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Trade Regulation—Clayton Act Section 3—Requirement Contracts—Substantial Share of Relevant Market—Tampa Elec. Co. v. Nashville Coal Co.

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omitted, the taxpayer will strive for accuracy in depreciation and the Government will theoretically be in the same position regardless of whether the asset was correctly depreciated.[17]

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Trade Regulation—Clayton Act Section 3—Requirement Contracts—Substantial Share of Relevant Market.—*Tampa Elec. Co. v. Nashville Coal Co.*[1]—Tampa Electric, a public utility situated in peninsular Florida, supplies electric energy to some eleven percent of Florida's population. Having started the construction of a new generating plant, Tampa entered into a contract by which it was obligated to buy the total coal requirements of two of the plant's contemplated six units from Nashville Coal Co. for a twenty year period. Nashville Coal was only one of 700 coal producers in the Appalachian coal area who could serve Tampa. Previous to this contract, every electrical generating plant in peninsular Florida burned oil as burner fuel. Tampa's coal requirements were expected to vary between one and two million tons per year, at a minimum cost of $128,000,000 over the twenty year contract term. Thus, within a few years of the contract starting date, the utility's coal consumption would surpass that of the remainder of the state. Just prior to the contract starting date, Nashville notified Tampa that it would not perform because the contract was in violation of the federal antitrust laws.[2] Tampa Electric brought declaratory judgment proceedings against Nashville to have the contract declared valid and enforceable. The District Court granted respondent's motion for summary judgment[3] and the Court of Appeals affirmed.[4] On writ of certiorari the Supreme Court reversed. HELD: the contract does not violate Section 3 of the Clayton Act as the competition foreclosed by the contract does not constitute a substantial share of the relevant market.

The "rule of reason" test developed in interpreting the Sherman Act.[5] It necessitated, in each case, an analysis of the case in the light of a broad public policy, hospitable to competition and cold to monopoly, to see

17 "Theoretically" is used because the taxpayer could have changed tax brackets since deducting the depreciation allowances.

1 81 Sup. Ct. 623 (1961).

2 "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods . . . for use, consumption, or resale within the United States . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the . . . seller where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 38 Stat. 731 (1914), 15 U.S.C. § 14 (1958). Respondents also argued that the contract violated the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-2 (1958).

3 168 F. Supp. 456 (M.D. Tenn. 1958).

4 276 F.2d 766 (6th Cir. 1960).

5 Standard Oil Co. v. United States, 221 U.S. 1 (1911).

whether the conduct under scrutiny was *unreasonably* anticompetitive.[6] At first, the "rule of reason" was also applied to the Clayton Act,[7] but the Supreme Court later rejected it in the celebrated *Standard Stations* case,[8] wherein it was stated that any such application would defeat the purpose of the Act. There, the true test—the "quantitative substantiality" test—for discerning whether exclusive arrangements violated Section 3 of the Clayton Act was set out: Has competition been foreclosed in a substantial share of the line of commerce affected? If there has been such a foreclosure, then violation is inferred, since such foreclosure gives rise to a probability that competition will be substantially lessened, or that a monopoly will be created. In applying this "quantitative substantiality" test, the dominant market position of the supplier, or a large volume of business are important considerations.[9] In the opinion, Mr. Justice Frankfurter emphasized that certain factors not to be considered include: (1) that competition has flourished despite the contracts, (2) the length of the term of the contract as compared with the reasonable requirements of the type of commerce involved, and (3) the economic desirability of the contract to the buyer.[10] The net result of this position was thought to be that, practically speaking, any exclusive dealing contract involving a large volume of business would be in contravention to the antitrust laws. Little help was forthcoming to solve this dilemma. Some found a glimmer of hope in a statement of Mr. Justice Frankfurter as to this concept of foreclosure.[11] Foreclosure, in his view, is to be analyzed in terms of market dominance and the obvious bargaining power of the seller, with definite but lesser importance being given to the number of outlets committed to exclusive arrangements.

Not only is the "quantitative substantiality" test hard to define; it is also uncertain in application.[12] The perfect example is supplied by the instant case. Seemingly without difficulty, the Court arrived at the conclusion that the relevant market was the area in which Nashville and the other 700 coal producers effectively compete.[13] The relevant market area

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6 Report of the Attorney General's National Committee to Study the Antitrust Laws 11 (1955).

7 Standard Oil Co. v. F.T.C., 282 Fed. 81 (3d Cir. 1922), aff'd, 261 U.S. 463 (1923).

8 Standard Oil Co. v. United States, 337 U.S. 293 (1949).

9 In the Standard Stations case the supplier's requirement contracts affected a gross business of $58,000,000 or 6.7% of the total in the relevant market. Cf. Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346 (1922).

