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BULLETIN

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ANTITRUST DIVISION

Assistant Attorney General Donald F. Turner

District Court Refuses to Reduce Sentences; Defendants Required to Serve Jail Terms. United States v. Boston & Maine Railroad, et al.; United States v. Boston & Maine Corporation, et al., and United States v. Boston & Maine Corporation, et al. (D. Mass.) D.J. Files 60-193-25; 60-193-28; 60-193-29. The first indictment was returned in August 1963; in the two later indictments in December 1964. All indictments alleged violations of Section 10 of the Clayton Act and of Section 660 of the Criminal Code (originally Section 9 of the Clayton Act). Section 10 requires competitive bids in railroad purchases or sales when officers of the railroad have a substantial interest in an outside corporation offering to purchase or sell. Section 660 prohibits misapplication and conversion of carrier funds by its officers or directors. At an early stage the trial judge, Judge Sweeney, now deceased, granted motions by the defense to dismiss Count 1 (alleged Clayton Act violation) of the two count indictment in the first case. United States v. Boston & Maine Railroad, 225 F. Supp. 577 (December 1963).

The Government took a direct appeal to the Supreme Court. That Court differed with Judge Sweeney's interpretation of the term "substantial interest" in Section 10 of the Clayton Act. The transaction involved in that count was one in which the three railroad officer defendants, McGinnis, Glacy and Benson, were alleged to have arranged for the B&M to sell to the defendant Mersey's corporation, International Railway Equipment Corporation, also a defendant, for the unreasonably low price of $250, 000, ten stainless steel passenger coaches which International immediately resold to the Wabash Railroad for $425, 000, out of which it passed back $71, 500 to the three railroad officer defendants. The sale was conducted, understandably, without competitive bidding.

The Supreme Court held that the railroad officer defendants' "substantial interest" in International could consist of a "joint venture or continued course of dealings, licit or illicit, with International for profit sharing." It remanded the case with the suggestion that the Government might file with leave of the District Court an amended bill of particulars conforming to that definition of "substantial interest." United States v. Boston & Maine Railroad, 380 U.S. 157 (1965). The Government did so and in October 1965 the case came to trial before a jury.

However, during trial the Government dismissed Count 1 when it became clear that the trial judge would not let it go to the jury and the case would be complicated by problems of possible prejudice because of evidence admitted as relevant to that count. Upon submission of Count 2 to the jury the four individual defendants and International were found guilty.

After Judge Sweeney imposed sentences of 18 months' imprisonment on the defendants under the first indictment and also fines of $5, 000, the maximum, the defendants appealed to the Court of Appeals for the First Circuit, which affirmed the convictions. Glacy, et al. v. United States, 361 F. 2d 31 (May 1966). Thereafter the Supreme Court of the United States denied certiorari. Benson, et al. v. United States, 385 U.S. _____ (Oct. 10, 1965).

Following denial of certiorari in the first indictment, the individual defendants moved for reduction of their 18 month sentences. At the hearing November 17, 1966, on request of defense counsel, to which the Government did not object, Chief Judge Wyzanski first heard defendants' petitions to change their pleas of not guilty under the two later indictments.

In the second indictment, a 30 count indictment which charged violation of Section 10 in Counts 1 and 2, substantive violations of Section 660 in Counts 3 through 29, and conspiracy to violate Section 660 in Count 30, the individual defendants offered to plead guilty to Counts 1 and 2 and *nolo contendere* to Count 30. The railraod offered to plead *nolo contendere* to Counts 1 and 2.

In the third indictment, a 3 count indictment which charged violation of Section 10 in Count 1, conspiracy to violate Section 660 in Count 2 and a substantive violation of Section 660 in Count 3, the individual defendants offered to plead *nolo contendere* to Counts 2 and 3. This indictment was basically an extension of the first indictment, involving the same defendants plus certain additional corporations controlled by the defendant Mersey and the same type of dealings--in surplus rail and scrap as well as in coaches and other like equipment of the railroad. The indictment in Cr. 64-355-S involved the same three railroad officer defendants plus one Traverse, a B&M director, but not Mersey. It concerned a corporation formed by the four defendants with a subscribed capital of $600. The corporation bought a fleet of piggyback trailers and the defendants funded the purchase of the trailers from rental payments from the railroad to their corporation. These payments came to more than $1, 200, 000 in the years 1960 and 1961. By mid-1961 defendants had increased their equity in the trailers sufficiently so that they were able to sell 80 percent of their corporation to third persons for $320, 000.

The Government offered no objection to these pleas. Judge Wyzanski denied the motions of defendants McGinnis, Benson and Mersey for reduction of sentence, but suspended defendant Glacy's sentence and placed Glacy on probation for two years on the basis of a medical report by the Government's physician that imprisonment would endanger his life.

With regard to sentencing under the remaining two indictments Judge Wyzanski prefaced his request for recommendations from the Government with the announcement that he would impose no additional imprisonment. Judge Wyzanski fined defendants McGinnis, Glacy and Benson $1,000 under each of the five counts to which they had pleaded in the second and third indictments. Because of Mersey's financial condition Judge Wyzanski imposed a fine on Mersy of only $100 each on Counts 2 and 3 in the third indictment. In addition, he imposed fines of $100 each on Mersey's corporations, United Salvaging Company, International Trading Corporation, and International Petroleum Corporation, which had pleaded nolo contendere to Count 2 and International Railway Equipment Corporation, which had pleaded nolo contendere to Counts 2 and 3 of Cr. this indictment; the Government, believing these corporations had no assets, had not recommended fines for them. Finally Judge Wyzanski imposed a fine of $100 each under Counts 1 and 2 in the second indictment on the Boston and Maine Corporation.

