IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. THE ASSOCIATED PRESS, et al., Defendants-Appellants.	Civil Action No. 19-163

JURISDICTIONAL STATEMENTS.

The jurisdiction of the Supreme Court of the United States upon appeal is conferred by the Act of February 11, 1903, 32 Stat. 823, as amended by the Act of March 3, 1911, 36 Stat. 1167, 15 U. S. C. § 29, and by Section 238 of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. § 345.

A statutory three-judge Court was constituted on plaintiff's expediting certificate. The final judgment of the District Court was entered January 13, 1944 on plaintiff's motion for summary judgment. The opinion, 52 F. Supp. 362, by Judge L. Hand, Judge Augustus N. Hand concurring and Judge Thomas W. Swan dissenting, is attached.

Application for appeal by defendants Tribune Company and Robert Rutherford McCormick, is presented herewith on this 9th day of March, 1944.

The following decisions sustain the appellate jurisdiction of the Supreme Court of the United States to review the judgment in this cause: *Swift & Co.* v. *United States,* 276 U. S. 311; *United States* v. *California Cooperative Canneries,* 279 U. S. 553.

Statutes Involved.

The statutes involved are the Act of July 2, 1890, 26 Stat. 209, as amended by the Act of August 17, 1937, 50 Stat. 693, 15 U. S. C., §§ 1, 2 and 4, commonly known as the Sherman Act. Section 1 declares illegal contracts, combinations and conspiracies in restraint of trade or commerce; Section 2, monopolization, attempts to monopolize and combinations or conspiracies to monopolize; and Section 4 authorizes the Attorney-General to institute proceedings in equity to prevent and restrain violations.

Also the First Amendment to the Constitution insofar as the same prohibits abridgment of freedom of speech and of the press; and the due process clause of the Fifth Amendment.

Nature of the Case.

This is a civil suit filed by United States of America, plaintiff, under Section 4 of the Sherman Act, against the following defendants: The Associated Press, a not-for-profit corporation incorporated under the Membership Corporations Law of the State of New York (hereinafter referred to for brevity as "AP"); eighteen individuals who constituted AP's board of directors on the date of the filing of the complaint; seventeen named corporations each a member of AP engaged in the business of publishing a newspaper; and, as a class, all other members of AP totaling approximately 1,250 persons, firms and corporations. Defendant Tribune Company is one of the named corporate members of AP; defendant McCormick one of the named directors.

Interrogatories and requests for admissions were served and answered under the Federal Rules of Civil Procedure and examinations before trial were had. Plaintiff filed sup-

porting affidavits with its motion for summary judgment and defendants filed affidavits in opposition thereto.

All charges of monopoly and of attempts to monopolize any part of trade and commerce were rejected by the court. The court held, and only held, that certain by-laws of AP are unlawful, not because of any undue tendency to monopolize or to hamper competition, but because the court believed them inimical to the public interest. The by-laws, therefore, exhibit the nature of the case.

The by-laws of AP perform dual functions: *First,* as required by the Membership Corporations Law of New York, they set up the corporate structure such as the officers, their election and duties; the directors, their number, selection and duties; the members, their meetings, selection, powers and duties; the bondholders and their vote; regular and associate memberships; and amendments to the by-laws. *Second,* the by-laws of AP also constitute an identical contract between AP and each of its members (Finding 7), setting forth the entire obligations of AP in selling its news reports, news pictures and features to its customers and the entire obligations of its customers to AP for such services. Under the law of New York AP, as a non-profit membership corporation, may not engage like ordinary business corporations in general trade for profit, hence the by-laws provide that AP may sell its services only to its members. The contractual character of the by-laws is recognized by plaintiff, which said below: "A member of AP is in reality a 'customer' of AP." Each member is required to sign the by-laws and to agree to fulfill their terms; and Article III, Sec. 5 provides "* * * such signature shall establish the contract between such owner and this Corporation, the By-laws of this Corporation and any amendments thereof constituting and being the terms and conditions of said contract * * *"

The main agreements of the parties with respect to the purchase and sale of AP's services embodied in the by-laws, and the holdings of the court with respect thereto, are as follows:

Each customer-member agrees that

1. He will take the news reports and publish them regularly, in whole or in part (Art. VII, Sec. 3) in a bona fide newspaper continuously issued (Art. XIII, Sec. 1) in the specified city and field (morning, evening, Sunday), giving credit to AP (Art. VIII, Sec. 7).

