

Argument for Appellant.

HEGEMAN FARMS CORP. v. BALDWIN ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 27. Argued October 8, 9, 1934.—Decided November 5, 1934.

1. By orders issued under the New York Milk Control Statute dealers were required to pay producers of milk a minimum price per quart and were subject to higher minimum resale prices. Competition made it impossible for the dealer in this case to sell for more than the resale minimum, and the "spread" or difference between that and the minimum purchase price was not enough to cover the cost of its operations. *Held* that upon these facts only, with nothing to show the degree of efficiency with which its business was conducted, there is no ground to conclude that the price limits are arbitrary and therefore in violation of the due process clause of the Fourteenth Amendment. P. 170.
2. The Fourteenth Amendment does not protect a business against the hazards of competition. *Public Service Comm'n v. Great Northern Utilities Co.*, 289 U. S. 130. P. 170.
3. One who complains that regulations promulgated under legislative authority by a state board are unreasonable and oppressive, should seek relief by resisting the regulations before that board or by applying to the board to modify them, before bringing suit. *Petersen Baking Co. v. Bryan*, 290 U. S. 570. P. 172.
- 6 F. Supp. 297, affirmed.

APPEAL from a decree of the District Court, of three judges, dismissing the bill in a suit attacking an order fixing minimum prices under the New York Milk Control Act.

*Mr. Leonard Acker*, with whom *Mr. Samuel Rubinton* was on the brief, for appellant.

The orders are unconstitutional, since the prices fixed were such as to prevent plaintiff from earning a fair return on the present reasonable value of its properties less depreciation.

The operating costs of plaintiff are very reasonable and indicate a well managed and efficient business unit.

Theoretically plaintiff could sell its milk at any price, but actually competition fixed the designated "minimum" as the highest selling price. The "spread" between the purchase price fixed by defendants and the selling price which economic forces fixed at the minimum selling price designated by defendants is insufficient, as the District Court found, to afford to plaintiff a fair return. This, in principle, is exactly the situation in every "rate" case in which a rate is held unconstitutional.

The District Court took the view that this suit presented no more than the case of a milk dealer faced with competition, unable to sell its milk above the price fixed by that competition, and thus unable to earn a fair return. This view overlooks that the statute and defendants' orders took from plaintiff the power it previously possessed to bargain with milk producers as to the purchase price of milk.

It is the ordinary business risk for a vendor to be unable to make a fair return by reason of competition alone and to be forced out of business; but it is an altogether different proposition for the State to intervene and by means of price regulation prevent the vendor from making a fair return and to destroy his business.

The effect of defendants' orders is to force out of business the small dealers and to leave the field to a few large companies, and this result will frustrate the very purpose of the statute.

A State may not properly impose confiscatory rates merely because they will not destroy the entire industry, but will eventually lead to a monopolistic control of the market and a higher price to the ultimate consumer.

The primary purpose of the statute, under which defendants issued their orders, is the protection of the dairy farmers of New York. The resultant monopoly of dis-

tribution in the hands of a few large companies will tend to destroy large numbers of milk producers.

A statute is valid only if "the means selected shall have a real and substantial relation to the object sought to be attained." *Nebbia v. New York*, 291 U. S. 502; *Adair v. United States*, 208 U. S. 161. This rule should apply equally to administrative orders issued under a statute.

No fair analogy is presented between health measures and defendants' confiscatory price-fixing orders.

In testing the validity of a measure which regulates the use of private property, it is the degree of regulation which is the important consideration and not the solitary factor that the law is a regulatory one. *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 415. Even the usual zoning law has been treated as invalid in its application to a particular owner when its operation is such as to deprive such owner of all beneficial use of his property. *Eaton v. Sweeney*, 257 N. Y. 176; *Dowsey v. Kensington*, 257 N. Y. 221.

In every case in which a State is allowed to fix the rates which may be charged for a commodity or a service, the underlying theory is that such fixation of rates is a part of the police power of the State. *Union Dry Goods Co. v. Public Service Comm'n*, 248 U. S. 372, 375; *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389.

Defendants' orders do not, in fact, tend to promote the public welfare, and their effect is to contravene the purpose of the Milk Control Law. But even though they were beneficial to the public instead of detrimental, such fact would not validate them, in view of their confiscatory nature. *Vide* Holmes, J., in *Pennsylvania Coal Co. v. Mahon*, *supra*, at p. 416; *Paducah v. Paducah Ry. Co.*, 261 U. S. 267, 272.

The purpose and effect of the statute are to deprive the milk producers of other States of the competitive advantage over New York producers possessed by them.

The law therefore discriminates against the products of other States and is unconstitutional.

Plaintiff did not waive its right to attack the constitutionality of the statute or of defendants' orders by applying for a license under the statute.

*Mr. Henry S. Manley*, with whom *Mr. John J. Bennett, Jr.*, Attorney General of New York, and *Mr. Henry Epstein*, Solicitor General, were on the brief, for appellees.

The orders are not unconstitutional. The resale price was only a minimum and nothing in the order fixing that price restrained appellant from asking a greater price.

