Commodity Futures Trading Commission
CEA CASES

NAME: G. H. MILLER AND COMPANY, GILBERT H. MILLER, HOWARD RANDOLPH, REFRIGERATED PRODUCTS, INC., J.W. HARDING, CENTRAL IOWA POULTRY AND EGG COMPANY, JOHN H. SNOWGREN, ALLEN HEADLEE, E.E. HUMMEL, K. HUMMEL, ALBERT SCHIRM, LEO HAGEN, A.L. MYRICK, LEWIS R. VAN SANT, AND ROY ROUNTREE

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 11959 September Term 1958 - September Session 1958

G. H. Miller and Company, et al., Petitioners, v. United States of America and Ezra Taft Benson, Secretary of Agriculture of the United States, Respondents.

On Rehearing By The Court En Banc

September 23, 1958

Before Duffy, Chief Judge, Finnegan, Schnackenberg, Hastings and Parkinson, Circuit Judges, on rehearing by the court en banc.

Parkinson, Circuit Judge. These proceedings originated in this court on a petition to set aside an order of the Secretary of Agriculture revoking the registration of G. H. Miller and Company as a futures commission merchant and Gilbert H. Miller as a floor broker and denying all trading privileges to the other petitioners for periods ranging from sixty days to one year and to cancel all sanctions imposed. There were fifteen petitioners in all.

A panel consisting of Judge Major, a former chief judge now retired but voluntarily rendering meritorious service as a member of this court, and Judge Schnackenberg, an able circuit judge in active service, and the writer of this opinion heard the case and handed down a written opinion denying the petition.

Two of the fifteen petitioners, G. H. Miller and Company and Gilbert H. Miller, filed a petition for rehearing wherein they asserted that Miller was in fact a damaging participant to the alleged manipulative scheme but if not at the most "[a]n objective analysis we submit will place Miller in the category of the lowest participant" and implored this court to reduce the penalties because they were "excessive" submitting an order as to them for entry as follows:

"The registration of G. H. Miller and Company as a futures commission merchant and the registration of Gilbert H. Miller as a floor broker is suspended for a period of six months from the effective date of this order.

With the effective date of this order G. H. Miller and Company and Gilbert H. Miller, directly or indirectly, shall be prohibited from trading speculatively on any contract market for a period of one year. During that period futures contracts may be executed providing they are clearly bona fide hedges against the cash commodity actually possessed by G. H. Miller and Company or Gilbert H. Miller and all contract markets shall refuse to said G. H. Miller and Company and Gilbert H. Miller the right to so trade speculatively on their exchanges for a period of one year."

On Millers' petition for rehearing Judge Schnackenberg, being of the opinion that the "penalties imposed by the Secretary are too harsh", and Judge Major, believing "that the penalties imposed in this matter are too severe", the court ordered the penalty as to Millers reduced. The writer of this opinion dissented. The order was practically verbatim with the submitted form of order herein-above set out. It reads as follows:

"The registration of G. H. Miller and Company as a futures commission merchant is suspended for six months and the registration of Gilbert H. Miller as a floor broker is suspended for a period of six months, and both of said petitioners are prohibited, directly or indirectly, from trading speculatively on any contract market for a period of one year, and during said one year period futures contracts may be executed

providing they are clearly bona fide hedges against the cash commodity actually possessed by G. H. Miller and Company or Gilbert H. Miller, and all contract markets shall refuse to said G. H. Miller and Company and Gilbert H. Miller the right to so trade speculatively on their exchanges for a period of one year."

In order to resolve the question as to the proper function of the Court of Appeals in proceedings to set aside an order of an administrative agency fixing a penalty within the statutory limits we granted a rehearing before the full court en banc.

Section 6(b) of the Commodity Exchange Act, Title 7 U.S.C.A. § 9 provides that the Secretary of Agriculture may suspend, for a period not to exceed six months, or revoke, the registration of a futures commission merchant or a floor broker registered under the Act who violates any provision thereof. Accordingly the penalties fixed in the order did not exceed and were within the limits of the statute.

In Great Western Food Distributors v. Brannan, 7 Cir., 1953, 201 F. 2d 476, 484, involving an order fixing penalties under the Commodity Exchange Act, we held that "we have nothing to do with the question of severity of the penalty."

In National Lead Company v. Federal Trade Commission, 7 Cir., 1955, 227 F. 2d 825, we ordered stricken from a general cease and desist order of the Commission a provision directing each respondent individually to cease and desist from adopting the same or a similar system of pricing for the purpose of "matching" the prices of competitors. The Supreme Court reversed, 352 U.S. 419, and restored the stricken provision.

In Federal Trade Commission v. C. E. Niehoff & Co., (Moog Industries, Inc. v. Federal Trade Commission), 1958, 355 U.S. 411, the Supreme Court reversed this court which had changed a forthwith cease and desist order so that it took effect at a future time. It held that "it is ordinarily not for courts to modify ancillary features of a valid Commission order."

