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Anti-trust Laws -- Sherman Anti-trust Act -- Professional Sports

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NOTES AND COMMENTS

Anti-trust Laws—Sherman Anti-trust Act—Professional Sports

The Supreme Court, in *Radovich v. National Football League*,[1] has added another professional sport to the growing list[2] of those which are now subject to the provisions of the Sherman Anti-trust Act.[3] In this case, plaintiff, a former professional football player for a member of the defendant league, sued to collect treble damages under the Clayton Act[4] for a violation by the defendant of the Sherman Anti-trust Act.[5] He alleged that through a method of blacklisting[6] he was prevented from becoming player-coach on a team of an affiliated league,[7] and that the result of this blacklisting was to prevent his employment in organized football in the United States. He further alleged that the defendant league scheduled football games in various cities and that a significant portion of gross receipts was derived from the transmission of these games over radio and television.[8] The defendant contended that the organization of professional football had been patterned after that of professional baseball and that since baseball had been exempted from these laws, the doctrine of stare decisis should apply. The court held that the business of football came within the meaning of the act and further stated that the rule which had been established in the earlier

[1] 352 U.S. 445 (1957).

[2] Boxing and basketball have been held to constitute interstate commerce within the meaning of the act. United States v. International Boxing Club, 348 U.S. 236 (1954); Washington Professional Basketball Corp. v. National Basketball Ass'n, 147 F. Supp. 154 (S.D.N.Y. 1956).

[3] 26 STAT. 209 (1890); 15 U.S.C. §§ 1, 2 (1952).

[4] 38 STAT. 731 (1914); 15 U.S.C. § 15 (1952).

[5] 26 STAT. 209 (1890); 15 U.S.C. §§ 1, 2 (1952), reading in pertinent parts as follows:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ."

[6] This is the commonly used term denoting that a player is no longer eligible to play.

[7] The Pacific Coast League, which was not in competition with the National Football League, offered plaintiff this job, but withdrew the offer when the defendant advised them that plaintiff was blacklisted and that severe penalties would be imposed on the league if he were signed. 352 U.S. at 448.

[8] Through the use of these two conveyances, the narratives and the pictures of the spectacle itself are transmitted across the state lines. For this reason radio and television have played a major role in the recent decisions for violations of the anti-trust laws. The first court to recognize their importance was Gardella v. Chandler, 172 F.2d 402 (2d Cir. 1949).

baseball cases[9] was specifically limited to the business of baseball and was not controlling insofar as any other sport was concerned.[10]

Professional sports, and the applicability of the anti-trust laws to them, have had an interesting history in the courts with results as unpredictable as the athletic events themselves. The first case to reach the Supreme Court regarding this subject was *Federal Baseball Club v. National League*.[11] Here, plaintiff had been a member of the Federal Baseball League. Through a pre-arranged plan of all the members except plaintiff, this league was dissolved in 1915 and the American and National Leagues were formed. Plaintiff was not included in either of these leagues. It brought its action under the Sherman Act alleging that the defendants had conspired to monopolize the business of giving baseball exhibitions. The Court, in a unanimous decision, held that the business was that of giving exhibitions of baseball, that the travel from state to state in order to give these exhibitions was a mere incident of the game itself,[12] and that personal effort, not related to production, was not a subject of commerce.[13]

Following this decision, baseball enjoyed more than twenty years without interference from the courts. But in 1946 efforts to lure players from the major leagues into the newly formed "Mexican League" prompted the Commissioner of Baseball to take drastic action, and the anti-trust problem, which had remained dormant since 1922, was reopened. The players who "jumped" to the Mexican League were suspended from organized baseball[14] for five years.[15] After playing for a

[9] Toolson v. New York Yankees, 346 U.S. 356 (1953); Federal Baseball Club v. National League, 259 U.S. 200 (1922).

[10] The dissenting Justices, being unable to distinguish football from baseball, felt that they were bound by those two decisions. 352 U.S. at 455, 456.

