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LEGISLATIVE NOTES

POINTS TO REMEMBER

Change In Name

Effective September 25, 1972, the Administrative Regulations Section of the Criminal Division will be known as the GOVERNMENT REGULATIONS SECTION. This is a change in name only and does not affect the Section's areas of responsibility.

(Criminal Division)

ANTITRUST DIVISION
Assistant Attorney General Thomas E. Kauper

DISTRICT COURT

SHERMAN ACT

CONSENT JUDGMENT IN SECTIONS 1 AND 2 OF THE SHERMAN ACT CASE.

United States v. The American Society of Mechanical Engineers, Inc., et al. (70 CIV 3141; September 11, 1972; DJ 60-251-7)

On September 11, 1972, Chief Judge David N. Edelstein, of the Southern District of New York, signed a consent judgment terminating the Department's civil antitrust case against the American Society of Mechanical Engineers and the National Board of Boiler and Pressure Vessel Inspectors.

The complaint, filed on July 22, 1970, charged the defendants with violating Sections 1 and 2 of the Sherman Act, in that they combined in unreasonable restraint of trade to exclude foreign-made boilers and pressure vessels from trade within the United States.

The complaint also charged that the defendants arbitrarily refused to permit the use of the ASME or the National Board stamps, which attest that the products meet technical safety standards, by foreign manufacturers of boilers and pressure vessels, and refused to register such products with the National Board.

The complaint also alleged that registration and the application of such stamps facilitates approval of boilers and pressure vessels for installation under many state and local laws and regulations.

The consent judgment requires that the two associations make their respective stamps available on a fair, reasonable and non-discriminatory basis to foreign manufacturers who meet the safety and technical standards applicable to American manufacturers.

The consent judgment also requires the National Board to register boiler and pressure vessels which meet the appropriate safety standards, without regard to whether they are made by a domestic or foreign manufacturer.

Staff: L. Barry Costilo, Adrian C. May, Jr., Charles F.B. McAleer and Stephen F. Sonnett (Antitrust Division)

CIVIL DIVISION
Assistant Attorney General Harlington Wood, Jr.

COURTS OF APPEAL

POSTAL CONTRACTOR -- CIVIL LIABILITY FOR EMPLOYEE'S ALLEGED THEFT -- BURDEN OF PROOF

FOURTH CIRCUIT APPLIES BOERNER v. UNITED STATES, 117 F.2d 387 (C.A. 2, 1941), TO ESTABLISH LIABILITY OF POSTAL CONTRACTOR FOR CIRCUMSTANTIALLY-PROVED POSTAL THEFTS BY ITS EMPLOYEE.

Elmore v. United States (C.A. 4, No. 72-1280, September 13, 1972, D.J. 78-80-8)

The Postal Service withheld from the compensation of plaintiff, a contract carrier, the value of 23 firearms which had allegedly been stolen from the mail on plaintiff's route (in Roanoke, Virginia) by one of plaintiff's drivers, Traynham. In plaintiff's action against the United States to recover the amount withheld, the government introduced evidence of unusual losses in the area to which the 23 firearms in question were destined (i.e. that they had been delivered for mailings to the Roanoke area, would have gone through plaintiff's route, but were not received by the Roanoke addressees); and of Traynham's actual dishonesty in the case of a test firearm mailed through plaintiff's route which had been stolen by Traynham and was recovered in his house (as well as discovery of another stolen gun in the trunk of his car). Since the government had direct proof that only four of the 23 guns in question had actually arrived as far as plaintiff's route in the Roanoke area, it attempted to establish a prima facie case with respect to the remaining 19 guns on the basis of the presumption in Boerner v. United States, 117 F.2d 387 (C.A. 2, 1941), that mail sent but not received is presumed to be delivered at least to such point where some irregularity is shown to exist, here plaintiff's route in Roanoke. The district court considered that the foregoing circumstances and presumption made out a prima facie case against Traynham, but not plaintiff, since the government had not charged plaintiff personally with complicity or "bad faith."

