OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1368

TITLE NORTHWEST WHOLESALE STATIONERS, INC., Petitioner v. PACIFIC STATIONERY AND PRINTING CO.

PLACE Washington, D. C.

DATE February 19, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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NORTHWEST WHOLESALE :
STATIONERS, INC., :
Petitioner, :
V. : No. 83-1368
PACIFIC STATIONERY AND :
PRINTING CO. :

- -x

Washington, D. C.

Tuesday, February 19, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:08 o'clock a.m.

APPEARANCES:

DAVID J. SWEENEY, ESQ., Portland, Oregon; on behalf of the petitioner.

CATHERINE G. O'SULLIVAN, ESQ., Chief, Appellate Section, Antitrust Division, Department of Justice, Washington, D.C.; on behalf of the United States as amicus curiae in support of petitioner.

JOSEPH P. BAUER, ESQ., Notre Dame, Indiana; on behalf of the respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Northwest Wholesale Stationers against Pacific Stationery and Printing Co.

Mr. Sweeney, you may proceed whenever you are ready.

ORAL ARGUMENT OF DAVID J. SWEENEY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. SWEENEY: Mr. Chief Justice, and may it please the Court, the petitioner Northwest Wholesale Stationers is a non-profit purchasing cooperative. It pools the collective buying ability of its members to achieve larger aggregate purchases, thus lowering prices to its members.

At year end, what would be profits are distributed to its members as rebates, which are exempt from being categorized as price discrimination under the Robinson-Patman Act.

The members of the cooperative are retail stationery stores located throughout the five western states. There is nothing in the record which demonstrates what market impact or power the cooperative had or in fact the definition of what the market is.

The respondent Pacific Stationery is a wholesaler-retailer combination, and used its

cooperative membership for purchases of odd lot and round out items when it could not stock them in its own wholesale inventory. It had additional sources of supply from manufacturers and other suppliers.

After Pacific's ownership changed, it filed another membership application. That application was denied, although they were informed that they could continue to purchase from the cooperative.

Pacific then filed a Sherman One antitrust lawsuit alleging that a group boycott had occurred, that its denial of cooperative membership in the absence of a due process hearing constitute a per se violation under liability theory based on Silver versus the New York Stock Exchange.

At the District Court level on cross motions for summary judgment, the District Court dismissed plaintiff's claim, reasoning that Pacific failed to submit any evidence showing a restraint on competition as distinguished from alleged unilateral harm to itself.

The Ninth Circuit, in a divided opinion, reversed, finding per se liability for the cooperative's acitons. It stated that termination in the absence of a hearing made the practice so likely to be anticompetitive that it was per se unreasonable.

Our petition followed. The recent decisions of this Court make it clear that under either a rule of reason or a per se analysis, the goal is to form a judgment about the competitive significance of conduct, that courts must view the purpose and effect on competition.

The Ninth Circuit should be reversed because it found per se liability under a simplistic analysis which simply characterized the conduct instead of viewing what actual effect, if any, the conduct had. In recent cases, this Court has authorized the use of an anlaysis of competitive impact: What is the economic reality which occurred as a result of the conduct?

QUESTION: Mr. Sweeney, I take it there is nothing in the record to support the District Court's observation that the exclusion of Pacific didn't affect competition.

MR. SWEENEY: The District Court in its oral opinion made no specific findings of fact or --

QUESTION: Well, I know that. Is there anything in the record that would support it?

MR. SWEENEY: Your Honor, yes, there is. The only factual impact in the record is the loss of rebate, which amounted to approximately $9,800. That was the $9,800 in its last year with the cooperative. So the

record would reflect that in fact a rebate had been lost.

There is nothing in the record that would indicate what effect the loss of that rebate had on Pacific unilaterally as a competitor. There is nothing in the record to demonstrate --

QUESTION: Would there be enough then in the record to even apply the kind of quick look analysis the SG is suggesting should be applied?

MR. SWEENEY: I believe that there would be, because we submit that it must be the plaintiff's burden to show in fact what competitive impact has occurred. If they fail to set forward any evidence as to an impact on competition itself, then that absence of material from the record would allow the Court, faced with a summary judgment motion, to conclude that there had been no meaning of the burden of proof on --

QUESTION: But if a per se rule is applied, that burden doesn't exist, I suppose.

MR. SWEENEY: I would -- arguably, although I would submit that there must be a showing of an impact on competition to act as a predicate for any antitrust injury, so that if in fact there was no showing of anticompetitive injury, then antitrust liability would not follow from that.

Facing liability, as we submit the Ninth Circuit did, on rank characterization ignores the competitive impact, and in terms of economic policy will deter pro-competitive conduct by cooperatives. Here the plaintiff made no showing that membership in the cooperative was a prerequisite or necessary to compete in the marketplace.

The plaintiff was not foreclosed from any supply -- it had multiple sources of supply from manufacturers and other wholesalers -- nor was it foreclosed from any markets in the competition. Nothing in the record indicates that the cooperative Northwest possesses any significant market power in an industry which in fact has been characterized as fragmented. It is in a retail industry.

Because there was no showing by the plaintiff of an impact on competition as distinguished from an impact on itself, the District Court correctly dismissed the suit and correctly, we submit, utilized the rule of reason. We believe it is now appropriate for this Court to clarify the method for appropriately analyzing concerted refusals to deal.

We submit that lower court decisions reflect a continuing uncertainty regarding how they approach a group boycott case. Lower courts realize that when they

engage in a strict characterization of conduct, it may thrust a defendant into the maw of a per se violation when it may be obvious that the purpose and intent of the conduct was not a naked restraint.

QUESTION: Mr. Sweeney, do you agree that this is a concerted refusal to deal?

MR. SWEENEY: I believe that there are a number of factors which would take it at least out of the traditional paradigm of conserted refusal to deal. Certainly we have joint -- we have a joint grouping of competitors.

QUESTION: Do you think you could answer my question yes or no?

MR. SWEENEY: Traditionally yes. I think the answer is yes, Your Honor.

QUESTION: You think it is a concerted refusal to deal?

MR. SWEENEY: Well, I guess -- let me back up. No, Your Honor. I will change my mind, because there are a number of factors involved. This is a cooperative that has membership scattered throughout five western states. I believe -- it is hard for me to conceive that --

QUESTION: Well, if it is not a concerted refusal to deal, isn't that the end of the case?

MR. SWEENEY: It may very well be. Our point --

QUESTION: Maybe it is really a very easy case.

