1984

Saturday Afternoon Fever

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by Michael Peter Waxman

National Collegiate Athletic Association
v.
The Board of Regents of the University of Oklahoma and the University of Georgia Athletic Association
(Docket No. 83-271)

Argued March 20, 1984

ISSUES

On fall Saturday afternoons, millions of Americans turn their television sets on and watch one — and sometimes two — college football games. In this case, the Supreme Court must tackle who selects the games that will be broadcast and how they will be selected. Specifically, the Supreme Court will address whether the National Collegiate Athletic Association (NCAA) may enter an exclusive contract, on behalf of its member institutions, with television networks and cablecasters.

The Board of Regents of the University of Oklahoma and the University of Georgia Athletic Association (Oklahoma and Georgia) represent two colleges with highly successful and salable football programs. They allege that the NCAA violated the antitrust laws by entering exclusive television contracts which restrict the number of games that may be broadcast in one season and limit the number of appearances a member school's team may make during the next two seasons. These contracts are alleged to monopolize the college football television market, restricting the fees member colleges receive compared to broadcasters bidding on individual games. Oklahoma and Georgia claim that the NCAA polices the exclusive contracts with an illegal provision requiring its members to boycott violators. Finally, Oklahoma and Georgia indicate that small telecasters and advertisers are harmed by their inability to participate in showing the games.

By contrast, the NCAA asserts that televised Saturday afternoon college football already competes against many diverse and significant programs. The NCAA claims the football games clearly vie for consumer attention and television dollars in a marketplace in which it is far from a monopolist. Further, the exclusive contracts are alleged to have clear procompetitive effects. (*e.g.*, The exclusive contracts spread television exposure among more teams, thus helping more schools attract good players. It is also claimed that these contracts actually enhance a pecuniary and intangible benefit to the members compared with a per game bidding system.)

Oklahoma and Georgia claim that the mere showing that these restrictive and price-fixing contract provisions existed constituted a conspiracy in violation of the antitrust laws. The NCAA argues that a court must weigh the proof and extent of the procompetitive benefits against any anticompetitive effects to determine whether there has been an antitrust law violation.

FACTS

The NCAA is an unincorporated association of 785 public and private American colleges and universities. The NCAA supervises athletic competitions between and among member institutions under the rules promulgated by the NCAA with the approval of its members. An NCAA bylaw entitled the "television plan" permits it, as exclusive agent for its members, to enter with national television broadcasters into exclusive contracts for televising live college football. The NCAA permits all other intercollegiate sports it regulates to be televised without exclusivity restrictions. The NCAA began its television plan in 1951.

Each exclusive contract with a television network permits showing live college football games on a "network package" basis. The network package gives the national broadcaster the right to present a season long block of games every Saturday afternoon but is subject to certain restrictions relevant to this case:

1. The broadcaster has a set number of exposures (an exposure is a time slot on the network for a national or multiple regional games) per season;
2. Each NCAA member institution is limited to a maximum number of times it may appear on national or regional telecasts in a two-year period (this is limited through the NCAA's bylaws for member institutions);
3. The broadcaster is required to show a minimum number of different teams during a two-year period;
4. Broadcasters and member institutions are restricted to only limited "exception" telecasts that might compete with the network or other live games. (The CFA was an association of NCAA member institutions consisting of five of seven major football playing conferences and virtually all major football playing

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independent schools.)

Although the television plan has generally maintained its original format from 1953 to the present, it was expanded in 1981 to permit more national television broadcasters to participate. In addition, the rules and penalties for violations were tightened.

