

**U.S. Department of Labor**

Office of Administrative Law Judges  
304A U.S. Post Office and Courthouse  
Cincinnati, Ohio 45202



DATE: JUN 12 1987

CASE NO. 84-CLA-20

IN THE MATTER OF

WILLIAM E. BROCK, SECRETARY  
OF LABOR, UNITED STATES  
DEPARTMENT OF LABOR,

PLAINTIFF

VERSUS

HARDEE'S FOOD SYSTEMS, INC.

RESPONDENT

APPEARANCES:

Michele M. Fox, Esq.  
Claire Brady White, Esq. (On Brief)  
U. S. Department of Labor  
Office of the Solicitor Chicago, Illinois  
For the Plaintiff

James M. Coleman, Esq.  
Thomas W. Power, Esq.  
Power, Coleman & Cocciardi  
Washington, D.C.  
For the Respondent

BEFORE: RUDOLF L. JANSEN  
Administrative Law Judge

**DECISION AND ORDER**

This proceeding arises under the Fair Labor Standards Act of 1938, as amended. 29 U.S.C. Section 201 et seq., (hereinafter referred to as "the Act"), and in accordance with the regulations promulgated thereunder at 29 C.F.R. Parts 570, 579, and 580. Respondent Hardee's Food Systems, Inc. (hereinafter referred to as "Hardee's"), requests review of the imposition of a

civil money penalty imposed pursuant to Section 16(e) of the Act and Titles 29 C.F.R. 570, 579, and 580 for alleged violations of the Child Labor Provisions of the Act.

Following an investigation, the Wage and Hour Division of the Department of Labor, on June 23, 1983, assessed a civil money penalty against the Respondent in the amount of \$5,150.00 for the employment of thirteen minors contrary to the Child Labor Provisions of the Act and Regulations. In a letter dated June 29, 1983, the Respondent filed exceptions to the assessment of the penalty, denied all liability for violations of the Act, and demanded a hearing on the matter. On April 6, 1984, the Deputy Assistant, Regional Administrator for the Wage and Hour Division, United States Department of Labor, referred the matter to the Chief, Administrative Law Judge for a final determination of the violations for which the penalty was imposed.

On October 25, 1985, a formal hearing on the merits was scheduled to be held on December 16, 1985 in South Bend, Indiana. Pursuant to two telephone conferences held on December 9, 1985 and December 12, 1985, it was agreed that the case would be submitted based upon a full stipulation of all relevant facts. As a result of the agreement to fully stipulate all facts in this case, the formal hearing was canceled.

#### FINDINGS OF FACT

The parties submitted a Stipulation of Facts with ten exhibits attached which forms the record for the Decision and order to be rendered in this matter<sup>1</sup>. Based upon the Stipulation of the

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<sup>1</sup> The Stipulation, together with the ten exhibits incorporated therein, are received into evidence. The case was fully stipulated based upon agreement of the parties as codified in my Pre-Hearing Telephone Conference Memorandum dated December 12, 1985. I noted in writing the Decision in this case that various documentary materials which were relevant to the issues involved had not been stipulated. I, therefore, directed the parties to execute a stipulation of these materials. The parties could not agree on this stipulation and Plaintiff subsequently filed a Motion For Leave To File Supporting Documents. That Motion is hereby granted. I do note the objection of Respondent to these materials. However, I also note that Plaintiff included these documents in his original brief and Respondent argued their substantive content without objecting to their admissibility into the record. Therefore, I conclude that they were omitted inadvertently and should be admitted into evidence. The following additional Plaintiff's Exhibits are received into evidence:

Plaintiff's Exhibit 1. (PX 1):  
C.F.R. Part 4 file August 15, 1962).

