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No. 2



UNITED STATES ATTORNEYS
BULLETIN

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DEPARTMENT OF JUSTICE PERSONNEL

UNITED STATES ATTORNEYS BULLETIN ²⁷

Vol. 6

January 17, 1958

No. 2

DISTRICTS IN CURRENT STATUS

As of October 31, 1957, the total number of offices meeting the standards of currency were:

CASES

MATTERS

<u>Criminal</u>		<u>Civil</u>		<u>Criminal</u>		<u>Civil</u>	
	change from		change from		change from		change from
	9/30/57		9/30/57		9/30/57		9/30/57
78	↑9	58	-1	45	-9	78	-3
82.9%	↑9.5%	61.7%	-1.0%	47.8%	-9.6%	82.9%	-3.2%

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UNITED STATES ATTORNEYS MANUAL

There will be no Manual correction sheets for the month of January, 1958.

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JOB WELL DONE

The Chief Judge, Eastern District of Michigan, has commended Assistant United States Attorneys George Woods and John Jones for the most efficient manner in which they have carried out their duties with regard to criminal arraignments.

In a recent complex tort case, involving a suit against the Government for damages arising out of an airplane accident the exceptionally able work of Assistant United States Attorneys A. W. Christian and Clayton Bray was commended by an executive of and counsel for the commercial airline involved.

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INTERNAL SECURITY DIVISION

Assistant Attorney General William F. Tompkins

False Statement; National Labor Relations Board; Affidavit of Non-Communist Union Officer. U.S. v. Clinton E. Jencks (W.D. Texas). On June 3, 1957, the Supreme Court reversed the conviction and remanded the case to the District Court for a new trial. Upon reappraisal of the available evidence, the government concluded that it was insufficient to warrant a retrial of the case. On December 31, 1957, on motion of the government, the District Court dismissed the indictment against defendant.

The indictment was returned by the Federal Grand Jury on April 20, 1953 (See United States Attorneys Bulletin, Vol. 3, No. 23, page 4).

Staff: United States Attorney Russell B. Wine (W.D. Texas)

Smith Act; Conspiracy to Violate. Yates, et al. v. United States (S.D. Calif.). The Supreme Court on June 17, 1957 reversed the convictions of the 14 defendants, acquitted 5, and remanded the remaining nine for a new trial. The government upon reappraisal of the available evidence concluded that, in light of the standards established by the Supreme Court, it was insufficient to warrant retrial of the case. On December 2, 1957, on motion of the government, the District Court dismissed the indictment against the remaining defendants.

Staff: Assistant United States Attorney Norman W. Neukom (S.D. Calif.); William G. Hundley, John F. Lally, Peter J. Donahue (Internal Security Division)

Smith Act; Membership Provision. United States v. Blum (S.D. Ind.). On November 27, 1957, on motion of the government, the indictment in this case was dismissed. The government reappraised the evidence in light of the Yates decision and concluded that it was insufficient to meet the standards laid down by the Supreme Court. The indictment was returned by the Federal Grand Jury on March 23, 1956 (See United States Attorneys Bulletin, Vol. 4, No. 8, page 246.).

Staff: United States Attorney Don A. Tabbert (S.D. Ind.); Victor C. Woerheide, Philip T. White, William S. Kenney (Internal Security Division)

Subversive Activities Control Act of 1950; Communist Front Organizations. Herbert Brownell, Jr., Attorney General v. American Peace Crusade. (Subversive Activities Control Board) On July 26, 1957, the Subversive Activities Control Board delivered its unanimous report in which it found that the American Peace Crusade is a Communist-front organization as defined by the Subversive Activities Control Act of 1950. An order was entered requiring the organization to register with the Attorney General.

Subsequent thereto, collateral considerations required that the testimony of one government witness be stricken from the record, necessitating the Board's reconsideration of its order. On December 30, 1957, the Board delivered its modified report reaffirming its original order.

