American Column & Lumber Co. v. United States

257 U.S. 377 (1921)

Mr. Justice CLARKE delivered the opinion of the Court.

The unincorporated 'American Hardwood Manufacturers' Association' was formed in December, 1918, by the consolidation of two similar associations, from one of which it took over a department of activity designated the 'Open Competition Plan,' and hereinafter referred to as the 'Plan.'

Participation in the Plan was optional with the members of the Association, but, at the time this suit was commenced, of its 400 members, 365 . . . were members of the Plan. The importance and strength of the Association is shown by the admission in the joint answer that, while the defendants operated only 5% of the number of mills engaged in hardwood manufacture in the country, they produced one-third of the total production of the United States. . . . The defendants are the members of the Plan, their personal representatives, and F. R. Gadd, its 'Manager of Statistics.'

The bill alleged, in substance, that the Plan constituted a combination and conspiracy to restrain interstate commerce in hardwood lumber by restricting competition and maintaining and increasing prices, in violation of the Anti-Trust Act of 1890. The answer denied that the Plan had any such purpose and effect as charged, and averred that it promoted competition, especially among its own members.

A temporary injunction, granted by the District Court, restricting the activities of the Plan in specified respects, by consent of the parties, was made permanent, and a direct appeal brings the case here for review.

The activities which we shall see were comprehended within the 'Open Competition Plan' (which is sometimes called the 'New Competition') have come to be widely adopted in our country, and, as this is the first time their legality has been before this court for decision, some detail of statement with respect to them is necessary. [*]

There is very little dispute as to the facts. . . . The record shows that the Plan was evolved by a committee, which, in recommending its adoption, said:

> "The purpose of the plan is to disseminate among members accurate knowledge of production and market conditions so that each member may gauge the market intelligently instead of guessing at it; to make competition open and above board instead of secret and concealed; to substitute, in estimating market conditions, frank and full statements of

[*] [In the 1910s, several commentators promoted the idea that collaborations among small dealers through trade associations could mitigate power of the trusts. *See*, *e.g.*, ARTHUR JEROME EDDY, THE NEW COMPETITION (1912)].

> our competitors for the frequently misleading and colored statements of the buyer."
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> [The committee further declared]:
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> *"Knowledge regarding prices actually made is all that is necessary to keep prices at reasonably stable and normal levels.*
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> The Open Competition Plan is a central clearing house for information on prices, trade statistics and practices. By keeping all members fully and quickly informed of what the others have done, the work of the Plan results in a certain uniformity of trade practice. There is no agreement to follow the practice of others, *although members do follow their most intelligent competitors*, if they know what these competitors have been actually doing.
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> The monthly meetings held in various sections of the country each month have improved *the human relations* existing between the members before the organization of this Plan."

And in another later and somewhat similar, appeal sent to all the members, [the association declared]:

> "The keynote to modern business success is mutual confidence and co-operation. *Co-operative competition, not cutthroat competition*. Co-operation is a matter of business, because it pays, because it enables you to get the best price for your product, because you come into closer *personal contact with the market*.
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> Co-operation will only replace *undesirable competition* as you develop a co-operative spirit. For the first time in the history of the industry, the hardwood manufacturers are organized into one compact, comprehensive body, equipped to serve the whole trade in a thorough and efficient manner. * * * More members mean more power to do more good for the industry. With co-operation of this kind we will very soon have enlisted in our efforts practically every producing interest, *and you know what that means*."

Thus, the Plan proposed a system of cooperation among the members, consisting of the interchange of reports of sales, prices, production, and practices, and in meetings of the members for discussion, for the avowed purpose of substituting 'co-operative competition' for 'cutthroat competition,' of keeping 'prices at reasonably stable and normal levels,' and of improving the 'human relations' among the members. [The Plan required members to provide the Association with]:

> 1. A *daily* report of all sales actually made, with the name and address of the purchaser, the kind, grade and quality of lumber sold and all special agreements of every kind, verbal or written with respect thereto. 'The reports to be exact copies of orders taken.'

