

In the
Supreme Court of the United States

FEDERAL TRADE COMMISSION,

Petitioner,

v.

THE SPERRY AND HUTCHINSON COMPANY,

Respondent.

No. 70-70

Washington, D. C.
November 15, 1971

Pages 1 thru 40

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Washington, D.C.

Monday, November 15, 1971

The above-entitled matter came on for argument
at 10:04 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, 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:

RICHARD W. McLAREN, ESQ., Assistant Attorney General,
Department of Justice, Washington, D.C.
for Petitioner.

HAROLD L. RUSSELL, ESQ., 4000 First National Bank
Tower, Atlanta, Georgia, for Respondent.

C O N T E N T S

<u>GRAL ARGUMENT OF:</u>	<u>PAGE</u>
RICHARD W. McLAREN, ESQ., for Petitioner	3
HAROLD L. RUSSELL, ESQ., for Respondent	19
<u>REBUTTAL ARGUMENT OF:</u>	
RICHARD W. McLAREN, ESQ., for Petitioner	37

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in the first case this morning, No. 70, Federal Trade Commission against Sperry and Hutchinson.

Mr. McLaren.

ORAL ARGUMENT OF RICHARD W. McLAREN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. McLAREN: Mr. Chief Justice, may it please the Court, this matter is before the Court under writ of certiorari Fifth Circuit, which overturned a Federal Trade Commission decision that Respondent Sperry Hutchinson had engaged in certain unfair activities in the green stamp business in violation of Section 5 of the Federal Trade Commission.

The complaint in this case is on three counts: I is the nature of the resale price charged; that S&H issued stamps to retailers and required the retailers to dispense them to consumers in ratio of one stamp to each 10 cents worth of purchases.

The second count charged conspiracy to carry out this program of the 1 to 10 ratio.

And Count III was that S&H carried out a policy of suppressing independent trading stamp exchanges, preventing anyone other than S&H from redeeming S&H stamps. This Count also contained a charge of conspiracy of S&H with other stamp

4
firms to carry out their programs.

On all three counts, the Complainant alleged the practices were anticompetitive and to the detriment of the consuming public.

The Commission found violation under all three counts but S&H appealed only on Count III in the Fifth, and the Fifth Circuit vacated the Commission's order in a two to one decision, Judge Wisdom dissenting. That majority opinion is now here for review.

There are two questions presented. The first principal question is whether the Fifth Circuit is in error in holding that FTC's power under Section 5 declares particular methods of competition, particular acts and practices unfair is limited to conduct which violates the letter or spirit of the antitrust law.

The other is whether the Commission erred as the Circuit Court seemed to indicate, in failing to give sufficient weight to decisions under state law that operations of stamp exchanges with retailers to redeem S&H stamps were unlawful.

The government's position on these two questions, on the first one is that FTC's power is not limited to declaring practices unfair simply when they are of an antitrust type conduct. Rather, we think the Commission has a broad mandate to consider the circumstances of particular cases to determine what is unfair in the light of the public interest,

and without trying to define these outer limits of this power, we think it clear, first, that a practice may be held unfair by FTC, where in analyzing all the facts and circumstances, of a particular case, one considers reasons for the practice, the need for it by the practitioner, its impact on various factors of commerce, and if FTC determines on this basis that the practice may have or has had a significant adverse effect on competition.

Secondly, we think that the practice may be held unfair or detrimental to the interest of the consumer public, without regard to the question of effect on competition.

On the second question, the state law question, our position is that state courts' decisions on matters as between private parties are to be given little weight in a government case where the issue involves public interest and particularly where broad public policy considerations such as those found in Section 5 are present. I have no doubt that the arrangements, for example, in the Brown Shoe case, the TVA cases were entirely legal under state law, but you will recall those arrangements had to give way to the overriding policy of the Federal Trade Commission Act and its intent to protect competition.

Turning to the facts of the case, they are relatively simple and I think substantially undisputed. The nature of the trading operations is a promotional service for retailers. Under the system, S&H licenses a limited number of retailers to

handle the stamps in each area, the retailers receive the stamps from S&H on consignment, and the retailers pay a service charge in proportion to the number of stamps they receive. This runs to an average of \$2.68 for 1200 stamps. The retailers in turn dispense the stamps to consumers in proportion to their purchases, and this has been as I indicated earlier, on a 1 per 10 basis, one stamp for a 10 cent purchase, and this, the S&H book says, is compensation for cash payment; in other words, in the nature of a cash discount.

Consumers however, are only authorized to paste the stamps in books and redeem the books for S&H merchandise, nothing else. The books are worth about \$3.00 for redemption of merchandise, and the record indicates somewhere between 5 percent and 14 percent of stamps go unredeemed. The record shows also that as of 1964, there were \$700 million worth of unredeemed stamps outstanding.

Q For what period?

MR. McLAREN: From the beginning of S&H--

Q I assume a longer period of time?

MR. McLAREN: A longer period of time. However, S&H's purchases run some \$320 million a year, gross receipts, so this is a good bit more.

