Supreme Court of the United States

OCTOBER TERM, 1968

In the Matter of:

Docket No. 624

- x

Clyde A. Perkins,

Petitioner,

v.

Standard Oil Company of California

Respondent.

- x

Pt. 1

Place Washington, D. C.

Date April 22, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

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Washington, D. C.
Tuesday, April 22, 1969.

The above-entitled matter came on for argument at 12:57 p.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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PROCEEDINGS

MR. CHIEF JUSTICE WARREN: No. 624, Clyde A. Perkins, Petitioner, versus Standard Oil Company of California.

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mr. Kintner.

ORAL ARGUMENT OF EARL W. KINTNER, ESQ.

ON BEHALF OF PETITIONER

MR. KINTNER: Mr. Chief Justice and may it please the Court.

Permit me to premise my remarks by stating that I will focus primarily upon the principal Clayton Act questions presented in this appeal, and Mr. Kucik, my colleague, will examine the questions of causation and damages.

This case has come to the Court on a petition for writ of certiorari from the United States Court of Appeals for the Ninth Circuit filed on October 9, 1968, and granted by this court on January 13, 1969.

The petitioner, Clyde A. Perkins, filed this suit against the respondent, Standard Oil Company of California, in March of 1959, ten years ago, alleging violations of Sections 2(a), (d) and (e) of the Clayton Act as amended by the Robinson-Patman Act of 1936.

In December of 1963, the jury awarded the petitioner actual damages of $336,407.57 which was trebled and attorneys fees of $289,000.

The cause was argued before the Court of Appeals for the Ninth Circuit in June of 1965, and then in November of 1967, nearly 2-1/2 years later, after oral argument and four years after the jury had reached its verdict, the Ninth Circuit set aside the jury verdict and ordered a new trial.

Approximately eight months later, July of '68, the Court of Appeals denied the appellees petition for rehearing.

Now before proceeding to a discussion of the Ninth Circuit's Clayton Act holding, I would like briefly to identify the persons involved and the state the facts which I think are essential to an understanding of this portion of the Ninth Circuit's decision.

Petitioner Perkins was one of the largest independent distributors in the Pacific Northwest States of Oregon and Washington. He began business in 1928, with a single filling station and over the years built a wholesale and retail gasoline business and during the claim period, March 2 to December 2, March 2, 1955 to December 2, 1957, he leased or operated approximately 60 retail stations.

Perkins was a wholesaler operating trucking equipment and bulk storage plants. He purchased substantially all of his requirements from Standard Oil of California. There is some indication that he purchased a little elsewhere, but the record shows that this was at the instance of Standard to test the market for the price.

He was required to maintain a bulk storage plant and an inventory on which he paid taxes. He could not represent the sold major brand gasolines.

Now Standard is engaged in all aspects of the oil industry from drilling for crude oil to selling gasoline at retail. During the claim period he would have had nearly 30 percent of the gasoline market in the Pacific Northwest. It was the price leader in the Pacific Northwest.

Selling its gasoline to its own branded dealers, the Chevron and Sigaal brands, and the wholesalers like Perkins and Signal Oil and Gas. Signal Oil and Gas purchased during the claim period its requirements from Standard Oil.

Now Signal Oil and Gas is a large integrated company engaged both in the production of crude oil and the distribution of gasoline in the Western United States.

Signal has been both a supplier and a customer of Standard since the early 30's. It drew its supplies directly from Standard's storage facilities near Portland and at Seattle during the claim period, and it purchased during that period only from Standard in that area.

It re-invoiced its purchases from Standard, had no storage facilities. It drew from a standard bulk facilities. It was in competition with Perkins. It re-invoiced the Western Highway Oil Company which was incorporated in 1950 with Signal owning 60 percent of its stock.

Western Hyway functions as Signal's transportation arm in Oregon, picking up gasoline from Standard's Willbridge terminal in Portland and delivering it to retail stations in Portland, operated by the Regal Stations Company.

These stations, there were three, were no more than 150 blocks from the bulk plant and Western Hyway's function was to take its trucks and transport the gasoline to those stations, from the Standard bulk plant.

Regal was formed in 1956, when with Western Hyway owning 55 percent of the stock, and in 1957 Western Hyway, the Signal Oil and Gas subsidiary, acquired 100 percent of the stock of Regal.

It operated three stations in the Portland area which competed with stations owned by Perkins. Now, these stations were set up near the third quarter of 1956, at a time through to 1957, early '57, these three Regal stations in the Portland area, at a time when Signal Oil and Gas, when Regal -- when Signal Oil and Gas of which Regal was part of the family, was carrying on its books a rebate, an anticipated rebate which was later paid.

In fact, the rebate was paid in January of 1957 by Standard to Signal. Signal already had anticipated that and had it on its books and there had been negotiations since spring for this rebate.

Now these stations were set up in that time context.

These three Regal stations in Portland and they immediately started a price war.

The Court of Appeals set aside the entire jury verdict in favor of Perkins because some of the petitioner's proof on the 2(a) aspects of his claim, the Section 2(a) of the amended Clayton Act, demonstrated that Signal, the wholesaler obtaining the better price, resold the gasoline to Western Hyway who in turn resold to yet another subsidiary, Regal.

The Ninth Circuit ruled as a matter of law that Section 2(a) of the Robinson-Patman Act, and I am quoting, "Does not recognize a causal connection essential to liability between a supplier's price discrimination and the trade practices of a customer as far removed on a distributive ladder as Regal was from Standard.

In other words, the Court of Appeals said that Section 2(a) was limited in terms to three levels of cognizable competitive injury, and that the injury to Perkins occasioned by Regal's marketing activities did not come within the purview of those three level's limitations.

Since a large part of Perkins damage was attributable to the activities of Regal which operated at the fourth level of distribution, the entire verdict was deemed tainted and set aside.

We respectfully submit that the Court of Appeals erred in so holding. First the jury properly could have returned a verdict against Standard on the ground that the effect of its price discrimination in favor of Signal may have been substantially to lessen competition in the Pacific Northwest wholesale and retail gasoline market.

Section 2(a) of the amended Clayton Act contains two independent tests of illegality. It prohibits price discrimination where the effect may be substantially to lessen competition or to tend to monopoly in any line of commerce.

And then it has another test, to injury, destroy or prevent competition with any person who either grants, knowingly receives the benefit of such discrimination or with the customers of either of them.

The Ninth Circuit completely ignored the substantiality to lessen competition standards, a carryover from the original Clayton Act Section 2 in setting aside this jury's verdict.

Q Did you try the case on that?basis?

A Yes, your Honor, this was before the Ninth Circuit. It was before the jury. Both Standard and Perkins offered charges to the jury and the judge I think substantially and properly charged the jury so that this question of overall injury to competition and tendency toward monopoly was properly before the jury.