The Fourth Circuit reversed, holding that the Boerner rationale was available not only to establish a prima facie case against an immediate actor, but also against a contract carrier responsible for the immediate actor: "Proof that unusual losses of guns were being sustained in the Roanoke area, not elsewhere in Virginia, coupled with the observed fact of Traynham's theft . . . was ample to make out a prima facie case that each of the [23] guns reached [plaintiff], who had the exclusive contract of parcel post from the railroad station to the main post office

and from the main post office to the parcel post annex."

Staff: Stanton R. Koppel (Civil Division)

SOCIAL SECURITY ACT -- ADMINISTRATIVE NOTICE

SECRETARY MAY TAKE ADMINISTRATIVE NOTICE OF THE FACT THAT LIGHT JOBS EXIST IN THE NATIONAL ECONOMY.

Reynolds v. Richardson (C.A. 4, 71-2031, September 21, 1972, D.J. 137-67-65)

This was an action to review a decision of the Secretary of H.E.W. denying claimant's application for Social Security disability benefits. The Secretary, finding that the claimant was only partially impaired, took administrative notice of the fact that light jobs of the category in which the claimant was able to engage existed in the national economy (and in the immediate region of claimant's residence) and, on such basis, held that the claimant was not entitled to disability benefits.

In upholding that determination, the Fourth Circuit stated:

> We conclude that administrative agencies may rely upon and employ the recognized principle of taking "official notice" when engaged in quasi-judicial proceedings. We find ample authority to support this conclusion. [Citations.] Taking administrative notice of the existence of certain job classifications in the national economy by an agency intimately acquainted with employment situations is appropriate; and in the absence of a showing of substantial prejudice the action of a quasi-judicial agency based upon such administrative notice, even the absence of direct evidence in the record proper, will not be overturned.

Staff: Robert M. Feinson (Civil Division)

CRIMINAL DIVISION
Assistant Attorney General Henry E. Petersen

COURTS OF APPEAL

BANKS AND BANKING
COMMISSIONS FOR PROCURING LOANS

LAW PROHIBITING BANK OFFICIALS FROM STIPULATING FOR OR RECEIVING COMMISSIONS FOR PROCURING LOANS DOES NOT REQUIRE THAT PAYMENT OF COMMISSION BE TO OR FOR BENEFIT OF SUCH OFFICIAL PERSONALLY.

U.S.v. Lane (C.A. 8, 71-1664, June 14, 1972, D.J. 29-9-281)

This appeal arose from the conviction of the appellant, a bank director, for stipulating for a fee or commission for procuring a loan, in violation of 18 U.S.C. 215. He made a $1 million loan to Wheel-Air, Inc. on behalf of the bank, and Wheel-Air paid a commission of $125,000 for procuring the loan to La-Co, Inc. of which appellant was the Chairman of the Board of Directors and controlling stockholder.

The Court quickly dispensed with the appellant's contention that the proof was at variance with the information filed and proceeded to briefly discuss the second claimed error concerning a jury instruction.

The trial court instructed the jury that it might find the defendant guilty if it found that he stipulated for this payment of a commission even though it was paid to someone else rather than to, or for the benefit of, the appellant personally. The Court of Appeals stated that the clear purpose of the Act was to protect the deposits of banks having Federal insurance by preventing unsound and improvident loans to be made from such deposits. The Congress was not concerned with who received the commission but desired that the judgment of a bank officer or director be unaffected by such influence when considering a loan. The court noted that in this case an interest in the third party receiving the commission was directly traceable to the banker. Moreover, the use of the disjunctive "or" between the words "stipulate for" and "receive" in the statute reveals a clear intent to make either one an offense.

Staff: United States Attorney W.H. Dillahunty
Assistant United States Attorneys James G. Mixon and Sidney H. McCollum
(E.D. Arkansas)

TRANSPORTATION OF EXPLOSIVES

CORPORATION CRIMINALLY LIABLE FOR ACTIONS OF EMPLOYEE IN LEAVING TRUCK CONTAINING EXPLOSIVES UNATTENDED, DESPITE INSTRUCTIONS TO ATTEND THE TRUCK.