Turning to the stamp industry, we find that it is a rather concentrated one, with six companies involving 5 percent of the business. Although there is a total of 400

companies, S&H is by a good bit the Number One in the industry, with about 40 percent of total industry receipts and about three times the size of its nearest competitor.

There are 77,000 retail outlets which handle S&H stamps, and nearly 60 percent of all American households, according to the record, save S&H stamps. That's around 35 million families.

To give an idea of the overall economic importance of stamps, in 1964, stamps of all kinds were issued on \$40 billion worth of purchases, and on some 43 to 46 percent of all food stores purchases, in some areas as high as 95 percent, and the record shows at R 24, that where stamps are prevalent, they tend to increase the level of retail prices and making a calculation of one stamp for 10 cents purchased, this would come to about two percent of sales.

Coming to the main issue of trading stamp exchanges and the redeeming retailers, the record indicates that the exchanges developed to meet the desire of consumers to get more out of various stamps than they were receiving as she shopped. A good many housewives testified and I think it is fair to say from their testimony, that they principally wanted to consolidate different stamps into one kind of a stamp. This permitted them to go out and redeem; they wouldn't have to wait so long to fill up a single kind of stamp book. They could get Christmas presents or whatever it might be, to fill

an immediate need, or in some cases they wanted to cash them in, perhaps they're leaving the part of the country where the stamps were used or they came to a part of the country where the stamps weren't in circulation. Perhaps they are military personnel going abroad.

Sometimes they wanted to get a better buy, they could get a better selection from one company's stamp catalog than from another, or maybe the redemption center was more convenient. Within 25 miles you can't mail in; you must come in, in person. If you don't have a car, perhaps there is another company with a more convenient center.

In any event, the exchanges grew up, the accumulated stocks of the different kinds of stamps, as many as 50 different kinds would be stocked. They were principally exchange, and I think that was some 60 percent of their business, they would also sell stamps to help somebody get the 7th book, if he had 6, to get--something on that order and they would buy stamps from people who wanted to sell them, as I indicated.

They charged a fee of around 30 to 50 cents a book for exchanging, and they also had varying prices, they would buy for a dollar and a half a book and sell for \$2.25 to \$2.75 a book.

The record also shows that mail retailers got into the redemption business as a way of competing for business. They would give credit for stamps on purchases of perhaps

small items that would not be carried in catalogs: work clothing, baby clothing, shoes, hose, things like that, or in other cases, the retailers would accept stamps as down payments on bigger items comparable to those in the catalogs and this was the way that some of the clients' stores and small department stores had of competing in effect, with the redemption centers of S&H. They would take stamps as a down payment.

Now the pleadings and the evidence show that S&H had a very strong program with regard to these exchanges, the retailers handling the stamps. They tried in every way, I think one of the executives testified, to prevent that. They wrote hundreds of letters, they took court action to wind down this kind of an operation, and the record shows that they were quite successful in doing so. The businesses of some of the exchanges who were enjoined in handling S&H stamps dropped off 40 to 60 percent. Some closed down completely. Many redeeming retailers stopped handling stamps. Some consumers testified that they would give or throw stamps away in the absence of exchanges because if you had to go through the whole length of time on a single hand, it just took too long to worry about it.

Now S&H's justification for its program was given through the testimony of its officers, one director, that free exchange and redemption by others, would bring the

relationship between S&H and the retailer and the consumer, would reduce the incentive of shoppers to patronize the S&H retailers to fill their books, and it would reduce or eliminate visits to redemption centers and overall, would reduce the tie of the consumer to S&H. This would in turn cause the retailer to lose interest in S&H, and they anticipated they would lose their licenses.

S&H didn't offer any evidence that this in fact happened in any of these areas where the exchanges or the redeeming retailers operated, and a number of those who testified were still in operation, they had not been enjoined. S&H showed no loss of licensees or even complaints by licensees, no retailer took the stand to indicate that he had had any loss of consumer business in the areas where the exchanges or other retailers were redeeming. Many housewives testified although they used the exchanges, this did not lessen their buying at S&H stores or changed their shopping habits in any way. Other evidence shows also that stamps are an insignificant factor with housewives in deciding where to shop. In other words, they decide where to shop based on price, on specials, on convenience, on quality of the meat or the produce, fondness for particular bakery goods, many things other than stamps although a survey did show that some 16 percent of people will go out of their way to get particular stamps but only 16 percent.

Now FCC's decision on these facts is based on what I think is fair to say is a rule-of-reason approach. They considered, and it's a very lengthy record, many thousands of pages, they considered the justification that was claimed, they considered the need for this restriction, and they considered particularly the impact of the restriction. They found no good business reason for it, they found no necessity for the restriction, and they held that the fears of S&W's officers that they would lose licensees and so on, were entitled to very little weight because they were in general terms, they were not backed up by hard facts, and because they were contrary to the other evidence that S&W had in fact had not been hurt and they saw no signs it would be hurt by the exchanges or by retailers' redemptions in future.

I think there is good precedent for rejecting that kind of testimony and here I would refer to the court's holding in Philadelphia Bank where the opinions of bank officers as to adverse effect on competition from the merger that competition would not be injured and so on, was given very little weight.

