Nebraska Law Review

Volume 47 | Issue 1 Article 6

1968

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Many professional sports associations have a rule that a member may not participate in a tournament, game, or contest sanctioned or sponsored by a rival association or promoter. If a member athlete does compete in a contest in violation of the rule, the association may remove the offending athlete from the membership list with a consequent loss of eligibility to compete in association sponsored competition. The purposes of such an eligibility rule are to suppress competition from rival leagues and to retain exclusive rights to the member athletes' performances. Such an arrangement may be viewed as an attempt to coerce or harm a competing association by restricting an intermediate third party, a member athlete. The offending association is effecting a refusal to deal between member athletes and the rival association by enforcement of the eligibility rule. The thesis of this article is that use of the eligibility rule is a secondary boycott (group boycott) illegal per se under the Sherman Act.

A secondary boycott may be defined as a perpetration of economic injury through the use of economic or coercive pressure on a third party which has or is attempting to do business with both rival parties—the offending party and that party's rival. In a wholesale-retail situation a retailer may attempt to injure a competitor across the street by persuading a common supplier or a number of suppliers to stop selling to the rival retailer. Such a case brought the Supreme Court to declare such attempts illegal per se in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*[1] Another case is where a wholesaler attempts to injure a competitor by cutting off its own sales to retailers buying from both concerns. Such attempts are also per se illegal under the Sherman Act.[2] Replace "wholesaler" with "manufacturer" and a variation of the second situation appears. For example, in *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*[3] the defendant American Gas Ass'n [hereinafter cited as AGA] whose membership included manufacturers of gas burners as well as gas suppliers refused to put a "seal of

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1 359 U.S. 207 (1959).

2 Fashion Originators' Guild of America Inc. v. FTC, 312 U.S. 457 (1941).

3 364 U.S. 656 (1961).

approval" on the plaintiff's ceramic gas burners and instructed AGA member gas suppliers not to provide gas for use in the unapproved burners thereby effecting a secondary boycott held illegal per se under section 1 of the Sherman Act. The intermediate third parties used by the AGA to unfairly compete with the plaintiff burner manufacturer were the association members who were induced to refuse to supply gas to units equipped with the unapproved burners manufactured by the plaintiff. The result was that the plaintiff could not sell his burners because a competitor was coercing potential customers not to buy. An apparent evil of AGA's attempts was its assumption of a governmental role in deciding which burners were to be approved and which were not as well as enforcement of the decisions. Such activity has long been condemned since it "trenches upon the power of the national legislature and violates the statute."[4] General Motors and some of its dealer associations recently invoked the secondary boycott ban by attempting to stop discount houses from giving customers a lower price on GM products.[5] Some California GM dealers sold cars to discounters who undercut the usual retail price by significant amounts. As might be expected GM's economic power was such that the dealers stopped selling to the discounters once GM decided the sales should cease. GM's and the dealer's efforts amounted to a secondary boycott since third parties—other GM dealers that sold to discounters—were coerced to order to harm the discounters, rivals to the dealers who did not sell to discounters. GM apparently thought it would lose money if price competition made serious inroads at the automobile retailing level. The opinion did not specifically label the arrangement a secondary boycott, but did discuss *Klor's* at some length.

Imposition of the per se rule in these situations makes it clear that the degree of market control or the absence of monopoly power is completely irrelevant. Equally immaterial is the absence of any substantial anti-competitive effect of the boycott on sellers, buyers, competitors, or the public.[6] Justification on economic or other grounds is not relevant as in the "rule of reason" cases.

