Supreme Court of the United States

In the Matter of:

UNITED STATES OF AMERICA

Appellant

vs.

ARMOUR AND COMPANY, AND
GREYHOUND CORPORATION,

Appellees

Docket No. 759

Place Washington, D.C.

Date April 19,1971

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

THE UNITED STATES OF AMERICA, Appellant	)	
vs	)	No. 759
ARMOUR AND COMPANY, AND GREYHOUND CORPORATION, Appellees	)	

The above-entitled matter came on for argument at 2:00 o'clock p.m. on Monday, April 19, 1971.

BEFORE:

WARREN E. BURGER, 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
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

JAMES van R. SPRINGER, ESQ.
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Department of Justice
Washington, D. C.
On behalf of Appellant

EDWARD L. FOOTE, ESQ.
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On behalf of Greyhound Corporation

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will now hear arguments in Number 759, United States against Armour.

ORAL ARGUMENT BY JAMES van R. SPRINGER, ESQ.

ON BEHALF OF APPELLANT

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

This case which comes here on direct appeal from the District Court from the Northern District of Illinois, is a reincarnation of the case of United against Armour and General Host Corporation that was here a year ago but became moot before the Court decided.

Like that case, it raises a question as to the impact as to the structural prohibitions of the great Meat Packer's Anti-Trust Decree of 1920 to which Armour, one of the appellees here anomally, is one of the four meat packer parties. The decree prohibits Armour from having any involvement in certain food lines other than meat packing and the question in both of these cases is essentially the same, and has been whether there is a remedy under that decree for a takeover of Armour by a company that is in itself in a forbidden food line, as there would be incontestably a remedy if Armour were to acquire such a forbidden food company.

The General Host case began in the beginning of 1969 and General Host acquired control of Armour. Since

General Host was in the forbidden food lines the Government took the position that thedecree was offended by General Host's takeover of Armour, just as it would have been by the converse situation. So, we filed a petition then against General Host in the beginning of 1969 in the District Court, which has had continuing jurisdiction over the Meat Packers' Decree for the last ten or 12 years, but a transfer from the District of Columbia, where a decree was initially entered.

At that time we asked the Court to enter an order supplemental to the decree against General Host, which would make General Host a party to the decree and then prohibit its acquisition of Armour. But, Judge Hoffman, the District Judge, who is also the District Judge int he present case, declined to entertain a petition, saying that the decree was aimed only at affirmative action by Armour or another named defendant and that therefore the relationship between Armour and General Host was perfectly consistent with the decree as long as it was created by somebody other than Armour, and as long as Armour avoided actively dealing in the forbidden food line.

The Government appealed the case here and it was argued in March of 1970. In mid-May last year, before the Court could reach a decision in the General Host case, General Host sold its controlling stock interest in Armour to Greyhound Corporation, which is the Appellee in the present case.

Over our objection this Court then held that the

case had become moot and ordered that the Government's petition against General Host be dismissed.

The papers that were filed in connection with that mootness issue were set forth in the separate supplemental appendix in this case and we have recited some of the related facts in our brief and I will not repeat them again here.

Following that action by this Court last June the Government promptly filed the present petition against Greyhound, since, in our view Greyhound, like General Host, has food interests that the Meat Packer's Decree forbids Armour to have.

Judge Hoffman promptly dismissed this petition as well at the end of June, after hearing arguments by the Government, and off the record by Counsel for Greyhound. As in the General Host case, Judge Hoffman again held that he was powerless to issue any order against Greyhound unless and until Greyhound actually caused Armour to deal in the forbidden food line. And so he held that the Government petition failed to state a claim upon which relief would be granted. Again we appealed to this Court for probably jurisdiction, and here we are again.

The question in this case, as in the General Host case, is whether an anti-trust decree can effectively keep a party to that decree from becoming involved in another line of business where it's involvements would, in the view of the

initial decree, create a risk to the competition.

Judge Hoffman held in each case that all a Court can do in entering an anti-trust decree is to tell the parties not to do anything itself that would have the effect of involving in the forbidden business and, incidentally, the act can punish anyone who actively aids or abets that party in doing what the decree tells him not to do.

We say, on the other hand, that a structural anti-trust decree can be somewhat more than that, that a Court can effectively decree an absolute prophylactic situation between a particular named party's business and another line of business and we say this Meat Packer's Decree has done that and that the court having jurisdiction over the decree can enter a supplemental order fashioning a remedy against an outsider like Greyhound which comes in to destroy the structural separation that we say is at the heart of the decree.

Just as in the school desegregation cases that we have referred to in our brief, we think an anti-trust court has the power to issue a narrow order directed at a particular third party involved in a particular situation after a hearing that will prohibit that party's interference with the effectuation of the specific purpose at the heart of the decree in question.

