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 22, 1974

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GULF OIL CORPORATION, et al., Petitioners, v. COPP PAVING COMPANY, INC., et al., Respondents.	No. 73-1012

Washington, D. C.,

Tuesday, October 22, 1974.

The above-entitled matter was resumed 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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

[Same as heretofore noted.]

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll resume arguments in Gulf Oil against Copp Paving.

Mr. Shapero, I think you're on.

ORAL ARGUMENT OF MARTIN M. SHAPERO, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

The position of the petitioners, which we heard yesterday, is represented by two basic concepts, each of which fail to withstand the test of close analysis.

Their first proposition is that in this case the issue is not what Congress could do, but what it did do. The petitioners' position is Congress did not intend to apply the antitrust laws to builders and suppliers of instrumentalities of interstate commerce. That fact standing alone.

This position is incorrect and, in point of fact, Congress has stated both generally and specifically its intent that the antitrust laws apply to builders and suppliers of instrumentalities of interstate commerce.

QUESTION: Are you speaking in this context or in other context that you regard as analogous?

MR. SHAPERO: I'm speaking in this specific context, and herein we are discussing the specific question of instrumentalities consisting of interstate highways.

QUESTION: Well, but my question is: Are you speaking in the context of antitrust or in others that you consider analogous to this?

MR. SHAPERO: I'm speaking specifically of this case, Your Honor, and the cases that I have to support it, and the statutes that I have to support it, I believe are practically on the button on this particular situation.

Coming to the second proposition, which we believe we will demonstrate to be in error, is that the term "interstate highway" has no meaning and is not a term of art. This is likewise an incorrect position. The term "interstate highway" has a recognized meaning, both in law and in fact.

The two misconceptions go to the essence of the petitioners' case, since it is clear that if Congress did indeed declare its intent that the antitrust laws apply to instrumentalities of commerce, and if interstate highways are clearly understood to be such instrumentalities, then these petitioners, as well as our clients, as builders and suppliers of instrumentalities of interstate commerce are subject to the terms and provisions of each and all of the antitrust Acts.

Let us start with the second proposition first. Does the term "interstate highway" have a meaning? Is it a term of art? Or is it something which has no significance in terms of the law or the English language?

It most certainly has a meaning, and that meaning is

disclosed by both history and the statements of this Court. You can go back, and I bring you old law -- it pays at this time to go back to the language of Gibbons vs. Ogden. Justice Marshall speaking, says the subject to be regulated is commerce; and our Constitution, being, as was aptly said at the bar, one of enumeration and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word.

The counsel for the appellee would limit it to traffic, to buying and selling or to the interchange of commodities, and do not admit that it comprehends navigation.

This would restrict a general term applicable to many objects to one of its significations. Commerce undoubtedly is traffic, but it is something more, it is intercourse, it describes the commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.

The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation which shall be silent on the admission of the vessels of the one nation into the forts of the other and be confined to prescribing rules for the conduct of the individuals in the actual employment of buying and selling or barter.

Perhaps the most striking example of the close and

intimate, intertwining relationship between interstate commerce on the one hand and the instrumentalities of interstate commerce on the other is the fact that the very first Commission in this country, which was formed to establish and control -- which was established to control the railroads -- it was not called a Railroad Commission, and it was not even called a Transportation Commission; it was called the Interstate Commerce Commission.

And no one, certainly, at this stage in our development, would deny that the authority of the federal government to control the railroads, under the commerce power, as an instrumentality of interstate commerce does not exist.

And what is the relationship, then, between interstate highways to interstate commerce?

We're now approaching the case at bar. As Professor Scharfman, in his work on the Interstate Commerce Commission, states as follows, quote, "The railroad industry is no more than a century old and the motor carriers and water lines, whose increasingly severe competition it has been encountering in recent years, are but the modern counterparts of the turnpikes and canals which it largely displaced, at the time of its first emergence, as an improved source of transportation service.

Justice Murphy, speaking for this Court, in Overstreet vs. North Shore Corporation, declared as follows, quote:

"We think the practical test should govern here, vehicular roads and bridges are as indispensable to the interstate movement of persons and goods as railroad tracks and bridges are to interstate transportation. If they are used by persons and goods passing between various States, they are instrumentalities of interstate commerce."

Justice Black, speaking in Alstate vs. Durkin, put the matter thusly, quote:

"In Overstreet we pointed out that the interstate roads and railroads are indispensable instrumentalities in the carriage of persons and goods that move in commerce."

What's the retort of the petitioners? The retort is that in those cases they were talking about labor laws, fair labor standards, and here we're talking about another kind of statute. But let us look at the Highway Act itself.

