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The President's Reemployment Agreement

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PROMULGATION OF THE AGREEMENT

Early in the summer of 1933 the National Recovery Administration (NRA) began the task of improving the standards of labor and of competition. The Administration planned that codes for different industries would be drafted with proper regard for the peculiar problems inherent in each industry. Representative groups of some industries immediately submitted codes to the Administration, but in the case of many industries which were not well organized by trade or industry associations, there was delay in forming representative groups qualified to propose codes. When a code was proposed, considerable time elapsed before it could be put through the code making process and approved. A public hearing was scheduled to discuss the code, provision by provision. At the hearing the three NRA advisory boards for labor, industry, and consumer participated in the deliberations and submitted suggestions. Generally several revisions were necessary before a code could be submitted to the President for his approval.[1] By the time the

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[1] For a discussion of the process of code making see, Gallagher, Government Rules Industry, 32-50 (1934); and Dearing, Homan, Lowin, and Lyon, The A.B.C. of the NRA 77-92 (1934).

first code was approved in July, 1933, it became apparent that code making, if properly done, would be a slow process requiring months of study and drafting to bring codes into acceptable form for a substantial majority of the industries.[2] Meanwhile a speculative increase in production during the summer of 1933 threatened a race of production against increased wages, which, if permitted to continue, might have resulted in glutted markets by the time wage increases were effected for some of the industries concerned. Furthermore, the inevitable slowness of the code making process threatened to delay any contribution which NRA might make to alleviate the unemployment situation by a reduction in the hours of labor.[3] Thus it became important that a few simple provisions of general applicability be put into effect immediately, anticipating the formulation of codes for the different trades and industries.

[2] The first code was the Cotton Textile Code, approved July 9, 1933.

Section 4(a) of the National Industrial Recovery Act authorizes the President to enter into voluntary agreements with persons engaged in trade or industry if, in his judgment, such agreements will aid in effectuating the purposes of the Act. Under the authority of this section the President, on July 27, 1933, issued an invitation to the employers of the country to enter into individual agreements with him in accordance with a prescribed form which is known as the President's Reemployment Agreement, (PRA).

Scope of the Agreement

The Agreement which some 2,300,000 employers[4] signed can be summarized as follows:[5]

(1) Elimination of child labor.

[3] Dearing, Homan, Lowin, and Lyon, The A.B.C. of the NRA, 60-61 (1934); Johnson, The Blue Eagle from Egg to Earth, 253-258 (1935).

[4] Condensed Information Based on the Operation of the National Industrial Recovery Act (1935), prepared by the Research and Planning Division of NRA.

[5] The numbering in the summary corresponds to numbering in the PRA.

(2) & (3) Limitation of the weekly hours of labor under varying circumstances from 35 to 40 hours.

(4), (5), & (6) Establishment of minimum wages under varying circumstances from $12 to $15 per week, and 30c to 40c per hour.

(7) Equitable adjustment of wages which are higher than the minimum.

(8) Prohibition against the use of subterufge to defeat the purposes of the Agreement.

(9) Prohibition against undue price increases and against profiteering.

(10) Support of other establishments which signed the Agreement.

(12) Adjustment of existing contracts for goods not yet delivered to make appropriate allowances for increases in cost to sellers of goods who signed the PRA.

(13) Termination of the Agreement upon approval of a code to which the signer is subject. Upon the submission of a code to which the signer would be subject, any provisions of the proposed code might, with the approval of the Administration, be substituted for any terms of the Agreement.

(14) Procedure for obtaining an exemption where a provision works a hardship. Section 7(a) of the Act (collective bargaining with employees) and Section 10(b) of the Act (power of the President to cancel or modify his approval) incorporated by reference.

The Agreement is concise. It is composed of general provisions the application of which to the normal situation is readily understandable. It was important that the Agreement be readily comprehensible to the business men who were to sign it. However, like other general rules, the provisions of the PRA have required construction and interpretation in their application to some situations which were not provided for in detail. For example, the Administration found it necessary to issue interpretations enumerating types of employees which came within the meaning of the words "service employees" as used in paragraph (2) of the Agreement, and the specific types of "professional persons" which came within the meaning of those

words as used in paragraph (4) of the Agreement.[6] The application of certain portions of the Agreement to part time workers was set forth in another interpretation which stated that the "minimum wage for a part time worker in an employment described in paragraph (2) of the Agreement is a wage such that if the employee worked at that wage for a full week of 40 hours, he would receive the minimum weekly wage prescribed for him by the Agreement."[7]