With that introduction let me turn now to the description of the corporate relationships that Greyhound has created between Armour and Greyhound's forbidden fruit operations and

hen point once again, as I did last year, to the explicit anguage of the decree that we think is designed specifically o prohibit such a relationship from coming into existence.

Some of these details have developed since the hearing, he argument as it really was, in the District Court last June, lthough there has not been any drastic change that materially its our theory of the case. The more recent occurrences are et forth either in our brief or in Greyhound's brief or in one instances in Greyhound's annual report for 1970 which has ust recently come out. We think they are undisputed and it ill be helpful to the Court to have the current corporate ituation.

Greyhound, at the time when General Host first became nvolved with Armour, Greyhound also was trying to get control f Armour in competition with General Host, but General Host on out, winding up in early 1969 with about 57 percent of the tock but leaving Greyhound with something of the order of a hird of the stock. In the May 1970 transactions that I have eferred to, Greyhound then sought out General Host, acquiring ll of the stock that General Host had had, giving it then a otal of about 86 percent of all of the stock of Armour.

Q Did that acquisition require approval of the nterstate Commerce Commission?

A Yes, it did, Mr. Justice. As we set forth in ur pleadings last term and we refer to in our brief, Greyhound

filed an application with the Interstate Commerce Commission. The Government, though not a party there, filed a pleading in which we suggested that the Commission withhold its action approving the issuance of the Greyhound stock involved in the General Host transaction until this Court should decide the anti-trust case to determine whether this acquisition was legal or not.

The Commission took the point of view that since the Court has not reached a decision there was not yet anything suggesting that the transaction was illegal. And then from -- the ICC's rather narrow focus, which of course does not deal with the -- the ICC's order does not deal with any anti-trust questions at all, and of course it has no power to immunize this kind of transaction. The only real question there was whether the issuance of this additional stock by Greyhound would be harmful to Greyhound's basic business as a common carrier.

So, the Commission did approve it, and within a couple of hours after notice was given of that approval, this transaction had been closed and Greyhound was the owner of Armour.

Greyhound has made no secret of the fact -- in fact it stated again in its current annual report that it went into Armour initially in 1969 with the encouragement of Armour's then -- that is pre-General Host, management.

As we understand it --

Q You don't say that they did actually participate with Armour or anybody else; do you?

A No, Mr. Justice, we are not making the argument in terms of Rule 65(d) of the Civil Rules, that Greyhound has been in active participation with Armour in doing something in violation of the decree.

Q Well, how do you escape that?

A I'm not sure that we might not have charged that. The case has not been handled along those lines. I think it has been perfectly open to the Government to proceed that way, and in a sense, of course, it's easier on Greyhound than calling Greyhound before the Court and suggesting that it itself was in contempt. The Government is -- has a perfectly adequate remedy to have an order against Greyhound telling Greyhound to divest itself and then and only then would the Government proceed --

Q That's an easier way of doing it than going directly against Greyhound?

A Yes. There are, I think, fewer questions to be argued about in that approach --

Q Well, assuming that it's easier for the Government; that doesn't make it legal, does it?

A No, Mr. Justice, though I think if the Government could proceed directly against Greyhound I think it

would follow that it could proceed indirectly in thiswway. I think that, assuming that the Court agreed with that, the Government could say --even though we could seek contempt punishment against Greyhound now we will give Greyhound another chance and we would like the Court to make clear what Greyhound's obligations are and then and only then would we proceed against them.

As we understand it, the Armour stock was initially owned by a Greyhound subsidiary. Subsequently at the end of 1970 Greyhound arranged a series of transactions which resulted first of all in the acquisition of all of the rest of -- all of the minority interests in Armour, giving Greyhound 100 percent ownership and then a reorganization of the corporate structure so that Armour is now a direct, fully-owned subsidiary of the Greyhound Corporation, which we are told is the holding company which owns Greyhound's various interests, including its bus lines, Armour, the food businesses that we find offensive to the decree and various other lesser interests.

And Greyhound has moved with some rapidity to integrate Armour into its corporate family. For example, the current annual report of Greyhound states, and I quote: "The various activities have been coordinated; computer operations, communications, insurance and banking arrangements, for instance. What Greyhound has deemed to be marginal unproductive assets of Armour have been sold and several unprofitable

Armour operations have been closed."

In fact, our information is that Armour facilities accounting for something like ten percent, perhaps more of its annual sales have been disposed of by Greyhound during the period that it has had that kind of control over Armour. The report further says that a consolidation of headquarters staffs is planned. The Chairman and chief executive officer of Greyhound is now the Chairman and chief executive officer of Armour. Seven of the 11 Armour directors are officers or directors of Greyhound, including the entire executive committee of Armour. The three top officers of Armour are on Greyhound's board of directors and so on.

So, obviously Greyhound's relationship to Armour is a good deal more than that of a mere investor or an ordinary stockholder, As Greyhound suggests in its brief. Armour is run by Greyhound people obviously for the benefit of Greyhound and its shareholders and of course Greyhound created this situation with full knowledge throughout, both of the Meat Packer's Decree and of the Government's interpretationof that decree.

