OU v. NCAA

United States District Court for the Western District of Oklahoma
546 F. Supp. 1276
September 15, 1982

– HORIZONTAL RESTRAINTS ABRIDGEMENT –

Original district court opinion in BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, and the UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION, Plaintiffs, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant. Civil No. 81-1209-BU Counsel for plaintiffs: Andy Coats and Clyde A. Muchmore or Oklahoma City, Stanley M. Ward of Norman, Okla. Counsel for defendants: Robert H. Harry of Denver, James D. Fellers of Oklahoma City, Richard K. Andrews and George H. Gangwere of Kansas City, Mo. SUBSEQUENT HISTORY: Affirmed in part by Board of Regents v. National Collegiate Athletic Ass'n., 707 F.2d 1147 (10th Cir. 1983) Affirmed by National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 104 S. Ct. 2948 (1984).

BURCIAGA, District Judge, Sitting by Designation.

THIS MATTER came on for trial to the Court on the merits on June 7 through 15, 1982. At issue is the legality of the controls exercised by the National Collegiate Athletic Association over the televising of college football games. The plaintiffs, both members of NCAA, allege that these controls violate the Sherman Antitrust Act, 15 U.S.C. §§ 1-2 (1980). Having considered the pleadings, evidence, briefs and memoranda submitted by the parties, the Court holds as follows:

(1) The television football controls exercised by NCAA constitute an horizontal **[*1282]** agreement among competitors to fix prices and restrict output, in violation of 15 U.S.C. § 1;
(2) The controls constitute a group boycott, in violation of 15 U.S.C. § 1;
(3) The NCAA exercises monopoly power over the market of college football television, in violation of 15 U.S.C. § 2; and
(4) The plaintiffs are entitled to injunctive relief under the Clayton Act, 15 U.S.C. § 26 (1980).

This memorandum opinion shall constitute the Court's findings of fact and conclusions of law.

I. *Findings of Fact*

The parties to this case are the Board of Regents of the University of Oklahoma, the University of Georgia Athletic Association, and the National Collegiate Athletic Association. Plaintiff Board of Regents of the University of Oklahoma [hereinafter, "Oklahoma"] is the governing body of the University of Oklahoma. The Board is responsible for all of the operations of the University, including its intercollegiate athletic program. Oklahoma is a member in good standing of the National Collegiate Athletic Association, the defendant herein.

Plaintiff University of Georgia Athletic Association is a non-profit corporation created under the laws of the State of Georgia. The Association has the responsibility of operating the intercollegiate athletic program of the University of Georgia. The University of Georgia is a member in good standing of the National Collegiate Athletic Association. The executive personnel of the University and the Athletic Association overlap. They shall be collectively referred to herein as "Georgia."

Defendant National Collegiate Athletic Association [hereinafter, "NCAA"] is a private non-profit association organized in 1905. NCAA consists of approximately 900 members. Membership is open to four-year institutions which meet certain academic standards. Allied and Associate membership is open to athletic conferences, associations and other groups interested in intercollegiate athletics.~

Under the NCAA's plan for the 1978 through 1981 seasons, ABC held the exclusive right to televise college football on the network level. For this right, ABC paid a so-called "minimum aggregate fee." A part of this fee, some 8% of the total, went directly to the NCAA to help fund certain of its activities. A specified dollar amount was then reserved for the fee to be paid to the teams participating in NCAA Divisions II and III football championships. Under the terms of its contract, ABC was required to televise these championship contests. The teams which participated in games broadcast by ABC received a fee from ABC for the right to televise those particular games. The remainder of the minimum aggregate fee was divided among the schools which appeared on ABC's weekly college football **[**26]** telecast. In order to comply with the contract, the total of the fees which ABC paid to the teams playing televised games had to equal at least the set minimum aggregate fee for that year, minus that part of the fee going to NCAA and the schools playing in the Division II and III championships.

In essence, ABC was paying a certain sum for the right to be the exclusive carrier of NCAA football on the network level. That sum was divided among the teams which appeared on ABC during the course of any given season. The particulars of how that sum was to be divided among the schools were not spelled out in the contract. However, the NCAA Football Television Committee, throughout the term of the contract, made "recommendations" to ABC as to how much should be paid for each regional telecast, and how much should be paid for each national telecast. ABC always implemented these "recommendations," and at no time did ABC pay any more or any less than the amount "recommended" by NCAA.

Once ABC had decided to televise any particular game, it would notify the host team of its decision. Up through the 1980 season, ABC would send a telegram and "require" confirmation of the school's acceptance of the rights fee which had been established. Beginning in 1981, ABC would only "request" confirmation. However, it is clear that negotiation of the rights fee was not anticipated, nor would it have been tolerated.

For example, in 1978 ABC was obligated under the contract to pay a "minimum aggregate fee" of $29 million. By letter dated April 10, 1978 (Pl. Ex. 18), Thomas Hansen, NCAA's Television Program Director, "suggested" the following distribution of the $29 million. Seven hundred fifty thousand was earmarked for the rights fee to the Division I-A playoffs, and $670,000 for the Division II and III playoffs. Another $165,000 was set aside for regular-season telecasts of Division II and III games. Under the contract, ABC was also awarded the right to televise five NCAA championship events in sports other than basketball and football. Two hundred fifty thousand was set aside for that purpose.

