In the

Supreme Court of the United States

EARL L. BUTZ, SECRETARY OF AGRICULTURE, et al.,

Appellants,

v.

GLOVER LIVESTOCK COMMISSION COMPANY, INC.,

Appellee.

No. 71-1545

Washington, D. C.
February 27, 1973

Pages 1 thru 41

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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v.	:	No. 71-1545
GLOVER LIVESTOCK COMMISSION COMPANY, INC., Appellee.	:	

Washington, D. C.

Tuesday, February 27, 1973.

The above-entitled matter came on for argument at 11:36 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

KEITH A. JONES, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C., 20530; for the Appellants.

R. A. EILBOTT, JR., ESQ., P. O. Box 5010, Pine Bluff, Arkansas, 71601; for the Appellee.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments now in No. 71-1545, Butz against Glover Livestock Commission.

Mr. Jones, you may proceed.

ORAL ARGUMENT OF KEITH A. JONES, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. JONES: Mr. Chief Justice, and may it please the Court:

This case is here on writ of certiorari to the Court of Appeals for the Eighth Circuit.

The issue presented is whether the court below exceeded the permissible scope of review in setting aside the Secretary's 20-day suspension of respondent as a registrant under the Packers and Stockyards Act of 1921.

The suspension was ordered pursuant to the Secretary's authority to suspend for a reasonable period any registrant committing any violation of the Act.

Respondent is a livestock broker or market agency who is paid a sales commission for conducting an auction at which livestock is sold on a weight basis.

Respondent has now been detected violating the Act on four separate occasions by short-weighing cattle consigned to it for sale.

On the earlier occasions, it had simply been warned against future violations.

On the fourth instance of short-weighing, which is the subject of this suit, a formal complaint against respondent was issued by the Packers and Stockyards Administration.

The case was initially tried before Department of Agriculture Hearing Examiner who found that respondent had intentionally short-weighed the cattle consigned to it for sale.

The hearing examiner recommended an appropriate cease and desist order, and also a 30-day suspension.

The matter was then reviewed by a judicial officer having authority to act on behalf of the Secretary. He found that respondent's short-weighing constituted a willful violation of the Act, and he issued the cease and desist order recommended by the hearing examiner, but he reduced respondent's suspension to only 20 days.

Since the respondent operates its market only one day per week, this 20-day suspension will affect, at most, three business days.

Before discussing the disposition of this case on appeal, I think it would be helpful to describe the respondent's brokerage function as a market agency, and to explain why a market agency like the respondent might intentionally short-weigh the cattle consigned to it for sale.

The sellers at respondent's auctions are typically livestock producers who bring, or send, their cattle to the

respondent for purposes of the auction.

These livestock producers rarely know the true weight of their cattle. They typically lack the weighing facilities necessary to determine the true weight.

It is the respondent who is responsible for weighing the cattle.

The buyers at the auction frequently, perhaps usually, are representatives of meatpacking companies. They buy the cattle at the weight given by the respondent, and the cattle are then shipped to the packing plants where they are reweighed.

The sad truth of the matter is that the packers tend to patronize the auctions held by market agencies which give them a favorable break on the weight, thus, short-weighing encourages buyers.

And this, in turn, stimulates an increase in sales, for the livestock producers will tend to patronize the markets which attract sufficient buyers to insure a sale of their cattle.

And, since the market agencies are paid on a per head basis, they profit from this higher level of sales.

Q Their commission isn't based on a percentage of the sale price?

MR. JONES: It is based -- and I think that in the record there is a schedule of the commissions -- it is based,

in part, on the weight of the cattle.

If the cattle in question weighs 400 pounds or more, I think the sales commission is $4 and some odd cents. If it is between 300 and 399 pounds, it is a lower figure, and so forth.

Q To that extent then, it would be against their interest to short-weigh.

MR. JONES: Only if the short-weighing brought the weight down from 100 weight category into a lower one.

And, in fact, in this case, none of the cattle short-weighed, in fact, brought the weight down from 100 weight category to another. So that there was no loss in commissions resulting from the short-weighing.

Now, the Packers and Stockyards Act was, of course, designed to eliminate abuses such as short-weighing. It does this by requiring the market agencies to observe a high fiduciary standard of care in dealing with both buyers and sellers.

And, since negligent as well as intentional short-weighing injures the livestock producers, negligent short-weighing has long been considered to be a violation of the Act.

Well, I turn now to the treatment of this case in the Court of Appeals.

Q Is there any concession here by Glover, however, that the short-weighing was not due to negligence in this case?

MR. JONES: No. I believe that they have consistently maintained that their infractions of the Act were not intentional.

