ORIGINAL

TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of:	)	
	)	
BUSINESS ELECTRONICS CORPORATION,	)	No. 85-1910
	)	
Petitioner,	)	
	)	
v.	)	
	)	
SHARP ELECTRONICS CORPORATION	)	

Pages: 1 through 42

Place: Washington, D.C.

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BUSINESS ELECTRONICS CORPORATION,

Petitioner,

V. : No. 85-1910

SHARP ELECTRONICS CORPORATION

Washington, D.C.

Tuesday, January 19, 1988

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

APPEARANCES:

GARY V. MCGOWAN, ESQ., Houston, Texas;

on behalf of the Petitioner.

HAROLD R. TYLER, JR., ESQ., New York, New York;

on behalf of the Respondent.

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P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 85-1910, Business Electronics Corporation versus Sharp Electronics Corporation.

Mr. McGowan, you may proceed whenever you're ready.

ORAL ARGUMENT OF GARY V. MCGOWAN, ESQ.

ON BEHALF OF PETITIONER

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

This antitrust case arises under Section 1 of the Sherman Act, and involves an allegation of vertical price fixing. It concerns two independent dealers in Houston, Texas, who bought calculators from Sharp Electronics Corporation, and resold those calculators to their customers.

The jury below found an agreement between Sharp and Hartwell, Hartwell being one of the dealers in Houston, to terminate the petitioner, Business Electronics, the other dealer in Houston, for the purpose of eliminating price cutting, an agreement to eliminate price cutting.

On appeal, Sharp did not contest the sufficiency of the evidence supporting that jury finding, but instead the issue in this appeal is whether an agreement to stop price cutting by terminating the price cutter is a per se violation of the Sherman Act. The Fifth Circuit below held that such an agreement did not constitute price fixing. The Court said that

a finding of price fixing required literally an agreement to charge resale prices at some level.

The decision below, which carves out conspiracies to eliminate price cutting from the definition of resale price maintenance should be reversed for several reasons. First of all, such a rule would eviscerate the per se rule against price fixing. The per se rule would be so narrow as to catch only blatant smoking gun cases of price fixing. Such a rule would deter only the ill informed and unsophisticated. It could easily be avoided. Instead of agreeing on price directly, suppliers and dealers who wish to achieve adherence to resale prices could simply collude to terminate dealers who refuse to charge those prices.

Second, a conspiracy to terminate dealers who don't comply with the suggested resale prices is clearly a form of resale price maintenance under the decisions of this Court. This Court has never limited the definition of vertical price fixing to direct agreements on price. In Parke, Davis and Albrecht, for example, the Court said that resale price maintenance need not take the form of an actual agreement on price. It's enough for the plaintiff to show collusion to enforce suggested resale prices.

And this makes sense. There is no meaningful difference between a direct agreement on price and a conspiracy to terminate dealers because they charge lower prices.

QUESTION: That depends on what you mean. Lower than

what? Was it established here that the non-terminated dealer would only charge list price all the time, and that the price cutter was always cutting below list. That wasn't established, was it?

MR. MCGOWAN: It was established here, Your Honor, that the terminated dealer was continually discounting and it was established that the non-terminated dealer wanted to avoid that discounting.

QUESTION: But sometimes discounted himself. He wasn't always selling at the manufacturer's suggested retail price, was he?

MR. MCGOWAN: There is evidence that he sometimes discounted himself, Your Honor, but --

QUESTION: So you really can't say for sure that by terminating the other one for discounting, what you were establishing is in effect the manufacturer's suggested retail price, or at least we don't know that for certain.

MR. MCGOWAN: What we can say for certain is that a price cutter, a firm that was clearly charging lower than the manufacturer's suggested resale prices was taken out of the marketplace in order to get rid of that price cutting. This is a form of an agreement on price, because it's in effect an agreement which says these lower prices should not be charged by that dealer.

QUESTION: Well, Mr. McGowan, why couldn't an agreement to eliminate a price cutter reflect an agreement to

maintain the conditions necessary for the continuation of some presale promotional practices, instead?

MR. MCGOWAN: Well, Your Honor, that contention was raised in this case, and the so-called free riding concern, promotion services. In this case, the evidence showed that in fact, the plaintiff, Business Electronics, was not a free rider. There was never any complaint from Sharp that he wasn't providing those services. The complaint from Sharp was that he was price cutting.

QUESTION: Well, the facts may show that, but it would seem to me that it speaks to whether there should be the application of a per se rule, or not.

MR. MCGOWAN: Well, the free riding rationale would in effect as used here, Your Honor, as a thinly distinguished attack on the per se rule in general, the same free rider arguments are made with respect to the per se rule itself. The free rider arguments should not be given any weight in the context of vertical price fixing. In Sylvania, this Court alluded to free rider effects, but only in the context of vertical non-price restrictions.

And the Court made it clear that as to price restrictions, there are significantly different policy concerns and effects as to price restrictions. As to price restrictions, the courts will always apply the per se rule.

QUESTION: Well, I don't think you've, at least not to my satisfaction, completely answered Justice O'Connor's

question. You say that the free rider consideration shouldn't be taken into account here, but why shouldn't they. I mean, if we're talking about economic utility and that sort of thing, why shouldn't that consideration along with many others be taken into account?

MR. MCGOWAN: It depends on what you mean by free rider, Your Honor. Free rider means a failure to provide a certain level of minimum promotional services, there are far less restrictive alternatives than vertical price fixing, which can be used to remedy free riding to the extent it's a problem.

