

Supreme Court of the United States

In the Matter of:

----- X
UNITED STATES OF AMERICA,

Appellant,

vs.

CONTAINER CORPORATION OF AMERICA, et al.

Appellees.
----- X

Docket No. 27

Office-Supreme Court, U.S.
FILED

NOV 22 1968

JOHN F. DAVIS, CLERK

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behalf of Appellant

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behalf of Appellees

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- - -

1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 - - - - -X
4 UNITED STATES OF AMERICA, :

5 Appellant, :

6 vs. :

No. 27

7 CONTAINER CORPORATION OF AMERICA, et al., :

8 Appellees. :
9 - - - - -X

10 Washington, D. C.

Monday, November 18, 1968.

11 The above-entitled matter came on for argument at
12 11:20 a.m.

13 BEFORE:

14 EARL WARREN, Chief Justice
15 HUGO L. BLACK, Associate Justice
16 WILLIAM O. DOUGLAS, Associate Justice
17 JOHN M. HARLAN, Associate Justice
18 WILLIAM J. BRENNAN, JR., Associate Justice
19 POTTER STEWART, Associate Justice
20 BYRON R. WHITE, Associate Justice
21 ABE FORTAS, Associate Justice
22 THURGOOD MARSHALL, Associate Justice

23 APPEARANCES:

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Department of Justice
Counsel for appellant

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New York, New York 10005
Counsel for appellees

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P R O C E E D I N G S

1 MR. CHIEF JUSTICE WARREN: No. 27, United States
2 versus Container Corporation of America, et al.

3 THE CLERK: Counsel are present.

4 MR. CHIEF JUSTICE WARREN: Mr. Zimmerman, you may
5 proceed.

6 ORAL ARGUMENT OF EDWIN M. ZIMMERMAN, ESQ.

7 ON BEHALF OF APPELLANT

8 MR. ZIMMERMAN: Mr. Chief Justice, and may it please
9 the court, this case is on appeal from the United States
10 District Court for the Middle District of North Carolina.

11 In 1963 the United States filed a civil complaint
12 under Section I of the Sherman Act alleging that at least since
13 1955 the defendant companies engaged in the business of selling
14 corrugated containers in the Southeastern United States,
15 unlawfully combined to exchange among themselves information
16 as to prices they charged or quoted specific customers for the
17 purpose and with the effect of restricting price competition.

18 The case was submitted to the District Court for
19 decision on the basis of proposed findings, many of which were
20 agreed to, as well as on the basis of extensive depositions
21 taken by the plaintiff of various officers of the defendant,
22 and of exhibits introduced by both parties.

23 The United States asserted the evidence as to the
24 defendant's course of conduct of the eight-year period compelled
25 the conclusion that a combination existed whereby defendants
furnished to one another upon request, information as to the

1 most recent price or current quotes any member of the group
2 was offering to a specific customer.

3 The United States also asserted that, under the
4 facts of this case, such a combination was unlawful because it
5 had the purpose and necessary effect of restricting price
6 competition.

7 The District Court handed down its decision on
8 August 31, 1967. It dismissed the Government's complaint with
9 prejudice, and we accordingly appealed to this court. In brief
10 the District Court concluded that no combination for the
11 furnishing of specific price information was proven. It further
12 found that even with such a combination, it was not unlawful
13 since there was no further agreement among the defendants to
14 use the exchange price information to maintain prices or
15 minimize price reductions.

16 We believe the District Court was wrong, as a matter
17 of law, in not finding that a combination existed, and that it
18 also applied an erroneous legal standard to the question of
19 the legality of the combination.

20 The agreed upon facts described the corrugated con-
21 tainer industry in the Southeastern part of the United States
22 does over \$100 million worth of business each year. There is
23 some 10,000 purchases of corrugated containers in this region.

24 The group of 18 defendants in this case account for
25 90 percent of the shipments, as defendants' brief points out
the four largest defendants account for 45 percent of the

1 business. It is also the fact that the six largest defendants
2 account for almost 60 percent of the business.

3 The number of sellers interested in any given purchase
4 was also limited by such considerations as the geographic
5 proximity of the buyer to the seller's plant, and the suitability
6 of the seller's equipment, and the attractiveness of
7 the order, and the particular product mix then being manufactured.
8

9 The business is essentially a custom order one, with
10 each purchaser indicating the particular specifications of its
11 box requirements. The buyers do not carry inventories, and
12 they must buy for immediate needs.

13 Price is the consideration which determines to whom
14 a buyer gives its business, since there were no quality
15 differences among the products offered by the sellers. A box
16 made to a particular specification is identical to any other
17 seller's box. The industry throughout the period was characterized
18 by chronic over-capacity.

19 The court found that as to each defendant that when
20 it considered it necessary to ascertain from a defendant competitor
21 the most recent price to a specific customer or when
22 to ascertain the accuracy of a customer's report of another
23 competitor's price that information was usually requested from
24 the competitor then supplying the customer.

25 The court also found as to each defendant that when

1 such a request for information as to the most recent price to
2 a specific customer was received that information usually was
3 furnished and it was accurate.

4 After receipt of the information each company was
5 free to do with it what it wished although the findings again
6 show and I cite Finding 28 that "In the majority of instances
7 the recipient quoted or charged substantially the same price
8 as the price given by its competitor in response to its request."

9 This interchange was engaged in throughout the eight-
10 year period except when, for brief periods, four defendants
11 went as one witness put it, "off the air".

12 In such cases, the defendants would neither give nor
13 request the price information.

14 Q Mr. Zimmerman, does the evidence show a uni-
15 formity of prices throughout the industry?

16 A No, it does not, Mr. Justice Harlan, and I think
17 this would enable me to clarify what this case is not about,
18 because it is not about that.

19 For one thing, this case is not about an express
20 agreement. It is about a combination which is revealed by a
21 persistent course of conduct.

22 Secondly, it is not about a claim of specific price
23 fixing, as for example the Government charged in the electrical
24 price conspiracy cases, where in submitting bids on custom-made
25 equipment, as here, manufacturers were accused of conspiring as

1 to who would bid what price. It is not about that. We are
2 claiming a combination that ameliorates the vigor of price
3 competition, that inhibits it, that breaks it.

