borderline rejection (78). The inspectors from outside, Wallaston and Burdge, called him regularly. They were outside, away from the plant, were required to use a little better judgment and a little more independent judgment than the inside inspectors, but still they would ask where they should go on their next call occasionally, and inquire what should be done. Those calls were mostly directed to Mr. Belfield (79). Mr. Belfield directly supervised the work of ten to twelve people. The direct supervision of the people was through Mr. Belfield." (79)

Mr. Thacker testified that on his trips around with Mr. Belfield, he never saw Belfield make an original inspection (79). On those trips, he was either making the rounds of the Inspection Department employees or he was called out directly by an inspector because

of some indecision on the inspector's part (79). Very often, he would recheck work of an inspector or he might tell the inspector to go ahead and write up a rejection on this or he might say, "This is all right," inspect it, and the inspector would write up his report (79). Thacker reiterated that when he was walking around with Mr. Belfield, Belfield was not doing inspecting. He said that Belfield disliked paper work but liked to be out circulating in the plant and that never at any time when the witness saw him or was with him did he ever go to any inspection spot in the plant and station himself there for the purpose of inspecting parts that had not already been inspected by some other inspector and were not in doubt. He said he knew of conferences with Belfield in the Inspection office. He said he sat in on some of them. He knew that Belfield had conferences among the inspectors. Primarily, that is, he met with one or two inspectors regarding some particular part that was a borderline case (84).

> "Someone has to decide those points, and it was Mr. Belfield's duty to determine—either the fact that they were usable or that they must be passed on to someone with greater authority to determine whether they could be used or not." (85)

Gerald S. McCarthy, the Works Manager of Webster-Brinkley Co., but no longer in its employ, stated that *he had heard the testimony of Mr. Thacker and that it was correct* (88). The Inspection Department was under Mr. McCarthy and he said that he held the Chief Inspector responsible for the entire activities of the department and, in the absence of the Chief In-

spector, he held the Assistant Chief Inspector responsible (88). He denied that he had ever gone over Mr. Belfield's head in dealing with the inspectors in the department. He testified that he had observed the operations of the Inspection Department throughout the entire plant, both morning and afternoon, every day when possible. As to the work of Belfield, he testified that he made trips to the outside plants and that Mr. Belfield would have occasion to inspect parts which were doubtful after coming from a sub-contractor's plant, that in some instances Belfield made trips to Western Gear Works to establish standards acceptable to the Inspection Department (90), that differences of opinion arose between the government inspectors and the Webster-Brinkley inspectors as to usability of parts and when they arose, doubtful parts were discussed (90). He said there were other flaws, such as welding and casting trouble, that those were matters of judgment to a much greater extent than tolerances, and that it was necessary for either Belfield or Fogman to discuss such matters with the Navy inspectors as to what they thought they could do to save such a piece if the Inspection Department thought it was justifiable to save it. He said that there were numerous conferences at which the top executives and Belfield and Fogman, either one or the other or both, were present in connection with the winch contract, because of some disagreements or differences of opinion with the Maritime Commission inspectors as to certain standards (91). The conferences were called at various times to determine the exact standards which the Webster-Brinkley Co. felt

made acceptable winches. He testified as to hiring or firing that Fogman had the right to hire or fire any employee in the Inspection Department and that Belfield's recommendations would receive consideration (91). He said that during the absence of Mr. Fogman, and his attendance was very irregular, Mr. Belfield was held responsible for the activities of the department. He said that he could not possibly have supervised the other activities in the plant, supervised the men in the Inspection Department, and made the decisions that were necessary and allocated the men to their duties in the day to day operation of that department, that Mr. Belfield did that work, that when Mr. Fogman was present, he in general took over the allocation of the work in the Machine Shop but that Belfield took care of the allocations in the assembly departments and on the outside, that in Fogman's absence Belfield took care of all of the assignments (92), that it was quite often necessary for Belfield or Fogman to reinspect parts for any one of a number of causes. The purpose would be to determine the final satisfactoriness based upon their knowledge and judgment or to refer the case, if it seemed questionable to them, perhaps to the Engineering Department or perhaps to McCarthy himself, for final decision (92). McCarthy said that his contacts with Belfield occurred several times a day personally, and anywhere from three to four times a day by telephone or inter-communicating system, that he saw him sometimes in the office, sometimes in the plant, and sometimes in McCarthy's office. In his opinion, Belfield did not spend over 5% of his time in original inspection work

(94). He said that he had been in the Inspection Depatrment or inspection areas of the plant at times as many as six hours in a day and that he would say he spent 25% or a little more of his time in the area of the Inspection Department.