In 1981, the College Football Association (CFA) attempted to develop an independent television plan with the National Broadcasting Company (NBC) while the NCAA was negotiating its television plan with NBC's competitors. The limited exception: Colleges generally may telecast their games outside the network contracts only if they are sold out or are more than 400 miles from the visiting teams' campuses, and the telecasts would not interfere with attendance at any other game that is not sold out. There are other exceptions for less prominent football programs, including those that have not recently been on network television. Telecasts of post-season bowl games also are outside the scope of the television plan and networks' contracts. The NCAA reacted by adopting an "official interpretation" to its bylaws that: "[T]he [NCAA] shall control all forms of televising of the intercollegiate football games of member institutions during the traditional football season ... ." In addition, the NCAA publicly threatened CFA members with sanctions ranging from reprimand to expulsion.

Since the NCAA announced that it would seek expedited disciplinary action against offending schools, affecting not only their football program but other sports as well, the CFA filed a class action against the NCAA in the United States District Court for the Western District of Oklahoma. In that action, they sought to obtain injunctive relief from the limits on telecasting contained in the television plan and the networks' contracts. Subsequently, the CFA application for classification was withdrawn and the action was maintained by the Board of Regents of the University of Oklahoma and the University of Georgia Athletic Association.

Oklahoma and Georgia argued in the district court that the television plan and networks' contracts violated the antitrust laws because: 1) the networks' practice of offering equal payments for every game telecast nationally or regionally was price fixing obtained with the agreement and direction of the NCAA; 2) the NCAA members refusal to telecast games other than in accordance with the plan and contracts due to the threat implicit in the NCAA's rule to expel members that violated the television plan constituted a group boycott; 3) the NCAA's exclusive representation of its member institutions in conjunction with its rule against outside telecasts constituted monopolization of live college football telecasts, and 4) that the television plan and networks' contracts constituted unreasonable restraints on trade.

The district court agreed with Oklahoma and Georgia on all issues and entered an injunction declaring the television plan and the 1982-85 networks' contracts void. It also barred the NCAA from making any other contract of a similar kind in the future. The injunction also prohibited the NCAA from interfering with member institutions' sale of television rights or requiring any college to relinquish control of television rights as a condition of membership. The Tenth Circuit Court of Appeals affirmed the decision of the district court, but on different grounds. The appellate court rejected the boycott holding and declined to consider the monopolization holding of the district court. Instead, the court of appeals concluded that the television plan and networks' contracts violate the antitrust laws because they reduce the number of games shown on television. Member institutions that would like to contract outside the network arrangements often cannot do so. Thus, the contracts are an unreasonable restraint on trade.

The court of appeals maintained the injunction but restricted some of the district court's injunctive relief. Instead of banning the NCAA from taking any role in telecasting, the appellate court permitted the NCAA to limit televising a college's games as a sanction for violation of other rules, to prohibit the telecasting on Friday nights (when high schools play) and to develop less restrictive plans that did not entail assertion of exclusive rights to telecasting. The NCAA petitioned the United States Supreme Court for review.

BACKGROUND AND SIGNIFICANCE

The Supreme Court's decision in this case will be extremely important not only to the parties, but to other collegiate members of the NCAA and the millions of dedicated Saturday afternoon armchair quarterbacks. The effect of the decision on antitrust law is far less certain.

If the Court finds for Oklahoma and Georgia, there will be an opportunity for colleges to negotiate individually with national, regional and local broadcasters to present their games. The starburst effect of these negotiations could include: diversity of game selection for viewers; greater opportunities for national, regional and local advertisers, and live football exposure for more colleges. Since hypothetically, the viewers would have more games to choose from, the price of the television contracts would reflect the size of each viewing audience. Advertisers unable or unwilling to pay for the exclusive national broadcasts could be accommodated to sell to smaller audiences. These prospects are greatly enhanced by the growing web of national, regional and local cable systems and the development of the "minicam."

The increase in televised college football games may also have substantial negative effects. The colleges rich with quality players and/or quality reputations will command the national spotlight. Since the national broad-

casters would be free to have top ranked teams and popular schools televised every week, national coverage of lesser teams may dwindle. This might mean less opportunity for these schools to attract current high school players from other regions. Most significantly, any of the exclusive contract dollars trickling down to the other colleges would probably dry up.

