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NEWS NOTES

DEPARTMENT SEEKS ORDER TO CLOSE DOWN PLANT FOR VIOLATIONS OF CLEAN AIR ACT

February 7, 1969: The Department of Justice has asked the United States District Court in Baltimore to order the Bishop Processing Company of Bishop, Maryland--an animal rendering plant--to stop manufacturing and processing operations because of violations of the Federal Clean Air Act. Attorney General John Mitchell said this was the first time that the Federal Government had asked a court to close down a plant because of air pollution.

The order was sought as a result of violation of a consent decree entered on November 1, 1968, which prohibited Bishop Processing from discharging malodorous air pollutants from its rendering plant into the air over Delaware.

Under terms of the consent decree, James T. Wilburn, director of the air pollution control division of the Delaware Water and Air Resources Commission, certified that Bishop has continued to discharge malodorous air contaminants into the air over Delaware.

The consent decree resulted from the Government's first suit under the Clean Air Act, which authorizes the Department of Health, Education and Welfare to request legal action in cases where an area's air pollution results from operations in another state.

DEPARTMENT FILES SCHOOL DESEGREGATION SUITS AGAINST THREE LOUISIANA PARISHES

February 10, 1969: The Department of Justice has filed desegregation suits against school systems in three Louisiana parishes. Attorney General John N. Mitchell said that the civil suits were brought under Title IV of the 1964 Civil Rights Act and named school boards in West Carroll, Morehouse and Catahoula parishes. The suit alleged that the three school boards maintained dual school systems for Negroes and whites. The actions, filed in the U.S. District Court for the Western District of Louisiana, at Shreveport, asked for injunctions ordering the assignment of teachers and students to schools without regard to race and the elimination of the dual systems.

Federal funds to the three school districts were terminated under the Civil Rights Act of 1964 in the summer of 1966.

DEPARTMENT CHALLENGES "FREEDOM OF CHOICE" PLAN IN HOUSTON

February 11, 1969: The Department of Justice has asked a Federal court to void a "freedom of choice" student desegregation plan in the Houston Independent School District, the sixth largest school district in the Nation.

A motion for supplemental relief was filed in the U.S. District Court in Houston alleging that a "freedom of choice" assignment plan for students had not eliminated racial discrimination in the South's largest school system. The order, if granted, would take effect for the 1969-70 school year.

The Department alleged that the current "freedom of choice" plan--the fourth court-ordered plan in the 12-year law suit--had permitted Houston to continue to maintain "dual school" system for the great majority of white and Negro students.

The Department asked the court to fashion a completely new plan on the grounds that "there are educationally sound alternative methods of student assignment available, such as pairing and geographical zoning, which if used would be more likely to achieve a desegregated, unitary school system than the freedom of choice plan presently being used."

The Department also asked the court to order teacher assignments in each school in direct proportion to the over-all racial composition of teachers in the Houston school system.

DEPARTMENT FILES PUBLIC ACCOMMODATION SUIT AGAINST TEXAS AMUSEMENT PARK

February 12, 1969: The Department of Justice has filed a desegregation suit under the public accommodations section of the 1964 Civil Rights Act against a Texas amusement park which advertises the largest swimming pool in the Southwest. The civil suit, which was filed in U.S. District Court in Dallas against Sandy Lake Pool, Inc., and Francis John McLean of Carrollton, Texas, owner and operator of the amusement park, contends that the amusement park refuses to allow Negroes to use facilities on the same basis as whites. The suit requested a court order prohibiting discrimination because of race or color against those who want to use the facilities.

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ANTITRUST DIVISION

Assistant Attorney General Richard W. McLaren

SUPREME COURT

SHERMAN ACT

SUPREME COURT REVERSES DISTRICT COURT IN PRICE FIXING CASE.

United States v. Container Corp. of America (Sup. Ct., No. 27; January 14, 1969; D.J. 60-86-16)

On January 14, 1969, the Supreme Court, in a six-to-three decision reversing the District Court for the Middle District of North Carolina, held that the defendant corrugated paper container manufacturers violated Section 1 of the Sherman Act by furnishing to one another, upon request, the price most recently charged or quoted to specific customers.

