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Antitrust Law—Constitutional Law—Commerce Clause--Applicability of State Law to Professional Baseball.—State v. Milwaukee Braves, Inc.

Joseph Goldberg

CASE NOTES

Antitrust Law—Constitutional Law—Commerce Clause—Applicability of State Law to Professional Baseball.—*State v. Milwaukee Braves, Inc.*[1] —The Milwaukee Braves operated a major league baseball team in Milwaukee, Wisconsin from 1953 to 1965. In October 1964, the board of directors voted to move the franchise from Milwaukee to Atlanta, Georgia. Under the rules of the National League of Professional Baseball Clubs, permission of the member clubs of the league was necessary to transfer the franchise.[2] The National League approved the transfer, effective with the 1966 season.[3] The State of Wisconsin brought this action in August 1965 against the Braves, the National League, and the nine other teams in the league, alleging[4] that the defendants, by approving the transfer to Atlanta without granting another franchise to the Milwaukee area, conspired to restrain trade and to prevent competition in violation of the state antitrust statute.[5]

The state circuit court found that the defendants' conduct was "an unreasonable exercise of monopolistic control of the business of Major League professional baseball and was in violation of" the Wisconsin antitrust statute.[6] The court issued an injunction ordering the defendants to either return the Braves' franchise to Milwaukee or grant a franchise to another club for the Milwaukee area.

The defendants appealed to the Supreme Court of Wisconsin, urging that in view of the exemption[7] of professional baseball from the operation of the Sherman Antitrust Act,[8] the Wisconsin antitrust law could not be applied.[9] The supreme court, although finding that "these facts support a conclusion that there is a combination or conspiracy in restraint of trade and commerce,"[10] nevertheless reversed. HELD: The area of interstate commerce involving professional baseball has been preempted from state regulation under the commerce and supremacy clauses of the United States Constitution, and the state antitrust regulation is inapplicable.

The majority opinion was divided, some justices holding that Congress, through its silence, had manifested an intent to preempt the area from state

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1 144 N.W.2d 1 (Wis. 1966), cert. denied, 35 U.S.L. Week 3210 (U.S. Dec. 13, 1966).

2 State v. Milwaukee Braves, Inc., No. 332-626, Milwaukee County Cir. Ct., at 7-8 (1965) (memorandum decision).

3 144 N.W.2d at 2.

4 Supra note 2, at 9-11.

5 Wis. Stat. Ann. § 133.01(1) (1963), as amended by Wis. Laws 1957, c. 397.

6 Supra note 2, at 172.

7 Federal Baseball Club, Inc. v. National League, 259 U.S. 200 (1922). See Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953).

8 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1964).

9 The appellants argued that judicial exemption of professional baseball from federal antitrust regulation signified to Congress that if it desired baseball to be subject to antitrust regulation, it should specifically enact legislation to that purpose. The appellants' contention was that, in the face of this judicial position, the silence of Congress manifested an intent that baseball be free from all regulation. See Brief for Appellant, pp. 33-36.

10 144 N.W.2d at 8.

regulation;[11] and others holding that professional baseball is an area of interstate commerce that demands uniform regulation, and therefore, the state was precluded from legislating in the area, despite the absence of federal regulation.[12] Three justices dissented, stating that the intention of Congress to preempt had not been clearly manifested, and that the interests involved were predominantly local in character.[13] Therefore, the area did not demand uniformity, and the state regulation was applicable.

The division in the majority opinion indicates that the justices considered as separate and distinct the two theories upon which they based their result. It is submitted, however, that neither theory alone is sufficient to find preemption where Congress has taken no official action. Since congressional silence is patently ambiguous, the Wisconsin court could properly determine that the area was preempted from state regulation in the following manner only: (1) the court must determine that professional baseball is an area of interstate commerce that demands uniform regulation; (2) the court must then recognize that this demand for uniformity is a strong national interest which can be protected *only* by preserving Congress' exclusive right to regulate; and (3) the court must hold that Congress' exclusive right to regulate will be preserved by imputing recognition of this strong national interest to Congress and determining that, despite its official silence, Congress must have intended to preempt the area from state regulation.