[11] 259 U.S. 200 (1922).

[12] That this statement is no longer true cannot be denied. In 1956 the Chicago White Sox, a baseball team of the American League, spent $91,059 for the transportation of its players to the various cities to participate in these "local exhibitions." *Hearings Before the Anti-Trust Subcommittee of the House Committee on the Judiciary*, 85th Cong., 1st Sess., ser. 8, pt. 2, at 2044 (1957).

[13] Personal effort has now been made the subject of commerce. United States v. Shubert, 348 U.S. 222 (1955) (performances on the stage were held to constitute commerce); United States v. National Ass'n of Real Estate Bds., 339 U.S. 485 (1950) (business of a real estate broker was held to be trade under the act).

[14] There are now approximately 400 baseball teams under the jurisdiction of organized baseball. This includes the American and National Leagues, commonly known as the major leagues, and 40 other leagues which compose the minor leagues. In 1956 there were fifty million spectators who paid one hundred million dollars to see ten thousand players perform in thirty thousand games. 103 CONG. REC. A5325 (daily ed. July 3, 1957).

[15] Major League Rule 15 was amended to authorize the suspension which the Commissioner had already imposed. *Hearings, supra* note 12, at 61. These rules have now been revised and the penalty of five years mandatory ineligibility for a major league player who jumps his contract or reservation has been completely eliminated. *Hearings, supra* note 12, at 122. Rule 15 (d) now provides that such ineligibility, reinstatement, or complete disqualification, is in the sole discretion of the Commissioner of Baseball in the major leagues and the President of

short time in Mexico they applied for re-instatement. When the Commissioner refused to lift the suspension, a few of these players turned to the courts for relief. The most important of these cases was *Gardella v. Chandler*,[16] in which an action was initiated under the illegality of restraint clause of the Sherman Act.[17] It was dismissed in the district court for want of anti-trust allegations, but the Court of Appeals for the Second Circuit voted two to one to send the case back for a trial on the merits. Chief Judge Learned Hand stated that if the business of television and radio, in addition to the personal effort and travel which had been insufficient in the *Federal Baseball* case, were enough to give the business an interstate character, plaintiff had stated a valid claim for relief. Judge Frank felt that the business was a monopoly which, with the reserve clause,[18] possessed characteristics repugnant to the moral principles of the thirteenth amendment condemning involuntary servitude.[19] Judge Chase dissented, saying that he was bound by the *Federal Baseball* case, and that radio and television were comparable to the telegraph wires which had been used earlier to transmit reports of the games.[20] Baseball, not anxious to have the Supreme Court rule on this decision after such distinguished judges had spoken in the lower court,[21] settled with Gardella.[22]

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the National Association if it concerns a minor league player. *Hearings, supra* note 12, at 1675.

[16] 172 F.2d 402 (2d Cir. 1949).

[17] 26 STAT. 209 (1890); 15 U.S.C. § 1 (1952).

[18] The reserve clause in its present form is a clause in the contract between the club and a player which gives the club an option on the player's services in organized baseball for life. The player, once he has signed his first contract, becomes the sole property of that club and he may be traded or sold by the club at any time. Furthermore, he is at the mercy of the club owner with regards to his salary, except that in the major leagues, salaries may not be less than $6,000.00 per year, nor may a player's salary be reduced more than 25% of that which he earned during the preceding year without his consent. *Hearings, supra* note 12, at 1493. Football contracts, contrary to common belief, do not have this perpetual option to renew. Since 1947, the standard player contract has contained only a modified reserve clause giving the club the right to renew the contract for one year at a salary not less than 90% of that received by the player the preceding year. Nor may the club exercise its option for more than one year. *Hearings, supra* note 12, at 2750. But football has a selective draft system which prevents eligible college players from acting as free agents even before they sign their first professional contract. The purpose of this system is to produce evenly matched teams and keener competition so as to give the fans a better exhibition. This is accomplished by having each team submit a list of the eligible players which it desires to have, and at a meeting of all the clubs a drawing is held commencing with the reverse order of the championship standings of the preceding year so that the team finishing last will get first choice, the team finishing second from last second choice, and so on until all the eligible players desired have been chosen. *Hearings, supra* note 12, at 2580s.

