ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1271

TITLE FALLS CITY INDUSTRIES, INC., Petitioner
v.
VANCO BEVERAGE, INC.

PLACE Washington, D. C.

DATE October 13, 1982

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IN THE SUPREME COURT OF THE UNITED STATES

FALLS CITY INDUSTRIES, INC.,

Petitioner

v. No. 81-1271

VANCO BEVERAGE, INC.

Washington, D.C.

Wednesday, October 13, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

HOWARD ADLER, JR., ESQ., Washington, D.C.; on behalf of the Petitioner.

STEPHEN M. SHAPIRO, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; as amicus curiae.

JOHN T. CUSACK, ESQ., Chicago, Illinois; on behalf of the Respondent.

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C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Adler, you may now proceed whenever you're ready in Falls City Industries against Vanco Beverage.

ORAL ARGUMENT OF HOWARD ADLER, JR., ESQ.,

ON BEHALF OF THE PETITIONER

MR. ADLER: Thank you, Mr. Chief Justice, and may it please the Court:

We are asking the Court to reverse a judgment of the Court of Appeals that upheld a district court judgment finding that Falls City had violated the Robinson-Patman Act in its sales of beer to the respondent Vanco, which was a distributor of Falls City and other beers in Evansville, Indiana.

It is our position, and the United States in the Federal Trade Commission agreed, that the lower courts applied a legally erroneous interpretation of Section 2(b) of the Robinson-Patman Act in rejecting Falls City's good faith meeting competition defense.

We also contend that the lower courts misapprehended this Court's Morton Salt decision and applied an overly lenient test of competitive injury under Section 2(a) of the act.

I expect, unless there are questions, to rest on our brief on the Section 2(a) competitive injury

point, and in the time I have in oral argument to address the meeting competition issue.

QUESTION: Well, I do have a question about that, counsel. Do you agree there's one market in this case, or do you think there are two?

MR. ADLER: I think there -- I think the court erred in finding a single market, but I think at the posture of the case in this Court there was a failure to prove competitive injury, even assuming a single market.

QUESTION: Well, do you think the question whether there is one or two markets is relevant to the competitive injury issue?

MR. ADLER: Oh, I think it's a very important issue, and if -- if there were not a single market -- that is, if the wholesalers in the two markets were not in competition with each other -- these would not be actionable, discriminatory sales under Section 2(a). But even to some degree they are in competition with each other, there are still many other matters that the plaintiff would have to prove regarding causal connection between the price differential and the kind of injury to competition and the kind of business injury that is actionable.

QUESTION: Well, Mr. Adler, I guess both the district court found one market and the Court of Appeals

affirmed. Is that a -- whether or not there's one or two markets, is that a question of fact or law?

MR. ADLER: I think that is somewhat of a mixed question. Our problem with the 2(a) case is that the court, both courts, and particularly most explicitly the Court of Appeals, articulated a standard of injury based on a misapprehension of Morton Salt under which injury was virtually presumed. And so it didn't make the kind of careful analysis of market factors.

QUESTION: But if there were two markets here there wouldn't be any Robinson --

MR. ADLER: There would be no Robinson-Patman.

QUESTION: No. Then that would be the end of the case, wouldn't it?

MR. ADLER: And that would certainly be -- that would be one way the case could have ended and should have ended.

QUESTION: Well, if that's so, I don't understand why you don't argue the question of whether there are one or two markets. If it's a question of law, and we may, notwithstanding the current finding --

MR. ADLER: Well, I think there are many factual components in that, and I think in our posture --

QUESTION: Well, you're not willing to argue that there are two markets.

MR. ADLER: I'm not asking this Court to delve into the record to second-guess that determination by the lower courts.

QUESTION: You didn't address it in your petition either, did you?

MR. ADLER: Only as part of the whole complex of factors that the court failed adequately to consider because of its simplistic view of what's required on proof of injury under 2(a). Had the lower courts done as this Court said in Standard Oil and made a real appraisal of competitive facts, we would have prevailed on the market issue; we would have prevailed on all kinds of causation issue. And on 2(a) I think realistically the courts, lower courts, Seventh Circuit, should be instructed that they cannot presume injury and that they should make a searching analysis of the fact to see whether the requisite injury is shown.

The courts -- the Morton Salt, we have no objection to it per se, but we think it is -- has been misapplied. The standards are too lenient. The courts find injury, find single markets, find effects on competition without the requisite analysis of the competitive facts, and that is made in our brief.

I would like to address the meeting competition issue which presupposes that there was a

prima facie case of injury. We don't think that there was, but assuming for the purpose of argument that there was a prima facie case of injury, we believe that the lower courts erred -- and this is strictly a matter of law -- in the legal standard, in the things that they thought were required in order to establish a good faith meeting competition defense.

The Robinson-Patman --

QUESTION: May I just ask one other case? Then your submission is that we should assume for purposes of analyzing the good faith defense that the law required as a prima facie matter your client to charge the same price in Kentucky and Indiana.

MR. ADLER: No, sir. No, sir.

QUESTION: Well, then, how will we get to the 2(b) defense?

Don't you assume a violation first and then say we can defend against --

MR. ADLER: I assume a violation -- I assume -- for purposes of arguing the good faith meeting competition --

QUESTION: Correct. That's what I mean.

MR. ADLER: I assume a violation, which the Court said in Standard Oil. Even assuming a prima facie violation, this Court --

QUESTION: Which means that you assume you were under a duty to charge the same price in Kentucky and Indiana.

QUESTION: Except for the --

MR. ADLER: For purposes of the -- for the purpose of the 2(b) --

QUESTION: Correct.

MR. ADLER: -- Argument.

QUESTION: Except for -- unless you can defend that under 2(b).

