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In the

Supreme Court of the United States

HUGHES TOOL COMPANY, et al., Petitioners, v. TRANS WORLD AIRLINES, INC., Respondent.	)	No. 71-827
TRANS WORLD AIRLINES, INC., Cross-Petitioner, v. HUGHES TOOL COMPANY, et al., Respondents.	)	No. 71-830

Washington, D.C.
October 10, 1972

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Washington, D. C.,

Tuesday, October 10, 1972.

The above-entitled matters came on for argument at 2:05 o'clock, p.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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

CHARLES ALAN WRIGHT, ESQ., 2500 Red River, Austin, Texas 78705; for Petitioners and cross-Respondents.

DUDLEY B. TENNEY, ESQ., 80 Pine Street, New York, New York 10005; for the Respondent and cross-Petitioner.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-827, Hughes Tool Company again Trans World Airlines, and 830, Trans World Airlines against Hughes Tool.

Mr. Wright, the papers before me right at the moment do not indicate whether the parties made a request for additional time.

MR. WRIGHT: Neither party has made such a request, Your Honor.

MR. CHIEF JUSTICE BURGER: Very well.

ORAL ARGUMENT OF CHARLES ALAN WRIGHT, ESQ.,

ON BEHALF OF HUGHES TOOL COMPANY, ET AL.

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

In the thirty minutes that we have, it is obvious that neither I nor Mr. Tenney are going to be able to discuss comprehensively all of the 11 issues on which the Court granted certiorari on the petition and the cross-petition, so we are going to have to let our briefs speak for us on many of those issues.

Indeed, I consider my time to be somewhat less than thirty minutes, because I am quite determined to close my initial submission while there is still some time remaining for rebuttal.

So, in this time that I have, I want to go immediately

to what seems to me to be the central overriding issue in this case: That I represent a corporation that has been ordered to pay the largest money judgment ever entered under the antitrust laws in a case that has nothing whatever to do with the antitrust laws.

Whatever else my client may have done, my client did not violate the antitrust laws, and even with all the benefits that my friends from TWA have by virtue of the default judgment, it is impossible to make out a violation of the antitrust laws.

There are three separate reasons, separate and independent, why this is not really an antitrust case.

In the first place, the conduct, the facts alleged in the complaint, the facts proven by TWA in the damage hearing, show conduct on the part of the defendants that as a matter of law cannot be held to violate the Sherman or Clayton Acts.

Second, if there had been any antitrust violations in this case, we would have a complete defense of immunity under Section 414 of the Federal Aviation Act, because everything that my client is shown to have done in this case was done in the exercise, the normal exercise, of control of TWA approved by the Civil Aeronautics Board.

And, third, even if there had been antitrust violations, and they were not immunized, the damages that have been awarded to TWA bear no relation to the supposed anti-

trust violations. The damages are that certain aircraft, jet aircraft, were ordered by Toolco, the parent company, for its carrier subsidiary, TWA, a few weeks later than they should have been; that Toolco subsequently decided that TWA should have only 47 first-generation jets and cut back the initial order that had been for 63 first-generation jets, but Toolco leased some of these aircraft to TWA for a period pending permanent financing, and that leasing is a more expensive way of acquiring aircraft than is purchasing them outright.

And, finally, there is a small item that alleges that Toolco disrupted Convair's production, and so some other planes came a little later than they should have.

Now, what happened in this case, in my submission, is this: That at the end of the 1950's, when the air carriers were converting to jet aircraft, it was obvious that neither TWA nor the parent company, Toolco, would be able, with its own resources, to pay the many millions of dollars required to acquire jets. It was going to be necessary to finance the acquisition of these aircraft by going to lending institutions.

The Eastern lending institutions, the banks, and the insurance companies would not make that financing available until Toolco, the owner of 78 percent of TWA, agreed to put its stock into a voting trust. The institutions controlled

the voting trust. They put in a new board of directors for TWA. They put in new management for TWA. And the first thing that the new management does is to bring the present action against the owners and those who formerly controlled the operation of TWA.

They chose to cast the case in antitrust terms. This gives them federal jurisdiction that they would not otherwise have had, it gives them, if they are successful, treble damages; but I think that it's on the record, that the principal motive for bringing the case on an antitrust theory was that they were primarily interested in forcing Toolco to divest itself of its interest in TWA, and they believe that divestiture was a remedy that they might get in an antitrust case, though they could not get it in a corporate management -- mismanagement action.

QUESTION: How does their motive bear on the issues here?

MR. WRIGHT: It bears in this way: they got what they wanted ultimately, Toolco is out. And it seems to me not unjust, Justice Rehnquist, for us now to hold them strictly to their antitrust claim, not to feel sorry that, well, perhaps TWA simply picked a wrong theory. And it's like the plaintiff in Diaguardi v. Burning, with his home-drawn complaint, and we ought to strain hard to save him.

I think that they follow the course with their eyes

wide open, and that now they have to live or die with whether or not the theory they chose was a legally viable one. We think that, demonstrably, it is not.

I was interested in the document TWA filed last week labeled, "Memorandum in Response to Petitioners' Reply Brief" for two reasons:

First, in our Reply Brief our principal thrust had been that after all of the hundreds of pages that TWA has written in briefs, that the court below wrote, we still have not been told (a) in what respect did Toolco and the other defendants violate the antitrust laws, (b) what is the immunity that you get when the CAB approves acquisition under Section 408?

QUESTION: Of course, I'm sure, Mr. Wright, before we're through, that someone is going to suggest that perhaps that should have been searched out at an earlier date. Before a default occurred.

