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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: TEXACO, INC., Petitioner V. RICKY HASBROUCK, dba
RICK'S TEXACO, ET AL.

CASE NO: 87-2048

PLACE: Washington, D.C.

DATE: December 5, 1989

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1 They were awarded treble damages during a period January
2 1972 through April 1981, based on Texaco's sales to
3 Dompier Oil Company, a wholesaler, at a higher price than
4 it sold directly to the Plaintiff retailers.

5 The record shows that Dompier purchased gasoline
6 from Texaco at the standard wholesale discount off the
7 retail tank wagon price that Texaco gave to all its
8 wholesalers in the Washington and Oregon territory.

9 QUESTION: Mr. Fishbein, how many wholesalers
10 were there in the territory?

11 MR. FISHBEIN: Well, the record indicates that
12 there were two wholesalers in Spokane and a substantial
13 number throughout the states. I don't know the exact
14 number, Your Honor.

15 QUESTION: But does the record show there were
16 any others in the same competitive market?

17 MR. FISHBEIN: There was a nonbranded wholesaler
18 in Spokane and one branded wholesaler.

19 QUESTION: So there are -- there are two?

20 MR. FISHBEIN: That's correct.

21 QUESTION: That -- that set the standard.

22 And both of them also sold at retail, didn't
23 they?

24 MR. FISHBEIN: No, Your Honor. Dompier, which
25 is the wholesaler at issue here, during part of the period

1 of damages, sold only at wholesale. During part of the
2 period and a later period it sold both at wholesale and at
3 retail.

4 Your Honor, the way the damages were advanced by
5 the plaintiffs here is they took four retail stations in
6 Spokane, and the damages were based exclusively on the
7 effect of the consumer sales from these four stations as
8 they affected the plaintiff stations. Those four were all
9 Dompier-supplied stations.

10 The record is clear that during the beginning of
11 the damage period, from January 1972 through July '74,
12 each of those four stations was an independent retailer,
13 had no direct relationship with Dompier, and Dompier
14 bought and then made an independent price decision to sell
15 to those four retail stations. They, in turn, made an
16 independent price decision as to what price to charge the
17 consumer.

18 So that for part of the damage period, Dompier
19 acted exclusively as a wholesaler and not a retailer, and
20 the only damages claimed by plaintiffs for that part of
21 the damage period were the sales from Dompier to these
22 four stations.

23 That is why the district court, in footnote 4 of
24 its opinion, specifically said prior to 1974 Dompier Oil
25 Company did not operate any retail stations but as a

1 distributor sold Texaco gasoline to retail stations.

2 Now, Your Honor --

3 QUESTION: Would -- would you concede liability
4 for the time when Dompier was acting as a retailer?

5 MR. FISHBEIN: No, Your Honor. The issue for
6 the time when Dompier was acting as a -- both a wholesaler
7 and a retailer is an issue that's been much debated within
8 the Federal Trade Commission and the courts of appeals
9 which has been recently discussed in Judge Starr's opinion
10 in Boise Cascade.

11 It goes back to the FTC's opinions in Doubleday
12 and Mueller, and it's a question of when -- when an entity
13 is performing both functions, what kind of a discount or
14 what kind of a lower price can the supplier give? Does it
15 have to cover only the retail functions? Can it -- can it
16 give the wholesale discount for all sales even though some
17 of them are on retail? That's an issue that is being much
18 debated in the lower courts and the Trade Commission now
19 which would have to be resolved as to the period
20 subsequent to 1974.

21 But that issue is not before this Court because
22 that wasn't addressed in the Ninth Circuit opinion. That
23 would have to be an issue that the lower courts would have
24 to deal with on remand if the Ninth Circuit decision is
25 reversed.

1 The issue that the Ninth Circuit opinion
2 presents to this Court, because that's the way the case
3 was tried and that's the way the record that clearly is
4 the part of the damage period is directly assailed to an
5 entity Dompier is exclusively a wholesaler and makes an
6 independent decision to sell to its retailers at a certain
7 price. That is the issue before the Court, and that's the
8 issue we suggest the Ninth Circuit departed from logic and
9 economics and precedent when it said that alone is
10 sufficient to create a liability under Section 2A.