MR. ADLER: Yes. The sole question on 2(b) is whether the different price, even though assuming for analytical purposes that it created a prima facie violation --

QUESTION: Right. You said you don't argue that today. You're going to assume that.

MR. ADLER: I'm going to assume that for purposes of the Section 2(b) argument.

QUESTION: Right. Which, in turn, is all I'm suggesting. You are therefore assuming for the purpose of the argument you're about to make --

MR. ADLER: Yes, sir.

QUESTION: -- That you are under a duty, a statutory duty, to charge the same price in Kentucky and Indiana.

MR. ADLER: Yes. Unless we are in good faith --

QUESTION: Right.

MR. ADLER: -- Meeting lower prices of competition.

This whole matter arose because of an industrywide practice of not only Falls City but all brewers of charging different prices to their distributors in different states. Falls City followed that practice. Vanco's other suppliers followed that practice. All brewers did. And there's no dispute on this. The court expressly found that other brewers had different prices for their distributors in the Kentucky portion of the relevant market that were lower than the prices they had in Indiana.

Faced with that industrywide situation, the question is what practical alternatives did Falls City have. The district court said it should have eliminated the competition -- the discrimination by either raising the price or lowering the price; that is, raising its price -- excuse me -- lowering the price in Indiana to the Kentucky level or else raising the Kentucky price so that it would be equal to the Indiana price.

This was not -- these are not really workable alternatives. This was not anything that any other

brewer did. It would have meant because Indiana law requires all wholesalers to be charged the same price that Falls City would have had to undercut, underprice below its competitors throughout the state of Indiana, not just to Vanco. And Falls City president testified that would be economically disadvantageous, and there is no obligation to price -- in a free market system to price below your competition.

The alternative of pricing in Kentucky at the higher Indiana level would, of course, have put Falls City above its competition, and this is precisely what we believe Section 2(b) is intended to avoid -- the problem of a competitor being forced to price above the competition, above the price level of its competition.

Judge Schweigert in his dissent found a much better answer: charge -- for Falls City -- charge the Indiana price, which was a free market normal price, charge the lower price in Kentucky because that was necessary to beat the competition there; and he said that's the essence of a good faith meeting of competition defense.

I think that's in line with what this Court has repeatedly said with regard to Section 2(b), that it's a pragmatic -- that good faith is a pragmatic and flexible concept and so forth. And the pragmatic and

sensible approach here was for Falls City to do what it did, follow the Indiana price, follow the Kentucky price, be competitive in both areas with the brands that it followed which were the nonpremium, popular-priced type of brands, which indeed it followed through market information and the like, as was abundantly testified to during the trial.

Vanco now contends that the good faith meeting of competition question was, I quote, "a pure question of fact." But in the Court of Appeals it argued to the court extensively, about five pages of its brief, under the heading that the proffered defense was contrary to settled law.

And it argued to the court two propositions: Section 2(b) does not apply unless there is customer-by-customer pricing; that the use of a price system is not meeting competition as contemplated by 2(b).

It also argued that the meeting of competition defense depends upon a lowering of prices; that you are not meeting competition if you are unable to raise prices because of competition; there must be an actual price decrease.

We submit that there's no difference in the law or in logic or in economics or anything else between

lowering a price to meet competition and being unable to raise a price, as Falls City was unable to raise its Kentucky price because had it raised it would not have been competitive.

The Court of Appeals accepted Vanco's legal argument. Its rejection of the 2(b) defense proffered by Falls City rested on two pivotal and we believe clearly erroneous legal propositions. One is that Section 2(b) does not justify price differences that result merely from the adoption of a competitor's discriminatory pricing structure; that the act places emphasis on individual situations and doesn't apply to the adoption of an overall pricing structure.

Secondly -- the second proposition that the court articulated was that the -- 2(b) didn't apply because the discriminatory pricing resulted not from -- from price increases in Indiana, not from price decreases; and that there was nothing in the record to show that Falls City had a price structure and then reduced its prices -- this is the court's word -- reduced its prices where necessary to defend against competition.

So that contrary to what Vanco has said, the rejection of the 2(b) defense rested clearly on two legal propositions, both of which are erroneous, both of

which depart from past interpretations of 2(b) by this Court, both of which are antithetical to the notion that you should accommodate the Robinson-Patman Act with other goals of antitrust, the procompetitive goals. And it resulted in an interpretation that prevented Falls City and would prevent others from being competitive, i.e., maintaining its lower competitive price in Kentucky.

QUESTION: Mr. Adler, did the court not also find as a matter of fact that your client raised its prices in Indiana not for competitive reasons but for other reasons, and what do we do with a factual finding like that?

MR. ADLER: The only factual finding that could be made is that of course Falls City raised its prices in Indiana when competition permitted. The testimony on this -- and there's no two ways about it, and there's no finding to the contrary -- was that Falls City was a price follower. It was a small, struggling brewer. It was driven out of business. It went out of business in 1978 as have, as you know, many other brewers. And it was a price follower, a price taker. And that is clear in the record. And when competition went up in Indiana, it went up with the -- when competition permitted. Competition didn't permit it to

go up in Kentucky, and it stayed down. And that's how the difference arose.

And one can look at it and say okay, the differential arose because of raising prices in Indiana. The differential arose because it was faced with different competitive circumstances in the two areas -- lower prices in Kentucky, higher pricers in Indiana. It was a price taker and price follower in both circumstances.

Vanco here now is making a big attack on the good faith and the reasonableness of Falls City's pricing practices. It makes, as we showed in our reply brief, a rather minimal attempt to defend the legal theories which it successfully persuaded the Court of Appeals to adopt, and it seeks now to, for example, cast a taint of illegality on Falls City's pricing saying that it was engaged in parallel pricing, collusive pricing, noncompetitive pricing and the like.

