IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

THE ASSOCIATED PRESS, *et al.*,
Appellants,

v.

THE UNITED STATES OF AMERICA,
Appellee.

No. 57.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

PETITION FOR REHEARING.

Appellants, The Associated Press, *et al.*, respectfully petition the Court for a rehearing with respect to the provisions of the final judgment entered below and affirmed without change on this appeal.

The final judgment below was based squarely upon the legal relevance of a special public interest in news, and the District Court necessarily sought to ensure, so far as possible, that membership in AP become a matter of right.

The decision of this Court rejects the theory of law upon which the court below placed its decision. The affirmance of the determination that the by-laws of AP contravene the Sherman Act as they now stand is premised not upon the legal relevance of a special public interest in the wider dissemination of news as distinguished from

the general public interest in competition expressed in the Sherman Act, but upon the hypothesis that the business of news gathering and news distribution, so far as the Sherman Act is concerned, should be treated like all other endeavors.

The objective of this Court, as expressed in its opinion, is thus vastly different from that of the District Court; not the application of the unprecedented and repudiated theory of "full illumination," but the ordinary application of the Sherman Act to the facts at bar. Petitioners respectfully submit that this change in substantive approach has a determinative bearing upon the propriety of the provisions of the final judgment.

The unique remedy of forcing AP to open its membership to competitors of its members depended upon the unique legal theory embraced on this appeal only by Mr. Justice FRANKFURTER. In the absence of that theory, AP is entitled to have the judgment conform to the normal judicial injunctions, customary in anti-trust proceedings, and sufficient to ensure that AP shall comply with the law.

Further, this Court also disclaims the application of public utility concepts to AP. Nor do petitioners believe that the Court intended to lay down for the first time a rule of law that every private cooperative must admit to the joint undertaking all the competitors of all its members. Private cooperatives may need legislative exemption from the Sherman Act in order to fix prices. It has never yet been suggested that legislation is necessary to permit them to select their membership, or to refrain from affirmatively aiding competitors of individual members, by agreement or otherwise.

The legal assumptions underlying this petition, therefore, are: *first,* that AP is not, and should not be dealt with

as, a public utility, either as affected with a public interest or for any other reason, and *second,* that compelling AP to serve competitors of its members cannot be based on the fact that AP is a large organization, though far short of a monopoly, gathering and distributing *news,* or on the fact that AP is a cooperative.

The arguments to which the petition is addressed are: *first,* that the provisions of the final judgment banning considerations of competition from the minds of the membership are unnecessary and inappropriate means to the end that AP shall conform to the Sherman Act, *second,* that such provisions are in fact more likely to hinder than to foster competition among news services and among newspapers, and, *third,* that such provisions will severely handicap AP in protecting the integrity of its news report.

These matters are all relevant to the continued propriety of the provisions of a judgment based on an opinion which has been superseded and, in important part, rejected by the decision of this Court. The prior briefs were addressed to the District Court's opinion and to the contentions of the Government. This petition is addressed to the decision of this Court.

A final point will deal with what petitioners regard as major misconstructions of their argument on the merits which are also relevant to the propriety of the judgment.

I.

JUDICIAL CONTROL OF WHO SHALL BECOME A MEMBER OF AP CANNOT BE SUPPORTED UNDER THE SHERMAN ACT.

The opinion of the Court relies upon two aspects of the AP by-laws, namely, the provisions relating to the gathering of news on the one hand, and those relating to the distribution of the AP report on the other, in order to reach the conclusion that AP has unreasonably restrained competition in, and attempted to monopolize, both the gathering and distributing of news. The limitation upon the membership and the covenant to furnish the AP report exclusively to members—the distributive provisions—are only said to evidence a purpose and effect which contravene the Sherman Act when coupled with the exclusive right to the members' local news of spontaneous origin and to the Canadian Press report—the provisions relating to the gathering of news.