Plaintiff's Exhibit 2: (PX 2):  
Letter date August r to Daniel P. Moynihan from  
Arthur W. Motley.

parties and the entire record, I make the following findings of fact:

1. Respondent, Hardee's Food Systems, Inc., is and at all times relevant to this action has been a North Carolina corporation engaged in the operation of restaurant establishments known as Hardee's Restaurants.
2. At all times relevant to this action, Respondent has been an enterprise engaged in commerce or in the production of goods for commerce within the meaning of sections 3(r) and 3(s)(2) of the Fair Labor Standards Act of 1938, as amended, 29 U. S. C. Sections 203 (r) and 203 (s) (2) , (hereinafter the "Act").
3. At all times relevant to this action, Respondent, Hardee's Food Systems, Inc.# operated a restaurant at 104 W. Hiveley Street, Elkhart, Indiana.
4. By notice dated June 23, 1983, from the Area Director, Wage & Hour Division, Employment Standards Administrations United States Department of Labor, a civil money penalty was assessed against the Respondent pursuant to Section 16(e) of the Act, as amended, 29 U.S.C. Section 216(e). (Stip. Exh. 1)
5. Attached to the notice of civil money penalty dated June 23, 1983, was a notice to the Respondent listing the names of each minor alleged to have been employed in violation of the Act and the specific amount assessed by the Employment Standards Administration with respect to each minor listed on the notice. (Stip. Exh. 2)
6. On June 29, 1983, Respondent timely filed with the Administrator of the Wage a Hour Division, Employment Standards Administration, United

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Plaintiff's Exhibit 3, (PX 3):

Letter dated May 24, 1962 to Mr. A. W. Motley from Thomas J. Lloyd, Amalgamated Meat Cutters and Butcher Workmen of America.

Plaintiff's Exhibit 4, (PX 4):

Explanatory Bulletin for Use in Applying Hazardous Occupations Order No. 10, March 1963.

Plaintiff's Exhibit 5, (PX 5):

Report on the Advisability of Amending Hazardous Occupations Order No. 10, dated July 1963.

Plaintiff's Exhibit 6, (PX 6):

Child Labor Civil Money Penalty Report (Form WH-266) dated June 21, 1983.

States Department of Labor, an exception to the civil money penalty assessment in its entirety. Such exception was later supplemented on April 12, 1984, wherein Respondent took exception to the determination that the alleged violations had occurred, as well as to the amounts of the respective civil money penalties assessed for each such alleged violation.

7. The parties have engaged in discovery in an effort to narrow and define the precise legal and factual issues involved herein. As a result of such discovery, the parties have reached agreement and will stipulate herein as to certain facts forming the basis for some of the alleged violations contained in the above-referenced assessment.
8. The Plaintiff hereby withdraws all assessments contained in its original notice for alleged violations involving the following individuals:
  - Angela Bonds
  - Laurie C. Raines
  - Rhonda Humphrey
  - Carmela Ritucci
  - Mike Snider
9. At all times relevant to this action, the hours of operation at Respondent's restaurant establishment in Elkhart, Indiana were normally 6:00 A.M. until 12:00 P.M. midnight, serving breakfast, lunch and dinner.
10. Respondent's restaurants are engaged in the business of retail sale of food to customers for their immediate consumption either on or off the premises of the restaurant. Respondent's lunch and dinner fare includes hot roast beef sandwiches. In preparing hot roast beef sandwiches for customers, certain of Respondent's employees slice a round of pre-cooked roast beef utilizing an automatic meat slicer.
11. The automatic meat slicer used in the slicing of roast beef at Respondent's restaurant establishments is the Berkel Model 818. This meat slicer is driven by a 1/3 horsepower electric motor, and automatically slices 45 to 80 slices per minute by means of a stainless steel, hollow ground knife. (Stip. Exh. 3)
12. At all times relevant hereto, Respondent has had a company policy not to allow employees under the age of eighteen to operate the meat slicer, and above the Berkel Model 818 slicer Respondent posted a notice directing that no one under the age of eighteen years is to operate the slicer.
13. Respondent is not now, nor has it ever been, engaged in the business of

slaughtering animals or meat packing, processing or rendering operations.

