IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH W. JONES, as Director of the County of Riverside, California, Department of Weights and Measures, Petitioner,	:	
v.	:	No. 75-1053
THE RATH PACKING COMPANY, et al., Respondents.	:	

Washington, D. C.,

Tuesday, December 7, 1976.

The above-entitled matter was resumed for argument at 10:07 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

[Same as heretofore noted.]

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments at this stage. Mr. Dunlavey, you may proceed whenever you're ready.

ORAL ARGUMENT OF DEAN C. DUNLAVEY, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

I am counsel for all respondents in the two cases that are under review in this single certiorari. One is Rath and involves meat, in particular, bacon is the example; and deals with the Wholesome Meat Act. The second involves flour and deals with the Fair Packaging and Labeling Act and the Food, Drug, and Cosmetic Act.

The certiorari also involves one California statute, which is a weight inspection statute, and one California regulation that implements that statute.

I hasten to point out to the Court that the case does not now and never has involved Handbook 67, which is something that has been brought into the briefs on certiorari.

There is only a single question presented by the petitioner in this certiorari, and that is: Has the federal law preempted the State? And that is limited to a consideration of preemption of the net weight labeling requirements on these two products.

The quality of the product or wholesomeness of the product is not now and never has been an issue in the case.

In response to a question from Mr. Justice White yesterday, the question before the Court in this certiorari does not involve jurisdiction or, more properly, as it arose in another petition, comity. Jurisdiction or comity has never been an issue in the flour case. It is not in issue in this certiorari, and it has not been dealt with by any brief on the merits in this certiorari.

It doesn't --

QUESTION: Are there different federal statutes involved -- or three?

MR. DUNLAVEY: Three. Wholesome Meat, as to the Rath; Fair Packing and Labeling and Food, Drug, and Cosmetic as to the flour.

QUESTION: And it's possible you could get different answers as to bacon and flour, I take it?

MR. DUNLAVEY: I think that the answers are the same, but the reasoning will be different.

QUESTION: Yes.

MR. DUNLAVEY: And I might add that there is a third case lurking beneath this certiorari, which was entitled Becker vs. Rath.

Becker was a counterpart of Jones in Los Angeles County, whereas Jones is in Riverside County. The Becker case

was tried by the district court, and when the trial had finished, the Jones vs. Rath case was consolidated with it, it was argued separately; and a single judgment was issued by the district court in those two cases.

Following those, the flour case was adjudicated by the same judge in a second opinion, and of course the Ninth Circuit dealt with the two Rath cases as a single one in its decision.

The jurisdiction was an issue at one point in the Becker case, but certiorari has not been granted in the Becker case.

However, the Becker record is before the Court for evidentiary purposes on this certiorari.

QUESTION: What was the jurisdictional question?

MR. DUNLAVEY: There had been a State court action between Rath and both Becker and Jones in California, it involved different statutes, did not involve the off-sale procedure, but it antedated the federal cases by one week. And there was always an attempt to induce the federal court to stay its hand while the State court went along.

But the two cases were unrelated and were recognized as unrelated, and they progressed separately, each to judgment, in fact.

The question arises from the fact that these are prepackaged foods, and the law requires that they have a label

on them that tells what the net weight shall be. In the case of bacon it's a one pound net weight statement that appears on the package. In the case of flour, it can be two pounds or five pounds or ten pounds or twenty-five pounds. But an even number of pounds that is prescribed by California law.

The packages are preprinted so the issue is: How close do you have to come when you put the product into the package to correlate with the label that's already printed on it?

One thing that occurs to most people is: Why don't you simply say it was one pound when packaged?

The answer is, you cannot.

Federal law, each of these federal laws and the regulations under them, and California, to boot, preclude any kind of a qualification statement on the label. It has to say, flat, what the weight is, and not qualify it in any way.

Each of the federal laws that's involved in the certiorari starts off by saying that the label is required to have an accurate statement of weight on it.

Now, if you take that literally, if the bacon package says one pound, then there would have to be one pound of bacon in it, no more and no less. That would be an impossible requirement for all practical purposes, you can't turn these food products into equivalents of a jeweler's balance.

The statute permits the respective agencies to

promulgate regulations that will provide for reasonable variation from this exact statutory requirement. The agencies involved have done that as to each of these products. The regulations are essentially the same, except in one case they are permissive, in the other case they are mandatory, but in each case the agency has done it, so it really doesn't matter.

