IN THE SUPREME COURT OF THE UNITED STATES

RICHARD A. GORDON, etc., et al., Petitioners,	
v.	No. 74-304
NEW YORK STOCK EXCHANGE, INC., et al., Respondents.	

Washington, D. C.,

Wednesday, March 26, 1975.

The above-entitled matter was resumed for argument at 10:02 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, Associte 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 will resume arguments in Gordon against the New York Stock Exchange.

Mr. Jackson, you may proceed whenever you're ready; you have sixteen minutes remaining of your time.

ORAL ARGUMENT OF WILLIAM ELDRED JACKSON, ESQ.,

ON BEHALF OF THE RESPONDENTS -- Resumed

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

First, if I may, I would like to deal with two questions from the Bench yesterday afternoon.

First, Mr. Justice Stewart asked a question of the petitioner with respect to the legislative history of the Exchange Act, and in particular a draft which utilized the word "uniform", "uniform rates", and that matter is laid out at pages 20 and 21 of the SEC's brief, Your Honor.

Secondly, it has been suggested that perhaps I misunderstood a question from Mr. Justice White, with regard to the antitrust situation, if fixed rates are abolished on May 1st in accordance with the SEC's directive.

I understood the question to relate to Exchanges, and I answered that there would be no antitrust liability. Obviously they would not be fixing rates any more.

But if Your Honor's question related to the situation of brokers, members of Exchanges, I'd like to make it clear

that, at least in my view, there is no question that if Merrill Lynch and Bache or other firms got together and fixed the rates between them, they would be subject to the full range of antitrust liabilities and penalties.

QUESTION: Apparently, then, the fact that the Commission has authority either to order or to -- to order uniform rates or to order non-uniform rates, or to say that there should be no uniform rates, and to say that there shouldn't be an Exchange rule about it, the Commission's jurisdiction would not be exclusive?

MR. JACKSON: Not in the case of members of Exchanges fixing rates amongst themselves, in my judgment.

QUESTION: So that the power of the Commission to have a rule and to enforce it would not oust the antitrust laws in that area?

MR. JACKSON: Not in that area, in my judgment. It would if the Exchanges again reinstituted fixed rates at some time in the future, and assuming no change in the statute.

QUESTION: Well, what if the Exchange had a -- replaced its present rule in accordance with the Commission's directive to say that there should be no -- there is no uniform rate?

MR. JACKSON: Yes, Your Honor. That's the situation I'm addressing myself to.

There would no longer be fixing of rates by the

Exchange.

QUESTION: So then you've got just the Silver -- you've got the antitrust remedy, could supplement or it would just be unaffected by the Securities law then?

MR. JACKSON: Well, the antitrust remedy would run only against members.

QUESTION: I understand. I understand that.

MR. JACKSON: Members, and it would be --

QUESTION: As conspiring against each other.

MR. JACKSON: That's exactly right, Your Honor. And the Exchanges would be out of the business of fixing rates.

QUESTION: But even though their conspiring would be contrary to an Exchange rule, the antitrust laws could still go --

MR. JACKSON: Yes, in that instance, that's my view, Your Honor.

QUESTION: Well, your submission is that the Commission's jurisdiction is exclusive over the Exchange as such.

MR. JACKSON: Exactly, Your Honor. Exactly.

And it's that jurisdiction from which we believe that exemption is derived.

QUESTION: Yes, but if the members violated the Exchange rules, the Exchange could discipline them.

MR. JACKSON: Yes, exactly.

QUESTION: But the fact that the Exchange could discipline them does not mean that the antitrust laws would be ousted.

MR. JACKSON: If the members were conspiring, exactly, Your Honor.

QUESTION: Right.

MR. JACKSON: Right.

QUESTION: Really, what you're saying is that if the individual members of the Exchange violate some federal law, they are subject to the same penalties as any other citizen who violates a federal law.

MR. JACKSON: Exactly, sir.

QUESTION: Well, the Securities and Exchange Commission has no -- whatever its jurisdiction is, it isn't such as to preclude an antitrust remedy on those facts?

MR. JACKSON: Against members --

QUESTION: Unh-hunh.

