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Assistant Attorney General Richard W. McLaren

DISTRICT COURT

SHERMAN ACT

INDICTMENTS AND COMPLAINT FILED FOR VIOLATION OF SECTION 1 OF THE SHERMAN ACT IN THE TRUCKING OF AIR FREIGHT.

United States v. National Association for Air Freight, Inc., et al. (E. D. N. Y., Cr. 71 C 487; May 13, 1971; D. J. 60-171-232)

United States v. Airfreight Transportation Corp., et al. (E. D. N. Y., Cr. 71 CR 485; May 13, 1971; D. J. 60-171-237)

United States v. National Association for Air Freight, Inc., et al. (E. D. N. Y., Civ. 71 C 563; May 13, 1971; D. J. 60-171-236)

On May 13, 1971, after 18 months of investigation, a Federal Grand Jury in Brooklyn, New York returned an indictment charging a conspiracy in violation of Section 1 of the Sherman Act by an air freight trucking association, 12 trucking firm members of the association, and four individuals. On the same date, the same Grand Jury returned an indictment charging three air freight trucking companies and two individuals with a conspiracy to fix prices in the trucking of air freight from John F. Kennedy International Airport to New Jersey.

Named as defendants in the first indictment were: National Association for Air Freight, Inc. (NAAF); A. T. D. Trucking Corp.; Air-Freight Trucking Service, Inc.; B & P Delivery Service, Inc.; Breen Air Freight Ltd.; Caltro Trucking, Inc.; Gesell Trucking Corp.; J & J Trucking Corp.; Junior Trucking, Inc.; and L & J Trucking Corp.; Anthony L. DiLorenzo; Jack F. Sarcona; Haskell Wolf; and Frank Yandolino.

This indictment charges a continuing conspiracy, existing since at least 1960 and continuing up to and including the date of the return of the indictment, the substantial terms of which were to allocate customers, to impose a uniform fixed surcharge, and to refuse as a group on various occasions to pick up import air freight at the terminals of some or all of the international air carriers at JFK. The conspiracy affected the deliveries of import air freight to customers in the New York Metropolitan area. In 1969, the defendant firms received approximately 3.7 million dollars for making such deliveries.

A key individual defendant, Anthony L. DiLorenzo, a $25,000 a year consultant to the Association, his appeal from a 1969 conviction for the theft of securities having been rejected by the Supreme Court, is about to enter federal prison to serve a ten-year sentence. DiLorenzo's presence at the arraignment, on May 27, 1971, was secured by the filing of a Writ of Habeas Corpus.

The second indictment (United States v. Airfreight Transportation Corp., et al.), charged a price fixing conspiracy involving the trucking of air freight to New Jersey from JFK. The defendants are Airfreight Transportation Corp.; Air Freight Trucking Service, Inc.; Teterboro Air Freight, Inc.; Henry Bono; and Howard Wofsy.

A companion civil suit to the first indictment was also filed on May 13, 1971 (United States v. National Association for Air Freight, Inc., et al.). In the civil suit, the Department asked that the defendants be perpetually enjoined from continuing the conspiracy or from engaging in practices having a similar purpose or effect. The complaint also asks that the Association be dissolved and that the defendants be perpetually enjoined from establishing any organization having a similar purpose of effect.

A third indictment was returned on May 13, 1971 by the same Grand Jury (United States v. Frank LaBell, 71 CR 486 E.D. N.Y.). This indictment arose out of a Hobbs Act (18 U.S.C. 1951) investigation which was initiated as a result of information uncovered during the course of the antitrust investigation. This indictment will be prosecuted by the Eastern District Strike Force.

This indictment charges LaBell with a violation of 18 U.S.C. §1623 (The Organized Crime Control Act of 1970) in that he made a false declaration before a grand jury.