Those reasonable variations have been of two kinds, and there's a long history behind each of them.

The first is an unavoidable deviation that stems from good manufacturing practice. Now, that is simply a recognition that you can't put an exact weight into the package. It's a particularly aggravated situation with bacon, because the bacon slicer turns out an increment of slices, about 16 or 20 of them, that you find in your household package, which come pretty close to a pound; but, of course, it's not accurate.

It then goes to a scale, and a human being has to bring the weight of that increment into a reasonable correlation with a one-pound accuracy; and it's done by putting on or taking off a slice or a half slice, maybe a third of a slice, but that's about as far down as you go.

The industry's answer to that is to have what's called a pass zone, which means that ten-sixteenths --

QUESTION: What do they call it?

MR. DUNLAVEY: A pass zone. P-a-s-s zone.

QUESTION: Yes.

MR. DUNLAVEY: At the center of the pass zone is a target weight, and in the case of bacon, before this litigation arose, it was three-sixteenths of an ounce over one pound. That was the target that they were shooting at.

Now, you can't hit three-sixteenths over any more easily than you can hit an even pound, so then comes the pass zone, which says it will be acceptable if any given package of bacon is within five-sixteenths of an ounce over the target weight or five-sixteenths of an ounce under the target weight, anywhere in that pass zone will be acceptable.

And probability tell us that that target weight turns out to be the average weight.

The point is that when you're dealing with a product like bacon, where you have, say, 16 or 20 units that you use to make a pound, you can only come so close. In flour, which, of course, is a powder, it's poured into the bag until it reaches the labeled weight or approximately that.

Once again you have a target weight, but the pass zone doesn't have to be as broad because you can come much closer to accurate weight when you're measuring out a powder than when you're measuring out a strip of bacon.

But the point now has been made that when you're dealing with different products, you have to allow for

different amounts of unavoidable deviation in the course of good manufacturing practice.

In this case there is no question, no issue, that when these products were shipped, the products had an average weight that was accurate. As a matter of fact, in the case of each of them, it would jut be slightly over,enough to be sure that no happenstance had thrown the average below. But we will say that the averages were accurate when the products were shipped from the plant.

If you looked at any individual package, it would deviate from that accuracy only because of the manufacturing problem that I have just described. That would be the reason for any deviation.

Now, each of those products bears moisture. The hog is about, or over fifty percent water; the flour is about 14 percent water.

QUESTION: You also put water into the bacon afterwards.

MR. DUNLAVEY: Not afterwards, Your Honor. You put water and salt solutions into the hog carcass in the process of curing it, but the law requires you to dry it all out before you ship the product.

QUESTION: You don't put water in the bacon?

MR. DUNLAVEY: You don't -- when you ship the bacon, it has no more water in it than the natural hog --

QUESTION: No, but don't you put it in before you cut it?

MR. DUNLAVEY: Not -- you put water --

QUESTION: Before you slice it?

MR. DUNLAVEY: You put water with a salt solution into the bacon and cure it, then you dry it and heat it, and that water comes back out again. Has to. So that water is not part of the problem.

QUESTION: Well, what is that you get in the pan when you cook bacon that's not grease?

MR. DUNLAVEY: Beg your pardon, Justice?

QUESTION: What is the substance in the pan when you cook bacon that is not grease? Water.

MR. DUNLAVEY: Well, the water will have boiled out, I would submit, it probably is liquid grease. But water does come out, there's no question about it. You see the steam rising off the pan, and that's the water vapor leaving the bacon.

These packages that the products are in are paper. They are sealed. They are pretty well sealed. But the paper is porous, the sealing is not moisture-tight, and so those products are going to lose some of their natural moisture content between the time that the manufacturer packages them and the time the consumer picks them up.

QUESTION: Now, you say "some"; on the average, how

much?

MR. DUNLAVEY: I would say,on the average, two percent. That's been the amount --

QUESTION: On both flour and bacon?

MR. DUNLAVEY: Yes. For flour --

QUESTION: But flour could gain. Flour is hygroscopic, isn't it?

MR. DUNLAVEY: Flour is hygroscopic, and flour can gain at a relative humidity in excess of 60 percent. Obviously these cases don't involve --

QUESTION: Bacon is always going to lose, --

MR. DUNLAVEY: Bacon is a one-way street, it will always lose.

