

## FEEDS AND GRAINS

29453. Canned dog food and canned cat food. (F.D.C. No. 45964. S. Nos. 1-207 R, 1-899 R, 2-223 R.)

INFORMATION FILED: 7-17-61, M. Dist Ga., against Fabro, Inc., Athens, Ga.

SHIPPED: Between 5-2-60 and 7-13-60, from the State of Georgia to the States of Florida, North Carolina, and South Carolina.

LABEL IN PART: "Henny Pen \* \* \* Dog Food \* \* \* Contents 1 Pound Packed by Fabro, Inc. Athens, Ga. \* \* \* Guaranteed Analysis Crude Protein . . . (Min.) . . . 11.00% Crude Fat . . . (Min.) . . . 2.00%"; and "SWITCH Nutritious Diet CAT FOOD \* \* \* Net Weight 15 Oz. Packed by Fabro of Georgia, Inc., Atlanta, Ga. \* \* \* Guaranteed Analysis: Minimum Crude Protein . . . 12.00%."

CHARGE: Dog food shipped to Florida, 402(b) (1)—when shipped, a valuable constituent, protein, had been in part omitted (count 1); and 403(a)—the label statement "Guaranteed Analysis Crude Protein . . . (Min.) . . . 11.00%" was false and misleading since the food contained less than 11 percent of protein (count 2).

Dog food shipped to South Carolina, 402(b) (1)—when shipped, valuable constituents, protein and fat, had been in part omitted (count 3); and 403(a)—the label statement "Guaranteed Analysis Crude Protein . . . (Min.) . . . 11.00% Crude Fat . . . (Min.) . . . 2.00%" was false and misleading since the food contained less than 11 percent of protein and less than 2 percent of fat (count 4);

Cat food shipped to North Carolina, 402(b) (1)—when shipped, a valuable constituent, protein, had been in part omitted from the article (count 5); and 403(a)—the label statement "Guaranteed Analysis: Minimum Crude Protein . . . 12.00%" was false and misleading since the food contained less than 12 percent of protein (count 6).

PLEA: Not guilty to all counts initially; on 12-2-63, nolo contendere to count 2 only.

DISPOSITION: On 12-4-61, the defendant filed a motion to dismiss counts 1, 3, and 5 for failure to state an offense. Thereafter the court rendered the following opinion authorizing the dismissal of those counts:

BOOTLE, *District Judge*: "For reasons hereinafter set forth, defendant's motion to dismiss Counts I, III, and V of the information is hereby granted.

"Defendant is charged in a six count information with violations of the Federal Food, Drug and Cosmetic Act, 21 U.S.C.A. § 301 et seq. Counts I, III and V of this information charge violations of § 402(b) (1) of the Act, 21 U.S.C.A. § 342(b) (1), which provides as follows:

'A food shall be deemed to be adulterated—(b) (1) If any valuable constituent has been in whole or in part omitted or abstracted therefrom;'

The information charges that the defendant, a manufacturer of dog and cat food, violated the above statute in that it shipped into interstate commerce food which was adulterated within the meaning of the statute in that 'valuable constituents'—in two counts protein, and in one count protein and fat—have been in part omitted therefrom. Defendant moved to dismiss the above enumerated counts upon the grounds that there is no definite, certain or ascertainable standard set forth in section 402(b) (1) of the Act by which it can be determined whether 'a valuable constituent' has been in part omitted from the food; that the statute as applied deprives the defendant of due process of law in violation of the Fifth Amendment to the Federal Constitution as it is too vague, indefinite and uncertain to state an offense; and that the

statute violates the Sixth Amendment to the Federal Constitution by failing to inform the defendant of the nature and cause of the accusation.

"By 21 U.S.C.A. § 341, the Secretary of Health, Education, and Welfare is authorized to

'promulgate regulations fixing and establishing for any food, under its common usual name so far as practicable, a reasonable definition and standard of identity, a reasonable standard of quality, and/or reasonable standards of fill of container.'

No such standards of identity or quality have been promulgated by the Secretary for the purpose of determining what constitutes 'valuable constituent(s)' in dog food or cat food, nor in what amounts or proportions said foods shall contain such 'valuable constituent(s)'. Thus the validity of the statute as here applied must rest upon the language of the statute itself, without benefit of any standard or regulation of the Secretary.

"The government contends that the constitutionality of the statute as applied should not be determined on a motion to dismiss. In *United States v. Petrillo*, 332 U.S. 1, 5 (1947), the Supreme Court said:

'We have consistently refrained from passing on the constitutionality of a statute until a case involving it has reached a stage where the decision of a precise constitutional issue is a necessity.'