MR. JACKSON: -- conspiring, themselves, to violate the antitrust laws.

QUESTION: Right.

MR. JACKSON: After fixed rates -- Exchange fixed rates are over.

And I just wanted to make that clear, because perhaps I hadn't been clear yesterday.

If I may recapitulate, Your Honors, our position in this case, which of course deals with past conduct, is that the Exchanges are entitled to an antitrust exemption for this limited area of activity, the fixing of commission rates, through implied repeal of the antitrust laws on the twin grounds of: first, irreconcilability of the two statutory schemes; and, secondly, because the jurisdiction of the district courts under the antitrust laws would create a conflict with SEC jurisdiction and would prevent the functioning of the Exchange Act, and this presents the different case which this Court reserved in Silver.

Now, Mr. Shapiro yesterday afternoon, if I understood him correctly, suggested that there might be various degrees of exemption, including concurrent jurisdiction of the courts and the SEC, depending on the type of procedure utilized by the SEC, whether it was action or inaction or formal order or whatnot, and it seemed to me that this argument dwelt rather much on form over substance.

But, in any event, I would suggest that the argument derives no support from either Section 19(b) of the Exchange Act, and certainly not from the implied repeal cases.

Because either the Exchange Act creates an implied exemption, or it does not. I fail to see any room for shades of gray in a matter of that area, and it seems to me that certainly the Exchanges of this country are entitled to know

with some certainty what conduct on their part is lawful and what is not.

Mr. Shapiro also argued, if I understood him correctly, that there could be no pugnancy in this situation, and therefore no exemption, until and unless the SEC actually issued a formal order to the Exchange to fix commission rates.

And this is a mirror image, I believe, of the, what I regard as a concession in the Department of Justice's brief, at page 48, that if there were a formal order by the SEC to the Exchanges to fix rates, no antitrust liability could arise.

Now, by limiting this concession to a formal order, I would submit that the argument fails to recognize the unique statutory scheme of the Exchange Act, and of Section 19(b) which does not provide for direct SEC regulation by formal order. It is not a public utility type regulatory statute. It has provided for a system of Exchange self-regulation.

The Exchanges first, themselves, on their own initiative, adopt rules. The SEC has the power, if it deems those rules objectionable, in the light of the statutory standards, to first request an Exchange to change them. And if the Exchange does so, that's the end of the matter.

If the Exchange refuses the request, then and only then does the SEC have to proceed by a formal hearing and an order or a rule.

So that the argument, which Mr. Shapiro made, it seems

to me, would in essence rewrite Section 19(b) of the Exchange Act by requiring an order; whereas the Act itself indicates that requests by the SEC and compliance by the Exchange are sufficient to achieve the statutory objectives without a hearing, and without an order.

QUESTION: What about the situation where nothing has happened? The Exchange has a rule and the SEC has never addressed itself to it.

MR. JACKSON: Now, in that --

QUESTION: Although it has the power to.

MR. JACKSON: Exactly. In that situation, Your Honor, -- let's assume that -- the Exchange adopts a rule, it has to be prefiled with the SEC three weeks before it becomes effective, the SEC looks it over, finds nothing objectionable --

QUESTION: Well, it doesn't say a word. You don't know whether it does or not.

MR. JACKSON: Well, it has the power, as you've indicated, and it has the duty, I would submit, under the statute to request and, if request is refused, to order the Exchange to change it if it doesn't comport with the statutory standards.

QUESTION: Well, so do you accept the test in Silver that there is immunity where some rule is essential to the effectuation of the Act?

MR. JACKSON: I do not accept that test, because I do not believe that is the test that this Court laid down in the Silver case.

QUESTION: Well, what do you think the test was there?

MR. JACKSON: Well, in the Silver case, as I read it, what this Court was saying was this: What may be necessary to make the Act work in a given case would be implied repeal of the antitrust laws.

It did not say, as I read it, what might be necessary to make the Act work would be a particular rule or practice of an Exchange.

That, sir, in my judgment, is where the Thill Court, the Seventh Circuit, got off the tracks.

QUESTION: But then, in that effect, your position is that anything the SEC -- any rule the SEC fails to disapprove is automatically immune from antitrust attack?