QUESTION: -- flour can lose or gain?

MR. DUNLAVEY: That's correct, Mr. Justice Stewart.

So the federal regulation says that moisture loss or gain that comes from good distribution practice will also be recognized.

Now, that regulation does not say that we will allow you to overpack so that the moisture loss does not bring it down to exact weight during distribution; it is not a recognition of an overpack to compensate for the forthcoming moisture loss, it's a recognition --

QUESTION: Is it clear that it would violate the federal law and the federal regulations for a manufacturer to

have a slight overweight at the time of shipment?

MR. DUNLAVEY: It would violate the federal law, because --

QUESTION: Where is that in the record, or in the briefs?

MR. DUNLAVEY: You have to use the --

QUESTION: I've seen it in the argument, but I haven't -- I can't find it in the law anywhere.

MR. DUNLAVEY: It has to be a rule of reason, because the statute says exact, except for two variations from specified causes. It does not say also a variation that you deliberately put in there, which we will call the overpack. That would be a variation --

QUESTION: If you say something weighs a pound and, in fact, it weighs a pound and a tenth, that's clear that would be a violation of the federal regulations, is it?

MR. DUNLAVEY: If you're outside the reasonable range, because of the manufacturing problems, yes. If you put a tenth of an ounce in there intentionally, that would be a violation.

QUESTION: Well, I couldn't find that explicitly in the regulations or the law.

MR. DUNLAVEY: If you're looking for words that say precisely that, I submit you will not find them, Justice Stewart. It has to be reasoned. And it --

QUESTION: And that's quite important, because that's the whole basis on which the -- on which your argument depends, isn't it?

MR. DUNLAVEY: That is important; no question about it.

QUESTION: Could it be practice in the industry?

MR. DUNLAVEY: You can overpack -- of course anybody can overpack, it's not going to save the consumer anything because he's going to pay for it; but when you start to overpack, you get into Pandora's jar, because nobody knows by how much. We've gone through that in this case extensively, and it's impossible to tell how much you should overpack to anticipate any given amount of moisture loss. And then the consumer cannot make his value comparison, because he doesn't know how much Brand X is overpacked as contrasted with Brand Y.

So, while it's possible, you're getting into a question of, Does the federal law proscribe it? And it does not.

QUESTION: Well, if there were no preemption here --

MR. DUNLAVEY: Your Honor?

QUESTION: If there were no preemption here, would you have to overpack to satisfy the California statute?

MR. DUNLAVEY: There is no other way that I'm aware of.

QUESTION: And it's your argument that you can't do

that without violating the federal statute, to overpack?

MR. DUNLAVEY: My argument is twofold.

First of all, it's a different requirement from the federal law, and that's as far as you need to go for the Meat Act and the Fair Packaging Act.

QUESTION: But it need not be different -- I mean, it's different only if this law and regulations are necessarily read the way you say they must be read. Otherwise, they are not different.

MR. DUNLAVEY: Well, the regulation for the manufacturing practice, of course, has nothing to do with this problem.

QUESTION: No.

MR. DUNLAVEY: The regulation for loss of moisture says: We will recognize the loss of moisture that occurs, after it occurs in the good distribution practice. Not so --

QUESTION: But it doesn't use the word "after", it doesn't use "thereafter", which is what the government says in its brief.

MR. DUNLAVEY: It says"during good distribution practice".

QUESTION: It would seem to me that if the -- it could be read that since federal standards do permit variations from accurate weight due to water loss, they permit them at the time of shipment.

MR. DUNLAVEY: I submit, Your Honor, it has to be reasoned that when it says "we will recognize the loss that occurs after the distribution process commences" --

QUESTION: It doesn't say "after".

MR. DUNLAVEY: It says "during": "during good distribution practice", that the only inference can be that it does not mean we will recognize an overpack that you put in there in order to compensate for the loss you know is coming.

Handbook 67, although I hate to fall back on that, because I'm condemning it, --

QUESTION: Because your claim is it's not here.

MR. DUNLAVEY: That's right, it doesn't belong here at all.

But it does say that even the States, when they recognize the moisture loss, recognize it at some point after distribution begins. There has never been any real question otherwise; argument yes, but not in practice.

QUESTION: Does the moisture loss vary depending on time and geography? Would it be the same in California as in South America or Alaska?

