OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1260

TITLE COPPERWELD CORPORATION, ET AL., Petitioners v. INDEPENDENCE TUBE CORPORATION

PLACE Washington, D. C.

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IN THE SUPREME COURT OF THE UNITED STATES

COPPERWELD CORPORATION, ET AL.
Petitioners
v.
INDEPENDENCE TUBE CORPORATION

No. 82-1260

Washington, D.C.

Monday, December 5, 1983

The above entitled-matter came on for oral argument before the Supreme Court of the United States at 2:02 p.m.

APPEARANCES:

ERWIN N. GRISWOLD, ESQ., Washington, D.C.; on behalf of the Petitioners.

LAWRENCE G. WALLACE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; as amicus curiae.

VICTOR E. GRIMM, ESQ., Chicago, Illinois; on behalf of the Respondent.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Griswold, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.

ON BEHALF OF THE PETITIONERS

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

This case is here on certiorari from the Seventh Circuit. It is an antitrust case turning on the construction of Section 1 of the Sherman Act.

Put briefly the issue is whether a corporation and its wholly-owned subsidiary can provide the two parties necessary to provide a combination or conspiracy under Section 1.

The wholly-owned subsidiary here is the Petitioner Regal Tube Company which the other Petitioner Copperweld purchase in 1972. Regal was a small manufacturer of structural steel tubing with about 14 percent of the market. Structural steel tubing is used to support buildings, machinery, and the like.

Copperweld was never in this business and did not compete with Regal.

Copperweld manufactures, among other things, wire and cable and tubing which is used to transport gases and liquids.

Upon purchasing Regal, Copperweld caused it to be organized as a separate subsidiary for tax purposes. All of the stock in Regal was owned by Copperweld. All of Regal's officers and directors were Copperweld's officers and directors and Regal's corporate headquarters are in Pittsburgh with Cooperweld.

The Regal business had been previously owned by Lear Siegler, Inc., a California company. It had been run as an unincorporated division. David Grohne, one of the counterdefendants below, was president of the Regal Division under Lear Siegler.

Just before Regal was sold to Copperweld, Grohne accepted a position as Lear Siegler's corporate secretary. Within a few months though, Grohne decided to establish his own steel tubing business. In May 1972, he formed the Respondent Independence Tube Corporation which sought bids on tubing mills from manufacturers. By October 1972, his new company gave an order for the delivery of a tubing mill and the supplier was Yoder Company which was one of the defendants below.

The Petitioners, with the advice of counsel, sent out letters designed to protect Copperweld's interest in designs, plans, drawings, and trade secrets and to prevent third parties from developing reliance interests in dealing with Independence.

One of these letters was sent to Yoder. Yoder then cancelled its acceptance of the purchase order for a tubing mill. However, Independence found another supplier which furnished the mill and the Respondent Independence commenced operations in September 1974, nine months later than would have happened if Yoder had delivered the tubing mill originally ordered.

The present suit was commenced in the Northern District of Illinois in 1976. It contained three counts. The first of these was under Section 1 of the Sherman Act and it alleged that Copperweld and Regal, together with Phillip Smith, the chairman and chief executive officer of both companies, had conspired with Yoder to restrict trade in the market for structural steel tubing.

The second count alleged that the Petitioners and Smith had attempted to monopolize the market for steel tubing in violation of Section 2 of the Sherman Act.

And the third count alleged that the Petitioners and Smith had interfered with the Respondent's contractual relations with Yoder, a state law tort.

Before the trial began, the Respondent dismissed this claim under Section 2 of the Sherman Act, that is the attempt-to-monopolize claim. It also dismissed Smith from all counts in which he was named.

The case thus went to trial on two counts, one

under Section 1 of the Sherman Act alleging a conspiracy between Copperweld, Regal, and Yoder, and the other alleging a state law tort of inference with contractual relations.

At the trial, the jury found that Copperweld and Regal had conspired to violate Section 1 of the Sherman Act. But, it likewise found that Yoder was not involved in the conspiracy. It also found that Copperweld, but not Regal, had interfered with the Respondent's contractual relationship with Yoder.

The jury found damages on the interference with contract claim in the amount of nearly $2.5 million. That issue is no longer in dispute. It is not before this Court.

The only issue here is whether the tort liability is also an antitrust liability under Section 1 of the Sherman Act with the damages consequently tripled under the antitrust laws.

The question at the heart of this case has a long history, going back at least to this Court's decision in the Yellow Cab case in 1947. The Court's opinion there said that an unreasonable restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent.

Nearly everyone is agreed that those words were unnecessary to the result in that case, but as Professor Areeda has said, the Court's language has come to have an independent significance.

