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John J. Snyder

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OFFSETTING OVERPAYMENTS AGAINST UNDERPAYMENTS— A QUESTION OF ADMINISTRATIVE LAW

By

John J. Snyder*

With the advent of administrative price-fixing bodies regulating many forms of business, a tremendous volume of accounting has been necessary to determine whether or not the orders promulgated by regulatory bodies have been obeyed. So voluminous has been the accounting, that in many instances the books and records of corporations and individuals operating under regulatory orders have not been audited for many months after the effective date of the orders. When audits are finally made, it is found that many orders have been violated in some months during the year by underpayments in amounts less than the minimums set by administrative orders. In subsequent months it is found that amounts have been paid to recipients in excess of the minimums required by orders of regulatory bodies. In many instances the overpayments have been in excess of the underpayments, and considered on an annual basis, the overpayments have equaled or exceeded the underpayments.

These conditions exist especially in the field of price-fixing and wage-making. The Milk Control Law, in which minimum prices to producers are fixed, is a typical example of this situation. Another example is the Wage and Hour Law, which fixes minimum prices to be paid labor.

Audits of individuals and corporations of milk dealers who purchase milk from farmers or producers, often reveal that producers have been paid less than the minimum rates fixed by the Milk Control Commission during some months of the year and have overpaid producers in other months of the year. This situation occurs by reason of the fact that in the spring of the year milk is more abundant than in the fall and winter months of the year. When a natural scarcity occurs, competition sets a price higher than those minimum prices fixed by the Milk Control Commission.

Likewise, audits reveal violations of the Wage and Hour Law which occur by reason of the following: During some days of the week labor will be "laid off," and then on Saturday will be called back for some type of emergency work. The Wage and Hour Law provides a certain minimum wage for a forty-hour work week, with a rate fixed at time and half time for labor performed on Saturday. When a laborer did not perform forty hours' labor from Monday to Friday, inclusive, some employers refused to pay them time and half time rates for labor performed on Saturday, unless the employee had performed full forty hours' labor from Monday to Friday, inclusive.

*A.B., Lafayette College, 1917; LL.B., Dickinson School of Law, 1921; Member, Pennsylvania Milk Control Commission, 1936—; Member of the Pennsylvania Bar.

This attempt to offset overpayments against underpayments has raised the legal question as to whether or not these overpayments could be offset against underpayments when the total payments equal or exceed the minimum prices fixed by regulatory bodies.

In a recent case (not reported as yet), *Milk Control Commission of the Commonwealth of Pennsylvania v. Royale Dairy Company* (No. 255 May Term 1948, Court of Common Pleas of Mifflin County), the question was first raised as to whether or not overpayments could be offset against underpayments in paying producers where the overpayments were greatly in excess of the underpayments.

During the licensing year of May 1, 1946, to April 30, 1947, the defendant dealer underpaid producers below the monthly minimum rates fixed by the Pennsylvania Milk Control Commission in the sum of \$322.65. During the same licensing period the defendant milk dealer overpaid producers the sum of \$4844.90 over and above the minimum monthly rates as fixed by the Pennsylvania Milk Control Commission.

On May 24, 1937, the Commission issued its Official General Order B-1, regulating the production, marketing and distribution of milk and milk products in all milk marketing areas in Pennsylvania with respect to methods of payments, fair trade practices and records of dealers.

The question involved in this appeal concerns the power of the Commission to enforce the 12th and 13th paragraphs of its Official General Order No. B-1 which read as follows:

SECTION 12. TERMS OF PAYMENT. Payment to producers, or to a cooperative agricultural association selling milk or cream on behalf of producers, shall be made not later than the last day and the fifteenth day of each month as follows: A payment that approximately covers the value of the milk or cream delivered from the 1st to the 15th inclusive, shall be made not later than the last day of the month. Such payment need not necessarily be accompanied by an itemized statement. All milk and cream delivered from the 16th to the last day of the month, inclusive, shall be paid for not later than the 15th day of the succeeding month, and such payment shall be accompanied by a complete statement to each producer or cooperative agricultural association, rendering in detail a full account of all milk or cream purchased during the entire preceding month, upon such a form as the Commission shall hereinafter prescribe, and shall include any amount due from the period of the first payment. In the event of overpayment for milk of the first period the amount of overpayment shall be deducted. In the event of underpayment for milk in the first period the amount shall be added. The statement shall show such adjustments. This section shall not be interpreted to prevent dealers from paying their producers on a weekly basis. However, said dealers paying on a weekly basis must give to producers a monthly statement as hereinafter prescribed in this Official General Order.

SECTION 13. MONTHLY STATEMENT TO PRODUCERS. All dealers purchasing milk or cream from producers or from cooperative agri-

cultural associations selling milk or cream on behalf of producers, shall render to each producer or cooperative agricultural association, not later than the 15th day of each month, a statement showing in detail a complete and full accounting for all milk or cream purchased during the preceding month.

The Milk Control Law has been held by the Supreme Court to be constitutional. (*Robrer v. Milk Control Board*, 322 Pa. 257; *Colteryahn Sanitary Dairy v. Milk Control Commission*, 332 Pa. 15, 20; *Rieck-McJunkin Dairy Company v. Milk Control Commission of Pennsylvania*, 341 Pa. 153, 156.) It is inevitable that notwithstanding the fact that the Supreme Court has declared the Milk Control Law constitutional, a multitude of other questions have been answered by the court, so far as the administration of the Act is concerned and there still exist numerous questions to be answered by the courts. The question involved in this discussion has had proponents both for and against the right to offset overpayments against underpayments.

The question is of vital financial importance both to producers and dealers as each one cent paid for a quart of standard milk in Pennsylvania represents \$14,000,000 annually. In the instant case, the milk dealer defendant was afforded an opportunity to be heard prior to the promulgation of the official general order, a section of which is above quoted. The defendant did not afford himself of the opportunity to be heard at the hearing as a result of which the above order was promulgated. Neither did he take an appeal within the statutory period required by the Milk Control Law. In this connection Chief Justice Kephart, speaking for the court in *Colteryahn Sanitary Dairy v. the Milk Control Commission*, 332 Pa. 15, pages 23 and 24, stated:

"...It is well settled under the Act of March 21, 1806, P. L. 558, section 13, that where statutory remedies are provided, the procedure prescribed by the statute must be strictly pursued to the exclusion of other methods of redress: *Bowman v. Bum, Inc.* 321 Pa. 516; *Commonwealth ex rel. v. Margiotti*, 325 Pa. 17, 32. This is particularly true of special statutory appeals from the action of administrative bodies: *White et al. v. Old York Road Club et al.*, 318 Pa. 346; *Taylor v. Moore*, 303 Pa. 469; *Ermine v. Frankel et al.*, 322 Pa. 70...."

The reasonableness of the order or its validity was, therefore, not before the court, as the validity of the order had been settled by failure of the defendant to appeal from its provisions. The court called attention to the fact that the preamble of the Milk Control Law clearly defines the purpose of the Legislature in unambiguous language, and, therefore, it was not necessary to resort to the application of the Statutory Construction Act. The Legislature found and recited in the preamble of the Act that due to the highly perishable character of milk, producers must market it immediately after it is produced and generally accept any market at any price. It was found that producers' lack of control over their market is aggravated by the trade custom of dealers not paying until weeks after delivery and keeping producers obligated to continue delivery in order to receive payment for previous

sales. As pointed out by Judge Uttley in the *Royale Dairy* case: "How could the Milk Control Commission have more clearly carried out the intention and purpose of the Legislature expressed in the clause of the preamble last above mentioned than providing the terms of payment to producers for milk and cream set forth in the twelfth and thirteenth paragraphs of the Official General Order B-1 above quoted."