Now I would say that in retrospect, both Perkins and Standard could have been far more explicit and extensive in submitting proposed charges to the jury. And the judge perhaps could have been more explicit and could have charged more extensively.

But the fact was that the whole question of injury to competition and a tendency toward monopoly, was before the jury and the jury even though not as elegantly charged as one -- as some might wish that it were charged, was substantially charged and knew what the res gestae was, knew what the questions of fact were, knew what they had to decide.

The Court of Appeals exalted form at the expense of the economic reality by imposing an artificial, three-level limitation on Section 2(a), to prevent discriminations which tends to lessen competition in any line of commerce.

It failed to assign any weight, the Ninth Circuit failed to assign any weight to the fact that Standard's price discrimination had caused a substantial lessening of competition in the Pacific Northwest wholesale and gasoline markets driving out of business one of the area's largest independents.

Moreover, by basing that limitation exclusively on the number of persons in the distributive chain established by the favored purchaser, that decision, if the Court please, unless reversed, will enable large buyers virtually to insure a statutory of immunity to suppliers which grant them favorable price concessions.

Q Mr. Kintner, suppose Regal, Western and Signal had all been totally independent of Standard, no control, no interlocking directorates, no stock ownership up the line.

Would you still contend that 2(a) applied?

A I think we have a different factual situation, but the realities in petroleum marketing are such that it is the price of the retailer, the competition exists, at that retail level, and if any one up the chain gets a better price and is able to pass it along at the retail level, that you can have absolute chaos at the retail level.

Q Well, what I am trying to get at, as I understand it, there is ownership all the way down the chain here in this case in some stock ownership. Is that right?

A Yes.

Q And what I am trying to get at is whether you relied on the facts of stock ownership running from Standard through Regal and Western and -- or Standard, Signal, Western and Regal. Whether you rely on that stock ownership or whether you say that even without the stock ownership sales by Standard to Signal at a lower price than sales by Standard to Perkins would be a violation of 2(a)?

A Well, we have alternative theories on this, of course, depending on how you read the evidence, but we believe and I urge upon the Court, that these were two families of gasoline dealers and that the economic realities that the retailers are tied to particular suppliers in the gasoline business, and that it wouldn't matter if there was a lack of ownership here and family connection, if the discrimination were passed from Signal down to Regal stations and Perkins who had his own chain of stations, was unable to compete.

The damage occurred at the retail level because Perkins either had to take a loss or he had to see his stations compete on an unequal basis.

Q Well, let us suppose that Signal were absolutely independent. Let us suppose that Standard sold to Signal at X. Signal is far up the distributory chain, wholesale, whatever is the proper time.

And let us suppose that Standard sold to Perkins retail stations direct at X plus 10 percent.

And let us suppose that Signal sold to its retail stations, nonaffiliated retail stations, to its retail customers, at X plus 5 percent.

Am I clear? Are you clear on this?

A Yes.

Q Would you say that that is a violation of 2(a)? by Standard?

A I think you will have to go back to the relationship of the parties with the supplier. If the parties were both independent as Signal ---

Q That is what my first question was and your answer mystified me a little. That is why I bother you with an elaboration.

A Signal Oil and Gas and Perkins are both independent of Standard Oil. Perkins was required to purchase his oil from Standard Oil and Signal did purchase all of its gasoline from Standard Oil, but they were both independent of Standard Oil. They were independent dealers and wholesalers.

And if the Perkins Company is unfairly discriminated against, it is unable to pass down through its chain of distribution the equivalent benefits that can be passed through by Signal, and the proof of the pudding is in the eating at the retail level.

Now I think that it makes a harder case if there is a family relationship as there is here, and you have got alternatives which one didn't have in the Hamm Brewing case where in Duluth and Superior, the distributors, the two distributors of the Hamm Company were unable to compete across the State lines, although this was one market.

But the Superior distributor was given a better price and his retailers then were able to take advantage of the retailers on the other side of the State line in the same market, take their customers away, simply because the better price was passed down the line at the retail level.

As we read it, Section 2(a) prohibits all price discrimination, the effect of which may be substantially competition in a commercially significant product, regardless of the functional level. This is our theory of the case. It was before the jury and all of the economic setting and the charges given by the judge, and it is in this instance that we feel that basically the Ninth Circuit was wrong.

In George Van Camp and Sons versus American, a 1928 case prior to the passage of the Robinson-Patman Amendment in 1936 and decided prior to that amendment, the court rejected the defendant's argument that its price discrimination could not be challenged by a purchaser because the words must be confined to the line of commerce in which a distributor is engaged. The court ruled that the words in any line of commerce literally are outside of all the various lines of commerce.

The point in the favored purchasers chain of distribution at which injury to competition is first felt is of concern only with respect to the factual questions of causation, not with respect to whether the statute had been violated as a matter of law.

We feel that this Court should bring its Section 2 of the Clayton Act in harmony with its interpretations in the Van Camp Decision prior to the passage of the Robinson-Patman Act and in harmony of its interpretations of the same language in Sections 3 and 7 of the Clayton Act.

Standard was a price leader and a principal leader of gasoline in the Pacific Northwest. Perkins was bound to purchase the vast bulk, if not all of its gasoline from Standard. It was a market dominated by the majors. In fact, Perkins was marketing eight percent of Standard's gasoline in one-third of that market to which he was confined, and during the claim period he lost 13 percent of his gallons, he lost 50 percent of his fuel oil business which is tied to gasoline, as the record shows, and Signal, the distributor, the independent distributor from Standard, in whose favor the discrimination was granted, gained 50 percent during that claim period if gallons.

As Perkins' expert witness, Dr. Mund, testified in response to a hypothetical question, the foreseeable market trend in that area was to increase concentration, a decline of small business, and higher gasoline prices, and he said, in other words, that price discrimination and monopoly are Siamese twins.

Perkins during this period before he went out of business, constantly begged Standard for price assistance. It was only one month before Signal's president went on the stand, who had been denying giving price assistance, that they finally admitted a discrimination of $1 million.

Perkins finally got some price assistance. It was a small amount, and it amounted for all his 60 stations what Standard gave one of its branded stations in a 75 day period.

Signal was even able during the claim period to offer to sell to Perkins gasoline at .75 per gallon lower on regular and .80 on ethyl, although Standard when faced with this denied it was discriminating in favor of Signal.

We submit on the basis of the foregoing that the jury could have found not only that a substantial lessening of competition was threatening, but that a substantial demunition in the figure of competition had already occurred, and thus the jury's verdict was supportable on this basis.

We do not believe this was the intention of the Congress in changing only a split infinitive, directing only a split infinitive when it passed the Robinson-Patman Amendment, that it was the intent of Congress to weaken the Robinson-Patman Amendment.

This Court itself has said quite causatively to the contrary in the Anheuser-Busch Decision, the opinion of this Court was, "The legislative history of these amendments leaves no doubt that the Congress was intent upon strengthening the Clayton rAc Restrictions, not weakening them."