On October 14, 1968, the United States filed a complaint charging that 19 manufacturers of corrugated paper containers in the Southeastern United States had, at least since 1955, engaged in a combination and conspiracy to exchange information as to the price each had recently charged or quoted to specific customers for the purpose and with the effect of restricting competition among themselves. There were 51 corrugated container manufacturers in this market, but the defendants accounted for 90 percent of the total sales. Corrugated containers are a standardized product in that all containers made to particular specifications are identical regardless of who produces them. Therefore, the price purchasers will pay is determined on the basis of the available price alternatives; to keep or obtain new business, suppliers cannot exceed a competitor's price. At any particular time, demand for containers is based upon current shipping needs of the purchasers and thus is quite inelastic. During the period covered by the complaint there was continual excess capacity and a downward trend of prices. Nevertheless, the industry expanded from 30 manufacturers with 49 plants to 51 manufacturers with 98 plants.

The case was tried on the basis of stipulations agreed to by both parties, the undisputed testimony, presented in depositions, of 36 pricing officials of defendants, and many documents introduced by defendants for the purpose of proving the existence of vigorous competition. On August 31, 1967, the district court dismissed the complaint. It held (1) that the Government had failed to prove an agreement to exchange price information, but rather had proved, at most, a course of parallel

conduct or business behavior which did not require an inference of conspiracy; and (2) that even assuming an agreement to exchange prices, the Government had not proved that the purpose or effect of such an agreement was to restrain price competition. The court emphasized that each defendant was free to set any price it chose after learning of its competitor's price, and found that there had existed during the period covered by the complaint substantial shifting of accounts among defendants, and no uniformity as to the velocity or direction of individual price trends.

On appeal, the Government argued that a combination among defendants was inherent in their course of conduct: each defendant requested information from another defendant whenever he needed such information, and each defendant usually furnished such information upon request with the implied understanding that it could obtain such information when needed. Each price communication was thus a joint action and this reciprocal, interdependent practice constituted a combination within the meaning of Section 1. Moreover, the Government argued that full disclosure among competitors of actual prices being quoted to specific customers is necessarily anticompetitive in a market such as the corrugated container market, dominated by relatively few sellers and having identical products, competition based solely on price, and inelastic demand. We contended that, in such a market, a defendant has little incentive to cut a competitor's price since he knows that such a cut may be promptly discovered and met. Thus, the anticipated benefit of the lower price--increased business becomes instead an anticipated detriment--the same share of the business at a lower return.

Justice Douglas spoke for the Supreme Court majority in reversing the district court's decision. Justice Fortas concurred in a separate opinion, while Justice Marshall, joined by Justices Harlan and Stewart, dissented. All the Justices agreed that the reciprocal furnishing of price information was concerted action sufficient to establish a combination or conspiracy within the meaning of Section 1, notwithstanding the absence of formal agreement. Justice Douglas, for the majority, agreed with the Government that the exchange of price information, in an industry structured in the way that the corrugated container industry is, tends to stabilize prices and chill the vigor of price competition. He observed that the exchange "seemed to have the effect of keeping prices in a fairly narrow ambit" and concluded that the result had been to stabilize prices though at a downward level. That some price competition continued was not fatal to the Government's case, since the stabilization of prices constituted "an interference with the setting of price by free market forces" and was thus unlawful per se under United States v. Socony Vacuum Oil Co. Finally, acknowledging that the condemned arrangement was

"somewhat casual", Justice Douglas observed that "price is too critical, too sensitive a control, to allow it to be used even in an informal manner to restrain competition."

Justice Fortas, concurring, emphasized that he did not understand the majority to hold that the exchange of specific price information among sellers to be unlawful per se, nor did he find it necessary to so hold. Recognizing the "probability" that the challenged conduct "materially interfered with the operation of the price mechanism of the market place", he rested his concurrence on confirmation of the probability that he found in the record. Specifically, he relied upon (1) the district court's finding that in a majority of instances, when a defendant had price information, he quoted substantially the same price as his competitor; and (2) the fact that vigorous price reductions sometimes occurred in periods when various defendants ceased exchanging price information. Justice Fortas also took note of the special sensitivity of the "price term in the antitrust equation" as a basis for concluding that defendants' arrangement substantially limited competition.

The dissenters, although acknowledging that the Government had made "a convincing argument in theoretical terms", declined to find that the corrugated container market was "sufficiently oligopolistic" to warrant the inference that price information will necessarily be used to restrain competition. Since they further could not conclude that the Government had established that the purpose or actual effect of defendants' course of conduct was anticompetitive, they would have affirmed the district court.

