In the

Supreme Court of the United States

THE GREYHOUND CORPORATION, ET AL.,
PETITIONER,
V.
MT. HOOD STAGES, INC., ETC.,
RESPONDENTS.

NO. 77-598

Washington, D. C.
April 24, 1978

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THE GREYHOUND CORPORATION, ET AL., Petitioners,	:	
v.	:	No. 77-598
MT. HOOD STAGES, INC., ETC., Respondents.	:	

Washington, D. C.

Monday, April 24, 1978

The above-entitled matter came on for argument at 10:06 o'clock 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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JOHN R. REESE, ESQ., Three Embarcadero Center, San Francisco, California 94111; on behalf of the Petitioners

EUGENE C. CREW, ESQ., One California Street, San Francisco, California 94111; on behalf of the Respondent

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P R O C E E D I N G S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in Greyhound Corporation v. Mt. Hood Stages.

Mr. Reese, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF JOHN R. REESE, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. REESE: Mr. Chief Justice, and may it please the Court: I am John Reese, counsel for the petitioners, the Greyhound Corporation and Greyhound Lines, Inc.

This is a private antitrust case, brought by the respondent Mt. Hood Stages against Greyhound. The issue as to which the Court granted certiorari is whether the four-year statute of limitations in antitrust cases was tolled by the Interstate Commerce Commission proceeding brought by Mt. Hood and in which the government later intervened with the result that the damage period in this case was multiplied five-fold, to twenty years instead of the normal four years.

The Court of Appeals held that the statute was tolled and it upheld a $13 million treble damage judgment against Greyhound; without tolling, the judgment would still be approximately $8 million. The jury --

QUESTION: Could you give me that last figure again?

MR. REESE: Approximately $8 million.

The jury found that Mt. Hood knew or should have known

of its claims in this case on a specific date, December 14, 1960, therefore in order to recover damages for any period prior to that date, Mt. Hood was required to file its complaint within four years, by December 14, 1964. Mt. Hood did not file its complaint within that four-year period; instead, it waited an additional three and one-half years. The complaint in this case was not filed until July 5, 1968.

On the face of it, then, the statute of limitations barred recovery for all damages prior to July 5, 1964. The Court of Appeals, however, allowed recovery all the way back to 1953. It did that on the theory that the statute was tolled by two different methods which could then be added together. First, is sustained the jury's finding that there was fraudulent concealment until December 14, 1960. Then it held that the claims were saved from being barred on December 14, 1964 because on that very date the government filed a petition asking leave to intervene in an Interstate Commerce Commission proceeding that Mt. Hood had brought. The court held that the filing of that petition on that very last day before the claims were barred satisfied the requirements for tolling under section 16(i) of the Clayton Act.

Now, section 16(i) is obviously at the heart of the issue before the Court. That is a carefully drawn statute, and it provides that whenever the United States institutes a proceeding to prevent, restrain or punish violations of the

antitrust laws and the statute of limitations is tolled as to any matter complained of in a prior government proceeding. Now, it is important to remember that while section 16(i) is a tolling provision, it is and is part of a statute of repose which is designed to cut off stale claims.

The panel of the Ninth Circuit cited this case failed to recognize that purpose and as a result its application of the statute does violence to the language and frustrates its purpose as a statute of repose.

QUESTION: What do you say was the purpose of the government's intervention in this case, Mr. Reese?

MR. REESE: The purpose of the government's intervention in this case, Mr. Chief Justice, was to assure that the Interstate Commerce Commission took into account competitive policies as it is required to do under section 5 of the Interstate Commerce Act.

QUESTION: What would be -- just to pursue that, what would be the consequences of its participation? Would there be any consequences that would either punish violations or restrain violations or prevent violations?

MR. REESE: No, Your Honor, there would not be. And as we understand the law as announced by this Court in McLean Trucking and Minneapolis & St. Louis Railway, that could not follow.

QUESTION: Then what was the real impact of their

being there, to sort of help the Commission understand the case a little better?

MR. REESE: Well, that is pretty accurate I think, Mr. Chief Justice. One of the duties of the Antitrust Division of the Justice Department is to participate before administrative agencies that are required to take into consideration competitive policies in their regulatory decision-making.

QUESTION: Do you say an intervention by the United States could never toll the statute?

MR. REESE: Mr. Chief Justice, we don't want to take such an extreme position as to say it could never toll the statute. We do maintain that it could never toll the statute in a section 5 proceeding under the Interstate Commerce Act. That is a section under which the ICC not only does not enforce the antitrust laws, but indeed it authorizes and immunizes conduct that would otherwise violate the antitrust laws. I cannot see how a proceeding under that section can fairly be read to be one to prevent restraint or punish violations of the antitrust laws within the meaning of section 16(i).

QUESTION: Of course, the Department of Justice Antitrust Division itself doesn't punish or restrain, does it? It can only persuade a court to do so, isn't that the essence of it, or another tribunal?

MR. REESE: That is absolutely correct, Mr. Chief Justice. What I am saying is that it cannot even persuade the

ICC to do so under section 5 of the Interstate Commerce Act, because that is not the function of the ICC under that section. Indeed, as I understand McLean Trucking, the ICC is without power to do that under section 5, and it is certainly not the purpose of section 5 to prevent restraint or punish violations of the antitrust laws.

The Court of Appeals decision finding that the statute is tolled by reason of section 16(i) is both bad statutory interpretation and bad policy. It is bad statutory interpretation because the terms and requirements of section 16(i) are clear. The government's petition for leave to intervene does not satisfy those terms and requirements. That petition is simply not an antitrust complaint. It is not the kind of document that should be required to bring section 16 (i) into play. The government's petition actually goes out of its way to remain neutral and non-committal and to avoid making any charges. In fact, that petition specifically denied knowledge of the facts, and it did not ask for any relief. The petition said, "We have no way of knowing whether those of Mt. Hood's charges which Greyhound denies are true or false." In other words, that petition could hardly have been more innocuous. It does not begin to satisfy the language or the purpose of section 16(i). To put its deficiencies in terms of the statutory language, the petition did not institute a civil or criminal proceeding as section 16(i) requires. The Court of Appeals apparently admits that this

proceeding was not instituted by the government.