On appeal, the Court of Appeals --

Q Denied that they were willful? Or do you distinguish between intentional and willful?

MR. JONES: Yes, we do distinguish between intentional and willful, as did the Court of Appeals.

The Act is phrased in terms of willfulness and negligent violations are considered willful for purposes --

Q It just means you know what you are doing.

MR. JONES: That's right.

Q I mean you know what physical acts you are going through.

MR. JONES: I believe that it means that if you act in careless disregard of your statutory responsibilities that's considered to be willfulness for purposes of the Act.

It simply means that you know what your responsibilities are and you don't live up to them.

Q And what is intentional?

MR. JONES: Well, I suppose that in this context intentional would mean that, for example, the respondent ordered its weigh master to weigh the cattle at less than their true weight.

Q And, there is no concession of their being intentional?

MR. JONES: That's correct.

Q Is there a concession that they were willful?

MR. JONES: I believe so in the sense that the respondent has conceded that the suspension here was within the statutory authority of the Secretary. And, of course, it would not be if the act were not committed willfully, in other words, was not a violation of the Act.

Furthermore, the Court of Appeals upheld the finding of a violation as supported by substantial evidence and the respondent has not cross-petitioned in this case, so that the finding of a violation of the Act is not at issue here.

However, although the Court of Appeals sustained the cease and desist order --

Q Did we limit the grant here only to the remedy? Is this a limited grant of the writ, do you recall?

MR. JONES: I don't recall, Mr. Chief Justice.

The only issue presented, of course, is whether the suspension itself -- excuse me, whether the court exceeded its permissible scope of review --

Q There really is only one issue in the case.

MR. JONES: And that's the proper scope of review and how it was applied.

The court did set aside the 20-day suspension here.

It is hard to determine just why the suspension was

set aside, however.

The court expressly held that the suspension was within the Secretary's statutory authority, and it further acknowledged that the shaping of remedies is peculiarly within the special competence of the Secretary.

Having acknowledged its narrow powers of review, however, the court turned to a comparison of this case with four previous administrative decisions involving suspensions for short-weighing.

In each of those four cases, at least in the court's view, the short-weighing had been intentional and flagrant.

The court did not view the respondent's offense as being equally culpable. And on the basis of this comparison alone, the court concluded that the 20-day suspension here failed to achieve uniformity of sactions for similar violations.

In so concluding, the court overlooked the fact that in those four cases with which it was comparing the present case, the suspensions there had all been for 30 days, longer than the period of suspension here.

And the court further overlooked the fact that the Secretary has frequently imposed suspensions in cases involving offenses no more culpable than those committed by the respondent.

The court then made its own independent evaluation of the proper sanction to be imposed and concluded that the cease

and desist order, when coupled with the adverse publicity which had attended the finding of the violation, would be an adequate remedy.

It is our position that the Court of Appeals merely paid lip service to the applicability of a narrow standard of review, and that it, in fact, substituted its own judgment for that of the Secretary with respect to the proper sanction to be employed for short-weighing under the Act.

I will first outline our view of what constitutes the proper standard of review in cases such as this, and then turn to a discussion of how that standard should be applied to the facts of this case.

This court has repeatedly stressed that the courts exercise only a very limited power of review over orders fashioned by administrative agencies.

This limited power of review has normally been described as requiring the courts to sustain an administrative action which is authorized by statute and which is not arbitrary, capricious or an abusive discretion.

Although in articulating the proper standards to be applied, the court has varied its language slightly from case to case, the essential point has remained clear. A reviewing court may not simply substitute its discretion for that of the administrator.

When discretionary enforcement powers are given by

Congress to an administrator who thereupon develops special expertise over the subject matter, a reviewing court may not replace its discretion -- may not replace the administrator's discretion with its own.

We believe that a narrow scope of review is particularly appropriate where the administrative action question is the imposition of sanctions for statutory violations.

The determination of what sanction is necessary to insure compliance with the act and to deter future violations must be based upon an informed judgment which can properly be made only by the administrator who, unlike the reviewing court, is thoroughly familiar with both the conditions in the industry and the real significance of the particular violation.

Where the sanction chosen by the administrator can be shown to have some reasonable relationship to his legitimate enforcement objectives, under the statute, we contend that the sanction must be sustained.

We believe that a party attacking a sanction bears a very heavy burden of proof. That party must show that the sanction bears no relationship whatsoever to the effectuation of the statutory program, and is out of all proportion to the seriousness of the offense.

And when, as in this case, the sanction employed is a suspension, we believe that that sanction may be modified or set aside only when the period of suspension is wholly lacking

in reasonableness.

Q Judge Stevens, in his opinion for the Court of Appeals, said this was unconscionable.