United States of America v. Harry L. Young & Sons, Inc. (C.A. 10, No. 72-1002; Aug. 24, 1972; D.J. 59-30-017-77)

Harry L. Young and Sons, Inc., was charged with a violation of 18 U.S.C. Section 834(f), which makes it unlawful to knowingly violate any regulation of the Interstate Commerce Commission concerning the safe transportation of explosives. The information charged that the corporate defendant knowingly violated 49 C.F.R. Section 397.1(b) by leaving unattended a motor vehicle transporting the explosives. The case was submitted to the trial court on stipulated facts and the defendant was convicted of the charge. The defendant appealed and the Court of Appeals affirmed the conviction.

On January 13, 1970, a tractor-trailer unit belonging to the defendant had a mechanical failure near Wendover, Utah while carrying a load of explosives. The defendant's Salt Lake City dispatcher advised the operators of the truck, Reeves and Brown, to remain in Wendover until repair parts arrived and further instructed the drivers to be certain that the unit was not left unattended at any time. In accordance with company policy, the drivers had also been told at the time of their departure with the load of explosives not to leave the unit. After the breakdown at about 2 p.m. on January 13, the unit was attended by Reeves until evening at which time an off-duty highway patrolman was hired to and did attend the unit overnight. On January 14, both drivers attended the unit during the day, with Reeves electing to attend during the night. However, Reeves left the unit unattended from 11:30 p.m. on January 14 until about 7:30 a.m. on January 15.

The Court of Appeals concluded that the Government had made a prima facie case by proof that the truck loaded with bombs and under the control of the defendant was in fact left unattached as charged and that the admitted fact that Reeves was specifically instucted to guard the truck did not overwhelm the prima facie case as a matter of law so as to require acquittal. The Court found that the proof was sufficient to establish a "knowing violation", citing Texas-Oklahoma Express, Inc. v. United States, 429 F.2d 100, and United States v. International Minerals Corp., 402 U.S. 558. The Court concluded its opinion by saying: "The fact that Reeves was instructed to attend the subject truck but did not do so may be a factor militating against corporate criminal responsibility but rises no higher. Were the rule otherwise,

enforcement of the statute would in practicality be frustrated for corporate conduct must necessarily reflect through the conduct and acts of its employees."

Staff: United States Attorney C. Nelson Day
Assistant United States Attorney Glenn J. Mecham
(District of Utah)

FORFEITURES; REAL PROPERTY

18 U.S.C. 1955(d) WHICH PROVIDES THAT ANY PROPERTY USED IN AN ILLEGAL GAMBLING BUSINESS MAY BE SEIZED AND FORFEITED IS NOT APPLICABLE TO REAL PROPERTY.

Anthony P. Di Giacomo and Ann M. Di Giacomo, his wife v. United States of America (D. Del, Civ. Action No. 4413, August 10, 1972)

The petitioners, husband and wife, filed suit for temporary and permanent injunctions enjoining the United States from denying them the use and control of certain real property held by them as tenants by the entirety. The United States had seized the property pursuant to 18 U.S.C. Section 1955(d) and certain procedures authorized for seizures in matters relating to forfeitures under the customs laws and, in the case of property with a value in excess of $2,500, in accordance with seizures and sales of property, such as vessels, under the practice in admiralty.

The seizure was based upon alleged violations by petitioner Anthony Di Giacomo of gambling laws and his subsequent arrest and indictment for such offenses, although no trial had been held on the date of seizure. The petitioners and others were evicted from the premises, and two months had elapsed between the date of seizure and the petitioners' suit, during which the United States took no further action regarding the seizure of the premises.

The court rejected petitioners first and second arguments that they were entitled to a remission hearing and that the forfeiture procedures violated their 5th Amendment right to prior notice and a hearing. However, it found a sound basis for the contention, that 18 U.S.C. 1955(d) was never intended to authorize the seizure and forfeiture of real property. The court, therefore, granted the application for injunction, reasoning that (a) had Congress chosen to include real property in the forfeiture provisions, it would easily have said so; (b) that the character of property subject to forfeiture under the customs laws and admiralty procedures is always personal; (c) that where real property seizures have been attempted and sanctioned in the past, they have been effected pursuant to statutes expressly authorizing the forfeiture of real property; and (d) that while the seizure

and forfeiture of personal property is relatively easy, the problem of disposing of various interests in real property presents many complications.