QUESTION: But why must we look for the least restrictive alternative in a statutory case, and it's not a First Amendment case

MR. MCGOWAN: Because free riding is a ready label which can always be used to excuse what amounts to a conspiracy to eliminate price cutting. And this case is a good example of that. I mean, there was no evidence that Business Electronics was actually free riding. And in fact, the evidence shows that if anybody was free riding, it was Hartwell. Because Business Electronics had been an established dealer in this market for four years. Hartwell was then appointed. Hartwell then started soliciting customers from Business Electronics.

So the free rider rationale, this business of inducing dealers to provide additional services is something that came to life in hindsight, Your Honor. It's not something --

QUESTION: Then your argument is not how much that it doesn't deserve consideration and evaluation of the legal principles, but just that whatever consideration it should get shouldn't apply here because this really wasn't a case of free riding?

MR. MCGOWAN: This wasn't really a case of free riding, and as to vertical price restraints as opposed to non-price restraints, free riding should not be a rationale for undermining the per se rule itself. Now, where you're talking about something that amounts to price fixing, these free rider concerns should not be used to justify price fixing?

QUESTION: But why not?

MR. MCGOWAN: If you look in the literature, Your Honor, on the subject of free riding, you can look high and low in that literature, and there is almost no empirical basis for it. There is no basis for assuming that this free rider phenomenon is something that is pervasive in our economy, or is something that should be used to justify --

QUESTION: You know, some of us -- I dare say all of us -- have had some experience of going to some very full line dealer and you know, getting the stuff demonstrated and that sort of thing, and then you go to some discount house and buy it there.

MR. MCGOWAN: Your Honor, another problem with free riding is that it prevents consumers from exercising their freedom of choice. A consumer may choose to buy a product at a

lower price, even with less service. And even though there may be cases of the so-called free riding you've described, those cases are probably so narrow and so unusual, that they do not justify applying a broad based rule that would undercut the per se rule.

QUESTION: Well, doesn't the manufacturer have an interest in protecting, to a certain extent, dealers that do provide full service and provide advertising and that sort of thing?

MR. MCGOWAN: The manufacturer can achieve that interest through contractually requiring those dealers to provide a minimum level of service, to provide a minimum number of salesmen, to provide a minimum showroom floor, and he can terminate those dealers for refusing to comply with those contractual requirements.

The manufacturer can also impose non-price vertical restrictions subject to the rule of reason. He can limit territories and customers, for example. But to use what amounts to vertical price fixing to avoid the free rider problem is like using a shotgun to kill a mouse. It's overly broad, it's crudely broad. It eliminates competition much more than is necessary to cure what is probably a very minor narrow concern in our economy.

QUESTION: It isn't the respondents who are urging a broad rule, a prophylactic rule, if you will, it's you. That is to say, under what they propose, you can always examine each

case one by one and decide whether indeed the free rider concern exists or not. But your principle is you can never even consider that. I am proposing a broad rule if he's being terminated for charging too low a price, it's a per se violation.

MR. MCGOWAN: Your Honor, the rationale for the per se rule is based on a judgment that certain practices are likely to be predominantly anticompetitive. And we submit that an agreement to eliminate price cutting -- that's what the jury found here, and that's what the evidence supported -- an agreement to eliminate price cutting is predominantly anticompetitive.

Now, when you apply the per se rule, the per se rule is applied for the sake of litigation efficiency, and business certainty. There may be cases, there may be individual cases where the per se rule catches conduct that doesn't have a terribly anticompetitive effect, but for the sake of litigation efficiency and business certainty, the per se rule was applied.

Here, I think it can be generally said that an agreement to stop price cutting by terminating price cutters is predominantly anticompetitive. It's clearly a price restraint. It deserves the per se rule for that reason.

QUESTION: Why would the manufacturer want to cause his products to be sold at a higher price, unless he had something to gain such as better promotion and all of these other things that eliminate the free rider prospect?

MR. MCGOWAN: For at least two reasons, Your Honor. The first reason being, as Justice Powell recognized in the Sylvania opinion, it may facilitate cartelizing, cartelization of the industry. For example, we have evidence in this case that Sharp's motive in imposing resale price restrictions on its dealers was pursuant to a promise that it made to its competitors not to enter into a meaningless price cutting war. Sharp would serve as an example for the industry. That's one reason.

The second reason, and I think a more obvious reason, is that rigorous price competition at the retail level is eventually going to put back pressure on the manufacturer's wholesale prices. The manufacturer cannot stand there and watch retail prices continue to go down without eventually lowering his own prices.

QUESTION: I have the impression you expected that question.

MR. MCGOWAN: Yes, Your Honor.

Now, the Court below said that there was no price fixing here because Hartwell remained free to charge any price he wanted. Now, this theoretical freedom is an artificial distinction. It's unrealistic to suppose that the remaining dealer will use his freedom to do anything other than raise prices or increase margins. I mean, after all, the purpose of the agreement here was to eliminate price cutting.

And focusing on the remaining dealer's supposed

freedom ignores the reality of the agreement. It's purpose and effect was to destroy Business Electronics' freedom to lower prices.

The narrow definition of price fixing adopted by the Court below not only runs against this Court's precedent and logic, it also violates the antitrust policy laid down by Congress. The best proof of this can be seen in Congressional response to the Justice Department's vertical restraints guidelines. In 1985, Congress passed legislation condemning those guidelines as an effort to "dilute or trivialize" the per se rule.

