United States Attorneys

Bulletin

Published by Executive Office for United States Attorneys
Department of Justice, Washington, D.C.

VOL. 16 FEB. 2, 1968 NO. 3

UNITED STATES DEPARTMENT OF JUSTICE

Vol. 16 February 2, 1968 No. 3

TABLE OF CONTENTS

ADMINISTRATIVE DIVISION

Assistant Attorney General Ernest C. Friesen, Jr.

SPECIAL NOTICE

PAYMENT OF COURT COSTS WHEN JUDGMENTS ARE AGAINST THE U.S.--P.L. 89-507, 7/18/67, 80 STAT. 308

A number of U.S. Attorneys' offices have requested instructions as to how court costs are to be paid in those cases in which the Government loses the case and the court taxes costs against it. The Civil Division advised that the following procedures are to be observed in such cases:

In those civil cases in which the Government is the defendant, and the court imposes a money judgment, including court costs, against the Government, the plaintiff's attorney should obtain a certified copy of the judgment, and forward it with a covering letter to the GAO requesting payment.

At the same time, the U.S. Attorney should send a letter to the Civil Division, with a copy of the judgment. The Civil Division will review the judgment and decide whether an appeal is to be taken. If no appeal is to be taken, the Civil Division will advise the GAO of this fact and advise GAO to pay the judgment.

For informational purposes only, judgments under $100,000 can be paid by the GAO. If the judgment is in excess of $100,000, the GAO transmits the judgment to the Treasury Department for the purpose of obtaining a special appropriation for the amount of the judgment.

MEMOS

MEMOS	DATED	DISTRIBUTION	SUBJECT
552	12/8/67	U.S. Marshals	Collection of Fees in Forma Pauperis Cases
553	12/13/67	U.S. Attorneys	Joint Statement by Atty. Gen. and Director of Selective Service
554	12/19/67	U.S. Attorneys & Marshals	Federal Salary Act of 1967
555	12/21/67	U.S. Marshals	Administratively Uncontrollable Overtime Regulations

MEMOS	DATED	DISTRIBUTION	SUBJECT
557	12/28/67	U. S. Marshals	Submission of Accounts
501-S1	12/15/67	U. S. Attorneys & Marshals	Withholding of Income Taxes From Moving Expenses
510-S1	12/8/67	U. S. Marshals	Prisoner Coordination Procedures Form USM-105, Declaration of Election not to Appeal
533-S1	12/27/67	U. S. Attorneys & Marshals	Revisions in Accounting Procedures
554-S1	12/29/67	U. S. Marshals	Premium Compensation Under Federal Salary Act of 1967
184-S8	12/28/67	U. S. Attorneys & Marshals	Position Schedule Bonds for 1968-69

* * *

CIVIL DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

COURTS OF APPEALS

CONTRACTS

CONTRACTOR WHO UNDERTOOK JOB ON TOWER OF GOVERNMENT BUILDING AND CAUSED FIRE DESTROYING TOWER HELD LIABLE FOR COST OF NEW TOWER, LESS SAVINGS IN MAINTENANCE COST TO GOVERNMENT FROM HAVING NEW TOWER.

United States v. Ebinger (C. A. 2, No. 31,656, December 5, 1967; D. J. No. 77-52-1722)

The contractor undertook an $880 plumbing job on the water cooling tower of a Government building. The job required that welding be done at certain places on the pipes in the tower. The tower was destroyed by fire shortly after the welding had been finished. The Government then brought this action for damages against the contractor. The district court, largely on the basis of circumstantial evidence, found that the welding was the cause of the fire and awarded the Government $35,000 damages, that amount being the cost of a new tower.

The Second Circuit affirmed as to liability, but remanded for recomputation of the amount of damages. The Court held that the Government could recover on the theory of breach of an implied warranty of workmanlike performance. The record showed that the Government had given warning to the contractor that precautions had to be taken against fire, so that at the very least the contractor should have carefully inspected the tower after the welding had been finished. Furthermore, the contractor's liability could be justified because the welding had not been performed in the proper places on the pipes specified by the contract; had it been done at the proper places, fire precautions would have been possible.