In Arrow Metal Products Corporation v. Federal Trade Commission, 3 Cir., 1957, 249 F. 2d 83, 85, the Third Circuit, under similar circumstances as here, correctly defines the function of the Court of Appeals in the following language:

"The petitioners complain that the cease and desist order is too drastic and that some other manner of preventing deception, if any, should be adopted. But the matter of shaping a remedy is for the Commission. Our function is simply, in the words of the Supreme Court, to find whether the Commission has made 'an allowable judgment in its choice of the remedy.' Jacob Siegel Co. v. Federal Trade Commission, 1946, 327 U.S. 608, 612, 66 S. Ct. 758, 760, 90 L. Ed. 888."

It is, therefore, clear to us that if the order of an administrative agency finding a violation of a statutory provision is valid and the penalty fixed for the violation is within the limits of the statute the agency has made an allowable judgment in its choice of the remedy and ordinarily the Court of

Appeals has no right to change the penalty because the agency might have imposed a different penalty.

The petitioners Miller insist that the penalty here is more severe than any penalty imposed upon any other violator of the Act and cite cases where a lesser penalty was affixed. We are not impressed by such a specious argument.

The very most which can be said for the position of the petitioners Miller is that the penalty must have some "reasonable relation to the unlawful practices found to exist". Federal Trade Commission v. National Lead Co., 1957, 352 U.S. 419, 429. This court, in Daniels v. United States, 7 Cir., 1957, 242 F. 2d 39, 42, held that "[t]he Administrative decision as to the remedy should be sustained unless the remedy selected has no reasonable relation to the practice found to exist."

The Judicial Officer concluded from his findings of fact, adequately supported by a preponderance of the evidence, that "[t]he violations of sections 6(b) and 9 of the act found herein are of serious and far-reaching consequences." He also concluded that Miller "was obviously the captain of the 'team' that effectuated what he described

to Morris Weinger as the 'deal' in which he was sorry to find Weinger caught."

In the application of the rule that Courts of Appeal must sustain the remedy selected by an administrative agency unless it has no reasonable relation to the practice found to exist we find in this record no lack of reasonableness in the penalty imposed upon Millers. To the contrary the record establishes a direct relation between the penalty and the violation. To paraphrase the language of the Supreme Court in Chicago Board of Trade v. Olsen, 1923, 262 U.S. 1, 39, manipulations of egg futures for speculative profit, though not carried to the extent of a corner or complete monopoly, exert a vicious influence and produce abnormal and disturbing temporary fluctuations of prices that are not responsive to actual supply and demand and discourage not only justifiable hedging but disturb the normal flow of actual consignments. Here the petitioners, with Miller as the prime factor, did corner the egg market on the Chicago Mercantile Exchange in December, 1952. The penalties affixed were certainly commensurate with the violation and in their imposition the Secretary of Agriculture did not abuse his discretion.

The order herein entered on February 26, 1958 is vacated and set aside.

The petition to set aside the order of the respondent Secretary of Agriculture issued through the Judicial Officer on September 26, 1956 is denied.

Finnegan, Circuit Judge, concurring. This matter first came to our Court on a petition to review a decision and order, dated September 25, 1956, of the Judicial Officer n1 of the United States Department of Agriculture. At the administrative level this was a disciplinary proceeding under the Commodity Exchange Act. n2 All of the respondents

joined in a 62-page petition for reconsideration and reargument submitted to the Judicial Officer, after his Decision and Order was issued for the Department of Agriculture, expressly seeking inter alia reconsideration of "the extent of penalties assessed." Counsel for the Commodity Exchange Authority filed an answer to that petition before the Secretary of Agriculture.

n1 The Judicial Officer acted for the Secretary of Agriculture pursuant to authority delegated to him. 10 F. R. 13769; 11 F. R. 177A-233; 18 F. R. 3219; 18 F. R. 3648; 19 F. R. 74.

n2 Act of September 21, 1922, c. 369, 42 Stat. 998, as amended by the Act of June 15, 1936, c. 545, 49 Stat. 1491, as amended, 7 U. S. C. § 1, et

seq. (1952 ed.) The phrase "to affirm, to set aside, or modify . . ." has been in the Act since 1922.

Point V of the brief filed on the merits for the United States and the Secretary of Agriculture, in our Court on October 31, 1957, was: "The Administrative Sanction should be Sustained;" and the point was briefed and authorities in support discussed. Petitioners' original brief filed August 2, 1957 in our Court is silent on the "sanctions." Apparently it was not until three judges of our Court denied the petition for review that G. H. Miller and Company and Gilbert H. Miller decided there was little else left to do but attack the administrative remedy invoked against them.