2. He will pay for same at cost to AP, under uniform assessments levied by the directors, weekly in advance (Art. IX).

3. He will not divulge the news which he obtains from the corporation to any unauthorized person (Art. VIII, Sec. 6), nor allow it to be disseminated in advance of publication to any unauthorized person (Art. VIII, Sec. 5).

4. He will furnish to AP all local news of spontaneous origin (Art. VIII, Sec. 4) and that he will not furnish such news to non-members (Art. VIII, Sec. 6) (save in the case of associate members who are relieved of the duty of furnishing local spontaneous news exclusively to AP). This agreement of the customer-member was specifically held lawful in and of itself (Conclusions of Law, ¶ V; Judgment ¶¶ II A, V); but was held unlawful and was cancelled only because it was conjoined with the membership restrictions described below.

5. For breach of these agreements, AP services may be withheld from the customer-member or the contract terminated, which is to say, the member may be suspended or expelled (Articles X, XI).

AP in turn agrees in these by-laws with each customer-member substantially as follows:

1. To furnish the news of the world and local news

gathered by AP by its own efforts and by exchange with other agencies and with its own members.

2. To sell such news solely to its own members. This contractual provision was specifically held licit in and of itself (Conclusions of Law ¶ III; Judgment ¶¶ II A, V); but was cancelled because conjoined with the membership restrictions described below.

3. Not to furnish its services to any other newspaper publisher in the city and field of a member, unless such other newspaper publisher becomes a member of AP under the restrictions laid down in the by-laws. The court invalidated these by-law restrictions on membership as unlawful in and of themselves.

The whole judgment therefore stands or falls on the holding of the court that the said by-law restrictions on admission to membership violate the Sherman Act; for the cancellation of the AP-Canadian Press contract, the agreement that members shall sell local spontaneous news solely to AP, the agreement that AP shall not sell its services to non-members—all three were held valid standing alone and were held invalid only because conjoined with the membership restrictions which, the court held, were unlawful.

Membership Restrictions Held Unlawful.

AP agrees in Article III of by-laws that it will not sell its services to an applicant newspaper publisher in the city and field (morning, evening, or Sunday) of a customer-member unless the applicant

(a) shall have been elected by the majority of regular members voting at a membership meeting (Sec. 1), each member having one vote, and

(b) shall pay to AP for the benefit of the member or members in the city and field a sum equal to 10%

of regular assessments in that field from October 1, 1900 to date of election (Sec. 2 a), and

(c) shall require any exclusive news or news picture services enjoyed by him to be furnished to such member or members on the same terms as made available to him (Sec. 2 b). The customer-members in the field may, of course, waive this requirement inasmuch as it is solely for their benefit.

The by-laws provide that the customer member or members in the field may waive the money payment in whole or in part (Secs. 2 and 3) in which event, the application is passed on by the directors when no membership meeting is in session.

The court held that these self-imposed limitations on the right of AP to render its services to another publisher in the city and field of a customer-member, ancillary to the admittedly licit sale of AP service to the customer-member,

(a) enable the customer-member to impose or dispense with conditions upon the admission of the applicant—which these defendants admit; and

(b) enable the defendants in passing upon such application to consider among other factors "the effect of admission upon the ability of such applicant to compete with members" in the same city and field (Conclusion of Law ¶ I; Judgment ¶ I A)—which these defendants admit.

