# Supreme Court of the United States



OCTOBER TERM, 1968

**In the Matter of:**

Clyde A. Perkins,

**Docket No.** 624

Petitioner,

v.

Standard Oil Company of California

Respondent

Pt. 2



**Place** Washington, D. C.

**Date** April 23, 1969

**ALDERSON REPORTING COMPANY, INC.**

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

TABLE OF CONTENTS



- - - -

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - - - - - x

Clyde A. Perkins,

Petitioner,

v. : No. 624

Standard Oil Company of California,

Respondent.

- - - - - - - - - - - - - - - - - - - - - - x

Washington, D. C.
Wednesday, April 23, 1969.

The above-entitled matter came on for argument at 10:14 a.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:

EARL W. KINTNER, Esq.
GEORGE R. KUCIK, Esq.
Washington, D. C.
(Counsel for Petitioner)

RICHARD J. MacLAURY, Esq.
San Francisco, California
(Counsel for Respondent)

0o0

P R O C E E D I N G S

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

Mr. MacLaury.

THE CLERK: Counsel are present.

ORAL ARGUMENT OF RICHARD J. MacLAURY, ESQ.

ON BEHALF OF RESPONDENT

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

I would like to return for a moment to the question of Justice Douglas had yesterday and the suggestion that there must have been control by Western over Regal because of Western's 55 percent stock interest in Regal.

My response to Mr. Justice Douglas' question was that although Western was in a position to control Regal, there was no evidence that there was in fact control.

I might add to that answer this morning, and say that I think it will be recognized that Western as the majority stockholder in Regal, had an obligation to the minority stockholders in Regal and it was Western's obligation as a majority stockholder to honor its obligations to the minority and to see that Regal could resell its gasoline at a price that would return to Regal a normal profit.

In other words, that the majority in Western had an obligation to frain from dealing with Regal and controlling

Regal to the point that Regal would operate at a loss.

Now the fact is that Western paid Signal slightly higher or approximately the same prices for its gasoline that Perkins paid Standard.

Now Signal owned the majority interest in Western and was obligated to treat the minority interests in Western fairly and to refrain from compelling Western to operate at a loss or to sell at a loss to Regal.

Beyond this, the fact of the matter was that the minority stockholders in Western were actually the controlling officers and controlled the operations of Western and they were in a very good position to see that their own interests were properly taken care of.

Q Whether there was control or not, I suppose Signal's lower price was either passed on or it wasn't. If it wasn't passed on, I suppose the Perkins case gets much tougher, doesn't it?

A It certainly does, yes.

Q Was that issue put to the jury? I suppose on one theory of the case the jury would have had to have found that it was passed on?

A No, I do not believe so.

Q Well, they came out with a verdict for Perkins?

A Yes, they did.

I would like to step back a moment and say this:

That the Respondents asked that this question of passing on be put to the jury. The court refused to do that and I might say that on page 5 of our brief ---

Q Well, let me just ask something else.

If it was passed on on a regular basis, it doesn't really make much difference about control does it?

A No.

Q And if it wasn't passed on, it doesn't make any difference about control either?

A I think that is correct.

The fact of the matter is that there is no dispute between Petitioners and Respondents as to the price that Western paid for its gasoline. That evidence was put in on the basis of invoices.

The invoices of Signal Oil and Gas to Western and there was no conflict in it and that invoice evidence is summarized in the footnote at page 22 of our brief and it shows that for virtually all of the time Western paid a higher price for gasoline than Perkins.

Q How does Regal get off with selling at such a low price unless it buys its gas at a low price. Now just how does that operate like that?

A Well, that, I think, goes to the very question, and the policy question as to why Congress cut this viability off at the third level.

Regal, it was established in the evidence had a very large, well-situated stations. They concentrated on the sale of gasoline; they concentrated on large volume stations; they opened with a well-advertised campaign and it was Perkins' own marketing experts. It wasn't a professor or somebody. He had actually worked for years in that Portland market and he was an independent at this time and he testified that he was in Portland then and he said it wasn't the prices of Regal that had the impact.

The real impact of Regal was on its tremendous advertising campaign, its promotional campaign and its method of selling gasoline.

Q You mean they didn't have lower prices? Selling prices for gas?

A Well, I think we would have to accept for the purpose of this record here --

Q That they did.

A -- that there was a reduction in the price in Portland of some 4 cents immediately after Regal came on the market.

But, Mr. Justice, we could not attribute that 4 cents reduction in the Portland market to the less than half cent advantage that Signal had over Perkins. And at the very time that Regal opened, Signal was paying a higher price than Perkins.