But the court expressly found that there was no agreement on price fixing; it rejected the claim of price fixing. And those allegations I think are totally, totally without legal significance. Falls City on this record was following free market, lawful, legitimate competitive prices in all of its markets.

There are other points made by the respondent

regarding Falls City's pricing. They say, for example, that it didn't show anything about the competitive analysis that led it to adopt lower prices in Kentucky. But the record is unequivocal that Falls City got pricing information through its sales and from distributors and others; that it made every reasonable effort that a business in this position would make to keep abreast of competitive conditions, and using that information it set these prices.

I would like to reserve the balance of my time for rebuttal.

CHIEF JUSTICE BURGER: Mr. Shapiro.

QUESTION: Mr. Shapiro, before you start, would you mind, do you think it's open to the Court to address the question whether there are one or two markets?

MR. ADLER: I think it's open the Court, but it isn't the question presented in the petition, and it hasn't been briefed by the parties, although this Court certainly could entertain that issue if it were disposed to do so.

ORAL ARGUMENT OF STEPHEN M. SHAPIRO, ESQ.,
AS AMICUS CURIAE

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

The Department of Justice and the Federal Trade Commission agree with Petitioner that the Seventh Circuit used the wrong legal standard when it rejected the meeting competition defense raised in this case. We therefore submit that the decision of the Court of Appeals is in error and should be reversed.

Both the Seventh Circuit and the District Court believe that the meeting competition defense was unavailable because the price difference here resulted from uneven price increases rather than some identifiable price decrease. The courts below thought it necessary to find some lowering of prices in the state of Kentucky before the defense could be sustained.

This holding finds no support in the literal language of the statute. Section 2(b) only requires the seller to show that his lower price was made in good faith to meet competition, not that he lowered his price compared to some pre-existing standard.

In our view, the Court of Appeals' departure from the statute's literal requirements threatens to undermine an important statutory purpose. During periods of general inflation price competition often may take the form of moderate price increases rather than outright price cuts. In this situation the lower price of the seller, even though it is the end product of a

moderate price increase, may well be a form of competitive self-defense of the very kind which Congress meant to protect.

In addition, if the law really did require what the Court of Appeals said, then sellers like Falls City would be enforced to engage in costly and artificial conduct such as hiking all of their prices to a particular level for a period of time and then cutting selectively certain prices thereafter. This would serve no useful purpose and would only aggravate the problem of inflation in our economy.

The district court also was of the view that the meeting competition defense requires proof that prices were adjusted on a customer-by-customer basis, and in affirming the district court, the Court of Appeals used language indicating that it was of this same view.

This also was a mistaken interpretation of the statute. Section 2(b) permits a price difference if the seller shows that his lower price to a purchaser or to a group of purchasers was made in good faith to meet the price of a rival. The test, as this Court frequently has held, is flexible and pragmatic, not technical or doctrinaire. The seller need only show a reasonable and good faith effort to meet the forces of competition.

The statute doesn't attempt to dictate what method the seller must use in different market situations.

Nothing in the statute or its legislative history says that a seller cannot adopt an areawide price when that's reasonably necessary to meet actual competition. As the facts of this case show, the seller's rival may have a single price of its own throughout the entire region, or a group of sellers of slightly different products may have a range of prices. In either event, a single price which is reasonably adjusted to meet actual competition prevailing in the area is a permissible response.

Customer-by-customer pricing often would be a complete waste of time when a larger rival charges a single price throughout the area and could impose substantial burdens on small sellers attempting to survive in a competitive market environment.

Now, contrary to the view of the Court of Appeals, nothing in this Court's decision in the Staley case requires a rejection of Falls City's meeting competition defense here. Staley rested on the conclusion that the sellers there lacked good faith because they copied an artificial basing point system which imposed substantial phantom or unearned freight charges on particular purchasers.

The court concluded that the basing point system was inherently unlawful under the Robinson-Patman Act, and therefore its adoption could not be characterized as good faith action.

In addition, the FTC explained in its opinion in the Staley case that the basing point system was the product of collusion, and that also undercut any claim of good faith action.

Now, in this case, by contrast --

QUESTION: Mr. Shapiro, may I interrupt a minute? What do you -- in the Government's view what did the defendant have to prove to establish the good faith meeting defense about the -- what did it have to prove is going on in Kentucky to justify the defense?

MR. SHAPIRO: As this Court held in Staley, it isn't necessary to prove precisely what the prices were. It is necessary to prove a good faith and reasonable effort to approximate what reasonable and believable prices were.

QUESTION: In your view is the defense made out if the price of Falls City in Kentucky was lower than any of its competitors?

MR. SHAPIRO: If -- if -- no, it could not deliberately undercut prices in Kentucky, but it --

QUESTION: It must prove there were prices in

Kentucky that were at least as low as its prices.

MR. SHAPIRO: And it did just that. The record in this case shows that it did that. It made a reasonable effort to monitor those prices.

QUESTION: Does it have to prove anything about the quality of the products being sold by the competition? If there were normally premium beers and standard price beers would that be relevant?

MR. SHAPIRO: It -- if -- there was evidence to the effect that this was a regional beer that didn't command the same premium price that Budweiser and other beers commanded, which would permit a little bit of an undercutting under our analysis. But here there wasn't even that element of undercutting.

QUESTION: But under your -- but under your analysis it then would have been permissible even if they'd undercut by no more than the reasonable margin between the premium and the --

MR. SHAPIRO: That's correct, Your Honor, and that point is made in the '55 Attorney General's study on the antitrust laws which we subscribe to.