A secondary boycott should be illegal per se because three parties are involved in a restraint and one, an intermediate party, is being harmed economically by a group or groups not in a horizontal competing relationship. It seems unfair for the intermediate third party to be put in such a foreign situation especially when the other groups possess superior economic power and when a means

[4] Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 242 (1899).
[5] United States v. General Motors Corp., 384 U.S. 127 (1966).
[6] Handler, *Recent Developments in Antitrust Law: 1958-1959*, 59 COLUM. L. REV. 843, 864-66 (1959).

of earning a living is at stake. The object of the boycott, the competitor, is also unfairly harmed because he is effectively cut off from doing business even though his buyer or seller would willingly continue trading. In the sports situation an association suspends or drops a member for competing in a rival association's tournament or contest. The athlete is then hurt economically in that he cannot compete in the association to which he originally belonged. If the athlete does compete in a tournament sponsored by a rival association, his activities will be restrained by the offending association. Commerce is thus restrained whether an athlete competes or not if the eligibility rule is enforced. The associations usually voice justifications such as safety or the orderly development of the sport, but these are more fiction than truth since it appears there is only a relationship between the eligibility rule and elimination of competition with rival leagues and keeping the price of the athletes down once they are affiliated with an association.

With an understanding of the problem it should be noted that courts are reluctant to interfere with the workings of private associations. Consequently, one prerequisite to a member athlete going to court with an antitrust theory is that he must exhaust all available non-judicial remedies inside the association framework. Once such remedies are exhausted a court may intervene if an association has allegedly violated the antitrust laws.[7]

Another somewhat ancillary question is the possible difficulty of showing a conspiracy in these cases since one association may be the only offender. But since professional sports association members usually must agree to abide by the association's rules when they join the organization, it would seem that members become part of a conspiracy to accomplish the rule's purposes especially since no specific intent to violate section 1 need be found to prove a conspiracy.[8] If corporate officers may be members of a conspiracy with their corporation,[9] it would seem that members and officers of an association may be found to be in an illegal agreement with each other.[10]

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[7] *See* Developments in the Law, 76 HARV. L. REV. 983 (1963).

[8] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 n.59 (1940).

[9] Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948); United States v. Yellow Cab Co., 332 U.S. 218 (1947). *But cf.* United States v. General Electric Co., 272 U.S. 476 (1926) (perhaps overruled sub silentio by Simpson v. Union Oil Co., 377 U.S. 13 (1964). The 1926 GE case is now under attack by the Justice Department. United States v. General Electric Co., 5 TRADE REG. REP. ¶ 45,066, at 52,633 (S.D.N.Y. Sept. 27, 1966).

[10] *Cf.* Radovich v. Nat'l Football League, 352 U.S. 445 (1957).

Before examining the secondary boycott—eligibility rule cases it may be valuable to distinguish them from cases involving so called "membership" rules. The latter are alleged primary or direct boycotts between two parties, an athlete either wanting to join an association or recently ousted from one on the one hand and the defendant association on the other. Here the alleged boycott is "primary" because no third party is involved. The courts relegate these cases to the "rule of reason" and due process standards as opposed to the secondary boycott being under the per se rule. For example, in *Molinas v. Nat'l Basketball Ass'n*[11] the court said that a basketball player who violated the association's anti-betting rules may be suspended without violating the antitrust laws even though a restraint is involved. A disciplinary rule against gambling was said to be "about as reasonable a rule as could be imagined."[12] In *Deesen v. Professional Golfers' Ass'n of America*[13] the "rule of reason" was again applied. This time a Mr. Deesen who had been expelled from the PGA because of his poor golf scores sought to be reinstated. He alleged that the PGA had acted in an unreasonable, arbitrary, and discriminatory manner and had perpetrated an illegal boycott. But the district court had found that Deesen's abilities were such that it was not unreasonable to exclude him. The higher court reviewed the standards and procedures of the PGA in selecting and discharging members which included test rounds and a review of the record scores and found them reasonable as well. The reasonableness of a rule limiting the number of golfers on the tour is apparent since only a limited number of golfers may play an eighteen hole course under tournament conditions during the daylight hours of a single day.[14] Finally, in *United States v. United States Trotting Ass'n*,[15] the government alleged that the USTA had unreasonably boycotted applicants wishing to participate in harness racing. But it was shown that the USTA excluded only those applicants who had participated in illegal or fraudulent activities which is obviously a reasonable practice. The significance of these cases is that an association must act in an arbitrary or discriminatory manner in excluding an applicant before he would be able to show an illegal boycott under the Sherman Act. Further, the per se rule does not apply leaving the field to the "rule of reason."[16]

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[11] 190 F. Supp. 241 (S.D.N.Y. 1961).

