BRIEF FOR APPELLANTS

Supreme Court of the United States

October Term 1951

No. 26

THE LORAIN JOURNAL COMPANY, SAMUEL A. HORVITZ, ISADORE HORVITZ, D. P. SELF and FRANK MALOY,
Appellants,

v.

THE UNITED STATES OF AMERICA

On Appeal from the United States District Court for the Northern District of Ohio

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BRIEF FOR APPELLANTS

OPINION BELOW

The opinion of the District Court below (R. 505) is reported in 92 F. Supp. 794.

JURISDICTION

The final judgment of the District Court was entered January 5, 1951 (R. 534). The petition for appeal was filed and allowed on January 8, 1951 (R. 538). The jurisdiction of this Court is conferred by 15 U. S. C. Sec. 29. Probable jurisdiction was noted April 30, 1951 (R. 547).

QUESTION PRESENTED

The Lorain Journal is the only daily newspaper in Lorain, Ohio. Another newspaper, the Lorain Sunday News, is published only on Sundays. The Lorain Journal is not engaged in interstate commerce.[1] In 1948 the Government licensed WEOL, Elyria, Ohio to serve an area wholly within Ohio. WEOL solicited ads on the basis of a local coverage only and attempted to take away as much of the Journal's local advertising as possible. The Journal told its Lorain advertisers that over a period of many years it had attempted to build up the Lorain market and that advertising over the Elyria radio station would tend to break down the Lorain market. The Lorain merchants were told that they were free to spend their money where they wished and could concentrate on Elyria radio advertising if they liked but if so the Journal wanted no part of their business (R. 418, 419). For these and other good business reasons the Journal refused advertisements of local merchants using WEOL. The Government thereupon sued to enjoin the Journal's refusal (1) as a conspiracy in restraint of trade or (2) as an attempt to secure a monopoly in interstate commerce. The Court below granted the injunction under (2) only. The validity of that injunction under *Sec. 2* of the Sherman Act covering attempts to monopolize (as distinguished from Sec. 1 covering restraints) is the sole question involved herein.

STATUTES INVOLVED

Sec. 2 of the Sherman Act (15 U. S. C. Sec. 2) provides:

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[1] The Lorain Journal has a total circulation of 21,244; its out-of-state circulation is 165, less than 1%, mostly to vacationists and men in the military service. (R. 476; 530). Less than 10% of the Journal's revenue is derived from "national" advertisers (R. 491-492), who use the Journal to reach local customers only.

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

Sec. 4 of the Sherman Act (15 U. S. C. Sec. 4) provides:

"The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 and 15 of this title;"

STATEMENT

Proceeding Below:

The Court below granted the Government a permanent injunction against the Lorain Journal and its officers prohibiting them from attempting to monopolize trade and commerce among the several states in violation of Sec. 2 of the Sherman Act. Specifically, appellants were enjoined from refusing to accept and publish advertising "where the reason for such refusal or discrimination is, in whole or in part, express or implied, that the person, firm or corporation submitting the advertisement or advertisements has advertised, advertises, has proposed or proposes to advertise in or through any other advertising medium."[1] Conversely, appellants were enjoined

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[1] The Government originally asked (Complaint R. 10):

"1. That a preliminary injunction issue, pending final adjudication of the merits of this complaint, enjoining the defendants from refusing to publish in the *Lorain Journal* at its current advertising rates and under its customary terms and conditions, the advertisements of any person, firm or corporation who offers to pay in advance for such advertisements and who advertises on the facilities of the Elyria-Lorain Broadcasting Company or in the *Lorain Sunday News*, or both; provided that nothing in said injunction shall prohibit the defendants from refusing to publish any advertisement, the publication of which would constitute a violation of any law of the State of Ohio or of the United States;"

from accepting ads on condition the advertiser should not use any other advertising medium, or should use only the Lorain Journal (R. 535).

The complaint charged (1) a conspiracy to restrain interstate commerce in violation of Sec. 1 and (2) a conspiracy and an attempt to monopolize interstate commerce in violation of Sec. 2 of the Sherman Act. Under Sec. 1 the complaint charged the Company and its officers conspired to acquire ownership of competing newspapers and radio stations, refusal to publish ads of persons advertising in the Lorain Sunday News, attempts to persuade employees of the News and WEOL to leave their jobs and with making certain restrictive agreements with the Lorain County Printing & Publishing Co. (R. 4-5). Bearing on attempted monopoly in violation of Sec. 2 the principal, indeed the only charge sustained (R. 506-508, 514), was the refusal to accept ads from those who advertised or proposed to advertise over WEOL (R. 5, par. 18(b)). The Court eliminated everything but the latter charge from the case (R. 506, footnote 1, 512-513) and viewed that as bearing only on the charge of attempted monopoly in violation of Sec. 2 (R. 506, par. 3; 508, par. 4; 512-513). The Court said the problem of whether a corporation could conspire with its officers to violate the Sherman Act where all combined made but a single impact on trade or commerce was "of mere academic interest." (R. 512-513) It based its decision on attempted monopoly alone (R. 512-513; Conclusion of Law 2, R. 534) and made no findings of fact as to conspiracy. (R. 529-33)

The Evidence:

Since 1933 the Journal has been the only daily newspaper in Lorain, Ohio, population 52,000 (R. 505, 530). It has a total daily circulation in the city of Lorain of 13,151 copies and reaches 99% of the families in Lorain (R. 505, 530). In the balance of Lorain County it has a

circulation of 6,315, or a total circulation in Lorain county of 19,466 (R. 475). The Cleveland Plain Dealer has a daily circulation of 10,940 in Lorain County, of which 4,742 is in Lorain proper (R. 490). The Cleveland News has a circulation of 2,335 in Lorain County and 735 in the City of Lorain (R. 487). The Cleveland Press has a circulation of 2906 in Lorain County and 571 in Lorain. (R. 485)

The Court below held the Journal had no competitor for local newspaper advertisements (except for the extremely limited competition of the Lorain Sunday News) until October 17, 1948 when WEOL was licensed by the Federal Communications Commission and commenced broadcasting in Elyria. (R. 506, 530). The Commission had previously denied the Journal a broadcasting license (R. 506, 530). WEOL applied for a license to broadcast only to parts of Ohio; its application and the map submitted with it shows this. (See map, Ex. C). The Commission's decision states "The applicant proposes to render a wholly local program service without network affiliations" (Pl. Ex. 1, par. 36; see also Conclusion 6). In accordance with its application, WEOL was licensed to serve a local area wholly within Ohio (R. 507-8; Pl. Ex. 1, R. 468-9, 511). WEOL sought ads on the basis of a local coverage only. (See map in WEOL's ad brochure, Ex. B, p. 30 this brief). Its salesmen immediately attempted to take away as many as possible of the Journal's advertisers (R. 506). By the end of 1949 substantially 84% of WEOL's income was derived from local merchants throughout the Ohio territory served by WEOL as shown on its ad brochure. (See map, p. 30 present brief). Only 16% came from national advertisers (R. 508, 532). A local radio station can only support itself through the sale of local advertising (R. 511 finding 24, R. 532).

