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Nos. 57, 58 and 59

IN THE

Supreme Court of the United States

OCTOBER TERM 1944

THE ASSOCIATED PRESS, *et al.*
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v.

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

MAY IT PLEASE THE COURT:

Field Enterprises, Inc., the owner and publisher of the Chicago Sun, respectfully moves this Honorable Court for leave to file the accompanying brief as *amicus curiae.*

The Chicago Sun has a direct interest in the outcome of this case. Membership in or access to the facilities of the Associated Press was sought on its behalf. When both were withheld, a complaint was filed by its publisher with the Attorney General, charging that the Associated Press was operating in violation of the Sherman Act.

All parties have consented to the filing of this brief.

LOUIS S. WEISS
Attorney for Field Enterprises, Inc.

CARL S. STERN
of Counsel

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BRIEF FOR FIELD ENTERPRISES, INC., OWNER AND PUBLISHER OF THE CHICAGO SUN AMICUS CURIAE

FIRST

The pooling by the vast majority of the newspapers in America of their news gathering resources and of the news gathering resources of the association supported by their funds, and the obtaining by agreement of similar rights to the news gathering resources of the vast majority of the Canadian papers confer upon the members of The Associated Press unique competitive advantages.

The following facts as to the unique competitive advantages enjoyed by the members of The Associated Press acting in concert are established:

1. The overwhelming majority of the newspapers in the United States have agreed to make their local news gathering facilities available to each other (Fngs 86, 88, R2618-19; Fngs 87, 95, R2619, 2620),[1] and by a collateral agreement have made a similar arrangement with the overwhelming majority of the Canadian newspapers. (Fngs 134, 135, 136, R2625-2626).

The effect of this gigantic interchange is to make the reporters of these various newspapers the reporters for AP and indirectly through the association, reporters for each member newspaper (G12, Fng 16, R2608).[2]

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[1]Figures preceded by "R" refer to the Pages of the Transcript of Record; by "G" to the Government's Brief; by "AP" to the Brief of AP; by "T" to the Brief of the Tribune Company and Robert Rutherford McCormick.

[2] In advertising the facts behind AP's superiority reference is made to "A staff of 7,200, augmented by the staffs of member newspapers and affiliated news services in foreign countries—a total of approximately 100,000 men and women contributing, directly or indirectly, to each day's effort,—a staff many times larger than the staffs of *all other American news agencies combined.*" (R225-226 italics in original.)

For the purpose of gathering local news in the United States and Canada,[3] there is thus an actual and potential coverage which cannot be duplicated.[4]

This coverage makes available news from all parts of the country regarding unanticipated noteworthy events, such as airplane accidents, train wrecks, tornadoes or mine disasters (Fng 16, R2608). Illustrations of the vitality of the coverage as regards occurrences in remote places but of interest to the country at large are supplied by the affidavits of AP members.[5]

In the famous case of *International News Service* v. *Associated Press,* 248 U. S. 215, AP applied for and obtained an injunction specifically enforcing its right to the local news of a member paper and enjoining its competitor from interfering therewith (*id.,* p. 231). Today AP maintains an elaborate machinery to safeguard this right. In 581 offices of member newspapers, AP has stationed its

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[3] Also included under the Canadian Press contract are Newfoundland, British West Indies, Bermuda and British Guiana (R457).

[4] Out of 373 daily morning English language newspapers published in the United States with a total circulation of 16,519,010, 302 with a total circulation of 15,849,132 are obligated by their contract in the by-laws to furnish their local news of spontaneous origin *exclusively* to AP (R2618-2619). Similarly bound are 877 evening newspapers with a total circulation of 18,812,988 out of a total of 1,480 evening newspapers with a combined circulation of 25,561,381 (R2619-2620). Similar exclusive rights are obtained to the news gathered by over 90% of the English language newspapers of Canada with over 95% of the total circulation (Fngs 135, 136; R2626).

[5] See, for example, the arrest and identification of Dillinger (R1840), the death of Senator Walsh (R1828), the draft status of Kay Kyser, a prominent orchestra leader (R1829), the furnishing of the news of automobile accidents and murder cases (R1819), of sports events (R1807), of local elections (R1837), of plane crashes (R1837).

own employees, "who have access to the local news of the newspapers and have charge of seeing that such news is obtained by AP" (Fng 101, R2621).

2. By agreement, the financial resources of the members —the vast majority of all the newspapers in the country— are placed behind AP.

The expenses of AP are borne by assessments levied by the directors whose power to levy assessments is unlimited (By-laws Art. IX, Sec. 1, R80). These assessments the members are obligated to pay (Art. VIII, Sec. 2, R79; Fng 14, R2607).