Mr. George Gregson, the General Manager of the Webster-Brinkley Co., testified that he knew Belfield and his work, that Belfield was responsible for the operation of the Inspection Department in the absence of his superior, Fogman (104); that he had spoken with him often, that in March, 1945, there was trouble on the winch contract; that the Maritime Commission took the position that the standards being set by the Inspection Department were not high enough, that that was a very serious matter and that on at least two occasions Belfield was present at conferences in the office of the President, Mr. Bannan, to advise the management and the President of the company as to the position Inspection took as against the charges made by the Maritime Commission inspection department (104).

But perhaps the most important piece of evidence showing that Belfield did have to exercise discretion and judgment is contained in defendant's Ex. No. 11-A and plaintiff's Ex. No. 6. There was in court every inspection report made during this period, both *acceptances and rejections* (66). They filled one and a half filing cases. As testified, articles which were passed by the original inspector were only formally approved. The initials of the Chief Inspector, "H. F." were affixed by the secretary (66). But all of the *rejections* by the original inspectors had to be ap-

proved by Fogman or Belfield. No other person was authorized to initial those reports. Of the thousands of reports in those files, 1,817 were *rejection* reports. Belfield picked out seven reports—we are not sure they were all rejections—where he says his initials were signed by someone else, but he does not know by whom. Four of those occurred on the same day, December 27, 1944, and all of them were between December 28, 1944, and January 4, 1945. When Belfield testified, there were tabs to mark these seven. Belfield and his counsel had the opportunity to examine every one of them. But he did not question any others. He finally said, "I never went through but just a few" (111). The fact is that 599 of those rejection reports were signed with Belfield's initials.

But there is another very significant fact in the reports bearing upon and rebutting Belfield's testimoney. Belfield had testified he made many original inspections. Every report carried the name of the original inspector. On *not one* of the 1,817 reports does Mr. Belfield's name appear as the original inspector. Wherever it appears, it is as *reviewing* inspector.

The lower court failed to distinguish between the two types of reports and utterly failed to grasp the significance of the rejections and the suggestions and directions frequently placed thereon by Belfield. He said (113):

> "These reports seem to the court, as disclosed by the evidence, to have been in themselves something of routine which was done pursuant to established procedure. They were done in a large

> percentage of the instances mentioned in the evidence as a matter of routine by some clerical employee or typist who had affixed the initials of Mr. Belfield. I believe, of those that were specifically mentioned or introduced in evidence, there was only one where the initials of Mr. Belfield were affixed by Mr. Belfield's own hand."

This indicates a complete misunderstanding of the evidence. The inspection reports which were O.K. were signed "H.F." by the secretary as a matter of routine (not with Belfield's initials), but *no witness testified* that the *rejected* reports were so signed. There were 1,817 rejection reports in the files in the courtroom subject to the inspection of Belfield and his counsel. Belfield referred to 10 reports in all, one signed by Fogman, two admittedly by himself (110). Mr. Washington's testimony (66, 67) is that 599 of the *rejection* reports (defendant's Ex. A-10) were signed by Belfield. Assuming the remaining 7 were all rejections, and we accept Belfield's testimony, the evidence still is that 592 were signed by him. Two hundred reports were introduced in evidence (defendant's Ex. A-11 and plaintiff's Ex. 6. There is, therefore, absolutely no support for the court's assertion that there was only *one* where the intials of Belfield were affixed by Belfield's own hand.

