No. 370. 98

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1916.

BOARD OF TRADE OF THE CITY OF CHICAGO, et al., *Appellants*, *vs.* UNITED STATES OF AMERICA, *Appellee.*	}	Appeal from United States District Court, Northern District of Illinois.

BRIEF FOR APPELLANTS.

MR. HENRY S. ROBBINS,
FOR APPELLANTS.

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INDEX.

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BRIEF FOR APPELLANTS.

STATEMENT.

The only question presented by this appeal is—does a rule of the Chicago Board of Trade, which in purchases of grain "to arrive" limits to certain hours price-making by its members, violate the Sherman Act?

So claiming, the Government filed its bill against this exchange and its directors, and obtained a decree enjoining the further maintenance or enforcement of this, or any other similar rule. From that decree the present appeal was perfected.

Appellant, Board of Trade, exists under a special charter granted by the State of Illinois, in 1859, to certain persons (Rec., 148), which confers authority "to establish such rules, regulations and by-laws for the management of their and the mode in which it should be transacted, as they might think proper."

The objects of this association are (Rec., 3):

> "To maintain a commercial exchange, to promote uniformity in the customs and usages of merchants, to inculcate principles of justice and equity in trade, to facilitate the speedy adjustment of business disputes, to acquire and disseminate valuable commercial and economic information, and generally to *secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits.*"

No limit is placed either by this charter or otherwise upon the number of members. Any male person of good character and credit may become a member. (Rec., 115, 151.)

This exchange has more than 1,500 members and has for many years maintained in Chicago an exchange hall, where its members trade in many of the products of the farm, but principally grain and provisions.

The exchange does not itself participate in any of this trading. It neither buys nor sells anything. Its only functions are to maintain an exchange room where its members may meet to trade, to determine who shall be its members, to maintain rules to enforce compliance by members with their contracts and with rules relating to the terms of such contracts, the method of delivery, payments and the deposits of money as security upon contracts, to provide arbitrating tribunals, and to exercise disciplinary power over members.

Trading by its members is of different kinds.

Grain, after it has reached Chicago and is either in cars or elevators is extensively sold by sample and warehouse receipts. The rule in question does not relate to this kind of trading. (Rec., 111.)

Another kind of trading (Rec., 10, 115) consists in the making of contracts of purchase and sale for delivery in a future month. The Board of Trade provides a space called a "pit," for each of the leading commodities so traded in, to which members desiring to trade for future delivery in such commodity resort. This "pit" trading is by *viva voce* bidding. It includes not only such as is speculative in character, but also a large volume of "hedging," which is a method of obtaining a species of insurance against price fluctuations, as is explained in

Board of Trade v. *Christie,* 198 U. S. 236.

The rule in question does not relate to this kind of trading.

A third kind of trading—and the one to which the rule does apply—is the purchase and sale of grain "to arrive." This consists in sending out from Chicago daily bids for grain by members of this Board of Trade,—generally by mail, but occasionally by telegraph,—to grain dealers at country points within the grain section tributary to Chicago. The terms of such trading permit the shipment of the grain within a certain number of days—usually ten, but sometimes more. (Rec., 146.)

These bids prescribe the time, within which the acceptance of the offer must be received in Chicago by the bidder, and this is usually before the opening of the market at 9:30 a. m. the next morning.

The rule in question was adopted in 1906, and was operative until after the institution of this suit —when it was replaced by another rule, which is not here assailed.

The rule in question here reads as follows:

> "Sec. 33. A. The Board of Directors is hereby empowered to establish a public 'Call' for corn, oats, wheat and rye to arrive, to be held in the exchange room immediately after the close of the regular session of each business day.
>
> B. Contracts may be made on the 'Call' only in such articles and upon such terms as have been approved by the 'Call' committee.
>
> C. The 'Call' shall be under the control and management of a committte consisting of five members appointed by the president with the approval of the Board of Directors.
>
> D. Final bids on the 'Call' less the regular commission charges for receiving and accounting for such property may be forwarded to dealers. It is the intent of this rule to provide for a public competitive market for the articles dealt in and that with such market all making of new prices by members of this association shall cease until the next business day.
>
> E. Any transaction of members of this association made with intent to evade the provisions of this rule shall be deemed uncommercial conduct and upon conviction such member shall be suspended from the privileges of the association for such time as the Board of Directors may elect."

The bill alleges (Rec., 5):

> "That the *purpose* and *intent* of said Board of Trade and its members in the enactment of said rule was * * * to prevent all competition among the members of said Board of Trade and the firms and corporations, with which said members are connected in dealings

> relating to corn, oats, wheat, and rye to arrive from the time of the public 'call' immediately after the close of the regular session of each business day until the opening of the session of said Board of Trade upon the next business day, * * * and that the *effect* of said combination and conspiracy has been and is to fix and control during the periods between the regular sessions of said Board of Trade the prices to be offered and paid for wheat, corn, oats and rye to arrive," including grain shipped from other states to Chicago.

The regular sessions of the Board are from 9:30 a. m. until 1:15 p. m., except on Saturday, when the exchange closes at 12 m.

The answer (Rec., 10-11) denies that either the purpose, intent, or effect of this rule was to impair or prevent competition, or to fix or control prices or to restrain trade, and alleges that such rule merely extended to this class of trading a time limit like that imposed by another of its rules, which limits trading for future delivery to certain trading hours, and that the rule in question had been adopted for the purpose of creating a broader and more constant market, and also to promote the health, comfort and welfare of its members and "that in thus limiting the trading by its members to such market hours, it has but followed a practice and precedent established by most commercial exchanges in this country as well as in Europe, among whom it has always been customary to limit to a more or less extent the hours for trading."