Staff: Troy B. Conner, Jr., Joseph M. Wysolmerski and Oliver J. Butler (Internal Security Division)

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CIVIL DIVISION

Assistant Attorney General George Cochran Doub

COURT OF APPEALSADMIRALTY

Responsibility of Coast Guard in Connection With Unsuccessful Rescue no Greater Than That of Private Salvor; Faulty Equipment Not Basis For Liability. Grace Frank, Administratrix of Estate of Daniel Frank v. United States, et al. (C.A. 3, December 16, 1957). Plaintiff's decedent was a passenger on a thirty foot cabin cruiser which became disabled and which anchored off the New Jersey coast. All but one of the Coast Guard boats suitable for towing the disabled cruiser were out assisting other craft in the rough seas. The only available boat, a heavy motor lifeboat, was dispatched to assist the disabled cruiser and took it in tow. During the tow, decedent fell into the sea when a handrail on the cruiser broke. The lifeboat crew immediately cut the tow line and attempted to rescue him but did not reach him before he drowned. Plaintiff contended that several derelictions of the Coast Guard were responsible for decedent's death and sought to establish liability under either the Federal Tort Claims Act or the Public Vessels Act. The alleged derelictions were that the lifeboat had a defective reverse gear which delayed it in reaching decedent after he fell into the sea, that life rings in the lifeboat were so secured that they could not immediately be thrown overboard, and that the crew of the lifeboat was less than the standard and customary Coast Guard complement. The district court found for the United States on the ground that plaintiff had not carried her burden of proving that the attempted rescue failed because of any faults of the Coast Guard.

On appeal, the Third Circuit affirmed on other grounds. It held that if the United States is liable at all for negligence of the Coast Guard in connection with an attempted rescue operation its responsibility is no higher than that of a private salvor and that, like a private salvor, the Coast Guard does not have an affirmative duty to aid persons or vessels in distress. The Court noted that a volunteer might be liable if the injured person was harmed because of reliance upon some representation concerning the voluntary service or if an attempted rescue is conducted so that it affirmatively injures the one in distress or worsens his position. These factors, however, were not present here for as the Court stated there was "a diligent rescue effort which proved ineffectual for lack of adequate equipment, preparation or personnel. For such ineffectual effort a private salvor is not liable." On the same basis, the United States was held not liable here.

Staff: William W. Ross (Civil Division)

DISTRICT COURTADMIRALTY

Shipping Contract Disputes Clause; Applicable Statute of Limitations Not Tolloed During Administrative Consideration of Dispute.
States Marine Corporation of Delaware v. United States (S.D. N.Y., December 14, 1957). Libelant, time charterer of the ALCOA PEGASUS, contracted to transport government cargo aboard that vessel. The contract required the government to load and discharge its own cargo and to pay for any damage to the vessel occasioned thereby. Such damage allegedly occurred during December, 1954, the charterer giving notice thereof to the Government. The claim was administratively denied and libelant invoked the "disputes clause" of the contract and appealed to the Armed Services Board of Contract Appeals. That tribunal affirmed the denial and the instant suit was filed under the Suits in Admiralty Act (46 U.S.C. 741-752) in September, 1957. The government excepted to the libel on the ground that the two-year statute of limitations had run; libelant argued that the government had not breached its contract until the Board of Contract Appeals adversely ruled on the case. The government's exceptions were sustained on the basis of A.H. Bull S.S. Co. v. United States, 235 F. 2d 1, 3 (C.A. 2, 1956).

Staff: Gilbert S. Fleischer (Civil Division)

COURT OF CLAIMSGOVERNMENT EMPLOYEES

Failure to Be Called for Work Is Suspension or Furlough Under Veterans' Preference Act. Zaverl v. United States (C. Cls., December 4, 1957). Claimant, a clerk-stenographer employed by the Post Office Department, was entitled to the benefits of the Veterans' Preference Act which affords certain protections against improper suspensions or furlough. Because of lack of work at the particular Post Office at which she was employed, she was placed on an "available" or "subject to call" list. She contended, however, that, while she was unemployed, other postal clerks with less seniority and fewer qualifications were called to work, contrary to the agency's own regulations. Subsequently, it was determined that she could be employed to perform duties other than of a stenographic nature, and she was then recalled to perform clerical work. Thereupon, claimant sued for back pay for the period during which she performed no services, contending that the failure to provide her with work in accordance with the Department's regulations amounted to an unjustified suspension or furlough within the meaning of the Veterans' Preference Act. The Court, although noting that this was a case of first impression, agreed with claimant. While a failure to afford reemployment priority rights to one who is not longer an employee would not create a cause of action, the agency's failure to afford proper seniority or priority rights to one who is still an employee does constitute an improper furlough under this Act.