In the latter indictment the Government dismissed Counts 3 through 29 of the indictment as to defendants, McGinnis, Benson and Glacy but not as to defendant Traverse. In the third indictment the Government dismissed Count 1 of the indictment.

These dispositions leave only one defendant, Traverse, charged under all counts of the second indictment, the only indictment in which he was named as a defendant.

Staff: John H. Dougherty, Kenneth C. Anderson and Jonathan Rose
(Antitrust Division)

Dairy Companies Charged With Violation of Section 1 of Sherman Act in Montana. United States v. Montana State Food Distributors Association, Inc., et al., and United States v. Beatrice Foods Co., et al. (D. Montana) D.J. Files 60-139-153; 60-139-154. On November 18, 1966, a grand jury in Billings, Montana returned two separate one-count indictments, each charging a combination and conspiracy to raise, fix, maintain and stabilize prices of dairy products in the State of Montana in violation of Section 1 of the Sherman Act. One of the indictments (United States v. Beatrice Foods Co.) named Beatrice Foods Co., four of its officials, eight other dairies, and four dairy executives. The second (United States v. Montana State Food Distributors Association, Inc.) named Beatrice Foods Co., two of its executives who were also named in the first indictment, a grocers trade association and its president.

Named as defendants in United States v. Beatrice Foods Co. were the following:

Beatrice Foods Co., Chicago, Illinois; Paul McClure, District Manager; John D. Connors, Assistant District Manager; Richard Chisholm, General Manager, Community Creamery Division; and Jerry Sullivan, General Manager, Billings Division.

Gallatin Cooperative Creamery, Bozeman, Montana, and Harold Goble, General Manager.

Equity Supply Company, Kalispell, Montana, and Stanley N. Halvorson, General Manager and Secretary-Treasurer.

Wilcoxson's, Inc., Livingston, Montana, and Harold Wilcoxson, President.

Best Dairy Farms, Bozeman, Montana.

Gate City Dairy, Glendive, Montana.

Jersey Creamery, Inc., Sheridan, Wyoming

Medo-Land Dairies, Missoula, Montana.

Phillips Dairies, Incorporated, Helena, Montana.

Theodore E. Olson, doing business as Dairyland Wholesale, Helena, Montana.

This indictment charged that beginning at least as early as February, 1966 and continuing thereafter up to the date of return of the indictment, the defendants and co-conspirators agreed to fix and raise the wholesale and suggested retail prices of nonfluid dairy products. Nonfluid dairy products include cottage cheese, ice cream, sour cream and popsicles.

Named as defendants in United States v. Montana State Food Distributors Association, Inc., were the following:

Montana State Food Distributors Association, Inc., Missoula, Montana, a trade association of groceries, and Ray Ormesher, President.

Beatrice Foods Co., John D. Connors and Richard Chisholm.

This indictment charged that during May 1966 defendants and co-conspirators agreed to raise and maintain the retail prices on such fluid dairy products as homogenized milk, skim milk, chocolate milk, buttermilk, half and half and whipping cream.

To effectuate the conspiracy, defendants and co-conspirator dairies agreed to boycott and refuse to sell fluid dairy products to retail grocery stores which failed to join the conspiracy. Co-conspirator retail grocery stores agreed to boycott and refuse to buy fluid dairy products from dairies which failed to join the conspiracy.

Beatrice Foods Co. is the largest dairy in the State of Montana. It and defendants and co-conspirators sell approximately five million dollars worth of nonfluid dairy products annually and about ten million dollars worth of fluid dairy products annually.

Judge William J. Jameson on November 18, 1966, ordered summonses issued to all the defendants, returnable on December 15, 1966.

Staff: Marquis L. Smith, Robert J. Staal and Shirley Z. Johnson (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General Barefoot Sanders

COURTS OF APPEALS

ADMIRALTY

Variation From Permit for Construction of Underwater Pipeline Is Violation of Rivers and Harbors Act Which Imposes Upon Pipeline's Owner Burden of Proving That Variation Could Not Have Contributed to Accident for Which Owner Seeks to Avoid Liability; Pennsylvania Pipeline Statute Held to Impose Absolute Liability for Damage Caused by Broken Pipeline; Findings of Negligent Puncturing of Pipeline and Negligent Continuation of Flow Through Punctured Pipeline Held Not Clearly Erroneous. United States v. Atlantic Refining Co., Atlantic Pipeline Line Co. and Dredge Philadelphia and American Dredging Co. (C. A. 3, Nos. 15729-15734, October 26, 1966) D. J. File 62-62-24. In January of 1961, the Philadelphia Naval Yard was flooded with some 30,000 barrels of oil which had escaped from a punctured underwater pipeline owned by the Atlantic Pipe Line Co. The United States filed libels against the Pipe Line Company and its parent, Atlantic Refining Co. (whose employees had been pumping oil into a tank connected to the pipeline), as well as the American Dredging Co., whose dredge PHILADELPHIA allegedly had caused the puncture. The district court held that each of the parties was liable to the United States and ordered that each pay one-third of the Government's damages; it also divided among the three respondents liability for the damages suffered by the Pipe Line and Refining companies.