MR. WRIGHT: Mr. Chief Justice, I think that is just what we had hoped would be threshed out at a much earlier stage by following the course that we did, choosing not to defend on the facts, and saying we are willing to stand or fall on the legal position that we have in this case.

Now, the thing, the events since February 8, 1963 have been convoluted. Obviously it's not produced the expeditious determination of the case that we thought that it

would. But it seems to me that it would have been irresponsible for my clients to have persisted in litigating the facts in a case of this sort, that would take so much time of the federal court, when, in our view, the facts make no difference whatever.

Yes, Mr. Tenney, we're willing to concede all that you want to say about our motive and intent, because we simply do not think that the bad motives that we may have had hidden are enough to make an antitrust violation out of conduct that does not violate the antitrust laws.

And we thought that we could get that legal issue before the Court. We expected to prevail on it very quickly. We have not prevailed quickly, we hope to prevail now, nine years later.

But it interested me that in the memorandum in response to reply brief, that TWA still does not undertake to answer either of these questions. We still don't know. They say again, as they said in their principal submission, that we have not disproved the fact that we could not have violated the antitrust laws in some way. Well, we say, how could we violate the antitrust laws, that we give you the benefit of admitting all your factual allegations, and, I conclude, ultimate fact as well as evidentiary fact, and constrain them as liberally as possible in the light of the damage hearing; but still it ought to be possible then to

look at the record and spell out some coherent theory on which my clients could be held to have violated the antitrust laws.

I think that cannot be done.

The second thing that interested me in that memorandum is that they pick up the example that we posed in both our earlier submissions about an acquisition of TWA by Lockheed. This time my friends call it a reductio ad absurdum, and on the difference between the two sides on that example, I am quite willing to stand or fall. Because I think that that is a clear and decisive illustration of the difference between our legal positions on the effective CAB immunity and with a change in the facts it also becomes a very interesting illustration of the difference between us on the supposed antitrust violation.

The example, Your Honors will recall, is imagine that in 1946, when TWA was on the verge of bankruptcy, that nobody wanted to acquire the company, the carrier was about to fail, except Lockheed. And suppose that Lockheed said, Okay, we'll buy control, CAB, if you'll approve it.

The CAB knows that to allow a major manufacturer of airplanes to acquire a carrier means that Lockheed will be the exclusive supplier for TWA; it recognizes that a vertical integration of this kind is going to reduce competition. But the CAB says we're required to look not just at antitrust, we're

required to look at the public interest, and we think that the continued operation and solvency of TWA is so much in the public interest that it justifies this incidental restraint on competition. And so we at the CAB will approve the acquisition and control, and just to make sure that Lockheed doesn't overstep, we'll put a condition on it that Lockheed can't sell any planes to TWA without our CAB approval. In that way we'll be sure that they don't force unnecessary planes on TWA.

In the view of my friends, Lockheed, under those circumstances, would be liable to an antitrust action because it did exactly what the CAB knew that it was going to do, said that it could do, because the CAB found that other things outweighed the effect on competition.

We think, in that illustration, that the CAB approval would be a complete grant of immunity. TWA says that to argue that it would immunize the antitrust violations there is a reductio ad absurdum.

I think that the lines there are quite clearly drawn.

But I would also vary the facts of my Lockheed illustration. Let's suppose that Lockheed is a super responsible corporate parent, and so it says to TWA, having acquired control with CAB approval, --

QUESTION: Let us suppose it's what kind of a

corporate?

MR. WRIGHT: Super responsible.

QUESTION: Super responsible.

MR. WRIGHT: Yes. It says: Much as we would love to sell you Lockheed planes, TWA, if you tell us you want Boeings and Convairs, fine; we want you to have exactly the planes you want to have.

And TWA says: Well, we really would like to have some Boeings and Convairs. So Lockheed, using its money, because TWA doesn't have any, goes down the street to Boeing and Convair and says, Sell us some planes.

And these planes, Lockheed in turn then, either leases or when it gets financing, it sells to TWA. Now, this would be much more of an antitrust violation on my friends' theories than anything than we have in our case, where Toolco is in fact not a manufacturer of planes, as Lockheed of course is.

And yet my friends would still be able to say, Well, but Lockheed forced TWA to boycott Boeing and Convair, even through TWA kept getting Boeing and Convair planes, because Lockheed insisted you can only buy planes from us, and we're going to be the conduit.

That's what all the talk in this case, about boycotts, tying arrangements, exclusive dealings, are; that Toolco was the conduit. It acquire planes from Boeing and Convair and

made them available to its subsidiary, TWA.

This, we think, with or without CAB approval, simply is not a violation of the antitrust laws. That for a parent to acquire goods for its subsidiary, even for a parent to decide what goods its subsidiary is going to have, how many it's going to have. We have here no restraint on competition of the sort to which the antitrust laws are directed.

QUESTION: And if the parent goes to the trouble of making the subsidiary promise not to get planes from any source except through the parent, you say that's just beside the point, that's just expressing what would happen anyway, because it is in control. Is that the way you look at it?

MR. WRIGHT: That's exactly my submission, Justice White.

QUESTION: So that a parent, in these circumstances, especially if approved by the CAB, can make the sub promise not to buy planes any place else, without any -- no problem under the anti-trust laws?

MR. WRIGHT: Well, since the subsidiary can't buy planes in any instance without the consent of its parent, it hardly matters whether you coerce this terrible-sounding promise out of the subsidary.