MR. SWEENEY: I hope so. We believe that simply because you have an aggregation of economic units that may be classified as a joint grouping, that that is not the end of the analysis, and in fact you must show some competitive impact. The effect of the cooperative was really more of a singular acting as a wholesaler. It was really in essence a vertical relationship between Northwest acting in its capacity as a wholesaler.

There certainly can be no showing that a small retailer in Montana competed with Pacific, which operated in downtown Portland. So we would in essence, Your Honor, characterize the basic nature of the case, although it certainly was analyzed as a concerted refusal to deal, although the District Court stated that he didn't believe it was appropriate to consider it as a group boycott.

We believe the lower courts, in line with the Court's recent decision, should now be given the tools of analysis for a joint venture or joint actions, so that a trial court can deter truly anticompetitive conduct without risking harm to joint conduct which is

procompetitive.

The courts already recognize that boycotts are not a unitary phenomenon. As a starting point, this Court could confirm that not all conduct which definitionally could be called a concerted refusal to deal, is deserving of per se treatment. This will free lower courts from the shackles of characterization so that they can roll up their sleeves and really get down to the job at hand, and that is seeing what conduct is truly anticompetitive.

How do they do that? We would submit that in line with the Court's opinion in GT Sylvania, followed up last term by Jefferson Parish and NCAA, the trial court could make a threshold analysis of competitive impact, which may likely require a market definition before characterizing the conduct as rule of reason or that which would merit per se condemnation.

QUESTION: Mr. Sweeney, procedurally, there are motions to dismiss, there are motions for summary judgment, there are motions for partial summary judgment, there are trials, there are judgments after trials. Where does this threshold analysis -- what category procedurally does it fit under? Is it a motion for partial summary judgment?

MR. SWEENEY: It could fit nicely there, under

a motion for partial summary judgment. It could in fact be utilized as a tool at a pretrial level for narrowing the issues that the trial court has to deal with. This may aid the District Court or the trial judge in focusing on whether or not a rule of reason trial is appropriate.

It could be done on a partial summary judgment basis. Conceivably, a motion to dismiss. In fact, there was absolutely no showing of anticompetitive impact. The trial court could in fact call a conference at some stage and request that the issue of anticompetitive impact be briefed.

QUESTION: You see it as simply a motion on a question of law that is involved in the case, that the trial judge could decide that question of law at any stage of the trial just like he might decide any other question of law.

MR. SWEENEY: I see it can be utilized in that function and at that level so that he could funnel down this important. It could also be, if the issues were not focused, if the litigants for some reason did not want to file motions, it could be used -- the trial court could indicate that the first portion of the trial should be devoted to some showing.

And if in fact there was a showing of

anticompetitive impact, the burden of going forward would then shift to the defendant to explain what his reason is, if there is some plausible efficiency-enhancing argument that exists, and if there is, then it would be appropriate to analyze it under a rule of reason basis.

If he can't comeforward with any plausible efficiency-enhancing argument, then in fact per se condemnation may be appropriate, but at that point when the plaintiff meets his burden of going forward and showing that there is some anticompetitive impact, then the defendant should be given the opportunity to say why he engaged in this conduct, and if in fact there is a plausible argument for it, then a rule of reason trial should ensue so that whatever restraint exists can be balanced against the pro-competitive arguments that the defendant may have.

If you apply that test here, we submit that the only evidence in the record is a nominal loss of year-end rebates by the plaintiff Pacific. A threshold analysis would demonstrate that no pernicious market effects did or were likely to occur. It was not foreclosed from any source of supply, including the cooperative.

On the record, the loss of rebates were the

only damage element the president of Pacific knew of, and stated that it was impossible to give any specific examples of how the loss of those rebates would affect it pricing policy or damage it.

All this was in the context of a fragmented industry spread over five different states, where there has been no showing that the cooperative possessed any market power or leverage to enforce its will or to preclude the plaintiff from any markets.

We submit that even if you saw anticompetitive impact, that it was the function of vital self-regulation by cooperatives. Cooperatives must engage in some self-regulation in order to become more efficient. We had a rule, the cooperative had a rule which required notification of change of ownership within 15 days after that ownership changed.

Now, this is a basic and an important rule for a cooperative. The cooperative simply must know who in fact its owners are. A change in ownership could signal a change in credit history, could signal a change in buying patterns. The cooperative's efficiencies would be sacrificed if its credit and buying policies had to be made in the absence of actual knowledge of who was doing the paying and who was doing the buying.

Now, the Ninth Circuit applied Silver versus

New York Stock Exchange, and really went off on a due process theory that held that it required self-regulation. Now, Silver requires self-regulation as a result of the Securities and Exchange Act. The Robinson-Patman Act does not hint that the cooperatives of this country should engage in self-regulation.

Absent self-regulation, there is absolutely no reason even under Silver that a due process hearing should occur. The lower court's ruling should be reversed, and this Court can now make it clear that group boycotts or any joint economic action should be analyzed on the basis of its competitive impact rather than its label.

Based on the record in this case, no impact has been shown, and the District Court's order of dismissal should be reinstated. Alternatively --

QUESTION: Don't you think the Court of Appeals said that there was a competitive impact, adverse competitive impact because of denial of a rebate? Didn't it say that?

MR. SWEENEY: They said that, Your Honor, but there is no reasoning behind that statement.

QUESTION: It is a fact, though, that they were denied a rebate.

MR. SWEENEY: They were denied the ability --

QUESTION: And you think that it is just really an unsupported inference that denial of a rebate that competitors are getting would hurt the competitive position?

MR. SWEENEY: I believe it is an unsupported inference, Your Honor. The loss of a rebate is something that --

QUESTION: Well, you may argue what the significance of the evidence is, but that is what the Court of Appeals relied on, and said that absent the Robinson-Patman Act exemption, there would be a per se liability. That is what it held, isn't it?

MR. SWEENEY: They held that, but --

QUESTION: And then said they couldn't take advantage of this so-called exemption because of procedural default.

MR. SWEENEY: In essence, where we submit the Ninth Circuit went afoul, Your Honor, is that they made no competitive impact analysis, and we believe it is --

QUESTION: You mean beyond saying that --

MR. SWEENEY: Beyond simply --

QUESTION: Beyond saying that there was a denial of a rebate which had an anticompetitive impact.

MR. SWEENEY: Really, beyond saying that there was a lack of --

QUESTION: That is what they relied on.

