United States v. Container Corporation of America

393 U.S. 333 (1969)

Mr. Justice DOUGLAS delivered the opinion of the Court.

This is a civil antitrust action charging a price-fixing agreement in violation of § 1 the Sherman Act. . . . The District Court dismissed the complaint. The case is here on appeal. . . .

The defendants account for about 90% of the shipment of corrugated containers from plants in the Southeastern United States. While containers vary as to dimensions, weight, color, and so on, they are substantially identical, no matter who produces them, when made to particular specifications. The prices paid depend on price alternatives. . . . It is common for purchasers to buy from two or more suppliers concurrently. A defendant supplying a customer with containers would usually quote the same price on additional orders, unless costs had changed. Yet where a competitor was charging a particular price, a defendant would normally quote the same price or even a lower price.

[The defendants had an arrangement of a reciprocal information exchange. Under this arrangement, upon request, each defendant furnished its competitor with information about transactions and bids, "with the expectation that it would be furnished reciprocal information when it wanted it." As a result, "each defendant had the manuals with which it could compute the price charged by a competitor on a specific order to a specific customer." After reviewing the arrangement, Justice Douglas stated that the "concerted action is of course sufficient to establish the combination or conspiracy, the initial ingredient of a violation of § 1 of the Sherman Act."].

The exchange of price information seemed to have the effect of keeping prices within a fairly narrow ambit. Capacity has exceeded the demand from 1955 to 1963, the period covered by the complaint, and the trend of corrugated container prices has been downward. Yet despite this excess capacity and the downward trend of prices, the industry has expanded in the Southeast from 30 manufacturers with 49 plants to 51 manufacturers with 98 plants. An abundance of raw materials and machinery makes entry into the industry easy with an investment of $50,000 to $75,000.

The result of this reciprocal exchange of prices was to stabilize prices though at a downward level. Knowledge of a competitor's price usually meant matching that price. The continuation of some price competition is not fatal to the Government's case. The limitation or reduction of price competition brings the case within the ban [on price fixing]. [As] we held in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), interference with the setting of price by free market forces is unlawful *per se*.[*]

Price information exchanged in some markets may have no effect on a truly competitive price. But the corrugated container industry is dominated by relatively few sellers. The product is fungible and the competition for sales is price. The demand is inelastic, as buyers place orders only for immediate, short-run needs. The exchange of price data tends toward price uniformity. For a lower price does not mean a larger share of the available business but a sharing of the existing business at a lower return. Stabilizing prices as well as raising them is within the ban of § 1 of the Sherman Act. As we said in *Socony-Vacuum*, 'in terms of market operations stabilization is but one form of manipulation.' The inferences are irresistible that the exchange of price information has had an anticompetitive effect

[*] [In *Socony-Vacuum*, Justice Douglas articulated the *per se* illegality rule for price fixing].

in the industry, chilling the vigor of price competition. The agreement in the present case, though somewhat casual, is analogous to those in *American Column & Lumber*.[3]

Price is too critical, too sensitive a control to allow it to be used even in an informal manner to restrain competition.

Mr. Justice FORTAS, concurring.

I join in the judgment and opinion of the Court. I do not understand the Court's opinion to hold that the exchange of specific information among sellers as to prices charged to individual customers, pursuant to mutual arrangement, is a *per se* violation of the Sherman Act.

Absent *per se* violation, proof is essential that the practice resulted in an unreasonable restraint of trade. There is no single test to determine when the record adequately shows an 'unreasonable restraint of trade'; but a practice such as that here involved . . . suggests the probability that it so materially interfered with the operation of the price mechanism of the marketplace as to bring it within the condemnation of this Court's decisions.

Theoretical probability, however, is not enough unless we are to regard mere exchange of current price information as so akin to price-fixing by combination or conspiracy as to deserve the *per se* classification. . . . In this case, the probability that the exchange of specific price information led to an unlawful effect upon prices is adequately buttressed by evidence in the record. This evidence, although not overwhelming, is sufficient in the special circumstances of this case to show an actual effect on pricing and to compel us to hold that the court below erred in dismissing the Government's complaint.