That is, indeed, somewhat surprising since the Yellow Cab case is really one of those phantom cases for the defendants there eventually prevailed. When the case went back to District Court for retrial, that court found that the operating companies had not been acquired unlawfully and the resulting judgment for the defendants was affirmed by this Court.

Since then the problem in various forms has come here in a number of cases. These are discussed fully in the briefs of the parties. I rely on all of the arguments there but perhaps I can make a contribution by emphasizing one aspect of our approach.

The antitrust arguments treat the question on a broad canvas. The antitrust laws are not like the tax laws which spin everything out in great detail so that the role of the courts if often to try to fit the precisely-stated provisions together somewhat like a jigsaw puzzle.

In the antitrust field, the statutory provisions are general and much of the law has been made by the courts, particularly by this Court.

Because of the need for this general approach in

many antitrust cases, it may have been overlooked that the decision in this case can best be obtained by focusing on what the statute does say and specifically on Section 1 of the Sherman Act. Section 1 and Section 2 are quoted on page two of our brief, the blue-covered brief, and careful consideration of their words will, I suggest, help to resolve the issue here.

Section 1 relates to concerted action, the kind of risk which lies behind the concept of conspiracy and the criminal law. Every contract combination in the form of trust or otherwise or conspiracy shall be illegal.

All of these words contemplate multiple actors. It takes two to tango and it takes at least two to make the sort of contract or combination or to enter into a conspiracy of the sort with which Congress was concerned.

Section 2 is the standard anti-remedy for misconduct by a single actor, but it requires a monopoloy or dangerous probability of monopoly. Neither is present here since Regal had only 14 percent of the relevant market. Moreover, as I have said, the count based on Section 2 was dismissed before trial by the District Judge.

Now let us look closely at Section 1. It is said that there are two entities, the parent and its wholly-own subsidiary. I suggest that Section 1 is

properly construed to apply only when there are two or more parties who are acting independently of each other.

Section 1, based as it was on the history of Standard Oil, focuses on the increased economic power, the increased threat to competition which results from the joining together of two or more independent centers of initiative and finance through combination in restraint of trade and that is, indeed, the construction which has been given to the statute in analogous circumstances.

QUESTION: Dean Griswold, would you think that would be possible if, despite complete ownership, there were different officers and directors of the two companies?

MR. GRISWOLD: I think that no matter how the intraenterprise organization is carried out, the subsidiary is always subject to the complete control of the parent.

QUESTION: Does it matter if it is anything over 51 percent ownership or do you get different questions if it isn't 100 percent?

MR. GRISWOLD: We don't need to decide that question here. Here is it wholly owned.

QUESTION: That is true, but, of course, you would have to look to the future.

MR. GRISWOLD: I would think that a good

approach would be in such a case when it comes up that if the corporation was subject to -- if the subsidiary was subject to the legal control of the parent, that the same rule ought to apply. There may well be different factors applicable in those cases. This is a case of 100 percent complete ownership.

QUESTION: Well, may I ask, Dean Griswold, suppose -- As I understand it Regal and Copperweld really functioned in different markets and produced different products. Suppose that Regal had persuaded Copperweld to refuse to sell some important component that it produced to a potential competitor or subsidiary of Regal. Just assume that. Would that be in agreement that on your approach would be protected?

MR. GRISWOLD: No. On the position which I am advancing, Regal would still be a wholly-owned subsidiary of Copperweld. It could have been that certain of the individuals who work in connection with Regal made that agreement with the individuals who worked in connection with Copperweld, but they always remain subject to the control of Copperweld and, moreover, that is not this case. In this case, the officers and directors of the two companies were the same and there was no such agreement.

QUESTION: Yes, but I guess I correctly understand your argument as being no matter what the

agreement may be, if one is wholly owned by the other, it can never be a conspiracy within Section 1.

MR. GRISWOLD: Yes, Mr. Justice, that would be my argument, but we don't need to go quite that far to decide this case.

QUESTION: Well, we certainly have to consider that possibility, don't we, in deciding this case?

MR. GRISWOLD: Almost --

QUESTION: How far your proposition, if we take it, is to take us.

MR. GRISWOLD: You would have to say that some of your language used in earlier opinions was not required for the decisions in those cases and may have been too broad, and as so often happens in the development of law, should now be qualified. It is not unlike the situation which you did handle in the GTE Sylvania case which was just referred to, not to mention the Genesee Chief, Erie Railroad and Tompkins and a good many other cases.

QUESTION: Do you think we would have to repudiate any holdings, Mr. Griswold?

MR. GRISWOLD: Do I think --

QUESTION: Do you think we would have to repudiate any holdings as opposed to any language?

