Commodity Futures Trading Commission
CEA CASES

NAME: HENRY S. SHATKIN

CITATION: 34 Agric. Dec. 296

DOCKET NUMBER: 211

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DOCUMENT TYPE: ORDER GRANTING MOTION TO WITHDRAW APPEAL

(No. 16,265)

In re HENRY S. SHATKIN. CEA Docket No. 211. Decided February 14, 1975.

Order granting motion to withdraw appeal

Herbert R. Bader, for complainant.

Philip M. Bloom, Chicago, Ill., for respondent.

Dorothea A. Baker, Administrative Law Judge.

Decision by Donald A. Campbell, Judicial Officer.

On January 7, 1975, the complainant filed an appeal to the Judicial Officer from the initial decision filed herein on November 21, 1974, by the Administrative Law Judge, Dorothea A. Baker. Final administrative authority to decide cases under the Commodity Exchange Act has been delegated to the Judicial Officer (37 F.R. 28475; 38 F.R. 10795).

n1. The office of Judicial Officer is a career position established pursuant to the Act of April 4, 1940 (7 U.S.C. 450c-450g), and Reorganization Plan No. 2 of 1953 (5 U.S.C. 1970 ed., Appendix, p. 550). The Department's first Judicial Officer held the office from 1942 to 1972. The present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

The complainant filed a motion on January 30, 1975, to withdraw its appeal in this case stating that "[although] we disagree with the interpretation of the Administrative Law Judge in some respects as to the issues of 'wilfullness' and 'notice' under the Administrative Procedure Act, we do not believe that the pursuit of this appeal is required in the public interest." The motion states that the attorney for respondent has no objection to the withdrawal of the appeal.

The rules of practice do not permit a party to withdraw an appeal as a matter of right. In considering whether to grant a motion to withdraw an appeal, the Judicial Officer must consider the public interest. Since the Administrative Law Judge's decision in this case with respect to "wilfulness" is contrary to the well established policy of this agency, it would not be in the public interest to permit the appeal to be withdrawn if this case were to be regarded as a precedent in any future proceeding in the Department. Accordingly, if the motion is to be granted, it should be on the condition that the case is not to be regarded as a precedent in any future proceeding.

I have not read the record in this proceeding, but there would appear to be no reason for disagreeing with the complainant's position that the pursuit of

this appeal is not required in the public interest. The case relates to a single violation which was unintentional. Accordingly, the complainant's motion will be granted with the qualification that the decision is not to be followed as a precedent in any future proceeding.

Since the meaning of the term "wilfulness" is of importance under a number of the Department's regulatory statutes, it is appropriate, once again, to set forth this Department's position with respect to the meaning of the term. n2

n2. The Department's position as to the meaning of "wilfulness" under section 9 of the Administrative Procedure Act has been consistently followed in many cases, *e.g., In re David G. Henner,* 30 Agric. Dec. 1151, 1260-1263 (1971); *In re American Fruit Purveyor's, Inc.,* 30 Agriculture Decisions 1542, 1587-1589 (1971); *In re George Steinberg & Son, Inc.,* 32 Agriculture Decisions 236, 262-266 (1973), affirmed *sub nom. George Steinberg and Son* v. *Butz,* 491 F.2d 988, 994 (C.A. 2), certiorari denied. No. 73-1681, 43 L.W. (Sup. Ct.) 3208; *In re Arthur N. Economou,* 32 Agric. Dec. 14, 98-105 (1973), reversed *sub nom. Economou* v. *United States Department of Agriculture,* 494 F.2d 519 (C.A. 2); *In re American Commodity Brokers, Inc.,* 32 Agric. Dec. 1765, 1793-1796 (1973); *In re James J. Miller,* 33 Agriculture Decisions 53, 83-87 (1974), affirmed (without any discussion of wilfulness) *sub nom. Miller* v. *Butz,* 498 F.2d 1088 (C.A. 5); *In re J. A. Speight,* 33 Agriculture Decisions 280, 302-303 (1974); *In re Trenton Livestock, Inc.,* 33 Agriculture Decisions 499, 517-518 (1974), affirmed *sub nom. Trenton Livestock, Inc.* v. *Butz,* No. 74-1644 (C.A. 4), decided January 30, 1975.

A violation is wilful, within the meaning of the term in a regulatory statute, if the violator "1) intentionally does an act which is prohibited, -- irrespective of evil motive or reliance on erroneous advice, or 2) acts with careless disregard of statutory requirements" (*Goodman* v. *Benson,* 286 F.2d 896, 900 (C.A. 7). Accord: *United States* v. *Illinois Central R. Co.,* 303 U.S. 239 242-244; *Gearhart & Otis, Inc.* v. *Securities & Exch. Com'n.,* 348 F.2d 798, 802-803 (C.A. D.C.); *Riss & Company* v. *United States,* 262 F.2d 245, 247-251 (C.A. 8); *United States* v. *Gris,* 247 F.2d 860, 864 (C.A. 2); *Trenton Chemical Co.* v. *United States,* 201 F.2d 776, 777-780 (C.A. 6), certiorari denied, 345 U.S. 994; *Dennis* v. *United States,* 171 F.2d 986, 990-991 (C.A. D.C.), affirmed on other grounds, 339 U.S. 162; *American Surety Co.* v. *Sullivan,* 7 F.2d 605, 606 (C.A. 2); *Chicago, St. P., M. & O. Ry. Co.* v. *United States,* 162 F. 835, 840-843 (C.A. 8), certiorari denied, 212 U.S. 579; *Schwebel* v. *Orrick,* 153 F. Supp. 701, 705 (D.C. D.C.).