MR. SWEENEY: Well, we submit that they also relied on --

QUESTION: How much more analysis do you want?

MR. SWEENEY: We want an analysis, Your Honor, of what in fact happened on competition, how the loss of a rebate affected Pacific, and there was no discussion of that. We believe it was a conclusory opinion. We submit that the decision of the Ninth Circuit should be reversed.

CHIEF JUSTICE BURGER: Mrs. O'Sullivan.

ORAL ARGUMENT OF CATHERINE G. O'SULLIVAN, ESQ.,

ON BEHALF OF THE UNITED STATES

AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

MRS. O'SULLIVAN: Mr. Chief Justice, and may it please the Court, the fundamental reason for concern in this case from the government's perspective is that an overly literal application of the per se group boycott label to conduct of joint ventures threatens to substantially undercut their procompetitive potential.

This Court has often observed that group boycotts are per se illegal, but it has only characterized conduct as a group boycott in cases involving an attempt to eliminate rivalry in the sense

of an attempt to exclude a competitor from the market or to eliminate a form of competition such as price discounting.

The group boycott or concerted refusal to deal label, however, literally covers a wide variety of conduct, and that conduct can range from the seriously anticompetitive to the substantially procompetitive.

QUESTION: Mrs. O'Sullivan, do you think it covers the conduct in thise case?

MRS. O'SULLIVAN: I think that is a question of characterization. In our view, the essential issue in the case is whether this conduct should be categorized as a concerted refusal to deal, because that category --

QUESTION: Do you think it should be?

MRS. O'SULLIVAN: Our view is that from the record that stands before the Court, it is not possible to say whether the net result of this conduct is procompetitive or anticompetitive.

QUESTION: Surely it is possible to say whether it is a concerted refusal to deal or not. You know what they did. You don't know the conseguences of what they did. Is it in the first instance a concerted refusal to deal?

MRS. O'SULLIVAN: It is possible to

characterize it that way, but if that characterization --

QUESTION: I know that.

MRS. O'SULLIVAN: -- implies per se illegality, if concerted refusal to deal is understood as a term which means not merely concerted action by competitors but concerted action by competitors ought to be per se illegal, then we say it is not possible to characterize it that way on this record.

QUESTION: Is there any case you can cite in which this Court has called something like this a concerted refusal to deal?

MRS. O'SULLIVAN: No. Precisely, or at least as we understand the facts on this record, and part of our concern is that we don't know enough about what was actually happening here in terms of the purpose or effect, but we believe --

QUESTION: Why do you need that information to know whether it is a concerted refusal -- what is a concerted refusal? Isn't it an agreement among competitors not to do business with a certain person?

MRS. O'SULLIVAN: If one characterizes it that way, then yes, this would be a concerted refusal to deal.

QUESTION: Why? They did agree to do business with them. They will sell to them.

MRS. O'SULLIVAN: They agreed not to do business on a particular basis.

QUESTION: But is that a total refusal to deal?

MRS. O'SULLIVAN: That is not a total refusal to deal, and it is not necessarily anticompetitive, but that is precisely our point, that if one says that any time one refuses to do business on a particular basis, that that is necessarily per se illegal, that leads to the results that we are concerned about, and this Court's decisions have very carefully limited that characterization. They have used that term, which implies per se illegality, only in cases that involved some effect on the competitive marketplace.

QUESTION: They have also only used it in cases in which there was a refusal to deal, haven't they, which isn't true here.

MRS. O'SULLIVAN: That is, I think, basically accurate. One can dispute whether in cases such as Associated Press, whether the restrictive membership requirements.

QUESTION: That was a total refusal to deal, wasn't it? All the members agreed they wouldn't do business with people who didn't belong to the Associated Press. You don't have that here, do you?

MRS. O'SULLIVAN: There was a possibility of membership on very restrictive terms, but I certainly agree with your point, which is that the effect in those cases has been to exclude someone from the market, and we think that that is the essential characteristic. We think that it is important that before characterizing something as a per se illegal concerted refusal to deal, there be a determination that it is the kind of conduct that --

QUESTION: It certainly can't be a per se refusal to deal unless it is a refusal to deal.

MRS. O'SULLIVAN: I think that is fair enough.

QUESTION: And I have been trying to figure out whether it is a refusal to deal or not, and everybody is kind of wishy-washy on that point.

MRS. O'SULLIVAN: That is fair enough, and I think that this illustrates precisely the problem, that there has been a tendency to use per se labels as just that, a label. If it is literally possible to include something within a label, then the courts have tended to assume that the inquiry was ended.

And I think as your questions point out, that is simply the beginning of the inquiry. Even if one can put certain words on the conduct, that does not

necessarily tell one very much about their competitive status under the Sherman Act.

QUESTION: Mrs. O'Sullivan, when does the so-called quick look that you espouse shade into the closer look of a rule of reason? It seems to me that there is a shading there that is a little difficult to understand or apply for courts.

MRS. O'SULLIVAN: As the Court noted in the NCAA opinion, sometimes the distinction between the rule of reason and the per se approach becomes a little blurred. In our view, the quick look is a method of analysis. It refers to the questions that one must ask before deciding what evidence one needs to determine that something is anticompetitive and thus a violation of the Sherman Act. It is an analysis that could be applied, I think, at virtually any stage of the proceedings. It could well be used --

QUESTION: Well, but presumably here you would suggest that the trial court has to have certain facts before it before it can determine whether a per se rule is appropriate, or whether a trial on the rule of reason is appropriate, and the question is, how much does it have to have, and are you going to have a mini-rule of reason trial to determine whether to apply the rule of reason? How do you approach it in a case like this?

How much do you need to establish?

MRS. O'SULLIVAN: In this case, for example, where there were summary judgment motions, it would be appropriate for a court that was confronted with a motion claiming that the offense was per se illegal to apply the quick look and determine whether the offense -- whether the conduct that is alleged in fact meets the Broadcast Music standards, that it is plainly anticompetitive, it is the kind of conduct that by its very nature --

QUESTION: How do you decide that on summary judgment if there are factual disputes?

MRS. O'SULLIVAN: If there are factual disputes, then summary judgment may not be appropriate. I think the question of what has been proven is not necessarily the same question as the quick look, what one needs to know.

QUESTION: If summary judgment isn't appropriate, how does the Court know whether to go to trial on a rule of reason or apply a per se rule? I mean, you are just locked in this endless cycle, it seems to me, and I want to know how you break out of it, and what a poor trial court judge is supposed to do as applied to a case like this.