MR. GRISWOLD: The only one that worries me is Kiefer-Stewart. I think all of the writers -- And the

writers are all opposed to the sweeping scope of some of this Court's statements. I think all of the writers are agreed that the cases, including Yellow Cab, are rather readily distinguishable except possibly Kiefer-Stewart.

However, the consequence of Kiefer-Stewart, as in Timpken and in some other cases, is simply that the company converted its wholly-owned subsidiary into a division and that is the way it has continued since. And, it makes no antitrust nor academic sense to say that there can be a conspiracy with a wholly-owned subsidiary, but not with a division.

And, the Court can rely on one of its own decisions in reaching this result for in Sunkist against Winckler and Smith the Court said that it was confronted with the question of whether three interrelated entities can be considered independent parties for the purposes of the conspiracy provisions of Sections 1 and 2 of the Sherman Act and the Court's answer was we conclude not.

There is further reference in the opinion of the fact that the entities were not independent and I suggest that that is the key to this decision.

For example --

QUESTION: That was Justice Clark's opinion, wasn't it?

MR. GRISWOLD: I believe it was.

QUESTION: Did he cite Yellow Cab? I have forgotten. My impression is he didn't.

MR. GRISWOLD: I believe it was cited in a dissenting opinion, so at least it was brought to the Court's attention.

QUESTION: Dean Griswold, do you think Parke-Davis can be reconciled with your view?

MR. GRISWOLD: Yes, I think so, though it is a somewhat complicated matter.

QUESTION: How would you distinguish it?

MR. GRISWOLD: I am sorry, Madam Justice, I would have to refresh myself on Parke-Davis.

Now, it is held that the officers and employees, who are surely separate entities, cannot form the plurality of actors required for a conspiracy under Section 1. And, the reason, of course, is that they aren't independent.

And, similarly, the courts have held that the contract, combination, or conspiracy can't be met by agreement between the corporation and an unincorporated division. A division of a company may have economic reality. One thinks of Chevrolet or Buick and the courts have not had trouble treating other unincorporated associations as entities for other purposes of the law such a partnerships or labor unions or, I may say, scrap

at Georgetown Law School. Is it not the subservience of a division? It is lack of independence which is the significant factor here.

At this point it said the subsidiary is incorporated and that makes it a separate entity.

When I was in law school, reliance on such an argument was already somewhat old-fashioned. It was called conceptualism, for it makes the result follow from a legal category without regard to the substance of the transaction. Such a result is purely formalistic, mechanical, and fortuitous.

In particular, the distinction between corporation and division is quite without any substantive antitrust significance.

More than 28 years ago the Attorney General's committee to study the antitrust laws and commenting on the Yellow Cab opinion observed -- and this is in part in answer to the question of Justice Brennan -- they said it is obviously unrealistic to expect or to command wholly-owned affiliates to compete.

Most of the difficulty in the lower courts in these cases have come from the fact that they have been unable, in the words of Chief Judge Cummings below, to re-examine the intracorporate conspiracy doctrine root and branch. We submit that it should be re-examined here and

the judgment should be reversed.

May I say to Justice O'Connor, my colleague, Mr. Baker, calls my attention to the fact that the Parke-Davis case is not cited in any of the briefs and it is a vertical price fixing case which seems to be somewhat different from this.

CHIEF JUSTICE BURGER: Mr. Wallace?

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.

AS AMICI CURIAE

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

The purpose of the Sherman Act is to promote competition, not, of course, for competition's own sake, but, as the Court has pointed out in Northern Pacific and Broadcast Music, as a means to encourage efficiency in the use of resources for the ultimate economic benefit of the society as a whole.

Section 2 of the Act, the Act's build-in paradox, preserves competition by prohibiting competitive behavior that threatens monopolization. That behavior is prohibited whether engaged in individually or by collaboration and regardless of the form of internal organization the transgressing enterprise has adopted.

And, Section 2's limitations on competitive behavior are supplemented by the prohibition of unfair

methods of competition in Section 5 of the Federal Trade Commission Act and by State Unfair Trade Practice laws such as we have seen in this case, the tort action for interference with contractual relations, for interference with business relations, or for business slander.

All of these as well apply regardless of whether there has been collaboration and regardless of the form of internal business organization that has been involved.

QUESTION: Mr. Wallace, has Section 5 as a practical matter been used frequently?

MR. WALLACE: Not frequently, but there is potential for use there that could go beyond Section 2.

The basic principle of antitrust is that within these relatively peripheral limitations on its individual behavior, each enterprise will be spurred on by the much more extensive prohibitions on collaboration to compete and, thereby, to achieve greater economic efficiencies, whether those efficiences are in scientific or technological advance, in product design, in improved distribution methods, or in improvements in management such as better utilization of personnel or changes in the form of internal business organization.

Now, laws with other objectives such as securities laws or state corporation laws may impose some restriction on an enterprise's flexibility to change its

internal business organization.