4 To express the distinction as to the conduct, it
5 was as though the electrical equipment manufacturers in sub-
6 mitting competing bids to public utilities on a custom-made
7 machine, agreed among themselves in order to alleviate the
8 perils of inadvertent price cuts that any time a prospective
9 seller on a piece of business was uncertain as to what a com-
10 petitor was bidding, that information would usually be accu-
11 rately supplied by the competitor upon request, and the favor
12 would be returned at some future point.

13 This is not a case that seeks to outlaw the avail-
14 ability of price information. The Trade Association in this
15 case supplied its members with monthly price trend figures, and
16 would weekly analyze price trend information computed for each
17 defendant and that is not challenged by the Government.

18 Published pricing manuals existed, and those are not
19 challenged by the Government. The defendants had available to
20 them their own cost information, and their own record of prior
21 pricing, and as the findings indicated, prior pricing to a
22 customer tended to be carried forward unless there were sig-
23 nificant cost changes or unless the market conditions altered,
24 and purchases could reveal to competing bidders if they
25 thought it improved competition the bids they had received.

1 Hence, this is not a case that challenges as illegal
2 any acquisition of information needed for intelligent marketing
3 decisions. It is a case which claims the defendants have
4 through the combination, become too precise, too detailed, too
5 knowledgeable about specific plans of each other and it is this
6 precision that inhibits price competition, a conclusion veri-
7 fied in this case by uncontroverted deposition evidence that
8 the parties to the information exchanged regarded it as
9 assurance against unnecessary price cuts.

10 Finally, Mr. Justice Harlan, we do not claim that the
11 agreement froze prices. This industry, according to the
12 findings, has throughout the period in question been charac-
13 terized by over-capacity, a condition which ordinarily makes
14 for a vigorous price competition, that works to adjust capacity
15 to demand.

16 The fact that under the circumstances prices varied
17 and business shifted is not as significant as the uncontro-
18 verted fact that despite the chronic over-capacity new entrants
19 were attracted to the market, an indication that market com-
20 petition was not doing its job of balancing capacity and
21 demand.

22 My task is to persuade you that the course of conduct
23 of the eight-year period evidences a combination, and that this
24 combination is illegal. Because I do not read defendant's
25 brief as showing much heart for the proposition that a

1 combination did not exist.

2 Q Perhaps I missed the point of something that
3 you said just a moment ago, the fact that there were new
4 entries into this business, into the production of fiber-
5 board boxes, this helps your case, you say?

6 A Yes, the fact that there was extensive new
7 entry despite the fact of chronic over-capacity indicates that
8 something is wrong in the pricing. If you had competitive
9 pricing, typically over-capacity would lead to depression of
10 profit and less attractiveness for new entrants into the
11 business.

12 In our judgment the fact that you have new entry
13 despite the chronic over-capacity suggests that something isn't
14 working.

15 Q It is a sort of a conspiracy that promotes
16 competition in?

17 A I beg your pardon?

18 Q It is a sort of conspiracy that promotes
19 competition?

20 A Competition, Mr. Justice Harlan, is intended
21 to allocate resources most properly. It is intended to have
22 people make informed decisions about when to leave the industry
23 and when to build new capacity. That is why we are committed
24 to it. And the fact that you get the distortion here suggests
25 that competition has not been working.

1 Q Well, Mr. Zimmerman, it would be a good idea
2 for you to tell us precisely what it is that you complain of.
3 I have all of these things that you are not complaining of,
4 and it makes me feel pretty comfortable. Now, what is it
5 that you don't like?

6 A Mr. Justice Fortas, you and I are at the same
7 point in my argument. The District Court stated that if a
8 combination existed, it was not unlawful. It appeared to
9 think that the critical question was whether the defendants
10 had a further understanding to use the exchanged price infor-
11 mation to inhibit competition.

12 The court found that each party made an individual
13 decision as to pricing after receiving the information, and
14 decided that no further agreement could be inferred. It there-
15 fore refused to consider the significance of uncontroverted
16 evidence, which the court itself described as showing that most
17 defendants felt that the price information was needed to main-
18 tain prices and minimize price competition that might otherwise
19 exist.

20 And here is my point, Mr. Justice Fortas.

21 We did not claim that in addition to the information
22 exchanged, you needed a further agreement on how to use the
23 information. The proposition we advanced to the court is that
24 when a group of sellers who account for by far the dominant
25 share of the market combined to meet or call one another when

1 there was a substantial doubt as to what some member of the
2 group may be bidding on a particular piece of business, and
3 when they were motivated to such a combination by their con-
4 cern that failure to have such complete and precise informa-
5 tion could lead to price cutting -- even though each party
6 walks away from the meeting with a nominal freedom to charge
7 as he pleases, the necessary effect of a laying the doubts
8 and resolving the uncertainties in this context is to mitigate
9 price competition.

10 Of course, if they had the further agreement as to
11 specific prices, the arrangement would be blatantly and
12 criminally unlawful, but under the circumstances a further
13 agreement is not necessary, unless this be regarded as novel
14 doctrine I refer you to this court's decision in American
15 Column, 257 U.S., at 399, the court again in an information
16 exchange agreement noted that there was the absence of a
17 further agreement as to pricing.

18 Q I thought I had an understanding of this case
19 but I must have been wrong. Were there meetings here of these
20 people?

21 A There were occasional meetings. Most of the
22 exchanges were by telephone, or by oral contact.

23 Q I thought so.

24 A Yes. There were occasional meetings, but it
25 doesn't make any difference whether they meet or whether they

1 meet over the telephone.

2 Q Maybe it doesn't and maybe it does. But you say
3 mostly it was a matter of telephoning, ---

4 A Yes.

5 Q And occasionally there were meetings?

6 A There was communication.

7 Q Were these meetings under the auspices of a
8 Trade Association, or pursuant to agreement, or what are you
9 referring to?

10 A We are talking about a course of conduct here,
11 and in terms of the exchange of information this is simply a
12 course of conduct in terms of the telephone calls and the
13 occasional meetings which I suppose happened after Trade
14 Association meetings ended. This was a course of conduct that
15 tipified this industry over the eight-year period covered by
16 the complaint, and apparently it preceded the complaint.

17 Q Your complaint is that at these meetings or in
18 these telephone conversations --

19 A In the telephone calls, yes.

20 Q -- when a competitor or one member of the
21 industry, one member would tell another what it had charged
22 a particular customer?

23 A No, it is more complicated than that. A com-
24 petitor would ask the other competitor, "What is your price to
25 'X' whom you are now supplying?"