Section 6(b) of the Commodity Exchange Act n3 provides:

"If the Secretary of Agriculture has reason to believe that any person (other than a contract market) is violating or has violated any of the provisions of this chapter, or any of the rules and regulations made pursuant to its requirements, or has manipulated or is attempting to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any board of trade, he may serve upon such person a complaint stating his charges in that respect, to which complaint shall be attached or contained therein a notice of hearing, specifying a day and place not less than three days after the service thereof, requiring such person to show cause why an order should not be made directing that all contract markets until further notice of the Secretary of Agriculture refuse all trading privileges to such person, and to show cause why the registration of such person, if registered as futures commission merchant or as floor broker hereunder, should not be suspended or revoked. Said hearing

may be held in Washington, District of Columbia, or elsewhere, before the Secretary of Agriculture, or before a referee designated by the Secretary of Agriculture, which referee shall cause all evidence to be reduced to writing and forthwith transmit the same to the Secretary of Agriculture. Upon evidence received, the Secretary of Agriculture may require all contract markets to refuse such person all trading privileges thereon for such period as may be specified in the order, and, if such person is registered as futures commission merchant or as floor broker hereunder, may suspend, for a period not to exceed six months, or revoke, the registration of such person. Notice of such order shall be sent forthwith by registered mail or delivered to the offending person and to the governing boards of said contract markets.

"After the issuance of the order by the Secretary of Agriculture, as aforesaid, the person against whom it is issued may obtain a review of such order or such other equitable relief as to the court may seem just by filing in the United States court of appeals of the circuit in which the petitioner is doing business a written petition praying that the order of the Secretary of Agriculture be set aside. A copy of such petition shall be forthwith served upon the Secretary of Agriculture by delivering such copy to him, and thereupon the Secretary of Agriculture shall forthwith certify and file in the court a transcript of the record theretofore made, including evidence received. Upon the filing of the transcript the court shall have jurisdiction to affirm, to set aside, or modify the order of the Secretary of Agriculture, and the findings of the Secretary of Agriculture as to the facts, if supported by the weight of evidence, shall in like manner be conclusive."

n3 7 U. S. C. § 9 (1952 ed.)

That the remedies used at the administrative level in this case are within the statutory range of § 6(b) was and still is uncontested. When G. H. Miller and Company and Gilbert H. Miller filed their consolidated petition for "Rehearing and Modification," on January 22, 1958, they asked for a modification of the "excessive penalties assessed against" the petitioners. That petition was the aftermath of the unanimous opinion reported as G. H.

Miller and Company v. United States of America, et al., . . . F. 2d . . . (7th Cir. 1958). An opinion on rehearing was filed February 26, 1958, later implemented, by an order, showing that Judges Major and Schnackenberg agreed the "penalties" imposed were "too severe" and "too harsh." Judge Parkinson who wrote the initial opinion, dissented to the opinion of February 26, 1958. Judges Major and Schnackenberg voted to deny the Millers' petition for rehearing on all other points presented; Judge Parkinson unqualifiedly voted to deny that petition for rehearing.

Understandably, the government petitioned for rehearing before the full Court sitting en banc and the current array of opinions flows from this last hearing.

The significance of this historical background lies in the fact that the initial unanimous opinion, handed down January 8, 1958, was by three Judges who flatly refused to set aside the order of the Secretary of Agriculture and it is that order which underlies the administrative "penalties", so-called, subsequently modified by two members of the original division of this Court, who first heard the petition for review of the Secretary's order.

I.

Consequently, the question now before us, as I view it, is just how much we can tinker with the Secretary's legal suspension and revocation of trading privileges -- concededly within the statutory range -- based upon the judicially approved administrative order issued by the Secretary. Indeed, § 6(b) states, inter alia: ". . . the findings of the Secretary of Agriculture as to the facts, if supported by the weight of evidence shall in like manner be conclusive." The three judges of our Court recognized this provision in their first opinion, and refused to disturb that phase of the case on rehearing number one.

Civil remedies and criminal punishments are both prescribed by the Commodity Exchange Act. See 7 U. S. C. § 13 and it must be borne in mind that we are not here concerned with a criminal case. Regardless of dramatic catch phrases, i. e., "economic death," we are confronted only with statutory devices committed by the Congress to

the Secretary's discretion, for the purpose of policing the market place. To be sure, revocation is a drastic step yet it must be assayed in the environment of the Commodity Exchange Act and the fact these petitioners were exercising a privilege. Another proceeding, Nelson v. Secretary of Agriculture, 133 F.2d 453, 456 (7th Cir. 1943) under the Commodity Exchange Act gave rise to proceedings to set aside an order of the Secretary of Agriculture and Judge Lindley, writing for the division of Judges, said:

"In permitting petitioner to buy and sell grain for future delivery on contract markets, the Government has in effect granted him a privilege. Suspension of such a privilege for failure to comply with the statutory standard is merely withdrawal by the Government of permission to engage in a business affected with the National public interest in which the person has no inherent right to engage, but in which he may participate only upon compliance with conditions imposed by Congress in the exercise of its power over commerce. Inasmuch as Congress has the power to fix conditions upon which petitioner may engage in trading on the market . . . it may, through an administrative agency, withdraw the privilege for violation of these conditions . . ."

A similar position was taken by the First Circuit in Nichols & Co. v. Secretary of Agriculture, 131 F. 2d 651, 659 (1st Cir. 1942): "We believe that suspension of a registrant is not primarily punishment for a past offense but it is necessary power granted to the Secretary of Agriculture to assure a proper adherence to the provisions of the Act."