14. During the period August 7, 1976 through October 12, 1979, Tom Lyn Braddock was employed by Respondent at its restaurant establishment in Elkhart, Indiana.
15. Tom Lyn Braddock's date of birth, as stated on "Employment Certificate - Ages 14 and 15", is December 29, 1962. (Stip. Exh. 4) A copy of the Certificate was, at all times relevant to this action, in the possession of the Respondent.
16. During the period August 7, 1978 through December 29, 1978 Tom Lyn Braddock, a fifteen year old, on occasion worked past 7:00 P.m. on a day when school was in session.
17. During the period October 20, 1978 through December 7, 1978 Judy Higgins was employed by Respondent as a cashier at its restaurant establishment in Elkhart, Indiana.
18. Judy Biggins' date of birth as stated on "Employment Certificate - Ages 14 and 15", is July 11, 1963. (Ship. Exh. 5) A copy of the Certificate was, at all times relevant to this action, in the possession of the Respondent.
19. During the period October 20, 1978 through December 7, 1978 Judy Higgins, a fifteen year old, on occasion worked after 7:00 P. M. and, on one occasion, worked as late as 9:00 P.M.
20. During the period October 14, 1978 through December 14, 1978, Terri Hirsch was employed by Respondent as a cashier at its restaurant establishment in Elkhart, Indiana.
21. Terri Hirsch's date of birth, as stated on "Employment Certificate - Ages 14 and 15", is May 17, 1963. (Stip. Exh. 6) A copy of the Certificate was, at all times relevant to this action, in the possession of the Respondent.
22. During the period October 14, 1978 through December 14, 1978 Terri Hirsch, a fifteen year old, on occasion worked after 7:00 P.M. and, on one occasion, worked as late as 9:00 P. M.
23. During the period October 14, 1978 through December 14, 1978, Terri Hirsch, a fifteen year old, on occasion worked more than 18 hours per week when school was in session and, on one occasion, worked as many as 29 hours one week.

24. During the period February 7, 1979 through May 1, 1980 Christine Kime was employed by Respondent at its restaurant establishment in Elkhart, Indiana.
25. Christine Kime's date of birth, as stated on "Employment Certificate - Ages 14 and 15", is December 19, 1963. (Stip. Exh. 7) A copy of the Certificate was, at all times relevant to this action, in the possession of the Respondent.
26. During the period February 7, 1979 through December 19, 1979, Christine Kime, a fifteen year old, on occasion operated Respondent's Berkel Model 818 meat slicer to slice beef for roast beef sandwiches.
27. During the period August 28, 1978 through January 20, 1979 Kimberly J. Note was employed by Respondent at its restaurant establishment in Elkhart, Indiana.
28. Kimberly J. Note's date of birth, as stated on "Employment Certificate - Ages 14 and 15", is March 12, 1963. (Stip. Exh. 8) A copy of the Certificate was, at all times relevant to this action, in the possession of the Respondent.
29. During the period August 28, 1978 through January 20, 1979 Kimberly J. Note, a fifteen year old, on occasion worked after 7:00 P.M. and, on one occasion, worked until 11:53 P.M. at Respondent's restaurant establishment.
30. During the period November 1, 1979 through May 1, 1980 Diana Rosenau was employed by Respondent at its restaurant establishment.
31. Diana Rosenau's date of birth is August 16, 1963 and was contained on her application for employment at Respondent's restaurant establishment.
32. During the period November 1, 1979 through May 1, 1980 Diana Rosenau, a sixteen year old, operated Respondent's Berkel Model 818 meat slicer to slice beef for roast beef sandwiches. During this period she operated the meat slicer approximately one half (1/2) hours per week.
33. During the period August 20, 1979 through May 28, 1980 Linda Schultheiss was employed as a cook at Respondent's restaurant establishment in Elkhart, Indiana.
34. Linda Schultheiss' date of birth is May 26, 1962 and was contained on her application for employment at Respondent's restaurant establishment.

