CRCl.1.23

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

HEART OF ATLANTA MOTEL, INC., A Corporation, Plaintiff, v. UNITED STATES OF AMERICA, and ROBERT F. KENNEDY as Attorney General of the UNITED STATES OF AMERICA, Defendants.	CIVIL ACTION NO. 9017
GEORGE WILLIS, JR., WOODROW T. LEWIS, AND ALBERT L. DUNN, Plaintiffs, v. THE PICKRICK RESTAURANT, a Corporation, and LESTER G. MADDOX, Defendants. ROBERT F. KENNEDY, Attorney General Applicant for Intervention	CIVIL ACTION NO. 9028

SUPPLEMENTAL MEMORANDUM OF LAW

I

<u>This case is properly heard by a court of three judges</u>

1. Section 206(a) of the Civil Rights Act of 1964 provides that, whenever there is a "pattern

or practice" of resistance to the rights guaranteed by Title II of the Civil Rights Act of 1964 the Attorney General may bring an action in the appropriate district court, and that, in any such proceeding he may request and obtain trial before a three-judge district court. Because in his complaint in intervention the Attorney General has alleged the existence of a pattern or practice[1/], all of the prerequisites to convening a three-judge court are present in this case.

It is irrelevant how the Attorney General gets into court, so long as once in court his claim is grounded upon the existence of such a pattern or practice. Clearly, the purpose of the three-judge provision is to permit the Attorney General to act quickly and decisively where resistance to Title II amounts to a pattern or practice of discrimination. Thus the three-judge court is directed to handle the case expeditiously, and a direct appeal to the Supreme Court is provided. Effective implementation of this congressional policy requires that three judges should hear a case involving such a pattern or practice whether such a claim is asserted in an independent suit or by way of intervention.

1/ It is alleged that "The acts and practices of the defendants herein alleged constitute a pattern or practice of resistance to the full enjoyment to Negroes of the rights secured by Title II of the Civil Rights Act of 1964, to the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of the Pickrick Restaurant without discrimination or segregation on the ground of race or color, and such pattern or practice is of such a nature and is intended to deny the full exercise of such rights." And the complaint as amended relies expressly upon section 206(b).

2. There are two independent sources of the Attorney General's authority to request intervention in this case. First, section 204(a) permits intervention in the court's discretion, whether or not a pattern or practice exists.

Second, Rule 24(b)(2) of the Federal Rules of Civil Procedure authorizes permissive intervention whenever the intervenor has a "claim" and that claim and the original cause have a question of law or fact in common. Pursuant to Rule 24(b)(2) the Attorney General is authorized to intervene here because there are common questions of both law and fact <u>and</u> the Attorney General has a "claim" arising under section 206(a) because there is a pattern or practice of discrimination. In this sense, it may be said that a Rule 24 intervention here is pursuant to a cause of action created by section 206(a), for Rule 24 allows intervention solely because the Attorney General has a cause of action under 206(a).

Once the Attorney General is in court under either source of authority in a case involving a pattern or practice under section 206(a), the case is one for three judges as authorized by section 206(b).

3. The Attorney General could have initiated a separate law suit in which, upon the same allegations, he would clearly have been entitled to have the matter heard before a three-judge court. If this were done, the common questions of fact and law would have had to be tried once before the three-judge court and once before a single judge. Appeal from the decision of the three-judge court would lie to the Supreme Court while appeal from the single judge court would be to the court of appeals. This is not, we submit, good judicial husbandry. Moreover, it is quite obvious that the difference between the assumed procedure and that actually followed here is one of form, not of substance. To hold that if the Attorney General files a separate suit he is entitled to a three-judge court -- even if it is consolidated with a similar suit filed by a private plaintiff -- but not if he intervenes in such a suit, is just not sensible.

4. The issue whether a three-judge court is authorized in this case is wholly statutory, and is not governed by the Georgia law of intervention. The rights of an intervenor in a federal court are governed, of course, by Rule 24 of the Federal Rules of Civil Procedure. Under Rule 24 an intervenor is, for all intents and purposes, an original party. In re Raabe, Glissman & Co., Inc., 71 F. Supp. 678 (S.D.N.Y. 1947); United States v. United States Fadility and Guaranty Co., 26 F.R.D. 568, 570 (E.D. Ky. 1960); French v. Gapen, 105 U.S. 509, 525 (1881); Rice v. Durham Water Co., 91 Fed. 433, 434 (E.D. N.C. 1899)("[intervenors] are[to be]treated, to all intents and purposes, as if they had been original parties to the suit"). This principle was explained in Hartley Pen Co. v. Findy Pen Co., 16 F.R.D. 141, 153 (S.D. Cal. 1954), where the court stated:

