UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Broadway Delivery Corp. v. United Parcel Service of America, Inc.

651 F.2d 122 (2d Cir. 1981) · No. No. 534, Docket 80-7727 · Decided June 3, 1981

SUMMARY

The United States Court of Appeals for the Second Circuit affirmed judgment for United Parcel Service in an antitrust action brought under the Clayton Act. The court held that the plaintiffs abandoned their Sherman Act § 1 claim by failing to pursue it at trial and that the jury instruction treating a market share below 50% as conclusively insufficient to establish monopoly power was erroneous. The error was harmless because the plaintiffs presented insufficient evidence to establish that UPS possessed monopoly power.

CASE DETAILS

COURT	United States Court of Appeals for the Second Circuit
WRITING FOR THE COURT	Newman, Circuit Judge; Irving R. Kaufman, Chief Judge; Jon O. Newman, Circuit Judge; Charles E. Lumbard, Circuit Judge; Charles H. Tenney, District Judge, sitting by designation
JURISDICTION	Federal
DECIDED	June 3, 1981
DOCKET	No. 534, Docket 80-7727
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from a judgment of the Southern District of New York dismissing, after a jury trial, a complaint seeking treble damages under section 4 of the Clayton Act for alleged violations of sections 1 and 2 of the Sherman Act.
STANDARD OF REVIEW	The court reviewed the legal sufficiency of the antitrust claims and the propriety of the jury instruction; it considered whether the evidence permitted a reasonable jury to find monopoly power and whether any instructional error was prejudicial.
PRECEDENTIAL VALUE	Published Second Circuit opinion; precedential
PARTIES	Broadway Delivery Corp., et al. v. United Parcel Service of America, Inc., et al.

TOPICS

commercial litigation · appellate procedure · standard of review · preservation of error · damages

PRACTICE AREAS

Antitrust · Commercial litigation · Appellate procedure

QUESTIONS PRESENTED

1. Whether plaintiffs abandoned their section 1 Sherman Act claim by failing to pursue it in the district court after receiving an opportunity to litigate it before the jury.
2. Whether the district court erred by instructing the jury that a market share below 50 percent could not establish monopoly power under section 2 of the Sherman Act.
3. Whether the instructional error required reversal of the judgment.
4. Whether plaintiffs presented sufficient evidence of monopoly power to make out a prima facie section 2 monopolization claim.
5. Whether the jury properly rejected plaintiffs' attempted-monopolization claim.

HOLDINGS

1. Plaintiffs abandoned their section 1 claim by failing to pursue it at trial, request a jury instruction, or object to the absence of such an instruction after the district court expressly permitted them to attempt to prove the claim.
2. A jury may not be instructed that a defendant necessarily lacks monopoly power whenever its market share is below a specified percentage, including 50 percent. Market share is evidence of monopoly power, but its significance depends on the entire market structure and other evidence bearing on the power to control prices or exclude competition.
3. The erroneous instruction was harmless because plaintiffs failed to present sufficient evidence from which a reasonable jury could find that UPSNY possessed monopoly power.
4. Although market-share evidence is not invariably required, a plaintiff lacking that traditional proof must present unambiguous evidence that the defendant has the power to control prices or exclude competition; isolated anticompetitive acts ordinarily do not suffice.

KEY QUOTATIONS

> *"The trend of guidance from the Supreme Court and the practice of most courts endeavoring to follow that guidance has been to give only weight and not conclusiveness to market share evidence."* (133)

> *"But when the evidence presents a fair jury issue of monopoly power, the jury should not be told that it must find monopoly power lacking below a specified share or existing above a specified share."* (134)

> *"We do not suggest that evidence of market share is invariably a requirement of a monopolization claim, but when such a traditional form of proof is lacking, the plaintiff must produce unambiguous evidence that the defendant has the power to control prices or exclude competition."* (136)

FACTUAL BACKGROUND

Plaintiffs were local package-delivery firms operating principally in the New York commercial zone. They alleged that United Parcel Service of America and its wholly owned operating subsidiary conspired to monopolize, monopolized, or attempted to monopolize the pickup and delivery of small wholesale packages from 1960 through 1975 through practices including below-cost pricing subsidized by profits from another UPS subsidiary. The UPS entities operated cooperatively under a management agreement, while UPS rates were subject to ICC tariffs and competition from the Postal Service. Plaintiffs presented no evidence of UPSNY's market share and offered deficient evidence concerning the relationship between UPSNY's prices and costs.

PROCEDURAL HISTORY

The district court granted partial summary judgment dismissing the section 1 claim after plaintiffs failed to submit evidence in opposition despite repeated extensions and an opportunity to pursue the claim before the jury. The section 2 monopolization and attempted-monopolization claims proceeded to a jury, which returned a verdict for defendants. The plaintiffs appealed the dismissal of the section 1 claim and challenged, among other matters, the jury instruction stating that a market share below 50 percent could not establish monopoly power.

DISPOSITION

affirmed

CASES CITED

- United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966)
- United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956)
- Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co., 614 F.2d 832, 841 (2d Cir. 1980)
- United States v. United States Steel Corp., 251 U.S. 417, 444 (1920)
- United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2d Cir. 1945)
- United States v. Columbia Steel Co., 334 U.S. 495, 527-28 (1948)
- United States v. Citizens & Southern National Bank, 422 U.S. 86, 120 (1975)
- United States v. Marine Bancorporation, 418 U.S. 602, 631 (1974)
- United States v. General Dynamics Corp., 415 U.S. 486, 497-98 (1974)
- United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953), aff'd, 347 U.S. 521 (1954)
- Hiland Dairy Inc. v. Kroger Co., 402 F.2d 968, 974 n.6 (8th Cir. 1968)
- Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 273 n.11 (2d Cir. 1979)
- Holleb & Co. v. Produce Terminal Cold Storage Co., 532 F.2d 29, 33 (7th Cir. 1976)
- Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 924-25 (9th Cir. 1980)
- Brager & Co., Inc. v. Leumi Securities Corp., 429 F. Supp. 1341, 1347 (S.D.N.Y. 1977)
- American Standard, Inc. v. Bendix Corp., 487 F. Supp. 265, 269 (W.D. Mo. 1980)
- Fox Chemical Co. v. Amsoil, Inc., 445 F. Supp. 1355, 1360 (D. Minn. 1978)
- Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962)

- Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696-97 & n.6 (1962)
- FLM Collision Parts, Inc. v. Ford Motor Co., 543 F.2d 1019, 1030 (2d Cir. 1976)
- Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 275-76 (2d Cir. 1979)
- Chillicothe Sand & Gravel Co. v. Martin Marietta Corp., 615 F.2d 427, 430-34 (7th Cir. 1980)
- California Computer Products, Inc. v. International Business Machines Corp., 613 F.2d 727, 733, 739-43 (9th Cir. 1979)
- Janich Brothers, Inc. v. American Distilling Co., 570 F.2d 848, 855-59 (9th Cir. 1977)
- Hanson v. Shell Oil Co., 541 F.2d 1352, 1357-59 (9th Cir. 1976)
- Juneau Square Corp. v. First National Bank of Wisconsin, 624 F.2d 798, 813 (7th Cir. 1980)
- Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1219 (9th Cir. 1977)
- Jack Winter, Inc. v. Koratron Corp., Inc., 375 F. Supp. 1, 68-69 (N.D. Cal. 1974)