3. By the pooling of the funds of the great majority of American newspapers, there is added to the aggregated news gathering facilities of the individual members a vast, collective news gathering machinery (Fng 3, R2606; Fng 15, R2607; Fng 17, R2608).

4. With its facilities, AP has built up an enviable record of success in speed of collection and transmission of news dispatches. It has advertised as a "fact behind AP superiority" (R225), the speed of its service and its resultant success in anticipating other news gathering agencies (R226).[6]

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[6] "AP is First With Headline News

"With The Associated Press it is news only when AP is Not ahead.

"An impartial survey of coverage for the past year showed that AP was ahead on 82 per cent of *all* important news events.

"This fact is presented not as a boast but as evidence of AP's superior performance in all categories of the news—performance based on 93 years of experience and effort—performance which has built up a tradition of reliability and integrity" (R 226).

In its suit against the INS, AP stressed the importance of "firstness" of news (*International News Service* v. *Associated Press,* 248 U. S. 215, Separate Brief for Complainant in United States Supreme Court filed by Hon. Peter S. Grosscup, p. 8) and procured a judgment, decreeing, among other things, that the value of the news service largely depends upon the requirement that news that it collects shall be transmitted to its members and their newspapers earlier than similar information can be furnished to other competing newspapers (*id.* Transcript of Record, p. 5).

AP's records as well as its advertising indicate the importance which it still attaches to "firstness". From October, 1938, to December, 1942, it kept a record of the times at which its news reports were transmitted by wire and compared those times with the times at which reports of the same news events were transmitted by UP (R552, 1175-1176).

5. AP has admitted that the character of its organization—"a membership corporation composed of persons representing every shade of economic, political, and religious opinion, and every section of the country—is an invaluable guarantee that the promise and claim made by each news-agency—that it represents the news without any political or sectional bias—will in fact be fulfilled" (Complaint 66, R18; Admitted R119). It has advertised that in 1893 it was "the first and only world-wide, non-profit, cooperative news gathering association," and that "*Today it still is the first and only news organization of its kind,* dedicated to the sole task of collecting and dis-

tributing factual, unbiased news'' (R225, italics in original).[7]

Admittedly one of the reasons for the high place of AP in the public esteem ''is the good will resulting from the fact that in the mind of the general public the name 'Associated Press' has long been regarded as synonymous with the highest standards of accurate, nonpartisan, and comprehensive news-reporting'' (Complaint 66, R18; admitted R119).

6. Out of these unparalleled resources and qualities has arisen the greatest of all American news agencies (G36-39, Fng 84, R2618): ''a vast, intricately reticulated organization, the largest of its kind, gathering news from all over the world, the chief single source of news for the American Press, universally agreed to be of great consequence'' (Fng 66, R2615); * * * ''in the forefront in public reputation and esteem'' (Fng 69, R2616; see also Fng 84, R2618).

The combination of so great a majority of the American newspapers pooling their individual and their collective news gathering facilities creates a news-gathering organization with an actual and potential power that cannot be equalled. No other American news agency has or, while the exclusive features exist, can have comparable facilities and resources.

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[7] Kent Cooper, summarizing to the Board of Directors of AP the advantages that it had over the foreign agencies said that "each of the important agencies is proprietary and profit-making and more interested in making money than in getting the news" (*Barriers Down* by Kent Cooper [1942], p. 192). UP and INS are also proprietary agencies.

7. The importance of AP to the newspapers is attested by its preponderant popularity over all the other services.

Except for the Chicago Sun, no morning newspaper in the United States, with a circulation in excess of 200,000, and no morning newspaper of general circulation in the United States in excess of 25,000, is without AP service (G38). In the evening field, only three of all evening newspapers with a circulation in excess of 200,000 are without AP service (Fng 96, R2620).

SECOND

By the agreement of the members the facilities of the individual members and the facilities afforded by their instrumentality are denied to non-members. By the same agreement the members have the power to keep out and have kept out competitors. An effect of this agreement is to constitute the members a privileged class who alone have the right of choice and comparison between the news dispatches of AP and those of other agencies, a privilege denied to non-members.

1. By agreement in the by-laws the unique facilities of AP and its members are denied to non-members.

"The members of AP are and have been for many years a combination of newspaper owners acting together, for the purpose of using their news gathering facilities and the news gathering facilities of the combination supported by them to obtain news which is made available to the members of the combination and denied to newspaper owners who are not members" (Fng 2, R 2606).

The exclusion is absolute. The news dispatches, whether of the member newspapers or of their agent—the AP—(Fng 3, R2606) are not available to any non-member newspaper (G11).

