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In the Supreme Court of the United States.

OCTOBER TERM, 1917.

BOARD OF TRADE OF THE CITY OF CHICAGO ET AL.,
APPELLANTS,
v.
THE UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE UNITED STATES.

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STATEMENT OF THE CASE.

This is an appeal from a decree of the United States District Court for the Northern District of Illinois enjoining the Board of Trade of the City of Chicago, its officers, directors and members, in a suit by the United States under the Anti-Trust Law, 26 Stat., 209, c. 647, from giving effect to a certain provision of what is known as the "Call Rule," adopted by the Board in 1906.[1]

The rule in its entirety reads as follows:

> Sec. 33. A. The Board of Directors is hereby empowered to establish a public "Call" for

[1] *Subsequently* to the institution of this suit this rule was abrogated.

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 committee 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 members shall be suspended from the privileges of the association for such time as the Board of Directors may elect. (Pet., R. 5; Ans., R. 11.)

The Board maintains at Chicago a commercial exchange for dealings in grain, provisions, and other commodities. Its membership includes not only brokers and commission merchants, but proprietors of elevators, and millers, malsters, manufacturers of corn products, and others who buy and sell grain and provisions on their own account—more than 1,600 in all. (Canby, R. 19, 20.)

We borrow from the brief for appellants the following statement of the kinds of trading in which members of the Board engage:

> 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. * * * 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. (P. 3.)

The "Call" immediately follows the regular session[1] and lasts about half an hour, usually ending before 2 p. m. (R. 117, 139.) To all intents and purposes it is simply a prolongation of the regular session. (Nichols, R. 108.)

The witness Canby, president of the Board, described the operation of the "Call" as follows (R. 20):

> What is termed the "Call" was what you might call an auction. In other words, these prices were bids and offers. It was held during the early part of the afternoon, held at the close of the day's business in one corner of the Board of Trade. The caller had a stand and stood up and called the different grades of grain, and as he would call each grade he would ask for bids, and all the members that desired to send bids out in the country that afternoon to buy grain to arrive would bid on this call, and they could bid, every one bid any price they wanted to send out.

After the close of the "Call" trading proceeds as follows, as exemplified in the typical case of the Armour Grain Company:

> * * * the Armour Grain Company, after the Call was over, took the prices which were established on the Call and put our bids into the country on the basis of those prices. * * * We mailed those cards wherever the grain was; wherever we thought we could buy any grain we put the bids in. (Marcy, R. 91.[2])

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[1] The regular session is from 9:30 a. m. to 1:15 p. m.; on Saturdays, from 9:30 a. m. to 12 n. (R., 11.)

[2] Other members testifying to the same effect were Stream, R. 99; Pierce, R. 100–101; Glaser, R. 101–102; Eckhardt, R. 114.

The points to which these bids were sent were located not only in Illinois, but in the grain-growing sections of other States tributary to the Chicago market—Ohio, Indiana, Missouri, Nebraska, Kansas, Iowa, North and South Dakota, Minnesota, Wisconsin. (Stream, R. 99; Marcy, R. 91; Pierce, R. 101; Eckhardt, R. 114.)

The provision of sub-division D of the rule, reading—

> 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,

as construed and enforced by the Board, absolutely prohibits members from competing as to price in the purchase and sale of corn, oats, wheat and rye at these country points, for Chicago delivery (i. e., grain "to arrive"), in the interval between the close of the "Call" and the opening of the regular session on the next day, by requiring all to quote the same price, namely, the final bid on the "Call" less the regular commission. (R. 96, 99, 100–101.)

It is this provision only which the Government now assails.

The charge of the bill is that by adopting and enforcing this provision, the Board, its officers, directors and members became parties to a combination in restraint of trade in violation of the Anti-Trust Law. (R. 5–6.)

The answer, while admitting the adoption and enforcement of the provision and its effect substantially as above stated (R. 11), avers that the purpose was not to prevent competition or to control prices (R. 11), but (a) to promote the health, comfort and welfare of members "by restricting their hours of business" (R. 11, 13), and (b) to break up a monopoly in this branch of the grain trade alleged to have been acquired by four or five large warehousemen in Chicago (R. 12).

On motion of the Government the allegation of the last-mentioned purpose was stricken from the answer on the ground that even if true it constituted no defense. (R. 15, 16.)

After a hearing the District Court entered a decree sustaining the charge of the petition and enjoining the Board, its officers, directors and members, in substance, from continuing to observe or give effect to the assailed provision, and from adopting or observing any rule or regulation of like character. (R. 165–167.)

ARGUMENT.

I.