35. During the period August 20, 1979 through May 26, 1980 Linda Schultheiss, a seventeen year old, operated Respondent's Berkel Model 818 meat slicer to slice beef for roast beef sandwiches. During this period she operated the meat slicer approximately two (2) hours per day, four to five days per week.
36. During the period November 29, 1978 through February 24, 1980 Stephanie Voyles was employed by Respondent at its restaurant establishment in Elkhart, Indiana.
37. Stephanie Voyles' date of birth, as stated on "Employment Certificate - Ages 14 and 15", is February 25, 1963. (Stip. Exh. 9) A Copy of the Certificate was, at all times relevant to. this action, in the possession of the Respondent.
38. During the period November 29. 1978 through February 25, 1979 Stephanie Voyles, a fifteen year old, on occasion worked after 7:00 P.M. at Respondent's restaurant establishment.
39. On May 13, 1983, Plaintiff and Respondent entered into a Stipulation of Compliance with respect to civil money penalties for alleged child labor violations occurring at certain restaurants in Kentucky. (Stip. Exh. 10)
40. On August 3, 1962, a letter was directed from Arthur W. Motley, the Director, Bureau of Labor Standards, to Daniel P. Moynihan. who was the Special Assistant to the Secretary of Labor which concerned a proposed extension of Hazardous - Occupations Order No. 10 to retail and service establishments. (PX 2).
41. On May 24, 1962, a letter was directed by Thomas J. Lloyd, President of the Amalgamated Meat Cutters and Butcher Workmen of America, to A. W. Motley, the Director, Bureau of Labor Standards. (PX 3) The purpose of this letter was to allow Mr. Lloyd to express his support to the proposal for rescinding the retail exemption from Order No. 10.
42. In March of 1963, the Bureau of Labor Standards for the use of the Wage and Hour and Public Contracts Divisions, prepared an explanatory bulletin for use in applying Hazardous - Occupations Order No. 10. (PX 4) The purpose of the bulletin was to assist in administering Hazardous - Occupations Order No. 10 by explaining the types of establishments subject to the Order and by describing those occupations to which the 18-year age minimum applies.
43. In July of 1963, the Bureau of Labor Standards prepared a report on the

advisability of amending Hazardous Occupations Order No. 10. (PX 5)  
The report dealt with an investigation made under the Child - Labor Provisions of the Fair Labor Standards Act to determine whether the operation of meat patty forming machines is too hazardous for 16 and 17-year old persons and should be made subject to the 18-year age minimum for employment.

44. On June 21, 1983, the United States Department of Labor, Employment Standards Administration, issued Child Labor Civil Money Penalty Report (Form WH-266). (PX 6)

### ISSUES

The issues to be decided are:

1. Whether Hardee's Food Systems, Inc. violated the provisions of 29 C.F.R. Section 570.31 *et seq.*, of the Child Labor Regulations, commonly referred to as Child Labor Reg. 3, in the employment of Tom Lyn Braddock, Judy Higgins, Terri Hirsch, Christine Rime, Kimberly J. Nonte,<sup>2</sup> Linda Schultheiss, and Stephanie E. Voyles after 7:00 p.m. or for more than eighteen hours in any one week when school was in session;
2. Whether Hardee's Food Systems, Inc. violated 29 C.F.R. Sections 570.33(e) and 570.34(b)(6) by allowing Diana Rosenau, Christine Kime,<sup>3</sup> or Linda Schultheiss to slice pre-cooked roast beef utilizing an automatic power-driven meat slicer;
3. Whether Hazardous-Occupations Order No. 10 prohibits Respondent's employees, sixteen or seventeen years of age, from operating a power-driven meat slicer to slice pre-cooked roast beef;
4. Whether the Plaintiff is estopped from asserting the violation of 29 C.F.R. Section 570.61, Hazardous Occupations Order No. 10, against the Respondent under the Doctrine of Collateral Estoppel; and

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<sup>2</sup> Kimberly J. Nontes last name is spelled "Note" in several of the documents contained in the record including the parties' Stipulation of Facts. The correct spelling is "Nonte":

<sup>3</sup> Plaintiff's Motion to Amend Assessment of Civil Money Penalty is granted. Therefore, the alleged violations of the Act are amended to include alleged violations of 29 C.F.R. 570.34(b)(6) involving the operation of a power driven meat slicer by Christine Kime.