QUESTION: Well, do I understand, Mr. Shapiro, that all really they had to do to prove the meeting competition defense was that in good faith they met the lower Kentucky price, period?

MR. SHAPIRO: That is it, period.

QUESTION: That's all they had to do.

MR. SHAPIRO: And these additional standards that are talked about in the lower court opinions are completely without statutory basis.

QUESTION: And area pricing and all that becomes quite irrelevant, doesn't it?

MR. SHAPIRO: And long as there was a good faith effort to meet prices charged their customers in the state of Kentucky, that is it.

QUESTION: Would that be true if Falls City was -- if this particular plaintiff was the only customer in Indiana?

MR. SHAPIRO: And --

QUESTION: They charged the low price in Kentucky, had one Indiana customer in the same market and they charged him an extra 30 percent.

MR. SHAPIRO: Well, if Vanco was --

QUESTION: Because they can get away with it. Because he's willing to pay it.

MR. SHAPIRO: If Vanco was the only customer in the state of --

QUESTION: In Indiana.

MR. SHAPIRO: -- Indiana and there were lower prices prevailing --

QUESTION: In Kentucky.

MR. SHAPIRO: -- In Kentucky, the differential would be permissible, yes.

QUESTION: Even though he's the only customer.

MR. SHAPIRO: That's correct.

QUESTION: Well, in part that's because the Indiana statute compels him, is it not?

MR. SHAPIRO: Indiana does indeed compel a single --

QUESTION: Yes.

MR. SHAPIRO: -- Throughout the state.

QUESTION: Well, it wouldn't compel a price higher than they charged in Kentucky, though.

MR. SHAPIRO: No, that's correct.

Vanco argues, nonetheless, in this case that Falls City acted with bad faith because it matched what it calls artificially high prices in the state of Indiana. With deference, we submits that this amounts to name-calling without any legal substance. Vanco failed to prove that the prices were unlawful under the Sherman Act or under the Robinson-Patman Act, and merely characterizing them as high or artificial doesn't make them unlawful.

In the absence of collusion each seller is permitted to charge its profit-maximizing price. This

is the very essence of a free enterprise competitive system.

QUESTION: But isn't it demonstrable that the higher price is above the free market price because competition has set the Kentucky price, and it's all one market.

MR. SHAPIRO: That is -- that is a possibility.

QUESTION: We must assume that the Indiana price is above the price that a free market would set, if you assume it's all one market.

MR. SHAPIRO: Well, but there are state law --

QUESTION: Because your submission is the Kentucky price is set by competitive forces.

MR. SHAPIRO: Yes, but there are state law barriers between the states that prevent arbitrage back and forth.

QUESTION: But you said there was no state law barrier to lowering the Indiana price.

MR. SHAPIRO: The Indiana price could be lowered, but there were state laws that prevented sales back and forth from the states that could result in competition producing different price levels.

QUESTION: Unless you take the position Justice Brennan suggested that there are two markets here, how is that relevant?

MR. SHAPIRO: Well, what it does is explain that different pricing structures could occur in the states without the presence of collusion. That's the significance of the state law.

QUESTION: There can be different pricing structures in the same market?

MR. SHAPIRO: In -- well, they -- it is the same market pursuant to the findings of the district court, but it's undeniable that there are legal restrictions that to some extent at least carve differences between these two markets.

QUESTION: What is the Government's position on whether there were one market or two, whether there was one market or two?

MR. SHAPIRO: We haven't taken a position on that because the court --

QUESTION: You don't think that's relevant and you don't think you have to decide that to make an intelligent analysis of the competitive defense?

MR. SHAPIRO: We think that it's sufficient under Section 2(b) for the defendant to show that there was a price prevailing in each state that was different, that its competitors were charging that price, and that it reasonably attempted to match that price, and that that is all that Section 2(b) requires.

QUESTION: But do you not agree that if the price in Kentucky is set by competitive forces and if the price in Indiana is in the same market, necessarily the price in Indiana is above the market price?

MR. SHAPIRO: We don't concede that because there is the undeniable fact of a difference between the two markets. Even though you can characterize them as one market, as the district court did, there are vastly different legal frameworks that the two states operate under. And you may well characterize that as a bifurcation of the markets, which we certainly wouldn't quarrel with, but these are realities of the two markets that we think can't be discounted and that definitely do explain the different price levels that Your Honor mentioned.

CHIEF JUSTICE BURGER: Your time has expired, Mr. Shapiro. Thank you.

Mr. Cusack.

ORAL ARGUMENT OF JOHN T. CUSACK, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. CUSACK: Thank you, Mr. Chief Justice, and may it please the Court:

This case presents two questions for the Court. The first is was the district court and the Seventh Circuit in affirming the district court clearly

erroneous in making two factual findings which are key to this case.

The first question if whether Falls City sustained its burden -- and its burden of showing that its persisent and substantial, from 10 to 29 percent, price discrimination throughout the entire period resulted from its good faith attempt to meet competition.

The second question presented by this case is whether Vanco established competitive injury when it showed it lost volume and profits, even in light of the fact that it absorbed substantial price increases by Falls City, and it lost these profits and lost these sales due to Falls City's persistent and substantial price discrimination.

In regard to the meeting competition question, one, Falls City never competed on the basis of price. And this was found by the district court and affirmed by the Court of Appeals. Judge Holder said that Falls City "was not meeting competition. Its action was to get a higher price in Indiana than in Kentucky." The Seventh Circuit said that Section 2(b) "is designed to allow a seller to defend against genuine price competition." And that the district court found that Falls City in setting its Indiana price was simply taking advantage of its competitor's policies of charging higher prices in

Indiana than in Kentucky and other states.