2. Through agreements embodied in the bylaws, the members of AP and of its predecessor AP of Illinois have, at all times maintained a structure designed to perpetuate their exclusive competitive privileges and to keep out competitors.

This has been accomplished by devices which have varied only in form. These devices—veto power, right of protest, payment to a competitor combined with other burdensome restrictions—are described in detail in the Government's brief (G21-31). It is perhaps worth noting that the "obvious tendency" of this kind of device to create a monopoly evoked a spontaneous comment from a distinguished court as far back as 1897.[8]

AP has retained the exclusionary feature despite the fact that it calls itself a cooperative, and that the essence of a cooperative is membership open upon equal terms to all persons in the class of those served by the cooperative (G 67).

AP has had difficulties in attempting to reconcile the interests of its members as a whole with the exclusory

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[8] In *Minnesota Tribune Co.* v. *Associated Press,* 83 Fed. 350, 357 the 8th Circuit Court of Appeals (Brewer, Thayer, Riner, JJ.) said that the veto provision then in force "* * * would seem to have an obvious tendency to create and perpetuate a monopoly of the news, by limiting the service of news reports to a single newspaper in a large city and placing it within the power of the proprietor of such newspaper to prevent other newspapers from having access to the same sources of information."

rights of the individual members (R267, 268, 275, 276, 341). As a cooperative, the interests of AP would be served by increasing its membership (G 99, R 341). As an institution designed to perpetuate the competitive privilege of individual members, this cooperative has had to limit the number of its members (R267, 268) and to refrain from seeking new members where the recruits would "infringe upon the home territories of existing members" (Report of the General Manager of AP to the Board of Directors [R 197, 341]).

3. There is an exception to the power of exclusion,—the right to become a member by purchase. But this exception emphasizes what the history and structure of AP establish: the principle of exclusion is designed to protect the competitive privileges of the individual members rather than to enable members to choose their associates. There is no choice of associates where a person purchases an AP member newspaper (By-laws Art. II, Sec. 4, R. 67, Art III, Sec. 4, Sec. 5, R. 70). He buys an absolute right to become a member. He may not be kept out, regardless of his character or qualifications. But then a member by purchase does not increase competition,—the number of member newspapers remains the same.

4. One effect of the exclusive privileges conferred upon members of AP and denied to non-members is to make of them a privileged class in American journalism. For they and they alone have the right of choice among the best available news reports. They may decide whether they will use the AP news story or that of UP or INS or of some other agency (cf. G 39). Non-members have no such choice.

The right to receive the services of AP and other agencies gives AP members another competitive advantage. If a member has reservations about a news story, he can check it before publication and while the news is fresh, against the standard AP dispatch. He can check also against the dispatches of any other news agencies for which he subscribes. A non-member paper is limited to the other agencies.

The value of this right is recognized by the industry. Most of the large newspapers and many of the small ones obtain the news services of AP, and also UP or INS or both (Fng 68, R2615-2616).[9]

5. AP is *sui generis*. We know of no other case where the leading members of an industry have (a) pooled their individual product, (b) pooled their aggregate product obtained through their combined resources, (c) entered into an agreement with another aggregation of dealers (The Canadian Press) whereby they obtained exclusive rights to the product of such dealers and (d) provided that competitors should be excluded from the product of these aggregated facilities.

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[9] Even the tabloids, the New York Daily News and the New York Daily Mirror, and the Hearst paper, the New York Journal, which had built up large circulations without AP membership, went to the expense of buying AP memberships (R689, 706, 718). Each of these papers, in addition to having an AP membership, is a subscriber to UP, INS or both (R1119, 1147, 1129, 1152).

THIRD

The agreement among the great majority of the American newspapers that the competitive privileges incident to AP membership shall be reserved to them and denied to others involves restraints illegal under the Sherman Act.

1. The persons involved in the combination are newspaper owners. The agreement would be illegal if they were tile merchants (*Montague* v. *Lowry,* 193 U. S. 38), clothing manufacturers (*Fashion Originators Guild* v. *F. T. C.,* 312 U. S. 457), sugar dealers (*Sugar Institute, Inc.* v. *U. S.,* 297 U. S. 553, 596-597, 604-605), railroad companies (*U. S.* v. *Terminal Railroad Association,* 224 U. S. 383), lumber dealers (*Eastern States Retail Lumber Dealers Association* v. *U. S.,* 234 U. S. 600, 613), moving picture producers (*Paramount Famous Lasky Corporation* v. *U. S.,* 282 U. S. 30, 43), or bill-posters (*Stevens* v. *Foster & Kleiser,* 311 U. S. 255).