The Third Circuit affirmed, per curiam, the district court's decision. It held that the district court's findings that the dredge had punctured the pipeline and that Refining's employees had been negligent in continuing to pump even after they had reason to believe that oil was escaping into the pipeline were not clearly erroneous. The liability of the Pipe Line company was founded, as the district court had held, on alternative grounds: (1) that the Pennsylvania Pipeline Statute (15 P.S. 2153) imposed absolute liability for "all damages occasioned by leakage [or] breaking of pipes or tanks" and (2) that under the rule of The Pennsylvania, 86 U.S. 125, the Pipe Line Company bore -- but had failed to satisfy -- the burden of proving that its violation of the River and Harbors Act, 33 U.S.C. 403, (maintaining the pipeline some 4 feet higher than permitted by the Corps of Engineers) could not have contributed to the accident. The Court of Appeals also affirmed the district court's holding with regard to the damages suffered by the Pipe Line and Refining companies.

Staff: Florence Wagman Roisman (Civil Division)

Trial Court's Finding That Government's Failure to Discover and Chart Rock Previously Struck by Vessel Was Not Proximate Cause of Second Vessel's Grounding in Same Area Held Not Clearly Erroneous; Vessel Not Rendered Unseaworthy Because Fathometer Was Inoperable; Pilot Navigating Vessel Which Strikes Uncharted Rock in Large Body of Water Is Not Required to Prove Vessel's Location at Time of Accident. United States v. Soriano; In re American Mail Line Ltd.; United Pacific Insurance Company v. United States (C.A. 9, Nos. 20266, 20129, 20130, September 27, 1966, petition for rehearing denied November 8, 1966) D.J. File 61-82-495. These cases arose out of the striking by the ISLAND MAIL of an uncharted rock in the Straits of Juan de Fuca, near Smith Island. The insurers of the damaged cargo sued the United States on the theory that the vessel had struck an uncharted rock which should have been charted since it had previously been struck by another vessel. The insurers also sued the owner of the vessel on the theory that the vessel was rendered unseaworthy by the lack of an operable fathometer (a device for determining depth). Finally, the United States, as owner of damaged cargo, sued the pilot on the ground that his negligence caused the accident.

In the suits brought by the cargo insurers, it was stipulated that the vessel had struck a specified uncharted rock (called the 3.5 rock) within the 10-fathom curve surrounding Smith Island. On the basis of this stipulation, the trial court found that the proximate cause of the accident was the negligence of the pilot in allowing the ship to penetrate the 10-fathom curve surrounding Smith Island. The trial court also found that the previous grounding in the area had been on a different rock, and that the negligence of the Government in failing to disseminate certain information was not a proximate cause of the ISLAND MAIL grounding. Finally, it found that the absence of a functioning fathometer did not render the vessel unseaworthy, since there were other instruments on board whereby a careful pilot could have determined whether he was penetrating the 10-fathom curve.

In the suit brought by the government against the pilot, there was no stipulation that the vessel had struck the 3.5 rock, or any other rock inside the 10-fathom curve. Witnesses testified that the vessel was outside the 10-fathom curve, but Navy divers found ship metal which could have come from the ISLAND MAIL around the 3.5 rock, and dragging operations in the area outside the 10-fathom curve failed to locate any other rock which the ISLAND MAIL could have struck. The district court did not credit the witnesses who testified that the impact was at a specified point outside the 10-fathom curve. However, the court also found the evidence insufficient to establish that the vessel had struck the 3.5 rock. Concluding that there was a failure of proof on the question of whether the impact occurred within the 10-fathom curve, the court held that the Government had failed to prove that the pilot's negligence caused the accident.

The Court of Appeals affirmed the district court in all three cases, concluding that, while it might have made different findings as a de novo matter, the district court's findings were not clearly erroneous. As to the seaworthiness of a vessel without a functioning fathometer, the Court concluded that the ISLAND MAIL was equipped to meet the particular situation which it faced at the time of the accident, since the pilot could have ascertained from other instruments on board whether the vessel was within the 10-fathom curve. In the Government's suit against the pilot, the Government argued on appeal that the pilot had the burden of showing where the accident occurred. However, the Court concluded that the presumption of fault on the part of the pilot, which would apply where the ship strikes a visible object or an object the location of which the pilot should have known, did not arise here, since the location of the grounding was not known. The Court held that the presumption of fault does not require the pilot to prove the location of the grounding.

Staff: John F. Meadows and Henry Haugen (Civil Division); Former United States Attorney William N. Goodwin (W. D. Wash.)

FEDERAL MEDICAL CARE RECOVERY ACT

Under Federal Medical Care Recovery Act United States Has Independent Right to Recover From Third Party Tortfeasors Reasonable Value of Hospital and Medical Care and Treatment Furnished Injured Person. Tolliver v. Shumate, et al., and United States, Intervenor (No. 12496, Supreme Court of Appeals of West Virginia, October 18, 1966) D. J. File 77-0-1. A veteran who was injured in an automobile accident was given medical care and treatment for such injuries in a Veterans Administration hospital. When he brought an action in the State court against the alleged tortfeasor, the Government intervened under the Federal Medical Care Recovery Act, 42 U.S.C. 2651-2653, to recover the reasonable value of such care and treatment. Subsequently, the State court dismissed the Government's complaint on the ground that the injured person could not recover under West Virginia law for medical care and treatment gratuitously furnished. The court reasoned that since West Virginia had not adopted the collateral source rule of damages, and that the right of the United States under the Federal statute was one of subrogation only, the Government's right was no greater than that of the injured person. Thereafter, the remaining parties settled the case, and on their motion, the court dismissed the action.