These allegations of the answer were supported by the evidence of a number of witnesses. (See appendix to this brief.)

Upon the motion of appellee the court struck out paragraph VI of the answer. (See Point V of this brief.)

Upon a final hearing the court, after hearing evidence, entered a decree (Rec., 165) adjudging that by enacting and enforcing such rule appellants had become parties to a combination or conspiracy to restrain interstate trade in violation of the Sherman Anti-trust Act, and permanently enjoining the Board of Trade "*and its members* and all persons acting or claiming to act for or on behalf of any of its members * * * from carrying out or attempting to carry out" such conspiracy, or any other like combination or conspiracy, and from agreeing or acting together directly or indirectly for the purpose or with the effect of fixing or maintaining a certain price or any price for grain for any specified time or times.

ERRORS RELIED UPON.

1. That the court erred in finding that the defendants were parties to a combination or conspiracy in restraint of trade, and in entering a decree in favor of appellee.
2. That the court erred in not dismissing the bill for want of equity.
3. That the decree is erroneous, because it enjoins intra-state commerce.
4. That the court erred in striking out paragraph VI of the answer.
5. That the decree is too broad in that it enjoins future acts of defendants respecting the fixing of prices, which acts are in no way similar to the rule in question.

ARGUMENT.

Point I.

THE SCOPE OF THE RULE.

The rule affected only bidding by *members* of this exchange.

It related only to buying and selling of grain "to arrive," that is, grain purchased for shipment within a specified time to Chicago.

It did not apply to grain in store or on track in Chicago. (See also, Rec., 94, 146.) A member could any afternoon after the close of the "call" buy grain in elevators or cars in Chicago at other than the call price without violating the rule.

These contracts "to arrive" are essentially contracts for future delivery, and differed from the other contracts for future delivery made on this exchange only in that the times of delivery, instead of being confined to some day in a named month, are, because of the time consumed in transportation, somewhat uncertain.

Another feature of this trading "to arrive" is, that (except between members of the Board residing in Chicago) it usually starts with a bid upon a post card mailed in Chicago. This is especially true as to so much of this trading as will be claimed to be interstate in character.

This necessarily places a practical time limit upon the restriction imposed by the rule; for the postal cards containing the prices must be deposited in the Chicago postoffice in time to reach the addressees early enough to enable them to get their telegraphic replies back to Chicago by 9:30 o'clock the next morning. (Rec., 114, 115.)

Many of these mails close at 3:45 p. m., and the final mails close between half past five and half past six o'clock. (Rec., 114, 115.)

Some time is consumed in the clerical work of writing the bids and getting them into the postoffice. In some cases the bids are printed.

Occasionally, however, where the business was of enough volume to warrant the expense, the bids were sent by day letters or telegrams. Generally the aim prior to the adoption of the rule was to have these bids ready by about two o'clock, but if certain conditions arose, it might be late in the afternoon. (Rec., 21, 114, 115.)

Hence in practice the restriction was at best only for a period of two or three hours at the end of the business day.

Again the rule applied only to bids sent out from Chicago *after the close of the call* at about two o'clock p. m. It imposed no restriction whatever upon this bidding between 9:30 a. m. and the close of the call. A large part of this bidding for grain "to arrive" took place during the market hours. (Rec., 100, 107.)

Again, the rule imposed no restraint upon any member in buying, as members often did, grain to be shipped to other markets than Chicago. The rule applied only to grain bought on "Chicago weights and inspection," and to be shipped to Chicago. (Rec, 94.)

There was no restriction upon the sending out of bids after the close of the call, but only upon the fixing of the prices to be inserted in such bids.

In other words, the rule required members, who desired to buy grain "to arrive," to make up their minds before the close of the call, what price they wished to pay that afternoon. It also made it to their interest to bid on the call, and if they did not there get sufficient grain, to see that the final bid on the call was high enough to enable them to bid the country. It thus ineffect compelled their presence upon the call.

Hence the real restriction was upon the period of price-making. The rule required members to desist from further price-making after the close of the call (about two p. m.) until 9:30 a. m. the next morning.

Another feature was that there was no restriction on the bidding during the call. The price bid to the country was the final bid on the call (less the commission), and this final bid was the result of all the competitive bidding members desired to indulge in.

Thus the question here is, whether a rule of a commercial exchange, which operates only upon its members and limits their price-making at Chicago only about two or three hours at the end of the business day, is under the trade conditions surrounding that market a restraint of trade in violation of the Sherman Act.

Point II.

THE LEGAL TEST.

It is not, and could not well be, claimed that this rule was an attempt to "monopolize" commerce, within the second section of the Sherman Act; especially as it imposed no restriction during the major part of the business day and in some of the territory, within which it was operative, members of this exchange were in competition with members of other exchanges.

The first section of the Sherman Act provides that "every contract, combination in form of a trust, or otherwise, or conspiracy in restraint of trade or commerce * * * is hereby declared to be illegal."

The Sherman Act, though an example of terse, lucid and comprehensive diction, necessarily used the most general terms in defining the kind of arrangements it sought to interdict. Thus it uses the phrase "in restraint of trade."

The correct meaning of this phrase has been much discussed. Happily this controversy has been put at rest by the decision of this court in

> *Standard Oil Co.* v. *U. S.*, 221 U. S. 1.
>
> *U. S.* v. *American Tobacco Co.*, 221 U. S. 106,

establishing what has come to be known as "the rule of reason."