Q Doesn't the record show what Regal was paying for gas?

A There is no direct evidence in this record as to what Regal was paying, except the ordinary inference that I think should be drawn, that Western paid a higher price than Perkins and we can't assume that Western is going to sell to Regal at a loss.

Q Well, you are suggesting though that it is quite rational to, a rational inference, that Regal although selling at 4 cents below what the price was, nevertheless was paying the same price for gas that other people were?

A Yes, that is what I am suggesting, and I am suggesting also that because of Regal's more efficient operation, Regal was probably taking a lower profit than these other markets. They were probably operating on a large volume and low unit cost and also, Regal could not perform the ordinary regular services that you connect with a service station, such as the lubrication and repairs and that sort of thing. They very efficiently concentrated on the sale of gasoline.

That was the testimony of the Petitioner's own witnesses. And I think a lot of it could be attributed to that.

Q But if you sell gasoline below the cost per gallon, the more gasoline you -- and that is all you sell, the more gasoline you sell the more money you lose. Is that right?

A You are absolutely correct.

Q It is just like ribbons. At less than they cost you, the more ribbons you sell the more money you lose.

A You are absolutely correct, of course.

Q I want to repeat to you the question that I asked you yesterday, but I didn't ask it well. I will try it again today.

Let us suppose that Signal owned 100 percent of Western and Western owned 100 percent of Regal and let us suppose that Standard sold to Signal at the lower price than it sold the same product to Perkins.

And let us assume that all the other statutory requirements were met, without competition

Would that be a violation of 2(a)?

A I would have to answer that, Mr. Justice, in this way.

Without more, the answer would be no. I still think it would take a factual inquiry to determine whether or not there was actual direction by Signal of the decisions of Western and by Western of the decisions of Regal.

I don't think the inquiry of the burden would be nearly as strong or as heavy as it is in this situation, but of course that is not the situation.

Q I understand that. I respect the logic of your answer. I expect you probably have to answer it that way

consistently with your position.

A I would like to go one step further than that. I believe it is the presumption in virtually every field of law that where there are separate entities, these separate entities make their own decisions, and I recognize that where there is 100 percent control the burden of showing to the contrary is not nearly the burden that Petitioner would have here.

We also have this further problem which I was going to mention, Mr. Justice, that where Signal is holding itself out as an independent corporation, where Western is holding itself out as an independent corporation and where Regal is holding itself out as an independent corporation, if there was actual price control down the line it would be a serious danger of the violation of the Sherman Act, and I don't think such a serious violation of the law can be lightly inferred just from the matter of this control, of stock control.

Q I just still wonder if control is very relevant.

A Well, that brings me to I think it is relevant and it brings me to ---

Q But if Standard's price cut was passed on, right on through at all levels, I wouldn't think the lack of control would necessarily ruin Perkins' case.

A Well, it would here -- put it this way. The ultimate seller, Western Hyway on the third level, then control

makes no difference, but even if this price differential had been passed on all the way down to Regal at the fourth level then I would say that that is beyond the purview of Robinson-Patman.

Mr. Justice, that brings me to the ---

Q Unless you view it as a line of commerce case.

A Unless you view it as a line of commerce case which we acknowledged yesterday.

And that brings me to a further answer perhaps to the question that you asked yesterday and that was this question: That the original language of the Clayton Act aside, were not Signal and Perkins competitors on the secondary level? I think the answer to that is that within the meaning of the language of the Robinson-Patman Act the answer must be no.

The first answer is that Robinson-Patman uses the word "competition" in its practical sense. That means as an endeavor of two or more persons to get the same trade from the same people at the same place at the same time.

Q Well, now Perkins was competing with somebody wasn't he?

A Well, I am certain that Perkins was competing with somebody, yes.

Q Well, if Standard's lower price to Signal had the effect of lowering or lessening competition in whatever market Perkins was competing in, it wouldn't make any

difference whether Perkins and Signal were competing or not?

A Well, let me respond to that this way: Just because somewhere down the line a purchaser of Signal Gasoline, third, fourth, fifth level down below, a purchaser of Signal Gasoline somewhere confronted and competed with a purchaser of Perkins Gasoline, that wouldn't make Perkins and Signal a competitor or competitors for the purpose of this act.

That wouldn't mean that Perkins and Signal competed on the secondary level, because if this were so, then every non-primary line case would have to be a secondary line case and clearly this is not what Congress meant.