QUESTION: Well, maybe ultimately that's right, but if you have a board of directors that runs the company, and just what if it happens to vote to buy some planes somewhere

else. I suppose it could unless it was under some contractual promise to the parent.

MR. WRIGHT: I suppose it could, but I must say --

QUESTION: You're just assuming that obviously, and maybe that's quite right, that the parent will have control of the board?

MR. WRIGHT: If I control 78 percent of the corporation, I'd be surprised if the board of directors voted contrary to my wishes.

QUESTION: Well, yes, but the board of directors might say, well, we have obligations as directors, too.

MR. WRIGHT: Yes.

QUESTION: To this corporate entity.

MR. WRIGHT: Yes.

And if we coerce our elected directors who control the board to do something that is wrong, something that is not in the interest of the corporation, then I say that of course a corporate mismanagement action will lodge, obviously.

QUESTION: But not an antitrust action?

MR. WRIGHT: Not an antitrust action, yes. That's the whole point of our case here.

I, of course, do not concede for a moment, as a matter of fact, as differentiated from what my legal position has to be here, I don't concede that there was any mismanagement on the part of Toolco. But, legally, I'm in the posture

that I have to admit it.

QUESTION: But there was the promise not to buy planes anywhere?

MR. WRIGHT: By default, that stands admitted, yes.

QUESTION: Given 100 percent ownership on the part of a parent of a subsidiary, Mr. Wright, did you say, nonetheless, that the subsidiary could not be a plaintiff and bring or state a claim for relief against the parent in the antitrust law?

MR. WRIGHT: The subsidiary certainly could bring an antitrust action or, if it were not 100 percent owned, a minority stockholder could bring a derivative action in its behalf challenging acquisition of control by the parent. But, so far as the cases that either side has been able to produce, to go, that is the extent of it.

But my friends have not been able to cite a case in which the challenge is solely to antitrust violations that the parent is alleged to have committed to the harm of the subsidiary, after a lawful acquisition.

I say, Mr. Justice Rehnquist, I've been reflecting on that question in the last few days, trying to see if I could hypothesize a case in which there might be such a case. I hesitate to say that it could not ever happen, but I've been unable to think of an example in which the minority would -- the subsidiary would have an antitrust claim against

the parent for activity after acquisition.

I can well imagine, of course, and I want to be sure that this distinction is understood, I can well imagine cases in which third parties might have claims that because of the way the parent exercised its control of the subsidiary, it --

QUESTION: There have been several cases.

MR. WRIGHT: Sure, and we have lots of cases of that kind.

But that isn't our case here. We don't have Boeing or Convair here saying, "We've been harmed by what -- those violations of the antitrust law that you've committed." They have, so far as the record shows, been perfectly content.

We have only the parent here -- I'm sorry, only the subsidiary here.

I revert, Mr. Chief Justice, to the question that you put to me a while ago, because I do think that one of the reasons this case has gone on so long and did not come to an end expeditiously as we had anticipated is because of a misunderstanding of what the position was that Toolco took on February 8, 1963, when it announced that it would not defend further on the merits. That has been made to have overtones of contumacy, of scorning the process of the court; and those overtones, in my judgment, are quite unjustified.

I think that it is not only proper, it is responsible

for a party to avoid factual issues if you can and say, let's simply stake it all on our legal test. We know the facts. We know what we have done. We don't see any way that those facts could possibly be made into a valid antitrust claim. We don't see any way they could possibly prove damages. Why should we go ahead and spend years, while people use all the wonderful engines of discovery that the federal rules provide, so that we come up with thousands of pages of facts, when ultimately the court is going to have to decide a straight legal issue.

That was the position we took then, we think that would have led to an expeditious termination of the controversy, except for one very unfortunate thing, and that is the failure of the District Court and then of the Court of Appeals to give a proper reading to what effect a default has.

Those courts took the view that by inviting default, as we certainly did, we had admitted the illegality of what we had done and we admitted that our illegal acts caused harm.

QUESTION: Well, they treated it as though it was a negligence case, in which the defendant stipulated negligence and just went to trial on damages, isn't that about right? A close analogy.

MR. WRIGHT: I think that that is what they did, and I think that that was giving it too much effect. We

waived any right to dispute the facts. But we think that the cases, that are written over and over in your books, even after a default a party still retains the right to challenge whether what he has done is a legal wrong, much as the analogy I put in the brief that a defendant in a criminal case who pleads guilty may still appeal on the ground that the indictment did not state a crime, that the law was unconstitutional.

We think that the legal questions were still open, and the example of the Section 7 claim in the complaint is the best illustration of that. The complaint says that we acquired the shares of their stock, that we did this to their great damage, and it specifically states a violation of Section 7 of the Clayton Act.

But everybody has agreed that there was no Section 7 violation because, as a matter of law, we can't be held to have violated Section 7 when the CAB has said we could acquire the stock. This, at least, is the irreducible minimum that CAB approval allows us.

QUESTION: What was it that you said that your client said that renders the analogy of conceding negligence and thus trying damages renders that inapposite here?

MR. WRIGHT: I'm sorry, I don't get the thrust of the question.

QUESTION: Perhaps I should do it more directly:

Why isn't this, then, what you rely on, to say that this is not like a case of conceding negligence and just going to trial, going to the trier on damages?

MR. WRIGHT: It would be like that only if we were in a jurisdiction in which negligence is no longer a sufficient basis for recovery. So that we might admit the fact of negligence by a default, but say, well, here, for this kind of action you have to prove wilful and wanton injury, something of that sort.

QUESTION: Well, of course, in the Chief Justice's example it's stated that negligence was conceded.