If, instead of using the word "unconscionable," he had said arbitrary and capricious, would that have satisfied the test?

MR. JONES: Well, I think that there must --

Q Isn't it, therefore, just a matter of language?

MR. JONES: I think there must be some reasoned elaboration.

Q Well, he gave the reason why he thought it was unconscionable.

MR. JONES: Yes, and I will turn to a discussion of those reasons in a moment.

First, I would say, however, that I believe that the use of the word "unconscionable" here was not a finding of an abuse of discretion, but really only a conclusory assertion -- a conclusory description based upon the presumed lack of uniformity of sanctions.

As such, it did not constitute a finding that there was no reasonable relationship between the sanction imposed and the need to effectuate the statutory program.

Q What if he simply said that the Department abused its discretion? That would be equally conclusory, wouldn't it?

MR. JONES: That's correct and I believe that a

reviewing court cannot simply say that this is an abuse of discretion without explaining why.

And I think that the explanations in this case were inadequate.

The violation committed --

Q The standard they use is all right here?

MR. JONES: Oh, no --

Q Only their --

MR. JONES: I think the court gave lip service to a narrow standard of review but that it did not attempt conscientiously to apply that standard.

The violation committed by the respondent here, the short-weighing of cattle consigned to it for sale, is a serious offense under the Act, and furthermore, this was not the respondent's first violation. It has been detected short-weighing on a total of four separate occasions.

These repeated violations may, as the respondent seems to contend, have been merely due to negligence, carelessness.

If so, the respondent has repeatedly been careless in the observance of its statutory responsibilities.

On the other hand, the violations may have been intentional.

The record is unclear and the Secretary's findings are couched only in terms of willfulness, which is the statutory

standard.

Whether intentional or careless, respondent's actions thwarted a fundamental safeguard devised by Congress for the protection of livestock producers.

In contrast to the seriousness of the offense, the 20-day suspension here is relatively mild.

It certainly cannot be said, in the context of respondent's repeated violations, that this brief suspension is arbitrary or lacking in reasonableness or an abuse of discretion.

Congress has given the Secretary wide discretion to choose the sanctions necessary to insure compliance with the Act, and the Secretary, in this case, acted well within his discretion.

The court below, however, was concerned with whether there had been uniformity of sanctions for similar violations.

I would note, first, that we believe the court was in error in concluding that there was a lack of uniformity here.

The Department of Agriculture has provided us and opposing counsel with a comprehensive list of short-weighing cases, including 152 cases involving suspensions.

Now, these suspensions range in length from a minimum of one week to a maximum of five years.

Now, some of the violations were more obviously intentional than those involved here, but many were not. So

that, if the history of the enforcement of the Act is any guide, the sanctions here were, if anything, lenient, certainly not severe.

But, more importantly, we would submit that the court fundamentally erred inquire, at least in any strict and comprehensive way, into the uniformity of sanctions at all.

The Secretary is not required to impose the same sanction for all similar violations.

In Federal Communications Commission v. WOKO, which we cite in our brief, the court was once before confronted with the argument that an administrator had not applied similarly harsh sanctions to violators in the past.

In holding that this factor was not a ground for rejecting the sanction, the court replied, and I quote from page 228 of that volume, "We cannot say that the Commission is bound to deal with all cases at all times as it dealt with some that seem comparable," end of quote.

We believe that the same answer is appropriate here.

Even if it is assumed that respondent's suspension was harsher than those meted out in the past, the Secretary's action, we believe, should be measured not against any past leniency, but only against the need to effectuate the statutory program.

So, Jr. Justice Rehnquist, I believe that is the answer to your inquiry about whether merely the verbalization

of an abuse of discretion would be adequate.

We believe it is necessary to show that there is no reasonable relationship between the sanction and the need to effectuate the statutory program.

The conclusion of the court's opinion, below, illustrates that the court was actually substituting its own judgment for that of the Secretary and not really finding an abusive discretion.

The court expressed its view that the cease and desist order, plus routine press releases describing the finding of the violation, quote, "Would certainly seem appropriate and reasonable with respect to the practice the Department seeks to eliminate," end quote.

This statement by the court reveals at least two serious errors.

First, it is for the Secretary and not the court to determine what constitutes an appropriate and reasonable sanction for purposes of carrying out the Secretary's enforcement obligations.

Secondly, Congress has made the legislative judgment that a suspension is appropriate and reasonable for any violation of the Act, an a fortiori for the serious violation of short-weighing involved here.

Q It seems to me in your brief, Mr. Jones, you emphasize that there had been prior violations and that there had been

three or four occasions when the authorities of the Secretary's staff warned Glover about violations.

MR. JONES: That's correct, Mr. Chief Justice. There were repeated violations.

