

2 Curtis C. Flood

3 v.

70 Civ. 202

4 Bowie K. Kuhn, et al

5 New York, June 3, 1970
10:00 a.m.

6 (Trial resumed.)

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8
9 THE COURT: Good morning. Please proceed.

10 MR. HUGHES: If your Honor please, the defendants
11 call Mr. Frank Dale as their next witness.

12 F R A N C I S L. D A L E, called as a witness by
13 the defendants, having been first duly sworn, testified
14 as follows:

15 DIRECT EXAMINATION BY MR. HUGHES:

16 Q Mr. Dale, where do you reside?

17 A Cincinnati, Ohio.

18 Q And have you lived in and about Cincinnati all of
19 your adult life?

20 A I have lived there since 1948.

21 Q And will you briefly outline to his Honor your ed-
22 ucational background?

23 A I was educated in the public schools in Ohio,
24 attended Duke University, graduating in 1943 with an A.B.
25 degree. I then served in the Navy and following the war came

back and graduated from the University of Virginia Law School in 1948.

Q And after that did you study law?

A I did.

Q Were you admitted to the bar?

A I was.

Q And have you been a practicing attorney in the State of Ohio?

A Since 1948, yes, sir.

Q Are you still a member of a firm there?

A I am counsel to the firm of Frost & Jacobs in Cincinnati.

Q Is that your own firm?

A Yes, sir.

Q During the course of your professional career have you been active in any bar association activities in the city or in the state?

A I have been active in bar association activities at both the local, state and national level. I served as president of the Cincinnati Bar Association in 1961. I was president of the Ohio State Bar Association in 1965. I have served in the antitrust section of the American Bar Association, particularly on its committee on the FTC.

Q When you became counsel to the firm, what was that,

in 1965?

A Yes, sir.

Q And what else happened in 1965 in connection with your career?

A For some years I had represented the Cincinnati Inquirer which is the morning and Sunday newspaper in Cincinnati. The publisher retired and I was asked by the Board of Directors to become publisher of the newspaper, which I did in October 1, 1965.

Q Are you president and publisher of the paper?

A My title is president and publisher. The newspaper is owned by a stock corporation and so I am entitled as both president and publisher.

Q And have you any connection of any kind with any football club in the City of Cincinnati?

A I serve as part owner and director of the Cincinnati Bengals and, of course, president of the Cincinnati Reds.

Q And are they the local professional football team?

A Yes, sir.

Q Now, did there come a time when you became interested in professional baseball?

A Yes, sir. In late 1966 and early 1967.

Q Prior to that time had you had any interest in the game as a fan?

1 A Oh, yes, an intense interest, an intense interest.

2 Q Going back to boyhood days, I suppose.

3 A Yes, sir.

4 Q And have you always been a Cincinnati Red fan?

5 A Yes, sir.

6 Q Now, would you tell his Honor how it came about that
7 you became involved in baseball in a business way, if I may
8 put it that way?
9

10 A As part of my duties as president and publisher
11 of the newspaper, we undertook a deliberate course of action
12 to become a civic leader newspaper, to lead the city in its
13 expansion economically as well as in its prestige. Begin-
14 ning in 1965, approximately, the city undertook the task
15 of building a new stadium, deeming it important to compete
16 with major cities. Cincinnati was the original baseball,
17 professional baseball team, and Cincinnati has a certain
18 flavor and immense affection for its baseball team. The new
19 stadium was deemed necessary, and they needed public sup-
20 port, and as publisher of the newspaper I was active in the
21 plans for the stadium. In order to finance the stadium it
22 was necessary to have a long term lease from the tenants of
23 the stadium. The previous owner of the Cincinnati Reds,
24 for various reasons, was unwilling to sign a long-term lease.
25 There was at that time the possibility that the previous

owner would move the Cincinnati Reds to another city, and the city was trying to get him to sign the lease and he refused to do so, and at the urging of the city officials and the stadium committee I put together a group of local residents, businessmen, to attempt to buy the franchise from the previous owner on condition that we would sign a 40-year lease to finance the stadium.