This left a total of $27,165,000. NCAA then took eight percent of this amount as its share, or some $2,173,200. This left $24,991,800 to be divided among the Division I teams appearing on ABC during the 1978 season. Under the contract, ABC was to televise 13 games nationally, and 45 on a regional basis. Mr. Hansen then "worked various combinations" until he reached prices for the regional and national telecasts which, when multiplied by the scheduled number of each type of telecast, equalled the balance of the "minimum aggregate **[*1290]** fee." Hansen "recommended" that ABC pay $533,600 for each national game, and $401,222 for each regional game. Multiplying $533,600 by 13 yields $6,936,800, and 45 times $401,222 equals $18,054,990. The sum of these figures is $24,991,790.

This method of determining prices was employed throughout the 1978-1981 seasons. The testimony of network officials establishes that for the years 1982-1985, the networks will employ the same method of determining rights fees, and that neither ABC nor CBS will pay any more than the "minimum aggregate fee." (See Table Summary below for key provisions of contracts.)

TABLE SUMMARY OF NCAA-NETWORK CONTRACTS*
1978-1985

Year	Number of Exposures	Minimum Aggregate Fee	Total Commercial Minutes	Price per Exposure	Price per Commercial Minute
1978	23	$29,000,000	506	$1,260,860	$57,312
1979	23	$29,000,000	506	$1,260,860	$57,312
1980	24	$31,000,000	506	$1,291,660	$61,264
1981	24	$31,000,000	506	$1,291,660	$61,264
1982	28	$59,000,000	728	$2,107,140	$81,043

* This Table does not include the contract with TBS for the 1982 and 1983 seasons. The number of exposures, minimum aggregate fee, and total commercial minutes are to be equally divided between ABC and CBS for the 1982-1985 seasons, so that the figure for each network will be one-half of the figure noted in the Table.

1983	28	$64,000,000	728	$2,285,710	$87,912
1984	28	$68,500,000	728	$2,446,420	$94,093
1985	28	$72,000,000	728	$2,571,420	$98,901

Another key feature to the NCAA-ABC contract was a limitation on the number of times any one team could appear on ABC over a certain time period. Under the contract, a school could appear no more than five times over the course of two seasons. A school could televise on stations other than ABC, but only under certain very limited conditions. The "exception telecasts" had to receive prior approval from NCAA. If a school could show that its proposed telecast met all of the prerequisites, NCAA had no discretion as to whether to approve the telecast. A school was allowed to have its game telecast only if all of the tickets for the game had been sold or if the game was to be played more than 400 miles from the school. If these preliminary criteria were met, the school was then required to show that the broadcast would not be shown within a certain distance of any other college football game being played at the same time as the game to be telecast. (For broadcast on a UHF station, the distance limit was 45 miles; for VHF, 120 miles.) The only exception to this rule was that if the other games being played within the distance limitation were sold out, then the broadcast would be allowed. The number of "exception telecasts" has increased over the years. However, many more games would have been broadcast locally were it not for the cumbersome requirements and procedures entailed in applying for an "exception telecast." All of the restrictions noted herein applied only to schools in Division I. Division II and III schools are allowed unlimited freedom in televising their regular season games.

[*1291] The NCAA makes much of the fact that under the terms of the contract with ABC, member schools were allowed to negotiate with ABC for the rights fee to be paid for any particular game. This so-called right to negotiate was clearly illusory, however. The practical effect of granting exclusive rights to ABC was to create a monopsony; that is, a situation in which there is only one eligible buyer in a product market. The school could not sell the rights to CBS or NBC, unless it was willing to flaunt the NCAA plan. Such a course would violate NCAA rules and subject the school to the disciplinary proceedings which would certainly follow.

As an example, suppose Oklahoma and Georgia had a game scheduled in the fall of 1981. Both teams were highly regarded by the national media, and with their tradition of excellence, the game would have attracted a great deal of national attention. ABC would have undoubtedly wanted to televise this game. If the schools balked at the figure offered by ABC (that is, the figure "recommended" by the NCAA Football Television Committee), ABC had two options. First, ABC could have actually negotiated with the two schools and arrived at a higher figure. Second, and the more likely result, ABC could tell the schools to either take it or leave it. ABC had an almost unlimited choice of other games it could televise in which the teams would accept the fee established by NCAA. The pernicious aspect of the plan was that Oklahoma and Georgia would have no alternatives available to them, save the far less lucrative "exception telecast." ABC would realize that the schools could not sell the rights to another network and, therefore, would be unconcerned about the possibility that the game they ultimately chose to broadcast would appear at the same time another network was broadcasting the Oklahoma-Georgia game.

A clear example of the failure of the rights fees paid to respond to market forces occurred in the fall of 1981. On one weekend of that year, Oklahoma was scheduled to play a football game with the University of Southern California. Both Oklahoma and USC have long had outstanding football programs, and indeed, both teams were ranked among the top five teams in the country by the wire service polls. ABC chose to televise the game along with several others on a regional basis. A game between two schools which are not well-known for their football programs, Citadel and Appalachian State, was carried on four of ABC's local affiliated stations. The USC-Oklahoma contest was carried on over 200 stations. Yet, incredibly, all four of these teams received exactly the same amount of money for the right to televise their games. There is no dispute as to the fact that, but for the NCAA contract, no broadcaster would be willing to pay the same amount for the Citadel-Appalachian State game as they would pay for the USC-Oklahoma matchup. The fees paid were exactly the amount which had been approved by NCAA. Had Oklahoma and USC attempted to negotiate a higher fee, they would have been able to do so only from a position of weakness. Because the schools had lost their right to sell the rights to a competitor of ABC, ABC had little if any incentive to actually negotiate the rights fee. If the schools had refused to accept the price established by NCAA and ABC, they faced the very real and unpleasant prospect of not having the game televised at all. This would have cost the schools both a great amount of money as well as the publicity and prestige which accompanies a network broadcast of a game.