Staff: Francis P. Borden, Jr. (Civil Division)

SUPPLY CONTRACTS

Increased Costs of Furnishing Hay Due to Drought Not Recoverable; Excess Transportation Expenses May Be Recovered. Dillon, et al., d/b/a Vinita Hay Company v. United States, (Ct. Cls., December 4, 1957). Claimant, an Oklahoma business concern, agreed to supply hay to an Army installation at Fort Reno, Oklahoma. A severe drought occurred in Oklahoma and surrounding states. Claimant attempted to be released from its contract obligations since, even at the greatly increased prices, it was not possible to obtain sufficient hay from the Oklahoma area from which claimant intended to fulfill the contract. However, the Contracting Officer insisted on compliance, and claimant, at greatly increased costs, and through purchases in Nebraska, finally completed the contract. Claimant then sued to recover its losses claiming that it was entitled to be relieved of its obligations under the contract provision excusing default if due to causes beyond the contractor's control or without its fault or negligence, including unusually severe weather. In a 4-1 decision, the Court held that, since claimant did complete the contract, it could not obtain relief for the excess costs of performance, which, under the contract terms, is available only for failure to perform. However, the Court gave judgment for the excess railroad transportation costs involved in transporting the hay from Nebraska.

Staff: Francis P. Borden, Jr. (Civil Division)

STATE COURTS

PRIORITY OF CLAIMS

31 U.S.C. 191; Priority Given Claims of United States Cannot Be Impaired by State Law. In the Matter of Estate of D. G. Hillesland, Deceased (North Dakota Supreme Court, November 27, 1957). The Court held that a debt due the Farm Home Administration is a debt entitled to priority under 31 U.S.C. 191 as a debt due to the United States and that priority given to the United States by that section in the assets of insolvent debtors cannot be impaired or superseded by state law.

Staff: United States Attorney Robert L. Vogel and Assistant United States Attorney Ralph B. Maxwell (N.D.)

TORT CLAIMS

State Court Has no Jurisdiction Over Commissioned Officers' Mess, A Nonappropriated Fund Instrumentality. David H. Brame v. Kermit C. Garner and Fort Jackson Officers' Open Mess. (South Carolina Supreme Court, December 9, 1957). Plaintiff alleged that he was assaulted by

another patron of an officers' mess. Plaintiff sued the mess in state court. A lower state court dismissed the complaint. The South Carolina Supreme Court affirmed on the ground that the officers' mess is a federal instrumentality whose immunity to suit has not been waived by the government. Pursuant to Standard Oil v. Johnson, 316 U.S. 481, the mess, just as a post exchange, is an integral part of the Defense Department and partakes of whatever immunities the Defense Department might have in such a situation.

Staff: United States Attorney N. Welch Morrisette, Jr. and
Assistant United States Attorney George E. Lewis
(E.D. S.C.).

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C R I M I N A L D I V I S I O N

Acting Assistant Attorney General Rufus D. McLean

NOTICE TO UNITED STATES ATTORNEYS

Interstate Commerce Commission; Motor Carrier Safety Regulations Violations; Referral of Cases to United States Attorneys by Regional Attorneys. The Interstate Commerce Commission recently voted to authorize their Regional Attorneys, with the concurrence of the appropriate District Directors, to refer directly to the United States Attorneys those cases involving only violations of the Motor Carrier Safety Regulations (49 C.F.R. Parts 190-196 and 198), promulgated under §204 of Part II of the Interstate Commerce Act, 49 U.S.C. 304. These Safety Regulation cases are referred for criminal prosecution under 49 U.S.C. 322(a). Hitherto, such cases were referred to the United States Attorneys by the ICC in Washington; now they will be submitted by the Regional Attorneys. No other change in procedure and no change in substance will be effected hereby, and the general instructions set forth in the United States Attorneys' Manual, Title 2, page 85, continue in full force and effect in these cases. With respect to the criminal sanction provided in 49 U.S.C. 322(a), see the United States Attorneys' Bulletin for September 13, 1957, Volume 5, No. 19, page 567, describing the effect of the recent amendment of the statute.