The court held that because the by-laws enable the members so to do, such by-laws violate the Sherman Act—which defendants deny.

The questions involved are substantial and of great public importance:

1. These By-Laws Are Reasonable Ancillary Restraints.

The validity of this judgment is tested by the validity of the principle on which it is based, namely: that a large

producer of news reports, news pictures and features may not sell the same to his customers and ancillary thereto agree not to sell his products to any other person in closely limited territory of the customer; or that he will not do so unless the customer consents. The agreement of AP in this case is much narrower than the foregoing: AP retains the right to sell without the customer-member's consent if the foregoing restrictions are met. Hence the test is controlling.

The whole doctrine of ancillary restraints of trade at common law and as applied under the Sherman Act envisages the protection of the purchaser in the enjoyment or resale of that which he has purchased against competition of the product in a limited territory for an appropriate length of time. His enjoyment is assured by the agreement of the seller not to sell the product to others in that territory, or, which is the same, not to sell therein save with the customer's consent. The social desirability of such ancillary agreements as an over-all enhancement of competition has been judicially recognized from the early common law to the present time; in the earliest Sherman Act cases to the most recent ones; in legislative trends,—such as the Fair Trade Acts; in every species of industry. Such ancillary restraints have been outlawed in none—until this case.

A generic case is *United States* v. *International Harvester Co.*, 274 U. S. 693 in which this court considered whether a consent decree had restored competition in the industry. Harvester did about 64% of the business in the farm equipment field thus occupying much more of that field than AP of the news agency field. The decree specifically allowed Harvester to sell its products to one dealer in a town under an ancillary agreement not to sell to any other dealer in the same town. This court found that sales

upon such terms enhanced competition in the farm machinery industry. The opinion also disclosed that Fordson tractors were marketed under the same exclusory restrictions.

In *National Broadcasting Co. Inc.* v. *United States,* 319 U. S. 190 this court held lawful a regulation promulgated by the Federal Communications Commission which permitted NBC, CBS, MBS and all other radio chains to sell radio programs on an exclusive agreement for "first call." The Commission necessarily held the regulation not to violate the Sherman Act; the Commission was empowered to make regulations in the public interest "not inconsistent with law," including the anti-trust law.

Courts, both federal and state, have held agreements by producers to deal exclusively with one dealer in a community reasonable and valid in at least twenty-six different industries. The decision below, holding such restraints to be unreasonable, stands alone and is in conflict with all prior decisions. In addition, it invalidates the use of such normal and customary restraints in an industry which more than any other industry requires their use for the protection of the purchaser and the maintenance of competition. The chief value of news reports, news pictures and features lies in their exclusivity. The struggle for exclusivity is the heart and core of competition throughout all phases of the industry. UP and INS sell their services largely on an exclusive basis or other bases designed to protect their customers. All smaller agencies sell their news services to only one customer in a field and city. Feature syndicates sell their cartoons, news commentaries, pictures, fashions, health advice, comic strips and all other newspaper features under like exclusory restrictions. Newspapers, including the one new newspaper which complains because it cannot purchase AP's services, sell their own

news reports, pictures and features to other newspapers on an exclusive basis.

2. The First Amendment.

The court erroneously held that the universal doctrine of ancillary restraints does not apply to this case because of the paramount public interest in "the dissemination of news from as many different sources, and with as many different facets and colors as is possible," an interest "closely akin to, if indeed it is not the same as, the interest protected by the First Amendment" (Opinion p. 19).

The history of the First Amendment shows clearly that the ratifying legislatures feared that the federal government (like its predecessors) might use the necessarily broad commerce and taxing powers to regulate, inhibit or regiment the people in religion, speech and press. It was designed solely to prohibit federal interference with these liberties. In the present case for the first time, prohibition against federal interference has been construed into a mandate for federal interference. The only industry mentioned in the Constitution and guaranteed against federal abridgment has now by strange paradox been decreed to be the only industry subject to federal curtailment in respect of these ancillary restraints universally held desirable.