The court also found that milk producers delivered to milk dealers an excess of milk in the spring months of the calendar year. This is inherent in the business of producing milk. When cows are turned out in the lush pastures in the early months of the year, producers deliver to milk dealers an excess supply of milk. It is at this period of the year that milk dealers cannot secure a different market. It is also the period of the year when milk dealers attempt to recoup excess prices paid when competitive forces compelled them to pay a higher price than fixed by the Milk Control Commission. Without notifying milk producers milk dealers pay prices which are less than those minimums fixed by official general orders of the Milk Control Commission. These underpayments over the past years have resulted in a tremendous volume of litigation between milk dealers and the Milk Control Commission, all of which resulted in milk dealers eventually paying producers the prices fixed by the Milk Control Commission or in compromise settlements.

The situation existing between milk producers (farmers) and milk dealers, both from a factual and contractual viewpoint, has been admirably reviewed by President Judge Keller in the case of *Robrer v. the Milk Control Board*, dissenting opinion later adopted as a majority opinion by the Supreme Court in 322 Pa. 257, at pages 264 and 265:

"In the early days of our existence as a State, even in town and urban communities, it was not uncommon for householders to keep their own cow, and the distribution and supply of milk was a comparatively simple matter, largely local in scope and operation. To-day it is expanded so as to be state-wide and even interstate in character. Exacting regulations looking to the public health have already been enacted, which greatly increase the cost of production. Practically no milk is produced for private consumption in town and city, and dairy farming has become a widespread industry, subject already to much regulation and inspection, on which the health and well-being of the people is largely dependent. The milk industry is not only absolutely vital to the health and well-being of the whole people, and especially growing children, but it is also unique and in a class by itself because (1) milk cannot be kept by the producer, but must be delivered to the dealer within twenty-four hours of production; (2) the supply must exceed the demand by a reasonable margin in order to provide for emergencies, and this excess over the normal demand be put to less profitable uses and consequently paid for at a smaller price; (3) the method of payment is based on how it is utilized by the dealer, who reports to the producer the uses made of it; (4) it must be handled with the utmost care from start to finish and is hedged about by a host of sanitary regulations, for the protection of the public, because it is a most fertile field for the growth of bacteria. These facts make the dairy farmer

or producer dependent for his return on the use to which the dealer to whom he delivers it puts it. His commodity and the price he receives for it are so far out of his control that, as a matter of fact, his supposed freedom of contract is largely illusory and at the mercy of the dealer unless the legislature intervenes for his protection; not primarily for his benefit, but only secondarily or incidental to the main purpose of promoting the public welfare by seeing to it that an adequate supply of pure milk is available at a price reasonable to the public, the dealer and the producer."

It is obvious that the Legislature desired to protect the health and welfare of the citizens of this Commonwealth and provide for an adequate supply of milk at all times. To allow milk dealers to pay a price less than the minimums fixed by the Milk Control Commission during several months of the year eventually lead (as the Legislature found) to an inadequate supply of milk on an annual basis as farmers must be assured of a reasonable return during each calendar month of the year rather than only part of the year. A producer or farmer's income must be assured on an annual basis and not on the basis when competition creates a short supply. To determine otherwise would soon create a nullity of the Milk Control Law.

Prior to the decision in the *Royale Dairy* case, above referred to, the Commission had brought action against a milk dealer for paying to his producers less than the minimum prices prescribed by the official general orders of the Commission. The period covered by the audit was for three calendar months and, therefore, the question of offsetting overpayments against underpayments on an annual basis was not involved. The defendant milk dealer in this case attempted to offset overpayments for a period not involved in the audit, a period which was not before the court for review.

Clover Leaf Dairy v. Milk Control Commission, 52 D. & C., 225: In that case Judge Knight, P. J., held:

"The appellant was charged with underpayment between certain dates, and the evidence was properly confined to this period. If the Commission were to introduce evidence of underpayments at times outside the citation period, appellant would have been the first to object, and properly so. Since the entire audit was not before the commission, that body could not make findings of fact based thereon. The appellant argues that if the whole audit were considered it would show overpayments in excess of the underpayments found by the commission to exist during the citation period, and these overpayments so contends appellant should be credited against underpayments.