Moving to the contracts which are in effect for the 1982 through 1985 football seasons, there is little indication that the situation will be any different.~

The effect of the NCAA's program of controls is quite obvious. Rather than letting the market operate freely, NCAA has seriously restricted free market forces in the economics of college football television.

Turning first to the plaintiffs' allegations of price-fixing, it can be said with certainty that the prices which have been paid in the past to participating schools for the right to televise any particular game do not even resemble the prices which would have been paid were it not for the NCAA controls. It is quite obvious that were it not for the NCAA controls, no network decisionmaker would even consider offering the same price to the schools involved in last fall's Oklahoma-USC and Citadel-Appalachian State games. Even the defendant's witnesses had to agree that a free market mechanism most certainly would not have resulted in the uniform price paid for each and every game broadcast under past NCAA contracts with the networks. The evidence is clear that NCAA controlled the price to be paid to participating teams, and made it impossible for the teams to negotiate any higher price by restricting dealings to a single network. The evidence is also clear that some teams would have received larger fees were they allowed to negotiate with any and all potential broadcasters. At the same time, the testimony made clear that many of the smaller schools would not have received as much as they did under the NCAA plans if they were forced to compete in a free market.

While the NCAA protests that these features have been eliminated by the new dual-network contracts, it is clear that they have not. As discussed above, a maximum of one game each week may allow the participating schools to engage the networks in true negotiations. However, after the network having the right of first choice on any given date has made its agreement with the teams playing the most attractive game of the week, the other schools are left in the same position as they were under previous contracts. They will be selling in a market where there is only one eligible buyer. They will be unable to use the bargaining leverage which would be available if they could sell the rights to the game to other broadcasters. Further, this monopsony situation is aggravated by the limitations on the number of times a school can appear on a given network over a two-year period. **[*1294]** Suppose Georgia appears on ABC three times during one year, two national broadcasts and one regional. Under the current contracts and the "ground rules" accompanying them, during the following year Georgia could only appear, if at all, on CBS. This is because Georgia is limited to six appearances over a two-year period, and these six are to be equally divided between the networks. During the second year, ABC would not be allowed to televise a Georgia game. Georgia would then be forced to appear only on CBS. Georgia would have no bargaining leverage to negotiate a larger-than-average rights fee, since it could not threaten CBS with selling the rights to ABC. Thus, while the new contracts may appear, at first blush, to alleviate these features of past NCAA contracts, in fact they do not. The setting of a minimum aggregate fee, in combination with the "ground rules" restricting competition between the networks and the limitations on each team's appearances, only perpetuate the monopsony situation which NCAA has created.

It was suggested by defense witness Landes that the "minimum aggregate fee" contained in the contracts represent a figure not substantially different from the total of all rights fees which would be paid to colleges in an unrestricted football television market. This testimony fails to persuade the Court that NCAA's controls are not illegal price-fixing for several reasons. First, Dr. Landes' testimony was pure speculation. There is no data whatsoever before the Court in support of this conclusion, and Dr. Landes' guesswork is unpersuasive. Second, even if Dr. Landes' speculation were proven correct, it does not resolve the essence of the plaintiffs' contention that some football games are worth more to broadcasters than others. The example of the rights fees paid for the 1981 Oklahoma-USC and Citadel-Appalachian State games was conceded by Dr. Landes to be a gross distortion of free-market forces. Third, whether or not the price paid by the networks is reasonable is not a permissible inquiry. Even if Dr. Landes were correct about the reasonableness of the price paid by the networks, that does not mean that the NCAA controls are any less offensive to the Sherman Act. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978).

The plaintiff also urges that NCAA has acted to place a horizontal limit on production. That is, by making agreements with the networks for exclusive national television rights and placing severe restrictions on local broadcasts of college football, NCAA has agreed to limit production of televised college football. It is clear from the evidence that were it not for the NCAA controls, many more college football games would be televised. This is particularly true at the local level. Because of NCAA controls, local stations are often unable to televise games which they would like to, even when the games are not being televised at the network level. The circumstances which would allow so-called exception telecasts arise infrequently for many schools, and the evidence is clear that local broadcasts of college football would occur far more frequently were it not for the NCAA controls. This is not a surprising result. Indeed, this horizontal agreement to limit the availability of games to potential broadcasters is the very essence of NCAA's agreements with the networks. The evidence establishes the fact that the networks are actually paying the large fees because the NCAA agrees to limit production. If the NCAA would not agree to limit production, the networks would not pay so large a fee. Because NCAA limits production, the networks need not fear that their broadcasts will have to compete head-to-head with other college football telecasts, either on the other networks or on various local stations. Therefore, the Court concludes that the membership of NCAA has agreed to limit production to a level far below that which would occur in a free market situation.

[*1295] The evidence is also clear that the NCAA plan has many of the characteristics of a group boycott. There are two different ways in which NCAA's cartel-like behavior works as a group boycott. First, by granting exclusive rights to certain networks for televising college football, the NCAA essentially agrees not to bargain or make its product available to other broadcasters. If an NCAA school were to make an agreement with a broadcaster which did not comport with the NCAA plan, very severe penalties could be inflicted on the offending school under NCAA's rules. Thus, the schools do not stray from NCAA plan, as can be seen from the events which transpired when CFA attempted to negotiate its own contract with NBC. The veiled threats which came from NCAA officials and NCAA's entire course of conduct constituted classic cartel behavior.