5. Whether any violations of the Child Labor Act and accompanying regulations determined to have occurred herein were reoccurring or willful violations of the Act or Regulations, thereby justifying an additional assessment of \$200.00 civil money penalty per individual.

### CONCLUSIONS OF LAW

The Plaintiff originally alleged thirteen of the Respondent's employees were found to have been employed contrary to the Child Labor Reg. 3 (29 C.F.R. Section 570.31 et seq. and Hazardous Order No 10, 29 C.F.R. Section 570.61) of, the Child Labor Regulations.<sup>4</sup> The alleged violations and assessments of penalties for five individuals employed by the Respondent were withdrawn by the Plaintiff. (Stip. of Facts, Paragraph 8) Plaintiff alleges both time and hours violations of Child Labor Reg. 3. The parties' Stipulation of Facts reflects several violations of time conditions of employment and one violation of the total hours conditions of employment.

Section 570.35(a)(3) provides, in pertinent part, that:

... employment ... shall be confined to ... not more than 18 hours in any 1 week when school is in session.

29 C.F.R. Section 570.35.

The parties' Stipulation of Facts establishes that Respondent employed Terri Hirsch, a fifteen-year-old, for more than eighteen hours and as many as twenty-nine hours in a week when school was in session. In light of the record before me, I find that Respondent violated Section 570.35(a)(3) of the Regulations by employing Terri Hirsch for more than eighteen hours per week, while school was in session.

Section 570.35(a)(6) provides, in pertinent part, that:

... employment ... shall be confined to ... between 7 a. m. and 7 p.m. in any 1 day, except during the summer (June 1 through Labor Day) when the evening hour will be 9 p.m.

29 C.F.R. Section 570.35.

The evidence establishes that Tom L. Braddock, Terri Hirsch, Judy Higgins, Kimberly J. Nonte, and Stephanie Voyles were employed at least on one occasion after 7 p. m. between Labor Day and June 1. Although originally alleged, the record contains no evidence that either Christine

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<sup>4</sup> The regulation numbers hereinafter referred to in this Decision and order are contained in Title 29 of the Code of Federal Regulations.

Rime or Linda Schultheiss were employed in violation of the time and hours standards of Child Labor Reg. 3. In light of the record before me, I find Respondent violated Section 570.35(a)(6) of the Regulations by the employment of Tom L. Braddock, Terry Hirsch, Judy Higgins, Kimberly J. Nonte, and Stephanie Voyles after 7 p.m. between Labor Day and June 1. I find that the Plaintiff has not established the alleged violations of Child Labor Reg. 3 by Respondent in its employment of Christine Rime or Linda Schultheiss.

Plaintiff has alleged Respondent violated Section 570.34(b)(6) by allowing Christine Rime to operate an automatic meat slicer to slice pre-cooked roast beef. Section 570-34(b)(6) prohibits minors between the ages of fourteen and sixteen to be employed in food service establishments and work in:

Occupations which involve operating, setting up, adjusting, cleaning, oiling, or repairing power driven food slicers and grinders, food choppers, and cutters, and bakery-type mixers.

29 C.F.R. Section 570.34(b)(6).

The parties' record establishes that Christine Rime, a fifteen year-old, on occasion operated an automatic meat slicer to slice beef for roast beef sandwiches. Accordingly, I find that Respondent has violated Section 570.34(b)(6) by employing Christine Rime in the operation of a power-driven food slicer.