There is another vitally important feature of the rejection reports which was entirely overlooked by the lower court. The lower court referred to all of the reports as "routine." On a number of the *rejection* reports in evidence, the reviewing inspector and, in many cases this was Belfield, has in his own handwriting written directions or suggestions as to what

should be done with the rejected part. We do not have present access to defendant's Ex. A-11 and plaintiff's Ex. 6, but we ask the court to examine them in confirmation of our statement. Had the lower court examined them, he would have seen that those reports clearly showed that Belfield was exercising discretion and judgment in making very important decisions for his employer. As previously stated, it would seem to be a fact that the ordinary inspectors themselves exercised discretion and judgment. Even if it were a fact, as we believe it is not, that Mr. Belfield did a large amount of the same type of work as the inspectors under him, that would not remove him from the exempt class. The regulations of the Administrator lay down no such test. The test is not whether the supervising administrative official does some of the same type of work as those under him, but "whether he assists another employee who is a bona fide executive or administrator and exercises judgment and discretion in the performance of nonmanual work." We submit that it is clear that the only manual work done by Mr. Belfield was that incidental to the job of inspection, that even the duties of the original inspectors involved judgment and discretion, that that is what they were paid for and what justified their high salaries, that Mr. Belfield did not make the original inspections to any appreciable extent but that he did make the *review inspections*, all involving the exercise of discretion and judgment; that he assigned the inspectors in the assembly to their stations; that in Mr. Fogman's absence he made all of the assignments and certainly supervised all the

inspectors; that frequently he held conferences with his inspectors in the discussion of inspection problems; that he was frequently called upon by those inspectors to come out and discuss problems with them; that he was also frequently called by the outside inspectors for assignments and to discuss their problems; and that in connection with his work he was also called upon at times to make reinspections of parts as a check on the original inspections. His superiors testified that they held the Chief Inspector responsible for the operation of the department and, in his absence, Belfield, the Assistant Chief Inspector. It seems to us that there cannot be a shadow of a doubt that Belfield falls within the definition of the Administrator as laid down.

There is authority supporting this conclusion. In *Ashworth v. E. B. Badger & Sons Co.*, 63 Fed. Supp. 710, the employee was an inspector-expediter. He went out to the plants of suppliers as did Belfield.

> "Equipped with plans, specifications and instructions from the Boston office, he would proceed to the plant of the vendor in question and present himself as the Badger inspector assigned to that job. He was then introduced around the plant and familiarized with plant procedure. Most, if not all, of his assignments were at plants engaged in the fabrication of pipe or the manufacture of pressure vessels. It was his duty to observe the fabrication or assemblage of the product from its initial stage until completion, making frequent checks to see that it conformed with the plans and specifications which he possessed. At times, these checks consisted of mere physical measurements. At other times, they

> were merely visual inspections, and frequently they involved the observation of hydrostatic or pneumatic tests made by the employees in the particular plant. If a variation from the plans or specifications appeared, he would notify the management or its representative in the plant. If they refused to correct the variation or if they requested that it be allowed to remain, the plaintiff would normally consult the Boston office for instructions as to how to handle it. In any event, if plans or specifications were not met, the plaintiff had authority to inform the vendor that the product was not acceptable."

He also observed and passed on crating and packaging. If a job moved too slowly, he would try to speed it up. This involved interviewing his vendors and contacting other Badger inspectors on the troubles outside his area. He performed some other duties along the same line. Judge Ford held that his work was along specialized lines requiring special training, experience or knowledge, that it clearly involved the exercise of discretion and independent judgment, that under the regulation "an employee possessing the authority to make decisions on his own account without discussion or instruction from others may be said to exercise 'discretion and independent judgment'." Judge Ford also remarked:

> "Employees serving in the plaintiff's capacity are more or less on their own in the field doing important work for the purpose of enabling the defendant's business to function. The unsupported testimony of the plaintiff that he performed manual labor at times does not aid him. True, he performed some manual labor, but that was incidental to his work."

Dolan v. Zimmerman, 65 Fed. Supp. 923, is helpful. There, Judge Ford had to pass on the classification of a large number of employees. One was an inspection engineer with work quite similar to Belfield's. He was held exempt as an executive. Judge Ford also passed the job of *Assistant* Chief Industrial Engineer, and held it exempt as administrative notwithstanding that the employee did "some routine work incidental to his duties as an executive employee." He found that an *Assistant* Industrial Engineer was employed in an "administrative capacity." He also passed upon the job of an *Assistant* Expediter who did internal expediting and carried on a number of special assignments. He held him exempt as an administrator.

In *Henry v. Chemical Construction Co.*, 11 Lab. Cas. 63,442, the court was dealing with an inspector-expediter whose job in many respects resembles Belfield's, except that it was a less important one.