It is, of course, self-evident that the limitation upon the membership and the covenant to furnish the AP report exclusively to members are, as a practical matter, inseparable. AP's privilege to determine who shall become a member is the correlative of the covenant to furnish the AP report to members only, without which that covenant becomes relatively meaningless. If the membership must be opened to competitors of all existing members, then the covenant to furnish the report to members only has no real significance.

The fact of determinative importance, however, is that these two aspects of the AP by-laws are always dealt with together in the opinion of the Court. The evil to be remedied is repeatedly stated not as the restriction imposed by the by-laws upon the ability of a non-member to obtain the news

gathered by AP alone, but the restriction upon his ability to obtain the news gathered by AP *or by any one of its more than twelve hundred members.* AP's privilege to determine who shall become a member is never dealt with by itself, apart from the by-law with respect to the members' local news of spontaneous origin.

For the purposes of this petition it will be assumed that the exclusive right to the members' local news of spontaneous origin and to the Canadian Press report may be construed as unreasonably restricting the sale of news gathered by others which might otherwise be available to non-members, although the evidence is to the contrary. While no one can prevent anyone from learning of or witnessing an event and reporting that event, it will be assumed that restraint and monopolization in the collection of news can take place through multiple exclusive arrangements with respect to the news gathered by others.

Petitioners make this assumption because it is only these provisions relating to the collection of news which can conceivably support the conclusions of the Court that the by-laws are "designed to stifle competition," (Op. p. 7),* have "hindered and impeded the growth of competing newspapers," (p. 7), have "hindered and restrained the sale of interstate news to non-members who competed with members," (p. 8), are "aimed at the destruction of competition," (p. 9), are "essential features of a program to hamper or destroy competition," (p. 9), are part of a "common plan which is bound to reduce their competitor's [non-member's] opportunity to buy or sell the things in which the groups compete," (p. 10), are part of a combination "to keep others from publishing," (p. 14), evidencing a "course of conduct which will necessarily restrain or monopolize a part of trade or commerce" (p. 8).

* Page references are to the slip-sheet opinion.

Petitioners will discuss these statements of the Court further in their final point. For present purposes, petitioners confine their argument to the fact that, in the context of the case, neither the privilege of the membership of AP to reject applicants for competitive reasons or for any other reason, taken by itself, nor such limitation upon the number of newspapers to which the AP report is distributed in a single city as may arise from that privilege, can be so characterized.*

Unless the opinion of this Court was intended to lay down a sweeping principle that all cooperatives which restrict their membership, and all news-distributing arrangements which recognize the value of exclusivity, are illegal, then the really distinguishing factor in the present situation must lie in the fact that so large a proportion of the newspapers of the country have agreed to turn over their local news of spontaneous origin exclusively to AP, and in the exclusive right to the Canadian Press report. If this is the determining factor, then petitioners respectfully submit that the judgment should address itself to that factor which constitutes the illegality, and should not go to the extreme of the court below, which was actuated by a wholly different theory.

The conclusion seems inescapable that the construction placed upon the case by this Court requires the enjoining of the exclusive provisions of the agreements with respect to local news of spontaneous origin and of the Canadian Press contract, not the opening of the membership. Moreover, enjoining the exclusive provisions of these agree-

* Whatever purpose or effect may be attributed to the exclusive right to the members' local news of spontaneous origin and to the Canadian Press report, no such purpose or effect can be attributed to the limitation on the membership. AP's privilege to select its members neither takes nor keeps anything from anyone which any rule of law says others should have. The desire to help oneself, and its result, must be distinguished from the desire to injure others, and its result. AP members do desire to reserve to themselves the fruits of their own joint enterprise, but there is not the slightest evidence of any element of malice, or of a desire to injure others.

ments falls within the orbit of recognized anti-trust remedies; opening the membership does not.

It is true that if the membership is opened as provided in the final judgment, there is no occasion for going further. Petitioners respectfully submit, however, that such opening of the membership can only be supported by legal theories which this Court has rejected.

