In the

Supreme Court of the United States

GULF OIL CORPORATION, ET AL.,

PETITIONERS,

V.

COPP PAVING COMPANY, INC., ET AL.,

RESPONDENTS.

No. 73-1012

Washington, D. C.
October 21, 1974

Pages 1 thru 24

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Respondents.

Washington, D. C.,

Monday, October 21, 1974.

The above-entitled matter came on for argument at 2:30 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:

MOSES LASKY, ESQ., 111 Sutter Street, San Francisco, California 94104; for the Petitioners.

MARTIN M. SHAPERO, ESQ., Corinblit and Shapero, 3700 Wilshire Boulevard, Suite 575, Los Angeles, California 90010; for the Respondents.

C O N T E N T S

[Second day - pg. 25]

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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. 73-1012, Gulf Oil Corporation against Copp Paving Company.

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

ORAL ARGUMENT OF MOSES LASKY, ESQ.,

ON BEHALF OF THE PETITIONERS

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

This case concerns the jurisdictional requirements of interstate commerce in three sections of the Clayton Act: Section 2, which is the Robinson-Patman Act; Section 3, which is the provision prohibiting certain tying arrangements; and Section 7, which is commonly called the Celler-Kefauver Act or amendment, which has to do with mergers and acquisitions.

The case does not involve any question at all of what Congress's powers are, it involves no question of what Congress can do, it only involves the question of what, in fact, it has seen fit to do by the legislation it has enacted.

Now, the starting point, I assume, of any consideration of what an Act of Congress means, is the language of the Act of Congress.

The jurisdictional requirements of the three Acts that I speak of are much the same, and are to be contrasted

with the provision of the Sherman Act. Because they are much narrower.

Now, each one of these three Acts, each one requires that the proscribed conduct have an effect and an impact on interstate or foreign commerce. And I'll use the word "commerce" hereafter for interstate or foreign commerce.

The language of the three is identical. It is required that the, quote, "effect may be substantially to lessen competition or tend to create a monopoly in a line of commerce."

And in this respect these three are identical with the Sherman Act. They require an effect or impact on interstate commerce. But the Sherman Act requires no more. Under the Sherman Act it makes no difference who commits the conduct or where it occurs, if it has an effect on interstate commerce.

But here, under these three Clayton Act sections, much more is required. Effect or impact, which is expressly spelled out and required, is only one of several of the tests of jurisdiction mandated by these Acts.

Robinson-Patman requires, in addition to the effect or impact, that the discriminatory sale be, and I quote, "by a person engaged in commerce, in the course of such commerce", and again a discrimination requires at least two sales to have a discrimination between it, requires, quote, "either or any of the purchasers involved must be in commerce."

That's in addition to the effect or impact clause.

Section 3 has almost the identical language, it requires that the tying conduct be that of a, quote, "person engaged in commerce, in the course of such commerce."

And Section 7, the anti-acquisition section, requires not only that the effect be adverse on the line of commerce, but that the acquiring corporation be, quote, "a corporation engaged in commerce" and, in addition, that the acquired corporation be a corporation engaged in commerce.

Now, before we go further to discuss the effect of these Acts on this case, it's necessary to find out what product we're talking about. Because that's the key to this case.

The product involved in this case is a substance known as asphaltic concrete. Not asphalt, and I emphasize it's not liquid asphalt, because liquid asphalt moves in interstate commerce, and while this case started as one of what later became consolidated as the Western Liquid Asphalt cases, the trial court carved out the asphaltic concrete aspects of it and left the liquid asphalt aspects still going, they're still in the court, they're still proceeding with the rest of the Western Liquid Asphalt cases.

Asphaltic concrete -- let me say, when the Court carved it out, the Court said at the beginning there seemed to be a jurisdictional problem on asphaltic concrete, it directed the plaintiff to take all the discovery he needed on

the jurisdictional elements, come back and make his showing. And when that occurred, the Court ruled out the asphaltic concrete elements.

Asphaltic concrete is a product made in California and which, by its very nature, cannot be sold across the State line. It's a bulky product, composed of 95 percent of rock, sand and gravel, which is mined in the local pits; and the other five percent is liquid asphalt, also produced in California from California refineries.

This material is used as a topping, blacktop, streets, roadways, driveways. In order to make it, you mix the rock with hot asphalt in a hot plant, and the product has to be laid down before it cools. Consequently, it has to be laid down with 35 miles of the plant where it's made.

