In the

Supreme Court of the United States

UNITED STATES OF AMERICA,)
Appellant,)
vs.)
)
AMERICAN BUILDING MAINTENANCE) 73-1689
INDUSTRIES,)
Appellee.)

Washington, D. C.
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UNITED STATES OF AMERICA,

Appellant,

v. No. 73-1689

AMERICAN BUILDING MAINTENANCE INDUSTRIES,

Appellee.

Washington, D. C.

Tuesday, April 22, 1975

The above-entitled matter came on for argument at 11:57 a.m.

BEFORE:

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

BRUCE B. WILSON, Esq., Deputy Assistant Attorney General, Antitrust Division, Department of Justice, Washington, D. C. 20530, for the Appellant.

MARCUS MATTSON, Esq., 605 West Olympic Boulevard, Los Angeles, California 90015, for the Appellee.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 73-1689, United States against American Building Maintenance Industries.

Mr. Wilson, I think you can proceed now.

ORAL ARGUMENT OF BRUCE B. WILSON ON BEHALF OF THE APPELLANT

MR. WILSON: Mr. Chief Justice and may it please the Court: I was interested in listening to the prior argument because we were dealing with matters of economic reality, serious matters, and matters which concern individuals.

I think this case is a little different in that it involves matters of economic reality which concern the national economy. This case is here today because in 1950 the Congress was concerned with increasing concentration in that national economy, and it was concerned with increasing concentration which was resulting from mergers and acquisitions, and it was concerned with acquisitions by national companies of local firms and that kind of acquisition which was contributing to that increasing concentration.

This case squarely presents the question of whether Congress effectively executed its expressed intention to prevent that kind of mergers and acquisitions. There is really only one issue or decision in this case, whether

Congress in section 7 of the Clayton Act intended to exercise the full scope of its power to reach mergers and acquisitions not only in commerce and the flow of commerce, but also those which affected commerce.

If Congress didn't so intend, and if Congress did not so effectively legislate, then a series of acquisitions could occur, acquisitions of intrastate firms which could result in a situation which Congress clearly sought to avoid. It sought to avoid that situation in a statute which it denominated as a supplement to the Sherman Act. And as we shall see, Congress in the Sherman Act intended to exercise the full range of its power.

The facts of this are as follows: In 1971 the United States filed this civil action under section 7 challenging a transaction in which the American Building Maintenance Industries --

MR. CHIEF JUSTICE BURGER: We will resume there at 1 o'clock, Mr. Wilson.

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

(Whereupon, at 12 noon, a luncheon recess was taken.)

AFTERNOON SESSION

(1 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Wilson, you may continue.

ORAL ARGUMENT OF BRUCE B. WILSON ON BEHALF OF APPELLANT (Continued)

MR. WILSON: Thank you, Mr. Chief Justice, and may it please the Court: Just before the luncheon recess we had outlined the central issue in this civil antitrust case which was filed by the Government in 1971.

In this case the Government challenged, under section 7 of the Clayton Act, a transaction in which a firm, American Building Maintenance Industries, acquired control of two janitorial service firms doing business in southern California. One was the Benton Maintenance Company, the other was the J. E. Benton Management Corporation.

In terms of market shares at the time of the acquisition, American controlled about 10 percent of the janitorial service market in Southern California, and the Benton companies combined had about 7 percent. Of course, the statute with which we deal here today, section 7 of the Clayton Act, prohibits the acquisition by any corporation engaged in commerce of the stock or assets of another corporation engaged also in commerce where the effect of that acquisition may be to substantially lessen competition

or tend to create a monopoly.

This case involves the meaning of four words in that statute, those four words being "also engaged in commerce." There is no question as to whether the acquiring firm, American, was engaged in commerce, no such question has been raised. But the decision in the district court was on a motion for summary judgment on the grounds that the acquired firms were not corporations engaged also in commerce.

The Government introduced various affidavits, none of which I think are disputed, showing that Benton had provided janitorial services necessary to support the interstate operation of its customers, that Benton had purchased substantial quantities of janitorial supplies manufactured outside of California, that it negotiated at least two major contracts with out-of-State customers, and that it did, although to an admittedly minor extent, utilize interstate communications facilities in its business.

The court below entered summary judgment in 1973, and in doing so, it adopted almost verbatim the findings of fact and conclusions of law submitted by American, but proposed prior to the time that the United States had filed its affidavits.

Of course, once the court had concluded that, it resulted in a holding that section 7 had no application to this case. But there was, however, in the court below, no

opinion explaining the court's reasoning as to how it reached its conclusion.