Nevertheless, in that case the court in considering a motion to dismiss, passed upon the validity of a statute, stating that the motion to dismiss

'squarely raises the question of whether the section invoked in the indictment is void in toto, barring all further actions under it, in this, and every other case.' 332 U.S. at 6.

The Court held further:

'Many questions of a statute's constitutionality as applied can best await the refinement of the issues by pleading, construction of the challenged statute and pleadings, and sometimes, proof. . . . But no refinement or clarification of issues which we can reasonably anticipate would bring into better focus the question of whether the contested section is written so vaguely and indefinitely that one whose conduct it affected could only guess what it meant.' 332 U.S. at 6.

The issue in the present case is sufficiently clear to warrant passing upon the validity of the statute in question without the necessity of the introduction of further pleadings or evidence. '[T]here is . . . [no] reasonable likelihood that the production of evidence will make the answer to the questions clearer' on the motion now before the court. *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 213 (1934). The issue now before the court is the constitutionality of section 402(b)(1) of the Federal Food, Drug and Cosmetic Act as applied in this case. The answer to that question is apparent upon the face of the statute itself.<sup>1</sup> A trial can give the court no better information than it now has as to whether this statute, absent any regulations promulgated by the Secretary concerning the subject-matter of the information, contains sufficiently definite standards and definition of the crime alleged to have been committed to withstand the attack now waged against it. *Boyce Motor Lines v. United States*, 342 U.S. 337, 345 (1952).

"The question of vagueness or uncertainty in both civil and criminal statutes has been considered by the courts in a multitude of cases. Out of these have arisen a series of tests or standards of construction which are to be applied in determining the constitutionality of such a statute or its application. In order for a penal statute to be valid,

'the crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, *in advance*, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another.' *Connally v. General Construction Co.*, 269 U.S. 385, 393 (1926). (Emphasis added.)

The language of the statute should convey 'sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.' *United States v. Petrillo*, *supra* at 8.

<sup>1</sup> Cf. *United States v. Foster*, 80 F. Supp. 479, 484 (S.D.N.Y. 1948).

"[I]t must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation. But few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.' *Boyce Motor Lines v. United States, supra*, at 340.

"Applying these standards of construction to section 402(b) (1) of the Federal Food, Drug and Cosmetic Act, the conclusion is inescapable that the language of the statute, unclarified by appropriate regulations of the Secretary, is too vague and indefinite to be sanctioned as a penal statute. The statute furnishes no definition of what constitutes a 'valuable constituent', nor can a satisfactory definition be found in the words themselves. The word 'valuable' is a relative term susceptible of many interpretations and of no definite or absolute meaning. That which is considered valuable by one court or jury might not be considered so by another. (*Connally v. General Construction Co., supra* at 392). A criminal statute should contain a definite, certain, immutable standard of guilt, and this standard should not be left to the variant views of different courts and juries. The statute should inform the accused of the nature and cause of the accusation against him. *United States v. Cohen Grocery Co.*, 255 U.S. 81, 87 (1921).<sup>2</sup> Nor does the statute establish any standard as to what constitutes 'in whole or in part' of a 'valuable constituent'. Assuming, arguendo, that protein is a valuable constituent within the definition of the statute, how is the defendant to determine what amount of protein it should consider as the minimum amount required by the statute? The information in Count I<sup>3</sup> alleges that the defendant had labeled the dog food as follows:

'Henny Pen \* \* \* Dog Food \* \* \* Contents 1 Pound Packed by Fabro, Inc. Athens, Ga. \* \* \* Guaranteed Analysis Crude Protein . . . (Min.) . . . 11.00%'

and that a valuable constituent, protein, had been in part omitted therefrom. The only standard shown by the information or by the statute upon which it is based is that the dog food showed upon its label that it contained 11% protein when in fact it contained less. Thus it attempts to make the product serve as its own standard, and thus the said product cannot be made to do. *United States v. 88 Cases, More or Less, Etc.*, 187 F. 2d 967, 972, 973 (3d Cir. 1951).

"The language of the Supreme Court in *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939), quoting in part from *Connally v. General Construction Co., supra*, at 391, is appropriate here.

'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids . . . . "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."'

"The court is not unmindful of the holding of the court of appeals for this circuit in *United States v. 36 Drums . . . Pop'n Oil*, 164 F. 2d 250 (5th Cir. 1947), wherein the court said, at page 252 of the opinion:

<sup>2</sup> This is particularly true in a case of this kind where it is not necessary to allege or prove guilty knowledge or intent (*United States v. Hohensee*, 243 F. 2d 367 (3d Cir. 1957), cert. denied 353 U.S. 976), and where statutory vagueness cannot be aided by the consideration that only those who knowingly transgress can be punished. Cf. *Boyce Motor Lines v. United States, supra*.

