OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

ORIGINAL

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-510

TITLE ASPEN SKIING COMPANY, Petitioner V. ASPEN HIGHLANDS SKIING CORPORATION

PLACE Washington, D. C.

DATE March 27, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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ASPEN SKIING COMPANY, :

Petitioner :

v. : No. 84-510

ASPEN HIGHLANDS SKIING :

CORPORATION :

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Washington, D.C.

Wednesday, March 27, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:06 o'clock p.m.

APPEARANCES:

RICHARD MELVYN COOPER, ESQ., Washington, D.C.;
on behalf of Petitioner.

TUCKER KARL TRAUTMAN, ESQ., Denver, Colo.;
on behalf of 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. Cooper, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF RICHARD MELVYN COOPER, ESQ.

ON BEHALF OF THE PETITIONER

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

The central question in this case is whether under Section 2 of the Sherman Act a firm with monopoly power has a duty to cooperate with a smaller rival by participating in a horizontal arrangement for joint marketing. The question in the circumstances of this case is shaped by two additional material facts.

First, the firm with monopoly power here, Aspen Ski Company, was not vertically integrated, but rather operated at only one level of the skiing industry, and therefore cases such as Terminal Railroad, Kodak, and Otter Tail are readily distinguishable. This case involves no vertical element.

Secondly, the conduct at issue here, Ski Company's refusal to cooperate with Aspen Highlands, was decided on and carried out by Ski Company independently and not as part of any group, contract, combination, or conspiracy, and thus, under the distinction between independent action and concerted action reaffirmed by

this Court last term in Monsanto and in Copperweld, what we have here is clearly independent conduct, not concerted conduct.

In these circumstances, we submit the answer to the question presented is no, that no firm, not even one with monopoly power, has a duty under the antitrust laws to engage in horizontal joint marketing arrangements.

Although voluntary horizontal arrangements between competitors sometimes have pro-competitive aspects and are consistent with the goals of the antitrust laws and therefore pass muster under Section 1's rule of reason, mandatory horizontal arrangements imposed by law and enforced and administered by courts have never had any place in the jurisprudence of antitrust.

QUESTION: Well, the joint marketing arrangement would involve price-fixing, too, I suppose?

MR. COOPER: Price-fixing would be per se unlawful.

QUESTION: Well, I know, but isn't that part of the kind of a joint marketing arrangement you're talking about?

MR. COOPER: Well, some joint market -- I said in some circumstances a joint marketing arrangement

would be examined under the rule of reason. Broadcast Music would be an example of that. Other horizontal arrangements are plainly per se bad. Cartels --

QUESTION: But this joint marketing arrangement involved here does involve an agreement on prices?

MR. COOPER: It does indeed.

In the 95 years since the enactment of the Sherman Act, this Court has never held or suggested that any duty of horizontal cooperation exists or should exist, and until the decision by the Tenth Circuit below no Court of Appeals in the 95 years of the statute had ever so held.

Thus, the decision below is unprecedented, and we submit is unwarranted on the facts of this case and is indeed directly contrary to the central goals of the antitrust laws.

The principal facts are relatively straightforward. The product market involved here is downhill skiing services. The jury found two geographic markets, one embracing all of North America and including all of the firms that cater to destination skiiers, those who travel a substantial distance to a ski area, generally by airplane, at least in part, and who spend a substantial amount of time, generally at

least a week.

The jury also found a sub-market consisting of the Aspen area in which the Petitioner and the Respondent conduct their businesses.

For a number of years, each of the two firms has offered single day lift tickets and a variety of multi-day lift tickets designed to meet the varying needs of different skiiers. And if you examine the exhibits, Exhibit 15 and 47 that show the history of the ticket offerings and prices of the two firms, you will see that there has been considerable experimentation. The specific kinds of tickets offered have varied from year to year and the pricing interrelationships among the tickets have varied from year to year.

The court below placed some reliance on the fact that shortly before trial Ski Company announced a prospective increase in its daily lift ticket price from $18 to $22 per day. That was a 22 percent increase. That's not the largest one-year increase shown in the record of this case. From 1977-'78 to '78-'79, Highlands increased its ticket price 25 percent in one swoop.

Also, the relationship between the single day lift ticket and multi-day lift tickets in terms of price varied from year to year. Ski Company's during '78-'79,

'79-'80 and prospectively for '81-'82 was in the 12.5 to 13.5 percent range. Highlands during these years was approximately a 35 percent discount.

So there isn't a pattern that can be inferred from the ticket pricing or the ticket offerings. These firms were experimenting each year to see what the market reaction would be.

For the 16 years through the 1977-'78 season, with the exception of one year, the two firms together cooperated in offering a joint ticket, on which they set the price together and the terms and conditions. It was good for six days of skiing at any of the four mountains operated by the two firms.

In 1977-'78, for the first time in several years Ski Company offered a competing six-day ticket good at its three mountains. And in '78-'79, '79-'80, and '80-'81, Ski Company refused to continue the joint ticket. It also refused to sell tickets to its horizontal competitor, Highlands, and in '78-'79 it refused to honor coupons issued by Highlands for entry onto Ski Company's facilities.

QUESTION: Mr. Cooper, did counsel for Petitioner object to the instructions given by the court that appear on pages 181 and 182 of the joint appendix relating to the Section 2?

MR. COOPER: No, counsel did not.