Q I don't find that the Court of Appeals made any mention of that, or perhaps --

MR. JONES: I think the court overlooked that, as it did, I think, many other things, as well, relating to the seriousness of this offense and to the uniformity of the sanctions which the Secretary has applied in the past.

In conclusion, we submit that the decision setting aside the suspension, ordered by the Secretary, should be reversed and the suspension reinstated.

Q The upshot was that no punishment or no remedy whatsoever was to be imposed?

MR. JONES: No. A cease and desist order was sustained by the court below.

Q But that's all?

MR. JONES: That's all.

I would like to reserve my remaining time.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Eilbott.

ORAL ARGUMENT OF R. A. EILBOTT, JR., ESQ.,

ON BEHALF OF THE APPELLEE

MR. EILBOTT: Mr. Chief Justice, and may it please Your Honors, gentlemen of the Court:

I think we came here -- or I thought I did -- to argue some degree of law.

But there have been so many statements of fact given which I do not agree with, and which can only be thought of as prejudicial to my clients that I think I should answer just a few of those before I go into what I had intended to say to this Court.

Now, number one, we have this statement by Mr. Jones. And may I say to Your Honors before I go further that I am a small country town lawyer and Mr. Jones has been most cooperative to us and most kind to us in the preparation of our appearance this morning before Your Honors.

I have never had that privilege before except when I was admitted.

Q I used to litigate against small town lawyers, too, and I almost always got beat.

(laughter)

MR. EILBOTT: That's what I hope to do today.

Q That's exactly what I thought, sir.

MR. EILBOTT: That's exactly what I intend to do if I can.

Q A small town lawyer, counsel, is like the lawyer who walks into the courtroom with just one law book and that's the fellow that --

MR. EILBOTT: I wish I had one law book, Your Honor.

(laughter)

He first makes mention, however, that we had been told four times.

Now, if it please Your Honors, let me get one thing straight,because I have now lived with this case for three and a half years.

We did receive three letters on the question of weighing and the record shows that in each and every instance we immediately had weigh scale testers in to determine what the condition was of our scales.

And, unfortunately, we got no answers on those first three occasions.

We would urge Your Honors that in -- and the transcript so shows -- that this was found to be true, that if you weighed these scales as was required by the Government, that is, put a weight on each corner and weighed it, they found nothing wrong with our scales.

And, indeed, nothing was found wrong with these scales until, at my repeated urging, they brought in a gentleman from Memphis who had been selling scales and had been using scales, Fairbanks Morse scales for 20-some odd years.

He testified and it is part of the record.

He showed that those scales had enough wear and tear that when a cattle rushed onto the scales, notwithstanding the scales would prove correct at a dead weight, but when you prodded one on with an electric prod,which is the system, when it hit the middle of that scale, there was going to be some variance sometimes.

Now, sometimes, the scales would weigh accurately. Other times, they would not.

Q Did he testify that it was true of scales all over the country?

MR. EILBOTT: That is correct, Your Honor. He certainly did, Justice Marshall.

Now, when we come down to the question here of how many --

(Whereupon, at 12:00 o'clock, noon, the oral argument was recessed to reconvene at 1:00 o'clock, p.m., the same day.)

AFTERNOON SESSION

(1:00 p.m.)

MR. CHIEF JUSTICE BURGER: Thank you, counsel, you may resume.

MR. EILBOTT: Mr. Chief Justice, and may it please the Court:

Truthfully, gentlemen, when we get through sparring and there are several things that I would like to answer from the Solicitor General, we are here on the matter of a 20-day suspension.

We could have, if it please Your Honors, and the court record will show, we could have taken the 30-day suspension the day they filed the complaint, or, in plain language, we could have taken our medicine for 30 days and that would have been all there would have been to it. It could all have been over.

Q How many business days would that actually be?

MR. EILBOTT: Your Honor, that's about three working days. The Government is correct on that, but they have no more conception of what those three working days are to us than anything in this world.

What those three working days amount to, I think Mr. Justice Leigh, in the Eighth Circuit Court of Appeals, very aptly put it, they amount to calling us crooks. And we are not crooks.

And that's what we stand before this Court on today.

We did not intentionally violate any regulation.

We did not intentionally, if it please Your Honor, deliberately under-weigh or over-weigh cattle.

In the first place, the Government says that we were warned four times, and each of those instances -- three times -- and in each of those instances, we had the Government's own weighing team to check our scales, and they couldn't report anything wrong to us, because there they use the four edges of balance.

That's what the record shows.

It was only when we tore those scales down that we found out what was wrong with the scales, or what could have been wrong with the scales.