"It is clear enough that under § 9(b) [of the Administrative Procedure Act], doing an act which is prohibited and doing it intentionally 'irrespective of evil motive or reliance on erroneous advice' or 'acts with careless disregard of statutory requirements' are wilful." *George Steinberg and Son.* v. *Butz,* 491 F.2d 988, 994 (C.A. 2), certiorari denied, No. 73-1681, 43 L.W. (Sup. Ct.) 3208.

Wilfulness means "no more than that the person charged with the duty knows what he is doing," and it "does not mean that, in addition, he must suppose that he is breaking the law." *Townsend* v. *United States,* 95 F.2d 352, 358 (C.A. D.C.), certiorari denied, 303 U.S. 664; *Fields* v. *United States,* 164 F.2d 97, 100 (C.A. D.C.), certiorari denied, 332 U.S. 851. It is only in statutes involving turpitude that "wilful" includes evil purpose, criminal intent, or the like. *Spies* v. *United States,* 317 U.S. 492, 497-499.

In *Trenton Chemical Co.* v. *United States,* 201 F.2d 776, 777-780 (C.A. 6), certiorari denied, 345 U.S. 994, the Court held that a company which exceeded its quota, under a regulatory order establishing quotas as to grain used by distillers, "willfully" violated the quota restriction, subjecting it to criminal

prosecution. The defendant contended that it used grain products, not grain, and "that it had been advised by its attorney that it was not illegal to use grain products in its distilling operations," but the "District Judge declined to permit the * * * [Company] to show at the trial that it acted in good faith and on advice of counsel that its acts were not illegal, in using the materials in question" (201 F.2d at 778, 779). In sustaining the judgment of the District Court, the Court of Appeals held that inasmuch as the regulatory statute did not proscribe acts "in themselves wrong," evidence of "bad faith or evil purpose on the part of the defendant was not necessary to constitute a violation of the act, but it was sufficient if the prohibited act was intentional or voluntary" (201 F.2d at 780).

Similarly, in *Chicago, St. P., M. & O. Ry. Co.* v. *United States,* 162 F. 835, 840-842 (C.A. 8), certiorari denied, 212 U.S. 579, the Court upheld the conviction of the defendants under the Elkins Act on the ground that they "willfully" granted rebates to a shipper, notwithstanding the reliance by the defendants on decisions by the Interstate Commerce Commission which, according to the Court, "might well have afforded ground for belief by defendants that their act * * * was justifiable and lawful" (162 F. at 840-841). The Court said that to "hold that the belief of an individual concerning the legality of his action should constitute a standard of innocence or guilt would establish an uncertain and dangerous criterion. It would in many cases justify a violation of statutes expressive of public policy concerning which there may obviously be and frequently are as many different opinions as there are different individuals affected by them" (*id.,* at 842). See, also, *Sinclair* v. *United States,* 279 U.S. 263, 299; *Armour Packing Co.* v. *United States,* 209 U.S. 56, 70-71, 85-86; *United States* v. *Union Pac. R. Co.,* 169 F. 65, 67 (C.A. 8).

It was held in *Dennis* v. *United States,* 171 F.2d 986, 990-991 (C.A. D.C.), affirmed on other grounds, 339 U.S. 162, that in order to prove a wilful failure to appear before a Congressional Committee, it is not necessary to show that the act of refusal was done from a bad purpose or an evil motive. The Court held that the mere fact that the defendant claimed to have followed the advice of counsel "is no defense," and that "[if] it were, many corporations, organizations and even individuals would maintain counsel permanently for the purpose of advising them against doing anything that they do not wish to do" (171 F.2d at 991).

In *Capitol Packing Company* v. *United States,* 350 F.2d 67,

78-79 (C.A. 10), the Court interpreted wilfully more narrowly, requiring a showing of "an intentional misdeed or such gross neglect of a known duty as to be the equivalent thereof."

Referring to *Goodman* v. *Benson,* 286 F.2d 896, 900 (C.A. 7), quoted at the beginning of this discussion as to wilfulness, the Court in *Capitol Packing Company* v. *United States,* 350 F.2d 67, 78 (C.A. 10) states:

The Court in the cited case found however that the defendant's violations constituted clear violations of the Act and that he was not acting in good faith.

However, *Goodman* v. *Benson* (which is a case I briefed and argued in the Court of Appeals) should not be brushed aside so easily. The *Goodman* case involved (i) exceeding trading limits, and (ii) failing to file reports under the Commodity Exchange Act. The respondent in the *Goodman* case claimed that he exceeded the trading limits because he acted in good faith in relying on erroneous information given to him by his broker. As to this violation, the Court sustained the Department's position that the respondent did not act in good faith. However, with respect to the failure to file reports, the respondent contended that he relied on his secretary and that he did not know that she was not filing the required reports. As to this violation, the Court stated (286 F.2d at 900):

The responsibility for making the reports was on the petitioner. Admittedly, he made no effort to determine whether the reports were being filed. It is immaterial whether a mistake was made by the secretary. The fact is, the reports were not made, and it was the responsibility of the petitioner that the regulations be carried out.