MRS. O'SULLIVAN: The quick look is a tool

that I think can help a trial court faced with a case where there are conflicts in the facts, and therefore summary judgment is not appropriate to shape the issues for trial. It can help to determine what issues would be relevant at trial and what --

QUESTION: Well, I suppose you don't go to trial if you apply a per se rule.

MRS. O'SULLIVAN: It may be necessary to go to trial even if one applies a per se rule. It may be necessary to prove that what is alleged was in fact committed. That may be a separate issue. But it would help the court, for example, if there were a dispute of fact as to what was done, it would help the court to narrow the issues in advance to say that if it is proved at trial that this conduct, which is facially anticompetitive and for which there are no plausible deficiency defenses, is proven at trial, then that will be per se illegal. That kind of analysis could be done --

QUESTION: Is there enough on the record in this case, in the cross motions for summary judgment, for a court to have applied your so-called quick look?

MRS. O'SULLIVAN: In our view, there is not enough to determine -- there is not enough to justify a conclusion that the conduct was per se illegal. We took

the position that it was inappropriate to grant summary judgment to the defendant because we think that the plaintiff did place in issue the question of the effect on its ability to compete, and the purpose, the competitive effect of a purpose with respect to excluding dual distributors.

We think that there was enough of a conflict in the evidence that it was inappropriate to grant summary judgment.

QUESTION: You just think the look was a little too quick?

MRS. O'SULLIVAN: We think the District Court was certainly justified in concluding that on the evidence before it at that time, plaintiff was not entitled to judgment on a per se theory. We think it was therefore for the same reason inappropriate for the Court of Appeals to --

QUESTION: Well, the Court of Appeals purported to find an anticompetitive effect. You just disagree with that conclusion based on whatever there was in the record.

MRS. O'SULLIVAN: Your Honor, I think our disagreement with the Court of Appeals goes to more than just the amount of evidence in the record. The Court of Appeals did in fact talk about impairing the ability to

compete, but their reasoning was that rebates had been denied, but those were an economic benefit.

The court did not purport to determine the significance of that economic benefit, did not purport to determine that denying that economic benefit would have the effect of excluding a competitor from the market or excluding some sort of competitive practice.

It simply noted the obvious, that they are an economic benefit, said that denying an economic benefit necessarily impedes to some degree, necessarily impairs to some degree the ability to compete, and that therefore this was a per se illegal group boycott. In our view, that was not sufficient.

QUESTION: Why wouldn't you be willing to say that if there really are good faith arguments on either side as to what the possible effects on competition might be, that that in itself is enough to say that you cannot apply a per se rule? It just isn't so plainly antcompetitive that there can't be any argument about it.

MRS. O'SULLIVAN: I think certainly on the record if there were no more than we have in this case, it would be accurate to say that there is no way one could determine --

QUESTION: If the so-called quick look review

is that there really are good faith differences of opinion about it, how can you ever say that this conduct is so plainly anticompetitive it should be per se illegal?

MRS. O'SULLIVAN: Indeed, if one could not get to the point where the record showed that it was facially anticompetitive and by its nature would tend to --

QUESTION: By that time you have tried it out, like a rule of reason case.

MRS. O'SULLIVAN: Certainly, Your Honor, that is a possibility, and if one cannot determine at any earlier stage, such as summary judgment, that the conduct is or is not facially anticompetitive, one would indeed need to move on to a more extensive inquiry at trial.

Thank you.

CHIEF JUSTICE BURGER: Very well.

Mr. Bauer.

ORAL ARGUMENT OF JOSEPH P. BAUER, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. BAUER: Good morning, Mr. Chief Justice, and may it please the Court, I would like to begin with a brief summary of our position. The essence of our argument is that the record reveals a classic concerted

refusal to deal, the classic group boycott, characterized by anticompetitive intent.

QUESTION: You say classic. What is the closest case to this in our cases?

MR. BAUER: Mr. Justice Stevens, there are a number of cases which are like this case. The Associated Press case, for example, involved a group of competitors who had combined into creating a joint venture there in the newspaper industry and who refused to admit potential new entrants, and this Court held that considering --

QUESTION: Not just a refusal to admit. They also refused to sell news to nonmembers, didn't they?

MR. BAUER: Precisely, Your Honor.

QUESTION: And this co-op does not refuse to sell goods to your client, does it?

MR. BAUER: I was listening to your questions to petitioner, Your Honor. I was struck by that, and we recognize in our brief that this is not a complete refusal to deal. The refusal to deal here consists of a denial of rebates, but there is a willingness to sell.

There are several responses to that. One, in this Court's opinion in Silver, and we mentioned that in Footnote 15 of our brief, this Court said, and if I might just read very briefly from the Court's opinion,

"Nor does any excuse derive from the fact that the collective refusal to deal is only with reference to private wires. The members remaining are willing to deal with petitioners for the purchase and sale of securities."

That is, a partial concerted refusal to deal was unlawful just as a complete concerted refusal to deal was, and the Court went on to say, "A valuable service germane to petitioner's business and important to their effective competition with others was withheld from them by collective action." That was enough to create a violation of the Sherman Act.

Here what you have in the record is --

QUESTION: This is a partial refusal to deal in your view because it is a refusal to sell at the same price that they sell to everyone else, in effect? The net price is not the same.

MR. BAUER: No, Your Honor, I think we would characterize it differently. As a practical matter, this is a refusal to deal. The purpose of forming a cooperative --

QUESTION: Refusal to deal, but what did they refuse to sell to your opponent? Not warehouse space. Not pencils and paper. What did they refuse to sell?

MR. BAUER: They refused to sell the same

goods that they were selling to every one of Pacific's competitors at the same price.

QUESTION: It is a price discrimination case.

MR. BAUER: No, it is more than a price discrimination case, Your Honor. This is not a Robinson-Patman case. This is a Sherman Act claim. What happened in this case was that a group of competitors created a cooperative organization to allow them better to compete with their larger rivals.

The function of a cooperative organization is to use joint buying power of individuals to obtain goods at lower prices, to confer a competitive benefit on every one of the members.

QUESTION: Is it your view that such a group has a duty to admit anyone who applies?

MR. BAUER: Your Honor, that raises different problems. This case does not raise that issue. Now, in fact, in both the Associated Press case --

QUESTION: Do you have a view on my question?