Congress recognized the realities of the market, it recognized the different levels, and Congress talked about competition with the grantor, competition with the favorite purchaser, competition with the customer of the favorite purchaser and if the argument is accepted just because somewhere way down the line there are people competing with gasoline derived from these two sources, Signal and Perkins, that that means that Perkins and Signal were competing at the secondary line, then this elaborate definition of language used by Congress would be entirely superfluous.

Congress could simply have forbidden price discrimination, whose effect may be "injure, destroy or prevent competition with any person" but Congress I think wisely so refrained from going that far.

Q Why did Congress cut off the line of responsibility in that way? On the grounds that it would not be fair to attribute responsibility to the original supplier, here Standard?

A I think that is correct.

Q Is there any other reason, I can't think of any.

A Well, I think that there could be so many intervening factors, by the time you get to the third level.

Q One of the questions you have here is whether that reasoning of the Congress applies to a case where there is majority stock ownership down the line; that is to say, whether in that kind of a case where you have a line of a majority stockholders involved all the way through such as you have here, the reasoning of Congress applies that is to say that it would not be fair or appropriate to pin responsibility upon the original seller, here Standard?

A There are just one or two other points I would like to cover before my time is up. I have only a few moments left and that is this:

Petitioner asked that the verdict be reinstated. We suggest that that should not be done. There were many material errors in the trial court which were presented to the Court of Appeals, which the Court of Appeals did not move upon.

One of them was this question of causality, and that

question of causality cuts across the Robinson-Patman Act standards as well as the original Clayton Act standard.

Now, in addition, there were serious and important questions concerning liability, there were questions concerning the fact of injury, there were also questions concerning the good faith meeting of competition defense.

Some of these questions the Court of Appeals ruled on against Perkins, others it reserved ruling but admonished that its failure to rule was not to be taken by the trial court as appellate approval.

Now to resolve these questions would require the review of this vast record, some 6,000 pages of transcript and some 15,000 or more pages of exhibits which we suggest would more appropriately be left in the first instance to the Court of Appeals.

One more point, there has been some talk about Regal selling at a loss, Mr. Justice. Regal must not have sold at a loss because there was a difference between 5 and 6 cents, according to Perkins testimony, between the price that Regal sold and the price that Perkins' single, retail station in Vancouver sold.

Now this difference certainly couldn't have been attributed to the less than one-half cent price differential that was granted to Signal after January.

Again, I don't think we can assume that Regal would

sell at a loss because I don't think that there -- I think the majority stockholders there in Western would have been violating their obligations to the minority to have compelled Regal to sell.

Q Doesn't the record show the price that Regal paid?

A No, your Honor, there was no evidence in the record of the price that Regal paid.

Q Why is that?

A I do not know why. The auditor for Regal was on the stand. He was also the auditor for Western. He testified as to what Western's prices were, put the invoices in, but he was not asked any questions by Petitioner as to what Regal's price was and certainly this was a crucial element of proof that was available to Petitioner but he failed to come forward.

Q Were the invoices in the record?

A The invoices from Signal to Western are in the record, but not from Western to Regal.

Q I see.

MR. CHIEF JUSTICE WARREN: Mr. Kintner.

REBUTTAL ORAL ARGUMENT OF EARL W. KINTNER, ESQ.

ON BEHALF OF PETITIONER

MR. KINTNER: It was the auditor, Mr. Chief Justice, and may it please the Court, it was the auditor who was put on

the stand by Standard and Mr. MacLaury examined him and did not ask any questions with respect to the price. As a matter of fact, Mr. MacLaury said yesterday in his argument that the minority ownership of Western Hyway lay with the officers of Western Hyway.

I quote you from the printed record a question to this same auditor by Mr. MacLaury.

"With respect to the years 1955, '56 and '57, what entities or what persons owned the stock, the capital stock of Western Hyway Oil Company?

"Answer. In Western Hyway Oil Company, 60 percent of the shares were owned by Signal Oil and Gas Company and 40 percent was owned by three individuals who were corporate officers."

But he didn't ask corporate officers of Signal or corporate officers of Western Hyway.

Q Could you just briefly tell me what your ultimate theory is here under the Robinson-Patman Act, is it the line of commerce theory or is it the injury or preventing competition with Regal?

A I think, sir, that there are at least two possible alternatives here for this court.

I believe beyond question that the Ninth Circuit was wrong with respect to the old Clayton Act ---

Q Yes, but what is your theory? What is your

theory about how would you prove a case under the Robinson-Patman Act in this?

A I think that the case can be proved under the old Clayton Act by showing a discrimination. Mr. MacLaury has indicated that the jury ---

Q A discrimination between Perkins and Signal?

A Perkins and Signal.

Q And then what is the line of commerce that is injured?