INDIANS

Crime on Indian Reservation; Murder. United States v. Edward Ashley Brown (D. South Dakota). On March 12, 1956, following a drinking party, the defendant, an Indian, struck and killed his half-brother, Henry Bert Johnson, and one Marion La Belle in the home of defendant's grandfather on the Sisseton Indian Reservation in South Dakota. Both victims were also Indians. The weapon used was a soft ball bat. Defendant was indicted March 23, 1956 charged with murder in the first degree on an Indian Reservation in violation of 18 U.S.C. 1153. Prior to arraignment, defendant filed a motion requesting a psychiatric examination under 18 U.S.C. 4244 and was ordered committed to the Medical Center for Federal Prisoners at Springfield, Missouri. There, he was first found insane and nine months later found sane and returned to South Dakota for trial. The case was resubmitted to a grand jury which returned an indictment in two counts charging murder in the second degree only. Defendant was tried and convicted on both counts in November 1957 and on December 5 was sentenced to 25 years' imprisonment on each count, to run concurrently.

Brown's defense was grounded on insanity. The government had a substantial problem in establishing Brown's competency at the time of the offense. Interestingly, a former Army psychiatrist was summoned to testify as to defendant's mental condition in 1952-53 because Brown was diagnosed just prior to his discharge from the Armed Forces as not being psychotic but lacking motivation and inner development and control

sufficient to adjust. This testimony was offered as the first link in the chain of proof to establish Brown's competency. In addition, the government offered testimony concerning the defendant's mental condition in 1955 as well as 1956.

Staff: United States Attorney Clinton G. Richards
(D. South Dakota).

BANK VIOLATIONS

Theft, Embezzlement, Misapplication and False Statements by Bank Employee. United States v. Maddux (D. Kansas, October 31, 1957). Following an investigation by the FBI into an alleged robbery of the Victory State Bank, Kansas City, Kansas, reported on August 27, 1957 by the defendant, the head teller, it was discovered the bank, insured under the provisions of the Federal Deposit Insurance Act, was missing some \$24,200. Defendant later admitted to FBI agents that he embezzled this amount and fabricated the robbery story to conceal his crime. A search was made of defendant's residence in an attempt to locate the missing funds and the sum of \$1008.20 was recovered. A seven-count information was filed October 4, 1957 charging defendant with embezzlement and with making false statements to FBI agents when he first reported the alleged robbery. Defendant, after waiving indictment, entered a plea of guilty to three counts charging embezzlement under 18 U.S.C. 656 and to one count of making false statements in violation of 18 U.S.C. 1001. On October 31, 1957 a five-year sentence was imposed by the Court on each of these four counts, such sentences to run concurrently. The Court further directed the recovered sum of \$1008.20 be turned over to a surety company since it had earlier reimbursed the Victory State Bank for the loss suffered in connection with the embezzlement.

Staff: United States Attorney William C. Farmer; Assistant United States Attorney Milton P. Beach (D. Kansas).

MISUSE OF FEDERAL CERTIFICATE

Possession and Use of Revoked Merchant Mariner's Document. United States v. Melvin C. Perkins (E.D. N.Y.). In April 1955, an examiner of the United States Coast Guard revoked Melvin C. Perkins' Merchant Mariner's Document following a hearing based upon certain specific charges of misconduct. Perkins appealed the decision revoking his document, but the Commandant of the Coast Guard affirmed it in July 1955. Perkins declared that the revocation was illegal and he refused to surrender the document. In fact, he asserted that he would use it to obtain employment, and in May 1956, he displayed it and sought to use it as a valid document in the course of applying for employment in the United States Military Sea Transportation Service as a seaman. He later again misrepresented himself as the lawful holder of a valid mariner's document in an effort to secure employment on a privately owned vessel as a seaman. On February 26, 1957, Perkins was indicted on two counts: one under 18 U.S.C. 2197 (misuse of federal certificate, license or document),

and the other under 18 U.S.C. 1001 (false statements). Following a trial that lasted two days, defendant was convicted, and on December 20, 1957, he was sentenced to serve six months on each count, the sentences to run concurrently.

Staff: Assistant United States Attorney Morton J. Schlossberg
(E.D. N.Y.)