MR. BAUER: I would think in this case there might be reasons that the defendant cooperative might not have had to admit the plaintiff in 1978. When the cooperative was founded in 1953 and the defendant chose not to apply --

QUESTION: Specifically, could they have had a

rule that we will not admit combination wholesalers and resalers, we will just admit retailers? Would that have been unlawful?

MR. BAUER: I am not prepared to answer that question, Your Honor. That is not the question presented by this case. It seems to me that in this case we were talking about an organization formed to confer a competitive benefit on all the members of the organization, which then arbitrarily, without any due process, without any notification, without any hearing, arbitrarily expels one of the members of that organization for anticompetitive purposes, that that is a classic concerted refusal to deal.

And the mere fact that the defendant remained prepared to sell goods to Pacific at elevated prices, at a different price than every other member of the cooperative had to pay, is not a real honest willingness to sell.

QUESTION: What does the absence of due process, as you put it, add to the concerted refusal to deal? What if they had had elaborate hearings and all sorts of evidence had been admitted before the board of governors, and they had reached exactly the same result? Would that make it any less a concerted refusal to deal if it was a concerted refusal to deal to start

out with?

MR. BAUER: Well, Justice Rehnquist, one response might be, if they had gone through that elaborate procedure, and if in fact the facts which are suggested in the record, which suggested that the explusion of the plaintiff Pacific was inappropriate, had that hearing been held, our suggestion is that the plaintiff would never have been expelled from the organization.

QUESTION: Yes, but my question was, what if after such a hearing the board reached exactly the result that it reached here as you claim without due process?

MR. BAUER: Well, the Silver case talks to that.

QUESTION: Does the Silver case make much sense in this context?

MR. BAUER: Your Honor, Silver addresses two very --

QUESTION: Well, do you think it makes much sense in this context?

MR. BAUER: Short answer, yes. Maybe I can --

QUESTION: Go ahead.

MR. BAUER: -- go into a little more detail, Justice Rehnquist. Silver talks to a particular issue.

That is, the antitrust laws made the conduct of the New York Stock Exchange unlawful, and this Court said that conduct would have been a per se unlawful concerted refusal to deal absent the possibility that the self-regulation duty imposed on the New York Stock Exchange by the Securities and Exchange Act might have conferred an exemption.

QUESTION: But now where is your correlative self-regulation function in the case of cooperatives?

MR. BAUER: Your Honor, that is not necessary, because I am going to suggest that Silver stands for two very separate propositions. The first proposition, and the one that has been talked to before, is the possibility that if self-regulation exists, the conduct which might otherwise be -- excuse me, the conduct which might otherwise be unlawful might in fact now be subject to a rule of reason analysis instead.

That is, the presence of a self-regulation duty, in that case imposed by the SEcurities Exchange Act, might have converted what was otherwise unlawful into lawful conduct. This case involves precisely the opposite, and so self-regulation is not an issue.

In fact, what is involved in this case is that you have already a concerted refusal to deal which is arguably ambiguous. That is, it may be difficult to

characterize the conduct. We allege that this conduct is characterized clearly by anticompetitive intent. We assert that this conduct was done with anticompetitive purposes.

But arguably that is ambiguous. In this case, where there is a complete absence of due process, no notice, no hearing, no explanation offered, in that case, what that absence of due process does is help us to characterize the conduct and make --

QUESTION: I had thought due process applied to state action. I don't understand your trying to import it into purely private action. That seems to me both unnecessary and unwise to your argument.

MR. BAUER: Justice O'Connor, in fact, in the Silver case, where the Court suggested --

QUESTION: Oh, but that was the Securities and Exchange Act, which had certain provisions that certainly aren't applicable here, and I can't imagine that we would want to extend that on, nor do I think it is necessary to your Sherman Act argument.

MR. BAUER: Well, I was merely addressing myself to your state action question, Your Honor. Clearly the New York Stock Exchange is not a state, although some might think it rises to that level.

QUESTION: That is why the decision may be one

that relies particularly on provisions of the Securities and Exchange Act and isn't really relevant to this situation.

MR. BAUER: But in the Silver case, what the Court recognized was the importance of due process even in those kinds of private transactions to ensure that persons did not engage in anticompetitive conduct, and so to return to Justice Rehnquist's question, our suggestion here is --

QUESTION: Why don't we return to whether it is anticompetitive conduct, because it seems to me that is the fundamental inquiry that is at issue here, whether it is anticompetitive. Is there anything in the way of harm to Pacific other than the loss of rebates?

MR. BAUER: Well, Your Honor, there is more, and I would like to amplify on --

QUESTION: Well, what?

MR. BAUER: What happened was that --

QUESTION: Just spell out in brief form what harm occurred other than the loss of rebates.

MR. BAUER: Well, in addition to the loss of rebates, since Pacific was no longer a member of -- excuse me, was no longer a member of the cooperative, and as a practical matter then was precluded from buying, not that it could not, but that as a practical

matter, given the elevated prices, it would not buy, what happened was, Pacific then had to engage in greater inventory, had to expand what went on in their own warehouses.

QUESTION: Well, let's see. Pacific was a much larger entity in terms of volume of business than all of Northwest co-op combined? Is that right?

MR. BAUER: No, it is not quite right, Your Honor. In fact, what you have is that in terms of total sales, as the brief suggests, Northwest's total sales were somewhat less than Pacific's total sales.

On the other hand, when you compare apples and apples, that is, the particular supply lines that Northwest engaged in, and then the particular supply lines that Pacific engaged in, and then compared them at the wholesale level, my recollection was that Pacific was of the order of $1.9 million and Northwest was approximately $5 million.

So in fact on a comparable apples to apples level, Pacific was somewhat smaller than Northwest.

Your Honors, we suggest that in this case what you have is the arbitrary expulsion of a member of the cooperative for anticompetitive purposes with an anticompetitive effect. Let me talk for a moment to the anticompetitive purposes, and if I could do that, I

would like briefly to talk a little bit about the facts of this case.

What happened was that in 1972, the present owner of Pacific, Mr. John Stirek, began purchasing stock in Pacific. In 1974, Northwest adopted bylaws which did two things. One, it made membership in the cooperative by so-called dual operators, companies which were both wholesalers and retailers, unavailable, but that new bylaw contained a grandfather clause which exempted Pacific.

QUESTION: Do you think that would have violated the Sherman Act without the grandfather clause?

MR. BAUER: If they had adopted the new bylaw in 1974, Your Honor, and then because of the --

QUESTION: And not grandfathered, so this of course means that you have to get out because you have a dual operation.