On appeal the Supreme Court of Appeals reversed. It accepted the Government's position as to the nature of the right under the Federal Medical Care Recovery Act, holding that the United States has under the Act an independent right of recovery against the third party tortfeasor, and also a right of subrogation. It held, therefore, that the right of the United States is not dependent upon the injured person's right to recover for such damages under

State law. The Court held further that, since the statute provided for recovery of medical care and treatment furnished a person injured "under circumstances creating a tort liability," the case would have to be remanded for the Government to prove negligence and proximate cause and the reasonable value of, and necessity for, the care and treatment furnished. This decision is the first by a State appellate court holding squarely that the Act creates in the United States an independent right of recovery.

Staff: Kathryn H. Baldwin (Civil Division)

FEDERAL TORT CLAIMS ACT

Soldier Travelling to New Permanent Duty Station Was Not Acting Within Scope of His Employment Under Illinois Law. Lois M. Cobb, etc. v. Robert Kumm and United States (C.A. 7, No. 15503, August 8, 1966) D.J. File 157-23-807. Pfc. Robert Kumm was ordered to transfer permanently from Denver, Colorado to a military base in Chicago, and was given 15 days' leave, or "delay-en-route" time. While driving in his own automobile through Illinois toward his new base, at the end of his leave, he was involved in an accident. The Seventh Circuit affirmed the ruling of the district court that Kumm was not acting within the scope of his employment under Illinois law, since he was merely on his way to report, and that the United States therefore could not be held liable for his negligence under the Federal Tort Claims Act.

Staff: Walter H. Fleischer (Civil Division)

OIL POLLUTION ACT

Oil Leakage by Barge With History of Leakage Is Not "Unavoidable Accident"; Barge Liable for Statutory Penalties Even Though Leakage Is Small. United States v. LeBeouf Bros. Barge Co. (C.A. 5, No. 21532, November 7, 1966) D.J. File 62-33-14. The Fifth Circuit reversed the district court's dismissal of a libel filed by the Government under the Oil Pollution Act, 1924, 33 U.S.C. 433, 434, to assess penalties against a barge which leaked oil into a lock in the Gulf Intracoastal Waterway at Algiers, Louisiana. The Court agreed with our contentions that (1) the statutory defense of "unavoidable accident" was improperly invoked, since the barge had a history of leakage, and was not shown to be a "tight ship"; and (2) that the statutory penalties applied even though the amount of oil discharged was small, because "any amount which can be avoided is prohibited."

Staff: Walter H. Fleischer (Civil Division)

VETERANS ADMINISTRATION

United States May Recover Amount Paid Out Under Veterans Administration Guaranty of Home Loan, When It Is Later Discovered That Note Was Forged. Mt. Vernon Cooperative Bank v. Gleason, (C. A. 1, No. 6736, October 19, 1966) D. J. File 151-36-1664. The plaintiff bank made a veterans home loan to an individual who had stolen a set of discharge papers and, on the basis of these papers, obtained a certificate of eligibility for such a loan from the Veterans Administration. The VA then guaranteed 60% of the loan and, when it went into default, paid the amount of its guaranty to the bank. Later, when the forgery was discovered, the VA set off the amount of the guaranty payment against another debt to the bank. The district court held that the set off was proper, relying on a VA regulation which establishes forgery as a defense to an action on the guaranty.

The bank argued that the regulation was inconsistent with 38 U.S.C. 1821, providing that issuance of a guaranty is conclusive evidence of the eligibility of the loan for a VA guaranty and of the amount of the guaranty. The bank also argued that, regardless of the validity of the regulation as establishing a defense to an action of the guaranty, the VA was not entitled to recover any payment made under the guaranty.

The First Circuit affirmed the district court's judgment for the VA. The Court held that, in the absence of statute waiving the right, the Government is entitled to sue for recovery of a payment made by mistake, and that in order to sustain recovery, "the government is not under the obligation of showing either that the recipient was unjustly enriched or that the balance of equities otherwise lies in its favor." The Court concluded that 38 U.S.C. 1821 only provided for incontestability as to the fact that the named veteran is eligible for a guaranty in the amount specified. The statute was not designed to protect the lending bank from the obligation to identify its borrower, but rather was designed to protect secondary purchasers of veteran's home loan papers. The Court pointed out that "To impose the responsibility of verifying a borrower's identity upon the Veterans Administration would be to remove that function from the smaller local organizations best able to fulfill it and to transfer it to a remote and centralized bureaucracy."

Staff: Robert V. Zener (Civil Division)

VETERANS BENEFITS - MOOTNESS

Second Circuit Holds That Action to Compel V. A. to Produce Records And Reports Does Not Become Moot on Death of Veteran Since Widow Can Be Substituted; But Suit Dismissed for Failure to Exhaust Administrative Remedies. Devany v. United States etc., (C. A. 2, No. 29963, October 13, 1966)

D. J. File 157-51-1283. Plaintiff, a veteran, alleged that through the negligence of the staff of a V. A. hospital he suffered loss of a leg, a toe and two fingers. He applied for disability compensation under the Veteran's Benefit Act, 38 U.S. 351, and when this was preliminarily denied, brought this action to compel the V. A. to produce the relevant records and reports so that he could properly pursue his administrative claim. The district court dismissed the action on the basis of 38 U.S.C. 211(a).

Between the dismissal and the appeal, plaintiff died. On appeal, the Government contended that his death rendered the action moot, since his widow's benefits would be granted under another section of the Act. Contrary to the Government's contention, the Second Circuit found that the widow would not have to file a new VA claim, but could be substituted in the administrative proceeding already begun by plaintiff. The Court did not reach the ground relied on by the district court, however, since it found that administrative remedies had not been exhaused, and affirmed the dismissal on that ground.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorneys Robert E. Kashner, and Dawnald R. Henderson, (S. D. N. Y.)