As to both violations, the Court held in *Goodman* v. *Benson,* 286 F.2d 896, 900 (C.A. 7):

We think it clear that if a person 1) intentionally does an act which is prohibited, -- irrespective of evil motive or reliance on erroneous advice, or 2) acts with careless disregard of statutory requirements, the violation is wilful.

The Court in the *Capitol Packing Company* case, in deciding that wilfulness requires a showing of an intentional misdeed or such gross neglect of a known duty as to be the equivalent thereof, stated (350 F.2d at 79):

This interpretation receives support from the legislative history of the Administrative Procedure Act. As stated in the House Report on the Act, in discussing § 9(b):

"The exceptions to the second sentence, regarding revocations, apply only when the demonstrable facts fully and fairly warrant their application. Wilfulness must be manifest." H.R. Rep. No. 1980, 79th Cong., 2d Sess. 41 (1946).

See also, S. Rep. No. 752, 79th Cong., 1st Sess. 25 (1945), 92 Cong. Rec. 5654 (remarks of Congressman Walter).

I do not find the support for the meaning of wilfulness in the legislative history that the Court found. For the legislative history to show that "[wilfulness] must be manifest" does not help me in defining wilfulness. Once I know the definition of wilfulness, then I know from the legislative history that it must be manifest, but I find nothing in the legislative history to shed light on the definition of wilfulness.

I believe that the many cases set forth above correctly interpret the Congressional intent as to wilfulness, as used in the Administrative Procedure Act. In view of the legislative history relied on by the Court in the *Capitol Packing Company* case, *supra,* a finding of wilfulness should be made if it is manifest from the record that a person has intentionally done an act which is prohibited -- irrespective of evil motive or reliance on erroneous advice -- or acted with careless disregard of statutory requirements.

In any event, the *Capitol Packing Company* view of "wilfulness" would seem to be rendered nugatory by the Court's decision in *Butz* v. *Glover Livestock Comm'n Co.,* 411 U.S. 182, 185, 187. The Court stated (411 U.S. at 185):

The Court of Appeals agreed that 7 U.S.C. § 204 authorized the Secretary to suspend "any registrant found in violation of the Act," 454 F.2d, at 113, that the suspension procedure here satisfied the relevant requirements of the Administrative Procedure Act, 5 U.S.C. § 558, and that "the evidence indicates that [respondent] acted with careless disregard of the statutory requirements and thus meets the test of 'wilfulness'."

Referring to the suspension provisions under the Packers and Stockyards Act, the Court stated (411 U.S. at 187 and fn. 5, p. 187):

Nothing whatever in that provision confines its application to cases of "intentional and flagrant conduct" or denies its application in cases of negligent or careless violations.

* * *

"Wilfully" could refer to either intentional conduct or conduct that was merely careless or negligent.

Hence it is clear that a suspension order may be issued under the Commodity Exchange Act if a person (1) intentionally does an act which is prohibited -- irrespective of evil motive or reliance on erroneous advice -- or (2) carelessly or negligently fails to comply with the Act.

The Administrative Law Judge states in footnote 15 of the initial decision in the present case that *In re American Fruit Purveyor's, Inc.,* 30 Agriculture Decisions 1542 (1971), is the "one exception" to the Department's consistent policy as to "wilfulness." However, the Administrative Law Judge has misread the *American Fruit* decision. The material quoted from the *American Fruit* decision in her footnote 15 is from 30 Agriculture Decisions 1557, 1577-1582. That material does not even relate to the meaning of "wilfulness." It relates to whether notice was given in that case. In the *American Fruit* case, after concluding that adequate notice was not given (30 Agriculture Decisions at 1576-1587), the Judicial Officer then applied the well established policy of the Department as to the meaning of "wilfulness" (30 Agriculture Decisions at 1588-1590).

The Administrative Law Judge in this case quotes the following sentence from *In re David G. Henner,* 30 Agric. Dec. 1151, 1260 (1971):

The respondent is an experienced trader, and the inference is inescapable that he intentionally paid more than he had to for November shell egg futures * * *

The Administrative Law. Judge then states:

It was concluded therein [i.e., in the *Henner* case] by the Judicial Officer that since the Respondent intentionally traded in a manner to cause the closing price to be artifically high such intention connoted willfulness.

However, there is nothing in the *Henner* decision to suggest that a finding of intentional conduct is essential to a finding of wilfulness. The *Henner* case involved price manipulation in which intention to manipulate the price was a necessary element of the substantive violation. Since the respondent's intent to cause the price to be artificially high was proven in that case, it was naturally relied on by the Judicial Officer as an element of wilfulness. Specifically, the Judicial Officer stated in the *Henner* decision (30 Agriculture Decisions at 1260-1261):

Irrespective, however, of whether he knew that his conduct was regarded as bad practice or that it was unlawful, it is sufficient to be wilful that he

intentionally traded in a manner to cause the closing price to be artificially high.

Following that statement in the *Henner* decision, the Judicial Officer set forth the Department's well established position that (30 Agriculture Decisions at 1261):

A violation is wilful, within the meaning of the term in a regulatory statute, if the violator "1) intentionally does an act which is prohibited, -- irrespective of evil motive or reliance on erroneous acvice, or 2) acts with careless disregard of statutory requirements" * * *.

The Administrative Law Judge refers in the initial decision to *Great Western Food Distributors* v. *Brannan,* 201 F.2d 476 (C.A. 7), certiorari denied, 345 U.S. 997, in which the Court stated (201 F.2d at 484):

[In] view of the evidence that petitioners wilfully violated the act, i.e., that they intentionally set out to widen the spread between December and January futures, its [*i.e.,* the wilfulness provision of § 9 of the Administrative Procedure Act] relevance is, by its own terms, excluded in this instance.