On the issue of damages, the Court ruled that the district court had correctly used the cost of a new tower as the basis for determining damages, even though that amount be greater than the value of the old tower before the fire. This was because the tower was a necessary and integral part of the building's air conditioning system, and thus could not be abandoned. However, the Court found that the district court had erred in failing to credit against the cost of the new tower the maintenance costs which the Government would save by having a new tower in place of the old, since the record

showed that a new tower would be more economical to maintain. Accordingly, the Court remanded the case to the district court to redetermine the amount of damages.

Staff: United States Attorney Robert M. Morgenthau; Assistant United States Attorneys Lawrence W. Schilling and Michael D. Hess (S. D. N. Y.)

FEDERAL TORT CLAIMS ACT

MALPRACTICE SUFFERED BY FEDERAL EMPLOYEE WHILE UNDERGOING TREATMENT FOR WORK INJURY IS COVERED UNDER FEDERAL EMPLOYEES' COMPENSATION ACT AND MAY NOT BE BASIS OF SUIT UNDER TORT CLAIMS ACT.

Samuel Gold v. United States (C. A. 3, No. 16, 616; December 20, 1967; D. J. 157-62-591)

Mr. Gold, a federal employee, was injured in the course of his employment and was treated for that injury, over a period of months, at a Government hospital. The employee brought this suit under the Tort Claims Act alleging malpractice by the hospital personnel. The district court granted the Government's motion to dismiss. The Third Circuit affirmed, holding that the Federal Employees' Compensation Act provided the sole remedy available to the employee as against the United States.

Staff: Morton Hollander and Robert C. McDiarmid (Civil Division)

JURISDICTION - CUSTOMS CASES

DISTRICT COURT LACKS JURISDICTION OF IMPORTER'S ACTION TO COMPEL COLLECTION OF CUSTOMS DUTIES UPON COMPETING IMPORTATIONS.

Walter Kocher v. Henry Fowler, Secretary of the Treasury et al. (C. A. D. C., No. 20, 765, December 29, 1967; D. J. No. 54-16-23)

28 U. S. C. 1340 gives the United States district courts "original jurisdiction of any civil action arising under any Act of Congress providing for ... revenue from imports... except matters within the jurisdiction of the Customs Court." 28 U. S. C. 1583 gives the Customs Court "exclusive jurisdiction to review on protest the decisions of any collector of customs, including all orders and findings entering into the same, as to the rate and amount of duties chargeable..." In this case, plaintiff Kocher, an importer

of Swiss watches, commenced an action in the district court to compel the Secretary of the Treasury and the Commissioner of Customs to annul an interpretative ruling of the Bureau of Customs (T. D. 54, 821(2), 94 Treasury Dec. 154) and to have an Act of Congress (19 U.S.C. 1202, general headnote 3(a)(i)) declared unconstitutional. In support of these objectives, he alleged that the Bureau of Customs was permitting foreign-made watches to enter the United States through the Virgin Islands free of duty and without markings as to origin; that the watches were not in fact manufactured or produced there, as required by the above-cited statute and interpretative ruling; and that his business was being damaged by defendants' actions. The district court dismissed plaintiff's action on the ground that he had no standing to maintain it.

The Court of Appeals affirmed the district court's dismissal, holding that 28 U.S.C. 1340 and 1583 vested "only the Customs Court with the jurisdiction to consider [plaintiff's] contentions" and that the district court therefore lacked jurisdiction to entertain the action. The appellate court stated that "an importer's action to compel the Secretary of the Treasury to instruct custom officials to collect duties on imported commodities falls exclusively within the preview of the Customs Court."

Staff: Howard J. Kashner (Civil Division)

LIENS - CIRCUITY

IN CIRCUITY SITUATION WHERE SBA LIEN IS SUBORDINATE TO BANK'S LIEN AND SUPERIOR TO MECHANICS' LIEN, BUT MECHANICS' LIEN IS SUPERIOR TO BANK'S LIEN, SBA LIEN CAN BE SUBORDINATED ONLY TO EXTENT OF AMOUNT OF BANK'S LIEN.

H. B. Agsten & Sons v. Huntington Trust & Savings Bank and Bernard L. Boutin, Administrator, Small Business Administration, et al. (C. A. 4, No. 11,028, December 4, 1967; D. J. No. 101-84-40)

The Fourth Circuit in an en banc decision, affirmed the district court's resolution in the Government's favor of a lien priority circuity problem engendered by competing liens arising under state and federal laws.