Regardless of its over-all position in the Act, and regardless of whether or not the SEC might say, Well, it just isn't harmful.

MR. JACKSON: That certainly is my position, Your Honor, and it's because of the existence of the SEC's jurisdiction, and also because I don't understand a fundamental justice and fairness of holding an Exchange liable for treble damages for doing something that a government agency has power

to stop, but does not stop.

And I think that there is an exemption in those circumstances.

I think there's an exemption --

QUESTION: But that's a considerably different rule, then. Do you find that in Silver or in some case?

MR. JACKSON: I find this may be --

QUESTION: You find it in the statute, I suppose that's your best answer, isn't it?

MR. JACKSON: Well, I think I analogize it to Parker v. Brown, which was argued yesterday. It comes close to government action. It's inaction, but to me it has the effect of action, because the hand is withheld when the hand could have been stretched out and stop the action by this private party; but instead the government agency doesn't do so.

QUESTION: You're saying it's something more than the government just not discovering some wrongdoing or some other -- there are a sufficiently small number of Exchanges that the SEC presumably is cognizant of what they are doing.

MR. JACKSON: Precisely, Your Honor. And the Exchanges -- the SEC does know, because rules, as I said, have to be filed in advance for scrutiny. And if there's something wrong in a rule, such as the commission-fixing rule,

they can say: Stop it.

As a matter of fact, they have said "stop it" as of May 1st.

QUESTION: Are you arguing that this is a sort of de facto approval when they fail to disapprove after notice?

MR. JACKSON: I would argue that it has the legal effect of approval, since they have the power to disapprove.

QUESTION: Are there not some statutes relating to regulatory agencies which provide a mechanism, like the filing of a tariff which, if not disapproved, goes into effect?

MR. JACKSON: Yes, Mr. Chief Justice.

QUESTION: Any in areas other than tariffs?

MR. JACKSON: Well, I'm certainly aware of that procedure for tariffs, I believe under the Interstate Commerce Act; and, if I'm not mistaken, perhaps also under the Shipping Act. But that is not the same as the procedure in this case, because those tariffs, as I understand those Acts, require some affirmative action by the agency.

In this case, the structure of the statute is such that no affirmative action is required in order for the Exchange rules, on whatever subject, to become effective. Affirmative action by the agency is required only to set them aside, and therefore, inaction has, to me as I said, the effect, the same effect as affirmative action; and the result should be the same in terms of antitrust exemption, I would submit.

In effect, the result of Mr. Shapiro's argument would mean this: that in order to avoid antitrust liability, an Exchange would have to refuse a request from the SEC, even though it was perfectly willing to do what the SEC asked it to do, and precipitate a hearing, precipitate an order, and then, at last, come to rest with its absolution.

And I submit that that would be a charade, a sham, and hardly a useful exercise.

QUESTION: Well, of course, there's something beyond -- I don't suppose this Court is necessarily bound by Mr. Shapiro's concession on page 48, either.

MR. JACKSON: Of course not.

QUESTION: And part of his argument, of course, has been, then, that even if the SEC approves -- I mean, arguably, even if the SEC approves, it has no authority at all to immunize under the antitrust laws; that it has no responsibility for competitive consideration; that it, if it approves, acts wholly within the scope of the Securities laws, and has no eye to -- and no authority with respect to the antitrust laws.

MR. JACKSON: Well, I --

QUESTION: That's been the holding in some other contexts with some other agencies.

MR. JACKSON: Well, on the other hand, Your Honor, the -- I think it's quite clear under this Court's decision in, I believe, Gulf Utilities, that the public interest standards

which are embraced in the Exchange Act, 19(b), would include competitive considerations.

And I say also that those considerations have been considered by the SEC in the past, as is reflected in this record. In fact, going as far back as 1941 in the Multiple Trading case, where they brought a proceeding against the Exchange on anti-competitive grounds. Those factors have been considered, and, as I said yesterday, they have been considered with the active assistance of the Department of Justice, which has intervened in the hearings which the SEC has held on this subject.