The Congress did not intend that that language regarding competition, injury to competition and a tendency toward monopoly should become mere surplusage with respect to the amended Clayton Act.

It conferred upon small business a less stringent remedy when it passed that Robinson-Patman Amendment, but it left the more stringent remedy to those like Perkins who had an ample record to prove the violation of the original standards of the Clayton Act, Section 2.

Thank you, Your Honors.

MR. CHIEF JUSTICE WARREN: Mr. Kucik.

ORAL ARGUMENT OF GEORGE R. KUCIK, ESQ.
ON BEHALF OF PETITIONER

MR. KUCIK: Mr. Chief Justice, may it please the Court.

I will address myself to the question of causation and damages. The first question is causation. The issue there is simply whether there was enough evidence before the jury from which it could reasonably infer that Perkins' distribution as an independent marketer of gasoline was approximately caused by the price discrimination in favor of Signal Oil and Gas Company.

Now, in the content of the Ninth Circuit's opinion in its reversal, the causation period in question which is important for the purposes of this case, is a period from September of 1956 through December of 1957. It involves in the beginning the Portland area in Oregon.

The most important parties are Signal, which was purchasing gasoline from Standard, and Regal Stations Company, which was marketing the gasoline in the Portland area. Western Hyway was repurchasing from Signal and trucking the gasoline to and from the Wigrich's Terminal to the retail outlets.

Now, the period, as I pointed out, is September 1956 through December 1957. Immediately prior to that time none of the members of Signal's corporate family were in the Portland area. Signal was lifting no gasoline from Wigrich. Western Hyway was trucking no gasoline and there were no regular outlets in Portland in late August.

Regal opened its first station in Portland in September and Western at that time began to truck the gasoline. Throughout the period there was an admitted discrimination in price in favor of Signal Oil and Gas by Standard. It was not always admitted. In fact, it was hotly contested prior to the deposition of Signal's president, but the day before that Standard admitted the discrimination and it is an admitted fact before this Court.

So the price of the gasoline was always lower going into the Signal chain of distribution, the wholesale, and it always came out lower. Regal consistently underpriced Perkins in the market throughout the period. Indeed, when Regal first opened its station, it dropped retail prices by four cents.

Q Is the Regal activity evidence essential to just prove damages to you, or to prove a violation of the act, or both?

A We have said that it was essential to prove both. The Ninth Circuit Court reversed on the ground that the statute did not encompass as a matter of law the activities of Regal. Therefore, the damages caused by Regal could not become a part of the verdict. We are arguing that the status does ---

Q You are saying that the discrimination between Perkins and Signal was a price discrimination within the meaing of the act, and that its impact on competition is an adverse impact on competition at that level, between Perkins and Signal, is encompassed by the act?

A We are saying that.

Q Once you show that, what else do you need to show? Once you show the discrimination had an adverse effect at the Perkins-Signal level, then what else do you need to show? Do you need to show injury and the amount of your damages?

A That is correct. Standard has contested that the price discrimination to Signal caused Perkins harm at the retail level and therefore there was no way in which Perkins could have been injured as a retailer or a wholesaler because his harm as a wholesaler was derivative harm by virtue of the fact his retailers were getting beat.

Q Do you think the Ninth Circuit decided it was a causation problem rather than a legal problem?

A No, no. The Ninth Circuit decided it was a straight question of law.

Q Why do we have to get to this other question?

A We address ourselves to this question principally because it is the overriding question in Standard's rate.

Q What if we agree with you that the Court of Appeals was wrong in the question of law? What should we do, decide the causation or send it back to the Ninth Circuit?

A Decide the causation question.

Q Here? That has never been decided by the Ninth Circuit?

A It is argued that the Ninth Circuit did decide it. The Ninth Circuit has a passage in footnote 6 of its opinion, where it says, "Granting there was a price discrimination in favor of Signal, and passed on to Regal, we hold it is not accountable."

Q That can be argued as a causation?

A The reason why we think it is arguable that was a holding on causation, there was no question on the discrimination. That was admitted. So you can fairly read that passage as a holding by the Ninth Circuit that there was causation.

In any event, the jury verdict was presumably based on the jury finding of causation, and the Ninth Circuit can be read to find that.

We address ourselves to it to show that Standard's objection is not substantial. There was overwhelming evidence from which the jury could have found causation and it is not a question of such importance that it needs to deter this Court from addressing itself to the major issue and to reinstating the burden.

Q You are just anticipating an argument by Standard that the court should be affirmed on another ground?

A I read the brief, and I think if some of that doesn't come out here, I will be willing to be a bit redundant. I think the causation point was by far the most important point expressed in the brief.

Q So Standard also would like to have that question settled, even if they lost on the initial question?

A I am not precisely sure that Standard would like this Court to do. I think ---

Q What price level do you think Standard should have sold Perkins in order to avoid violation of Section 2(a)? The same price it sold to Signal?

A Yes, sir.

Q Is that because Perkins was a wholesaler?

A Both Perkins and Signal were wholesalers in the Pacific Northwest.

Q Is that the reason why? Your theory is that Standard should have sold Perkins at the same price as Signal because of that?

A As I understand Section 2(a), unless you have other reasons for discriminating, you sell to all direct purchasers at the same price.

Q You mean, let us suppose Perkins was not a wholesaler at all. He had one gasoline station selling at retail. And it is purchased directly from Standard.

Is it your theory in 2(a) that Standard would have to sell to Perkins retail gasoline station at the same price it sold to Signal which is solely a wholesaler and distributor?

A Well, at that point, Mr. Justice Fortas, I would think it would probably be cost justified or ---

Q Unless it is cost justified, your theory is that there is no place under 2(a) for any so-called functional price difference?

A Well, that really isn't an integral part of our argument because the question isn't raised here. Both Signal and Perkins were operating on the same functional level. They were both wholesalers in the Pacific Northwest.

Perkins described himself as a wholesaler and there was testimony of an expert marketing witness ---

Q How much of Perkins' purchases from Standard did it sell to anybody other than itself?

A Well, ---

Q Does the record show?

A Well, Perkins sold to independent distributors. He also sold to retail stations.

Q How much of it did it sell to anybody other than its own gasoline stations?

A There is no breakdown in the record, your Honor.

Q Suppose it sold to nobody except its own gasoline station. Does that have an effect on your theory? What would happen on 2(a) on your theory?

A No, it does not, your Honor, because the theory depends on Perkins' function. Perkind was a very real wholesaler. He operated bulk plants, he had his own trucking facilities ---

Q Now all the damages that are involved in this case are alleged to flow from injury at the retail level. Is that right?

A The damage is based -- the damge is -- the Ninth Circuit reversed because of its feeling that the damages attributable to Regal were not fairly comprehended within the verdict.