And Congress even condemned a statement in the guidelines which comes very close to the holding in this case. And I'll quote briefly. "Whereas, such policy guidelines --

QUESTION: Where are you reading from, Mr. McGowan?

MR. MCGOWAN: I'm reading now from page 37 of the Petitioner's Brief. The quote at the bottom.

"Whereas such policy guidelines are inconsistent with established antitrust law as reflected in Supreme Court decisions and statements of Congressional intent in stating that vertical restraints that have an impact upon prices that are subject to the per se rule of illegality only if there is an explicit agreement as to specific prices."

That was one of the things that they specifically condemned in the Justice Department's guidelines.

QUESTION: This was a sense of Congress resolution?

MR. MCGOWAN: Yes, Your Honor. And it was actually passed and signed by the President.

In addition, using its power over appropriations, Congress even went so far as to prohibit the Justice Department from attempting to alter or amend the per se rule, again demonstrating Congressional belief that the per se rule should be broadly applied in the area of vertical price fixing.

QUESTION: Just what weight ought this Court to give, I mean, this isn't the Congress that enacted the Sherman Act, or enacted the Clayton Act or any of the basic Acts upon which, you know, the various per se rules have been based.

MR. MCGOWAN: Your Honor, in Sylvania in distinguishing price from non-price restraints, and in reaffirming the application of the per se rule to price restraints, Justice Powell took pains to note that among other things, Congress had expressly approved the per se rule repeatedly over the years. And most of that indication of Congressional intent has occurred since 1975. So it should be given great --

QUESTION: And was he referring to sense of Congress resolutions such as this one?

MR. MCGOWAN: He was referring to repeal of the Miller-Tydings Act, he was referring to Congress as in the Square D case, Congress having enacted legislation in the antitrust field without being aware of the per se rule, without altering the per se rule, for example.

There should be no fear here that reversal of the Fifth Circuit's narrow definition of price fixing would erode the Sylvania decision. The Court made clear there that price restraints usually reduce both interbrand and intrabrand price competition, that price restraints facilitate cartelizing and that Congress approved the per se rule.

We are not dealing here, as Sharp contends, with a mere exclusive distributorship. This is not a mere agreement to terminate a dealer who happened to be a discounter. An exclusive distributorship is defined as an agreement between a supplier and a distributor, whereby the supplier agrees not to appoint any other dealer in a defined territory. It's clearly a non-price restraint, it says nothing about pricing.

Here, we have a conspiracy aimed specifically at ending price cutting by a dealer, by the only means left available to those who wanted higher prices, and that is termination of the price cutter. Sharp says, well, you've got to look at effect. The effect is the same whether you have an exclusive distributorship or the agreement at issue here.

But a bona fide exclusive distributorship may or may not have an adverse effect on interbrand competition. For example, if Sharp had appointed Business Electronics as its exclusive distributor, a price cutter would have remained in the market and would have represented price competition viz a viz interbrand competition. And even if an exclusive distributorship had the same effect on competition as the

agreement here, the availability of lawful means to achieve the same result, the same anticompetitive result, does not excuse the use of conspiracies to eliminate price cutters and unlawful means.

QUESTION: Mr. McGowan, what do you expect a manufacturer to do when he's confronted with this situation. One of his distributors comes and says, look, I'm a full service distributor, I do a lot of advertising. Let's assume this is true. I know you say, this is not the situation here. But let's assume one distributor whose a good guy, he has a full showroom, and he does all the services. And he comes to the manufacturer and he says, this other fellow is a discounter and he's killing me. Now, I cannot compete and have these full services the way I have them now. Either terminate him or I'm going to quit.

What is the manufacturer supposed to do?

MR. MCGOWAN: The manufacturer can say we cannot agree to terminate this man because of his discounting, and I'm not going to terminate him just because you don't like his discounting. What I can do, if it's in my best interest, is I can contractually require the other dealer to provide minimum services, minimum showroom, number of salesmen, floor space, and so forth, so that at least he's providing full services like I, the manufacturer want him to do.

QUESTION: And I have to police those and only if he violates them and I can prove in a lawsuit that he's violated

them, can I get out of it. Right?

MR. MCGOWAN: Well, --

QUESTION: That's a rather expensive way to get rid of a distributor.

MR. MCGOWAN: But the manufacturer is always free to unilaterally terminate a distributor. He's free to set up non-price restrictions, and if the distributor violates those subject to rule of reason, he's free to terminate the distributor for those reasons. He is not free, as happened in this case, to enter an agreement -- which is uncontested. The sufficiency of the evidence supporting the agreement is uncontested.

He's not free to enter into an agreement to eliminate price cutting by terminating the price cutter. I mean, this is a case where Business Electronic's competitor approached Business Electronics and wanted to engage in a horizontal price fixing conspiracy. Business Electronics ignored it, refused to do it. Sharp repeatedly requested my client to raise his prices. He refused to do it.

It finally got to the point where they got together and said the only way we can get rid of this distributor is terminate him. That's the only way this price cutting is going to go away. That is illegal, and that is a far cry from unilateral termination or termination because of violation of non-price restrictions.

And juries can tell the difference between those two.

QUESTION: Mr. McGowan, is there any evidence in this case that the manufacturer, Sharp, did request your client to add additional salesmen or additional services or anything else as a condition of retaining his dealership?