Side by side, as I indicated, in the Greyhound corporate complex is another wholly-owned subsidiary, called "Greyhound Food Management, Incorporated," which manages Greyhound's forbidden food interests, as we call them. These are basically two kinds: one, Post Houses, which operates a

chain of restaurants and two, the larger element of this, something called "Prophet Foods," which is an industrial catering business. It sells prepared meals to schools and industrial plants and hospitals and various other establishments.

Food management is also a very substantial part of the Greyhound complex. Leaving Armour out, it has averaged something on the order of 15 percent of Greyhound's total sales. Something like the $110 to $120 million a year.

Q Is this an auxiliary -- is any part of these activities an auxiliary to their -- to Greyhound's transportation service? I mean, do their buses stop -- in other words --

A I think that that could be said to some extent of Post Houses.

Q To Post Houses?

A I believe runs restaurants, but I think it also runs other restaurants. I don't think that that can be said in any way of Prophet Foods, which is the larger element, which is basically --

Q Prepared meals?

A Prepared meals --

Q Are they sold to airlines or what?

A I -- Greyhound's counsel could tell you a bit more about that. I don't believe airlines. I haven't seen any reference to that. I think it's plants and institutions.

Among other things, the same person is the Chairman

of Food Management, which operates the other two businesses. The Vice-Chairman of Armour and the Vice-President for Food of Greyhound. This is one individual. And Food Management, of course, sells in prepared form a great many of the commodities in very large amounts that are specified in the paragraph of the Meat Packer's Decree telling Armour what it can't get involved in.

Now, let us look at the specific language of the decree. Paragraph four says that the meat packer defendants, including Armour, are perpetually enjoined and restrained from either directly or indirectly engaging in or carrying on the manufacturing job in selling, transporting, distributing or otherwise dealing in these forbidden food products. And that same paragraph goes on to say that the corporation defendants are further perpetually enjoined and restrained from owning, either directly or indirectly any capital stock or other interests whatsoever in any corporation engaged in those forbidden businesses.

Paragraph 6 prohibits Armour from directly or indirectly operating meat markets -- retail meat markets and paragraph 8 of the decree has prohibitions on dealing in fresh milk and cream which are comparable to the other prohibitions in paragraph 4.

As we show in our brief, this Meat Packer's Decree, of course, is no mere historical relic. The packers have twice

asked the Court, this Court each time, to lower the prophylactic structural barriers between the meat packing business and the other food businesses and each time the Court, including this Court, has rejected their arguments that changed conditions, replacement of the original officers and directors who got Armour and the other packers into this in the first place, and so forth, have justified changes in the decree. So, the decree has remained intact through all these years and it was only 11 years -- ten years ago that this Court last considered the modification question.

Armour is still the second largest member of the meat packing industry and that is still a quite highly concentrated industry, although somewhat less so than it was in the twenties.

As Justice Cardozo said in 1932 in the earlier modification attempt: "Such great size carries with it an opportunity for abuse, which is not to be ignored when the opportunity has proved to have been utilized in the past." It was for that reason he said that the decree absolutely prohibited the forbidden food line from being added to the meat packing business. And the underlying purpose of this structural barrier was, again in Justice Cardozo's words: "To avoid the difficulty of ferreting out particular competitive evils and repressing them when discovered."

In other words, I think the classic case of a

prophylactic kind of structural insulation of the parties to the decree from other businesses where it was considered that their involvement would risk anti-competitive effects. I think then it's as clear as it could be that the specific and primary purpose of the decree, both based on its own language and on what this Court and the District Court has said over the years in interpreting it: Armour was to be kept in perpetuity out of the food lines in which Greyhound, through its sister subsidiary of Armour: Food Management, is involved. And this specific prohibition is what we say the acquisition of Armour by Greyhound has interfered with.

As I indicated, they are now sister subsidiaries of a single holding company with interlocking managements and boards of directors and common banking arrangements and so forth. They are obviously common servants of a single owner: Greyhound, or if you will, the stockholders of Greyhound, every bit as much, we think, in practical terms, as if Armour had acquired Food Management, or if Greyhound now, as it obviously could, were to merge the two of them and perhaps operate them as divisions of a single corporation. I think it's uncontested that both of those particular situations would be literally prohibited by the decree.

Moreover, I think it's clear that Armour could not have created a holding company itself which would own its stock and then would have acquired a company such as Food Management,

but of course that corporate relationship is the precise corporate relationship that now exists by virtue of Greyhound's acquisition and rearrangement of these corporate structures. So, again, the same economic unit, the same corporate family, is in the two businesses and we say that the decree was plainly specifically designed to prevent that exact situation as to Armour, from coming into being without regard, we say, to who was active and who was passive in creating the situation.