MR. BAUER: We would maintain absolutely. In fact, our postion, Justice Stevens, is that that in fact is precisely what happened.

QUESTION: And that is the anticompetitive purpose you are talking about?

MR. BAUER: Absolutely. In fact, our --

QUESTION: Could they have organized in the

first instance having that anticompetitive rule in the bylaws? You don't want to answer that, I guess.

MR. BAUER: I did't want to answer you before, and I am not sure I --

QUESTION: Even though it is the heart of your case when they make the change.

MR. BAUER: Excuse me?

QUESTION: Even though it is the heart of your case when they make a change in the bylaws to impose that requirement.

MR. BAUER: Well, our proposition, Justice Stevens, is the following, that what you have here is an organization composed of members designed to confer competitive advantages on one another by coming together and amalgamating their joint buying power. And what they have done is arbitrarily decided, but we don't like one of our members. We don't like him because --

QUESTION: Well, you say arbitrarily. Supposing they said, we will have one member from each market area, and no more than one member from any given market area. Would that be per se illegal?

MR. BAUER: Now we are talking about a concerted refusal to deal, and we are getting closer to the Topco case, and I guess if this is like Topco --

QUESTION: You are getting closer to a

concerted refusal to deal.

MR. BAUER: I would say absolutely. In fact, in Topco you will recall, Justice Stevens, this Court said one of the things that was unlawful about that conduct was the unwillingness to admit perspective members.

What the members of Topco did, you will recall, is, they got together because they wanted to confer a competitive advantage on one another, the so-called private brand labels, so they could compete better with A&P and Kroeger and National.

And they were leaving all the mom and pops out of the organization, and they applied and wouldn't be admitted. The District Court said that is okay because it confers a competitive benefit on the members of Topco, allowing them better to compete with A&P, and this Court reversed, and this Court said, it is not for those members to make that decision as to whether or not to benefit themselves to the disadvantages of prospective members.

That is precisely what we would have here under your hypothetical. Now, what we have here, however, arguably the facts are more ambiguous. If in 1974 they had simply amended the bylaws and kicked Pacific out, it seems to me that would clearly evidence

anticompetitive intent.

What you have here is arguably more ambiguous, because what you have is a bylaw adopted which is designed to impact only on Pacific. There is lso this notification provision, but they go along without any problem.

In 1977, the sale of stock from the former owner of Pacific to Mr. Stirek was completed, and Mr. Stirek doesn't notify Northwest, and one of the reasons he may not have notified Northwest is because he didn't even think the provision applied to him. He started buying this stock in 1972. He was already a shareholder. This goes to Justice Rehnquist's question.

The reason I suggested due process was important is, if that hearing had been held, that fact would have come out. It would have come out that we shouldn't kick this guy out because he is entitled to stay in here. They had a hearing -- excuse me. They had a meeting where they decided to throw him out, and never gave him any notice. Never gave him any warning.

QUESTION: That is a matter of Oregon law, isn't it, whether they are entitled to throw him out under the rules of the cooperative?

MR. BAUER: Well, it is clear that under

Oregon law cooperatives can adopt bylaws, and it is clear that under Oregon law a coop can regulate itself, but I would have thought that the antitrust laws supersede the Oregon laws under the supremacy clause.

QUESTION: But what in the antitrust laws, the Sherman Act or the Robinson-Patman Act talks about applying due process to private corporations other than the very unsual facts of the Silver case?

MR. BAUER: As I suggest, we do not assert that the conduct is unlawful because of the absence of due process, and so I want to make that clear. Our assertion, Your Honor, is that this is a classic concerted refusal to deal. The reason it is a classic concerted refusal to deal is because the defendants threw the plaintiff out of the cooperative for anticompetitive intent with an anticompetitive effect.

How do we know that they had an anticompetitive intent in an arguably ambiguous record, arguably ambiguous? I would suggest the facts leave absolutely no ambiguity. But one of the ways we resolve the ambiguity is because of the procedure, so it is not that due process is necessary, and I think that would be my response to Justice O'Connor's question, it is not that due process is necessary, it is that due process is relevant to characterization.

When we throw him out of the cooperative without any due process, we have a better handle on what went on, we have a better way of knowing that it was with anticompetitive intent. We have a better way of knowing that the reason they didn't want him in there is because he was a more efficient competitor. They wanted to get rid of him because he was maybe working a little bit better, and that is precisely --

QUESTION: Isn't a necessary element of your argument there that they threw him out in a way that they didn't throw other people out?

MR. BAUER: Well, in fact, Justice Rehnquist, they did not throw anybody else out. Now, in fact, there is some evidence in the record which suggests that other members of the cooperative may -- now, I say may -- may have violated some bylaws, just as I say we may have violated some bylaws.

It seems to me that an examination of the record would suggest that since the purchase of stock began in 1972, and the bylaw didn't even go into effect until 1974, the plaintiff itself did not violate the bylaw, and had that come forward, the plaintiff would not have been thrown out of the organization.

QUESTION: Are you defending the Court of Appeals' judgment, I take it, that if there had been a

hearing, and it had come out exactly the same way, that then there wouldn't have been a per se -- it wouldn't be a per se case, but a rule of reason case, because of the Robinson-Patman Act?

Do you agree with that part of the judgment?

MR. BAUER: Absolutely not, Justice White.

QUESTION: I didn't think -- you are not defending the Court of Appeals across the board.

MR. BAUER: No, we are not. That is, our position is that this is --

QUESTION: Well, it also sounds to me as though you are saying that this whole cooperative, this joint venture of competitors is itself in violation of the Sherman Act, and suppose some supplier that the cooperative refused to deal with because it could get a cheaper price from somebody else, suppose some supplier sued them under the Sherman Act. This is a joint buying effort by competitors that hurts me. Isn't that what you are saying?

MR. BAUER: No, Justice White, that it not what we are saying. What we are saying is -- and by the way, the argument is made that this Court ought to be reluctant to affirm the judgment of the Court of Appeals because of some perceived adverse impact that this might have on cooperatives, and I say quite the opposite.

Indeed, not only do we agree that cooperatives have procompetitive efficiency-enhancing characteristics. Cooperatives are desirable. That is why we want to be back in the cooperative. So we are not challenging the cooperative generally. Indeed, we are not even challenging the possible requirement that notification has to be given.

QUESTION: I can't imagine why you would make a serious argument that the per se rule ought to apply in this case.