The *Great Western* case (in which I participated in the briefing and arguing in the Court of Appeals) involved a corner of the egg futures market in which

"the intent of the parties during their trading is a determinative element of a punishable corner" (201 F.2d at 479). Since the intent to manipulate the price was proven in that case, the Court naturally relied on that fact in its discussion of wilfulness. But in the *Great Western* case as in the *Henner* case, *supra,* there is no holding that intent must be proven as a necessary element of wilfulness.

Cargill, Inc. v. *Hardin,* 452 F.2d 1154, 1173 (C.A. 8), certiorari denied, 406 U.S. 932, relied on by the Administrative Law Judge in this case, is another manipulation case in which the intent to manipulate the price on the futures market was an element of the substantive violation. The Court's entire statement with respect to wilfulness consists of the following (452 F.2d at 1173):

We think it is clear that Cargill's acts were willful within the meaning of the Act and thus the section is not applicable. See *Great Western Distributors, supra,* 201 F.2d at 484.

There is nothing in the *Cargill* case to suggest that proof of intent to violate the Act is necessary for proof of wilfulness.

In *Schwebel* v. *Orrick,* 153 F. Supp. 701, 705 (D.C. D.C.), affirmed on other grounds, 251 F.2d 919 (C.A. D.C.), certiorari

denied, 356 U.S. 927, the Court held that the notice provisions of the Administrative Procedure Act had been complied with, and the Court also stated (153 F. Supp. at 705):

"Wilfullness" as used therein [*i.e.,* § 9 of the Administrative Procedure Act] has been interpreted as meaning the intentional doing of the act charged.

The Court in *Schwebel* v. *Orrick* cited two cases, the *Great Western* case, *supra,* and one other Court of Appeals case. Here again, the Court's statement should not be viewed as a holding that the intentional doing of the act charged is necessary to wilfulness -- this is merely the meaning of the term that fit the facts of the particular case.

The Administrative Law Judge states that in *Eastern Produce Co.* v. *Benson,* 278 F.2d 606, 609 (C.A. 3), (which I briefed and argued in the Court of Appeals) the "court, in its opinion, did not seek to equate neglect and willfulness, but rather, '* * * that notorious neglect of explicit provisions of law may be evidence of willfulness,' and that *repeated violations* justified the finding of willfulness therein." Since there were many repeated violations in the *Eastern Produce* case, such repeated violations were, of course, relied on in concluding wilfulness. But the Court in the *Eastern Produce* case, quoting from *United States* v. *Illinois Central R. Co.,* 303 U.S. 239, 242-243, made it clear that wilfulness does not require "evil purpose, criminal intent or the like," but may involve conduct "which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.' "

The facts in *United States* v. *Illinois Central R. Co.,* 303 U.S. 239, 242-243, relied on by the Court in the *Eastern Produce* case discussed immediately above, are very close to the factual situation in the present case. Specifically, the Court held in the *Illinois Central R. Co,* case (303 U.S. at 242-243):

The case depends upon the meaning of the phrase "knowingly and willfully," used in § 3 to characterize the transgressions for which penalties are imposed. The Act is to be construed to give effect to its humanitarian provisions, and as well to the exceptions in favor of the carriers. *Chicago & N. W. Ry. Co.* v. *United States,* 246 U.S. 512, 517-518. The penalty is not imposed for unwitting failure to comply with the statute. *United States* v. *Sioux City Stock Yards Co.,* 162 Fed. 556, 562. *United States* v. *Stockyards Terminal Ry. Co.,* 178 Fed. 19, 23. *St. Joseph Stockyards Co.* v. *United States,* 187 Fed. 104, *Oregon-Washington R. & Nav. Co.* v. *United States,* 205 Fed. 341, 343. But in

this case, the respondent knew when the permissible period of confinement would expire, brought the car to destination, and, within the time allowed, placed it for unloading. By allowing the 36 hours to expire, it "knowingly" failed to comply with the statute.

Mere omission with knowledge of the facts is not enough. The penalty may not be recovered unless the carrier is also shown "willfully" to have failed. In statutes denouncing offenses involving turpitude, "willfully" is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States* v. *Murdock,* 290 U.S. 389, 394, shows that it often denotes that which is "intentional, or knowing, or voluntary, as distinguished from accidental," and that it is employed to characterize "conduct marked by careless disregard whether or not one has the right so to act." The significance of the word "willfully" as used in § 3 now before us, was carefully considered by the circuit court of appeals for the eighth circuit in *St. Louis & S. F. R. Co.* v. *United States,* 169 Fed. 69. Speaking through Circuit Judge Van Devanter, now Mr. Justice Van Devanter, the court said (p. 71): "'Willfully' means something not expressed by 'knowingly,' else both would not be used conjunctively . . . . But it does not mean with intent to injure the cattle or to inflict loss upon their owner because such intent on the part of a carrier is hardly within the pale of actual experience or reasonable supposition. . . . So, giving effect to these considerations, we are persuaded that it means purposely or obstinately and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements." That statement has been found a useful guide to the meaning of the word "willfully" and to its right application in suits for penalties under § 3. *Unites States* v. *Stockyards Terminal Ry. Co., supra,* 23. *St. Joseph Stockyards Co.* v. *United States, supra,* 105. *Oregon-Washington R. & Nav. Co.* v. *United States,* 205 Fed. 337, 339. *St. Louis Merchants' Bridge T. Ry. Co.* v. *United States,* 209 Fed. 600. See also *Chicago, B. & Q. R. Co.* v. *United States*, 194 Fed. 342, 346. *United States* v. *Kansas City Southern Ry. Co.*, 202 Fed. 828, 833.