Again, in the Flag Salute cases* it was held that the state is without power to compel one to utter when one wishes to remain silent or to publish when one wishes to remain mute, except when to remain silent or mute will work clear and present danger, "grave and pressingly imminent," to "orderly society as a whole," or to "effective government," or to "interests which the state may lawfully pro-

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* *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624; *Taylor* v. *Mississippi*, 319 U. S. 583; overruling *Minersville District* v. *Gobitis*, 310 U. S. 586.

tect." Yet here, AP and the defendants prior to general publication are compelled under penalty of punishment for contempt to impart their news dispatches and pictures and features to applicant-publishers to whom they would not impart the same save for this judgment. They are forced by a branch of the federal government to admit to membership—and hence to impart their news reports to —many applicants who would not be admitted save for this judgment. They are not only coerced to speak, they are told exactly what to say—to furnish exactly the same dispatches to all—and the terms on which they shall say it—at the same price, time, conditions. This protects no interests akin to or the same as that protected by the First Amendment; this contravenes the First Amendment.

3. Tendency Toward Monopoly Inheres in the Judgment.

Although finding that AP and the defendants do not monopolize or dominate the furnishing of news-agency services (Conclusion of Law ¶ IX), or access to the original sources of news (idem X), or transmission facilities for the gathering or distribution thereof (idem XI), the court finds that AP is the largest of the three major news-agencies (Findings 66, 84), the chief single source of news for the American Press, first in point of public reputation and esteem (Finding 68) and the only one of the three major news-agencies which furnishes its services at cost on the non-profit assessment plan (Findings 14, 39, 59). The court finds that the growth of other news agencies has been fostered to some extent as the result of AP's membership restrictions (Finding 70); and the evidence shows that because of the foregoing facts the size of AP would have been greater in the past if it had not restricted its membership and that its size will increase in the future if it shall be compelled to remove or to lessen its membership restrictions.

Thus the judgment below will have the immediate effect of increasing the size, prestige and membership of AP; to what extent is not clear. The ultimate effect on the size, prestige and membership of AP is a genuine issue of fact; it depends on the construction of the principles involved, whether all or only a few news-agencies will be affected (Opinion pp. 20, 21*), and the diligence of plaintiff in uniformly enforcing the announced principles. But the court admits there is "perhaps a possibility," "though an exceedingly remote one," that requiring AP to serve every publisher may "drive out" all other news-agencies (Opinion p. 25). On motion for summary judgment the preponderance of evidence is not to be found: likelihoods, and possibilities are not to be weighed; it must be considered that compliance with the judgment will greatly increase the size, prestige, strength and power of AP to a degree not short of sole occupancy of the news agency field.

Plaintiff's justification for compelling AP to travel so far along the road to monopoly is expressed by the court (Opinion p. 25): "If other services were incidentally driven out that would not be actionable wrong." This completely begs the whole question. Of course, a news-agency "driven out" of the competitive arena by loss of customers flocking to AP would have no cause of action against AP: the injury would be caused by the judgment, not by AP. The real danger which will face AP if it becomes a monopoly by the decree of the court is the probability—in fact, the certainty—that as a monopoly it will be subjected to complete regulation by the state. However created, monopolies must and will be regimented, regulated and controlled by the state. This is proven by history from the days of the Stationers Company to the fate of industry under modern dictators. "A monopoly of all those interested in an activ-

* Pagination of attached opinion.

ity is no monopoly at all, for no one is excluded and the essence of monopoly is exclusion" (Op. P. 25) is a half-truth valid only if one adds "ex hypothisi, however, the monopoly will be treated as a public utility and be regulated as to the reasonableness of its rates, the fitness of its services, and its adherence to public convenience and necessity."