In the *Standard Oil* case this court construed the Sherman Act as prohibiting only "contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contracts or act, or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade;" but rather "with the intent to do wrong to the general public, and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy;" and as not restraining acts "which did not unduly restrain interstate or foreign commerce."

The effect of that decision was "to leave it to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case, whether any particular act or contract was within the contemplation of the statute."

The *American Tobacco* case, in reaffirming the Standard Oil case, held (p. 179) "that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose."

The following subsequent cases reinforce these views:

U. S. v. *Union Pacific Co.*, 226 U. S. 61.
U. S. v. *Reading Co.*, 226 U. S, 324.
Nash v. *U. S.*, 229 U. S. 373.
Eastern Lumber Assn. v. *U. S.*, 234 U. S. 600.

Earlier cases were to the same effect.

U. S. v. *Joint Traffic Assn.*, 171 U. S. 568.
Hopkins v. *U. S.*, 171 U. S. 600.
Anderson v. *U. S.*, 171 U. S. 615.

In the *Joint Traffic Assn.* case, this court said:

"An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce."

In the *Anderson* case, this court in sustaining a rule of an exchange said:

"Where the subject matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effects of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object. * * * The same is true as to certain kinds of agreements entered into between persons engaged in the same business for the direct and *bona fide* purpose of properly and reasonably regulating the conduct of their business among themselves and with the public. If an agreement of that nature, while apt and proper for the purpose thus intended, should

> possibly, though only indirectly and unintentionally, affect interstate trade or commerce, in that event we think the agreement would be good."

The court also held in the *Anderson* case that the effect on interstate commerce of the rule there in question was "too small to be taken into account."

Thus the question here is, whether a rule of an exchange, which prohibits for two or three hours at the end of each business day its members from participating in price-making for grain "to arrive" at Chicago, materially directly and unduly restricts competition or obstructs trade.

Is the present rule anything more than a normal method of accomplishing the purposes, for which this exchange was organized and a reasonable exercise of a legitimate function of the exchange?

Is its prejudicial effect, if any, upon interstate commerce so direct and substantial as to come within the Sherman Act, or so indirect and incidental as to be "too small to be taken into account?"

The legal test being thus established—in determining, whether this particular rule is within the statute, all the facts and circumstances existing at the time of its enactment, as well as its effect, are to be taken into consideration.

> *Anderson* v. *U. S.*, 171 U. S. 605.
>
> *Continental Paper Co.* v. *Voight,* 212 U. S. 266.
>
> *U. S.* v. *St. Louis Terminal,* 224 U. S. 395.

In the *St. Louis Terminal* case, this court held that it could not be determined, whether the Act violated the Sherman Act "without a consideration of natural conditions, greatly affecting the railroad situation in St. Louis."

While, doubtless, a contract or act may be *per se* a violation of the statute—that is, so necessarily and directly a violation as to render the intention unimportant—still, in all cases presenting the question, whether the act is anything more than a normal and usual method to further trade, the intention or purpose of the parties necessarily becomes a fact to be considered.

> *U. S.* v. *Union Pacific R. R.*, 226 U. S. 61.
> *U. S.* v. *Reading Co.*, 226 U. S. 370.
> *U. S.* v. *St. Louis Terminal*, 224 U. S. 394.
> *Swift* v. *U. S.*, 196 U. S. 396.

In the *Union Pacific* case, *supra*, the court said:

> "In determining the validity of this combination we have a right to look also to the intent and purpose of those who conducted the transaction from which it arose and to the objects had in view."

POINT III.

THIS LEGAL TEST APPLIED TO THE FACTS.

The bill alleged that the purpose and intent, as well as the effect, of the rule was to restrict competition and restrain trade, while the answer averred that such was neither its purpose, intent or effect.

Upon the issues thus raised the Government introduced no evidence. Its evidence was directed only to showing the meaning of the rule, how transactions under it were carried on, the volume of trading in the Chicago market, the number of persons participating therein, etc. It was thus content to stake its case upon the terms of the rule, which it claims to be such that compliance therewith necessarily must result in such restriction of competition as is violative of the Sherman Act.

On the other hand, appellants examined many witnesses to show that the purpose and effect of the rule was harmless, and would have introduced many more, had not the trial judge suggested (Rec., 137) that to do so would unnecessarily cumulate evidence.

This evidence shows (Rec., 97, 98, 107, 22, 111, 142 to 144) that the purpose of the rule and of those enacting it was (1) not to restrict competition in trade, but to promote the interest of the Board of Trade by bettering existing trade conditions, under which most of this trading "to arrive" had largely concentrated in a few hands, and other members of the exchange were being driven out of this business, and to otherwise better trade conditions, and (2) to restrict reasonably the hours for trading, and thereby promote the health and comfort of members. (Rec., 98.)

In other words, the evidence shows that one purpose was to improve market conditions by providing a more competitive public market, and inducing more members to participate in this trade. (Rec., 22, 111.)

The rule itself declares that "it is the intent of this rule to provide for a public competitive market for the articles dealt in, and that with such market all making of new prices by members of this association shall cease until the next business day."

This evidence also shows (Rec., 117 to 122, 123, 125, 126, 129) that one *effect* of the rule was to benefit the country shippers, including the numerous corporations organized by farmers to facilitate the marketing of their crops. In one state alone, Iowa, the evidence shows that there were from 330 to 340 farmers' companies having about 65,000 farmers as their stockholders. (Rec., 119.)