11 QUESTION: Mr. Fishbein, I think I understand
12 that the jury was given an instruction at trial, number
13 20, which told the jury that it could infer the likelihood
14 of injury to competition from evidence that Texaco had
15 discriminated in price in the sale of gasoline between
16 different purchasers who were in competition with each
17 other and that the price difference was substantial and it
18 lasted for a substantial period of time, the so-called
19 Morton Salt type instruction.

20 MR. FISHBEIN: Yes.

21 QUESTION: You may -- your client did not object
22 to that instruction, I take it?

23 MR. FISHBEIN: That's correct. That's the
24 standard Morton Salt instruction.

25 What my client did object to, Your Honor, was

1 instruction 23(A) which converted the Morton Salt
2 inference as it was enunciated by this Court in Morton
3 Salt into a very different inference because instruction
4 23(A) told the jury that Dompier, in effect, would be in
5 competition with the plaintiffs if any of Dompier's
6 customers were in competition with the plaintiffs.

7 So when you take instruction 20 and 23(A)
8 together, what the jury was instructed is that the
9 discriminatory price, the price difference between Dompier
10 as a wholesaler and the plaintiffs as a retailer itself
11 and alone would justify the Morton Salt inference because
12 Dompier's customers, not Dompier, was in competition with
13 the plaintiffs.

14 Now it's our position -- and, of course, the
15 Ninth Circuit dealt with the Morton Salt inference rather
16 extensively in its opinion, and it's our position, Your
17 Honor, that that is a misapplication of the Morton Salt
18 inference.

19 In effect, what that does is convert a
20 traditional time-honored, economically required policy of
21 selling to a wholesaler at a lower price than a retailer
22 into an automatic inference that that in itself effects
23 competition at the retail level, whereas Morton Salt, of
24 course, was a sale by a seller to two competing buyers who
25 were competing with each other.

1 Now it's one thing to say that it's self-evident
2 that if over a substantial period of time a seller is
3 selling to two competing buyers at substantially different
4 prices that that is going to affect the competition
5 between them. It's wholly different, as the Ninth Circuit
6 did in this case, and as the jury instructions required
7 the jury to do, to say that when a wholesaler -- when a
8 retailer, a supplier sells to a wholesaler at one price
9 and a retailer at a lower price, that that in itself said
10 that it self-evidently is going to affect competition
11 between the wholesalers, retailers and the direct buying
12 retail.

13 QUESTION: Mr. Fishbein, the Robinson-Patman Act
14 does prohibit discrimination in price between different
15 purchasers of commodities of like grade and quality.

16 Now what was it about this case that prevented
17 that language from applying to your client?

18 MR. FISHBEIN: There are two parts of the
19 Robinson-Patman Act language that don't apply in this
20 instance, Your Honor. One is, as you pointed out, it has
21 to be the person, i.e. Texaco, has to discriminate in
22 price. It's our position that this is not a
23 discrimination because, when you charge different prices
24 to people at different levels of the distribution chain,
25 that is not a discrimination within the meaning of the

1 Robinson-Patman Act.

2 Our second argument --

3 QUESTION: Well, you -- you think there's -- is
4 there something then invidious in the notion that the word
5 "discriminate" conveys? Certainly, ordinarily
6 "discriminate" means to differentiate.

7 Your Honor, in an oft-quoted statement by
8 Representative Utterbach, who was the conference sponsor
9 of the Robinson-Patman Act, he pointed out that
10 discrimination means a difference or a differentiation
11 only in those circumstances where the two people being
12 differentiated have some reason or some justification to
13 be treated the same. Any difference doesn't automatically
14 mean a discrimination. The normal English language
15 use of discrimination seems to us to mean something more
16 than just a difference. It means a difference in a
17 circumstance where you would expect or require equal
18 treatment.