1 Q What does that mean, what has been your price?

2 A No, it includes -- there are two types of price
3 information generally that were supplied. The last quoted
4 price or a current quote, it varied from competitor to com-
5 petitor, but the point is that the information requested was
6 readily understood as indicating the current price. Certainly
7 a current quote indicates the current price. The last sale
8 quote in this industry is a very good indication of the current
9 price, because of the finding, that there was a persistency
10 of prior prices. If a company had been supplying a customer
11 at a given price, it typically, barring certain changes in the
12 industry, would requote that price.

13 So that this information, when exchanged, was mean-
14 ingful to the parties asking it.

15 Q Did this go beyond the 1940 consent decree?

16 A Yes, the 1940 consent decree was not a per-
17 missive decree, but the 1940 consent decree spoke of past
18 prices, and in this respect I think it went beyond the
19 Section 3 of the 1940 consent decree.

20 Q That decree did permit, what was it, seven of
21 the -- no nine of the defendants here?

22 A I believe eight defendants gave only their most
23 recent price rather than a current quote, but as I indicate
24 that most recent price is readily translatable, and, of course,
25 that decree didn't permit, it simply indicated its limitations.

1 Q To the extent that it did, you are charging
2 communication of the most recent price?

3 A Yes.

4 Q And then you are charging them with doing
5 something that was expressly permitted by the consent decree,
6 these particular defendants?

7 A As the court below points out the consent decree
8 does not repeal the anti-trust laws. It simply indicated what
9 the limitations of that decree were.

10 Q But the consent decree does something, doesn't
11 it?

12 A Well, it was limited -- designed to limit the
13 Trade Association here to the activities permitted by Maple
14 Flooring, and indeed that is what they did. They exchanged
15 all of the information that Maple Flooring permitted them to.
16 The Association did that.

17 Q You are saying that they did something beyond,
18 Maple Flooring, something beyond the exchange of information?

19 A Exchange of information as to past and closed
20 transactions.

21 Q You say they did something beyond that?

22 A Yes.

23 Q Did it go as far ---

24 A It included current information.

25 Q -- as to what they were going to charge?

1 A In the case of some defendants we have explicit
2 evidence that they gave current quotes, that they now have
3 to a purchaser.

4 In the case of the closed quotes, the practice in
5 this industry was such that this could be readily assumed to
6 give a very good indication of what the next quote would be.

7 Now I think that the court below failed to look at
8 the uncontroverted deposition evidence, because it misconceives
9 the teachings of the prior cases. The prior cases don't say
10 that you need an additional agreement. The prior cases say
11 that the additional agreement can be the missing link, and I
12 quote the American Column, the missing link the absence of the
13 agreement on how to use the prices supplied by the disposition
14 of men to follow their most intelligent competitors. It is
15 to make the most money possible, and by the system of reports
16 which makes discovery of price reductions inevitable and
17 immediate.

18 To illustrate what the uncontroverted deposition
19 evidence indicated, I would like to refer you to page 32 of our
20 brief, where we have the following colloquy:

21 "Q Were you ever requested for information by the
22 same competitors?

23 "A Yes, sir.

24 "Q What would you do on these occasions?

25 "A We would give them the information, Mr. Bernstein.

1 If I am selling a box for \$1 and I don't give you the informa-
2 tion, you got to guess at my price, and I don't want you
3 guessing 68 cents of my dollar price. If you are going to cut
4 it, I would rather you cut it a penny, to 99, and don't make
5 me look like an idiot, that is why Dixie Container gives prices "

6 Other officials testified that the exchange of
7 information prevented destructive price competition, avoided
8 the necessity of pricing as low as he was willing to go.

9 The District Court erroneously, because it insisted
10 on a further agreement, ignored this evidence. But even if we
11 didn't have this evidence, we think that the necessary affect
12 here where you have information requested at times of un-
13 certainty by members of a relatively small group of sellers,
14 six of whom did almost 60 percent of the business, under cir-
15 cumstances where self-interest would dictate minimization of
16 the rigors of price competition, and where the buyer's demand
17 was fixed, we think that under such a situation so long as
18 pricing was clearly visible to one another, so long as any
19 uncertainty was avoided, it would not pay anyone substantially
20 to cut prices, since the others could know of and match the
21 cut, and the share of the business would be apt to remain the
22 same at a lower profit.

23 The individual self-interest of each participant could
24 be relied upon to mitigate competition. Once the combination
25 to exchange information was in effect, and predictably, and

1 this is important, evidence showed and the court found that
2 in the majority of instances the recipient of the information
3 in fact quoted substantially the same price it had received.

4 The District Court stresses the fact that the infor-
5 mation exchanged was for the purpose of enabling informed
6 marketing decisions, but the court treats informed decision
7 making with an undiscriminating reverence, and linseed oil
8 and American Column shows the dangers of over-specificity on
9 current prices.

10 The point is that but for the information exchanged,
11 occasions would have arisen when the defendants would have
12 been slightly in the dark as to how low they would have to bid.
13 These are the occasion when the buyers determined it is not in
14 their self-interest to educate the bidders as to the precise
15 state of the competition.

16 On those occasions, but for the combination, the
17 competitors would have consulted their own costs and the
18 extensive general price information available to them, and
19 submitted a price that warranted them a profit.

20 Defendants argue that without the information they
21 may have bid too high but they had a good idea of the level of
22 prices, and if they bid too high the buyer would probably tell
23 them and in fact the court found that many buyers gave high
24 bidders a second chance to meet the low price.

25 It is not in the buyer's interest by being silent to

1 induce high price. He is interested in inducing low prices.
2 Indeed, if a want of specific information, a serious risk
3 existed that the uninformed seller would bid too high, one
4 wonders why each competitor assisted his colleague to avoid
5 such a mistake.

6 Q I am sorry to interrupt you again, but would you
7 tell us just what information, if any, as to price, you believe
8 that these companies could lawfully exchange and what informa-
9 tion they could not and as to the exchange of which you are
10 here complaining?

11 A Very simply, Mr. Justice Fortas, they could and
12 did exchange through their Trade Association information as to
13 past pricing behavior in the industry.

14 Q I don't understand that. What does that mean?
15 Does that mean past prices?

16 A At every ten days they would compute what the
17 prices had been?

18 Q Average prices?

19 A Average prices, the previous week, average
20 prices with some breakdown according to region, and some break-
21 down according to type of box.