[12] *Id.* at 244.

[13] 358 F.2d 165 (9th Cir. 1966).

[14] Id. at 172 & n. 9.

[15] 1960 Trade Cas. ¶ 69,761, at 76,954. (S.D. Ohio May 18 & June 20, 1960).

[16] Other cases which support a "rule of reason" in membership situations include Union Circulation Co. v. FTC, 241 F.2d 652 (2d Cir. 1957)

The United States Supreme Court has had one case involving a secondary boycott by a professional sports association, *Radovich v. Nat'l Football League.*[17] The more important aspect of the case is that professional football was held to be subject to the antitrust laws in spite of baseball's well known immunity. The other aspect is that Mr. Radovich was an all-pro guard with the Detroit Lions of the NFL in 1945, but left them for the 1946 and 1947 seasons for the Los Angeles Dons of the All-America Conference (since disbanded). In 1948 he was offered a position with an NFL affiliated club, the San Francisco Clippers of the Pacific Coast League. However the NFL intervened saying Mr. Radovich was "blacklisted" or ineligible and that any affiliated club that signed him would be subject to severe penalties. After the NFL's action Mr. Radovich was not able to obtain employment in United States professional football. The complaint was that the NFL was engaged in a conspiracy to boycott the All-American Conference and its players to destroy it and strengthen the NFL. As to this part of the case, the Court decided that a cause of action had been stated and that a trial court should make findings of fact. Presumably the case was settled out of court. The case involved a secondary boycott since the "blacklisting" was an enforcement of the NFL's eligibility rule which said that Mr. Radovich was not free to play with a rival club and then return to the NFL. Under the present law the NFL's rule as applied to Mr. Radovich should be held illegal per se.

The American Football League, formerly a NFL rival and potential object of an eligibility rule, merged with the NFL in 1966;[18] Congress exempted the merger from possible antitrust action.[19] That act did not, however, affect the legality of an eligibility rule invoked by the new league as against any other league.[20]

Before eligibility rules as found in professional baseball may be examined it is necessary to consider baseball's immunity to the federal antitrust laws. That rule originated with the remarkable

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and Young v. Motion Picture Ass'n of America. 28 F.R.D. 2 (D.D.C. 1961) ("blacklisting" of alleged Communists by movie producers).

17 352 U.S. 445 (1957).

18 For the fascinating story of how Mr. John Brodie, quarterback of the San Francisco 49ers, became a millionaire by virtue of the antitrust laws, the NFL-AFL merger, and good lawyers see Sports Illustrated, August 29, 1966, at 16.

19 15 U.S.C. § 1291 (1966). By its terms the statute applies only to a merger of professional football leagues which does not decrease the number of operating clubs.

20 The conferees stated that they intend "that the new league will commence operations with no greater antitrust immunity than the existing individual leagues now enjoy." 3 *U.S. Code Cong. & Ad. News* 4378 (1966).

decision of *Federal Baseball Club, Inc. v. Nat'l League of Professional Baseball Clubs*,[21] which held that baseball was neither commerce nor interstate thus destroying federal jurisdiction and giving rise to the antitrust immunity. Twenty-seven years later a distinguished court of appeals reasoned that the interstate commerce clause had changed since the *Federal Baseball* case and that baseball's interstate activities through radio and television had increased to the point that the antitrust immunity should be lifted. But that case, *Gardella v. Chandler*,[22] did not reach the Supreme Court. In 1953 the Court did hear a challenge to the immunity rule, but refused to overrule *Federal Baseball* giving deference instead to the doctrine of stare decisis.[23] The Court left Congress to change the rule, but no change has been made.