The steady inroads made by WEOL into the Journal's advertisers required the Journal to look ahead: Must it resign itself to their loss to the new radio station?[1] Or could it act in self-preservation?

The Journal tried to convince its advertisers of the superior merits of newspaper over radio advertising. (R. 105-8). It pointed out that WEOL was essentially an Elyria station and that advertising over an Elyria station tended to break down the Lorain market. (R. 418-419). It suggested a "trial period" within which advertisers would give the radio a fair trial before determining whether to advertise by radio or by newspaper (R. 507). One of the difficulties of using both newspaper and radio is the inability to ascertain which advertising produces the results. There is good business sense therefore in a newspaper wishing to put itself in a position where it can prove that sales are the result of newspaper ads alone. (R. 436-437). The Journal cancelled some 15 terminable advertising contracts of local users of WEOL (R. 531). It did not apply this policy to "national" advertisers who used WEOL. Nor did it refuse to publish ads of out-of-state shippers who solicited orders to be filled by direct shipment (R. 508). There was evidence that local merchants regarded newspaper and radio advertising as mutually complementary and that they would prefer both types as distinguished from either (R. 188, 218, 222, 227, 249, 265, 299, 310).

The action of the Journal in refusing to accept advertising from local merchants using WEOL was the sole

[1] WEOL was licensed to serve a local area in Ohio only (R. 507-8, 511, Pl. Ex. 1, R. 468-9) and in its campaign for ads never pretended any outside-the-state coverage. (See WEOL ad brochure, Ex. B, p. 30 present brief). The Government however contended that a radio station in the nature of things was bound to operate in interstate commerce. Its arguments convinced the Court below which stated: "It is doubtful whether there exists a purely 'intra-state' radio station." (R. 510).

basis of the decision below (R. 506-508, 514) which held such action an attempt to monopolize interstate commerce in violation of Sec. 2 of the Sherman Act (R. 534).[1]

Evidence As To Interstate Commerce:

As to proof of interstate commerce, it has already been stated that WEOL was licensed in 1948 to serve a purely local area within Ohio (R. 507, 508, 511; Pl. Ex. 1, R. 468-9) and in dealing with its customers never pretended to have any interstate coverage (WEOL brochure, Ex. B, p. 30 present brief R. 71-76). The Court below, however, held that in the nature of things broadcasting was an interstate activity (R. 510); that WEOL "in inseparable characteristics, if not in volume, is undeniably interstate in character" (R. 512). The Court held that "While WEOL was licensed to serve and primarily serves an area located wholly within the State, the evidence establishes that it can be and is heard in Michigan" (R. 511). The evidence as to Michigan hearers was obtained after suit was filed by running a prize contest called "Far Away Fans" and asking out-of-state hearers to send in cards. The farthest away listener got a prize of $25. The prize contest was arranged by WEOL after consultation with government attorneys for the purpose of securing evidence to support the claim of interstate commerce. Prior to that time Michigan was of no importance to WEOL (R. 53-57, 69).

WEOL is not affiliated with any national network and the majority of its programs originate in local studios. In the past year it made broadcasts of about one hundred athletic events occurring outside Ohio (R. 508). They were really re-broadcasts received by WEOL not

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[1] The Court also noted the Journal refused to carry WEOL's program logs as ads and refused to carry a want ad for WEOL. (R. 507).

from outside the state of Ohio but from WJW in Cleveland, Ohio, the basic station. (R. 60, Ex. 2, R. 469-470). About 65% of WEOL's time is devoted to playing musical transcriptions shipped to WEOL from Hollywood, California (R. 62, 508). WEOL devotes only 10% to 12% of its radio time to news broadcasts sent to WEOL by United Press teletype (R. 508).[1] WEOL's gross income of around $175,000 comes predominantly from Ohio advertisers in the area shown on the map in its ad brochure (Ex. B present brief p. 30). Only 16% comes from "national" sources (R. 46-47, 508).

Yet the Court concluded:

> "The transmissions of WEOL which have their origin as broadcast energy outside of Ohio comprise interstate commerce though heard only by listeners within the State, for WEOL is an inseparable link in the chain of an interstate journey which carries the voice of the speaker to the ear of the listener" (R. 511).

Points Not Considered Below:

The Court below grounded its decision on Sec. 2 of the Sherman Act because of doubt as to whether an actionable conspiracy under Sec. 1 or Sec. 2 could exist between the Company and its officers where a single enterprise was involved (R. 513). Possibly because of this it overlooked the intrinsic contradiction involved in holding that a purely local newspaper, not engaged in interstate commerce, was attempting to monopolize interstate commerce. The question suggests itself: What interstate commerce? Not radio broadcasting; the Journal was not in the broadcasting business. Not local advertising; such business is not interstate. The Court

[1] The news is assembled in Cleveland and Columbus, Ohio and teletyped from there to WEOL (R. 165-170).

below held the Journal had no local competition until WEOL commenced broadcasting in 1948 (R. 506, 508) and that its efforts thereafter were to put WEOL out of business (R. 507). If so the Journal, on the court's theory, only sought a return to the status quo of a *local* absence of competition, but not to obtain an interstate monopoly.

The Court below never faced this problem but held that as WEOL was engaged in interstate commerce it was entitled to the protection of the Sherman Act (R. 510). Having held the Journal was attempting to put it out of business, the Court granted the injunction seemingly as of course, without stopping to consider whether the Journal's acts were an attempt to monopolize interstate commerce under Sec. 2, as distinguished from an alleged conspiracy to restrain trade under Sec. 1.

SPECIFICATIONS OF ERRORS TO BE URGED

1. The District Court erred in holding that the refusal of the Lorain Journal to accept advertisements from local customers who advertised over WEOL constituted an attempt to monopolize interstate trade and commerce in violation of Sec. 2 of the Sherman Act.

2. The District Court erred in holding WEOL was engaged in interstate trade or commerce.

3. The injunction restraining the Lorain Journal from refusing advertising "*where the reason is*" that the advertiser has proposed or proposes to use another advertising medium is so broad that it amounts to a form of thought control and violates the First Amendment as a prior restraint on freedom of the press.

SUMMARY OF ARGUMENT

I.

The Journal's refusal to publish ads of local users of WEOL was not an attempt to monopolize interstate commerce in violation of Sec. 2 of the Sherman Act. The Journal was not itself engaged in interstate commerce; hence it could not monopolize such commerce, particularly by local acts. Its refusal was a legitimate competitive weapon. Control of a local business situation is itself a property right; the use of such control is no more unfair than the use of superior size, greater efficiency, lower cost, better quality or any other selling argument which takes customers away from a business rival. The struggle for business survival is a selfish one; the Sherman Act does not enact into law a doctrinaire counsel of perfection. The right of a company to choose its customers is universally admitted and the government cannot police its use to favor and protect a so-called interstate rival.