BY ADHERING TO THE RULE IN QUESTION THE BOARD, ITS OFFICERS, DIRECTORS, AND MEMBERS, BECAME PARTIES TO A COMBINATION TO FIX A UNIFORM PRICE FOR BIDS FOR GRAIN AT COUNTRY POINTS, FOR CHICAGO DELIVERY, BETWEEN THE CLOSE OF THE CALL AND THE OPENING OF THE REGULAR SESSION ON THE NEXT DAY, THEREBY DIRECTLY AND SUBSTANTIALLY RESTRICTING COMPETITION AND RESTRAINING TRADE AMONG THE STATES.

The intended effect of the assailed regulation is to bind members of the Board to bid a uniform price in purchasing grain at country points, for Chicago delivery, between the close of the "Call" and the opening of the regular session on the following day. (Appellants' Br., p. 9.)

As stated, the points at which grain was thus purchased were located part in Illinois and part in neighboring States (*supra*, p. 5). The regulation, therefore, operated upon interstate commerce.

The manner in which this regulation restricted competition amongst members of the Board is best set forth in their own words contrasting conditions before and after the adoption of the regulation.

George E. Marcy, president of the Armour Grain Company (R., 96):

> The effect of the rule was that whereas before its adoption there were offers sent out by this, that and the other man here in Chicago through the wheat producing territory after the Board of Trade closed on one day,

bids sent out at whatever figure the bidder wanted to name, after this rule was adopted that figure was the last named highest figure before 'Change closed on that day, and he was limited to that.

John P. Stream (R., 99):

Prior to the adoption of that rule we, and others on the Board of Trade, would arrive at a figure that we thought we could afford to bid for grain to arrive, based on conditions existing at that time, and we would send out those bids broadcast, and these were transmitted to the various sellers and owners of grain in the country by means of cards and telegrams, almost every day; they were sent over the grain territory, Iowa, Illinois, sometimes Nebraska, and Missouri and Indiana, sometimes Kansas. After the rule was adopted in 1906 we had to follow the rule, and send out the prices as made by the Call on that day. There was no other price to submit to these various sellers between the close of the Call and the opening of the Board the next morning at 9:30.

Charles B. Pierce, of Bartlett, Frazier & Company (R., 100–101):

I am familiar with the manner in which grain is purchased to arrive, and was purchased, prior to the adoption of the Call rule. We bought grain under the same methods we always have, and that we did then, and now, that is, by giving bids over night by post card and by letter, or through the day by telephone

> or telegraph, as the case may be. Whatever our judgment indicated as the price that we desired to purchase at, that price was transmitted over the country on postal cards and by telegraph, prior to the adoption of this rule. And after this rule was adopted in 1906 the price communicated on grain to arrive by postal cards and telegrams was determined by the price fixed at the call, on all bids that we sent out while the market was not in session between the adjournment of the Call meeting and the opening of the Board upon the following morning. *If our judgment dictated that a higher price should be paid than that fixed on the Call, we could not offer that price.* [Italics ours.]

The potency of members of the Board in the grain trade is reflexly shown by the primacy of the Board among grain markets of the world. "Chicago," said the witness Patten, "is the greatest grain market in the world. The whole world looks to Chicago for its prices." (R., 103.) The answer itself avers that the Board "is a great commercial center for the transaction of business in wheat, corn, oats, rye and other grain." (R., 10.)

An agreement between men occupying a position of such strength and influence in any branch of trade to fix the prices at which they shall buy or sell during an important part of the business day is an agreement in restraint of trade within the narrowest definition of the term.

As the Circuit Judges observed in *United States* v. *United States Steel Corporation*, 223 Fed., 55, 155—

> When individuals or corporations make distinct contracts with each other, either in the form of pools or other agreements, dividing territory, limiting output, or fixing prices, there can be no question about the illegality of such contracts.

Such agreements belong to the class described by the Chief Justice in the *Standard Oil Case*, 221 U. S., 1, 56, 59, as "in restraint of trade in the subjective sense"—agreements by which one "voluntarily and unreasonably restrains his right to carry on his trade or business"; or, in the language of Mr. Justice Holmes:

> They are contracts with a stranger to the contractor's business (although in some cases carrying on a similar one), which wholly or partially restrict the freedom of the contractor in carrying on that business as otherwise he would. (*Northern Securities Case*, 193 U. S., 197, 404.)

There is a complete analogy in principle between the present case and *Swift & Co.* v. *United States*, 196 U. S., 375, where it was held that an agreement of packers not to bid against each other in the purchase of cattle violates the Anti-Trust Law. The members of the Board of Trade agreed not to bid against each other in the purchase of grain at country points.

It is of no legal consequence that the restriction operates only during the afternoon. The afternoon is an important part of the business day, particularly in this branch of the grain trade. As defendants' witness Ray testified—

> You will find out in the country that a large percentage of the grain is bought in the afternoon, especially at this time of year and in December, when farmers have done lots of hard work all through the summer, and they became a little lazy like, get up late in the morning, and they hardly get to town to do business before about noon. (R., 128–129.)

