In the

Supreme Court of the United States

UNITED STATES,

Appellant,

v.

TOPCO ASSOCIATES, INC.,

Appellee.

No. 70-82

Washington, D. C.
November 16, 1971

Pages 1 thru 46

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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UNITED STATES, Appellant,	:	
v.	:	No. 70-82
TOPCO ASSOCIATES, INC. Appellee	:	

Washington, D. C.,

Tuesday, November 16, 1971

The above-entitled matter came on for argument at 10:03 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:

HOWARD E. SHAPIRO, ESQ.,
Attorney, Department of Justice
Washington, D. C. 20530 for Appellant

VICTOR E. GRIMM, ESQ., Bell, Boyd, Lloyd, Haddad & Burns, 135 South LaSalle Street,
Chicago, Illinois 60603 for Topco Associates, Inc.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in No. 82, United States against Topco Associates.

Mr. Shapiro, you may proceed whenever you're ready.

ORAL ARGUMENT OF HOWARD E. SHAPIRO, ESQ.,
ON BEHALF OF THE APPELLANT, UNITED STATES OF AMERICA

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

This is an appeal by the United States from a decision of the District Court for the Northern District of Illinois in a Civil Anti-Trust Case. The Appellee, the Defendant in the District Court, is Topco Associates, Inc. "Topco" is a cooperative corporation which procures grocery and related nonfood products for 23 supermarket chains and 2 wholesalers. These chains and wholesalers are owner-members of the corporation and they control it.

The restriction challenged by the government is an agreement among the member chains, through Topco, that they will not retail Topco-branded products outside of specified territories, and that they will not sell Topco-supplied products at wholesale.

The government contended in the District Court that the arrangement was a horizontal territorial allocation scheme which was illegal per se under Section 1 of the Sherman Act.

After a trial on the merits, the District Court held that the Act had not been violated and entered judgment for the Defendant. In its opinion, which is page 545 of the Record, and its findings of fact, which are page 553, it concluded that the division of territories among Topco supermarket chains, and the accompanying wholesale restrictions, were not illegal per se. Rather, the Court ruled, they were reasonable restrictions ancillary to the cooperative private label program Topco furnishes its owner-members. I would like briefly to describe the Topco organization.

Q This was after a full trial before Judge Hubert Will, was it?

MR. SHAPIRO: That is correct, Your Honor.

The Topco organization, as I said, procures food and related nonfood grocery items. About 55 percent of these are furnished to the members under brand names which are owned by Topco. These brand names are not nationally advertised. They are such names as Food Club, which is the top line for canned goods, L & L, which is a second line, Gala, which I think covers carbonated beverages, Top Frost and so on.

They include primarily strategic grocery items: canned goods, frozen foods, carbonated beverages, cookies and crackers. They are sold outright to the members, so that the member grocery chains have absolute title to them.

Now, Topco's member grocery chains are independent business entities. They have simply joined together through Topco for the purpose of procuring these products. Topco is managed much in the same way that the Sealy Corporation was managed in the United States v. Sealy. Voting stock is held equally by each member chain, and the business of the corporation is conducted by a 14-man Board of Directors made up of officials who are selected from among the chief executive officers of the member chains.

Q Are the members of Topco in any way inhibited from acquiring other brands in the open market?

MR. SHAPIRO: No, Your Honor, they are not.

Q Their membership does not restrict their activities necessarily?

MR. SHAPIRO: No, Your Honor, it does not.

The Topco member chains are, as I said, independent organizations, and their combined retail sales in 1957 were $2.3 billion, so that the 25 Topco organizations are fourth in retail sales, after A&P, Safeway and Kroger. Many of the chains are very substantial in their local market. Giant Foods, for example, was a member of Topco from 1960 to 1966, and it had 23 percent of the District of Columbia market.

Q What percentage of that gross is represented by Topco brand names?

MR. SHAPIRO: Out of the $2.3 billion in total

sales, about 10 percent is Topco-supplied products, with $237 million, and about $133 million of that would be Topco brand products, Your Honor.

I started to describe the size of these organizations which, we maintain, is quite substantial. The record at A. 17 through 25 describes them:

Nine members have total sales in excess each of $100 million, and 20, according to my count, have sales in excess of $50 million.

Q Does Topco supply any goods that aren't under private label?

MR. SHAPIRO: Yes, it does, Your Honor.

Q So it does mass purchasing of national labels?

MR. SHAPIRO: No, not of national-labeled products. It may buy a few, but there are a great many nonbranded goods. It does purchase some branded goods which are not Topco brands. As I say, the division seems to break down to about $102.5 million of non-Topco-branded products.

Q And what is it that a Topco affiliate is given, an exclusive license, or whatever it is, to sell the Topco brands in its area, is that it?

MR. SHAPIRO: That is correct.

Q And is that the crux of the government's case?

MR. SHAPIRO: That is the crux of the government's

case. The Topco organization licenses each member, and the terms of the license say, "You may not sell the branded goods you are authorized to sell outside of specified territories."

Actually, there are three kinds of license. One is exclusive, the other is nonexclusive, and the third is called "co-extensive," but, in effect, as the District Court found, they add up to exclusive in fact.

Q And what's the remedy that the government wants?

MR. SHAPIRO: The remedy wishes to enjoin the territorialization and the wholesale restrictions that are in effect.

Q It would be limited then, what, to the Topco brand, is it, items?

MR. SHAPIRO: Ugh --

Q The injunction?