Those would be damages at the retail level. Perkins' damage computation exhibits, however, contained evidence of the loss in going up from current values in his enterprise, as well as evidence that is ---

Q Well, I understand that. But was the damage allegedly incurred at the retail level?

A Insofar as -- yes, sir, insofar as his theory is concerned, yes. We are concerned about the harm caused the retailers service by Perkins, the independent retailers, or be they retailers operating stations owned by Mr. Perkins.

Q Well then I suppose your theory has to be that the element of causation here, the causation question is as follows: That the damage suffered by Perkins Retail Gasoline Stations was caused by the discrimatory low price at which Standard sold to Signal which enabled Signal through Western to supply Regal with gasoline at a price which enabled regal to cut below Perkins' price.

If you follow me, is that correct?

A Your Honor, that puts most of it very concisely.

We do believe that there was substantial evidence which the jury -- from which the jury could have found that the price differential did go down through the distributive chain.

In view of the integrated nature of the chain we don't believe that the jury had to trace the price at every level but that question again is not necessarily presented because of the substantial evidence to support your Honor's formulation.

Q Can you illustrate the difference in price charged to Signal and to Perkins, about how much was it?

A Well, the difference -- there is some dispute as to this. The price difference is admitted. Standard contends that the dispute amounted to between 45/1000ths of a cent, to approximately 65/1000ths of a cent per gallon.

Q In the price charged to Signal on the one hand and the price charged to Perkins on the other hand?

A That is hundredths, I am sorry. I had that wrong.

It was approximately a half a cent to approximately 7/10ths of a cent. We contend that at the very least a freight factor has to be added back into those figures which we pay, which would increase them to approximately 8/10ths of a cent to a penny.

Q You mean to say that 2(a) requires a delivered price, even if the gasoline is not sold on a delivered basis that you have got to equalize them on the price, net price, to the allegedly competing buyers on a delivered basis?

A Well, your Honor, it comes up in this way.

The Portland-Vancouver area, under the evidence, is an integral marketing area. Standard's terminal is in Willbridge, which is in Portland. There was a price to Signal which lifted at Willbridge and there was a price to Perkins which lifted at Willbridge.

The Perkins though had to transport his gasoline across the river because his stations were in the Vancouver area, within the same trading area, within the same relevant market, but across the river.

That cost him approximately 3/10ths of a cent per gallon of gasoline and Standard gave him an allowance for that. But Standard deducts it allowance from his price. We contend that since he had to pay the freight anyway, there should be no deduction from the price he paid Standard and, therefore, the prices should be equalized at the price in Willbridge.

But there is an additional factor on this. As Mr. Kintner pointed out, there was evidence in the record that Signal offered Perkins during this period a price which ranged from 75/100ths of a cent to 8/10ths of a cent better than the price Standard offered Perkins and Standard at that time was supplying all of Signal's gasoline.

Now the jury could have inferred from that, if you believe respondent's price discrimination figures that Signal was selling to Perkins at a loss and was willing to do so, or the jury could have believed that Signal was going to make a profit on these sales, which would have meant that they would have been getting a better price than either party had been able to demonstrate.

The upper limit of it would not be able to be determined on the record but the jury was certainly not bound to find that the prices as set forth in the schedules and the amounts of the differentials as set forth in the schedules were the only prices.

Beyond this, it is a very substantial -- it comes to be a lot of money. Perkins sold over 20 million gallons of gasoline during the claim period. A ahalf a cent per gallon would have been $100,000 which would have made a substantial difference in his ability to remain viable.

During the time, during this period, Standard was giving as I pointed out this lower price to Signal. Standard also was providing price assistance to its Branded Dealers who competed with Perkins at retail.

Now the Branded Dealers were independent operators of Chevron and Signal stations, Signal stations being independent of Signal Oil and Gas Company. They were purchased from Signal Oil and Gas Company by Standard in the late 40's and were operated as a division of Standard.

Standard gave price assistance to those Branded Dealers, both in Portland and located many miles distant from Portland. The result was that the market went down even further and stayed down, precisely because Standard was the price leader in the area.

There is testimony in the record that when Standard dropped its prices or raised its prices, other companies could not long remain at equilibrium. They have to go that way.

As one Shell dealer testified it was the Signal Branded Dealer that he looked to and there were two retailers under-pricing him in the market. So this was a further depressing effect and it was one which caused the market to stay down.

Now the Ninth Circuit reviewed the facts underlying. The Ninth Circuit reviewed the facts involved in most of this situation. The Ninth Circuit pointed out that there was substantial evidence in the record that Regal caused the price wars, that those price wars spread throughout the Pacific Northwest and that Perkins had demonstrated that those price wars had harmed him in his business, and had adversely affected him causing his ultimate destruction.

Now petitioner was harmed in two ways. He lost customers and his sales declined.

He was selling gasoline as a minor. Standard would not permit him to testify, would not permit him to advertise that he sold major brand gasoline.

The accepted major-minor differential was 2 cents. At times during the period involved here, Mr. Perkins was unable to keep his price 2 cents below, unless he was willing to absorb great losses.

He ended up 1 cent below the majors; he ended up even with the Branded Dealers at times. When he did that, he lost sales. When he maintained the differential, he lost -- when he maintained the differential, he lost profits on the sales he did make; either way he was caught.

Perkins went to Standard during the period and asked for assistance. He said he would be willing to take assistance at the wholesale level for the same type granted Signal in getting the same price or else he would appreciate getting some assistance comparable to that being received by the Branded Dealers at the retail level.

Standard not only declined to give him the assistance, they denied that they had been giving price assistance to the Branded Dealers or that they had been discriminating in price in favor of Signal.

As a result, Perkins received no help and he went out of business.

Now, there was evidence before the jury and this is the evidence that I referred to before as the evidence of passing on -- there was evidence before the jury that Signal wanted a lower price from Standard precisely so that it could give that lower price to its customers.

The price didn't just happen; it was negotiated and it was negotiated at the behest of Signal. Signal had Standard in somewhat of a box because Standard was dependent on Signal's crude oil to run its refineries.

So Signal kept insisting on a better price. During those negotiations the Signal negotiator, who was their marketing vice president, pointed out that -- and took the position that unless he had a lower price he couldn't pass it on.

After he got the lower price, and after Regal entered the Portland area, two Standard executives acknowledged that Regal had a better price than Perkins in the Pacific Northwest. And they predicted that unless Standard did something to a lleviate the situation, Regal would wreck that market, and they were right.

Standard also knew of Perkins' position. Perkins had told him that unless they helped him, not only was the market going to be wrecked, but that he was going to be driven out of business. As he put it, he told them that he couldn't live under the existing arrangement. And that, too, turned out to be true. He went out of business.

It is our feeling that there was substantial evidence before the jury on which the jury could have based a finding that it was the price discrimination in favor of Signal supported by the price assistance to the Branded Dealers which proximately caused Perkins' destruction; that the jury in short could have inferred the same causal connection which Standard executives had predicted.