This leads directly to the second aspect of the group boycott allegation. If a member school were to defy the NCAA and make its product available to all potential buyers on an equal basis, that school would itself be made subject to a group boycott. This aspect of the group boycott operates in the following way. Unlike many industries, college football requires the cooperation of two producers in order to create their product. That is, two schools must stage a game; one school could not stage a football game by itself, at least not a game which would attract the kind of attention which NCAA football now attracts. If a member school strayed from the NCAA plan, it would be subject to very severe sanctions from the NCAA. Among the sanctions available would be expulsion from NCAA. Since NCAA members are prohibited from playing televised football games with non-NCAA members, the expelled school would be unable to produce its product. Such a situation would clearly constitute an agreement among NCAA members to boycott the school which strays from the NCAA Football Television Plan.

The NCAA offers several justifications for its policies. The principle argument relied upon by the NCAA is that it is attempting to protect the gate attendance of member institutions. The evidence does not support that contention. First, the Court is not persuaded that college football television has any effect on gate attendance. The N.O.R.C. reports so heavily relied upon by NCAA are fallible in a number of ways. First, their age renders them most suspect. The last of these reports was compiled in 1957, some twenty-five years ago. It strains logic past its breaking point to suggest that because something was true twenty-five years ago, it is still true today, particularly when the subject of discussion is something so fluid as public preference in entertainment. Moreover, the N.O.R.C. studies, while quite professional and thorough, were analyzing a controlled market. Only the first of the N.O.R.C. studies was done in the absence of NCAA controls. The rest were studying a controlled market. No valid conclusion can be reached on the basis of a single year's study, nor on the basis of studies of a controlled market. We simply do not know the effects of uncontrolled televising on gate attendance. Nor is the Court willing to infer deleterious effects from the evidence presented.

The N.O.R.C. studies fail to show that football television was the cause for the steadily declining gate attendance at college football games during the early years of the study. There was no evidence that N.O.R.C. made any attempt to measure the general impact of the rapidly growing television industry (outside of televised football) on gate attendance. The N.O.R.C. study conceded that college enrollment had declined during the same years that gate attendance did, yet tries to minimize the very obvious relationship between declining enrollment and declining gate attendance. In short, because of the N.O.R.C. study's failure to account for the effect of circumstances which logic says would negatively impact college football attendance, and the inadequate data base upon which it relies, the reliability of the conclusions is suspect. Yet the N.O.R.C. studies are the only empirical **[*1296]** evidence supporting NCAA's conclusion that football television harms gate attendance.

The study conducted by Dr. Landes and introduced into evidence is equally unpersuasive. While the study purports to analyze the effect of football television on gate attendance in the areas surrounding Oklahoma and Georgia, Dr. Landes was forced to admit that the study was imperfect since there is no weekend in which college football is not being televised nationally. The statistical significance of the correlation between televised football and gate attendance is marginal, and particularly unpersuasive in that it fails to analyze that effect in terms of the time of day in which the televised games are broadcast as opposed to the time at which the other games are being played. Furthermore, like the N.O.R.C. study, Dr. Landes was studying a controlled market.

However, the greatest flaw in the NCAA's argument is that it is manifest that the new plan for football television does not limit televised football in order to protect gate attendance. The evidence shows that under the new plan, many areas of the country will have access to nine hours of college football television on several Saturdays in the coming season. Because the "ground rules" eliminate head-to-head programming, a full nine hours of college football will be shown on television during a nine-to-twelve hour period on almost every Saturday of the football season in most of the major television markets in the country. It can hardly be said that such a plan is devised in order to protect gate attendance.

In the end, the NCAA's argument regarding gate attendance is either an ill-founded belief at best, or at worst, a deception employed to make the majority of the NCAA membership believe that they should control football television out of self interest. The vast majority of NCAA members suffer none of the restrictions of the NCAA controls, yet that majority can seriously undermine the goals of those schools which are subject to the controls and whose athletic programs are almost completely dependent on revenue from football.

It is also suggested by NCAA that the controls help preserve a competitive balance among the football programs of the various schools. Again, the argument must fail. NCAA has failed to show why this competitive balance cannot be maintained without NCAA acting as the exclusive bargaining agent for its members in matters of football television. Several witnesses testified to a vague belief that the entire program of controls is necessary, but not one witness could give a credible, factually-supported explanation as to **[**50]** why that is so. Even the executive officers of the NCAA could not explain why it is necessary for NCAA to act as the exclusive agent. If the NCAA is seeking to improve the competitive position of smaller schools seeking television revenues, it has done so in a way which inhibits, if not destroys, the effect of free market mechanisms on the price paid to teams appearing on television.

If the NCAA is seeking to improve competition on the football field, it has chosen a much too far-reaching manner of doing so. The NCAA regulations on recruitment, the limitations on the number of scholarships each team may award, and the other standards for preserving amateurism found in NCAA legislation are sufficient to achieve this goal. Rather than relying on the NCAA to improve their competitive position by restraining competition, the schools can and should compete on their own and improve their position in that way.~

In summary, the Court concludes that the NCAA controls over college football make NCAA a classic cartel. This cartel has an almost absolute control over the supply of college football which is made available to the networks, to television advertisers, and ultimately to the viewing public. Like all **[*1301]** other cartels, NCAA members have sought and achieved a price for their product which is, in most instances, artificially high. The NCAA cartel imposes production limits on its members, and maintains mechanisms for punishing cartel members who seek to stray from these production quotas. The cartel has established a uniform price for the products of each of the member producers, with no regard for the differing quality of these products or the consumer demand for these various products.