> Rule 24(c) requires the applicant to accompany his motion to intervene by 'a pleading setting forth the claim or defense for which intervention is sought.' Fed. Rules Civ. Proc., rule 24(c), 28 U.S.C.A. Rules 7-11 plainly disclose that only parties may file pleadings; while Rule 13 directs that compulsory counter-claims must, and permissive counterclaims and cross-claims may, be filed by any person entitled to file a pleading. [See: Fed. Rules Civ. Proc. rule 13, 28 U.S.C.A.: 4 Moore, supra, para. 24.01-24.11.] So once intervention has been granted the intervenor becomes a 'party', within the meaning of the Rules, ' entitled to litigate fully on the merits'. Park & Tilford v. Schulte, 2 Cir., 160 F. 2d 984, 989, note 1, certiorari denied, 1947, 322 U.S. 761, 68 S. Ct. 64, 92 L. Ed. 951; Galbreath v. Metropolitan Trust Co., 10 Cir., 1943, 134 F. 2d 569, 570; Rector v. United States, 8 Cir., 1927, 20 F. 2d 845, 859.

* * * *

> Rule 24 'amplifies and restates the present federal practice at law and in equity.' See: Notes of Advisory Committee on Rules, 28 U.S.C.A. following rule 24; 2 Barron and Holtzoff, supra, §591. The limitation of former Equity Rule 37 -- that 'intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding' [see 28 U.S.C.A. App. p. 810 (1941)] -- was not carried into Rule 24. Cf. State of Washington v. United States, 9 Cir., 1936, 87 F. 2d 421, 434-435; Leaver v. K. & L. Box & Lumber Co., D.C. N.D., Cal. 1925, 6 F. 2d 666; King v. Barr, 9 Cir., 262 F. 56, certiorari denied, 1920, 253 U.S. 484, 40 S. Ct. 481, 64 L. Ed. 1025. Nor did Rule 13 carry over the limitation of former Equity Rule 30 that counter-claims, including those in the nature of cross-bills, should be available only to a defendant. See id. at 809.
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> To be sure, the intervenor still must take the main suit as he finds it, cf. Johnson v. Middleton, 7 Cir., 1949, 175 F. 2d 535, 537, but only in the sense that he cannot change the issues framed between the original parties, and must join subject to the proceedings that have occurred prior to his intervention; he cannot unring the bell. Cf. Leary v. United States, 1912, 224 U.S. 567, 576, 32 S. Ct. 599, 56 L. Ed. 889; see 4 Moore, supra, par. 24.16.
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> <u>By amplifying Rule 24 to give the intervenor equal standing as a party to the litigation and by broadening Rule 13 to accord the privilege of counter-claims and cross-claims to all parties, the incidence of intervention has been enlarged and the operative field of ancillary jurisdiction has been broadened</u> (emphasis added).

The <u>Hartley Pen Co.</u> decision points out that the intervenor cannot change the issues framed between the original parties or relitigate issues already heard and determined. <u>Kansas v. Occidental Life Ins. Co.</u>, 95 F. 2d 935, 936 (C.A. 10, 1938). But in all other respects he is as if he had brought the lawsuit himself.

It follows that in the instant case once the United States was permitted to intervene it became as if it had been an original party within the meaning of the Rules. Its rights are such as if it had originally brought the action, including the right to ask for and receive a three-judge court pursuant to section 206(b) if a "pattern or practice" of resistance is involved.

II

During the recent hearing of this case it was suggested that no obstruction to the flow of food and other restaurant products in commerce may, in fact, exist since Negroes who are excluded from restaurants must nonetheless eat at home. It would follow that the same quantity of food moves interstate regardless of the racial exclusion policies of restaurants, and regardless of where it is consumed.

1. It is clear that the quantity of food and other goods moving in interstate channels <u>to restaurants</u> is substantially diminished by the racially exclusionary and discriminatory practices of restaurants. Since many such places refuse to serve a substantial portion of the population, it follows that all told the restaurant industry buys through interstate channels a good deal less food and other goods that it otherwise would. Thus, there is an obstruction, and the Civil Rights Act, when implemented, will certainly remove that obstruction. So much seems clear.

But the suggestion is that, while there may be an obstruction, its only effect is to divert the flow of food and other goods from restaurant to home consumption, without affecting the aggregate quantity shipped interstate. However, a precisely analogous argument has been made and repeatedly rejected in cases arising under federal labor laws.

In the labor cases it has been argued on several occasions that the flow of goods in interstate commerce will not be affected by a labor dispute at a given business establishment because its competitors within the same state will simply increase their production or purchases (as the case may be) proportionately, so as to compensate for the reduced flow to or from the disabled establishment. Hence, it has been contended, there is no resulting net reduction in the quantity of goods moving interstate. But very early in the Labor Board's history the Supreme Court held, reversing a lower court decision accepting such an argument, that "it is not material, as the court below thought, that respondent's customers might be able to secure the same services from other Rhode Island processors if a labor dispute should stop the interstate flow of materials to and from respondent's plant." _Labor Board_ v. _Bradford Dyeing Ass'n_, 310 U.S. 318, 326 (1940), _reversing_ 106 F.2d 119 (C.A. 1, 1939).