Former Assistant Attorney General Edwin M. Zimmerman argued the case for the United States.

Staff: Gregory B. Hovendon, Rebecca J. Schneiderman, Lewis Bernstein, Wharey M. Freeze (Antitrust Division); Lawrence G. Wallace (Assistant to the Solicitor General)

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CIVIL DIVISION

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COURTS OF APPEALS

EMPLOYEE DISCHARGE

JUDICIAL REVIEW OF DISMISSAL OF POST OFFICE DEPARTMENT EMPLOYEE INCLUDES INQUIRY INTO SUBSTANTIAL EVIDENCE QUESTION.

Ulysses S. Vigil v. Post Office Department of the United States of America & The United States of America (C.A. 10, No. 10,162; January 29, 1969; D.J. 145-5-3190)

Vigil, a Post Office Department janitor, was convicted under a local ordinance of committing an indecent act, a misdemeanor, with a male companion. Vigil later admitted to a Post Office Department investigator that he had engaged in homosexual conduct on this and other occasions. Ultimately he was fired on a charge of sexual perversion based specifically on his conduct on the date of his arrest. He then filed suit for reinstatement and back pay in the district court. Our motion for summary judgment was granted and Vigil appealed.

In affirming, the Tenth Circuit recognized that ordinarily the scope of judicial review in employee discharge cases is limited to insuring that all procedural requirements have been complied with and that the agency action was not arbitrary or capricious. On that score the Court held, inter alia, that the failure of the Denver police to warn Vigil of his right to counsel at the police court hearing had no bearing on the Department's right to dismiss him. The Court also ruled, however, that an additional question for review in employee discharge cases is whether the determination of dismissal was supported by substantial evidence. Reviewing the testimony elicited at the hearing, the Court concluded that the dismissal was so supported and found no occasion to substitute its own judgment.

Staff: Robert E. Kopp and Judith S. Seplowitz
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SOCIAL SECURITY ACT

SOCIAL SECURITY AMENDMENTS OF 1967 DO NOT REQUIRE DISABILITY CLAIMANT TO ESTABLISH IMPAIRMENT BY OBJECTIVE MEDICAL EVIDENCE.

William J. Thacker v. Gardner (C.A. 6, No. 18,409; January 10, 1969; D.J. 137-30-346)

Thacker applied for disability benefits claiming inability to work due to asthma, ulcers, heart trouble, and an old work-related injury. The Secretary, concluding that no objective medical evidence supported the claim, denied benefits. In contending that the Secretary had correctly held that an impairment must be established by objective medical evidence, we relied on Section 158(b) of the Social Security Amendments of 1967 which provides that the impairment which can be the basis for a finding of disability must be "demonstrable by medically acceptable clinical and laboratory diagnostic techniques".

The Sixth Circuit, following its recent decision in Whitt v. Gardner, 389 F.2d 906, disagreed and reversed. The Court ruled in effect (contrary to the view taken by the Ninth Circuit in Ryan v. Secretary, 393 F.2d 340) that the quoted portion of the Amendments did not require the medical evidence to be objective. Concluding that the Secretary had thus applied an erroneous standard of disability, the Court remanded the case for consideration in light of the standards enunciated in Whitt.

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CRIMINAL DIVISION
Assistant Attorney General Will Wilson

COURT OF APPEALS

POSSESSION OF PROPERTY STOLEN FROM INTERSTATE COMMERCE

INDICTMENT NOT FATALLY DEFECTIVE FOR FAILURE TO ALLEGE SPECIFIC FACILITY FROM WHICH PROPERTY STOLEN.

Nathaniel Walter Dunson v. United States (C.A. 9, November 19, 1968; D.J. 15-11-137)

On appeal from conviction for having possession of property stolen from an interstate shipment, knowing the property to have been stolen, defendant contended the indictment failed to state an offense under 18 U.S.C. 659, since it did not set forth specifically the interstate facility from which the merchandise was allegedly taken.