MR. WRIGHT: Yes.

QUESTION: Your point is here you've never conceded the violation of the antitrust laws.

MR. WRIGHT: That's right.

QUESTION: You've never conceded liability at any point.

MR. WRIGHT: We've never conceded liability.

QUESTION: You conceded all the facts, but say they don't add up to antitrust liability.

MR. WRIGHT: That is precisely what we're saying, Justice Brennan. That, as a matter of law, the facts that their complaint alleges and that the damage hearing established do not add up to an antitrust violation.

With the Court's permission, I would like to reserve

my remaining time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Wright.

Mr. Tenney.

ORAL ARGUMENT OF DUDLEY B. TENNEY, ESQ.,

ON BEHALF OF TRANS WORLD AIRLINES, INC.

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

I am here on behalf of Trans World Airlines, TWA, and 35,000 public stockholders. According to defendants, they have no claim to economic independence and no right to relief under the antitrust laws.

This case is almost twelve years old now. The judgment below is the result of unanimitybelow. The Special Master, who was Herbert Brownell, the District Judge, Charles Metzner, and two panels of the Court of Appeals have been in full agreement.

Like my opponent, I am going to leave the facts and the history of the proceedings to the statement in our brief, which is very detailed, and which is documented to the record, and which is, as to both the facts and the history of the proceedings, pretty much the same as the courts below saw.

I would also leave to our case the four questions that are presented by our cross-petition in No. 830. The questions in the cross-petition are pretty straightforward

questions of policy and statutory interpretation, and of course we hope that the Court will agree with us on them; but I don't think they need any special explanation.

In 827, the first two questions that this Court granted certiorari on had as their subject the conduct of the pretrial discovery during the first two years of this twelve-year-old litigation, and the entry of the default judgment when the defendants, expressly refusing to obey court orders, refused to proceed with either pretrial or trial.

In the petition and in the initial brief, the defendants claim that this conduct of the pretrial proceedings, in these ways they were denied due process of law, a Fifth Amendment point.

We haven't heard anything about that in the reply brief or in the oral argument today. The reply brief says that this is all procedural underbrush.

But there is one point I would like to make about it. The defendants have had their day in court, their full day in court on these points.

On March 8 of 1965 this Court entered an order dismissing certiorari in No. 501 of that term. That worked to dispose finally the appeal the Hughes Tool Company had taken from the dismissal with prejudice of its counterclaims, counterclaims against TWA, as well as a number of other additional defendants.

That was a default judgment entered in favor of TWA, as well as these counterclaim defendants, when the Tool Company formally and expressly refused in open court to proceed with pretrial or trial of the factual issues of the entire litigation.

The same refusals that are before you on those questions today.

In 501 this appeal presented the questions of whether the pretrial proceedings had been properly handled by the District Court, whether the discovery, as complained of, were proper; whether the entry of the default judgment was justified when the defendants refused to obey those orders and announced that they would not proceed further.

Those are the first two questions before the Court today.

The excuse for raising them again is that the scope of the interlocutory appeal, 423 of that term, was restricted to jurisdictional questions. But a restriction on the permissive interlocutory appeal is really beside the point. Even if there had been no interlocutory appeal at all, if the permission had been refused to take that appeal, 501 would have reached the discovery orders, the defendant's refusal to proceed, and the entry under Rule 37 of the default judgment, because of those events.

And as far as those questions are concerned, this

Court's order in No. 501 operate as a final order.

We think that, as a matter of judicial finality, the principles that this Court has laid down is no reason to look at those questions at any subsequent staqe of the litigation.

And the Court of Appeals, of course, disagreed with us on this. They met again, they reviewed the record again, they came out with a second unanimous decision that there was no error in the pretrial proceedings, that the discovery orders were proper, and that -- and I'll quote the 1971 opinion on this: were less at stake in this litigation, the propriety of the default judgment would not have deserved the full discussion we have afforded it.

The entry of the default judgment was inescapable and virtually invited by Toolco.

I don't believe any of the defendant's procedural arguments in the brief need any further comment besides, of course, what we have in our brief.

Now, as I see it, the defendants are presenting two questions of substantive law, I suppose -- I only see two -- their antitrust defense and their CAB defense. Those are the same questions that they reaised on the prior interlocutory appeal. They are still presented only on the pleadings, or at least that's the way they should be presented. There has still been no trial on the merits, and

it is still true now as it was in 1965 that the reason there hasn't been any trial is because defendants decided, a responsible business decision, to prevent one in 1963.

But, as I hear them today, they are still denying matters alleged in the complaint. They are still arguing their factual view of these matters that were at issue. The conduit theory of the ordering of jets, that this was solely for TWA. They are denying that they tried to establish themselves as the dominant factor in the supply of aircraft to airlines, that they seized the TWA market, imposed boycotts, and prevented TWA from acquiring sufficient aircraft and arranging financing so that they could do this, so that the diversions of aircraft from TWA to its competitors had, as a very specific purpose, the establishment of defendants as a factor, a competitive factor, in the business of supplying aircraft to airlines.

QUESTION: Mr. Tenney, --

MR. TENNEY: Yes, sir.

QUESTION: -- if this Court should hold that a subsidiary does not have any post-acquisition antitrust claim available to it under the law against a parent, would you think that was something that these petitioners couldn't raise, because of the default?

MR. TENNEY: No, Your Honor, I believe that the default does not preclude them from raising complete legal

defenses that are presented by the pleadings. They would not be barred from raising that point. I can't, I frankly can't conceive of this Court coming to that conclusion, in light of the history of its decisions.