A The line of commerce is the whole Northwest petroleum marketing as our expert witness indicated.

Q You mean on all levels?

A Yes, sir.

Q Bothwholesale ---

A The competition is down at the retail level. That is where the injury is felt. This is where the price is felt.

Q You mean the line of commerce is the retail sale of gasoline?

A Yes, your Honor, and in this instance the retail and wholesale because Perkins had an average profit of 1.54 percent and Standard itself indicated that it took 2 cents to live.

Q Well, was there any indication in the record about the characteristics of this market, the geographical

market and the product market and what percentage Perkins has in it or not?

A Perkins had 2.4 percent of the overall market.

Q But that is in the record?

A That is in the record. That is the equivalent of what Sun Oil has antionally. Perkins sold 8 percent of Standard's gallonage in that market. Standard had 30 percent of that market. Perkins lost 13 percent of his gallonage of gasoline, 50 percent of his gallonage of fuel oil during the claim period and Signal gained 50 percent during the claim period.

Perkins was making an average of 1.54 cents a gallon. Standard's own witnesses stated that it took 2 cents a gallon to live and if you added the discrimination which Standard gave to Signal to Perkins' price, Perkins would have had 2.2 cents per gallon which would have given him a fighting chance of living in that market.

Now there is no evidence as to the price that Regal sold in that market.

Standard's own executives acknowledged that Regal had a better price than Perkins and that Regal would wreck that market unless something was done to control them.

There is no evidence of Western's price to Regal. Standard was in a position to supply this but didn't do it, and in that connection this court has held with respect to the

matter of ---

Q But you have the burden of proof in this case, didn't you?

A Yes, your Honor, and if I might return to this question of control, I think that we adduced sufficient evidence from which the jury could have inferred that there was control with respect to Regal and Western by Signal.

Q What was that evidence?

A I beg your pardon.

Q What was that evidence?

A The amount of ownership and ---

Q Besides the ownership.

A --- and there is other evidence that Standard treated an offer made to Western Hyway for the purchase of gasoline as an offer made to Signal, its customer. That is in the record.

We think in looking at the whole evidence, the whole record, the jury could reasonably have inferred that there was control.

Q You would agree, wouldn't you, that the fact that Regal sold at a lower price than Perkins, it was not established a violation of law standing alone?

A Not standing alone, sir.

Q Now, as I understand Mr. Justice White's question, which is the same question which I have in my mind, could you

state succinctly as to what the theory was on which you tried this case? It wasn't just that Regal sold for a lower price than Perkins.

What is the theory on which this case was tried? I was a little startled to learn that the invoices showing the prices paid by Regal are not in this record, but apart from that parenthetical remark, would you tell us just what your theory was and is on this case?

A The theory was that Standard gave a better price to Signal which resulted as it was passed down the line in a price war which spread from Portland as one would drop a pebble in a pool of water, throughout the Northwest Territory, Northwest market.

Also, there is considerable proof that Standard, because of this price war, gave special assistance to its retail stations which were branded stations, which were competing with the Perkins stations just as Perkins stations were competing with the Regal stations, so that what you have here, as Dr. Munn pointed out in his testimony is an examination of the whole petroleum marketing situation in the Northwest and based upon his hypotheticals, he found that there was a lessening of competition, a tendency toward monopoly and a probability of higher prices.

Q So you suggest it makes no difference whether Signal, Western and Regal were or were not connected by

stockholders? It makes no difference at what level the Signal stations were in terms of their remoteness from Standard?

A I think, sir, that that under the old Clayton Act it makes no difference with respect to the showing of injury not based on functions, but alternatively ---

Q When you say the old Clayton Act, what are you talking about?

A This is the first alternative spelled out in the amended Clayton Act which is a carryover of the language, the same language, used in Sections 3 and 7 which this court has interpreted many times.

Q What part of the law are you talking about?

A I am talking about the amended, the Robinson-Patman Act ---

Q Section 2(a)?

A --- Section 2(a), amendments to the Clayton Act which carried over in the amendments the first alternative, injury to competition and tendency toward monopoly and added the functional amendment to the Clayton Act under which I also think we have adequate evidence here in this record from which the jury could have found that is the requisite injury.

Q Your theory cuts back far underneath years and years of gloss on Section 2(a), doesn't it?

A Section 2(a) has been glossed at the functional level many times. I think it is time this court ruled on the

first alternative and made that first alternative applicable as it has made the similar language applicable under Sections 3 and 7.

Thank you.

(Whereupon, at 10:43 a.m. the oral argument in the above-entitled matter was concluded.)

- - - -