APPLICABILITY OF HAZARDOUS OCCUPATIONS  
ORDER NO. 10 TO RESTAURANTS

The Plaintiff has alleged that Respondent violated Section 570.61(a)(4) as provided by Section 570.33(e) in the employ of Diana Rosenau and Linda Schultheiss in the operation of a power-driven meat processing machine. Regulation Section 570.61(a) (4) is a part of Order No. 10. Section 570.61(a) (4) provides, in pertinent part, that certain:

Occupations in or about slaughtering and meat packing establishments, rendering plants, or wholesale, retail, or service establishments are particularly hazardous for the employment of minors between sixteen and eighteen years of age . ... all occupations involved in the operation or feeding of the following power driven meat-processing machines, including settingup, adjusting, repairing, oiling, or cleaning such machines: Meat patty forming machines, meat and bone cutting save, knives (except bacon-slicing machines), head splitters, and guillotine cutters; snoutpullers and jaw-pullers; skinning machines; horizontal rotary washing machines; casing-cleaning machines, such as crushing, stripping, and finishing machines; grinding, mixing, chopping, and hashing machines; and presses (except belly-rolling machines).

29 C.F.R. Section 570.61 (a) (4).

Respondent denies that Hazardous Occupations Order No. 10 as codified in part by Section 570.61(a)(4), prohibits Respondent's employees sixteen and seventeen years of age from operating an electric power-driven food slicer and slicing pre-cooked roast beef in its restaurants. Respondent alleges that the scope of section 570.61 does not extend to include within its coverage restaurant establishments such as Respondent's and that the operation of power-driven food slicing machines such as the Berkel Model 818 is not "meat processing" within the meaning of Section 570.61.

Section 570.61 provides definitions for both "slaughtering and meat packing establishments" and for "rendering plants". See Sections 570.61(b) (1) and 570.61(b) (2). Respondent's restaurants cannot be construed to be included in either the definition of "slaughtering and meat packing establishments" or "rendering plants". The definition of "wholesale, retail or service establishments" is not set forth in the Regulations. A review of the history of the Act shows that in 1961, the Fair Labor Standards Act of 1938, 29 U.S.C. Section 201 et seq., was amended to extend coverage of the Act to employees in various retail and service establishments. In keeping with the amendments, the Secretary proposed, received comments, and adopted the "wholesale, retail or service establishment" language to update the Hazardous Order No. 10 in accordance with the amendments to the Act. See 27 Fed. Reg. 8185: See the statutory and regulatory history stated in Brock v. Hardee's Food Systems, Inc., DOL Case No. 84-CLA-19, Stewart, ALJ, (unpublished opinion, August 29 , 1986).

In a letter dated August 3, 1962, the Director of the Bureau of Labor Standards stated that the extension of Hazardous Order No. 10 to retail and service establishments would have the effect of prohibiting sixteen and seventeen year olds from being employed in positions that:

1. ... involved ... the operation of the following power-driven machines: meat and bone cutting saws; knives; and grinding, mixing, chopping, and hashing machines.
2. All boning operations.
3. Work involving the manual handling of carcasses.

(PX 2).

This memorandum was intended to answer an inquiry concerning the number of persons who would be affected by the extension of Order No. 10 to retail and service establishments. Statistical data is provided wherein reference is made to "meatcutters." The memorandum makes no reference to restaurant employees.

In March of 1963, an explanatory bulletin was issued by the United States Department of Labor for Hazardous Occupations Order No. 10. (PX 4) The cover sheet of that bulletin refers to its applicability to "Slaughtering, Meat Packing, or Processing, or Rendering." This explanatory bulletin makes a passing reference to restaurants as being retail or service establishments where

meat or meat products are processed or handled and therefore subject to Order No. 10. However, at Page 2, the directive indicates that:

Coverage of the Order is limited to:

- (1) those types of establishments described above which slaughter, process, sell, or handle cattle, calves, hogs, sheep, lambs, goats, or horses, including parts of such animals,
- (2) the manufacture or processing of meat products or sausage casings from such animals, and
- (3) rendering plants.