For the purposes of this petition it will also be assumed that the provisions of the membership by-laws requiring a new member to make the news reports of other agencies to which he has exclusive rights available to AP and requiring payments to be made to the old member in the same field are in some way unreasonable. It is these provisions, and *only* these provisions, which the District Court stated were "plainly designed in the interest of preventing competition." (R. 2592). None of these matters is of remotely comparable importance to the right to select who shall and who shall not join the cooperative venture and contribute to and receive the AP report.

Assuming, therefore, that the final judgment provides against the unreasonable restriction of news gathered by others and the imposition of unreasonable conditions upon the admission of members, the question remains whether the members can nevertheless, under the Sherman Act, be compelled to reject competitive considerations from their minds in electing new members.

Petitioners feel entitled to make this assumption and to pose this question because they have found no case in which involuntary association has been compelled or the involuntary serving of others has been required where other and less drastic steps would satisfy the Sherman Act.

The District Court found that "It is practically impossible for any one newspaper alone to establish or maintain the organization requisite for collecting all of the news of the

world, or any substantial part thereof; aside from the administrative and organization difficulties thereof, the financial cost is so great that no single newspaper acting alone could sustain it." (F. 37, R. 2611). The pooling by newspaper publishers of "their power to acquire, to purchase, and to dispose of news reports through the channels of commerce", (Op., p. 10), is therefore a necessity, and combining to accomplish a lawful purpose which cannot be achieved alone is not unlawful.

Nearly all news services, large and small, are the result of the joint effort of more than one newspaper. Pooling of power to acquire, purchase and dispose of news reports is common to substantially all news services. The word may be invidious; the fact is clearly beneficial and necessary.

Further, all of the news services discussed by the court below protect, in some form or other, that part of the value of their service which lies in its exclusiveness, (F. 29, R. 2609); UP and INS by asset value contracts; the others by not furnishing their service to two subscribers in the same city. (R. 2586). In the absence of a rule of law that all private cooperatives are illegal *per se* unless their membership is open to everyone, AP's form of organization alone cannot deprive it of the ability similarly to protect the value of its service by selecting its members.

There is nothing in the anti-trust laws requiring the destruction of that part of the value of a news report which depends upon its being distinctive. Provisions designed to protect that value are a part of competition rather than a restraint upon competition. While each news service creates something that did not exist before, it takes nothing from anyone else. Any number of such services can exist simultaneously, furnishing their own report of

the news to the same or different newspapers, as is in fact the case.

In such a state of facts, it is difficult to see how competition is restrained or monopoly can be achieved by the failure of a particular service to supply all newspapers. Indeed, the purpose of the Court to keep AP from achieving a "complete monopoly", (Op., p. 8), would seem to be advanced not by compelling AP to serve more, but by permitting it to refrain from serving more. The suggestion that AP must be prevented from achieving a monopoly is paradoxical unless it is addressed to the exclusive right to the members' local news of spontaneous origin.

This is not to deny that different considerations would become applicable were AP the only news service in existence, and hence indispensable. Petitioners conceded on the prior argument that in such a situation considerations of public policy might require AP to serve all. In the absence of indispensability, and in the absence of monopolization, or restrictive or coercive practices, or if those matters are enjoined against, the Sherman Act does not require any such result. Nor is a measure of excellence in the competitive race among news services of legal significance.

The few sporadic local situations, where, in one way or another, rights to the three major services are in one hand, referred to by the Court, (Op., p. 9), are also irrevelant to the application of the Sherman Act to AP. They are no part of any purpose of AP, and the evidence shows that there are 20 to 30 other news services ready to fill such need as may arise, certain of which are by themselves fully adequate for the successful conduct of the most substantial newspaper (AP main brief, pp. 21-2). Moreover, no instance has been brought forward of a prospective newspaper failing to be published or of an existing newspaper ceasing publication because it could not obtain adequate news services.

Further, the obvious remedy for such local situations, assuming that they do constitute violations of the Sherman Act, is to deal with them directly. The problem is entirely local and is the same as in any case of undue aggregation of property. The remedy, where possible—and here it would be possible—is to compel the relinquishment, in each particular situation, of enough of the property, i. e. the rights so aggregated, to bring about compliance with the anti-trust laws.