Baseball contracts commonly contain the so called reserve clause, an eligibility rule. Under it a player may not quit the club he originally signed with and play for another one willing to pay him more money. His services may be disposed of only by the club that owns him by trading, selling, or releasing him. Without the clause or other binding contractual obligations, a player is able to sell himself to the highest bidder. The clause is enforceable since other clubs must respect the rule or face league repercussions. The obvious effect of the clause is to depress players' salaries. Supporters of the clause claim that the richest clubs would soon siphon off the the best talent if it were a bidder's market, a rich get richer and poor get poorer argument. The most severe test of the vitality of the reserve clause was a suit by Daniel L. Gardella, an outfielder under contract to play exclusively with the New York Giants. Mr. Gardella along with nine other players made the mistake of playing winter baseball with a Mexican league prior to the 1946 season. They were all given five year suspensions by the commissioner of baseball for violating the reserve clause—they became ineligible to play baseball in the United States. *Gardella v. Chandler*[24] represented clearance of the antitrust immunity barrier. The case had been sent back to the trial court and was ready for trial when Mr. Gardella's suspension was lifted and the case dropped.[25] Consequently the eligibility rule question was never reached although Judge Jerome Frank did state that he believed the clause illegal.[26] Another case involving a victim of the operation of the

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21 259 U.S. 200 (1922).

22 172 F.2d 402 (2d Cir. 1949).

23 Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953).

24 172 F.2d 402 (2d Cir. 1949).

25 N.Y. Times, Feb. 11, 1949, at 30, col. 1. (late city ed.).

26 172 F.2d at 404.

reserve clause was *Toolson v. New York Yankees.*[27] However, the question was not reached there either because of the Court's decision as to immunity. It seems clear that the reserve clause will be quickly declared illegal once the immunity is removed. Such a decision would be correct on the basis of the per se illegality of secondary boycotts—the two major U.S. leagues force the best players to boycott other U.S. and foreign leagues. In addition, a single player is made to boycott other clubs within the major leagues and vice versa.

Professional bowling leagues are currently providing the most fertile area for secondary boycott litigation. In *Washington State Bowling Proprietors Ass'n, v. Pacific Lanes, Inc.,*[28] a private treble damage suit under sections 1 and 2 of the Sherman Act, the plaintiff was an owner-operator of a bowling establishment in Tacoma, Washington. The defendants included owners of other bowling establishments in Tacoma as well as the local and state bowling associations to which the defendant owners belonged. A national bowling association was named a co-conspirator, but was not a defendant. The jury found that the defendants had agreed to conduct, sponsor, and sanction bowling tournaments open only to those persons who restricted their league and tournament bowling to defendant-member establishments and that any person who bowled in non-member establishments would become ineligible to bowl in member tournaments. The jury also found both a conspiracy to restrain trade under section 1 and an attempt to monopolize commerce in violation of section 2 of the Sherman Act. As a result of the unlawful acts the plaintiff was awarded substantial damages sustained upon appeal. An initial issue in the case on appeal was whether group boycott (secondary boycott) rules apply only to commercial boycotts, those against "other traders," or whether they would apply to boycotts against bowling organizations as well. This does not sound like much of a distinction and the court said there was not any for purposes of boycott law. Bowling establishments are certainly engaged in commerce just as are "traders."

The Justice Department has filed a civil complaint against the Bowling Proprietors' Association of America charging that the association's eligibility rules have been coercively used for over a decade.[29] The rules provide that no bowler will be allowed to

[27] 346 U.S. 356 (1953).

[28] 356 F.2d 371 (9th Cir. 1966).

[29] 5 TRADE REG. REP. ¶ 45,064, at 52,564 (S.D.N.Y. Jan. 3, 1964). A consent judgment was entered on May 19, 1967, requiring the BPAA to revoke some league and tournament eligibility rules and by laws. 5 TRADE REG. REP. (1967 Trade Cas.), ¶ 12,105 at 83,966 (S.D.N.Y. May 19, 1967).

participate in any of the tournaments sponsored or conducted by the defendant unless the bowler confines all of his league bowling to defendant establishments. It is apparent that the association uses the secondary boycott as a method of improving its owner members' position in the market. An additional boycott aspect of this case seems to be that the eligibility rule cuts against both rival bowling associations and member owners' competitors in the local markets. If that is fact, the reason for applying the per se rule in secondary boycott cases applies even more so—*two* different types of competitors are the objects of the eligibility rule restraint.