"We cannot agree with this. This Milk Control Act in Sec. 803 authorizes the commission to fix by official order the minimum prices to be paid by milk dealers to producers. General Order B-1 in Secs. 11, 12 and 13 provides that payment by dealers to producers shall be made on a monthly basis. The act as we read it does not give the commission authority to fix a maximum price to be paid by dealers to producers for their milk, nor so far as we have been informed has the commission establish-

ed any such maximum price. There is nothing then to prevent a dealer from paying more than the minimum price for milk he receives from a producer.

"It seems obvious to us that such voluntary overpayments cannot be set off against established underpayments. Of course if the overpayments were made by inadvertence or mistake, a different situation would be presented, but there is no finding of the commission showing overpayments, nor does the record disclose why the overpayments were made. The commission has found as a fact that the underpayments during the citation period amounted to \$705.03, and there was evidence to support this finding."

In the two cases above cited no appeal was filed. It is presumed, however, that at some future date when the underpayments charged will be many thousands of dollars that the appellate courts of this Commonwealth will be called upon to make the final decision in this question.

A similar situation to the Milk Control Law is the Fair Labor Standards Act. The Fair Labor Standards Act provides for certain minimum wages, the fixing of other minimum wages by the Wage Hour Administrator and the payment of time and one-half for hours in excess of forty in the workweek for employees engaged in inter-state commerce or the production of goods for shipment in inter-state commerce. The courts have uniformly refused to allow employers to offset higher than minimum wages in one week against underpayments in other weeks. This has been decided both in cases involving underpayments of minimum wages and cases involving underpayments of overtime premiums required by the Act.

The establishment of the workweek as the unit for full payment was established by the Wage and Hour Administrator—just as the monthly basis for milk payments was established by the Commission. In one case the pay practices of employers led to the decision. In the other case the pay methods of milk dealers was followed. The Supreme Court of the United States recognized the validity of computing underpayments of statutory wages by workweeks in *Overnight Motor Transportation Co. v. Missel*, 316 U. S. 572, 579, 62 S. Ct. 1216 (1942), where the court said:

"Neither the wage, the hour nor the overtime provisions of sections 6 and 7 on the passage spoke specifically of any other method of paying wages except by hourly rate. But we have no doubt that pay by the week, to be reduced by some method of computation to hourly rates, was also covered by the Act. It is likewise abundantly clear from the words of Section 7 that the unit of time under that section within which to distinguish regular from overtime is the week."

Overtime cases refusing to allow offsetting of heavy pays against light pays include *McMillan v. Wilson & Co.* 212 Minn. 142, 146, 2 N. W. 2d 838 (1942); *Winer v. Eckerling*, 323 Ill. App. 421, 429, 55 N. W. 2d 876 (1944); *Walling v. Blue Mountain Logging Co.*, Civil Action 380 in the United States District Court

for the Western District of Washington, 6CCH Labor Cases 61,466; and *Roland Electrical Co. v. Black*, 163 F. 2d 417, 420-421 (C.C.A. 4, 1947), certiorari denied, 68 S. Ct. 729. In the last case cited, the court said (163 F. 2d at 420-421):

"...payments in excess of the amount required by the statute (Fair Labor Standards Act) to an employee for work done in certain weeks do not relieve the employer from the obligation to compensate the employee for deficiencies in other weeks, or from the obligation to pay him in addition an equal sum for liquidated damages. The opposing argument fails to take account of two principles basic to the Act and buttressed by the force of judicial decision and the persuasiveness of administrative interpretation. Initially, it disregards the now well settled construction that the Act takes as its standard a single workweek consisting of seven consecutive days. See *Overnight Transp. Co. v. Missel*, 316 U. S. 572, 579, 62 S. Ct. 1216, 86 L. Ed. 1682. And even where it is conceded that the employer believed in good faith that he was not covered by the Act, nevertheless, if he fails to pay overtime compensation promptly and when due on any regular payment date, the statutory action for the unpaid minimum and liquidated damages given under Section 16 (b) immediately arises in favor of the aggrieved employee

"Furthermore, the so-called excess payments in certain weeks were not made or intended to be made as compensation for overtime within the contemplation of the Act, but as additional compensation for work done by the employees during the less desirable parts of the day; and it cannot be contended that the increased pay for work during inconvenient hours should now be considered as payment at one and one-half times the regular rate required for excess hours under the statute."