Petitioners respectfully submit that the final judgment must be modified. If, as clearly appears to be the basis of the Court's decision, this Court believes that the exclusive provisions of the by-laws relating to the members' local news of spontaneous origin and of the Canadian Press contract unreasonably restrict the sale of news gathered by others, those provisions should be enjoined. Similarly, petitioners have assumed that the power of a member to impose unreasonable conditions upon the admission of a competitor must also be enjoined. When these things are done, however, AP will have conformed to the anti-trust laws.

Broadly speaking, both this Court and the court below have treated the exclusive flow of news to AP and the exclusive flow of news from AP to its members as two halves of a single sphere, neither one of which alone is unlawful, while the sphere itself is. The theory of the District Court may have required the removal of the upper half, i. e. the opening of the membership. The theory of this Court requires the reverse, for only the lower half, i. e. the exclusive flow of news to AP, can be unlawful under the Sherman Act.

The succeeding points of this petition will deal with additional considerations bearing upon the impropriety of

the present provisions of the final judgment under the Sherman Act.

II.

THE PRESENT JUDGMENT IS MORE LIKELY TO HINDER THAN TO FOSTER COMPETITION.

Having established to its satisfaction that the determining legal principle was that of "full illumination," the opening of the AP membership by the District Court followed as of course. The overriding relevance of the special public interest in the dissemination of news carried its own conclusion, and the determination of the actual competitive effect of the final judgment was irrelevant.

Under the Sherman Act, however, upon which the decision of this Court is based, and in the absence of the theory of the District Court, the competitive effect of the judgment is of prime importance. Petitioners respectfully submit that this is determinative as to the impropriety of the provisions of the present judgment.

Because of the peculiar substantive theory of the court below, no factual investigation of the competitive effect of the final judgment was had. Indeed, the District Court went so far as to say that if AP should become a monopoly as a result of opening the membership, no public injury could result. (R. 2600). A judgment based upon such a theory is certainly not a judgment automatically appropriate to be entered under the Sherman Act.

As the case now stands, petitioners have been deprived of the opportunity, customary in all anti-trust suits, to demonstrate that the opening of their membership is not an appropriate means to achieve the objectives of the Sherman Act. Petitioners respectfully submit that injunctive provisions of such far-reaching character as those in-

cluded in the present judgment should not be imposed, under the Sherman Act, without a trial as to their actual effect upon competition. Petitioners further submit that the competitive effect of opening their membership will be contrary to the purposes of that Act.

So far as competition among news services is concerned, history and reason show that the development of competing news services is actually fostered by whatever limitation on the number of newspapers served by AP results from the membership by-laws. So much, at least, is historically and logically demonstrable, whatever may be said as to the exclusive right to the members' local news of spontaneous origin.

The opening of the membership as provided in the present final judgment cannot, therefore, have anything but an adverse effect upon competition among news services. The same is true, so far as can be foreseen, for competition among newspapers.

The perspective of the case has been distorted by the focus upon the large newspapers. The fact of the matter is that any large newspaper is competitively able to take care of itself. The only two examples of newspapers allegedly competitively injured by non-election to AP set forth in the Government's complaint are good illustrations of this fact. The all day circulation of the Washington *Times-Herald* is greater than that of any other Washington paper. (R. 1078, 1091, 1122, 1135; F. 83, R. 2618). In a single year *The Chicago Sun* achieved phenomenal success, growing from nothing to the eighth largest circulation of all full sized morning dailies, and the eleventh largest including tabloids. (F. 82, R. 2618). Other illustrations are set forth at pages 23 to 25 of the AP main brief.

These large papers have available to them, and they can afford, a multiplicity of news services. Moreover, they rely to a very large extent upon their own news gathering staffs, which are often world-wide. Competitive injury to such papers arising from lack of AP is either non-existent, or, at least, of far less importance than the competitive injury to the smaller newspapers arising from the provisions of the judgment.