Chief Judge Duffy has followed the same line of thinking when reviewing a suspension order of a Judicial Officer of the United States Department of Agriculture, issued under the Packers and Stockyards Act, 7 U. S. C. § 181, et seq., in Cella v. United States, 208 F. 2d 783, 789 (7th Cir. 1953).

Cella was cited and quoted in the brief filed for the government in Daniels v. United States, 242 F. 2d 39 (7th Cir. 1957) and used in that opinion by Chief Judge Duffy. Under "contested issues" in the Daniels' brief is this one:

"3. The final issue is whether or not the suspension order should be set aside at this time on the grounds that, even under the present record, it is excessively harsh and oppressive." It was to this point then, that Chief Judge Duffy stated: "The Administrative decision as to the remedy should be sustained unless the remedy selected has no reasonable relation to the practice found to exist . . . In view of respondent's previous violations, the order, including the sanctions, should be approved." (242 F. 2d 39, 42).

"Equitable relief" mentioned in § 6(b), is not, in my opinion, Congressional authority for substituting our subjective attitudes concerning the quantum of sanction or duration of suspension of trading privileges for that of the Secretary. A common sense approach, I should think, shows this to be nothing more than a recognition of the common garden variety of temporary injunction. Congress, in my view, simply recognized the usual questions arising in connection with enjoining orders of administrative agencies and made it clear that equitable relief could be invoked against the government. See e. g., Davis, Administrative Law § 213 and § 217, Statutory Limitations on Enjoining Administrative Action. I do not believe "equitable relief" means we are to decide the extent of sanction for that power is expressly conferred on the Secretary (not the Courts) by § 6(b), and as I view it his power is so potent -- and necessarily so to achieve the aims of this legislation -- that injunctive relief is expressly authorized in order that the basis in fact for administrative action can be probed expeditiously, in appropriate cases, rather than await the run of a calendar of cases for review.

"Modify" is the target word lurking in § 6(b). What has been done in this case was to treat "modify" as a third exclusive remedy on a petition for review of the Secretary's order, i. e., approve his order and modify his order of suspension or revocation of registration. At best, I think the general principles of administrative law would permit modification, by a Court of Appeals, only to the extent of unlawfulness of the Secretary's ruling or order. But so long as the Secretary makes findings of fact and they are based on evidence conforming to the statutory standards and he acts intra vires the relevant acts of Congress we cannot, in my opinion, modify sanctions because we personally think them "too harsh" or "too severe."

To do otherwise ignores the expertise of the Secretary in the complexities of trading in futures. We can abdicate our judicial function by usurpation just as well as by abandonment to administrative agencies. Obviously all this goes further. Without the word "modify" in § 6(b), Courts of Appeal would have only two alternatives regarding the Secretary's final orders -- affirm or set aside. But by using "modify" Congress allows some play in the joints, enabling a reviewing court to send back an order for further administrative action based upon some modification. Even a cursory reading of the first portion of § 6(b) reveals the numerous grounds of administrative action, any one of which could be the basis of a lengthy record and detailed order. Rather than have an order set aside and the proceedings annulled, the word "modify" allows for adjustment between Court, parties and Secretary on some aspects of the order. There is nothing in § 6(b) indicating that the scope of judicial review has been enlarged to the point where periods of suspension, for example, can be either increased or decreased, or that revocations can be judicially converted into suspensions.

Much lays in the balance here if we merely glance at the word "modify" and let quick reaction turn us away from the broader question demanding our judicial attention. As part of his dissent to the majority in United States v. Monia, 317 U. S. 424, 431-432 (1943), Mr. Justice Frankfurter, caught the theme implicit in statutory interpretation problems:

"The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification. It is a wooden English doctrine of rather recent vintage . . . [citing], to which lip service has on occasion been given here, but which since the days of Marshall this Court has rejected, especially in practice . . . [citing] A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true where the statute, like the one before us, is part of a legislative process having a history and a purpose. The meaning of such a statute cannot be gained by confining inquiry within its four corners. . . ."

Though I have quoted from a dissent the concept and grasp of the problem is diminished not one whit because the author was not with the majority. Yet, if it be insisted only majority opinions deserve mention, then what Mr. Justice Reed wrote for the majority of a divided court in U. S. v. American Trucking Association, 310 U.S. 534, 542-544 (1940) will serve the purpose:

"In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in a law drawn to meet many needs of a major occupation.

"There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination'. The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function. This duty requires one body of public servants, the judges, to construe the meaning of what another body, the legislators, has said. Obviously there is danger that the courts' conclusion as to legislative purpose will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body. A lively appreciation

of the danger is the best assurance of escape from its threat but hardly justifies an acceptance of a literal interpretation dogma which withholds from the courts available information for reaching a correct conclusion. Emphasis should be laid, too, upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts. A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, 'excepting as a different purpose is plainly shown.'"