Moreover, if such a restriction may be imposed in the afternoon, why may it not be imposed in the morning?

To the naïve inquiry in appellants' brief (p. 19–20)—

> How can anyone 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 [italics ours],

we reply—

> It is not for the Board to ordain that owners of wheat at country points shall not have a competitive market in which to sell in the afternoon.

Counsel for the Board was at pains to bring out that a member desiring to buy wheat in the afternoon from an elevator *in Chicago* could do so without any restriction at all as to price; that the rule "did not in the slightest affect the price at which the owners

of wheat in elevators could sell." (R., 22, 23, 94, 111.)

This but emphasizes the illegality of the restriction.

Why make a difference between buying wheat in the afternoon from elevators *in Chicago* and buying wheat in the afternoon at country points for subsequent delivery in Chicago? Why should members be free to compete in the one case and restricted to one price in the other? Why should sellers of wheat *in Chicago* enjoy a competitive market in the afternoon while sellers of wheat at country points are denied one?

II.

THE CONTENTION THAT THE RULE WAS BENEFICIAL IN OPERATION.

It is claimed for the rule (a) that it " is nothing more than a rule limiting the trading hours of its members," with the object of promoting their health and comfort (Appellants' Br., pp. 15, 20, 26); (b) that by inducing more members to participate the rule has kept trading in grain "to arrive" from being monopolized by a few, as formerly (ibid., pp. 15, 17, 21); (c) that it has afforded those having grain to sell at country points a market in the interval between the close of business on the Board on one day and the opening on the next (ibid., pp. 16, 21); (d) that it has apprised such persons more promptly of the prevailing prices in the Chicago market (ibid., p. 21); (e) that it has enabled such persons to fulfill their

contracts by tendering grain arriving at Chicago on *any* railroad, whereas formerly shipments had to be made over the particular railroad designated by the buyer (ibid., pp. 16, 17, 21); (f) that it has enabled the grain merchants of Chicago to work upon a narrower margin of profit and thereby to pay more for grain and to sell cheaper, thus making the Chicago market more attractive to shippers and grain buyers (ibid., p. 21).

This is but another way of saying that good intentions and some good results can save the rule from illegality. Where, however, as here, the necessary effect of an agreement or combination is unduly to restrict competitive conditions, the purpose or intention of the parties is immaterial. Agreements or combinations producing that effect are prohibited by the Act of Congress; and on the most elementary principles a transaction which the law prohibits is not made lawful by an innocent motive or purpose. *United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290, 341; *Addyston Pipe Co.* v. *United States*, 175 U. S. 211, 234, 243; *Swift & Co.* v. *United States*, 196 U. S. 375, 396. The intent to violate the law implied from doing what the law prohibits renders immaterial every other intent, purpose, or motive. *Bishop, New Criminal Law*, sec. 343; *Holmes, The Common Law*, p. 52.

In *Thomsen* v. *Cayser*, 243 U. S. 66, after hearing "the good intention of the parties, and, it may be, some good results," once more put forward as a

defense under the Anti-Trust Law, this Court disposed of the contention in language which should be final:

> The argument that is employed to sustain the contention is one that has been addressed to this court in all of the cases and we may omit an extended consideration of it. It terminates, as it has always terminated, in the assertion that the particular combination involved promoted trade, did not restrain it, and that it was a beneficial and not a detrimental agency of commerce.
>
> We have already seen that a combination is not excused because it was induced by good motives or produced good results, and yet such is the justification of defendants. (P. 86.)

It follows, that were the good intentions or good results claimed in this case conceded, it would make no difference.

For this reason the District Court was right in striking from the answer, as legally irrelevant, paragraph 6 averring that one purpose of the "Call Rule" was to break up an existing unlawful monopoly in trading in grain "to arrive."[1] Moreover, the law, Federal and State, provides remedies for monopolies and restraints of trade.

As a matter of fact, however, with a single exception, none of the benefits claimed is attributable to the particular provision of the rule which the Government is attacking, i. e., the price-fixing restriction.

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[1] The fact is that all the circumstances and conditions leading to the adoption of the rule were brought out by the defendants at the trial, and in no possible view, therefore, were they injured by the striking of paragraph 6 from their answer. (R., 107–108, 112, 143–144.)

Neither that nor any other provision of the rule limits the hours of trading. As stated by the witness Nichols, who was produced by defendants and described himself as "in a sense the father of the rule,"

> We amended the rule prohibiting trading after 1:15 and established an afternoon session which was called the "Call," beginning practically at 1:30 and running until midnight or 9:30 the next morning if the traders cared to stay. (R., 108.)

So far, therefore, from being a measure to protect the health and comfort of members by restricting the hours of trading, the rule really removed a restriction of that character already existing, only, however, to impose a restriction as to prices.

Again, there is no apparent relation between the price-fixing restriction and the increase in the number of members of the Board engaged in trading in grain "to arrive"; and no effort was made to show any.

