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TRADE RESTRAINTS--APPLICABILITY OF SHERMAN ACT TO BY-LAWS OF NEWS SERVICES

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TRADE RESTRAINTS—APPLICABILITY OF SHERMAN ACT TO BY-LAWS OF NEWS SERVICES—The Associated Press is a non-profit association of more than 1,200 publishers. It is incorporated under the laws of New York [1] for the collection, assembly, and distribution of news for the exclusive benefit of its members. The United States charged in an action before a special three-judge district court [2] on a motion for a summary judgement [3] that the news service had violated the Sherman Anti-Trust Act [4] because its by-laws restricted the sale of news to nonmembers and gave each member the power to block the admission to membership of competitors, and because it had a contract with the Canadian Press, a similar organization in Canada, under which they would furnish news exclusively to each other. *Held,* that the injunction of the District Court of the observance of the by-laws and restrictions on sale of news and, pending the revision of the by-laws, a temporary injunction against the enforcement of the contract with the Canadian Press should be affirmed. *Associated Press v. United States,* (U.S. 1945) 65 S. Ct. 1416.

In this case the application of the Sherman Act to the organization and activities of the Associated Press marks an extension of enforcement of regulation into a new field. The case is also unusual because it was tried on a motion for summary judgment. Thus the record presented for review was limited to the pleadings and affidavits submitted. The Court, while holding that the rule

[1] N.Y. Consol. Laws (1939) c. 35.

[2] 15 U.S.C. (1940) § 28.

[3] Federal Rules of Civil Procedure, rule 56.

[4] 15 U.S.C. (1940) §§ 1-7.

should be cautiously invoked, sustained the use of such summary proceedings on the ground that there had been no injustice to the appellants because the record did present the history of the by-laws and the status of the organization in relation to other news services on which the Court could make a determination. The absolute veto given to the members of the association against applications for membership had been held in restraint of trade in Illinois.[5] Thereupon the AP incorporated under New York statutes. Publishers who still could not obtain membership registered complaints with the Department of Justice, resulting in a "right of protest" which prevented the directors from admitting a new member unless overruled by a four-fifths vote of the entire association. By amendment this was changed in 1942 so that the board of directors could elect new members except where the applicant would compete with a present member who would not consent to admission. A majority vote of the association determined the question in that event. If admitted, the applicant still had to pay 10 per cent of the assessment received from members in the same area since 1900 and surrender any exclusive privileges. All members were required to sell their spontaneous news only to the AP. The by-laws on their face constituted a contract in restraint of trade from the viewpoint of the majority opinion written by Justice Black. Ordinarily, an association can choose its own members and require an entrance fee. Such a contract would be invalid under the Sherman Act only if it restrained the free flow of commerce or tended to create a monopoly.[6] The news services of the AP had been held by previous decisions to be interstate commerce.[7] The persuasive factor here is that the restrictive membership provisions were applicable only to competitive areas. Although their main object is to give members adequate news service and protect a valuable right, their effect was to eliminate competition. A good motive, however, will not prevent the application of the Sherman Act.[8] The majority paid slight attention to the actual past effect of such agreements for three reasons. First, whether the attempts to restrain commerce had been "wholly nascent or abortive, on the one hand, or successful . . . on the other" such a contract per se was invalid.[9] Secondly, by so restricting the possibilities of newcomers to enter the field, competition was restrained. Justice Douglas pointed out in his concurring opinion that the Court did not decide whether the provisions of the by-laws were so effective that they created a monopoly. The findings of the district court persuasive with the majority were that the AP was "the largest and chief single source of news of the American press." If the court had decided that the by-laws

[5] Inter-Ocean Publishing Co. v. Associated Press, 184 Ill. 438, 56 N.E. 822 (1900).

[6] Fashion Originators' Guild of America, Inc. v. Federal Trade Commission, 312 U.S. 457, 61 S.Ct. 703 (1941); United States v. Bausch & Lomb Co., 321 U.S. 707, 64 S.Ct. 805 (1943).