It would be illegal if the refusal to deal with non-members was in support of some real or fancied advantage to the industry instead of being designed to protect the competitive advantage of the individual member (*Fashion Originators Guild* v. *F. T. C., supra,* 312 U. S. 457, at p. 467); or if the refusal to deal was not absolute but involved merely imposing burdensome restrictions (*Montague* v. *Lowry,* 193 U. S. 38, at pp. 46-47; *U. S.* v. *Terminal Railroad Association,* 224 U. S. 383 at pp. 399-400; *Paramount Famous Lasky Corporation* v. *U. S.,* 282 U. S. 30, at p. 44).

This case goes much further. Here the exclusion is absolute and the restraints are directed to the individual facili-

ties of the associated publishers, to their collective facilities and even to the facilities of the publishers in another country.

2. AP, in its brief, devotes much space to what it calls a "novel doctrine of 'full illumination'" (AP 33-41). However the argument may be captioned or phrased, its purpose is to insinuate the idea that it is somehow discriminatory to apply to the complex system of restraints practiced by this great organization, the principles of the Sherman Act held applicable to lesser restraints; that it is somehow discriminatory to apply to restraints of the vital commodity, news, the principles that are applicable to restraints in motion pictures or women's garments.

The argument is without foundation. To suggest that there is anything novel in the idea that restraints by newspaper publishers are subject to the penalties of the Sherman Act is to overlook the statement of this Court (*Associated Press* v. *National Labor Relations Board,* 301 U. S. 103, at page 133, discussed in G123, 130, 132).

No immunity can or should attach to those restraining competition in news. On the contrary, the widest possible dissemination of news is of the greatest importance to the national welfare,—dissemination from as many different sources and with as many different facets and colors as possible (Fng 33, 34, R2610).[10]

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[10] Special privileges e. g. second class mailing rights, have been given to newspapers "to secure to the public the benefits to result from 'the wide dissemination of intelligence as to current events'" (*Lewis Publishing Co.* v. *Morgan,* 229 U. S. 288, 304).

It is a commonplace that newspapers and news agencies accord varying treatment to news dispatches (Fng 35, R2610; Fng 67, R2615).

It is obviously detrimental to the public interest to have artificial restraints hinder the development of different slants on the news. Vital interests are impaired if a group of newspaper publishers exercise the power to hinder the development of new newspapers.

Especially is this true in a great American metropolis.[11] For years, the City of Chicago, the second largest city in the United States, the fifth largest city in the world, had but one morning newspaper (Complaint 106, R34, Admitted R154). The Chicago Sun entered the morning field in Chicago in December, 1941 (R1011).

In the public interest the competition of an additional newspaper in this field was highly desirable.[12] Yet this

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[11]As to the unhealthy condition in cities in which there is but a single newspaper, Professor Zechariah Chafee, Jr., referring to this case, writes (*Providence* [*R. I.*] *Sunday Journal* of April 18, 1943, columns 2, 3):

> "Suppose a city has only one newspaper, and the citizens who would like another editorial policy must go without because nobody can afford to start their kind of newspaper in this city. Obviously this city lacks many advantages of a free press although no law forbids the establishment of a new journal. The situation differs from this only in degree when one newspaper is able to give its readers abundant news while any rival is denied access to the best source of national and international news."

See, to the same effect, statement in *Editor & Publisher,* December 31, 1938, p. 20.

[12]"If the Tribune were the best, as it claims to be the greatest, newspaper in the world, it would not be a healthy thing for a city of Chicago's size and influence on the Mississippi valley to be left dependent on a single paper for its morning picture of the contemporary world" (*Christian Century,* September 6, 1939, p. 1061).

competition was hindered by the exclusionary machinery of the AP, set in motion by the competitors of the Sun (G31-33) for their own benefit and to the financial detriment of the Sun (R1015; compare R2049).

3. Akin to the argument, "novel doctrine of full illumination", is the argument that freedom of the press is adversely affected if a group of newspaper publishers are enjoined from continuing an illegal combination (AP 100-109; T 51-57).

The argument was made and rejected in the Court below (R2600).[13]

The argument is not only without merit (G130-134); it is a sheer inversion. It is the present restraints in the AP structure which endanger the liberty of the press.