MR. SHAPIRO: Yes, Your Honor, the injunction would run against the restrictive term in Topco's By-laws, which require this territorialization.

Q And now, is that -- can you refer me to that term?

MR. SHAPIRO: Yes, Your Honor. It appears in the record at Appendix 395 and 398. The description of the restraint itself, the licensing arrangement itself, is in

Paragraph 2 of Article 9 of the Topco Bylaws, and the wholesale restriction, which is a supplementary restriction to the territorial restriction, is described in Paragraph 8 of Article 9 on Appendix A. 398. Very briefly, it is:

No member will sell or offer for sale any products bearing any of the Association's trademarks at any point outside the territory which has been specifically assigned to him.

Then the wholesale restrictions follow. That is what we are attacking.

Q What if the particular member who has a small chain wants to expand his territory? Does he have any problem until he runs into the territory of another?

MR. SHAPIRO: Well, in order to expand his territory, he has to get the consent of the Topco organization, which, of course, consists of his fellow chains. If he runs into the territory of another, he is subject to a veto, in effect.

Q If it's open territory, I suppose Topco wants to sell all the merchandise it can, so if it is open, he can move into it.

MR. SHAPIRO: Yes, Your Honor.

Q Open in the sense of not being franchised to another member.

MR. SHAPIRO: Yes. If the Topco organization has

not licensed the territory, it will be open. Occasionally, there will be clashes over territories. The territories can be quite large. They are defined by county, and some of them include very substantial segments of states.

The District Court found that, in practice, the consent of the incumbent in any territory is needed for a chain to enter.

Q Is the operation nationwide?

MR. SHAPIRO: Yes, Your Honor. There is a map at the back of the Appellees' brief which sets forth the areas in which Topco operates. I think it covers some 33 states, which makes it comparable to organizations like A&P, which operates, I think, in about 37 states, or Safeway, which may operate in about 30.

Now, there is no question as to the purpose of the restrictions. The purpose of he territorialisation and the wholesale restrictions which supplement them are to protect the members from each others' competition in the sale of Topco-branded products. That is why you have an exclusive arrangement like this. And it was the Government's position in the District Court, and it's the government's position here that this kind of an arrangement, effected through this kind of an organization, is a horizontal agreement to allocate territory and to restrict wholesale operations, which is illegal per se, and has been illegal per se ever

since the Addyston Pipe Case, 70 years ago.

If this were a vertical restriction, arguably, it might be a different case, although, even there, I think, the law is now clear that a vertical restriction on products which are sold to a business for resale, and are owned by it, cannot be imposed even vertically, and when you have it horizontal, as you do in this case, as an agreement among actual and potential competitors, it has to be illegal per se.

The District Court relied particularly in its decision on the 6th Circuit's ruling in Federal Trade Commission against Sandura Company in 339 F.2d 847, yet that was a vertical case, and in that case, the 6th Circuit pointed out that if the arrangement before it had been a horizontal arrangement, as this is, then it would have been illegal per se.

Now, I call this horizontal because this organization is almost identical in its operation to the operation in the United States v. Sealy. When you put the Sealy case together with the ruling in United States v. Schwinn Company, which also involved a territorial restriction, you come up with the plain rule that it is illegal per se, and we think the District Court should have stopped right there.

It didn't. It went on to say that this kind of territorialization was reasonable, even though it's among actual and potential competitors, because, without

competition from each other, each member would better be able to control the pricing and merchandising of Topco goods, and thus would better be able to compete with the vertically integrated chains, such as A&P, Kroger and Safeway. The argument was that these organizations, A&P, Safeway, and Kroger, are able, through vertical integration, to have exclusive private brands; that is, private brands that they don't sell to anybody else.

So what the Topco organization was permitted to do by the District Court was to agree among themselves not to compete so that they could have exclusive private brands, and the only way that they could achieve that exclusivity, however, was by horizontal agreement among themselves. That is the justification which is said to take this case outside the per se rule.

Our objection is not to exclusivity as such, with respect to a brand, nor is it to the combination of chains into a single buying organization to achieve useful economies of scale. What we object to is the attempt to achieve exclusivity by an agreement not to compete among direct and actual and potential competitors.

Now, when the District Court sought to justify this arrangement, it said that the government had conceded that the Topco arrangement enabled Topco members to compete better. We did not make such concession. In our post-trial

brief, we said:

While it may be true, as the Defendant contends, that these unlawful agreements are intended to enable the member chains to more effectively compete with others in the marketplace, this motive does not immunize Defendant's conduct.

Instead, what we urged in the District Court was that the law just does not allow direct agreements among competitors as a means of counterbalancing the power or advantages of somebody else in the marketplace. The same argument was made in the Schwinn Case, where it was said:

Let us have territorialization so that our dealers in trademarked bicycles can better compete with the mass merchandisers.

Q Well now, how does this work out? You said Giant had been a member of this. Supposing 7-11 also was a member? They are competitors, in a way, in this area. How does this arrangement work out, as between them?

MR. SHAPIRO: Well, it would depend on the type of license which was given. If 7-11 and Giant both had -- they'd have to have a co-extensive or nonexclusive license to compete in the same area, and it is unlikely that you would have that kind of arrangement, because the Topco members have been quite insistent that they not have competition from somebody else in the sale of Topco merchandise.

Q Are we concerned then only with the exclusive license?

MR. SHAPIRO: No, Your Honor, I think we have to be concerned with the nonexclusive and the co-extensive license also, because all of them involve some kind of arrangement in which the members of the organization, as competitors, get together and say, "Well, we'll either let this guy in, or we won't let him in." I shouldn't use that kind of language, but it really amounts to that.