A West Virginia bank made a loan to a local developer to be used to help pay for the construction of a motel. This loan was made after construction had begun, and was secured by a recorded first deed of trust. Thereafter, a second loan was obtained by the developer from SBA. That loan was secured by a recorded second deed of trust, expressly subordinate to that of the bank. After completion of the building and because of the developer's default, the building contractor filed a mechanics' lien on the property for the unpaid balance of the contract price. Thereafter the

contractor instituted this suit to obtain a determination of all valid liens against the property, a sale of the property, and satisfaction of the liens out of the sale proceeds.

The circuity problem arose because, under state law, the mechanics' lien was prior to that of the bank; by agreement the lien of the bank was prior to that of SBA; and by the Federal Insolvency Statute, 31 U.S.C. 191, the lien of SBA was prior to the mechanics' lien. The Court of Appeals, in accordance with the Government's contentions, resolved the circuity in the manner suggested by the Supreme Court in United States v. New Britain, 347 U.S. 81, holding that under federal law the lien of SBA was inferior only to that of the bank and that, therefore, only an amount equal to the bank's lien could be disbursed ahead of the payment to SBA. Once that amount was determined, however, the relative claims of the bank and the contractor to the sum would be governed by state law, and the mechanics' lien would have to be satisfied in advance of any payment to the bank from that fund.

The Court expressly rejected the argument that the Federal Tax Lien Act of 1966, 80 Stat. 1125, amending 26 U.S.C. 6323, implicitly subordinated non-tax liens, as well as tax liens, to those of mechanics. The language and legislative history of that act, the Court held, showed that Congress did not intend "to elevate inchoate mechanics' liens over federal contractual claims". The Court noted that "we cannot say that it is illogical for Congress to deem it advisable to retain a priority for money it loans, while relinquishing the priority for its tax liens, which represent no financial outlay."

Staff: John C. Eldridge and Robert C. McDiarmid
(Civil Division)

UNIVERSAL MILITARY TRAINING AND SERVICE ACT

VETERANS' REEMPLOYMENT RIGHTS; RETURNING VETERAN HELD ENTITLED TO PROMOTION WHICH IN PRACTICE IS AUTOMATIC, EVEN THOUGH COLLECTIVE BARGAINING AGREEMENT SPECIFIES THAT PROMOTIONS ARE BASED ON "ABILITY AND SENIORITY."

Richard T. Power v. Northern Illinois Gas Co. (C.A. 7, No. 16,290; January 2, 1968; D.J. 151-23-1069)

This action under the Universal Military Training and Service Act, 50 U.S.C. App. 459, was brought by a reemployed veteran (represented by the United States) seeking to recover the additional wages he would have received had he been granted a promotion by his employer upon his return from the military service. The plaintiff, prior to enlisting in the Air Force,

had been employed as a meter shop helper. Upon his honorable discharge four years later, he claimed he was entitled to a promotion to meter repairman, noting that twenty employees with a later seniority date had been promoted to meter repairman in his absence. The collective bargaining agreement provided that promotions to the higher job classification were to be based on "ability and seniority." However, the twenty promotions in the plaintiff's absence had all been in order of seniority, and nothing indicated that the men promoted had any greater skill than the plaintiff.

The district court held in the plaintiff's favor, and the Seventh Circuit affirmed. The Seventh Circuit observed that under the Act, the veteran steps back on the "seniority escalator" not at the point where he stepped off, but at the precise point where he would have been had he kept his position continuously during his military service. The test was whether the promotion followed automatically from seniority status, or whether promotion was based on the employer's discretion. Here, although the language of the collective bargaining agreement indicated that the employer was permitted to exercise discretion, the facts showed that in practice promotion followed automatically from senior status. Accordingly, the plaintiff was entitled to the promotion.

Staff: United States Attorney Edward V. Hanrahan; Assistant United States Attorneys John Peter Lulinski and Jack B. Schmetterer (N. D. Ill.)