As local ads are the chief source of revenue of a local radio station, the Federal government when it licensed WEOL must have intended the latter to take away the Journal's advertisers to support itself. The Journal however was under no duty to fall in with these plans. A Federally licensed radio station is not an arm of the Government; the Sherman Act should not be utilized to guarantee the survival of the so-called interstate competitor; it is not to be used as a form of subsidy or insurance. The Federal license launched the radio station to succeed or fail in the market place like any other company; refusals to deal which are legal under State law are not rendered illegal merely because used against the alleged interstate rival.

II.

The Journal refused to publish in Ohio, to be read in Ohio, the ads of Ohio merchants using WEOL. It did not apply this policy to "national" advertisers or to out-of-state merchants. Such local refusals must be distinguished from direct restraints exerted upon the stream of commerce itself, such as an attempt to prevent out-of-state news reaching WEOL, or cutting off the out-of-state supply of electricity, etc. Purely local acts which have only the end result of taking away business from an interstate (?) rival are not restraints under Sec. 1, still less attempts to obtain a monopoly under Sec. 2 of the Sherman Act. Obtaining advertising contracts from local merchants is a local business, as this Court has held; a refusal to publish local ads is likewise a local act. Such refusals are not tied into price controls; the object of the acts done puts them outside the Sherman Act in the same way as the sit-down strike in *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469. Loss of income to the radio station is a secondary result of valid acts; it is akin to the diminution of goods in interstate transit in cases such as *United Mine Workers* v. *Coronada Coal Co.,* 259 U. S. 344 and *Industrial Ass'n.* v. *U. S.,* 268 U. S. 64 which involved restraints on local production but lacked any attempt to restrain interstate commerce as such.

III.

The Journal not being engaged in interstate commerce the Government must try to find it in WEOL, licensed for local broadcasting only. The Government's showing is an artificial and synthetic one only; WEOL is heard in Michigan;[1] it buys canned records in California; it

[1] This was discovered as a result of the prize contest. (R. 53-57)

re-broadcasts out-of-state baseball and football games;[2] it gets United Press news by teletype.[3] The Government also seeks to eke out an interstate showing by resort to NLRB cases in the building trades industry, involving out-of-state purchases of material. These analogies are valueless in the present case; the point is that WEOL asked and got a license to fill a local Ohio need. Every purchase it makes in Hollywood or New York is directed to that end, to serve its hearers *in Ohio.* Its Ohio advertisers do not advertise to have their ads heard in Michigan, or by the two auditors in Pennsylvania; they get no good out of transient eavesdropping outside Ohio. WEOL has no selling argument based on these factors; its advertising brochure (Ex. B present brief p. 30) does not pretend to show an out-of-state coverage.

The claim of interstate commerce in respect to WEOL is so artificial it is almost a pretense. Its hollowness is indicated by the injunction below which is designed to protect WEOL not in its interstate (?) aspects but in acts done in Ohio. WEOL wants no protection in Michigan, or Hollywood, it wants help in Lorain, Ohio,—help in taking away the Journal's advertisers. The injunction which purports to be to safeguard interstate acts is thus for a different purpose entirely; it is deliberately designed to operate solely intra-state.

IV.

The injunction prohibits refusal to publish ads "where the reason for such refusal or discrimination" is that the customer uses another medium. Although proof herein was limited to customers using WEOL the in-

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[2] Which it gets from WJW in Cleveland, Ohio (R. 60, Ex. 2. R. 469-470).

[3] From Columbus and Cleveland, Ohio (R. 165-170).

junction is broad enough to cover local advertisers using billboards, handbills, signs, loud-speakers, etc. These are all local acts; hence the injunction is not limited to interstate commerce and its protection; it regulates the Journal in purely local actions, divorced entirely from anything interstate.

The injunction likewise involves proof pro and con of thoughts and reasons. In practice this means that on a contempt citation the Journal, on proof that an advertiser it cut off used WEOL or a signboard, must show that its reason was something different. Hence the Journal must err on the side of the Government. From the viewpoint of the First Amendment, the injunction is no mean restraint, considering the magnitude of the right. It is no answer for the Government to contend that the injunction does not police thoughts but acts directed by thoughts. If the nature of the act can only be determined by analysis of the thought the result is the same: thought assay, mind-plumbing, idea testing; this program puts the Journal's entire business at the peril of a summons for contempt.

ARGUMENT

I.

The Journal Made No Attempt to Monopolize Interstate Trade or Commerce

A. *Extraordinary Nature of the Claim:*

It is an extraordinary claim the Government makes; that the Journal, a purely intra-state newspaper, is attempting to monopolize inter-state commerce. The Court below held that the Journal had no competitor for local advertising prior to October 1948, when WEOL started business (R. 506, 508). The Court held that its refusal to publish ads from local merchants using WEOL was designed to put WEOL out of business (R. 507). This would have restored the Journal's original status quo, when it had no competitor. But this status quo, if a

monopoly as claimed, would be an intrastate monopoly, not one interstate in character. How, therefore, is there an attempt to obtain an interstate monopoly?[1]

As is well known, a monopoly is not illegal *per se*. (*U. S.* v. *Aluminum Co.*, 44 F. Supp. 97, 154-5; same case 148 F. (2) 416, 429-430; *U. S.* v. *U. S. Steel Co.*, 251 U. S. 417, 451, 460; *U. S.* v. *Int. Harv. Co.*, 274 U. S. 693, 708; *Standard Oil Co.* v. *U. S.*, 221 U. S 1, 55, 62). Sec. 2 does not prohibit or even mention a monopoly; it prohibits an attempt to monopolize. An existing monopoly is not made illegal. In *Standard Oil Co.* v. *U. S.*, 221 U. S. 1, 55, 62, the Supreme Court said "nowhere at common law can there be found a prohibition against the creation of a monopoly by an individual" (p. 55). Likewise, as at common law, the Sherman Act omitted "any direct prohibition against monopoly in the concrete" (p. 62).

Hence an *intra*-state monopoly cannot, any more than an *inter*-state monopoly, be illegal by its bare existence.

B. *The Sherman Act As a Subsidy or Insurance:*

If the Journal had no competitor before the Government licensed WEOL, is the Government to be allowed to use the Sherman Act as a subsidy of WEOL? Or as an insurance policy against its insolvency?