QUESTION: Did the government through the Antitrurst Division have a right, an absolute right of intervention in the ICC proceedings?

MR. REESE: No, it didn't, Mr. Justice Stewart. It petitioned for leave to intervene from the ICC under the ICC's regulations, and it was granted leave some several months after the petition was filed.

QUESTION: Does the petition recite the purpose of its intervention, its motion for leave to intervene?

MR. REESE: The petition recited only that the United States was an interested party in the proceeding. It declined to say on whose side the United States sought leave to intervene.

QUESTION: Is there any need in light of the broader enforcement procedures of the antitrust laws for the Antitrust Division to intervene in this administrative proceeding as a predicate to later bringing suit under the antitrust laws? Is there any concept of exhaustion of administrative remedies or anything akin to that?

MR. REESE: None, Mr. Justice Stewart. A direct antitrust case could have been brought.

QUESTION: Any time, with or without any motion for leave to intervene in these ICC proceedings?

MR. REESE: That's correct.

Second, the second deficiency of the petition in terms

of the statute of limitations of the statutory language of section 16(i) is that the petitioner did not complain of anything, as the statute clearly requires. The Court of Appeals does not discuss this point. And, third, the government's petition did not seek to prevent, restrain or punish violations of any of the antitrust laws, as section 16(i) requires.

On this point, the best the Court of Appeals can say for us is that the petition showed that the government's interest lay in the possibility of antitrust violations should Mt. Hood's allegations prove correct. It is purely hypoehtical. It is plainly insufficient to satisfy the requirements of section 16(i).

Now, it is important to remember also what kind of proceeding it was. I touched on this in answer to the Chief Justice's question a moment ago. It was an ICC proceeding brought by Mt. Hood under section 5 to reopen some old acquisition cases for the purpose of obtaining a supplemental order in those cases. It was not an antitrust proceeding when Mt. Hood brought it, and no one has suggested that it would have satisfied the requirements of section 16(i) at that time. The government's petition for leave to intervene only as an interested party without requesting relief, without making any charges, could not have changed the fundamental regulatory nature of that proceeding into an antitrust case that satisfies the statute. Indeed, the Justice Department itself specifically distinguishes

that kind of activity from its normal antitrust enforcement activity.

Now, I have been focusing on the petition for leave to intervene. There are three basic reasons for that. First, even Mt. Hood agrees that section 16(i) applies only to the extent that the private case is based upon a matter complained of in the prior government proceeding. And this Court, in Leh v. General Petroleum, said that in general what the government complained of must be determined from the face of its complaint. Here, although the petition for leave to intervene did not complain of anything, that is the only document that is even remotely analogous to a complaint.

Second, since that petition was filed on the very last day before the statute ran on the claims, anything that the government did after that date would be too late to save the claims anyway. If the test should be to look beyond the face of the government's first pleading, then tolling should commence only when the government first does something that can fairly be called a complaint that institutes a proceeding.

QUESTION: Does the judgment which you are challenging now depend in any part or in whole or in part, using the language of the statute now, on any matter complained of in said proceeding, that is in the ICC proceeding in which the government intervened?

MR. REESE: The judgment we are currently attacking

is not based upon any matter complained of by the government in the ICC proceeding.

QUESTION: Not complained of by the government, complained of by Mt. Hood, that is my question.

MR. REESE: The charges in the Interstate Commerce Commission proceeding as to acts and practices are very similar to the charges of acts and practices or at least some of them in the antitrust case.

QUESTION: Then why is not -- why does not this case fall within that language which I believe it is your brief, at the top of page 7, italicized in section 16(i), at the top of page 7, reading "the running of the statute of limitations in respect of every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding." Now, if you say that the antitrust judgment ultimately depends and rests in part on what Mt. Hood was complaining of, then why doesn't the statute apply?

MR. REESE: There are similar bases for the charges in the antitrust case and in the ICC proceeding. The ICC proceeding, however, was never one by the United States to prevent, restrain or punish violations of the antitrust laws, and without that predicate, based upon language that the Chief Justice has just read, it seems to us to be inapplicable.

QUESTION: In other words, it must be the United States that is making the complaint, the antitrust complaint, in

your view?

MR. REESE: Yes, it is.

QUESTION: Not the injured party?

QUESTION: That certainly was Congress' view, too, don't you think, in enacting 16(i)?

MR. REESE: Well, I think certainly the statute contemplates that the action upon which the private plaintiff awaits to take advantage of is a government action in which the government makes a complaint against an alleged antitrust violator. You are absolutely right, Mr. Justice Rehnquist.

QUESTION: And isn't the reason for that the superior resources that are at the disposal of the government, may unravel a lot of things that private plaintiffs by themselves couldn't unravel and therefore it is reasonable to let private plaintiffs ride on the tail of an action that was brought by the government?

MR. REESE: That is the way we understand the purpose to have been conceived by Congress in 1914, and is why Congress has --

QUESTION: Why do you think it makes any difference whether the private litigant rides on the government or whether the government rides on the private litigant's proceeding?

MR. REESE: It seems to me, Mr. Chief Justice, that that is what the statute says, and that is what the statute was designed to accomplish.

QUESTION: But you also said, I take it, in your brief that even if the intervention could be sort of instituting the case, that the government really didn't complain of anything in that suit.

MR. REESE: That's right, Mr. Justice White, the petition specifically denied knowledge of the charges that Mt. Hood itself had made.

QUESTION: And so it didn't complain of anything in that suit that the petitioner in that suit might have complained of?

MR. REESE: That's right.

QUESTION: Why did it intervene?

MR. REESE: I believe in answer to the Chief Justice's question earlier I indicated that it does have a duty under its mission to participate before administrative agencies, which agencies are required by law to take into account policies of competition. I believe that is why it intervened.

QUESTION: Was it just an interested spectator and, if so, couldn't the government do this from the bleachers without joining in the action?

MR. REESE: Your Honor, the record really doesn't show much about what the government did. The only indications that we have that I can find are that the government sat there during the proceeding and cross-examined some witnesses but didn't put on any evidence of its own during that proceeding.

QUESTION: Well, that could be because they thought that the private party was doing well enough without them.

MR. REESE: That may be, we just don't know. We do know that when it filed its petition, it refused or at least declined to endorse the charges that the private party had made.