10 Supra note 8, at 308-14.

11 F.T.C. v. Motion Picture Advertising Serv. Co., 344 U.S. 392, 401-03 (1953) (dissenting opinion).

12 See Report of the Att'y Gen'l, supra note 6, at 141-2; Johnson, Antitrust Law: An Approach to Some Common Problems, 45 A.B.A.J. 596 (1959); Kessler & Stern, Competition, Contract & Vertical Integration, 69 Yale L.J. 1, 24-37 (1959); Lockhart & Sacks, The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act, 65 Harv. L. Rev. 913 (1952).

13 Both the Court of Appeals and the District Court considered the relevant market to be peninsular Florida; cf. supra note 1, at 627. When the Court here considers the relevant market to be a large national area supplied by these 700 producers (See Brief for Petitioners, p. 42), it makes applicable Mr. Justice Douglas' dissent in United

being so large, Tampa consumed less than one per cent of the coal produced.[14] But this factor evidently was not a sufficient basis for the Court to say that Section 3 was not violated, in view of the fact that the contract ran for twenty years and involved at least $128,000,000. As a result, stress was given to the less than dominant position of Nashville, the fact that only one outlet was encompassed, and the type of industry involved. As to this last, the Court noted that, *"at least in the case of public utilities* the assurance of a steady and ample supply of fuel is necessary in the public interest. Otherwise consumers are left unprotected against service failures owing to shut-downs; and increasingly unjustified costs might result in more burdensome rate structures eventually to be reflected in the consumer's bill."[15] (emphasis supplied). Can it be said that the economic desirability of the contract is a valid consideration under the test laid out in *Standard Stations?*[16]

While it is true that the number of outlets involved in an exclusive arrangement, the dominant position of the seller, and his obvious bargaining power, have been used before in applying the yardstick of "quantitative substantiality,"[17] other economic factors have been rejected; the reason being that such would result in a "determination in each case [of] the ultimate demands of 'public interest,' "[18] i.e., a retrogression to the forbidden "rule of reason." In other words, in applying Section 3 of the Clayton Act to a given set of facts, one should not consider the purpose of the particular contract or the end desired from same. Yet, in the instant case, the Supreme Court hesitated to enforce the contract after applying the "quantitative substantiality" test. Rather, it pointed out that the buyer was a peculiar type, a public utility, that shut-downs would be fatal to the consumer, and that such a contract was required to maintain stable

States v. Columbia Steel Co., 334 U.S. 495, 538 (1948), "There is no safeguarding of competition in the theory that the bigger the national market the less protection will be given those selling to the smaller components thereof. That theory would allow a producer to absorb outlets upon which small enterprises with restricted marketing facilities depend. Those outlets . . . could be a matter of life and death to small, local enterprises."

[14] The Court, in delineating the relevant market area of competition to be that area in which the 700 producers effectively compete, followed the pattern set out by the Court in Standard Stations, Note, 60 Colum. L. Rev. 1188, 1192 (1960). But it neglected to take the extra step of Mr. Justice Brennan in United States v. E. I. duPont de Nemours & Co., 353 U.S. 586 (1957), where he said that "the bounds of the relevant market for the purposes of this case are not coextensive with the total market for finishes and fabrics, but are coextensive with the automobile industry, the relevant market for automotive finishes and fabrics." (594-95). If the relevant market here was considered to be coal used by public utilities then Tampa would have consumed 2.86% of the total coal consumed by the public utilities.

[15] Supra note 1, at 632.

[16] Cf. text accompanying note 10 supra.

[17] Standard Stations, supra note 8; Int'l Salt Co. v. United States, 332 U.S. 392 (1947); Standard Fashions, supra note 9.

[18] Standard Stations, supra note 8, at 311. For an excellent statement of the "rule of reason" see Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).

prices. But, what relevance this public interest consideration had, was not made clear. If any it had, such would appear to be at least a partial retreat to public policy considerations so as to uphold the contract.

It would seem that the Court might have been able to reach the same result by means of another tack, which would not have entailed any public interest examination. As was stated above, the Court in *Standard Stations* eliminated consideration of economic data other than the relative positions of the parties, bargaining power of the seller, number of outlets foreclosed, length of contract term and the volume of the contract, so as to lessen the chance of return to the "rule of reason." Another rationale for this reluctance to investigate the economics of a given case hinges on the notion that courts are not equipped to handle a detailed economic evaluation.[19] Yet, if the Clayton Act is to be kept free from the "rule of reason," and at the same time large-volume exclusive arrangements are not to be arbitrarily struck down, an analysis of some of the heretofore prohibited economic evidence would appear to be the only way to attain both these ends.[20]