MR. DUNLAVEY: It will vary with time, of course. Because moisture loss is a continuing thing, and the longer it occurs, the more it will be. It was vary with the temperature of the storage, because the vapor pressure of the water is lower at the lower temperature, and that retards the evapora-

tion.

QUESTION: If that is so, would it be possible for overweight to be included at the point of shipment to adjust for future moisture loss?

MR. DUNLAVEY: Not accurately. If I put a pound and a half of these products into a one-pound package, I can be pretty sure that when the consumer buys it, it will have at least a pound in it; but when I -- and that's the only way, to over-estimate what the overpacking shall be. But once you do that, then you have foiled the purpose of the Fair Packaging Act that says value comparison is our goal.

QUESTION: Well, wouldn't there be another way for the manufacturer to comply with both statutes, at least with respect to the flour? Couldn't he put them in a hermetically sealed package?

MR. DUNLAVEY: If you have ever seen a house with a plaster wall, you know you can't seal the wall, because you get condensation on it.

There is a problem analogous to that with flour. If you put that flour in an airtight, hermetically sealed bag, that moisture is going to be loose inside the bag if the outside of the bag is cold and it can't get out, it will condense on the inside of the bag. Then your flour turns into lumps; then you've got a problem.

QUESTION: What's your statutory argument on pre-

emption?

MR. DUNLAVEY: The statutory argument on preemption, I should go first through the State procedures, because the goal, of course, is to show a difference.

To jump to Your Honor's question, the Wholesome Meat Act says that the States cannot impose a labeling requirement that is different than the federal.

QUESTION: Where do you print that in the brief or petition?

MR. DUNLAVEY: Well, that would be Section 678, Your Honor, --

QUESTION: Well, where is it in the brief?

MR. DUNLAVEY: By page, I -- I can only turn to the index in the brief, Your Honor; I don't know offhand.

On my respondents' brief, it would be pages 23, 26 and 54.

QUESTION: Okay.

QUESTION: Also on page 8 of the government's amicus brief, there is a quotation from it.

MR. DUNLAVEY: But the statutory language is that there shall be no labeling requirement in addition to or different than which is to be imposed by any State.

Now, it's clear that the federal law and the State law in California are different.

Now, there has been attention brought to another

clause in the statute that says California and other States have concurrent jurisdiction, but that concurrent jurisdiction is not to define what is a mislabeling or a misbranded package. The concurrent jurisdiction is over the article itself, that's the way the statute reads. The concurrent jurisdiction is over the article, so that the State can prevent its distribution if it's misbranded, under the federal test.

QUESTION: Now, under -- what is that? 678, isn't it?

MR. DUNLAVEY: Yes, Your Honor.

QUESTION: If -- when Congress has said, if the State regulation is -- what's the language -- different -- in addition to or different from; and if you can persuade us that it is, I gather the statute controls, doesn't it?

MR. DUNLAVEY: I would certainly think so, Your Honor.

QUESTION: That makes -- that's the end of the case. Well, areyou going to get to that?

MR. DUNLAVEY: Yes, Your Honor.

QUESTION: All right.

MR. DUNLAVEY: Justice White put me on my last page first.

The Fair Packaging and Labeling Act is much like the Wholesome Meat Act. It says that the State law cannot be less stringent than or require information different from the

federal.

Now, when you're talking about something that's less stringent, that is not quite the same as talking about something that's different from.

But we have legislative history to bring us out of that ambiguity. The Senate Report says that the intent of this statute is to supersede any State net quantity labeling requirements which differ from the federal.

So, in the Fair Packaging Act, just like the Meat Act, we are back to the question merely of "Are they different?"

QUESTION: And how is the California standard different from the federal standard?

MR. DUNLAVEY: All right.

California's difference starts with the statute itself, because the California statute says that it will not permit the sale of packages whose average is less, at the time of sale, than the net weight which is stated upon the package.

Now, if you reflect upon that a minute, the difference is already becoming clear.

California says that the average of the group of packages can be overweight -- and that's all right. It can be exact weight, and that's all right. But it cannot be less.

And then the statute says, we will leave it to the regulation to dictate the weighing procedures to find out whether the statutory test is met.

And that brings us to Article 5. And Article 5 is the sampling procedure. Its purpose is to take a limited number of packages from a much larger over-all group, to weigh those packages and then to estimate what the lot average must be.