The vast majority of American newspapers are published in smaller communities. Many of these are AP members. For whatever it is worth, they have built up public acceptance of the AP report in their communities. The value arising from their distinctive publication of the AP report is an asset—much more of a competitive asset in these smaller communities than in a metropolis, because they generally cannot pursue the quest for something distinctive to the extent of taking two world-wide services.

The result of taking away this asset will not be to increase the number of papers in these communities. Ample other news services are available to serve this purpose. The result, instead, will be to enable special interests, or such large newspaper publishers as may so desire, to expand into those small communities with a paper offering both what the local paper now offers, namely, AP, and a great deal more besides.

The control of the American press is now widely dispersed. Opening the membership of AP would set in motion a trend toward chain operation, and it is not to be assumed that the local newspapers could readily stand up against such competition.

Any metropolitan paper could then be published in any community having an existing AP member, using AP and any other news services and features it may have. The

value of AP to the local paper would be largely destroyed. Moreover, the development of facsimile and wire photo transmission would obviate the necessity for the duplication of the printing plant of the large paper. Further, a newspaper published in a sufficient number of places would be better able to attract national advertising. The ultimate effect upon the local paper is apparent.

Petitioners respectfully submit that the effect upon competition among newspapers and among news services of opening AP's membership as provided in the final judgment requires its modification. At the very least, the opening of the membership as provided in the judgment should not be imposed without a full exploration of its competitive effect in a trial, as is customary in all anti-trust cases.

III.

THE PRESENT JUDGMENT WILL SEVERELY HANDICAP AP IN PROTECTING THE INTEGRITY OF ITS NEWS REPORT.

Petitioners see no way in which they can remain free to control their membership and to protect the standard of their report so long as the rejection and expulsion of members can be invalidated, and individual members summarily punished, on the entirely subjective ground that someone considered the competitive effect of the action taken.

Some of the facts bearing upon the peculiar benefits of AP's form of organization and the necessity for the untrammelled right to protect the integrity of its report by rejection of applicants, expulsion of members and other disciplinary measures are set forth in the affidavits of Noyes, McLean and Cooper. (R. 1415-1439).

Briefly stated, the purpose of the formation of AP was the creation of a news service free from ulterior influence. Theretofore the newspapers of the United States had been at the mercy of news collecting and distributing organizations run for profit and either privately owned or owned by a small group of newspapers, with results beneficial neither to the newspapers nor to the accuracy and impartiality of the news. Thereafter, AP's unbiased, complete, and accurate news report set the standards for all press services. Partisan reporting may, like editorializing, be indulged in by individual newspapers. It no longer plays any part in any important news service in the United States.

The control of the AP report is dispersed among some 1,200 newspapers representing an infinite variety of opinion, no one or group of which can control the AP report. The collective interest of the membership requires that the news transmitted to AP by each member be unbiased, complete, and accurate, and that the news published by each member under the AP by-line also be unbiased, complete, and accurate. The sanctions are fine, suspension, and expulsion.

It is true that economic considerations require that an AP membership be transferable as an asset of the member paper. The new member is nevertheless subject to the same discipline as the old. And where admission in the first instance is not obtained by transfer, the fourth sanction is failure of election.

Interjected into this situation by the provisions of the present final judgment is the requirement, at least so far as rejection and expulsion are concerned, that those participating in the disciplinary action overcome what is, in effect, a presumption that it was done for competitive rea-

sons. That presumption is clearly stated in the opinion of the District Court:

> "Although, as we have said, only a few members will have any direct personal interest in keeping out an applicant, the rest will not feel free to judge him regardless of the effect of his admission on his competitors. Each will know that the time may come when he will himself be faced with the application of a competitor; and that will be true even as to those in whose 'field' no applicant has as yet appeared. Unless he supports those who now object to the admission of their competitor, he will not in the future be likely to get their support against his own." (R. 2592)

The language is confined to the rejection of an applicant. The same argument can be made in the case of an expulsion, and even in the case of a suspension or fine. It would be perfectly possible for a newspaper to claim that a fine or suspension had been imposed for competitive, not disciplinary, reasons, in contravention of the judgment.