Nor is there any relation between the price-fixing restriction and the creation of a market for those having grain to sell at country points in the interval between the close of business on the Board on one day and the opening on the next. That result was due to the practice, in no wise questioned, of sending out bids in the afternoon to country points.

It was due to that practice again, and obviously not to the price-fixing restriction, that sellers of grain at country points were more promptly informed of the prevailing prices in the Chicago market.

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The privilege enjoyed by traders under the operation of the "Call Rule" of tendering in fulfillment of their contracts grain arriving at Chicago over *any* railroad instead of over the particular railroad designated by the buyer was due to a new form of contract. (R., 126, 138.) The price-fixing restriction had nothing to do with it.

The claim that the rule enabled the grain merchants of Chicago "to work upon a closer margin of profit" doubtless has reference to the supposed advantage of a fixed price. This is the one exception to the statement that all the benefits claimed for the rule are referable to some other provision than the one under attack. And here, of course, the answer is that however beneficial a fixed price might be according to the point of view of the Board, Congress has proceeded on a different economic theory.

It must be kept in mind, therefore, in reading of the alleged advantages of this rule as set forth in the brief for the Board and in the testimony of the witnesses introduced on its behalf, that in practically every instance the alleged advantage is in no way whatever dependent upon the only provision of the rule which the Government is now attacking, namely, the price-fixing restriction.

III.

THE CONTENTION THAT UNDER THE POWER TO MAKE REGULATIONS FOR THE CONDUCT OF ITS MEMBERS THE BOARD COULD PROHIBIT MEMBERS FROM TRADING AT ALL AFTER A CERTAIN HOUR OR WITH NON-MEMBERS, AND THAT THEREFORE IT COULD DO THAT WHICH IS LESS—PRESCRIBE THE PRICE AT WHICH MEMBERS MAY TRADE AFTER THE GIVEN HOUR OR WITH NON-MEMBERS.

Another defense is, that under the power to make regulations for the conduct of its members the Board could prohibit members from trading at all after a certain hour or with non-members, and that, therefore, it can do that which is less—prescribe the price at which members may trade after the given hour or with non-members. (Appellants' Br., p. 30.)

The proposition that the Board might lawfully have prohibited *all* trading by its members after a certain hour is mere assertion, unsupported either by reason or authority. It suggests a hypothetical case for decision in lieu of the one before the court. The assertion is based, apparently, on the circumstances that "banks prescribe and conform to shorter business hours than other branches of business," that "labor unions combine to shorten hours," that the Chicago Board of Trade itself has for years "maintained a rule confining future trading *in its exchange building or in its vicinity*[1] to less than four hours a day," and on the supposed analogy of various rules shown to be in vogue at other commercial exchanges. (Appellants' Br., 24–25, 30; R. 155, 159–163.)

It may be conceded that the instances cited support by analogy the right of the Board to regulate the duration of its sessions—to restrict trading on the

[1] Italics ours.

exchange within prescribed hours. But the present proposition goes much further. It asserts the right of the Board not only to say when the exchange shall close but to prohibit thereafter any trading whatever by members, whether on the floor of the exchange or elsewhere. This transcends any reasonable regulation of the conduct of members.

Almost without exception the supposedly analogous rules of other exchanges relate to the conduct of members *in and about the exchange halls*—a very different thing from prohibiting members from trading altogether after the closing of the exchange. In the few instances where they might superficially appear to prohibit trading generally after exchange hours it is not clear in the absence from the record of any authoritative exposition of the rules that they really had that effect or were intended to do more than to prohibit public trading by members, after the prescribed hours, in or about the exchange halls.[1]

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[1] Thus the rule of the Chicago Board of Trade respecting future trading (R. 155) does not absolutely prohibit such trading outside exchange hours, but merely prohibits future trading in the exchange hall or its vicinity. (*Supra*, p. 17.)

The rule of the New York Cotton Exchange limiting hours of trading has reference on its face to trading "*on the floor of the exchange.*" (R. 160.)

The similar rule of the New York Coffee Exchange prohibits trading after hours "*in exchange or its vicinity.*" (R. 161.)

The rule of the New York Stock Exchange restricting hours of trading (R. 159–160) refers to dealings in the exchange, or publicly in its vicinity. While dealings in stocks "*publicly* outside of the exchange, in any place" are stated to be in contravention of the purpose and intent of the rule, the context would indicate that this is only in the sense that contracts so made are not recognized or enforced by the governing committee of the exchange.

The rule of the Consolidated Stock Exchange of New York prohibiting transactions in any of the securities dealt in on the exchange before or after exchange hours "in the rooms of the association *or elsewhere*" is qualified by the statement that "this is to apply to trading *outside of the railing, in the corridors of the exchange, and on the street in the vicinity of the exchange.*" (R. 161.)