* * *

TAX DIVISION

Assistant Attorney General Charles K. Rice

CIVIL TAX MATTERS**Appellate Decisions**

Priority of Liens; Federal Tax Lien Held Prior to Mechanic's Lien.
Aquiline v. United States. (New York Court of Appeals, December 6, 1957.)
 A contractor, entitled to be paid by the owner of real property improved by him, owed federal taxes. He also owed a subcontractor for materials furnished. The government filed a tax lien in the office of the clerk of the city where the contractor maintained his place of business. Thereafter the subcontractor filed a mechanic's lien in the county clerk's office against the improved property.

Reversing the lower courts, the Court of Appeals held that the tax lien was asserted not against the real property but against the debt, which was personal property, and that therefore it was properly filed in the city clerk's office. It also held that a state law that funds received by a contractor for the improvement of real property shall be deemed to be "trust funds" for the payment of subcontractors cannot affect the rights of the government or the priority of its lien, citing recent Supreme Court decisions.

Staff: United States Attorney Paul W. Williams; Assistant United States Attorneys Daniel F. MacMahon and Harold J. Raby, (S.D. N.Y.)

Remand for Consideration of Applicability of Subsection Not Relied Upon by Either Party in Tax Court. **Ah Pah Redwood Co. v. Commissioner** (C. A. 9, December 13, 1957.) In the Tax Court and in the Court of Appeals, the taxpayer contended it was entitled to the preferential capital gains treatment afforded to certain dispositions of timber under the provisions of Section 117(k)(2) of the Internal Revenue Code of 1939. The Commissioner contended that the six months holding period requirement of this subsection had not been met, and that, in any event another requirement of the subsection, the retention of an economic interest in the timber, was not fulfilled. On these points issue was joined. Subsequent to the oral argument, the Court of Appeals ordered the filing of additional briefs discussing the question of whether capital gains treatment in the sale of timber was attainable solely under Section 117(k)(2) or whether it might also be available under some other provision of the Code. Both parties pointed out that Section 117(a)(4) provided long term capital gain treatment to capital assets held for more than six months and that the term "capital assets" as defined by Section 117(a)(1) does not include properties held primarily for sale to customers in the ordinary course of trade or business. Thereupon taxpayer claimed, for the first time in this action, that it was not a dealer in timber and that

under Section 117(a) the transactions were entitled to capital gains treatment. In its decision the Court of Appeals accepted the Commissioner's argument that taxpayer did not retain an economic interest in the timber, and held that Section 117(k)(2) was inapplicable. However, it remanded the case to the Tax Court for a determination of whether taxpayer held the timber primarily for sale to customers in the ordinary course of its trade or business. The Court stated the general rule that the appellate courts will not consider issues not raised in the lower court, but held that this was an exceptional case wherein such action was necessary to prevent a miscarriage of justice.

The Action of the Ninth Circuit in remanding this case, although unusual, has good authority in Hormel v. Helvering, 312 U.S. 552, 557, wherein it was stated that "There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below." Cf. Helvering v. General Utilities, 296 U.S. 200. The exceptional aspect of this case, however, is that the new issue was interjected into the case, not by either party, but by the Court itself.

Staff: Helen Buckley, Marvin Weinstein (Tax Division)

CRIMINAL TAX MATTERS

Offers in Compromise in Criminal Tax Cases. Under a new policy, adopted by the Department in recent weeks, offers in compromise will not be considered in criminal tax cases. Under the former policy (Title 4, United States Attorneys' Manual, pp. 50-51), there was limited provision for such offers, including the requirement that the defendant enter a plea of guilty (in exceptional cases, nolo contendere) to at least one major count of the indictment. This procedure has proved to be unsatisfactory because of the sometimes lengthy delays involved and because Tax Division attorneys are required to consider the adequacy of the offer with respect to civil tax liabilities, a matter with which they are not sufficiently advised without protracted conferences with personnel of the Internal Revenue Service. Under the new policy the criminal case is entirely separate from the matter of the civil liability and collection of the taxes, penalties and interest and is to be disposed of first. No consideration whatsoever will be given to settlement of the civil liability until after sentence has been imposed in the criminal case, except where the court chooses to defer sentence pending the outcome of such settlement. Appropriate changes are being made in the United States Attorneys' Manual and the revised pages will be published in the near future.