The first issue which this appeal raises and on which is easily disposed of is whether the power of Congress could reach this kind of a transaction. This Court disposed of that question in Mandeville Island Farms v. American Crystal Sugar in 1947. There the question was whether an agreement by sugar refiners which sold sugar in interstate commerce could agree on the price, whether they could agree on the price which they were going to pay to sugar beet growers located in northern California. This Court in that case clearly held that such an agreement on price was an agreement which affected commerce and one that was within the reach of the Sherman Act, the first antitrust statute.

Now, of course, when we are dealing with the Sherman Act and with the Clayton Act, we are not dealing with the same statutes. But we are dealing with statutes in which Congress sought to address substantially the same problem, the problem of monopoly, the problem of trusts, the problem of anticompetitive effects on the American economy.

When Congress passed the Clayton Act in 1914 it made clear that that Act was intended to supplement the Sherman Act which Congress had enacted in 1890. In the light therefore of Mandeville Farms, the holding of this Court in that case, there doesn't seem to be much question

but that Congress, if it so desired and intended, could have made the scope of the Clayton Act equally as broad. It could have reached a merger or acquisition of the type with which we deal here.

And this brings us, I think, down to the central issue: Did Congress intend, in section 7 of the Clayton Act, to exercise, as it did in the Sherman Act, the full extent of its power under the Commerce Clause?

I think if one looks at the history of the antitrust laws, one can conclude only that Congress in enacting section 7 did intend to exercise the full extent of those powers. In the Sherman Act we have not only Mandeville Farms, we have South-Eastern Underwriters in 1944, again holding that in that Act Congress wanted to go the full extent of its constitutional power in restraining trust agreements and in restraining monopoly agreements.

And thus, given the history of that Act, Senator George in 1890, stating that Sherman was ingeniously drawn to cover every case that is within the commercial power of Congress, and Senator Sherman, after whom the act was, of course, named, noting that the bill was just as broad and as sweeping and as explicit as the English language could make it, we come then to 1914, and we see a Congress in 1914 dissatisfied and disappointed with the application of the 1890 law. We find the Congress disappointed and dissatisfied

with its efforts to control trusts and monopolies.

And so in 1914 we find the Congress enacting a law which according to its title was to supplement the existing laws against restraints and monopolies. The Congress in that Act wanted to arrest such restraints in their incipiency. And they intended to do that insofar as it was possible to do so. And they did it in section 7 of the Clayton Act.

QUESTION: Has the Department taken out after any mergers such as this before?

MR. WILSON: I think so, Mr. Justice White. I think we have --

QUESTION: Could you give me a couple of examples?

MR. WILSON: Bennington Bank where the question was as to the jurisdictional -- not the jurisdictional reach of the Act, but rather --

QUESTION: So it wasn't the question. That wasn't the question.

MR. WILSON: No, but it's a merger of the same type. And that, I think, is very important, because the question here is does the jurisdiction of the Act extend to this kind of a merger? The question in Bennington was whether Bennington, Vermont, was --

QUESTION: You wouldn't suggest the Department regularly since 1914 has taken this position and has attempted to apply the Act to corporations that were engaged solely in

intrastate commerce. I just assume that they were here.

MR. WILSON: Well, I think the problems --

QUESTION: Well, has it or hasn't it?

MR. WILSON: I think in recent years, yes, sir, it has, but not consistently since 1914. I think the appellee is correct on that. But until we get to such cases as Bennington, until we get to the problems within, let us say, the last 10 years, the Department indeed has not challenged that kind of a merger.

QUESTION: Mr. Wilson, on page 36 of your brief at the top of the page, that sentence states that previous section 7 cases have involved both acquiring and acquired firms that had been engaged in the flow of commerce.

I take that to mean that this is the first case the Justice Department has brought in which the acquired firm was not engaged in commerce. Is that correct?

MR. WILSON: Mr. Justice Powell, I agree that this is the first case in this Court which clearly presents the question of whether the acquisition by and interstate firm, no question on the acquiring corporation, of an acquired firm dealing primarily in intrastate commerce, but with the interstate contacts that we have here serving interstate firms, buying supplies from out of state. I think this is the first case which presents this kind of a set of facts.

QUESTION: You referred to the dissatisfaction of

Congress in 1914 with the limitations of the Sherman Act. Has Congress indicated any dissatisfaction with the failure of the Justice Department to bring this type of suit before in the last 60 years?

MR. WILSON: I think the Congress, Mr. Justice Powell, has indicated that it wants us to bring this kind of a suit where the result of the acquisition is going to be in the words of the statute "substantially to lessen competition." And it has indicated that time and time again. It did again in 1950 when it amended the statute.