The problem would not be so acute were the considerations involved not so subtle and intangible. The integrity of the AP report is not preserved by preventing the publication of provable lies alone. The distortion of news is a far more subtle matter than that. Only in the most flagrant case would the members feel free to exercise a discretion which, fully to perform its function, must be without restraint.

Whether likely to be incurred or not, the hazard of failing to prove a state of mind permissible under the judgment is imprisonment upon a summary proceeding for contempt of court. The inherent threat to the freedom of the press in

such a state of affairs was set forth in the briefs on the prior argument. This petition is addressed to the effect upon the integrity of the AP report of so shackling the free exercise of disciplinary discretion to protect against distorted news.

The only other situation cited where the legality of the conduct of the internal affairs of an organization is made to depend upon so subjective a test arises under the National Labor Relations Act. There the hiring and firing of employees, and other matters, may be legal or illegal depending upon whether or not they were done because of the union activities of the employees involved. Any apparent analogy between the consideration of union activities under the National Labor Relations Act and the consideration of competition under the present provisions of the judgment is, however, entirely specious.

Leaving aside the fact that the National Labor Relations Act is the expression of a special legislative policy administered by an expert administrative tribunal,* a determinative distinction lies in the fact that the consequences of considering the wrong thing under that Act are far different from the consequences of considering the wrong thing under this judgment.

If, under that Act, an employer is believed to have done a particular act upon improper considerations, the National Labor Relations Board issues a complaint. If, after a hearing relating to a particular charge, the Board is persuaded the facts so warrant, a cease and desist order is issued. This order is in the nature of a warning, defining the particular offense, and is not enforceable except upon further proceedings in court.

* Moreover, the National Labor Relations Act was enacted only after extensive legislative deliberation, in response to an urgent public need, which, presumably, could adequately be met in no other way.

The employer who transgresses the provisions of the Act in a particular situation is in effect subjected to no sanctions whatever, unless back pay be defined as a sanction. He is, instead, told what he may not do in each particular situation involving a violation of the Act, after a hearing, and sanctions are imposed only after the issuance of an order of a court. His freedom of action from situation to situation from time to time is relatively unrestricted.

The impact of the present provisions of the final judgment is in sharp contrast. The immediate sanction of fine or imprisonment upon summary proceeding for contempt of court will be ever present in all situations for all time.

Petitioners respectfully submit that the restrictive effect upon the protection of the objectives of AP which would be brought about by the injunctive interference with AP's control over its membership on such a subjective basis has a most significant bearing upon the impropriety of the present judgment and upon the reasonableness under the Sherman Act of leaving AP free to select its members.

IV.

THE COURT APPEARS TO HAVE MISCONSTRUED CERTAIN OF AP'S PRIOR ARGUMENTS.

Petitioners have sought to avoid, so far as possible, taking issue with the opinion of the Court. Thus a restrictive and monopolistic effect of the exclusive right to the members' local news of spontaneous origin and of the Canadian Press contract has been assumed, as stated in the Court's opinion, although the evidence is to the contrary.

Similarly, petitioners will not, at this point, take issue with every assertion in the opinion which they regard as unsupported in the record. Nor will petitioners repeat the argument stemming from the First Amendment, except to point out that their argument was not that the First Amendment entitled them to "a different and more favorable kind of trial procedure than all other persons" (Op., p. 3). Nor did petitioners argue that the First Amendment gave them "a partial immunity" from the Sherman Act (Op., p. 4).

Petitioners did argue, and they in truth believe, that the provisions of the final judgment opening the membership constitute a real threat to freedom of the press, for the reasons stated in their briefs. Petitioners believe that at the very least the history of the preservation of the freedom of the press should militate against the imposition of these pervasive judicial controls upon the press as a remedy in an anti-trust suit, particularly when the remedy is based on a theoretical and unproved need and when the remedy inherently involves opportunities for oppression.