QUESTION: Did not, okay. And do you contend now that the instruction was somehow wrong or that the evidence was insufficient?

MR. COOPER: We contend the evidence was insufficient. We do not challenge the instructions. On our view of the case, you would never have reached the giving of instructions.

QUESTION: Was there some evidence that Aspen Ski Company refused to accept the Adventure Pack coupons that were equivalent to cash simply because they were issued by a competitor?

MR. COOPER: Yes.

QUESTION: And would that be enough evidence, then, to get to the jury on the Section 2 issue?

MR. COOPER: I would submit not.

QUESTION: Why not?

MR. COOPER: Because the premise on which that evidence would go to the jury is that there is a duty under Section 2 to engage in horizontal joint marketing arrangements with a competitor. We submit as a matter of law there is no such duty and therefore the refusal to accept the coupons issued by a competitor could not support a finding of a Section 2 violation.

QUESTION: Well, I had thought the Adventure

Pack coupon proposal was different from the joint ticket, that it was a substitute offered by Highlights; is that correct?

MR. COOPER: That's correct. It was issued unilaterally by Highlands for access to its own facilities and to Ski Company's facilities. And it's our submission to the Court that no firm has to accept that when it's done by a horizontal competitor.

QUESTION: Regardless of intent?

MR. COOPER: That's correct.

QUESTION: Although it's the same as cash?

MR. COOPER: Even if it's the same as cash, although in this case --

QUESTION: So Highlands could just as well have given their people the money and sent them over there.

MR. COOPER: In fact, when they did that Ski Company accepted it. In the latter two years --

QUESTION: Well, good, good.

(Laughter.)

MR. COOPER: They don't turn down money.

QUESTION: Well, Mr. Cooper, did Highlands try to buy some tickets at the retail price?

MR. COOPER: They tried to buy some tickets from Ski Company.

QUESTION: At the regular retail price?

MR. COOPER: I think that's a fair inference, although it's not absolutely clear what price they were offering. I read it as the retail price.

QUESTION: But in any event, Ski Company would not sell Highlands any retail tickets?

MR. COOPER: That's correct.

QUESTION: At the retail price?

MR. COOPER: That's correct. And its evident reason for its refusal to do so was that it wanted to market its tickets its own way and not through Highlands. It wanted to compete for those same skiiers by offering them its array of tickets.

QUESTION: May I ask, Mr. Cooper, because you rely on the motion for directed verdict, I guess, as the basis for the error --

MR. COOPER: Yes, Justice Stevens.

QUESTION: And I notice right in front of the instructions the argument that's quoted in the joint appendix, at least, was that the relevant market was incorrectly defined. That was one of the arguments made.

MR. COOPER: That was one of the arguments.

QUESTION: And did you make another argument in support? Did you argue this duty to cooperate

point?

MR. COOPER: The duty to cooperate point was raised by counsel in those very terms, and counsel cited the relevant cases.

QUESTION: In support of the motion for directed verdict?

MR. COOPER: Yes.

QUESTION: Because it doesn't appear in this part of the joint appendix.

MR. COOPER: It does not appear in the joint appendix. It's in the transcript, cited in our reply brief.

QUESTION: I see.

And is it your position that -- and as I read the Court of Appeals' opinion, they said there were six different factual claims that added up to exclusionary conduct. Is it your position that each of those six things was rebutted by your argument, no duty to cooperate?

Some of them don't seem to me to quite fit that.

MR. COOPER: Let's analyze them, if we may. One of them was an allegation of a Section 1 conspiracy between -- that was the fourth one alleged, conspiracy alleged between Ski Company and a reservation service.

The jury returned a verdict for Ski Company on that issue, so that one's gone.

QUESTION: Were there separate verdicts on each of the six, is that what it was?

MR. COOPER: No, but there was a separate Section 2 verdict and a Section 1 verdict, and that allegation related to both.

QUESTION: But I thought the argument on that was that the exclusive contract with the tour operator was one form of exclusionary conduct.

MR. COOPER: But the jury held that it was not a Section 1 violation.

QUESTION: But does that necessarily foreclose the possibility that they relied on that evidence as evidence of exclusionary conduct?

MR. COOPER: I would think so in this case. I would think we're entitled to all of the fair inferences that would arise from that verdict.

QUESTION: You know, we have inconsistent verdicts in the criminal law. You don't think we could have them in the civil law?

MR. COOPER: I don't think you have an inconsistent verdict here. I think the jury -- it's fair to infer that the jury simply did not rely on the allegation of a Section 1 conspiracy as part of a

Section 2 violation.

The second element of the six, the third one mentioned, was the advertising, and our submission on that is it's de minimus and indeed insufficient as a matter of law.

All of these other four -- the refusal to continue the joint ticket, the offering of the competitive three-area ticket, the refusal to accept the coupons, and the announcement of the prospective price increase, which were the other four elements cited by counsel in closing argument and relied on by the Court of Appeals -- all are subsumable, as the Court of Appeals held, under the issue of the duty to cooperate.

QUESTION: Why would this last one be? The last one, as I understood it, was they raised the single ticket price without raising the joint ticket price.

MR. COOPER: It was simply that they raised the single ticket price in such a way as to make Highlands' Adventure Pack prospectively uneconomical. If you ask yourself, why is it an antitrust violation for a firm, even with monopoly power, to raise its price, which normally would divert --

QUESTION: Let me just be sure I have the facts right. I thought there was the charge that you raised the single ticket price dramatically while

maintaining the six-day coupon at the existing level.