In a federal system of government, there must be some way to resolve the conflict when a state regulation or policy contravenes a significant national interest. Under the supremacy clause, the resolution of such conflicts requires the state regulation to yield.[14] Once the supremacy clause is applied by the courts, the area in question is thereafter preempted from state regulation. It is the courts' function to determine whether a congressional intent exists, and if so, what that intent is, and they have consistently demanded a clear congressional intent to preempt.[15] Therefore, in order to determine when preemption will occur, it is necessary to examine the circumstances in which courts have traditionally found and construed congressional intent to preempt. Judicial construction of such an intent will occur in one of the following three contexts: (1) where there is legislation that explicitly states an intent to preempt; (2) where there is legislation, but no specific statement of an intent to preempt; and (3) where there is no legislation at all.

The first situation poses no difficulty, of course, since intent is expressly declared in the legislation.[16] The second situation is somewhat more difficult

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[11] Id. at 17-18.

[12] Id. at 18.

[13] Id. at 19, 23.

[14] See, e.g., Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173, 176 (1942); Corwin, The Constitution of the United States of America 808-09 (1964 ed.).

[15] E.g., Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Southern Pac. Co. v. Arizona, 325 U.S. 761, 766 (1945); H. P. Welch Co. v. New Hampshire, 306 U.S. 79, 85 (1939). See Note, The Commerce Clause and State Antitrust Regulation, 61 Colum. L. Rev. 1469, 1477 (1961).

[16] See, e.g., United States Warehouse Act ch. 313, pt. C, 39 Stat. 486 (1916), as amended by 46 Stat. 1465 (1931), 7 U.S.C. § 269 (1964), wherein it is stated that "the power, jurisdiction, and authority conferred . . . under this Act shall be exclu-

for the court, although it may still discern an intent in the absence of express language in the statute.[17] The passage of the statute may be, in itself, some indication that there is a congressional intent. To determine specifically what the intent is, however, the court must look to criteria other than the wording of the statute itself.[18]

The third situation presents the most difficulty for the court, because there is no statute to indicate whether there exists any congressional intent in the area, and because the court must overcome a strong presumption that where Congress has taken no official action, it has no intent at all.[19] Moreover, even if the court can infer a congressional intent, it has a more difficult job in determining what that intent is without specific legislation. In addition, where Congress has not acted, the court cannot look to the other criteria of congressional intent, such as legislative hearings and reports, because these criteria are either not present, or, if they are, they lose their relevance, absent legislation.

It was this third situation that was before the Wisconsin court in the instant case. Since the exemption of baseball from federal antitrust regulation was by judicial determination,[20] rather than by congressional legislation, there could be no inference that *Congress* intended the area to be preempted from state regulation. Therefore, the only way the Wisconsin court could properly determine whether there was any congressional intent at all, and if so, that the intent was to preempt the area from state regulation, was to find: (1) that an important national interest was involved, the recognition of which must be imputed to Congress; (2) that Congress *could not* intend this national interest to be subjected to the vagaries of state regula-

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sive . . . ." This language was interpreted by the Supreme Court to require preemption of the area from state antitrust regulation. Rice v. Santa Fe Elevator Corp., supra note 15, at 234, 236.

[17] See, e.g., Pennsylvania v. Nelson, 350 U.S. 497, 501-02 (1956). See Note, supra note 15, at 1477-78.

[18] The courts usually look to the legislative history of the statute in question, the language of the statute as a whole, past judicial interpretations of the statute in question, and/or similar statutes. See, e.g., Wright v. Vinton Branch of the Mountain Trust Bank, 300 U.S. 440, 463 (1937).

[19] See Helvering v. Hallock, 309 U.S. 106, 120 (1940), where it was stated that to give weight to the non-action of Congress is to "venture into speculative unrealities"; Sibbach v. Wilson & Co., 312 U.S. 1, 18 (1941), where Frankfurter, J., stated in dissent that "to draw any inference from the nonaction of Congress is to appeal to unreality." See generally Hart & Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1393-406 (tent. ed. 1958).