FCC's ultimate finding here was that the effect of S&W's practices--I am quoting--was to "unfairly suppress such exchanges in the business of such retailers to the detriment of the persons engaged therein, and to the consuming public, and, (b) to substantially impair and restrain competition."

The Commission concluded that the act and practices were to the prejudice and injury of the public, that they unreasonably restrained, injured and impaired competition and thereby were unfair under Section 5.

I think it is important to note that both the complaint counsel's theory of the case throughout emphasized that this restrictive policy on exchange and redemption had an unreasonable impact on the consuming public as well as an adverse effect on competition.

Q Mr. McLaren, may I interrupt you with a question?

MR. McLAREN: Yes, sir.

Q The Federal Trade Commission's opinion, both the opinion of the Commission by Commissioner Mac Intyre and the concurrence by Commissioner Elman, and the dissent seem primarily concerned with this one for ten ratio policy. Was that dropped out of this case entirely? That I gather from the briefs here--

MR. McLAREN: I am sorry that I didn't make that clear, Mr. Justice Stewart. The Commission found against SAH on that proposition, both as a unilateral enforcement and as conspiracy and there was no appeal on that. It was only Count III that came to the Court of Appeals, and it is only Count III that is here.

Q I think the concurring opinion of Commissioner Elman and the dissenting opinion do not really direct themselves

to Count III in any explicit kind of way at all.

MR. McLAREN: Commissioner Elman's opinion, as I recall, he concurred in the result here but he had dissented from the issuance of the complaint originally on the theory that there ought to be a complete study, and he simply concurred and reiterated that, and then Commissioner Jones, I believe, dissented only on the theory that the remedy didn't go far enough with respect to the one for ten holding. In other words, there was a limit on maximum designation of the trading ratio but not on the minimum, and she thought there ought to be both and I think they went by Albrecht--

Q There was no appeal by S&W finally suggested on Counts I and II?

MR. McLAREN: That's correct, sir, yes.

Q Thank you.

MR. McLAREN: Well, as a matter of law, we think that the Commission in this case could have based its decision on either of these two grounds, the adverse effect on competition or the detrimental effect upon the consuming public.

As to the first ground, I think at least since Brown Shoe, where the Gatz rule is officially intarred, this Court has recognized that although ultimate responsibility rests with the courts, Congress has reposed in FTC very broad powers to give content to the term "unfair" and to

determine at exactly what point when a practice which is otherwise lawful, at what point its effect on competition, the practice becomes unfair.

As the Court said in the Texaco TRA case, I quote, "It is enough, that the practice in question unfairly burdens competition for not insignificant volume of commerce" and here I think that standard was not only met but substantially exceeded since the Commission found that with respect to exchanges, S&W had and exercised a monopoly power over the trading stamp exchanges and they tended to eliminate a whole class of small businessmen.

As far as the retailers are concerned, they found that there was a restraint of trade on these retailers who found stamps another way of competing and serving their customers, and those two points, I think, fully support the Commission on the anticompetitive grounds.

As far as the unfairness or being detrimental to the interests of the public, I think that is fully supported as Judge Wisdom pointed out in his dissent. It was the very purpose of the Wheeler-Lee amendment in 1938 to establish this proposition. The legislative history which Judge Wisdom outlines, various lower Federal Court decisions which we have listed in our briefs, and the Commission itself and of course under the rules of this Court, the Commission's interpretation of its own statute is entitled to a great deal of weight, the

Commission has interpreted the statute in that way, all in support of this particular proposition that when there is adverse effect on the consuming public, there need not be in effect adverse effect on competition. In fact, FTC in an article opinion, going into the matter very carefully, based its holding on both of these propositions and under the test applicable on these appeals, we think it is warranted in the record, and there is reason in the law to support it and we would urge for these reasons that the Court reverse the decision of the Fifth Circuit and remand for entry of a judgment.

Q Do you mind telling me precisely what paragraphs the Order, page 126 to 130 are before us?

MR. McLAREN: It is paragraph 5, Mr. Justice Brennan, and paragraph 6 and paragraph 7.

Q Those are the only three?

MR. McLAREN: Yes, sir.

Q I gather that S&H has complied with the rest of the Order?

MR. McLAREN: I assume that they are in the process of complying, yes, sir.

Q It is on appeal?

MR. McLAREN: Not on appeal.

Q Would you tell me where in the Federal Trade Commission's findings, conclusion or opinion, it relies on

injury to consumers?

MR. McLAREN: Mr. Justice White, the opinion itself speaks very little in the section under Count III of the impact on consumers, and I think that it is in the ultimate findings which I read, which I think are on page 125 there, and there are one or two other references in the Commission's opinion. Mostly the Commission addressed itself to the question of the anticompetitive effect and--

Q Do you think really that a court can affirm a Commission by putting aside the question of the anticompetitive effect and just resting it solely on injury to consumers, even if there was no injury to competition?

MR. McLAREN: As a matter of law, I think there is no question it could, Mr. Justice White.

Q Wouldn't that be resting an affirmance on the ground that the Commission didn't really reach?