Staff: Richard L. Shanley, Bruce Repetto and Stephen M. Behar (Antitrust Division)

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CRIMINAL DIVISION

Assistant Attorney General Will Wilson

COURT OF APPEALS

FLAG DESECRATION

COURT CONSTRUES FLAG DESECRATION STATUTE, 18 U.S.C. 700, TO REQUIRE ACTUAL PHYSICAL MUTILATION, DEFACEMENT OR DEFILEMENT

Hoffman v. United States (C.A. D.C., No. 23,514, March 19, 1971; D.J. 95-763-15)

The United States Court of Appeals for the District of Columbia recently reversed the conviction of Abbie Hoffman for violation of the federal flag desecration statute, 18 U.S.C. 700. In three separate opinions all three members of the panel agreed that the statute requires actual physical mutilation, defacement, or defilement of the flag. In the Court's opinion Hoffman's actions did not constitute a violation.

Hoffman had been convicted for wearing a commercially manufactured shirt which, while not actually a flag of the United States, resembled a flag sufficiently to come within the terms of the statute. Attached thereto were two buttons, one saying, "Wallace for President; Stand Up for America," the other saying, "Vote Pig Yippie in Sixty-Eight." Judge Fahy concluded from the legislative history of the act that the clear intent of Congress was to condemn only physical mutilation, defacement, or defilement of the flag, its "physical dishonor or destruction." Based on the record the judge found that wearing the shirt and pinning on the buttons did not constitute physical mutilation, defacement, or defilement, as those words are to be narrowly construed. In dicta, Judge Fahy also suggested that where the injury is not to the flag itself but rather to a simulated design, it may well be that the proof of violation must be clearer than if the flag itself were desecrated.

In his concurring opinion, Judge MacKinnon found that the Government had also failed to establish that the defendant had "knowingly cast contempt" on the flag. To prove the accused acted with the requisite intent, it must be shown that he publicly defaced or defiled the flag and the facts must support the inference that the accused intended his acts to be contemptuous of the flag. Hoffman's act of wearing the shirt and buttons would not support such an inference, and there was no other testimony which would justify a finding that his actions were knowingly contemptuous. Judge Robb concurred simply on the basis that the word "defile" must be narrowly construed and connotes only a physical mutilation, defacement, or defilement of the flag.

The holding of the Court did not reach the constitutionality of the statute. In passing, Judge Fahy reaffirmed the principle that the people of the United States have an interest in the flag and Congress has the power to protect it from desecration. However, the Court did not have to face squarely the issue of whether the statute, as they had construed it, was consistent with the requirements of the First Amendment. Thus, the holding of the case is limited to its facts and does not bar federal prosecution for contemptuous public burning or physical defilement of the flag.

It remains the Department's policy to defer most flag desecration matters to local authorities in view of the primary jurisdiction of the states and the general policy against dual prosecution. When a violation of the statute occurs within the exclusive jurisdiction of the United States or when the state fails to act on an incident that constitutes a clear violation of the statute, prosecution will be considered. United States Attorneys should obtain Department approval prior to instituting any prosecution under Section 700, except when the exigencies of the situation dictate that immediate action be taken. See United States Attorneys Bulletin, Vol. 17, No. 4, dated January 24, 1969, pp. 59-60.

Staff: United States Attorney Thomas Flannery; Assistant United States Attorneys John Ellsworth Stein, John A. Terry and John F. Evans

DISTRICT COURT

AIRCRAFT--CARRYING WEAPONS ABOARD

STARTER PISTOL HELD DANGEROUS WEAPON UNDER 49 U.S.C. 1472(l)

United States v. William D. Bissett (D. Mass., Cr. 71-139-J, April 22, 1971; D.J. 95-017-36)

William D. Bissett attempted to board a Northeast Airlines flight from Boston to New York on October 22, 1970, while possessing on his person a concealed 8-shot .22 caliber R.T.S. starter revolver with one expended and seven unexpended blank cartridges loaded in its chambers. Also on his person the defendant possessed operating instructions for the weapon, which described the weapon as dangerous and capable of inflicting burns if not fired properly.