And I've got to say it to this Court, the testimony of Mr. Tate was that in the thirteen states where they sold beer, the price was higher in Indiana than anywhere else, and he guessed that all brewers charged a higher price in Indiana than somewhere else. And I am appalled that the amicus could take the side of Falls City under these circumstances.

The Court of Appeals also said that the findings of the district court are not clearly erroneous and "There is nothing in the record to show that Falls City first adopted a nondiscriminatory pricing structure and then reduced its prices when necessary to defend against competition."

Falls City admitted at trial and also in the deposition of Mr. Tate which took place a year before when he was asked by Judge Holder the following question, and the focus was on the higher Indiana price. The Court: "Well, the price is FOB at your dock. Why is the Indiana price higher than Kentucky under the policy of your company?" Mr. Tate: "Well, because we followed the leaders, the pricing of the leaders of the beers in Indiana as far as their dock prices were concerned."

Falls City throughout the period never

decreased its prices in Indiana, but throughout raised its prices continuously in both Indiana and Kentucky. And, in fact, on six separate occasions by letters dated the same dates and for price increases effective the same exact dates they sent out price increase letters to both customers in Indiana and Kentucky. How is that an evidence of good faith?

As an example: price increase letter dated January 20, 1977, effective January 1, 1977. The letters are identical except one letter says Kentucky, the other says Indiana, and the prices are higher. For example, 24 16-ounce cans, the price in Kentucky is $4.45; the price in Indiana is $5.00 -- a 55-cent difference. They raised the Indiana price 15 cents; they raised the Kentucky price a dime. The differential is now 60 cents. How can this possibly be any evidence of good faith meeting competition when you continously throughout the period raise, raise, raise in both markets, but you preserve the differential?

QUESTION: Mr. Cusack, you used the term "both markets."

MR. CUSACK: Both states, Your Honor.

QUESTION: Did you mean that?

MR. CUSACK: I'm sorry. That's a slip. I worked on the Pabst case where we had states as a

separate market for purposes of brewery mergers.

It's clear that Henderson -- just a very fast -- it's clear the market is the same; that the Henderson-Evansville market -- it's -- it's a geographically isolated area where people in Kentucky work in Indiana and people in Indiana work in Kentucky.

QUESTION: Well, does your client compete with -- with whom does your client compete?

MR. CUSACK: Our client competes, Your Honor, with beer distributors in the relevant geographic market, which is the Henderson -- the Evansville-Henderson SMSA, and including to some extent --

QUESTION: Does your client sell to any single customer that the distributors in Henderson sell to?

MR. CUSACK: No, Your Honor, it does not. Our client sells to retailers in Indiana who have an Indiana basic permit. It is the consumers, however, who buy beer in both markets.

QUESTION: But aren't they doing so illegally when they do that?

MR. CUSACK: Yes, Your Honor. And I submit that when people buy beer in Virginia and live in the District of Columbia, or vice-versa, and in Maryland, they do the same thing. All states, as I understand it,

have a requirement that you're not supposed to take beer across a state line, and it is ignored completely.

QUESTION: But the entire competition that you're concerned with here is unlawful competition, isn't it?

MR. CUSACK: Your Honor, I submit it's not unlawful if it's not enforced.

QUESTION: Well, all right. But if the laws were enforced to the letter, there would be no competition --

MR. CUSACK: Your Honor, if the law was enforced to the letter, I submit the bridges over the Potomac would be very crowded with policemen.

QUESTION: Well --

MR. CUSACK: The reality of it, Your Honor, is that it's a market. Whiting, Indiana, Your Honor, and Chicago, that's a market. You've got liquor stores on Whiting, Indiana on -- on what is it, Indianapolis Boulevard, and people from Indiana are going there all the time. It's never been enforced.

The thing in Evansville, yes, at one time in 1974 the retailers in Evansville got the state excise police to put some policemen on the bridge to stop cars. It created such a terrible furor that they stopped.

The point is that the area is so obviously an isolated, unified geographic market. And I submit --

QUESTION: You'd better be careful about Virginia and the District of Columbia. They do pick you up.

(Laughter.)

I mean don't assume it's just like out there.

MR. CUSACK: Yes. And, Your Honor, they did for a short time pick people up going into Kentucky, but they stopped. And that's the evidence in the case, that they stopped doing this; and that it was common knowledge. Articles in the Evansville newspapers or ads in the Evansville newspapers, cheapest beer in the tri-state area. It's a continuous crossover.

The one bit of evidence we didn't put in our brief which I think is interesting, Mr. Powell of the House of Beverages, which is the big liquor store in Kentucky along the strip where so many people from Indiana went, he complained -- his deposition, incidentally, was taken by Mr. Adler -- he complained at the time he was losing tremendous liquor sales to lower Indiana prices.

And I'd like to point out to the Court that the Indiana law, the one-price law, applies to sales of liquor as well as beer. Why is it that liquor was

cheaper in Indiana than in Kentucky while beer was so much more? It was an artificially set price. West Virginia is a one-price state. West Virginia was priced cheaper by Falls City than Indiana. Why is Indiana discriminated against?

It's clear, it seems to me, the price system in this case I submit is simply this: the system by which Falls City and its brewer competitors, with the noticeable exception of Drury's, continuously charged a higher price in Indiana than they did in other states.

The evidence shows that Falls City was not meeting competition in good faith, was never interested in competing on the basis of price, nor ever competed on the basis of price, and never set up a nondiscriminatory pricing structure as commanded by the statute.

And when Falls City received any pressure in regard to its high and discriminatory prices in Indiana such as in 1973 with the attempt by the principal of Vanco to get the Indiana legislature to pass a law that brewers would not charge higher prices to Indiana distributors than it did to distributors in adjoining states, or the threat of the pendency of this lawsuit and the institution of this lawsuit, Falls City turned to its major brewers, competitors, members of the United States Brewers Association, for help in order to

perpetuate this persistent and substantial price discrimination. How is that possibly in good faith?