Although general interpretations of the type just discussed greatly facilitated the administration of the PRA, a considerable number of cases have required individual rulings. A case of the latter type was recently heard by the Industrial Appeals Board.[8] In this case a meat packing company which raised cattle in conjunction with its packing business had signed the PRA. The Agreement of the company covered only its industrial operations and not its agricultural operations.[9] The company maintained four feed lots where cattle arriving from the ranches were kept for periods varying from several weeks to several months until they were in proper condition for slaughtering. One of the feed lots was located two blocks away from the

[6] NRA Bulletin No. 4, Interpretations No. 8, 12, and 19 (1933). Paragraph (2) of the PRA provides in part, "Not to work any accounting, clerical, banking, office, service, or sales employees (except outside salesmen) in any store, office, department, establishment, or public utility, or on any automotive or horse-drawn passenger, express, delivery, or freight service, in any other place or manner, for more than 40 hours in any 1 week. . . . " Paragraph (4) of the PRA provides in part, "The maximum hours fixed in the foregoing paragraphs (2) and (3) shall not apply to employees in establishments employing not more than two persons in towns of less than 2,500 population which towns are not part of a larger trade area; nor to registered pharmacists or other professional persons employed in their profession; . . . "

[7] NRA Bulletin, No. 4, Interpretation No. 10 (1933).

[8] The Industrial Appeals Board is a reviewing agency within NRA. It hears appeals which are made to the National Industrial Recovery Board from the decisions of officers or agencies of NRA.

[9] According to Interpretation No. 6, NRA Bulletin No. 4 (1933), Agricultural labor is one of the types of labor not intended to be covered by the PRA. However, NRA subsequently took the position that a farmer who complied with the terms of the PRA as to his agricultural labor was entitled to the Blue Eagle. See General Explanation 2, NRA Bulletin No. 4 (1933).

packing plant; the others were several miles away. In addition to these feed lots and immediately adjacent to its slaughter house the company maintained concentration corrals into which cattle for slaughter were concentrated after they had been fattened and conditioned. Cattle were not kept in concentration corrals more than forty-eight hours. It was conceded that employees working in these corrals were engaged in a phase of the industrial business of meat packing, but there was disagreement as to the proper classification of the employees who worked in the feed lots. The question arose as to the character of work in the feed lot nearest the packing house. Was this a part of the business of raising cattle, and so an agricultural function, or was it a part of the packing business, and so industrial, and within the Agreement? The Industrial Appeals Board decided that the feed lot employees should be classified as agricultural employees.[10]

Cases in which there has been a change in the ownership of the business since the time of the signing of the PRA have presented some difficult problems of construction. It is clear that if a person who has signed the PRA sells his business, the purchaser does not, merely because of the purchase, incur the obligations of the PRA. However, if the purchaser had been subject to the PRA in the operation of an establishment prior to the purchase, he might continue to be subject to the terms of the Agreement in the business which he purchased. The determination of these cases depends on the similarity of the two enterprises. If a person subject to the Agreement simply moved his business from one block to another, his PRA liability would continue. On the other hand if he changed from one type of business to another his liability would ordinarily terminate. The test is one of substantial change of identity. This same general standard is used in the situations where the type of ownership is changed, but the original owner retains a portion of the title to the business, as where a sole proprietorship is

[10] Industrial Appeals Board, Decision No. 53 (1935).

changed to a partnership; or where a partnership is changed by increasing or decreasing the number of partners.

At the time of issuance of the PRA it was recognized that some of the provisions might tend to work a hardship in particular instances and perhaps in entire industries, therefore, the Agreement made express provision for the granting of exceptions.[11] The ordinary exception for an individual member of industry has been handled on the basis of the merits of the petition for the particular applicant.

Another type of exemption of more general application is authorized in paragraph 13 of the Agreement. Under this provision, when NRA found that the wage and hour provisions of a code which had been submitted were within the spirit of the PRA, the Administration would authorize the industry to operate under those code provisions rather than under the corresponding provisions of the Agreement. By October 14, 1933, substitution of this type had been approved for some three hundred and fifty industries.[12] By this means of substituting the provisions of a proposed code for the somewhat general provisions of the Agreement, the particular needs of an industry could be met. From the employer's standpoint, the substituted provisions were, in general, less burdensome than the original provisions of the PRA, and consequently, a signer ordinarily preferred operating under the substituted provisions. However, the Administration did not wish to modify the Agreement against the wishes of any individual signer, and so any such person was privileged to continue operating under the original provisions, if he so desired.