Another illustration of an eligibility rule's effects is *Paul Goldsmith v. United States Automobile Club.*[30] Mr. Goldsmith, a professional racing driver, was a member of the defendant club. USAC's principal function is the sanctioning of automobile racing events in the United States by contract with promoters of such events. At the time of the litigation USAC's rules included one banning member participation in any competition not sanctioned by USAC unless permission was obtained from the association. The same rule flatly stated that permission would not be granted to race in a non-sanctioned event "in competition with a United States Auto Club sanctioned event." Another rule stated that any person who violated the rules may be punished by disqualification, fine, suspension, or exclusion. On November 3, 1963, Mr. Goldsmith participated in the "Golden State 400," a race sponsored by one of USAC's competitors, the National Association of Stock Car Auto Racing [NASCAR], held in Riverside, California. USAC had warned Mr. Goldsmith and other USAC licensed drivers including Dan Gurney and Parnelli Jones that the "400" was non-sanctioned and participation in the race would be a violation of the eligibility rule. Other drivers withdrew, but Mr. Goldsmith raced and received a one year suspension from USAC. He later attempted to enter the "Indianapolis 500" sanctioned by USAC, but his application was rejected because of his suspension. His next step was a request for an injunction in the federal district court in Indianapolis, but it was denied on the grounds, *inter alia*, that USAC had not engaged in a conspiracy, that it cannot conspire with itself or with its officers and employees acting within their authority, and that the eligibility rule is reasonable and reasonably related to assuring safety in USAC events. If a conspiracy had been present, it seems that the eligibility rule should have been held to be illegal per se. It is difficult to see the relationship between USAC's eligibility rule and any safety con-

[30] Paul Goldsmith v. United States Auto Club, Inc., No. 64-C-214 (S..D. Ind. June 3, 1964). (Facts about the United States Auto Club are taken from the court's findings of fact).

sideration; the nature of the arrangement under the Sherman Act dictates that any reasonableness is irrelevant anyway. USAC obviously has an interest in competing with NASCAR and the eligibility rule is a means of forcing the type of drivers who participate in the "Indianapolis 500" to boycott USAC's competitors. The advantages of this arrangement to USAC on the one hand and disadvantage to NASCAR are obvious—the drivers who draw spectators and sponsors stay with USAC even if NASCAR is willing to pay the drivers more money. The drivers are not able to negotiate for a higher purse and so trade is restrained. The public loses since they only see the top drivers when and where USAC chooses to sanction a race. It would seem that the path is clear for a USAC member to challenge the eligibility rule and expect to win on a secondary boycott theory.

One continuing threat to court action to stop the operation of eligibility rules is Congressional action. Many bills have been introduced over the last few years to exempt professional sports from the federal antitrust laws.[31] One bill would have exempted employment, selection, or eligibility of players; or the reservation, selection, or assignment of player contracts.[32] It passed the Senate, but not the House. Such a bill would be unfortunate since it would depress player salaries, frustrate a player's attempts to move to another club for any reason including money, hurt minor competing leagues attempting to become established, and discourage persons thinking of forming a new sports association in a given sport. For the same reasons Congress should remove baseball's antitrust immunity and let the "reserve clause" be declared illegal by the courts.

The per se rule is apparently becoming established as a means of disposing of secondary boycott—eligibility rule cases. The main problem seems to be recognizing an eligibility rule case as a secondary boycott in disguise. Once recognized, the per se rule should make the opinion short and decision easy.

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[31] *E.g.* H.R. 10378, 85th Cong., 2d Sess. (1958).

[32] S. 950, 89th Con., 1st Sess. (1965). S. Rep. No. 462, 89th Cong., 1st Sess. (1965) deals with S. 950.