Contrary to the repeated testimony from Mr. Tate, and he told Judge Holder that, "I have never ever known a small brewery our size to step out and lead the parade" -- in reference to prices -- and he told Mr. Adler, "We sort of followed along what Pabst and Stroh did in most cases."

And it's not refuted by Falls City in its reply brief. Falls City led off at least one price increase in Indiana, the July 1974 price increase, on which day Falls City also increased prices in Kentucky. And, incidentally, Falls City never really showed who the leading brewers were in Kentucky, but a document submitted by Mr. Tate in evidence shows that from 1962 to 1969 Falls City was the leading brewer in Kentucky. And this cry that they're so small and put upon I think should be evaluated in that light.

QUESTION: Well, I took that to mean small in relation to the giants, not to the locals.

MR. CUSACK: But large, Your Honor, in relation to the market; large in relation to where they were selling beer; large in relation to Kentucky, southern Indiana, parts of Ohio, Tennessee, West Virginia. It was a regional brewer which had

substantial sales in those states. As I say, number one in Indiana -- excuse me -- in Kentucky until 1969 where it dropped from '70 -- in '71 to second place, and that's as far as the statistics go.

Your Honor, the Court -- and may it please the Court, the Court in Staley said -- and it's true as it was then -- and, incidentally, the thrust of our argument in the Seventh Circuit was the Staley case, which we think is the finest decision by the Court in regard to good faith meeting competition -- that you cannot meet competition by following the higher prices of your competitors.

In Staley the Court said -- this Court said the statutory test is whether respondents by their basing point system adopted a lower price in good faith to meet an equally low price of a competitor. This test presupposes that the person charged with violating the act would by his normal nondiscriminatory pricing methods have reached a price so high he would reduce it in order to meet the competitor's equally low price. Instead they, Staley, maintained their own prices at a level of the competitor's high price based upon the competitor's high cost of delivery by including phantom freight in their own delivered prices.

Vanco is a better case than Staley. There are

no cost savings in southern Indiana over -- in Indiana over the twelve other states where Falls City sold beer, as Mr. Tate stated that his costs were identical in all states. He also said in regard to that that the identity of his competitors in both states were practically identical.

A footnote in Staley states that the chairman of the House conferees on the Robinson-Patman Act had presented a conference report emphasized with illustrations that the 2(b) procedural provision cannot be construed as a carte blanche exemption -- exception to violate the bill so long as a competitor can be shown to have violated it first, nor so long as that competition cannot be met without the use of oppressive discriminations in violation of the obvious intent of the bill.

In Staley the Court also stated the Commission's conclusions in regard to the meeting competition defense "It seems inescapable that Staley's discriminations such as those between purchasers in Chicago and Decatur were established not to meet equally low Chicago prices of competitors there, but in order to establish elsewhere the artificially high prices whose discriminatory effect permeates respondent's entire pricing system."

Lastly, the Court said, "We cannot say that a seller acts in good faith when it chooses to adopt such a clearly discriminatory pricing system, at least where it never attempted to set up a nondiscriminatory system."

Falls City, as in the case of Staley, maintained their own prices at the level of their competitors' high prices, did not -- and did not meet the test that the person charged with violating the act would by his normal, nondiscriminatory pricing methods have reached a price so high that he'd reduce it in order to meet the competitor's equally low price.

QUESTION: Mr. Cusack?

MR. CUSACK: Yes, sir.

QUESTION: Don't you think the Court in Staley gave some weight to the fact that Staley had throughout its entire pricing structure the element of phantom freight built in, so there was kind of a unitary price structure?

MR. CUSACK: Yes, Your Honor, but the interesting thing about it is they admitted -- the Court in Staley also said that some of the phantom freight -- there was some phantom freight and there was some valid freight, and they've got that chart in there where some of the prices were perfectly fair.

QUESTION: But it was almost a coincidence

that they were fair in Staley.

MR. CUSACK: Well, I think that's probably right. It depended upon where the customers were located primarily, and the difference between the Kansas City plant and the Chicago plant.

But, you know, in Staley you had at least some freight absorption because the sucrose was sold and delivered to the customer. Here you have no such a situation, Your Honor, because it's all FOB the plant, which is, incidentally, my understanding of what happens throughout the brewing industry based on my experience. All beer is sold FOB the brewery.

I'd like to point out that the Solicitor General's representative has mentioned the 1955 Attorney General's report on the antitrust laws. It's the Attorney General's National Committee to Study the Antitrust Laws. That report states at page 184, "We recommend that the term 'good faith' be utilized solely to test the seller's adherence to the basic objectives of the meeting competition proviso, facilitating price reductions in genuine response to competitive market pressures in order to equalize an opportunity. In practice this will disqualify the seller to whom meeting of competition is only an incidental by-product of a scheme to monopolize or other objective inimicable to

overall antitrust policy."

And I submit that it is inimicable to overall antitrust policy for all brewers to charge higher prices in Indiana merely because their competitors do so. And to stand around in a circle and to point with each other is a perversion of the legislative intent, and contrary to what Congressman Ottoback talked about; and that's really what they're talking about. They have relied on the Ingliss case out of the Ninth Circuit, and I am very happy that they have relied on that. I represented American Bakeries Company in that case. After a five-week jury trial our client was held not liable.