The Highway Act, which is 23 United States Code, section 103. In the Highway Act we have described a federal primary system, a federal secondary system, a federal-aid urban system, and, lastly, the interstate system, which the Congress, in the Highway Act, defines as follows, and I'm quoting:

"The interstate system shall be designated within the United States, including the District of Columbia, and except as provided in paragraphs 1 and 2 of this subsection, it shall not exceed 41,000 miles in total extent. It shall be

located as to connect by routes as direct as practicable the principal metropolitan areas, cities and industrial centers, to serve the national defense and, to the greatest extent possible, to connect at suitable border points with routes of continental importance in the Dominion of Canada and the Republic of Mexico. The routes of this system, to the greatest extent possible, shall be selected by joint action of the State highways departments of each State and the adjoining States, subject to the approval by the Secretary as provided in subsection (e) of this section."

We come to the case at hand.

The language which we consider critical was contained in the stipulation which we entered into very early in this case. And the stipulation, as set forth by the trial court, reads as follows, quote:

"A more than de minimis quantity of asphaltic concrete delivered by plaintiffs and their competitors is delivered for use on interstate highways."

That's contained in the record, in the Appendix to the Respondents' brief, at page 3.

I submit this to you, that the Petitioners, at the time they entered into that stipulation, well understood the distinction and meaning and the clear -- the clear meaning of what was intended and what is intended in law by the phrase "interstate highway".

As stated in the Respondents' complaint, at page 17 and 18 of the Appendix -- I'm quoting now from the record, in the Appendix, quote:

"Defendants Gulf, Union and Edgington sell to end users and contractors, including plaintiffs, substantial quantities of hot asphalt oil to be used as hot asphalt or as asphaltic concrete for constructing, maintaining, surfacing, resurfacing and repairing roads and highways, including Federal interstate system highways and highways directly connected to interstate highways."

How did the Petitioners respond to that? They admitted -- they admitted those very phrases.

Now, I can represent to the Court --

QUESTION: Mr. Shapero, --

MR. SHAPERO: Yes?

QUESTION: -- is that all conceded, do you think?

MR. SHAPERO: It is conceded. And that is exactly the next point that I was coming to, Mr. Justice Blackmun. It is conceded, and they admit that indeed they did apply this to interstate highways.

The Petitioners clearly understood at that point, and my point is that by making the concession they must have understood the distinction between interstate highways and roads, which are merely funded by federal money, when they entered into the stipulation. Otherwise the stipulation makes

no sense whatsoever.

QUESTION: Mr. Shapero, would you think that the suppliers of raw material, who furnish the sand and the gravel and the binder to Copp Paving, would be in interstate commerce?

MR. SHAPERO: If -- to the extent that the particular supplies are going on an interstate facility, I would say yes, Your Honor, they are.

QUESTION: Well, let's take a hypothetical case, a specific one: Copp calls whoever the supplier is, or writes them, to make the evidence more definite, and says, We have a big contract to resurface Interstate Highway No. 81 for 23 miles, all inside of California; we request you to submit bids for -- and lists the following items: sand, gravel, whatever else they put into this asphaltic cement.

MR. SHAPERO: Yes, Your Honor.

QUESTION: Is he in interstate commerce?

MR. SHAPERO: I believe that he is, and I believe that the Congress has so stated and intended that they be so considered. And that will be my next point that I would point out to the Court, where Congress has indeed expressed its specific intent in the very limited area -- in that very limited area, it has reference to the specific instrumentalities of interstate commerce.

So that I'm not talking in this case about a big spread or a wide expansion of the reach of the antitrust laws,

because I must remind the Court, at all times, that we're talking about interstate -- an interstate instrumentality. So that we're talking about an expansion within a very, very confined area of the law.

But within that confined area, Congress has expressed its intent, which I will come to shortly, with your permission.

To continue my point: To enter into the stipulation, which they've entered into, that the amount of asphaltic concrete delivered by the Petitioner and their competitors would, by definition, mean that all the paving -- if we would take the stipulation as it's interpreted by the Petitioners, it would mean that the amount of asphaltic concrete delivered by the Petitioner and their competitors, which would, by definition, mean all the paving done in Southern California was more than de minimis, this would simply be entering into a nonsense stipulation.

Because the terms of the stipulation would mean that we would be stipulating that all the pavers, the total industry in Southern California is producing all the roads in Southern California, and that all that activity is more than de minimis. The stipulation simply has no meaning whatsoever unless you are confining it to the specific reference of the interstate instrumentality.

Now, the Petitioners, I would submit they knew better than this when they entered into the stipulation, and

their pleadings and their understanding was that at the time that the pleadings were drawn, at the time that we entered into the stipulation, that we were tracking the use, we were actually tracking statutory language. And the statutory language we were tracking and the statutory language which, as Justice Blackmun points out, they admitted was the specific statutory language set forth in the Highway Act itself.