The remaining issue is one of damages.

The evidence which I have discussed on causation proves the requirement of legal harm. Perkins was injured, he went out of business, he lost sales and he lost profits.

And there was substantial evidence before the jury from which the jury could have inferred the amount by which he was injured, which is the remaining requirement that he must meet. His evidence of damage included his business records for the entire claim period, his purchase invoices for the claim period, his sales invoices, lists of his lost customers, mainly distributors.

It contained evidence of his decline in gallonage. It contained evidence that he could have increased his sales above what he was selling in the claim period without any additional costs.

The record contained evidence of the amount of gross profit Perkins was making during the claim period. It contained evidence of his expenses. It also contained evidence of the minimal gross profit necessary to survive as an independent jobber in the Pacific Northwest. It contained evidence of the amount of the price differential.

And it contained a formula by which the jury could ascertain the going concern value of Perkins' operation, where they defined that it had a going concern value.

Now the Ninth Circuit did not rule that there was not substantial evidence to support the jury verdict, or that the amount of the award was unreasonable. The Ninth Circuit ruled contrary to Perkins on one damage item. It held that there had been evidence improperly admitted as evidence of damages, and that this evidence was evidence of brokerage commissions which Perkins had not been paid by his corporations for getting them gasoline and evidence of lost rentals from retail stations.

A little bit of history is necessary to explain that.

This was a lawsuit brought on behalf of Perkins as an individual and two corporations he had formed to run his business in the 50's.

The evidence demonstrated that Standard never recognized the corporations and they dealt with Perkins independently. But when the lawsuit was filed, Standard insisted that the corporations bring the suit, and there were assignments in the corporation suit in addition to Mr. Perkins.

In that context, Mr. Perkins in trying to prove that he had standing to sue as an individual and that he had suffered legal harm, introduced evidence of these items of proof, brokerage and the lost rentals.

He introduced in to prove that he had standing. That issue isn't in the case anymore because the District Judge charged the jury that Mr. Perkins was a purchaser from Standard and that is not contested.

But that is how it came in. Our answer to that point is that the evidence was not introduced as evidence of damages, that it was introduced as evidence of legal injury and that in any event it could not have mislead the jury because it was not included in Perkins damage computation exhibits nor was it included in the Judge's detailed charge on damages as one of the items which the jury might properly consider.

And just one final point, it is important, I think, that Standard argued this point at great length in the Ninth Circuit, the point on which the Ninth Circuit ruled adversely to Perkins, on the damage question. But they don't say a word in defense of it here. Here they take a different tact and they suggest that there are many other errors which preclude reinstatement of the verdict.

We discussed those in our reply brief, but it is our position that none of those errors, the errors which the Ninth

Circuit didn't see fit to discuss, are of any greater substance than the errors discussed in the reply brief and indeed that our reading of the brief fails to disclose any significant differences between the issues raised in the brief and the issues in the specifications of errors.

More elaborate, but essentially the same questions.

We respectfully submit that this Court should reverse the judgment of the Ninth Circuit and affirm the judgment of the District Court.

MR. CHIEF JUSTICE WARREN: Mr. MacLaury.

ORAL ARGUMENT OF RICHARD J. MacLAURY, Esq.

ON BEHALF OF RESPONDENT

MR. MacLAURY: Mr. Chief Justice, and may it please the Court.

At the outset, we emphasize that this is not a case of predatory or widespread discriminations aimed by Standard at eliminating a customer.

To the contrary, in the 1950's, Petitioners and some four or five other jobbers were important customers of Standard in the Northwest.

These jobbers have accounted for a large percentage of Standard's sales in that area, enabled Standard to gain access to a market it could not otherwise reach. And this was a market comprised for people who simply don't buy major brand gasoline. They prefer to purchase minor brand gasoline from the local dealer.

In these -circumstances there was absolutely no commercial reason why Standard should wish to drive one of its own customers from the market. Predatory pricing after all is associated with a marketor who attempts to enhance its position in the market.

After all, when Perkins terminated his contract with Standard, it was Union Oil Company of California whose gasoline was sold to his stations, not Standards.

And certainly that was not a situation that Standard sought to instigate. And similarly, it was not in Standard's interest to instigate widespread price wars that would cost the company vast sums of money by way of price assistance to its dealers.

This case involves three basic claims.

1. The discrimination in price of the gasoline to Signal.

2. The claim discriminations on the price of gasoline to Standard's Branded Dealers.

3. The Section 2(e) and 2(d) discriminations in favor of Standard's Branded Dealers.

Now as to Signal, there are two claims. Counsel so far I believe has mentioned only one.

There was a claim in the Centralia-Seattle area and there was a claim in the Portland-Vancouver area. The facts are that in 1955, Signal first purchased gasoline from Standard in

Seattle. There Perkins was buying gasoline, but it was Union's gasoline which Perkins purchased through Westway. And Perkins competed with Signal's customers, Harris and others, in Seattle, but he competed with Westway gasoline, Union gasoline, not Standard's gasoline.

Now some 80 miles to the South of Seattle is the small town of Centralia. And there Perkins had a customer named Carter. And it was claimed that Signal reached out through one of its wholesalers and took this customer Carter away.

The facts are that neither Signal nor any of Signal's customers ever sold any gasoline in Centralia.

Now the second market involving Signal is Portland-Vancouver. Signal commenced buying from Standard in Portland in August of 1956. Signal resold all of this gasoline to Western Hyway.

Signal, by the way, had absolutely no stock or ownership connection with Standard. Western Hyway was owned 60 percent by Signal and the remaining stock was owned by Western's corporate officers.

Western sold all of its gasoline except for a minor amount which is not pertinent to this lawsuit to three Regal stations in Portland. Those Regal stations were owned 55 percent in stock by Western and the remainder by persons having no connection with Western.

The important fact is that when Regal opened for business in Portland in September, Signal was paying Standard a higher price for gasoline than Perkins was paying. And at all times in this lawsuit, from September, 1956 to June of 1957, the price paid by Western Hyway, Regal's supplier of gasoline, was higher than the price paid by Regal. That was until June of 1957.

Q The price paid by Regal?

A The price paid by Regal -- excuse me. If I said that, I misspoke myself. The price paid by Western Hyway, Regal's supplier for gasoline was higher than the price paid by Perkins.

That was no evidence in this case of the price paid by Regal.

After November 1, 1957, Western's price was some 35/10,000 of a cent higher than the price paid by Perkins.

So the summary on Signal is that Signal never sold to a retailer and Signal never sold through its wholesaler or directly to any one in Centralia.

Q Did Signal sell to anybody or offer to sell to anybody that Perkins wanted to sell to? Were they in competition?

A No. No, the situation in neither market was that true, Mr. Justice.