In fact, we think it can be said that the situation created by Greyhound with respect to Armour, puts Armour in a position where it can be said to be in literal violation of the decree. As I indicated: paragraph 4th of the decree notonly prohibits Armour from directly or indirectly engaging in the business in which Food Management is involved; it also prohibits Armour from owning any interest whatsoever in any company that is engaged in such a business as Food Management, we think plainly is.

We think that the situation, the interlocking situation of a common ownership, is a situation where, in realistic appreciation of modern corporate realities it has to be said that Armour does own an interest of the kind, any interest whatsoever in the business of its sister subsidiary. Any other approach, we think, tends to confuse modern corporate realities with modern traditional notions of ownership by real individual people of real individual things, given the power

that a holding company like Greyhound has over the various corporate structures that he has chosen to put within the system, we think that realistically this has to be regarded as a situation where --

Q Mr. van Springer, what would be the major problems of the Government's Section 7 suit against Armour and Greyhound?

A Well, I can't speak very authoritatively on that, Mr. Justice White, because I'm not aware that specific analysis has been done. I think that this is a conglomerate problem which, of course, the department has moved into in other areas. We have not contended that this would be a Section 7 violation and I think that in the very premise of this case we don't even show that it would be one. I think perhaps the nature of the dealings between the two companies and the magnitude of the markets might not be sufficient to make it a very easy SEction 7 case. In any event, we say we don't need to cross that bridge because there is already a decree entered specifically against Armour saying Armour can't be in this kind of business and that's the very purpose of this kind of prophylactic relief in the decree to make it unnecessary for the Government to go into the particular facts and prove a particular violation of the anti-trust laws de novo.

The only question, then, as we see it, is one of relief, for what we think is uncontestably an interference by

Greyhound with the substantive structural relief that this whole decree is designed to create or, if you will, an actual situation where Greyhound has put Armour into violation of the literal terms of the decree. Of course it's plain that only Greyhound, and not Armour, its pawn, can remedy this situation because the title to the stock that has to be divested to give the Government the relief it wants is in Greyhound. And Armour, of course, in the remedial sense, is the only one of these entities that's a party to this case.

As I indicated, we have not suggested, we have not proceeded on the theory that Greyhound is in active participation with Armour in making Armour violate the decree. What we have said is that as in the civil rights cases, which I think are quite analogous, where the courts have found the power to issue a supplemental order creating a remedy against interference with school desegregation, interference by a third party, not a party to the initial decree, because of course the party defendant in these cases has been the school boards.

The Courts have found no trouble in creating a remedy for independent actions by third parties not in conflict with the school board, and we think that this is a very analogous situation. Where Section 5 of the Sherman Act gave the District Court power to bring Greyhound in, we think, as a party on the theory that that was required to -- the ends of justice, and Paragraph 18 of the decree again specifically

provided that the court retain jurisdiction to enter appropriate supplemental orders to carry it out and we think that the order requested in the Government's position would have been such an appropriate order.

I'd like to reserve the rest of my time.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Springer.

Mr. Foote, you may proceed.

ORAL ARGUMENT BY EDWARD L. FOOTE, ESQ.

ON BEHALF OF APPELLEES

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

As Greyhound sees the issue, the question is one of application of traditional and acceptable principles that apply to injunctions under Rule 65(d) and whether the accepted law that applies to such injunctions is going to be observed in this case under the attack of the Justice Department, that in this case structural anti-trust decrees will be circumvented.

The basic question in this case starts with Rule 65(d) and the District Court is very familiar with the fact Packer's Decree, because he is the judge who handled the modification proceedings in Chicago in a 14-week trial back in 1958. This District Court reviewed the petition and dismissed it. Now, he's familiar intimately with the terms of this decree.

The basis of Judge Hoffman's decision is that Rule 65(d) simply does not apply to situations unless someone is actually participating in violation of an injunction. He observed and I think the record is unmistakably clear, that Armour's conduct in this case is not at issue. Armour has never violated a decree; there is no suggestion that Armour did; Armour's conduct is impeccable.

There is no suggestion that in this instance Greyhound is actively participating with Armour in violating the decree and as the District Court says: "Rule 65(d) of the Federal Rules of Civil Procedure provides that every order granting injunction is binding only upon the parties to the action, their officers, et cetera, and upon those persons in active concert or participation."

There is no part of this decree that relates to the conduct that the Government is talking about. I think it might be of interest to the Court -- the Court probably knows that three years after this decree was entered, back in 1925, one of the original signatories to the decree: Morris Packing Company, was acquired by Armour. Here we have supposed prophylactic and structural anti-trust issues that were supposedly decided, for all purposes, in 1920 in this decree. And yet three years later one of the original signators was acquired by Armour.

Now, the fact of the matter is that this decree does

preclude some conduct and does not apply to other conduct. All of the stock of Morris, all of the business of Morris, was acquired by Armour. There is no attack on that. As a matter of fact, the Government, over the last 50 years, has interpreted this decree completely inconsistent with their current interpretation.