22 Q And you distinguish between that and prices
23 to individual customers, is that your point?

24 A Yes, I distinguish between that and prices to
25 individual customers.

1 Secondly, they could receive from the buyers, infor-
2 mation as to what their competitors were selling, if the buyer
3 wanted to give it to them. We have no objection to that.

4 Thirdly, they could publish to the world their price
5 lists and we have no objection to that, because price lists are
6 general, and people can discount from price lists in specific
7 cases.

8 It is when they call up to one another and agree
9 upon the exchange of information as to the specific price to
10 a specific customer.

11 Q I thought you said you weren't charging an
12 agreement here?

13 A Yes, we are charging a combination to exchange
14 information, an agreement to exchange information.

15 Q I thought you said deduce from a course of
16 conduct?

17 A Yes, well one can deduce an agreement or a
18 combination from a course of conduct.

19 Q I understand that. Are you charging an agree-
20 ment or a course of conduct?

21 A We are charging a combination. The language
22 of the complaint is a combination by agreement to exchange
23 prices. That is the language ---

24 Q I agree.

25 A That is the language, or understanding.

1 price list. Q And what you object to is that these prices
2 were prices to individual customers in individualized trans-
3 actions?

4 A And were current.

5 regarded. Q And were current instead of say 10-days old?

6 A Right. Current, either because they were current
7 quotes, or current because they were last sale transactions
8 which in the context of this particular industry was a very
9 good indication of what the seller who gave that information
10 would next charge.

11 Now, we argue that the buyer would not ordinarily
12 act against his self-interest and by remaining silent for
13 sellers to bid too high, and we think that as this court has
14 recognized, extensive and specific information on current
15 price is available to a relatively small group of sellers,
16 buying for the same market, will result in mitigation of
17 competition.

18 The agreement here, the combination, the under-
19 standing, evidenced by the course of conduct over eight years
20 and before, can be understood by a seller's desire to avoid
21 the possibility that his opponent if kept in the dark may come
22 in at a lower price, and again I note the explicit testimony,
23 which revealed this, and which I referred to earlier, and the
24 court's finding that in most cases, in fact upon receiving
25 information, the recipient quoted the same price as the

1 price furnished.

2 I would like to turn for a moment to the question
3 of whether there was a combination.

4 The court below seemed to think that this could be
5 regarded as unilateral conduct, as in theater enterprises.
6 But we are not dealing with unilateral conduct such as a
7 refusal to deal. There were two parties to each request, and
8 each answer.

9 Furthermore, the District Court itself referred to
10 an implied understanding that by giving the information one
11 gets the right to request the information and indeed I read
12 appellee's brief, on page 13, to concede that.

13 Hence, the conduct is not only bilateral, joint, it
14 is interdependent, one simply doesn't do that without reliance
15 on what the others are doing. This is evidenced by the fact
16 that when a company went off the air, it went off the air both
17 ways. It didn't continue furnishing information. It neither
18 furnished nor requested information.

19 The District Court was also misled by the fact that
20 requests varied in frequency, that information was supplied in
21 different forms, and that defendants retained the freedom
22 to stop furnishing information. The variations in frequency
23 merely meant that the agreement worked when it had to; namely,
24 in those occasions when there was uncertainty.

25 That is where the buyer wasn't talking or wasn't

1 being accurate. The different forms of the information, as I
2 tried to explain to you, Mr. Justice Fortas, did not make very
3 much difference because with the manuals that existed here,
4 and with the practices of the trade, the information was
5 readily translatable, and we can't assume that the parties here
6 were engaged in a useless exchange of stale information.

7 Finally, the fact that each company maintained its
8 freedom to furnish information was another way of stating that
9 it retained the right to depart and go off the air. The fact
10 that they usually furnished information rather than always
11 furnish information does not mean that there was not a course
12 of conduct here.

13 Such usual conduct over an eight-year period is
14 evidence enough of a combination, even the most explicitly
15 conceived of conspiracy does not operate to perfection.

16 Thank you.

17 Q Mr. Zimmerman, as I understood you earlier in
18 the argument, you took the position that the history of over-
19 production in this industry, and the history of new entries
20 into it, somehow helped to establish your case in this specific
21 restraint of trade?

22 A We are not relying on it, Mr. Justice Stewart.

23 Q I thought you were.

24 A No, I was saying that it confirms. We are
25 arguing that the necessary effect here is to inhibit price

1 competition.

2 Q Is in restraint of trade?

3 A Yes, ---

4 Q The new entry and the over-production. Now
5 how about the history of constantly lowered prices?

6 A To be expected when you have over-capacity, but
7 the point is that the adjustment isn't being made properly.

8 Q I don't quite understand how that -- it may be
9 too bad, but how does it establish a restraint of trade?

10 A You establish a restraint of trade in this type
11 of case when you assume that the necessary effect -- look, the
12 purpose of this if you accept the Government's view, was to
13 avoid unnecessary price cutting, inadvertent price cutting due
14 to ignorance of what the buyer is getting.

15 They, therefore, enter the combination, if you
16 accept our view. The combination provides the precise infor-
17 mation which avoids that uncertainty. We argue under those
18 circumstances the necessary effect is to ameliorate, and not
19 to end price competition.

20 There are many cases here in which the buyer would
21 reveal the price, and there would be competition. There was
22 ample price information to the parties, so that the economic
23 forces at work would be working but the point is it was not
24 working as it should have, and this is evidence, we think,
25 although I am not relying on it, by the fact that you have

1 chronic over-capacity new entry.

2 Q Economically if the buyer reveals the price,
3 or if another seller reveals the price?

4 A Because you deprive by having the sellers agree
5 with one another that they will give the price if the buyer
6 doesn't, and you will deprive the buyer in a situation where
7 he probably needs it of a bargaining tool, which is namely
8 silence.

9 That is the difference.

10 Q Thank you.

11 MR. CHIEF JUSTICE WARREN: Mr. Seymour, you may
12 proceed.

1 ORAL ARGUMENT OF WHITNEY NORTH SEYMOUR, ESQ.

2 ON BEHALF OF APPELLEES

3 MR. SEYMOUR: Let me in the few minutes just try to
4 summarize the situation as I see it as a result of Mr.
5 Zimmerman's argument.

6 This case, all of the respondents have filed a
7 common brief in this case because the question was common to
8 all of them. The common denominator was that all of the
9 defendants from time to time, when they couldn't get the
10 information from their own records and they didn't trust the
11 information when they got it from the buyer, would call up
12 another manufacturer and ask him for his last price.