QUESTION: Do you know of any cases from this Court that have authorized that sort of a suit, where the subsidiary is a plaintiff and the parent is a defendant?

MR. TENNEY: Well, Your Honor, every derivative suit that involves the antitrust laws, in which the subsidiary sues its parent, clearly involves this matter. There have been several of them that the Court has denied certiorari on.

QUESTION: But there they're assuming the claim of the parent, aren't they? They aren't making a claim against the parent; but merely assuming a claim of the parent?

MR. TENNEY: No, they are derivative suits by stockholders of a minority owned subsidiary. Against the parent.

QUESTION: But if your opponent correct in saying that these suits are with respect to the acquisition?

MR. TENNEY: No, Your Honor, he's not. There are several cases in which that is not the case.

QUESTION: And you've got those in your brief?

MR. TENNEY: I believe so, sir.

Moreover, we aren't -- the question basically is

whether there is a violation of the antitrust laws.

Now, if the subsidiary can't sue because there has been no violation of the antitrust laws, nobody can sue. The government can't sue for an injunction. So, therefore, cases like the Timken Roller Bearing case, the Perma Life Mufflers case, Fortner v. U. S. Steel -- further, if there is no antitrust violation, if that is the reason why the subsidiary can't sue, then the entire scope of the antitrust laws has been gravely diminished.

QUESTION: What if the reason the subsidiary can't sue is that it fails to meet the damages requirement, the treble damages section, injured by reason of, and so forth?

MR. TENNEY: If any plaintiff fails to meet the damages requirement, that he is injured by reason of violation of the antitrust law, he's out of court.

QUESTION: That wouldn't preclude a government suit under the same circumstances.

MR.TENNEY: No, it would not. But that is not my opponent's argument here. I think his argument is the subsidiary can't sue. He's disqualified just because he's a subsidiary.

QUESTION: But you don't contend, then, that the default admitted to any violation of the antitrust law?

MR. TENNEY: The default --

QUESTION: I mean as such.

MR. TENNEY: As such here, Your Honor, it did not. It admitted all of the conduct, it admitted the purposes, the antitrust --

QUESTION: Admits the historical facts.

MR. TENNEY: The historical facts and the anti-competitive purposes, the intent to monopolize --

QUESTION: Those are historical facts, you're saying that --

MR. TENNEY: Yes, sir.

QUESTION: -- those are just facts from the past.

MR. TENNEY: Those are facts. They are admitted. It also happens to be the case, of course, that there is a concession here, that the complaint states the cause of action under the antitrust law.

QUESTION: But that's a legal --

MR. TENNEY: But that has been conceded, actually, in the briefs.

QUESTION: Yes, but the default doesn't concede a violation of the antitrust laws.

MR. TENNEY: The default does not. As a matter of law, the allegations are sufficient to establish --

QUESTION: So that whether the facts alleged add up to a violation of the antitrust laws is a question of law that --

MR. TENNEY: That is a question of law.

QUESTION: -- that -- on which your right to damages depends?

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

If we had not alleged a violation of the antitrust laws in thie complaint --

QUESTION: You mean if you have not alleged facts.

MR. TENNEY: If we had not alleged --

QUESTION: Which have been admitted.

MR. TENNEY: -- the facts.

QUESTION: Which add to a violation of the antitrust laws, then you're out of court.

MR. TENNEY: Exactly, Your Honor. That has been the case right along.

QUESTION: Or even if there's a violation, there -- if there isn't causation.

MR. TENNEY: Well, causation was a peculiar word, Your Honor, in this context. It's called proximate cause in the final question that was presented to this Court in the petition for certiorari. But that's, really that's an argument of desperation. What happened to TWA here wasn't some accidental explosion like the Paulsgraf? case, everything that was done to TWA was done deliberately.

QUESTION: Yes, but everything, every kind of damage imaginable that happened to TWA during these years can't be charged to Hughes Tool -- Toolco, they have to have

resulted from the antitrust violation.

MR. TENNEY: Of course not, Your Honor. But it created damages that are traceable precisely, as we have traced every element of damages that is the basis of our damage award, to the conduct that is alleged in the complaint as having been done by the defendants pursuant to their illegal conspiracy in restraint of trade.

For example, six Boeing jets, six of the first jets that went into service in this country, were diverted by the defendants from TWA to TWA's principal trans-Atlantic competitor, PanAmerican.

Now, that diversion is admitted. That it was pursuant to the conspiracy in restraint of trade in order to establish themselves in the market; that's admitted.

On damages --

QUESTION: Well, that really isn't admitted, is it?

MR. TENNEY: Yes, it is, sir.

QUESTION: In restraint of trade?

MR. TENNEY: To a conspiracy in restraint of trade, where the restraint --

QUESTION: Well, that's a legal -- that must be a legal --

MR. TENNEY: I don't think so, sir.

QUESTION: Isn't that just mismanagement?

MR. TENNEY: I don't see where it's mismanagement,

when the purpose is to establish a -- to establish the defendants, through use of the TWA market, as a dominant factor in the supply of aircraft to airlines.

It's mismanagement also. It's mismanagement involved, and certainly TWA got badly hurt by its manager; but it got badly hurt for purposes that its manager had on the outside. And those purposes were anti-competitive.

There's a lot of -- there's a great deal of mismanagement involved in many antitrust cases. But that doesn't make them any less antitrust cases.

QUESTION: Well, do you have a mismanagement case which involves antitrust, which the court has said violated antitrust, where there was a subsidiary and a parent corporation involved?