[7] International News Service v. The Associated Press, 248 U.S. 215, 39 S.Ct. 68 (1918); Associated Press v. National Labor Relations Board, 301 U.S. 103, 57 S.Ct. 650 (1937).

[8] Standard Sanitary Manufacturing Co. v. United States, 226 U.S. 20, 33 S.Ct. 9 (1912).

[9] United States v. Socony Vacuum Co., 310 U.S. 150 at 225, note 59, 60 S.Ct. 811 (1939).

of the AP were valid, conceivably it might soon have to face the situation in which the three largest news services including the AP might individually adopt such restrictive provisions that as a group they could bar any newcomer from the field of distribution of news to publishers. The contracts here are compared to the limited trade outlet system which had been held invalid.[10] Thirdly, since the subject matter of the enterprise is news, the public is interested in the widest dissemination possible. In invoking the Sherman Act in this area the Court was preserving the guaranty under the First Amendment against governmental interference from repression by private interests. In spite of the fact that the Court explicitly states that the AP is not held to be a "public utility" it is inherent in the evaluation of the membership contract that the business should not only be free of undue restraints of competitors but free to serve the widest possible reading public. Justice Frankfurter substantiates this position in his concurring opinion, saying: "A public interest so essential to the vitality of our democratic government may be defeated by private restraints no less than by public censorship." [11] The Court, therefore, appears to revert to the strict common law position expressed by Justice Peckham in *United States v. Trans-Missouri Freight Association*,[12] that a contract which restrains trade is invalid. This position on the record presented was sharply criticized by Justices Roberts and Murphy. Both view the consideration given to the evidence in the record as inadequate. Justice Roberts points out that there was evidence showing that the AP was not in effect restraining trade by this contract because there was active competition from other news services and that as such, such an agreement was not unreasonable. Justice Murphy, on the other hand, weighing the importance of the decision finds that the evidence falls short of sustaining a violation of the Sherman Act because there was no more than a showing that membership was extended for a competitive advantage without a resulting monopoly which deprived the public of access to news. The evidence made no showing of coercion which had been an element invalidating other contracts restraining trade.[13] Thus, he contends, a jury trial should have been given to receive such information. The dissenting justices also directed their criticism to the form of the decree which is similar to others granted in recent cases in this field.[14] The effect of the decree providing for a satisfactory revision of the by-laws on which the decree enjoining the Canadian Press contract may be contingent puts the Court in the position of supervising the manner in which news is made available to publishers. This decree may be justified on the ground that the Court is not only interested in preventing restraints of trade but in

[10] Montague & Co. v. Lowry, 193 U.S. 38, 24 S.Ct. 307 (1904); Eastern States Retail Lumber Dealers' Association v. United States, 234 U.S. 600, 34 S.Ct. 951 (1914); United States v. Crescent Amusement Co., 323 U.S. 173, 65 S.Ct. 254 (1944).

[11] Principal case at 1428.

[12] United States v. Trans-Missouri Freight Association, 166 U.S. 290, 17 S.Ct. 540 (1897).

[13] Fashion Originators' Guild of America, Inc. v. Federal Trade Commission, 312 U.S. 557, 61 S.Ct. 703 (1941), and note 8, supra.

[14] United States v. Bausch & Lomb, 321 U.S. 707, 64 S.Ct. 805 (1943); United States v. Crescent Amusement Co., 323 U.S. 173, 65 S.Ct. 254 (1944).

policing the enforcement of its own orders. Thus, reverting to old common law doctrines, the Court in a summary judgment proceeding limited the scope of its judicial notice to the contract and a few attending circumstances and prescribed within its discretionary power a revision of corporate by-laws in order to promote a free press. As Justice Murphy remarked here: "We stand at the threshold of a previously unopened door." [15]

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[15] Principal case at 1442.