While it may be urged we are not barred legislatively on the bare word "modify" I think the temporary urgency characterized by these petitioners as an "economic death sentence," fails in overriding broader principles controlling

court-administrator relations. Virtually all final orders of federal administrative agencies have economic impact on the parties against whom they are directed; obviously such deprivations are the teeth in the statutes. Mr. Justice Douglas, delivering the Court's opinion in F. P. C. v. Idaho Power Co., 344 U. S. 17, 21 (1952) wrote: "The Court, it is true, has power 'to affirm, modify, or set aside' the order of the Commission 'in whole or in part,' . . . But that authority is not power to exercise an essentially administrative function. See Ford Motor Co. v. Labor Board, 305 U. S. 364, 373-374; Siegel Co. v. Federal Trade Commission, 327 U. S. 608."

Chief Judge Swan, speaking for a division of the Second Circuit, observed in Consumers Sales Corp. v. Federal Trade Commission, 198 F. 2d 404, 408 (2nd Cir. 1952); "Our power to modify an order such as this, once an illegal trade practice has been found, is severely circumscribed [citing cases in a marginal note] but even if it were not we could find nothing improper about the Commission's efforts to prevent this scheme from reappearing in a slightly altered garb."

"It is a fundamental principle . . . that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.'" American Power Co. v. S. E. C., 329 U. S. 90, 112 (1946). One need only read

§ 5 of the Commodity Exchange Act, embodying the Congressional declaration of "the dangerous tendency of dealings in commodity futures," to commence understanding the reason why it supplied the Secretary with such drastic remedies:

"Transactions in commodity involving the sale thereof for future delivery as commonly conducted on boards of trade and known as 'futures' are affected with a national public interest; such transactions are carried on in large volume by the public generally and by persons engaged in the business of buying and selling commodity and products and byproducts thereof in interstate commerce; the prices involved in such transactions are generally quoted and disseminated throughout the United States and in foreign countries as a basis for determining the prices to the producer and the consumer of commodity and the products and byproducts thereof and to facilitate the movements thereof in interstate commerce; such transactions are utilized by shippers, dealers, millers, and others engaged in handling commodity and the products and byproducts thereof in interstate commerce as a means of hedging themselves against possible loss through fluctuations in price; the transactions and prices of commodity on such boards of trade are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation, or control, which are detrimental to the producer or the consumer and the persons handling commodity and products and byproducts thereof in interstate commerce, and such fluctuations in prices are an obstruction to and a burden upon interstate commerce in commodity and the products and byproducts thereof and render regulation imperative for the protection of such commerce and the national public interest therein."

Since the Secretary's order does not contravene any constitutional limitation, is within the constitutional and statutory authority of the Secretary, and is supported by the requisite quantum and quality of evidence, I fail to see how we can set the order aside in part pertaining to the legal sanction or remedy given him to exclude persons

from the trading privileges. These remedies are matters left specifically by Congress to the discretion of the Secretary; we fully perform our function on review by a determination that there has been a fair hearing, correct

application of the relevant statutory provisions, and nothing contravening constitutional rights.

II.

In C. E. Niehoff & Co. v. Federal Trade Commission, 241 F. 2d 37 (7th Cir. 1957) the Commission's opinion contains this factor: "Stating that an order requiring the respondent to terminate its unlawful discriminations will destroy the Niehoff business when its competitors are not likewise enjoined, appellant [Niehoff] requests that this proceeding be held in abeyance until the Commission can place all industry members under identical restrictions. The pricing practices used by the respondent, however, have been found to be in violation of law. Since their continuance by the respondent is likewise unlawful the Commission's duty under the applicable statute is to require their termination forthwith . . ." 51 F. T. C. 1114 (See also Transcript of Record filed on certiorari, at page 1026).

On review of that Niehoff order and opinion I dissented (241 F. 2d 37, 43) because my two colleagues stated "the order against Niehoff is hereby modified by striking the word 'forthwith' therefrom and by adding to said order the following: 'This cease and desist order shall take effect at such time in the future as the United States Court of Appeals for the Seventh Circuit may direct, sua sponte or upon motion of the Federal Trade Commission.' As thus modified, the order is affirmed." Judge Major and Judge Schnackenberg invoked § 11 of the Clayton Act, 15 U. S. C. § 21 as their authority for such modification, and, of course, the word "modify" appears in that section of the Clayton Act.

When the Solicitor General, on behalf of the Federal Trade Commission, sought issuance of a writ of certiorari to review our judgment in Niehoff, the question presented in the petition was stated as: ". . . [W]hether the power of judicial review conferred by Section 11 of the Clayton Act authorizes the reviewing court to postpone the operative

date of a Commission order adjudicated to be valid, for the declared purpose of rendering the order a nullity until like orders have been entered against respondent's 'competitors.'" (Petition for certiorari, p. 2). The brief in opposition to the government's petition responded to that issue and the question was thus crystallized for review by the Supreme Court. When certiorari was granted, both sides briefed that particular issue.