> 2. A *daily* shipping report, with exact copies of the invoices, all special agreements as to terms, grade, etc. The classification shall be the same as with sales.
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> 3. A *monthly* production report, showing the production of the member reporting during the previous month, with the grades and thickness classified as prescribed in the Plan.
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> 4. A *monthly* stock report by each member, showing the stock on hand on the first day of the month, sold and unsold, green and dry, with the total of each, kind, grade and thickness.
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> 5. *Price-lists*. Members must file at the beginning of each month price-lists showing prices f. o. b. shipping point, which shall be stated. New prices must be filed with the association as soon as made.
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> 6. *Inspection reports*. These reports are to be made to the association by a service of its own, established for the purpose of checking up grades of the various members and the Plan provides for a chief inspector and sufficient assistants to inspect the stocks of all members from time to time.

All of these reports by members are subject to complete audit by representatives of the association. Any member who fails to report *shall not receive the reports* of the secretary, and failure to report for twelve days in six months shall cause the member failing to be dropped from membership. Plainly it would be very difficult to devise a more minute disclosure of everything connected with one's business than is here provided for by this Plan, and very certainly only the most attractive prospect could induce any man to make it to his rivals and competitors.

But, since such voluminous disclosures to the secretary would be valueless, unless communicated to the members in a condensed and interpreted form. [The Association's secretary, therefore, produced the following reports]:

> 1. A *monthly* summary showing the production of each member for the previous month, 'subdivided as to grade, kind, thickness,' etc.
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> 2. A *weekly* report, not later than Saturday, of all sales, . . . including . . . the price, and the name of the purchaser.
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> 3. [A weekly report] of each shipment by each member. . . .
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> 4. A *monthly* report showing the individual stock on hand of each member and a summary of all stock, green and dry, sold and unsold. . . .
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> 5. [A *monthly*] summary of the pricelists furnished by members, showing the prices asked by each, and any changes made therein must be immediately transmitted to all the members.
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> 6. A market report letter . . . pointing 'out changes in conditions both in the producing and consuming sections, giving a comparison of

> production and sales and in general an analysis of the market conditions.'

[The association held monthly meetings intending to] 'afford opportunity for the discussion of all subjects of interest to the members.' [The Association recognized that such an elaborate plan] 'requires the selection of a man to take charge of the gathering and dissemination of data, with necessary assistants.' . . . F. R. Gadd was selected and given the title of 'Manager of Statistics.'

. . . The Plan on paper provided only for reports of past transactions. [The defendants argued that information about] past transactions cannot fix prices for the future. But [the Plan] plainly invited an estimate and discussion of future market conditions by each member, and a co-ordination of them by an expert analyst could readily evolve an attractive basis for cooperative, even if unexpressed, 'harmony' with respect to future prices. . . .

It is plain that the only element lacking in this scheme to make it a familiar type of the competition suppressing organization is a definite agreement as to production and prices. . . . [Nonetheless,] the organization of the defendants constitutes a combination [in the meaning of § 1 of the Sherman Act. Accordingly, the remaining question is] whether the system of doing business adopted resulted in that direct and undue restraint of interstate commerce which is condemned by this anti-trust statute.

It has been repeatedly held by this court that the purpose of the statute is to maintain free competition in interstate commerce and that any concerted action by any combination of men or corporations to cause, or which in fact does cause, direct and undue restraint of competition in such commerce, falls within the condemnation of the act and is unlawful. . . .

With this rule of law and the details of the Plan in mind, we come to consider what the record shows as to the purpose of this combination and as to its effect upon interstate commerce.

We have seen that the Plan provided for the selection of a man to have charge of the gathering and dissemination of the data, which were to be contained in the various reports, and that the defendant F. R. Gadd was selected for this purpose, with the title of 'Manager of Statistics.' Mr. Gadd was a man of large experience in the lumber business, competent and aggressive, and the record makes it clear that he was in complete and responsible charge of all the activities of this Open Competition Plan. He compiled the summaries of daily, weekly, and monthly reports, and wrote the monthly market letter and the market comment in the weekly sales reports, which were distributed to the members. . . .

[The record shows that the Association and its members acted] to suppress competition by restricting production. [The minutes of the monthly meetings] convincingly show that one of the prime purposes of the meetings . . . was to induce members to co-operate in restricting production, thereby keeping the supply low and the prices high. . . . The co-operation is palpable and avowed, its purpose is clear, and we shall see that it was completely realized. . . . The intention to create such a common purpose is too clear to be doubted. . . .