<sup>3</sup> Counts III and V of the information contain similar allegations.

'To conclude that a food for which a standard of identity has not been promulgated is exempt from the economic adulteration provisions of the Act would result in rendering inoperative all of 21 U.S.C.A. § 342(b). The Administration is not required to promulgate definitions and standards of identity for foods under any and all conditions. Administrative selectivity in such standardization is a part of his discretion and responsibility. To permit a class of foods not so selected to escape other applicable provisions of the law would create a loophole which the Act sought to avoid.'

In that case, however, the court was applying 21 U.S.C.A. § 342(b) (3) and (4), not § 342(b) (1). And this court interprets that case as holding that the Secretary is not required to promulgate standards for every class of food sought to be regulated under § 402 of the Act, provided the statute itself sets forth sufficient standards to meet the requirements of the Fifth and Sixth Amendments to the Constitution.

"The essential purpose of the 'void for vagueness' doctrine is to warn individuals of the criminal consequences of their conduct,"<sup>4</sup> and in order for an effective warning to be conveyed, there must be a sufficient standard of conduct promulgated. The standard of the statute here under attack is 'so vague and indefinite as to be really no rule or standard at all.'<sup>5</sup> It does not give to the defendant fair warning as to what conduct on its part will subject it to criminal prosecution, (*United States v. Cardiff*, 344 U.S. 174, 176 (1952)), and the enforcement of it in its present form, absent any regulations promulgated by the Secretary as to the meaning of the phrases 'valuable constituent' and 'in whole or in part' as here applied would be a denial of due process in violation of the Fifth Amendment, and violative of the Sixth Amendment in that it does not inform the accused of the nature and cause of the accusation against him. As the Supreme Court said in *United States v. Cardiff*, *supra*:

'The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid . . . may be as much of a trap for the innocent as the ancient laws of Caligula.' 344 U.S. at 176.

"Accordingly, the court concludes that the statute, 21 U.S.C.A. § 342(b) (1), absent any regulations promulgated by the Secretary pertaining to the subject matter involved, does not meet the requirements of the Fifth and Sixth Amendments to the Constitution. Let counsel for defendant prepare and submit an order dismissing Counts I, III and V of the information."

On 6-6-63 through 6-11-63, counts 2, 4, and 6 were tried before a jury. On 6-11-63, the jury having notified the court that they could not reach a decision, the court declared a mistrial. On 6-17-63, within 5 days after the discharge of the jury, the defendant renewed its motion for acquittal which had been made during the trial at the close of the presentation of evidence by the Government and at the close of presentation of all the evidence.

The motion enumerated the following grounds:

1. That the Government did not prove the allegations respecting venue, namely, that the defendant, did, within the Athens Division of the Middle District of Georgia, cause to be introduced and delivered for introduction into interstate commerce at Athens, State of Georgia, the article involved.

2. The form, manner, and nature of the misbranding alleged in counts 2, 4, and 6, and the form, manner, and nature of the misbranding allegedly shown by the evidence presented upon the trial of the case, did not bring this case within the meaning and application of the provisions of 403(a) as alleged and charged by the Government, but did, as shown by the information and as shown by the evidence presented upon the trial of the case, bring the case within the meaning and application of the provisions of 403(e) which relates

<sup>4</sup> *Jordan v. De George*, 341 U.S. 223, 230 (1951).

<sup>5</sup> See *Champlin Refining Co. v. Corporation Comm.*, 286 U.S. 210, 243 (1932).

to food in package form and a misbranding thereof by and through statements made on the labeling respecting weight, measure, or numerical count of the content of such packages; that if the subject packages were misbranded in the form, manner, and nature alleged in counts 2, 4, and 6 of the information, the packages could only be misbranded under the terms of 403(e), but that the Government had neither alleged nor sought to prove nor proven any misbranding, violation by defendant of the provisions of 403(e), or of the provisions of any regulations established by the Secretary pursuant to authority conferred therein respecting reasonable variations in stated weight, measure, or numerical count of the content of such food packages.