The Federal Communications Commission refused to give the Journal a broadcasting license (R. 506). Later it licensed WEOL to serve a local area wholly within Ohio (R. 507-8). (See Commission's decision, Pl. Ex. 1; WEOL's maps Def. Ex. C; see brochure Ex. B, present brief p. 30) As a local radio station can only support itself from local advertising (R. 508, 511, finding 17, 531) the question may be asked; how did the Commission ex-

[1] There is an Ohio State anti-trust act, the Valentine Act, so called (Chapter 31, Ohio General Code Sec. 6390 et seq.) which could reach an intra-state monopoly if one existed.

pect WEOL to support itself? The only answer is: by taking away the Journal's advertisers. If the Government's reasoning is correct, any resistance by the Journal would become (1) a conspiracy in restraint of trade under Sec. 1 of the Act; (2) an attempt to obtain (really maintain) a monopoly under Sec. 2. Why, therefore, was it necessary to prove refusal to publish ads of users of WEOL?

C. *A Local Newspaper Which Acts Locally and Does Not Resort to Interstate Means, Is Outside the Monopoly Provisions of Sec. 2:*

As this Court in deciding Sherman Act cases decides what Congress intended the Act to prohibit, the question is: did Congress intend, by Sec. 2, to suppress local action which indirectly hurts an interstate (buys records in California) radio station not by doing anything interstate in character but by doing purely local acts. Thus if the Journal prevented the California company from selling WEOL the phonograph records, or prevented the delivery of the outside-the-state athletic broadcasts, or cut off the interstate flow of electricity into WEOL, there would be direct restraints on interstate commerce.[1] But this is not the present case. The Journal refused to publish *in* Ohio, to be read *in* Ohio, the ads of merchants *in* Ohio, who used WEOL to advertise their goods *in* Ohio to Ohio customers. There was, therefore, no restraint whatever on anything interstate in character. Were such local acts by a local company an attempt to monopolize interstate commerce?

The Government cited below *U. S.* v. *Women's Sportswear Assn.*, 336 U. S. 460, as holding that interstate commerce may be restrained by a wholly intrastate operation.

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[1] Even so, would the Journal in such a case be guilty of an attempt to *monopolize* under Sec. 2?

This is beside the point; the case was a Sec. 1 case involving restraints. Local acts may well *restrain* interstate commerce. But this is no authority that local acts *of a local company* constitute an attempt to obtain an interstate monopoly. This Court held the Sportswear Association liable because the contracts it insisted on restrained the jobbers, who were in interstate commerce, from a free choice of stitching contractors. It said the fact that the Association was not itself in interstate commerce was immaterial (p. 464). But would it be immaterial if the Association was charged with an attempt to monopolize interstate commerce in violation of Sec. 2?

Likewise not in point is *U. S.* v. *General Motors Co.*, 121 F. (2) 376, a charge under Sec. 1 of conspiracy to restrain trade by forcing dealers to finance cars through the General Motors Acceptance Corporation. No question of monopoly under Sec. 2 was involved. *U. S.* v. *Chrysler Corp.*, 180 F. (2) 557, was likewise a conspiracy in restraint of trade under Sec. 1.

The Government cited below certain other cases as directly involving an attempt to monopolize by local acts. They seem singularly inapposite. *Stevens Co.* v. *Foster & Kleiser Co.*, 311 U. S. 255, was a triple damage suit alleging a conspiracy to restrain under Sec. 1 and to monopolize under Sec. 2. All parties involved were engaged in interstate commerce. The case turned on whether the complaint alleged damage to petitioner's business as the result of the interstate conspiracy or by local acts. This Court held the complaint did both but sustained it on the ground of a conspiracy under the Sherman Act (p. 260-261).[1] The party doing the acts was in interstate

[1] The opinion below in 109 F. (2) 764 shows the issue involved was damages and not an interstate monopoly allegedly achieved by a local company doing local acts.

commerce and did them with the clear intention of securing an interstate monopoly.

Mandeville Island Farms v. *American Crystal Sugar Co.*, 334 U. S. 219, likewise cited below was also a triple damage suit. The refiner engaged in a conspiracy with other refiners, all engaged in interstate commerce, to fix purchase prices of sugar beets and do other acts, in order to obtain a monopoly on the resulting interstate sale of sugar. The statement in the opinion (p. 235) that the Act condemns "monopolization of local business when achieved by restraining interstate commerce" is wide of the present charge which is the converse: alleged monopolization of interstate commerce achieved by restraining local business. The *non-sequitur* is apparent.

Nearer than these cases to the present is *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, where a union by a sit down strike cut off production and the later flow of articles in interstate commerce. This Court held the case outside the Sherman Act saying (p. 500) "in general, restraints upon competition have been condemned only where their purpose or effect was to raise or fix the market price." The enlightened self-interest of the labor union in the *Apex* case is balanced by the same motive shown by the Journal herein. To the same effect is *U. S.* v. *Gold*, 115 F. (2) 236, where a union leader tried to have certain factories employ only union men and failing called a strike. In his opinion, Judge Learned Hand held there was no question he was attempting to obtain a monopoly but that under the *Apex* case it was outside the scope of the Sherman Act. To the same effect is *Levering & Garrigues* v. *Morrin*, 289 U. S. 103, *United Mine Workers & Coronado Coal Co.*, 259 U. S. 344, and *Industrial Assn.* v. *U. S.*, 268 U. S. 64, all of which involved restraints on local production but lacked any attempt to restrain interstate commerce as such. In each case interstate trade would suffer a loss of volume but this was held not enough. Loss in interstate

volume as a secondary result of an act done is no different from financial loss to the interstate (?) radio company herein.

D. *Publishing or Refusing to Publish Local Ads Was a Local Business:*

Publication by the Journal of local ads, or its refusal to publish them was a local business, as seems self-evident. In *Blumenstock Brothers Advertising Agency* v. *Curtis Publishing Co.*, 252 U. S. 436, the complaint alleged the defendant as part of a plan to maintain a practical monopoly in interstate commerce refused to make advertising contracts unless it could control, and limit, and reduce, the amount of the ads in other publications. This Court held squarely that making the contracts was not interstate commerce, though the interstate circulation of the magazines was, stating:

> "The advertising contracts did not involve any movement of goods or merchandise in interstate commerce, *or any transmission of intelligence in such commerce.*" (Op., p. 442) (Italics ours)

The Government below suggested this opinion has lost its vitality since *U. S.* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, holding that intangibles can be subjects of interstate commerce. The italicized words above quoted belie this. In the present case, however, not even intangibles move in interstate commerce when the Journal either makes or refuses to make an intra-state advertising contract. Nothing at all goes across state lines. In *Western Live Stock* v. *Bureau of Internal Revenue*, 303 U. S. 250, 258, this Court said "the business of preparing, printing and publishing magazine advertising is peculiarly local and distinct from its circulation whether or not that circulation be interstate commerce."