And their inability at this point to understand the meaning of that phrase "interstate highway" is no more than an attempt, I would submit, to remove themselves from one portion of a syllogistic box which they find themselves in.

Now, let's turn to the first issue which still remains. Did the Congress express the intent to do that which it had the power to do, namely, apply the Antitrust Acts to instrumentalities of commerce, namely, interstate highways, within the meaning of that phrase as we have now demonstrated the phrase has a meaning?

The Clayton Act itself expresses the congressional purpose and intent. And in reference to the instrumentalities as they existed at the time of the passage of the Clayton Act in 1941, at that time the development of highways had not yet occurred, but the intent of the Congress to control and apply antitrust legislation to the builders and suppliers of the instrument -- of the interstate instrumentalities was clear; and it was done.

And it was done even in view of the fact that the railroads were natural monopolies.

Now, the specific language is contained in section 10 of the Clayton Act, and that's one -- that's the primary Act that we're concerned with. And Section 10 of the Clayton Act says that no common carrier engaged in commerce shall have any dealings in securities, supplies, or other articles of commerce, or shall have any contracts for construction or maintenance of any kind to the amount of more than $50,000 in the aggregate in any one year with another corporation, firm, partnership, or association, when said common carrier shall have upon its board of directors or as its president, manager, or its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, purchasing or selling officer, or who has any substantial interest in such other corporation, firm, partnership, or association unless and except such purchases shall be made from or such dealings shall be with the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under the regulations to be prescribed by the rules or otherwise by the Interstate Commerce Commission.

And it states further: any person -- any person; this is contained within the Clayton Act itself -- any person who shall directly or indirectly do or attempt to do anything

to prevent anyone from bidding or shall do any act to prevent free and fair competition among the bidders of those desiring to bid shall be punished as prescribed in this section, as in the case of an officer or director.

So that in reference to the construction of the railroads, I think the intent of Congress is spelled out perfectly clear, in referring to the question that you put, Mr. Chief Justice.

That here we have a specific intent of the Congress. We have a statement by the Petitioners that if the Congress declared its intent, they would certainly have the power to do so. Here we have a specific intent set forth by the Congress.

Now, the next question, of course, immediately is: Well, that's all very well and good, but that was in reference to the railroads. That had nothing whatsoever to do with the highways.

We have the same specific intent which is set forth by the Congress within the Highway Act, and they discussed these in terms of maintaining competition.

Now I might state that this Court, in a unanimous opinion -- in a unanimous opinion, written by Justice Douglas, stated that the section that I just quoted from is an Antitrust Act. And Mr. Justice Douglas used the following language, quote:

"It is pointed out that the railroad scandals of that

age were not limited to interlocking directors and multiple shareholders, but that suppliers of railroad materials had made substantial gifts to the railroad officials with whom they dealt."

With the railroads at that time, at least you had -- at least you had, in theory at any rate, where you had an independent entrepreneur, and he was acquiring supplies for his road, he had at least the impulse, and,unless there was a conflict of interest, the desire to hold the prices down. But where you're dealing with public highways, who, I would ask the Court, is the entrepreneur who is going to protect the public under those circumstances?

And the Congress answered that question. And the Congress declared that their vote and their position was going to be that the protector of the public under those circumstances would be competition; and they've stated so. And they've stated so specifically.

They stated, under letting of contracts -- and I'm now referring to section, to 23 section 112: The Secretary shall require, as a condition precedent to his approval of each contract awarded by competitive bidding, pursuant to subsection (b) of this section, and subject to the provisions of this section, a sworn statement executed by or on behalf of the person from an association or corporation to whom such contract is to be awarded, certifying that such person, firm,

association, or corporation has not, either directly or indirectly, entered into any agreement, participated in any collusion, or otherwise taken any action in restraint of free competitive bidding in connection with such contracts.

Now, that is a clear statement of congressional intent.

They've stated it even further, at section 304. This is 23 section 304 of the Highway Act. It states: It is declared to be in the national interest to encourage and develop the actual and potential capacity of small business and to utilize this important segment of our economy to the fullest practicable extent in construction of the federal highway systems, including the interstate system.

Now, what's the answer of the petitioners to this? They say these aren't directives. That it's within the power of the State to ignore each one of these items if they so choose. All they have to do is forego the federal funds. And this, I would submit to you is introducing a new doctrine that, unlike death, taxes are no longer inevitable. All you have to do is give up income. Because the fundamental facts of life are, today in the United States, that the money that's available for the construction of highways is available through the federal government.

And that's the only way that these highways are going to be constructed.

QUESTION: Let's assume, Mr. Shapero, that some State gets some strong notion of independence and says, We don't want any federal money, we'll build this extension, we'll cooperate, we'll build this extension with our own money.

Do I understand you to say that the source of the money is the key factor?