DISTRICT COURTS

ARMED FORCES

Navy Officer Seeking to Resign His Commission May Be Involuntarily Retained in Service by Secretary of Navy. Laurence C. Baldauf, Jr. v. Paul Nitze, Secretary of the Navy, (S. D. Cal. Civil No. 3518-SD-K, November 3, 1966) D.J. File 145-6-807. The District Court for the Southern District of California has ruled that the Secretary of the Navy has ample power to issue regulations controlling an officer's right to resign and that under Cafeteria Workers v. McElroy, 367 U.S. 886, it makes little difference whether the regulations are based upon power delegated from the President, the Secretary of Defense, or Congress. Plaintiff, an Annapolis graduate, is a naval aviator on duty in Japan who along with more than 1,000 other officers in all categories has had a resignation rejected by the Navy because of the current military buildup in Vietnam. In all, the Army, Navy, and Air Force have retained more than 3,000 officers by denying their requests for resignation. A few (less than 20) of these officers have filed actions in the Southern District of California, the Southern District of Texas, the Eastern District of Missouri, the Eastern District of Virginia, and the District of Massachusetts, seeking a mandatory injunction directing the Services to accept their resignations. Their complaints allege generally that the Services are unlawfully requiring them to serve and are subjecting them to involuntary servitude within the

meaning of the Thirteenth Amendment. The Court (Kunzel, J.) noted that historically it has been universally accepted that an officer cannot leave the service until his resignation is accepted by the President, and that judicial notice could be taken of the emergency caused by United States military operations in Vietnam. Judge Kunzel relied in part upon the Joint Resolution of August 10, 1964, 78 Stat. 384, and stated:

> "We know that pursuant to the Universal Military Training Act, enlisted personnel have been and are being drafted at an average rate of in excess of thirty thousand per month. We know that to train the new personnel and to provide for their support in the military field there must be an enlarged officer corps. This corps and the whole military build-up can only be maintained by the executive branch by exercise of the right and power to control the length of time that an officer is required to serve. Congress has abstained from acting in this field for the apparent reason that, traditionally, the executive branch has acted and controlled the right of a regular officer to resign, and the executive power in this regard is not restricted except as Congress has provided by statute, giving officers a right to voluntarily retire under certain conditions and to be involuntarily retired under certain conditions. 10 U.S.C. § 6321, et seq.
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> "Common sense would dictate that to allow officers to resign at will during a period of military build-up such as now exists, could seriously impair our military effectiveness."

Staff: Fred William Drogula (Civil Division)

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CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

INVESTIGATION OF VIOLATIONS OF LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959

The Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 401-531) contains a number of criminal provisions. Pursuant to a Memorandum of Understanding entered into between the Secretary of Labor and the Attorney General, the Department of Justice has been delegated the responsibility of investigating possible violations of 29 U.S.C. 501(c), the statute prohibiting embezzlement and theft of union funds. This Memorandum of Understanding was entered into by authority of Section 607 of the Labor-Management Reporting and Disclosure Act which states, in part:

> In order to avoid unnecessary expense and duplication of functions among Government agencies, the Secretary may make such arrangements for cooperation or mutual assistance in the performance of his functions of any such agency as he may find to be practicable and consistent with law . . .

Situations may arise where the intent of the Act, specifically Section 607, can be defeated by too literal an application of the Memorandum of Understanding which was evolved to support the Act. A good example of such a possibility is where a Labor Department investigation, conducted to discover whether a reporting or record keeping violation had occurred, simultaneously develops an embezzlement based upon the same basic factual situation. In such a case a reinvestigation by the FBI involving the re-interviewing of witnesses and a re-examination of records would appear to result in unnecessary expense and duplication of function. This situation could also lead to practical difficulties in the trial of cases particularly with regard to compliance with 18 U.S.C. 3500, which requires production of statements made by prosecution witnesses to Government agents. There also could be problems relative to admissions or confessions by an accused.

This problem is one that can vary depending upon the facts of a given case and the stage of a particular investigation. It should, therefore, be determined by the United States Attorney what is the best method of achieving successful completion of the case and at the same time avoiding unnecessary expense and duplication of function. For example, if the parallel embezzlement case is substantially completed as a result of the reporting and disclosure investigation, the Department of Labor should follow the investigation to completion. On the other hand, if fresh investigation not parallel to a reporting and disclosure violation is necessary, the FBI should be assigned to the matter.

Also, when an initial complaint is received by the Department of Labor which indicates an embezzlement violation, this information should be reported immediately to the United States Attorney in order that such investigation can be assigned to the FBI. It should appear further that cases involving large conspiracies and kickback schemes should be investigated by the FBI.

In assigning these cases, United States Attorneys should exercise their discretion in accordance with the above. In addition, it should be emphasized that as soon as it is apparent within a given investigation that an embezzlement possibility exists, the Department of Labor should disclose this information to the FBI and the United States Attorney.

ASSAULTING A FEDERAL OFFICER BY THREAT OF FORCE

The Federal Bureau of Investigation has informed the Department that an increasing amount of abuse and intimidation is being directed toward FBI agents and other Federal officers while attempting to carry out their responsibilities under the law.

Section 111, Title 18 of the United States Code punishes anyone who "forcibly assaults, resists, opposes, impedes, intimidates or interferes with any person designated in Section 1114 of this Title while engaged in or on account of the performance of his official duties." Judge Parker in Long v. United States, 199 F. 2d 717 (4th Cir., 1952) said, "Congress has not left the matter in doubt but has specifically prescribed the use of force as an essential element of the crime."