[20] In 1923, the Supreme Court decided, in *Federal Baseball Club*, supra note 7, that the Sherman Antitrust Act was not applicable to professional baseball, because such activity was strictly *intra*state. Thirty years later, in *Toolson*, supra note 7, when the same issue was again before the Court, the Court noted that for many years professional baseball had relied on "the understanding that it was not subject to existing antitrust legislation." Id. at 357. In a per curiam decision, the Court affirmed *Federal Baseball Club*, "without reexamination of the underlying issues. . . ." Ibid. The Court later characterized its 1923 decision as "a ruling which at best was of dubious validity." Radovich v. National Football League, 352 U.S. 445, 450 (1957). This narrow application of stare decisis is still in force, however, and in the eyes of the Supreme Court, professional baseball remains intrastate activity.

tion; and (3) therefore, that despite its statutory silence, Congress *could have no other intent* but that state regulation be precluded. The dominant national interest in this case is the demand for uniform regulation of professional baseball. The majority's result can only be reached if the field of professional baseball is an area of interstate commerce that demands uniform regulation; and then the area is preempted from state regulation under the supremacy clause. The majority opinion is incorrect, therefore, in its implication that the result of precluding state regulation can be reached on either one of their theories alone: (1) that Congress, through its silence, manifested an intent to preempt the area from state regulation; or (2) that baseball was an area of interstate commerce that demands uniform regulation.

In order to determine that professional baseball requires uniformity, it is necessary to show that it is an area of commerce that is predominantly national (as opposed to local) in character.[21] In addition, however, in order to invalidate the application of the Wisconsin antitrust statute in this case, it is also necessary to show that this was not a valid exercise of the state police power.[22] This can be done by showing one of the following: (1) that the purpose for which the statute was applied was not to protect, appropriately, the health and welfare of the local citizens;[23] or (2) that the effect of the application would be to impose a direct and substantial burden on interstate commerce.[24]

The conclusion that baseball is an area of interstate commerce that demands uniform regulation is supported best by the magnitude and scope of the activity. Professional baseball is a combination of teams that play in the major and minor leagues. The twenty teams in the two major leagues operate in twelve states and the District of Columbia and are associated by the terms of the Major League Agreement.[25] Presently, there are nineteen minor leagues, most of which operate in more than one state.[26] These minor leagues are associated with each other and the major leagues through the Major-Minor League Agreement. Through these two agreements, the interrelated structure of professional baseball operates more than 150 teams in thirty-seven states, the District of Columbia, and several foreign countries.[27]

Competition among the teams involves a great deal of interstate travel and such other interstate activities as the transportation of equipment and sale of tickets. Each individual game is also a part of a "pennant race" culminating in a "world series" which must be considered national in character.

21 California v. Zook, 336 U.S. 725, 728 (1949); Southern Pac. Co. v. Arizona, supra note 15, at 769; Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

22 See, e.g., Shafer v. Farmers Grain Co., 268 U.S. 189, 199 (1925); The Minnesota Rate Cases, 230 U.S. 352, 402-03 (1913).

23 Buck v. Kuykendall, 267 U.S. 307 (1925).

24 See, e.g., Shafer v. Farmers Grain Co., supra note 22, at 199.

25 Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary, Organized Baseball, H.R. Rep. No. 2002, 82d Cong., 2d Sess. 5 (1952).

26 Letter from the Boston Red Sox, Nov. 29, 1966, citing the Baseball Blue Book, 201-77 (1966 ed.).

27 Ibid.

Finally, the exhibition of each game may no longer be considered merely a local event, since, with radio and television coverage, a single game may be seen throughout the country.