Considered as unaffected by the yardmaster's negligence, respondent's failure to take the cattle from the car already placed at the yard for unloading, unquestionably discloses disregard of the statute and indifference to its requirements and compels the conclusion that, within the meaning of § 3, respondent willfully violated its duty to unload as required by § 1. It is immaterial whether the yardmaster's negligence or oversight was intentional or excusable. As between the government and respondent, the latter's breach is precisely the same in kind and degree as it would have been if its yardmaster's failure had been intentional instead of merely negligent. The duty violated did not arise out of the relation of employer and employee but was one that, in virtue of the statute, was owed by respondent to the shippers and the public. As respondent could act only through employees, it is responsible for their failure. To hold carriers not liable for penalties where the violations of §§ 1 and 2 are due to mere in-difference, inadvertence or negligence of employees would defeat the purpose of § 3. Whether respondent knowingly and willfully failed is to be determined by the acts and omissions which characterize its violation of

the statute and not upon any breach of duty owed to it by its employees. Respondent's contention that it is not liable because its failure was due to the negligence or oversight of the yardmaster cannot be sustained. *Montana Cent. Ry. Co.* v. *United States,* 164 Fed. 400, 403. *United States* v. *Atlantic Coast Line R. Co.,* 173 Fed. 764, 769. Cf. *Oregon-Washington R. & Nav. Co.* v. *United States,* 205 Fed. 337, 340.

We come now to *Economou* v. *United States Department of Agriculture,* 494 F.2d 519 (C.A. 2), relied on by the Administrative Law Judge in the present case. The Court in the *Economou* case reversed the Judicial Officer's decision in *In re Arthur N. Economou,* 32 Agric. Dec. 14 (1973), in which the Judicial Officer set forth the same view that is set forth above with respect to the meaning of "wilfulness" (32 Agriculture Decisions at 98-105). n3

n3. However, the Judicial Officer's decision in the *Economou* case was filed prior to the decision in *Butz* v. *Glover Livestock Comm'n* Co.,411 U.S. 182, 185, 187, in which the Court held that "the evidence indicates that [respondent] acted with careless disregard of the statutory requirements and thus meets the test of 'wilfulness;'" and that "'[wilfully]' could refer to either intentional conduct or conduct that was merely careless or negligent."

Section 9 of the Administrative Procedure Act provides (5 U.S.C. 558(c)):

Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given --

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

The entire opinion by the Court in the *Economou* case consists of the following four sentences:

PER CURIAM:

Petitioners, who are no longer in business as futures commission merchants under the Commodity Exchange Act seek review of a 90-day suspension order, advancing numerous grounds, including estoppel, lack of evidence of violation and of willfulness. We need not address most of these, since it appears that the essential finding of willfulness, now passionately protested, was made in a proceeding instituted without the customary warning letter, which the Judicial Officer conceded might well have resulted in prompt correction of the claimed insufficiencies. Under these circumstances, the finding of willfulness appears erroneous on the record taken as a whole, and the sanctions imposed unwarranted.

The petition for review is granted and the order set aside.

The Court seems to be saying in the *Economou* case that the violations were not wilful because a warning letter was not sent. But to attribute that meaning to the decision is to attribute judicial illiteracy to the Court. As stated by the Assistant Attorney General in the petition for rehearing filed in the *Economou* case, p. 3:

However, this holding apparently overlooks the applicable provision of the Administrative Procedure Act. The Act expressly provides that *"[except] in cases of willfulness* * * * the withdrawal, suspension, revocation, or annulment of a license is lawful only if" the licensee has prior notice and opportunity to demonstrate compliance (5 U.S.C. 558(c), emphasis added). Thus, this Court's holding nullifies the willfulness exception to the prior notice requirement of the APA -- which until now has never been interpreted as requiring the sending of a prior warning letter as a prerequisite for a finding of willfulness. If the lack of a warning letter negates willfulness, the exception in the APA is meaningless.

If the Court really meant that the lack of a warning letter negates wilfulness, the Court's interpretation of the Act would be contrary to the

settled principle that a statute should not be interpreted so as to render void any provision thereof.

"No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that 'significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant".' " *Ex parte Public Bank,* 278 U.S. 101, 104. Effect shall, if possible, "be given to every clause and part of a statute." *Ginsberg & Sons* v. *Popkin,* 285 U.S. 204, 208. See, also, *Jarecki* v. *G. D. Searle & Co.,* 367 U.S. 303, 307-308; *Singer* v. *United States,* 323 U.S. 338, 344; *McDonald* v. *Thompson,* 305 U.S. 263, 266; *Market Co.* v. *Hoffman,* 101 U.S. 112, 115-116.

Accordingly, it would seem that the Court in the *Economou* case would not want its decision construed as holding that the sending of a warning letter is essential to a finding of wilfulness.

Another possible interpretation of the Court's decision in *Economou* to be considered is whether the Court meant that, based on circumstances other than the lack of a warning letter, there was no support in the record for the finding of wilfulness. However, there are several insurmountable difficulties precluding that interpretation.