That means it can't move in interstate commerce. The hot plants of all the parties in this case are located in California. The hot plants of the plaintiff are all located in the Los Angeles Basin. The hot plants of the acquired corporation involved in the Section 7 aspect of this case, Sully-Miller, are all located in the Los Angeles Basin. That is to say, Los Angeles County and the suburbs around it.

None of the asphaltic concrete made and sold, involved in this case, ever got within 200 miles of an interstate border of California.

Now, the Robinson-Patman, Section 3, counts concern

sales of asphaltic concrete by the petitioner, Industrial Asphalt. It is accused of having discriminated, and yet none of its asphaltic concrete sales ever got within 200 miles of the California border.

None of them ever crossed a State line, none of them ever could cross a State line.

Now, the Section 7 count involves the acquisition by Union Oil Company, which is not in the asphaltic concrete business, of one Sully-Miller. Sully-Miller has its plants solely in Los Angeles County and neighboring Orange County. It makes asphaltic concrete from local materials, sells it within a 35-mile range of Los Angeles; it also engages as a paving contractor. And the complaint, the amended complaint in this case alleged that Sully-Miller's business was being engaged primarily in the business of operating asphaltic concrete hot plants and contracting street improvements. It's a street paver.

Now, this appears in the Appendix at page 15.

Its plants are in the Los Angeles Basin. It's a contractor in paving streets in that particular area, all 200 miles or thereabouts from the border.

Now, upon this state of undisputed fact, the District Court ruled that the jurisdictional requirements of Sections 2, 3, and 7 were absent. It said that the Robinson-Patman Act did not apply, because no sale by Industrial of asphaltic

concrete was in commerce. No sale was made in the course of commerce.

For the same reason, they held that Section 3, the tying section, did not apply.

And it held that Section 7 did not apply to Union's acquisition of Sully-Miller, for the simple reason that Sully-Miller was not a corporation engaged in commerce.

I may add that the District Court also found that there wasn't any effect on interstate commerce. And it had given the plaintiffs, the petitioners, every opportunity to show their jurisdictional facts.

This case went to the Court of Appeals on an interlocutory appeal allowed under 1292(b), and that Court reversed.

Now, until the decision in this case, it had been the uniform decision of a mass of cases that Robinson-Patman does not apply unless at least one of the sales involving a discrimination crosses the State line.

The Court of Appeals dismissed this State line test. And it did it because it said asphaltic concrete is used on streets and roads. Streets and roads are all hooked up and eventually something crosses the State line, so you have an interstate highway system, therefore the roads and streets are linked up to, quote, "an instrumentality of commerce", and, therefore, said it, as a matter of law the seller and the sale are engaged in commerce.

As for Sully-Miller, it held that as a matter of law it was engaged in commerce, because it sold asphaltic concrete for use on roads and because it paved streets. As I say, all 200 miles from an interstate border.

Now, the Ninth Circuit ignored the finding of no effect on interstate commerce, because it said that because an interstate instrumentality of commerce was involved, a road, everybody was engaged in commerce, and if you're engaged in commerce the effect follows as a matter of law.

I'm not going to discuss that. This Court -- we petitioned for cert on the -- certiorari upon the Sherman Act issue, and certiorari was not allowed on that; so that's not before us.

The proposition we advance now is that the judgment, the decision was wrong because no sales were made in commerce by anybody engaged in commerce, and nobody engaged in commerce was acquired.

Now, just this year, on May 24th, the Fifth Circuit, in Scranton Construction vs. Litton Industries, reported in 494 Fed 2d at 778, referred to the decision below, the very one I'm here on now. It referred to it as a, quote, "new deliverance" and refused to follow it.

Now, this Court granted certiorari to review this new rule of law. And yet, now that we're here, the decision of the Court of Appeals for the Ninth Circuit is barely defended.

The Solicitor General has filed an amicus brief, the other day, in which he urges that Sections 3 and 7 should be read as if they were co-extensive with the Sherman Act. In other words, you delete all the language about sales in commerce, in the course of commerce, by a corporation engaged in commerce, and read the Acts as if they required no more than the Sherman Act.

Curiously enough, he says nothing about the Robinson-Patman Act. He just talks about Section 3 and Section 7.

We know, of course, that the Department of Justice, in the Antitrust Division, have never been lovers of the Robinson-Patman Act, and apparently they don't seek to defend the decision.

But the language of those sections are all the same. And that whatever decision is made about 3 or 7 would, of necessity, have to apply to the Robinson-Patman, which is 2.