We were successful in doing that. We purchased the Reds on January the 9th, 1967, immediately set about trying to get a football franchise, because we needed another tenant, not just one, and ultimately, essentially the same group of men also purchased the football franchise; both the Reds and the Bengals signed 40-year leases.

2 Q Was that an American Football League franchise?

3 A Yes, sir.

4 MR. HUGHES: Your Honor, there is an exhibit
5 in evidence, Exhibit 11. I am looking for it now. Yes,
6 I have it here, your Honor. I would just simply like to
7 call your Honor's attention and Mr. Topkis' attention to
8 the paragraph in that exhibit, Paragraph 2. That indicates
9 the consideration which was paid for the acquisition of
10 the Cincinnati Reds.

11 THE COURT: Be good enough to hand it to the
12 clerk.

13 MR. HUGHES: Yes, sir. It is Paragraph 2.

14 (Handed to the Court.)

15 THE COURT: Thank you, Mr. Clerk.

16 Q Did you acquire that operation by an acquisition
17 of the stock from the previous owner?

18 A Yes, sir.

19 Q Did you in fact enter into the lease for the new
20 stadium?

21 A Yes, we did.

22 Q And the term of that lease is 40 years?

23 A Yes, sir.

24 Q Is that stadium substantially completed?

25 A It is. We expect to play our first game in it

on June 30, this year.

Q And it is to be the site of the All-Star game this year?

A Yes, sir.

Q Having acquired the stock of the prior owner, have you had any expenditures in addition to the consideration you paid for the acquisition of the stock since the acquisition?

A Yes, sir. We have deliberately tried to build up the farm system, we have tried to promote the club to a greater extent, we have increased the staff, the scouting staff as well as the administrative staff, so that we have invested considerable money over and above the purchase price of the stock in order to build the franchise.

Q And can you tell us, Mr. Dale, approximately how much you expended for player development in the year 1969?

A In the year 1969 it was approximately 989, \$990,000.

Q Do you recall what it was the preceding year?

A My recollection is that it was something in the order of \$760,000.

Q And what do you anticipate your expenditures this year?

A I would expect them to run over a million dollars,

perhaps as much as a million two.

Q Were some of the men who went into this acquisition with you also lawyers?

A Yes. There are two other practicing lawyers in our group.

Q When you made the acquisition of the stock, the Cincinnati Reds, were you aware of baseballs' so-called reserve system?

A Yes, I was.

Q Would you tell us just in a general way what your understanding of that system is?

A My understanding then was as it is now that the reserve system was a collection of various documents which contained the rights to reserve a ballplayer. Those documents include the Uniform Player's Contract, the Major League Agreement and the Professional Baseball Rules and the regulations that were issued thereunder and the various relationships between the major leagues and the minor league systems.

Q Does this embrace the right of reservation?

A Yes, right of reservation, right of assignment.

Q The rule against tampering?

A Right.

Q When you acquired your interest, were you and your

1 associates aware of the legal status of organized baseball
2 under the Federal Antitrust Laws?
3

4 A Yes.

5 Q At the time you made that acquisition, what was
6 your understanding of the status of organized baseball?

7 MR. TOPKIS: Objection.

8 Q Legal status of organized baseball.

9 MR. TOPKIS: Objection, your Honor. I see no
10 relevance in this question.

11 MR. HUGHES: May I be heard, your Honor?

12 THE COURT: Certainly.

13 MR. HUGHES: Your Honor, in the Toolson case,
14 the whole burden of the Toolson opinion was that baseball
15 should enjoy this exempt status because of the large
16 amounts of investments that had been made in baseball by
17 reason of the exemption that had been granted way back in
18 the Federal league days, and I think it is relevant to
19 show that down through the years since Toolson in making
20 investments in baseball clubs, that owners have had in mind
21 that special status and have relied upon it and that is what
22 I propose to bring out.

23 THE COURT: Objection overruled.

24 MR. HUGHES: Now may we have the question again?

25 THE COURT: Would you please, Mr. Court Reporter.

(Question read.)