Now, the Government says that was not mentioned by the Eighth Circuit Court of Appeals, but indeed, if it please Your Honors, it was mentioned not once, but twice, in their opinion.

And if Your Honors look at the Appendix, it is on page 16 and 19, that the Eighth Circuit --

Q It wasn't the Solicitor General. It was my suggestion. I said I couldn't find it --

MR. EILBOTT: If Your Honor will look at Appendix A to the Petition for Writ of Certiorari, on page 16, you will find, "Glover is an operator of a posted stockyard in Pine Bluff,

Arkansas, registered," and so forth, "to sell livestock."

"On or about June 2, 1964, July 26, 1966, and June 20, 1967, representatives of the USDA conducted investigations of," so forth and so on. And it goes on.

Then, on page 19, it also points out in another place that these matters were brought to the attention of the Eighth Circuit Circuit Court of Appeals, and they mentioned them in their finding and in their decree.

We would respectfully point out also that in three of those instances there was no evidence taken, nothing other than to say, you are not weighing properly, and we called in a scale examiner, one approved by the Federal Government, and they could give us no answers.

The Agriculture Department made no effort to give us any answers.

So, consequently, when it came to the Eighth Circuit Court of Appeals, we had had a situation where the Eighth Circuit Court of Appeals found specifically that it was not an intentional and flagrant violation.

And that, also, is in the Eighth Circuit Court of Appeals opinion, if it please Your Honor. It is on page 9 of our brief, and I am sure it is in the Appendix. I didn't go to that trouble to find it out.

But, most assuredly, they found no intentional violation.

But we have had a situation that I would like to bring to the attention of this Court.

The word "unconscionable" has come in. And, Mr. Jones states that really the Eighth Circuit didn't give any reason for that word.

But, gentlemen, they did. They most assuredly did. In the last paragraph of their opinion, they pointed out exactly why they thought it was unconscionable.

I don't think there is any doubt about it.

They found out that these press releases which Mr. Jones a few moments ago says -- I've forgotten what he called them -- routine press releases, I believe.

Well, we are in the unenviable position that we found out we had been charged with an offense in the newspaper.

Everything that was done in this case was in the newspaper. Routine press releases? If they be routine, they damaged us.

They damaged us to the point that truthfully and honestly if it wasn't at my own insistance we wouldn't be here today because we are not financially able to be here.

But we are here. We are still saying we didn't intentionally do anything. We didn't intentionally do it, and we are not crooks. That's what it amounts to.

Now, they say we short-weighed cattle.

There were 29 drafts, I believe it was, proven to

have been weighed.

Whether or not those cattle had any excess water, which would have caused them to gain weight, I am not in a position to say, but if it please you Justices, neither was the Government because they weren't there either.

I know one thing. Of the 29 drafts weighed, 9 were under-weighed, 9 were over-weighed and the rest were right on the spot.

And I want to say to you that of the 9 under-weighed, 2 of them -- 2 out of the 9 -- belong to one of my clients who was selling his own cattle through the Livestock Commission Agency.

In other words, if anybody got cheated on those two, it was Thomas Glover who owns part of Glover Livestock Commission Agency.

Now, that doesn't make sense to me, that we would intentionally cheat ourselves.

Now, the Government has used the argument that I have heard since the first day we heard this before a hearing examiner.

And, let me digress just one minute and say that the way we heard this matter is simply this. The Government, through the Agriculture Department, charges us with an offense. That's heard before a hearing examiner who is an employee of the Agriculture Department. That's heard with two witnesses

from the Agriculture Department.

That's heard with prosecutors, two of them, from the Agriculture Department.

And from that, we had an appeal to a judicial review officer who also is an employee of the Agriculture Department.

And that was what we got in the way of a hearing until we got to the Eighth Circuit Court of Appeals.

And I would be the first to admit that they do have somewhat limited powers of review, but Congress never intended that the Judiciary abdicate all of its powers to the regulatory commissions.

Certainly, if it did, it should have said so.

We have been told here that the reason that we did this, the reason we short-weighed was because if we short-weighed them when we weighed the cattle, then the buyer got more than he paid for and he was happy.

I've heard that now for three and a half years, but that isn't the truth either.

And, I don't mean to imply that anyone is fibbing. I mean to say that's a matter of philosophy.

The truth about the matter is, in the conduct of livestock commission agents, whoever's got the cattle to sell, the buyers will come. You don't need to worry about getting buyers if you can get the farmer to bring you the cattle.

We don't have to under-weigh the farmers' cattle and

give Armour a little excess 10 or 15 pounds.

Q You are -- at least as I follow your argument -- you are arguing,rearguing,an element on which the Court of Appeals has found against you, and you have no cross appeal here.