QUESTION: Yes, but it has consistently refused to put the words "affecting commerce" in the Act.

MR. WILSON: Oh, Mr. Justice White, I don't think it has.

QUESTION: I'll put it this way: There have been proposals --

MR. WILSON: There have been proposals, but one cannot rely, as this Court has recognized, on the failure of Congress to act on a specific proposal as an indication of Congress' intent in enacting a statute which it has already enacted one way or another.

QUESTION: But you certainly wouldn't rely on a failure to amend the statute to show that Congress expressed some dissatisfaction with the way the Department of Justice was enforcing the Act.

MR. WILSON: Oh, heavens no. One has to --

QUESTION: What other evidence is there?

MR. WILSON: Well, there is the evidence of Congress and the statements of its intention in 1950, again, came back to the Clayton Act in 1950.

QUESTION: I take it then that the --

QUESTION: You are under the Department's position now that the Act would mean exactly the same if the words "engaged in commerce" weren't in the Act at all.

MR. WILSON: Read "engaged in or affecting commerce."

QUESTION: I know, but let's just take them out. No corporation shall acquire,directly or indirectly,the whole or any part of the stock of any other corporation if the effect would be to substantially lessen competition in any line of commerce. The Act would be precisely what you say it is now, the way you would want to construe it.

MR. WILSON: Yes, sir.

QUESTION: So those are just surplusage.

MR. WILSON: I think that is correct.

QUESTION: And you must take that position.

MR. WILSON: Yes, sir.

Coming back to 1950, Congress then made the Act applicable to acquisitions of assets as well as the stock of competing corporations. And the House report indicated that the 1950 amendments made the Act less restrictive,

prohibiting mergers and acquisitions where in any line of commerce in any section of the country, the effect of that acquisition may be substantially to lessen competition. The report made it clear that what Congress was trying to do was go even further, if they could, than they went in the Sherman Act.

One can't conclude, looking at that legislative history, that Congress intended that the reach of the Clayton Act should be less than the reach of the Sherman Act.

But there was a concern raised in Congress at that time that the Act might be construed to prohibit the acquisition of a local business by another local business in the same town. These concerns are addressed in the legislative history and rather than narrowing the reach of the jurisdiction under the commerce requirement, the Congress limited the terms of the substantive offense. The original draft provided that the Act would be violated if competition was substantially lessened in any community, and that language concerned the Senate, and the Senate noted that that language was dropped and the phrase "in any section of the country" was substituted in order to get rid of that concern.

But even so, the Senate also concurred in the view that it was the purpose of this legislation to assure a broader construction of the more fundamental provisions that are retained than has been given in the past.

Then we come, now retroversing a little bit, to the questions of the 1936 amendments which inserted in the Clayton Act provisions governing price discrimination. But those provisions and the merger provisions, section 7, have very different jurisdictional tests, and the jurisdictional tests under the price discrimination provisions were those construed by this Court in Gulf Oil Corporation v. Copp Paving Company, decided earlier this term. The Court there expressly declined to decide the question which we are dealing here with today.

If one examines those jurisdictional provisions, the differences are immediately apparent. To violate the price discrimination provisions, one must be engaged in commerce, yes, the same language which we have under the merger provisions. One must also make a sale in the course of such commerce. And, finally, either or any of the purchases involved in the price discrimination must be in commerce. So we have there a three-part test for jurisdictional purposes, not the single test which is involved in section 7.

Second, I think we have to note that this Court has recognized that the congressional enactments dealing with commerce reveal the process of legislation which is, in the words of, I believe, Mr. Justice Frankfurter, strikingly empiric. The Court has uniformly looked to what Congress was trying to do in enacting particular statutes. Again, Mr.

Justice Frankfurter said if we do not do that, to search for a dependable touchstone is as rewarding as an attempt to square the circle.

So we have to look to the intent of Congress in passing this statute in 1914, in amending it again in 1950, and the construction which this Court has since placed on section 7 of the Clayton Act. The Court in Von's Grocery noted that the 1950 amendments were designed to broaden the scope of the antitrust laws.

QUESTION: But the amendments simply added the acquisition of assets to stock acquisitions. That was basically what it did, wasn't it?

MR. WILSON: That's right. It did not, Mr. Justice Stewart, in any way change what the jurisdictional requirements had been in 1914.

QUESTION: Right. That's what I thought.