But, the question before the Court today is whether the antitrust laws themselves should be interpreted to impose an additional inhibition on an enterprise's ability to adopt various forms of internal business organization.

The view of the United States and of the Federal Trade Commission is that it is self-contradictory for the antitrust laws to be interpreted to impede this particular avenue of achieving efficiencies, to impede this particular way of competing.

We are not dealing here with a paradox like Section 2 that ultimately furthers the overall larger purposes of the Sherman Act, but here we are dealing with a self-contradiction that detracts from the achievement of those purposes.

QUESTION: Mr. Wallace, may I ask one question? You have emphasized the internal operations of affiliated group of companies. The Attorney General's committee report in 1955 drew a distinction which may or may not be valid between internal and external activities. What is the position of the Department of Justice today on the views of the Attorney General's committee in 1955?

MR. WALLACE: We don't believe that that is a valid basis for distinction here.

Now, it is true that intraenterprise conspiracy can be referred to or relied on in situations where fortuitously there is reason in furthering the policies of the antitrust laws to find a violation.

In our brief, we attempted to show that many of this Court's decisions can be explained that way. But, in any instance where it is useful to the objectives of the antitrust laws to do that, it would be equally useful to do it if the same effect were achieved through operation by divisions that had the same external effects rather than the fact that there happened to be a separate corporation in the internal organization of the enterprise.

So, the reliance on the corporate form, seems to us, only to obscure the proper antitrust analysis and at the same time to deter flexibility in organizing the enterprise.

QUESTION: Would you take the view that the activity shown by this record, if performed by independent corporations, constituted a violation of Section 1? And, if so, why is it worse if they are affiliated?

MR. WALLACE: Well, I haven't really considered whether there would be a violation of Section 1 if these were independent organizations. There certainly would be a basis for at least a rule of reason argument, if not a

per se argument, that there was a violation here and there was a finding of tortious interference with contract.

The point that I am trying to make here is that while an external effects test seems to implicate antitrust policies and objectives, it really is a form in the intraenterprise conspiracy context of expanding the restraints on unilateral behavior, what is essentially unilateral behavior, without facing up to the question whether Section 2 of the Act should be read that expansively because the fact that that is the form of internal organization of the defendant organization really is a fortuity from the standpoint of the ability of that organization to achieve the same economic result through the same activity.

Now, it is true that competition within an enterprise can have beneficial effects and that is perhaps one of the confusing factors in this field. But, the proper role of the antitrust laws in our view is to encourage those benefits only indirectly as matters of managerial discretion. This becomes very apparent in a very simple example of the kind of beneficial effects that can result.

Rivalry between two clerks in a department store can result in much better service to the customers in a particular situation. But, it is obvious to everyone that

the extent to which the clerks shall compete with each other and the extent to which they will cooperate must be a matter of managerial discretion, that the clerks certainly cannot be cut off from each other in the kinds of exchanges of information that may be inappropriate between independent enterprises and that what counts is that the management of Macy's is competing with Gimball's across the way and will develop whatever mix of rivalry and cooperation within the enterprise that best serves that competition.

There is really no difference in principle in the more complicated question of cooperation or competition between divisions of an enterprise like General Motors or cooperation or competition between separately incorporated subsidiaries.

What we are speaking of here does not, in our view and contrary to the submission made in the briefs on the other side, require the Court to adopt an exemption from the antitrust laws which exemptions are not lightly implied. The question of exemption arises when a statute other than the antitrust laws is being construed to determine whether by implication or otherwise it exempts certain conduct from the scope of those laws. This is a question purely of construing the Sherman Act itself and the exemption cases do not apply here.

Then in response to one other question, we don't think this can be limited to the 100 percent situation because some of the most pro-competitive aspects of separate incorporation are the ability to diversify the stock ownership to some extent.

CHIEF JUSTICE BURGER: Your time has expired, Mr. Wallace.

Mr. Grimm?

ORAL ARGUMENT OF VICTOR E. GRIMM, ESQ.

ON BEHALF OF THE RESPONDENT

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

In this case autonomously operated parent and subsidiary corporations acted in concert to exclude a new competitor from the market.

QUESTION: May I ask, Mr. Grimm, could Copperweld have avoided all this difficulty had it just made this a division when it acquired Regal?

MR. GRIMM: Well, there certainly is a distinction that is made in the statute.

QUESTION: No, but -- Would it have avoided any Section 1 problems if it had done it that way?

MR. GRIMM: If there had not been a separate corporation, there would not be a Section 1 claim particularly because the statute requires the existence of

two separate legal persons which this Court has always held.

QUESTION: Yes.

MR. GRIMM: As a threshold matter.