MR. McLAREN: No, I think that in this particular case, the Commission saw this as a matter of impact upon the consumer from the elimination of these outlets, and this runs throughout the opinion.

Q Do you think a fair reading of the Commission's point is that even if there is no injury to competition, we nevertheless find this an unfair practice because consumers are injured?

MR. McLAREN: Yes, I think so. I would point to the

Order.

Q I certainly read your brief that way but I wonder where you can find--

MR. McLAREN: Well, I look at the Order. They say that SSH no longer purports to reserve title and restrain alienation of these.

Q The Commission expressly said in its opinion that it did not want to rest its opinion on any such narrow technical grounds, didn't it?

MR. McLAREN: Not the opinion but the Order goes to that and that represents to me--

Q The opinion said that it didn't want to rest it on that technical ground, that it would prefer to rest it on broader considerations of effect upon competition. That is almost what it says.

MR. McLAREN: I think it is true that the impact on competition caused the injury to the consumer.

Q Again I say that the impact on competition then was essential to the FTC's conclusion.

MR. McLAREN: That undoubtedly is true.

Q But you take the approach that regardless of its effect on competition, the Commission should be upheld because of the impact on the consumer?

MR. McLAREN: No, I don't think we quite say that, Mr. Justice White. We say that the Fifth Circuit is wrong in

saying that you must have a violation of spirit or letter of the antitrust law and we say they are ~~not~~ in two ways: you can have an anticompetitive impact that is not a violation of the antitrust laws and violate Section 5. You can also have an impact upon consumers without regard to competition and you can uphold a Section 5 violation on that ground. That is a far-reaching point, Mr. Justice White, from the Fifth Circuit that we feel badly needs rejection in order for the FTC to continue about its business.

Q Well, maybe that is true, but what I was really getting at is whether or not the appellate court would be free to observe the Commission or to uphold the Commission on the sole ground of injury to consumers rather than to competition in light of the fact that it isn't so clear to me, anyway, that the Commission rests itself on such independent grounds.

MR. McLAREN: Yes. As a matter of law, yes, they could. In this record I think the Commission rested on both. I would like to call your attention to the phrase in the middle of page 177, where the Commission said that the trading exchanges had provided a useful and valuable function but I agree with you, we do have two propositions here: one, the question of law where we are speaking to what the Fifth Circuit said; and the other, a question of this record, and here I think the Commission rested on both the impact on the consumer and on competition.

I would like to reserve whatever time I have, Mr. Chief Justice Burger.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. McLaren. Mr. Russell.

ORAL ARGUMENT OF HAROLD L. RUSSELL, ESQ.,

ON BEHALF OF THE PETITIONER

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

At the outset, I would like to note that actually the only paragraph of the Order with which we are concerned is paragraph 5, which appears at pages 127-128 of the joint appendix. All we wanted to do is to be able, as I have said, unilaterally and all by ourselves to go to court as we have done for 75 years, to protect the quality and integrity of our stamp business by stopping unauthorized trafficking in stamps.

S&H is in the business of licensing retail merchants to use its sales promotion system, which is based upon the use of S&H trading stamps. Retail merchants subscribe to that service to increase trade and to maintain and enhance customer loyalty. They use stamps to get their customers to return to their stores again and again until they have collected enough stamps to secure redemption merchandise of their choice.

Now throughout the history of this company, non-licensed retailers and stamp exchanges have attempted to cash in on the S&H system without paying for S&H service, by

purchasing, exchanging and making other commercial use of S&H stamps, without S&H's authorization.

Now the reason we have consistently sought judicial relief and the reason why the courts have enjoined it is that if competing merchants were free to redeem S&H stamps issued by its licensees, for their own merchandise, or if they could exchange S&H stamps for their own stamps or if the consumers could get stamps at trading stamp exchanges rather than at the licensees, the S&H system would lose its attraction for the licensees, who after all are the people who pay S&H for the use of its service. In fact, in the case of unauthorized redeeming retailers, the S&H system could be turned into an industry to introduce the S&H licensee's customers to the store and unlicensed competitor.

This is the basic reason why the courts of equity have consistently granted judicial relief to S&H against unauthorized traffickers, holding that these traffickers have been engaged in unfair competition and tortious interference with S&H's contractual and business relations.

The central question presented in this case is whether S&H's actions in preventing the unauthorized commercial use of its trading stamps by obtaining judicial relief against the abuse constitutes an unfair practice violating Section 5.

The petitioner's main argument is that S&H's action violates Section 5 in that because of court restraints, S&H

stamp savers do not have complete freedom of choice in the transfer of their stamps. This is alleged to be unfair to consumers who are said thereby to be deprived of the full value of their stamps. S&H contends on the other hand that challenged actions are essential to the successful conduct of its business for the reasons previously stated, and the worst that could be said with regard to consumers is that a few of them--the record doesn't show how many--a few of them may be influenced by S&H's actions in preventing the stamp traffickers from offering to purchase or redeem stamps.

I might say the reason why the record show no experience in the matter of injury to S&H by the activity of these traffickers is that the courts over a period of 67 years restrained activity of the exchangers and unauthorized redeeming retailers.