Does it carry very far -- you undoubtedly must think it does because you spent a good deal of time in your brief and oral argument on it, but I wondered how far does it carry you just to say that Congress intended to implement, add to, effectuate, amplify the Sherman Act, both in 1914 and again in 1950 when it enacted and then amended the Clayton Act, because it is clear from the language of the Clayton Act that in many ways it did add to the Sherman Act, but in certain other ways it very clearly was more limited than the Sherman

Act quite apart from the question now before us. For example, what is now section 7 of the Clayton Act applies only to corporations, whereas the Sherman Act applies to individual people as well as corporations. That certainly is a more limiting jurisdictional coverage, isn't it?

MR. WILSON: Well, I think it is more limiting in the sense that it limits the substantive offense under the Clayton Act, but there is no indication in any of the legislative history that Congress intended the jurisdictional reach of the Clayton Act to be less --

QUESTION: That's jurisdictional reach, if I --

MR. WILSON: -- than jurisdiction which Congress exercised under the Sherman Act.

QUESTION: You can argue about what the word "jurisdictional" means, but certainly no matter how strangling of competition potentially, at least, the acquisition of an individual person's assets might be, even though that person was engaged in commerce, by somebody else engaged in commerce, section 7 simply doesn't reach it as a matter of statutory scope, or jurisdiction, if you want to call it that. Isn't that correct?

MR. WILSON: Well, I don't think the substantive offense is so defined.

QUESTION: Precisely. Precisely.

MR. WILSON: Now, if Congress --

QUESTION: Even though the -- go ahead.

MR. WILSON: If Congress jurisdictionally wanted to reach it, there's no doubt that they could. And the question is did they intend to reach this kind of a merger.

QUESTION: And there is no doubt that if Congress wanted to exercise their full power, the same Sherman Act power with respect to section 7 of the Clayton Act, they could. Everybody agrees on that. The only question here is did they?

MR. WILSON: And our answer to that is, yes, they did.

QUESTION: And your brother's answer is, no, they didn't.

MR. WILSON: That is correct.

QUESTION: That is what the case is about.

MR. WILSON: Now, coming back just for a moment to Mr. Justice White's question as to what kind of acquisitions was section 7 designed to reach, well, we have in Von's Grocery the curious parallel, I think, to this case. We have already discussing the Bennington Bank case, the whole issue in that case, everything else was conceded, was whether the Bennington area of Vermont was a section of the country for the purposes of section 7. That's how the Congress limited the reach of the statute in addition to limiting its reach to corporations rather than natural persons.

But I think Von's Grocery is a good example of something which is a purely local merger. There were two grocery companies. They had 7.5 percent of the Los Angeles market. And by coincidence in this case we are dealing with precisely the same market with which the Court dealt in that case. And this Court noted that in that case Congress had passed the 1950 amendments to prevent a destruction of competition. It noted that the cases since the passage of that Act have faithfully endeavored to enforce that congressional command, and the United States believes that the Court should today continue to enforce that congressional command.

Let me sum up. In our view the scope of the Clayton Act is coterminnus with that of the Sherman Act, the Act which it was designed to supplement.

Mr. Chief Justice, if I could reserve the remainder of my time for rebuttal, I would appreciate it.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Mattson.

ORAL ARGUMENT OF MARCUS MATTSON ON

BEHALF OF THE APPELLEE

MR. MATTSON: Mr. Chief Justice, and may the Court please: I'm not here to deny the Clayton Act was intended to reach areas not reached by the Sherman Act. I'm not here to deny that as to specifically limited transactions and specifically limited entities Congress exercised far-reaching commerce

powers or that they exercised all of their commerce power, only history can tell because only ingenuity can define how far those powers go. Obviously, Congress exercised its power only with regard to acquisitions; contrary to the Sherman Act it was every contract. It exercised in Clayton 7 only with regard to corporations engaged in commerce. Now, this Court has already said in Gulf Oil v. Copp that that language appears to denote only persons or activities within the flow of interstate commerce, the practical economic continuity in generation of goods and services for interstate markets and their transport and distribution to the consumer.

With that legal principle, the past enforcement pattern of the Department of Justice has until now agreed, as Mr. Justice Powell has indicated, from page 36 of the Government's brief, this case marked the advent of a new policy in the Department of Justice in the enforcement of the Clayton Act 7. And the fact that this policy, as stated on page 36 of the Government's brief precisely conforms with the explicit terms of section 7, is, according to the Government's intimation, only coincidental. This conformity, says the Government, simply reflects the fact that the Government has devoted its limited enforcement resources to areas where the need is most pressing.

The Government's new so-called application of the statute, and I was surprised to hear that counsel now says

that the words that we rely on are surplusage. But they say in their briefs that their application is that the words "engaged in commerce" includes not only activities in the flow of commerce, but also local activities that substantially affect interstate commerce. And those are their words.