13 This was done by telephone and this is the universal
14 practice which is challenged in this case, and the Government
15 says, on that fact alone, and the speculation that people
16 would not cut their prices any more than they had to, we have
17 established a combination or violation of the law.

18 Now the meetings that counsel has talked about, as
19 your Honors will find, are a few small trade gossip meetings
20 involving three or four of the defendants, and not challenged
21 as illegal and not part of this practice at all. They were
22 just thrown in for color and the practice was, this tele-
23 phoning practice, which I have referred to, now Mr. Zimmerman
24 said that after they telephoned, the fellow who got the
25 information was nominally free to go about his business.

1 It is stipulated and it is found that everyone of
2 the prices fixed was fixed in the individual judgment of the
3 seller, in his business judgment alone. He wasn't nominally
4 free. He was free, and he exercised that freedom, and there is
5 not a word of proof in this case that he was under any re-
6 straint or under any coercion.

7 Now I will come after recess to the precise manner
8 of competition, and the fact that there was wholesale price
9 cutting in this industry, and the prices went down, and the
10 prices varied, and the people were taking away customers all
11 of the time from other people and they were not nominally free,
12 they were free.

13 That is the heart of it.

14 What is the Government really challenging here? The
15 Government is really challenging the Maple Flooring decision
16 under the guise of not challenging it by saying that when there
17 is an exchange of price information or when there is price
18 information furnished, and the word exchange is not an accurate
19 one, because there wasn't an exchange here, each company some-
20 times called another company and got information, so in that
21 sense there was an exchange.

22 What they are really saying is that such a practice,
23 one not disapproved, not specifically disapproved in the
24 consent decree which has been on the books for 28 years and
25 which everybody has relied upon, that such a practice is now

1 per se unlawful, and that the court ought to so declare,
2 because this case was tried on a stipulation, the findings
3 were largely agreed to, and where the findings weren't agreed
4 to they were based upon documents or other stipulation, and
5 so the Government is coming in and asking the court somehow
6 to review, not just ordinary findings of a District Court, but
7 to sort of renegotiate the stipulation.

8 I submit that when your Honors look at the stipulation,
9 and the findings, you will find that the conclusion that the
10 District Court reached was inescapable on this record.

11 Now, if there is a case, some other case, in which
12 there is supplying of price information, and some kind of an
13 agreement as to the prices, some kind of a stabilizing of the
14 prices, some kind of a uniformity of the prices none of which
15 were present here, let them bring such a case, and give this
16 court and the Trial Court the economic basis which this court
17 has insisted in White Motors and others is essential if it is
18 to expand the group of per se violations.

19 This is not a proper case for expansion.

20 So that is the summary of our position, and I will
21 just say this in addition before the lunch recess, that this
22 was a practice followed by the 18 defendants in this case,
23 those in existence at the time of the consent decree by them
24 and by their successors, large and small, and it was regarded
25 as vital to their operation to know what the price alternatives

1 of buyers are. That is stipulated, and that is agreed, in the
2 agreed findings. This is vital information, and it is stipu-
3 lated as to each company that the company needed the informa-
4 tion in order to compete.

5 This was a highly competitive business, as your
6 Honors will see when you see the charge.

7 Q That would apply to everything to all of our
8 economy, wouldn't it, Mr. Seymour, that they need price infor-
9 mation or price information from your competitor is useful?

10 A Otherwise you are asked fire a cannon without
11 knowing where the target is. And I submit that the idea that
12 our great economy has been built by a balancing demand and
13 supply into a position where it can't grow, shouldn't grow is
14 a kind of fantastic approach to the problem.

15 MR. CHIEF JUSTICE WARREN: We will recess now.

16 (Whereupon, at 12 o'clock noon, the Court recessed,
17 to reconvene at 12:30 p.m. the same day.)

1 AFTERNOON SESSION

2 (The oral argument in the above-entitled matter was
3 resumed at 12:30 p.m.)

4 MR. CHIEF JUSTICE WARREN: Mr. Seymour, you may
5 continue your argument.

6 ORAL ARGUMENT OF WHITNEY NORTH SEYMOUR, ESQ.

7 ON BEHALF OF APPELLEES (cont.)

8 MR. SEYMOUR: May it please the court: Perhaps just
9 a little more on the nature of this industry.

10 As I think I said, this case challenges a trade
11 practice which goes back to at least 1940, when the consent
12 decree, which did not enjoin the dissemination of information
13 on past transactions was entered, there are 18 of the 51
14 companies in the Southeastern part of the United States
15 involved in the case.

16 The number of companies and the number of plants has
17 grown, because the business of the customers has grown. There
18 has been an enormous increase in the furniture business in the
19 Southeast, and that is one of the main purposes of the use of
20 these containers.

21 The containers are used to ship furniture, fruit,
22 cigarettes and other things. While they are made to specifi-
23 cations, any one of the companies can make them. There is no
24 published market. There are few published price lists, and
25 therefore in order to get information to enable a company to

1 compete, it has to get it somewhere, and the court found that,
2 and stipulated, that it was vital to have information about
3 various alternatives, here, as elsewhere, and the usual method
4 of getting information was to -- if the seller had sold the
5 purchaser before, to look at his own record, and if not, ask
6 the potential customer what he was buying for, and usually the
7 customer supplied that information.

8 Obviously, it was to their advantage to do so, and if
9 not that, then occasionally, and usually according to the
10 findings where they had some doubt about information which was
11 supplied by the customers, did the practice of telephoning and
12 getting information from competitors.

13 But when the information was obtained from com-
14 petitors, while the findings indicate that in a majority of
15 cases the new potential supplier would bid the same amount
16 that he understood was being bid by his competitors, if he
17 couldn't get the business that way, he would cut the price, and
18 if he cut the price, the old supplier would cut the price,
19 and it happened all the time.

20 The findings indicate that price competition was
21 rife, that it was a highly competitive business, and that
22 this practice of price-cutting went all the time, and I am
23 going to show you some affirmative evidence, or tell you about
24 some affirmative evidence before I get through.

25 Q Mr. Seymour?

1 A Yes.

2 Q There are 18 defendants here, were there?

3 A Yes.

4 Q And those are the ones that constitute the
5 90 percent of the business?

6 A Yes.

7 Q Is this same arrangement open to the others,
8 the other 53, and do they participate in the same thing as the
9 18?

10 A I can't answer that, but I have no reason to
11 db out that it is. I don't know whether it is or not. The
12 case was brought charging only these 18. Nobody ever inquired
13 about others, but I can assume that an industry practice of
14 this character is probably followed by everybody.