[19] 172 F.2d at 409.

[20] *Id.* at 404.

[21] Commissioner Chandler, being questioned on this subject said, "I do not think our lawyers thought we could win." *Hearings Before the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary*, 82d Cong., 1st Sess., ser. 1, pt. 6, at 290 (1951).

[22] Two other suits, involving Max Lanier and Fred Martin, were also settled

Immediately following these cases, legislation was urged by friends of baseball to exempt professional sports from the anti-trust laws. Bills were introduced in the House of Representatives to this effect.[23] A subcommittee was appointed to study organized baseball as a monopoly power. After extensive hearings in which many persons connected with baseball testified, the subcommittee submitted a report to Congress[24] which concluded that baseball in all probability could not operate successfully without some form of a reserve clause, that they disapproved of exempting baseball from the anti-trust laws and recommended that no legislative action be taken at that time. The subcommitee indicated that Congress should not pass any legislation until the Supreme Court had made clear its position.

The chance for the Supreme Court to state its position came in 1953 in *Toolson v. New York Yankees*.[25] But in a per curiam decision of one paragraph, the Court examined the holding in the *Federal Baseball* case, the fact that Congress had not passed any legislation on the subject since that case, and then said: "Without re-examination of the underlying issues, the judgments below [dismissing the complaint] are affirmed on the authority of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs* . . . so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal anti-trust laws."[26] Mr. Justice Burton wrote a strong dissenting opinion, stating that "the present popularity of organized baseball increases, rather than diminishes, the importance of its compliance with standards of reasonableness comparable with those now required by law of interstate trade or commerce."[27]

It would seem that this decision clearly indicated the Court's position. Yet in 1955, in a suit initiated by the Government,[28] the Court held that professional boxing was within the meaning of the act and that the *Toolson* case neither affirmed nor overruled the *Federal Baseball* case and was not authority for exempting other businesses.[29]

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when Commissioner Chandler reinstated all eighteen players who had violated the reserve clause of their contracts after three years of their suspension had been served. *Hearings, supra* note 21, at 343.

[23] H.R. 4229, 4230, 4231, 82d Cong., 1st Sess. (1951).

[24] H.R. No. 2002, 82d Cong., 2d Sess. (1952).

[25] 346 U.S. 356 (1953).

[26] 346 U.S. at 357.

[27] *Id.* at 364-65.

[28] United States v. International Boxing Club, 348 U.S. 236 (1955).

[29] "It would baffle the subtlest ingenuity to find a single differentiating factor between other sporting exhibitions, whether boxing or football or tennis, and baseball insofar as the conduct of the sport is relevant to the criteria or considerations by which the Sherman Law becomes applicable to a 'trade or commerce.'" Mr. Justice Frankfurter dissenting in United States v. International Boxing Club, 348 U.S. 236, 248 (1955).

Earlier, in *United States v. Shubert*,[30] the Court had stated that *Toolson* was a narrow application of stare decisis.

The only other professional sport which has been ruled on is basketball. In a district court decision,[31] it was held that professional basketball as conducted by the defendant on a multi-state basis caused this sport to be subject to regulation by the Sherman Act. Here again, the sale of radio and television rights was given great weight in reaching the decision.