QUESTION: But your focus, I take it, is that the government as such did not institute any proceeding either to prevent or to restrain or to punish?

MR. REESE: That's right.

QUESTION: And is it on thatbasis that you distinguish the Minnesota Mining case?

MR. REESE: The Minnesota Mining case, I believe is related to a point that is almost not involved in this case. I understood the issue there was principally whether a Federal Trade Commission proceeding could satisfy the terms of section 16(i). It was, however, a proceeding brought by the FTC to prevent, restrain or punish violations of section 7 of the Clayton Act, and that requirement was therefore clearly satisfied in the Minnesota Mining case, as it is not in this one.

QUESTION: That is a point of my inquiry, that it was a government instituted --

MR. REESE: I was a little slow on the uptake there, Mr. Justice Blackmun.

Now, I have been focusing on the government's petition, as I said, and there is another reason still. The only

alternative to that is to review the entire administrative proceeding to try to determine whether the government eventually did complain of anything. We submit that that imposes a heavy burden on the parties and the courts, and it is an inherently uncertain process. If the government's position is not clear enough at the outset of the proceeding to enable it to state it in a proper complaint, the parties will have no notice that their conduct is being complained of. If the government is unable to state a complaint at the outset, how is a party to know from the way it conducts itself later during the course of the proceeding whether it is complaining of something?

Indeed, if the government is that uncertain at the outset, it is likely to change its position during the course of the proceeding, and what does one do in that case? Does tolling depend on the position the government ends up taking or does the statute start and stop with each change in the government's views?

The result of that approach in general would be that the parties would not know where they stood on the antitrust statute of limitations. But in any event, the result of that approach in this case is that Mt. Hood's claims would still be barred.

Now, the decision below is bad policy for another reason as well. It would take a very specific and limited tolling provision, an exception to the statute of limitations, and

broaden it to the point where there would be practically no statute of limitations in regulated industries. One can hardly pick up a trade regulation report without reading of some Justice Department intervention or participation before one or another of the administrative agencies, and that participation cannot fairly be distinguished from the government's neutral position to intervene in this case. In other words, if the decision below is upheld, the antitrust statute of limitations may well be found tolled by literally countless administrative proceedings that no one ever intended to prevent, restrain or punish violations of the antitrust laws.

I would say a word about Mt. Hood's alternative theory. Mr. Hoot argues in the alternative that the statute should be tolled to prevent injustice because it itself brought the ICC proceeding. Simply, that makes even less sense than the 16(i) tolling theory, and all of the good reasons for not suspending the statute under section 16(i) are even better reasons for not suspending it by a theory of equitable tolling.

First, it would be contrary to the policy proposed that Congress has sought to effect; second, it would create even greater uncertainty and unpredictability as to the circumstances and the period of tolling; but, more fundamentally, equitable tolling simply doesn't fit the facts in this case. In the first place, equitable tolling ought to depend upon the plaintiffs having been diligent, but Mt. Hood wasn't diligent in this

case. It knew of its claims in 1960. It did nothing at all about them until 1964 when it brought its ICC proceeding, and it waited almost eight years before it finally filed the complaint in this case. I submit that that is not diligence. Mt. Hood's equitable tolling theory should fail for want of equity alone.

Contrary to the impression that Mt. Hood's brief seeks to leave, there is no forfeiture or threat of forfeiture in this case. Even if Mt. Hood loses on the issues before the Court, the judgment that would be remaining in its favor would be nearly double the total amount of its actual loss as determined by the jury for the entire period from 1953 to 1973. To recover double damages is not to suffer a forfeiture.

Mt. Hood is not at all like the plaintiff in the Burnett case on which it relies, who stood to lose all remedy whatever for his injury if the statute had not been tolled. I find no excuse for Mt. Hood's failure to wait eight years to file this case.

The Court's decision in Johnston v. Railway Express Agency ought to be dispositive on this point. In any event, none of the excuses that Mt. Hood has offered has any merit. It says that it delayed filing this case because it wanted to get an injunction. But it is hard to see how that excused the delay. If Mt. Hood had really believed that it couldn't file this case sooner because it couldn't ask the federal court for

injunctive relief, then it is even harder to understand why it asked the federal court for injunctive relief when it finally did file this complaint.

Now, the doctrine of primary jurisdiction is no excuse either. Although Mt. Hood would have us believe that its failure to act was in reliance or out of respect for that doctrine, the theory is plainly an afterthought. It was not even raised in this case until after the trial, when the case had been pending for more than five years. I think the Court's decision in the Johnson case makes it clear that Mt. Hood's resort to an administrative agency cannot excuse its "failure to take the minimal steps necessary to preserve each claim independently."

In conclusion, Mt. Hood delayed filing of the case for nearly twice as long as the statute of limitations permits. It still stands to recover far more than it lost, even if it cannot persuade this Court to extend the statute of limitations. There is no reason why Mt. Hood should not be held to the statutory period that Congress has prescribed for antitrust plaintiffs. The petitioners submit that the judgment of the Court of Appeals should be reversed.

Thank you.

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

Mr. Crew.

ORAL ARGUMENT OF EUGENE C. CREW, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

Greyhound claims that the question before this Court is whether Mt. Hood should be allowed to expand the statutory period five-fold, from four to twenty years. I submit that is not the question. The question is whether the statute should be tolled for the brief three and a half-year period, December '60 to July 1964, by reason of the ICC proceedings so as to allow Mt. Hood to recover damages proven for those years that Greyhound was found to have violated the antitrust laws and to have fraudulently concealed those violations from Mt. Hood.

The lower courts held that the statute was tolled under section 16(i), and we ask this Court to affirm on that ground, and on the additional ground that this Court's equitable doctrine of tolling applies.

Both statutory and equitable tolling on the facts presented here will promote various important federal policies which may be collectively described as the orderly procedure developed by Congress and this Court for the private enforcement of the antitrust laws against defendants regulated by the Interstate Commerce Commission.

QUESTION: Mr. Crew, where do you say that the intervention of the United States fits into the language of the

statute as a proceeding instituted by the United States to prevent, restrain or punish? What did the United States do in that proceeding, what did it assert in its intervention or what did it do after the intervention to prevent, restrain or punish?