On review by the Supreme Court, Niehoff was taken together with Moog Industries, Inc. v. Federal Trade Commission, 355 U. S. 411, 414 (1958) where, in a per curiam, the Court ordered that the Niehoff judgment be ". . . vacated and the cause remanded to the Court of Appeals [Seventh Circuit] with directions to affirm the order of the Commission in its entirety." Reaching that result the salient portion of the per curiam opinion was as follows:

"In view of the scope of administrative discretion that Congress has given the Federal Trade Commission, it is ordinarily not for courts to modify ancillary features of a valid Commission order. This is but recognition of the fact that in the shaping of its remedies within the framework of regulatory legislation, an agency is called upon to exercise its specialized, experienced judgment. Thus, the decision as to whether or not an order against one firm to cease and desist from engaging in illegal price discrimination should go into effect before others are similarly prohibited depends on a variety of factors peculiarly within the expert understanding of the Commission. Only the Commission, for example, is competent to make an initial determination as to whether and to what extent there is a relevant 'industry' within which the particular respondent competes and whether or not the nature of that competition is such as to indicate identical treatment of the entire industry by an enforcement agency. Moreover, although an allegedly illegal practice may appear to be operative throughout an industry, whether such appearances reflect fact and whether all firms in the industry should be dealt with in a single proceeding or should receive individualized treatment are questions that call

for discretionary determination by the administrative agency. It is clearly within the special competence of the

Commission to appraise the adverse effect on competition that might result from postponing a particular order prohibiting continued violations of the law. Furthermore, the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically.

"The question, then, of whether orders such as those before us should be held in abeyance until the respondents' competitors are proceeded against is for the Commission to decide. If the question has not been raised before the Commission, as was the situation in No. 77, a reviewing court should not in any event entertain it. If the Commission has decided the question, its discretionary determination should not be overturned in the absence of a patent abuse of discretion."

Certainly that opinion shrivelled the word "modify" in the section of the Clayton Act concerning our reviewing powers and the result understandable when read with an acute awareness of our relationship to the Commission. No doubt the luster of "modify" in pre-Niehoff days would be blinding unless read in the broad context of the administrative law problem.

The word "modify" employed in § 6(b) should not be construed to reach the statutory remedies given the Secretary unless those remedies, (called "penalties" when viewed from an offender's position) are shown to be wholly without evidentiary support or ultra vires the enabling act of the Congress. Of course, if the order suspending a futures commission merchant or floor broker were unsupported by the "weight of evidence" we would be bound to set it aside. But "modifying" the remedy utilized by the Secretary when his order meets the statutory test, is unsound.

We should, I think, withhold substitution of our judgment of the extent of the Secretary's remedy when he acts within the scope of his statutory standards and administrative discretion. Congress entrusted the Secretary with these remedies to cope with market problems arising

within his jurisdiction. Clearly the question of remedy, whether suspension or revocation, is peculiar to this case and these facts and consequently we ought not to interfere with particularized application of § 6(b) when there is absent any constitutional impingements and the Secretary's compliance with relevant statutes is unchallenged.

Our personal powers of discrimination might well discredit the degree of remedy invoked by the Secretary because it does not square with our individual judgments. But this can arise from circular thinking enclosing the record and our personal predilections rather than combining all of that with the Secretary's experience, knowledge and goal. After all this is a review, not a petition for enforcement of an administrative order. Here I do not wish to be misunderstood. I speak from a point of view confronting what I believe to be the judicial function in this situation which is not too well delineated by case precedent. On the record now before us the question is not whether the remedy is too harsh. Congress invested the Secretary with primary authority for selecting among statutory remedies the ones useful to achieve the purposes for which such power was granted. Whether facts found by the Secretary amount to a violation is a question of law for this Court. The initial judicial review answered that question favorably for the administrator, going further when no other error of law has been urged invades the province of discretion granted the Secretary. To countenance judicial adjustment of sanctions imposed by the Secretary in this case makes a stalking horse out of the statutory word "modify."

Schnackenberg, Circuit Judge, dissenting.

By this court's order the rehearing en banc was limited to this question: Does the Court of Appeals have the power and jurisdiction to change a penalty fixed by respondent Secretary of Agriculture, which penalty is within the statutory limits? In effect, Judge Parkinson's opinion answers this question in the negative. Inasmuch as I find myself in dissent, I deem it essential to state my reasons. The prior proceedings herein are partly set forth

in Judge Parkinson's opinion, supra. His statement in that regard needs the following supplementation and clarification.

1. After retired Circuit Judge Major and I modified the original panel opinion written by Judge Parkinson, over his objection that this court "has no power or right to reduce a penalty imposed by this respondent which is within the statute", the order for the en banc hearing eliminated Judge Major from further consideration of the case (to which he had been regularly assigned). Thereby, not only his vote, but the benefit of his mature judgment in conference with the other members of the court, were lost. The only reason given for excluding Judge Major at that point was reliance upon 28 U.S.C.A. § 46 (c), which reads:

"(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit."

This reasoning, however, overlooks other relevant sections of the statute. They are 28 U.S.C.A. § 294(b) and § 296, which in their present form were enacted on June 25, 1948, 62 Stat. 901, which is the same day § 46 was enacted in its present form.

Sec. 294 (b) provides:

"Any retired circuit * * * judge may be designated and assigned to perform such judicial duties in any circuit as he is willing to undertake. Designation and assignment of such judge for service within his circuit shall be made by the chief judge * * *."