MR. MCGOWAN: There is no evidence that they complained to him about failure to provide requisite number of services. My client did lose a number of salesmen well before Hartwell was appointed as a dealer, and didn't have as many salesmen as Hartwell. And there are memos in the file saying, he's working to build back up his sales force. But there's no evidence that they ever came to my client and said, if you don't have more salesmen, we're going to terminate you. Or if you don't provide more advertising, we're going to terminate you.

There's not a shred of evidence to support the notion that Sharp cared about the level of advertising.

QUESTION: Is the dealership agreement in the record? Are there conditions like that in the standard -- do they use a standard agreement, the same agreement with both of the two dealers?

MR. MCGOWAN: There is no dealership agreement in the record for Hartwell, I don't believe, and I don't think there's a dealership agreement in the record for Business Electronics, either. It's irrelevant to the case. It didn't contain any -

QUESTION: Well, does the record show whether Hartwell had all these additional services because he thought

it was a good way to run his business, or because Sharp required it?

MR. MCGOWAN: The record shows as a matter of fact, Your Honor, that Sharp never went to Hartwell before the termination and said, we're glad you're providing these services, or you should be providing these services, or Hartwell said, I can't provide these services. As a matter of fact, Hartwell himself testified that the termination was done pursuant to his request. Then Sharp came to him and asked an open ended question, what do you intend to do with this market now that it's yours. And he said well I'm going to add some salesmen and that sort of thing.

Sharp lost salesmen because Business Electronics was beating him in the marketplace.

QUESTION: Did Hartwell handle other products, too? This wasn't his only line, was it?

MR. MCGOWAN: It was not his only line. He handled numerous other office products. And there's no evidence, at all, by the way, that he did any advertising of Sharp during the time he was a Sharp dealer. The only evidence in the record concerning his advertising is 1981 and 1982, some nine years after my client was terminated and that evidence relates to his budget for his total advertising, which includes all of his products.

QUESTION: And what percent of his total business was this line? Does it indicate -- is this a major part of his

business or just part of it?

MR. MCGOWAN: I would say I don't believe there was evidence as to what percentage it was.

QUESTION: And what about your client? Was this the only product your client handled?

MR. MCGOWAN: This was the only product my client carried, Sharp calculators.

Nothing in this Court's Monsanto case requires the Rule adopted by the Fifth Circuit. That case does not limit vertical price fixing to a single form. It dealt with the minimum proof required to show collusion in the vertical context. And there's no issue here as to collusion to eliminate price cutting. The evidence is not in dispute.

Here the question is what kind of conspiracy falls within the scope of the per se rule applicable to price fixing. A conspiracy to do what?

QUESTION: What would be the rule if a dealer came to his supplier and said, this fellow's too close to me, I want a bigger area, or I can make more money if you'll eliminate that competitor of mine across town. And the manufacturer says, okay, I agree to do it, and he does.

What rule would apply there?

MR. MCGOWAN: The rule of reason would apply there, Your Honor.

QUESTION: You can conspire to eliminate a competitor?

MR. MCGOWAN: Well, subject to the rule of reason.

QUESTION: Yes. I mean, that it's not per se.

MR. MCGOWAN: Not per se. It's subject to the rule of reason because it doesn't involve price. It's not price-related. It's not an agreement specifically aimed at stopping the price cutting of the existing dealer.

QUESTION: Well, I know, but it's aimed at stopping competition.

MR. MCGOWAN: It is aimed at stopping competition, but --

QUESTION: And it's aimed at giving the favorite dealer more business.

MR. MCGOWAN: That's correct, Your Honor.

QUESTION: So is the price cutting conspiracy.

MR. MCGOWAN: That's correct, Your Honor, but --

QUESTION: Same result economically, isn't it?

MR. MCGOWAN: Not quite, Your Honor, because --

QUESTION: Well, in this case, he's complaining because the fellow's cutting price and taking a lot of business, right?

MR. MCGOWAN: Yes. He's complaining because of the lower prices, and those lower prices effect interbrand as well as intrabrand competition. And so when you eliminate those low prices from the marketplace through a conspiracy, it has a direct effect and immediate effect on both inter- and intrabrand price competition. Whereas, if the agreement to

terminate has nothing to do with price, it may well have only effects insofar as price competition is concerned, on intrabrand competition.

Again, for example, if the dealer who is given the exclusive after somebody else is terminated is a price cutter himself, then he's still in there keeping prices low, viz a viz other brands. So that would be the difference in effect.

QUESTION: Well, if it would have an adverse effect on interbrand competition, you have to assume a pretty stupid manufacturer, since I assume he's getting the same amount from the distributor, no matter how much the distributor sells. Why would he want to reduce his share of the interbrand market?

I can't imagine why.

MR. MCGOWAN: I'm not sure I understand your question, Your Honor. I don't think the manufacturer might want to reduce his share. He may want to reduce his share if he can charge higher prices. If he can achieve more overall profit through lower volume and a higher price, it might be to his benefit to do that.

QUESTION: This assumes that he can get a different amount from the distributor, but there's no indication in this case, nor do I think it's normal, that you charge the distributor a certain percentage of what he sells it for.

MR. MCGOWAN: I think it is common, Your Honor, for manufacturers' wholesale prices to rise and fall with retail prices. The cutting edge is at the retail end. The

manufacturers cannot charge wholesale prices in ignorance of what's happening at the retail level.

It's important to realize what's at stake here. The free riders that Sharp alludes to are really innovative efficient businessmen who enable consumers to choose lower prices, even if less service is provided. They're the Targets, the K-Marts, the discount drug stores. They are the businesses like Business Electronics in this case, who want to be free to offer lower prices to their customers.