What they say is, "Is this area adequately covered to promote the sale of Topco brands?" And if they say it is, then they agree to give an exclusive. If they have doubt that it is adequately covered, then they'll say, "No, we won't give an exclusive, we'll allow more than one chain to handle it," usually, in a situation where the chains aren't directly bumping into each other. Their object is to keep competition away. That is the whole purpose of this arrangement.

Q You mean in this arrangement of the hypothetical case, they wouldn't have any?

MR. SHAPIRO: I doubt very much that 7-11 and Giant would both have been licensed at the same time.

Q Does the government agree with the District Court that, absent the exclusivity, Topco would dissolve?

MR. SHAPIRO: No, we do not, Your Honor. Our

position on that was stated quite clearly. The Topco organization furnishes its members very valuable economies of scale in purchasing of --

Q Only aside from the private brand operation, joint buying is still an attractive mechanism?

MR. SHAPIRO: Not only is it attractive, Your Honor, it is necessary. In fact, Dr. Barnes, the expert that the Defendants put on, said that the members would incur costs many times the cost of Topco if they didn't have it. Now, if they were free from agreements not to compete, it is quite possible that they could still achieve some of the benefits of individual labeling, for example, by using its joint organization to achieve brands for each of them. That way, they might achieve exclusivity without having territorial barriers to each other.

Q Well, I gather Topco, in any event, doesn't promote -- doesn't advertise.

MR. SHAPIRO: No, it --

Q It is the local chains that do all the promotion of the brands.

MR. SHAPIRO: Yes, Your Honor. Now, carrying on with Your Honor's question for a moment, Topco itself sells to two wholesalers. One of them, Frankford-Quaker, is a large Pennsylvania wholesaler and it obtains supplies from Topco under its own brand, the Unity brand. Another instance,

Topco now supplies the Twin Ports Grocery Company. This is a large wholesaler, operating up in Duluth and Superior. The members up there compete in the grocery supermarket business, and the record shows that Topco members have competed with each other in the sale of Topco products without disastrous results. We have newspaper advertisements in the record of Exhibits 115 through 132 that show that Fred Meyer, up in Spokane, Washington, furnishes Topco products at wholesale to grocers who compete with its own Spokane, Washington stores.

Perhaps the most dramatic example I can give of this is the instance in Michigan. There there were two stores that had a co-extensive license, Plum's and Meijer's. One of them -- they both entered each other's prime territory, as the phrase is used, because they didn't have exclusive licenses. Meijer's witness testified in this case that they ended up "competing all over the place," and yet the Meijer's revenues rose in that area. The witness explained this by saying, "Well, sometimes you get so mad, and work so hard, that you run past yourself."

Well, this is what we think that the Sherman Act is about, and this is what the per se prohibition against market division is intended to achieve.

Q You've answered Justice White that you didn't think that Topco would have to dissolve, if the government

prevails?

MR. SHAPIRO: No, we do not.

Q Well, now, the District Court made a finding that it would. Now, suppose we accept that. Suppose we had to accept that finding. What then, is the government's position?

MR. SHAPIRO: Well, Your Honor, our position would remain that if Topco has, in order to compete, engaged in horizontal territorialization, you have to give up Topco.

Q Even though it would just go out of business?

MR. SHAPIRO: Yes, Your Honor. This goes to the reasons for having per se rules. One of the assumptions is that, in most instances, horizontal territorialization is just going to -- is going to be extremely harmful. Now, once in awhile a case may come along in which that is not so, but even if that is true, you still apply the per se rule, because you need the benefits of predictability. Right now, any anti-trust lawyer in the country can tell a supermarket chain, "You may not divide up territories with your competitors." The law is absolutely clear on it.

Now, along comes this case which says, "You will find out whether you can divide up territories after the trial, because we will go through a full-scale rule of reason examination."

Now, a rule of reason examination in this kind of

case is extremely difficult. This is a case in which you have some 65 different geographic markets involved. The district court tried to say, "Well, we have to balance A&P's market position against the Topco members' position," and yet, you find nothing in the record showing what A&P's position is in these 65 markets. It is almost impossible to do that kind of vast market analysis.

Instead, the district court tried to make findings as to market shares, based on the market areas in which these firms did business on some kind of average basis, and the results are very inaccurate.

Q Well, do I get a suggestion out of your argument that there should be a per se rule because it is inconvenient and difficult for the government to prove a case by case violation?

MR. SHAPIRO: Oh, no, Your Honor. It's not simply a matter of the government's convenience in proof, but of predictability and certainty in antitrust law, and of effective judicial administration as well.

Q Well, of course, the per se rule is always very predictable, but that's hardly a reason standing alone for having it, is it?

MR. SHAPIRO: It is one of the factors, and the other major factor, of course, Your Honor --

Q Standing alone, I said.

MR. SHAPIRO: Oh, standing alone, it wouldn't be, of course. The other factor is that, in almost every instance, horizontal territorialization carries adverse effects, and it does here. We think there are at least three things we can point to that accompany this kind of territorialization.

First, the territorialization here inhibits expansion by the members into each other's territory.

Q What did the court have to say -- the district court have to say about the impact on the public interest, the consumer interest, if Topco had to dissolve, go out of operation?

MR. SHAPIRO: The district court felt that the public would be disadvantaged if Topco were to dissolve.

Q Do you agree with that, in and of itself, just that part of it, or do you think that's not right?