QUESTION: Are there some reasons independent of antitrust considerations perhaps which explains why they didn't do it that way?

MR. GRIMM: There -- It was somewhat conflicting evidence in the record on this point. The Petitioners gave some testimony to the effect that there were tax considerations. They wanted to avoid some state tax. There was also evidence in the record that the Copperweld Corporation wanted it subsidiaries to stand on their own two feet, to be, in effect, independent businesses in the competitive market.

The question essentially before the Court in this case is whether the anticompetitive conduct engaged in by Petitioners should now be excused from antitrust coverage?

There are three basic points which I should like to address bearing upon this issue. First, the language of the statute, including its legislative history, and the proper distinction between corporate divisions and subsidiaries, as well as the relationship between Sections 1 and 2 of the statute.

Secondly, the applicable Supreme Court decisions which uniformly conclude that concerted anticompetitive conduct can come within Section 1 of the Sherman Act.

And, third, the proper standard to be applied in cases of this kind.

But, first there are a couple of observations which I believe are important concerning the facts of this case. First, there was simply no question but that the acts of Petitioners caused the complete exclusion of a competitor from a market for a substantial period of time. That exclusion resulted in a clearly demonstrated restraint of trade under a rule of reason analysis.

Price competition was frustrated, product supply was reduced during a period of serious product shortage. These facts are important, we submit, because this Court has always held that the Sherman Act must be interpreted in light of its fundamental objective; that is preservation of competition. In this instance, the acts of Petitioners seriously undermined that objective.

QUESTION: Well, if the Petitioners had not been separately incorporated and it had been a division within corporation, would there have been liability?

MR. GRIMM: There would not have been liability under Section 1 of the Sherman Act, because, as we point out, Section 1 of the Sherman Act deals solely with the

question of the activity of separate legal persons. That is a threshold requirement of Section 1 of the statute.

QUESTION: Well, that is really a question so I am not sure the consequences of the action are as significant as you suggest.

MR. GRIMM: The consequences of the action are significant for this reason, because the fundamental objective, as we point out of the Sherman Act, is the preservation of competition. Therefore, the language of the Sherman Act, we suggest, should be interpreted to apply to those situations where it properly can be so interpreted based upon that language if there has, in fact, been a subversion of competition.

This, we would point out, is not simply a case of an isolated interference with contract. There were broad scale efforts on the part of the Petitioners here to induce and to coerce other firms to refrain with dealing with Independence Tube Corporation.

For example, when Regal learned that Independence would be entering the market as a competitor, it recruited Copperweld to help take action in response to Independence's impending entry.

The Petitioners --

QUESTION: That would have been -- To pursue the other question submitted, would the mechanism have been

any different if it was a division of Copperweld?

MR. GRIMM: The mechanism may or may not have been different.

QUESTION: Would the control have been any different?

MR. GRIMM: The control would have have been -- May have been considerably different, that is control by the parent of its subsidiary.

QUESTION: With common directors and common chariman of the board and officers?

MR. GRIMM: The evidence in this case demonstrated that despite the fact that there were common directors and officers, the real decisions, as the Court of Appeals pointed out, both in day-to-day operations and in major policy decisions, were made at the subsidiary level. Indeed, the subsidiary functioned essentially as a separate business unit even though there were common directors.

QUESTION: Isn't that commonly true of division of large organizations, day-to-day operations are in the hands of the division?

MR. GRIMM: Divisions may function with some autonomy. The distinction between a subsidiary and a division comes from the language of the statute itself. This Court has always interpreted Section 1 of the Sherman

Act to require the existence of two separate legal persons. An unincorporated division is not a separate legal person and, therefore, would be incapable of meeting that threshold requirement.

I think it is also important to note that there is some historical explanation to that distinction as well.

In 1890, of course, Congress was aware of corporations and, indeed, of affiliated corporations, but autonomous or even the existence of unincorporated divisions did not exist in 1890. The statute was framed to be directed toward those kinds of entities which did exist.

So, the language itself drew the line -- The statute itself drew the line on the basis of independent entity, business entity and along the line of the concepts of common law conspiracy which, of course, also requires the existence of two separate legal persons.

There seems to be, we would submit, some substance to this distinction as well. An unincorporated division, while it may, as Your Honor points out, exists with significant autonomy, nevertheless, there are some important things that an unincorporated division is not capable of doing which has significance in the market place. An unincorporated division is incapable of

engaging in a contract in its own name and in its own identity. It is incapable of engaging in a contract in restraint of trade or otherwise.

So, we would submit that there is some logic to drawing the line where the statute seems to draw the line and that is on the basis of legal entity, because an unincoporated division in reality cannot perform all of the functions that a separately incorporated legal entity can by virtue of the legal privileges which the law attributes to separate incorporation.