The statute, of course, is doubly explicit to the contrary. Not only must the acquiring corporation be engaged in commerce, but also the acquired corporation must be engaged also in commerce. The repetition of those terms demonstrates that they were obviously important to Congress. This importance has until now and for more than 60 years been recognized by the Department of Justice as its past enforcement pattern, and that's what it calls it. There are additionally important features in the record which indicate that the new policy of the Department of Justice was not in mind when it initiated this case and has not even yet given it adequate consideration. That's while the Government postively states, on page 36 again, that it is true, and this is the Government's words, it is true that previous section 7 cases have involved both the acquiring and acquired firms engaged in the flow of commerce.

QUESTION: You think this was an inadvertence or what?

MR. MATTSON: I think that their argument they are making in their brief and the argument they make today is an effort to reach a problem which arose in this case, and this

is the first time they have used it as a means of taking care of this case.

QUESTION: But you don't think this case was brought with the idea of reaching farther with section 7 than had been reached before.

MR. MATTSON: I do not.

QUESTION: You think the idea in the first place was that these corporations were engaged in commerce.

MR. MATTSON: I thought perhaps they felt that -- they hardly conceived that there was anyone who had such local operation as the Benton corporations. They assumed that everybody could be included within commerce. They didn't understand what the janitorial business was about when they brought the case, and that's my judgment as to why this case was brought.

Now, they say in their -- to continue, and this is along the line of your idea, Mr. Justice White -- they say in their brief that the Department of Justice has never taken that position, that is, that they had a past enforcement pattern along the lines they say that they had on page 36 of their brief in chief. So they go out of their 60-year history under section 7, they were able to select only two cases to support the denial of what they said on page 36. One was the Bennington National Bank case.

Now, everyone knows that banks are engaged in

commerce. That's long since been decided. There is no question about it. That case doesn't indicate one way or another.

The other is the Von's Shopping Bag case. There the Government proved its allegations that both the acquired and the acquiring corporations were supermarket chains and its allegation, and I read from the complaint, "such chains operate purchasing offices which are in contact with suppliers located throughout the United States to purchase and effect the shipment of substantial quantities of groceries and related products from producing facilities located in the various States to the chains' distribution centers and supermarkets in the Los Angeles area."

The facts here would not support any such allegation and none was made. And as Mr. Justice White asked, it is reasonable to assume that if the Government had in mind a new application of the statute, a new extension of the statute, and was prepared to prove it, its complaint would have reflected these facts. And yet you look in vain for any allegation in this complaint that Benton, the acquired corporation, was engaged in local activities that substantially affected interstate commerce. There is nothing of that in the complaint. You look in vain for any allegation which would describe the commerce so affected or which would state what the effect had been. The most that is found are the allegations in

paragraph 8 of the complaint that the acquiring corporation maintains offices and serves customers in various States of the United States, but as to Benton, the acquired corporation, there is no comparable allegation. As to Benton it is alleged only that some of its customers and some of its vendors were engaged in interstate commerce. This state of .. evidences an inconsistency with the Government's new application of the statute and shows a total disregard of the explicit jurisdictional requirements of the statute.

I mentioned that I didn't think they understood the janitorial service business, and I think that perhaps that's one of their basic failures in bringing this case to start with.

QUESTION: You are not suggestion, are you, that if the case went back to the district court, Mr. Mattson, and the Government were to amend its complaint to supply these deficiencies and you had the same affidavits,that then the district court ought not to deny the motion for summary judgment.

MR. MATTSON: No, I don't think they could support the situation at all. I am only indicating that because there seemed to be a question as to why did they bring this case at all. My only indication is from the complaint itself they didn't have a basis. They made a mistake.

Now, janitors don't manufacture a product; they don't

sell a product. Their raw material is unskilled labor which necessarily must be obtained locally for the rendering of a local service. Janitors can't go into other than their local areas to compete for unskilled labor, their raw material, or to get it at a lower price. A janitorial firm can, of course, expand and go national, as the acquiring corporation did here. Or it can elect to remain local, as Benton, the acquired corporation, did.

Of course, janitors need mops, pails, soap, and that sort of thing. But these supplies are incidental and are extensively available from local vendors, just as they are to the local housewives. Benton to an extraordinary degree limited its activities to the southern California area. When the Government's discovery efforts developed that Benton's interstate purchases aggregated $140 and that its interstate telephone calls cost only $19.78, the Government was driven to conceding in its footnote No. 5 that Benton's interstate purchases were admittedly small.