Sec. 296 provides:

"A * * * judge shall discharge, during the period of his designation and assignment, all judicial duties for which he is designated and assigned. He may be required to perform any duty which might be required of a judge of the court * * * to which he is designated and assigned.

"Such * * * judge shall have all the powers of a judge of the court, * * * to which he is designated

and assigned, except the power to appoint any person to a statutory position or to designate permanently a depository of funds or a newspaper for publication of legal notices.

"A * * * judge who has sat by designation and assignment in another district or circuit may, notwithstanding his absence from such district or circuit or the expiration of the period of his designation and assignment, decide or join in the decision and final disposition of all matters submitted to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters." (Emphasis supplied).

Judge Major, being willing to undertake the judicial duties to which he was assigned, sat on the three-judge panel which decided the case at bar and he concurred in the opinion of the court and the panel's modification of the order

entered by the respondents. The designation and assignment to hear this case had not expired when a rehearing en banc was ordered and will not expire until this case is finally disposed of in this court, because § 296 makes it clear that he may be required to perform any duty which might be required of a judge of this court, and certainly that would include participating in the final action on a petition for rehearing in this case. That function is included in the language of the second paragraph of § 296, which is to the effect that such a designated and assigned judge "shall have all the powers of a judge of the court to which he is designated and assigned", with certain irrelevant exceptions. Moreover, the third paragraph of § 296 is clear that, even if he were designated to sit in another circuit, neither his absence from said circuit or the expiration of the period of his designation and assignment would deprive him of the power to "decide or join in the decision and final disposition of all matters submitted to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters." (Emphasis supplied.) A fortiori, Judge Major, having been designated and assigned to sit in his own circuit, the Seventh, does not have less power than if he had been designated and assigned to sit in another circuit.

We are not justified in attributing to congress an intention, by § 46, to prevent a judge, who actively sits on the panel which decides an appeal, from participating in an en banc hearing on a petition for rehearing, the object of which is to overturn a major part of the panel's decision. A reading of both § 294 (b) and § 296, in conjunction with § 46, dispels any such legislative intention. The only reasonable construction which can be given to the entire pertinent legislative language, in its application to this case, is that the designation and assignment of Judge Major to this case bestowed upon him the duty of acting as a judge therein and in the consideration and disposition of such applications for rehearing as have been or will be filed therein. It would be incredible that congress intended that an experienced and capable retired judge, who voluntarily accepts an assignment to hear a case in his own circuit and in the decision of which he has joined, should be excluded from the consideration of a petition for rehearing thereof, whether or not it is to be heard by the original panel of which he is a member or the court sitting en banc. Such a result would be incongruous and contrary to common sense. Even if it could be urged that this construction involves a "sacrifice of literalness for common sense," I call attention to the apt language of Justice Douglas in Textile Mills Corp. v. Comm'r., 314 U.S. 326, 334, where he said:

"* * * any sacrifice of literalness for common sense does no violence * * *. Certainly, the result reached makes for more effective judicial administration. Conflicts within a circuit will be avoided. Finality of decision in the circuit courts of appeal will be promoted. Those considerations are especially important in view of the fact that in our federal judicial system these courts are the courts of last resort in the run of ordinary cases. Such considerations are, of course, not for us to weigh in case Congress has devised a system where the judges of a court are prohibited from sitting en banc. But where, as here, the case on the statute is not foreclosed, they aid in tipping the scales in favor of the more practicable interpretation."

To me, the legislative intent in enacting § 46 was to prevent the overturning of a panel decision by the loading of the court on an en banc hearing by bringing in a

number of retired judges who had not been members of the original panel. That intent is based upon an obviously sound purpose, but the section should not be extended beyond that objective.

The views herein expressed find support in U.S. v. Watkins, 164 F.2d 457 (2 Cir.). There Justice Holtzoff of the District of Columbia was designated to sit in the District Court for the Southern District of New York. His first ruling

was to amend the warrant of deportation there involved. He thereafter granted respondent's motion for reargument, and, after further hearing, changed his holding to agree with respondent and dismissed the writ of habeas corpus. It was held, at 460, that, although his designation had already expired when he granted reargument, he was the proper judge to hear same. The court in a footnote cited Frad v. Kelly, 302 U.S. 312, 316, where the Supreme Court said:

"When an assigned judge has presided at the trial of a cause, he is to have power, though the period of his service has expired, and though he may have returned to his own district, to perform the functions which are incidental and supplementary to the duties performed by him while present and acting in the designated district. And where a cause has been submitted to him in the designated district, after his return to his own district he may enter decrees or orders and file opinions necessary to dispose of the case, notwithstanding the termination of his period of service in the foreign district. * * *" (Emphasis supplied).

I believe that Judge Major is entitled to participate in this case until its final disposition in this court.