The present situation places the Court in an unenviable position. As a result of its decisions, baseball, the originator of the reserve clause and agreements among clubs to blacklist, and whose organization has expanded to the point that it embraces every section of the United States, is exempt from the anti-trust laws. Football and basketball, whose organizations were patterned after baseball, and which are relatively small enterprises when compared to that sport, are not favored by such an exemption. The Court recognized that its decisions might be considered inconsistent in the *Radovich* case when it said: "If this ruling is unrealistic, inconsistent, or illogical, it is sufficient to answer, aside from the distinctions between the businesses, that were we considering the question of baseball for the first time upon a clean slate we would have no doubts."[32] There is, however, some justification for the method the Court has used in handling the problem. When the *Federal Baseball* case was decided, the Court was dealing with a problem of congressional intent. It was decided that baseball was not intended to be covered by the anti-trust laws. After a long period of inaction by Congress, there was good reason for the Court to affirm its stand in the *Toolson* case. But in dealing with other professional sports, the Court is free to apply stare decisis narrowly and approach the problem more realistically, in accordance with changed conditions.

Congress is making another attempt to solve the problem at this time. There are now a total of seven bills before the House. These bills fall into three categories which present the possible solutions: (1) exempt all professional team sports from the anti-trust laws;[33] (2) place baseball under the act;[34] or (3) place the four major team sports under the act, but specifically exempt from anti-trust enforcement certain practices considered essential to the successful operation of these

[30] 348 U.S. 222 (1955).
[31] Washington Professional Basketball Corp. v. National Basketball Ass'n, 147 F. Supp. 154 (1956).
[32] 352 U.S. at 452.
[33] H.R. 5383, 85th Cong., 1st Sess. (1957).
[34] H.R. 5307, 5319, 85th Cong., 1st Sess. (1957).

sports.[35] The hearings of the subcommittee have been completed, but as of this writing, no report has been published of its recommendations.

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Constitutional Law—Limits on Power of Congressional Investigation

In *Watkins v. United States*[1] the Supreme Court of the United States again considered the constitutional limits on the power of congressional investigation. In that case a labor union organizer was questioned by a subcommittee of the House Committee on Un-American Activities. The Committee's authorizing resolution[2] directed it to investigate "un-American propaganda activities." The witness was willing to and did divulge his past political activities and the activities of those whom he believed were still members of the communist party. However, while disclaiming the privilege against self-incrimination, he refused to tell whether he knew certain named persons (some of whom were not connected with labor) to have been members of the communist party, because he believed that they were not members at the time of the investigation. He was indicted and convicted for "contempt of Congress."[3] The Court of Appeals for the District of Columbia affirmed[4] the conviction and held that it was proper for the trial court to exclude evidence[5] offered by the defendant to prove that the Committee claimed a power of exposure independent of the legislative function and was interrogating him pursuant to this claimed power. The Supreme Court reversed the court of appeals on other grounds.[6]

In the trial court and in the court of appeals the defendant argued

[35] H.R. 6876, 6877, 8023, 8124, 85th Cong., 1st Sess. (1957). These four sports are baseball, football, basketball, and hockey.

[1] 354 U.S. 178 (1957).

[2] Act of Aug. 2, 1946, c. 753, 60 STAT. 812 (codified in scattered sections of 2, 5, 15, 31, 33, 34, 40, 44 U.S.C.).

[3] 52 STAT. 942 (1938), 2 U.S.C. § 192 (1952).

[4] 233 F.2d 681 (D.C. Cir. 1956).

[5] The trial court excluded statements from house committee reports, house committee hearings, the Congressional Record, and newspapers to the effect that the Committee asserted an independent power of exposure. Also excluded was evidence offered to prove that the Committee already had in its possession the information that it sought to acquire from defendant.

[6] There were two principal reasons for reversal. First, the vagueness of the Committee authorizing resolution inadequately safeguarded against the dissipation of constitutional freedoms because of the impossibility of: (1) weighing congressional need against private rights; (2) determining pertinency; (3) the Committee's limiting its questioning to statutory pertinency. Second, the vagueness of the authorizing resolution denied the witness notice of the subject of the investigation with the same degree of exactness required by the due process clause in the expression of any element of a criminal offense.

This latter reason raises a question of comparing investigating committee hearings with criminal trials for purposes of the due process requirement of certainty in criminal statutes. See 26 GEO. WASH. L. REV. 98 (1957); 106 U. PA. L. REV. 124 (1957).