A It was my understanding at that time that baseball had been considered by the Supreme Court to be outside the scope of the antitrust laws.

Q Were you at the time familiar with the so-called Toolson case?

A Yes, sir, I was.

Q You have read that case?

A Yes, sir.

Q And were you familiar with the cases decided by the Supreme Court subsequent to it, the Radovich case and the case involving boxing?

A In a general way I was. I did not pursue the cases following this, but in the course of my examination of the situation at the time we acquired the stock, I was naturally concerned about contingent liabilities that we might be getting into, and I was aware of the fact generally that there had been hearings before Congress, that legislation had been proposed but had not passed. I was aware in a general way of the -- I believe it is the Federal Baseball League case that had been decided years ago, and that the Supreme Court had refused to include baseball. I was aware that in essence the question of whether baseball had been included in the antitrust laws had been left to

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2 pride, a great hurt to our pride, in addition to that, we
3 had a number of Cincinnati ballplayers on the team playing
4 before their home crowd. There was great public acceptance
5 of them and great -- they have great notoriety and they
6 are very valuable to the Cincinnati franchise. In consider-
7 ing whether we should buy the franchise or not, we would
8 want to know, of course, and we investigated whether or not
9 those players would remain with the club, and the reserve
10 system assured that to us and we relied on that.

11
12 There is a tremendous affection for this ball
13 club in Cincinnati. It is one of the smallest if not the
14 smallest market in the major leagues. We have one of the
15 smallest parks, yet we have always enjoyed a relatively
16 high level of support from the fans and we are convinced
17 that this is because of this rapport between the hometown
18 boys coming from high school, through the American Legion
19 teams, through the minor leagues and then coming home to
20 play in front of the hometown crowd.

21
22 So this was one of the major assets we were
23 acquiring.

24 Q Mr. Dale, would you and your associates have made
25 this investment if you did not understand or believe that
baseball had the exemption from the antitrust laws as

1
2 you have described it?

3 A I don't think we would have, no, sir.

4 Q Did you consider the possibility that Congress
5 might remove the exemption? Did you take that into account?

6 A Yes, we did, but in that instance we -- what
7 we were trying to protect ourselves against was a retroactive
8 contingent liability, and in the Congress we did not believe
9 that they would be passing any retroactive legislation
10 that would place a liability for antitrust violation on
11 us in any sense.

12 Q Did you take into account the likelihood that
13 if Congress were to explore the field of legislation that
14 interested parties would be given an opportunity to be
15 heard and state their case?

16 A Yes, I did, and if we were part of that baseball,
17 I expected I would be down there trying to explain it to
18 Congress.

19 Q Mr. Dale, you have given us your understanding
20 of the reserve system. In your opinion, is the reserve
21 system as you understand it to be reasonably necessary
22 for the effective operation of organized baseball?

23 MR. TOPKIS: Objection, your Honor. I don't
24 see that the witness is qualified to express an opinion
25 on that. He has been active in baseball as a part owner

1 and president or something like that for two years. I would
2 think that that would make almost anybody qualified if
3 we applied that test.
4

5 MR. HUGHES: Your Honor, he has not only had
6 that experience, he has been a baseball fan all his life.
7 He is a lawyer and he is the chief executive officer of the
8 Cincinnati Reds, and I think he is in a position, having
9 explored all these things in connection with the making of
10 a very large investment, he is in a position to give a
11 qualified opinion on that question.

12 THE COURT: The fact that the witness is an attorney
13 and in light of what he has disclosed as to his concern
14 and the many details that he had to cope with and bearing
15 in mind that a lawyer brings a concentrated attention that
16 possibly exceeds that of most people to a given problem,
17 I will take his testimony on that score.

18 What is the pending question?

19 (Question read.)