MR. CREW: Mr. Chief Justice, the government -- and I would point out that it was the Antitrust Division of the Justice Department, not another division such as the Tax Division or the Civil Rights Division -- but it was the Antiturst Division of the Justice Department that petitioned for leave to intervene in December 1964, and I submit that it is the intervention of the government at that time which constitutes the institution of a civil action within the purview of 16(i).

I point out that they must begin with the language of the statute, and that is true, but I submit that when they did intervene on that day, the Justice Department instituted a civil action on behalf of the United States as only the Justice Department could do.

QUESTION: And what relief did they ask for?

MR. CREW: Mr. Justice Marshall --

QUESTION: Or I say what, if any?

MR. CREW: Mr. Justice Marshall, the relief sought by the Justice Department -- and I believe this is a fair reading of the petition on its face alone -- was that if -- and I submit that they referred expressly, and I won't take up the Court's

time by reading the petition to the Court -- but I think a fair reading of that petition demonstrates that it was relying upon not only the sworn allegations of Mt. Hood in its verified petition, but also other evidence, and on the basis of that was telling the Interstate Commerce Commission that it had cause to suspect that an antitrust violation might have occurred, and that if the facts prove so at a hearing, that relief should be granted to prevent further violations.

Now, that is a fair reading, I submit, Mr. Justice Marshall.

QUESTION: What relief?

MR. CREW: The relief that I believe they were seeking was --

QUESTION: No, what relief were they seeking? We are talking about a document now.

MR. CREW: Yes.

QUESTION: You know, when you get to the point and wherefore or something, you know --

MR. CREW: Yes, Your Honor.

QUESTION: -- you know the part I am talking about.

MR. CREW: Yes, Your Honor.

QUESTION: It wasn't in this. It wasn't even in here.

MR. CREW: Mr. Justice, it is true that the word "relief" probably doesn't appear in the petition. But what I think is clear from a fair reading of the document is that they

were seeing relief. I would point out --

QUESTION: And the relief they were seeking was to toll the time?

MR. CREW: Pardon me, Your Honor?

QUESTION: To toll the time of the statute?

MR. CREW: Your Honor, they did toll, we do submit --

QUESTION: Yes, I say that is the relief they were asking for.

MR. CREW: Not the Justice Department, Your Honor, but that is the relief we do seek here. But I would point out that the --

QUESTION: Just to follow up on my Brother Marshall's question, first of all, apparently you acknowledge that there was no prayer for relief in the government's original petition for relief?

MR. CREW: Mr. Justice Stewart, I cannot say that. I believe that it does seek relief, and I would point out to Your Honor that, for example -- and this would be in the joint appendix, at page 39, the government stated, "If anything, the need for sharp surveillance of any abuse of the power these acquisitions have given Greyhound and for prompt action to correct any such abuse has become more important as Greyhound's encirclement of Mt. Hood has become more complete with each successive acquisition." And on the last page of the petition, at page 41 of the appendix, again the Justice Department points

out that the antitrust laws are very much involved, and that while the approvals might be exempt, predicatory conduct made possible by those acquisitions would not be -- and they state in the last paragraph -- "For if it then appears that the Commission lacks jurisdiction to dispose of Mt. Hood's complaint, in whole or in part, Mt. Hood, remitted to another forum, may find relief elsewhere illustory if it comes too late to be effective."

Now, it may not be the orthodox prayer that you see in the typical complaint, where it is at the bottom of the page, but I submit that this document within the four corners prays for relief.

QUESTION: And what relief could the Interstate Commerce Commission have given in this proceeding, what antitrust relief?

MR. CREW: The antitrust relief, Mr. Stewart, the Interstate Commerce Commission could give was the relief it gave, and that was to enter a cease and desist order which prevented Greyhound -- attempted to prevent Greyhound from continuing its predatory behavior to destroy Mt. Hood's business. And I submit, Your Honor, that that is exactly the relief that was given and it was the relief that was sought and it was granted in substantial part because the Justice Department intervened and sought it on behalf of Mt. Hood.

QUESTION: And does the Interstate Commerce Commission

have that as such, the power or the function of enforcing the antitrust laws and giving antitrust relief as such, or is it confined to simply considering antitrust laws in administering the Interstate Commerce Act?

MR. CREW: Mr. Justice Stewart, I believe that it has the power and the duty to enforce the antitrust laws and to prevent their --

QUESTION: It can't award treble damages, of course?

MR. CREW: No, of course it cannot, Mr. Stewart, but it certainly can do everything else.

QUESTION: It can enjoin action as in violation of the antitrust laws without any reference at all to the Interstate Commerce Act?

MR. CREW: I think we are talking now about what the Interstate Commerce Commission -- oh, without reference to the Interstate Commerce Act?

QUESTION: Without reference to its duties under the Interstate Commerce Act? It is a creature of the Interstate Commerce Act.

MR. CREW: That's right.

QUESTION: And its basic function is to enforce that statute.

MR. CREW: That is correct, Mr. Stewart, Mr. Justice Stewart. And I would say that the authority of the Interstate Commerce Commission to enforce the antitrust laws is statutory,

and I would refer primarily to section 5 of the Interstate Commerce Act, to section 15 U.S.C. 21 of the U.S. Code, and I would refer to the National Transportation Policy which prohibits --

QUESTION: Do you mean they would refuse to approve the acquisition?

MR. CREW: I believe so.

QUESTION: That would fall under the language of the statute that prevents?

MR. CREW: That is true, Mr. Chief Justice. I believe that -- this was a section 5 proceeding. Now if the Justice Department had intervened at that time and asked that the acquisitions be disapproved because they violated antitrust concepts, and the Interstate Commerce Commission disapproved the acquisitions, then I would submit that the Interstate Commerce Commission was enforcing the antitrust laws by preventing a violation at that time.

QUESTION: Mr. Crew, in your -- you say you find somewhere implied in the government's pleading in this case a prayer for relief.

MR. CREW: Yes, Mr. Justice.

QUESTION: Do you think that implied prayer sought relief over and above that which Mt. Hood sought?