QUESTION: What position do you take if the board of directors are identical and the officers are identical?

MR. GRIMM: That was substantially the fact here. The important inquiry, we submit, is that one must look at the realities of the operation. Are the --

QUESTION: That is what I am trying to do.

MR. GRIMM: Are the officers really performing a function of running the business, the officers of the parent that is, or is the business really being run, as in this case, by either officers of the subsidiary or by the executive --

QUESTION: In my hypothetical, the officers are identical.

MR. GRIMM: And, the inquiry, I would submit,

where there are identical officers is whether the officers are dominating the operation of both corporations in day-to-day operations and in policy decisions or whether, in fact, the actual operation of the subsidiary is run by those who are not running the parent corporation which is the case here.

QUESTION: How in the world -- Do you want to give them a lie detector test or something?

MR. GRIMM: No. The Court of Appeals in this case, and the District Court as well, identified a number of factors which determines whether or not corporations are being run with real and substantive autonomy. It identifies a list of factors which Professor Sullivan, in his antitrust treatise identified, which considers such matters as who is really making the decisions as to the long-term planning of this corporation? Is it the parent or is it someone at the subsidiary who is not a part of the parent? Are the other day-to-day activities --

QUESTION: Do you mean you would find that the board of directors would act differently when they are sitting in the subsidiary board meeting than they were here? Would they be hostile by any chance?

MR. GRIMM: No, they wouldn't be hostile. It is really a question --

QUESTION: Is there any way in the world

they could be?

MR. GRIMM: That they could be?

QUESTION: Yes.

MR. GRIMM: No, I wouldn't think that they would be hostile. I would think that they may perform --

QUESTION: Is there anything they could be other than 100 percent cooperative?

MR. GRIMM: Well, they would be cooperative certainly. I think the important point --

QUESTION: Is there anything that they could do that the independent person couldn't do? I think it adds up that they are not independent, are they?

MR. GRIMM: Well, I would refer the Court, if I may, to the Joint Appendix which sets forth an affidavit at page A-103 which is the affidavit of the general manager of Regal Tube Company in which he identifies all of the activities in which he has sole responsibility for operation of the subsidiary corporation and that it is not the board of directors in that sense who was running the corporation either in terms of long-term policy decisions or in terms of day-to-day activities.

So, the question is who is really running the corporation as an actual matter of reality as distinguished from who might ultimately have the power to change the corporate setup or to even sell the stock of

the corporation at some point?

QUESTION: Mr. Grimm, who controls the profits of the subsidiary in this case?

MR. GRIMM: In this case, the general manager of the subsidiary was solely responsible for developing a profit for the subsidiary corporation.

QUESTION: But, when he made a profit, who controlled it?

MR. GRIMM: Who receives the profit?

QUESTION: Yes.

MR. GRIMM: The parent corporation by virtue of its stock ownership would ultimately benefit from that profit, of course.

QUESTION: Were consolidated returns filed both to the public and the SEC?

MR. GRIMM: The consolidated tax returns, I believe, were filed. I believe that SEC requirements compelled the filing of consolidated --

QUESTION: But, they were filed?

MR. GRIMM: They were filed in accordance with the SEC requirements as I understand it.

QUESTION: Was there any limitation on capital expenditures by the subsidiary?

MR. GRIMM: There were some restrictions, although again there is conflicting evidence on this

point. The general manage of the subsidiary had the authority to make capital expenditures up to a certain level.

QUESTION: What was the level?

MR. GRIMM: There is conflicting evidence on what the level was. Ten thousand dollars was one of the points of testimony. But, the general --

QUESTION: You couldn't go very far with $10,000, could you?

MR. GRIMM: In capital expentiures.

QUESTION: Yes.

MR. GRIMM: That was the limitation solely on capital expenditures without approval. Now, in terms of other activities, he had complete authority and complete responsibility for making a profit.

QUESTION: In day-to-day operations.

MR. GRIMM: Both day-to-day operations and, as the Court of Appeals points out, policy decisions, long-range planning.

QUESTION: Like what?

MR. GRIMM: Pardon me?

QUESTION: Policy decisions with respect to what?

MR. GRIMM: Policy decisions with respect to planning new products and introducing new products,

developing new products, policy decisions with respect to establishing new facilities, policy decisions with respect to identifying corporate acquisitions to be made, policy --

QUESTION: Corporate acquisitions were not approved by the board of directors of the parent?

MR. GRIMM: Well, the corporate acquisitions would have been subject to approval, but he was essentially responsible for identifying and developing those opportunities.

QUESTION: That would be true if it were a division of a central corporation, would it not?

MR. GRIMM: It presumably would be depending --

QUESTION: The management of the division is supposed to move out on its own and look for more business.