The managers of three of these farmers' elevator companies—one of them having been at one time a candidate for Governor of Iowa, and none of them being a member of this exchange—testified that this Call rule was beneficial to them, and specified among its benefits that it enabled them to participate in this trading "to arrive," and also furnished them better information of the Chicago prices on grain "to arrive," thus enabling them to buy grain upon a smaller margin of profit, and that under the rule they were not confined—as they had been before the rule—to the delivery of grain arriving in Chicago on any particular railroad, but could fulfill their contracts with grain arriving on any railroad.

Several members of the Board of Trade, who act as commission merchants for these farmers' companies, testified (Rec., 130 to 133) to the same effect.

Three members of the Board of Trade, whose business is buying grain in Chicago to ship east, also testified (Rec., 137, 140, 141) that the rule benefited their business, in that it enabled them to acquire grain for their shipments through purchases upon the call of grain "to arrive," and that thereby they were enabled to accept lower bids from the east, because they were able to operate on smaller margins of profit.

A number of members of the Board of Trade testified—and many more would have testified, if the court had not regarded the evidence as unduly cumulative—that the rule benefited trade (Rec., 98, 105, 107, 11, 133, 136-142, 144, 147) by increasing the numbers of bidders for grain "to arrive," by bringing more of that trade into the open market during market hours, by making more generally known the afternoon bid price for grain "to arrive," and by creating through an increase of bidders a more competitive price than that prevailing before the enactment of the rule. Some testified that the rule increased prices by reducing the risk, and thereby the margin of profit, of the middleman. Many of them also specified as a benefit the fact that the rule permitted a broader contract, under which grain arriving on *any* road could be delivered upon these contracts for grain "to arrive."

Several of the few large dealers and owners of elevators, against whom the rule was aimed, were called to testify by the Government (Rec., 95, 99, 100, 105, 106), but none of them testified that the rule was really restrictive either as respects the volume of the grain affected or the prices thereof. Indeed, James A. Patten, a member of one of the largest of these grain buying firms, and the largest individual grain dealer in the country, testified that in his judgment the Call rule did not affect prices. (Rec., 105.)

For the convenience of the court and to avoid an undue enlargement of this brief, some of the evidence of these witnesses is set out in an appendix to this brief.

Thus the uncontradicted evidence shows that this rule did not restrain trade, nor restrict competition. At least, if it did, such restriction was only incidental, and "too small to be taken into account." For while the period of price-making was thereby reduced, the rule brought into this kind of trading many more bidders, whose participation therein made the afternoon price for grain "to arrive" a much more competitive one than it was before the rule was enacted.

The only effect of this rule on the bidding was to compel bidders to make up their minds a little earlier in the afternoon, what price they were willing to bid that afternoon for grain "to arrive," and to subject this price to a stimulating influence from the open bidding by other traders.

No witness testified that the result of this rule was to lower prices. Some testified affirmatively that it had no effect whatever upon prices. Others thought it bettered prices to the producers without increasing it to the consumers. (Rec., 118, 124, 129.)

Indeed, when the conditions are analyzed, it is difficult to see how this suspension of price-making for two or three hours at the end of the day could prejudicially affect competition.

The rule did not change the times when the country shippers received their bids. These were fixed by the mail schedules. It only required these Chicago bidders to be a little more expeditious in determining what prices they would bid.

Nor did this reduction in the hours of price-making lessen the volume of such trading in Chicago. The quantity of wheat for sale was not by this rule reduced one bushel. Nor did it reduce the number or requirements of those who needed the nourishment furnished by the existing supply of grain. It affected neither the supply nor the demand.

Nor is it conceivable how it could in any substantial way have affected the prices obtainable by owners of grain. Its only effect was either to bring competition into play a little earlier in the day or to postpone it until 9:30 a. m. the next morning.

Persons bidding in Chicago for grain "to arrive" there do so, because they know of a use, to which they can probably put the grain they bid for. They want it either for, or to sell at once to, millers, exporters, etc., or to hold until others will later take it off their hands at a profit. Is it at all probable that the number of these persons wishing to buy grain "to arrive" for one or the other of these purposes, or the quantity each wanted, was lessened by an inability to bid for it other than the call price between 2 o'clock one day and 9:30 o'clock the next? If the miller, exporter, or speculator wants the grain, he will want it just as much the next morning. If he is not able to get it upon the Call or subsequently at the Call price, he will buy it the next morning, because the reasons, which induce him to want it, are not at all affected by this short suspension of trading in the afternoon.

Nor will prices be thereby affected; for the speculator, miller, or exporter fixes his price from a consideration of the supply and demand and other trade conditions, which this rule did not affect.

Thus how can any one affirm that the competition, if delayed until the next morning, will not be as keen, and result in as good prices, as if it took place in the preceding afternoon, or that by inducing the attendance at the call of prospective bidders for grain "to arrive" and thus subjecting them to a stimulating influence from the open bidding there, prices will not be *beneficially* affected sa much as, or more than, the suspension of bidding at the end of the day will *prejudicially* affect them. How can it be certainly affirmed that compelling traders to bid the call price for any grain they wish to buy after 2 o'clock any afternoon will not lead them to pay more than they otherwise would as often as, or more often than, it would prevent them from paying, more than the bid price.

In short, to use an expression of this court, is not the restraint of trade, if any, imposed by this rule "too small to be taken into account?"

It may be accurately described as a rule, which somewhat reduced the *time* of price-making, without prejudicially affecting prices, and it is difficult to see how it violated the Sherman Act.

This evidence also shows that this rule was only a normal method of accomplishing some of the objects, for which this organization was created—"to maintain a commercial exchange" and "to secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits." These objects were furthered as follows:

It shortened the hours of price-making, and thereby contributed to the health and comfort of members.

It also forced more of this trading "to arrive" into the regular trading hours, and upon the exchange floor, thus distributing it among more members and thereby rendering it more profitable to be a member of the association.