MR. COOPER: Well, that's the argument made in counsel's brief, in Highlands' brief in this Court. As it was presented -- and I'll address both. As it was presented to the jury and relied on by the Court of Appeals, it was simply that there was a large increase in the one-day price, this 22 percent increase, and given the economics of Highlands' Adventure Pack, it made the Adventure Pack uneconomical.

And our submission is that a firm in setting its own prices does not have to take into account, as a matter of law does not have to take into account, the needs of a horizontal competitor. Normally when a firm with monopoly power raises its price it induces consumers to go to its competitors.

QUESTION: Well, but supposing you did the opposite and left the single ticket price alone and dropped the six-day coupon, cut it in half, and said, if you don't go anyplace else during these six days you can get a real cheap rate at our three mountains.

MR. COOPER: Well, then you might have --

QUESTION: Could that possibly create a problem?

MR. COOPER: You might have a predatory pricing question. You'd have to see whether the price

was below some relevant cost, marginal cost, average variable cost, average total cost, something of that sort.

QUESTION: The mere fact that it was a discount in order to induce people just to patronize your own business wouldn't be enough, you'd say?

MR. COOPER: I would submit not. And indeed, on the record here, as I mentioned earlier, Ski Company's discount in the neighborhood of 13.3 percent for the prospective increase -- I'm sorry, 13.6 percent -- was way below the discounts offered by Highlands on its unilateral six-day ticket, which in general were 35 and 36 percent in the years in question. So you don't have that sort of problem here.

And just one more point on the price increase. The only reason why a price increase would hurt a horizontal rival rather than help the horizontal rival is that that horizontal rival is in some way depending on the product of the firm that raised its price. Now, we submit that there's no duty to yield to such claimed dependence.

QUESTION: I'm not sure that's right. It seems to me that a price -- a dramatic price increase on a single ticket would tend to motivate consumers to buy the six-day ticket, and once you've motivated them to

buy the six-day ticket they're not going to ski anyplace else.

MR. COOPER: Well, even in the range we're talking about, the discount between the single day ticket and the six-day ticket is very small. It's a 13-something percent discount. As a matter of dollars it's $18 over the six days of skiing.

QUESTION: Well, whatever it is, you raised the single ticket more than you raised the six day.

MR. COOPER: Right. But the evidence, even from the Plaintiff's expert witnesses, was that ticket price differences of a few dollars, given the wealth of the people who ski in Aspen, is insignificant, has no substantial market effect. These people are relatively price inelastic. That was the evidence from the witnesses on both sides.

QUESTION: Mr. Cooper, to go back just a moment, is it your position that the Petitioner could refuse to sell to the Highlands Corporation lift tickets for cash?

MR. COOPER: Yes, that a firm has no duty to deal with a horizontal competitor.

QUESTION: Even if the refusal were for the purpose of harming your competitor?

MR. COOPER: If all that you have is the

refusal, then it wouldn't matter what the purpose is. Our position is that the purpose of every firm that engages in competition is to prevail in competition, and at the level of intent, intent alone, there's no difference between a desire to, an intent to prevail in competition and a desire to defeat competition.

The test between the two comes at the conduct level. If a firm seeks to prevail in competition through exclusionary practices, then you have a Section 2 violation. If it seeks to --

QUESTION: Well, that's the inquiry, whether there isn't some evidence here that would support the Section 2 violation.

MR. COOPER: Our submission is there is not. There is only two kinds of evidence that are relevant here: evidence of failure to cooperate and the advertising evidence. And we submit that there is no duty to cooperate and therefore evidence of failure to cooperate is in effect evidence of competition, not of anti-competitive behavior.

QUESTION: Well, what if the lift tickets had freely been made available say in drug stores and grocery stores in the village. Could they still have, with the same impunity, have denied them to Highlands?

MR. COOPER: Yes. Again, under Colgate and

under Monsanto a firm has a -- so long as it's acting independently, has a right, an element of economic freedom to decide with whom it will deal, how it will sell its products. Instead of --

QUESTION: It surely couldn't say, we won't sell tickets to you if you ever buy any tickets from the Highlands.

MR. COOPER: Correct. That is, where you have the refusal to deal combined with something else, where it's combined with concerted action, if you have the Lorain Journal kind of situation where you're going to discriminate against consumers who patronize a rival and you have monopoly power, you clearly can't do that. But that's not what's involved here.

Instead of combining cooperation with competition, we submit Ski Company engaged in a strategy of competition, for which it was held to have violated Section 2 and it was held liable for $7.5 million of treble damages.

We submit that the conduct at issue here was not exclusionary under any reasonable definition of the term "exclusionary." It imposed no restraint on the ability of Highlands to bring its own product to the market. Highlands was free to engage in whatever unilateral conduct it chose. It could run its ski

operation and it could sell its lift tickets, package them any way it chose, unilaterally.

Ski Company's conduct imposed no restraint on consumers. They remained free to patronize either or both companies and to divide their patronage between the firms any way they wished.

The conduct was not predatory. It was capable of being sustained indefinitely and without subsidy, and its success did not depend on destruction of Highlands, on injury to Highlands, or on inducing through discipline any changes in Highlands' unilateral conduct.