The principal argument made in respondents' brief is exactly the same as the Solicitor General's, namely, that with respect to all these Acts, Robinson-Patman, 3 and 7, they should be read as expansively as the Sherman Act, and that nothing is required other than effect on commerce.

Now, if I may be forgiven to characterize them, I would say that these two lines of argument are: one, would work surgery, by excising the specific provisions of Robinson-Patman, Sections 3 and 7; and the other, that of the court

below, is applying LSD to the language, and arriving at a rather strange interpretation.

Now, let me turn to the reason of the Court of Appeals. The great Chief Justice Trainer of California once wrote about the use of magic words, as if the use of a certain phraseology somehow decided a case. And I respectfully submit that that's what the Ninth Circuit did. It picks up the words "interstate highway", which has an inflated sound divorced from reality. It attaches a conclusive significance to that, and then also looked for analogy to the Fair Labor Standards Act, which is an Act of quite different language, purpose and background.

The court below talks about interstate highways, and, if the Court please, that is not a legal term. It is a loose terminology for roads, for whose construction the federal government, under grant-in-aid statute, the Federal Highway Aid Act, contributes money.

It does so for forest roads, trials, farm-to-market roads, local rural roads, streets, parkways, county roads, and also State roads selected to connect the principal centers.

Respondent called on the petitioners to admit, by request for admission, and we did admit that 98.5 percent of these funds received by the State of California went for county roads. We've already observed that Sully-Miller was a street paver in the suburbs of Los Angeles.

All roads for which federal aid is given are under the jurisdiction of the State, local governments; the federal Act, Highway Aid Act, does not presume to regulate highways, or operations of those working on them or supplying materials for them, it does do no more than attach conditions to the gift. And none of those conditions have anything to do with the problems of this case.

And so I respectfully submit that what the decision of the court below comes to is to advance this proposition: since every street in every city and every road anywhere in the United States, unless it connects with no other, is part of an interstate network of highways; therefore, the seller of anything used in a street or a road is in commerce.

And by that reasoning the local Society for the Care of the Blind, that sells brooms made by the blind to be used for sweeping the streets, or the street cleaner or the tow-truck operator who removes illegally parked cars on the streets, all are engaged in commerce.

Now, this Court over and over again, in its interstate commerce decisions, has said that the concept of commerce is guided by the most practical considerations. Commerce is an intensely practical concept drawn from the normal and accepted course of business.

These are statements the Court has made.

Now, if this case concerned workers constructing a

lock across a canal, or a drawbridge across the Mississippi, one might see such an immediacy to the operation of an interstate facility. But you might come to the conclusion there, practically, that the construction of that bridge was in interstate commerce.

But, I submit, that from any practical reality, selling asphaltic concrete to put on a street or a road, 200 miles from the border, simply is a horse of another color. Also paving a city street.

Now, if the Court please, to get back to a fundamental. Our system of government is federalism, certainly, where a federal statute plainly applies. It has to be applied.

But when,to apply it is going to intrude upon local policy and to apply it requires some Procrustean treatment, some stretching, then we've been taught by the decisions of this Court that the hand is stayed.

Now, the philosophy of the Robinson-Patman Act is a highly debatable one. This Court has frequently commented how it is in conflict with the philosophy of the Sherman Act. California has considered that Robinson-Patman and has deliberately refused to adopt a Robinson-Patman type statute. California Supreme Court, reviewing the matter, has said no, California has no Robinson-Patman type statute, and has noted this conflict of policy.

And yet what has happened here is that a federal Act

has been extended into the California area to something local, the misconception that asphaltic concrete is put upon a road.

Now, if the Court please, California also has not adopted any general anti-acquisition statute. The proposed Uniform State Antitrust Law has deliberately left out a Section 7 type provision, on the idea that acquisitions at a local level have a different impact and deal with different kind of policies than on a national level.

So I say again, the question here is not how far Congress could go -- I think Congress could go the full length here, if it wished to. How far has it gone?

And in deciding that question, respect has to be paid, first, to the language Congress has used; and, secondly, to the federal structure of the union.

QUESTION: Under Section 7, just the -- one of the -- the company has to be engaged in commerce.

MR. LASKY: The company has -- both of them.

QUESTION: But the transactions, there isn't any transaction language in that.

MR. LASKY: No. The requirement of Section 7, as Your Honor notes, is that the companies, the acquirer and the acquiring each --

QUESTION: But they don't need to be engaged in commerce with respect to the product involved, I take it.

MR. LASKY: I doubt it. I doubt it. But the --

QUESTION: So it doesn't take much of an involvement in commerce, I would think.