MR. GRIMM: Certainly a division can be established in that way. I have no question about that.

I think that on the question of the relationship between the parent and subsidiary, there are a number of case of this Court which are instructive on whether or not a combination can exist in a situation where there is influence of dominance or coercion between the parties.

This Court in the case of Albrecht versus the Herald Company, for example, held in a case that involved

a principal and an agent where the agent is under the total dominance and control of the principal and carries out an anticompetitive objective, that the principal and the agent, even though the agent is totally under the domination and control of the principal, but is nevertheless a separate legal entity. If an anticompetitive restraint is worked, the Court held that that was a combination where the agent materially aided in the advancement of that objective.

QUESTION: Tell me, Mr. Grimm, is there any decision of this Court construing Section 1 as you suggest it should be construed?

MR. GRIMM: Is there any decision --

QUESTION: Is there any decision of this Court which says that if they are two independent -- in the sense that they are two corporate parties here that any agreement between them is a violation of Section 1?

MR. GRIMM: There are a number of cases which hold that corporate affiliation is not a defense. And, beginning really with the Standard Oil case and coming down all the way to the Perma Life case. Yellow Cab --

QUESTION: Do you read those as holding that because there are two independent corporations here that is enough that it falls within Section 1?

MR. GRIMM: That in and of itself is not enough

to make out a violation. I think it is important to keep in mind here that what we are talking about is not --

QUESTION: Apart from what the agreement may be between them. If there is an agreement as defined under Section 1, the fact that these are two independent parties, are the you suggesting we have held makes it a violation of Section 1?

MR. GRIMM: I think that Timken, Kiefer-Stewart, Yellow Cab --

QUESTION: Are you arguing that if that is a matter of statutory construction that ordinarily if that is to be changed, that is for Congress not for us to do?

MR. GRIMM: Absolutely. In Timken versus the United States, for example, this Court was presented with the issue that is exactly the same issue that is presented in this case. In that holding, this Court said, and I quote the following language. In precisely the same issue involved in that case over 30 years, this Court said, "if such a drastic change is to be made in the statute, Congress is the one to do it." That is 341 U.S. 599.

I should like to turn next to a brief discussion of the legislative history, because we submit that it bears -- it sheds light on this question. But, even before that, I think it is important to refer to the language of the statute itself which provides every

contract combination in the form of a trust or otherwise or a conspiracy in restraint of trade is declared to be illegal.

Here the Petitioners were, indeed, separate corporations. This Court has held that that is a threshold requirement. Here it has been concluded unquestionably that Petitioners' activities resulted in an unreasonable restraint of trade under a rule of reasoned analysis. The language of the statute was plainly violated. We submit that the basic objectives of the statute and the legislative history support this conclusion.

Congress was clearly concerned about the predatory efforts to prevent new competitiors from entering into the market. Congress also, I believe, made it clear in the legislative history that affiliated corporations were indeed within the meaning of the combination and conspiracy language of the statute.

In 1890, of course, Congress was primarily concerned with the anticompetitive behavior of the trusts, but Congress considered those trusts to be the manifestation of a more fundamental problem at which the statute was aimed. That problem was the suppression of competition by any form of concerted action.

Senator Sherman made it clear that the primary

concern of the Sherman Act was not with the creation of combinations by merger or otherwise, but with the anticompetitive acts in which those combinations engaged.

The words of Senator Sherman during the legislative debates, I think, are apt for this particular case when he said that if a humble man starts in business in opposition to them, they will drive him down, they will crowd him down. Then it is the duty of the courts to intervene and that is the kind of activity involved here, that is the kind of activity that Senator Sherman was concerned about.

It is important to recognize that the trusts of 1890 were themselves groups of corporations under common ownership. The trust device was nothing more than a group of commonly-owned corporations in which a group of trustees owned all of the stock.

The trusts, however, were evolving into the holding company even in 1890, which is why Congress framed the statute to cover in the language of the statute, combinations in the form of trust or otherwise.

Indeed, I believe that it is very important in interpreting the word "combination" in the statute to understand what was meant by that term in 1890. What did the framers of the statute think the term "combination" meant? Indeed, that term was a commonly understood and

well-used term. In its simpliest form, it meant nothing more than the cooperation of two or more persons to achieve a given result.

The framers of Section 1 of the Sherman Act, we submit, meant to use that term as it was commonly used at the time and that is a combination meant any form of a collection of persons or as the trust were a collection of corporations which, when they engaged in a restraint of trade, could be held to violate Section 1 of the Sherman Act.

In light of this legislative history, this Court has held in each and every case that has been presented to it which involved this issue.

I should like to for a moment direct my attention to the relationship between Section 1 and Section 2 of the statute. Both sections deal with combinations or conspiracy. Section 2 is not limited to individual conduct. Indeed, the language of Section 2, I submit, is instructive as to the meaning of combination or conspiracy under Section 1.