Transfers Under Rule 20, Federal Rules of Criminal Procedure. This rule permits a defendant arrested in a district other than that in which the case is pending, with the approval of both United States Attorneys involved, to waive trial and enter a plea of guilty or nolo contendere in

the district in which he is apprehended. Some defendants have misused this provision as part of a plan to shop around and have their cases transferred to what they believe to be a more lenient court. For this reason it is requested that before consenting to any transfer under Rule 20 in a criminal tax case United States Attorneys secure express authorization from the Tax Division which may have information as to the reason for the requested transfer that is not available to the United States Attorneys involved.

Approved: _____
Special Agent in Charge

ANTITRUST DIVISION

Assistant Attorney General Victor R. Hansen

SHERMAN ACT

Jencks Case Distinguished in Antitrust Price Fixing Case. United States v. Erie County Malt Beverage Distributors Association, et al., (W.D. Pa.). In this price fixing case against seven distributors of case lot beer and two associations of such distributors, all defendants had been found guilty in June 1957. Thereafter, prior to sentencing, they moved for a new trial and in arrest of judgment, primarily on the ground that according to the Jencks decision they should have given access to the complete FBI reports concerning this matter. Actually, the government had called two agents only as impeachment witnesses, after certain defense witnesses had denied making incriminating statements to those agents. Those portions of the agents' reports which reflected the defense witnesses' statements had been offered for inspection. After argument in October 1957, Judge Sorg, on December 30, 1957, issued an opinion denying defendants' motions and refuting, particularly, their interpretation of the Jencks decision.

It is expected that the Court soon will impose sentences upon the defendants. A companion civil case is still pending.

Staff: James P. Tofani and John E. Sarbaugh (Antitrust Division)

Court Denies Motion to Dismiss for Mootness and Motion For Summary Judgment. United States v. Federation Suisse Des Associations De Fabricants D'Horlogerie, et al., (S.D. N.Y.). On December 19, 1957, Judge William B. Herlands denied in all respects the motions of defendant Elgin National Watch Company to dismiss the complaint against it for mootness under Rule 12, and for summary judgment under Rule 56.

The complaint charged Elgin with conspiracy to restrain United States trade in watchmaking machinery by reason of its execution of a lease for such machinery containing numerous restrictive conditions. While admitting that the lease contained restrictive conditions, Elgin argued that it had been entered into by the Wadsworth Watch Case Co., prior to Wadsworth becoming a subsidiary of Elgin, that Elgin itself had never been willing to enter into such restrictive leases, and finally that Elgin had cancelled the lease prior to the filing of the complaint. The government in its affidavit argued that Elgin had ratified and adopted the Wadsworth lease, that Elgin never had a policy against signing such leases and in fact had itself sought to sign identical leases, and finally, that Elgin had not cancelled the lease prior to the complaint, but that in any event cancellation immediately prior to the institution of suit did not render the action moot. The government contended therefore that the case was not moot and that in fact Elgin's policy in regard to such leases indicated a reasonable probability of resumption of violations requiring injunctive relief.

Judge Herlands, stating that he was in substantial agreement with the government's factual and legal analysis, denied both Elgin motions, holding that issues of fact of the good faith of Elgin in cancelling the restrictive contract, the probability of future violations, and the existence of past violations precluded granting summary judgment, and that as to the motion to dismiss for mootness "there is a genuine controversy and issue as to the reasonable likelihood of a recurrence of conduct on the part of the defendant Elgin in violation of the controlling statutes."

The government had cross-moved under F. R. C. P. 56(d) for an order establishing twenty-two facts for the trial of the action, eight of which were consented to by Elgin, either as submitted by the government or with minor revisions suggested by Elgin. The Court found these eight facts which were not contested by Elgin and refused to find those to which Elgin objected.

Staff: David Schwartz, Mary Gardiner Jones and Averill M. Williams
(Antitrust Division)

Opinions Denying Motions to Dismiss Indictments. United States v. Maine Lobstermen's Association, et al., (D. Maine), United States v. Maine Lobster Company, Inc., et al., (D. Maine). Two indictments were returned on October 15 involving members of the lobster industry in Maine. One indictment against the Maine Lobstermen's Association and its President charged a conspiracy among lobstermen to fix the price for live Maine lobsters. The other indictment against lobster dealers charged a conspiracy to fix prices at which they would purchase lobsters from the lobstermen.