19 Now that's certainly true when you have a
20 supplier selling to two buyers who are at the same level
21 in competing with each other. We suggest it's certainly
22 not true where you have a supplier selling on one hand to
23 a wholesaler, on the other hand to a retailer who are at
24 two different levels.

25 QUESTION: Mr. Fishbein, how many courts have

1 adopted this theory that you're -- it's not a
2 discrimination? I know that everybody's heard Congressman
3 Utterbach's comment for 50 years, but what -- what's the
4 principal judicial decision that says a mere price
5 difference is not a discrimination?

6 MR. FISHBEIN: Well, Justice Stevens, I'm sure
7 that you're aware, the principal authority you're dealing
8 with at this point is this Court's opinion in
9 Anheuser-Busch, which is its opinion by Justice Warren
10 quite some time ago which has discouraged lower courts
11 from applying this literally.

12 It's our position in this case that
13 Anheuser-Busch, while it has language in it that says a
14 difference is a discrimination, is totally distinguishable
15 from this case and shouldn't be applied --

16 QUESTION: Well, I understand you can
17 distinguish all or most of these cases, but I was just
18 wondering. Most of -- most -- most of the cases seem to
19 say a price differential is a -- is a discrimination but
20 it's not unlawful unless it has the adverse impact on
21 competition at either the first, second or third level.

22 And you -- and why aren't you also troubled by
23 the language, "customers or either of them"?

24 MR. FISHBEIN: Well, "customers or either of
25 them" is a different issue, Your Honor. Under the

1 Robinson-Patman Act, as I was saying to Chief Justice
2 Rehnquist, there are two requirements and the language of
3 the act before it applies.

4 One is there has to be a discrimination.

5 QUESTION: Correct.

6 MR. FISHBEIN: The second, that discrimination
7 has to affect competition.

8 QUESTION: Correct.

9 MR. FISHBEIN: That's where the "customers of
10 either" come in. It can affect competition of the
11 customers of either.

12 QUESTION: Right.

13 MR. FISHBEIN: There are two reasons why we say
14 that this practice doesn't come under the language. One
15 is discrimination, and the other is it's not the
16 discrimination between the wholesaler and the retailer
17 that has the effect on competition down at the lower
18 level. In a case like this, where you have different
19 prices at different levels and you have an independent
20 wholesaler, it's that separate decision by the independent
21 wholesaler what to charge his retailers that it causes the
22 impact on competition.

23 QUESTION: Can you give me an example of a case
24 in which the statute would be violated at the second
25 level?

1 MR. FISHBEIN: Where it would be violated?

2 QUESTION: Yeah.

3 MR. FISHBEIN: At the second level?

4 QUESTION: Where you have substantial price
5 difference between the prices charged to a wholesaler and
6 a retailer, could that ever adversely affect competition
7 between the two customers or customers of either -- either
8 of them?

9 MR. FISHBEIN: Well, Your Honor, it is our
10 position that where you -- where you have a difference in
11 price it's not between people of the same level, two
12 wholesalers or two retailers, but if people in different
13 distribution levels --

14 QUESTION: You say if they're
15 different -- different functional levels, it never
16 violates the statute?

17 MR. FISHBEIN: It does not violate the standard.

18 QUESTION: What if there was an agreement, pass-
19 on agreement?

20 MR. FISHBEIN: Oh, yes, Your Honor. If there
21 was a sham or a pass-on agreement or a supplier set up a
22 wholesaler and required him to pass on or it was a phony
23 situation where he was using that to pass on --

24 QUESTION: Well, what about -- what about
25 knowledge over a long period that the pass-on was being

1 given?

2 MR. FISHBEIN: I think, Your Honor, that there
3 are two answers to that. First of all, knowledge is not
4 an issue in this case based on the Ninth Circuit's opinion
5 and -- and the instructions below.