The court noted a split in the Circuits on this issue, United States v. Manusak, 234 F.2d 421 (C.A. 3, 1956), holding an indictment invalid on this ground and United States v. Wora, 246 F.2d 283 (C.A. 2, 1957), to the contrary. In affirming the conviction here the Court adopted the Wora rationale. It stated that the allegation that the article was "stolen ... from an interstate shipment of freight moving from Chicago, Illinois, to Oakland, California" necessarily implies that it was stolen from a "railroad car, wagon, motortruck, or other vehicle, or from /a/ ... station, station house, platform or depot or from /a/ steamboat, vessel, or wharf, or from /an/ aircraft, air terminal, airport, aircraft terminal or air navigation facility ...". No other possibility was suggested.

It further stated that the purpose of the statute was to protect any conceivable instrumentality of interstate transportation and there was nothing in the language of the statute to indicate it "was intended to be less than all inclusive, i.e., that some interstate freight facilities were intended to be included and others excluded, and therefore the particular interstate facility pillaged was to be an element of the offense."

Staff: United States Attorney Cecil F. Poole;
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LAND AND NATURAL RESOURCES DIVISION
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DISTRICT COURT

SEABED RESOURCES

CONTINENTAL SHELF; CORAL REEFS ARE NATURAL RESOURCES; UNAUTHORIZED CONSTRUCTION OF ARTIFICIAL ISLAND ON CORAL REEFS ENJOINED.

United States v. Louis M. Ray & Acme General Contractors, Inc., Defendants; Atlantis Development Corp., Intervenor (S.D. Fla., No. 65-271-Civ-CF, Jan. 2, 1969; D.J. 90-1-10-666)

Under the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. 1331-1343, and the Convention on the Continental Shelf, 15 U.S.T. (Pt. 1) 471, the United States has exclusive sovereign rights over the continental shelf seaward of its territorial sea (three-mile belt) for the purpose of exploring it and exploiting the natural resources. By section 4(f) of the Act, 43 U.S.C. 1333(f), the authority of the Secretary of the Army to prevent obstruction to navigable waters of the United States is extended to artificial islands and fixed structures on the shelf.

Without any authority from the United States, defendants Ray and Acme began building an artificial island on Triumph and Long Reefs, about five miles east of Miami, which they claimed by right of discovery and on which they intended to establish an independent nation. The United States filed a complaint seeking an injunction (but no damages) on two counts. The first count, filed at the request of the Secretary of the Interior who has responsibility for administration of the resources of the outer continental shelf under the Outer Continental Shelf Lands Act, sought an injunction on the ground that the defendants were in effect trespassers whose conduct was causing irreparable injury to the only living coral reefs in the United States. The second count, filed at the request of the Secretary of the Army, sought an injunction on the ground that the defendants had not secured a construction permit from him as required by section 4(f) of the Act. A preliminary injunction was issued, 281 F. Supp. 876 (1965), following which the Atlantis Development Corporation, claiming rights in the reefs superior to both the United States and the defendants, was allowed to intervene as a defendant and as cross-claimant against the original defendants, Atlantis Development Corp. v. United States, 379 F.2d 818 (C.A. 5, 1967).

In answer to a challenge to its jurisdiction, the court found jurisdiction under 28 U.S.C. 1345, as an action brought by the United States; 28 U.S.C. 1331, as a case or controversy arising under the Constitution, laws or treaties of the United States involving more than $10,000; the court's general equitable jurisdiction; and the Act, which extended federal district court jurisdiction to cases involving the natural resources of the outer continental shelf.

The court determined that the reefs are not "islands" because they are below the level of mean high water; that these coral reefs are part of the seabed and subsoil and are natural resources on the outer continental shelf within the meaning of the Act and the Convention; that "whatever proprietary interest exists with respect to those reefs belongs to the United States under both" the Act and the Convention; and that the defendants' activities would injure the reefs irreparably. It nevertheless denied relief on the first count, giving as its reason that the admittedly limited interest of a nation in the adjacent continental shelf is not such complete title as is requisite to maintenance of a common law action of trespass quare clausum fregit. However, under the second count it enjoined the defendants from proceeding without a permit from the Secretary of the Army.

The Division believes the elements of a common law trespass action to be irrelevant to its right under the Civil Rules to secure the injunctive relief sought on the basis of the facts pleaded in the first count, entirely apart from the question of a construction permit from the Army, and is considering an appeal as to that count.

Staff: First Assistant United States Attorney Aaron A. Foosaner (S.D. Fla.); George S. Swarth and John G. Gill, Jr. (Land & Natural Resources Division)

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