MR. CREW: In terms of the conduct that the Justice Department wanted to prevent, they were coextensive. And in

terms of the legal standards to be applied, I believe that the Justice Department's intervention brought the antitrust laws to bear, but I would have to say that they are coextensive there, too, because the Interstate Commerce Commission has a duty to enforce the antitrust laws, whether the Justice Department intervened or not.

So I submit that, although Mt. Hood's petition did not expressly refer to the antitrust laws, that the relief that Mt. Hood was seeking was a prevention of destructive competition and violation of those laws.

QUESTION: And the government sought no more in its prayer and intervention is implied --

MR. CREW: I believe I would say hat is correct, that they both sought the prevention of predatory conduct in violation of the antitrust laws.--

QUESTION: Don't you think that --

MR. CREW: -- and the Interstate Commerce Act, Mr. Justice Rehnquist.

QUESTION: Don't you think the kind of suit that the tolling provision is talking about at least requires the United States to make some assertions as to fact?

MR. CREW: Mr. Justice White, I believe that the statute requires reasonable notice to the party against whom it is --

QUESTION: I know, but the United States in its

petition said that it had no idea whether Mt. Hood's allegations were true or false and took no position on whether they were true or false.

MR. CREW: Mr. Justice White, first, I believe that a position has to be taken, but I would add, if you will permit, by stating that the Justice Department clearly did take a position and its position was to align with Mt. Hood and against Greyhound from the very outset. I believe that it was stating that --

QUESTION: Well, where did it ever make itself take any position with respect to the facts?

MR. CREW: Well, Mr. Justice White, I would start with the petition itself and --

QUESTION: I know, but it says we have no way of knowing whether those matters which Greyhound denies are true or false.

MR. CREW: All right. Mr. Justice White, it is correct that the Justice Department stated that, but I don't see really any difference between that and any complaint that is filed in a federal court. The government was referring to the sworn allegations of Mt. Hood and stated, "While we have no way of knowing the facts, we have cause to suspect" --

QUESTION: The government itself then was not undertaking to prove these facts --

MR. CREW: Well, I submit --

QUESTION: -- in its own lawsuit?

MR. CREW: Not in the same respect that it may be in a complaint, but I do believe that it does --

QUESTION: Did it participate in the hearing and call witnesses?

MR. CREW: Yes, it did, Mr. White, it did cross-examine witnesses --

QUESTION: I know, but did it call its own?

MR. CREW: No, it did not but it cross-examined the witnesses that were the parties to the case, that is it examined Greyhound witnesses who were already there and cross-examined them.

QUESTION: Did it submit suggested findings to the Hearing Officer?

MR. CREW: Mr. Justice White, I believe that it did and I would refer --

QUESTION: Do you believe or do you know?

MR. CREW: Well, I believe that I know, but I would refer to the Interstate Commerce Commission decision and particularly --

QUESTION: Well, wouldn't they be in the record filed here if they did submit some suggestions?

MR. CREW: Mr. Justice White, we do not have in the record below the briefs that were filed, and frankly, if I had thought of it, they would be in the record before this Court now.

But what is in the record insofar as this Court's judicial notice is concerned is the published decision of the Interstate Commerce Commission in 104 MCC 449, and there there are two or three references to relief sought by the Justice Department and complaints made by the Justice Department throughout these proceedings, including examination of witnesses, the filing of briefs. Greyhound filed exceptions to the Interstate Commerce Commission order and the Justice Department, along with Mt. Hood, filed a reply to those exceptions, so it was stating opposition to Greyhound at that time, and at one point in the --

QUESTION: Well, at some point in the proceeding you are saying the United States took a solid position with respect to the facts of the record --

MR. CREW: Yes, Mr. Justice.

QUESTION: -- and as to what relief should be granted.

MR. CREW: Yes, Mr. Justice White.

QUESTION: Whether their complaint and intervention could be so characterized or not?

MR. CREW: I think at that point that you have asked about is the filing of the petition. I believe that they took the position then, and the subsequent events during the proceedings substantiate it and corroborate it, that that was their position from the outset.

Mr. Justice White, I would say, and Your Honors, I would say that when the Justice Department filed this petition,

I believe it was saying no more than whatany complainant in a court action could in good-faith say, and that is we don't have the facts yet, but we have cause to suspect and we need a hearing, and if that hearing bears out those facts, then we want relief.

QUESTION: Mr. Crew, do you know of any case where somebody came in and said I want to be a party and the reason I want to be a party is I agree with the other party, that is all? Don't you have to show some basis to be a party, an independent basis?

MR. CREW: Mr. Justice Marshall, I believe --

QUESTION: Don't you have to ask for something and allege something?

MR. CREW: -- I think that is true, but I think that that is exactly what --

QUESTION: Isn't this an amicus brief and that is all?

MR. CREW: I would say not, Mr. Justice Marshall.

QUESTION: All it says is I agree with what Mt. Hood might be able to prove, but they don't say I agree with what they can prove.

MR. CREW: Mr. Justice Marshall, that is precisely what any plaintiff will say when he files an allegation on information or belief, is that this is what I believe I will be able to prove.

QUESTION: They don't say information believed any

place in here.

MR. CREW: Well, they don't use those magic words, Mr. Justice Marshall, but I do believe --

QUESTION: Those aren't magic words, they are kind of necessary words.

MR. CREW: Well, Mr. Justice Marshall, I believe that if it is required that those words be here --

QUESTION: No, I think they want to intervene as a party.

MR. CREW: That is correct, sir.

QUESTION: And in order to intervene as a party, I understood the general rule was you had to allege enough on your own to be a party and not to ride on somebody else's "coattails."

MR. CREW: Mr. Justice Marshall, I believe that the law concerning intervention in our federal courts, for example, indicates that an intervenor, once that leave is granted, becomes a party no less than a plaintiff thereafter.

QUESTION: After he says which side he is on.

MR. CREW: That is correct.

QUESTION: But he didn't say here -- they don't know which side they are on yet.

MR. CREW: Well, Your Honor, I believe that it is quite clear that the Justice Department was aligned with Mt. Hood and against Greyhound, and I would point out that the sole purpose of the Justice Department's --

QUESTION: Now, I am getting to it, they were against Greyhound.

MR. CREW: That is correct, but, Your Honor --

QUESTION: They weren't necessarily with Mt. Hood.