Probably the broadest exemption was one granted by an Exeuctive Order which relieved from PRA obligation, all employers in towns of less than 2,500 who were engaged only locally in retail trade or local service industries and who do not

[11] Paragraph 14 of the PRA.

[12] NRA Bulletin No. 6 (1933). By February 1, 1935, 546 codes and 186 supplements had been drafted and approved.

employ more than five persons.[13] This exemption was designed to relieve small business enterprises in small towns from fixed obligations which might work a hardship.

Duration of the Agreement

Paragraph 13 of the PRA provides that the Agreement shall cease "upon the approval by the President of a code to which the undersigned is subject." The intent of this paragraph was that the PRA obligations would terminate when code obligations were assumed, but most codes were approved by the President several days before they took effect in the sense of subjecting the numbers of the industry to the provisions of the code. The Administration construing this paragraph in accordance with the purpose for which it was designed, has regarded the PRA as continuing its force until a code takes effect even though the formal act of approval by the President takes place at some earlier date.

An interesting problem arose under Paragraph 13 in connection with a code which contained the unusual provision that it was to become binding on each member of the industry only after the individual member had signified his assent.[14] The provisions of this code were in general more stringent than the provisions of the PRA. A few members of the Industry indicated the desire to continue under the PRA, and displayed PRA insignia, even though there was a code for their industry. It was the view of the Administration that the PRA was a temporary expedient designed to meet the situation which existed prior to the taking effect of a code for the industry. Accordingly, after the code had taken effect for this particular industry, a member of the industry, unless he complied with the code was not cooperating fully with the Administration, and should not be permitted to continue the display of PRA insignia which indicated such cooperation.

[13] Executive Order No. 6354 (1933).

[14] Code of Fair Competition for the Daily Newspaper Publishing Business, approved February 17, 1934.

The Agreement provided for its termination on December 31, 1933, if it did not terminate earlier because of the taking effect of a code to which the signer was subject.[15] At the time the PRA was written, it was believed that practically all industries would be under codes by the end of 1933. By December, 1933 it was apparent that code making would not be completed for some time and that an extension of the PRA was highly desirable. On December 19 of that year the President issued an Executive Order by the terms of which he offered to enter into an extension of the PRA for an additional four months from January 1, 1934 to April 30 of the same year.[16] An employer who had signed the PRA could accept the offer of extension simply by displaying the Blue Eagle after January 1, 1934. A persons who had not signed the PRA could accept the offer by signing the Agreement. On April 14, 1934, the President issued another Executive Order for the extension of the PRA, similar to the Order of December 19, except that the latter Order provided for an indefinite extension.[17] Members of several industries for which codes have never been approved are still operating under the PRA.[18]

Under these Executive Orders it has been possible for a person who had signed the Agreement to permit it to lapse either on December 31, 1933 or April 30, 1934 and then to revive it at some subsequent date simply by displaying the Blue Eagle. During the period of lapse the signer is not obliged to comply with the provisions of the Agreement, but he might be deprived of the privilege of using NRA insignia because of a violation during the period when the Agreement was in effect. This deprivation prevents future display and renewal of the Agreement unless the violation is adjusted to the satisfaction of the Administration.

[15] Paragraph 13 of the PRA.

[16] Executive Order No. 6515 (1933).

[17] Executive Order No. 6678-A (1934).

[18] Two of the more important industries for which a code has not as yet been approved are the Fluid Milk Industry and the Meat Packing Industry.

In one or two instances codes have taken effect and then been stayed.[19] If this had occurred before expiration date of PRA, it is quite apparent that inasmuch as the Agreement had terminated, it could not have been revived except by a new signing. But where a code has been stayed since the first of January, 1934, it has been entirely possible for those members of the industry, who were formerly subject to the PRA to revive their liability under this Agreement by continuing to display the Blue Eagle. A continued display of the code Blue Eagle after knowledge that the code has terminated is construed as a representation that the displayer is complying with the PRA and an acceptance of the offer of extension contained in the President's Order. A variation of this problem was presented by a situation in which there had been a retroactive stay.[20] In this case a code which had taken effect in February, 1934 was allowed to continue nominally in effect until May, 1934. During the first two and one-half months of the code the machinery which it prescribed for its administration was not adequately set up. The code was then stayed retroactively to the date of its inception. The stay did not, however, affect the code with respect to its operation after May, 1934. The question was raised as to whether members of the industry who had signed the PRA prior to the code and who had displayed the Blue Eagle after the first of January, 1934, were subject to the PRA during that period in which the code was retroactively stayed. It was argued that as the PRA was to terminate when the code took effect, the life of the PRA was extended by a retroactive stay which moved the effective date of the code forward. The Administration took the position that the code had, in fact, terminated the Agreement in February, and that the liability of the Agreement could not be revived without some new act of assent.