Section 2 of the statute with respect to the combination element povides every person -- and person is defined to include corporations. So, if one reads Section 2 substituting the word "corporation" for "person," the language of Section 2 says every corporation who shall

combine or conspire with any other corporation may violate the statute. We submit that Congress meant exactly what it said.

Section 2, of course, also concerns attempts by individual persons to attempt to monopolize. The Petitioners and the government in this case have suggested that this Court should now hold that Section 2 of the Sherman Act, that part of Section 2 which relates solely to attempts to monopolize by single persons, should henceforth be applied and only applied -- the only section of the Sherman Act to be applied to restraints of trade among affiliated corporation. We submit that that approach strains the language of the statute itself.

But, there is a more important and fundamental point here. That is that the government's position -- that is the attempt to monopolize section should only be applied to these circumstances would, in effect, exempt these kinds of activities from the Sherman Act for this reason, because Section 2, the attempt to monopolize portion of Section 2 has always been held by the courts or at least in recent years to apply only in those situations in which there is a dangerous probablility of achieving monopoly as measured by substantial market shares. That would mean in this particular case where two corporations are engaged in different markets, neither one of which

having a dominant position in either market, nevertheless combine their activities to suppress competition of third parties, that that activity would be automatically exempt from antitrust coverage.

I should like --

QUESTION: Does the two corporate language that you referred to in the statute do any more than get you past the first threshold of a case? In other words, if it was the "X" division of "Y" corporation, then you wouldn't meet that threshold test, would you?

MR. GRIMM: That is correct.

QUESTION: So that the language, two corporations, doesn't really decide very much, does it?

MR. GRIMM: Well, what it decides is that it is within the scope of Section 1.

QUESTION: It is one of the first questions you asked.

MR. GRIMM: It is a preliminary -- It is a threshold question. And, beyond that it is important, as we point out in our briefs, to apply a substantive standard. And, as we have pointed out, the standard which is appropriate in these cases is the standard which is derived from the decisions of this Court.

When presented with issues of this kind in the past, this Court has concluded that there are two factors

which should be considered, the effect of the activities of the parties involved on competition and also the operational realities of those parties.

The lower courts have applied this doctrine and these concepts not always with the greatest precision we would agree, but the results of the lower court cases are essentially consistent with the two-part analysis which says that whether affiliated corporations should be held to have violated the statute should turn upon two factors, whether they actually functioned in the market place in reality as two distinct economic units and, secondly, whether each corporation undertook activities to suppress the trade of third parties.

And, as I point out, this is a threshold inquiry. It is designed to determine whether those corporations are capable of engaging in an antitrust violation and not in whether an antitrust violation actually occurred.

In addition to that threshold inquiry, it would be necessary to determine that those parties actually formed a conspiracy within the meaning of that term under the cases relating to conspiracy and it would also be necesasry to establish that anticompetitive acts were undertaken to destroy the competition of a third party.

The aspect which relates to the autonomy of

operation is designed to determine whether, as in the words of the Court of Appeals in this case, there is enough separation so that it is sensible to treat those two separate legal units as separate economic units under the Sherman Act.

When a separate corporation is functioning as a separate economic entity into the -- in the market place, it enters into contracts and other business arrangements which give it some economic influence. When that economic influence is combined with another separate corporation, even though an affiliated corporation --

QUESTION: But, you have conceded that the parent corporation kept this subsidiary on a very tight, short rein.

MR. GRIMM: The evidence showed that, as I pointed out, there was an affidavit, among a substantial amount of other evidence, which showed that, in fact, the general manager of the subsidiary had the sole responsibility for operating the subsidiary.

The Court of Appeals addressed that question very specifically and in a detailed way based upon all of the evidence presented. That was precisely one of the issues that was presented to the Court of Appeals by Petitioners. Was there enough autonomy to meet that test as to whether or not they could be considered separate

economic units?

The District Court in the post-trial motions and the Court of Appeals all concluded that there was sufficient and substantial autonomy both in day-to-day operations and in policy decisions.

The second aspect of the test relates to the effect of the activities on third parties, whether or not significant restraints of trade are imposed on third parties.

In this case, an unreasonable suppression of competition did occur. The Sherman Act was clearly intended to protect competition against such competitive assaults.

We submit, therefore, that the decision of the Court of Appeals should be affirmed.

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

THE CLERK: The Court is now adjourned until tomorrow at 10:00.

(Whereupon, at 3:02 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:

#82-1260 - COPPERWELD CORPORATION, ET AL., Petitioners v. INDEPENDENCE TUBE CORPORATION

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BY _____

(REPORTER)