6 Beyond that, it's our position that knowledge is
7 irrelevant to this issue and is not of material fact
8 because knowledge doesn't add anything. If the difference
9 at the two levels is not a discrimination, then knowledge
10 is irrelevant, and if it is the independent decision of
11 the wholesaler that causes the effect on competition,
12 knowledge that the wholesaler is going to do that on
13 behalf of the supplier is also irrelevant.

14 Another way to answer that question, Your Honor,
15 is to ask, what could the supplier do if it has a dual
16 channel distribution system and it is selling to a
17 wholesaler at a price that presumably covers his cost and
18 provides for a profit and that wholesaler is aggressive
19 and either is taking lower margins than other wholesalers
20 or is willing for a period of time to try to expand its
21 business and is selling by passing on the discount.

22 Given the facts like this situation, where the
23 wholesaler is an independent entity and the supplier is
24 not engaging in vertical price maintenance and the
25 wholesaler has the right to make those decisions,

1 knowledge doesn't help the supplier at all. There's
2 nothing the supplier can do to prevent that other than to
3 cut out the wholesalers or cut out the retailers, which is
4 not what this statute is designed to bring about.

5 QUESTION: I suppose you could also say there's
6 an independent retailer?

7 MR. FISHBEIN: Well, there might be. I mean, I
8 don't know that it's relevant to this.

9 QUESTION: No, but an independent retailer might
10 not pass it on.

11 MR. FISHBEIN: Yes, that's right. That is
12 exactly right, Your Honor.

13 QUESTION: He might prefer a profit.

14 MR. FISHBEIN: Yes. When a supplier sells to a
15 wholesaler, it sets that -- that price presumably based on
16 what it has to pay in a competitive market to get the
17 wholesaler to do the work, plus it has to add enough on so
18 the wholesaler will have a profit which will encourage the
19 wholesaler to carry out those functions.

20 QUESTION: Mr. Fishbein, how do we know who's a
21 wholesaler and who's a retailer?

22 MR. FISHBEIN: Well, Your Honor --

23 QUESTION: And certainly in this case there was
24 some -- I guess Gull and Dompier were doing both?

25 MR. FISHBEIN: Your Honor, again, in this case

1 the damages are based solely on the activities of Dompier.
2 There's no question that until the middle of 1974 Dompier
3 was exclusively a wholesaler. We know he was a
4 wholesaler. Subsequently, he was both a wholesaler and a
5 retailer.

6 QUESTION: And -- and if we had that subsequent
7 situation in front of us, how do you distinguish? I mean,
8 your rule couldn't apply.

9 MR. FISHBEIN: No. That is what the D.C.
10 Circuit has been grappling with in Boise Cascade, that one
11 has to separate out the wholesale and the retail functions
12 and make a determination as to what kind of price
13 discounts can be given overall for each one.

14 But that is clearly not our case in the period
15 through the middle of 1974, and since the plaintiffs'
16 damage evidence consisted of a single damage number for
17 each plaintiff through the entire period, and there was no
18 evidence presented or no way the jury or anybody else
19 could break out the damage during various subsets of this
20 period, necessarily part of the damages that the jury
21 found was for this period from January 1972 through July
22 of 1974, and necessarily that depended on a legal
23 conclusion that it was a violation of the act for Texaco
24 to sell to Dompier exclusively as a wholesaler.

25 Therefore, if that proposition of law that the

1 Ninth Circuit enunciated is incorrect, this -- this
2 judgment has to be reversed.

3 Your Honors, I would like to reserve a few
4 minutes for rebuttal.

5 QUESTION: Very well, Mr. Fishbein.
6 Mr. Dreeben.

7 ORAL ARGUMENT OF MICHAEL R. DREEBEN
8 ON BEHALF OF UNITED STATES AND FTC
9 AS AMICI CURIAE, SUPPORTING THE PETITIONER

10 MR. DREEBEN: Thank you, Mr. Chief Justice, and
11 may it please the Court:

12 The Ninth Circuit ruled that a supplier's use of
13 a functional discount constitutes price discrimination
14 when the wholesaler passes on a portion of the discount to
15 retailers. The supplier cannot show that the functional
16 discount is cost based, and the retailers who buy from the
17 wholesaler compete with other retailers who buy directly
18 from the supplier.