What you have, as Greyhound sees the matter, is the same situation that this Court decided in May of 1969 in the Hazeltine-Zenith situation. Now, to be sure, there is no analogy that's perfect, but what did the court do in the Hazeltine litigation? Here are the similarities: Both cases involved anti-trust decrees; both cases involved an anti-trust decree on a subsidiary; both cases involved a parent, and the parent obviously owned the subsidiary.

Now, in the Hazeltine litigation, this Court said and reversed the District Court, that you could not apply the injunction, the injunction that was entered against the subsidiary, to bind the parent. And the case was reversed on that grounds.

This Court at that time again referred to Rule 65(d) and neither the injunction for damages nor the injunction against Hazeltine was processed, although injunctions issued by Federal Courts bind not on the parties defendant in the suit, but they cannot, the Court goes on to quote Rule 65(d) "apply to the parent." In that case Hazeltine, since Hazeltine

was not a party to the litigation.

Now, what is the difference between that case and this? Why does the Government not apply the traditional law that applies to normal injunctions under Rule 65(d) to this case? Isn't really the issue in this case whether the injunction entered in 1920 against Armour, binds Armour's stockholders? In this instance, Greyhound. That's really what the Government is asking for. They want the injunction to run upstream, and isn't that contrary to the theory of the Hazeltine litigation where, in that instance, the Court refused to support the District Court that had done just that.

Over the years the Packer's decree has been interpreted -- the Court of course well knows, about Justice Cardozo's decision back in 1932 and it was again reviewed in the 50s by the District Judge Hoffman. Those proceedings involved modifications of a decree. In those situations parties went into court and asked for the decree to be modified. The same thing happened in the United Shoe case, and in that case Justice Fortas, for the Supreme Court, set down the rules that govern modifications of decrees.

But, I think it's very important to observe that in this case the Department of Justice, the Government, is not seeking a modification of the decree. They are not going into Court under the United Shoe theory in asking for a modification. What other kinds of cases, then, has this Court considered,

interpreting decrees and trying to extend them?

Well, I suggest to the Court Justice Black's decision in the Atlantic Refining case in 1959. That case is very similar to this case in several respects. Both cases started out with a complaint alleging illegal conduct. In the Atlantic Refining case a trial actually started and later on a consent decree was entered. The consent decree prohibited various shippers and owners from certain discriminatory arrangements, with one exception: a seven percent payment was permitted under the consent decree.

The Government, having consented to that decree, operated under it with the parties for approximately 16 years. Then in 1957 the Government did in that case what they have done here. They did not seek modification. They went into court and simply said the language of the consent decree applies to this situation, meaning the situation that was actually the subject of the original decree. They wanted an interpretation of the language; they didn't want a remand; they didn't want any modification hearing; they wanted the language of the decree itself stretched to include the conduct that they quarreled about in this second proceeding in 1957.

Now, in that case --

Q I gather you think that under this proceeding if Armour went out and was in the process of purchasing the assets of a company in a forbidden line, that the Court would

be limited to enjoining Armour from doing that. It couldn't just issue a supplemental order against the seller; it -- could it enjoin both Armour and the seller?

A Well, in the original action --

Q I didn't ask about the original action. Under the decree Armour is forbidden from acquiring some company of a certain kind and it's in the process of acquiring one of those forbidden companies, could the Court issue an order against Armour and also against the possible seller?

A Well, I believe in terms of what would happen in that case, Judge Hoffman discussed that, and he indicated that he would certainly enter an order against Armour if Armour's conduct ever appeared to violate the decree. I believe that you would also ask that the party who was being acquired be brought in. If that answers your question, I believe he could have --

Q Well, what about your opinion about whether the order could run against the seller, too?

A Well, I don't know whether the order could run against the seller, Mr. Justice, but the Court can issue an order against Armour and if the Court issues a summons against a third party, presumably if the third party were -- under Rule 65(d) if the third party were actively participating in it it comes within Rule 65(d).

Q So, in that sense the decree wouldn't be

limited?only to Armour?

A Mr. Justice, we have never contended that the decree was simply limited to the packers. We would like applied to this case the traditional law that has applied to any injunctive case, meaning Rule 65(d). What has happened in this case, it seems to us, is that because of the purpose that the Government sees in this decree, they want to circumvent the normal rules that apply to injunctions. They have cited no cases that are parallel to this. The Faubus case is not an analogous situation.

Q But, Armour, under this decree, I suppose, couldn't acquire Greyhound?

A That is correct.

Q But if Armour said: "No; I can't acquire you but you can acquire me; why don't you do that? Then 65(d) would be, would come into play, I suppose?

A That is correct. This petition does not allege any such facts. As a matter of fact, before the District Court in the briefs of this case the United States has abandoned that position and does not want to urge that position. They have never alleged any active concert or participation.