15 The consent decree was relied on by everybody, and
16 probably the practice was followed by everybody, but I can't
17 answer your Honor specifically.

18 I said before recess that this case was stipulated
19 largely on stipulated facts, and I think it is important to
20 realize that, because it is upon the stipulation and the agreed
21 findings that the court below largely based its judgment.

22 And in this case Mr. Lewis Bernstein, who is here,
23 handled the case for the Government in the lower court, and
24 handled it in a very statesman like fashion. He is a very
25 able and tough adversary.

1 The court urged the parties to try to get together
2 on stipulations instead of taking the court's time with a lot
3 of miscellaneous testimony and exhibits, and after Mr. Bern-
4 stein had deposed 34 representatives of the defendants, they
5 proceeded to the stipulation table, and after some months
6 there, the stipulations which are in this record were arrived
7 at.

8 I submit that it is not an occasion for looking into
9 little fragments of the deposition, as Mr. Zimmerman did in
10 one reference this morning and saying, "Well, look at this.
11 Here the Government has stipulated the facts, the basic facts,
12 the broad sweep of facts."

13 But I submit there is no occasion for the Court to
14 have to revert to these depositions, but if you do, you will
15 find as in most other depositions or testimony of 34 witnesses,
16 that some say one thing and some say another, and it is out
17 of the total of this that this stipulation was arrived at.

18 You can find a little fragment here or a little
19 fragment there that will support almost anything, but you can't
20 find any that would show there was any agreement on price, or
21 that anybody was constrained as to what price he should charge
22 and didn't have full freedom of action, and that, I submit
23 is the key to it.

24 Q Mr. Seymour, I suppose that if there were price
25 uniformity or price stability of this industry, that the fact

1 of the exchange of price information would be some evidence
2 of a combination, in a conventional anti-trust figure?

3 A I have no doubt it would be pointed to as some
4 evidence of that.

5 Q It could be relied on as some evidence of that.
6 Now the Government admits, as I understand it, that there is
7 no indication of price stability here. What they say is, as
8 I get it, is that there would have been more vigorous com-
9 petition than if there had not been this exchange of
10 information.

11 Is that your understanding of the theory?

12 A Mr. Zimmerman, if I understood him, said "If
13 you assume the effects, you can establish the restraint," and
14 that is the Government's case.

15 They assume, without any proof, that it has had this
16 effect upon competition, and upon that assumption they say that
17 it was a combination in the restraint of trade.

18 The trouble with it is, there is no such proof and
19 so it is only a matter of assumption. Now, just on the fact
20 of stipulation, one other thing which I think is significant,
21 these stipulations were arrived at after the Government had
22 a Grand Jury investigation, which did not result in an indict-
23 ment, when they called many witnesses and had gotten thousands
24 of documents, and we supplied, the defendant supplied the
25 list of 10,000 customers, they apparently found no customer

1 who complained about this practice because no customer was ever
2 called and there is no testimony or stipulation showing what
3 a customer would testify on this subject.

4 And I submit that the case is not a proper one for
5 the court to go behind the stipulations as if the parties had
6 made different stipulations.

7 Q Mr. Seymour, did I understand Mr. Zimmerman to
8 say that in addition to the stipulation, there was an agreement
9 upon many of the findings of fact?

10 A Yes, if your Honor will look in Volume I ---

11 Q I notice here at page 483, there are 326
12 findings of fact.

13 A The agreed findings begin at page 55, and run on
14 for 150 pages.

15 Q Those are the agreed findings?

16 A Those are the findings with an indication in
17 the margin as to whether they were agreed or not agreed
18 and the agreed findings are the basis for the Trial Court's
19 findings, and those agreed findings, in turn, were based upon
20 the underlying stipulation which is also in this record. There
21 are several stipulations.

22 Q Did the District Court make some findings?

23 A Yes, if your Honor will look at that agreed set
24 of findings, you will see some matters which are underlined,
25 where the parties did not agree, and there, in some cases, the

1 court based its conclusion on the stipulation or documents of
2 record, made independent findings.

3 But the critical findings, the dispositive findings,
4 here, stem from the stipulation in the agreement, I think.

5 If your Honors will look at the sweep of those agreed
6 findings, and the sweep of the practice of price competition
7 and the need for this information and how it was used, you
8 will see one other thing, which I ought to mention at this
9 stage.

10 If a supplier had supplied the customer before, he
11 could find out the price from looking at his own records, the
12 price he charged.

13 Now, one did not always adhere to the same price, and
14 he couldn't rely on the fact that another supplier would adhere
15 to the same price, because it is also stipulated that if there
16 were charges in costs, or in supply, or changes in specifi-
17 cations, those prices would not be adhered to.

18 So you cannot take it that, just because the price
19 was charged once, that it will still be the same charge.

20 After the records of the supplier as a source, the
21 supplier would then ask the customer and the customer would
22 supply information, sometimes information which the supplier
23 doubted, but usually supplied information.

24 The important part of this is that it didn't make
25 the slightest difference where the information was obtained as

1 to how the seller got the information behaved. He behaved
2 exactly the same way in seeking further business whether he
3 got the information from his records or from a customer, or
4 from a competitor, and, therefore, to say that any of the
5 alleged detects stem from this exchange of price information
6 seems to me to be without foundation.

7 Now, I am going to push on here and say only that,
8 as we said in our brief that I think the Government's statement
9 of the questions really rather bely the fact that this record
10 was stipulated and bases it rather on some fragments here and
11 there, I said before recess that, really, there was a common
12 denominator here of the practice which was challenged, which
13 was the practice of getting information by telephone, and then
14 supplying it in due course when it was asked for on a wholly
15 different transaction.

16 Mr. Zimmerman said this morning that in some cases
17 people gave not only past transaction information, but current
18 quote information.

19 Now, it is clear from the findings that only a part
20 of all the defendants ever supplied quote information, but the
21 case was tried on the assumption that it was the common
22 denominator information that was the thing that bound all
23 these defendants together.

24 Therefore, I submit that there is no occasion to
25 explore separately the few cases where there was quotation

1 information supplied.

2 If that made a difference, the court would have to
3 dispose of the case by dismissing as to some and not as to
4 others, and what the Government was trying to do, as it is
5 trying to do here, is to hold all of the defendants together
6 on the exchange of information about past transactions.