At stake here is the freedom of these entrepreneurs to compete on price. And without price competition, all other competition is mere window dressing.

I'd like to reserve the rest of my time for rebuttal.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. McGowan.

We'll hear now from you, Mr. Tyler.

ORAL ARGUMENT OF HAROLD R. TYLER, JR., ESQ.

ON BEHALF OF RESPONDENT

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

I think listening to the argument of petitioner here, it is well for us to make very clear at the outset that Sharp is not contending that terminating a discounting dealer, such as has occurred here in June of '73, is always permissible. What we're arguing is that such a decision to terminate a dealer is not necessarily legal, that is to say, it is not per se legal, and should be open to inquiry in the courts as to

just what were the circumstances that led to that termination. What was going on in the marketplace. What services, functions, etcetera, that the various dealers hired in the marketing system of the manufacturer and supplier, were doing best so as to be as competitive as possible in the interbrand marketplace.

In other words, we're arguing that this Court and the lower courts should not presume conclusively that terminating dealers is always anticompetitive. In many instances, as this Court has already recognized in Sylvania and Monsanto, there can be circumstances where this kind of termination for price cutting is not anticompetitive but procompetitive, particularly when you measure what is going on not only interbrand but intrabrand.

Now, let me suggest that one of the difficulties with the rule apparently argued for by petitioner is that without really doing anymore than using the phraseology, the petitioner seems to assume that terminating a discounter is so obviously and exclusively and constantly pernicious that it can be assumed in each case to be anticompetitive.

QUESTION: Mr. Tyler, I wonder if that's fair to your opponent's case, because he's not saying terminations are always bad. He's saying they're bad when they're done pursuant to an agreement with a person whose having his business taken away by the price cutter.

MR. TYLER: We may have a difficulty there, Mr.

Justice Stevens. I think he made the using agreement a little more broadly than he ought. In other words, what happened here was, as you know, that actually there was an ultimatum laid down by the surviving dealer, Hartwell in June of '73. And it is true that confronted with that ultimatum, our client Sharp said we're going to go with the dealer that we think will do a better job because we don't think that discounting is helping us.

QUESTION: Yes, I know, but it would be quite a different case if there'd been no ultimatum and no agreement.

MR. TYLER: No, no. I agree with you. Hear me out.

We could have the same argument if, for example, Sharp had had a beauty contest here, and suddenly sat down Hartwell and Business Electronics, and said, fellas, I want to know that you fully understand what I'm trying to do. I'm going to shift my marketing. I'm not so happy with constant discounting. I want full service, pre-sale, point of sale, post-sale.

Let me evaluate what you can do, and you tell me what I can do. That supplier without an ultimatum, it seems to me, under existing case law, has every right to say, well, listen, I'm going to go with Hartwell. True, I might make a little more money in Houston for awhile if I went with you, Business Electronics, because you sell cheaper. Presumably you'll sell more units. But I'm going for the bigger score.

There are a hundred people out there selling

manufacturing calculators. And remember this was a long time ago when calculators for business people were not cheap, a thousand dollars and so on.

Our argument is that dealer should expect that his supplier in a beauty contest, as I call it, has every right to go with the dealer who is not the discounter.

QUESTION: Isn't that exactly what the Judge instructed the jury? That it would be perfectly all right to do it unilaterally.

MR. TYLER: Respectfully, Justice Stevens, I don't agree. What happened in the charge and the most sensible fact finder couldn't help without more with the charge, what the Trial Judge, Judge Seals, did was say, it is a violation of Section 1 if a terminated dealer, Business Electronics, comes in and says, a) I was terminated. No doubt about that, no issue of fact.

b) there was some talk I was terminated because I was a discounter. Not much argument about that. The case is over. We said that the Fifth Circuit was right, you've got to do a little more than that. And it doesn't make any sense because there is no showing in that instruction or that view of the law that keeps in mind the purpose of Section 1. And that is to prevent a remaining dealer, Hartwell in this case, from being able to sit down with his supplier and actually tie Hartwell, the remaining dealer's hands, as to what he can charge.

That is what the Fifth Circuit found wrong. There

was no real evidence about that, particularly in light of the charge which didn't take that into account.

QUESTION: Well, as I read the charge, the Judge did distinguish between an agreement and a unilateral termination.

Let me ask you this question. Assume there were three dealers, and two of them went to the supplier and said, we're both going to quit unless you terminate the third because he's a price cutter.

MR. TYLER: Well, then I'd be in a little trouble.

QUESTION: Well, why isn't that the same case? They don't agree to maintain prices themselves. They just say he is spoiling the market?

MR. TYLER: Because in the cases such as Sylvania and Monsanto, as I read them, this Court has recognized that you have to be a little less wooden than that. You have to allow a dealer the option to say, hey, I have two dealers, one's a discounter, the other I consider a full service or at least a better full service dealer than that discounter. There has to be flexibility to allow that manufacturer to make that determination if he's in a highly competitive position interbrand. And the distinction that the Court below drew is perfectly sensible and consistent with Sylvania and Monsanto because it said, look you've got to go further, discounter, who comes in with a treble damage action, and show there was some agreement to hobble or restrain the surviving dealer's right to decide what to charge in that marketplace.

And Business Electronics didn't do it. And with that instruction, there was no way in the world that the greatest jury or fact finder could avoid doing what they did with no economic advantage, purpose, or fairness whatsoever.

