Eastern States Retail Lumber Dealers' Association v. United States

234 U.S. 600 (1914)

Mr. Justice Day delivered the opinion of the court:

These are appeals from a decree of the district court of the United States for the southern district of New York an action brought by the United States under the Sherman anti-trust act, having for its object an injunction against certain alleged combinations of retail lumber dealers. [The government averred that the alleged combination] had entered into a conspiracy to prevent wholesale dealers from selling directly to consumers of lumber.

The defendants are various lumber associations composed largely of retail lumber dealers in New York, New Jersey, Pennsylvania, Connecticut, Massachusetts, Rhode Island, Maryland, and the District of Columbia, and the officers and directors of the associations.

[The record is voluminous. The decree declaring that the defendants formed and acted through an unlawful combination in restraint of trade concerned a method that the defendants used for the "distribution of the information," a document known as the 'Official Report.' The report included a statement to members, saying]:

> *You are reminded that it is because you are members of our Association and have an interest in common with your fellow members in the*

> *information contained in this statement, that they communicate it to you; and that they communicate to you in strictest confidence, and with the understanding that you are to receive it and treat it in the same way.*
> *The following are reported as having solicited, quoted, or as having sold direct to the consumers: [a list of names and addresses of various wholesale dealers].*
> *Members upon learning of any instance of persons soliciting, quoting, or selling direct to consumers, should at once report same.*

. . . The record discloses that the defendant associations are constituted largely of retail lumber dealers, each of whom has the natural desire to control his local trade, which the retailers contend have been unduly interfered with by the wholesalers in selling to consumers within the local territory in . . . conflict with what they regard as a strictly local trade, and it appears that the defendant associations have for their object, among other things, the adoption of ways and means to protect such trade and to prevent the wholesale dealers from intruding therein.

The particular thing which this case concerns in the retailers' . . . circulation of the reports . . . to keep the wholesalers from selling directly to the local trade. . . . The record discloses a systematic circulation among the members of the defendant associations of the official report. . . .

[The associations developed a policy to maintain a "blacklist" of wholesalers who sold directly to customers of member retailers. This policy allegedly included an elaborate verification process intending to assess the validity of complaints against wholesalers]. Each report contains the names of all wholesalers who have been reported from the very beginning as selling to consumers, and whose names have not been removed for cause. The reports or lists after being printed in New York are distributed amongst the secretaries of the defendant associations. . . . The secretary of each association then distributes the lists to his members. Should any wholesaler desire to have his name removed from the list he can have it done upon satisfactory assurance to the local secretary that he is no longer selling in competition with the retailers. [The defendants emphasized that] "the greatest care is taken to make the list accurate. . . . only contains the names of such wholesalers as are absolutely committed to the practice of competing with retailers for the custom of builders and contractors."

The reading of the official report shows that it is intended to [disseminate information among members about] wholesalers reported as soliciting or selling directly to consumers. . . . [The wholesalers on the lists arguably attempted] to invade the exclusive territory of the retailers, [and] as they regard it, have been guilty of unfair competitive trade. These lists were quite commonly spoken of as blacklists. . . . True it is that there is no agreement among the retailers to refrain from dealing with listed wholesalers, nor is there any penalty annexed for the failure so to do; but he is blind indeed who does not see the purpose in the predetermined and periodical circulation of this report to put the ban upon wholesale dealers whose names appear in the list of unfair dealers trying by methods obnoxious to the retail dealers to supply the trade which they regard as their own.

Indeed, this purpose is practically conceded in the brief of the learned counsel for the [defendants]: ". . . [T]he circulation of this information would have a natural tendency to cause retailers receiving these reports to withhold patronage from listed concerns. That was, of course, the very object of the defendants in circulating them."

In other words, the circulation of such information among the hundreds of retailers as to the alleged delinquency of a wholesaler with one of their number had and was intended to have the natural effect of causing such retailers to withhold their patronage from the concern listed.

The Sherman Act . . . broadly condemns all combinations and conspiracies which restrain the free and natural flow of trade in the channels of interstate commerce. It is true that this court held in the Standard Oil and Tobacco Cases, supra, and in the subsequent cases following them, that in its proper construction the act was not intended to reach normal and usual contracts incident to lawful purposes and intended to further legitimate trade:

> 'Applying the rule of reason to the construction of the statute, it was held in the *Standard Oil* Case that as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the anti-trust act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition, or unduly obstructing the due course of trade, or which, either because of their inherent nature or effect, or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance.' *United States v. American Tobacco Co.*, 221 U.S. 106, 179 (1911).

. . . But it is said that in order to show a combination or conspiracy within the Sherman act some agreement must be shown under which the concerted action is taken. It is elementary, however, that conspiracies are seldom capable of proof by direct testimony, and may be inferred from the things actually done. [In this case], . . . the conspiracy . . . was the natural consequence of [the] action [and therefore] may be readily inferred.

The circulation of these reports not only tends to directly restrain the freedom of commerce by preventing the listed dealers from entering into competition with retailers, . . . [and] it directly tends to prevent other retailers who have no personal grievance against him, and with whom he might trade, from so doing, they being deterred solely because of the influence of the report circulated among the members of the associations. In other words, the trade of the wholesaler with strangers; was directly affected, not because of any supposed wrong which he had done to them, but because of the grievance of a member of one of the associations. . . . This practice . . . [is] within the prohibited class of undue and unreasonable restraints. . . .

A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade. But, . . . when [dealers] combine and agree that no one of them will trade with any producer or wholesaler who shall sell to a consumer within the trade range of any of them, quite another case is presented. An act harmless when done by

one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy. . . . When the retailer goes beyond his personal right, and, conspiring and combining with others of like purpose, seeks to obstruct the free course of interstate trade and commerce and to unduly suppress competition by placing obnoxious wholesale dealers under the coercive influence of a condemnatory report circulated among others, actual or possible customers of the offenders, he exceeds his lawful rights, and such action brings him and those acting with him within the condemnation of the Act of Congress and the District Court was right in so holding. It follows that its decree must be affirmed.