Nor does the proposition that the Board c prohibit altogether trading between members non-members rest upon any stronger founda The case of *Anderson* v. *United States*, 171 U. S. supports no such proposition. The question tl as stated by the Court, was "whether, witho violation of the Act of Congress, persons who engaged in the *common business as yard tr* of buying cattle at the Kansas City stock y * * * may agree among themselves that they form an association for the better conduct of business, and that they will not transact bus with *other yard traders* who are not memb (171 U. S. 613–614.) [Italics ours.] Observe the prohibition was against dealing with "c yard traders," i. e., others "engaged in the com business of buying cattle at the Kansas City s yards." Giving the case its widest applica it carries no suggestion that this exchange c have prohibited altogether trading in cattle bet its members and persons who were not meml e. g., could have prohibited its members from bu cattle at country points for shipment to Kansas (On the contrary, it was expressly stated in opinion that the rule "has no tendency * * * place any impediment or obstacle in the cours the commercial stream which flows into the Ka City cattle market." (P. 619.)

Even, however, should this Court agree with hypothetical premise that the Board could have

hibited *all* trading by members after exchange hours, or *all* trading with non-members, it would still not follow that the Board, as a condition of withholding such prohibition, could *prescribe the prices* at which members should buy or sell. In the *Anderson Case*, upon which this branch of the defense rests, the Court laid especial emphasis upon the fact that the rule "has nothing whatever to do * * * with fixing the prices for which the cattle may be purchased or thereafter sold" (p. 614); that "this association does not meddle with prices" (p. 617).

The argument is similar to the one sometimes made that because individuals or corporations might abstain from commerce altogether they are therefore at liberty to say on what terms they will engage in it. Thus in *Thomsen* v. *Cayser, supra*, p. 13, 243 U. S. 66, it was urged in behalf of certain steamship lines that because they were volunteers in ocean shipping, free to go or come as they liked, therefore they might have withheld their service except on the illegal conditions they sought to impose. Mr. Justice McKenna answered the contention as follows (87–88):

> This can be said of any of the enterprises of capital and has been urged before to exempt them from regulation, even when engaged in business which is of public concern. The contention has long since been worn out and it is established that the conduct of property embarked in the public service is subject to the policies of the law.

IV.

THE CONTENTION THAT THE RESTRICTION OF COMPETITION CAUSED BY THE RULE WAS ONLY INCIDENTAL AND TOO SMALL TO BE TAKEN INTO ACCOUNT.

Again, it is said that the restriction of competition caused by the rule was only incidental and "too small to be taken into account."

There is doubtless a principle of *de minimis* in the Anti-Trust Law as elsewhere; but there is no room for its application here, either in respect to the nature and extent of the restriction imposed or with reference to the volume of commerce on which it operated. The short answer to the contention is that the restriction was not "incidental"; it was direct and deliberate—the defendants "intended to make the very combination and agreement which they in fact did make." [1]

The following statement from the opinion in the *Anderson Case* is relied upon:

> 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.* (171 U. S., 604, 618–619.) [Italics ours.]

[1] Addyston Pipe Case, 175 U. S. 211, 243.

This language refers to the remoteness of a merely possible effect *which was not intended.* It has no reference either to *intended* restraints or to *volume* of commerce affected.

Moreover, the restriction here, besides being direct and deliberately imposed, was drastic, not slight; it interposed an absolute barrier against free agency in price making at all times when the Board was not in session. The volume of business affected was also substantial. (R. 21.) The record shows that this trade in grain "to arrive" was a sufficiently attractive bone of contention among members of the Board to produce a condition which Vice-President Griffin, a witness for the defendants, described as bordering on "civil war" (R. 143). A branch of interstate commerce which was thus of enough magnitude and importance to call forth a special restraining rule of the Board, the largest grain market in the world, must be deemed of enough importance to call for the application of the countervailing rule of Congress declaring that interstate commerce shall be unrestrained.

Appellants seek to minimize the extent of their restraint on commerce by showing that the schedule of mail trains effective at Chicago interposed a practical limitation on dealings in grain to arrive after about 6 o'clock in the evening, and from this they argue that the restriction due to the rule prevailed only for "about two or three hours at the end of the business day" (Br., p. 9). A restraint of trade during part of the business day can not be justified, however,

by leaving it free during the remaining part. The law intends that it shall be free at all times.

In any event, however, the contention has no foundation in fact. The record shows that bids were sent to the country by telegraph and telephone as well as by mail. (R. 91, 114, 117.) These instrumentalities were available at all hours and it does not appear that they were on the whole used less than the postal facilities. The witness Hubbard, in extolling the advantages of the "Call Rule," testified that its effect in his business was to establish a market on commercial grades of grain *for practically the twenty-four hours of the day* (R. 123).

V.

THE CONTENTION THAT INTERSTATE COMMERCE IS NOT INVOLVED.