Like all cartels, NCAA seeks to regulate the distribution of revenues to the cartel members. The distribution of football television revenues under the NCAA program in no way resembles the distribution to be expected in a free market. Like all cartels, NCAA, the umbrella under which the cartel has formed, takes for itself a sizable cut of the revenues from the cartelized product.

Finally, the internal wranglings among NCAA members strongly resemble classic cartel infighting. The many less prominent schools seek to expand their football revenues beyond what they would receive in a non-cartelized market. As in all cartels, these artificially high revenues must, at some point, be derived at the expense of more prominent cartel members. The NCAA's attempts to placate the prominent producers, such as Georgia and Oklahoma, have failed. These plaintiffs and others whose superior competitive practices have earned them prominence in the sport of college football wish to no longer suffer the economic injury visited upon them by the less prominent members of the cartel.

Most cartels ultimately fall because of a healthy self-interest among the producers whose competitive ability has earned them prominence in the market. The NCAA football television cartel is no different.

II. *Conclusions of Law*

A. *Jurisdiction and Venue*

The plaintiffs have filed this action pursuant to Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2 (1980). Jurisdiction is proper under 28 U.S.C. § 1337 (1980).~

B. *Justiciability*

~It is clear that the plaintiffs have suffered antitrust injury.~C. *The Sherman Act*

"The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958).~The basic policy of the Act is that economic competition be unrestrained. The policy rests on the premise that "the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." *Northern Pacific Railway Co. v. United States, supra*. The Court is not allowed to determine whether competition is the wisest policy in any given industry, because Congress has determined that free and open competition shall be the rule of commerce in our nation. Arguments describing the ruinous effect of competition in a particular industry are to be addressed to Congress, not the courts. *National Society of Professional Engineers v. United States, supra*, 435 U.S. at 689-90.

While the Sherman Act forbids only "unreasonable" restraints of trade, "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific Railway Co. v. United States, supra*, 356 U.S. at 5. These types of arrangments have been determined to be unreasonable *per se*. The practices which the courts have thus far determined to be unreasonable *per se* include price fixing, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 84 L. Ed. 1129, 60 S. Ct. 811 (1940); group boycotts, *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959); and horizontal agreements among competing sellers to limit the availability of their products. *United States v. Topco Associates*, 405 U.S. 596, 31 L. Ed. 2d 515, 92 S. Ct. 1126 (1972).

With these principles in mind, the Court will now analyze each of the plaintiffs' antitrust theories. As will be seen below, the Court finds that the NCAA controls constitute a *per se* violation of Section 1 of the Sherman Act. Additionally, the Court will go on to analyze the restraints under the rule of reason.

Price-Fixing and Restriction of Output

Price-fixing is a *per se* violation of Section 1 of the Sherman Antitrust Act. *United States v. Socony-Vacuum Oil Co., supra; Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 102 S. Ct. 2466, 73 L. Ed. 2d 48, 50 U.S.L.W. 4687 (1982). If an activity is determined to be price-fixing, the courts may not inquire into the reasonableness of the price which has been established. *Id.*

[*1305] NCAA first argues that the plaintiffs have failed to show literal price-fixing. This argument is not sustained by the Court's findings of fact. NCAA suggests that ABC is the price-fixer. NCAA says it will no longer "recommend" prices for the games, and injunctive relief is therefore unnecessary. The Court is not persuaded by this argument. The objectionable features of the NCAA package remain in place. The NCAA plan results, in most situations, in a single eligible buyer. The contracts' "minimum aggregate fee" is the minimum, maximum, and *actual* price which will be paid. The networks will continue to pay the same price for every national broadcast, and the same price for every regional broadcast.~

Turning directly to the price-fixing aspect of the NCAA controls, NCAA argues that the establishment of the "minimum aggregate fee" is absolutely necessary to guarantee the colleges a reasonable rights fee from the networks. While this is certainly true, it is true only because NCAA has commandeered the right of its members to market their football games for television broadcast. Having bound its members to selling their rights only to certain networks, and having destroyed their ability to invite competitive bids for the right to broadcast their games, it *is* necessary for NCAA to negotiate a minimum aggregate fee. But this argument assumes the validity of NCAA's literal taking of the rights of these colleges to sell their football games to broadcasters. What NCAA argues, in essence, is that having formed an illegal cartel, restricted output, and organized a group boycott, it was necessary to fix the price of the product. That is not the teaching of *Broadcast Music*, and this argument has no merit.

This case is distinguishable from *Broadcast Music* in other key respects, as well. An important factor in *Broadcast Music* was that it was impossible for each composer to negotiate agreements with each radio and television broadcaster each time the broadcaster wanted to air one of the composer's copyrighted works. That factor is not present here. The colleges are clearly **[*1308]** able to negotiate agreements with whatever broadcasters they choose. We are not dealing with tens of thousands of relatively brief musical works, but with three-hour football games played eleven times each year. Thus, *Broadcast Music* is distinguishable on this ground.