It also carried to country shippers in a wider area a prompter knowledge of the prevailing prices for grain "to arrive," and thereby encouraged more country shippers to ship their grain to the Chicago market.

It also prevented an undue concentration of this kind of trading among a few large dealers, who could more readily agree upon a bid to be sent out to country shippers.

It also facilitated this trading "to arrive" by enabling participants therein to fulfill their contracts by delivering grain arriving upon any railroad entering Chicago.

It also placed country shippers in closer touch with the Chicago prices, and thereby enabled them to accept smaller margins of profit, thus increasing the prices to farmers and making the Chicago market a more attractive one to ship to.

It also enabled the grain merchants of Chicago, who sell to millers, exporters and consumers, to work upon a closer margin of profit, and thereby to pay more for their grain in Chicago, or sell it cheaper, thus making the Chicago market more attractive to shippers and grain buyers.

These results all helped to make the grain market maintained by this Board of Trade a larger and better one for shippers, and the exchange a more profitable one for traders to be members of.

A rule which accomplished these results surely must be deemed a normal method for promoting the business of the association.

This will be more apparent when we consider what are the proper functions of an exchange.

The comprehensive purpose of this exchange, as declared in its enumeration of objects, is "to maintain a commercial exchange."

No exchange can exist unless it attracts members. Few will join or remain in an exchange, unless it is to their personal interest to do so. An exchange is an expensive thing to maintain. The yearly expense of this exchange is about $395,085.26. (Rec., 115.) The principal source of revenue of all exchanges is from the dues collected from its members. Thus, to induce persons to be members of an exchange, the value of the benefits it confers upon a member should exceed his share of the cost of maintaining the exchange.

The chief benefit to members—as well as the chief utility to the public—is the maintenance of a market, and the broader that market—that is, the larger the volume of its trade and the number of its trading members—the greater the advantage to the members as well as to the public. The Chicago Board of Trade is a greater exchange than some of its rivals, because it has more active members and attracts a greater volume of trade, and it thus provides a more constant market.

The very idea of an exchange suggests an exclusion of persons, and consequently some restriction of free competition. An exchange cannot establish and maintain a market without resorting to restrictions, which necessarily somewhat impair the right of both members and non-members to trade.

Thus it is the function of every exchange to maintain a trading room, where its members may meet to trade. This bringing together of traders to a particular place is what makes a public market. In doing this every exchange does and must provide that non-members may not personally trade there; for this compels them to become members, or to employ members as their agents. This is in a sense a restraint upon trade. But no one will claim that it is an undue restraint of trade within the Sherman Act.

So—although this exchange does not do so—it is a legitimate function of an exchange to limit the number of its members with a view to making it more profitable for persons to become members. This somewhat restrains trade by preventing many persons from participating personally, either for themselves, or as agents, in the trading on the exchange. Yet no one will claim that to be a restraint of trade within the Sherman Act.

Again, most exchanges exercise the right to compel their members to refrain from trading with suspended members, and whenever this has been called into question the courts have sustained it.

> *Gladish* v. *Kansas City Exchange,* 113 Mo. App. 726.

But clearly that is not an undue restraint under the Sherman Act.

Again, many exchanges find it necessary, in order to maintain a high character of business integrity among members and induce persons to be members, to prescribe, and to compel members to conform to, minimum rates of commissions. This has also been generally recognized as a legitimate function of an exchange, and in the few instances in which it has been questioned the courts have sustained its legality.

Board of Trade v. *Dickinson,* 114 Ill. App. 295.

State v. *Duluth Board of Trade,* 107 Minn. 506.

Yet these rules do restrain trade by restricting competition in commission rates among members, whom outsiders desiring to buy and sell on these exchanges are obliged to employ. Will any one contend that such a rule is an undue restraint of trade, or anything more than a normal regulation reasonably adopted to accomplish the purposes, for which exchanges exist?

Most exchanges also exercise the right to confine trading by their members within certain trading hours, and to suspend or expel members trading at other times. The evidence shows (Rec., 159, 163) that every important exchange in this country does this. It is one of the recognized and usual functions of exchanges; for the shorter the hours the more active and constant is the market. The volume of trading being dependent entirely on other conditions, it follows that the maintenance of trading hours lessens the interval between individual trades, and the shorter those hours, the less these intervals, the more constant the market and the more successful the exchange in creating a market, in which the public may buy or sell at any moment when it is in session.

Another benefit accruing from restricted market hours is the promotion of the health, comfort and welfare of members, by securing to them leisure and freedom from business cares the latter part of the day.

The Chicago Board of Trade has for years maintained a rule confining future trading in its exchange building or in its vicinity to less than four hours a day. (Rec., 155.)

In the only case, in which it has been questioned, this right of the exchanges has been upheld.

> *State* v. *Milwaukee Chamber of Commerce,* 47 Wis. 670.

This limitation of hours for business or work is not confined to exchanges. Banks universally prescribe and conform to shorter business hours than other branches of business. Labor unions combine to shorten hours. Legislatures and Congress compel eight hour days for many who work.

Merchants may, within reasonable limitations, agree among themselves to limit their business hours without being guilty of undue restraint of trade.

> *Stovall* v. *McCutchen,* 107 Ky. 577.

Yet these rules of exchanges prescribing market hours do materially restrain trading at other times than these trading hours. They not only restrain members of the exchange in the making of their own trades, but restrain the trading of non-members, because a large volume of the trading of members is as agents for non-members. Will it be contended that these rules fixing trading hours unduly restrict trade, or are other than normal regulations of the exchange to accomplish the legitimate purposes, for which it is organized? Will it be claimed that Congress, in enacting the Sherman Act, intended to abolish the trading hours of the exchanges?