However, petitioners' arguments at this point will be confined to the assertion that AP is tending towards monopoly, the assertions with respect to the purpose and effect of limiting their membership, and the disposition of the case on summary judgment.

AP Has Not Been Tending Toward Monopoly

One of the turning points of the opinion, if not the turning point, is the statement on page 8 that "For these reasons the argument, repeated here in various forms, that AP had not yet achieved a complete monopoly is wholly irrelevant."

AP made no such plea of confession and avoidance. On the contrary, AP argued not only that it was not a monopoly but also that it was not even headed in that direction, and urged that heretofore, under the Sherman Act, the obligation to serve others had been imposed only in cases of monopoly. AP never based its argument on the fact that it had *"not yet"* achieved a *"complete"* monopoly. AP never desired a monopoly, and the tendency has been in precisely the opposite direction.

The conclusions of law upon which AP's argument was based in part were not that AP was not yet a monopoly, but that AP does not either "monopolize" or "dominate" (C. of L. IX, X, XI, R. 2629). The facts show, moreover, that far from being on the road to becoming a monopoly AP is in fact much further from being a monopoly than at any time since its formation in 1900. The rapid and vigorous growth of UP, INS and the 20 to 30 other news services makes this self-evident. The trend has continuously and steadily been *away* from monopoly.

Further, so far as the judgment is concerned, it would seem uncontrovertible that compelling AP to serve more newspapers would, in effect, set it on the road to monopoly, not reverse such a trend.

The Purpose and Effect of AP's Privilege to Select its Membership

Both this Court and the District Court, perhaps because of the summary judgment procedure, purport to deal with the by-laws "on their face", without regard to purpose or effect.

Petitioners respectfully submit that the disposition of this case on such a narrow ground, without regard to purpose or effect, would read the rule of reason out of this case.

The District Court disregarded all evidence as to admissions of members in the past (R. 2581). However, the District Court did not modify the membership by-laws so as to open the membership because they appeared on their face to have an illegal competitive purpose or effect under the Sherman Act. It did so because of the overriding importance of the alleged public interest in "full illumination" (R. 2594-5). On the prior argument before this Court petitioners demonstrated not only the legal irrelevance of the theory of the court below to a suit under the Sherman Act, but also the unproven nature of the assumption that full illumination would be furthered by the relief imposed.

While this Court has rejected the theory of the court below, it also has gone beyond the face of the by-laws, not to "full illumination", but to their assumed competitive purpose and effect. Petitioners respectfully submit that any adverse competitive purpose or effect of their privilege to select their membership is similarly unsupported in the record.

This Court disregarded the *past* effect of the by-laws (Op. p. 8). Yet the Court assumed that the *future* net effect of the by-laws will necessarily be unreasonably to restrain competition and that they have that purpose, as the statements from the Court's opinion quoted above, page 5, make clear.

Petitioners are therefore faced with the anomaly that 40 years of actual experience of the operation of their by-laws, clearly the best evidence of their purpose and effect, are flatly disregarded in favor of *a priori* reasoning. Petitioners respectfully submit that the rule of reason permits of no such result. Petitioners further submit that the evidence, even as resolved by the court below, is actually in clear support of their privilege to select their members.

There is only one finding with respect to the competitive effect of the AP by-laws. Finding 70 states that "The growth of news agencies has been *fostered* to some extent *as a result of the restrictions of The Associated Press' services to its own members,* but *other restrictions* imposed by The Associated Press have hampered and impeded the growth of competing news agencies and of newspapers competitive with members of The Associated Press." (R. 2616. Emphasis added.) Petitioners assigned error to the second part of this finding (Assignment of Error No. 9, R. 2638), and sought to demonstrate on the prior argument that it was entirely without support.