It is also urged that the decree should be reversed on the ground that the subject-matter upon which it operates is purely *intrastate* commerce because the contracts made for the purchase or sale of grain "to arrive" do not in terms *require* the grain to be shipped in interstate commerce. It is said that in order "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." (Appellant's Br., 31–33.)

The answer is twofold.

First. The transactions pursuant to the "Call Rule" actually were in large measure of interstate

character. Bids were sent out broadcast to persons outside of Illinois who were the owners and shippers of grain located in States other than Illinois, offering to purchase their grain "to arrive" at Chicago. The parties to the resulting contracts did contemplate the shipment of property from one State to another, and property was actually so shipped in the performance of the contracts. Therefore interstate commerce was directly involved as the subject-matter of this suit and the appellant's contention has no basis in fact.

Second. It makes no difference, however, whether particular contracts made pursuant to the "Call Rule" were or were not interstate transactions. Regardless of the character of the transactions, the "Call Rule" and the concerted action under it directly restrained an actual current of interstate commerce consisting of the grain moving from States other than Illinois to the Chicago market by precluding members of the Board of Trade from competing with each other in the purchase of such grain after exchange hours. *Loewe* v. *Lawlor*, 208 U. S. 274; *Temple Iron Co.* v. *United States* (*United States* v. *Reading Company*), 226 U. S. 324, 357–358.

The case is like *United States* v. *Patten* (*Cotton Corner Case*), 226 U. S. 525, 543–544, where a conspiracy to run a "corner" in cotton was held to be an unlawful restraint on the whole volume of interstate commerce in that commodity even though the restraining acts were not altogether, if at all, interstate transactions.

Ware & Leland v. *Mobile County*, 209 U. S. 405, and *Engel* v. *O'Malley*, 219 U. S. 128, ane not in point. In the *Ware & Leland Case* the defendants were brokers who took orders in Alabama, and transmitted them by telegraph to points outside the State, for the purchase and sale of cotton on speculation. The contracts so negotiated did not require, nor did they ordinarily entail, the shipment of any cotton in interstate commerce, and it was accordingly held that the imposition of a license tax on the business of making the contracts did not obstruct or interfere with interstate commerce. In *Engel* v. *O'Malley* the contention was that the exaction of the license tax amounted to a restraint on the interstate transmission of funds. The Court held otherwise because the law "was passed for the purpose of regulating and safeguarding *the business of receiving deposits*, which precedes and is not to be confounded with the later transmission of money, although leading to it." (Mr. Justice Holmes, p. 139. Italics ours.)

Both cases go merely to the question whether certain state tax laws burdened or directly affected interstate commerce. It does not follow that a given transaction is outside the body of interstate commerce because the State taxing power may be permitted to operate upon it. As said in the *Swift Case*, 196 U. S. 375, 399–400:

> But it may be that the question of taxation does not depend upon whether the article taxed may or may not be said to be in the course of commerce between the States, but

depends upon whether the tax so far affects that commerce as to amount to a regulation of it. * * * But we do not mean to imply that the rule which marks the point at which state taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the States.

VI.

CONCERNING THE SCOPE OF THE DECREE.

Lastly, the claim is made that the decree [1] is too broad, first, because certain of its injunctive provisions are not in terms restricted in their operation to interstate commerce (Appellant's Br., 33), and second, because it "enjoins future acts of defendants respecting the fixing of prices, which acts are in no way similar to the rule in question." (Ibid., 6, 38–39.)

The first proposition is addressed specifically to paragraph 1, sub-paragraphs (a), (b) and (c). If

[1] The decree, paragraph 1, finds that the Board of Trade of the City of Chicago, its officers and directors, "by adopting, acting upon and enforcing" the Call rule became parties to a combination and conspiracy to restrain interstate trade and commerce in violation of the Sherman Law. It permanently enjoins the Board, its members, officers and directors named in the petition and their successors in office, agents, etc., "from carrying out or attempting to carry out the aforesaid combination or conspiracy, and from entering into any other like combination or conspiracy among themselves or one with another to restrain interstate or foreign trade or commerce in the articles corn, oats, wheat and rye or any of them, by means or devices similar to those herein specifically enjoined," and each and all are "permanently enjoined and restrained—

(a) From agreeing or acting together or one with another, expressly or impliedly, directly or indirectly, for the purpose or with the effect of maintaining a limited price or any price for the articles corn, oats, wheat and

these were isolated from the language immediately preceding, there would be some merit in the contention that according to their terms they apply as well to intrastate as to interstate commerce. Taking the entire context, however, it is clear that the provisions have reference only to the latter. This objection, moreover, is raised now for the first time. It was not assigned as error.