Finally, the conduct at issue here was not based on monopoly power. Any firm having facilities that it believes can attract consumers on their own individual merits can pursue the kind of competitive non-cooperative strategy that Ski Company pursued here.

We submit that Ski Company's refusal to cooperate not only did not violate Section 2, but that it is entirely consistent with the central goals of the antitrust laws. First, it is consistent with the goal of achieving economic efficiency and consumer welfare, and the duty to cooperate is contrary to that interest. A duty to cooperate mandated by law is in essence a subsidy that transfers resources and rewards from the

more efficient firm that seeks to compete to the less efficient firm that is dependent on cooperation, and it thereby injures the efficient use of resources by the more efficient firm, with consequent injury to long-term consumer interests.

In addition, a duty to cooperate would discourage risk-taking, innovation, and entrepreneurial activity. If a firm that engages in risk-taking, for example, has to share with its rivals the benefits of successful entrepreneurial activity, but must itself absorb on its own the costs of unsuccessful entrepreneurial activity, then the law discourages such activity, to the detriment of consumers, of productivity, and of the competitiveness of American firms.

Second, a duty to cooperate is contrary to the antitrust goal of economic freedom, of autonomous decisionmaking by individual economic units. That is a value that has been asserted in numerous decisions of this Court: in Topco, in City of Boulder, in NCAA, in Monsanto, in Copperweld, in many other decisions.

There are very few circumstances where our law grants to someone a power to coerce someone else to deal with them. We have many negative prohibitions. You shall not discriminate in various ways against various

classes of consumers or others. But the notion that a firm has a duty to deal with another or that the other firm has a power to coerce horizontal dealing I submit --

QUESTION: Well, even if you're right on that issue, then where does that leave you on the Section 2 issue? Was there evidence that Aspen Ski Company refused to honor the coupons as presented by customers, by people, actual skiers who had bought the coupon from the Highlands and then would present them to Aspen Ski Corp. and Aspen Ski Corp. would deny them?

MR. COOPER: Aspen Ski Corp. would not accept the coupons. It wanted to sell them its own tickets.

QUESTION: And no evidence that that conduct had the effect of coercing unfairly the customers, to get them away from the Highlands?

MR. COOPER: Not to get them away from the Highlands. They could buy groups of tickets from each firm. The one thing that Ski -- and ski at either firm's facilities as they wished.

And if I, for example, were to open a very small amusement park as close as I could get to Disneyland and then purport to issue a joint ticket entitling my consumer to go to Disneyland and to come to my little one-block facility with a ferris wheel, I

think it would be understandable why Disneyland wouldn't want to accept my coupon --

QUESTION: Yes, but this --

MR. COOPER: -- even if they were bank-guaranteed.

QUESTION: Okay.

MR. COOPER: Ski Company was perfectly willing to deal with Highlands' customers by selling them tickets, which is the normal way one gets entrance to somebody's facilities.

QUESTION: Mr. Cooper, what if we agreed with you that none of this evidence really ought to have been used to prove monopolization except, except your refusal to accept coupons and money orders?

MR. COOPER: We accepted money orders. There were three years that were involved with the Adventure Pack.

QUESTION: All right. Well then, your refusal to accept coupons.

MR. COOPER: Correct.

QUESTION: What if we thought that that evidence was quite relevant to prove monopolization, but all of the other things that you're objecting to -- your refusal to issue a joint ticket, that you had no duty to do that -- would that require a new trial?

MR. COOPER: I would believe so, Your Honor, because that conduct was engaged in in only one year, only in the 1978-'79 year. There were four damage years here, '77-'78 through '80-'81.

The only year in which Ski Company refused to accept coupons was 1978-'79. But I would submit --

QUESTION: Well, of course you -- I suppose continuously you refused to issue the joint ticket.

MR. COOPER: That's correct.

QUESTION: Mr. Cooper, I agree, I think, with most of what you say about antitrust law. But tell me how we got around the jury's findings in this case? The jury found the relevant sub-market was skiing in the area involving these tickets.

As a matter of general antitrust law, I would have thought that's a perfectly absurd finding, but the jury found it, and CA-10 said there was evidence to support it. With all the other mountains in that area, it seems absurd to have a market that narrow.

The jury also found that Petitioner had monopoly power in the sub-market, and CA-10 found there was evidence to support that. And finally, the jury found that Petitioner willfully used its monopoly power to exclude the Respondent from the market.

Now, I take it, in response to a question from

one of the other Justices, you said your position basically is that those findings were contrary to the evidence. Does that mean we must review the evidence and make a decision as to whether or not they were contrary to the evidence?

MR. COOPER: Well, in form you have to review the evidence. In substance the task is much easier, because the only evidence, we submit, that could possibly support the jury verdict that isn't de minimus is the evidence of failure to cooperate in various ways.

And we submit that there is no duty under Section 2 as a matter of law why that evidence should even go to the jury, but even taking that evidence as established fact, it doesn't amount to an antitrust violation; that there is no duty to accept your competitor's coupons for entry into your own facilities; that there's no duty to have a joint ticket with your competitor; and that there's no duty to sell your tickets to your competitors so that he can package them with his own tickets to get tag-along purchases of his own tickets.

And if the Court launches on a new duty to cooperate, if it establishes that in antitrust law, we submit the consequences would be very deleterious. It

would create great uncertainty, for firms would not know when they had a duty to compete and when they had a duty to cooperate.