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LAND AND NATURAL RESOURCES DIVISION
Assistant Attorney General Kent Frizzell

COURTS OF APPEAL

CONDEMNATION

UNITARY TRACT THEORY WHEN SEVERANCE DAMAGES HAVE BEEN DISCLAIMED, POTENTIAL USE, UNITARINESS NOT JURY QUESTION UNDER REYNOLDS, NON-JURY HEARING.

United States v. 105.40 Acres of Land, More or Less, situated in Porter County, State of Indiana, and United States v. 253.61 Acres of Land, More or Less, situated in Porter County, State of Indiana, Tracts Nos. 02-119 and 02-129 (C.A. 7, Nos. 71-1396 and 71-1397, Aug. 9, 1972, D.J. 33-15-322-328 and 33-15-322-280)

The United States took two parcels of 150 and 40 acres, located in Porter County, Indiana, from Bethlehem Steel Corporation for part of the Indiana Dunes National Lakeshore Park. The parcels, which were unused and unimproved at the time of the taking, are near, but not contiguous to a much larger tract upon which Bethlehem has invested over one billion dollars in constructing a steel mill. The three tracts, however, are connected by easements. Bethlehem disclaimed severance damages to the main tract which it retained, but contended that, since the two parcels taken were an integral part of its steel mill development, each parcel had enhanced value as it was part of the "whole tract" "assembled as "raw land;" that the "whole tract" was used and treated as a "unitary tract;" that the value of each parcel taken should be measured by reference to its contribution to the whole; and that the measure of value should be the "highest and best" current use of the two parcels as part of the "whole tract" under existing zoning ordinances or the adaptability of the parcels to a different use in the event of zoning changes.

The district court rejected Bethlehem's offer of testimony based on the before and after values of the total acreage, because (1) Bethlehem had disclaimed severance damages; (2) Bethlehem's theory was an averaging technique; and (3) the tracts taken were not contiguous to the main tract and were not zoned for heavy industry.

The Seventh Circuit reversed and remanded for a new trial on the grounds that the district court's ruling precluded Bethlehem from proving the highest and best use to which the parcels were adaptable or would likely be needed in the reasonably near future as part of Bethlehem's entire development.

The circuit court pointed out that the disclaimer of severance damages applies only to loss in value to the remainder

tract, not the enhanced value of the tracts taken due to their relationship to the whole. Bethlehem was entitled to offer evidence of the reasonable probability of their use relative to the main tract, and that accordingly they had a higher average value because of their relation to the whole.

The court held that the ultimate question of whether the tracts taken were an integral part of the whole is, under United States v. Reynolds, 397 U.S. 14 (1970), for the judge not the jury. The determination may be made in a non-jury hearing as in United States v. 327 Acres of Land, 320 F.Supp. 844 (N.D. Ga. 1971).

Staff: Larry G. Gutterridge and Robert S. Lynch (Land and Natural Resources Division); and Assistant United States Attorney Richard L. Kieser (N.D. Ind.)

EMINENT DOMAIN; PROJECT ENHANCEMENT SET-OFF

BURDEN OF PROOF IN SET-OFF OF PROJECT ENHANCEMENT BENEFITS; CORPORATIONS AS SEPARATE ENTITIES.

United States v. Parcel of Land in Wayne Co. (C.A. 6, No. 72-1134, Sept. 19, 1972, D.J. 33-23-704)

In 1960, in connection with an interstate highway project, the State of Michigan sought to condemn a five-acre portion of a 10-acre tract completely owned by June, Inc. That proceeding was terminated because the state statute under which it was filed did not provide for a project enhancement set-off. Thereafter, at the State's request, the United States filed a condemnation action for the same five acres. Just prior to commencement of this action, however, June, Inc., conveyed the five-acre remainder portion to Trauskle Co., a corporation wholly owned by the wives of the stockholders of June, Inc.

The United States, contending that Trauskle Co. was the agent or alter ego of June, Inc. requested that the 10-acre tract be considered under common ownership in order that benefits for project enhancement to the five acres of remainder could be set off in the award of just compensation. The district court held that the United States failed to meet this burden of proof.