The most important distinction, however, is that in the *Broadcast Music* arrangement there was nothing to prohibit an individual member-composer from selling broadcast rights to any broadcaster on an individual basis. Unlike the members of NCAA, the members of Broadcast Music, Inc., had not agreed among themselves that none of them would sell their rights outside of the blanket license arrangement. In this case, NCAA members have agreed -- or have been forced to agree by the will of the majority -- not to make their own individual arrangements with any network other than the networks with which NCAA has contracted.~The Court finds that the NCAA controls are not at all like the arrangement in *Broadcast Music*. The essence of the NCAA controls -- indeed their raison d'etre -- is to restrict competition. The controls distort the prices paid by the networks for the right to broadcast any given college football game. NCAA forces the networks to broadcast many games which the networks would not broadcast in the absence of the NCAA's controls. One of the stated purposes of the NCAA controls is to generate more revenue for smaller colleges than they could generate on their own in a free market. Another aspect of the controls is to reduce the market share which superior competitors -- such as Oklahoma and Georgia -- might win in a free and open market. In short, the NCAA controls are a repeal of the laws of supply and demand. Competition is eliminated, and the pernicious effects of non-competition are present in abundance in the market of college football television.

NCAA suggests that its television controls have procompetitive features, and therefore are not appropriate for condemnation under the *per se* rule. The Court considers this argument to be foreclosed by the recent decision of the Supreme Court in *Arizona v. Maricopa County Medical Society, supra*. In that case, a group of physicians established a maximum fee schedule for services rendered to policyholders of specified insurance plans. The Court held that the fee schedule constituted price-fixing and was illegal *per se*. In so holding, the Court said:

> The respondents' principal argument is that the *per se* rule is inapplicable because their agreements are alleged to have procompetitive justifications. The argument indicates a misunderstanding of the *per se* concept. The anticompetitive potential inherent in all price fixing arrangements justifies their facial invalidation even if procompetitive justifications are offered for some. Those claims of enhanced competition are so unlikely to prove significant in any particular case that we adhere to the rule of law that is justified in its general

> application.

457 U.S. at 351.

This language is a clear indication that the *per se* rule applies even where the defendant alleges procompetitive justifications. This argument of NCAA therefore has no merit.~

NCAA submits that if it is not allowed to control football, the "power elite" will systematically rout their opposition on the field, thereby alienating viewers, and ultimately destroying the marketability of college football. This argument borders on frivolous. What NCAA argues, in essence, is that competition will destroy the market. This argument is hardly novel. It has been consistently rejected by the courts, and it will be rejected now. As the Supreme Court said in *Socony-Vacuum*,

> Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination.

310 U.S. at 221-222.

The basic policy of the Sherman Act is free competition. If NCAA is correct about the "power elite," and if viewers lose interest in one-sided games, the free market should and will resolve the problem. The networks will respond to poor ratings by **[*1311]** showing more competitive games. That is how the market should operate, and that is what the Sherman Act demands.~

Finally, NCAA insists that its activities are not price-fixing because it does not have market power. Of course, the Court has determined that NCAA does have market power. But even if that were not so, NCAA's argument is without merit. "Any combination which tampers with price structures is engaged in unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered or stabilized prices they would be directly interfering with the free play of market forces. The [Sherman] Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference." *United States v. Socony-Vacuum Oil Co., supra*, at 221. Simply put, "price fixing is contrary to the policy of competition," and "it makes no difference . . . whether the participants possess market control. . . ." *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 309-310, 100 L. Ed. 1209, 76 S. Ct. 937 (1956).

The Court thus concludes that the NCAA television controls are not mere "ancillary" restraints. They are much more far-reaching than necessary to accomplish the legitimate purposes of NCAA. They not only inhibit competition, they destroy it.~ The television controls of NCAA are *per se* violations of § 1 of the Sherman Act.

Group Boycott

> Group boycotts, or concerted refusals by traders to deal with other traders, have long been in the forbidden [*per se*] category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they "fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality." . . . For . . . "such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment."

Klor's Inc. v. Broadway-Hale Stores, Inc., supra, 359 U.S. at 212 (citations omitted).

The plaintiffs assert that the NCAA controls constitute a group boycott. The Court has described in its findings of fact the way this group boycott operates. The Court now concludes that, as a matter of law, the NCAA controls constitute a group boycott and are illegal *per se* under § 1 of the Sherman Act.

Group boycotts can operate in a number of different ways. For instance, a group of producers can conspire to boycott other producers. *See Associated Press v. United States*, 326 U.S. 1, 89 L. Ed. 2013, 65 S. Ct. 1416 (1945). The conspirators in *Associated Press* agreed that none of them would sell their product, news, to competitors of the conspirators. Any violation of the agreement could result in sanctions against the violator ranging from fines to expulsion. By agreeing not to sell to each other's competitors, the conspirators crippled their competitors' ability to effectively compete.

The same situation exists in this case. As in *Associated Press*, group members who **[*1312]** violate NCAA rules are subject to expulsion. NCAA members have agreed that none of them will allow their football teams to appear on television against the football team of a non-member. The non-member is then not only crippled, but completely unable to produce its product, football games, for sale to broadcasters. Therefore, the non-member of NCAA is unable to compete with NCAA members in selling football games to broadcasters.

Another form of group boycott is found in *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 5 L. Ed. 2d 358, 81 S. Ct. 365 (1961). In that case, the American Gas Association had established a testing procedure for determining the safety and efficiency of gas burners. The Association consisted of utility companies which distributed gas, pipeline companies which transported gas, and manufacturers of gas burners. Unless a particular gas burner received the Association's seal of approval, the gas distributors would not supply gas for use in that burner.