The distinction between Ingliss and the distinction between Vanco is simply this: in Ingliss there was intense competition, and the prices went down. Not so in Vanco. The Court of Appeals opinion in Ingliss, the district court opinion in Ingliss stresses the competition. Judge Williams' October 2, 1978 memorandum and order setting aside the jury's verdict, and again in the judgment NOV as to ITT Continental, the one defendant that was convicted by the jury, stated that "The evidence presented at trial painted only a picture of a highly competitive market. Evidence at trial emphasized the highly competitive nature of the northern California market. In all cases Continental

responded to some activity of lower prices offered by its competitors. Although this court recognizes that the question of good faith is appropriately left for the jury, it cannot let stand what it views as a totally erroneous result."

QUESTION: Mr. Cusack, do you believe the -- do you believe the brewers were violating the Robinson-Patman Act by selling at different prices in the two states?

MR. CUSACK: Yes, Your Honor, I do.

QUESTION: So that the -- so the people who were charged higher prices in Indiana should have been able to sue the -- any brewer or -- right?

MR. CUSACK: Yes, Your Honor.

QUESTION: And their lower price in Kentucky was illegal. That's your -- everybody --

MR. CUSACK: Well, it --

QUESTION: Everybody's lower price in Kentucky was illegal.

MR. CUSACK: No, Your Honor. I would say it was the higher price. The artificially high Indiana price was the illegal price, the discriminatory price, Your Honor. I don't -- there's no evidence where their other prices were. We --

QUESTION: Well, one or the other price was

illegal.

MR. CUSACK: Yes, Your Honor. I say the higher price was the -- the price that Falls City focused on was the higher Indiana price. That was the illegal price.

QUESTION: Well, do you think the --

MR. CUSACK: That was the discriminatory price, Your Honor.

QUESTION: Does the lower price that a competitor is meeting, is that supposed to be a legal price or not?

MR. CUSACK: Well, it's supposed to be --

QUESTION: Does the price that you're meeting have to be a lawful price?

MR. CUSACK: Yes, Your Honor, according to the rules of the Court. Well, it's a good faith test. It can be an unlawful price, but if you think it is a lawful price, it's a subjective test, as Judge Williams said in California. If you think it's a lawful price, you can meet it.

QUESTION: Well, I suppose the -- I suppose the brewers who -- whom -- who you say were violating the Robinson-Patman Act by charging different prices in two states could cure their -- could cure what was wrong by raising the price in Kentucky.

MR. CUSACK: Your Honor, I don't think that's what they would do, because Mr. Tate said they charged a higher price in Indiana than any state. I submit that Indiana was the aberration.

QUESTION: I just say they could have raised their price in Kentucky and avoided violating the act.

MR. CUSACK: That's one way they could have done it, Your Honor. But that is not what we submit because we think that's anticompetitive, and that doesn't help consumers either. What we submit is the higher Indiana price was the wrong price, the aberration, and that the system here, Your Honor, for some reason they charged -- the agreement or system or the tacit economic collusion that's involved here at least is the system where they charged the higher price in Indiana and a lower price in Kentucky and surrounding states.

In all of this -- the testimony in regard to the prices going up on the same day in both states, the fact that their own testimony focused on the higher price, the fact that the assistance that they sought and received from the United States Brewers Association to defend this lawsuit, to defeat the attempt by the Indiana legislature to make a bill that they -- to pass a law that they could not charge a higher price in -- to

Indiana distributors as they did to distributors in surrounding states, we submit that this all goes to the good faith element.

I don't know whether the Kentucky price was artificial. There is no evidence that they are either making a lot of money in Kentucky or losing a lot of money in Kentucky. We do know, however, that they are making from 10 to 30 percent more money in Indiana than they are in Kentucky, Your Honor.

In the Engliss case, to summarize, the prices from 1967 to 1973, which is an area, a time of inflationary pressurs, the prices were as high as 22, 24, 25 cents a loaf of bread, and it went down to 17.2 cents a loaf. There was price competition. There was intense competition. In the Engliss case, we won because we were able to convince the jury that when our client, American Bakeries Company, dropped its price areawide, it was because of competitive necessity. If we had not done it, we would have lost substantial customers, and we proved that to the satisfaction of the jury. That's the distinction.

There is nothing -- I don't have any argument with reducing the price areawide, but what I submit is that the area in this case is the Henderson, Evansville relevant product market, relevant geographic market.

Incidentally, I would like to point out that the Dean Note case in 1968 so held in regard to the sale of milk that Evansville, Henderson was a relevant

geographic market, a retail market. Fall City's counsel, Arnold Porter, Washington counsel at the time, surely must have been aware of this. This isn't something that they just blundered into by mistake.

QUESTION: Yes, but there is no similar statute governing the sale of milk across the river.

MR. CUSACK: That's right. There is no prohibition.

QUESTION: Yes.

MR. CUSACK: Although there may be some health regulations which I am not aware of.

In regard to the second question before the Court, whether Vanco established competitive injury when it showed it lost volume and lost profits, the following is crucial, and the Morton Salt case is a red herring. The Court did not infer competitive injury. The Court found competitive injury based on substantial evidence. Vanco absorbed substantial price increases by Falls City, as was specifically found by the district court. Vanco's customers, the Evansville retailers, lost substantial business from their regular customers by their purchasing beer in Kentucky. The district court and the court of appeals both found that there was competitive injury.

I must go back, as I have -- we have repeated

in our briefs, the best evidence of the relevant geographic market as well as the competitive injury as Falls City's own documents, documents by Mr. Schneider, who they never bothered to call at trial to rebut it, never bothered to call at trial, and he worked for Falls City at the time. August 16th, 1974, Mr. Schneider reported that "This week, I worked the Henderson, Kentucky, market with our distributor, Mr. Ron Utley. I am very pleased to report that the market for the first seven months this year is up. I realize that some of this increase is due to the higher prices in the Evansville market."