The Court of Appeals affirmed per curiam, holding that a corporate entity is respected, unless one is employed as a mere conduit or for purposes of fraud; that the United States was not able to dispute the genineness of the consideration that the conveyance was for some purpose other than avoiding a set-off of benefits.

Staff: Glen R. Goodsell and William J. Kollins (Land and Natural Resources Division)

CONDEMNATION

JURISDICTION, AMENDMENT OF JUDGMENT, FINAL JUDGMENT.

United States v. 1,431.80 Acres in Cross County, Ark. (Raphael Holt Andrews, et al.) (C.A. 8, No. 72-1443, Sept. 22, 1972, D.J. 33-4-277-36)

This condemnation suit was tried by a jury on the issue of title and just compensation. After the entry of final judgment, the trial judge amended the judgment to correct the dates of trial. The Government filed its notice of appeal within 60 days of the amendment to the final judgment, but more than 60 days after the judgment itself. The Eighth Circuit ruled that the mere retention of district court jurisdiction for future ministerial orders (here the district court's sua sponte correction of trial dates recited in the judgment) does not withhold the finality required to make the order appealable.

Likewise, the amendment neither tolls running of the time for filing a notice of appeal nor is itself a final judgment which starts the time running anew.

Therefore, the Government's appeal of this condemnation case was dismissed for want of jurisdiction because the notice of appeal was filed out of time.

Staff: Larry G. Gutterridge and Carl Strass (Land and Natural Resources Division) and Assistant United States Attorney James G. Mixon (D. Ark.)

DISTRICT COURT

CIVIL PROCEDURE

GRANT OR DENIAL OF PRELIMINARY INJUNCTION DOES NOT ESTABLISH "LAW OF THE CASE" TO ESTOP CONSIDERATION OF ISSUE ON REMAND.

Sierra Club v. Morton (N.D. Cal., Civ. 51464 WTS, Sept. 18, 1972, D.J. 90-1-4-191)

Sierra Club brought suit against the Secretaries of Agriculture and Interior for injunctive and declaratory relief against execution of a recreation project in Mineral King Valley. The district court granted a preliminary injunction, and the Court of Appeals reversed and remanded, holding that (1) the Club had no standing, and (2) plaintiff was not likely to prevail on the merits. 433 F.2d 24. On certiorari, the Supreme Court affirmed on the issue of standing. 405 U.S. 727 (1971)

On remand, the district court allowed the Club to amend its pleadings to establish standing and to add a third cause of action alleging violation of the National Environmental Policy Act of 1969 (NEPA).

The United States then moved, under Rule 12(b)(6), F.R.Civ.P., to dismiss the first and second causes of action on the ground that the Court of Appeals' discussion of the reason for denying a preliminary injunction had established the "law of the case" adversely to plaintiffs.

The district court denied the motion, holding that the decision of a court granting or denying a preliminary injunction does not establish the law of the case as to estop either the parties or the court from proceeding with the case on its merits, and accordingly, notwithstanding the Court of Appeals' "handwriting on the wall," plaintiffs retained their right to proceed on the merits. Finally, the court stated that plaintiffs' complaint had sufficiently raised the issue of defendants' compliance with NEPA to withstand a notice to dismiss the third cause of action.

Staff: Assistant United States Attorney Rodney H. Hamblin (N.D. Cal.)

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OFFICE OF LEGAL COUNSEL
Assistant Attorney General Roger C. Cramton

LEGISLATION ON NEWSMEN'S PRIVILEGE OPPOSED ON GROUNDS THAT GUIDELINES ARE WORKING WELL.

The Department has testified before Congress in opposition to pending bills that would establish a testimonial privilege for newsmen. Roger C. Cramton, Assistant Attorney General, Office of Legal Counsel, testified that requests for issuance of subpoenas to newsmen had been infrequent since the Attorney General's "Guidelines for Subpoenas to the News Media" had gone into effect in August 1970. Since the Guidelines are operating satisfactorily and abuses have not been established, legislation is unnecessary. Under the Guidelines a request for a subpoena to a newsman must be referred to the Attorney General for his approval.