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Regulation of Business - Boxing and Theater Now Within Scope of the Sherman Act

Norman A. Zilber S.Ed.
University of Michigan Law School

REGULATION OF BUSINESS—BOXING AND THEATER NOW WITHIN SCOPE OF THE SHERMAN ACT—The United States instituted two civil antitrust actions under section 4 of the Sherman Act[1] claiming that defendants were acting in restraint of trade in their respective fields. Defendant Shubert was engaged in the multistate business of producing, booking, and presenting legitimate theatrical attractions. Defendant International Boxing Club was engaged in the business of promoting professional boxing contests, also on a multistate basis, with an alleged 25 percent of its revenue being derived from the interstate sale of radio, television, and motion picture rights. The district court dismissed both complaints on

1 26 Stat. L. 209 (1890), 15 U.S.C. (1952) §4.

the authority of *Federal Baseball Club v. National League*[2] and *Toolson v. New York Yankees, Inc.*,[3] which had held that the business of professional baseball was not interstate trade or commerce within sections 1 and 2 of the Sherman Act.[4] On direct appeal to the Supreme Court, *held,* reversed, with two justices dissenting in the I.B.C. case. Both activities constitute interstate trade or commerce under the Sherman Act. The baseball cases apply only to that sport and afford no basis for a conclusion that all businesses built around live performances of local exhibitions are exempt from the antitrust laws. *United States v. Shubert,* 348 U.S. 222, 75 S.Ct. 277 (1955); *United States v. International Boxing Club,* 348 U.S. 236, 75 S.Ct. 259 (1955).

To prosecute a federal antitrust action successfully under the Sherman Act, the complainant must show the violation to be "in restraint of trade or commerce among the several states."[5] Although the *Federal Baseball* decision narrowly construed the scope of these requirements, trade or commerce is not limited to the exchange or production of commodities,[6] but includes businesses providing only services.[7] In addition, the activity will be within the scope of the act if it is an inseparable part of a continuous and indivisible stream of intercourse among the states[8] or has a substantial economic effect on interstate commerce.[9] In the *Shubert* case the integration of producing, booking, and presenting stage productions across the nation clearly meets the jurisdictional requirements of the Sherman Act.[10] Despite defendant's claim that the baseball cases were decisive authority, the Court decided that in light of earlier theatrical cases[11] and in the absence of unique factors present in the *Toolson* case, the theater business should not come within the exemption granted to baseball.

2 259 U.S. 200, 42 S.Ct. 465 (1922).

3 346 U.S. 356, 74 S.Ct. 78 (1953).

4 26 Stat. L. 209 (1890), 15 U.S.C. (1952) §§1 and 2.

5 Ibid.

6 Federal Baseball Club v. National League, 259 U.S. 200, 42 S.Ct. 465 (1922); Apex Hosiery Co. v. Leader, 310 U.S. 469, 60 S.Ct. 982 (1940). Eckler, "Baseball—Sport or Commerce," 17 UNIV. CHI. L. REV. 56 (1949).

7 United States v. National Assn. of Real Estate Boards, 339 U.S. 485, 70 S.Ct. 711 (1950); American Medical Assn. v. United States, 317 U.S. 519, 63 S. Ct. 326 (1943); United States v. Crescent Amusement Co., 323 U.S. 173, 65 S.Ct. 254 (1944).

8 Swift and Company v. United States, 196 U.S. 375, 25 S.Ct. 276 (1905); United States v. South-Eastern Underwriters Assn., 322 U.S. 533, 64 S.Ct. 1162 (1944).

9 Wickard v. Filburn, 317 U.S. 111, 63 S.Ct. 82 (1942); Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 68 S.Ct. 996 (1948).

10 See United States v. Paramount Pictures, 334 U.S. 131, 68 S.Ct. 915 (1948).

11 In Hart v. B. F. Keith Vaudeville Exchange, 262 U.S. 271, 43 S.Ct. 540 (1923), a conspiracy to control the booking and presentation of vaudeville acts was alleged. The same court that decided the Federal Baseball case held that the incidental interstate aspects of any activity may become of sufficient magnitude to place it within the Sherman Act. See also Ring v. Spina, (2d Cir. 1945) 148 F. (2d) 647, mod. (2d Cir. 1951) 186 F. (2d) 637, cert. den. 341 U.S. 935, 71 S.Ct. 854 (1951) (theater productions within the Sherman Act). In San Carlo Opera Co. v. Conley, (2d Cir. 1947) 163 F.