. . . On this record, taking into account the sensitive function of the price term in the antitrust equation, I cannot see that we would be justified in reaching any conclusion other than that defendants' tacit agreement to exchange information about current prices to specific customers did in fact substantially limit the amount of price competition in the industry. That being so, there is no need to consider the possibility of a *per se* violation.

Mr. Justice MARSHALL, with whom Mr. Justice HARLAN and Mr. Justice STEWART join, dissenting.

I agree with the Court's holding that there existed an agreement among the defendants to exchange price information whenever requested. however, I cannot agree that that agreement should be condemned, either as illegal *per se*, or as having had the purpose or effect of restricting price competition in the corrugated container industry in the Southeastern United States.

Under the antitrust laws, numerous practices have been held to be illegal *per se* without regard to their precise purpose or harm. *per se* rules always contain a degree of arbitrariness. They are justified on the assumption that the gains from imposition of the rule will far outweigh the losses and that significant administrative advantages will result. In other words, the potential competitive harm plus

[3] The American Column case was a sophisticated and well-supervised plan for the exchange of price information between competitors with the idea of keeping prices reasonably stable and of putting an end to cutthroat competition. There were no sanctions except financial interest and business honor. But the purpose of the plan being to increase prices, it was held to fall within the ban of the Sherman Act.

the administrative costs of determining in what particular situations the practice may be harmful must far outweigh the benefits that may result. If the potential benefits in the aggregate are outweighed to this degree, then they are simply not worth identifying in individual cases.

I do not believe that the agreement in the present case is so devoid of potential benefit or so inherently harmful that we are justified in condemning it without proof that it was entered into for the purpose of restraining price competition or that it actually had that effect. . . . The nature of the exchanged information varied from case to case. In most cases, the price obtained was the price of the last sale to the particular customer; in some cases, the price was a current quotation to the customer. In all cases, the information obtained was sufficient to inform the defendants of the price they would have to beat in order to obtain a particular sale.

Complete market knowledge is certainly not an evil in perfectly competitive markets. This is not, however, such a market, and there is admittedly some danger that price information will be used for anticompetitive purposes, particularly the maintenance of prices at a high level. If the danger that price information will be so used is particularly high in a given situation, then perhaps exchange of information should be condemned.

I do not think the danger is sufficiently high in the present case. Defendants are only 18 of the 51 producers of corrugated containers in the Southeastern United States. Together, they do make up 90% of the market and the six largest defendants do control 60% of the market. But entry is easy; an investment of $50,000 to $75,000 is ordinarily all that is necessary. In fact, the number of sellers has increased from 30 to the present 51 in the eight-year period covered by the complaint. The size of the market has almost doubled because of increased demand for corrugated containers. Nevertheless, some excess capacity is present. The products produced by defendants are undifferentiated. Industry demand is inelastic, so that price changes will not, up to a certain point, affect the total amount purchased. The only effect of price changes will be to reallocate market shares among sellers.

In a competitive situation, each seller will cut his price in order to increase his share of the market, and prices will ultimately stabilize at a competitive level—i.e., price will equal cost, including a reasonable return on capital. Obviously, it would be to a seller's benefit to avoid such price competition and maintain prices at a higher level, with a corresponding increase in profit. In a market with very few sellers, and detailed knowledge of each other's price, such action is possible. However, I do not think it can be concluded that this particular market is sufficiently oligopolistic, especially in light of the case of entry, to justify the inference that price information will necessarily be used to stabilize prices. Nor do I think that the danger of such a result is sufficiently high to justify imposing a *per se* rule without actual proof.

. . . I do not find the inference that the exchange of price information has had an anticompetitive effect as 'irresistible' as does the Court. . . . I would prefer that a finding of anticompetitive effect be supported by 'evidence in the record.' I cannot agree that the evidence in this case was sufficient to prove such an effect. The Government has simply not proved its case.