Now, I would submit, Your Honors, that the argument of Mr. Shapiro means that if there can be exemption only where there is an order, there is no exemption, and this would repeal the doctrine of implied repeal, and would result in endless litigation rather than regulation.

Thank you.

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

Mr. Nerheim.

ORAL ARGUMENT OF LAWRENCE E. NERHEIM, ESQ.,

ON BEHALF OF THE S.E.C. AS AMICUS CURIAE,

SUPPORTING RESPONDENTS

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

To the extent that time permits today, I would like to present the Commission's views on the issue in this case,

by discussing three points, and in doing so address myself to some of the questions asked by this Court yesterday.

The first point is, What is the regulatory scheme of the Exchange Act, and how did Congress deal with the question of fixed commission rates in that scheme?

The second is, How does that regulatory scheme actually work at the SEC, and what has the SEC been doing for the last 41 years in dealing with the question of fixed rates?

And, third, Why, to use this Court's expression, we believe a plain repugnancy exists between two regulatory regimes, and why the regulatory scheme of the Exchange Act simply will not work, as Congress intended it, if antitrust courts are given the opportunity to substitute their judgments for the reasoned regulatory judgment of the Commission.

QUESTION: Who should make the decision as to whether there's repugnance?

MR. NERHEIM: This Court.

QUESTION: Well, what's the matter with the Exchange making it?

MR. NERHEIM: The distinct --

QUESTION: You don't claim that authority?

MR. NERHEIM: No, we don't, Your Honor.

QUESTION: But why not? Why not?

MR. NERHEIM: We don't claim the authority to

determine a repugnancy issue.

QUESTION: Well, in the first instance, you have to make the decision, do you not?

MR. NERHEIM: Well, in the first instance, Your Honor, we apply the standards of the Act, the public interest standards of the Act, and we do consider competitive considerations; but we also consider other economic considerations, regulatory considerations, and the other considerations under the Act.

And then take action.

And we believe that's the Commission exercising its jurisdiction, and we do not believe that then our action should be attacked collaterally in an antitrust action.

The Congress gave the Commission specific authority under the '34 Act to do several things.

It gave it specific authority to adopt rules, mandatory rules, concerning financial responsibility, concerning borrowing practices, concerning manipulative and deceptive practices, and concerning practically every other important thing dealing with investor protection.

And the Congress also gave the SEC authority to register stock exchanges, to police stock exchanges, and to require amendments to their constitution and by-laws as the Commission determines necessary in the interest of investor protection.

Now, in Section 19(b) Congress gave the Commission jurisdiction to supervise rules and require changes in Exchange by-laws and rules and regulations in such matters as twelve enumerated categories and similar matters, including specifically the authority to regulate the fixing of fixed commissions by Exchanges.

The subject of fixed commissions by Exchanges had been 142 years old in 1934 when Congress addressed itself to this issue.

And Congress argued as to how to regulate that practice, not whether they should be outlawed. Congress chose to regulate the practice by subjecting it to the jurisdiction of its new federal agency, like so many other things it did.

Now, in the Act, Congress gave the Commission a variety of regulatory tools; it gave the Commission authority to adopt rules and impose them upon the industry; it gave the Commission authority to conduct investigations, hold hearings, and make recommendations to the industry, and expect them to follow the recommendations.

It gave it authority to supervise these rules, and to require changes. It gave it authority to issue demand letters, which are called the 19b letters of request; in effect are demands.

And, lastly, it gave it the ultimate club of giving the Commission authority to withdraw or suspend the registra-

tion of an Exchange for failure to follow a Commission rule, order, or regulation.

That is the regulatory scheme we're talking about today, and it is the regulatory scheme that Mr. Justice Blackmun analyzed in the Ware case just 15 months ago, in talking about the kinds of direct supervisory authority the SEC had, and then other areas, like Ware, like Silver; but in that case analyzed that there should be a repealer when we are talking about an area over which the Commission has direct supervisory jurisdiction. Which we think is this case.

Now, yesterday a question was asked by Mr. Justice White about the Commission's authority to take action against a member of an Exchange for violating an Exchange rule.

And that -- the answer to that question is that there are four parts to it:

The Commission does have authority to take action directly against a member, if the member violates the Exchange Act or an SEC rule or regulation. It doesn't specifically refer to Exchange rules.