Further confirmation of that fact is, and the fact that Benton's operations were intensely local, is shown by the fact that no officer, no employee of Benton traveled outside of California on business. There is every evidence that Mr. Benton who founded the business was convinced that if he satisfied the local people, that if he cleaned their buildings properly, they were the ones with whom he had to

deal, he need not waste the firm's money on any nonessentials connected with interstate commerce.

I think the Government also started from a false premise as to the legislative history. We were willing, we would have found no necessity of going to legislative history because this statute is explicit. It was the Government that went to the legislative history here. And the unrestricted freedom with which the Government exercised their reference to the explicit language of section 7 is based upon a misunderstanding of the legislative records. The Government persists in urging that Congress had not considered the meaning of the words "engaged also in commerce" in connection with section 7. That, of course, is an unflattering conclusion because the legislators must have known that they were putting that language in.

QUESTION: Suppose one of these building companies or, say, both of them, the janitor companies, the maintenance companies, bought a couple hundred thousand dollars a year apiece of goods from out of State, would that be --

MR. MATTSON: You mean directly from out of State?

QUESTION: Yes.

MR. MATTSON: You would have a more difficult question.

QUESTION: But at least to some extent, then, they would be engaged in commerce.

MR. MATTSON: They might have then come within part of the Government's contention if he could prove that those purchases affected interstate commerce.

QUESTION: Yes. But for jurisdictional purposes -- they would have the problem of proof about the line of commerce, whether there would be an effect on commerce. But for jurisdictional purposes they would have been in commerce, I suppose.

MR. MATTSON: I am not prepared to concede that. I think the words "engaged in commerce" mean that you have a business which is day to day engaged in commerce.

QUESTION: Well, all their supplies, most of their supplies they buy from out of State, let's assume that.

MR. MATTSON: If that's an assumption, it is possible to so state. I think, however, that --

QUESTION: But if instead of buying from ten suppliers from out of State they buy from one wholesaler in California who buys in turn all those supplies from out of State, you say that breaks the flow.

MR. MATTSON: Yes, I do. And moreover, I would say if they bought directly, it may be that that is an incidental part of their business. I go back to the fact that the janitorial business is local.

QUESTION: I will change my -- let's assume that you would concede that if they bought directly from out of

State, they would be engaged in commerce.

MR. MATTSON: I am willing to work from that assumption.

QUESTION: All right. But I know you don't agree with that.

MR. MATTSON: Right.

QUESTION: But you say it makes all the difference if they, instead of doing it directly, they buy from a wholesaler, a California wholesaler.

MR. MATTSON: Right.

QUESTION: That changes the case completely? No jurisdiction.

MR. MATTSON: That's the assumption, yes.

QUESTION: You say that would be the legal result.

MR. MATTSON: Right.

QUESTION: That the flow of commerce was broken with the wholesaler.

MR. MATTSON: Yes, very much so.

QUESTION: Have you got some Clayton Act cases, jurisdictional cases, on that point?

MR. MATTSON: I don't think --

QUESTION: There aren't any, are there?

MR. MATTSON: There aren't any. And I think the reason for that is that the statute is so explicit.

QUESTION: What is the fact? Does this record show

what the fact is where the mops and pails and things -- were they purchased from a wholesaler?

MR. MATTSON: They were purchased all in California.

QUESTION: Yes, I know, but from a wholesaler?

MR. MATTSON: Or a distributor, or whatever you might call him.

QUESTION: But it also shows that those distributors buy from out of State.

MR. MATTSON: Yes, they buy part from out of State. The affidavits talk about a portion going from out of State. The closest they got was an estimate of one man who said that 40 percent came from out of State.

QUESTION: Of the distributor's.

MR. MATTSON: Yes, the distributor's purchases were 40 percent out of State.

QUESTION: You don't have any figures on what these two maintenance companies bought, what supplies they bought that had their origin out of State?

MR. MATTSON: The record doesn't show any figures that you can point to with that regard. Portions were. For instance, anybody who is in the janitorial business purchases a lot of paper goods. We don't have paper forests in California, so you've got the paper comes from out of State, it came to -- in some cases it was reprocessed in California. But it came to a wholesaler and Benton bought the paper from

the wholesaler.

QUESTION: Were any of these employees, maintenance employees, window washers who would have to go to heights?

MR. MATTSON: Oh, yes.

QUESTION: Wear a harness?

MR. MATTSON: Yes.

QUESTION: I take it those came from out of State.

MR. MATTSON: I really don't know. The founder of my client was a window washer, the father of the two men who operate the American Building Maintenance was a window washer in San Francisco in the Bank of America building, and he started this business from there. And it has expanded.