MR. BAUER: Because what we are challening is very limited conduct. What we are challenging is the arbitrary expulsion --

QUESTION: Well, that just sounds like that on the facts of this case, there ought to be antitrust liability under the rule of reason.

MR. BAUER: No, Your Honor. We are saying that this is a classic group boycott, a classic concerted refusal to deal, but that this Court can write a very narrow opinion holding that we are only talking about very specific conduct, what is a classic concerted refusal to deal --

QUESTION: Did you cross-appeal here?

MR. BAUER: No, we did not, Your Honor.

QUESTION: Well, you want more relief than the

Court of Appeals would give you.

MR. BAUER: No, in fact, the Court of Appeals decision -- let's --

QUESTION: You say that this is a classic refusal to deal and it wouldn't have made any difference whatsoever whether there was a hearing or not.

MR. BAUER: Let's go back to the trial court for a moment, Justice White.

QUESTION: Let's go back to the Court of Appeals. That is the judgment that is under attack here.

MR. BAUER: Well, the reason I wanted to start at the trial court was, at the trial court level there are cross motions for summary judgment, but in the District Court all that the plaintiff sought, all that we sought was partial summary judgment with respect to liability and no determination with respect to the damages or injunctive relief.

In fact, what we are principally asking for is injunctive relief. Now, what the Court of Appeals held was that not only did the District Court err in granting summary judgment for the defendant, but it should have granted summary judgment for the plaintiff, and in fact entered that judgment.

Now, it is that judgment with respect to --

excuse me, that partial summary judgment with respect to liability that we are asking this Court to uphold, but our position is that what we have --

QUESTION: Do you want us just to affirm the Court of Appeals? Is that what you want?

MR. BAUER: Absolutely.

QUESTION: And then say that the reason that the per se rule applies here is that there was not due process?

MR. BAUER: No.

QUESTION: Well, that is what the Court of Appeals said.

MR. BAUER: I would ask you to affirm the judgment of the court but not necessarily its reasoning.

QUESTION: Well, that is giving you more than you would get under the Court of Appeals judgment.

MR. BAUER: Well, I think the relief we are asking, Your Honor, is precisely the same. That is, the relief we are asking is that if you remand it to the District Court for a determination of the proper remedy, the proper remedy, we suggest, is principally one of injunctive relief, that the plaintiff be readmitted to the cooperative.

I come back to your earlier question, Justice

White --

QUESTION: Well, yes, but if it goes back under the Court of Appeals position, with a hearing they could keep you out.

MR. BAUER: No, as I was saying, because --

QUESTION: You don't want that. You don't want that.

MR. BAUER: I don't think that the Court of Appeals has -- I don't think the Court of Appeals decision is, give these guys a hearing and try over again. That is not what the Court of Appeals said. What the Court of Appeals said is, this is a classic concerted refusal to deal.

Then the Court of Appeals went on to examine the possibility that because of the duty of self-regulation imposed under the Silver line of cases, that what would otherwise be a classic group boycott might nonetheless be subject to rule of reason analysis, and then because it found that the Denver Rockets exception didn't exist, came back to where it started and said, yes, this is a classic concerted refusal to deal subject to per se liability.

And that is exactly what we are asking this Court to hold, that what you have here is -- again, I think it is important to focus on what we are

complaining about and the very narrow aspect of this case that we are asking this Court to look at, that is, the arbitrary expulsion of a member of the cooperative, a cooperative which was formed for competitive benefits, designed to confer competitive benefits on all the members, which threw one member of the cooperative out for anticompetitive purposes, and with adverse effects not only on a competitor but on competition.

Maybe it would be useful to address that question. What kind of effect was there on competition? The plaintiff, Pacific, was denied rebates. The rebates were the very reason for creating this cooperative.

If there were no rebates, there wouldn't have been any need to have the cooperative. The plaintiff was thrown out of the cooperative. The plaintiff was denied the rebates. And so when the plaintiff was competing with all of the other members of the cooperative it competed at a price disadvantage.

QUESTION: Is it not true that its business has flourished?

MR. BAUER: It is true that its business has prospered. However --

QUESTION: More relatively than others.

MR. BAUER: We have no evidence whatsoever in

the record about the others.

QUESTION: I see.

MR. BAUER: There is evidence in the record as to the percentage increase that the plaintiff's business.

QUESTION: And the dollars are much larger than the dollar amount of the rebates, aren't they?

MR. BAUER: The actual dollar increase of sales is larger than the amount of rebates. We have no information, again, on the profit margin, but there are several responses, Justice Stevens.

One, even if it is true that the plaintiff has prospered, the fact of the matter is, it may have prospered even more had that conduct not taken place. This Court addressed that question in the Standard Stations case.

There is a second response, and it seems to me an important response.

QUESTION: But if you make that argument, isn't Justice White right that you will always have that kind of competitive impact, and if that is enough, why then that is a per se rule?

MR. BAUER: Well, in fact --

QUESTION: That is what you are arguing for, I suppose.

MR. BAUER: That may well be a part of our argument, Justice Stevens, but I would make a different argument as well. What you have here is conduct which is characterized clearly by anticompetitive effect. A review of the scenario here reveals that what the defendant did was throw the plaintiff out of the cooperative because the plaintiff was undesisrable, it was more efficient, it was bigger, for whatever reason.

The plaintiff -- excuse me, the defendant wantei to get rid of the plaintiff for those anticompetitive reasons. Perhaps it didn't have quite the anticompetitive effect that they desired.

QUESTION: Let me stop you right there for a moment. Can a co-op -- could a co-op, like Topco, for example, say, we won't let A&P in, we won't let big companies in to join our co-op?

MR. BAUER: Well, but this case perhaps raises a different kind of question. What if 30 years ago --

QUESTION: Let me just ask, could a co-op put a size limit on and say, we won't have big members who exceei a certain sales volume?

MR. BAUER: The answer, Your Honor, yes, if there is a reasonable procompetitive justification for doing it.

QUESTION: Why do you have to have a procompetitive justification for that? What in the law says that -- say they just want to have people whose names begin with X as members. The Sherman Act would forbid them from having some kind of an arbitrary limitation on membership. Is that what you are saying?

MR. BAUER: Again, you are asking a third time a question I haven't answered -- I recognized the first two -- which is, is there a difference between admitting members and expelling members? The case that we would have here is, if they impede --

QUESTION: And does the Sherman Act require open membership in co-ops?

I think you said no to that.