Now, although there are other defects in the Commission's decision which would preclude the affirmation as requested by petitioner, there are really two fundamental defects in petitioner's position.

The first is that the Commission did not make findings of unfairness or inconvenience to consumers, which the petitioner alleges would support its request.

Secondly, if the Commission had made findings in accordance with petitioner's contentions, even if they had gone that far, and they didn't, the findings would not support a

conclusion that S&H's conduct violated Section 5.

In short, the Petitioner's requested Order would be beyond the scope of Section 5 and outside the jurisdiction of the Commission. It has never before been suggested that inconvenience could be a basis for determination that Section 5 has been violated. The Commission in fact purported to decide only an unfair competition case, an anticompetition case, not an unfair to consumers case. It found that the actions of S&H in stopping unauthorized trafficking in its stamps was an unfair method of competition. We appealed and arguments made to the Fifth Circuit are foreign to any arguments which you heard today, but they are germane to the basic issue before you, which is, was the decision of the Commission correct and should it be affirmed?

Now, the errors which we urged upon the Fifth Circuit and which are reasons why this Commission decision should not be affirmed are, one, that a most flagrant error of the Commission was that it pointedly ignored the 43 decisions of the courts in eight Federal Districts and 19 states upholding unanimously our practice of proceeding against commercial traffickers, and they likewise ignored the statutes of four states which make trafficking a crime.

Now we say that the Commission should have considered those decisions and found them controlling. The petitioners come a little bit to our view this morning and said they should

be given some weight, but on either standard, the Commission's decision is wrong because it did not consider those decisions at all and it pointedly ignored them.

Secondly, the Commission's decision is in error because it says that the simple matter of writing letters in good faith, followed up if necessary by court action, based upon unfair competition, that that simple matter of going to court constituted conduct contravening Section 5.

The third thing that is wrong with this Commission decision is that the Commission erroneously failed to consider that the traffickers themselves, as determined by the 43 court decisions and the state statutes, are engaged in unlawful activity and therefore they are not entitled to the protection of Section 5, and finally, and this was an egregious error in the Commission decision, the Commission erroneously ignored the effect of its action upon competition among and between trading stamp companies. We said that the Commission's decision would make all brands of stamps interchangeable and would destroy trading stamp competition. The Court of Appeals agreed with this and it, as did the Commission, considered the case as one involving anti-competitive practices. It pointed out that although fairly challenged to do so, the Commission had been unable to point to any antitrust law which S&H has violated in either letter or spirit, and that the efforts of S&H to prevent that

which time and time has been declared unlawful, did not constitute practices of the type which transgress the spirit of the antitrust laws.

The Fifth Circuit said that mere injury to traffickers was not enough to establish violation of Section 5, that the Commission itself had pointed out that trading stamps are a viable means of competition at the retail level, and had become an integral and important part of retailing in America and they went on to agree with us that the Order of the Commission would make all stamps interchangeable and would reduce as against other trading stamp companies, the effectiveness of S&W's competitive tools.

Now in seeking certiorari, Petitioner presented two questions, one as to whether the Court of Appeals restricted erroneously Section 5, conduct which violates the letter or spirit of the antitrust laws, and a second one, which the Petitioner restated this morning, which was did the Commission in failing to give sufficient weight to decisions under state law--that was as it was presented this morning and as I have indicated--whether under Petitioner's view of that or our view, the Commission was wrong because it did not consider at all the 43 decisions.

Now in sum, the Petitioner is urging you to affirm the decision of the Commission upon the basis of evidence which is not in the record before the Commission, upon the

basis of evidence not considered by the Commission, upon the basis of findings not made by the Commission, and upon the basis of legal theories without support in legislative history of Section 5 or the decision of the court or in the decision of the Commission.

Some of the things that I think are important in this context is Petitioner's claim that the Commission found that S&H's activity in stopping traffickers was to the detriment of the traffickers and also to the consuming public. Now those so-called findings are not findings in any sense, but are wholly naked, nitimate conclusions and are in fact simply mechanical repetitions of the conclusions contained in the original complaint. They are found in the 39th of the so-called findings and then the second of the three conclusions and they are preceded by no discussion of any evidence of consumer injury, by no mention of consumer injury, by no basic or underlying findings and more importantly, they form no basis for the action of the Commission.

Q Where are these findings in the Appendix, what pages? Have you got them?

MR. RUSSELL: Yes, sir. Page 126. Those are the ones I have just mentioned, and actually, the Petitioner has two fragile straws upon which it rests: 126 and 176.

Q That is page 126?

MR. RUSSELL: Of the Joint Appendix I, yes, sir.

Q Page 126, Finding 89?

MR. RUSSELL: Eighty-nine and then the second of the three conclusions immediately below that.

Q All right, thank you.

MR. RUSSELL: And then 176, your Honor, you will find the second straw where it is alleged, Petitioner alleges that the Commission adopted the Examiner's finding on injury to consumers. Now the Commission did no such thing.

The first full paragraph, last five lines.

Q The effects found by the Examiner?

MR. RUSSELL: Right.