MR. SHAPIRO: I don't -- well, I think that the Topco organization does achieve very useful and beneficial economies of scale and advantages in distribution for its members.

Q What about keeping the big chains under competitive conditions?

MR. SHAPIRO: Well, Your Honor, I think that there are means of combining group buying power without territorialization. I think that is the answer that has to be given.

Nobody, as far as we know, at the retail level, uses territorialization, except Topco. There is nothing in this record, no testimony by either expert that suggests that anyone else uses horizontal territorialization.

I would like to save the remainder of my time for the rebuttal.

MR. CHIEF JUSTICE BURGER: Fine, Mr. Shapiro.

Mr. Grimm.

ORAL ARGUMENT OF VICTOR E. GRIMM, ESQ.,
IN BEHALF OF APPELLEE, TOPCO ASSOCIATES, INC.

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

This Court recognized, in the White Motor case that caution must be exercised when a per se concept is extended to embrace new practices. The relevant inquiry in such a circumstance is not whether an existing concept can be read broadly enough to cover a new practice, but rather, whether the rationale, and the policy behind the rule really fits the new practice.

Per se rules, after all, are based upon judicial experience. What experience, then, have the courts had with the practices such as those here presented? I would point out that in the district court, the government conceded that it could find no case which would justify a motion for some rejudgment. In its jurisdictional statement to this Court,

the government pointed out that the Court had never been presented with a similar case.

Under such circumstances, we submit that it was proper and appropriate for the district court to engage, as it did, in an inquiry into the "economic and business stuff," to use the words of the White Motor decision, from which these competitive practices emerged.

Judge Will, having done that, found that their ultimate effect was not to detract from competition, but to enhance it.

What, then, is the competitive context which the district court found in this industry, and from which these practices emerged? There does not appear to be any dispute concerning the purpose for which Topco was formed, or for which it continues to exist. The cooperative was formed in the mid-1940's by a group of local grocery chains who recognized that the only way to successfully compete in this industry, indeed, perhaps the only way to survive in the industry, was to duplicate in some measure the advantages of scale which the giant mass merchandisers had attained.

We have set forth in some detail these advantages in our brief. They are impressive and, to some in the industry, were overwhelming. But Judge Will found that perhaps the most competitively significant advantage which the large regional and national chains had achieved was the

private label. Private label permitted these chains to reduce their costs, to lower their prices, and yet to increase their profits and, at the same time, to instill consumer loyalty for their stores.

The national chains adopted groups of trademarks by which to identify their private labels. These were often the store names themselves, or contractions thereof. The trademarks and the products bearing them were exclusive in these large chain stores. The chain, rather than a manufacturer, was identified as the source of those products in the mind of the consumer. The consumer soon recognized that if her family had a preference for "Ann Page" green beans, or "Eight O'clock" coffee, she was required to patronize A&P stores in order to obtain these items.

Most of the advantages of the giant national chains were beyond the ability of smaller operators to obtain. One which was not, however, was the private label which, through cooperative efforts, they were able to achieve. These cooperative efforts then gave them one competitive tool which the large chains had. Many of the other advantages of the larger chains were still beyond their economic reach.

The Topco Cooperative adopted a family of brands which each of its members could use and identify, in his own marketing area, as his own private label. Each continued, however, to operate under his own store names. Each continued

to adopt his own merchandising philosophy, his own pricing. Each continued, in short, to remain independent. But for the first time in their history, these independent chains had the means of meeting the significant price competition which only the giant chains had theretofore offered the consumer.

The trademarks, however, adopted by these cooperatives, had no immediate recognition in the marketplace, as often did those of the national chains. It was necessary for each operator to introduce those trademarks into his own marketing area. This required an investment in time, in money, in effort, in resources. Such an investment was designed to identify his stores with these products in the mind of the consumer, just as the large national chains had done, to build a secondary meaning for them. If, however, the trademarks, which were used as private labels, were subject to use by another operator in the trading area of a member, their value as private brands would be destroyed.

Q Now, would you develop that for us a little bit? I assume you are, but if not, I would like to have you dwell on that, for me, at least. Why would it be destroyed?

MR. GRIMM: The national chains, as I have outlined, had developed these private brands, and they had built them as competitive tools. Through them, they had instilled a consumer loyalty for their stores.

Q Could you put that in terms of an illustration of what can A&P do with their vertical situation that is analagous to this?

MR. GRIMM: A&P had developed their own line of private labels which the consumer recognized were available only in A&P stores. "Ann Page" was one of their principal products, for example.

Q And A&P, I take it, controls the competitive situation as between stores by their power to locate their supermarket wherever they want to?

MR. GRIMM: That's correct, but the consumer knows that if she wants to buy "Ann Page" green beans, for example, she is required to go to an A&P store in order to obtain them. It engendered a uniqueness for the stores -- one of the basic means of competition in this industry is to develop a uniqueness for the store so the consumer desires to shop in one store as opposed to another. There are many ways of doing this, but the most competitively significant way, as far as the consumer is concerned, perhaps, is through a medium which offers her a good value at a low price, and one which she can only get at that store, and that is what A&P and the larger chains use private labels for.

Q Why would it be impossible in the illustration I gave Mr. Shapiro, having Topco and all the economies of scale, having both Giant and 7-11, with Giant having

green beans under some private Giant label of green beans, and 7-11 having some private 7-11 green beans, although they both are packed by the same packers, but the economies of scale are realized in the purchasing and packing arrangements that Topco experts did. Why is something like that -- why doesn't that work?