QUESTION: Well, it scunds to me like you're really saying that all of this evidence was just not admissible to prove monopolization.

MR. COOPER: I think the case could have been --

QUESTION: That you can do all of these things and still not monopolize.

MR. COOPER: That's correct. I don't know that I'd phrase it as admissibility. I think the case could have been decided on the pleadings. There could have been a motion to dismiss.

QUESTION: Did you try it? Did you do that? Did you move?

MR. COOPER: No, I didn't try the case, no. It wasn't done.

QUESTION: So there wasn't any motion, was there?

MR. COOPER: There was not a motion. But we can still raise it at the trial.

QUESTION: Was there a motion for directed verdict?

MR. COOPER: Yes, there was.

QUESTION: And was this kind of an argument made?

MR. COOPER: Yes, it was.

QUESTION: But you never did object when they presented this evidence? You never objected to the evidence as irrelevant, or you didn't make this kind of an argument, that this evidence should never go to the jury because the antitrust law just doesn't impose this kind of a duty?

MR. COOPER: But the appropriate time to make -- one appropriate and sufficient time to make that argument is at the close of the Plaintiff's evidence, when you can argue that you're entitled to a directed verdict, and that argument was made.

QUESTION: May I ask a hypothetical question. Assuming you're right on the duty to cooperate and assume your board of directors had a meeting at which they said, we don't have a duty to do any of these things, but we'll make a little more money if we do cooperate in the way they're asking us to, but also that'll help our competitor, strengthen him, whereas if we adopt the policy that was adopted it'll harm our competitors.

And they said, I think we'd rather harm our competitor than do it, even though we have no -- would

that present a problem?

MR. COOPER: I would submit not. Again, you look at the conduct. If the conduct is merely competition, then it's permissible under the antitrust laws. If I want to drive my --

QUESTION: But did not the jury instructions make intent an issue? Maybe that's wrong. And I think you accepted those instructions.

MR. COOPER: The jury was told -- we accepted the instructions. The jury was told that it didn't have to find specific anti-competitive intent. That instruction was correct. That's been the law for decades.

QUESTION: Was it not also told that if you do find specific anti-competitive intent plus monopoly power, that that's a violation? I don't remember the exact wording.

MR. COOPER: Well, the instruction was in terms of Grinnell. It had to find willful acquisition or maintenance. Maybe the jury understood that better than antitrust practitioners do.

But it didn't -- the jury did not have to find specific intent, and I would submit that if I want to drive my competitor out of business, I want to destroy him and hurt him, but the way I want to do it is by

making a better product and selling at a profit maximizing price, I've committed no antitrust violation.

I'd like to reserve whatever time I have left.

CHIEF JUSTICE BURGER: Mr. Trautman.

ORAL ARGUMENT OF

TUCKER KARL TRAUTMAN, ESQ.,

ON BEHALF OF RESPONDENT

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

This case, decided by the jury originally and affirmed by the Tenth Circuit, does not create a duty to cooperate. Instead, the issue that you find yourselves having to decide here is to review the jury's findings. That is, whether or not there was sufficient evidence, including all of the conduct that was presented at trial, to find that Petitioner's conduct, including its refusals to deal and its other actions that are noted, constituted monopolization.

That was the issue. Two points I'd like to make in this argument:

One, because of the lack of evidence below justifying its refusals, Plaintiff seeks a new per se rule of free license for monopolists in this Court. It

has tc because there was no evidence to justify its refusals below.

Secondly, reviewing the evidence under the established rule, which I will mention in a moment, there clearly was sufficient evidence for the jury to find, in taking all of the conduct as a whole, that this conduct was exclusionary, this conduct was in violation of Section 2 of the antitrust laws.

Now let me tell you just a little bit about how this case was tried, because as you know --

QUESTION: Could I just ask --

MR. TRAUTMAN: Sure.

QUESTION: -- just in brief, so that I can listen to you better, what is your theory of monopolization?

MR. TRAUTMAN: The theory of monopclization --

QUESTION: Can you state what monopolization is just briefly?

MR. TRAUTMAN: Yes. The theory of monopolization is I think as this Court has stated it in Grinnell, and that is that it condemns conduct which maintains or extends a monopolist's power, but it does not ccndemn conduct which is the result of a superior product, business acumen, or historic accident. That in

a nutshell is the rule that this case was tried under.

And as a matter of fact, that rule was submitted as the instruction in this case by trial counsel for Petitioner, and trial counsel for Petitioner further set forth in the instructions that were proposed to this trial judge that competitors do not have a duty to cocperate.

He went on to say that they may refuse to deal, provided they have a valid business justification. That's the basis, that's the rule of law, that this case was tried under, and that's been the law in this country since 1927, when this Court decided Eastman Kodak.

And in that rule essentially we set up a standard for monopolists which subjects their refusal tc deal to scrutiny, and that particular rule makes some economic sense. Whereas in a competitive market firms in those situations are disciplined by the market if they refuse to deal -- after all, consumers can turn to other suppliers of the product -- not so in the situation where a firm has monopoly power, and especially in a market such as this, where there are only two firms, one with over 80 percent of the market and the other with the balance.

A refusal to deal in that circumstance is not

disciplined automatically as it is in a competitive market. Thus the rule as set forth in the jury instructions which the trial judge accepted from the Petitioner essentially sets forth how this case was tried.