> "The plaintiff in the performance of his work inspected and either approved or rejected fabricated pipe and fittings and other materials at the vendor's plant. In the performance of his duties, the plaintiff was required and found to be familiar with specifications, blueprints, drawings and purchase orders. If the work did not conform to the drawing and specifications, plaintiff advised the vendor and immediately reported to the home office. If the home office advised him that the material should be accepted notwithstanding variations, plaintiff did then proceed to approve the material. He was required, however, to use his judgment and discretion in determining whether the work should be held up or permitted to proceed. When he approved, his de-

> cision was accepted as final and not questioned, and when he determined the parts were up to standard the work proceeded and the said parts went into the job. At the various plants under his jurisdiction he took measurements of the parts, made visual inspections and observed tests made by the vendor's personnel after which he informed the vendor of his decision as to whether the material was acceptable."

The court held he was employed in an administrative capacity and therefore exempt.

In *Bender v. Crucible Steel Co. of America*, 71 Fed. Supp. 420, the court was dealing with a foreman who apparently had the duties of an inspector. As such, he exercised functions similar to those exercised by Belfield. The court said:

> "The foreman, when a doubt arose as to the rejection or approval of a partly completed article, had the power to determine whether it should be rejected or an attempt should be made to perfect it. Also the foreman could determine whether or not material alleged to be of no use to the company could be removed from the plant."

The court also said:

> "Some of the foremen included in the non-exempt work claimed by them the clerical work they performed in maintaining production and personnel records and making reports in connection with their particular department. Such work was clearly a part of supervisory duty also resembling the duty of a bookkeeper. Of the same nature was work necessary in the inspection and testing of the work of employees under supervision, even when a foreman in an emergency

temporarily aided an employee in the LaBelle Works in his job. Such aid was nonexempt work."

The court held that the foremen were exempt.

II.

The lower court found that Belfield was employed during the period in question for $425.00 a month upon the basis of forty hours of work per week. The defendant maintained that the employment was for no definite number of hours per week but to do the job, in short, for a fluctuating number of hours per week.

The position of the court has no support at all in the evidence. Even Mr. Belfield testified that when he was employed, he was told that there was to be no overtime (38, 62). Later, when asked what was his basic week, he testified (55):

"After we went on salary, I think it was *supposed* to be 44 hours.

Q. A 44 hour week?

A. Yes."

The amount awarded Mr. Belfield is calculated on the basis of employment for a 40 hour week. It is therefore clearly erroneous.

But we think that the testimony shows that the employment was for a fluctuating work week, that Belfield was employed to do the job and to spend as much time on the job as was necessary to do it properly, that his employment was on exactly the same basis as that of all of the other executive and administrative employees in the Webster-Brinkley plant. No one of them was employed for any definite num-

ber of hours per week and although all of them worked many hours in excess of 40 or 44 per week, no one of them received any additional compensation for it.

Mr. McCarthy, Works Manager and Belfield's superior, testified that he talked to Belfield, informed him what his salary would be and said, "The hours of work were explained as the hours that the plant operations normally worked and that the other executive and administrative personnel worked, which at that time was six days a week." (It appears elsewhere that the normal work day was 8 hours a day.) Again, on cross examination, he said, speaking of Belfield, "He never complained to me that he was putting in hours of overtime and was not paid for it. He complained that he was putting in hours of overtime but I don't remember him complaining about the overtime. He understood when he took the job that he was on a fixed salary.

"Q. You had that understanding with him?

A. I know I did."

Mr. Gregson, the General Manager and a member of the Operating Committee of which Mr. McCarthy was also a member, testified that all of the executive or administrative personnel were hired to do a definite job irrespective of the time it took, that none were ever hired for a definite number of hours per week (103). Belfield's own testimony and actions confirm these statements. It will be recalled that Belfield, prior to his appointment as Assistant Chief Inspector, had been previously employed as an inspector for about a year and a half at the hourly rate of $1.50. During that time, a record had been

kept of his time and he had been regularly paid his basic salary and overtime at that rate (41, 38, and checks in plaintiff's Ex. 1). His pay checks carried on their face the exect number of hours worked per day.