MR. CREW: Your Honor, I would point out first that the Interstate Commerce Commission in this decision stated, and this wasn't mentioned in our brief so I would like to point it out here, at page 457 of the ICC report that the Department of Justice urges that petitioners' -- that is Mt. Hood's -- charges be sustained in full and that respondent Greyhound also be found to be in continuing violation of section 216, referring to the Interstate Commerce Act. It stresses respondent Greyhound's arrogant attitude, and doubts that a one-year policing period is long enough and suggests five years or even indefinite surveillance.

Now, that surely demonstrates that the Justice Department was not a mere neutral petitioner or an amicus. It was coming in as a party, an intervenor but a party to join sides with Mt. Hood. But I don't believe that is --

QUESTION: Well, am I free to read the record and find out for myself?

MR. CREW: Pardon, Mr. Justice?

QUESTION: Am I free to read the record and find out for myself?

MR. CREW: I believe that would be so, but --

QUESTION: I've got news for you, I am going to do it.

MR. CREW: Well, I not submitting that, Mr. Justice. What I am saying is that the decision of the ICC to go with the petition of the government indicate beyond per adventure that the Justice Department was intervened to prevent a violation of the antitrust laws and was seeking relief to prevent a violation if the evidence at the hearing demonstrated such a violation.

QUESTION: Mr. Crew, the part you read doesn't refer to the antitrust laws at all.

MR. CREW: The part I read does not refer to the antitrust laws, but it does state that Mt. Hood's charges should be sustained in full --

QUESTION: A violation of section 216, yes.

MR. CREW: Well, in addition they referred to 216. But the Interstate Commerce Commission also referred expressly to the antitrust laws, as did the Chicago Federal Court in affirming in, and stated that the ICC was in granting that relief applying the antitrust laws to Greyhound's conduct.

QUESTION: Mr. Crew, going back for a moment to your response to my Brother Marshall's question as to the status of an intervenor once it gets in, turning to the appendix, at page 43, which is the ICC's order to allow intervention, the second paragraph of that order says that intervention is allowed but "the permission to intervene herein granted shall not be

construed to allow intervenors to introduce evidence which will unduly broaden the issues raised in this proceeding." That is a somewhat limited intervention status that the ICC granted to the government, isn't it?

MR. CREW: Mr. Justice Rehnquist, you are correct that it did not allow any broadening of the issues, but I think that helps support the position that the issues concerning antitrust laws were already present. I believe that any time an intervenor intervenes that they usually do intervene on the basis of the issues drawn at that time. And I believe that the antitrust issues were already a part of the proceedings.

QUESTION: Okay. But then take your position in this case which is that the statute is tolled while the government prosecutes its case against the wrong-doer under the antitrust laws, and here you are seeking to invoke that general rule on the basis of a proceeding which was begun by the private plaintiff who initiated the proceedings before the Commission, and the government simply came in to say we agree with the private plaintiff. Isn't that standing the thing on its head?

MR. CREW: Well, Mr. Justice Rehnquist, I don't believe it is. First, when Mt. Hood filed its petition, I submit that it was seeking to prevent a violation of the antitrust laws because it was being destroyed by predatory conduct which violates those laws, no other law. And when the Justice Department -- and the ICC has the duty to enforce those laws, and the Justice

Department intervened to insure that the ICC enforced those laws. So I think --

QUESTION: If they thought it was being destroyed by anti-competitive conduct violative of the antitrust laws when it brought this action before the ICC, wasn't it also under a duty if it intended to prosecute a damages action in federal court to move within the time provided by the statute of limitations?

MR. CREW: Are you referring to the duty of Mt. Hood to file an action or a duty to --

QUESTION: Yes.

MR. CREW: To file a court action?

QUESTION: Yes.

MR. CREW: Your Honor, that really does get to the alternative ground for tolling. I believe that if we are going to refer to Mt. Hood's position, I would like to address that question which is under equitable tolling, if I may. I would in response to your question state that Mt. Hood should not have filed a court action at the time that it filed the Interstate Commerce Commission proceedings because to do so would have been a futile act, an idle act and would be discouraged by the doctrine of primary jurisdiction.

First, Mt. Hood, in terms of injunctive relief, had no forum to go to save the Interstate Commerce Commission. It is the only place it could go. And having gone there, I would

submit -- and I would like to address that if I may now in the time remaining -- under equitable tolling --

QUESTION: How about damages, however?

MR. CREW: Pardon?

QUESTION: How about damages? You are free to seek damages --

MR. CREW: Yes, Your Honor, you are free to seek damages but by reason of the doctrine of eequitable tolling, under the doctrine of equitable tolling and the doctrine of primary jurisdiction, I believe that Mt. Hood was effectively and legally precluded from prosecuting an action to recover damages until the Interstate Commerce Commission had first passed upon the --

QUESTION: The United States of America could at any time have filed an antitrust suit in the United States District Court --

MR. CREW: Mr. Justice --

QUESTION: -- which would be the paradigm example of the application of 69.

MR. CREW: Mr. Justice Stewart, I believe that it would be even more compelling in that case because the Interstate Commerce Commission was already considering prospective relief with respect to Mt. Hood's petition. At that point in time, had the Justice Department filed a court action for prospective relief with respect to the same conduct, I think

that a dismissal would have been inevitable under Far East and other cases.

QUESTION: Is it not correct that sometimes the Antitrust Division simply sits back and waits for the facts to develop and then makes a decision whether they will commence proceedings independently?

MR. CREW: Well, that is sort of the reverse of what I think the laws contemplate, but they sometimes do. And I think that in this case, had Mt. Hood filed as it did that the Justice Department had two choices, either to sit back and wait until Mt. Hood had resolved the issue in the agency or filed an agency proceeding or intervene in the agency proceeding, and among its alternatives I submit under the law of this country was not to file a court action in the face of the ICC proceeding, because I think it would have created a direct and immediate conflict between the two forums.

QUESTION: So you don't agree with the implication of my question that the government was free at any time, despite the pendency of these ICC proceedings, to file an antitrust action? Or in any event, if it filed one, you say it would have been deferred and delayed --

MR. CREW: It would have been deferred and delayed and ineffectual because of the doctrine of primary jurisdiction that would be invoked in that instance.

QUESTION: Do you think this was the government's only

alternative?