And as it was tried, both sides put on evidence. Trial counsel for Petitioner put on numerous business justifications to try to show that its conduct was justified, including its so-called free rider argument that it's resurrected on appeal and still belabored in the Petitioner's briefs.

QUESTION: Mr. Trautman --

MR. TRAUTMAN: Yes.

QUESTION: -- I take it you support the Court of Appeals' theory on the essential facilities doctrine?

MR. TRAUTMAN: Let me just mention briefly, that issue came up when Petitioner filed its brief in that case. We had never tried this case on essential facilities. We tried it as a traditional --

QUESTION: Do you defend that --

MR. TRAUTMAN: It's our position that that was a proper analogy for the court to use in analyzing the case, that specifically in this case there was vertical conduct, as I will get to. A refusal to sell tickets is

vertical conduct. We had the Ski Company providing --

QUESTION: What was the facility --

MR. TRAUTMAN: Well, the facility --

QUESTION: -- to which Highlands was denied access?

MR. TRAUTMAN: "Facility" is probably a poor choice of words by the commentators that have set it up. I think all that that doctrine has tried to do is to establish when there is an important item in the market that competitors cannot do without and successfully compete, that that is an essential component of competition. In this particular case, we --

QUESTION: Well, do you think it's the joint lift ticket or something?

MR. TRAUTMAN: We think that the ability to be involved in a multi-mountain, convenient multi-mountain package of skiing in a multi-mountain resort like Aspen is crucial.

QUESTION: Well, the joint lift ticket, in other words, you think is the facility?

MR. TRAUTMAN: The components of that ticket are the facility.

QUESTION: Are there any other cases that you know of involving the so-called essential facilities

concept where the court has held that a monopolist has to provide access to the final product to the competitor?

MR. TRAUTMAN: Well, it seems to us, Your Honor, that there are cases where -- for example, Associated Press is one I can think of, where newspapers that were excluded from Associated Press, wanted to take Associated Press news, package it with the news that they had gathered and sell their newspapers. And we think that that's an analogy.

We think that this Court has recognized that a monopolist can leverage in a one-market situation. You don't have to have two markets, as the rigid essential facilities test sets up.

Lorain Journal is a good example. This case is Lorain Journal because we have a situation where the monopolist, a dominant monopolist, attempted to use his power to increase that power in a single market. And this Court when it decided that case in 1951 did not make any fine distinctions between different levels of distribution or different products. They were talking --

QUESTION: Counsel, why do you really bother with this essential facilities doctrine? You didn't raise it below, did you?

MR. TRAUTMAN: We sure didn't, Your Honor.

QUESTION: The Court of Appeals imposed it on you, and I take it it's your position that you would prevail utterly apart from --

MR. TRAUTMAN: That is exactly our position, Your Honor. It is not necessary to affirm based on the essential facilities doctrine, and the case wasn't tried on that basis.

Let me just mention -- finish up, if I may, on how the case was tried, because after all of the business justifications were put on by Petitioner, they came to their motion for directed verdict. And in their motion for directed verdict, their counsel argued vigorously on the market power issue and the relevant market issue which Justice Powell mentioned. They argued vigorously, it was a close question, the court allowed it to go to the jury, and we prevailed on that issue.

But they did not mention the issue of monopolization. And we apologize for not putting the actual pages out of the transcript in so that you could conveniently see it, but we ask you to look at page 1452 of the transcript, and I think that it's utterly clear that what was happening when the counsel happened to mention duty to cooperate is that it was part and parcel

of his relevant market argument.

The court had interrupted and said, "We think the evidence, as far as I can see," she said, "I think the evidence showed that there was no competition to get skiiers to Aspen, that the competition really began after they got there."

QUESTION: This was a colloquy on jury instructions?

MR. TRAUTMAN: This was a colloquy in the directed verdict motion, Your Honor. And in that colloquy, counsel was responding, because some of the evidence was, in terms of how the advertisements went, there was cooperation in advertising. And counsel was arguing that that's not relevant to determining the market.

And then, in the context of that -- and I'll give you the entire quote because I think it's important. It is a narrow issue that this case can be affirmed on. In the context of that argument, counsel said:

"Now, we also think, Judge, that there clearly cannot be a requirement of cooperation between competitors. You've indicated that in your view these two companies do not compete with one another. We think that's incorrect. The advertising" -- and then he's cut

off.

And she comes back and reiterates her point. And he comes and says advertising's irrelevant to the relevant market issue.

Quite clearly, the mere mention of the right word -- that is, "cooperation" -- in the midst of an irrelevant point does not meet your specificity requirement in Rule 50, and we think on that basis alone that the Tenth Circuit should have affirmed and we think you can affirm on that basis.

QUESTION: That isn't, of course, the basis on which the Tenth Circuit --

MR. TRAUTMAN: That is not the basis, and we don't think that it expands anything that we received by the Tenth Circuit. So we believe this Court can certainly address it.

Let me review, if I may, a couple of points of evidence which I think are crucial. Mr. Cooper has made much in his brief and his oral argument about how this case creates mandatory joint marketing. Well, there's more to this case than mandatory joint marketing. Obviously, when you're reviewing the jury verdict you have to look at all of the evidence together and you have to see the whole picture that the jury saw.

And this case involved more than just dropping

out of a four-area arrangement that had existed for 16 years. It involved conduct, very targeted conduct, refusing to allow Highlands to market a package to provide four-area skiing. And we think that that's crucial, because that element involves no price-fixing dangers.