In the lobstermen's case, the Association and its President filed a number of preliminary motions on October 25: (1) motion to dismiss on the ground the indictment does not state facts constituting an offense; (2) motion to dismiss the defendant President on the ground he obtained immunity when he produced Association documents before the grand jury; (3) motion to sever the trials of the two defendants on the ground of prejudicial joinder; and (4) motion for a bill of particulars. Argument on the motions was held on December 3.

Subsequently, in the lobster dealers' case, defendants filed a motion for a bill of particulars, as well as a motion to dismiss on the ground that a grand jury member was discharged by the Court because of his occupation as a lobsterman, thereby prejudicing defendants' interests. Argument on these motions was heard on December 16.

In two memorandum opinions filed by the Court on December 20, all of these preliminary motions in both cases were denied. The Court held that the indictments state all of the necessary facts to charge a Sherman Act violation, and that the allegations adequately inform the defendants of the offense sufficiently to enable them to plead and to prepare their defense.

The Court further held that the individual defendant in the lobstermen's case did not obtain immunity for production of Association records because he neither testified nor produced documents under oath. And in view of the fact that the same evidence would be used to prove the charges both against this defendant and the Association, the Court found there would be no prejudice by a joint trial.

With respect to the dismissal of a grand juror in the lobster dealers' case, the Court held that the discharge appeared to be warranted and was authorized by Rule 6(g) of the Federal Rules of Criminal Procedure. He further concluded that it did not amount to an intentional exclusion of a class of workers from the grand jury.

Staff: John J. Galgay, Alan L. Lewis, Philip Bloom and
Richard L. Shanley (Antitrust Division)

INTERSTATE COMMERCE COMMISSION

Action Brought Before Commission by Railroads Under Railway Mail Pay Act of 1916 for Increase in Mail Rates. Eastern and Southern Railroad Applications for Increased Rates, 1956, and Application of Western Railroads, 1957 (Interstate Commerce Commission). By three applications filed with the I.C.C. the Eastern railroads, Southern railroads and Western railroads petitioned for increases of approximately 65% in the rates paid them by the Post Office Department for transportation of mail. At the time the applications were filed the Post Office Department paid approximately \$300 million per year to the Railroads and the increases sought, if granted, would require an increased payment of almost \$200 million per year. (See U. S. Attorneys' Bulletin, Vol. 5, No. 12, p. 365, June 7, 1957; Vol. 5, No. 16, p. 493, August 2, 1957; and Vol. 5, No. 21, pp. 627, 628, October 11, 1957.) Since the last report of this litigation contained in the Bulletin for October 11, 1957, the following has occurred:

1. On November 29, 1957, Eastern railroad applicants informed the Commission they wished to waive their right to submit rebuttal evidence on January 15, 1958, and suggested that the Commission require both parties to submit final briefs by that date. They further requested the Commission to set January 30, 1958, for oral argument. After a conference held December 9, 1957, the presiding commissioner ordered both parties to file briefs on or before February 20, 1958, and reply briefs before the date to be set for oral argument before the Commission.

2. On December 3, 1957, hearings were held by the Commission for the purpose of receiving evidence of the Post Office Department and the Southern and Western railroads supporting the settlement agreements previously filed by these parties. Under said agreements the Western applicants would receive an increase of 7.5% from July 1, 1957; Southern applicants would receive an increase of 6% from July 1 to August 31, 1957, and 13.5% thereafter.

The 13.5% increase was designed in part to offset a loss of revenue which will result from a change in the method of computing payment. The net increase realized by the Southern railroads will amount to approximately 7%.

3. By order dated December 30, 1957, the Commission approved the Southern and Western agreements thus closing these cases and leaving only the Eastern case to be disposed of.