7 And the fact that some of the defendants might have
8 interpreted that phrase differently I think does not affect the
9 basic legal position.

10 Now on the question of combination, I won't take any
11 real time on that. I must say that the cases don't clarify
12 entirely what is a combination and what is a conspiracy, or an
13 agreement.

14 Here, what happened was that a supplier would call
15 up another supplier and ask for some information, knowing that
16 in due course that supplier might expect to have the courtesy
17 to reciprocate, not in connection with that transaction, but
18 in connection with a wholly different transaction, and that is
19 all there is in the way of consensual basis, for whatever you
20 want to call this.

21 Each supplier at some time asked, and then as a
22 matter of reciprocal courtesy at some other time supplied some
23 information, sometimes a few requests, sometimes more requests,
24 and so you have a sort of a situation of reciprocal commercial
25 courtesy at work.

1 Now the Government says that is enough to make it
2 a combination. It seems to me not to fit any of the existing
3 authorities on that subject, but it isn't vital, because if it
4 was a combination, it was not a combination to restrain trade,
5 because it did not result in restraining in any degree the
6 price which any supplier would get for his product.

7 It did neither coerce nor restrain, and so, however
8 you break it down, if you say it was a combination, it was not
9 a combination in restraint of trade. My own view is that the
10 District Court was quite right on this record in concluding
11 that this was sort of like the mutual courtesies which we all
12 do each other and which cannot be regarded as a combination
13 just because we expect them we we give them.

14 Q Mr. Seymour, is there anything pro or con in
15 the record as to the small suppliers that are not in this group?

16 A I think not, but there are small suppliers in
17 the group.

18 Q But is there any that they were denied this
19 information or anything?

20 A No, nothing of the kind.

21 Q One way or the other?

22 A No, it is absolutely neutral on that point.

23 Q Mr. Seymour, is there anything in the record on
24 the price history in the industry? Is there a tendency for
25 prices to be uniform?

1 A May I at this time ask those of your Honors
2 who want to look at a chart or two, to look at Volume 3,
3 which contains significant information. The Government put
4 in no proof about the course of price history, and the de-
5 fendants confronted with this kind of a record did their best,
6 and these charts in Volume 3 show it.

7 Now the first chart in Volume 3 shows how prices
8 of everything else was going up while the prices of containers
9 were coming down, a result which one would not expect if there
10 was any kind of a price conspiracy or a price fixing arrange-
11 ment, however tenuous.

12 The next group of charts shows how the prices varied
13 between the defendants' plants, and shows that there was
14 absolutely no uniformity of price as between defendants or
15 within plants.

16 The next group of charts, which is a very significant
17 group, which begins on page 21, shows the business gained and
18 lost by these defendants, and it shows on page 22, for example,
19 in those columns, that each of these companies in every year
20 gained some business and lost some business to competitors,
21 and, for example, in this chart on page 22, the Container
22 Corporation, which is my client, in the year 1960 did business
23 with about one-third of -- about one-third of its customers
24 were people with whom it had not done any business the year
25 before, and about one-third were people with whom it didn't do

1 any business the year following.

2 Now it is found and stipulated, that generally
3 speaking, customers changed suppliers only when they got a cut
4 in price, and therefore it is reasonable to infer that all
5 these changes were a result of the price competition in the
6 industry, and the fact that there was widespread price cutting.

7 Now beyond that, the next group of charts shows
8 how the price went in almost like a seismograph during a
9 convulsion, when the prices went like this as between companies,
10 as between plants, and because of the difficulty of getting
11 more than five lines on a single chart -- these are rather
12 grouped geographically, as plants of various competitors.

13 But your Honors will see you look through these that
14 the price was all over the place, and was all over the place
15 as between plants and as between defendants.

16 Then, going on, there is another series of charts
17 toward the back of the volume which shows that there was a
18 great variation from so-called manuals. Now each company had
19 a manual which it used to compute price, although they were
20 rarely, if ever, published, and their manual was departed from
21 as shown here, both up and down -- usually down for manual.

22 So nobody who knew what anybody else's manual is,
23 could surely compute the price.

24 Then finally, there is another group of charts in
25 that same part of the volume which show departure from board

1 prices, which was another possible way of computing the price.

2 Q I am beginning to think that perhaps what the
3 Government is seeking is a per se rule with respect, not to
4 price fixing, but with respect to a "combination," to show
5 exchanged current price information.

6 A I think that is perfectly evident. What they
7 are saying is, "We are entitled to bar this access knowledge
8 among competitors who must thereafter compete in ignorance,
9 because we say the effect might be to somehow chill price
10 competition."

11 There is no proof of that. The proof is of the most
12 active kind of price competition, and the most destructive
13 kind, because it takes customers away in large numbers year
14 to year.

15 Q Mr. Seymour, on page 567, in the opinion of
16 the District Court, it says that the plaintiff concedes that
17 -- the United States concedes that if it had only charged in
18 the complaint that the defendant had agreed to exchange price
19 information it would have no case.

20 A Yes, sir.

21 Q I take it that what you are saying is that the
22 Government is taking an entirely different position here?

23 A I think the Government's position in the lower
24 court was if they just charged exchange "of price information"
25 they would have no case. They went beyond that and charged the

1 effective price information, but they didn't prove any such
2 effect. They relied as to its effect on what they said was
3 the natural effect of the exchange.

4 Q Well, the court goes on and says that the --
5 the District Court says that the plaintiff therefore has the
6 additional burden of showing that from such inferred agreement,
7 namely, to exchange price information, the court should
8 further infer that there was an agreement to use such exchange
9 price information.

10 A What the court is saying, really, is that you
11 have to have a combination which restrains trade, and if there
12 was a combination it didn't show any restraint of trade, and
13 whether you say it is one agreement or two agreements, it
14 doesn't really make much difference.

15 The fact is that they did not prove any such re-
16 straint. The record shows to the contrary.

17 Now let me push on very rapidly just to touch on a
18 couple of other points.

19 The Government relies here on the cases decided before
20 Maple Flooring, American Column and Linseed Oil and a case
21 decided after Maple Flooring, and it says that this combination
22 was invalid under those cases.

23 Now, I won't take your Honor's time to try to
24 describe those cases, but your Honors will recall that they
25 were a very tight and explicit arrangement by which, in every

1 case, information about prices was supplied, there was policing
2 of the price picture. In the Column case, the prices went up
3 over 300 percent as a result of the arrangement. In the other
4 case they were stabilized.