Q All right.

MR. RUSSELL: That is its only reference to consumers and it merely mentioned in passing and it did not adopt--as a matter of fact it pointedly refrained from adopting, because the complaint counsel had asked for a finding on this subject, but the Commission made none and if you refer back, your Honor, to the statement of the Examiner, that to which the Commission referred, and it appears at Joint Appendix 73, what the Examiner said was that the stamp collector had less of a choice than she would have had if she could have used the stamps as currency anywhere she chose.

Now he went ahead to point out that to make the stamps equivalent to currency would be for the Commission to exercise its power solely for the convenience of consumers

and he noted that Section 5 does not give the Commission such power, but the power only to prevent unfair acts and practices.

Q You lost me there, Mr. Russell. Where are you reading?

MR. RUSSELL: I was reading first, Mr. Chief Justice--

Q Still at 176?

MR. RUSSELL: One seventy-six. The Commission referred and did not adopt the finding of the Examiner.

Q I am just trying to relate--

MR. RUSSELL: Examiner's finding to which it referred appears at 73. The Examiner said that the stamp saver--we didn't issue currency which of course we couldn't do because we can't get it wholesale and we can't stay in business if we can't buy materials wholesale to let our customers redeem at retail prices. Furthermore, 78, of the Examiner's decision, 78 of the record he pointed out this was a matter of mere convenience to the consumer, and that Section 5 does not give the Commission power over mere convenience.

Now, the Commission certainly didn't adopt the findings of the Examiner on injury to consumer. The Examiner did not find injury to the consumer and the Examiner found simply a matter of possible convenience to the consumer which didn't warrant exercise of the Commission's power.

Now, the big point is that the Commission itself did

not consider and weigh the evidence as to the effect of S&W's actions upon consumers and since the Commission did not make a determination of facts, a large part of the Petitioner's argument has been taken up with request that you, the Supreme Court, consider evidence not considered by the Commission and that you make findings not made by the Commission.

For example, the Petitioner urges you to find that the cost of groceries ordinarily is higher because stamps are issued by retailers, when the stamps are issued by retailers. Now, the Commission made no such finding. It was not even requested to do so by complaint counsel. As a matter of fact, complaint counsel asked the Commission to find that stamps reduced prices and I think it is just absolutely wrong for the Petitioner to be coming here and saying they find that stamps raise prices, when a contrary finding was asked of the Commission and as a matter of fact at 158, your Honor, the Commission found that stamps reflect a price reduction.

Now the Petitioner also asks you to make a finding not made by the Commission that under the Order, a higher percentage of stamps would be redeemed and that consumers as a whole would thereby get greater benefit from their stamps. Now the fact is that such a finding was requested by complaint counsel before the Commission and the Commission refused to

make such a finding and the fact is that the Commission conceded that as much as 95 percent of S&W's stamps are redeemed or may be redeemed and there is no support in the record, and Petitioner cites none, for the assumption that a higher percentage would be redeemed. Moreover, an unchallenged finding, the Examiner stated that competition forces S&W to invest the value of unredeemed stamps in greater values for savers and licensees, and your Honor, the unredeemed stamps of which Petitioner spoke amounted to 14 percent of those outstanding, which were almost precisely the same in number as those issued in the preceding year, and the record shows that ordinarily as the year lags between issuance and redemption. As a matter of fact, 13 percent were issued in 1964, the last year involved in this compilation. Now here we have a situation where 95 percent of the people are getting \$3 redemption value for a \$2.58 cost to the retailer. We have a situation where seven consumer witnesses out of 35 million households who save S&W stamps, we have a situation where even those seven consumer witnesses did not complain about S&W practices. We have a situation in which they said at the most it is more convenient sometimes for them to use the trading stamp exchange than it is to redeem their stamps.

Now, the Petitioner asks you to make other findings not made by the Commission, such as this business that the man who owns no car cannot get to the redemption center, but

the Examiner found and it was not submitted, that even if a man is within the twenty-five mile range of a redemption center, if it is inconvenient for him to get to the center, he can and does redeem by mail. That appears at pages 39 and 46 of the record before you.

I could go on to other things. As a matter of fact, last night I did a compilation from the Respondent's briefs and I found that they have asked you at least 50 times to consider smatterings of evidence not considered by the Commission, and they have asked you at least six or eight times, such as in this matter of effect on price, this matter of greater number of redemptions to make findings which they recognize are essential to their position and which the Commission itself did not make.

Q Now, did the Commission's Order have anything to do with redemption for cash which I understand is required in two states, Wisconsin and Wyoming, and 16 other states require that the purchaser have an option of doing so, is that right?

MR. RUSSELL: That is correct, your Honor. I think it is fair to say that no part of the treatment of Count III was involved with that aspect of the trading stamps.

Q No part of that question is before us?

MR. RUSSELL: I believe that is right. As a matter of fact, I am sure it is right.