First, the Court does not discuss any of the record deficiencies other than the failure to send a warning letter, discussed above. Moreover, there are no factual circumstances in the record that would lend any support to such a view. The record in the *Economou* case compels a finding of wilfulness irrespective of what definition is given to the term (unless wilfulness is, as a matter of law, precluded by the failure to send a warning letter).

The Court in the *Economou* case did not and could not (unless wilfulness is, as a matter of law, precluded by the failure to send a warning letter) refute the Judicial Officer's finding and conclusion that (32 Agriculture Decisions at 101):

In this case, however, the conduct of the respondents was wilful under the most narrow definition of the term. It is manifest from the record that the respondents knowingly, intentionally, and deliberately failed to meet the minimum financial requirements of the Act and regulations.

In the *Economou* case, it was alleged that Economou failed to meet the minimum financial requirements under the Commodity Exchange Act and regulations as of four dates. The complainant alleged that four assets claimed by Economou to be "current assets" did not meet the definition of "current assets."

The Judicial Officer explained in the *Economou* case that under the express provisions of the regulations, two of the four current assets claimed by respondents qualified only if they were secured; that it is conceded that the Government's auditor told Mr. Economou that such assets had to be secured; that Mr. Economou consulted an attorney for the preparation of drafts of security agreements; that the respondents refused to show any security agreements to the Government's auditor; and that the respondents refused to comply with the Hearing Examiner's request to produce the security agreements at the hearing (32 Agriculture Decisions at 33-37, 46, 101). The Judicial Officer's finding and conclusion that the security agreements did not exist and that the violations in this respect were wilful is not only adequately supported by the record, but is the only rational finding and conclusion that can be made as to these issues.

The requirement that the assets in question be secured was of major importance. In the event of bankruptcy, such assets, if unsecured, would have been of little help to innocent investors.

As to the third current asset claimed by the respondents, the Judicial Officer stated (32 Agriculture Decisions at 101):

As we have shown, (i) such organizational costs could not remotely qualify as current assets, under any stretch of the imagination by anyone familiar with accounting principles; (ii) when this matter was discussed by the complainant's auditor with Mr. Economou and his accountant, Mr. Radcliffe, Mr. Radcliffe could not think of any theory to support a classification of these items as current assets; and (iii) Mr. Radcliffe's complete silence as to this matter at the hearing gives rise to the inference that he still could not think of any basis for classifying these items as current assets at the time of the hearing.

There is no basis whatever in the *Economou* record for setting aside the Judicial Officer's finding and conclusion as to wilfulness with respect to the foregoing issues. As the Judicial Officer explained in his decision (32 Agriculture Decisions at 102), these issues alone would result in a violation as of two of the dates involved in the case.

In view of the strongest possible proof that the *Economou* violations were wilful even under the most narrow definition of the term (unless wilfulness is precluded by the failure to send a warning letter), it would seem that the Court could not have meant that the Judicial Officer's finding of wilfulness was not supported by the facts in the case (other than the failure to send a warning letter).

Another theoretical possibility to be considered (and immediately rejected) is that the Court was so busy that it brushed the case aside in order to avoid the onerous chore of giving full consideration to the case.

The *Economou* case was decided by Chief Judge Kaufman, retired Circuit Judge Smith, and retired Circuit Judge Anderson. The case was submitted without oral argument. The record in the case is huge. Oral argument before the Judicial Officer took 15 hours. The Judicial Officer spent several months working exclusively on the case. It takes more than two hours just to read, thoughtfully, the Judicial Officer's decision in the case, which consists of 201 typed pages, or 121 printed pages in Agriculture Decisions. However, it would not be fair to the Court to suggest that it might have failed to discharge its duties properly because it was too busy to study the voluminous record if there is any other rational explanation for the Court's decision.

In this case, there is a rational (but legally erroneous) basis for overturning the Judicial Officer's decision in the *Economou* case, albeit a basis which, if expressed, might have been summarily overturned by the Supreme Court, and, therefore, would not likely be expressed. Namely, a reasonable person could differ with the Administrator as to whether the *Economou* complaint should have been filed without sending a warning letter.

The respondents' past reputation was excellent (32 Agriculture Decisions at 130).

The respondents were phasing out of the regulated futures trading business; they planned to meet all of their obligations to customers in full; and they actually met all of such obligations. Hence, violating the minimum financial requirements caused no actual losses (32 Agriculture Decisions at 129).

Since the respondents were no longer engaged in any business regulated by complainant when the final decision was issued in this case by the Judicial Officer (32 Agriculture Decisions at 131), the only practical effect of a sanction on respondents would have been the deterrent effect on other persons (32 Agriculture Decisions at 125).

"The respondents contend [ed] that the issuance of any sanction would be disastrous to their non-regulated business ventures because of the damage to their reputation" (32 Agriculture Decisions at 125).

Many prior decisions issued by the Judicial Officer under the Commodity Exchange Act referred to the issuance of warning letters prior to the institution of a formal action, and the Economous were on the mailing list to receive such decisions. Hence, the Economou respondents might have been "lulled into a false sense of security, believing that the Commodity Exchange Authority would not institute a formal complaint without a written notice telling them to cease violating the minimum financial requirements" (32 Agriculture Decisions at 128-129).