* * *

CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

COURT OF APPEALS

SEARCH AND SEIZURE

SEARCH OF AUTOMOBILE AT POLICE STATION WITHOUT WARRANT FOUND REASONABLE UNDER CIRCUMSTANCES

Francisco Maltas-Roque v. United States (C.A. 5, No. 23995; July 12, 1967, 381 F. 2d 130; D.J. 12-73-245)

The defendant was convicted of receiving, concealing, and facilitating the transportation of illegally imported marihuana in violation of 21 U.S.C. 176a. He appealed on the ground that the marihuana introduced into evidence was the product of an illegal search and seizure.

United States Customs agents were told by Mexican police officials that defendant had been smuggling marihuana into this country. Later an informant of proven reliability notified Customs that, during the next 24-hour period, defendant would enter the United States at Del Rio, Texas, from Mexico with 100 pounds of marihuana. He gave them the license number and description of the car and defendant. In the early afternoon of the same day he informed an agent that defendant had already entered the country with the marihuana in the described vehicle, accompanied by a woman and small child.

At about seven-thirty that evening an agent stopped a car driven by a Mexican male who fitted the description given and who was accompanied by a pregnant woman and small child about twenty-two months old. The agent identified himself and asked the defendant to step out. In searching defendant for weapons he found a large quantity of cartridges. At agent's request the woman (defendant's wife) handed him a loaded pistol which she took from the glove compartment.

Since night had begun with an accompanying drop in temperature and the agent (in civilian clothes) was alone, he handcuffed defendant and drove him and his family to a local police station approximately one mile distant so that defendant could be kept under surveillance and his family made comfortable. Immediately on arrival the agent searched the car, discovering several packages of marihuana. Thereupon, he arrested defendant and seized his vehicle pursuant to 49 U.S.C. 782. Upon arrival of other agents a more thorough search was made and a total of 101 packages of marihuana was removed from various parts of the car.

The Court of Appeals held that the search of the automobile was a valid, reasonable search. The Court stated that the police officers may stop a moving vehicle and search it without a warrant where probable cause exists to believe that the vehicle is "carrying contraband or illegal merchandise" and there is no time to obtain a warrant. It affirmed the district court's finding that the tip from the known and reliable informant, coupled with the information supplied by the Mexican police authorities, constituted probable cause to search the automobile, citing McCray v. Illinois (386 U.S. 300 (1967)). The Government's position that there was no time to obtain a search warrant was found to be supported by the testimony at the trial and the hearing to suppress the evidence. Even if there were no probable cause to arrest defendant prior to the search, the detention was proper and necessary in order to conduct the search.

The Court, although noting that the search was conducted by a Customs agent who may conduct a border search on mere suspicion, did not reach the question whether this was a valid border search, since there was probable cause for a search in any case.

The Court agreed with the district court that the agent acted in a reasonable and decent manner, considering the welfare of the child and the pregnant woman. It was noted that the search was begun within thirty minutes after the car was initially stopped. Under the circumstances, the detention at police headquarters was found not to have tainted the subsequent search.

Staff: United States Attorney Melvin N. Diggs and
Assistant United States Attorney Robert S. Travis (N.D. Tex.)

DISTRICT COURT

SAFETY APPLIANCE ACT

ATTORNEY'S DOCKET FEE ALLOWED IN CONSENT JUDGMENT.

United States v. Southern Railway Company (W.D. No. Carolina, December 20, 1967; DJ 59-2-532-0)

The United States brought an action for penalties under the Safety Appliance Act (45 U.S.C. §§ 1-16). A consent judgment allowed the Government to collect "$250 and the costs of court." The Clerk of the Court allowed the attorney's docket fee of $20 as provided in 28 U.S.C. § 1923(a). Defendant petitioned the Court to review the action of the clerk.

The sole question was whether the United States was entitled to have taxed and collected the attorney's docket fee in cases where the judgment is based upon the consent of the parties. Section 1923 provides that attorney's docket

fees may be taxed as costs on trial or final hearing. Defendant contended that a consent judgment was not the result of a trial or a final hearing. The Court stated that the judgment entered in this cause upon a stipulation of the parties could not become a final disposition of the controversy until it had been considered, consented to, signed, and entered by the Court and therefore held that this was a final hearing for the purpose of assessment of costs.

* * *

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

Assistant to the Deputy Attorney General John W. Kern, III

SPECIAL NOTICE

Economy in Operation

We are happy about the initial response to our memorandum of December 19, 1967, advising of the necessity of reducing expenditures for the balance of the current fiscal year. Needless to say, each of you and the members of your staff must hold the line for the remainder of the year.