But not only does the record thus show a persistent purpose to encourage members to unite in pressing for higher and higher prices, without regard to cost, but there are many

admissions by members, not only that this was the purpose of the Plan, but that it was fully realized. [The minutes and other records] are sufficient to show beyond discussion that the purpose of the organization, and especially of the frequent meetings, was to bring about a concerted effort to raise prices regardless of cost or merit, and so was unlawful, and that the members were soon entirely satisfied that the Plan was 'carrying out the purpose for which it was intended.'

[T]he record shows that the prices of the grades of hardwood in most general use were increased to an unprecedented extent during the year. Thus, the increases in prices of varieties of oak, range from 33.3% to 296%; of gum, 60% to 343%, and of ash, from 55% to 181%. [We conclude] that the united action of this large and influential membership of dealers contributed greatly to this extraordinary price increase.

Such close co-operation . . . is plainly . . . inconsistent with that free and unrestricted trade which the [Sherman Act] contemplates shall be maintained. [T]he persons conducting he association [repeatedly declared] that their purposes were not unlawful, that they sought only to supplant cutthroat competition with what in their own judgment would be 'fair and reasonable competition,' and to obtain, not make, fair prices. [However, in their "confidential communications," they repeatedly said] that the Sherman Law, 'designed to prevent the restraint of trade, is itself one of the greatest restrainers of trade, and should be repealed.' To call the activities of the defendants, as they are proved in this record, an 'Open Competition Plan' of action is plainly a misleading misnomer.

The Plan is, essentially, simply an expansion of the gentleman's agreement of former days, skillfully devised to evade the law. . . .

Convinced, as we are, that the purpose and effect of the activities of the Open Competition Plan . . . were to restrict competition, . . . we agree with the District Court that it constituted a combination and conspiracy in restraint of interstate commerce within the meaning of the Anti-Trust Act of 1890, and the decree of that court must be *Affirmed*.

Mr. Justice HOLMES, dissenting.

When there are competing sellers of a class of goods, knowledge of the total stock on hand, of the probable total demand, and of the prices paid, of course will tend to equalize the prices asked. But I should have supposed that the Sherman Act did not set itself against knowledge—did not aim at a transitory cheapness unprofitable to the community as a whole. . . .

A combination to get and distribute such knowledge, notwithstanding its tendency to equalize, not necessarily to raise, prices, is very far from a combination in unreasonable restraint of trade. . . . A combination in unreasonable restraint of trade imports an attempt to override normal market conditions. An attempt to conform to them seems to me the most reasonable thing in the world. . . . The parties to the combination are free to do as they will.

I must add that the decree as it stands seems to me surprising in a country of free speech that affects to regard education and knowledge as desirable. . . . I cannot believe that the fact, if it be assumed, that the acts have been done with a sinister purpose, justifies

excluding mills in the backwoods from information, in order to enable centralized purchasers to take advantage of their ignorance of the facts.

I agree with the more elaborate discussion of the case by my Brother BRANDEIS.

Mr. Justice BRANDEIS, dissenting, with whom Mr. Justice MCKENNA concurs.

There are more than 9,000 hardwood lumber mills in that part of the United States which lies east of a line extending from Minnesota to Texas. Three hundred and sixty-five concerns—each separate and independent—are members of an association by means of which they co-operate under the so-called 'Open Competition Plan.' Their mills . . . are located in 18 states. Their aggregate production is about 30% of the total production of hardwood in the United States. The question presented for our decision is whether the Open Competition Plan . . . violates the Sherman Law.

The plan provides for co-operation in collecting and distributing information concerning the business of members and generally in regard to the trade. That in adopting the Plan the members formed a combination in trade is clear. Co-operation implies combination, and this combination confessedly relates to interstate trade. It is also clear that a plan for co-operation, although itself innocent, may be made an instrument by which illegal restraint is practiced.

But the decree below should, in my opinion, be reversed, because the Plan is not inherently a restraint of trade. . . .