MR. GRIMM: It doesn't work in the Topco content because even though they have combined into a purchasing organization with large volume, they still have not achieved sufficient volume by which they could have a different private label for each member. The Topco Cooperative has about 1,000 principal items. To suddenly make it a cooperative procuring 26,000 items, in effect, under each different member's own label, would require an investment in time and effort which would be beyond the resources of the cooperative to do.

Q Was this possibility explored in the district court?

MR. GRIMM: Pardon me?

Q Was this possibility explored in the district court?

MR. GRIMM: There was discussion on this. I will refer to the government exhibit wherein the possibility of one second line of labels was discussed, and it was determined that one second line alone would necessitate -- that's page 438 GX 102 of the Joint Appendix.

Q 1027

MR. GRIMM: Government Exhibit 102 on page 438 in which one second line of labels was determined to -- page 440 is the relevant reference -- there it is indicated that just one additional line of labels would cost $350,000, well beyond the capacity of -- so it was necessary, in order to achieve the advantages, for them to develop a family of brands which all could use in his own marketing area.

But in order to achieve this, it became a necessary element of the Topco Cooperative to have a form of trademark licensing. The trademark licensing made the system work, in effect. Its purpose was not to preclude competition among Topco members, but rather to assure that the private brands, those cooperatively obtained, would be and would remain, the private brand of each member individually.

We do not contend that trademark licensing or the existence of trademarks provides any insulation from Sherman Act liability.

Q That's right.

MR. GRIMM: But what we do contend is that trademark licensing in this context serves a proper and procompetitive purpose. That, in effect, it makes cooperative procurement of private labels possible.

Q But, of course, if each 7-11 and Giant had its own labels, assuming $350,000 would have not that much effect,

that would mean, of course, that neither would have an exclusive on that particular item, even though it was under a different brand name.

MR. GRIMM: That is correct, Mr. Justice Brennan.

Q Why isn't that precisely what the Antitrust Laws contain?

MR. GRIMM: The purpose is not to prevent another member from having the identical item in terms of the content or the can or jar or container. The purpose is to allow each member to have a private labeling, that is, a trademark which he can develop and identify as the private label of his store.

Q Well, the illustration I gave you would permit that. If we could have a private label, then the private 7-11 label would be competing with the private Giant label.

MR. GRIMM: That's correct, and this is precisely --

Q And under this arrangement, that doesn't happen because only Giant or only 7-11 is allowed the Topco private label. Isn't that right?

MR. GRIMM: Except that through the cooperative, it would not be possible for them to obtain second lines of labels so that each could have his own label. The economy of combined purchasing would largely be lost by attempting to do that.

Q Let us assume for the moment that it was just

as cheap for each person to have his own private label as to have just the one brand among all of them. Then the effect of exclusivity in this arrangement is simply to limit competition, and private label does. It reaches a number of private labels in any one market.

MR. GRIMM: No, it would not do that. What it would do is to assure that each member would have his private label which will be indeed his. Other operators in that area--

Q As compared with the situation where each chain has its own private label, and is free to move into any market it wants, with its own private label, as compared with that, the present system under Topco does limit the quantity of competition in private label merchandise.

MR. GRIMM: If we're taking only the Topco Cooperative as a source of private brands, that would be true. There are other sources of cooperative --

Q I see.

MR. GRIMM: -- private labels which, in such cases, another member would obtain, and what happens as a practical matter --

Q Isn't it true that the locals do their own promoting of the brand, of the Topco brand, anyway?

MR. GRIMM: They do indeed. And they must, because --

Q And Topco doesn't do that?

MR. GRIMM: Topco does not do that.

Q So it wouldn't be any more expensive for a local chain to promote its own private label than the Topco label, except for start-up costs, maybe?

MR. GRIMM: Well, it's more than start-up costs. It's having a staff of personnel out in the procuring areas. It is the developing a second line of labels themselves, the artwork, the plates, the printing, having label inventories. There are a large group of factors required in this type of operation.

The Topco organization is not a static or rigid one. The Topco member is constantly in a state of change. As the larger members of Topco grow and become large enough to, in fact, develop their own private label programs, which is the record of the case, requires a sales volume of upwards of $250 million annually, they graduate from the Topco organization and do develop their own private label programs when they are large enough to do so, and often under their own store names.

Q Which chain was it, you say, graduated from Topco? You mentioned one of them.

MR. GRIMM: Well, Giant was one. I believe that Mr. Shapiro mentioned that Giant did, in fact, leave Topco. It became large enough to develop its own private label programs and has its own procured brand and, I believe, under

the Giant name. There are -- as an example, within three years preceding trial, five of Topco's largest members left to develop their own private label programs. So Topco Cooperative is a waystation in a corporate chain's economic development.

Q Is this to suggest that the private label program is so important to the whole arrangement that, without it, Topco would go -- disappear?

MR. GRIMM: That is correct, and that is precisely what Judge Will found, Mr. Justice Brennan.

Q Why would it disappear if there were still great advantages in just the act of cooperative purchasing?

MR. GRIMM: Well, it would --

Q Even of nationally branded goods?

MR. GRIMM: I think that it would be a process, and I think that if I can describe that process quite briefly: If exclusivity of a private brand would be lost, the members closest to graduation, closest to the ability to develop their own private label programs, would no longer be interested in continuing to pour their corporate resources into a private label which would be subject to use by others, and therefore, they would look for their own private label, to begin to develop their own private label program. Even --

Q And there are no additional advantages out of Topco, such as mass purchasing power?