Think about another aspect of the argument petitioner makes. They seem to think that somehow what happened here was terribly offensive, but apparently are willing to recognize that the law of the land is that what happened here in practical effect is legal. And what I'm adverting to here is that once Hartwell was the surviving dealer, he became an exclusive dealer in the Houston area.

The Courts say you can do this. I would argue that once you say, hey, fellow, you're an exclusive in Houston, that's a lot more devastating and stark to any discounter who was kicked out on that basis.

The other thing is the argument, apparently, as I understand Business Electronics is that look, what was going on here leads to the possible cartelization of the calculator industry. Counsel for Business Electronics cross examined the sales manager, a man named Burkholder in this trial, and brought out happily that at the time there were a hundred firms in the business of manufacturing, like Sharp, and selling calculators. Cartelization with a hundred competitors across this great country? Ridiculous.

Another thing that the argument comes down to as I understand petitioner is this, that we are in no trouble. The

courts would take no offense to the teaching of Sylvania and Monsanto, if they took the broad rule that they argue for. Well, it seems to me that that really is a little bit tough.

As I read Sylvania, the Court in that case reasoned and concluded that exclusive dealerships which certainly eliminate intra-brand competition are permissible. Now, if this Court can say that, why not allow this, particularly since all we're arguing for is not a free ride ourselves. We're simply arguing that the rule of reason should apply and we may lose. You recall in the decision below, Judge Clark pointed out his view of the evidence as he understood it in the trial record.

There's evidence on both sides. I assume we're not here to argue with you or to ask this Court to decide on the evidence, but the point is there should be a chance. And if the price cutter can show that what happened was the result of a true conspiracy to do no more than to fix retail prices through his surviving retail dealer, or some other anticompetitive effect, then he wins.

QUESTION: Mr. Tyler, the Fifth Circuit majority sent this case back for a new trial to a properly instructed jury, didn't they?

MR. TYLER: Exactly. And our only point is, we want to support that, and we say that's fair and not inconsistent with what this Court has already held true. The facts are different and so on.

Let me make one other point, and that is this: one of the curious things about petitioner's argument here is that normally it would seem from an economic and practical point of view that if I were a supplier of a calculator and I liked to sell calculators particularly in a big city like Houston, and if as I think the marketplace truly was in the early 70s, you know, calculators were still coming along and weren't quite as popular as they are today, but very competitive. I would really hesitate to think that any sensible supplier would just say willy nilly, okay, other dealer, you come in and say, I get rid of the price cutter.

I want to think about that a bit. Why should I throw out the fellow who might sell the most calculators in Houston unless there were powerful reasons in terms of what I was trying to achieve across the board that I'd want somebody that doesn't discount as much.

Let me point out another obvious economic circumstance here which petitioner seems strangely to ignore in arguing on the law point here. There are suppliers in this world which don't like to be known as having a marketing system whereby they sell in discount stores. On Fifth Avenue in New York City, there are fellows who have signs saying, I'm going out of business tomorrow, come in and buy calculators and cameras at a discount. A few blocks over there's Bloomingdales. They sell these same things.

Their suppliers don't want sometimes to sell their

products by these discount guys on Fifth Avenue who have fire sales or going out of business sales. It seems to me that under the Court's existing reasoning in the earlier cases such as Sylvania and Monsanto, leave open to a supplier the right and the capacity so long as he doesn't do something to maintain retail prices at some level. If he makes the determination to go with somebody who doesn't charge the cheapest prices --

QUESTION: Mr. Tyler, your Bloomingdales example makes me wonder with respect to this particular case, if you say that the plaintiff is the fire sale store, he's always got fire sale signs up and the surviving dealer, that Hartwell, is the one the Bloomingdales in the pattern, and that Bloomingdales said, we want to have no more fire sales, and if you terminate him, we won't necessarily agree to sell at your suggested price, but we at least won't do this fire sale business, we won't cut 30, 40 percent off the list price. We'll just be on a kind of a reasonable price.

Would that violate the antitrust laws under the Fifth Circuit holding?

MR. TYLER: If I heard you rightly, Justice Stevens, you threw in a number of parties. That's dangerous.

QUESTION: No, just three parties. Just three parties. We've got a discounter fire sale person who sells at 40 percent off list. You've got a Bloomingdales that sells usually at list but maybe 10 or 15 percent off from time to time, but no 40 percent stuff.

MR. TYLER: Right.

QUESTION: Now, if the real discounter is terminated pursuant to an agreement with Bloomingdales in this case, and the agreement is well, you don't have to sell at list, but you certainly are not going to behave like this other fellow did and have fire sales all the time.

Would that be legal?

MR. TYLER: Yes. So long as in this arrangement the supplier, let's say, Sony, to take it out of this case says, Bloomingdales, fine. I want to go with you because I think you're a better dealer and you're classy. I may sell more units with the fire sale guy, a couple of boxes over, that's legal, we are.

Now, you understand that this encompasses what the Fifth Circuit recognized. I can't sit down then quietly as the manufacturer, Sony, and say, now look, Bloomies, let's agree here and now, you know, let's keep those prices pretty much what I say. If the fire sale guy -- and I must say in fairness to my opposing counsel, I perhaps shouldn't call Business Electronics fire sale people; I don't know of any reason to think they were that way -- but to take the analogy, I couldn't get away with that.

And that's all the Fifth Circuit said.

QUESTION: I'm just wondering what the Fifth Circuit requires the plaintiff to prove on the retrial. That they maintained the specific suggested prices, that they agreed to

maintain specific prices or just that they agreed not to discount as much as Business Electronics used to.