The Directive contains a specific reference to the operation of meat processing machines as including "occupations involving the operation of only those grinding machines or presses that perform an operation on meat or bones ... are subject to the 18-year. minimum."

A literal reading of Hazardous Occupations Order No. 10 leaves little doubt that both the original and amended Order were directed to occupations involving slaughtering, meat packing, or processing, or rendering. The captions prefacing the Order contain that description. The entire content of the Order is directed toward those occupations. Following amendment of the statute, the Order was amended by simply inserting the words "retail or service establishments" to the body of one paragraph of the Order. I note with interest that the memorandum of Arthur W. Motley, Director, Bureau of Labor Standards, which was issued on August 3, 1962 and referred to above, mentions approximately one thousand twenty-two persons, sixteen and seventeen years of age, who were employed as meat cutters and who would be affected by the amendment to the Order and then makes a passing reference to other individuals "... in retail and service establishments, would, on occasion, operate meat processing equipment". My impression from reading his comments in that regard is that he did not believe that significant numbers of individuals would be impacted by this directive.

The issue involved in this case, that being the interpretation of Hazardous Order No. 10, has been litigated on numerous occasions previously. See Usery v. Numero Uno of Oak Forest, Inc., DOL Case No. 76-CLA-121, Feldman, ALJ, 1977 (unpublished opinion at page 5); Donovan v. LaCaille et Quail Run, DOL Case No. 81-CLA-12, Labor Law Reporter CCH Paragraph 31, 414 (1982); Donovan v. Walt's Submarine Sandwiches, Inc., DOL Case No. 81-CLA-60, Labor Law Reporter (CCH) Paragraph 31, 427 (1982); Brock v. Hardee's Food Systems, Inc., supra. Some of these decisions favor the Secretary of Labor and others favor the Respondents. In considering the applicable statutes, regulations, and the decisions of other judges on this same question, I must conclude that Hazardous Order No. 10 was never intended to bind restaurant establishments like Hardee's. That conclusion is based primarily upon a literal interpretation of the applicable regulation. Hardee's retail outlet power-driven meat cutting machine would fall under the Act if that process is considered to be comparable to companies that

perform the functions of slaughtering, meat packing, or rendering of animals. However, the Regulations clearly define what processes involved in slaughtering and butchering of animals and subsequent meat processing which are encompassed in Section 570.61(b). This record does not show that Hardee's Food Systems, Inc., is engaged in the killing, butchering, processing, or conversion of dead animals as contemplated by the Regulations in Hazardous Order No. 10. Slicing pre-cooked roast beef cannot be construed to be the equivalent of slaughtering and butchering of animals and thus, I find that this activity conducted at Respondent's restaurant located at 104 w. Hively Street, Elkhart, Indiana, is not included within the scope of Hazardous Order No. 10. It is also my belief that Order No. 10 does not apply to the restaurant industry generally in its performance of food preparation and sales. If a restaurant enterprise also performs slaughtering, meat packing or processing, or rendering activities, then the individuals engaged in those activities are clearly covered.

Not only is Respondent not engaged in an operation involving slaughtering, meat packing, or processing, or rendering of dead animals, but the use of a food slicer to slice pre-cooked meat is not included in the prohibited occupations contained at Section 570.61(a)(4). Section 570.61(a)(4) prohibits minors under eighteen years of age from engaging in occupations that involve the operation or cleaning of power-driven meat-processing machines. The Section specifically sets forth and lists several different types of machines used in the slaughtering process that are considered powerdriven meat--processing machines and notably fails to include power-driven food slicers for prepared or pre-cooked meats. Although power-driven knives (except bacon-slicing machines.) are included, I cannot conclude that slicers of cooked meats are included, or were contemplated by the Secretary to be included, by the term "power-driven knives."

As previously discussed, the Secretary specifically prohibited minors fourteen to sixteen years of age from operating power-driven food slicers in food service establishments. See Section 570.34(b)(6). Food slicers were not specifically included in the lengthy rather detailed litany of excluded power-driven machinery in Section 570.61(a)(4).