Whether the element of force, as required by the statutes, is present in a particular case is a question of fact to be determined from all of the circumstances. The Long case indicates that a threat of force will satisfy the statute. Such a threat which reasonably causes a Federal officer to anticipate bodily harm while in the performance of his duties constitutes a "forcible assault" within the meaning of 18 U. S. C. 111. See also Gornick v. United States, 320 F. 2d 325 (10th Cir., 1963). Thus, a threat uttered with the apparent ability to execute it, or with menacing gestures, or in hostile company or threatening surroundings, may, in the proper case, be considered sufficient force for a violation of 18 U. S. C. 111. These judicial decisions suggest a similar construction of the statutory words "resists, opposes, impedes, intimidates or interferes with."

The Criminal Division has advised the Federal Bureau of Investigation that we will review criminal matters presented for prosecution under 18 U. S. C. 111 in light of the above. The General Crimes Section will render necessary assistance.

MAIL FRAUD - CHAIN REFERRAL SCHEMES

Since the latter part of 1962, there has been a surge of chain referral schemes resulting in a loss to the public of more than $12 million. The schemes involve the sale of various types of installations and merchandise -- aluminum siding, fire and burglar alarms, intercommunications system, color television sets, vacuum cleaner systems, water softeners, and the like. High-pressure salesmen promise referral commissions which will pay for the product and even bring in additional income to the purchaser, who has only to submit a list of names of acquaintances and, in some cases, write a note to a friend concerning the product. In most instances, the product is greatly overpriced and the installation is not as represented. The purchaser finds that the time payment contracts have been sold to finance companies, and often a lien has been obtained against his property. Needless to say, the promised commissions are not forthcoming and, having reached a saturation point in the area, the operators of the scheme have moved on.

In fiscal year 1966, the Post Office Department investigated 60 cases of this nature. Indictments against 29 persons were returned and 16 convictions were obtained. In the previous year, 48 cases were investigated, indictments against 13 persons were returned and 4 were convicted. At the present time, 21 persons are under indictment and awaiting trial and 138 cases are under investigation. These cases now being investigated involve estimated public losses of $200 million. Prosecution is usually undertaken under the Mail Fraud Statute (18 U.S.C. 1341), but the Lottery Statute (18 U.S.C. 1302) has also been used.

A progression will easily show the impossibility that the persons relying on the promises of the salesmen as to payment for the product by means of referral can realize any substantial recoupment. If 20 people purchase, they must refer 400 others; the 400 must refer 8,000; the latter must refer 160,000; then it becomes 3,200,000; 64,000,000; 1,280,000,000; and in the eighth step, 25,600,000,000 persons.

The plight of the victims who are pushed into time payments for merchandise they would not otherwise have purchased is pointed up in the November 5, 1966 issue of The Reporter, in an article by Ralph Lee Smith, "Saga of the Little Green Pig." In describing a vacuum cleaner (the little green pig) chain referral scheme, the author points out the relationship between the exploitation of the poor and minority groups as consumers and the current unrest and outbreaks throughout the country.

The Fraud Section of the Criminal Division is very much interested in the prosecution of the operators of this type of scheme. Any questions should be directed to the attention of that Section.

GRAND JURY MINUTES

Failure to Record Grand Jury Minutes Not Ground for Striking Testimony of Trial Witness who Appeared Before Grand Jury. William D. Campbell v. United States, No. 8719, C.A. 10 (Nov. 1966). A motion was made for the production of a transcript of the testimony given by the witnesses who appeared before the grand jury. It then appeared that the testimony had not been recorded. There was no stenographer present at the grand jury sessions. Relying on Dennis v. United States, decided by the Supreme Court June 20, 1966, the appellant assigned as error the failure of the district court to order production of the grand jury testimony. The Court of Appeals held that the circumstances of the case presented a "clear exception" to the rule announced in Dennis, for the reason that, unlike Dennis, there were no minutes to produce. See also Welsh v. United States, C.A. 10, No. 8097, decided June 22, 1966.

The decisions in Campbell and in Welsh are consistent with the Second Circuit decisions in United Stares v. Cianchetti, 315 F. 2d 584 (1963), and United States v. Caruso, 358 F. 2d 184 (April 6, 1966). Both of these cases were decided prior to the Supreme Court decision in the Dennis case. Both involved the same point. In each of them a motion was made for an order to produce the transcript of a witness' grand jury testimony, followed by a motion to strike the testimony when it appeared that no transcript had been made. Appellants relied on an earlier opinion of the Second Circuit, United States v. Giampa, 290 F. 2d 83 (1961) which seemed to hold that "if the government calls a witness who has given testimony before a grand jury, it is under a duty to have the transcript of such testimony available upon the trial". In both Cianchetti and Caruso it was held that Giampa rule applied only in cases where grand jury testimony had been reported and not to cases where there was no transcript. The Court observed that while the taking and transcribing of grand jury testimony would be the better practice, there was no statute or rule which required it.

FALSE STATEMENTS

False Accusation Against Government Officials to FBI Held Violation of 18 U.S.C. 1001. United States v. M. Raymond Adler (S.D. N.Y., Oct. 31, 1966). Defendant was convicted in a non-jury trial on October 31, 1966, of making false statements to the Federal Bureau of Investigation.