For example, at page 19 --

MR. EILBOTT: Mister --

Q Let me read this, first.

"All evidence considered, the hearing examiner, crediting the evidence that the cattle reweighed had no access to food and water, could properly conclude that they had been underweighed by Glover."

And that's just one of several items.

The only thing the case is here on -- at least so I had thought -- was the appropriateness of the Court of Appeals modifying the penalty, not the fact findings.

MR. EILBOTT: Yes, sir, Mr. Chief Justice, and that was what I was prepared to argue until I came this morning and I found that it was stated that the Court of Appeals had not considered this, that and the other, and I knew the Court of Appeals had because it was in their opinion.

I will gladly move along into what we are really here for.

The appellee here concedes that the judicial review by the Eighth Circuit Court of Appeals, whether it be good law

or bad law, is a limited review.

But, we say to you, in all sincerity, that there has been absolutely no proof, and the Eighth Circuit Court of Appeals so found, that there was any intentional violation of the statute, or the regulations.

As a matter of fact, there is none.

We have asked the Department of Agriculture. We have requested of the Solicitor General that they show us one case in which the Department, without a finding of intentional, can say that a suspension is in order.

We didn't place into the law the requirement that these orders be uniform.

Indeed, this Court did not place that into the law.

The Secretary of Agriculture, himself, said that the findings of the Department of Agriculture should be uniform, because otherwise they would be discriminatory.

And that is in the much cited case of Royce v. d/b/a Madison Stockyards, which is a Department of Agriculture case.

We are here saying merely one thing. The Department of Agriculture may have found that there was a proper reason for suspension of our license for 20 days, but if they did, they didn't set it out in their opinion and neither did the Eighth Circuit Court of Appeals.

Yet, as the Eighth Circuit said, and as the Department

of Agriculture has said, these rulings must be uniform.

Mr. Jones mentioned 150 cases, but those were not cases. That was a mere citation at the bottom of a page, that merely mentioned rulings of the Department, whether they were consent cases, those in which a person had consented to be suspended, which most of these cases end up being, or whether they were actually tried, or whether they were entered on an original order.

Q What difference would it make, I wonder, whether they were tried, actually tried out on a contested basis, or whether they, in effect, entered a guilty plea, in terms of the penalty?

MR. EILBOTT: Your Honor, we find no case, and we have asked the Department to show us a case,in which it has been tried or otherwise, where they have made a finding that -- or have not made a finding that it was intentional and suspended a business.

Not a one.

And I say to you today, standing in the Supreme Court of the United States, we have not found a single case, absence the finding of intentional violation,that a suspension order has been issued by the Secretary of Agriculture up to the day he issued our order.

Q Why did the Court of Appeals send it back for a finding?

MR. EILBOTT: I beg your pardon?

Q Could the Court of Appeals have sent it back for a finding?

MR. EILBOTT: I don't think there was evidence there, Justice Marshall, to support such a finding.

Q I said, well, could they have sent it back to the administrative agency to make a further finding one way or the other?

MR. EILBOTT: Yes, sir. And if they did, I think they could, yes. And if they did --

Q But, instead, they took over the administrative agency's job.

MR. EILBOTT: They may have taken it over only because --

Q Well, if they took over the administrative agency's job, do they have authority to do that?

MR. EILBOTT: I think they do. Unless you would read the Stockyard and Packers Act as a complete abdication of judicial review.

Q I am just talking about general administrative law --

MR. EILBOTT: I understand that.

Q What in the Act makes it so different?

MR. EILBOTT: What makes it so different from the --

Q The regular Administrative Procedure Act?

MR. EILBOTT: I think the Eighth Circuit could have

sent it back, but they chose to say --

Q Well, would you object to us suggesting that the Eighth Circuit send it back?

MR. EILBOTT: That would be just like throwing us back to the lions from which we came. Somewhere along this line, surely we have a right to be heard by judiciary.

We went through all of the departments --

Q I am asking you about what relief you are entitled to?

MR. EILBOTT: I am entitled to a relief --

Q You want this Court to say that you are just not guilty of doing anything.

MR. EILBOTT: No, sir. If it please, Your Honor, Mr. Justice Marshall, there is plenty that has already been done.

Number one, we have been dragged through the mud and mire.

Number two, there is a cease and desist order that we do not appeal from.

If we violate that cease and desist order, I am sure Your Honor knows that the penalties are rather severe.

What we are fighting and all we are fighting is what the Eighth Circuit Court of Appeals said was unconscionable. And that's the 30-day suspension.

There's plenty of teeth in what they've done to us,

besides the 30-day suspension.

They didn't need that to add to our woes.

That is our point.

Because with the finding of that 30-day suspension, on the basis of the cases before us, they have found that we intentionally violated the Act.