After November 15, and after an application to the Stabilization Unit by which a salary of $425 a month was aproved, Belfield was paid semi-monthly on the basis of $425 a month without overtime. After his employment on the salary basis, no check was kept of his time. Although he was paid no overtime during all the 25 weeks of his employment as Assistant Chief Inspector, he made no request for any overtime payment. He protested on the amount of the overtime he was called upon to put in but he never claimed that, under his contract of employment, he was entitled to any payment for it. The lower court was interested in and clarified this point. The court asked Belfield:

"I know, but whom did you inform that you had an overtime claim?"

Belfield replied, " I never said I had an overtime claim" (107). Later, he said, "Well, I told him that I was putting in quite a bit of overtime—I didn't like it, I told him."

Also on Belfield's own testimony, it was not until eleven months after he quit his employment with the Webster-Brinkley Co. that he called Mr. Gregson by telephone and said he was going to sue for his over time (61).

Mr. Belfield's claim is inherently incredible. If he is to be believed, he was suddenly raised from $1.50 an

hour to a basic regular rate of $2.42 with overtime at $3.63 an hour, and with no change of duties. That is a jump of 63%. No reason is suggested for any such increase. Such an increase is entirely inconsistent with the policy of the federal administration and the controls being exercised by it at that time. It is unbelievable in the light of the wage policies which were in effect in this country then that the Salary Stabilization Unit would have approved any such advance. If, on the other hand, Belfield were an administrator and his employment were for a fluctuating work week without overtime, then the action of the Stabilization Unit is understandable and consistent with Belfield's own actions. He had been accustomed to overtime as an inspector, he had been regularly collecting overtime, when on November 16, he is put on a salary. His time is no longer kept. He is paid semi-monthly, and accepted some fifty salary checks without any claims of overtime and never voiced even a suggestion of payment for overtime for a period of eleven months after he had quit his employment. We submit that the overwhelming weight of the evidence is to the effect that Belfield's employment was for a fluctuating work week. Even, therefore, if this court should disagree with us as to the proper classification for Belfield's job and hold that he came under the Federal Fair Labor Standards Act, it should still hold, under the evidence in this case, that the employment was for a fluctuating work week. In any event, there is no evidence at all supporting a 40 hour week.

III.

As to the number of hours worked, there is no evidence whatever except the unsupported testimony of Belfield himself. To understand how frail is that testimony, we ask the court to read pages 41, 44, 54 and 56 of the record. Belfield was first put on the stand and testified that he had kept some memoranda of his overtime, that part of it had been upon a time book and part on a desk calendar, that the time book was at his home in Spokane and that the kids had torn up the calendar. On the plaintiff's testimony that the record the plaintiff was trying to introduce had not been made up until after he quit his employment at Webster-Brinkley and not as a part of his daily work and routine, the court rejected the proposed exhibit. When asked to testify then as to the number of hours of overtime he worked between November 15, 1944, and May 13, 1945, he said:

"I can't answer that." (43)

His counsel then asked to withdraw him from the witness stand. He stepped down, consulted his counsel and then his counsel attempted to put him back on the stand, but the court would not permit it at that time (44). Later, the court did permit him to resume the stand. He then testified that he had been confused. He was then asked if he knew now the total number of hours he had worked. He answered:

"591 hours." (55)

Just that. Nothing more.

On cross examination, he was asked whether he could tell the total number of hours he worked in any

day or in any single week between November 20, 1944, and May 12, 1945. He said (56):

> "From that paper that I turned in.
>
> Q. You have no recollection apart from that paper, have you, of the time that you worked?
>
> A. No, I don't believe I could. That has been quite a while ago."

"That paper" is not in evidence. Is it not obvious that Mr. Belfield had no recollection of his overtime apart from the paper referred to which was itself secondary and self-serving and which is not in evidence? Is it not obvious that he had simply memorized the total of hours in Exhibit A to his complaint (6) after he had stepped down from the stand and been talked to by his counsel? The Federal Fair Labor Standards Act is set up upon a weekly basis, and provides for overtime above 40 hours per week. That Belfield worked some overtime is undoubtedly true, but his unsupported testimony given as it was given in this case is wholly inadequate to establish the amount. The lower court on this unsupported testimony credited Belfield with an *average* overtime of *24 hours* a *week* for *25 consecutive weeks*, that is, 64 hours working time a week for every one of those 25 weeks. There was some evidence to show, in spite of the absence of records, that he did not actually work every day or for full days (81). During that period of time, the plant was working on a 48 hour week, the clerical employees on a 44 hour week, but both only six days a week. Is it credible that any man who thought he was hired for a 40 hour week or even for a 44 hour week would work 64 hours a

week for 25 consecutive weeks without a claim of overtime?