Similarly, the Court of Appeals for the Eighth Circuit, considering the contention that a labor dispute in a department store would only "shift" consumption "to competing stores and would not affect the flow of interstate commerce," held that "the fact that the employer's customers might be able to secure the same services elsewhere [is] not material." _J. L. Brandeis & Sons_ v. _Labor Board_, 142 F.2d 977, 980 (C.A. 8, 1944), _certiorari denied_, 323 U.S. 751. And the Court of Appeals for the Fifth Circuit has held that "it is well settled by the highest authority that the availability of a substitute arrangement [for the supply of a product cut off by a dispute at a given plant] is not material, _as a matter of law_, to the issue of [the labor board's] jurisdiction" (emphasis added).

Labor Board v. Mid-Co Gasoline Co., 183 F.2d 451, 453 (C.A. 5, 1950). There are many other decisions to the same effect. e.g., Cudahy Packing Co. v. Labor Board, 118 F.2d 295, 299 (C.A. 10 1941); Pueblo Gas & Fuel Co. v. Labor Board, 118 F.2d 304, 306 (C.A. 10, 1941); Labor Board v. El Dorado Water Co., 195 F.2d 950, 952 (C.A. 8, 1952); Labor Board v. Western Mass. Elec. Co., 120 F.2d 455, 457 (C.A. 1, 1941); Labor Board v. Bank of America, 130 F.2d 624, 626 (C.A. 9, 1942); Labor Board v. Townsend, 185 F.2d 378, 382 (C.A. 9, 1950). Indeed, the only decision since Bradford Dyeing which we have been able to find holding that "alternative sources of supply" are relevant (but even then only with respect to the Board's statutory, not constitutional, jurisdiction), Labor Board v. Reliance Fuel Oil Corp., 297 F.2d 94, 99 (C.A. 2, 1961), was unanimously reversed by the Supreme Court in a *per curiam* opinion. 371 U.S. 224 (1963).

This rule, it should be noted, applies even though it may be thought, as in the case of a department store (the Brandeis case) or natural gas (the Mid-Co case) that precisely the same product or products could be obtained from other sources (which, of course, is not true with respect to the restaurant v. home consumption suggestion).

These decisions are controlling here. What the courts have held is that if the flow of goods to or from a given establishment may be interrupted, it is no defense to say that the quantity will not be diminished, but only diverted. So here, it is no defense to say that the quantity of food moving interstate may not be diminished by the existing obstruction (exclusion of Negroes from restaurants with consequent reduction in the market for restaurant sales), but only diverted to home consumption.

The reason for this rule seems plain enough. The power of Congress to regulate the flow of goods in commerce would be severely hampered by a rule that Congress must show that obstruction at any given place would not be compensated for by increased flow someplace else, or that obstruction of one product would not be offset by increased flow of another similar and competing product. Congress has the power to remove the sources of obstruction to the free flow of goods, and it may do so without considering whether a compensating effect may occur. This is really a social and political, and therefore legislative, not a legal, question.

A good example is found in In the Matter of Steel Corp., 8 F.T.C. 1 (1924), cited and discussed at length in our brief (pp. 40-42). There Congress--through the Federal Trade Commission--acted to stimulate the flow of steel and steel products from the South and West, to the disadvantage of the East, even though the aggregate quantity of steel moving interstate probably remained largely unaffected by the price discrimination which the Commission ordered removed. A regulation of commerce which diverts the flow of goods from one place to another, because Congress believes that such a diversion is desirable, is nevertheless a regulation of interstate commerce regardless of the effect of the regulation on the quantity of goods moving interstate. The Commerce Clause of the Constitution says nothing about the power of Congress being limited to the quantity of goods flowing from state to state.

In sum, as long as there is an obstruction to the free movement of food in commerce--as there clearly is, resulting from a widespread refusal to serve Negroes in restaurants--Congress may act to remove the obstruction where it finds it regardless of the net result on the quantity of goods moving interstate.