In the I.B.C. case the Court did not hold that boxing itself was interstate trade. But the promotional undertakings of the defendant, especially the large percentage of gross receipts it derived from the sale of radio, television, and motion picture rights, did serve to bring it within the scope of the Sherman Act.[12] Though by analogy to the baseball cases, it would seem that boxing should also be exempt, the Court refused to extend the exemption since (1) there had been no previous case specifically exempting boxing;[13] (2) boxing, unlike baseball, had not built up a vast organization in reliance on the *Federal Baseball* decision;[14] (3) there was an apparent desire by Congress to immunize certain aspects of baseball from the Sherman Act, but a contrary expression as to the promotional aspects of organized sports,[15] with the final legal distinction between baseball and other sports being left to the courts.[16] The *Toolson* case was concerned only with the "reserve clause" system, which is admittedly necessary for the preservation of organized baseball and other team sports.[17] Thus, the I.B.C. case presented the Supreme Court with its first opportunity to pass on restraints in a non-team sport as well as the promotional features of organized athletics.[18] While team sports, depending upon limited league competition, have a need for a monopoly of player talent, non-team sports such as boxing do not have this need and can be promoted equally well on an independent competitive basis.[19] In light of Congress' recommendations and the I.B.C. holding, it is probable that promotional restraints of any sport, including baseball, will be subject to the Sherman Act even though the language of the baseball cases is sufficiently broad to exclude all of its activities.

(2d) 310, Ring v. Spina, supra, was distinguished and an individual performer was held not to be within interstate commerce.

12 This conclusion approves recent lower court decisions holding that the sale of such rights is sufficient to place a sport within the antitrust laws. In Gardella v. Chandler, (2d Cir. 1949) 172 F. (2d) 402, the district court's dismissal was reversed on the theory that the sale of radio and television rights may bring baseball within the Sherman Act. Subsequently, at the request of the Justice Department, baseball rescinded its restrictive agreements in this area. H. Hearing on H.R. 2002, 82d Cong., 1st sess., part VI, pp. 1177-1179 (1951). In United States v. National Football League, (D.C. Pa. 1953) 116 F. Supp. 319, football's restrictions on the sale of radio and television rights were considered within the jurisdiction of the Sherman Act. See 21 GEO. WASH. L. REV. 466 (1953).

13 Shall v. Henry, (7th Cir. 1954) 211 F. (2d) 226, which did exempt boxing, was decided after the district court's dismissal of the IBC case.

14 But see United States v. South-Eastern Underwriters Assn., note 9 supra; Neville, "Baseball and the Antitrust Laws," 16 FORDHAM L. REV. 208 (1947); REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTI-TRUST LAWS 62-63 (1955).

15 H. Rep. 2002, 82d Cong., 2d sess., p. 230 (1952).

16 Id. at pp. 134-136, 231-232.

17 Id. at p. 228. See also 53 COL. L. REV. 242 (1953).

18 Although the Court in the principal cases limited the Toolson case to baseball, it is likely that the lower courts will use its authority to immunize the reserve clause agreements of other professional team sports.

19 See 62 YALE L. J. 576 at 630 (1953).

By applying the distinction that restraints which are necessary for the preservation of team sports are beyond the scope of the Sherman Act, the courts in effect decide the merits in order to determine the issue of jurisdiction. A more logical alternative would be to include professional organized sports within interstate commerce and then determine liability through application of the rule of reason.[20] But because of the possibility that some of the necessary restraints may be found to be unreasonable per se,[21] thereby causing a breakdown of organized baseball,[22] it may be best to maintain the status quo. It is unlikely that Congress will advocate a change if the Supreme Court continues its present trend of deciding the merits of the case at the jurisdictional stage and shielding necessary monopolistic practices in baseball and other team sports from the operations of the Sherman Act.

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[20] See Oppenheim, "Federal Antitrust Legislation," 50 MICH. L. REV. 1139 at 1151 (1952), and cases cited therein.

[21] Id. at 1150.

[22] See 53 COL. L. REV. 242 (1953).