

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

UNITED STATES OF AMERICA,)	
)	
)	
v.)	CRIMINAL NO. 00-10-P-H
)	
ALAN ARCHIBALD,)	
)	
DEFENDANT)	

ORDER ON MOTION TO DISMISS INDICTMENT

The Grand Jury has charged the defendant Alan Archibald in an Indictment containing three counts.

First, conspiracy

- (a) to defraud the government by defeating lawful Federal Highway Administration (“FHA”) functions;
- (b) to violate FHA statutes and regulations by violating an out-of-service order the FHA issued against Aulenback Trucking;
- (c) to conceal the violation by altering drivers’ logs, making false statements to FHA representatives, destroying original documents and providing altered documents to the Grand Jury.

Second, violation of FHA statutes and regulations by violating an FHA out-of-service order; and

Third, violation of 18 U.S.C. § 1001 by scheming to conceal Aulenback Trucking's violation of the out-of-service order.

The defendant has moved to dismiss the Indictment. I will therefore assume for purposes of this motion that the government can prove all the allegations contained in the Indictment. The defendant maintains that the FHA out-of-service order he violated was invalid because it was based upon previous noncompliance by his company, Aulenback Trucking, rather than upon any imminent safety hazard. See Aulenback, Inc. v. Federal Highway Admin., 103 F.3d 156 (D.C. Cir. 1997) (dismissing the same argument as moot after the parties entered into a consent agreement to lift the order and at a time before criminal charges had been brought; in dictum stating that past violations are not alone sufficient to justify an out of service order).¹ The government responds that this is not the proper forum in which to attack the order and that the asserted defect is no defense to the crimes charged. I conclude that the government is correct.

¹ Assuming that the FHA order was in fact invalid, I observe that this argument would affect only Count Two and what I have characterized as Part (b) of Count One. In other words, any invalidity of the out-of-service order would not affect Count Three, the concealment count, or those portions of Count One, the conspiracy count, that deal with conspiracy to defraud the government or conspiracy to conceal.

In Yakus v. United States, 321 U.S. 414, 433 (1944), the United States Supreme Court established the principle that Congress can require the validity of a regulation to be challenged in only a particular forum. Its more recent decision, United States v. Mendoza-Lopez, 481 U.S. 828 (1987), implicitly confirmed that principle, but opened a small window for due process attacks. Specifically, in Mendoza-Lopez, the Court assumed that an earlier administrative proceeding (a deportation hearing) had violated the defendant's right to due process. In the deportation hearing, the Immigration judge had permitted the defendant to waive his right to appeal in circumstances that were not "considered or intelligent." 481 U.S. at 840. The Immigration judge's decision thereby deprived the defendant of all judicial review of his earlier deportation proceeding. As a result, the Court held that it would be unconstitutional to prevent the defendant from attacking his earlier deportation at his later criminal trial where the crime charged depended upon the existence of the earlier deportation order.

The defendant argues that I, as the presiding judge in his criminal trial here, should likewise determine the validity of the FHA out-of-service order he violated. He maintains that this is his first opportunity to have the order reviewed, and that the Court of Appeals for the District of Columbia Circuit dismissed as moot an earlier attempt, before the criminal charges were

brought. See Aulenback, 103 F.3d at 163. In fact, however, the defendant never tried to challenge the validity of the out-of-service order before choosing to violate it. The chronology is as follows, according to the defendant's motion. On January 29, 1999, the FHA issued the out-of-service order. From January 29 to 31, the defendant violated the order (the defendant does not admit the violations, but that is the relevant time period for any violation). On January 31 his company, Aulenback Trucking entered into a consent agreement with the FHA resulting in the FHA's lifting the order. On February 9, Aulenback Trucking petitioned the FHA and the District of Columbia Circuit for a stay of the order and on February 26 Aulenback Trucking petitioned the FHA for review of the order.²

The FHA statute explicitly provides that judicial review of any FHA order is to occur in the circuit court of appeals—either the District of Columbia Circuit or the circuit where the alleged violation occurred (here, the First Circuit). See 49 U.S.C. § 521(b)(8). That is a clear indication that review in a later criminal trial was not intended.³ In addition, Congress

² Although the legal memorandum is not entirely clear, the defendant may be suggesting that he personally was unable to challenge the order. See Reply Br. at 5-6. Certainly through his closely-held corporation (of which he is President, see Mot. to Dismiss at 1), he was able to challenge the order and did so, but did it late.