MR. SHAPERO: No, no, absolutely not. And that doctrine has already been considered and rejected by the Court.

The source of the money does not give the federal government the power. The power comes from the fact that the particular highway is, itself, an integral part of the interstate process.

All that I'm stating is that this is a designation and a recitation of what the congressional intent was. The intent to apply the antitrust laws to the interstate -- to an interstate construction of highways. Because, certainly, in terms of the protection of the public, the advantages and the necessity for having competition is just as strong if it's paid for by the State of California as if the particular highway is paid for by the federal government.

We still need the same protection. And that is the fundamental purpose of these statutes and why they are essential as far as the construction of the highways are concerned. Because the competition has the ability of

eliminating -- and I put chicanery aside. And by putting it aside, I don't say that it doesn't exist; but I put it aside.

The other factors, what becomes a proper measure of profit; what formulas do you use? All these matters are eliminated automatically by the presence of competition, and we have the clear expression of Congress, which states that what the Congress is looking for is not -- in the construction of the highway, what they're looking for is not so much that when they want to build a highway, they don't want to look to a company, they want to look, to have the ability of looking to an industry in order to build that highway.

And in order to do it, they have declared that we must maintain the integrity in full competition.

Now, the extent there's been -- that was some discussion yesterday that was put in terms of the extent to which the federal government had participated and the extent to which the federal government had made contributions, and we have -- the record is very full with specific references as to the extent of the federal contribution that we have made. For example, at page 172 of the Appendix, I invite your attention to examining the fact that in one year, for example, $294 million went into the national system of interstate and defense highways in California alone, for the year 1972-73.

QUESTION: Mr. Shapero, --

MR. SHAPERO: Yes?

QUESTION: -- may I interrupt you for a minute? Are you arguing that these transactions had an effect on commerce?

MR. SHAPERO: This is not an effect case. We are in commerce.

QUESTION: Right. You do not reflect on the effects?

MR. SHAPERO: We don't rely on the effect, Doctor.

QUESTION: Right.

MR. SHAPERO: This is an in commerce case.

QUESTION: And the District Court found there was no proof of the effect on commerce in this case?

MR. SHAPERO: Well, the District Court never considered the problem specifically. The District Court ruled that there was no effect on commerce and therefore threw out all of the Acts. It made no distinction when it ruled, it threw out everything because it failed to find an effect on commerce under the Sherman Act.

And since the Sherman Act fell, then it ruled that all four of the Acts fell. So that the District Court made no distinction whatsoever.

I might say that I think you have an effect on commerce, almost as a matter of law, by the very language of the District Court itself, where it spelled out that we already have 75 percent -- and this is from the opinion of

the District Court, that we have 75 percent of the road construction in Southern California now being built by two parties: Industrial and Sully-Miller. Each of which are owned, in turn, by two large oil companies: Gulf and Industrial.

So that we are already approaching an effect doctrine because the court, the trial court, again in the trial court opinion, says that where you have a monopoly you presumably would have such an effect. And we are approaching already, by our trial court's own findings, such a monopoly situation.

QUESTION: You're supporting the Court of Appeals reasoning and its opinion.

MR. SHAPERO: That's correct.

QUESTION: In contradistinction with the reasoning in the government's amicus brief, aren't you?

MR. SHAPERO: That is correct, Your Honor.

Thank you very kindly.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Lasky?

REBUTTAL ARGUMENT OF MOSES LASKY, ESQ.,

ON BEHALF OF THE PETITIONERS.

MR. LASKY: Yes, if the Court please.

Mr. Chief Justice, if the Court please:

In the few moments that I have, I would like to note the consequences of this argument that's just been made.

What is called Interstate Highway 480 is a stretch

of street in San Francisco of about twelve blocks in length, running from the so-called Barbery Coast.

If a man should pick up a woman there, or abduct her and carry her, for purposes of prostitution, over those twelve blocks, under this argument you've just heard, that man would have violated the Dyer Act, the Mann Act, and the Lindbergh Kidnapping Act. Because he would have transported a kidnapped person in a stolen automobile, if he had a stolen automobile, in interstate commerce.

Now, the only other thing I wish to say is on the subject of effect. The District Court, in its opinion, which is printed as an Appendix to our Petition for Certiorari, on page 6, discusses the subject and concludes:

"I conclude that the local activities of the defendants with regard to asphaltic concrete did not have a substantial impact on interstate commerce."

Counsel has said this is not an impact or effect case, and he's relying on the arbitrary notion that because asphaltic concrete went into a road that's part of a -- that connects with other roads that crosses a State line, it is in interstate commerce.

And with that submission, he has largely abandoned the bulk of his own brief, which was an argument along the lines of that of the Solicitor General.

I submit the case. Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 10:34 o'clock, a.m., the case in the above-entitled matter was submitted.]

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