The plaintiff was a manufacturer of gas burners seeking to enter the market. It submitted its burner to the Association for approval, but did not receive the seal of approval. The gas distributors would not, therefore, supply gas for such burners, and the product was therefore worthless to the buying public. The plaintiff alleged that the Association's standards were not designed to test efficiency and safety, but rather to insulate from competition those members of the Association who were manufacturers of burners. The Supreme Court held that these allegations were sufficient to state a claim of group boycott under § 1 of the Sherman Act.

The NCAA controls operate in a similar fashion. Non-members of NCAA, as discussed above, cannot appear on television against NCAA members. Thus, as in *Radiant Burners*, group members can withhold from non-members an input without which the non-member's product is worthless. Just as a gas burner is worthless without gas, a football team cannot produce its product without an opponent. The NCAA controls in effect deprive the non-member of the means of producing its final product, a football game. It is clear that neither plaintiff could market its product if not allowed to televise their games against NCAA members. NCAA membership is as critical to the plaintiffs' business success as the American Gas Association's seal of approval to the plaintiff in *Radiant Burners*.

Another form of restraint which the Supreme Court has determined to be a group boycott is found in *Fashion Originators Guild of America v. Federal Trade Commission*, 312 U.S. 457, 85 L. Ed. 949, 61 S. Ct. 703 (1941). In that case, a group of manufacturers agreed among themselves to refuse to sell to retailers who dealt in inexpensive copies of the original designs of the group members. The boycott was intended to drive the so-called "fashion pirates," horizontal competitors of the conspirators, out of business. The technique employed was to threaten retailers with a boycott if those retailers bought from the blacklisted manufacturers. In other words, a group of sellers agreed to boycott any buyer who bought from certain seller-competitors of the conspirators.

In this case, NCAA members have agreed not to sell their product -- football games -- to certain buyers. Every broadcast and cable network in the country, other than ABC, CBS and TBS, are being boycotted. Further, those local broadcasters which are not affiliated with ABC or CBS are allowed to buy football games only in very limited circumstances.

The situation here is somewhat different from that in *Fashion Guild*. Unlike the "fashion pirates" in *Fashion Guild*, the buyers being subjected to the boycott have done nothing to provoke such a boycott. Another distinguishing factor is that it is not the horizontal competitors of the boycotted buyers which have organized and enforced the boycott. Instead, the sellers themselves have increased, through concerted **[*1313]** action, the value of their collective product by promising ABC, CBS and TBS that they will boycott all other networks.

However, while there are factual distinctions between this case and *Fashion Guild*, the effect of the boycotts in the two cases are the same. The boycott narrows the outlets to which producers of college football can sell by prohibiting dealings with NBC. It subjects all buyers and sellers of college football television rights to an organized boycott if they refuse to comply with the controls. The NCAA boycott "has both as its necessary tendency and as its purpose and effect the direct suppression of competition." *Fashion Guild, supra*, at 465. Indeed, as was the case in *Fashion Guild*, "the combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations. . . ." *Id.* The NCAA "trenches upon the power of the national legislature and violates the statute." *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 242, 44 L. Ed. 136, 20 S. Ct. 96 (1899).

The Court has no difficulty in concluding that NCAA has organized a group boycott. Indeed, it is the ultimate group boycott, far more powerful and effective than those in the cases discussed above. There is an absolute refusal to deal with all of the major competitors of ABC, CBS and TBS. Broadcasters like NBC, the Hughes Sports Network, MetroMedia and TVS cannot buy NCAA football for network broadcast. Cablecasters such as the ESPN and USA networks cannot buy NCAA football for cablecast. There are no exceptions. The producers of college football have horizontally agreed that they will refuse to deal with these buyers. The existence of a group boycott could not be more clear.

The existence of a group boycott against horizontal competitors of NCAA members is also clear. The non-member of NCAA which wishes to sell its football games for television is subjected to a boycott. NCAA members are in a more powerful position than any of the combinations described above. NCAA members dominate the college football television market. The amount of college football televised outside of the NCAA contracts with the networks is minimal. NCAA members will not play televised games against non-members. They have the power to withhold from their competitors a key ingredient of the product. There is no doubt that NCAA has organized a group boycott, enforced the rules of that boycott, and employed threats and coercion to maintain the boycott.

Thus, the existence of a group boycott is clear from the evidence.~

The Rule of Reason

Although the Court has concluded that the NCAA controls constitute a *per se* **[*1314]** violation of the Sherman Act, it seems appropriate, nonetheless, to examine the restraint under the Rule of Reason. In large part, the *per se* rule was developed for the purpose of avoiding detailed inquiry into an industry where such an inquiry is unlikely to reveal procompetitive justifications for the challenged restraint. In this case, the Court has already undertaken a detailed inquiry into this industry, and the interest of litigation efficiency is not offended by conducting a Rule of Reason analysis.~ Applying the Rule of Reason to this case, the Court concludes that the NCAA **[*1315]** controls are unreasonable restraints on competition and therefore illegal.~Many untoward characteristics inhere in the NCAA controls. The controls dictate which broadcasters and cablecasters NCAA members may deal with, and which they **[*1318]** may not. The schools are not allowed to test the marketplace; they are locked into dealing with only certain networks. The schools are not even free to deal with local broadcasters except in the very limited situations where "exception telecasts" are allowed.