February 15, '74, Mr. Schneider reported, "Sales in the Henderson market are up the last months. Some of this increase is due to the price increase in the Evansville area."

August 23, '74, reported in Vanco's -- Vanco's sales stated, "Sales for the month of July are off over 9,000 cases from last year's sales. Part of this decrease is due to the lower prices in the Kentucky markets."

It is replete that it was a unified market in Falls City, so admitted, and the important thing to look at is not the decline of the sales of Falls City's customers in central Indiana. The important thing to

look at is the decline of the sales of Vanco relative to the decline of the sales of Mr. Utley of Dawson Springs, the Henderson distributor, the favored distributor. That is absolutely crucial, and the fact is and the evidence is that from 1971 to 1977, the favored purchasers, that is, Utley's sales, the distributor of Henderson, went down only 18 percent, while Vanco's went down 63 percent.

From 1971 to 1975, the favored purchasers' sales actually increased 22 percent, while Vanco's sales decreased 48 percent. These are startling statistics for distributors located less than ten miles apart. Actually they are five miles apart.

Vanco respectfully submits that this case was given a full and fair trial, and the district court found on its facts that Falls City had violated the Robinson-Patman Act, that Vanco was injured in its business and property as a result of Falls City's violation of the Robinson-Patman Act, and that Falls City was not meeting competition in good faith.

We ask the Court how a defendant can be meeting competition when it reduced prices, when on six separate occasions it raises its prices on the same day in Indiana and Kentucky, when it continuously increased prices, when they never even attempted to comply with

the requirements of the statute, and its price increase was the result of its filing in the higher prices of competitors, and in fact leading off price increases. How can you be meeting competition under those facts?

Lastly, I direct the attention of the Court to the Stigler report, who is the author of the Chicago School of Economics, so he certainly is a very distinguished gentleman.

QUESTION: He can't be all bad.

(General laughter.)

MR. CUSACK: He is a great man, Your Honor. The Stigler report was the report of the Task Force on Productivity and Competition in 1969, which was instituted by President Nixon, and it states, "Collusion that can be incontrovertibly inferred from behavior, such as persistent, substantial price discrimination in the economists's sense, should not bring immunity from the Sherman Act."

In this case, persistent and substantial price discrimination and Falls City's continual increase of prices and interest in maximizing its prices in Indiana should not, I respectfully submit, bring immunity to violation of the Robinson-Patman Act.

Thank you very kindly.

CHIEF JUSTICE BURGER: Very well.

Mr. Adler, you have about four minutes remaining.

ORAL ARGUMENT OF HOWARD ADLER, JR., ESQ.,
ON BEHALF OF THE PETITIONER

MR. ADLER: Thank you, Your Honor.

It is clear from what we have heard that there is no doubt that that Falls City was following prices, different prices that prevailed in Indiana and Kentucky, as did everyone else. There is no dispute from his argument or from the record about that. The thrust of the argument is that there was something wrong with the price in Indiana, that it was tainted, collusive, parallel, a lot of adjectives, but there was no adjudication that those prices were illegal. There was no adjudication that there was any illegal price disrcimination between Henderson and Evansville. Vanco bought from Anheuser Busch. It bought from others who followed the same practice. It didn't -- no other distributor has sued or challenged, let alone have an adjudication of illegal price discrimination or illegal collusion.

They charged illegal collusion. They lost it. They didn't appeal it. The judge found there was no evidence of any agreement, so all of this rhetoric about artifical prices in Indiana being an aberration

has no legal foundation. He may believe that to be true, but it has no legal distinction. As in the second Standard Oil Case, 400 355, 400 U.S. 355, where this Court emphasized the fact that there had been no adjudication of illegality, I think that is vital here.

We have got a small, dying brewer trying to keep alive, trying to follow prices. We can't call prices artificial or aberrational and have that have legal significance and turn on whether a company which is trying, and the record is abundantly clear, trying to be competitive, trying to survive, trying to match prices of its leading competitors in other markets.

There is no inconsistency at all with having a unified market. Remember, that only referred to Henderson and Evansville. The Indiana price was determined by competitive conditions in Indiana as a whole, and the law required that the Evansville price be the same as charged throughout Indiana, and there is no real mystery as to why the prices were higher in Indiana. It wasn't collusion or anything else. It was different competitive conditions, and if one looks at the wholesale price evidence that there is in the record, one will see that the wholesale prices of Vanco were higher than the wholesale prices that the distributor across the river was going to get, and that

was reflected in the brewery prices.

Indeed, there was a wholesale price increase in late 1973 in Evansville, no corresponding increase in Kentucky. There was an FOB increase to Indiana, but not to Kentucky. There were different competitive circumstances. One had the law in Indiana that everybody had to charge the same FOB brewery price to all wholesalers. We had a higher wholesale price structure, as the record shows. That the brewers perceived and raised their prices.

But in any event, whatever the explanation is, and I think that's it, there was no illegality in the Indiana price or any illegality in the Kentucky price. Falls City was following both, and the fact that it didn't reduce a price in order to meet competition should be and is legally significant for all the reasons that the government has said.

On the subject of the competitive injury, just one brief point. Reference is made to August, 1974, and the lower prices that prevailed in Henderson, the higher prices in Evansville. The record is replete with evidence that it was the wholesale price increase in Evansville at a time when there was no wholesale price in Kentucky that caused that episode to occur. The documents refer to price difference, not the FOB price

difference, which was constant throughout that 1974 period.

My time is up. Thank you very much.

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

(Whereupon, at 1:59 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

Falls City Industries, Inc., Petitioner v. VANCO Beverage, Inc.

No. 81-1271

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY Pine Hammond

(REPORTER)