Staff: James D. Hill, William H. Glenn, Howard F. Smith and
Morris J. Levin. (Antitrust Division)

* * *

ADMINISTRATIVE DIVISION

Administrative Assistant Attorney General S. A. Andretta

CASE FOLDERS

Several times in the past, United States Attorneys have been asked to comment on proposed case folders. It is important that the Department have a uniform folder to assist in the administration of our records, and it now has a supply of criminal and civil folders in stock. A set (Form Nos. USA-33 (Criminal) and USA-34 (Civil)) is being forwarded under separate cover. These folders should eliminate requests for specially printed folders. Districts using unprinted folders may continue that practice.

Items provided on the new folders represent the suggestions of a majority of the districts. However, entries opposite each item are not mandatory. Information entered under "Remarks" should be as brief as possible to avoid duplication of docket cards. The numbered boxes on the side of the folder may be used for tickler or follow-up information by placing tabs over the day of the month when further action is to be taken (e.g. next collection due, date answer is due, etc.).

EXPENDITURES FOR POSTAGE

Effective July 1, 1957, increases in postage rates went into effect as follows:

Registered Mail - from 40¢ to 50¢

Certified Mail - from 15¢ to 20¢

Return receipts - showing to whom and when
delivered - from 7¢ to 10¢

Return receipts - showing to whom, when and address
where delivered - from 31¢ to 35¢

Special Delivery - from 20¢ to 30¢

Because of these increases and apparent indiscriminate use of postage, our postage expenditures for United States Attorneys' Offices, legal and administrative activities, has reached the rate of over \$100,000 a year. The Department has received air mail bearing three or four dollars postage from United States Attorneys close to Washington which could have been sent first class or special delivery without any appreciable loss of time. It is suggested that all United States Attorneys east of the Mississippi consult mail schedules before using air mail.

Each envelope carrying penalty indicia frank costs the Department postage at the rate of 3¢ for letter size envelopes up to 4 by 9 inches and 9¢ for larger sizes whether the envelopes are properly used or not. Therefore, penalty envelopes should not be used for intraoffice communications or for storage of material. When mailing communications in double envelopes, do not use an inner envelope carrying the penalty printing.

Because of the large increase of postage expenditures, it is requested that postage requirements be carefully watched and that waste of penalty envelopes be avoided.

RECENT COMPTROLLER GENERAL'S DECISIONS

By decision of December 30, 1957, the Comptroller General carefully reviewed the legislation authorizing Government employees to be absent without loss of pay, time or efficiency for military training duty for periods not to exceed 15 days. The question occasioning the review was whether the 15 days were 15 calendar days or 15 days on which the employee would normally work. The Comptroller General came to the conclusion that military leave of absence requires a continuation of the practice of charging intervening nonwork days to the 15 day total. However, as pointed out in 27 Comp. Gen. 245, only the intervening nonwork days need be charged. Thus, if the 15-day training period begins on Saturday, that day and the following Sunday are not charged, but the following Saturday and Sunday are. The last Saturday of the 15-day period likewise is not charged nor the 16th day which is Sunday. Summarized, the decision holds that military leave is required to be computed on a calendar-day basis, except that nonwork days, not intervening within the training period, are not charged.

By decision also of December 30, 1957, B-108632, the Comptroller General held that an employee may request the substitution of annual leave for advanced sick leave under the following conditions: (1) that he has remaining to his credit sufficient annual leave for the purpose, (2) that at the time of request there remains the possibility of taking as annual leave the number of days and hours desired to be substituted, and (3) that the office would be willing to approve an application for leave in that amount and at that time.

When these conditions are met, it will be permissible under the decision for the office to liquidate advanced sick leave. Obviously, relaxation of the decision in 31 Comp. Gen. 524 cannot be employed as a device to avoid forfeiture of annual leave, and the record when made will be subject to scrutiny for compliance with every condition of the decision. The principal points to remember are the application for substitution must be made in sufficient time in advance of the end of the leave year to permit the taking of the leave in kind and the office must be agreeable to such an absence before the proposal can be approved. To illustrate, the 1957 leave year ended January 11, 1958. Application could not have been made on January 8, 1958, to substitute 10 days of unused current annual leave for an equal amount of advanced sick leave. Only two days could be charged off in this illustration.

DEPARTMENTAL ORDERS AND MEMOS

The following Memorandum applicable to United States Attorneys Offices has been issued since the list published in Bulletin No. 1 Vol. 6 dated January 3, 1958.

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