Words of advice, seemingly innocent and perhaps benevolent, may restrain, when uttered under circumstances that make advice equivalent to command. For the essence of restraint is power; and power may arise merely out of position. Wherever a dominant position has been attained, restraint necessarily arises. And when dominance is attained, or is sought, . . .the Sherman Law is violated, provided, of course, that the restraint be what is called unreasonable.

In the case before us there was clearly no coercion. There is no claim that a monopoly was sought or created. There is no claim that a division of territory was planned or secured. There is no claim that uniform prices were established or desired. There is no claim that by agreement, force or fraud, any producer, dealer, or consumer was to be or has in fact been controlled or coerced. The Plan is a voluntary system for collecting from these independent concerns detailed information concerning the business operations of each. . . . No information gathered under the Plan was kept secret from any producer, any buyer, or the public. Ever since its inception in 1917, a copy of every report made and of every market letter published has been filed with the Department of Justice, and with the Federal Trade Commission. The district meetings were open to the public. Dealers and consumers were invited to participate in the discussions, and to some extent have done so.

It is claimed that the purpose of the Open Competition Plan was to lessen competition. Competition among members was contemplated and was in vigorous operation. The Sherman Law does not prohibit every lessening of competition; and it certainly does not command that competition shall be pursued blindly, that business rivals shall remain ignorant of trade facts, or be denied aid in weighing their significance. It is lawful to regulate

competition in some degree. *Chicago Board of Trade v. United States*, 246 U. S. 231 (1918). But it was neither the aim of the Plan, nor the practice under it, to regulate competition in any way. Its purpose was to make rational competition possible, by supplying data not otherwise available, and without which most of those engaged in the trade would be unable to trade intelligently.

. . . But surely Congress did not intend by the Sherman Act to prohibit self-restraint. . . . The purpose of the warnings was to induce mill owners to curb their greed [and protect them] from the crushing evils of overproduction. Such warning or advice, whether given by individuals or the representatives of an association, presents no element of illegality.

[And] there is nothing in the Sherman Law to indicate that Congress intended to condemn co-operative action in the exchange of information, merely because prophecy resulting from comment on the data collected may lead, for a period, to higher market prices. Congress assumed that the desire to acquire and to enjoy property is the safest and most promising basis for society, and to that end it sought, among other things, to protect the pursuit of business for private profit. Its purpose, obviously, was not to prevent the making of profits, or to counteract the operation of the law of supply and demand. Its purpose was merely to prevent restraint. The illegality of a combination under the Sherman Law lies, not in its effect upon the price level, but in the coercion thereby affected. . . .

The co-operation which is incident to this plan does not suppress competition. On the contrary, it tends to promote all in competition which is desirable. By substituting knowledge for ignorance, rumor, guess, and suspicion, it tends also to substitute research and reasoning for gambling and piracy, without closing the door to adventure, or lessening the value of prophetic wisdom. In making such knowledge available to the smallest concern, it creates among producers equality of opportunity. In making it available, also, to purchasers and the general public, it does all that can actually be done to protect the community from extortion. If, as is alleged, the Plan tends to substitute stability in prices for violent fluctuations, its influence, in this respect, is not against the public interest. The evidence in this case . . . presents, in my opinion, an instance of commendable effort by concerns engaged in a chaotic industry to make possible its intelligent conduct under competitive conditions.

The refusal to permit a multitude of small rivals to co-operate, as they have done here, in order to protect themselves and the public from the chaos and havoc wrought in their trade by ignorance, may result in suppressing competition in the hardwood industry.

. . . This court held in *United States v. U. S. Steel Corporation*, 251 U. S. 417 (1920), that it was not unlawful to vest in a single corporation control of 50% of the steel industry of the country; and in *United States v. United Shoe Machinery Co.*, 247 U. S. 32 (1918), the court held that it was not unlawful to vest in single corporation control of practically the whole shoe machinery industry. May not these hardwood lumber concerns, frustrated in their efforts to rationalize competition, be led to enter the inviting filed of consolidation? And, if they do, may not another huge trust, with highly centralized control over vast resources, natural, manufacturing, and financial, become so powerful as to dominate competitors, wholesalers, retailers, consumers, employees, and, in large measure, the community?