Indiana Farmers Guide Publishing Co. v. *Prairie Farmer Publishing Co.*, 293 U. S. 268, cited below, is not in point

on the question. In that case the advertising contracts themselves were made by bargaining across state lines. This Court said: "Most of the advertisers are located in States other than those in which the papers are published" (Op., p. 273). Also, "about ninety per cent of petitioner's advertising comes from points outside Indiana" (Op., p. 273). The opinion makes clear that all parties were engaged, throughout, in interstate commerce. This Court said its decision in *Blumenstock Bros. Adv. Agency* v. *Curtis Publ. Co., supra,* assumed that a publishing business such as in the *Farmers Guide* case would amount to interstate commerce. (Op., p. 276)

Neither in reason nor in law can any respectable case be made out of the proposition that interstate commerce is involved in the Journal's making or the refusal to make, local advertising contracts with local merchants or their later publication.

II.

The Journal Had the Right to Refuse to Publish the Intrastate Ads

There is not a word in the record that the Journal ever refused to publish an out-of-state, or "national" advertiser's ad, or any so-called "interstate" ad of a customer using WEOL. The Court below so found (R. 508). The Government's claim is that it was illegal to refuse *local* ads if the purpose was to take away customers from WEOL. It would be naive to think WEOL was not, all this time, itself trying to take away the Journal's customers; these customers were WEOL's principal source of income; perhaps it was expressly licensed with this end in view.[1] However, it is somehow supposed

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[1] Although the Federal Communications Act was not intended to discriminate against newspapers in favor of the radio (*Stahlman* v. *Fed. Com. Commission* 126 F. (2) 124, 127.)

to be poor sportsmanship for the Journal to fight back. A man who had spent a lifetime in building up a small-town newspaper, something independent, and decent and good, something above all personal to himself, is not inclined to stop at politeness in a life and death struggle. We make no apology for the Journal's refusal to bow to the Government's plans, if it had such plans.

The utter unrealism of the Government goes, we believe, to the extent of thinking that when the Federally licensed WEOL came into operation, it was the duty of the Journal quietly to fold up and resign itself, in a gentlemanly way, to the total loss of its advertisers. Lord Chief Justice Coleridge repudiated this quixotic view over a century ago in *Mogul S. S. Co.* v. *McGregor,* 21 Q.B. Div. Law Reports 553:

> "It must be remembered that all trade is, and must be in a sense, selfish; * * *. In the hand to hand war of commerce * * * men fight on without much thought of others * * *. Amongst lawful means is certainly included the inducing by profitable offers to customers to deal with them rather than their rivals. It follows that they may, if they think fit, endeavor to induce customers to deal with them exclusively by giving notice that only to exclusive customers will they give the advantage of the profiable offers."

The Journal is not a public utility required to take all customers [1]—if so, let it be regulated with a fair return. Hence, it must fight destructive competition with the only weapon it has: the value to its customers to be able to use its columns. Control of a local business situation is itself a property right. Its use is no more unfair than the use of superior size, greater efficiency, lower cost, better quality, or any of the other weapons of competition. The Government's attitude is a doctrinaire counsel

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[1] *In re Wohl* 50 F. (2) 254.

of perfection at war with the harsh realities of business survival.

The right to refuse to sell has long been recognized as part of the concept of private property. This Court clearly affirmed it in *U. S.* v. *Colgate*, 250 U. S. 300, 307, saying:

> "In the absence of any purpose to create or maintain a monopoly,[1] the act does not restrict the long-recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."

A refusal to sell newspapers to a carrier was upheld, against Sherman Act charges, in *Journal of Commerce Publishing Co.* v. *Tribune Co.* 286 F. 111:

> "In the circumstances, counsel's advice that the Tribune Company had the right to give and to act upon a notice to each carrier that, if he handled appellant's papers, the Tribune Company would no longer sell him its papers, was a correct interpretation and application of federal law."

The Court cited *U. S.* v. *Colgate Co., supra; U. S.* v. *Schrader's Son, Inc.*, 252 U. S. 85; *Fed. Tr. Com* v. *Gratz*, 253 U. S. 521. To the same effect is *Eastern States Petroleum Co.* v. *Asiatic Petr. Co.*, 103 F. (2) 315; *Great A. & P. Co.* v. *Cream of Wheat Co.*, 224 F. 566; *Union P. Coal Co.* v. *U. S.*, 173 F. 737; *Camfield Mfg. Co.* v. *McGraw Elec. Co.*, 70 F. Supp. 477; *William Goldman Theatres* v. *Loew's Inc.*, 54 F. Supp. 1011 (rev'd on other grounds 150 F. (2) 738); cf. *Jax Beer Co.* v. *Redfern* 124 F. (2) 172.

In *Brosious* v. *Pepsi-Cola Co.* 155 F. (2) 99 the Court held, against Sherman Act claims, the unquestioned right of a business to choose its own customers, quoting with approval the statement in *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.* 227 F. 46, 49: "We have not

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[1] i.e., an *interstate* monopoly.

yet reached the stage where the selection of a trader's customers is made for him by the Government."

Anyone concedes that a refusal to sell can be part of an illegal conspiracy (*Binderup* v. *Pathe Exch.*, 263 U. S. 291), but it is the *conspiracy* which is illegal, not the refusal to sell. The present is a monopoly case under Sec. 2, not involving conspiracy. Even in a conspiracy case, the mere fact of refusal to sell does not of itself give rise to an inference of interstate conspiracy (*Johnson* v. *Yost Lumber Co.*, 117 F. (2) 53.)

Specifically, a newspaper, even though it is the only one in the community, has been held to have the right to refuse to publish ads as it sees fit. (*Shuck* v. *Carroll Daily Herald*, 247 N.W. 813; 87 A.L.R. 975 and cases cited).[1]

The Government below made the stock argument:

> "It may be assumed that defendants could refuse to carry the advertisement of X for any reason or no reason. But they cannot lawfully use their power to refuse advertisements to require X to choose between radio and newspaper as a medium of advertising."

This statement is obviously self-contradictory in two places. If the Journal has the right to refuse, the fact that as a result the advertiser must choose between newspaper and radio is beside the point. The act is local. A quantity discount requires the customer to choose between buying all from A and thus excluding B, a competitor. But up to now no one has suggested that a local discount is an interstate restraint.

The Government cited in support, *Morton Salt Co.* v. *Suppiger Co.*, 314 U. S. 488, holding that a patent owner

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[1] See also *Com.* v. *Boston Trans. Co.* 249 Mass. 477; *In re Wohl* 50 F. (2) 254; *Phila. Record* v. *Curtis Publ. Co.* 305 Pa. 372; *Lake County* v. *Lake County P.&P. Co.* 280 Ill. 243; *Belleville Advocate Co.* v. *St. Clair County* 336 Ill. 359; *Waasler* v. *Mahaska Cty.* 122 Iowa 300; Mack v. Costello 32 S.D. 571.

cannot condition a license upon an agreement to buy unpatented goods. The customer thus could not obtain the machine without buying the salt. No such situation exists in the present case; the customer can use the radio at will. The restraint in the *Salt* case was a direct restraint in interstate commerce.