Before accepting a plea of guilty, the court questioned whether a starter pistol incapable of firing a projectile because of a blocked barrel was a deadly or dangerous weapon within the meaning of 49 U.S.C. 1472(l). In response the government prosecutor submitted a Department of Justice memorandum

prepared on January 25, 1971, containing an analysis of the legislative history of the statute and a general history of federal and state cases which have defined and examined the phrase "deadly or dangerous weapon." Also submitted for the court's consideration was the case of Commonwealth v. Henson, 259 New Eng. 2d 769 (1970), where defendant was convicted of assault with a dangerous weapon for firing a starter pistol at the direction of a police officer.

After consideration of the Departmental memorandum, the Henson decision, and applicability thereof to the facts of the case before it, the court concluded that a starter pistol came within the prohibition of 49 U. S. C. 1472(l).

It should be noted that the usual starter gun is covered by the federal firearms statutes only if it is designed or can be readily converted to expel a projectile. The holding of this case does nothing to affect that requirement. 18 U. S. C. 921(3). However, a starter gun which is not designed to expel a projectile is now covered by federal law when it is carried aboard an aircraft. It can be considered a "deadly or dangerous weapon" for the purposes of 49 U. S. C. 1472. It should also be remembered that the federal firearms statute which proscribes the use or unlawful carrying of a firearm during the commission of a federal felony, 18 U. S. C. 924(c), is superseded by those statutes which contain special provisions for increased punishment for the use of a dangerous weapon in the commission of the offense. E. g., 49 U. S. C. 1472 and 18 U. S. C. 2113. See United States Attorneys Bulletin, Vol. 19, No. 3, February 5, 1971, pp. 63-64. Thus, only the penalties of the crime aboard aircraft statute would be applicable.

Staff: United States Attorney Herbert F. Travers, Jr.; Assistant United States Attorney Edward J. Lee; and Richard J. Boylan (Criminal Division) (District of Massachusetts)

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LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Shiro Kashiwa

COURTS OF APPEALS

CONDEMNATION

EVIDENCE; DECLARATION OF TAKING; TUCKER ACT; EVIDENCE OF FLOODING BEYOND TAKEN AREA INADMISSIBLE AS SEVERANCE DAMAGES AS IMPERMISSIBLE VARIANCE OF DECLARATION OF TAKING; NO COUNTER-CLAIM IN CONDEMNATION SUIT.

United States v. 3,317.39 Acres in Jefferson County, Ark., and Earl Moore (Ark-Mo Farms) (C.A. 8, No. 20467, May 27, 1971; D. J. 33-4-205-80)

In connection with the construction of a lock and dam on the Arkansas River, the United States condemned flowage easements over about 2,000 acres of a 10,000-acre tract. The Government's appraisers testified that the damages amounted to between $110,000 to $116,000. The landowner, claiming that the Government was actually flooding an additional 4,000 acres, introduced valuation testimony from $1,184,195 to $1,500,000. The district court sustained the admission of evidence of this alleged additional flooding on the ground that it represented severance damages, and entered judgment in favor of the landowner on a jury verdict of $976,071.

The Court of Appeals reversed and remanded, with the direction that at the new trial evidence be limited to damages sustained to that portion of the property included in the declaration of taking, plus any severance damage to the portion not taken. The court explained that the nature and extent of the interest to be acquired is discretionary with the authorized federal officials; that these interests specified in the complaint and the declaration of taking may neither be increased nor decreased by courts. If the landowner did sustain additional flooding, he was required to seek compensation in a separate proceeding under the Tucker Act, 28 U.S.C. 1491.

Staff: Jacques B. Gelin (Land and Natural Resources Division)

CONDEMNATION; APPEALS

DECLARATION OF TAKING; "LESSEE" ALLOWED RENT-FREE POSSESSION AFTER GOVERNMENT'S TAKING OF FEE; SUMMARY AFFIRMANCE.