3. To apply the provisions of 403(a), which makes no provision for allowance of reasonable variations in the measure, weight, or numerical count of the content of food packages stated on the labeling thereof, to the defendant in this case and deny to the defendant the application of and protection afforded by the provisions of 403(e), deprived defendant of rights guaranteed under the Fifth Amendment to the Constitution of the United States which provides in part:

"No person shall . . . be deprived of life, liberty, or property without due process of law: . . ." because, to apply the statute to the defendant upon the facts alleged in the information and shown in this case by the evidence was arbitrary and unreasonable, unjust, unfair, and harsh, rested upon no rational basis, and thus denied defendant due process of law, and further denied to the defendant the equal protection of, and impartial administration of the law, and was discriminatory in that 403(e), to the contrary, provided for allowance of reasonable variations in the measure or numerical count of the content of food packages stated on the labeling thereof, and no rational or reasonable basis whatever existed for distinguishing and excluding therefrom and from the protection thereof, of statements on the labeling of food packages of the measure or numerical count of the content of such packages when the same was stated in the form, manner, and unit of measure or numerical count involved in this case.

4. That 403(a) was a further unconstitutional deprivation of rights guaranteed under the Fifth Amendment, as applied to the facts, since the statute was too vague, indefinite, and uncertain to state an offense, or to constitute a standard of criminal conduct, or to put the defendant on notice of what would constitute an offense under the statute, for it did not fix nor relate to any definite, certain or ascertainable standard respecting the words "false or misleading in any particular" with which the defendant was required to comply.

5. That 403(a) was an unconstitutional deprivation of the right under the Sixth Amendment to be informed of the nature and cause of the accusation since the statute was so vague, indefinite, and uncertain by reason of its failure to fix or relate to a definite, certain, or ascertainable standard respecting the words "false and misleading in any particular" that it failed to sufficiently inform the defendant of the nature and cause of the accusation and of the standard of conduct required of defendant in order to avoid violation of same.

6. That the evidence offered upon the trial of the case was not sufficient to take the case to the jury.

On 11-29-63, the court issued the following order:

BOOTLE, *District Judge:*

ORDER ON MOTION FOR JUDGMENT OF ACQUITTAL

"The trial of this case resulted in a hung jury and the court entered an order declaring a mistrial. Subsequently, defendant filed a motion for judgment of acquittal on the ground that venue had not been proven and upon other grounds.

"Proof of venue as a jurisdictional fact may be shown by circumstantial evidence as well as by direct evidence, and the venue may be deemed proven by inference drawn by the jury from the circumstantial evidence presented at time of trial, or from the record as a whole. *Holdridge v. United States*, 282 F. 2d 302 (8 Cir. 1960). *Weaver v. United States*, 298 F. 2d 496, 497, 498 (5 Cir. 1962). See also *George v. United States*, 125 F. 2d 559 (D.C. Cir. 1942); *Wallace v. United States*, 243 F. 300, 306 (7 Cir. 1917); *United States v. Karavias*, 170 F. 2d 968, 970 (7 Cir. 1948). It has been held that venue need not be proven beyond a reasonable doubt. *Dean v. United States*, 246 F. 2d 335, 338 (8 Cir. 1957); *Morehouse v. United States*, 96 F. 2d 468 (8 Cir. 1938).

"The Government contends that venue was shown by (1) a stipulation<sup>1</sup> entered into by defendant and the Government prior to trial and (2) Government's exhibits 4 and 5 which were admitted into evidence and which were two labels from cans of dog food containing the following language 'Packed by Fabro, Inc., Athens, Georgia.'

"The Government contends that when the stipulation is read in connection with the allegation in the information that the acts alleged to be criminal were committed 'within the Athens Division of the Middle District of Georgia', 'it becomes clear that the articles of food referred to in those counts are the ones which were introduced into interstate commerce at Athens, State of Georgia.' This contention is untenable, for the stipulation does not stipulate where the articles of food were introduced or delivered for introduction into interstate commerce.

"Let us examine the evidence adduced upon the trial of the case in order to determine if it was shown that a violation occurred within the Middle District of Georgia. The evidence showed that defendant, a Delaware corporation, has two animal food plants, one in Atlanta which is the home office and one in Athens and that defendant also has warehouses in Atlanta and Athens. Title 21 U.S.C.A. § 331(a) proscribes 'the introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.'

"Defendant is charged in counts II<sup>2</sup> and IV of the information with introducing or delivering for introduction into interstate commerce shipments of 'Henny Pen' dog food for delivery to Jacksonville, Florida and Greenville, South Carolina, respectively, which were allegedly misbranded within the meaning of 21 U.S.C.A. § 343(a) in that they contained less protein, as to count II, and less protein and fat as to count IV than was guaranteed by the manufacturer on the label.