MR. CREW: I believe that this was the government's only alternative, mainly to go to the ICC. I think it was literally driven there by the law. I think that it had to go to the ICC whether it be to file a complaint and consolidated with the other complaint or to file a petition to intervene. And I think what it did was the most expeditious thing that it could do.

QUESTION: When you talk about expeditious, one day later and they wouldn't have had any problem, would they?

MR. CREW: Well, I think that is correct, and we are saved by a day, that is correct, Mr. Justice Marshall, under statutory authority. But I would like to, if I may, address equitable tolling in the time left.

Your Honors, we submit that without statutory tolling and without section 16(i), this Court has declared that a federal statute should be tolled if it will promote important federal policies without frustrating the statute of limitations policy of repose.

We believe that in light of the tolling principle that is enunciated in the Burnett case, in American Pipe, and most recently in the Johnson case, that tolling should at least apply if the following factors are present, and we submit these factors were present here:

Firstly, that a plaintiff's prior resort to an agency

having primary jurisdiction of the conduct alleged in a subsequent antitrust complaint is necessary to the maintenance and prosecution of his antitrust claim.

Secondly, that a plaintiff is required to obtain his injunctive remedy --

QUESTION: Why was that necessary in this case? Why couldn't you have just filed suit in December, without ever going into the ICC except you wanted a different kind of relief there?

MR. CREW: Mr. Justice Stevens, the answer to that question, I submit, is the doctrine of primary jurisdiction which is particularly applicable when an antitrust exemption is available in this case and --

QUESTION: An antitrust exemption went to the acquisitions, and the basis of your recovery of damages assumes that the acquisitions were immune from the antitrust clause, as I understand it.

MR. CREW: Well, Mr. Justice Stevens, that is correct. However, that did not prevent Greyhound from asserting that the antitrust exemption applied and they asserted that right up to this Court.

QUESTION: But they made an improper assertion, they are wrong on that. But you could, I believe, have filed suit in 1964 for damages for the preceding period if you had elected or wanted to do so.

MR. CREW: In a technical sense, that is correct. But I submit that by virtue of the law of primary jurisdiction, that case would have been dismissed in 1964.

QUESTION: Not if you hadn't also been pros uting an ICC proceeding which you didn't have to do.

MR. CREW: Well, Mr. Justice --

QUESTION: I can understand why you did it. It is good representation of your client, but you at least had the option. If you wanted to, you could have said let's take our damages for past action and file a supplemental complaint five years from now to keep doing the same sort of thing.

MR. CREW: But Mt. Hood, I submit, Your Honor, was powerless, legally powerless to file a damage action in 1964 by virtue of the doctrine of primary jurisdiction. It could have filed for damages, and I submit that under the law of Far East and Cunard and Carnation and Ricci and other cases of this Court that started from the turn of the century, that case would have been dismissed.

QUESTION: Well, I take it you have cited in your brief the cases you think would require a dismissal, rather than just a stay and a reference and -- why wouldn't the Distirct Court, if you filed a suit for damages, simply say, well, under primary jurisdiction you must go over to the Commission, and if you have a favorable judgment there, come back? Why wouldn't they --

MR. CREW: That is a possibility.

QUESTION: Why do you tell us that there would have to be a dismissal of the damages action?

MR. CREW: Well, Mr. Justice White, I believe in answer to that question that we would have to assess what Mt. Hood did in 1964, the question is whether or not Mt. Hood acted reasonably at that time, and I believe that he should have done the same thing today. But what I am stressing here is thatin 1964, the law of this country under primary jurisdiction indicated that his case would have been dismissed, not stayed. And I would point out to Your Honors that the Carnation decision, which was reversed by this Court in 1966 to substitute a stay for dismissal, but the Ninth Circuit in 1964 had stated that such a case on similar facts to this case must be dismissed because the District Court lacked jurisdiction. So I think that there was enough law to --

QUESTION: Lacked jurisdiction of what?

MR. CREW: Lack of jurisdiction to hear the antitrust claim --

QUESTION: Was that a damages action?

MR. CREW: Yes, the Carnation was a damage action, yes, Your Honor. The lack of jurisdiction to hear the antitrust claim until the Interstate Commerce Commission had first resolved the immunity question and had a chance to pass upon the matter under this salutary doctrine of primary jurisdiction.

Now, in addition to the requirement of primary jurisdiction as an element, I was stating that the second factor which is present here too is that the plaintiff is required to obtain his injunctive remedy in one forum and his damage remedy in another forum and is legally precluded from seeking both remedies in the same forum. Now, that was clearly the case here. And thirdly, and this is one more factor which should be present and was present here, that despite this legal bifurcation of remedies between two forums, the plaintiff's claim is factually and legally identical so as to satisfy the requirement of notice stated in the Johnson case and thereby avoid the "evils against which the statute of limitations is designed to protect."

With respect to that factor, I would point out that the claim here presented in both the ICC and the court was factually the same, and I submit that it was legally the same, that only the remedies were different, and that is due to the bifurcation in the law confronting Mt. Hood. Mt. Hood invoked the ICC's jurisdiction to apply the antitrust laws to Greyhound's conduct for injunctive relief purposes and then before the court apply the antitrust laws for purposes of damages.

Now, Your Honors, the Johnson decision which I think is an important decision declared that the statute of limitations may be tolled if there is "a federal body of procedural law which denotes interdependency between two proceedings and a

positive preference that one be undertaken before the other." I submit that federal policy is present here.

QUESTION: Mr. Crew, one question. When did the government get out of this case?

MR. CREW: The government is there today, Mr. Justice Marshall.

QUESTION: I am looking very carefully and I can't find it.

MR. CREW: Well, by that I am referring to --

QUESTION: I couldn't even find it in the Court of Appeals.

MR. CREW: The which, Your Honor?

QUESTION: The heading in the Court of Appeals, the caption.

MR. CREW: They are not in this case but in the Interstate Commerce Commission proceeding, the Justice Department has never gotten out.

QUESTION: But when did they get out of this case that is here now?

MR. CREW: Actually the Justice Department did intervene in this case at an early stage of the proceedings for discovery purposes and conducted discovery in this case to be used in the contempt proceedings that took place in Chicago.