4. The Injunction Is Not Specific in Terms—Civil Procedure Rule 65(d).

The Judgment, in Paragraph I B, enjoins the defendants from promulgating new membership by-laws "having a like purpose or effect" of those held invalid in the preceding paragraph; i. e. by-laws

> "whereby the defendants, in passing upon an application of such applicant for membership, may take into consideration the effect of admission upon the ability of such applicant to compete with members of The Associated Press in the same territory and 'field'."

No by-law provisions can actually prevent any person from considering such competitive factors. However explicitly the by-laws prohibit consideration of such factors, the member or the director when casting his vote for admission or rejection can in fact weigh the competitive factor. Must the defendants in the future actually prevent the members from considering competitive factors, or must the defendants in the future merely forbid members to consider the competitive factors? The proviso in Paragraph II B does not clear up the uncertainty. It states that AP may adopt new by-laws imposing restrictions on admission "*provided,* however that nothing herein shall prevent the adoption" of new by-laws which will restrict admission "provided that the by-laws shall affirmatively declare that the effect of admission upon the ability of such applicant

to compete with members in the same city and 'field' shall not be taken into consideration in passing upon his application.''

Suppose the defendants are cited for contempt at some later day for rejecting several applications for membership under new by-laws containing the affirmative declaration. Suppose the citation charges the defendants with contempt because those rejecting the applications have considered the prohibited competitive factors. The court in deciding might take one of two interpretations:

First: the mere adoption of by-laws containing the affirmative declaration fully complies with the injunction; ''the members may disregard the last provision in practice * * * it is as far as we can go'' (Opinion pp. 22, 23); the actuating motives of the defendants in passing on applications cannot be inquired into; the citation is dismissed. Such an interpretation renders the injunction useless and vain. Surely the courts will not enter orders which invite evasion, or which, like canonical decrees, are merely *pro salute animae.*

Second: the court might hold the vague language to mean that the motives of defendants in rejecting the applicants may be inquired into,—in which event the government would try to show their bad motives by the surrounding facts and circumstances. If the issue of good or bad motive is to be determined by surrounding circumstances, then the paramount circumstance will be the court's idea of the fitness of the applicants. If the court deems the applicants fit, the defendants' motives must have been the prohibited ones. Under this construction, the defendants will be punished, not for entertaining or allowing others to entertain the prohibited motives, but for rejecting applicants deemed fit by the court.

To conform to the Civil Procedure Rule 65(d), the injunction must clearly define the forbidden acts. This injunction does not do so.

5. The Practical Effect of the Judgment is to Require AP to Serve All Equally.

The defendants, not knowing how the court will construe its injunction, will, as prudent men faced with fine or imprisonment for contempt, comply with both possible constructions of the injunction. To be safe, they will not fail to serve all equally. This is not excess of caution: the opinion contains significant expressions leading reasonable men to believe that the court so intended. For example, the admitted purpose of the judgment is to "liberalize" the membership restrictions (Opinion p. 24); "to compel them [AP members] to make their news dispatches accessible to others" (Opinion p. 25); to exclude from consideration competitive conditions in the field in passing on admissions; AP is to open its membership to all who are "entitled to it," eschewing exclusion "for competitive reasons" (Opinion p. 16); AP is held to be a "* * * combination which, though bound to admit all on equal terms, does not do so" (Opinion p. 23). These expressions, plus the dissent of Judge Swan on this particular point (Opinion p. 27 et seq.), give color for the belief that the basic principle underlying the judgment is:—AP must become "a collective effort of the calling as a whole" (Opinion p. 25) and its members are not "to enjoy the fruits of their foresight, industry and sagacity," but are to share those fruits with excluded newspapers (Opinion p. 19).

Whatever might be the meaning of the language of the injunction *in vacuo,* its practical effect in this case will be

to transform AP from a private calling to a public calling serving all indifferently.

6. AP Is Not Engaged in a Public Calling Under Long-Established Precedents.

The transformation of news-agencies, indispensable agencies of the press (Finding 38), from private enterprises to public calling, obligated indiscriminately to serve all comers, contradicts all reputable precedents (Judge Swan, p. 28) and constitutes judicial invasion of legislative territory. It is of moment to the nation.