Q In that circumstance, though, you would say that an order could run against Greyhound.

A Yes.

Q But, as long as Armour is passive and doesn't pick it up in the first place, why an order of Greyhound --

A I believe, Mr. Justice, that's what Rule 65(d) says.

Q That's what this case is all about?

A This case is in part about that. There are other issues.

Under the Atlantic Refining case, as Justice Black observed, "The purpose of the decree would be better served by the proceeding that the Government brought. We cannot modify without a modification hearing the languageof the decree, paticularly since the Government in that case and in this, has consistently over the years had a completely different interpretation."

It seems to us that the problem of interpretation of the Government in this decree over thelast 50 years is not stopping the government in this instance, but as in the Atlantic Refining case, as Justice Black said in that case: For 17 years the Government had interpreted the decree consistent with his interpretation in the opinion in that case. And the new interpretation which was the new interpretation by the Government, he suggested that perhaps modification proceedings were in order. Based on that consistent interpretation over the 17 years, you can read into the decree its absolute

purpose.

Now, in this instance, as the Court knows, the Government has interpreted this decree completely different from a suggestion made to this Court. In the LTD litigation on March 10, 1970, while this case, that is the General Host case, was inthis Court, the Department of Justice was filing papers in Pittsburgh on this very decree in the sense that Wilson and Co., which is an original signator for the Packer's Decree, was a party as a subsidiary of LTV in the Pittsburgh litigation.

Now, in that case the Government suggested to the Court that LTV could own 86 or some percent of Wilson and Co. and also own Jones and Laughlin; Jones and Laughlin as products which are expressly included in the decree. Now, what is the difference between those two situations? In both situations you have a form of conglomerate, a holding company, LTV, or the Greyhound Corporation. In both situations each of the holding companies had a major transportation company: the Greyhound Bus Company contrasted to Braniff Airlines, one of LTV's subsidiaries.

In both situations the holding company, Greyhound or LTV had a substantial interest in packer: Wilson and Company, or in this instance, Armour. And in both situations there were alleged to be decree products in another subsidiary.

Now --

Q Would it have been an appropriate remedy in this case if the -- for the trial court in 1928 to have said: Armour shall not acquire any one these forbidden lines and neither shall Armour be acquired by anybody in those forbidden lines?

A Mr. Justice, it is our view that no such order could be binding.

Q Well, it wouldn't be binding until somebody -- but let's assume it happened -- somebody acquired Armour like this, as in this case. Do you think that the Court would impelled then to enter an order against their being acquired?

A It is our view that injunctions such as that cannot run against the world. You could perhaps enjoin transfer of stock; you could enter an order that you could not transfer the stock. You could put people on notice, but on Rule 65(d) even after actual notice on a party you must have active participation.

It seems to me the question here is what traditional law is as it applies to injunctions on nonverdicts. If that is notthe proper law and if we are going to accept the Government's view then an injunction once entered binds the parents, even corporations that acquire the stock at a later time, how can you justify the Court's decision in the Hazeltine litigation, where 65(d) was used very specifically to reverse the District Court for entering an injunction against

Hazeltine Corporation.

This is the traditional law as we see it. We think it is the traditional law as this Court has seen it over the years. Now, here, for some reason the Government has taken the position that this traditional law applying to injunctions should be extended and it should be extended according to the Government because if that is not done structural anti-trust decrees will be circumvented.

But if there is any need to look to an illustration of how to circumvent structural anti-trust decrees we can look at the Government's own conduct in the LTV litigation. There isn't a particle of difference between what the Governmetn did in LTV and this case and yet in LTV the Government suggested to a Federal Court in Pittsburgh it was perfectly proper for LTV to own a company: Jones and Laughlin, that deals in prohibited products and also owns 86 percent of Wilson and Co.

Now, the apology for that, let's call it "different point of view," is stated in the briefs filed in this Court last year in the Host litigation as follows:

"A proposal of settlement" -- this is the LTV litigation -- "does not make law, especially in light of the serious anti-competitive factors involved in the underlying case,"meaning this case. "Moreover, the prohibition under the Meat Packer's Decree to which Greyhound points, comes under the heading of miscellaneous articles, but if we are really in this

case not trying anti-trust lawsuits,"and we think this exactly what the Government is doing, are circumventing the requirements of Section 7 and trying to extend this decree well beyond this Court's decisions both in the Hughes case and the Atlantic Refining.

In both those cases this Court plainly said it might well serve the purpose for the Government; it might well serve the prophylactic effect of the decree to have the relief entered, but we can't look to those purposes because the Government over the years has interpreted the decree inconsistent with that.

In the Hughes litigation and the Atlantic Refining litigation the Government tried to do exactly what they are trying to do here and this Court would not accept those arguments.