[19] See NRA Administrative Order 480-4 (1934) staying the code for the Structural Steel and Iron Fabricating Industry.

[20] NRA Administrative Order 278-11 and 278-18 (1934) staying the code for the Trucking Industry.

Enforcement of the Agreement

NRA has sought to secure voluntary compliance with the PRA by education and persuasion. Where violations have occurred, the Administration has sought to induce the violator to make restitution to parties injured by the violation insofar as restitution is practicable and equitable. Although the National Industrial Recovery Act makes no specific provision for the enforcement of the PRA, there are three sanctions which can be used in instances where a violator fails to make a proper adjustment of the violation.[21] These sanctions are:

(1) Deprivation of the privilege of using NRA insignia.

(2) Deprivation of the privilege of participating in Government contracts.

(3) Civil suits by employees and others who are beneficiaries under the Agreement.

The effectiveness of NRA insignia as a compliance device has varied from time to time and from place to place, but from an administrative standpoint it has been desirable to have a uniform rule with respect to the privilege of using insignia. It has been the policy of the Administration to deprive the signer of his privilege of using NRA insignia in all cases where a violation is found and an adjustment is not made. Some question has been raised with reference to the application of this policy to a situation in which a violator has become subject to a code which superseded his Agreement. If he is complying with the code should he be deprived of his code insignia because of his violation of the PRA? The Administrative Order dealing with the power to deprive a person of insignia states "a person may be publicly deprived of the right to display any Blue Eagle or other NRA insignia if he violates any provisions or the spirit and intent of any code, Presidential Agreement, or regulation,

[21] Authority for the various Executive and Administrative Orders on the privilege of using NRA insignia and on participation in Government contracts is found in Section 10 (a) of the National Industrial Recovery Act. This section permits the President to prescribe such rules and regulations as may be necessary to carry out the purposes of the Act.

duly prescribed or approved."[22] Under this Order the Administration has taken the position that it is proper to deprive a person of code insignia for the violation of the PRA. An exception is made in the case of NRA labels. Labels are used only pursuant to specific code provisions.[23] These provisions generally permit the use of labels by any person subject to the code who is complying with the terms of that code. Such a provision would not permit a person to be deprived of his privilege of using labels because of a violation of another code or because of a violation of the PRA. Insofar as this is in conflict with the Administrative Order on deprivation of insignia privileges, the code provision takes precedence. Code provisions are not subject to modification by Administrative Order except where the Administrative Order is issued pursuant to a delegation of the President's power to modify codes.[24]

Under the terms of an Executive Order participation in government contracts is limited to those who are complying with codes to which they are subject or to the terms of the PRA, if there is no code for that particular trade or industry. This order applies to all invitations for bids promulgated by any agency of the United States to all contracts and purchase orders of such agencies and to all contracts and purchase orders authorized by any State, municipal corporation, local subdivision, person, or corporation in connection with projects to be carried on in whole or in part with funds loaned or granted by the Federal Government.[25] The administration of such agencies as the Army, Navy, Public Works Administration, Federal Emer-

[22] NRA Administrative Order X-22 (1934).

[23] See for example, Code of Fair Competition for the Cotton Garment Industry, Article XII (1933). The label is a particularly effective enforcement device in the garment industries. The Retail Code contains a provision prohibiting a retailer from purchasing articles without NRA labels when the articles are produced under a code which requires labels. Retail Trade Code, Article IX, Section 2 (1933).

[24] Under Section 10 (b) of the Act the President has the power to cancel or modify any order or approval under the Act. With respect to major codes, this power has not been delegated. See Executive Order 6543-A (1933).

[25] Executive Order No. 6646 (1934).

gency Relief Administration, and the Reconstruction Finance Corporation involves the use of Government funds in a great variety of businesses and industries. Through the cooperation of the various Government agencies the use of Government funds has become an important instrumentality for the securing of compliance with the PRA as well as with codes.