5 There were fines and forfeitures in the Linseed Oil
6 case for any departure, and there is nothing of that kind here.
7 And Maple Flooring I submit lays down the principle that the
8 knowledge which invokes the self-interest of sellers and lets
9 the sellers use the knowledge to compete in any way that suits
10 their situation, which is the situation here, it clearly
11 permits the kind of information that was supplied here, and
12 that was recognized when the consent decree was made, largely
13 in reliance on the Maple Flooring case.

14 But my friend says that in Maple Flooring they
15 didn't have any information about particular customers. But
16 they did in the Cement Institute case. In the Cement Institute
17 case, information was supplied about particular customers,
18 because of the fact that in that case it was the practice to
19 order cement from a lot of different suppliers in order to
20 get a lower price even if you weren't going to use it and that
21 was kind of a commercial fraud and the information about that
22 could be exchanged.

23 Q What was the essence of the charge in the case
24 that led to the consent decree?

25 A It was a broad price-fixing charge which included

1 references to an earlier trade association, one not involved
2 here, and the one involved here is not charged at all, and the
3 injunction provisions in the consent decree bar the kind of
4 trade association activities which were involved in the
5 earlier case, but they exempt the exchange or dissemination
6 of information about past transactions, and it is stipulated
7 and found that every defendant relied upon the provisions of
8 that consent decree in doing business this way.

9 I submit that -- of course, the consent decree is
10 not binding on your Honors, but it is some precedent for the
11 fact that the Government has recognized for a long, long time
12 that this practice does not have the pernicious effects
13 alleged now, and if this practice does have such pernicious
14 effects so that your Honors can be asked to extend again the
15 area of per se violations it ought to be proved, and it ought
16 not to be assumed just on the basis of speculation.

17 Q Mr. Zimmerman, before we go to the next case,
18 I would like to ask you the same question I asked Mr. Seymour
19 about these 18 people who were charged.

20 Are they the only ones who engaged in these practices
21 or is the practice open to all 53 of them in the business?

22 A Again, I have to give the same answer that
23 Mr. Seymour gave, Mr. Chief Justice.

24 I do not know. The only information that I have is
25 that the President of the Dixie Company testified that he

1 exchanged information only with people that he could trust.
2 There is some suggestion that the exchange may not have
3 included everyone in the industry, but beyond that I cannot
4 say, and I don't think the record discloses it.

5 Q I understood, Mr. Seymour, that some of these
6 were large companies and some were small companies. Why would
7 you pick out some of the small companies and join them with
8 these big companies, and not join the others, in a lawsuit?

9 A Well, we picked out all the substantial companies
10 There were a number of new entrants. I don't know how many
11 of the other companies would have been relatively new entrants,
12 but I assume we chose those as to whom we have evidence.

13 The Grand Jury which began this was inspired by a
14 complaint of a customer, and I suppose we tracked the Grand
15 Jury to see who was involved in this.

16 Q Mr. Zimmerman, may I take advantage of this to
17 ask you whether you agree that the Government is seeking a
18 per se rule here? That is to say, that it is a per se violation
19 of an anti-trust laws once you have proved that there is a
20 combination among the defendants to exchange current price
21 information as to individual customers?

22 A No, I think the rule we are advancing here,
23 Mr. Justice Fortas, is that when you have an industry which
24 is dominated by a relatively small number of sellers, then the
25 precise exchange of current price information with respect to

1 particular customers necessarily has an inhibiting effect on
2 pricing, because of the ability of that small group to
3 visualize the necessary consequences.

4 Q Without any proof as to effect?

5 A As to effect, yes. Now in this case we have
6 explicit proof that this was their purpose, but the court
7 ignored it, because it seemed to think that we had to prove
8 a subsequent agreement, and we don't, and American Column makes
9 it clear that we don't.

10 Q You don't claim that you have any proof in this
11 record as to specific effect on price in the market?

12 A Yes, we have specific findings which indicate
13 that when the information was supplied, the recipient quoted
14 the same price. We have that. But we did not even attempt to
15 go into the question of what was happening to prices; that,
16 it seemed to us, was not necessary after the Socony-Vacuum
17 case.

18 Q You say this is the dominant group in the
19 business. What percentage of the business does it control?

20 A The 18, Mr. Justice Black, control 90 percent.
21 Six of the 18 control 60 percent. Seven of the 18 control
22 70 percent, and the 18 as a whole control 90 percent.

23 Q If it is a great help to competition for them
24 to exchange information, is that affected in any way by the
25 fact that they do not get information from all?

1 A I could assume that one could infer, that if
2 they didn't -- perhaps they weren't interested in helping
3 competition. Indeed, we don't think they were.

4 Q You accept as a ruling the Maple Floor case that
5 if some of the business want to get together and exchange
6 information that that is all right?

7 A Maple Flooring, Mr. Justice Black, is a very
8 interesting case.

9 Actually there were 365 sellers representing but 33
10 percent of the industry who were -- I am sorry, I am speaking
11 of American Column. American Column is a case where the court
12 found a legally exchange of information among 365 sellers
13 representing but 33 percent of the industry.

14 Now Maple Flooring was a case in which the informa-
15 tion exchanged only as to past transactions without identity
16 of particular customers, neither of which ---

17 Q How many belonged to that group?

18 A I think about 22.

19 Q Twenty-two?

20 A I believe so.

21 Q What percentage?

22 A I think they had most of the business. But
23 there was no exchange of current or specific price information,
24 and the Maple Flooring exchange indeed went on here, and we
25 didn't challenge it.

1 Q But they had an agreement to exchange informa-
2 tion and did exchange information with reference to current
3 sales; that is, made from day to day?

4 A Yes.

5 Q And that you have evidence that when they made
6 those, gave this specific information the price went out?

7 A We do not claim any evidence that the price
8 went up. We are not ---

9 Q You said something. What was it?

10 A I stated that the purpose of the exchange as to
11 explicit information was to avoid unnecessary, in their terms,
12 price cutting, that in order to eliminate doubt as to what the
13 price was so that there wouldn't be price cutting, they
14 exchanged specific information as to prices a seller was
15 quoting to a specific customer, and this was the arrangement
16 and this was the combination.

17 (Whereupon, at 1:15 p.m. the oral argument in the
18 above-entitled matter was concluded.)
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