MR. BAUER: I think -- the answer is that they do not, and I will stand by that. In fact, in two cases in this Court, both the Associated Press case and the Terminal Railroad case, this Court required admission to membership when that was an essential function of competition. No, we do not assert that this is an essential function. That is, Pacific can indeed compete even if it is not a member. But go back to Topco. The mom and pops --

QUESTION: In Topco, of course, there were

agreements restricting where the members could sell, the territories in which they could sell, and the like, which you don't have here, and that is why you don't rely heavily on it, as I understand it.

MR. BAUER: That's right. That's right. But I would like to give another illustration, Justice Stevens, to the inquiry to what extent is a competitive effect necessary, and the assertion that here the plaintiff has prospered, so no harm.

Let me give an analogy. Let's assume that we have a marathon race, and one member of that group that is going to be in the race is a little bit faster or a little bit more determined, or has a little bit more stamina than all the rest, and so they all get together with the exception of this one individual and say, hey, let's push him off the track somewhere down into the race. And they do that.

But this man is so determined, he dusts himself off and gets back on the track and runs, and maybe he even wins. He does well. Now, he has been pushed off the track in the same way that the plaintiff here has been pushed out of this organization, and the conduct --

QUESTION: Well, they just said to him, we will sell to you like everybody else on the track, but

we are just not going to invite you to dinner.

(General laughter.)

MR. BAUER: I would suggest, Your Honor, that the analogy is a little closer to saying, we will let you run, but we will put three-pound weights in your shoes, because what they are doing is, they are saying, we will sell to you, but we will sell to you at a substantial competitive disadvantage, and we are selling to you at such a disadvantage that no rational business person would do that.

QUESTION: Sounds like a price discrimination case.

MR. BAUER: If it were not for the exemption, Section 13B of the Robinson-Patman Act, it would be, and we would have added that count, too. But the fact that it nails something post-discrimination does not make it not a Sherman Act violation.

See, in my example, Your Honor, what you have is an attempt to injure. Now, they may not have succeeded, but they sure as heck intended to injure. What they did was unfair. What they did was unlawful. And the fact that it wasn't successful doesn't make it any the less unfair or unlawful.

What you have here is an attempt by members of an organization who have a competitive advantage among

themselves, and they finally decide, hey, we don't like one of our members, he is a little too efficient, he is a little bit too much of a threat, let's get rid of him so we can compete more, so we will hobble him.

And that is precisely what the Sherman Act prohibits. It prohibits conduct which is designed to injure competition. It is, as I suggest, a classic concerted refusal to deal. And even though it may be true that they have not absolutely refused to deal with him, they have refused to deal with him in any meaningful sense.

I see my time is up, Your Honor. If there are no further questions, thank you very much.

CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. Sweeney?

ORAL ARGUMENT OF DAVID J. SWEENEY, ESQ.

ON BEHALF OF THE PETITIONER

MR. SWEENEY: Briefly, Your Honor.

I believe that the respondent is trying to characterize and try a case before this Court that was never tried below. They are trying to attempt to argue and try a classic group boycott case when it was clear that below the liability theory was based on Silver versus New York Stock Exchange and a due process theory.

The record simply does not support an inference of increased inventory, of expanded warehousing, anticompetitive animus, reasoning for the action, and in fact if there is any inference or any equivocation on the record, what the Ninth Circuit did was grant summary judgment on the basis of liability against Northwest, so before this Court, any --

QUESTION: Mr. Sweeney, don't you think the record does raise an inference that the reason this man was excluded was because he was a partial wholesaler? Isn't that at least a permissible inference, that he had a dual operation?

MR. SWEENEY: The record reflects that that was discussed. That is correct, Your Honor.

QUESTION: And we are on summary judgment.

MR. SWEENEY: We are on summary judgment.

QUESTION: So conceivably that -- but it seems to me that nobody really argues about it, but is that permissible or not, to exclude somebody for that reason? Your opponent says it clearly is not, because that is an anticompetitive purpose, and you haven't talked much about it.

MR. SWEENEY: No, we would -- it is not on this case, Your Honor, whether --

QUESTION: Well, if it is in the record, and

there is an inference there that would raise a question of fact of summary judgment, I would submit it is in the case.

MR. SWEENEY: Well, if there is an inference there on a summary judgment record, those inferences at this Court have to be weighed most favorably with Northwest, since summary judgment was rendered against Northwest --

QUESTION: Yes, but are you asking -- what are you asking for? Are you asking for a trial, or for summary judgment in your favor?

MR. SWEENEY: What we are saying for --

QUESTION: You don't take the same position the government does as I read it.

MR. SWEENEY: No. What we take is a fallback position, Your Honor, that if the Court --

QUESTION: You would rather try the case and lose.

MR. SWEENEY: -- if the Court feels that the record is equivocal or not strong enough, we submit the inferences, if there are, should be accorded to Northwest, and that the case should be reversed and remanded for decision by the trial judge.

We submit that the Sherman Act, if there is no showing of necessity, would not require a blanket open

admission to a cooperative. There are a number of different reasons. A cooperative, just in terms of economic size, may not be able to handle an open admission basis.

QUESTION: What about an admission policy excluding dual distributors? Do you think that is lawful?

MR. SWEENEY: Just in the abstract, Your Honor?

QUESTION: In this case, that thet had an cut and out -- this very bylaw they have got in this case. Do you think that is permissible?

MR. SWEENEY: The exclusion of a wholesaler-retailer combination I think can be justified economically on a number of different grounds. A wholesaler will always have the ability to purchase because of its wholesaling ability at the same level that the cooperative would, so that the the wholesaler-retailer combination, it can feed that retailer through its wholesaling arm, whereas going through the cooperative will simply increase any transaction's cost.

What that does, and the record does show this, that the wholesaler-retailer combination here bought in odd lot, small quantity items. Now, a cooperative

really lives and dies by getting bulk aggregate purchases. It relies on its members who traditionally buy through the cooperative, day in and day out, high prices, low prices.

What a wholesaler-retailer combination will do is simply take those small items that it happens to run out of, increasing the transaction cost from the cooperative, because they have to engage in more stocking and other kinds of things, and not improve its efficiencies.

Thank you.

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

(Whereupon, at 11:10 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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

#83-1368 - NORTHWEST WHOLESALE STATIONERS, INC., Petitioner v. PACIFIC STATIONERY AND PRINTING CO.

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BY Paul A. Richardson

(REPORTER)