Now, as soon as you start to estimate what the larger number of packages weighs by resorting to only a few of them, you're into the area of probability. And Article 5 is nothing but the statistician's procedure for determining whether the lot, the whole number of packages, has an average weight less than labeled weight.

Now, the first thing that the article brings to mind is that you're already talking about a lot or a group of packages which is different from what the federal government was testing at the plant.

If you have 100 packages whose average is X, and you take any ten of them, the chances are that the average of the ten is not going to be exactly X. And that's the first problem with the State procedure, because they are only investigating a portion of the over-all lot that the federal estimated.

The second difference is that the federal -- that the State says, We are going to charge against the manufacturer all of the product weight that sticks to the wrapper. That's like telling the manufacturer of catchup that if I can't get

your catchup out of the bottle, I'm not going to give you credit for having put it in.

That's the wet tear, the wet wrapper philosophy of the State versus the dry wrapper or the dry tear philosophy of the federal. The federal government says We'll give you credit for all that put in. The State government says, No, we'll only give you credit for what our inspector can take out.

Now, in trying to ascertain the average of the lot from a limited number of samples, the regulation first has to decide whether there are any of those samples that are aberrations on the over-all picture. That is, is there an unreasonable error in any of those packages?

So it says, the State regulation says that the permissible plus or minus variation of each of these packages in the sample is limited in this fashion: First of all, you have to find out how many packages there are in this lot. And the regulation is blind as to what they are packages of, it doesn't distinguish between bacon and flour or anything else; it simply says, Tell me first how many packages are in the lot. And from that, I will tell you what to put in your sub-group, and from that I will help you find out those packages which cannot be counted in your averaging procedure.

The second thing is to determine the range of the samples, which means, what's the difference between the heaviest package in the sample and the lightest package?

That range, no matter what's caused it, becomes another factor in deciding whether a package in the sample can be counted.

The next thing is: What's the total variation in these sample packages? If three of them are overweight and two of them are underweight, what's the net balance? And that, whatever caused it, is also a factor in determining the unreasonable variation of the individual package.

QUESTION: Mr. Dunlavey, are you asking us to throw out any kind of a statistical procedure here at all?

MR. DUNLAVEY: No, Your Honor, I most certainly am not. There has been a confusion in the briefs between statistical sampling and averaging. Averaging for one purpose or another.

A statistical sampling, in the proper sense of the word, simply means: Give me a few packages and I will find out for you the characteristic, whatever you want to make that characteristic, of the larger number.

If the goal of the statistical sampling were right, there would be no objection to it. The problem with Article 5 is it has the wrong goal.

QUESTION: The real incompatibility, as I understand it, the basic incompatibility, as I understand it -- and tell me if I misunderstand it -- is that the State regulation requires a certain rate at the time of sale, and the federal

law and regulation requires certain weight at the time of shipment. Is that it?

MR. DUNLAVEY: And of course distribution takes place after shipment.

QUESTION: After shipment.

MR. DUNLAVEY: So that has to be allowed for, also.

QUESTION: Well, isn't that it? Or am I wrong?

MR. DUNLAVEY: If -- yes, if the -- that's a very terse condensation, but it's --

QUESTION: Well, that's what it was intended to be.

MR. DUNLAVEY: I will say yes, that that's it, but subject to the qualifications that I've already covered in my argument.

QUESTION: Well, isn't it enough, from your point of view, from your argument, to show that it is different from, and at that point you argue, I take it, that preemption --

MR. DUNLAVEY: Takes its course.

QUESTION: -- begins?

MR. DUNLAVEY: That's correct, Your Honor.

QUESTION: And what the difference is becomes, at least relatively, irrelevant, even though we need to have it demonstrated to us.

MR. DUNLAVEY: That's exactly right as to the Wholesome Meat Act and the Fair Packaging Act, because they say just to be different is enough for preemption. There is a

little bit more to the Food and Drug Act, but basically it's the same problem. In fact, the difference rises to the dignity of an irreconcilable conflict, and of course that's why that Food and Drug Act preempts also.

Let me make one thing clear, if I may, Mr. Justice Stewart. The evidence and the record in this case are unequivocal on two points. California law does not allow any deviation whatsoever because of good manufacturing practice. It simply doesn't.