2. Judge Parkinson's opinion reveals no disagreement among members of the court as to the harshness of the penalty imposed by the administrative agency, -- but disagreement only as to the court's power to restrain the agency when it seeks to inflict an unreasonable and harsh penalty. Here Judge Major and I have relied upon the heretofore undisputed power of courts to protect citizens from such a penalty. This court has exercised its jurisdiction to review the sanctions imposed by the Secretary of Agriculture, under the Packers and Stockyards Act, in Daniels v. United States of America, and Ezra Taft Benson, Secretary of Agriculture, 242 F.2d 39. Chief Judge Duffy, who wrote the court's opinion in that case, did not in any way indicate that this court had no power to pass upon a contention that the sanctions imposed by the Secretary of Agriculture were excessive. Instead he proceeded, at 42, to review the facts in the record bearing upon that contention and came to the conclusion that the record supported the sanctions imposed.

Traditionally, courts who find their historical roots in Anglo-Saxon jurisprudence have always been alert to strike down harsh or excessive penalties.

Legislatively, congress has expressly bestowed upon this court power to "modify" orders of the administrative agency here involved. 7 U.S.C.A. § 9 provides:

"After the issuance of the order by the Secretary of Agriculture, as aforesaid, the person against whom it is issued may obtain a review of such order or such other equitable relief as to the court may seem just by filing in the United States court of appeals of the circuit in which the petitioner is doing business a written petition praying that the order of the Secretary of Agriculture be set aside. * * * the court shall have jurisdiction to affirm, to set aside, or modify the order of the Secretary of Agriculture, * * *." (Italics supplied.)

Both Judge Parkinson and the respondents have mistakenly relied upon Federal Trade Commission v. C. E. Niehoff & Co., 355 U.S. 411, which held, in a Federal Trade Commission case, that we were correct in our holding, 241 F.2d 37, at 42, where we said:

"The commission takes the position that it has no power to stay compliance with its order. It relies upon a part of section 11 of the amended Clayton Act, contending that it has no discretion as to the enforcement of the law. It fails to cite that part of section 11 which provides that the commission 'shall issue * * * an order requiring such person to cease and desist from such violations * * * within the time fixed by said order.' It is our opinion that this statutory

language vests in the commission power to postpone the time at which an order is to take effect." (Italics supplied for emphasis.)

It is true that, in order to induce the Federal Trade Commission to seek a review in the United States Supreme Court in the Niehoff case, we modified the Commission's order sua sponte, in view of the Commission's assertion that it had no power to stay compliance with its order. The Commission thereupon took the case to the Supreme Court which inter alia sustained our holding that the Commission did have such power. It is apparent, therefore, that the Supreme Court agreed with us that the Commission had power to postpone the date for compliance with its order and that the Commission was mistaken in its stated position that it did not have that power. That was the principal question involved in the Niehoff case, as we had held that we would affirm the Commission's order on the merits.

Judge Parkinson's opinion in the en banc proceeding avoids the language of 7 U.S.C.A. § 9, supra, as to our power to grant "such other equitable relief as to the court may seem just" and our power to "modify the order of the Secretary of Agriculture", by simply not mentioning it. Why this crucial language in the statute is swept under the rug is not explained. Judge Parkinson does not in any way explain why the panel's changing of the order of the Secretary of Agriculture, by reducing the penalties imposed on G. H. Miller and Company and Gilbert H. Miller, did not amount to a modification of the order, as is expressly authorized by the Act. He has ignored the Act in that critical aspect. It would be interesting if Judge Parkinson or counsel for the Secretary of Agriculture had stated what the words "modify the order" mean. Do the words bestow upon this court the mere power to "cross the t's and dot the i's" in an agency's order? Judge Parkinson instead emphasizes the statutory grant of power to the agency to "revoke" a license. n1 Our cleavage is over the question of our power -- not the power of the agency. Here we have express authority to affirm, set aside or modify the administrative order, and to grant equitable relief as to us may seem just. Those are the words of congress. While congress has adopted a policy which recognizes the usefulness of a system of administrative

agencies, it has seen the need for judicial control of such agencies, which usually exercise the multiple functions of instigating proceedings, gathering evidence, as well as prosecuting and acting as judges of those proceedings. Moreover, most Americans realize the need for judicial control because they see in the history of commissions and other administrative agencies no proof that they are infallible. The majority opinion would sustain in all cases the most severe penalty which the agency may be authorized by congress to impose in the most aggravated case, taking the position that we are powerless to restrain such abuse of authority. The mere statement of such a doctrine exhibits its utter speciousness.

n1 7 U.S.C.A. § 9. It will be noted that this section does not require a revocation. Other alternatives are provided.

While this is an obscure case, it is one which will shock all observers of the American scene, when its full import is realized. It marks a court's retreat from a long-established line of defense. The publication of the court's opinion will emerge as an outright abdication of a judicial protection upon which our citizens have hitherto justifiably and proudly relied.

In a nutshell we have here a situation in which an agency has imposed upon two citizens what is virtually economic death. To review the harshness of this action they came to the court designated by congress to review the agency's decisions. They are met by a refusal by that court to perform its function in

this regard. Asserting its impotence, it abdicates its functions and leaves the citizens remediless.

The action of the original panel in modifying the order of the Secretary of Agriculture, as to the penalty imposed, was correct.

A true Copy:

Teste:

Clerk of the United States Court of

Appeals for the Seventh Circuit.

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