To sum up, the law of private property still permits an owner to refuse to sell his product where, in his opinion, the end result will be inimical to him. He has a right to condition his sale to situations he deems favorable. The customer has no right to require the newspaper to deal with him absolutely, without regard to the newspaper's self-interest. Nor can the customer or WEOL enforce this so-called "right" through the Federal government.

The present is an extreme case and is more important than might first appear. Is it the spearhead of a drive to have the courts hold that once the Federal government has licensed an interstate (?) activity, the activity is beyond the hazards of local competition and cannot be permitted to lose the fight?[1] Does the Government wish to read into ownership of private property the concept that it cannot be used contrary to the most casual wishes of the state? In other words, that if the Government licenses an interstate (?) radio station, no local property right must be allowed to thwart the sovereign will?

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[1] So far as *Congress* is concerned, a radio station is not an agency of the Federal government, nor a public utility (*McIntire* v. *Wm. Penn Broadc. Co.*, 151 F. (2) 597, 601; *F.C.C.* v. *Sanders Radio Station* 309 U.S. 470). Neither is a newspaper. (In re *Wohl*, 50 F. (2) 254). The fact that a radio station is, in a sense, a trustee for the public (*National Broadcasting Co.* v. *U.S.*, 319 U.S. 190) does not detract from its being, in essence, no more than any other private corporation. Assuming it is a trustee, it only is such for the purposes for which it was licensed, in the present case, an intrastate usefulness.

III.

WEOL Was Not Engaged in Interstate Commerce and the Injunction Below Was Not Granted to Assist It In Interstate Commerce

If the Department of Justice succeeds in getting WEOL into interstate commerce, it will certainly be contrary to the intentions of the Federal Communications Commission. WEOL asked for a local license only (Ex. 1) and the Commission licensed WEOL to serve local patrons only, inside Ohio. (R. 507-8; Pl. Ex. 1, R. 468-9, 511, WEOL's map, Def. Ex. C.) WEOL's ad brochure shows it claims no outside-the-state coverage (Ex. B, R. 71-76 present brief p. ....). Appellee did not even attempt to show WEOL was in interstate commerce except in a synthetic and undesigned sense. The court below held that "in the nature of things" broadcasting was an interstate activity; (R. 510) that while WEOL was licensed to serve Ohio, it could be heard in Michigan. By the same token, with a sufficiently sensitive instrument, it could be heard in Mexico or South Africa. The fact that WEOL was heard in Michigan and by two persons in Pennsylvania is irrelevant unless WEOL intended it to be heard there *as part of the service it was licensed to furnish.* This is the vital factor; otherwise it was heard outside the state not as part of its real business, as intended and designed, but accidentally or by force of circumstance.[1]

There is no evidence that WEOL ever received any income from Michigan; no one ever advertised over it to Michigan people; its function under its license was not to carry into and serve Michigan. Its penetration outside the state had no bearing whatsoever on its finances, or indeed on its business at all. It got 84% of its income

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[1] As already shown, WEOL asked for a license for part of Ohio only; this was the license it got. (Pl. Ex. 1); its ad brochure mentions only Ohio coverage. (Ex. B, p. 30 present brief)

from Ohio advertisers, and the balance of 16% from "national" advertisers trying to reach Ohio audiences. It was not affiliated with any national network. It broadcasted over a hundred out-of-state athletic events, but this was a means to reach *local,* not out-of-state audiences. The government desperately tried to eke out interstate commerce by showing WEOL bought canned music in Hollywood and had the records shipped to Ohio. Also that 10% to 12% of its radio time was devoted to news broadcasts teletyped into WEOL by United Press teletype from Cleveland & Columbus Ohio. (R. 165-170.) However, this is not an NLRB case where the out-of-state source of construction materials may be used to buttress interstate commerce. Even so, the present case would not qualify under NLRB standards, the Board's ruling of October 6, 1950 requires a *direct* inflow of out-of-state material in excess of $500,000, or an indirect flow in excess of $1,000,000.[1]

If WEOL is in interstate commerce, then anything and everything is in interstate commerce. The Government plumps for its interstate theory on the basis of *National Broadcasting Co.* v. *U. S.,* 319 U. S. 190; *Fisher's Blend Station* v. *State Tax Commission,* 297 U. S. 650, *U. S.* v. *Betteridge,* 43 F. Supp. 53, 55 and other similar cases. All these cases show is that the general business of running powerful radio stations is interstate commerce. They do not touch the fact that the Federal Communications Commission intended WEOL to be *non*-interstate in character and that, in any event, many phases of the radio industry are purely local in character. In fact, it was the failure of the State taxing authorities to differentiate, in the *Fisher's Blend* case, between local income and inter-

[1] See *Petredis & Fryer,* 85 NLRB 241, construction project of $80,000 too low; *Makins Sand & Gravel Co.,* 85 NLRB 213, $72,000 in out-of-state materials too low; *Brewer & Brewer & Sons Inc.,* 85 NLRB 387, $50,000 out-of-state materials too low; *Carpenter & Skaer,* 90 NLRB 78, $81,000 out-of-state purchases too low.

state income, that led this Court to strike down the tax as an interstate burden. Conversely, where the distinction was observed, the tax was good. In *Albuquerque Broadcasting Co.* v. *Bureau of Revenue*, 51 N.M. 332, 184 P. (2) 416 and *Beard, Collector* v. *Vinsonhaler*, 221 S.W. (2) 3, the distinction between true interstate broadcasting designed and intended as such and broadcasting such as in the present case was pointed out. In the *Albuquerque* case the Court said that there were three kinds of broadcasts (1) National network broadcasts; (2) national spot advertising; (3) local advertising for local merchants. The first two were held interstate and revenues therefrom nontaxable by the state. As to (3), the Court said of course the ads could be heard in other states but were of no interest to the hearers:

> "It is only the fact that the range of radio, unlike communications by telegraph and telephone, is limited only by the power employed in broadcasting, that it may be heard by people to whom the message is of no interest. As a practical matter this business is intrastate."

If so, WEOL's business is intra-state.

In the *Vinsonhaler* case, the court made the same distinction:

> "It is immaterial equally to the appellees and to their advertisers that a handful of non-residents may listen momentarily to the broadcast before turning to a program of greater interest. Such transient eavesdropping is merely an adventitious consequence of the uncontrollable carrying power of radio waves."

If local broadcasts are local for state tax purposes, they ought to be local in the eyes of the Sherman Act.

As said in *Benioff Co.* v. *Benioff* 55 F. Supp. 393 interstate commerce does not exist "because over the radio, forsooth, some listener in Reno, Nevada, or Tucson, Arizona, heard the merits of defendant's stock in trade proclaimed."