California law also does not allow any deviation for loss or gain of moisture during good distribution practice.

QUESTION: Well, it measures it at the time of sale, it doesn't say anything about distribution practice. California measures the weight at the time of sale. Isn't that correct? After the distribution has taken place.

MR. DUNLAVEY: That is absolutely correct. And the inspectors have told us, just as you can ascertain from reading the statutes and regulations on their face, "We make no allowance for unavoidable deviations for either of the two causes prescribed by the federal law. In no way do we make allowance for those two reasons."

QUESTION: And I take it that's where you say it differs from the federal standard, --

MR. DUNLAVEY: Yes, Chief --

QUESTION: -- one of the points of difference.

MR. DUNLAVEY: Yes, Mr. Chief Justice. That is a very substantial difference, and that should be enough to carry the day. It's frosting on the cake to say that that difference rises to the point where you can't comply with federal and State law at the same time. And that's the worst kind of difference, and that is good for preemption, even for a statute like the Food and Drug Act, that is not an express preemptory --

QUESTION: That's on the basis that you put too much in at the beginning. In order to be sure you have enough at the sale place.

MR. DUNLAVEY: That's exactly right, Justice Marshall.

QUESTION: And by doing that, you violate the federal law, by putting too much in.

MR. DUNLAVEY: Yes, Mr. Justice Marshall, that's right. Andyou can see that that is an evil that can lead to a lot of complications, because if people are overpacking to meet the requirement in California, each one has to decide for himself how much he's going to overpack, the customer will never know; the customer then cannot make an intelligent price comparison, because he doesn't know what the food value is in the package when he buys it.

QUESTION: He knows it is at least the weight or quantity that is marked?

MR. DUNLAVEY: Yes, but he won't know whether 79 cents

for a pound and an ounce is a good buy, as compared with 81 cents for a pound and two ounces, because, as far as he knows, each package has only got a pound in it. So he's deprived of the chance to make his decision.

QUESTION: I know it's in the statute, and I appreciate your argument, but if I was buying a pound of bacon and I got a pound and a quarter for the same price, I don't think I'd quarrel.

MR. DUNLAVEY: Mr. Justice Marshall, you know you're not going to get a pound and a quarter of bacon for the price of a pound.

If you get a pound and a quarter in your package, the price you pay is going to reflect it. There is nothing -- there is no "something for nothing" in this lawsuit.

QUESTION: Mr. Dunlavey, does the record tell us whether any representative of the federal government has ever asserted an overpacking -- that overpacking is a violation? Have you ever been criticized for overpacking, or any packer, or anybody subject to this statute?

MR. DUNLAVEY: The record in this case would be silent on that, I believe, Justice Stevens.

QUESTION: And the Solicitor General, or nobody representing the United States, has ever been asked his views on this issue, which is critical to your whole argument, isn't it?

MR. DUNLAVEY: Oh, the Solicitor General has made it very clear that you cannot overpack. That is a violation of the federal law.

QUESTION: That is?

MR. DUNLAVEY: And the Food and Drug Administration has said in --

QUESTION: I understand.

MR. DUNLAVEY: -- a brief to the Ninth Circuit that "We're not going to require these manufacturers to overpack, because that's not the policy that our agency is enforcing."

QUESTION: Not require it, but not permit them -- the word would be "permit" rather than "require".

It would seem to me, I don't know, but just from everything you've said, if you did add another sixteenth of an ounce or so, maybe you'd have enough in there so you comply with both statutes. I'm just -- is it perfectly clear you couldn't do both?

MR. DUNLAVEY: It is perfectly clear that if you put extra bacon or flour into your package, not because of the manufacturing problem, not because of a distribution moisture loss problem, but simply because you're going to overpack intentionally to allow for something that you know is coming, that is a variation that is not permitted by federal statute or federal regulation.

QUESTION: Now, where, in these papers that we have,

is that perfectly clear?

Because that's a necessary link in your argument.

MR. DUNLAVEY: If I have done my job -- and I hope I have -- respondents' brief is very clear on that point, Your Honor. That you cannot serve both masters.

QUESTION: Well, what is it? Is it a regulation? Is it an interpretation of the statute? Is it the language of the statute? What precisely is it that supplies that link?

MR. DUNLAVEY: It comes from this chronology, or sequence, --

QUESTION: I mean, is it just an argument on your part?