MR. LASKY: Well, except that Sully-Miller is not. I mean, the plaintiff was called on to produce all his evidence, complete discovery as to what Sully-Miller did. And Sully-Miller is simply a local paving contractor, and 95 percent --

QUESTION: Hasn't even -- there was no evidence even about a boom out of State.

MR. LASKY: No evidence whatever on that aspect.

QUESTION: Unh-hunh.

MR. LASKY: The respondent produced no evidence whatever on that. But the only business --

QUESTION: How about the machinery that it used in its business?

MR. LASKY: There's -- one could take a guess, of course, that it buys machinery. One might guess that the machinery may have originated originally out of the State, probably came to --

QUESTION: What if it did?

MR. LASKY: But there's no evidence in the record on it.

QUESTION: What if it did? What if it did? That's engaged in commerce, I take it, isn't it?

MR. LASKY: May or may not be, depends on how they

bought it.

QUESTION: I take it they have these large delivery trucks, don't they, Mr. Lasky? You know, these specially constructed things.

MR. LASKY: Oh, I would -- again the record is silent on it, but I would have to take a guess that they do.

QUESTION: Well, I was just thinking of what I see around town here, these enormous things that they use.

MR. LASKY: I would guess that they do.

QUESTION: Those aren't made in California, I guess, are they?

MR. LASKY: Pardon?

QUESTION: They aren't made in California, are they?

MR. LASKY: I don't know. There are large assembly plants in California of all kinds on machinery.

QUESTION: But, in any event, even if they -- there just isn't any evidence in the record about it.

MR. LASKY: The evidence, that is right, the record is silent on that. Again I repeat the Court called upon the respondent to take all the discovery and produce all the evidence that they wished to bring to bear on the subject, and they said nothing about this.

QUESTION: Well, what if they did? Am I engaged in commerce because I drive a car that was made in Detroit?

MR. LASKY: Well, I wouldn't think so. I wouldn't

think so.

QUESTION: Or a carpenter, if he's using hammer and nails that were made outside the State? A building contractor.

MR. LASKY: I wouldn't think that would put them in commerce, either.

QUESTION: So the size of the tool, whether it's a great big earth-moving machine or a hammer, wouldn't make any difference in the principle, would it?

QUESTION: You'd have quite a bit of different argument.

You'd have a different case if there is evidence in the record that they were regularly buying trucks from out of State.

MR. LASKY: If there -- I suppose if there were a constant flow of trucks in --

QUESTION: Well, it's in continuous business, it's using up its trucks all the time.

MR. LASKY: Yes, and very well they may be buying them locally, from local distributors.

QUESTION: Maybe.

MR. LASKY: Again, while it's in the record [sic], we all know that this kind of machinery is sold by local distributors.

QUESTION: Well, I agree, but you'd have a different case if it was.

MR. LASKY: We would be talking about different things. We would be talking about different things, but I can only talk about the things in the record, and I can only reply to the arguments my opponents have presented.

QUESTION: There isn't anything in the record.

MR. LASKY: Right, the record is silent on it.

QUESTION: The only thing that bears on it at all is that this end product by Sully is laid on roads --

MR. LASKY: That's right.

QUESTION: -- some of which, at least, are constructed with the aid of federal funds?

MR. LASKY: That's right. That's lawfully so.

QUESTION: And that's all there is.

MR. LASKY: The opinion, the decision of the Court of Appeals was based upon that one fact, that a road is an instrumentality of commerce, the asphaltic concrete went into the road, therefore it was, as a matter of law, engaged in commerce.

That's the decision of the Court of Appeals. It's not strongly defended, as I say. It's being defended -- the judgment is being defended on the notion that these -- you just ignore the provisions of these laws and say that Congress intended to exercise its congressional power to the utmost, using exactly the language which has often been used about the Sherman Act.

Now, may I --

QUESTION: Mr. Lasky, would you be making a different argument here if this were centered in San Diego rather than Los Angeles?

MR. LASKY: No, I don't think so.

QUESTION: Even though, then, the State line is within 35 miles of such plants as might be used.

MR. LASKY: When we said 35 miles, everybody has been talking generously. The evidence talks about 5 to 15.

I think if we had a case in Delaware, a hot plant operator in Delaware, you might have a different problem, because the hot plant might very well be crossing the border.

But you get -- the border around southern California surrounded largely a desert area.

But, again, one can conceive where a hot plant operator might be crossing State lines. Here it did not.

QUESTION: That could be true here in Washington, the hot plant operator here might deliver both in Virginia and in Maryland.