Now, it seems to us that the law is a little different in modification proceedings. There, as Justice Cardozo indicated in 1932, if someone goes into Court and actually seeks a modification of this decree then you have to analyze the background of the decree, you have to analyze the purposes in order to determine the extent and breadth of the modification. But this is not a modification proceeding. This is a proceeding brought under the decree to extend its term well beyond any language in the decree.

The decree merely forbids Armour from doing various

things. It prohibits Armour from owning any companies that are actually in decree products. There isn't the slightest suggestion in this case that Armour is violating this decree. We have an attempt to apply the decree to a parent or stockholder, contrary to the decisions of this Court.

As Justice Black said in the Atlantic Refining case, which is a case like this and not a modification proceedings: "You must look to the experience and the conduct of the parties over theyears to determine the extent of the application of the decree to this new situation."

And what has been the experience over the years? In 1925 Armour was permitted to acquire a packer: Morris. LTV in recent times is permitted to have exactly this same relationship that they are now complaining about with Wilson and Co., another packer. How can you possibly distinguish those two situations? How can the Government on March 10, 1970 file papers in a Federal Court asking that that relationship be approved and at the same time file papers in this Court asking as to another packer that that relationship be stopped?

Over theyears there has been a consistent interpretation by the Government that this decree does not apply to upstairs activities by the packers. Meaning, for example: let's take F. H. Prince & Co., Inc. F. H. Prince and Co., Inc. owned 100 percent of the stock of the U. S. Y. and T. The Union Stockyard and Transit Company in Chicago. One of the

direct prophylactic provisions of this decree was that Armour would have no relationship with the stockyard. There was a specific provision asking for divestiture and divestiture occurred.

But between 1958 and 1960 F. H. Prince and Co., Inc., had controlling interest, through a variety of Prince interests, of Armour and also owned 100 percent of the stock of the USY&T. The USY&T operates restaurants. All these facts were known to the Government and they acquisced in it because they were trying a modification proceeding in Chicago during this same period.

So, you have a decree which has never been applied in 50 years to investments in a packer. It wasn't applied when Morris was acquired, a signator. It wasn't applied when F. H. Prince and Co., Inc., owning both USY&T and Armour. It wasn't applied in the LTV litigation in which LTV owns both a packer and a corporation that deals in decree products.

With 50 years of experience of interpreting the decree in that way under the Atlantic Refining case this Court's latest decision that we know on the subject, this case should be affirmed. As Justice Black suggested in that case, perhaps modification is appropriate, but this is not a modification proceeding. This is a proceeding in which the Government contends that the purposes they see in this decree, the purposes that go back to 1920 control the anti-trust issues of

today.

We have not in our briefs, attempted to answer, from any references outside of the record, concerning meat and other food facts that supposedly control the anti-competitive facts in the meat industry today. WE don't think it is appropriate to put in briefs in this Court a lot of references to how much control Armour does or doesn't have. We would like to dispute them. We don't think that themeat industry has anywhere near the control it used to have, but it seems to us that that's an irrelevant point.

What we really have in this case is a simple issue of interpreting the decree under Rule 65(d). Why does the Government not proceed under Rule 65(d)? They admittedly have not; they admittedly want to challenge the Court's decisions like in Atlantic Refining and they admittedly want to take a different position in this case than they have in other cases.

What was the purpose of the decree? The Government seems to be able to read out of the decree a variety of purposes which we can't find. The decree itself as presented in 1920 contains an express provision in the beginning of it that the packers, first of all deny all the charges. This is a settlement of a lawsuit. And the settlement of the lawsuit contains in it an express provision that says that the entry of a settlement decree is no admission on their part that they have ever violated the laws or had monopolies. This decree does not stand for

the proposition that the monopoly ever existed. As a matter of fact, if the prophylactic nature of this decree is such that accretions of power among the packers are included in its prohibition then how could the Government, three years after the ink was dry on this decree, permit Armour to acquire Morris? And if that is so, how can the Government contend against Greyhound that we cannot, through different subsidiaries, own a packer and a company that has some decree products when they permit other companies to?

What is the difference between the Board of Directors of LTV and the Board of Directors of Greyhound? We're not saying the Government should stop. If they want to let LTV conduct their affairs that way, obviously that's their right, but in interpreting the decree over the years in that way, under this Court's decided authority, those facts are material in determining the purposes of the decree.

I have one last point. The real issue in this case is not Armour; it's Prophet Foods. Greyhound has another subsidiary. It operates in the food business, in the catering business. It also has another small subsidiary that sells food as an accommodation to people who want to buy food when they stop at the bus line out in Omaha or someplace. This is a small business, part of an adjunct to their bus depots.

Now, if the Court is going to accept the Government argument we would respectfully suggest that the real issue in

this case, as was stated in the relief paragraph of the appeal brief, is that we divest ourselves, that is we get rid of, say, Prophet Foods. This is not an anti-trust case. There are no findings here that Greyhound has violated any law.