2. Even if this were not so--which we believe it clearly is--it would not follow that this Court could find that prohibiting segregation and discrimination would not have a substantial impact upon interstate commerce. In order to find that it would not have such an impact, the Court would have to determine beyond any rational doubt that the same kind and quantity of food and goods sold by restaurants is purchased by Negroes for home consumption. Manifestly, this is not the case. Not only is it apparent that restaurants sell many different kinds of food products that people do not ordinarily--or as often--eat at home, but restaurants also sell and buy additional products which are not used in homes in the same quantity, if at all, such as glassware, silver and table ware, many specialized foods and liquors, and the like. Moreover, restaurants commonly order their food and goods from special restaurant suppliers in other states and within the same state, businesses which specialize in catering to the restaurant trade and not to the retail grocery and food trade. Racially restrictive practices in restaurants have an immediate impact upon such interstate businesses which is not compensated for by purchases of food for home consumption. For this

reason alone it is impossible to say that Congress was not justified in concluding that the racial practices of restaurants do have a substantial impact upon interstate businesses.

3. In any event the "home consumption" objection could, at best, affect only one of the four principles pursuant to which Congress has the power to ban discrimination in restaurants.

a. The objection certainly has no impact upon the power to remove burdens on interstate travelers. See our principal brief, pp. 3-22.

b. The objection can have no effect upon the power of Congress to promote the flow of goods in interstate channels by removing the causes of disputes which obstruct that flow, such as the picketing, boycotting, and counterboycotting which has prevailed in many parts of the country in recent years (see our principal brief, pp. 32-35). These disputes over restarant segregation affect not only restaurant sales but every imaginable variety of retail and wholesale sales. It seems obvious that such disputes cannot be thought merely to divert sales from stores in one town to stores in another, without a net reduction in total sales and hence total interstate purchases. See the testimony of Undersecretary Roosevelt, discussed in the brief at pp. 32-34.[2/]

2/ Secretary Roosevelt quoted one store executive as follows (Hearings, Senate Commerce Committee, on S. 1732, Part 2, p. 700):

(Cont. on following page.)

It is exactly this kind of situation which prompted Congress to enact the National Labor Relations Act in 1930, and it is because of the effect of strikes, boycotts, picketing, and the like upon interstate movement of goods that the Supreme Court sustained that statute. Labor Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), and cases discussed in the principal brief, pp. 23-35. That Congress had these precedents in mind when it enacted the instant statute is evident from the separate Report of Congressman McCulloch, principal House Republican spokesman for the Civil Rights bill, who said:

2/ (Cont. from preceding page.)

> The effect is not going to be confined to the retail stores. It will hit the banks, the office supply concerns, the insurance firms, the real estate interests, and all the rest.

And the Report of the Senate Commerce Committee on S. 1732 quotes the Mayor of Salisbury, Maryland, as testifying (Report, p. 19):

> I am engaged in the wholesale plumbing, heating, and supply business in Salisbury, a family-owned business. We have a branch store--we have seven of them, and one is in Cambridge. Our own particular business is there, we sell to the plumbing and heating contractors. We do not sell to the retail public. Our business there has dropped very substantially, as much as 80 percent off from when it was on its peak, as far as the demonstration.

A national chain shoe store manager in Cambridge had said that after "the freedom riders came into town" his business "dropped and within the next 3 months he was down to less than 40 percent of his quota. He had gone from 165 down to 40 percent on a yearly quota." (Report, p. 19.

(Cont. on following page.)

> Taking the NLRA, for example, there developed a general revulsion against the violence and turmoil that resulted from labor unrest. A continuation could have caused havoc to our political and social structure. At the same time, however, labor unrest was, through work stoppages and slowdowns, producing a recognized impediment to interstate commerce--and thereby the national economy. In the case of NLRB v. Jones and Laughlin Steel Corporation, 301 U.S. 1 (1936) [sic], the NLRA was upheld and the Government was given sanction to take jurisdiction over intrastate businesses which had an effect, even if indirect, upon interstate commerce. Report, p. 14.

The effect of segregation and discrimination in restaurants--which has notoriously been the major cause of social unrest in large areas of the South--upon other kinds of business, with respect to which it cannot possibly be said that the flow of goods in commerce is merely diverted elsewhere--is alone a sufficient basis for Congress to prohibit such practices in restaurants.

2/ (Cont. from preceding page.)

The Mayor of Salisbury also said:

> Definitely the demonstrations have a real effect. Certainly when demonstrations are at their peak, you are not going to take your family, normally speaking, down on the street to see what is going on. You are going to leave your children home. You want your wife to stay home. If you have to go some place, buy something, or do something, you do only the necessities. And if you can you avoid the area that is troubled, you are going to avoid it. It very definitely has an effect.

c. Finally, the diversion argument has no bearing upon the disruption of normal patterns of industrial plant location, convention site selection, and the like, resulting from disputes over restaurant segregation and discrimination. Whether or not food not eaten in restaurants is eaten at home, the failure of industries to locate or expand in the South, of conventions to convene there, of skilled personnel to desire to move there, which result in large part from disputes over restaurant practices, is widespread and without any compensating effect.

Respectfully submitted,

BURKE MARSHALL
Assistant Attorney General

CHARLES L. GOODSON,
United States Attorney