The situation in Seattle was that Signal sold to one B. F. Harris, a jobber, the same as Perkins. Perkins and B.F. Harris in Seattle sought the business of one Carter, in Seattle.

Q Yes, but weren't the Perkins' interests, what were the Perkins' interests, wholesalers or what do you call them? Distributors or jobbers?

A Technically we call them jobbers, but, Mr. Justice, they are on the wholesale level.

Q Wasn't Signal a jobber?

A No, Signal we would not call a jobber. Signal was an integrated oil company and was more on the level of Standard. But it sold wholesale to jobbers.

Q I mean it had a jobbing department when I say that. I mean it sold at wholesale?

A Yes, it sold at wholesale.

Q Perkins sold at wholesale?

A Perkins sold at wholesale.

Q Well, were they in competition or not?

A No, I would say that Signal and Perkins was not in competition.

Q They weren't seeking -- why, they weren't selling in the same areas or they weren't selling the same customers?

A They weren't selling to the same customers. If I may, I will analyze that for you.

Q Perkins wouldn't have thought of selling one of Signal's customers if he could have gotten it?

A That is what I am saying. I would like to go to the Seattle market ---

Q That is very odd.

A No, it is not in this circumstance. Take Portland, for example. Signal sold only to Western in Portland. Now as to Portland, Perkins had by agreement and contract with the others that would sign the Standard contract with him, precluded himself from selling gasoline in Portland.

Perkins gave the Portland market to Powell and Harris, his cosigners, on the contract with Standard. Secondly, Perkins sold to distributors such as his nephew in Vancouver, and sold to dealers who were tied to him by leases or to dealers where he owned the retail stations.

And so there was never any competition between Signal and Perkins for the business in question.

Q Well, not at Western, but how about generally?

A Generally ---

Q You mean if Perkins could have gotten some of Signal's customers, Perkins wouldn't have sold them?

A As a practical matter, Perkins could not have taken Signal's only customer in Portland, and Signal had only one customer in Portland and that was Western Hyway.

Q Well, do you think he would have ever wanted another one in Portland?

A As matters developed, I don't know. The record doesn't show. At the time that Perkins went out of business, Signal still had one customer in Portland and that was Western

Hiway. As I say, Perkins had precluded himself from seeking that business by contract with his cosigners on the Standard agreement.

Q Well, you are just saying here are two wholesalers of gasoline, comparable gasoline, selling in the same area, and you are saying that we must accept the fact that they are not in competition?

A Well, I say that they are not in direct competition to the business in the same place and the same time, and I think that is the definition of competition generally accepted under Robinson-Patman.

Now I might refer to this court's decision in Fred Meyer. There the same concept of competition was suggested. Fred Meyer, as the court will recall, involved the 2(d) claim of discrimination. The manufacturer sold to a direct buying retailer and also sold to a wholesaler.

The Federal Trade Commission suggested and argued that because the wholesaler was really competing for the same customer's dollar as the retailer, the wholesaler was entitled to the same promotional payments as the retailer was getting.

But this court rejected that concept of competition and said specifically that despite the broader terms of distribution used in Section 2(d), which is broader than the term of resale, the Congress did not intend the word competition to be used in the Robinson-Patman Act to have that broad meaning.

Going to the Seattle market, there, Signal sold to jobbers who were on the same level as Perkins. And I mentioned one, B. F. Harris. B. F. Harris and Perkins were certainly competing for the same business, but Signal and Perkins, as a practical, factual matter, this record shows that they were not.

Q May I ask you -- I am a little confused by the statements here -- this lawsuit seems to be on the basis that somehow Standard is selling to Signal and someone else who competes with Perkins or who competes with somebody that Standard has originally sold the oil to, so it did suffer damages.

I don't gather from you how they would suffer any damages at all. How it is possible. Is that your idea?

A Well, I don't believe -- my position here, of course, that Perkins did not suffer any damage whatsoever from Standard's sales to Signal switching to the Portland market, and to follow up your Honor's question, there the market was structured this way: Standard sold to Signal, Signal sold to Western, Western sold to Regal, which was a retail outlet

Regal did in fact compete with some of the stations supplied by Perkins across the river in Vancouver. It was at that level where we had the competition. It was there where there was head-to-head competition for the dollars of the same customers.

Q There was real competition?

A There was real competition. We must acknowledge that at the retail level. And our whole point here and the only real matter decided by the Court of Appeals, was that the cause that competition which Perkins asserted injured him was at the fourth level, and because Congress did not extend the Robinson-Patman Amendments down to that fourth level, Perkins was not entitled to recover here for any injury that may have been caused to him by Regal, assuming that Regal did cause that injury.

Do I answer your question?

Q I think so.

Q You get a different result if you regarded the stock ownership in Regal and Western, as being or creating sufficient identification with Signal, wouldn't you?

A Well, if I understand your Honor's question, my answer would be this: That because the operating people making the operating decisions in Western, making the price decisions in Western, owned 45 percent of the stock; because they were making the decisions, I would expect these decisions to be as much in the interest of these independents as it would be in Signal.

Q Well, maybe it would and maybe not because you had 55 percent of the stock of Western that was owned by Signal, is that right?

A Well, it is sixty percent.

Q Sixty percent. And then how much of the stock of Regal was owned by Western?

A Fifty-five, your Honor.

Q Fifty-five percent, so you had a chain of theoretical control in a way, all the way down from Signal through Western through the stations, and you, therefore, would, I assume, kind of an independence of pricing judgment, but then one might not, depending upon one's intellection, I suppose.

A Or the facts, and Mr. Justice, I would like to pick up the facts on that situation.

First, we go to the Court of Appeals finding that there was no evidence in the record of operational control. Then we look at the invoices from Signal to Western and there is every invoice, every sale representing every sale from Signal to Western is in this record.

They are summarized at page 22 of our brief and they show that the prices to Western were higher than the prices of Standard to Perkins. And so Signal, in other words, took that price differential, of something less than a half of a cent and put it in his pocket.

Q Some people think that in those situations one might suspect what is lost on peanuts is made up on the bananas. Sometimes it works that way, too.

A Yes, but I don't understand how that could happen here ---

Q Because of the 55 percent ownership and depending upon how just one aggregates all of the various interests that enter into this common pool if you will regard it as a common pool of ownership and financial interest. That to me is one of the sticky problems in this case. That is why I was asking your colleague about whether -- I mean your adversaries as to whether you would make a different analysis of this case if there were not this thread of more than majority ownership running from Regal to Western to Signal.

And here you do have that thread of more than majority ownership that runs right through. And the question is what, if any, bearing, that should have on the intricate problems presented by 2(a) in this situation.

A I think Petitioner puts his finger right on it in his brief. When he states that the question of control, Mr. Justice, is a question of fact.