The rule in question is nothing more than a rule limiting the trading hours of its members, and having for one of its purposes the promotion of their health, comfort and welfare by enabling them to be free from the anxiety of price-making in the later hours of the day.

True it differs from most of these exchange rules prescribing trading hours, in that it prohibits during the non-trading hours members from trading with non-members, while such rules ordinarily deal only with trading between members. But this is a difference in form rather than substance; for rules limiting the trading hours between members in effect restrict trading by non-members. They are thereby prohibited, during the prescribed period, from trading through their agents. A restraint upon the free right to trade, if injurious to the public and unlawful at all, must be so when traders are acting through agents as well as when they are trading personally.

Again a rule of an exchange, which prohibits its members from trading with non-members, is in a sense a restraint upon trade. Yet this court has held that such a rule does not violate the Sherman Act.

Anderson v. *U. S.*, 171 U. S. 604.

There the rule of a live stock exchange prevented its members from trading with other yard traders, who were not members, and with those, who traded with such yard traders as were not members of the Association; but this court held the rule not violative of the Sherman Act, saying:

> "From very early times it has been the custom for men engaged in the occupation of buying and selling articles of a similar nature at any particular place to associate themselves together. The object of the association has in many cases been to provide for the ready transaction of the business of the associates by obtaining a general headquarters for its conduct, and thus to ensure a quick and certain market for the sale or purchase of the article dealt in. Another purpose has been to provide a standard of business integrity among the members by adopting rules for just and fair dealing among them and enforcing the same by penalties for their violation. The agreements have been voluntary, and the penalties have been enforced under the supervision and by members of the association. The preamble adopted by the association in this case shows the ostensible purpose of its formation. * * * In other words, we think that the rules adopted do not contradict the expressed purpose of the preamble, and that the result naturally to be expected from an enforcement of the rules would not directly, if at all, affect interstate trade, or commerce. * * * This association does not meddle with prices and itself does no business. In refusing to recognize any yard trader who is not a member of the exchange, we see no purpose of thereby affecting or in any manner restraining interstate commerce, which, if affected at all, can only be in a very indirect and remote manner. * * *
>
> The design of the defendants evidently is to bring all the yard traders into the association as members, so that they may become subject to jurisdiction and be compelled by its rules and regulations to transact business in the honest and straightforward manner provided for by them. * * * And if, for the purpose of com-

pelling this membership, the association, refuse business relations with those commission merchants who insist upon buying from or selling to yard traders who are not members of the association, we see nothing that can be said to affect the trade or commerce in question other than in the most roundabout and indirect manner. * * *

If, for the purpose of enlarging the membership of the exchange, and of thus procuring the transaction of their business upon a proper and fair basis by all who are engaged therein, the defendants refuse to do business with those commission men who sell to or purchase from yard traders who are not members of the exchange, the possible effect of such a course of conduct upon interstate commerce is quite remote, not intended and too small to be taken into account. * * *

A claim that such refusal may thereby lessen the number of active traders on the market, and thus possibly reduce the demand for and the prices of the cattle there set up for sale, and so affect interstate trade, is entirely too remote and fanciful to be accepted as valid. * * *

The rules are evidently of a character to enforce the purpose and object of the exchange as set forth in the preamble, and we think that for such purpose they are reasonable and fair. They can possibly affect interstate trade or commerce in but a remote way, and are not void as violations of the act of Congress."

The principle thus established in the *Anderson* case would seem to be conclusive on this appeal. For in most respects the two cases are similar. Each presented the question, whether a rule of an exchange was a restraint of trade under the Sherman Act. In each case, the rule, if at all restrictive of trade, had another legitimate purpose—to promote the growth and welfare of the exchange. In each case, to use the language of this court in the *Anderson* case, "a lessening of the amount of the trade is neither the necessary nor direct effect," and "there is not the slightest evidence that the market prices have been lowered."

In the *Anderson* case the lessening of the number of yard traders was held too remote an interference with trade to constitute a restraint thereof within the Sherman Act. This is equally true of the lessening of the hours of price-making in the case at bar.

In the *Anderson* case stress is laid upon the fact that other traders in Kansas City furnished a sufficient market. In the case at bar the absence of any restriction upon price making between 9:30 a. m. and 2 p. m. furnished sufficient opportunity to all desiring to purchase grain "to arrive."

In the *Anderson* case stress is laid upon the fact that the object of the rule was to enlarge the membership. In the case at bar, one object of the rule was to increase the participation of members in this trading "to arrive" and the volume of this trading upon the exchange, and to thereby make the privilege of membership a more valuable one.

Thus under the principle of the *Anderson* case this Call rule could have gone further than it did, and have required members of this association to trade in grain "to arrive," only with other members of the exchange, and thus have confined all this trading by its members to its exchange and within its regular trading hours.

The *Anderson* case also emphasizes a distinction in the application of the Sherman Act between a combination of persons existing for the maintenance of a commercial exchange and a combination of persons not so associated. For in the *Anderson* case this court held that it was not a violation of the Sherman Act for members of an exchange to bind themselves not to trade with certain outsiders, while in

> *Eastern States Lumber Assn.* v. *U. S.* 234 U. S. 600,

it was held that, while one dealer may refuse to deal with another for any reason appearing sufficient to him, if a number of dealers agree not to deal with outsiders, it is an undue restraint of trade.