MR. TENNEY: I'm not sure that I can think of one where mismanagement has been expressly referred to.

QUESTION: Well, you said mismanagement and antitrust, they always tied them together. I just wondered --

MR. TENNEY: No, sir, I don't mean that they're always --

QUESTION: I wanted one closer in on this case.

MR. TENNEY: No, sir, I don't mean that they're always tied up together, but I mean that many violations of various kinds of law are also violations of the antitrust laws. And mismanagement can be one of them.

QUESTION: Answering the question of my brother Rehnquist you said you don't have a case that says that the subsidiary can recover against the principal on antitrust.

MR. TENNEY: I don't have a case that's been decided by this Court on that precise point, sir. There are cases in the lower courts, some of them with --

QUESTION: Well, is that the point in this case?

MR. TENNEY: Well, the defendants have presented this as the point. They've developed a new doctrine -- it's new to me -- under the antitrust laws. They've constructed a doctrine applicable to what they call a parent-subsidiary relationship that puts everything in that relationship outside of the scope of the antitrust laws. They say that as long as the parent controls the subsidiary --

QUESTION: The burden is not on them, the burden is on you. You allege the antitrust violation.

QUESTION: Right.

MR.TENNEY: The burden is on me at a trial to establish the violations, Your Honor. There was no trial.

QUESTION: And it stands where the plaintiff is the subsidiary against the parent. That's also your burden.

MR. TENNEY: As a legal proposition, it's my burden to establish the legal proposition. I think that's so, sir.

However, I believe that that is implicit in the -- all of the antitrust decisions of this Court. I don't

believe that there is such a thing as an immunity for a parent's conduct with respect to a subsidiary, and I suggest that there shouldn't be.

First of all, I'd like to point out, Your Honor, TWA is not just an incorporated division of Tool Company, it is and it has always been an independent entity, organized to provide public service as an air common carrier. It had 13,000 public stockholders when the suit was brought, and now it's 35,000.

What was done to TWA in this case was to deprive them of the jets that it needed to carry on its competitive business in the air transport industry, an industry that Toolco is not engaged in. It very nearly destroyed TWA.

If ever, for the economic purposes that the antitrust laws are concerned with, separate corporations should be considered as entities having independent economic significance, then Toolco and TWA should be recognized as having independent economic significance for antitrust purposes.

QUESTION: Mr. Tenney, --

MR. TENNEY: Yes, sir.

QUESTION: -- isn't it at least arguable that the parent-subsidiary immunity, as you refer to it, isn't simply an arbitrary carving out on the part of the petitioner, but related in some way to the type of harm which Congress sought

to protect potential competitors from how far did it intend to extend the protection of the antitrust laws insofar as a person seeking treble damages is concerned?

MR. TENNEY: I should not think so, Your Honor. I have trouble believing that the public stockholders of a subsidiary that is not a wholly owned subsidiary, and the corporate entity in which they have invested, have been intended by Congress to be deprived of the rights that they would otherwise normally have.

I find nothing in the statute that suggests that.

After all, a corporation has a separate legal personality, it has a separate economic personality in this case. The person's -- the right of that legal person or that economic person is the right that has been infringed, and it is the right that is protected here.

Now, --

QUESTION: Mr. Tenney, --

MR. TENNEY: Yes, sir.

QUESTION: -- would it make any difference to your submission if Toolco had owned 100 percent of TWA?

MR. TENNEY: Frankly I don't think that under the Court's decisions that would give them immunity. I think that it makes a great deal of difference to the independence of the -- I think we have a much stronger case because it was initially a 46 percent ownership, then went up to 70 percent

in the Fifties, and finally 78 percent. I think we have a much stronger case to establish the independent economic significance of this enterprise.

Similarly, I think we would have a weaker case if Toolco had had a division that was an airline and just incorporated it, for example. But that's not our case.

QUESTION: I was going to ask you about that. Suppose the CAB had allowed Toolco, after acquiring TWA, to fold it into the parent and operate it as a division, and these same acts had been conducted, would there have been any violation of antitrust laws that could have been taken advantage of by anybody except the United STates Government or some competitor of Toolco?

MR. TENNEY: Well, if you have no person -- a competitor of Toolco, of course, could have taken advantage of them. If you would destroy TWA's legal personality by merging it in, I don't quite see how a division could sue.

But as long as we have a separate legal personality, as long as there is that legal personality that can sue, as long as there is a body of directors, a controlling entity capable of taking advantage of that independence, I see no difficulty in their asserting their legal rights.

Now, I think that it's interesting to notice that today, more and more, some conglomerates and some other corporate affiliates are starting to positively discourage

practices of preferential feeling, and require their units to operate in the open market.

Now, to the extent that this is happening today, and I think it is happening, I think that this is one of the healthiest trends in American industry. And it can only have something to do with the influence of the general belief today -- and I believe it is a general belief -- that you don't have any immunity from the antitrust laws just because there is a corporate affiliation. You are still subject to the antitrust laws, and you have to behave appropriately.

And I believe that if this doctrine of parent-subsidiary immunity were established, one of the most important areas in which the antitrust laws have influence today would be removed from that influence.

This isn't a simply foreclosure we're talking about. I have to recall that Toolco has, from 1961 to date, without any interruption because of their default, or their statement that they admit the facts of the complaint, they have continued to deny that the foreclosure of the TWA market, the seizure of the TWA market, was intended to, was a step towards establishing themselves as suppliers of aircraft to other airlines.

That is a fact alleged in the complaint.