20 A Yes, sir, I believe that it is.

21 Q And without going into it too extensively,
22 can you briefly tell his Honor the reason for your opinion?

23 A My experience as president of the Reds and other
24 interest in baseball has led me to the conclusion that
25 baseball is a unique business, unique even from other pro-

1 fessional sports, and, if I may give you one example of its
2 uniqueness, in the other major professional sports the
3 players come to the major leagues with a certain amount of
4 not only skill, but also great notoriety.
5

6 In basketball you take All American Basketball
7 players. They are known to the public. In football it is
8 the same case. In hockey they are known. In baseball
9 it requires a considerably longer time to bring a player
10 to the point of skill as well as to the point of public
11 acceptance, and those two factors are almost equally import-
12 ant in my view.

13 So that if there is to be a large investment,
14 as we were about to make, we must be assured that there is
15 enough time to get that kind of return from the investment.
16 Therefore, I think it is necessary that there be certain
17 rules, restraints, if you will, both on the players and the
18 owners that produces a balance where this system can work
19 to the benefit of both the owners and the players.

20 And my experience leads me to believe and to
21 know that there are restraints on both sides and that it is
22 a rather delicate balance and my experience leads me to
23 believe that the balance is good and is working. It has
24 within it the makings for the flexibility that is necessary
25 to keep it moving with the times.

MR. HUGHES: Would your Honor bear with me for a moment?

THE COURT: Of course.

(Pause.)

Q Mr. Dale, during the course of this trial there was a witness for the plaintiff, a Mr. Nathan, an economist, and in the course of his testimony, at Pages 432 to 433, he was asked this question:

"Q That tendency that you described" -- namely the tendency of concentration of players into the hands of wealthier clubs under certain circumstances -- "that tendency that you described as being potentially present with the trade system" -- that is, the system of being able to trade players -- "that tendency would be, nevertheless, accentuated, accelerated greatly if the player were now the determining factor rather than the club as to whether he would be transferred to another club?"

And the answer of the witness was:

"No, I don't agree with that, because I think that the owner of a club would be more money-responsive or money-conscious than a player. An owner of a club who is offered say a quarter of a million dollars for the contract of a player will be inclined as a businessman, as an

investor, to look at the monetary reward more exclusively than, in my judgment, would a player who has these other factors: A family, community relationships. So that I would frankly, as an economist, expect the opposite. I would expect that under the contract transferability that there would be more tendency for a concentration of players through the transferability in sale of contract than by the free negotiation."

Do you agree with Mr. Nathan in his answer to that question?

A No, sir, I do not.

Q And will you briefly tell his Honor the reasons why you disagree?

A Mr. Nathan is talking about a baseball of the past and not the baseball as it is today. In the first place, the business investment, the return on the investment, is not the prime reason for the investment. There are many more investments that are much better than getting into baseball, I assure you, so that the incentive of the money is not the prime incentive. The prime incentive of the owners of baseball, whether they are in it as a business or as a community service, which is closer to our situation, is to try to win for the city and for themselves the prestige that it brings, the upsurge of the

1 economy that it brings to the city, and there is the
2 pride that is there.
3

4 That is the prime motivating factor in ownership.

5 Secondly, you no longer are trading players for
6 cash. The selling of players is a thing of the past.
7 You are now trading ballplayers and you are trading skills,
8 The commodity in the market today is skill, not money.

9 And so I do not agree with Mr. Nathan that the
10 owners would be motivated by the desire to get some cash.
11 That is not today's baseball.
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Q It was to try to win the pennant?

A Yes, sir.

Q And the world series.

A Yes, sir.

MR. HUGHES: I have no further questions.

THE COURT: Mr. Kramer.

MR. KRAMER: I have none, thank you.

MR. TOPKIS: Could we have just a minute or two,
your Honor?

THE COURT: Surely. Take your time, please.

(Pause.)

CROSS EXAMINATION BY MR. TOPKIS:

Q Mr. Dale, do I understand it to be your testimony
that baseball club owners are motivated primarily, predom-
inantly by local pride and similar considerations rather
than by the desire to make money?

A My testimony was that some are. All are motivated
primarily by the desire to win.

Q And I suppose then that it would be your testimony
that the Brooklyn Dodgers moved to Los Angeles for sentimental
reasons?

A I don't know all of the reasons why they moved,
but I am certain that the move included that motivation,
yes, sir.