The legislative history is particularly significant when you come to the 1950 amendments. And mind you, in 1950 the Clayton Act 7 was extensively reviewed, and you can find that in Brown Shoe where you spell out the extent to which that went. The Federal Trade Commission, starting in 1928, proposed changes in section 7. So I say that section 7 as reenacted in 1950 was just like a reenactment of that statute, and our brief will show you there were,in the seven years prior to 1950, six bills were introduced which mentioned affecting commerce, in other words, would have changed the words "engaged in commerce" to "affecting commerce." Now those were, as a part of section 7,in a premerger notification proposal that was made. And highly significant is that in

1958 there were two bills introduced which would have provided that if either corporation, either the acquired or the acquiring corporation, was engaged in commerce, the action could proceed.

Senator Sparkman was in the hearings. He was the proposer of one of those two bills. And he explained that his bill made section 7 applicable if either company was engaged in interstate commerce. And he explained that the existing situation was that in cases where the acquired corporation is engaged exclusively in intrastate commerce the enforcement agencies lacked jurisdiction. And Paul Rand Dixon spoke up at that hearing and he said, the "in commerce" test is quite different from the "affecting commerce", as you recognize. And as late as January of this year Congress changed the Federal Trade Commission Act, section 5, so that it now reads "in or affecting commerce." But Congress didn't at that time embrace the opportunity to change section 7.

And the 1950 amendments, of course, came subsequent to this Court's decision in Federal Trade Commission v. Bunte in which the Court said, "This case presents the narrow question of what Congress did, not what it could do." In other words, that's the question here. And we merely hold that to read unfair methods of competition in interstate commerce as though it meant unfair methods of competition in any way affecting interstate commerce requires, in view of the relevant considerations, much clearer manifestations of the intention

of Congress than it furnished.

QUESTION: I recall seeing a discussion of the proportion of the total costs of the acquiring company and of the acquired company particularly, and it's overwhelmingly the cost of labor, is it not?

MR. MATTSON: Oh, yes. It's a labor-oriented business.

QUESTION: Only a small percentage is the material.

MR. MATTSON: Right. It's 3 percent, as I recall, of the cost that produce total gross income.

The Government's position with reference to the legislative history is ambivalent, it relies upon post-1914 history itself, on a number of pages, but would apparently foreclose us from doing that.

QUESTION: Mr. Mattson, are you suggesting in your argument that in order to -- of course, the issue isn't here, I take it -- but are you suggesting that to satisfy the latter part of section 7, the impact on any line of commerce, that the impact, the substantially lessening of competition, would have to result only from activities in commerce?

MR. MATTSON: No, I do not.

QUESTION: All right.

MR. MATTSON: The commerce part of section 7 is the first part, the "engaged in commerce."

QUESTION: I understand that.

MR. MATTSON: The operative part --

QUESTION: The effect on the line of commerce could be delivered by wholly intrastate.

MR. MATTSON: Exactly.

QUESTION: OK. Thank you.

MR. MATTSON: And this case is brought upon that theory. They allege only that the effect is in southern California.

QUESTION: Thank you.

MR. MATTSON: But you have to -- the only way to get into court perhaps is by means of the jurisdictional point.

QUESTION: "In any section of the country" can be purely intrastate.

MR. MATTSON: Yes.

QUESTION: As it was in Von's, for example, and is alleged to be here.

MR. MATTSON: Right. Right. Correct. And as it could be here.

QUESTION: Or as alleged to be here, southern California.

MR. MATTSON: Yes, it is alleged only southern California.

For the purpose of trying to foreclose us from using 1950 legislative history, which they apparently would like to avoid, they cite Philadelphia National Bank. There the Court was dealing with the assertion that after the 1950 amendment to section 7, some Members of Congress, and for a time the

Justice Department -- this is quoting from the opinion -- some Members of Congress and for a time the Justice Department voiced the view that bank mergers were still beyond the reach of the section, as to which this Court said, the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.

Now, that may have been perfectly valid there, but here we are not presenting post-1914 legislative history for the purpose of inferring anything into the statute. We are using the legislative history to confirm the explicit terms of the 1914 statute and for the purpose of showing that Congress when it reenacted the Clayton Act in 1950 had an intent consistent with the explicit terms of the statute and inconsistent with the new application of the statute which the Government is now asserting.

In Philadelphia Bank the defendant was attempting to avoid the language of section 7, and to use for that purpose matters outside of section 7, like the Bank Merger Act of 1960. The Government here is trying to do the same thing. They are trying to avoid the explicit language of the statute. We, on the other hand, are supporting it.

Now, I perhaps should refer to the Standard Oil case because that's been referred to by counsel and I think it confirms some of the things that we have said in our briefs, and perhaps I didn't treat it fully there.