Now this fact, this issue, control, was never passed on to the jury. It was never submitted to the jury. We suggested an instruction which would ask the jury or instruct the jury of one of the issues here, was whether or not this price differential was passed on, and the court refused to give that instruction.

Q Let me see if I can get at your theory, which is what I am trying to understand, and it is very simple illustration.

Suppose that Standard sold to Signal which resold to stations, independent stations. And let us suppose that Standard sold to Perkins which resold to independent stations. And let us suppose that Standard sold to Signal at a lower price and let us suppose that the customer of Signal and of Perkins were in the same competitive area.

A violation of 2(a), prima facie.

A Well, depending on whether the impact there would probably be on the third level, but certainly a possibility of a violation of 2(a), depending on impact.

Q Right.

Now the question is, whether this is to be regarded as that sort of a case? That is one of the questions here. And I understand what you say about control. The question whether it is controlled to which we should look or a majority -- or the extent of stock ownership as distinguished from operational control.

I think that is one of the novel questions, as far as I know it is a novel question, that at least in degree that this case presents.

A Of course, in every other field of the law, for example some creditor's rights, which is to attack the separate corporate identities of two corporations, it is the burden on the creditor to show that there is an alter ego situation here, and I don't see why the situation shouldn't be the same here.

As far as the fact that Signal owned a part of Western and that Western owned a part of Regal, that would make no difference whatsoever if there was, if each of these entities did operate independently.

It would be exactly the same situation as though Standard had sold to Signal and that Signal had sold to a completely different independent entity and in turn it sold to a completely independent entity.

The only question is a question of fact which the Petitioner points out and there is no evidence to overcome what I think the presumption should be was that these entities were truly independent.

Q Did the Court of Appeals by deciding it the way it did at least implicitly decide that there was no control?

A No, I think what the Court of Appeals ---

Q Well, they said ---

A There was no evidence on it and they left that open for retrial. They left that issue open for retrial.

Q But the Court of Appeals said that it doesn't extend to the fourth line situations.

A That is correct.

Q Well, it wouldn't have been a fourth line situation if there had been control.

A That is correct. I agree with that.

Q And yet it reversed. So it just said that there --

that unless the control was proved, the Act didn't reach this.

A That is correct.

Q It left open control, did it?

A It left the question of control open and specifically stated in response to the petition rehearing that that question is open for retrial.

Q At least they didn't decide it?

A No, they couldn't decide it. Because there was no evidence on the question of control.

Q And without proving control they decided that this was a fourth line situation not covered by the Act?

A That is correct. That is precisely the only holding on 2(a) that the Court of Appeals made.

Q Well, now, would you say that the -- and you say that the effect on the line of commerce in which Perkins was engaged is not in this case?

A I don't believe I understand your Honor's question.

Q Well, the Court of Appeals said that 2(a) doesn't reach this because it is fourth line.

A Yes.

Q And the petitioners say, "Well, the act says that if there is an adverse effect on any line of commerce," now what about the line of commerce which Perkins was engaged in?

A Well, I entirely agree with petitioner that had this case been submitted to the Court of Appeals under the original language of the Clayton Act ---

Q Well, yes, but let us talk about submitted in the District Court to the jury and the instructions were certainly broad enough to submit this issue to the jury.

A Well, I would say that I agree with the legal proposition that the original language of the Clayton Act has no limitations insofar as level is concerned.

So far as Van Camp is concerned, that case, that issue was decided. If there was a substantial lessening of competition on any level, ---

Q That is right.

A --- that case, that is the end of this lawsuit.

Now, to come back to your Honor's other suggestion that it was submitted to the jury, I don't agree with petitioner's point of view on that at all.

I was in the trial of the case. The case was never focused on a general lessening of competition in the market. It is perfectly true that ---

Q Do you think it focused on showing a lessening of competition with Regal?

A Yes.

Q That Regal cut prices and, therefore, competition with it was lessened?

A Yes. The competition with Regal was lessened and Perkins himself was injured rather than entire market.

Q Well, the instructions to the jury didn't focus on that either.

A Well, the instructions to the jury did focus on that in that it named very specifically the competitors of Perkins who would be Regal, Signal, Western and the dealers.

Q Yes, but it didn't ask the jury to focus on saying you must find that the competition with Regal was lessened.

A No, I have no quarrel with petitioner on this at all. It appears that those instructions appears at page 54, they were given in the alternative. The jury was told that it must find -- and I am reading at the second line -- "that the reasonable, probable effect of the discrimination may have been to substantially lessen competition and then in the disjunctive or tend to create a monopoly in any line of commerce or then Robinson-Patman to injury, destroy or prevent competition with Perkins of Oregon," et cetera.

Q You told Justice White, as I recall, that there was no evidence that Signal controlled Regal?

A There was no evidence that Signal controlled ---

Q How naive do you want us to be? There is a majority stock ownership, isn't there? These companies?

A There is a majority stock ownership.

Q What would you want to -- what standard would you have for control? We have had cases here where one percent of the stock ownership has been tantamount to control.

A I don't think there is any question as the Court of Appeals pointed out that Signal was in the position to control Western. And that Western was in a position to control Regal. But there was no interlocking directorates and there was no demonstration of actual control.

I am not saying for one moment ---

Q Who controlled it?

The majority stock owner doesn't control it, who controlled it?

A The officers of the corporation who are operating the corporation control the corporation.

Q And they are not elected by any stockholder's meeting?

A They are elected at a stockholder's meeting, technically speaking, yes.

But I think it is especially significant here that the minority stockholders of Western were the operating officers and you would expect them as they did often operate that company against the best interests of Signal when they were purchasing gasoline from others than Signal and deprive Signal of its wholesale profits ---

Q It comes to me a person who is not entirely ignorant of the corporate seal that majority stock does not control. Perhaps that could be shown in some way that majority stock does not control. It wasn't under any trust?

A No.

Q Locked up?

A No.

There was no evidence that the president and the chairman of the board or any officer of Signal directed the pricing decisions of Western and absence that kind of evidence you would expect that Western's pricing decisions would be independent.

Q I would assume that in the family of a nest of c orporations you wouldn't have to have any such things go along as the top company wants them to go, or else there is a change.

A That assumption might be valid, Mr. Justice, but here in this case we had quarrels between the owners of Signal, the majority owners of Western and the Signal operating offices as to where they would buy their gasoline and Western insisted that they would buy their gasoline wherever they could get it at a cheaper price, even though this deprived its parent of its wholesale profits.

That would indicate to me a lack of control. As I said before, I am not assuming for a moment or suggesting for a moment, as the Court of Appeals pointed out, Signal was in a position to control, but there was no evidence that it did.

Q But minority holders of Western, were in ---

A Were in control.

Q --- position. The minority stockholders of Western were also rather interested in having that company buy its gasoline as cheaply as it could.

A Yes, whether it was purchased by Signal or wherever else they could get it. They certainly weren't going to operate that company so as to advantage the minority of the majority ownership in Signal, if they could avoid it, and they did avoid it.