United States v. 46.23 Acres in Benton County, Mo., and Kenneth H. Estes, et al. (C.A. 8, No. 71-1004, May 14, 1971; D.J. 33-26-472-667)

Before this condemnation action was begun, the former owners of the subject property signed an instrument styled as a "mineral lease" which permitted their lessee to enter the property and extract minerals. The instrument was recorded. It is silent as to length of term and no rent was reserved for any time period, the sole consideration being a royalty on materials and minerals extracted. The Government's later declaration of taking encompassed the fee-simple title to the subject property.

The lessee moved the district court to permit his continued possession. Over the Government's objection, the court's final judgment allowed the lessee to remain in rent-free possession and to remove minerals without royalty for five years beyond the date of taking. No award of money compensation was sought by or granted to the lessee.

The Government appealed, contending that the district court had no power to alter or reduce the fee estate it had acquired by its declaration of taking. It further claimed that the lessee had no compensable interest because his lease, having no definite term, made him a tenant at will at best.

The case was submitted to the Court of Appeals on the Government's brief without argument. The lessee filed no brief and made no appearance, although his attorney wrote a letter to the clerk of the court presenting informally the lessee's arguments.

The Court of Appeals, under its Rule 14, summarily affirmed the district court's judgment without opinion. The Division disagrees with the disposition of this case.

Staff: Dirk D. Snel (Land and Natural Resources Division)

PUBLIC LANDS; NAVIGATION

EQUAL FOOTING DOCTRINE DOES NOT REQUIRE THAT TITLE TO THE TIDE AND SUBMERGED LANDS, FILLED BY FEDERAL OFFICERS IN CONNECTION WITH ALASKA RAILROAD PRIOR TO STATEHOOD, PASS TO STATE OF ALASKA UPON ADMISSION.

United States v. State of Alaska, 423 F. 2d 764 (C. A. 9, 1970, cert. den., 400 U. S. 967; D. J. 90-1-5-984)

United States v. City of Anchorage, 437 F. 2d 1081 (C. A. 9, 1971; D. J. 90-2-1-2449)

In City of Anchorage, the Ninth Circuit held that its decision in State of Alaska was conclusive on the proposition that land under navigable water, withdrawn by implication by executive order prior to statehood, did not pass to the State upon admission under the equal footing doctrine (Tustemena Lake within the Kenai Moose Range). The court in City of Anchorage found the necessary implication from the factual need for wharfs, docks, etc., to be used in connection with the Alaska Railroad authorized by the Act of March 12, 1914, 38 Stat. 305, and Executive Order No. 2242 withdrawing certain lands along the ordinary high water mark on the shore of Knik Arm, in Anchorage, Alaska, for construction and operation of the Alaska Railroad, the only federally owned and operated railroad in the United States.

Staff: Martin Green and Edmund B. Clark (Land and Natural Resources Division)

CONDEMNATION; APPEALS

EVIDENCE; VALUATION OF LEASEHOLD WITH OPTION TO RENEW; COMPARABLE LEASEHOLDS BEST EVIDENCE; BURDEN OF PROOF; COMMERCIAL VALUE OF PASTURE LAND HELD SPECULATIVE; EXCLUSION OF DIMINUTION CAUSED BY GOVERNMENT USE UNTIL USE ENDS; CLEARLY ERRONEOUS RULE ON REVIEW OF CONDEMNATION AWARD.

United States v. 883. 89 Acres in Sebastian County (Peerless Coal Company) (C. A. 8, No. 20465, May 13, 1971; D. J. 33-4-145-32)

The United States condemned a one-year leasehold interest with options to renew for the following four years for a military installation. Prior to the Government's taking, the tracts in question had been used as pasture land. The Army currently is using them for an artillery and

and small arms range. At the time of trial the Government was in its fourth year of occupancy, having exercised its option to renew. The district court entered judgment for the landowner for $12,000 from which he took this appeal.