Based upon this record, I find that the operation of power-driven food slicers is not included within the purview of Section 570.67, which prohibits minors from working in occupations involving slaughtering, meat packing and processing, or rendering of dead animals and operating power-driven meat processing machinery. Thus, I find that the Respondent did not violate Section 570.61(a)(4) by, allowing two employees, ages sixteen and seventeen, to slice roast beef for sandwiches, and that the Order does not apply to restaurants.

#### COLLATERAL ESTOPPEL

Respondent has alleged that the Plaintiff is estopped from asserting violations of Section 570.61 by the operation of the Doctrine of Collateral Estoppel as the result of this issue having been litigated on several previous occasions. The United States Supreme Court has held that principles of res judicata or collateral estoppel do not apply in all administrative proceedings.

United States v. Utah Construction and Mining Co., 384 U.S. 394, 421-422 (1961). The court-set forth a test to determine when collateral estoppel is applied to prevent the unnecessary relitigation of factual disputes. The test provides that when an administrative agency acts in a judicial capacity, factual disputes resolved were clearly relevant to the issues properly before the agency, both parties were afforded a full and fair opportunity to present their arguments, and an opportunity for court review of any adverse findings is afforded both parties, the doctrine of collateral estoppel is applicable. See United States v. Utah Construction and Mining Co., *supra*.

Although an adversely affected employer has a right to judicial review under the provisions of the Administrative Procedure Act, 5 U.S.C. Section 701 *et seq.*, the post-hearing procedures provide no mechanism for the secretary to appeal an adverse Administrative Law Judge's decision. Section 580.32(a) provides that the Administrative Law Judge's decision shall become the final decision in the administrative process as provided in the Act upon service of copies thereof upon the parties. Since only one party in Child Labor actions is afforded an opportunity for court review of an adverse decision, I find that the doctrine of collateral estoppel is not applicable to these cases.

#### ASSESSMENT OF CIVIL MONEY PENALTIES

In Child Labor violations, the Administrative Law Judge's Decision and order shall order payment of a penalty either in the amount originally assessed, or in a lesser amount determined in accordance with Section 579.5 or the Administrative Law Judge may order that Respondent pay no penalty. Section 579.5 provides several different factors to consider in assessing the amount of a civil money penalty.

The civil money penalty report prepared by the United States Department of Labor's Compliance Officer follows the Department's standard procedure in computing penalty amounts. The amounts asserted included \$300.00 each for hours' violations, \$700.00 for a child under age sixteen who was allowed to operate a meat slicer and \$450.00 for the violations of Order No. 10. For purposes of this case, the maximum assessable penalty on the violations asserted was \$8,000.00. The Compliance Officer has asserted a potential liability of \$2,950.00. In considering the criteria outlined at 29 C.F.R. Section 579.5, and in considering the facts contained within this record, I believe the amounts assessed are entirely reasonable.

#### ORDER

IT IS ORDERED that Hardee's Food Systems, Inc., pursuant to a consideration of the criteria provided by 29 C.F.R. Section 579.5 shall:

1. Pay civil money penalties in the amount of \$300.00 for each violation of Child Labor Reg. 3 in the employment of Tom L. Braddock, Terri Hirsch, Judy Higgins, Kimberly J. Nonte, and Stephanie Voyles. The time and

hours standard violation asserted against Christine Rime is dismissed since the record contains no evidence in that regard;

2. Pay a civil money penalty of \$400.00 for employing Christine Rime in violation of Section 570.34(b)(6) of Child Labor Reg. 3; and
3. It is further ORDERED that the initial assessment of civil money penalties for Child Labor violations contained in the letter dated June 23, 1983, is modified in accordance with this Decision and Order; and that Respondent shall pay the determined penalties in accordance with 29 C.F.R. Section 579.8.

RUDOLF L. JANSEN  
Administrative Law Judge