Q Do we have any information anywhere in the record that would indicate how much of Armour's products are used by Greyhound in its food dispensing aspects?

A No; we don't.

Q That's because we have no record?

A We have no record. I believe we have furnished such information to the Department of Justice in their investigation of the case, starting out as a Section 7 investigation, but it's never been made a part of this record.

But, more than that, Mr. Chief Justice, the problem here is not one of an anti-trust violation. There are references in this appeal to reciprocity, to possible control of prices by a combination between Armour and Greyhound. All of these statements are not in the record. At this juncture all we have is a petition filed which merely states that they want a subpoena or summons issued against Greyhound under Section 5 of the Sherman Act, and that requirest a finding that the action be pending and when the District Judge, who has had a lot of experience in these matters, repeatedly asked counsel for the Government to give him some authority on it, they cited the Bayer case. The Bayer case is the only one we know of. But,

in that case this third party was permitted to litigate the merits of the original decree. That can't conceivably be what the Government is asking for in this case. And yet it's the only case that could be cited, and the reason is that Section 5 of the Sherman Act requires findings that the action is pending before a summons issues.

We think this whole business of possible circumvention of anti-trust decrees is a ruse. The Government is trying to create a noble public interest objective to get around the basic rules of injunctions that apply in case after case. And a careful reading of this record in the hearing before Judge Hoffman -- Judge Hoffman is a seasoned, experienced Judge, one of many, and all the District Judges have problems with injunctions. And, as Judge Hoffman said: "What am I to do in the next injunction case? I have had all kinds of injunctions over my experience on the bench. I have many injunctions. ARe we going to apply these rules to that kind of a case?"

The Government in this case is asking and seeking to have the rules that normally apply in injunctions and the rules that they have permitted to apply to the Packer's Decree, to be amended in this proceeding.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you Mr. Foote.

Mr. Springer.

REBUTTAL ARGUMENT BY JAMES VAN R. SPRINGER, ESQ.

ON BEHALF OF THE APPELLANT

MR. SPRINGER: Thank you Mr. Chief Justice.

I think, to try to put this thing back in focus perhaps I should say that this is not primarily an anti-trust case here at all. It is an equity case. We are not, as we have said many times, seeking to modify this decree. We do not rely upon some general notion of what's good for competition and what is bad for competition. We take this decree as we find it. We think there are in this decree, prohibitions against a certain kind of structural situation. We think the decree did everything it could to try to create such a prophylactic separation. We think anti-trust decrees should be able to do that, and the only question here, as I hope I have indicated, is whether thereis a remedy for such an interference or violation, whatever you want to call it, with a structural separation which an anti-trust decree, whether it's a consent decree, or a litigated decree, has tried to establish.

We acknowledge, of course, that this is, as far as we know, a case of first impression in this Court, and perhaps in any of the courts, but that's, of course, why we brought it here.

We say, frankly, that our case does depend upon the proposition that in a decree, specifically an anti-trust decree, there are two aspects: there is the substantive aspect

and the remedial aspect. We think a distinction can be drawn between them. This decree had a specific substantive aim of decreeing a separation. That separation has been broken down. Admittedly the decree, as written, does not provide a remedy for that, and it is for that reason that we went before the Court seeking a very limited additional remedial order which we had thought was necessary to remedy this breaking down of the substantive separation which the decree was designed to create.

This case we think is nothing like Atlantic Refining or Hughes, for the simple reason: again, as I say, that we think this decree does specifically prohibit this situation.

Q How about LTV?

A Several things can be said about LTV. The first is that, as Mr. Foote has submitted, there is no element of estoppel here. LTV came up long after the Government had told Greyhound that it objected to this situation.

Second, and again this is a distinction from Atlantic REfining: the Government has never approved LTV's simultaneous ownership of Jones and Laughlin and Wilson & Company in any specific way. The Government -- the situation is this, and this is also true in the Prince case -- the Government has not taken any action against those situations.

The Pittsburgh case to which Mr. Foote refers, of

course, as a Section 7 case, initially brought to get LTV to divest itself of Jones and Laughlin. So far as I know Wilson and Company has never beenmentioned in the proceedings.

And one further point on that, if I may: the prohibition of the decree to which Mr. Foote refers is one of a number of miscellaneous articles listed at the end of Paragraph 4th of the Decree which include structural steel and Babbitt(?) and a lot of other incidental products which are not mentioned, for one thing, in the Government's petition and I think plainly they are not central to the decree in the sense in which we think that the separation between meat packing and the other food lines is central to that decree.

So, in light of that I think it's perhaps appropriate for -- and the Government should not be bound in this case by the fact that it has not taken steps against that one particular situation.

MR. CHIEF JUSTICE BURGER: Thank you Mr. Springer. Thank you Mr. Foote. The case is submitted.

(Whereupon, the argument in the above-entitled matter was concluded)