All these factors demonstrate that professional baseball is a nationwide activity. Its organization, purpose, and income are intrinsically related to interstate commerce. The local interests of the area where the individual game may be played are clearly outweighed by these national interests. After a thorough investigation of organized baseball, the Monopoly Subcommittee of the House Committee on the Judiciary concluded that "organized baseball is not amenable to effective State regulation."[28] As the Subcommittee report noted, "equality of competition among clubs within the same league requires equality of the fundamental conditions under which they operate . . . ."[29] Therefore, baseball is an area of commerce that is predominantly national in character, and demands uniform regulation.

If, however, the application of the Wisconsin antitrust statute in this case was a valid exercise of the state police power, it would be upheld, because it would not be deemed to be a regulation of interstate commerce.[30] Therefore, the court should also have considered whether the statute was appropriately applied to protect the health and welfare of the local citizens, and whether it effected a direct and substantial burden on interstate commerce. It is submitted that application of the Wisconsin statute to professional baseball cannot be permitted because it fails to meet either of the above criteria.

It is well established that a state may not use its police power to protect or give economic advantage to its own local commerce at the expense of interstate commerce.[31] In bringing this action against the Braves, the state emphasized that the removal of the franchise from the Milwaukee area was detrimental to local business and economy.[32] In *H. P. Hood & Sons v. Du Mond*,[33] the Supreme Court struck down a state statute that attempted to keep interstate commerce out of the state in order to protect local business. The present case is the reverse of the *Hood* situation. The effect of the application of the Wisconsin regulation would be to keep interstate commerce *within* the state in order to protect local business and economy. Such a result is at least as objectionable as the one proscribed in *Hood*, and leads to the conclusion that the application of the state regulation in this case was not an appropriate way to protect the health and welfare of the local citizens.

In addition, the state regulation does pose a direct and substantial burden on professional baseball. The state attempted, by the application of its antitrust statute, to force the Braves to remain in the Milwaukee area or to force the league to expand to include another franchise for Milwaukee.[34]

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[28] H.R. Rep. No. 2002, supra note 25, at 7.

[29] Ibid.

[30] See, e.g., Vandalia R.R. v. Public Serv. Comm'n, 242 U.S. 255, 258-59 (1916); Atlantic Coast Line R.R. v. Georgia, 234 U.S. 280, 291 (1914).

[31] H. P. Hood & Sons v. Du Mond, 336 U.S. 525 (1949).

[32] Brief for Respondents, p. 57.

[33] 336 U.S. 525 (1949).

[34] The circuit court imposed these alternative demands upon the defendants. Supra

If the Braves were compelled to remain in Milwaukee, this would, in effect, prohibit the movement of interstate commerce, and such prohibition has been struck down by the Supreme Court as a direct and substantial burden on interstate commerce.[35] If the league were expanded to include another franchise for the Milwaukee area, this would require the teams in the National League to change their schedules to include the new club, and to give up players from their own rosters to staff the new team. These, also, are direct and substantial burdens on interstate commerce.

The importance of the decision in this case rests primarily on the fact that it preserves the status quo. If the Wisconsin court had reached the opposite result, the entire structure of organized baseball would have been affected; and if the court had allowed the application of the state antitrust regulation, it is a reasonable assumption that other courts would allow similar applications of state antitrust laws in the future. One area that might be subject to widespread antitrust regulation would be the "reserve clause" in the uniform players' contract.[36] This clause, and the league rules that operate in conjunction with it, permit a team to control the playing rights of the team members.[37] If a player does not renew his contract with the team that controls his rights, he may not sign with any other team in organized baseball, unless the controlling club releases him. Although this practice would be open to antitrust regulation, it has been acknowledged that it is "not only desirable, but indeed is essential, to the successful operation of the game."[38] It is therefore a reasonable assumption that professional baseball depends, to some extent, on its exemption from antitrust regulation.[39]