On the proposition that the decree enjoins "future acts * * * in no way similar to the rule in question," it is enough to say that the decree, as appears on its face, merely enjoins the continuance of the combination found to exist, or any similar one, either by means of the "Call Rule" or by any like rule or device. This much was necessary to prevent the recurrence of the evil which the case disclosed. *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 308; *Swift & Company* v. *United States*, 196 U. S. 375, 400. It was said in the *Swift Case*, "Under the [Sherman] act it is the duty of the court, when applied to, to stop the

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rye or any of them, which may be arrived at by virtue of a certain 'Call' rule [setting forth the rule].

(*b*) From enforcing, acting upon or hereafter adopting any similar rule, regulation, by-law or practice or agreeing or acting together or one with 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.

(*c*) From enforcing, acting upon or hereafter adopting any rule, regulation, by-law or practice or agreeing or acting together or one with another, expressly or impliedly, directly or indirectly, to the effect that members of said Board of Trade of the City of Chicago shall fix offers or bids which may be made to dealers in the articles corn, oats, wheat or rye to arrive, which said offers or bids are to be made between the regular sessions of said Board of Trade of the City of Chicago." (R. 165–167.)

[unlawful] conduct" (p. 400). That is all the decree in this case did when it enjoined the defendants from entering into any agreement 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."

CONCLUSION.

The decree of the District Court should be affirmed.

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DECEMBER, 1917.

SUPREME COURT OF THE UNITED STATES.

No. 98.—October Term, 1917.

Board of Trade of the City of Chicago, et al., Appellants, *vs.* The United States of America.	Appeal from the District Court of the United States for the Northern District of Illinois.

[March 4, 1918.]

Mr. Justice Brandeis delivered the opinion of the Court.

Chicago is the leading grain market in the world. Its Board of Trade is the commercial center through which most of the trading in grain is done. The character of the organization is described in *Board of Trade* v. *Christie Grain and Stock Company,* 198 U. S. 236. Its 1600 members include brokers, commission merchants, dealers, millers, maltsters, manufacturers of corn products and proprietors of elevators. Grains there dealt in are graded according to kind and quality and are sold usually "Chicago weight, inspection and delivery." The standard forms of trading are: (*a*) Spot sales; that is, sales of grain already in Chicago in railroad cars or elevators for immediate delivery by order on carrier or transfer of warehouse receipt. (*b*) Future sales; that is, agreements for delivery later in the current or in some future month. (*c*) Sales "to arrive"; that is, agreements to deliver on arrival grain which is already in transit to Chicago or is to be shipped there within a time specified. On every business day sessions of the Board are held at which all bids and sales are publicly made. Spot sales and future sales are made at the regular sessions of the Board from 9.30 A. M. to 1.15 P. M., except on Saturdays, when the session closes at 12 M. Special sessions, termed the "Call," are held immediately after the close of the regular session, at which sales "to arrive" are made. These sessions are not limited as to duration, but last usually about half an hour. At all these sessions transactions are between members only; but they may trade either for themselves or on behalf of others. Members may also trade privately with one another at any place, either during the sessions

or after, and they may trade with non-members at any time except on the premises occupied by the Board.*

Purchases of grain "to arrive" are made largely from country dealers and farmers throughout the whole territory tributary to Chicago, which includes besides Illinois and Iowa, Indiana, Ohio, Wisconsin, Minnesota, Missouri, Kansas, Nebraska, and even South and North Dakota. The purchases are sometimes the result of bids to individual country dealers made by telegraph or telephone either during the sessions or after; but most purchases are made by the sending out from Chicago by the afternoon mails to hundreds of country dealers, offers to buy at the prices named, any number of carloads, subject to acceptance before 9.30 A. M. on the next business day.

In 1906 the Board adopted what is known as the "Call" rule. By it members were prohibited from purchasing or offering to purchase, during the period between the close of the Call and the opening of the session on the next business day, any wheat, corn, oats or rye "to arrive" at a price other than the closing bid at the Call. The Call was over, with rare exceptions, by two o'clock. The change effected was this: Before the adoption of the rule, members fixed their bids throughout the day at such prices as they respectively saw fit; after the adoption of the rule, the bids had to be fixed at the day's closing bid on the Call until the opening of the next session.

In 1913 the United States filed in the District Court for the Northern District of Illinois, this suit against the Board and its executive officers and directors, to enjoin the enforcement of the Call rule, alleging it to be in violation of the Anti-Trust law (July 2, 1890, c. 647; 26 Stat. 209). The defendants admitted the adoption and enforcement of the Call rule, and averred that its purpose was not to prevent competition or to control prices, but to promote the convenience of members by restricting their hours of business and to break up a monopoly in that branch of the grain trade acquired by four or five warehousemen in Chicago. On motion of the Government the allegations concerning the purpose of establishing the regulation were stricken from the record. The case was then heard upon evidence; and a decree was entered which declared that defendants became parties to a combination or conspiracy to restrain

*There is an exception as to future sales not here material.

interstate and foreign trade and commerce "by adopting, acting upon and enforcing" the "call" rule; and enjoined them from acting upon the same or from adopting or acting upon any similar rule.