MR. LASKY: He might very well. He might very well. That would be a different case. Then we'd have at least one sale crossing a State line. Then we'd have the counterpart of Sully-Miller engaged in paving all around here, you'd have interstate commerce. That's a different case.

And the decision we ask the Court to render here is

not going to be the last decision it's going to be asked to -- to be rendering on questions like this.

Now, the second vice in the reasoning of the court below is that it appears to the analogy of the Fair Labor Standards Act.

That Act provides for minimum wages. Not only to employees engaged in commerce, but also to employees, quote, "engaged in the production of goods for commerce", end quote.

And this Court, by a divided decision, held that the last words even meant engaged in the production of goods for those engaged in commerce, based upon the particular legislative history of that Act.

Amendments to that Act have added definitions whereby if some employees are engaged in commerce or in the production of goods for commerce, all employees of the same employer are deemed brought under the Act.

And Congress could do that sort of thing on Robinson-Patman and Section 3 and unquestionably on Section 7, if it wished to do. But it hasn't done so.

Now, if the Court please, and this brings me to the Solicitor General's line of argument, which I think I can answer very quickly.

Whenever Congress is called on to legislate, conflicting views of politics, economics, sociology are pressed upon Congress, each one contending for adoption. And in the

end Congress draws a line and makes compromises.

Now, one can grant that legislation is to be given a scope commensurate with Congress's purposes and aims, but Congress is the only judge, not only of its goals but of the millions it wishes to advance them and of the compromises it wishes to make among the contending factors.

And the only way Congress has to express the solution and the compromises it is forced to make is in words.

Now, here the words are absolutely clear; not to be ignored.

In talking about the Sherman Act, this Court, for example in the South-Eastern Underwriters case, said the words of the Sherman Act were all comprehensive, any person who restrains trade falls under the ban of that Act.

Here we have in the English language a body of terms, each of separate meaning, each having an -- with an ascending order of reach. We have "in commerce", we have "production of goods for commerce", we have "production of or working on instrumentalities of commerce", we have the words "affecting commerce"; and each one reaches out a little further.

Now, the "affecting commerce" reaches out to the furthest extent of the law.

These words comprise an armory from which Congress can draw when it wishes to express its particular purpose. And if the Court is to treat all these words as synonymous, as

you're being asked to do by the Solicitor General, I respectfully submit that corrupts the language, corrupts the law, and it impoverishes Congress, because it takes away from Congress words it could use.

And if the Court should hold that the words selected so carefully by the Legislative Branch, such as "engaged in commerce", "engaged in the course of commerce", don't mean any more than "affecting commerce", then Congress is going to be hard put to express itself when it doesn't wish to exercise the commerce power to its fullest extent.

It would be driven to circumlocution, negatives and provisos.

Now, everybody knows the legislative history of the Robinson-Patman Act demonstrates that Robinson-Patman was the product of a complex series of legislative proposals, ending up in compromises that have given many courts headaches in trying to resolve the many.

I was quoting at that point from the Mayer Paving case, in which this Court denied certiorari recently, in 414 U.S.

QUESTION: When was it enacted? In the late Thirties?

MR. LASKY: Robinson-Patman? Robinson-Patman was 1936 amendment to Section 2 of Clayton, which was 1914.

QUESTION: 1936?

MR. LASKY: Approximately, yes; since 1936.

Enacted, incidentally, after this Court, in the Bunte

Brothers case or the Darby case and the cases involving the Labor Relations Act, had explicated the far reach of power that Congress possessed.

No doubt that this Court, at the time Congress enacted this Act, had told Congress that it had the most extensive power. Nevertheless, there was no extension of change in these words.

Similarly in Celler-Kefauver, 1951 -- '50. They didn't change the words they used in 1914, despite the fact that they could have, and gone much further.

I submit the case with this submission: The Congress of the United States still sits, and if it is the view of the Department of Justice or others that these three Acts should be made extensive in their roots with the Sherman Act, they can go over to Congress and try to get them enacted, and go through all the debates that will occur before various legislative committees.

But in a time when we've just been going through a period when everybody has been much concerned that the several departments of the government stay within their own proper ambit, and at a time like that, that's where they should go, to Congress not to this Court. The words of these statutes are clear.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Counsel, I don't think we'll ask you to take a minute and a half, to divide your argument; we will begin at 10 o'clock in the morning.

[Whereupon, at 2:58 o'clock, p.m., the Court was recessed, to reconvene at 10:00 o'clock, a.m., Tuesday, October 22, 1974.]

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