The Standard Oil Company of California case confirms our position. The Court there was dealing not with the narrowly directed jurisdictional question of section 3, as we are here with section 7. The Standard Oil Company was obviously engaged in commerce, there wasn't any question about it. And under section 3 it was necessary that only the corporation making the contract be engaged in commerce. The Standard Oil Company was, the question which this Court faced and determined in the Standard Oil case was, whether the requirements contracts lessened competition under the broadly phrased portion of the statute. Since the contract prevented service station operators from dealing with suppliers from outside of California, as well as from within the State, and because the large number of such contracts, competition was lessened in both intrastate and interstate. But again that was the operative portion, not the jurisdictional portion of the statute.

There was no issue as to whether Standard was engaged in commerce, and the operative portion of section 3 was satisfied by extensive evidence on the structure of the industry and the substantiality of the number of requirements contracts. And I think that case will demonstrate to the Court that there has been no satisfying the requirements of the Government's own proposal with regard to section 7. They say it should read that local activities which have a substantial effect on interstate commerce. But they have proved no such

effect. All they have shown is that we received money, they said 80 to 90 percent of our revenues from interstate operators. That shows only an effect on Benton, not on interstate commerce. And they have shown nothing with regard to the structure of any product which was bought. They merely showed that we bought, I think it's $150,000 worth, according to the briefs, I can't find where they got that figure in the record, but be that as it may, they have shown no market structure of any kind with regard to any market of goods that passed into interstate commerce before we bought them.

Thank you.

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

Do you have anything further, Mr. Wilson?

REBUTTAL ARGUMENT OF BRUCE B. WILSON ON BEHALF OF APPELLANT

MR. WILSON: Mr. Chief Justice, I rise to make but one short point.

It seems that page 36 of our brief is becoming fairly notorious. I would only wish to point out that our enforcement policy can in no way estop what the Congress tried to do in a statute. Even if it's a new policy, even if this is the first case brought, we do not believe it is, maybe the first case we have brought --

QUESTION: Has the Government abandoned the notion that these companies were engaged in commerce?

MR. WILSON: They were engaged in commerce within the meaning of those words for the jurisdictional purposes of --

QUESTION: Are you saying they were engaged in commerce without having to rely on the effect notion? I mean, you certainly argue in your brief --

MR. WILSON: No, I think we have to say that the effecting commerce in any section of the country -- in any line of commerce in any section of the country. That's what gets this merger within the scope of the section 7 of the Clayton Act.

QUESTION: But you argue that these people are sufficiently dealing directly in interstate commerce.

MR. WILSON: They were. There were certainly dealings in interstate commerce, directly in interstate commerce.

QUESTION: On that basis, you don't need any redefinition of "engaged in commerce" at all.

MR. WILSON: Well, the district court, of course, found that those dealings were de minimis.

QUESTION: You don't agree with that.

MR. WILSON: We don't agree with that, but if one accepts the district court's findings, we say that nevertheless --

QUESTION: Well, you're not abandoning your challenge to the district court's findings.

MR. WILSON: No, sir.

There is one case which is directly on point, a Third

Circuit decision in Transamerica, decided by a panel of Judges Maris, Goodrich, and Kolodner, which deals directly with the point at issue here: Did Congress intend in this statute to exercise the same full range of its jurisdictional power which it exercised in the Sherman Act? The court there so held.

Just coming back to that last point --

QUESTION: Mr. Wilson, may I interrupt you here? Before you sit down, would you expound a little bit on what your response is to your opposition's reliance on the comments of Senator Sparkman and Member Dixon in the 1958 debate?

MR. WILSON: Well, I think one has to come back to a position taken by an administrative agency cannot be used subsequently to estop the intent of Congress in passing a statute. If the statute means what we contend it means, the fact that we may have been mistaken and the fact that another committee may have been mistaken and the fact that the Federal Trade Commission may have been mistaken in some of the positions it has taken in the past should not prohibit a new construction, not really a new construction, a real construction, a true construction of the statute and its meaning.

QUESTION: At what point would you fix the time when this sort of maintenance became a nationwide business on a large scale?

MR. WILSON: Well, I think one has to look at the

growth of the service industries generally. I don't think, as in the antitrust business as we deal with it every day, one can precisely put a time --

QUESTION: Not precisely, but it's something in the last decade?

MR. WILSON: Yes, sir, 10 or 15 years.

Thank you, sir.

QUESTION: Pretty much the same history as, or at least a comparable history to the private security business protecting industries and office buildings and things of that kind.

MR. WILSON: I think that's correct, Mr. Chief Justice.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:57, the oral arguments in the above-entitled matter was concluded.]