MR. GRIMM: Well, there may be, but if they --

Q Is there or not?

MR. GRIMM: Yes.

Q The government said that there were substantial advantages, wholly aside from the private label business.

MR. GRIMM: That's right, there are advantages, but they're advantages of the private label program. In other words, the Topco members testified that the purpose for which they joined the organization was to obtain private label, not to achieve the cost advantages, but they had to have a private label program which was also cost competitive.

Q Now, you've started to emphasize the transient nature of the membership of Topco, which does appear in the brief and the record. How does it work? Now, Giant Foods, for example, was a member of Topco --

MR. GRIMM: That's true.

Q -- and left in 1966, and when it left, it, of course, then no longer had the Topco private labels, it had its own, I would suppose.

MR. GRIMM: That is correct.

Q And therefore, lost all the consumer goodwill and habits of buying of the previous label, and had to develop its own. Or did it do it in a transitional way?

MR. GRIMM: Well, it takes a transitional period in order for this to occur, but normally when a chain will

develop its own private label, or frequently, when they will, they will develop it under their own corporate name, so that it will be immediately identified in the mind of the consumer as the brand of that store.

Q Often it is not the corporate name, but it's some sort of an acronym or something else.

MR. GRIMM: That is correct.

Q Like "Ann Page" for A&P, and so on.

MR. GRIMM: Or a contraction in store name.

Q How does a person -- how does a company become a member of Topco, and how does it get out? Any --

MR. GRIMM: The membership -- there's a membership committee in Topco, a group of independent employees of the organization who are seeking new members all the time, actively soliciting new members, for new membership will give the Cooperative the volume which they need to achieve economy.

When a new chain comes into the organization, they purchase 50 shares of common stock. They purchase preferred stock on the basis of a formula, depending upon their sales volume, and they pay service charges on an annual basis, based upon sales. When they want to leave Topco, they are required only to give 60 days notice, but there is provision for a tapering-off service for 6 months during this transitional period, which we referred to earlier.

Q Is the stock they own in Topco then repurchased by Topco?

MR. GRIMM: The common stock is repurchased at par. In effect, they pay $5,000 for the common stock, and it's repurchased at, I believe, par, which is $1 a share, so that part of it they do not get back, but the preferred stock is repurchased.

The government has stated in its brief that it did not specifically attempt to prove any adverse effect on competition, and yet contends that such an adverse effect ought to be inferred. This inference is based largely upon the economic theory which we contend does not find support in the record, and which Judge Will rejected. Judge Will found that Topco licensing has no appreciable effect on Topco member expansion, and does not control or affect prices.

Q Further on that theory, does the government concede that it did not adversely affect prices? Or is that just about --

MR. GRIMM: No, Mr. Justice -- Mr. Chief Justice, the government conceded that it did not specifically attempt to prove an adverse effect on competition, but they alleged that certain inferences ought to be drawn from the record in terms of effect on expansion and prices, where these inferences were rejected by Judge Will.

Topco members naturally are interested in expansion

and growth. Judge Will has found, as I have said, that Topco licensing has no appreciable influence on member expansion, and the government has been able to cite no instance to the contrary. Expansion exists as follows -- let me try to outline it briefly:

When a member desires to expand into a new area, he gets a license. License is granted as a matter of course, because the Topco Cooperative is interested in having its members expand. Even in licensed areas, an expanding member may be licensed to sell Topco branded products. It is only in those cases where a primary marketing area, the heartland of another's operation exists, that a member may not be licensed to sell Topco brands. But even in those cases, the record demonstrates that the operator will use alternative sources of private label in the industry, such as from another cooperative, or from a wholesale organization. But that situation would not often occur because of the geographic dispersion of Topco members in various parts of the country.

Despite the district court's findings that the Topco licensing provisions resulted in no unreasonable restraint, the government now urges that these findings ought now to be ignored, because the government urges the irrebuttable presumption is an unreasonable restraint, regardless of its actual effect. We submit that if Antitrust law --

Q Well, Mr. Grimm, didn't Judge Will find that

this arrangement did restrain competition in private label merchandise?

MR. GRIMM: Judge Will found that it had no appreciable influence on the two aspects of competition which the government claimed were injured: one, prices, two, expansion. Judge Will specifically found the Topco licensing provisions had no effect on prices, did not --

Q What did he find about effect on competition generally in private label merchandise? I thought he found that the advantages to -- the advantages resulting from increasing competition with the national firms outweighed the disadvantages of the restraint on competition in private brands.

MR. GRIMM: That reference, I believe, was a reference to the government's argument.

Q Well, didn't he find that?

MR. GRIMM: No, not quite. What he did say was that, whatever may be the effect. In other words, the government has argued this to me, he said. He said, "Whatever may be the effect, it is far outweighed by the advantages."

Q What if he were wrong in saying that you may balance competitive impacts like this, that competitors may combine as long as it furthers competition with another group of competitors? What if he were wrong on that as a

matter of law?

MR. GRIMM: I think -- I don't think that's quite what he did, if I may --

Q Well, let's assume that he did that and he were wrong. Is that -- do you say that that is proper Anti-trust law?

MR. GRIMM: I do not think that that is the proper way to approach the problem, and I do not think that Judge Will approached it that way. What Judge Will did was to find that the ultimate effect of these practices was to benefit competition. The ultimate effect was not adverse. Then, with reference to the government's argument, he said, "Whatever may be their adverse effect would be far outweighed." I don't think a weighing was his real inquiry here. I think that was just a way of describing the government's argument.