In a minimum wage case where the employer tried unsuccessfully to have payments higher than minimum wages in some weeks credited against underpayments in other weeks, the court said (*Travis v. Ray*, 41 F. Supp. 6 [D. C., W. D. Ky., 1941]):

"The rate per hour should be determined by treating each work-week as a separate unit of time, the excess payments in one work-week, if any, not being credited against any deficit which may exist in another."

In *Walling v. Smarr*, Civil Action No. 717 in the United States District Court for the Middle District of Pennsylvania, apparently reported only in 2 Wage and Hour Cases 579, decided July 15, 1942, the court held that amounts of wages paid in excess of the statutory minimum in one workweek could not be offset against underpayments of the statutory minimum wages in a preceding or succeeding week. The minimum wages had been established by wage orders of the Administrator of the Wage and Hour Division, United States Department of Labor. In its findings of fact, opinion and order, the court said, in part (2 Wage and Hour Cases at 581-582):

"13. In many instances, the amounts which employees earned in one week of a two weeks' pay period amounted to less than the amount arrived at by multiplying the number of hours worked in that workweek

by the applicable minimum hourly rate; whereas the amount earned at piece work rates, in the other workweek of the two week pay period was greater than the amount arrived at by multiplying the number of hours worked in that workweek by the applicable minimum hourly wage rate. In such cases, the defendant failed to pay the whole amount necessary to pay the employee the full amount of the minimum wage for the workweek in which the employee's piece rate earnings were less than the minimum, but instead applied towards the amount necessary to make up the minimum wage the amount by which the employee had exceeded the minimum wage by the employee's piece rate earnings for the other week of the two week pay period, and only paid to the employee the difference, if any, between the amount the employee was short in one week of the two week pay period and the amount the employee earned over the minimum in the other week of the two weeks' pay period.

"14. Defendant did not pay his employees at least the applicable minimum for every hour worked by said employees, but averaged their piece rate earnings over a two week pay period.

"15. Defendant because of his method of averaging the earnings of his employees over a two weeks' pay period, in many instances, failed to pay his employees the amount of the applicable minimum for the workweek which the employee is entitled to by the Act.....

"It is ordered, adjudged and decreed that the defendant, his agents, servants and employees and attorneys and all other persons acting or claiming to act in his behalf and interests be, and they hereby are, permanently enjoined and restrained from:....

"(2) During the period from the date of this judgment to October 24, 1945, paying any of his employees (except those for whom special certificates have been issued and are in effect) employed in or about his place of business at New Cumberland, Pennsylvania, wages for any workweek at rates less than 40 cents (40c) an hour, the rate of the current wage order for the women's apparel industry which became effective September 29, 1941: or... at the rate...prescribed in any applicable order of the Administrator of the Wage and Hour Division, United States Department of Labor, issued pursuant to the provisions of Section 8 of the Act, whichever is lower;...."

Unquestionably the offsetting of overpayments against underpayments will be raised many times during the next decade in other fields of administrative law than the fields discussed, Milk Control Law and Labor Law. The increasing complication of our social life, rapidity of transportation and increased intercourse between the states, all have a tendency to increase the field of administrative law. The inevitable result will mean greater centralization of power in the National Government and the diminishing of the power in state government. Unquestionably the trend of modern administration of law will increase not only the number of administrative bodies but the power of administrative bodies. The question above discussed will become of vital importance if the modern growth of administrative bodies continues at the rapid rate that has continued since the turn of the century.