The action taken by NRA with respect to insignia and Government contracts does not affect any power of an employee to bring civil suit. Generally the civil suits brought under the Agreement have been by employees who have sought to recover the difference between the amount which they were paid and the amount which they should have been paid according to the terms of the Agreement which their employers had signed. In a large majority of the cases of this type the courts have permitted the employees to recover.[26] Most of the decisions and opinions, where opinions have been written, show that courts have taken the view that the PRA is a contract, and that the employees of a signer are third party beneficiaries of that contract. Several courts have regarded the employee as the donee beneficiary of the contract, pointing out that in third party beneficiary contracts, no consideration need flow from the beneficiary to the promisor.[27]

[26] Most of these actions have been brought in Municipal or Justice of Peace Courts and very few cases have been carried to higher courts. Godkin v. Jett, Mun. Ct., Hot Springs, Ark. (1933); Chipa v. Regas, J. P. Ct., Tucson, Ariz. (1933); Beaton v. Avondale, Dist. Ct., 2d Jud. Dist., Colo. (1933); Tedford v. Taylor, J. P. Ct., Kansas City, Mo. (1934); Fields v. Wysocki, City Ct., E. St. Louis, Ill. (1934); Govens v. Peterson, Mun. Ct. Polk Co., Iowa (1933); Johnson v. Ben Shrago & Sons, City Ct., Hammond, Ind. (1934); Bethel v. Karras, C. P. Ct., Detroit, Mich. (1933); Walter v. Hyman-Rose Tobacco Co., City Ct., Buffalo, N. Y. (1934); Thompson v. Cohen, Mun. Ct., Greensboro, N. C. (1934); Saranita v. Imbrosciano, Mun. Ct. of Cleveland, Ohio, No. 715779 (1934); Petruska v. Farina, Co. Ct., Allegheny Co., Pa. No. 368 (1934); Nagel v. Mades, Mun. Ct., Mitchel, S. Dak. (1934). These cases and many others are summarized in NRA Bulletin No. 27 (1934).

[27] DeVries v. Mid-West Walkathon Ass'n Inc. et al. Mun. Ct., Black Hawk Co., Iowa, No. 16281-A (1934); Petruska v. Farina, Co. Ct., Allegheny Co., Pa., No. 368 (1934); Greleck v. Amsterdam, Mun. Ct., of Philadelphia, Pa., January Term, 1934, No. 1105.

Occasionally a question has been raised as to the existence of consideration between the principals to the Agreement. The courts which have considered this question have regarded the privilege of using NRA insignia as sufficient consideration to support the contract.[28] Although no provision was made in the Agreement for the use of insignia, persons who signed the Agreement were given the privilege of using distinctive emblems which signified their cooperation with the Recovery program and represented that they were complying with the terms of the Agreement. The benefit which a person might derive by representing to the public generally, by means of authenticated insignia, that he was complying with the terms of the Agreement would seem to be sufficient to support the Agreement on a contract theory.

Even if the contract theory were not accepted, recovery in civil actions by employees would seem to be entirely correct. If the PRA is not a contract, it is a legislative device promulgated for the benefit of employees of those persons who signed the Agreement. Any member of the class intended to be benefitted by the legislation should be permitted to recover for a breach of the legislation on a quasi contractual theory. This conclusion is based on the assumption that the position of an employee under the PRA is similar to the position of an employee under a code. It has been held that employees who did not receive the wages prescribed by a code to which their employer was subject, might recover the difference between the amount which they were paid and the amount which was prescribed by the code even though the National Industrial Recovery Act makes no express provision for such suits.[29]

[28] DeVries v. Mid-West Walkathon Ass'n Inc. et al., Mun. Ct. Black Hawk Co., Iowa, No. 16281-A (1934); Tedford v. Taylor, J. P. Ct., Kansas City, Mo. (1934).

[29] Laney v. Milner Hotel Co., J. P. Ct., Grand Rapids, Mich. (1934); Laux v. Smith et al., Mun. Ct., Marion Co., Ind., No. 51647 (1934); and see Billig, Fridinger, and Herrick, The Workers Day in Court. 3 George Washington L. R. 657 (1934).

The President's Reemployment Agreements differ from the codes which have, in general, superseded them. The Agreements are voluntary obligations assumed by the particular employers who signed them and they contain practically no fair trade practice provisions to compensate the employer for the contracted labor concessions. Notwithstanding these facts, some 2,300,000 separate Agreements, covering about 16,300,000 employees, were negotiated.[30] This general assent to the PRA enabled the Administration to effectively meet the problems arising out of the unavoidable delay in the completion of codes and to put immediately into operation on a national basis three of the fundamental principles of the NRA for social betterment, namely, the elimination of child labor, fixing of minimum wages, and setting maximum hours of labor.

[30] See n. 4, supra.