³ This case is unlike McKart v. United States, 395 U.S. 185 (1969). There, the statute prohibited all judicial review *except* as a defense to a criminal prosecution. In McKart, the government argued that the defendant could not challenge the legality of the order (continued...)

provided explicitly that a party could seek to have the FHA order stayed in connection with such a review. See 49 U.S.C. § 521(b)(8). Stay of the order would avoid the need to violate it as a way of testing it.⁴ Moreover, this is the very type of case that calls for exhaustion of the administrative remedy. Assessment of the need for a safety order involves administrative discretion and interpretation of the significance of a company's past history in assessing its current risk factors. These are issues best presented first to

³ (...continued)

because he had not taken certain *administrative* (not judicial) appeals. The Court observed that the statute "said nothing which would require registrants to raise all their claims before the appeal boards," 395 U.S. at 197, and in that context uttered the words the defendant here relies upon:

it is well to remember that use of the exhaustion doctrine in criminal cases can be exceedingly harsh. The defendant is often stripped of his only defense; he must go to jail without having any judicial review of an assertedly invalid order. . . . Such a result should not be tolerated unless the interests underlying the exhaustion rule clearly outweigh the severe burden imposed upon the registrant if he is denied judicial review.

395 U.S. at 197. No such limitation of judicial review is present in this statute.

⁴ In that respect, this case is unlike Estep v. United States, 327 U.S. 114 (1946). In Estep, not only did the statute fail to provide any judicial review but the defendant also had exhausted all the avenues of administrative appeal before ultimately defying the order and being prosecuted criminally. There, the Supreme Court allowed the defendant to challenge the validity of the order. This case is also unlike Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978), where the Court ruled that when a statute permitted the agency to issue an "emission standard," a defendant could challenge the legality of an agency action on the basis that it was *not* an emission standard. Here, there is no question that what is being tested is an FHA out-of-service order; it is just that the defendant thinks that the FHA had inadequate grounds for issuing the order.

the agency for evaluation rather than to a court. See McKart, 385 U.S. 193-94 (highlighting the administrative benefits of the Exhaustion doctrine).

As a result, I conclude that the defendant may not challenge the validity of the FHA out-of-service order in this criminal prosecution. The motion to dismiss the Indictment is therefore **DENIED**. The request for a hearing on the validity of the out-of-service order is **DENIED** as unnecessary.⁵

Nevertheless, as a matter of judicial economy I also point out that the government may wish to reconsider its prosecution strategy as it brings the matter to trial. If I am wrong in the opinion I have issued here, Count Two is defective. A verdict on Count Three may survive appeal, but a verdict on Count One will be subject to reversal because one of the three alleged purposes/objects of the conspiracy will be tainted. See United States v. Mitchell, 85 F.3d 800, 810 n. 8 (1st Cir. 1996); Griffin v. United States, 502 U.S. 46 (1991) (clarifying multiple-object conspiracy jurisprudence and distinguishing legal error, which would render an entire multiple-object conspiracy verdict problematic, from insufficiency of proof, which would

⁵The defendant has stated that he is now seeking review of the out-of-service order in the First Circuit. Even if the First Circuit ultimately finds the out-of-service order to be invalid, my holding is that the defendant can still be guilty of the crimes charged because he proceeded to violate the order without first challenging it and obtaining a stay.

not). The government could avoid that outcome by narrowing at least the conspiracy charge in the Indictment.

SO ORDERED.

DATED THIS 25TH DAY OF APRIL, 2000.

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE

U.S. District Court
District of Maine (Portland)
CRIMINAL DOCKET FOR CASE #: 00-CR-10-ALL

USA v. ARCHIBALD

Filed: 01/20/00

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