In a competitive market, each football-playing institution would be an independent seller of the right to telecast its football games. Each seller would be free to sell that right to any entity it chose. Most often the seller would sell to the higher bidder, although that need not always be the case. Quite obviously, the NCAA controls do serious violence to the competitive forces which should determine which telecaster ultimately wins the right to televise any particular game.

Turning to the price paid for the product, it is clear that the NCAA controls utterly destroy free market competition. NCAA has commandeered the rights of its members and sold those rights for a sum certain. In so doing, it has fixed the minimum, maximum and actual price which will be paid to the schools appearing on ABC, CBS and TBS. NCAA has created the mechanism which produces a uniform price for each national telecast, and a uniform price for each regional telecast. Because of the NCAA controls, the price which is paid for the right to televise any particular game is responsive neither to the relative quality of the teams playing the game nor to viewer preference.

In a competitive market, each college fielding a football team would be free to sell the right to televise its games for whatever price it could get. The prices would vary for the games, with games between prominent schools drawing a larger price than games between less prominent schools. Games between the more prominent schools would draw a larger audience than other games. Advertisers would pay higher rates for commercial time because of the larger audience. The telecaster would then be willing to pay larger rights fees due to the increased prices paid by the advertisers. Thus, the price which the telecaster would pay for a particular game would be dependent on the expected size of the viewing audience. Clearly, the NCAA controls grossly distort the prices actually paid for an individual game from that to be expected in a free market.

Turning next to the availability of the product, the NCAA controls limit free market forces in a number of ways. First, the controls force the networks to show more games involving the less prominent football schools than they would if it were left up to them. The controls restrict the number of games shown by local telecasters far below that which would be shown in a free market.

The controls also prevent the broadcast networks from showing more than six games over two years involving any particular team. In a free market, some teams would likely be shown more than six times over two years. The controls also require that 82 different teams be shown on the broadcast networks over a two-year period. The testimony of network executives makes clear that many fewer teams would be seen on the networks in the absence of the NCAA controls.

Thus, the evidence is clear that the NCAA controls cause the number of games shown to the viewing public to be very different from that which would be shown in a free market. Fewer different teams would appear on the networks, and more games involving more teams would be telecast by local and regional stations, in the absence of the NCAA controls. It is clear therefore that NCAA has drastically affected the number of games seen on television. To put it a different way, NCAA has restricted output.

It is clear that the NCAA controls have a devastating effect on competition. By their very nature, they inevitably result in price manipulation, restriction of output, and severe limitations on the options of both buyers and sellers. It cannot be said that their **[*1319]** effect on the market is *de minimus*. NCAA dominates the entire market of college football television. The NCAA controls affect every single college football game shown on television. They affect nearly every aspect of the market.

Perhaps its most pernicious aspect is that under the controls, the market is not responsive to viewer preference. Every witness who testified on the matter confirmed that the consumers, the viewers of college football television, receive absolutely no benefit from the controls. Many games for which there is a large viewer demand are kept from the viewers, and many games for which there is little if any demand are nonetheless televised.

Nor are there any redeeming pro-competitive benefits. The controls have not been shown to protect gate attendance, nor do they preserve a competitive balance among the schools. The only benefits from the plan go to NCAA itself, and the less prominent schools whose games would not appear on network television in the absence of the controls. Consumer demand and the free market are sacrificed to the interests of the NCAA administration and its allies among the membership.

The Court therefore concludes that the NCAA controls are unreasonable naked restraints on competition, both by their nature and by virtue of surrounding circumstances which compel the inference that they were intended to restrain competition. It is clear that NCAA is in violation of Section 1 of the Sherman Act.~

DECLARATORY JUDGMENT
AND PERMANENT INJUNCTION

THIS MATTER having come on for a trial on the merits to the Court, and the Court having considered the evidence, pleadings, memoranda and briefs submitted by the parties, and being otherwise fully advised in the premises, and the Court having entered concurrently herewith its findings of fact and conclusions of law,

IT IS ORDERED, ADJUDGED AND DECREED:

(1) The right to telecast college football games is the property of the institutions participating in the games, and that right may be sold or assigned by those institutions to any entity at their discretion;

(2) The contracts for the televising of college football for the 1982-1983 seasons between National Collegiate Athletic Association and American Broadcasting Companies, Columbia Broadcast System and Turner Broadcast System violate Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1-2, and are therefore void and of no effect;

(3) National Collegiate Athletic Association, its officers, agents and employees, shall be and hereby are enjoined from enforcing or attempting to enforce the provisions of the contracts above described and from making any other contract of similar kind or nature in the future;

(4) National Collegiate Athletic Association, its officers, agents or employees, shall be and hereby are enjoined from prohibiting member institutions from selling or assigning their rights to telecast the college football games in which they participate, and from requiring as a condition of membership that those institutions grant to National Collegiate Athletic Association the power to control those institutions' rights to telecast college football games;

(5) The plaintiffs shall recover their costs and reasonable attorneys fees expended in the prosecution of this action, and counsel for plaintiffs shall submit to the Court in affidavit form a statement of their attorneys fees in accordance with the guidelines found in Francia v. White, 594 F.2d 778 (10th Cir. 1979); and

(6) The Court shall retain jurisdiction over this matter for the purpose of monitoring compliance with this order and for the purpose of modifying the relief granted or of granting further relief should circumstances so require.

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NOTES ABOUT THE EDITING OF THIS CASE: *The superscript tilde (˜) denotes an ellipsis. Citations were removed without notation. Footnotes were eliminated. Some text from footnotes was inserted into the main text without notation.*