Going back to my argument, we have no disagreement here that the original language of the Clayton Act extends to all levels of competition. Our point here is that this standard was presented to the jury in the alternative. Certainly the standard of the Robinson-Patman Act provisions was a more or less offered far less burden than the standard of the original Clayton Act and one would expect that having the choice the jury would make the decision on the basis of the more simplified and less onerous Robinson-Patman Amendments.

But before the Court of Appeals, our objection here to raising this problem here was not a technical one. The matter was not presented to the Court of Appeals. It was not briefed to the Court of Appeals. The Court of Appeals never had an opportunity to define this market either on a functional basis, on a geographical basis.

There are other jobbers in the Northwest supplied by competitors of Standard. There was no showing of the impact of Signal's operations on these other jobbers or on the retail outlets of the other jobbers.

The only showing of the impact at all in an adverse effect at all was on the competitor Perkins.

And that is the limit of the findings of these Court of Appeals in its footnote 6.

So, I don't disagree with the proposition of law, but my only suggestion is that this court has before it the abstract question of whether or not the standard of the original Clayton Act was limited to the fourth level, or to the third level, or to the second level.

The answer to that is no. Van Camp settled that. There isn't a record here that would support a holding that the original Clayton Act should apply here in this case.

Q Suppose Signal owned 100 percent of Western which he still had no evidence of control in your sense, that is to say, the issuance of orders to management, but suppose the facts were otherwise the same.

Suppose Western owned 100 percent of Regal, with the facts all the same. Would you still think that this case truly raises a question of we would have to decide the question of fourth level competition?

A Yes, Mr. Justice, I think you would. I don't think it is a matter of degree of control. I think petitioners put their finger right on the question. It is a question of fact in every case.

Q That is where petitioner put his finger.

A Yes. And that is where I am in agreement with him, at least on that point.

Q I think you would, yes.

A Otherwise we would get into, it seems to me, the rule would be so vague, would it be 30 percent control, 50 percent control, 75 percent control, and despite these percentages the factual situation may vary in each one of them.

Q Usually 50 percent is considered as sort of a dividing line, I mean a clear dividing line. Sometimes 40 percent or less than that may also be significant, but 50 percent is usually considered pretty significant.

But in any event, I suggest to you that is why I was asking you those questions of mine, because that if that may be, I don't know, it may be, though, that this case does not require decision about the fourth level of the distribution channel.

A One other aspect of the fourth level point that we have here, there is no question at all, that the plain language of the Robinson-Patman Amendments, limits the impact to the third level.

It declares a price discrimination, a violation of law, if there is a lessening of competition with the grantor, a lessening of competition to the second level of the recipient, or thirdly a lessening of competition at the third level with the favored buyer of the recipient in this case, Western.

The plain language of the statute limits it to that level, this court held in Sun Oil, Congress knew very well how to designate the levels of competition.

Q Do you think the statute when it says lessening competition in any line of commerce, do you think that is the same standard as saying lessening of competition with a customer?

A No, I do not think it is the same standard.

Q And so you could have any line of commerce could apply to the fourth level?

A It certainly would.

Q That would be a different standard than just preventing lessening competition with Regal?

A Correct.

Then it would have to be a general depression and lessening of competition in the market generally.

Q That is right.

A And there was no evidence of such an effect in this case.

Q If all you could show was lessening of competition with Regal, the Act doesn't cover that?

Q Well, that is our question.

Q I mean that is what you are arguing?

A That is correct.

Q But if you could show lessening of the competition, in the line of commerce Regal was engaged in, the Act would reach?

A I think that is correct. Yes, your Honor. That is correct.

Q May I ask you a question. I am still a little confused about all these levels, all this.

I would like to know, suppose the evidence had shown that Standard was selling any line which carried this through a channel that would reach Perkins and put him out of business because of the prices that Standard was knowingly selling and Standard knew that it would do this, would that violate the law?

A I would have to say to the general question, no, Mr. Justice, but let me make sure that I understand your question.

Q I will tell you what I am thinking about so it will maybe make it a little plainer.

It is not so much how business institutionalizes itself, or what names it gives. As I understand it, anti-trust law was constructed for the purpose combat that a company should not sell to one company cheaper than they sold it to competitors.

Suppose it is not the actual competitor, but it is one in a line of business that have been set up which accomplish precisely the same thing, and would put Perkins out of business.

Suppose it did that?

A First, let me answer it this way. And I will get to your specific question.

Going to the broader anti-trust policy, I do not believe that the broader anti-trust policy under the Sherman Act would want to prohibit price discriminations in all situations I think or rigidify price. But within that broad policy, certainly I think it is the purpose of the Robinson-Patman Act in Section 2 of the Clayton Act to put competitors generally on the same pricing level.

Yes. So that they can start off at an equal start. And Congress, in order to accommodate itself to the broader view of law should have competitive pricing and bargaining of pricing, restrict it, the regional Robinson-Patman so that it declared a price difference, price differential, only where there was a lessening of competition at one of these three levels.

Q Now suppose, however, that there was a business contrivance arranged.

A Yes.

Q Where there was really no business difference between the levels and it was just simply the same company selling right straight through without any levels. What about that?

A I have no problem with that at all, your Honor. I think that would be a situation that would be a violation of the Robinson-Patman Act.

Q You say that that was not shown.

A I say that that was not shown and that was not the situation here and in fact the evidence tended to show just the other way.

Q Well, if the jury followed its instructions, it wouldn't have found for the plaintiff on the basis that competition with Regal had been lessened, would it?

A I think it did, yes.

Q It must not have followed its instructions then.

A Well, the problem here, Mr. Justice ---

Q Well, there wasn't anything submitted to it on the basis of control, and if it followed the evidence there was a Standard, Signal, Western, Regal.

A Yes.

Q And all the instructions to it said was that it got as far as Western but stopped there?

A That is correct.

Q If it followed its instructions then the only way it could have reached the result it did was by going on the line of commerce?

A No, I don't think that the jury understood this problem. We had asked the court at the trial level to submit to the jury the question whether the price differential, as small as it was, was passed down to Regal.

The court refused to give that instruction. The court instructed the jury, contrary to our request, that Perkins and Signal were competitors. And I think that the jury did, was to take that instruction, assume that Perkins was injured and assume that it was as a result of the price to Signal.

Q So you think there was -- so you think that the jury decided that there was an injury to a line of commerce, in which Signal and Perkins were engaged?

A I think under that erroneous instruction, it very well could have.

Q Because of the competition between those two, that you say was nonexistent?

A Which I say was nonexistent and it certainly wasn't approved.

MR. CHIEF JUSTICE WARREN: We will recess now.

(Whereupon, at 2:30 p.m. the Court recessed, to reconvene at 10 a.m. Wednesday, April 23, 1969.)