MR. TYLER: Forgive me, sir, I'm betraying my past and where I was a professional jury watcher for many years, but from a jury's point of view, or a fact finder's point of view, we can almost forecast what's going to happen. A) proof of termination. No dispute. We all know they were terminated in June of '73.

The next issue, was there something said about discounting? I don't think there's any great issue about that. What's missing in this case is the awareness that there should be a proper instruction of the rule of law that would enable and require a terminated dealer to go one step further and show somehow directly or indirectly to the satisfaction of that properly instructed juror, that this amounted to an agreement, express or implied, to fix, to use Judge Clark's words below, the prices in such a way that was restraining the hand of the surviving retailer as to what he'd charge for calculators.

You see, that's the very important point here.

QUESTION: Would it be enough, Mr. Tyler, if it were just understood that look, the reason I'm terminating B.E. is because they were charging too little. Now, I don't care what you charge, Hartwell, but it's understood you're going to charge more than B.E. charged.

Would that be enough?

MR. TYLER: That's getting close to the line.

QUESTION: Well, you see, I understand the Government's position very well. It's a nice clear position, it doesn't matter price or not. Whereas, I'm not sure of what --

MR. TYLER: You've confused me, excuse me, Justice Scalia. The government's position? Do you mean in the antitrust division?

QUESTION: Right, right. In their amicus brief, that's clear and easy to apply. Yours I think gets very fuzzy. I'm not sure how you instruct the jury.,

MR. TYLER: No, no, no. I think it's not as fuzzy as you say, with all respect.

QUESTION: I hope not.

MR. TYLER: All we're arguing here is look, what happened below was the judge said flatly, look, Section 1 lays it down as a matter of law that all this plaintiff, petitioner here, has to prove is, one, he was terminated. No doubt about it. Two, there was some talk about him discounting and that's why he was terminated.

QUESTION: No, that isn't what he said, not that there was some talk about it, but rather he was terminated pursuant to an agreement. That was critical in the instruction and in the findings.

MR. TYLER: Yes, but that's, if I may say so --

QUESTION: Maybe you say that's a lot of nonsense, but that's what the jury found.

MR. TYLER: It is a lot of nonsense in this sense.

QUESTION: You suggest there's no distinction between unilateral action and conspiratorial action.

MR. TYLER: No, no.

QUESTION: Which is exactly what the Judge, that was what the Judge asked the jury to decide.

MR. TYLER: The trouble with this is, once you've used labels like, conspiracy and agreement, they can be freighted with more meaning than the law or common sense should allow.

QUESTION: Congress picked the words.

MR. TYLER: I don't mind saying to you, Justice Stevens, that there was an agreement in a sense here. What else could there be? In runs Hartwell, who by the way, had been mumbling and fumbling around and complaining for some time, Sharp had been saying, oh, no, no, we can't do this, we can't terminate these guys. Finally, there's an ultimatum. It's either us or them. The decision is made, them.

You can call that agreement, but that's not an agreement which is rendered illegal by Section 1 standing alone. That's our point. You see, we're not in here arguing that hey, we deserve a medal, we are seeking from you, Justice Stevens, a ruling that once this kind of thing happens, it is deemed legal, per se. We're saying that they shouldn't argue that what happened here is illegal per se without more.

QUESTION: Yes, Mr. Tyler, but --

MR. TYLER: Therefore, I don't understand this play on words, of agreement or not agreement or ultimatum or not ultimatum.

QUESTION: Because it's settled as a matter of jury determination that there was an agreement between the surviving dealer and the manufacturer to have it cause the termination of the plaintiff. The jury found that. And the Court of Appeals said, yes, there was an agreement, but it was not an illegal agreement unless one of the terms of the agreement was that the surviving dealer is not completely free to charge whatever prices he wants.

And Justice Scalia and I have been asking you whether that means that they have to prove that well, if you just have an understanding we won't charge as low as Business Electronics would, wold that make it illegal. Or does it have to be an agreement to sell at list?

And you seem to be unwilling to address that.

MR. TYLER: I don't think there's any real difference between us. What I'm trying to say is though, to answer what you and Justice Scalia are posing, the real point is here there would have to be some proof that -- and the petitioner here, the terminated dealer, I assume would bear the burden of proof -- to show that the agreement was not just to terminate, but there had to be more, as you say. There had to be an agreement to restrict in some way the surviving dealer's capacity to charge prices as he wanted to.

A good illustration is in this --

QUESTION: You've been telling us that that can exist. I mean, part of your earlier presentation was look, if a manufacturer wants to go with a person whose going to charge a higher price and have a more quality product and more services and what not, he ought to be able to do it. But now you're telling me he really can't be sure that he's getting somebody whose going to charge the higher price.

MR. TYLER: No, no.

QUESTION: It can't even be part of his understanding that the non-terminated dealer will at least charge more than the discounter was charging. That can't even be part of it.

MR. TYLER: Well, I'm sorry. If you put it that way before, I missed it. This that you're now saying to me is quite a different spin. This is a fast ball and not just an old fashioned curve. What you're saying now is quite different.

Let me repeat. What Judge Clark and the Court below tried to say is all we're trying to say. There has to be some proof that once the terminated dealer is told be gone, because you discounted and you did this and you didn't do that, then the law permits this so long as the discounted dealer whose terminated can't come in and show that there was truly a conspiracy in addition, or an agreement to pick up on the colloquy between me and Justice Stevens, what you will maybe an additional agreement to stay the hand or restrict the hand and

come in with some form of resale price maintenance which the law doesn't permit.