On the landowner's appeal, the Eighth Circuit, noting the landowner's burden of proof as to value, refused to reweigh the evidence of value; approved the use of other leaseholds without options to renew as substantial evidence of the market value of this leasehold, since there was no evidence the options had any value; rejected as too speculative in this case the landowner's attempt to have his pasture valued as commercial property; and concluded that the award need not include diminution caused by government use as an artillery range, on the ground of prematurity, since the Government's term has not ended.

Staff: John D. Helm (Land and Natural Resources Division)

CONDEMNATION

COMPENSABILITY OF STATE SCHOOL LANDS CONDEMNED FOR IRRIGATION PROJECT UNDER RECLAMATION ACT.

United States v. 111.1 Acres in Ferry County, Wash. (State of Washington) (C.A. 9, No. 23161, Nov. 17, 1970; D.J. 33-49-208-1965)

The Reclamation Act of 1902, 32 Stat. 388, set up a reclamation fund to be used in construction of irrigation projects in 17 western states. In response to the federal legislation and to facilitate the construction of such irrigation projects, substantially all of these western states enacted irrigation codes. The Washington statute, R.C.W. 90.40.050, provides that whenever the proper officers of the United States file with the State a list of lands required for irrigation projects, such list shall constitute a reservation of these lands, "which reservation shall, upon the completion of such works and upon the United States by its proper officers filing with the [State] a description of such lands * * * ripen into a grant from the state to the United States."

The specific tract condemned had been granted to the State of Washington by the Enabling Act for support of the public schools. This tract was part of two such withdrawal notices. The first withdrawal notice was initially filed April 26, 1938, and the final notice was filed March 29, 1945. The second withdrawal notice was initially filed August 21, 1962, and the final notice filed November 9, 1962. This suit

was filed on November 20, 1964. Thus, the test case included lands which had been held by the United States both more and less than the six-year limitation period of 28 U. S. C. 2401, 2501.

At the trial it was shown that 65,000 acres of state school lands had been withdrawn for the Columbia Basin Project of which the lands condemned here were a part. The acreage actually used for the Project was not clear on the record, but was presumably substantially smaller than the total acreage withdrawn.

The district court started from the premise that the state irrigation code provided state lands needed for federal reclamation projects without cost. The court held that insofar as state school lands were concerned this was contrary to Section 111 of the Enabling Act which provided:

> * * * That none of such [school] lands * * * shall ever be disposed of except in pursuance of general laws providing for such disposition, nor unless the full market value of the estate or interest disposed of, * * * has been paid or safely secured to the State.

The district court held that, moreover, the granting of state lands without cost to federal reclamation projects was also violative of the Washington Constitution, Article XVI, Section 1, which provides:

> All the public lands granted to the state are held in trust for all the people and none of such lands, nor any estate or interest therein, shall ever be disposed of unless the full market value of the estate or interest disposed of * * * be paid or safely secured to the state; nor shall any lands which the state holds by grant from the United States * * * be disposed of except in the manner and for at least the price prescribed in the grant thereof, without the consent of the United States.

The Court of Appeals, in a per curiam opinion, affirmed on the basis of the district court's opinion, 293 F. Supp. 1042 (E. D. Wash. 1968).

Staff: A. Donald Mileur (Land and Natural Resources Division)

DISTRICT COURT

HIGHWAYS; ENVIRONMENT

SECTION 4(f) OF DEPARTMENT OF TRANSPORTATION ACT; NEPA; FEDERAL PARTICIPATION IN STATE ROAD PROJECT THROUGH PARK LANDS ENJOINED.