If the Court finds for the NCAA, member colleges will remain bound to the exclusive contracts until they vote to change it or to leave the association.

Because Oklahoma and Georgia raised a potpourri of antitrust issues, it is difficult to prognosticate the legal significance of a decision in this case. The difficulty is revealed and compounded by the differing antitrust law analyses, findings of violations and remedies in the district and appellate courts. The Court must first determine whether the football games are in a separate market than other events televised on Saturday afternoon (as the district court found). Next, the Court may decide whether the NCAA's share of the market (however market is defined) and the exclusivity restrictions which maintain that market share constitute monopolization or an attempted monopolization of that market. In lieu of a monopolization analysis (a monopolization analysis was made and supported by the district court but avoided by the appellate court), the Supreme Court may decide that the restrictions of the television plan are an unreasonable restraint of trade (as found by the appellate court). The Court could even revive Oklahoma and Georgia's argument that the NCAA's enforcement mechanism which requires its members to boycott violators constitutes a group boycott in violation of antitrust laws. Although the parties did not directly argue this issue to the Supreme Court, the district court found a group boycott and the appellate court rejected it. Indeed, any or all of these analyses are possible.

The legal issue with the greatest potential significance is whether the mere existence of the restrictive contract provisions in conjunction with the provisions which appear to fix the price paid by the television broadcasters as agreed to by the NCAA constitutes a violation of the antitrust laws. This analysis has been a tradition of the antitrust laws for price fixing cases virtually since the passage of the Sherman Antitrust Act of 1890. If the NCAA convinces the Court to weigh the proof and extent of procompetitive benefits against anticompetitive effects (referred to as the "rule of reason" approach), this case will become a landmark decision. It will dramatically change the evidentiary standard and burden of proof in price fixing cases. Because it is unlikely the Court will reverse this precedent, NCAA success on this issue would be a home run, goal and touchdown rolled into one opinion.

ARGUMENTS

For National Collegiate Athletic Association

1. An agreement among universities to establish television packages for football may not be held unlawful on its face because it reduces the number of different games shown on television when there exists significant procompetitive features.
2. To avoid application of the per se rule the defendant in an antitrust case only need prove the existence and extent of procompetitive benefits and not the "necessity" of the contractual arrangements.
3. College football television programming on Saturday afternoons is not a separate market for antitrust purposes.
4. A process of competitive bidding ending in the letting of contracts for the telecasting of college football should not be treated as a suppression of competition because, once the contracts have been signed, there is no further rivalry game-by-game for broadcast rights.

For Oklahoma and Georgia

1. An agreement among virtually all producers of commercially salable intercollegiate football to sell football television rights exclusively through a common sales agency may be held unlawful on its face when it eliminates price competition, restricts output, forecloses small telecasters and advertisers from the market and restrains trade more than reasonably necessary to promote the efficiencies of the integration.
2. An antitrust defendant may not obtain a rule of reason analysis for otherwise illegal restraints by asserting that such restraints are ancillary to other purported goals, irrespective of the actual impact of the restraints on competition, without showing the alleged goals are procompetitive or that the restraints are reasonably necessary to attain such goals, and in the face of factual findings that the restraints do not further the goals.
3. The district court's finding, affirmed by the court of appeals, that NCAA has sufficient market power to produce anticompetitive effects through its controls over its members' football television rights is not clearly erroneous.
4. A combination by virtually every producer of commercially salable intercollegiate football to sell broadcast rights only as a package, on an exclusive basis, to a limited number of buyers, and restricting the number of games sold, should be treated as a suppression of competition although the package is sold by a process of competitive bidding.

AMICUS BRIEFS

An amicus brief in support of the National Collegiate Athletic Associationwas filed by the National Federation of State High School Associations. Supporting Oklahoma and Georgia were the United States of America and the Association of Independent Television Stations, Inc.