Q You mean his approach was that, assuming the government was correct on some possible adverse competitive impact, it was offset --

MR. GRIMM: Yes, I think what --

Q -- by benefit to the public?

MR. GRIMM: -- what he was saying was that the ultimate effect -- that's correct, Mr. Chief Justice -- was a benefit to the public.

Let us look at a moment, at the concept of the horizontal restraints concept which the government would

seek to have applied here. This per se concept concerning horizontal market divisions finds its origin and application in those cases where competitors, typically those with sufficient market power to restrict output -- if they chose -- have combined and conspired to eliminate all competition among themselves. Such naked restraints have no capacity to achieve any beneficial effect on competition.

However, when courts have been presented with restrictions which are necessary and reasonably related to achieving a legitimate venture, courts have refused to apply this per se analysis, and properly so, we submit, for such arrangements have a capacity to intensify competition, and therefore, their ultimate effect on competition must be discerned. And Judge Will did discern that effect here, and found it was beneficial.

The refusal to apply per se rule here would not, we submit, result in interminable economic inquiries. The doctrine of ancillary restraints provides a well-defined legal concept by which to identify those practices which have a capacity to increase efficiency, to ultimately enhance competition and to benefit the consumer. This distinction was highlighted, we submit, in the Sealy case. Sealy presented a combination of manufacturers who agreed to refrain from selling trademarked items outside of licensed areas. Despite the government's urging in that case, the

court did not find that those provisions were per se a violation of the Sherman Act. Instead, the court examined the context and found an aggregation of trade restraints, including unlawful price fixing and policing, the ultimate purpose and effect of which was anticompetitive. But the court specifically distinguished those quite different situations such as, restrictions incident to cooperative efforts among small grocers.

In Topco, grocers have entered into cooperative efforts, not for the purpose of eliminating competition among themselves, not for the purpose of restricting channels of distribution, but for the purpose of creating new brands, more important, competitively significant private labels, and in so doing, they have created new competition in the industry which did not exist before, and which can continue to exist only because of the licensing provisions.

We do not contend because Topco members are small, medium-size chains, because their purpose is to assist their members to better compete in the industry, that the Sherman Act doesn't apply. What we do contend is that the ultimate effect of these practices is to enhance competition, and Judge Will so found.

The government here seeks to claim competition in private labels, but that is a contradiction in terms, because competition in labels means they would no longer be private,

and would deprive the consumer of the competitive benefits which they provide.

Q Mr. Grimm, one thing that is not entirely clear to me on the factual situation here is this. One of the things that the government says is violative of the anti-trust laws is the restrictions on wholesaling. There are two. Two of the members of Topco are wholesalers. How do they operate and how do they fit into this picture and into this argument that you just gave us?

MR. GRIMM: Yes, Mr. Justice Stewart. As Mr. Shapiro did point out, there are two Topco members who are wholesalers. In the one which Mr. Shapiro referred to, Frankford-Quaker, which operates in the Philadelphia area, there are a few brands, perhaps 200 or 300 brands, which that wholesaler obtains through the Topco Cooperative, which are a second line of labels. In other words, they are not the same ones that the Topco member in the Philadelphia area --

Q The Topco retail member --

MR. GRIMM: That's right.

Q -- carries.

MR. GRIMM: And that retailer serves several hundred so-called "Mom and Pop" grocers who --

Q That wholesaler, you mean.

MR. GRIMM: That wholesaler, I'm sorry, who in effect, use those as their private labels.

Q I see. Now, that's one of them. Is the other --

MR. GRIMM: The other is a consumer organization. I believe the other is a member of IGA as well, and therefore its member stores would operate under an IGA name or something similar. They would present a chain image.

Q Wholesalers therefore deal in a secondary label, in a different label from the retail -- from the label carried by the retail member in the same area.

MR. GRIMM: In those areas where there is a retail member existing, that's correct, Mr. Justice Stewart.

Q But they might deal in the primary label in an area where there is not a retail member?

MR. GRIMM: That's correct.

Q And in that area, the wholesaler will just sell to the independent "Mom and Pop" corner grocery store.

MR. GRIMM: That's right.

MR. CHIEF JUSTICE BURGER: Mr. Shapiro, you have about seven minutes left.

REBUTTAL ARGUMENT OF HOWARD E. SHAPIRO, ESQ.,

ON BEHALF OF THE APPELLANT, UNITED STATES OF AMERICA

MR. SHAPIRO: Thank you, Your Honor.

The government's argument has been that competition is not enhanced by the territorialization device for achieving exclusivity. In very brief terms, what we are

saying is that it is better to have two Topco members competing against A&P in a given market, or Kroger, or Safeway, than one. You don't enhance competition by erecting a barrier around the market.

Secondly, we have argued that we do have here an effect on the price. Topco's expert, Dr. Applebaum, explained the whole purpose of exclusivity is to insulate the seller from competition with respect to price. You try and get as much control over price and margin as you can, so that exclusivity itself has an effect on price, and when exclusivity is achieved by territorial agreements not to compete, that effect is aggravated because we have the third consequence of this agreement, namely something that inhibits entry into each other's markets.