The SEC does have specific power under Section 15B of the Exchange Act to reokve the authority of a member to do business in the securities industry if it violates certain conduct in that section. But again it doesn't specifically refer to Exchange rules.

Thirdly, if that conduct in violating the Exchange rule

also violated another rule of the Commission or of the statute, then the Commission has direct authority under Section 21 to bring an injunctive action against that member for violating the statute, or a rule or regulation of the Commission.

And then lastly, of course, the Commission has the authority, under 19(a)(1) to withdraw the registration of an Exchange for failure to comply, or force compliance by its members of its own rules; which the Commission did in 1966, revoking the registration of the San Francisco Mining Exchange for, among other things, just that: failing to require compliance by Exchange members.

The question was also asked yesterday, and Mr. Jackson came back to it today, and I think the Commission woul like to make its position clear on the question of what happens after May 1, 1975, when we have said there shall be no practice of fixed rates.

We --

QUESTION: Yes, what happens if two or more members of the Exchange agree together to fix rates.

MR. NERHEIM: Precisely.

We were a little bit puzzled yesterday by Mr. Jackson's comment, but today we agree completely: that after May 1st, if we have adopted a rule, as we have, that there shall be no -- that Exchanges shall not have rules requiring their members to fix rates, and if members thereafter do

agree to fix their rates, high or low or wherever, we do not claim that the existence of the Exchange Act, the presence of the SEC, repeals or exempts antitrust application of that situation.

Nor, indeed, would we if members did something like that today. Even in a fixed-rate environment. Because members can charge more than minimum-commission rates.

QUESTION: That is, today, if members, a couple of members of the Exchange agreed to divide their markets or --

MR. NERHEIM: Exactly, that's another example --

QUESTION: -- that would be clearly amenable to the antitrust laws, and you're saying that --

MR. NERHEIM: And we agree, and we would not claim any repealer for that kind of anticompetitive conduct.

QUESTION: And I don't -- would you claim some -- let's assume the claim was that the Exchange was conniving with those conspirators, how about the liability of the Exchange?

MR. NERHEIM: We -- if there was an allegation of conniving or conspiracy by the Exchange with its members, we would say the mere presence of the SEC or its jurisdiction would not exempt the antitrust application.

QUESTION: And so today if there were some -- if two or three of the -- any kind of conspiracy then among the members, today, under the present -- even under a rule that did set minimum rates, if members conspired either to charge higher

or lower prices than that, you wouldn't think -- you would say there would be antitrust liability.

MR. NERHEIM: Right. Yes, we would, Your Honor. There would be antitrust liability there because we do not believe that application of the antitrust laws collides or conflicts with our jurisdiction in that case, but we believe it's supplementary and complementary to our jurisdiction.

We are concerned about those acts and practices and rules which Exchanges and their members operate under, which are consistent with our jurisdiction and consistent with our policy, not inconsistent.

Now, the second aspect of our presentation is to just describe how this process under this regulatory scheme works in practice.

Our brief and our documentary appendix go into detail, to describe the steps taken by the SEC over the last 41 years, most particularly the last 15 years, in reviewing, approving, modifying, changing, and finally eliminating the practice of fixed rates.

These studies contained in practically the entire Documentary Appendix, and indeed most of the Appendix of the Petitioners, these studies, hearings, investigations, 19b letters, demand letters, have resulted, in 1968, in the introduction of a volume discount by Exchanges.

They resulted in the introduction of a non-member

discount in 1971, permitting persons who are not members of the Exchange to get a 40 percent discount from the public rate.

The Exchanges in that situation had come in with a rule proposing a 30 percent non-member discount, and we said no, it had to be 40 percent. And the Exchange adopted a 40 percent discount. That's how this process works.

These studies and these letters also resulted in the elimination of the give-up practice in 1968, at the SEC's insistence.

These policies and these procedures resulted in the elimination of fixed rates for under $2,000 and for over $500,000, and then for over $300,000; all of which came at the insistence of the SEC through these informal procedures, 19b letters, if you will.