As Professor Chafee wrote (*Providence* [*R. I.*] *Sunday Journal,* April 18, 1943, Column 1):

> "Liberty of the press is commonly said to be endangered by the pending Sherman Act suit against the Associated Press. Innumerable editorials in member newspapers have denounced the suit as a senseless and malicious attack on this cherished constitutional right and as an effort to undermine the efficiency of this great organization * * *.
>
> "As a longtime advocate of free speech, I have tried to learn what all the shooting is about. I have no

[13] "The effect of our judgment will be, not to restrict AP members as to what they shall print, but only to compel them to make their dispatches accessible to others. We do not understand on what theory that compulsion can be thought relevant to this issue; the mere fact that a person is engaged in publishing, does not exempt him from ordinary municipal law, so long as he remains unfettered in his own selection of what to publish. All that we do is to prevent him from keeping that advantage for himself" (R 2600).

opinion whether the AP is violating the Sherman Act or not. That question can safely be left to the able Federal judges in New York and eventually to the Supreme Court. The purpose of this article is to show the unsoundness of the prevailing opinion that liberty of the press will be promoted by the retention of the present barriers against the admission of new members to the AP. On the contrary, it is these by-laws which abridge liberty of the press."

FOURTH

The form of the judgment should be modified to eliminate the possibility of retaining illegal competitive advantages.

Where the essence of the restraint is exclusion—where people have been blacklisted or boycotted or in some way illegally deprived of the right to deal with the combination or its members—the remedy must be to remove the exclusion (G123) and this is the way it has been done in the past (G82, 123-125).[14]

The Court, in addition to striking down the present by-laws, laid down two restrictions on the new ones: (1) that members in the same city and in the same "field" as an applicant shall not have power to impose or dispense with conditions upon his admission; (2) that the effect

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[14]The remedy flows from the evil,—the violation of the Sherman Act. It is not imposed because of the status of the defendants (as in the case of public utilities) but because they are restraining competition in an important commodity. The suggestion that the elimination of the restraints subjects AP to the public utility principle distorts the essence of the transaction and ignores the kind of remedies regularly applied in these cases (G82, 123-125).

of admission upon the ability of an applicant to compete with members in the same city and "field" shall not be taken into consideration in passing upon his application (Judgment Par. I-B, R2630, 2631).

Under the first of these restrictions as drawn, attempts might conceivably be made to submit by-laws under which someone other than a competitor could set in motion the exclusionary machinery.

This possibility has already been pointed out in a speech reported in the trade journal of the newspaper business:

> "This means that a member of the AP may remain seemingly inactive when his competitor applies, but he can have his friends elsewhere kindly administer the anesthetic and put the applicant to sleep by a 51% rejection vote. Thus this part of the decision falls of its own weight, and leaves practically in force the exclusive franchise that has always been the basis of value in an AP membership."[15]

Though such a course would undoubtedly constitute a contempt, litigation might be avoided by eliminating any such possibility of evasion.

The second restriction is in the form of a subjective test. It might raise an issue as to whether competitive reasons had been taken into consideration. But the objection goes deeper than this, for when a person is arbitrarily excluded and a competitor or a group of competitors are, because of this exclusion, left in enjoyment of their competitive advantages, the restraints persist, what-

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[15]Clyde H. Knox, addressing the Missouri Press Association (*Editor & Publisher,* November 27, 1943, p. 8).

ever reasons may be given (*Montague* v. *Lowry,* 193 U. S. 38 at p. 47).[16]

We agree in principle with the Government's suggestions for avoiding these pitfalls (G119-121). We suggest that the new by-laws should be so drawn as to declare that membership shall not be denied to applicants except for cause. Such by-laws would completely safeguard the legitimate interests of AP and of its members. Under such by-laws, membership could be denied to applicants who do not conduct *bona fide* newspapers (as distinguished, for example, from racing sheets or purely advertising media such as shopping information) or who are unable to meet their financial obligations as members of AP; it could be denied for other legitimate reasons, which are not a mere cover for arbitrary exclusion (*Montague* v. *Lowry,* 193 U. S. at p. 47).

As a minimum guarantee of the removal of the restraints, the defendants should be enjoined from continuing to deny membership to the particular victims of past exclusion (see decree in *U. S.* v. *National Association of Retail Druggists* [G123]; N. D. Indiana, in *Decrees and Judgments in Federal Anti-trust Cases,* p. 115).

If the removal of the restraints results in making AP a true cooperative, the real agency of all qualified American newspapers, instead of an exclusive group, it would be a

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[16]The reasons given in the past for objecting to persons applying for membership range from objections plainly based on the desire to avoid competition and to keep one's exclusionary privilege (R1171, 1173, 1211, 1312) to dislike or antagonism to particular individuals (AP 54, 55; R473-478, admitted R738; 204, 508-511, 537-539).

result that is not only buttressed and sanctioned by precedent (G 82, 123-125) but one that would make AP in truth, as it now is in name, the associated press of America.

Respectfully submitted

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