"Food and Drug Administration Inspectors Billy B. Ashcraft and J. W. Montjoy picked up samples of the Jacksonville and Greenville shipments, respectively. Each can of 'Henny Pen' dog food picked up and tested had printed on the label 'Packed by Fabro, Inc., Athens, Ga.' The case containing the cans picked up at Jacksonville had printed on it 'Fabro, Incorporated, Athens, Georgia'. The court does not see among the exhibits any case relating to the Greenville shipment.

"Defendant contends, in effect, that because the Government did not introduce evidence showing that the Jacksonville and Greenville shipments were made directly from the Athens plant or warehouse that it has not proven venue, for the shipments, for all the evidence shows, might have been made from the Atlanta warehouse outside the jurisdiction of this court. While it is true that there is a warehouse in Athens and Atlanta there is no evidence that the dog food was ever shipped to Atlanta. The circumstances that Atlanta was the site of the home office; that the labels on the dog food in the two shipments were marked 'Packed by Fabro, Inc., Athens, Ga.'; that the cans of cat food alleged to be misbranded in count VI had printed on the labels

<sup>1</sup>The stipulation, in part, stipulates "that the articles of food referred to in counts II, IV, and VI of the information were delivered into interstate commerce by defendant . . . ."

<sup>2</sup>Counts I, III, and V were dismissed before trial, leaving counts II, IV, and VI.

'Packed by Fabro of Georgia, Inc., Atlanta, Ga. '; and that the case containing the Jacksonville cans had printed on it 'Fabro, Incorporated, Athens, Georgia' would authorize the jury to conclude that the dog food was packed where stated on the labels, in Athens.

"It follows that the introduction or *delivery for introduction* into interstate commerce of the dog food took place at the Athens branch. Even if the dog food was shipped to the Atlanta warehouse and from there to Jacksonville and Greenville, the *delivery for introduction* into interstate commerce occurred in Athens for when defendant manufactured the dog food in Athens and delivered it to the Atlanta warehouse, if it did so, it was contemplated that from Atlanta at least a substantial portion of it would be shipped in interstate commerce.

"Under these circumstances and this evidence, the court would not be authorized to rule that venue has not been proven as to Counts II and IV.

"The labels on the cat food alleged in count VI to be misbranded have printed on them 'Packed by Fabro of Georgia, Inc., Atlanta, Ga.' There is no evidence that this cat food ever entered the middle district of Georgia. Therefore it appears that as to count VI a judgment of acquittal should be entered. All of the other grounds of the motion have been considered and found to be without merit.

"SO ORDERED, this 29 day of November, 1963."

On 12-2-63, counts 1, 3, 5, and 6 having been previously dismissed upon order of the court, count 4 having been dismissed upon motion of the Government, and the defendant having pleaded nolo contendere to count 2, the defendant was fined \$100.

**29454. Alfalfa hay.** (F.D.C. No. 49498. S. Nos. 50-702 X, 78-261 X.)

QUANTITY: 158 tons at Auburn, Calif.

SHIPPED: Between 8-13-63 and 9-18-63, from Yerington, Nev., by George N. Cooper.

LIBELED: 11-6-63, N. Dist. Calif.

CHARGE: 402(a)(2)(B)—the article was a raw agricultural commodity and, when shipped, contained pesticide chemicals, namely, DDT (DDD, DDE) and heptachlor epoxide, which were unsafe within the meaning of 408(a) since no tolerance or exemption from the requirement of a tolerance for DDT (DDD, DDE) on alfalfa hay has been prescribed by regulations, and since the quantity of heptachlor epoxide on the article was not within the limits of the tolerance for such pesticide chemical on alfalfa prescribed by regulations.

DISPOSITION: 3-20-64. Consent—claimed by George Cooper and denatured for use as feed for nonfood producing animals.

**29455. Vitamin-mineral supplement feed.** (F.D.C. No. 49263. S. No. 76-953 V.)

QUANTITY: 35 25-lb. bags, at Cedar Rapids, Iowa.

SHIPPED: Prior to 4-4-63, from Peoria, Ill.

RESULTS OF INVESTIGATION: Examination showed that the article contained approximately 30 percent of the declared amount of vitamin D<sub>3</sub>.

LIBELED: 8-5-63, N. Dist. Iowa.

CHARGE: 402(b)(1)—while held for sale, the valuable constituent vitamin D<sub>3</sub> had been in part omitted or abstracted therefrom; and 403(a)—the label statement "Vitamin D<sub>3</sub> 190 I.C. Units Per Gram Equal to 86,000 I.C. Units Per Pound" was false and misleading.

DISPOSITION: 1-10-64. Default—destruction.