Now, go all the way back to the movie cases, and I guess a lot before the movie cases, this Court has a whole

series of vertical integration decisions. It says that just because you have control over a subsidiary doesn't mean that you can use your power over the market of that subsidary as a weapon in a broader market.

And I don't see how you can remove the parent-subsidiary situation from the scope of the antitrust laws without taking a really tremendous step back from the whole -- maybe two generations of decisions. And I cannot believe that it would be the desirable thing, let alone intended by Congress.

Now, --

QUESTION: Mr. Tenney, --

MR.TENNEY: Yes, sir.

QUESTION: -- if this Court should conclude that the Court of Appeals in error in putting it under the doctrine of Thomson v. Wooster, the effect of what was done here was to admit liability, that at least of a technical matter, would -- it might be all that we would be called upon to decide in this case, might it not?

We might then remand it to the canvassing of all these issues, subsequent issues that you and your brother have been talking about.

MR. TENNEY: Your Honor, that's not actually what the Court of Appeals decided.

The Court of Appeals did not decide that under the

doctrine of Thomson v. Wooster a default admitted liability. It decided that under the doctrine of Thomson v. Wooster the allegations of the complaint with respect, not just to what -- not just to simple facts but to ultimate facts, such as in that case --

QUESTION: Such as the antitrust violation, isn't that right?

MR. TENNEY: Well, no, sir. Such as the particular attempts to -- the particular seizures of markets, the attempt to use that seizure of market as a weapon to move into broader markets, the boycotts, the exclusive-dealing arrangements. Those things were admitted, like the validity and so forth of patent. Not liability per se; that is, whether a patent law existed, for example, or that it precluded, in Thomson v. Wooster, recovery for some other reason.

The facts, and by facts, things like intent, things like purpose, things like restraints of trade. In the Employing Plasterers case a couple of decades ago, it was held that an allegation that trade had been restrained was a factual allegation that needed trying. That is the kind -- that trade has been restrained, that there have been marked effects here has been admitted.

Liability hasn't been admitted by that, but liability just stems from this.

QUESTION: It follows.

MR. TENNEY: It follows.

QUESTION: Yes.

MR. TENNEY: It can't possibly be avoided.

QUESTION: Well, I accept the correction of my characterization of what the Court of Appeals decided, but let's assume, again, if we should conclude that it gave too much effect to this default, that might be all we need decide in this case.

MR. TENNEY: Well, I had some trouble understanding what other effect really could be given, Your Honor.

QUESTION: Well, that's -- but you're arguing that it was correct in giving the effect it did. Let's assume for a moment that we held otherwise, that we accepted, in other words, the petitioners' Point Two in his brief.

MR. TENNEY: If this Court accepted the argument of petitioners that they can refuse discovery of issues of this kind, refuse to proceed to a trial, and still be entitled to -- at a damage hearing -- contest restraints of trade, contest anti-competitive conduct, contest all those things, if Your Honors accepted that, I think that you could remand this case. I think that you might do some really ultimate damage to the entire system of procedure that civil practice has been based on now for thirty years and perhaps even more.

QUESTION: But in your statement there it seemed to me that you were saying that, or assuming that the restraint of trade is admitted by the default.

QUESTION: Just in your very statement to Mr. Justice Stewart, is he entitled at a damage hearing to challenge a restraint of trade?

MR.TENNEY: I believe he was definitely not entitled to it -- he is definitely not entitled to challenge the --

QUESTION: According to what you said a while ago, that he does not admit questions of law?

MR. TENNEY: He does not admit that restraint of trade is unlawful. There are, perhaps -- there is a rule of reason, I suppose.

QUESTION: Well, is he --

QUESTION: Then, is he -- he's entitled to a damage hearing, then, to argue that this restraint of trade is not unlawful under the antitrust laws.

I thought you said that he was not, just a moment ago; but --.

MR. TENNEY: Well, perhaps I can make it a little clearer in terms of their second defense.

QUESTION: Well, how about my question, though? Is he entitled to argue at the damage hearing that"whatever facts I've admitted do not amount to a violation of the anti-

trust laws"?

MR. TENNEY: Yes, he's certainly entitled to that. And he is certainly entitled to argue that he has, if he has it, a complete exemption from restraints of law under Section 414 of the Federal Aviation Act. If he got such an exemption, he's entitled to argue it. That is a plea for the defense, he hasn't waived the thing.

He's waived his right to argue any facts with respect to what is specifically, but as far as that goes, for example, the CAB is perfectly clear, they never gave him any such permission. They won't have anything to do with that argument.

The CAB is perfectly clear, as a matter of fact --

MR. CHIEF JUSTICE BURGER: For your guidance, counsel, we'll finish today, but it will take us about six minutes over. But you're almost at the end of your time now.

QUESTION: Are you going to touch on the immunity point?

MR. TENNEY: Well, I'll touch briefly on it, Your Honor.

MR. CHIEF JUSTICE BURGER: If necessary, we'll enlarge the time a little for that purpose.

MR. TENNEY: Thank you, sir.

As a matter of fact, on the immunity point, which

is that even if defendants' conduct violated the antitrust laws, they cannot be held liable because that conduct was approved by the CAB.

I don't think there's much I can say about it, because the government has covered it so thoroughly.

First of all, it's a little incredible that the CAB would have approved the kind of conduct that we have charged in our complaint. But they expressly have said that they didn't. The government brief, of course, is the small gray brief.

On page 13 they say: the defendants' restraint upon TWA's activities was, of course, neighter submitted to nor approved by the Board, and it was certainly not necessary to carry out any of the Board's orders.