QUESTION: Let me be clear what your position is. You say it would be enough the Judge could instruct the jury, it is enough, ladies and gentlemen of the jury, if you find that when Sharp terminated B.E., it was the understanding between Sharp and Hartwell that Hartwell whatever other prices he might charge, would at least not charge prices as low as B.E.?

If you find that there was even that minimal understanding regarding price, then you can find for the plaintiff.

MR. TYLER: Now, that raises another problem.

QUESTION: Well, is that the instruction you want, or isn't it?

MR. TYLER: No. I would like to be free, I would like I say, Sharp would like to be free of this kind of instruction. And this is Judge Seals. Listen to this: "The Sherman Act is violated when a seller enters into an agreement or understanding with one of its dealers to terminate another dealer because of the dealer's price cutting." That's bad. We don't want that.

We want the further instruction that you've got to go further and find that there was an agreement express or implied between Sharp and the surviving dealer to engage in some form of retail price maintenance.

QUESTION: Is the minimal assurance that I just gave you, would that be enough? The only thing I ask from you Hartwell, is that you not charge prices as low as B.E. I don't care what else. We have no other understandings. You can charge any prices you want, but at least this much is understood between us, you won't charge as low as B.E.

Would that be enough for a jury verdict against you?

MR. TYLER: Well, --

QUESTION: You can answer that question, yes, or no, can't you, Mr. Tyler.

MR. TYLER: If you're asking the point or raising the point again which we don't like, let me take it this way. I would say to you that it should not be sufficient, as the Court of Appeals apparently thinks would be, although it's unclear, to simply go in and among other things, have the charger of the rules of law applicable to this to say look, the mere fact that everybody seems to agree that, a) there was a termination of discounter, and a remaining dealer who picks up his work, that may be enough, jury, for you to infer an illegal agreement to maintain retail prices at some level.

I don't think that's enough, but I think this Court has already answered this in Monsanto. Is that what you're getting at? Otherwise, I'm

QUESTION: We agree it can't be inferred.

I think you can answer this one yes or no. Ladies and gentlemen of the jury, if you find an explicit agreement

between Sharp and Hartwell that Hartwell would not charge prices as low as B.E.'s prices, then you can find Sharp liable under the antitrust laws?

Would you accept that instruction?

MR. TYLER: I'd prefer to phrase it a little better, if I may say so, but I'll accept it.

QUESTION: All right.

MR. TYLER: I'd use the word, discount.

I think I've overstayed my time to allow rebuttal.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Tyler.

Mr. McGowan, you have two minutes remaining.

ORAL ARGUMENT OF GARY V. MCGOWAN, ESQ.

ON BEHALF OF PETITIONER

MR. MCGOWAN: I think we first of all need to be clear on the full instructions given by Judge Seals below. If you read the instructions in their entirety, he made it clear to the jury that the jury had to find a conspiracy to eliminate price cutting. And I'm quoting now from Joint Appendix 19, where the Judge said, "Sharp, on the other hand, contends that it terminated Business Electronics unilaterally, not as a result of any agreement or understanding with Hartwell, but because of Business Electronics' sales performance. If you find that Sharp did not terminate Business Electronics pursuant to an agreement or understanding with Hartwell to eliminate price cutting by business electronics, then you should answer, no, to question number one."

It's also important, to repeat, that sufficiency of the evidence supporting the finding of that agreement has never been contested on appeal. We submit, Your Honors, that there should be the requirement of a further finding of some sort of direct agreement on price is mere surplus. What we have here is a form of pricing agreement, an agreement to stop price cutting can't be anything other than an agreement on price.

QUESTION: Mr. McGowan, can I ask you the question Justice Scalia and I were asking your opponent. How do you interpret Judge Clark's opinion? Do you understand that you have to prove merely that there was some restraint, as I understand your opponent now conceded, in Hartwell's ability to price independently? Or do you have to prove that he agreed to follow the suggested retail prices of the manufacturer?

MR. MCGOWAN: The latter is the way I understand it. I will confess to you that the term --

QUESTION: That's funny. Each of you interprets it in a way more favorable to your opponent. It's strange.

MR. MCGOWAN: I will confess to you that the terms, agreement on price at some level, has always mystified me, exactly what it means. But the unfortunate thing is that read literally, it's a narrow rule. If there would be no need to have a direct agreement on price if suppliers and dealers can police discounting through collusive termination of discounters.

QUESTION: But it's really a different question.

I can agree with you that I'm getting rid of this discounter, but that doesn't necessarily mean that I'm not going to allow you to charge as low prices, if in the course of your business, you find you can charge that low a price and still make a good business for yourself. Maybe ten years hence you might be able to find that.

MR. MCGOWAN: But if the jury is instructed that in order to find a conspiracy, they have to find a mutual purpose to achieve an unlawful objective, and the jury finds that there was a mutual purpose, a conspiracy to eliminate price cutting, that is a purpose shared by both the supplier and the dealer, and the evidence supports that finding, then it has to be a form of vertical price fixing. It has to be a form of -- there's no reason to have that purpose other than to eliminate price cutting.

It is unrealistic to assume that the remaining dealer is going to charge lower prices.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. McGowan. I think you've answered the question.

The case is submitted.

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

REPORTER'S CERTIFICATE

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I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Supreme Court of the United States

Date: 1/19/88

Margaret Daly
Official Reporter

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