Nor does the fact that this Call rule, in prescribing the maximum bid to the country after the call, required the final bid on the call to be reduced by the regular commission materially affect the question under discussion; for an exchange, having the right, as already seen, to confine all trading by its members to certain hours, and to thus limit the hours of any price-making by its members, may also fix the price, at which its members may buy *after those hours*.

So an exchange having, as the *Anderson* case decided, the right to require that its members shall trade only with other members, it may also prescribe that its members may trade with non-members only at a certain price or during certain hours. For the greater always includes the less.

Finally, it seems not inappropriate to recall here that this court, in rejecting the claim that the "pit" trading on this same exchange was illegal, said in

> *Board of Trade* v. *Christie,* 198 U. S. 247,

> "that legislatures and courts generally have recognized that the natural evolutions of a complex society are to be touched only with a very cautious hand."

POINT IV.

THE DECREE REGULATES INTRA-STATE TRADING.

It will, of course, be conceded that this decree, if otherwise sustainable, should be confined to such of this buying "to arrive" as is interstate commerce.

This kind of trading "to arrive" is divisible as follows:

1. Where both the contracting members, including the principal (where either is acting merely as agent), reside in Illinois, and the grain involved is there located.

2. Where the person receiving and accepting the bid resides in, and the grain is shipped from a state other than Illinois.

Occasionally, the grain shipped is in Illinois, but the shipper resides in another state, or *vice versa*. But such cases are too exceptional to be considered.

The terms of these contracts do not require the party accepting the bid to—although he usually does—ship the grain in fulfillment of the contract from a particular place. He may acquire the grain in Chicago and there tender it to the bidder, or tender grain coming in from some point in Illinois, provided he does so within the shipping time mentioned in the contract, plus the time required for transportation from the residence of the seller to Chicago. (Rec., 111, 124, 125, 126, 133, 138.)

That the decree should not include the first of these classes of trading will, of course, be conceded. There is neither interstate transportation, nor an interstate sale.

Inasmuch, also, as the contracts in this trading "to arrive" do not *require* shipments of grain across state lines, even though in the practice much of such grain is so shipped, it would seem that under previous decisions of this court none of this trading "to arrive" is interstate commerce.

> *Ware & Leland* v. *Mobile Co.,* 209 U. S. 405.
> *Engel* v. *O'Malley,* 219 U. S. 128.

The *Ware & Leland* case involved the right of a state to tax brokers, who collected in Alabama orders for sales and purchases for future delivery to be forwarded to and be executed on the New York Cotton Exchange, and this court held the business not to be interstate—although it resulted in the making of contracts between persons who were citizens of different states—because the contracts entered into did not *compel* a shipment of grain across state lines, the court saying:

> "The appellants are brokers who take orders and transmit them to other states for the purchase and sale of grain or cotton upon speculation. * * * When the delivery was upon a contract of sale made by the broker, the seller was at liberty to acquire the cotton in the market where the delivery was required or elsewhere. He did not contract to ship it from one state to the place of delivery in another state. And though it is stipulated that shipments were made from Alabama to the foreign state in some instances, that was not because of any contractual obligation so to do. In neither class of contracts for sale or purchase was there necessarily any movement of commodities in interstate traffic, because of the contracts made by the brokers. * * *
>
> The delivery, when one was made, was not because of any contract obliging an interstate

> shipment, and the fact that the purchaser might thereafter transmit the subject-matter of purchase by means of interstate carriage did not make the contracts as made and executed the subjects of interstate commerce."

In *Engel* v. *O'Malley, supra,* the business of making deposits of money with a banker, with a view to its safekeeping and transmission to other states was held not to be an interstate business, because it did not contemplate the receipt of bailments for the transmission of the identical objects received to other states, and that for this reason the case was in principle similar to the *Ware & Leland* case.

A sale is not an interstate one merely because the contracting parties reside in different states; nor are sales interstate in character merely because they give rise to interstate transportation. The transportation may be interstate and the transaction of sale still be intra-state in character. To make the transaction of sale interstate, the parties should contemplate, and their contract should require, the shipment of property from one state to another. The terms of the trading under this Call rule did not do this.

Hence this decree is reversible *in toto.*

Furthermore, if the decree be held to properly cover any of this trading, it is too broad in that its terms include trading between residents of Illinois for grain located in that state. While the first paragraph of the decretal part of the decree is confined to interstate commerce, clauses (a), (b) and (c) of the decree (Rec., 166) make no such restriction, but are general and include sales by residents of Illinois to other residents of Illinois of grain located in Illinois.

For this reason the decree, if it is to be sustained, should be modified in this respect.

POINT V.

IT WAS ERROR TO STRIKE OUT PARAGRAPH SIX OF ANSWER.

This paragraph contained the following allegations:

> "That defendants aver that some years before the adoption of said rule, four or five persons engaged extensively in purchasing grain to arrive in Chicago—and who were also members of said Board of Trade—also severally acquired by leases from the railroad companies whose lines terminated in Chicago, or otherwise, control of practically all the grain elevators in Chicago which were used as public (Class "A") warehouses, and were conveniently located as respects rail and lake transportation, and they have since severally operated the same as such warehouses, and have also themselves built and thereafter operated other like grain elevators, they thus together controlling practically all such public grain elevators or warehouses in Chicago, and each of them combining with his business of public elevator proprietor that of grain buyer; and each such proprietor used his said elevators for the storage of grain purchased and owned by himself. That this ownership by said grain dealers of said public elevators enabled them to drive out of such business other grain buyers, which they did by overbidding such other purchasers of grain and thus in effect giving away a portion of their storage charges, and that by reason of this and other advantages which said warehousemen had by reason of their operating such

warehouses, said warehousemen were able to, and did, acquire a practical monopoly of the business of purchasing and selling grain to arrive in Chicago, and they were thereby enabled to crush out, and they had prior to the adoption of said rule in part succeeded in crushing out, competition among buyers of grain to arrive in Chicago, and that as a result said warehousemen had, prior to the adoption of said rule, been enabled to purchase and were purchasing, more than three-fourths of all the grain arriving in Chicago.