The claim that WEOL's business is interstate is so artificial as to be almost a pretense. Under Sec. 2 an attempt to monopolize "any part" of interstate commerce means an appreciable part. (*U. S.* v. *Paramount Pictures,* 334 U. S. 131; *U. S.* v. *Yellow Cab Co.,* 332 U. S. 218; as to acts *de minimis* see *Industrial Assn. of San Francisco* v. *U. S.,* 268 U. S. 64, 84). The injunction herein was granted not to assist WEOL in its so-called interstate (?) business in Michigan or to help the two listeners in Pennsylvania. Why pretend? The local David was defeating the Government's interstate (?) Goliath and the cry for help followed. The present injunction will not help WEOL in Michigan and Pennsylvania—WEOL wants no help there. It wants help in Lorain, Ohio, help in taking away the Journal's customers, help in getting the wherewithal to operate, not in interstate commerce, but locally.

Thus the injunction which purports to be for the purpose of safeguarding interstate commerce is seen to be for a different purpose entirely. It seems a clear misuse of the Sherman Act. An injunction under Sec. 2 necessarily connotes that the things enjoined are crimes (*Hill* v. *Francklyn & Ferguson,* 162 F. 880), which shows how far-fetched is the Government's case herein. Can anyone seriously consider that the Journal in doing what it did was guilty of a crime?

IV.

The Injunction is Grossly Illegal in Its Terms and is in Violation of the First Amendment

The injunction herein prohibits refusal to publish "where the reason for such refusal or discrimination" is that the customer uses another advertising meidum.[1] If the Jour-

[1] The government tactfully omitted mention of WEOL in its injunction, no doubt to avoid appearing as its special pleader and to give an air of general usefulness which the injunction does not

nal cut off an advertiser because he used haud-bills, signs, bill-boards, loud-speakers, or any other purely intra-state device, it would violate the injunction. But this is not the worst feature: it is quite evident the injunction prohibits not acts but thoughts and reasons. The Journal from now on is at the mercy of the Enforcement Branch of the Anti-Trust Division, which can hale it into court and require it to show any refusal to deal is *not* based on use of WEOL or other local media. The contest will turn on the validity of the Journal's excuses. What becomes of the law that it can refuse to deal for *any* reason, or no reason at all? To avoid possible contempt the Journal must naturally err on the side of the government. It would only be really safe in refusing its own exclusive advertisers—the very customers it would be least likely to wish to refuse.

The day to day bugaboo of contempt proceedings is no mean prior restraint on the Journal, considering, as this Court suggested in *Thomas* v. *Collins*, 323 U. S. 516, the magnitude of the right. See also *Near* v. *Minnesota* 283 U. S. 697; *Schneider* v. *Irvington* 308 U. S. 147; *Sun Publishing Co.* v. *Walling* 322 U. S. 729. Day to day supervision of advertising by a Federal court, or the fear of it, seems clearly violative of the First Amendment.[1]

It is no answer for the Government to contend that the injunction does not police thoughts but acts directed by thoughts. If the nature of the act can only be determined by analysis of the thought the result is the same.

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possess (unless it is illegally applied to local business). Is it possible the injunction is invalid as not in the public interest but protective only of selfish private rights? See *District of Columbia P. Co.* v. *Merchants & Mfgr. Ass'n.* 83 F. Supp. 994, 997.

[1] Also the injunction granted below orders the Journal to publish the terms of the present judgments (R. 536, Sec. IV) to this extent a clear control of the press by a Federal Court.

The injunction is of the objectionable class referred to in *Hartford-Empire Co.* v. *U. S.* 323 U. S. 386, 410 "so vague as to put the whole conduct of the defendant's business at the peril of a summons for contempt." See also *Paramount Pictures* v. *U. S.* 85 F. Supp. 881, 895; *U. S.* v. *Paramount Pictures* 334 U. S. 131, 163.

CONCLUSION

The judgment below should be reversed and the complaint dismissed.