And they go on, at page 18, to say that: in circumstances such as these, the availability of antitrust or other judicial remedies may be regarded as additional safeguards for the protection of the public interest.

And I suggest, Your Honors, that the defendants' Lockheed acquisition illustration, that hypothetical is a perfect example of why additional protection for the public interest is necessary. If a simple order approving acquisition of a majority interest in an airline authorizes, just by the existence of that order, Lockheed to establish at TWA as an exclusive market for its aircraft, used to break

out other manufacturers and use this as a weapon to increase their market position with other airlines, that violation of the antitrust laws should be open to attack under the antitrust laws.

QUESTION: Of course the government was on the short side of Pan American Airways, wasn't it?

MR. TENNEY: The government has lost some cases before this Court, yes.

QUESTION: Including that one?

MR. TENNEY: Including the Pan Am case, yes, sir. That, of course, was dealing with allocation of routes, which is specifically within the CAB's exclusive authority.

I thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Wright.

REBUTTAL ARGUMENT OF CHARLES ALAN WRIGHT, ESQ., ON BEHALF OF HUGHES TOOL COMPANY, ET AL.

MR. WRIGHT: May it please the Court:

It seems to me that, in an important respect, Mr. Tenney has, by what he has said today, confessed error. If I have heard him correctly, he responded more than once, in response to questions from the bench, that we are still free at this stage, after default, to challenge whether or not the acts pleaded in the complaint amounted, as a matter of law, to a violation of the antitrust laws.

And that, it seems to me, equally to correlate, is exactly the opposite of the view that the Second Circuit adopted at -- I refer particularly to the discussion at pages 70nand 71 in 449 Fed 2d, appearing also in the record at Appendix 2772, 2773, 2776, such statements as the following:

The default had the effect of admitting or establishing that the acts pleaded in the complaint violated the antitrust laws and that those acts caused injury to TWA in the respects there alleged.

Again, there was no burden on TWA to show that any of Toolco's acts pleaded in the complaint violated the antitrust laws.

And again, the illegality of Toolco's arrogation of all authority for allowing aircraft was, as we have said, conclusively established by the default judgment.

So that it seems to me the case was decided by both courts below on a theory that Mr. Tenney, I think quite properly, has now conceded, to be unsound and contrary to the decisions of this Court.

QUESTION: Mr. Wright, assuming we agree with that, should we do anything further than just to hold that and remand the case to the Court of Appeals?

MR. WRIGHT: It seems to me, Justice Stewart, that's a question of judicial administration, and it would really be presumptious of me to advise this Court.

QUESTION: Well, since you do advise us through your brief, by arguing all these substantive issues.

MR. WRIGHT: Yes, and I would hope I gave you such good advice that you might decide you could bring the case to an end right now by simply saying "reverse and dismiss". But --

QUESTION: Well, couldn't you --

MR. WRIGHT: I would agree, Justice Stewart, quite seriously, that ordinarily it is a tremendous advantage to this Court to have the considered opinion of the Court of Appeals on a difficult question, and that there would be valuable guidance, in this case, to have the Court of Appeals enlightened as to the proper standard, than to review the thousands of pages in the record, the hundreds of pages in the complaint, and then say that these are violations or not.

QUESTION: Of course, if we decide to go --

MR. WRIGHT: Beg pardon, Justice --

QUESTION: If we decide that there wasn't, and we send this back, what do we send it back to?

MR. WRIGHT: If you decide -- ?

QUESTION: If we decide, as my brother Stewart suggested, what's left to be invaded below?

MR. WRIGHT: Well, then the question would be the substantive question: What is the effect of immunity? Are

these pleaded facts enough to make out liability?

The second Circuit then would be deciding those issues on the merits rather than saying that Toolco is not entitled to litigate those issues.

QUESTION: But hasn't -- didn't the Second Circuit really decide the immunity question?

MR. WRIGHT: The Second Circuit --

QUESTION: On the merits, I mean they reached that.

MR. WRIGHT: The Second Circuit decided the immunity question in 1964 --

QUESTION: But it doesn't depend on what they thought the effect of the default was?

MR. WRIGHT: No, I quite agree, that --

QUESTION: So if that isn't --

MR. WRIGHT: They considered that, and they decided --

QUESTION: At least here, you're entitled to -- you're finally here -- if you're immunized?

MR. WRIGHT: Yes. I should think that that is right, Justice White.

QUESTION: Wholly aside from whether they gave too much effect to the default?

MR. WRIGHT: Wholly aside from that. That is correct.

QUESTION: As far as the Court of Appeals goes,

they would presumably not reconsider that if we didn't decide it. That's the law of the case, from their point of view, isn't it?

MR. WRIGHT: Right. From their point of view it is, and that's why it didn't come in on the second appeal. Even though it seems to me that the immunity issue is now in a very different factual setting than it was in 1964.

QUESTION: But, nonetheless, it's been decided in this case.

QUESTION: Well, it's right now, at least.

MR. WRIGHT: It is right, yes, Your Honor.

We would pray that the judgment below be reversed.

Thank you, Your Honors, for your attention.

MR. TENNEY: If it please the Court, in 1964 the Court also decided this point, that the conduct charged in the complaint violated the antitrust laws; that is why it was not considered in the 1971 opinion. There are two Court of Appeals opinions here, and you have to look at them both. That was why we of course didn't have to prove it, they had already decided it.

MR. CHIEF JUSTICE BURGER: Do you have any comment on that, Mr. Wright?

MR. WRIGHT: No, thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: The case is submitted.

[At 3:06 p.m., the case was submitted.]