No opinion was delivered by the District judge. The Government proved the existence of the rule and described its application and the change in business practice involved. It made no attempt to show that the rule was designed to or that it had the effect of limiting the amount of grain shipped to Chicago; or of retarding or accelerating shipment; or of raising or depressing prices; or of discriminating against any part of the public; or that it resulted in hardship to anyone. The case was rested upon the bald proposition, that a rule or agreement by which men occupying positions of strength in any branch of trade, fixed prices at which they would buy or sell during an important part of the business day, is an illegal restraint of trade under the Anti-Trust Law. But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences. The District Court erred, therefore, in striking from the answer allegations concerning the history and purpose of the Call rule and in later excluding evidence on that subject. But the evidence admitted makes it clear that the rule was a reasonable regulation of business consistent with the provisions of the Anti-Trust Law.

First: The nature of the rule: The restriction was upon the period of price-making. It required members to desist from further price-making after the close of the Call until 9.30 A. M.

the next business day: but there was no restriction upon the sending out of bids after close of the Call. Thus it required members who desired to buy grain "to arrive" to make up their minds before the close of the Call how much they were willing to pay during the interval before the next session of the Board. The rule made it to their interest to attend the Call; and if they did not fill their wants by purchases there, to make the final bid high enough to enable them to purchase from country dealers.

Second: The scope of the rule: It is restricted in operation to grain "to arrive." It applies only to a small part of the grain shipped from day to day to Chicago, and to an even smaller part of the day's sales: members were left free to purchase grain already in Chicago from anyone at any price throughout the day. It applies only during a small part of the business day; members were left free to purchase during the sessions of the Board grain "to arrive", at any price, from members anywhere and from non-members anywhere except on the premises of the Board. It applied only to grain shipped to Chicago: members were left free to purchase at any price throughout the day from either members or non-members, grain "to arrive" at any other market. Country dealers and farmers had available in practically every part of the territory called tributary to Chicago some other market for grain "to arrive." Thus Misouri, Kansas, Nebraska, and parts of Illinois are also tributary to St. Louis; Nebraska and Iowa, to Omaha; Minnesota, Iowa, South and North Dakota, to Minneapolis or Duluth; Wisconsin and parts of Iowa and of Illinois, to Milwaukee; Ohio, Indiana and parts of Illinois, to Cincinnati; Indiana and parts of Illinois, to Louisville.

Third: The effects of the rule: As it applies to only a small part of the grain shipped to Chicago and to that only during a part of the business day and does not apply at all to grain shipped to other markets, the rule had no appreciable effect on general market prices; nor did it materially affect the total volume of grain coming to Chicago. But within the narrow limits of its operation the rule helped to improve market conditions thus:

(*a*) It created a public market for grain "to arrive". Before its adoption, bids were made privately. Men had to buy and sell without adequate knowledge of actual market conditions. This was disadvantageous to all concerned, but particularly so to country dealers and farmers.

(*b*) It brought into the regular market hours of the Board sessions, more of the trading in grain "to arrive."

(*c*) It brought buyers and sellers into more direct relations; because on the Call they gathered together for a free and open interchange of bids and offers.

(*d*) It distributed the business in grain "to arrive" among a far larger number of Chicago receivers and commission merchants than had been the case there before.

(*e*) It increased the number of country dealers engaging in this branch of the business; supplied them more regularly with bids from Chicago; and also increased the number of bids received by them from competing markets.

(*f*) It eliminated risks necessarily incident to a private market, and thus enabled country dealers to do business on a smaller margin. In that way the rule made it possible for them to pay more to farmers without raising the price to consumers.

(*g*) It enabled country dealers to sell some grain to arrive which they would otherwise have been obliged either to ship to Chicago commission merchants or to sell for "future delivery."

(*h*) It enabled those grain merchants of Chicago who sell to millers and exporters, to trade on a smaller margin and by paying more for grain or selling it for less, to make the Chicago market more attractive for both shippers and buyers of grain.

(*i*) Incidentally it facilitated trading "to arrive" by enabling those engaged in these transactions to fulfil their contracts by tendering grain arriving at Chicago on any railroad, whereas formerly shipments had to be made over the particular railroad designated by the buyer.

The restraint imposed by the rule is less severe than that sustained in *Anderson* v. *United States,* 171 U. S. 604. Every board of trade and nearly every trade organization imposes some restraint upon the conduct of business by its members. Those relating to the hours in which business may be done are common; and they make a special appeal where, as here, they tend to shorten the working day or, at least, limit the period of most exacting activity. The decree of the District Court is reversed with directions to dismiss the bill.

Reversed.

Mr. Justice McREYNOLDS took no part in the consideration or decision of this case.