Now, I would like to go on to the legal question which is before you and that is that Petitioner says he has asked this Court to answer the question whether Section 5 is limited to conduct which violates the letter or the spirit of the antitrust laws. Now on this question there is no difference between the parties. Obviously Section 5 is not so limited. Since its enactment, Section 5 has been held to apply not only to antitrust-like conduct but also to deceptive practices and other forms of unfair conduct. The real question before the Court is how far can the Commission go in holding a practice which is not deceptive or in the nature of an antitrust violation to be unfair, are there any limits at all? Does the Commission have unrestricted authority to condemn practices simply because it is of the opinion that they are not beneficial, as beneficial to consumers as some modification might be?

Now, when Section 5 was originally enacted, many were afraid that the language of the statute was too broad and in Congressional debates, the doubters were reassured that unfair methods of competition actually had some limitations and it was even said that the practices covered would be limited to those which shocked the universal conscience of mankind.

Now it is more than interesting to note, your Honor, that one of the unfair practices referred to in the debates

as being an unfair practice was that of inducing savers of S&H stamps to trade their unfilled books of S&H stamps for the stamps of another company. That was a reference to the case of S&H versus Louis Weber and under the Commission's Order in this case we could not bring that case which we brought in 1908 and which Congress said represented a type of unfair competition, unfair practice case which Section 5 was supposed to cover.

Q I didn't quite get that. What was the supposed unfair practice that appears in legislative history?

MR. RUSSELL: That is the case of S&H versus Louis Weber, a Federal District Court case in 1908. It was held that S&H-- I mean S&H got an injunction against this rascal who was swapping his stamps for S&H stamps and that was the sum and substance of it, although Petitioner attempts a wholly inadequate distinction of the matter in which he says that first this rascal was selling these stamps back to our licensees but the Court said it doesn't appear that happened very much, but the point is that under this Commission Order, this rascal could sell these stamps back to our licensees. The Order runs only against reissuance by non-licensees, not our licensees, so we would be completely powerless to prevent what the Congress thought was an unfair method of competition.

Q And who, in the view of the Congressman who referred to this, who was being unfair, S&H or--

MR. RUSSELL: Louis Weber. Mr. Weber.

Q Mr. Weber?

MR. RUSSELL: Exactly. Exactly, your Honor. He referred to that as an unfair competitive practice, unfair trade practice.

Q Was Mr. Weber operating an exchange or was he just--

MR. RUSSELL: He was a competing stamp company.

Q I see.

MR. RUSSELL: Now the broadest interpretation of the Commission's powers as I believe are to be found in its report on cigarette advertising and labeling, in which to come right to the point insofar as we are concerned, the Commission said that something would be unfair, and unfair or deceptive acts or practices, if, in addition to being morally objectionable, it is seriously detrimental to consumers or others. Now, under no stretch of the imagination could it be said that our challenged actions violate that kind of standard.

The principal argument of Petitioner is that we have been unfair to consumers. Petitioner argues about raising the cost of goods, the prices of groceries, and matters of greater redemption which as we have pointed out are findings that the Commission did not make at all, and which the Petitioner would have you make.

Now the basic question is, is it unfair for S&W

not to offer the convenience, if there are any such, of the trading stamp exchange, unauthorized redeeming retailers, which has some cost. You heard this morning about paying \$1.50 for a book of stamps which is worth \$3. One of these trading stamp exchange operators testified that the principal part of his business came from door-to-door salesmen who went around selling Bibles and photos and they took S&H trading stamp books from the unsuspecting housewife and then took them to Rosenwasser, who gave them \$1.50 a book for them and then Rosenwasser went to S&H and got the TV sets which Rosenwasser was able to sell to the TV store down the street for stock in trade. Now this is the principal part of this rascal's business, but this is the kind of thing which petitioner would have you protect. If there has ever been an overreaching of the consumer level, it is done by trading stamp exchanges and not by S&H.

Now, is it unfair for S&H to prevent that kind of practice? It certainly doesn't seem so to me, and the restrictions which do not, restrictions on transferability which do not put a substantial burden on the consumer are justified in this particular case without question.

Q Did you say that the only provisions of the Order was paragraph 5, page 127?

MR. RUSSELL: Yes, Mr. Justice Douglas.

Q That's the only one that--

MR. RUSSELL: All we want to be able to do is unilaterally and all by ourselves go to Court to stamp out unfair competition as we have done for the 75 years of the company's existence.

Now in conclusion I come back to the request of the Petitioner that this Court affirm the Commission's decision and give you the reasons why it would be grossly inappropriate for the Court to take that action. Not to be repetitive but the Commission pointedly ignored the 43 decisions. The Commission erred in saying when we wrote letters in good faith and brought litigation in good faith, we were transgressing Section 5. The Commission erred in failing to consider that the traffickers themselves are engaged in unlawful activity and are therefore entitled to no protection under Section 5. The Commission erred in overruling the _____ and holding that S&H is not harmed by unauthorized trafficking in its stamps. It erred in ignoring the fact that its action would destroy ~~competition~~ among and between trading stamp companies.

As Petitioner appears to concede by its argument here, the decision cannot be affirmed unless you, the Supreme Court of the United States, made factual findings on injury to consumers not made by the Commission and more importantly, as Petitioner appears to concede, the Order cannot be affirmed unless you conclude, contrary to all authority and contrary

to the Commission's broadest interpretation of its jurisdiction under Section 5, that inconvenience to consumers constitutes a violation of that Section.