That in conjunction with said terminal elevators in Chicago said public warehousemen had, prior to the adoption of said rule, also acquired control of sundry smaller warehouses, adjacent to railroads at many country places within the principal grain producing states, and that by arrangement among themselves said warehousing business was so apportioned among them that each of them acquired and controlled exclusively the elevator system of one or more railroad lines or systems without interference therewith on the part of any of said others; and that it was also a part of such arrangement or understanding between said elevator owners that the one operating said warehouse system on any such railroad should be the only one of them to bid for grain 'to arrive' in Chicago over said road; and that it was also prior to the adoption of said rule, a frequent practice of said elevator proprietors to agree among themselves each afternoon upon the prices which all should adopt in their bids, to be sent that day to persons in the country for grain 'to arrive' in Chicago; and that by reason of the facts aforesaid many members of the Board of Trade—who would otherwise have joined in the bidding—ceased either to bid on said exchange for grain 'to arrive' in Chicago or to send out bids therefor to the persons in the country and ceased to solicit or accept from country shippers consignments

> of grain to be sold 'to arrive' in Chicago; and that competition in bidding for grain 'to arrive' in Chicago had, prior to the passage of this rule, become very much restricted.
>
> Defendants aver that the only purpose or intention of said Board of Trade and its members in adopting and of its officers and directors in enforcing said rule—other than that of promoting the convenience of its members by restricting their hours of business—was to increase competition among those engaged in buying and selling grain 'to arrive' in Chicago by enlarging the number of members of said Board who would participate in such bidding for grain 'to arrive' not only upon said exchange and among the members of said Board of Trade, but also the number of those who would send out bids to the country for grain 'to arrive.' "

The court struck out this paragraph because none of "the facts alleged in said paragraph, whether considered by themselves or in conjunction with other alleged facts in said answer, constitute a defense to said bill."

All the conditions existing at the time of the enactment of this rule should be taken into consideration. (See cases cited on p. 13 of this brief.)

The unhealthy trade conditions set up in this paragraph have been proven in cases before the Supreme Court of Illinois, in which the Attorney General secured injunctions to prevent public warehousemen at Chicago from mixing their own grain in their public elevators with that of their depositors.

> *Central Elevator Co.* v. *People,* 174 Ill. 203.
> *Hannah* v. *People,* 198 Ill. 77.

In the former case the court said:

> "The evidence shows that defendants, as pub-

> lic warehousemen storing grain in their own warehouses, are enabled to, and do, overbid legitimate grain dealers by exacting from them the established rate for storage while they give up a part of the storage charges when they buy or sell for themselves. By this practice of buying and selling through their own elevators the position of equality between them and the public whom they are bound to serve is destroyed, and by the advantage of their position they are enabled to crush out, and have nearly crushed out, competition in the largest grain market of the world. The result is, that the warehousemen own three-fourths of all the grain stored in the public warehouses of Chicago, and upon some of the railroads the only buyers of grain are the warehousemen on that line. * * * In this way they use their business as warehousemen to drive out competition with them as buyers."

Appellants expected by evidence in support of this paragraph, to show that, despite these decisions of the Illinois Court, this unhealthy trade condition existed at the time of the enactment of the rule, and that a desire to eliminate this feature of the trading was one of the purposes of enacting this rule. The trial court, however, not only expunged these allegations as immaterial, but excluded the evidence tending to prove them.

And why was it not proper to do so? It would have tended to disprove the charge of the Government that the purpose of the rule was to restrain trade, and would have helped to support the claim of appellants that this rule was enacted in the proper exercise of a legitimate function of the exchange—the improvement of trade conditions.

Surely the exchange's right to proceed in this direction is not limited to acts, which are not violative of law. The fact that a state may be vested with power by civil suit or criminal action to abate an unhealthy trade condition, is no reason why a commercial exchange, within its limited sphere and through the exercise of its disciplinary power over its members, should not be permitted to aid in bringing about a healthy trade condition.

Why should an exchange suffer from inadequate state laws or the lax enforcement of laws?

Why may it not supplement the efforts of the state to suppress monopoly?

POINT VI.

THE DECREE IS TOO BROAD.

This is true as respects appellants, and more so as respects the members of the Board.

In suits to enforce the Sherman Act this court has held that the Government must be confined to specific violations, and that a decree for the Government should not contain general prohibitions, which are tantamount to enjoining defendants from in any way violating the Sherman Act.

Swift v. *United States,* 196 U. S. 375, 401.

Clauses (b) and (c) of the decree (Rec., 166) plainly violate this principle; for in addition to enjoining the enactment or enforcement of, any similar rule paragraph (b) enjoins not only the Board of Trade, but all its members from "agreeing or acting together, or with one another, expressly, or impliedly, directly or indirectly, for the purpose or with the effect of fixing or maintaining a price on the articles, corn, oats, wheat or rye, for any specified time or times." Clause (c) is open to the same objection.

While these provisions of the decree do not seriously embarrass the appellant Board of Trade, as it does not engage in any business whatever, they may embarrass its members.

It is, therefore, suggested that this decree, if it is to stand, should be confined to enjoining the enforcement of or compliance with, the Call rule in question, or any other similar rule or method.

Respectfully submitted,

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