Now, we heard yesterday that the Commission should act by order, and that the antitrust laws would not apply if the Commission ordered these things. I suppose we could issue orders on every single rule; but that isn't the way the Exchange Act intended us to operate.

QUESTION: Now, suppose an Exchange files a rule with you, and you look it over, and you don't think it requires any approval or disapproval; you just don't take any action? You say that's tantamount to approval --

MR. NERHEIM: Yes, Your --

QUESTION: -- just as though you issued an order.

Now, is that -- how can anybody get a review of that?

MR. NERHEIM: Well, let me -- may I first answer the first part of that, Mr. Justice, by saying we simply don't file these rule changes in a drawer, and --

QUESTION: Well, I understand. You've already answered that, I think, earlier. But --

MR. NERHEIM: All right. So that when there is this procedure by the SEC to not disapprove, because we believe that the rule change is consistent with the Act, that we believe is agency action; and as the Circuit Court --

QUESTION: As long as it's consistent with the Act, do you say that --

MR. NERHEIM: No, we --

QUESTION: -- "as long as it's consistent with the Act, we think that it ought to be"?

MR. NERHEIM: Well, we say that it ought to be, but we believe that that is agency action, and is reviewable under the Administrative Procedure Act.

And the Circuit Court --

QUESTION: How do you know -- how do you ever know when that happens?

MR. NERHEIM: When the agency took the action? Well, if you're following the developments of Exchanges with respect to rule changes, you would know when they put into effect a rule change.

QUESTION: And how do we -- how would you know when you decided not to do anything about it?

MR. NERHEIM: Well, it would be at that point, because if a rule change comes in and we have reason to question it, we would then notify the Exchange that "we suggest you not adopt that rule, or you adopt another rule".

QUESTION: In other administrative agencies, when they have some authority to take into consideration comeptitive considerations, you have a hearing and you get the -- somebody has a chance to present to you, the agency, some of the competitive considerations. None here. Zero.

And yet in -- and you say it's reviewable; would it be reviewable on an administrative record or just in a new lawsuit, or what?

MR. NERHEIM: It would be reviewable in a district court, Your Honor.

QUESTION: Who would you sue?

MR. NERHEIM: Well, we wouldn't sue anyone, but --

QUESTION: I know, but who would --

MR. NERHEIM: Well, Mr. Bader would sue us, as he has before; testing our jurisdiction.

QUESTION: Well, as I understood him, he was told about six times that it wasn't reviewable.

MR. NERHEIM: Well, it isn't quite that bad, Mr. Justice.

QUESTION: Maybe you could give him some advice here, how to do it.

MR. NERHEIM: Yes, I'd like to. The last time --

QUESTION: Right now.

MR. NERHEIM: I would give the same advice we gave him in the Second Circuit Court of Appeals, in 1974, the last time he sued, where he brought just such an action, testing the agency's non-disapproval of an Exchange rule. And he brought a direct appeal in the Second Circuit under 25(a) of the Exchange Act, which calls for direct appeal in the Circuit Courts for appeals of orders.

QUESTION: Is that a de novo thing? Can you make a new record there, or are you stuck with your record?

MR. NERHEIM: You're stuck with your record. But the --

QUESTION: Which is only the rule here. A letter came in and gave you the rule, and that's it.

MR. NERHEIM: Well, but the point, Mr. Justice, is this: that in that case we suggested to the Second Circuit that this was not an order, just as the Third Circuit found in the PBW case, that our rule was not an order within the meaning of Section 25 of the Exchange Act. And we suggested to the Court that Mr. Bader had an action in the district court on the basis of agency action, which he did not pursue. He did not then go to the district court.

QUESTION: Could he -- in your view, could he present evidence? Could there be an evidentiary hearing in the district court or not?

MR. NERHEIM: Under that circumstance I would say yes.

QUESTION: Well, the Administrative Procedure Act provides, doesn't it, that if there has been no record made in the agency, you're permitted to make one in the district court?

MR. NERHEIM: I believe it does, Mr. Justice, and of course if the record consisted of a rule proposal, and a non-disapproval, there wouldn't be much of a record, and I think in that case there would have to be a record, and I'm sure that the Department of Justice would be an active participant in that hearing.