It involves none of these things that are being argued here that go against the antitrust laws. All we were asking to do, as tour operators were allowed to do, is to buy tickets, to come up to the window and pay full retail price.

QUESTION: Mr. Trautman, forgive me. Let me interrupt you just a moment to get back to the earlier point about the directed verdict argument.

MR. TRAUTMAN: Yes.

QUESTION: I was just looking at 14(a) of the petition for certiorari, which is part of the Court of Appeals' opinion, and it says there, the Court of Appeals says: "Defendant moved for a directed verdict on two occasions. Each time it urged that there was no duty to cooperate."

MR. TRAUTMAN: Okay. Let me tell you about the second occasion. I've told you about the first occasion. The first occasion was in the midst of the relevant market argument.

The second occasion was after all of the evidence was finished, and what counsel said is that we incorporate our previous arguments.

QUESTION: Well, the Court of Appeals went on to say that this preserved Defendant's opportunity to challenge the sufficiency of the evidence on that issue.

MR. TRAUTMAN: That's right.

QUESTION: So you're really asking, if you ask us to affirm on the basis of the insufficiency of the argument as part of a motion for directed verdict, you're asking us to take a different view of the sufficiency of that motion than the Court of Appeals took.

MR. TRAUTMAN: That's correct.

QUESTION: May I ask one other question about that. Do you contend that there's a duty to cooperate?

MR. TRAUTMAN: We contend that the law in terms of a monopolist is that you can refuse to deal, that is you can refuse to cooperate, if you have a legitimate business reason.

QUESTION: Because the judge instructed the jury that a corporation which possesses monopoly power is not under a duty to cooperate. I guess everybody agrees with that much.

MR. TRAUTMAN: Everybody agrees with the general proposition there is no general duty to cooperate. But a monopolist, unlike a firm without monopoly power, when it does refuse, because that is conduct which is not economically rational at first blush, has to justify it. And that's all the law requires.

In this particular case, the reason we think the jury rejected the justifications presented and the reason the court let it go to the jury is that we had targeted conduct. We had situations where, when we asked to buy tickets in the first year, 1977 -- our first response was, sell us tickets like you do to tour operators, we'll package the ticket ourselves, we'll promote the ticket ourselves -- they said no.

There was no question of price or terms or how we were going to do it. They said absolutely not. That's on page 34 of the joint appendix.

QUESTION: Weren't you asking to buy them at a discount?

MR. TRAUTMAN: No. There is no evidence. There is no evidence of that. And I agree with Mr. Cooper; I think the fair inference is that the request was, would you pre-sell us tickets, and the answer was no, and there was never any further discussion because

there was no point to it.

QUESTION: May I ask what may be a stupid question. Can a normal fellow who wants to go skiing buy tickets a week in advance, daily tickets?

MR. TRAUTMAN: No.

QUESTION: It must be bought day by day?

MR. TRAUTMAN: But you see, the point, what Highlands wanted to do was essentially to buy a three-day ticket, which they sold in advance to tour operators, a three-area three-day ticket or a three-area four-day ticket, and package that with their ticket and create a four-mountain ticket, which had been demanded over the last 16 years.

QUESTION: But an individual consumer could not have gone to their wondow and said, on Monday and said, I'd like tickets I can use on Thursday, Friday and Saturday?

MR. TRAUTMAN: Not daily tickets. But that's not the full array of tickets that were available and that's not the type of tickets that were sold to tour operators.

QUESTION: Mr. Cooper, I understand that their refusing to honor your coupons and things like that wouldn't have involved price-fixing at all, but the joint ticket, the joint ticket does involve fixing the

same price for the two areas.

MR. TRAUTMAN: That's correct.

QUESTION: And you now have an injunction requiring this monopolist to price-fix with Highlands.

MR. TRAUTMAN: We have an injunction which exists now only because the Petitioner wanted it to exist for another year while this case was appealed. That --

QUESTION: Well, nevertheless --

MR. TRAUTMAN: -- particular injunction is going to run out.

QUESTION: Nevertheless, you have that injunction. You have that injunction, and you say everybody agrees that you don't have a duty to cooperate. But you must apparently think that there is a duty of the monopolist to price-fix with your client.

MR. TRAUTMAN: No. No, we don't think that.

QUESTION: Well, you say that part of your claim is that the monopolist refused to sell a joint ticket.

MR. TRAUTMAN: As part of our claim, taken with all of the other conduct. We think that was the precis to what occurred thereafter, and what occurred thereafter is, when they said to us, we don't want anything to do with you, we're not going to sell this

joint ticket any more, we said: All right, we'll independently market our ticket; sell us tickets.

Now, the sales of tickets that we were asking for took place during the entire damage period.

QUESTION: You mean the court in entering the injunction just thought it up on its own, or did you ask for it?

MR. TRAUTMAN: No, the reason the court did it, Your Honor, I think quite clearly is that it was a model that was being used by Petitioner itself in another county in Colorado, in Summit County, Colorado.

QUESTION: Yes, but you must have asked for it.

MR. TRAUTMAN: We asked for an injunction, Your Honor.

QUESTION: Yes.

MR. TRAUTMAN: We tried at trial to put on evidence of damages --

QUESTION: But you asked for an injunction to make Aspen Ski Corporation cooperate in the joint ticket.

MR. TRAUTMAN: That's correct, that's correct.