Harrisburg Coalition Against Ruining the Environment, et al. v. Volpe, et al. (M. D. Pa., Civil No. 71-143, May 12, 1971; D. J. 90-1-4-301)

This case involves the so-called Harrisburg River Relief Route which the State of Pennsylvania planned to build through approximately five miles of park lands owned by the City of Harrisburg--with a 50% participation of federal interstate highway moneys. The park property required for the road was conveyed to the State a number of years ago and one contract for grading and construction had already been let and work begun when this suit was filed.

Plaintiffs are primarily students at a community college which occupies some 150 acres, formerly a part of the same park. Although the Secretary of Transportation had prepared a so-called Section 4(f) statement on May 22, 1970, the statement was challenged as not meeting the standards laid down by the Supreme Court in its recent Overton Park decision. In addition, it was alleged that construction was proceeding without the hearings required by a Department of Transportation policy and procedure memorandum. Additional issues raised related to an alleged civil rights discrimination, a failure by the state defendants to comply with a state environmental law, and a failure of the federal defendants to prepare a Section 102(C) statement under the National Environmental Policy Act of 1969.

After hearing evidence on a motion for a preliminary injunction, the court concluded that it would treat the hearing as a final hearing. In an opinion handed down on May 12, 1971, it dismissed the civil rights issue, dismissed the state defendants but remanded the entire matter to the Department of Transportation for reconsideration of the Section 4(f) decision in light of the Overton Park decision, for preparation of a Section 102(C), NEPA, statement, and for specific rulings by the Department of Transportation on the issues involving the departmental

policy and procedure memorandum. The court enjoined the federal defendants from contributing federal funds for completion of any part of the project.

Staff: Assistant United States Attorney Laurence M. Kelly (M. D. Pa.) and Thomas L. McKevitt (Land and Natural Resources Division)

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TAX DIVISION

Assistant Attorney General Johnnie M. Walters

SPECIAL NOTICE

Establishment of Judgment Collection Unit - Redelegation of Settlement and Rejection Authority in Post Judgment Collection Cases

In furtherance of the Attorney General's program to increase the Department's efforts to effect the collection of outstanding judgments and fines owed to the United States and to dispose of these cases in the shortest possible time, the Tax Division established, effective June 10, 1971, a Judgment and Collection Unit (JCU).

All cases under the jurisdiction of the Tax Division involving fines and judgments in favor of the United States will be transferred to JCU when these judgments and fines become final (usually when the time for appeal or certiorari has run and no appeal or petition has been filed), unless the Chief of the General Litigation Section deems it inappropriate to transfer the case at that time due to the imminency of further litigation relative to the collection of the judgment. Following transfer, the Unit will supervise the collection of these judgments and fines and will communicate with the concerned United States Attorney.

The Unit, which is under the general supervision of the Executive Assistant and the direct supervision of the Chief of the Litigation Control Unit, will continue to work closely with the United States Attorneys in the same manner as the Litigation Control Unit did heretofore.

As a further aid in bringing collection cases to a speedy conclusion, the Attorney General, on May 22, 1971, approved the redelegation of settlement and rejection authority, within limits to the Execution Assistant and the Chief of the Litigation Control Unit. (Tax Division Directive No. 16 - Federal Register, June 4, 1971)

Pursuant to the aforementioned Directive, and within certain limitations as set forth in said Directive, the Executive Assistant and the Chief of the Litigation Control Unit are authorized to accept offers in compromise of claims in behalf of the United States in post-judgment collection cases in which the difference between the gross amount of the original claim and the proposed settlement does not exceed $20,000, provided that such action is not opposed by the agency or agencies involved. In addition, the aforementioned officials are authorized to reject offers in such cases under the

summary rejection procedure or when the Service has recommended rejection.

In order to expedite action on these offers, you are reminded that, immediately upon receipt of an offer (with accompanying financial statement), you should forward copies of these documents both to the Tax Division and the Regional Counsel, Internal Revenue Service. In your letter to the latter official, please request that he forward his recommendation to the General Litigation Division, Office of Chief Counsel in Washington, D. C., as soon as possible.

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