However that may be, the first part of the finding, relating to the restriction of AP's service to its members, holds that competition has been *fostered* thereby. This part of the finding is meaningless unless it includes the limitation of the membership within the phrase "the restrictions of The Associated Press' services to its own members." Indeed, it is self-evident that the growth of UP, INS and the other news agencies was fostered, if not brought about, by the limitations upon the membership of AP.

The rest of the finding, relating to hampering and impeding competitive news agencies and newspapers, refers to *other restrictions* imposed by AP, not the limitation of membership. Such other restrictions can only be those matters discussed above which petitioners have assumed, for the purposes of this petition, may, in view of the Court's opinion, properly be enjoined against.

The *only* finding, therefore, as to the competitive effect of AP's privilege to select its membership, is a finding that competition among news services has been stimulated thereby. Taken by itself, the privilege is beneficial to com-

petition among news services. So far as the effect upon competition among newspapers is concerned, the findings are silent.

The only finding with respect to purpose states that the purpose of AP is "to obtain news". (F. 2, R. 2606). The finding also states that AP is a "combination of newspaper owners", but the Sherman Act does not make illegal all combinations. Only those combinations which are in unreasonable restraint of trade are unlawful. The District Court did not even find that the exclusive right to the members' local news of spontaneous origin was attributable to a purpose illegal under the Sherman Act.

However, petitioners have assumed that the exclusive right to the members' local news of spontaneous origin and to the Canadian Press report may properly be enjoined against, if only because of their claimed effect, although the effect is disputed.

Leaving these matters aside, it would seem to be beyond question that the members of AP have combined in order to create something which would not otherwise exist. They wish to retain what they have created for themselves, but there is no finding, and petitioners respectfully submit that there is no evidence, that their purpose in so doing is in any way to injure others by restraining competition or otherwise. The fact that their "enterprise and sagacity" is collective rather than individual (Op., p. 10) is thus of no legal significance whatever.

Summary Judgment

Petitioners have pointed out that they assigned error to the only finding dealing with the competitive effect of the by-laws. The statements in the Court's opinion with respect to other findings, *e.g.*, that the District Court "found" that

the by-laws were in restraint of commerce and contained provisions designed to stifle competition (p. 7), refer to expressions in the lower court's opinion, not to findings of fact. Petitioners could hardly be expected to assign error to particular expressions in the opinion of the District Court.

The reason these expressions from the opinion of the District Court are not reflected in the findings of fact is obviously because they are far too controversial to be made the subject of factual findings on a motion for summary judgment.

The findings ultimately found were arrived at only after a great deal of work by petitioners' counsel and counsel for the Government, after careful conferences, and after oral argument before the District Court on findings proposed by both sides.

The District Court made no findings as to the purpose or effect of the AP by-laws except as noted above. The District Court did not even find that possession of an AP membership is a competitive advantage or that the failure to obtain an AP membership was a competitive handicap. Yet the opinion of the Court assumes not only that such is the case, but that there can be no justification for the retention of a competitive advantage by him who has created it.

Whatever may be the view of the Court with respect to local news of spontaneous origin, the Canadian Press contract, or the imposition of unreasonable conditions upon new members, petitioners respectfully submit that their privilege to select their membership cannot be voided in the name of the Sherman Act without a trial, with findings of fact to which error can be assigned. The reasonableness of that privilege cannot be denied in the absence of a thorough investigation, on trial, of the nature of the calling, the necessity for the privilege in terms of protecting

the report, whether competitive injury has in fact been inflicted on non-member papers, and the overall effect upon the industry of opening the membership.

The Government chose to move for summary judgment, pinning its faith on legal theories similar to those of the District Court. The case is now a straight Sherman Act case. Petitioners submit that under the Sherman Act their right to select their membership, taken by itself, is clearly lawful. Petitioners further submit that in no event should this right be voided without a trial.

CONCLUSION.

Petitioners respectfully urge upon the Court that this case be further heard.

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I hereby certify that the foregoing petition is presented in good faith and not for delay.

JOHN T. CAHILL

September 7, 1945.