The Federal Trade Commission has adopted this alternative. In a series of decisions the Commission has required "evidence relating to the competitive effect of the exclusive dealing provisions."[21] Various factors found to be relevant in this area include whether there has been a growth or decline in the particular industry, whether the exclusive arrangement has increased the supplier's share of the market, or, in lieu of the last, whether such arrangements, as used by comparable suppliers, have lessened competition. In a sense the Commission has repudiated the "quantitative substantiality" test, and it will reverse a finding of a violation of Section 3 of the Clayton Act, if the latter is solely based on inferences arising from the test.[22] However, evidence tending to show economic merit, expediency or necessity—the public interest arguments—has been excluded.[23] By admitting evidence tending to show the competitive effect of these exclusive dealing contracts and excluding such as would justify these same contracts, the Federal Trade Commission has in no way frustrated Congress' intent

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19 Standard Stations, supra note 8, at 310.

20 Report of the Att'y Gen'l, supra note 6, at 146. One writer suggests that three questions be asked before finding a violation: "(1) whether there are other legitimate interests that are served by the practice in question; (2) if so, whether those interests can or cannot be served by less restrictive alternatives; and (3) if they cannot, whether the contribution made by the restrictive practice is likely to be outweighed by the harm." Turner, The Validity of Tying Arrangements Under the Antitrust Laws, 72 Harv. L. Rev. 50, 59 (1958).

21 Maico Co., 50 F.T.C. 485, 486 (1953). Cf. Anchor Serum Co. v. F.T.C., 50 F.T.C. 681 (1954), aff'd, 217 F.2d 867 (7th Cir. 1954); Dictograph Prod., Inc. v. F.T.C., 50 F.T.C. 281 (1953), aff'd, 217 F.2d 821 (2d Cir. 1954); Outboard Marine & Mfg. Co., 52 F.T.C. 1553 (1956); Revlon Prod. Corp., 51 F.T.C. 260 (1954); Harley-Davidson Motor Co., 50 F.T.C. 1047 (1954).

22 Maico Co., 50 F.T.C. 485 (1953).

23 Anchor Serum Co. v. F.T.C., 50 F.T.C. 681 (1954); Dictograph Prod., Inc. v. F.T.C., 50 F.T.C 281 (1953)

to strike down, in their incipiency, such contracts as may substantially lessen competition or tend to create monopolies.

ROBERT J. MARTIN

Trade Regulation—Robinson-Patman Act—Knowledge of Violation Imputed to Members of Buyers' Association by Way of Trade Experience.—*American Motor Specialties, Inc. v. F.T.C.*[1]—It had been the custom of major suppliers in the automotive parts industry to offer jobbers successively increasing percentage reductions off their list prices for specified increases in dollar volume purchases. These cumulative volume rebates and graduated price schedules were accorded all purchasers and were available generally throughout the industry. Certain companies engaged as jobbers in the sale and distribution of automotive parts formed a buying group to which suppliers were requested to submit their price schedules. After the prices of a certain supplier had been approved by a committee, the member firms would place their individual orders with the buying group, i.e., the orders were written on forms bearing the name of the buying group, but these forms were either sent by the individual firm directly to the supplier or were sent through the group office without any consolidation of member orders. The orders were processed by the supplier in the same manner as if they had been received directly from the individual jobber instead of in the name of the buying group, and the volume rebates were computed on the basis of the total purchases for all member-jobbers. After deducting operating expenses of the buying group these rebates were distributed to member-jobbers in proportion to each jobber's purchases for the year. The effect of this was to give member-jobbers a substantially lower cost than would have been paid for the same kind and quantity of goods by such jobber individually or by a competing jobber. The granting of these volume discounts by suppliers had previously been held violative of § 2(a)[2] of the Robinson-Patman Act.[3] In this case the Commission issued

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1 278 F.2d 225 (2d Cir. 1960), cert. denied, 364 U.S. 884 (1960).

2 "That it shall be unlawful for any person engaged in commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them . . ." 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1958).

3 Standard Motors Products v. F.T.C., 265 F.2d 674 (2d Cir. 1959), cert. denied, 361 U.S. 826 (1959); P. Sorenson Mfg. Co. v. F.T.C., 246 F.2d 687 (D.C. Cir. 1957); P & D Mfg. Co. v. F.T.C., 245 F.2d 281 (7th Cir. 1957), cert. denied, 355 U.S. 884 (1957); C. E. Niehoff & Co. v. F.T.C., 241 F.2d 37 (7th Cir. 1957), modified sub nom. Moog Industries, Inc. v. F.T.C., 355 U.S. 411, rehearing denied, 355 U.S. 968 (1958); E. Edelmann & Co. v. F.T.C., 239 F.2d 152 (7th Cir. 1956), cert. denied, 355 U.S. 941 (1958); Whittaker Cable Corp. v. F.T.C, 239 F.2d 253 (7th Cir. 1958), cert. denied,