And we'll deny that until the day we die.

Those are our sentiments.

Q You are saying that it is inconsistent and in violation of -- what is it, the Secretary's own rules -- if he, for the first time, imposes a suspension that is not an intentional violation?

MR. EILBOTT: That's correct, without giving a reason. And he gave no reason here.

Q Well, he imposed a penalty though.

MR. EILBOTT: Yes, sir.

And his own judicial review officer reduced it 10 days.

Q But you are saying that because this is the first time it is inconsistent?

MR. EILBOTT: Then it is discrimination, unless he gives a reason why we should be discriminated against.

Q So any two instances where you have non-intentional, non-intentional violations, you must either give them both -- you either suspend them both or not suspend them both? One

or the other.

MR. EILBOTT: Yes, sir.

Q Well, he could be starting on a program of suspending everybody.

MR. EILBOTT: Well, why didn't he start before he got --

Q I don't know. He's changed his mind.

MR. EILBOTT: He may have changed his mind, then he should have given us a reason why we, of all the world, should be singled out.

The record will show in this case that of the 50 stockyards in the State of Arkansas, only one was examined in twelve months, and that was us.

Now is there reason for that, too?

Q I don't know. That isn't the issue here right now.

MR.EILBOTT: I know that's not the issue, but that's all part of the --

Q I am not even sure that is part of the record.

MR. EILBOTT: Yes, it is. I can quote it to you verbatim, from Mr. Krzyminski questioning.

Q But not with respect to the remedy phase?

MR. EILBOTT: No, but I can say to you I asked Mr. Grizzell, one of the two Government witnesses, whether or not he had any proof whatsoever that we intentionally violated this Act, and he said no.

Q What do you understand willful means under this Act?

MR. EILBOTT: What I understand willful means, could be flagrant negligence, but that's far different from intentional.

Q Oh, yes, but is that all it means? Willful means --

MR. EILBOTT: Yes, sir.

It does not mean that we intentionally back-weighed.

Q You didn't know you were short-weighing. You knew what physical acts you were going through and you were careless. That's the most it means, huh?

MR. EILBOTT: We were careless, but we also, when we were careless, we took every step we knew to find out what was wrong. We had the Government's own scale weighers to weigh the scales, to check them.

Q But it was, nevertheless, the finding is that you were careless.

MR. EILBOTT: The Eighth Circuit found we were careless, but the Eighth Circuit refused to find that we intentionally did what we did. And the Eighth Circuit pointed out that the Secretary had held that uniformity was --

Q So, you are saying that the Secretary may not, may not suspend a willful violator --

MR. EILBOTT: Unless --

Q Well --

MR. EILBOTT: According to his own opinions.

Q He has to put him with the negligent violator rather than with the intentional?

MR. EILBOTT: Yes, sir.

But if he puts him only with the negligent violator then it is my position that the Department of Agriculture or the Secretary must show a reason for doing that.

Otherwise, all others who have been found guilty only of negligence -- there has been nothing but a cease and desist order.

Why suddenly us?

Q Well, on that score --

MR. EILBOTT: May I finish?

Q Go ahead, you finish.

MR. EILBOTT: If he was going to make the new rule, then why didn't he say so?

Q Well, right on that point, it is a common occurrence in traffic courts, for example, that a traffic judge confronted with hundreds and hundreds of cases sees a mounting epidemic, almost, of either drunken driving or speeding, or some such thing.

Finally, the last straw comes. And on that day he starts imposing more severe sentences to make an example of them, either a drunk driver or a speeder, or what not.

Now, do you think the judge, that's what you have

here, must make some explanation that this situation is getting so severe that I am tired of this under-weighing and we are going to make an example out of Glover?

Do you think he has to articulate that?

MR. EILBOTT: You are getting down on my level now, Mr. Chief Justice.

I know that the judge would lean back in his chair and say, "Mr. Eilbott, I am tired of this. I am tired of this continuing mounting of this type of offense and that type of offense and I am going to put a stop to it."

Q Let's assume he didn't, though. That's the assumption.

Let's assume he --

MR. EILBOTT: I don't think he would ever do it. that's my --

Q Well, they do it quite regularly.

MR. EILBOTT: Then assuming he did. If it was within his power, he had that right, but it would certainly be discriminatory against the first man he did it to.

Q The first man, but not the second?

MR. EILBOTT: Sir?

Q The first one, but not the second.

MR. EILBOTT: No, if he had announced a caveat then, yes, I would say he had the power. I would not deny that.

Q But not the second or the third.

MR. EILBOTT: If he had announced a caveat, then I would say it was not discrimination.