Considering all of the circumstances, a reasonable person could reasonably conclude that the formal complaint in the *Economou* case should not have been issued by the Administrator without a warning letter. n4

n4. That conclusion would be particularly easy to reach by a person who, unlike the Administrator, had the advantage of hindsight (no actual loss resulted from Economou's failure to comply with the financial requirements), and who was not responsible for protecting (with a staff of about 160) the $ 388 billion (in 1974) regulated futures trading industry. There were, of course, many considerations supporting the issuance of the complaint in the *Economou* case (32 Agriculture Decisions at 126-130).

If the Court had a strong conviction that the *Economou* complaint should not have been filed without a warning letter,

and if the Court had forthrightly stated in its opinion that it was reversing the Judicial Officer's decision because it disagreed with the Administrator's policy in filing the complaint without a prior warning letter, it would have risked summary reversal by the Supreme Court. The Court would have been substituting its judgment for that of the agency as to a matter committed to agency discretion (see Davis, *Administrative Law Treatise* (1958 ed, and 1970 Supplement), § 28.20).

Assuming (solely for the purposes of a full analysis of all of the theoretical or actual grounds for the Court's decision in the *Economou* case) that the Court felt that "justice" required it to reverse the Judicial Officer's decision, even though "law" would not permit it to do so, an easy method of accomplishing the desired objective would be to assert in a short opinion that the agency's finding of wilfulness was erroneous, without defining wilfulness. Words are not always used in their ordinary signification. n5

n5. "* * * There's glory for you!"

"I don't know what you mean by 'glory'," Alice said.

Humpty Dumpty smiled contemptuously. "Of course you don't -- till I tell you. I meant 'there's a nice knockdown argument for you'."

"But 'glory' doesn't mean 'a nice knockdown argument'," Alice objected.

"When *I* use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean -- neither more nor less."

Lewis Carroll, *Alice in Wonderland and Through the Looking Glass* (Grosset & Dunlap, Inc.), p. 229.

To fail to recognize that a court sometimes substitutes its judgment for that of an administrative agency where it is "supposed not to," n6 and to fail to recognize that a court

sometimes does not verbalize in its opinion the real basis for its decision, n7 is to ignore reality, which may lead to a serious misinterpretation of a Court's decision.

> n6. And on the law, of course, a judge is supposed to see that the agency has followed the statute which set it up, followed its own regulations, its own rules which itself has prescribed, followed the Administrative Procedure Act in all of the cases relative to its own procedures, indeed followed the United States Constitution where Constitutional elements are involved, and after we have reviewed the law on all of these matters, we are supposed not to substitute our judgment for the agency's. Well, that is all very well, and very easy to say, but in some cases the conscientious judge does indeed have to substitute a judicial for an administrative judgment.
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> * * * Any realist would have to concede that a judge's views as to the extent of judicial review vary from agency to agency, from time to time, with the character of the administrative agency, the nature of the problems with which it deals, the confidence the agency has won, the degree to which the review would interfere with the agency's functions, or burden the courts, and the nature of the proceedings before the administrative agency, as well as other factors. We would like to think this wasn't so, but it is so.
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> Remarks by Hon. James L. Oakes, Circuit Judge, United States Court of Appeals for the Second Circuit (the circuit which decided the *Economou* case), before the Administrative Law Section of the American Bar Association, March 15, 1974, Washington, D.C., appearing in *Administrative Law Review,* Fall 1974, Vol. 26, No. 4, pp. 573, 575.
>
> n7. Quite essential to an understanding of judicial practices with respect to scope of review is a recognition that in final analysis the judicial behavior depends primarily upon discretion and not primarily upon formulas or precedents or analysis of law and fact or articulated theory. What counts is what the judges do in fact, not what verbalisms they recite when they deliver opinions. And even the most discerning and most conscientious judges are commonly limited in their articulation of what they do by a combined inability and unwillingness to spell out the detailed facts about the intensity of their review and about the influences upon their behavior with respect to review. A goodly portion of what happens in fact probably ought not to be articulated.
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> Davis, *Administrative Law Treatise* (1958), § 30.08, p. 233.

An additional circumstance that might lend support to the possibility that the real basis for the Court's decision in the *Economou* case was that it substituted its judgment for that of the Administrator, as to whether the complaint should have been filed without a warning letter, is the fact that the Court did not discuss serious issues which would have destroyed the expressed basis for its action (*i.e.,* lack of wilfulness) even if a warning letter were necessary before a finding of wilfulness could be made. As stated by the Assistant Attorney General in the petition to rehear filed in the *Economou* case, pp. 3-4:

In any event, willfulness is irrelevant to the violation of March 31, 1970, which is the most serious violation involved in the case. The formal complaint was filed on February 19, 1970, six weeks before this violation. It cannot be denied that the complaint was written notice to petitioners that their conduct was in violation of the Act and its implementing regulations, and afforded them an opportunity to correct the matter. Notwithstanding receipt of this formal notice, petitioners continued to

violate the minimum financial requirements, leading to the filling of an amended complaint alleging the March 31, 1970 violation. Surely, as to this violation, there can be no proper basis to set aside the Departmental finding of willfulness.

The violation referred to immediately above, which occurred six weeks after the original formal complaint was filed in this case, involved the identical issues that were involved in the original complaint. Obviously, the filing of the original complaint would satisfy the notice requirements of the Administrative Procedure Act as to a violation involving the same issues occurring six weeks later. See *Shuck* v. *Securities and Exchange Commission,* 264 F.2d 358, 360 (C.A. D.C.); *American Air Transport and Flight School, Inc.,* Enforcement Proceeding, 2 Pike & Fischer Ad.L.2d 213, 216 (C.A. B.); same case, Revocation Proceeding, 2 Pike & Fischer Ad.L.2d 733, 737.