QUESTION: So he isn't stuck with the record before the agency?

MR. NERHEIM: I would not believe so in that case, no.

I just wanted to conclude that part of my remarks by saying that in the PBW case in the Third Circuit, 1973, and in the Independent Broker-Dealer case in 1971, in the Circuit Court of Appeals for the District of Columbia, those two Circuits analyzed exactly how this regulatory scheme works, talking about the jurisdiction, how these informal assortment

of regulatory tools are intended to operate, and both concluded that is the way the Exchange Act is intended to work, and the agency should not be required to resort to formal hearings, mandates and orders, unless the Exchange refuses to cooperate.

And that, we believe, is what happened in this case, and that's what we have before us.

I'd also like to say that we believe that the record in this case is replete with example after example of what the SEC has been doing in this situation, and the Department of Justice's reply brief, at page 6, which was filed on Saturday, that suggests that the SEC has done nothing with respect to the practice of fixed-commission rates until September 1973, but merely tolerated the practice, is, we believe, shockingly disingenuous.

The last point gets to the issue of plain repugnancy, and as I've indicated this Court had that question before it in Silver and analyzed the Commission's regulatory jurisdiction again more thoroughly in Ware, where there Mr. Justice Blackmun, speaking for a unanimous Court, said that these kinds of measures and rules by Exchanges, authorized by the Commission, are designed to insure fair dealing and to protect investors, and are the kind directly related to the Act's purposes.

And we believe that we're talking about an essential

ingredient in the Exchange Act in this case. And in Silver, which was a particular enforcement of an Exchange rule, this Court spent five pages of its opinion reciting rule after rule after rule over the Exchange, every one of which was anti-competitive, and then said that those rules were designed to meet the standards of the Act, but that there would be no repealer in that case, because the SEC didn't have jurisdiction over the particular enforcement of that situation.

But that a different case would be presented when this Court was faced with a rule over which the SEC does have jurisdiction; and if there was ever a classic "different case" we believe that this is that case.

QUESTION: Now, your brothers on the other side of the rostrum take a good deal of comfort from the Ricci case, saying that that answered the question left unanswered in Silver.

What do you have to say on that?

MR. NEMEIM: Yes, they do, and we think they have misread Ricci, Mr. Justice. Ricci involved the withdrawal of a membership on the Chicago Mercantile Exchange, and this Court's opinion said that there were facts that had to be resolved in that dispute, had Ricci voluntarily given up his membership, did Siegal have a lien on his shares, did Ricci owe Siegal brokerage fees, and was the withdrawal of the membership, or the taking away of the membership consistent

with the valid rule of the Exchange.

It said this is something that should be sent to the Commodity Exchange Authority for a decision on the facts; and after the facts are in, we will decide if there is an implied repealer.

Because if the membership was taken away pursuant to an invalid rule, or taken away improperly, then the implied repealer question goes away, the antitrust case should proceed.

But if it was taken away from him --

QUESTION: Well, contrary to a valid rule, say?

MR. NERHEIM: Then the antitrust court action proceeds.

QUESTION: Right.

MR. NERHEIM: And as the Chief Justice indicated in that case, the Silver case was clearly not before it in Ricci, and we agree.

We think this is -- we believe this is a situation where the district court properly applied Silver. We believe that the Second Circuit properly applies Silver, and we respectfully urge this Court to affirm the lower court.

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

Mr. Bader.

REBUTTAL ARGUMENT OF I. WALTON BADER, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. BADER: May it please Your Honors:

May I first point out to the Court that based upon everything that has been said here, it is my feeling and belief that in fact the record in this case before this Court is completely inadequate to make a proper determination.

And I think that really what should be done in this case is to send this back to the district court for a full and complete trial.

Because there is the question of the antitrust immunity involved, the position of the Stock Exchange, the position of the SEC are completely different.

Interestingly enough, Mr. Nerheim now tells me that if I had started a district court action against the SEC in connection with the Stock Exhcnage rules, that that district court action would not have been subject to a motion to dismiss.