At what point should the minimum price be established? Clearly it should not be fixed high enough to yield a fair return on the operations of the least efficient dealers. That is the highest tolerable point for fixing a maximum price.

Should the minimum be high enough to yield a fair return to dealers of average efficiency? There is something to be said for and against that conclusion. Perhaps the minimum now involved was that high. There is no finding that the appellant is of average efficiency, although there is some material in the moving papers which probably is intended to yield that inference.

Fixing the minimum price at the point where only the most efficient dealers can earn a fair return would seem to be the course most in the public interest. The pressure of competition will then compel efficiency as a necessary condition for survival. We submit that there is no constitutional objection to a minimum price fixed so low. Indeed, we believe that the very nature of a minimum price is such that the failure to fix any minimum price whatever is no constitutional grievance.

Difficulties lie in the way of fixing a minimum resale price high enough to enable appellant to operate profitably, without at the same time compelling other dealers to operate at an outrageous profit.

Essentially, appellant's grievance is against the order fixing a minimum price which it must pay producers for milk. But the power to fix this can scarcely be questioned since *Nebbia v. New York*, 291 U. S. 502. The attack must be upon the reasonableness of the minimum price fixed. Appellant does not support such an attack otherwise than by the inference derived from its own failure to make a profit. We submit that a constitutional case is not made out so easily. Why does appellant infer that its loss is a direct result of only one factor in its costs? Apparently because it is a novelty to have that cost fixed. Appellant does not allege its labor costs or taxes or freight rates as a constitutional grievance.

The statute is not unconstitutional in any matter of which appellant can complain.

We respectfully submit that the appellant should have pursued its administrative remedies provided by statute before seeking the aid of a federal court of equity (*Gorham Mfg. Co. v. Tax Comm'n*, 266 U. S. 265; *Chicago, M., St. P. & P. Ry. Co. v. Risty*, 276 U. S. 567), and that it should not have pretended to be obeying the orders while really disobeying them; its conduct should disentitle it to relief on constitutional grounds in a court of equity.

MR. JUSTICE CARDOZO delivered the opinion of the Court.

In this suit for an injunction, the appellant, a wholesale milk dealer, contests the validity under the Fourteenth Amendment of orders of the New York Milk Control Board limiting the price of milk. A District Court of three judges, organized in accordance with § 266 of the Judicial Code (28 U. S. C. § 380), has denied a motion by the complainant for an interlocutory injunction, and granted a motion by the defendants to dismiss the bill. 6 F. Supp. 297. No testimony was taken, but for the purposes of the two motions certain facts were stipulated and

embodied in findings. Nothing important is there added to what is stated in the complaint. From the final decree there has been an appeal to this court. 28 U. S. C. § 380.

The attempt is made in the bill to state two causes of action, pleaded in separate counts. The first cause of action assails the Milk Control Act (N. Y. Laws 1933, c. 158) as a whole, and was dismissed on the authority of *Nebbia v. New York*, 291 U. S. 502. It has not been pressed in this Court, and must be treated as abandoned.<sup>1</sup> The second cause of action, the only one contested here, assumes provisionally the validity of the statute and assails the orders made under it in their application to appellant. On that head the bill recounts the orders of the Board prescribing a minimum selling price to be charged by dealers to their customers and also a minimum buying price to be paid by dealers to producers. The milk sold by the appellant is known as Grade B. At the time of the trial the minimum wholesale price for milk of that grade in the City of New York was nine cents per quart, except that dealers such as the appellant marketing their product without a well established trade name might sell one cent a quart below the minimum for others. By the same orders the minimum price for fluid milk to be paid to producers was fixed at five cents a quart. A separate schedule of the orders gives the rates for fluid cream. The complainant's license was revoked by the Board after notice and a hearing because of underpayments to producers. The license was, however, to be reinstated upon payment of the difference (\$23,000). The bill prays a decree cancelling the revocation with exemption for the future.

The question on this appeal is whether the allegations of the bill, admitted in the stipulation, but not substan-

<sup>1</sup> The Act of 1933 has been amended and continued by Laws of 1934, Chap. 126.

tially enlarged, make out a cause of action. For an understanding of the complainant's position both in its economic and in its legal aspects, the fact is of critical importance that there has been no attempt by the Board to fix a maximum price in respect of any of the transactions subject to its regulatory power. What is fixed is a minimum only. None the less, the competition among dealers is so keen that in practice the legal minimum is the maximum that the appellant is able to charge. The "spread" between what must be paid to the producers and what can be collected from the customers is so small that it "is insufficient in amount to afford plaintiff a fair return on the present fair value of the properties devoted by it to its milk business less depreciation." This the bill and findings state. They tell us also that the properties have a value of more than \$450,000. They do not tell us whether the appellant ran its business with reasonable efficiency when compared with others in its calling. They do not even tell us whether it was earning a fair return on its investment before the orders were adopted. The omission is the more significant because, according to official records, the "spread" has been increased, instead of being diminished, through the operation of control. Report of the Milk Control Board, March 1934, pp. 17, 18.<sup>2</sup> For all that appears upon this record, a change of the minimum prices would avail the appellant nothing if a corresponding increase or reduction were allowed to its competitors. It might still be driven to the wall without the aid of a differential that would neutral-

<sup>2</sup> "If allowances are made for the additional milk which, because of the tightening-up of the classification for Class 1 milk occurring on February 16, 1934, must be included in Class 1, the milk dealers' spread at this time is approximately 0.12 cents per quart greater than it was just before the Board was created."