QUESTION: Which involved a price fix.

MR. TRAUTMAN: That's correct.

Your Honor, we think that the evidence shows in terms of the sales of these tickets that they were targeted, because testimony by the financial vice president, statements were, the reason we're not selling you these tickets -- and I think Mr. Cooper has essentially admitted this -- is because you're our competition, whereas they would sell tickets to tour operators, which the evidence showed were also competitors, because what do tour operators do?

They do the exact same thing that Highlands wanted to do. They purchase tickets, package them, and resell them. And they try to get people to come to Aspen, and that's what Highlands wanted to do.

But Highlands was singled out over others because Highlands was also a competitor in terms of supplying services.

QUESTION: Well, didn't the Colorado Attorney General think that this joint ticket was a price fix, illegal price fix?

MR. TRAUTMAN: The Colorado Attorney General filed a lawsuit alleging that there was price-fixing. The lawsuit terminated with a consent decree and the consent decree very specifically said the four-area ticket may continue.

Now, the coupons were the second flat refusal

to deal. After we couldn't buy tickets to put together the package, the next thing we thought of was, well, let's use the coupons, which are used, again, in Summit County They were used in Aspen for 16 years, a recognized medium of exchange in the ski business. We'll go down to the bank, we'll deposit money so that they won't have any problem in the redemption process. And again, a flat refusal.

Now, both of these refusals again were targeted, because they accepted coupons from other competitors and their customers. We think that this type of conduct, where the consumer would show up at the window with a Highlands ticket, a Highlands coupon, and say please exchange it, and they'll say, no, we won't accept your medium of exchange, that they were telling the consumers the same thing that Lorain Journal was telling consumers. That is, if you deal with us exclusively things will be fine, but if you don't we're going to make it difficult for you.

And that's why we believe that this case is Lorain Journal. It falls into traditional exclusionary antitrust precedent by this Court, which focuses on conduct. And again, the reason why the acceptance of coupons from competitors in other markets and the sales of tickets to competitors and skiiers, but

the refusal to do the same thing to Highlands, that's important, because what that does is it disproves all of their justifications.

How could they possibly have free rider problems with Highlands, but not have them with tour operators? Highlands wanted to do the same thing. How could they possibly have free rider problems with coupons when they didn't have free rider problems in Summit County with coupons?

So we think that that contrary conduct in similar situations exposes those refusals to deal as ones that create no economic detriment to the incentives to invest in this particular company, as hypothetically surmised by Mr. Cooper. And we think also that it reveals that it was targeted conduct, trying to prevent Highlands from competing with its package.

Let me just mention the competitive effect and what the evidence was on that issue. Highlands invested in and helped develop this four-area joint venture, this four-area ticket. It had been in existence since 1962, for about 16 years.

And in 1973 Highlands brought an innovation, creating Aspen Reservations, Inc., as we discuss in our brief. And with that innovation came another innovation, which was the around the neck format, and

the around the neck format is really what made this venture take off, which made this distribution system superior to the daily lift tickets, because now, instead of having to go back to the ticket window and stand in line every day, they could go right into the lift and go up the mountain.

They could choose any one of the four areas on any given day. That particular distribution system, the four-area ticket, became the state of the art way of gaining access in multi-mountain resorts. It coupled convenience with variety, two things that skiiers when they came to such resorts wanted.

In every other market that Ski Company operated in, it participated in these arrangements. In Aspen, after it kicked Highlands out of the four-area ticket, it didn't return to just offering daily tickets; it returned to a very similar type system which combined convenience with variety.

In short, the strong demand for this ticket, this type of an arrangement, made access to it crucial for a competitor such as Highlands. And it's not a situation where we are, if you will, on the coattails of Ski Company's enterprise. This was partially our enterprise as well. This enterprise was one that we invested in with advertising dollars and that we helped

out with some of our innovative ideas.

The refusal then of Ski Company to allow us to market our own substitute product by refusing to sell tickets to us or accept coupons had two fundamental adverse impacts on the competitive process. In the short run, consumers were deprived of a product that they wanted, that they clearly had demanded, that they had voted on clearly and shown to be the preferred type of ticket.

And in the long run Highlands was slowly being driven from the market. The evidence showed -- and we ask you to look at Exhibit 97, which shows that Highlands was falling in terms of its skiier visits, despite the fact that the evidence showed that it was a quality mountain, a quality product, and was efficient.

In conclusion, let me just state that an affirmance in this case will not create a duty to cooperate. As I have argued and pointed out, instead well-established Section 2 precedent will be continued which permits refusals to deal by monopolists provided that they are supported by efficiencies or other business justifications. In this case you have a jury verdict, where quite clearly there was strong evidence that there were no efficiency or other justifications tc support these targeted refusals.

By contrast, a reversal of this case, in light of the record below, will result in a freeing of a monopolist to completely refuse to deal without any justification, even though there's a demonstrable showing of damage to the competitive process, even though innovation will be retarded, even though there will only be one competitor in the market potentially, that is Aspen Ski Company.

And we think that the antitrust laws mean more than just a call for trader sovereignty. There are other interests that must be protected.

Thank you.

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

[Whereupon, at 1:59 p.m., argument in the above-entitled case 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:

#84-510 - ASPEN SKIING COMPANY, Petitioner V. ASPEN HIGHLANDS SKIING CORPORATION

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BY Paul A. Richardson

(REPORTER)