Adler was President of Ray Adler, Inc., which firm had been awarded a multi-million dollar contract in 1962 to construct housing units at a naval submarine base. On his own initiative he appeared at the FBI's New York office in July 1963, and told a Special Agent that a friend of his, who had a construction contract with the Government, had been forced to pay bribes to Federal employees in order to complete the contract. Adler suggested the Bureau only

reprimand the officials as his friend hoped to continue in the construction business. In response to a direct question Adler said there was no friend and the man in question was himself. Adler was then given the customary warning and terminated the interview. Thereafter, Adler was approached by Bureau agents on various occasions and was even called before a Federal grand jury but declined to give any further particulars. However, in view of the nature of the charge the inquiry continued and both naval and civilian personnel who came under the cloud of the accusation were interviewed, all denying any wrong doing. Finally, in February 1965, during a visit made by a Bureau agent to examine Adler's books, Adler said there was something he had been meaning to tell the Bureau and on that occasion he admitted he had lied when he came to the Bureau in 1963. He said his approach to the Bureau had been prompted by difficulties he had encountered with Government officials administering his contract and he thought his "accusation" would induce a Bureau investigation that would scare the Government personnel into being more "cooperative" and "getting off his back".

The indictment charged in a matter within the jurisdiction of the FBI, Adler had made false, fictitious and fraudulent statements and representations that, while engaged in the performance of a contract for the United States, public officials corruptly extracted money and other things of value from him in return for being influenced in their performances of official acts in connection with the said contract.

The Government argued and the Court agreed that Adler's false accusation was a "matter within the jurisdiction" of the FBI within 18 U.S.C. 1001, citing Public Law 725 Ch. 1143 (83rd Congress, 2nd Session, August 31, 1954; 68 Stat. 998) authorizing the Bureau "to investigate any violation of Title 18, United States Code, involving Government officers and employees." It was also successfully contended the power to investigate necessarily includes the power to listen to a citizen complaint that there has been a violation of 18 U.S.C. 201, the bribery statute. Reliance was placed on 5 U.S.C. 299 and 300, authorizing appointment by the Attorney General of persons to investigate official matters under the control of the Department including detection of crime, as well as Title 28, C.F.R. Section 0.85 (1964 Rev.) directing the Director of the FBI to investigate violations of laws of the United States.

The Government distinguished the instant situation from the "exculpatory no" cases, United States v. Davey, 155 F. Supp. 175 (S.D. N.Y., 1957); Paternostro v. United States, 311 F. 2d 298 (5th Cir. 1962); United States v. Stark, 131 F. Supp. 190 (D. Md., 1955); and United States v. Levin, 133 F. Supp. 88 (D. Colo., 1953), emphasizing that Adler himself went to the FBI causing an inquiry to be inaugurated the subjects of which were third parties, not himself, toward whom he intended to cast suspicion, and whom he intended to frighten. It further persuaded the Court such activity is clearly within the purview of 18 U.S.C. 1001 that statute's objective being: " . . . to protect

the government from the affirmative or aggressive and voluntary actions of persons who take the initiative, or, in other words, to protect the government from being the victim of some positive statement, either written or oral, which has the tendency and effect of perverting its normal proper activities." Citing United States v. Stark, 131 F. Supp. at p. 205 and United States v. Gilliland, 312 U.S. 86 (1941). The case was analogized to United States v. Van Valkenberg, 157 F. Supp. 599 (D. Alaska, 1958) and several unreported similar factual situations cited in United States v. Stark, supra, at page 204.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorney Jack Kaplan (S. D. N. Y.).

* * *

IMMIGRATION AND NATURALIZATION SERVICE

Commissioner Raymond F. Farrell

DEPORTATION

Claim of Prejudgment in Deportation Hearing Not Sustained. Paul De Lucia v. INS (C.A. 7, No. 15661, November 17, 1966) D.J. File 38-23-1729. Petitioner, a native and national of Italy, sought review of an order of the Board of Immigration Appeals denying him discretionary relief from deportation. The Seventh Circuit in an earlier proceeding had found the petitioner deportable (De Lucia v. Flagg, 297 F. 2d 58 (7th Cir. 1961) cert. denied, 369 U.S. 837 (1962)).

At the conclusion of the deportation hearing the Special Inquiry Officer found that petitioner was not eligible for discretionary relief because he did not establish that he was a person of good moral character. The Special Inquiry Officer also denied relief as a matter of administrative discretion on the ground that petitioner had not made full disclosure of matters within his knowledge. On appeal the Board of Immigration Appeals denied relief from deportation as a matter of administrative discretion. The Seventh Circuit found the Board's decision clearly warranted by the record. The Court pointed out that petitioner had refused to answer numerous questions relating to his criminal record, the nature and source of his income and many of his other activities. In the Court's opinion, petitioner's conduct amounted to a blatant refusal to furnish information pertinent to the exercise of administrative discretion and justified the withholding of relief.

Petitioner contended that the Special Inquiry Officer had prejudged his applications for discretionary relief. In support of this claim, petitioner pointed to certain statements by United States Attorneys General and other Department of Justice officials over a period of several years characterizing him as a "racketeer" and a "kingpin of vice". The Court noted that no evidence had been introduced to connect these statements with the Special Inquiry Officer or that his decision was controlled by his superiors. It further noted an existing order of the Attorney General directing all persons exercising hearing powers in deportation proceedings to exercise independent judgment in such matters. Petitioner argued that he should have been accorded a hearing on the issue of prejudgment. The Court found that petitioner's meager presentation did not make a prima facie case of prejudgment and therefore no hearing on the issue was required. Finally the Court pointed out that petitioner did not assert a claim of prejudgment against the Board which is not bound by the Special Inquiry Officer's order and may determine a deportation case de novo.