The Supreme Court denied Wisconsin's petition for certiorari by a 4-3 vote, two Justices not participating.[40] Acceptance of this case would have afforded the Court an opportunity to reexamine the area of preemption and congressional intent, but would have placed the Court in a difficult position. In order for the Court to have affirmed the Wisconsin court decision, it would have had to find that professional baseball is interstate commerce, thereby expressly overruling *Federal Baseball Club, Inc. v. National League*,[41] which held that baseball was *intra*state commerce. This was a step the Court had expressly avoided taking in *Toolson v. New York Yankees, Inc.*[42] Although such a decision would have enabled the Court to preclude state antitrust regulation, it would have removed the only bar to federal antitrust regulation. If the Court had reversed, it would have been in the position of holding that baseball is exempt from *federal* antitrust regulation, but subject to *state* regulation. This would have been a curious result, in view of the

note 2, at 174-75. The first alternative was hardly practical, since the Braves were already playing in Atlanta.

35 E.g., Oklahoma v. Kansas Natural Gas Co., 221 U.S. 229, 249 (1911).

36 H.R. Rep. No. 2002, supra note 25, at 130.

37 Id. at 112-14.

38 Id. at 208.

39 See id. at 228.

40 35 U.S.L. Week 3210 (U.S. Dec. 13, 1966).

41 259 U.S. 200 (1922).

42 346 U.S. 356 (1953).

policy statement in *Toolson* that any imposition of antitrust regulation on baseball should come prospectively from Congress and not retrospectively from the courts.[43]

JOSEPH GOLDBERG

Labor Law—Unfair Labor Practices—Union's Potential Conflict of Interest Relieves Employer of Duty to Bargain.—*NLRB v. David Buttrick Co.*[1]—This unfair labor practice proceeding arose as a result of the refusal by the David Buttrick Company to bargain with the exclusive representative of its employees, Local 380, an affiliate of the Teamsters Union.[2] Local 380 petitioned the National Labor Relations Board to order the company to bargain in good faith. Buttrick refused on the ground that the Local was subject to a disqualifying conflict of interest. The company asserted that a Teamsters pension fund[3] had made substantial loans to the Whiting Milk Company, a direct competitor of Buttrick.[4] Since the General President of the Teamsters Union was also a trustee of that pension fund, he might, in order to protect the loans, compel Local 380 to act adversely to Buttrick's interests. The Local would then be in the position of having to choose between two courses of action: either to bargain in good faith in behalf of the employees it represented, or to obey the General President's orders.

The Board found that Local 380 was in no way affiliated with the pension fund and that it had not participated in the negotiations leading to the loans. It concluded that Buttrick had failed to show an *actual* conflict of interest in Local 380 and, therefore, ordered the company to bargain.[5] Upon Buttrick's continued refusal, the Board and Local 380 sought to have the order enforced by the Court of Appeals for the First Circuit.[6] That court HELD: An em-

[43] Id. at 357.

[1] 361 F.2d 300 (1st Cir. 1966).

[2] Labor Management Relations Act (Taft-Hartley Act) § 8(a)(5), 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(5) (1964).

[3] This is the Central States, Southeast, and Southwest Areas Pension Fund. The fund was established as a trust to administer pension funds accumulated through collective bargaining agreements between employers and Teamsters locals in the central and southern states, and through various investments. The beneficiaries of the fund are the union-member employees of those employers who contribute to it; Local 380 derives no benefit from this fund. The fund is administered by a committee of 16 trustees, 8 selected by the contributing employers and 8 by the union-member employees. 361 F.2d at 302 n.2. The General President of the Teamsters Union is one of the eight union trustees of the fund. Brief for Local 380 as Intervening Petitioner, p. 5.

[4] In the early 1960's, Whiting was seeking money for expansion and reorganization purposes. The Chairman of the Board of Whiting asked a business agent of Local 380 to arrange an interview with the trustees of the fund. Local 380, however, played no part in the negotiations which led to highly-secured loans amounting to $4.7 million. 361 F.2d at 303.

[5] 154 N.L.R.B. No. 126, 60 L.R.R.M. 1181 (1965).

[6] The Board may seek enforcement of its orders in the court of appeals for the circuit in which the unfair labor practice occurred. 61 Stat. 146 (1947), as amended, 29 U.S.C. § 160(e) (1964).