There has been some misunderstanding concerning Item 9 in that memorandum urging United States Attorneys to limit their requests of Divisions in Washington to try their cases. We had reference only to those cases where your office has been given primary trial responsibility and you have requested assistance from the Department. In the Tax Division, refund suits are primarily the responsibility of that Division and the travel expenses are financed by the appropriation to the Tax Division. Likewise, travel costs incurred in those criminal tax and collection cases handled by the Tax Division upon its own initiative are not charged to the United States Attorneys' appropriation.

APPOINTMENTS

ASSISTANT UNITED STATES ATTORNEYS

Illinois, Northern - NICHOLAS J. ETTEN; Loyola University Law School, J. D.

Iowa, Northern - GENE R. KREKEL; University of Iowa Law School, J. D.

Louisiana, Eastern - JAMES D. CARRIERE; Tulane University Law School, LL. B., and formerly in private practice.

Nevada - ROY LAVERNE J. NELSON, II; University of Michigan, LL. B., and formerly a field claims representative.

Texas, Western - ROMAULDO C. CABALLERO: University of Texas, LL. B., and formerly in private practice.

* * *

LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Clyde O. Martz

COURT OF APPEAL - STATE

WATER RIGHTS

SCOPE OF CONSENT OF UNITED STATES TO SUIT UNDER 43 U.S.C. 666; CLAIMANTS TO PRESCRIPTIVE AND APPROPRIATIVE RIGHTS MAY NOT BE PRESENTED AS CLASS IN WATER ADJUDICATION ACTION.

City of Chino, et al. v. Superior Court of the State of California for the County of Orange, Orange County Water District, real party in interest (Ct. of Appeal, Fourth Appellate Dist., Cal., Nov. 7, 1967 - modified, Nov. 28, 1967; D.J. 90-1-2-733)

In 1963, the Orange County Water District, which includes within its boundaries approximately one-third of the area drained by the Santa Ana River in California, initiated an action for the general adjudication of water rights of the Santa Ana River. Named as defendants to this action were over 1,100 water users within the watershed of the Santa Ana River, but outside the boundaries of the Orange County Water District. Among the defendants named in the complaint was the United States, over which the Orange County Superior Court was alleged to have jurisdiction by virtue of 43 U.S.C. 666, which provides in part that "consent is given to join the United States as a defendant in any suit * * * for the adjudication of rights to the use of water of a river system or other source * * *." The United States demurred to the complaint, on the grounds that 43 U.S.C. 666 conferred consent to sue the United States only in a proceeding constituting a general adjudication of water rights and that the proceeding initiated by the Orange County Water District was not a general adjudication because, among other reasons, none of the water right claimants within the Orange County Water District were parties to the suit, and their interests were not so identical as to permit their representation as a class by the Orange County Water District. The Orange County Superior Court overruled the demurrer, without an opinion. The United States applied to the California Court of Appeal for a writ of prohibition forbidding the Superior Court from proceeding with the action. On November 7, 1967, the writ was granted.

In its opinion, amended November 28, 1967, announcing the granting of the writ, the Court of Appeal held that in order for the proceeding initiated by the Orange County Water District to constitute a general adjudication of the type to which 43 U. S. C. 666 confers the sovereign's consent to be joined as a defendant, all owners and claimants of water rights in the Santa Ana River must be joined as parties, and that whether or not any of these owners and claimants may be represented as a class depends upon the interpretation

given by the federal, not the state, courts to 43 U.S.C. 666. Examining federal decisions on this point, the Court held that although riparian and overlying owners within the Orange County Water District could be represented as a class by the District, prescriptive and appropriative claimants could not. It held also that if there are any claimants to or owners of water rights based upon riparian or overlying ownership of lands outside the Orange County Water District who are not named as parties to the action, or are not the subjects of class representation in the action, they, too, must be joined as parties in order for the proceeding to be one to which the United States has consented to be joined. The Court allowed the Water District 90 days to file an amended complaint bringing in the parties which, under its ruling, are necessary to hold the United States of America as a defendant.

Staff: Assistant United States Attorney James R. Akers, Jr. (C.D. Calif.); Walter Kiechel, Jr. and Martin Green (Land and Natural Resources Division).

* * *