MR. DUNLAVEY: Yes, I suppose it could be categorized as that, Mr. Justice Rehnquist; but it's more than an argument, really, because the statute says, first of all, it will be accurate weight. No exemptions. No deviations, for any reason.

Then the regulation comes along and says, "No, it can deviate from accuracy for one of two causes; but over-packing is not one of those two causes." Therefore, it must be contrary.

QUESTION: Mr. Dunlavey, I don't quite understand why -- since the preemption section says that the federal controls if it's different from -- if the State is different from the federal. Why isn't, at least as to bacon, it enough

to affirm, that the federal statute focuses on the time of packaging, and the State at the time of sale? Why isn't that the end of the case, as to bacon?

MR. DUNLAVEY: I really have no answer to that. That is the end of the case.

QUESTION: Then what's the relevance of all this overpacking --

QUESTION: Even if you could comply with both of them, the preemption section controls the case, in your view, I take it?

MR. DUNLAVEY: The two statutes that say that preemption shall occur as to anything that's different, yes. Then, as to those statutes, which are Meat and Fair Packaging, it makes no difference whether you could comply with both. You don't have to.

The federal law --

QUESTION: Although the packaging is an irrelevancy, at least as to meat, isn't it?

MR. DUNLAVEY: Overpacking is an unacceptable or --

QUESTION: Well, acceptable or not, for purposes of deciding whether or not the federal statute preempts, if the federal statute speaks to the time of packaging and the State statute the time of sale, why isn't that the end of it under the preemption clause?

MR. DUNLAVEY: I would agree with Your Honor, that --

QUESTION: On bacon.

MR. DUNLAVEY: -- if you can interpret the law that meticulously, that is sufficient. They are different. The law says they shall not be different. That's the end of the case.

QUESTION: Well, they're different, but they are not necessarily inconsistent. If the State law required that the packaging be of a certain color, and the federal law didn't say anything about color, would that be?

MR. DUNLAVEY: That wouldn't be this case. If the federal law doesn't tell you, in a given area, that you neither have to do something, nor must not do something --

QUESTION: And the federal law doesn't say anything about what it has to be at the point of sale. And the State law doesn't say anything about what it has to be at the time of packaging. So where -- how are they different?

MR. DUNLAVEY: Well, Your Honor, may I suggest that the federal law does say what it has to be at the time of shipping as well as at the time of sale.

QUESTION: The federal law says what it has to be at the time of shipping.

MR. DUNLAVEY: And what it has to be at the time of sale, because what it has to be at the time of sale is a combination of what it was when it was shipped, plus what's happened to it in the meantime.

QUESTION: Well, it's a product of -- it's a consequence of what it was at the time of shipping. And the federal law, you told us, I thought, applies only to the time of shipping.

MR. DUNLAVEY: That's not literally right. The federal law says that when the product is shipped, its label has to be accurate, subject to only one of these two deviations.

QUESTION: Right.

MR. DUNLAVEY: That's the manufacturing.

QUESTION: The manufacturing of the product --

MR. DUNLAVEY: That's the shipping time requirement of the federal law. And the federal law says you have to expand that into the moisture loss that comes afterward.

QUESTION: In the distribution process. In the course of it.

MR. DUNLAVEY: That becomes a distribution problem. So they are cumulative by the time they reach the consumer.

QUESTION: But it doesn't have an impact directly at all at the time of sale, does it, the federal law or regulation?

MR. DUNLAVEY: Only that the distribution lastsup until the time of sale.

QUESTION: But if the State directs itself to the time of sale, that's an additional requirement, isn't it?

MR. DUNLAVEY: Yes, of course, Your Honor, an additional --

QUESTION: It's an additional over and above, or even if it's no more rigid, even if it were no more rigid, it's an additional requirement.

QUESTION: If something is additional, is it necessarily different? That's the question.

MR. DUNLAVEY: These two are different --

QUESTION: It's additional or different in the standard --

MR. DUNLAVEY: In the Meat Act, additional or different; that's correct.

But, if I may, Mr. Justice Stewart, when you talk about the course of good distribution practice, you are talking about things that happen up until the day the customer pulls it out of the cooler and buys it.

And so, any federal requirement that extends up to that point, really, is extending up to the point of sale.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 10:41 o'clock, a.m., the case in the above-entitled matter was submitted.]

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