Now, it is argued that, well, there really isn't any inhibition on entry into markets. People can enter without Topco products. Well, of course, if they can enter without Topco products, as is suggested, then the justification for the importance of Topco is not as great as has been suggested. But the record is to the contrary. Just to use the Exhibit that was referred to a moment ago, page 440, there there is a discussion of the second line of products, and it's also pointed out that -- page 438 and 439 -- one of the reasons there isn't a demand for second line doubtless lies in the fact that it is impracticable to stock in the

same warehouse, duplicating private brand inventories.

Now, this really means that once you are in for the Topco system of distribution, so that it's your basic system, anywhere where you are operating out of your basic warehouses, you really can't go to some other line if you want to expand, and that means you can't walk into another Topco member's territory with a different line. In fact, that same paragraph illustrates the kind of conflict we run into here, the Big Bear label situation, where neither wanted to give up the brands that the other -- the exclusivity, and neither one nor the other member having the advantages of the same brand.

Now, this goes also to the second line, if you look at page 440. The explanation is given, why wouldn't members want a second line of brands, and the answer is that, if there were a second line, the competitive edge of the Topco members gives -- the Topco program gives its members would be eliminated. That is, the competitive edge they have against each other.

Now, the district court found expressly, a third factor, finding 58 in the record at 856, it expressly found that "intrabrand competition is eliminated." There was nothing else it could find on its record.

There has been some mention here about the importance of brand loyalty as a competitive factor here.

Now, the record on brand loyalty is that no one can determine what it is that brings the housewife in. It certainly isn't just loyalty to a private label brand. People don't travel across a city to get Food Club canned peas. Dr. Barnes -- I mean, Dr. Applebaum, the expert put on by the Defendants, testified that the brand loyalty factor really can't be determined because there aren't studies available to do so. This is in the record at 186 and 187.

The point has been made that the government didn't specifically attempt to prove that this practice was anti-competitive, that we did not go forward with evidence beyond enough to show that this was illegal per se. We did, however, on the record that was made, try to carry the burden to show that this practice was unreasonable, and we argued principally three things: that it inhibits expansion by members into each other's territory, that it affects price, and that it restricts intrabrand competition.

Q Mr. Shapiro, you said earlier that two Topco stores can compete better with Giant than one. Now, that has the ring of a good aphorism, but I'm not clear on why it is necessarily true. Could you enlarge on that? I'm not rejecting it, I just don't understand why it follows that that is true.

MR. SHAPIRO: Well, let's suppose that we had, in

the same market -- let me give the example that I referred to a moment ago, the situation in Michigan. Two Topco stores, Meijer's and Plum's, both entered each other's territory, Grand Rapids, Muskegon, and I think, in Lansing, and they began vigorously competing with each other. They were necessarily vigorously competing with A&P as well, and the result for Meijer's was very, very good, because Meijer's ended up the winner in that contest, with a very substantial marketship.

That's really what it boils down to. With this system, you don't get two Topco members competing in one market, you get one.

Q By "competing," you mean price competition?

MR. SHAPIRO: This was price competition.

Q From the same brand?

MR. SHAPIRO: Aaaaaah -- the -- Plum's and Meijer's were competing on Topco brands. They handled the entire line together. They were "competing all over the place," in the witness' words.

Q Well, but if the district court's finding is correct, the breakdown of the Topco method that you attack would mean that you might not have any Topco brand there. Both stores might decline to be members and function. That's always assuming that the district judge was correct.

MR. SHAPIRO: Yes, Your Honor. Now, we don't

agree that Topco would collapse. There are just too many other advantages, as the witnesses testified, particularly Dr. Barnes, who emphasized those very substantial advantages that the Topco organization has. It's a good organization. They offer very good buying services. I think one witness from Hillman's described them as a "We use them like our own buying division," and they have very excellent quality control services. And they, incidentally, wouldn't have to develop 26 different brands. They might achieve some real wonders with a smaller line than 26 for each store.

Q Well, on your theory, Mr. Shapiro, if there can't be an exclusivity of brand by two competing Topco members, that's what you're trying to stop, is that exclusivity, isn't it?

MR. SHAPIRO: May I qualify that?

Q Yes.

MR. SHAPIRO: We are not trying to stop exclusivity, we are trying to stop the achievement of exclusivity by territorial agreement and wholesale restriction.

Q Well --

MR. SHAPIRO: And there is a very important difference.

Q By agreement between competitors?

MR. SHAPIRO: By agreement between competitors, yes.

Q You went to stop it for those reasons, then.

Now, there's nothing to prevent these two competing chains from putting their stores right across the street from each other, is there?

MR. SHAPIRO: No, Your Honor.

Q But Giant doesn't put, or A&P doesn't put one of its stores across the street or 100 yards away from another Giant stores, does it?

MR. SHAPIRO: No.

Q So they achieve a distribution and, in a sense, a limitation of competition by their vertical control, don't they?

MR. SHAPIRO: Yes, they do, Your Honor. But they achieve it because they are a single economic and legal unit. The law has always looked differently at attempts between independent firms to make agreements not to compete among each other, and situations where a single firm, managing its own affairs, restricts competition with itself.

Q At least it was Judge Will's view, whether correctly or not, that this was one means by which these independents could hold their own against A&P, and Giant, and the other big ones. That was his theory in part, wasn't it?

MR. SHAPIRO: Oh, yes, Your Honor. That was his theory, yes.

Q You challenge that.

MR. SHAPIRO: There are other -- there are less restrictive means, let us put it, which is really what the ancillary restriction rule is about. There are less restrictive means by which it can be done, Your Honor.

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

Thank you, Mr. Grimm.

The case is submitted.

(Whereupon, at 11:06 a.m, the case was submitted.)