IV.

This specification of error depends upon the preceding. The court adopted a formula based upon the basic regular 40 hour week. It divided the annual salary of $5,100 by 52, making the weekly wage $98.08. The regular hourly rate was therefore $2.45. The overtime of 24 hours a week was allowed on that basis. If the basic week had been 44 hours, the allowance by the same formula would have been $1,978.85. If the basis of Belfield's employment was a fluctuating work week, then, of course, it is impossible to calculate the recovery under the Federal Fair Labor Standards Act because the plaintiff was unable to establish the number of hours actually worked during any specific week.

V.

This specification of error depends upon the foregoing specification. Since the original calculation of overtime was incorrect, the doubling merely increased the error.

VI.

Since the decision in the lower court, Congress has enacted the Portal-to-Portal Bill of 1947 approved on May 14 of that year. Under Sec. 11 of that Act, the Federal Fair Labor Standards Act is altered so that it is no longer mandatory upon the lower court to double the amount of the overtime as liquidated damages. If it appears to the court that the employer has acted in good faith, the court in its discretion

need not make any allowance for liquidated damages. It must be clear to the court that the employer in this case did exercise the highest degree of good faith. Belfield's duties were certainly such as afforded reasonable ground for the belief that he was an administrator. Under that belief, the employer applied to the Stabilization Unit of the Department of Internal Revenue for the fixing of a salary. The jurisdiction of that Unit depended upon the classification of the employee in one of the exempt classes. If not exempt, the whole matter would have been transferred to the Wage, Hour and Public Contracts Division of the Department of Labor. The Stabilization Unit, believing, on the showing made, that this position to which Mr. Belfield was subsequently appointed, was exempt as administrative in character, proceeded to fix the salary at $425 a month. Relying upon this ruling, the W.B.Co. ceased to keep such records and it paid him regularly semi-monthly as it did all of its executives and administrative employees. Mr. Belfield was in no wise damaged. He made no request for overtime for more than eleven months after his employment ceased.

On the other hand, the effect of the ruling of the lower court was a great injustice to the employer. When Belfield was appointed Assistant Chief Inspector, he became entitled to a *guaranteed* monthly salary. For the 25 weeks he was employed, he received a total of some $2,452. That was a high wage for the employment. In this case, he sued for overtime and the lower court proceeded to award him an additional sum of $4,249.76, or almost twice the amount

of his agreed salary. The result is that if he should received the amount awarded by the lower court, Mr. Belfield will have received for his services during the 25 weeks $272.00 a week. This windfall he gets in spite of his contract of employment, not because of any virtue on this part or any fault on the part of the Webster-Brinkley Co. We submit that such a result is more than unjust; it is literally outrageous. Had the lower court possessed any discretion at the time of entering judgment, as he now has under the Portal-to-Portal Act, we cannot believe he would have allowed double damages. In any event, if this court cannot itself dispose of the case finally, it should be sent back to the lower court for further proceedings under the law as altered by the Portal-to-Portal Act. *Alaska Juneau Goldmining Co. v. Robertson*, 12 Lab. Cas. 51,252 (U.S. Sup. Ct., June 16, 1947); *149 Madison Ave. Corp. v. Williams & Co.*, 12 Lab. Cas. 51,253 (US. Sup. Ct., June 16, 1947); *Lassiter v. Atkinson Co.*, 13 Lab. Cas. 63,947 (9th Cir., July 28, 1947); *Lasater v. Hercules Power Co.*, 13 Lab. Cas. 63,946 (U.S. Dist. Ct., E. D. Tenn., July 25, 1947).

But we believe the proper disposition of this case on the evidence calls for a reversal of the judgment of the lower court and dismissal of the cause.

CATLETT, HARTMANN, JARVIS & WILLIAMS
Attorneys for Appellant.