Now, with respect to the federal policy or federal body of procedural law which the Johnson case requires, I would

point out that there are two. First, I would like to consider the federal policy expressed in 15 U.S.C. 26, the injunction remedy under the antitrust laws. Despite the importance of this remedy and the obvious preference that a plaintiff try to save his business first in mitigation of his damages, that remedy was not available to Mt. Hood in the courts. When Mt. Hood was about to go under as a result of Greyhound's conduct in 1964, it went to the only forum that was available to it to save its business.

MR. CHIEF JUSTICE BURGER: Your time is expired but we will extend it two minutes and give your colleague the same.

MR. CREW: Thank you, Your Honor.

Now, that was not a preference, as mentioned by Johnson, but it was a congressional mandate. In that respect, Your Honors, Mt. Hood differed from the plaintiffs in Johnson. Johnson's plaintiffs could have gotten full relief from the federal court if he wished, but he exercised his valuable option not to do so. Mt. Hood had no such option here. The doctrine of primary jurisdiction also is a federal doctrine which directed Mt. Hood to go to the ICC and it is particularly applicable here because of antitrust exemptions claimed.

Now, Your Honors, I would say this, that the doctrine of primary jurisdiction has always been invoked by defendants, never by plaintiffs, to protect defendants against premature lawsuits. I believe that the primary jurisdiction doctrine should now be completed and that the statute of limitations

should be tolled for those plaintiffs who act in accordance with it. Judicial economy will be served, just as notions of litigative efficiency were served by tolling the statute in American Pipe.

And on the point of equities, counsel for Greyhound stated that we do not have a shred of equity, that Mt. Hood was not diligent, and that our damages should be reduced from treble to double damages to avoid a windfall. First, Congress said treble damages, it did not say double damages. Greyhound cannot use this as a rationalization to deny tolling. Secondly, Greyhound's claim regarding the equities requires that the equities be balanced and compared.

Greyhound was found by the jury to have fraudulently concealed its conduct for eleven years, from 1953 to 1964. Now, with respect to Mt. Hood's behavior, Greyhound states that you weren't diligent, you should have filed your action in 1961, in 1962 or 1963. I submit --

MR. CHIEF JUSTICE BURGER: Your time is expired now, Mr. Crew.

MR. CREW: Your Honor, I would say that that is a false issue in that instance because whether or not they were diligent then is irrelevant to the question of whether tolling occurred later. Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Mr. Reese.

ORAL ARGUMENT OF JOHN R. REESE, ESQ.,

ON BEHALF OF THE PETITIONERS - REBUTTAL

MR. REESE: Your Honors, I only wanted to take up about two points. There was some talk here during counsel's presentation about the United States being aligned with Mt. Hood in the ICC proceeding. Counsel made the statement that the United States was driven to the ICC. There is a bit of evidence that hasn't appeared in the brief, and I would like to call it to the Court's attention at this time.

In 1964, prior to the time that it filed its ICC proceeding, Mt. Hood's President, Mr. Niskanen, went to the Department of Justice and asked it to take antitrust enforcement action against Greyhound. It is perfectly clear that the Department of Justice determined not to do that.

QUESTION: That is in the record, I take it?

MR. REESE: That is in the record, at transcript 3772 to 3774. There is another bit of evidence in the record, this is at clerk's transcript record 1006, and that is the reply Greyhound filed to Mt. Hood's petition in the ICC, and that notes that Mt. Hood had gone to the government and made some of its charges and the government had informed Greyhound that it found at least some of those charges to be without substantiation.

In other words, even prior to the time that Mt. Hood filed its ICC proceeding, it appeared that it had sought antitrust enforcement relief from the government and that was not

forthcoming. The government certainly did subsequently intervene. It is not at all clear that it was aligned with Mt. Hood, certainly not --

QUESTION: Do you suggest that it was with Greyhound?

MR. REESE: No, Mr. Chief Justice, I can't make that claim.

QUESTION: Your colleague, of course, makes the point that there would have been little or no point for the government to file an antitrust action in a Federal District Court during the pendency of this ICC proceeding, because that action would simply have been delayed and the court would have deferred to the administrative agency until the completion of those administrative proceedings.

MR. REESE: Well, I would like to say two things to that. First, the point that I have been trying to --

QUESTION: Perhaps I misunderstood your colleague, but did you understand him to say something along those lines?

MR. REESE: I understaood him to say that. The point I am making now is that the government was asked prior to the time there was any ICC proceeding to bring an antitrust case and it didn't do it, and that is at 3772 to 3774 of the transcript.

QUESTION: Do you think that undermines the possibility of their intervention being construed as the institution of a proceeding?

MR. REESE: Yes, and I think it also highlights the

distinction between a normal antitrust enforcement case and this neutral petition for leave to intervene before the ICC.

QUESTION: You say they could have done it at that time. What do you say the government could have done at that time to prevent or restrain an antitrust violation?

MR. REESE: It could have filed a civil action for injunctive relief.

QUESTION: And what would the court have done with that while the ICC proceeding was pending?

MR. REESE: I am not in a position to say, Your Honor. I think nobody is.

QUESTION: No, but from a practical matter, you know they wouldn't have proceeded, don't you?

MR. REESE: Your Honor, I find the decisions on primary jurisdiction to be less than clear. For example, one would have thought that in the Otter Tail case, Mr. Justice Stewart, a reference to the agency might have occurred. I don't think the answer can be predicted with any clarity, and I think that the position of relying upon primary jurisdiction from the position of hindsight in order to determine whether tolling has occurred is a very hazardous process.

QUESTION: At least in any event if the government had filed the suit, at least it would have been then been taking a position and making a claim.

MR. REESE: Yes.

QUESTION: And I take it that you don't say that the united states didn't take the position before the ICC proceedings were over?

MR. REESE: Before, the United States --

QUESTION: And if they had done at the time of their intervention complaint what they later did in the proceeding, what would you have said then?

MR. REESE: It would still be an action to enforce not the antitrust laws but rather section 5 of the Interstate Commerce Act.

QUESTION: And it wouldn't have been a civil action to enforce the antitrust laws?

MR. REESE: No. I think I have had my say and I thank the Court for its attention.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 11:08 o'clock a.m., the case in the above-entitled matter was submitted.]

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