For over fifty years courts have recognized the legality of an association of publishers to collect and distribute news for their common benefit and, in so doing, to determine who shall be members of the group. In *Matthews* v. *Associated Press,* 136 N. Y. 333, 32 N. E. 981, N. Y. Ct. of Appeals 1893 (cited with approval in the *Addyston* case, 85 Fed. 271, 282, and approved in the dissenting opinion in the *Freight Association* case, 166 U. S. 290, 348, which dissent later became the law in the *Standard Oil* case, 221 U. S. 1) and in *State ex rel Star Publishing Co.* v. *Associated Press,* 159 Mo. 410, 60 S. W. 91 (1900), the courts recognized the validity of exclusory membership by-laws far more stringent than those involved in this case. The single exception to these authorities is the *Interocean* case, 184 Ill. 438, 56 N. E. 822, which has been thoroughly discredited in later decisions (J. Swan p. 28). In 1915 the Attorney General of the United States flatly held that AP's membership by-laws were valid under the Sherman Act. In his opinion he stated:

> "* * * it is no violation of the Anti-trust Act for a group of newspapers to form an association to col-

> lect and distribute news for their common benefit, and to that end to agree to furnish the news collected by them only to each other or to the Association * * *. Newspapers desiring to form and maintain such an organization may determine who shall be and who shall not be their associates.''

Competition among news agencies and newspapers has flourished under this opinion. There is no ''clear and present danger'' to our country or its institutions in continued adherence to this opinion. In 1915 AP occupied more of the newsagency field than today.

AP and its members in reliance upon these decisions and this administrative construction have developed and built up their newspaper properties. Other news agencies have been organized and developed on the principle that they too might lawfully sell their services to only one publisher in a field and city or might sell their services upon terms which would protect existing customers in such fields.

The decision of the court below now overturns these former decisions and this construction of the Attorney General of the United States. It will revolutionize AP's business, and doubtless UP's and INS's also. The decision may or may not apply to many other news agencies; no certain standards are given on which prediction can be based. The decision may likewise require many feature and newspicture agencies, some of which are larger and superior to AP, to cease selling their services on an exclusive basis. They are all sailing an uncharted sea.

The decision therefore leaves the whole news industry, news agency and newspaper fields alike, in a state of chaos. If any change is required in the industry—and Congress,

though petitioned, has held hearings on this subject and refused to act—such change should only be effected under a comprehensive enactment after thorough legislative investigation and not by successive judicial decisions necessarily based upon facts conforming to the limited rules of evidence or, as in this case, without a trial of such facts on the merits.

7. The Judgment Is Self-Contradictory.

The AP-Canadian Press agreement, AP's agreement to serve members only, and the members' agreement to return local spontaneous news only to AP, have been held innocent *per se* and illicit solely because conjoined with the present membership restrictions. In the future these three agreements will not be conjoined with the membership restrictions: the membership restrictions have been cancelled and forever prohibited. Hence one would expect these three agreements not to be prohibited in the future because in the future they will be no longer conjoined with the objectionable membership restrictions. Yet the court will not suffer them in the future unless and until some other new membership by-laws shall be passed. The contradiction is self-evident.

Thus it is apparent that the court bases the relief on a principle entirely unexpressed in the Findings of Fact, Conclusions of Law and Judgment,—the principle that AP is obligated to replace the cancelled membership by-laws with new ones admitting all on equal terms. This unmentioned unlawfulness emanates from the basic fallacy, itself unexpressed in the Findings of Fact, Conclusions of Law and Judgment, that the nature of AP's business obligates it to serve all indiscriminately. This fallacy, like all unconscious assumptions in the realm of logic, is the more

insidious and potent because, while pervading the whole case, it is not expressly recognized.

Respectfully submitted,

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