Petitioner applied for a stay of deportation on medical grounds and on the ground that he would be politically persecuted if deported to Italy. The Court

approved the denial of this relief by the Board. Petitioner designated England as the country to which he wished to be deported. The Special Inquiry Officer informed him that if England refused to accept him he would be deported to Italy. Petitioner argued that the order was illegal because the record contained no evidence that Italy is presently willing to accept him or that England has refused to accept him. The Court rejected this argument on the basis that the Court was concerned only with the validity of the deportation order and not with its execution. The order of the Board of Immigration Appeals was affirmed.

Staff: United States Attorney Edward V. Hanrahan (N. D. Ill.); Assistant U.S. Attorney John Peter Lulinski, of Counsel.

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

Riparian Lands: Extent of State Ownership of Bed of Navigable Stream; After Construction of Hoover Dam by United States Had Controlled Regimen of Colorado River, Ordinary High Water Mark Is Determined by Reference to River in its Present Location. United States v. Edward M. Claridge, et al. (Civil No. 5080, D. Ariz., D.J. File 90-1-10-609). The United States brought this action to quiet title to certain lands in Arizona, to evict persons trespassing thereon, and for damages. The land in issue is located in the Palo Verde Valley on the eastern side of the Colorado River. The westerly border of the greater portion of the land is situated approximately one-quarter of a mile east of the easterly bank of the present channel of the river. The Palo Verde Valley is approximately eight miles wide at this point. The floor of the valley is composed of alluvion deposited by the Colorado River. The valley is bounded on either side by bluffs rising sharply from the valley floor.

The State of Arizona intervened, asserting title to the lands by virtue of its ownership of the bed of the Colorado River between the thread of the stream and the ordinary high water mark on the eastern side of the river. According to the State's assertions, prior to the building of Hoover Dam in 1935 the Colorado River was subject to annual spring rises which caused the land to be flooded by waters flowing outside the main channel of the river. Under this claim, the ordinary high water mark of the river would be measured by the extent of the more or less annual flooding of the river in its natural state before it was controlled by Hoover Dam. Thus, according to the State, the entire valley east of the river channel would be part of the bed of the river and, as such, would be owned by the State of Arizona.

The District Court held that it was not necessary to determine the ordinary high water mark as it existed prior to 1935 because the present ordinary high water mark as established by the river after it has been controlled by Hoover Dam is the determinative issue. Since the Court found that the present ordinary high water mark is within the existing bank of the river and that the easterly bank lies to the west of the lands in issue, the claim of the State of Arizona was denied and title was quieted in the United States.

Staff: Assistant United States Attorney Richard S. Allemann (D. Ariz.) and Glen E. Taylor (Land and Natural Resources Division).

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TAX DIVISION

Acting Assistant Attorney General Richard M. Roberts

SPECIAL NOTICE

Effective Date of Title I Amendments of Federal Tax Lien Act of 1966 (P. L. 89-719)

Section 114(a) of the Federal Tax Lien Act of 1966 provides that generally the amendments made by Title I (Priority and Effect of Tax Liens and Levies) shall apply after the date of enactment of the Act, i.e. beginning on November 3, 1966. This is so regardless of when a lien or title of the United States arose or when the lien or interest of any other person was acquired. However, Section 114(b) sets forth two exceptions to this general rule, as follows:

1) The first exception provides that Title I amendments shall not apply in any case, in which the Government has, in effect, completed enforcement of its interest arising under a lien. Thus, the amendments do not apply in any case where the Government has sought to enforce its lien interest in a civil action or suit which has become "final by judgment, sale, or agreement" before November 3, 1966. The Tax Division, Department of Justice, and the Office of the Chief Counsel, Internal Revenue Service, interpret the quoted statutory language in the following manner.

a) The words "final by judgment" have reference to a judgment or decision which has become final by failure to appeal within the time allowed by law, or, if a timely appeal is taken, upon termination of the appellate proceedings. Where a judgment has been entered by a trial court in a case in which a lienor had not claimed a particular item, such as an attorney's fee, which he is now entitled to under the Act, and where the appeal time is still open, the Government will take no action to effect a change in the court's judgment. This, on the theory that the judgment is not appealable with respect to that particular issue. On the other hand, where an item has been claimed, but not allowed, and the appeal time is still open, the Government will not assume the blanket burden of initiating action to have the judgment corrected to reflect priorities under the Act; however, as particular cases come to the attention of the Tax Division or a United States Attorney's office in cases where the appeal time is still open, we should cooperate with opposing counsel in bringing the matter to the attention of the court.

b) The word "sale" refers to a distraint sale conducted by the Internal Revenue Service and to a sale under the provisions of Section 7425(b) of the Internal Revenue Code of 1954, as added by the Act, but not to sale in suits under 28 U.S.C., Section 2410. In this regard, it is our position that where a

judgment of foreclosure determining priorities is entered in a suit under 28 U.S.C., Section 2410, but there is no sale or distribution until after the judgment has become final, the rights and priorities of the parties are fixed by the judgment and are not affected by the fact that sale and distribution remain to be accomplished.

c) Generally, the word "agreement" is to be determined on an *ad hoc* basis. If a problem develops as to whether an agreement has been consummated within the meaning of the statutory phrase, please communicate with the General Litigation Section.

2) The second exception provides that Title I amendments are not to apply in any case where they would impair a priority enjoyed by any person (other than the United States) holding a lien or interest prior to November 3, 1966; operate to increase the liability of any such person; or shorten the time for bringing suit with respect to any transaction occurring before November 3, 1966.

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