But I say, in all fairness, that when you, out of a great line of cases, none of which has ever imposed a suspension unless there be found an intentional violation, then suddenly you do that, you are saying to me and to my clients, you are a bunch of crooks.

Q But that wouldn't go for the second man?

MR. EILBOTT: Not if I had been told why and it had been done to me. It wouldn't be a first impression.

Q You take that position today. Do they take you before them next year and do the same thing to you?

MR. EILBOTT: Yes.

Q I see.

Q I never thought there could be a second if you set the first one aside. It would always be a first.

MR. EILBOTT: But, Mr. Justice White, my position, simply, is --

Q If you set aside and say it is unjustified, the next fellow would again be the first.

MR. EILBOTT: The Eighth Circuit didn't say it was unjustified. They found it unconscionable. How stronger can you get than that?

Q Well --

MR. EILBOTT: They found that the punishment meted out heretofore was ample to cover the proof. Now, that's what they found.

Q The question in the case is whether Congress gave them that power, really, isn't it?

MR. EILBOTT: Yes, that is, but the question is also in this case that the Secretary set out the original rule that the findings must be uniform.

And, if he is going to depart from those findings, then he should say, "Now, gentlemen, this is where we get off. This is the first case, but we are going to depart from our rule for these reasons."

They shouldn't just single one out without any warning whatsoever and say, "You little bitty outfit down there in Arkansas, now, we've had packers, we've had stockyards, we've had -- by the thousands. But, now, we are going to start with you," but didn't say it.

Q Well, would it be fair to assume that since you indicate there were news releases and the word has gotten around in the industry, among the dealers -- would it be fair to assume that perhaps they are being a little more careful after the experience with Glover and the litigation that's ensued?

MR. EILBOTT: Mr. Chief Justice, I do not propose to deal in levity with you, but it would have been easier if

they just chopped off one of our hands. Then, maybe, it might have been a better lesson.

Q I am speaking of others. Do you think this has made other --

MR. EILBOTT: I don't think it has had any effect on anybody besides Glover Livestock. That's the only one that's ever been inspected, as far as I know, in the State of Arkansas. It certainly was up until the day we were inspected.

I think there is a little more here than is in the record, if you want to know what I think, but I have no proof of that, Your Honor.

Thank you for your kindness. Thank you, gentlemen.

MR. CHIEF JUSTICE BURGER: Thank you, Mr.Eilbott.

Mr. Jones, do you have anything further?

REBUTTAL ARGUMENT OF KEITH A. JONES, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. JONES: I would just like to dispel one misimpression.

The counsel for the respondent has asserted repeatedly that the Secretary has not imposed suspension in cases where there was no finding of intentional misconduct.

However, I would like to bring to the Court's attention the 18 cases which we cite in our Footnote 7, page 20, of our merits brief, where there were suspensions --

Q Give us a little time to find that, will you,

Mr. Jones.

What page again?

MR. JONES: Page 20 of our brief, Footnote 7.

And in these cases, there was a suspension issued for short-weighing without a finding of intentional misconduct.

And I would, particularly, refer your attention to the Williamstown Stockyards case, where, although it was a consent order, as counsel for the respondent points out, the consent order was conditioned upon the assertion that the offense was not intentional.

Nevertheless, a suspension, I don't recall whether it was 20 or 30 days, but it was not less than that involved in this case, was issued.

Furthermore, the distinction between intentional and merely negligent violations of the Act is a very difficult one to make in practice.

For example, in this case, all we know for a fact is that the respondent's scales were accurate and that the cattle was misweighed.

Respondent did not call the weighmaster to testify as to why there might be a discrepancy between the true weight and the weight given by respondent.

Q Were you in Department procedures, would you have been entitled to call him as an adverse witness?

MR. JONES: I can't answer that with confidence,

Mr. Justice Rehnquist, but I assume that he could have been called. I understand it is not generally the practice to call the employees of the respondent -- or the person subject to sanction.

So that distinctions made between intentional and negligent misconduct are really very difficult ones to make, and, in this case, as in almost all cases, the final finding of the Secretary was simply one of willfulness, and not one of intentional misconduct.

And it is the willful violation which, in almost all these cases, is the one which is subject to sanction.

That's all I have, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you.

Thank you, gentlemen.

The case is submitted.

MR. EILBOTT: I don't suppose I could have one minute of what he left?

MR. CHIEF JUSTICE BURGER: No. We don't permit a surrebuttal, counsel.

MR. EILBOTT: Thank you. Thank you for your kindness in hearing us, sir.

MR. CHIEF JUSTICE BURGER: Very well.

Thank you.

The case is submitted.

(Whereupon, at 1:27 o'clock, p.m., the oral arguments in the above-entitled case were concluded.)