Now, finally and I believe also importantly, the Commission's actions cannot be confirmed upon the basis not relied upon by the Commission, namely, alleged harm to consumers, a factor which has been stated by you in Burlington, Chenery, Lakeland, Investment Company, that the Order may not be affirmed on the basis of appellate counsel's post hoc rationalizations.

Now the Commission is here, your Honors, in my view, and because it is seeking expansion or exposition, not expansion, exposition of its powers in the consumer field. It must be obvious to you, I hope, that this case was instituted in 1965, six years ago today, and tried in 1966, before this Commission became acutely consumer conscious, that this case is only in actuality a sow's ear of a case out of which the Commission's desire for a silk purse decision cannot be met.

The Commission has never found that this matter of injury to consumers initially justified the institution of the proceeding. As you heard this morning, there were three counts. This count, although of great importance to us, was a small tail on a large dog. The Commission was primarily concerned with the one for ten, with the conspiracy with respect to the one to ten, and it would be to me, shocking

that this afterthought, boiler plate, cranked in, mechanical reproduction of the complaint as to consumer injury, without discussion of the facts of consumer injury could be found to support this decision of the case, and even if we took the case to the point where Petitioner, I think, ended when he was questioned this morning, that the Commission's decision should be affirmed because of anticompetitive problems as well as consumer problems, you recall that when the Commission relies upon several factors and puts them in the conjunctive and one fails, they all fail.

On the matter of injury to competition, Fifth Circuit was entirely right, and the Petitioner has pointed out no reasons why, in this anticompetitive aspect of the case, the Fifth Circuit should be reversed.

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

Mr. McLaren: you have four minutes left.

REBUTTAL ARGUMENT OF RICHARD W. McLAREN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. McLAREN: Thank you, Mr. Chief Justice.

With regard to the question of the prices, RX 24, an exhibit of the Respondent, states: "Stamp costs clearly raise margins when all or most retailers in an area employ them." RX 24, that is.

We think, may it please the Court, that this is a good bit more than a question of the convenience of consumers.

As I indicated earlier, some 43 to 46 percent of all food purchases carry with them food stamps, and there is testimony in the record and I think it is well justified, housewives feel that they pay for these stamps and the witnesses who testified felt that they should have a right to deal with them substantially as they wished and not to be restricted in something that they had paid for.

Q Where do we find the specific finding on that?

MR. McLAREN: No specific finding, Mr. Chief Justice. I was quoting from the testimony of one of the witnesses, at record by--

Q Wouldn't it have been very helpful if the Commission made a finding on that for us?

MR. McLAREN: I think it would, Mr. Chief Justice, on the other hand, I think where we follow the standard on judicial review, that we look for warrant in the record, reason and warrant, and I think there is warrant in the record.

This Count III came at the end of a very long opinion that dealt in many respects with this whole stamp business, the restrictive practice that S&W used and the fact I think, that Count III doesn't fully contain every little finding should not be read in isolation but rather the opinion should be looked at as a whole, as well as the fact that there is record support for these propositions that I

think are inherent in the lengthy findings and the opinion.

Q But this is the heart of the case now, isn't it?

MR. McLAREN: I beg your pardon, sir?

Q This is the heart of the case that is before us now, isn't it?

MR. McLAREN: The heart of the case is a double finding that there is an adverse effect on competition, that there is an adverse effect on the consuming public.

I think if the Commission had taken the approach solely of going by the proposition of the legal consequence of S&W having eliminated these outlets and focused entirely on the fact that now all these outlets are out of the way, they had the restriction. In the book that said you don't own the stamps and so on, and so on, we find that, an ultimate finding, this has prevented consumers from dealing freely with stamps, this is an unfair method of competition and an unfair trade practice. I think that would have been enough, but they did both. On the way to that finding, on the way to the consumer finding, they said this is an adverse effect on competition that in effect will support an unfair holding. Now they are supported both ways, and I don't think that they should be faulted simply because they didn't spell out the fact that here and there along the way, the effect on the consumer. The effect on the consumer was tied in with the effect on the competition, the two things, the restrictive

provision in the stamp and the elimination of the places where you could trade the stamps.

Q And you think, Mr. McLaren, that in reading Commissioner MacIntyre's opinion for the Commission, reading that part of it, which refers to the issues raised under Count III which is the only part, the only issue directly before us now, that nonetheless we should sort of assume that there is an implicit incorporation by reference of the discussion in the earlier part of his opinion, which is the lion's share of the opinion? Is that your point?

MR. McLAREN: I think it needn't be ignored, Mr. Justice Stewart, and I think that there is a solid finding, and there is a finding at page 126, I believe. It is not a conclusion, it is a finding, and then they went on and they concluded that the effect of all of this was anticompetitive and contrary to the consumer.

Thank you very much, Mr. Chief Justice Burger.

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

Thank you, Mr. Russell.

The case is submitted.

(Whereupon, at 11:14 o'clock, a.m. the case was submitted.)