But we did start such an action. It was Civil Action 1984-71 in the United States District Court for the District of Columbia, and, as pointed out on page 6 of my brief, the SEC did make a motion to dismiss on the ground that the district court had no jurisdiction. That motion was granted.

Now, perhaps the SEC is taking a different view at this point, but I don't think that a plaintiff in this case should have to come all the way up to the Supreme Court to

obtain a change in the rule.

The fact remains that the procedures that the SEC has for the review of their so-called non-objection to Stock Exchange rules are now, are basically not reviewable by any court, and if you try the Circuit Court you're held -- you're dismissed on the ground that it's not in order; if you try the district court, you're dismissed on the ground that there are other considerations involved, which make that inappropriate.

And I submit that without a consistent means for the public to proceed in any of these agency determinations, that, as a practical matter, such an agency determination could not repeal the antitrust laws; and, as a matter of fact, there might be some serious due process violations involved as well.

Now, basically, as far as this Court had determined under the Silver case, it seems that the exemption in each case has to be considered under the facts that are involved in the particular case.

And under the facts that are involved in this particular case, I submit to the Court that if the record is considered by the Court to be complete, that there is no such implied exemption of the antitrust laws.

I point out, for example, that, let us assume that the Stock Exchange provided for a rule which is similar to what

I believe Mr. Justice Stewart mentioned, that, let us say, the rule provided for a division of markets. And we'll assume that the SEC does not object to that rule, for one reason or another.

Is the position of the defendant now in this case that such a clear violation of the antitrust laws would now be insulated?

Or, let us go to something else, let us suppose that the SEC has a rule now abolishing fixed-commission rates, as they do.

Two Exchange members get together now and go ahead and determine that they are going to fix commission rates regardless. Mr. Nerheim has said, and Mr. Jackson has said, quite correctly, that that would not be exempt from the anti-trust laws.

However, since this is now a violation of the SEC Act, we are now met with the situation where there are a number of cases holding that if you sue under antitrust grounds for a violation of the SEC Act, that at that point you're only entitled to single damages and not triple damages.

So that what I'm pointing out to the Court is that you're ending up into a plethora of problems. The proper regulatory scheme, as the plaintiff submits, and I believe Justice submits, is that any particular regulatory scheme which is tended to be a claimed exemption from the antitrust

laws must be considered in each individual case.

Now, it actually happens that in so far as fixed-commission rates there has been no significant agency action taken in this case, except now, after some 41 years.

Now, furthermore, the SEC grants any of their requests that are made or files a Rule 19b request, there is no public participation in such request.

Now, to say that that can now be reviewed by a member of the public now coming in and bringing a suit in the district court and getting into a full-dress trial would belie the entire administrative process. This means now that there is no way to come before the SEC first, and say to the SEC: Gentlemen, this rule that is being proposed has serious anti-competitive effects.

The normal rule of exhaustion of administrative remedies, it would seem to me, would be completely violated by permitting such a procedure; and since there is no mechanism for public participation in connection with such a rule, it seems to me that such a statutory scheme cannot be held to be regulatory authority in violation -- immune from the antitrust laws.

As a matter of fact, this is precisely what Otter Tail held, and it seems to me that this case is almost directly analogous to Otter Tail.

Also, I point out to the Court that there has been

never any SEC order of any kind ordering any fixed-commission rates. The only SEC order that has been made has been the order now that fixed-commission rates shall be phased out.

Now, let us suppose that the SEC now determines, after, let us say, the 1st of June or the 1st of July, that fixed -- that unblocked rates have not worked out, and the Stock Exchange now presents a proposal for fixed rates.

The SEC now goes ahead and permits that fixed-rate order to go in without any review, without any hearing, without anything of that sort going on.

Now, the -- I, as a member of the public, do not have any right to make my views known to the SEC. I must now go ahead to the district court of the District of Columbia, bring an action with respect to this, and I have the entire burden on myself of a full-dress trial with the SEC no longer in a position where I am attempting to convince a regulatory agency to take certain action, but as an adversary to the regulatory agency.

And I submit that that is not the proper regulatory practice.

I thank the Court for its consideration.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 10:46 o'clock, a.m., the case in the above-entitled matter was submitted.]