Respectfully submitted,

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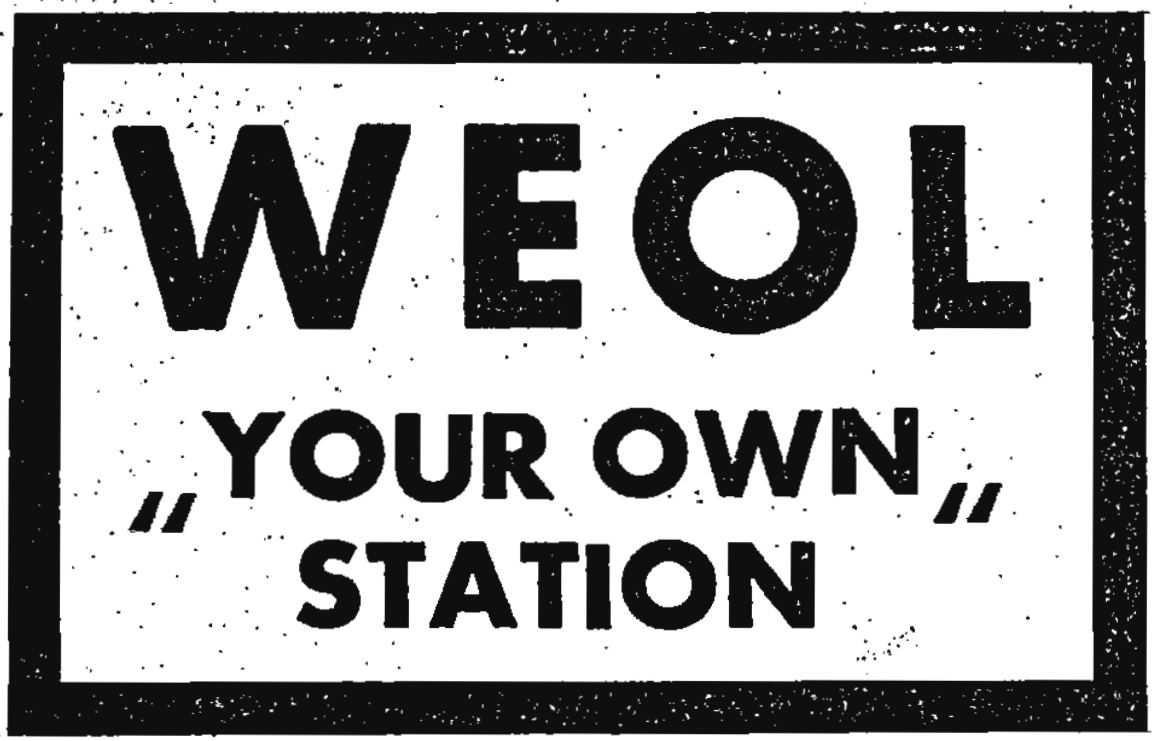
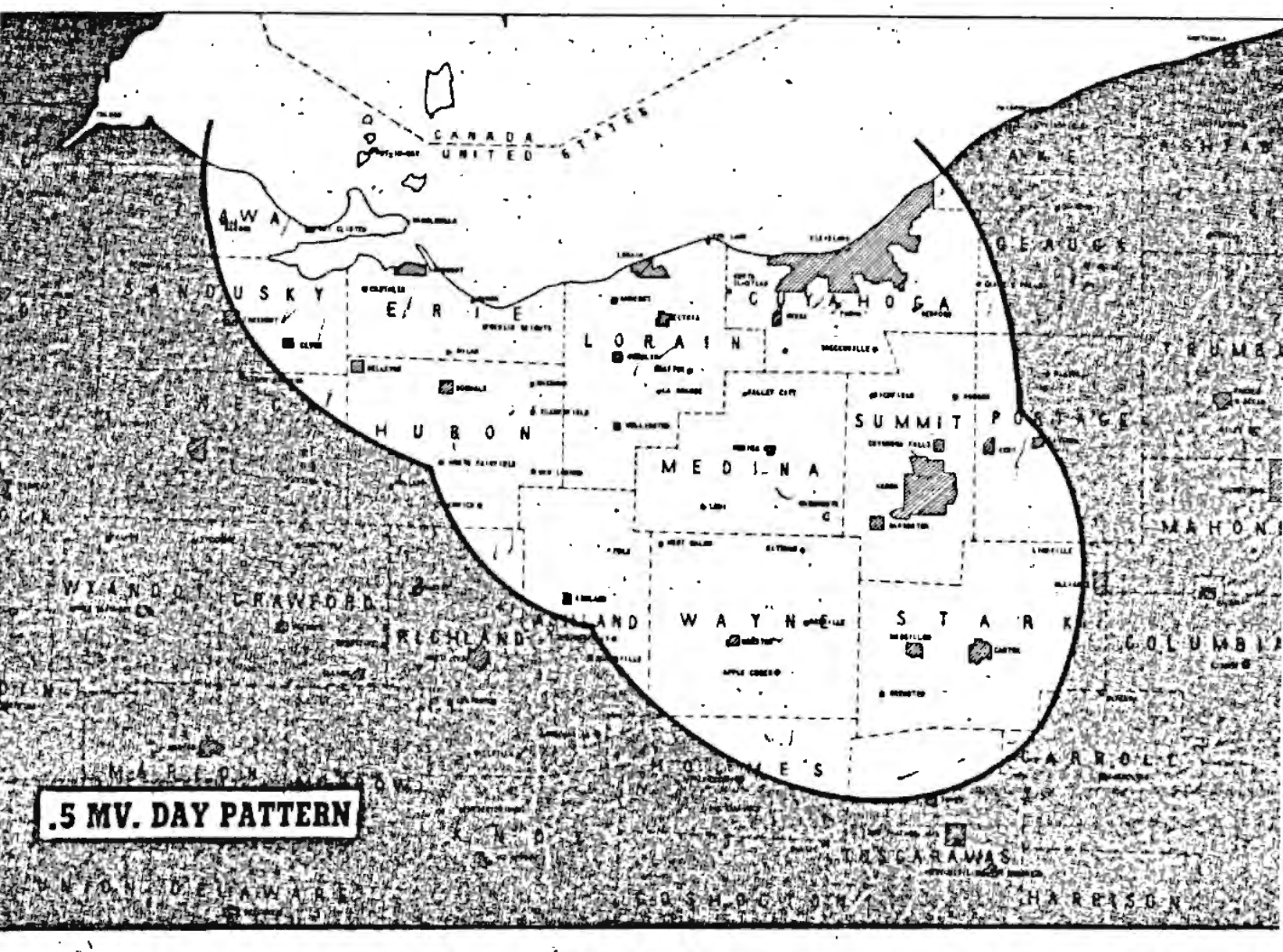
Defendant's Exhibit B




CANADA
UNITED STATES
SANDUSKY
ERIE
LORAIN
CUYAHOGA
HURON
MEDINA
SUMMIT
WAYNE
STARK
RICHLAND
CRAWFORD
.5 MV. DAY PATTERN

WEOL MARKET DATA

COUNTIES Covered During Day	PER CENT of County Covered	POPULATION of Area Covered	RADIO [1] Homes In Area	TOTAL [2] Retail Trade Stores	Retail Trade Sales	TOTAL [2] Food Group Stores	Food Group S
Ashland	55	16,280	4,290	220	$ 12,595	49	$
Carroll	5	795	196	11	335	3	
Cuyahoga	95	1,200,300	307,705	15,860	1,087,985	5,900	32
Erie	100	46,815	11,250	710	34,965	180	
Geauga	10	1,670	440	25	975	5	
Holmes	30	5,010	915	65	2,347	10	
Huron	80	25,840	7,255	460	20,001	100	
Lake	5	2,900	153	36	1,960	9	
Lorain	100	120,110	30,055	1,605	82,708	515	2
Lucas	5	17,630	4,450	210	16,920	65	
Medina	100	34,910	8,615	495	24,440	135	
Ottawa	75	18,825	4,725	315	12,180	75	
Portage	50	25,750	5,850	305	13,750	80	
Richland	10	7,405	1,850	95	6,050	25	
Sandusky	50	22,900	6,010	615	14,505	80	
Seneca	30	15,390	3,615	220	10,350	54	
Stark	90	242,280	54,235	2,795	180,945	855	6
Tuscarawas	55	30,745	8,350	525	24,560	150	
Summit	100	380,835	90,110	4,310	337,048	1,510	9
Wayne	98	50,470	11,415	735	35,250	175	
TOTALS		**2,266,860**	**561,484**	**29,612**	**$1,919,869**	**9,975**	**$57**
COUNTIES Covered During Night							
Cuyahoga	10	120,030	30,771	1,595	$108,810	590	$3
Erie	65	30,430	7,312	461	22,727	117	
Huron	8	2,584	726	46	2,005	10	
Lorain	80	96,088	24,044	1,284	66,160	412	1
Medina	90	31,419	7,753	445	21,996	122	
Stark	5	13,461	3,013	153	10,052	47	
Summit	35	133,292	31,539	1,508	117,966	528	3
Wayne	30	15,471	3,490	225	10,785	54	
Ottawa	15	3,765	945	63	2,436	15	
TOTALS		**446,540**	**109,593**	**5,780**	**$362,937**	**1,895**	**$1**

BASED ON PER CENT OF AREA COVERED

Source of Sales Figures—SALES MANAGEMENT, Survey of Buying Power, 1947

1—Radio Homes Based on NAB Market Data and FCC Engineering Standards

2—Sales Expressed in Thousands of Dollars