In addition, as stated by the Assistant Attorney General in the petition to rehear filed in the *Economou* case, p. 4:

Additionally, since the APA's requirement of prior notice exists only where the sanction involves license suspension or revocation, the cease and desist portions of the Department's Order should be allowed to stand even where the Department's finding of willfulness is set aside.

A cease and desist order is appropriate even though the respondents discontinued their regulated business. *Consumer Sates Corp.* v. *Federal Trade Commission,* 198 F.2d 404, 407-408 (C.A. 2), certiorari denied, 344 U.S. 912. See, also, *Benrus Watch Company* v. *F.T.C.,* 352 F.2d 313, 322 (C.A. 8), certiorari denied, 384 U.S. 939.

The Court's failure to discuss these issues, sharply brought to its attention, could lead one to believe that the Court was determined to substitute its judgment for that of the Administrator as to whether the complaint should have been filed without a warning letter.

To attribute to the Court in the *Economou* case the motive to substitute its judgment for that of the Administrator as to whether the complaint should have been filed without a warning letter, and the objective to disguise that motive by asserting that the agency's finding of wilfulness was improper (so that the case would not be overturned by the Supreme Court) would seem less harsh than to attribute to the Court judicial illiteracy, or the purpose to avoid the necessity of spending the required time to analyze the issues and write an opinion with respect thereto.

I will not, however, attempt to speculate as to the actual basis for the Court's decision in the *Economou* case. The foregoing analysis is not to be regarded as expressing any view other than the view that the case was erroneously decided. Irrespective of what view is taken of the Court's *Economou* decision, it is quite obvious that the Court did not mean for its opinion to be followed as a precedent in any future proceeding. If it did, it certainly would have explained in greater detail the basis for its opinion. The Court undoubtedly meant for the *Economou* decision to set aside the Judicial Officer's decision in the case and then to be buried in obscurity. With the latter purpose, I heartily agree. The Court's *Economou* decision will not be followed as a precedent in any proceeding before this Department.

For the foregoing reasons, the Administrative Law Judge's decision in the present case as to the meaning of wilfulness, as used in § 9 of the Administrative Procedure Act, is contrary to the well established policy of the Department and will not be followed in any future proceeding. n8

n8 My view that it is the duty of an Administrative Law Judge to follow the agency's policies as set forth in its published decisions has been expressed in a number of cases; most recently in *In re J. Acevedo & Sons,*

34 Agriculture Decisions (1975). PACA Doc. No. 2-2717, decided January 16, 1975.

I also have serious reservations with respect to the Administrative Law Judge's decision in this case as to what satisfies the "notice" requirement of the Administrative Procedure Act. It would seem that if the complainant gives written notice to an apparent violator warning him of his apparent violation and affording him an opportunity to demonstrate or achieve compliance with all lawful requirements, such notice is sufficient to meet the requirements of the Administrative Procedure Act even if it later develops that a violation had not actually occurred. However, complainant apparently abandoned its position that notice was sent in this case. In any event, it would seem prudent for me to wait to decide that issue until it is directly presented in some future proceeding.

For the foregoing reasons, the complainant's motion to withdraw its appeal in this proceeding should be granted with the qualification that the case is not to be regarded as a precedent in any future proceeding.

The express indication in this Order that the initial decision in this case is not to be regarded as a precedent in any future proceeding should not, of course, be construed as an indication

that all initial decisions which become final by virtue of no appeal will be regarded as persuasive precedents by the Judicial Officer.

For example, in *In re John S. Morris,* 34 Agriculture Decisions (1975), CEA Doc. No. 205, in which the initial decision was filed January 9, 1975, and no appeal was taken, the following statement is made:

Moreover, there is no precedent in the cases previously decided under the Commodity Exchange Act for this type of action. The Complainant has failed to show that it has, in the past, considered the facts as alleged herein to be violative of the Act. Consideration of the entire record fails to disclose that a violation of the Act occurred or that institution of the Complaint was justified on the basis of Complainant's prior policy. Moreover, it should be noted that this is an administrative proceeding and not a rule-making proceeding.

However, as the Court stated in *Securities Comm'n* v. *Chenery Corp.,* 332 U.S. 194, 203: "There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency."

A brief reference should be made to one further matter involved in this proceeding. The complainant's request for an extension of time to file the appeal was filed one day after the time set forth in the regulations had expired. The respondent contended that the Judicial Officer lacked jurisdiction to extend the time for appeal, in those circumstances. Although the matter is now moot, the 30-day appeal time set forth in the regulations is not jurisdictional. It may be waived for good cause shown. See *Money Aircraft Parts, Inc.* v. *United States,* 479 F.2d 1350, 1351-1354 (Ct. Cl.). In this case, good cause existed for the late filing of the appeal and, therefore, the 30-day time period would have been waived.

ORDER

The complainant's motion to withdraw the appeal to the Judicial Officer in this proceeding is granted, and the initial decision filed in this case shall be the final decision herein; *Provided,* however, that this case is not to be regarded as a precedent in any future proceeding before the Department. The Order issued by the Administrative Law Judge in the initial decision filed November 21, 1974, in this proceeding shall become effective upon the service of this Order upon respondent.

LOAD-DATE: June 16, 2008