This statement in the report is followed by schedules which contain supporting data.

ize inequalities of capacity or power. If different minima would help, the pleading leaves us in the dark as to what those minima should be. There is no statement that a different selling price could be fixed with fairness to consumers, or a different purchasing price with fairness to producers. The appellant's grievance amounts to this, that it is operating at a loss, though other dealers more efficient or economical or better known to the public may be operating at a profit.

A bill of complaint so uncertain in aim and so meagre in particulars falls short of the standard of candor and precision set up by our decisions. *Public Service Comm'n v. Great Northern Utilities Co.*, 289 U. S. 130, 136; *Aetna Ins. Co. v. Hyde*, 275 U. S. 440, 447. True the appellant is losing money under the orders now in force. For anything shown in the bill it was losing money before. For anything there shown other dealers at the same prices may now be earning profits; at all events they are content, or they would be led by self-interest to raise the present level. We are unable to infer from these fragmentary data that there has been anything perverse or arbitrary in the action of the Board. To make the selling level higher might be unfair to the consumers; to make the purchasing level lower might bring ruin to producers. The appellant would have us say that minimum prices must be changed whenever a particular dealer can show that the effect of the schedule in its application to himself is to deprive him of a profit. This is not enough to subject administrative rulings to revision by the courts. If the designation of a minimum price is within the scope of the police power, expenses or losses made necessary thereby must be borne as an incident, unless the order goes so far beyond the needs of the occasion as to be turned into an act of tyranny. Nothing of the kind is charged. The Fourteenth Amendment does not protect a business against the hazards of competition.

*Public Service Comm'n v. Great Northern Utilities Co.*, *supra*, at p. 135. It is from hazards of that order, and not from restraints of law capriciously imposed, that the appellant seeks relief. The refuge from its ills is not in constitutional immunities.

Much is made of a supposed analogy between the plight in which the appellant finds itself and that of public utilities subjected to maximum rates that do not yield a fair return. But the analogy, when scrutinized, is seen to be unreal. A public utility in such circumstances has no outlet of escape. If it is running its business with reasonable economy, it must break the law or bleed to death. But that is not the alternative offered where the law prescribes a minimum. An outlet is then available to the regulated business, an outlet that presumably will be utilized whenever use becomes expedient. If the price is not raised, the reason must be that efficient operators find that they can get along without a change. Either that must be so, or else, as was pointed out in the opinion below, the industry will perish. The bill does not suggest that such a catastrophe is imminent. True, of course, it is that the weaker members of the group (the marginal operators or even others above the margin) may find themselves unable to keep pace with the stronger, but it is their comparative inefficiency, not tyrannical compulsion, that makes them laggards in the race. Whether a wise statecraft will favor or condemn this exaltation of the strong is a matter of legislative policy with which courts are not concerned. To pass judgment on it, there is need that the field of vision be expanded to take in all the contestants in the race for economic welfare, and not some of them only. The small dealer may suffer, but the small producer may be helped, and an industry vital to the state thus rescued from extinction. Such, at any rate, is the theory that animates the statute, if we look to the official declaration of the purpose

of its framers. *Nebbia v. New York, supra*, pp. 515, 516. The question is not for us whether the workings of the law have verified the theory or disproved it. At least, a law so animated is rescued from the reproach of favoritism for the powerful to the prejudice of the lowly. If the orders made thereunder are not arbitrary fiats, the courts will stand aloof.

The statute (N. Y. Laws 1933, c. 158, § 312 [d] [f]) contains provisions whereby a dealer dissatisfied with any administrative order may be heard in opposition, or may apply to the Board afterwards to modify its ruling. This is an administrative remedy which in the one form or the other the appellant should have utilized before resorting to a suit. *P. F. Petersen Baking Co. v. Bryan*, 290 U. S. 570, 575. There is no statement that it did so.

The decree should be

*Affirmed.*

MR. JUSTICE SUTHERLAND concurs in the result.

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ZELLERBACH PAPER CO. *v.* HELVERING, COMMISSIONER OF INTERNAL REVENUE.\*

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Nos. 37 and 38. Argued October 17, 1934.—Decided November 5, 1934.

1. The Revenue Act of 1921, approved November 23, but effective January 1 of that year, did not nullify a return by a corporation for its fiscal year ending April 30, 1921, filed in July 1921; in effect, it adopted and renewed the return retroactively from January 1, and the time within which the Commissioner might make a de-

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\* Together with No. 39, *National Paper Products Co. v. Helvering, Commissioner of Internal Revenue*, certiorari to the Circuit Court of Appeals for the Ninth Circuit.