19 The United States and the Federal Trade
20 Commission believe that the Ninth Circuit's rule should be
21 rejected. A supplier should not be held liable for the
22 independent pricing decisions made by a wholesaler who
23 receives a legitimate functional discount.

24 QUESTION: Mr. Dreeben, is this some sentence or
25 paragraph of the Robinson-Patman Act that the Federal

1 Trade Commission has interpreted to reach this conclusion?

2 MR. DREEBEN: Yes, Your Honor. The
3 interpretation of the language of the Robinson-Patman Act
4 that's in question here is Section 2(a), which, as you
5 read, provides that it's unlawful for a person engaged in
6 commerce to discriminate in price where the effect of such
7 discrimination may be substantially to lessen competition
8 and to cause the competitive effects described in the
9 statute.

10 We believe that the -- the word and the language
11 of the statute that should be interpreted here are the
12 effect language. The question is whether a discrimination
13 between a wholesaler and a retailer in a legitimate
14 functional discount causes the requisite anticompetitive
15 effect described in the statute.

16 The Federal Trade Commission believes that it
17 does not because the primary purpose of a functional
18 discount is to shift distribution functions from a
19 supplier to a middleman who assists in getting the goods
20 to market.

21 The interpretation of the language effect is
22 that -- is the identical interpretation given by the 1955
23 report of the Attorney General's national committee to
24 study the antitrust laws. That committee also took a look
25 at these issues and felt that the appropriate

1 interpretation of the statute is to look to the word
2 "effect" and to hold that a legitimate functional discount
3 does not cause the requisite anticompetitive effects.

4 There are two reasons primarily --

5 QUESTION: How do you identify a legitimate
6 functional discount?

7 MR. DREEBEN: Yes, Your Honor. The -- the
8 interpretation of legitimate functional discount that we
9 bring to those words involves three elements. The first
10 is that the wholesaler is not in fact competing with
11 retailers for --

12 QUESTION: Did the wholesaler here satisfy that
13 test?

14 MR. DREEBEN: As to the early marketing period
15 in which Dompier was selling to independent retailers, we
16 believe that he does.

17 QUESTION: Yes, and what about the latter
18 period?

19 MR. DREEBEN: As to the latter period, we
20 believe that he does not. He integrated vertically --

21 QUESTION: Do you agree there was a violation of
22 law during the latter period?

23 MR. DREEBEN: Well, the Federal Trade Commission
24 hasn't taken a position on that, but I believe --

25 QUESTION: But under your test, would --

1 MR. DREEBEN: Under -- under the test that we
2 proposed, the discount, once Dompier is performing the
3 retail functions, would disqualify him from the discount.

4 QUESTION: So you agree that at least as to
5 liability for a part of the period, the judgment should be
6 affirmed?

7 MR. DREEBEN: Justice Stevens, we do believe
8 that as to part of the liability period --

9 QUESTION: And specifically what error was made
10 in the trial court, in your view, if any?

11 MR. DREEBEN: The instructions to the jury,
12 Justice Stevens, did not isolate any point at which
13 Dompier was selling only to retailers for purposes of
14 damages and instruct the jury that -- that it should not
15 impose damages unless it concluded that the function --

16 QUESTION: Is it your view there was a -- a
17 necessary instruction was omitted, or was there any error
18 in the instructions that were given?

19 MR. DREEBEN: I think the instructions that were
20 given were extraordinarily vague on the point and that
21 there --

22 QUESTION: Was any of the instructions, in your
23 view, erroneous?

24 MR. DREEBEN: Yes. The instruction to the --

25 QUESTION: Which one?

1 MR. DREEBEN: I believe that if the combination
2 of jury instructions 18 and 23(A) would permit the
3 imposition of liability on Dompier for the time when he
4 sold to retailers even when the discount that he received
5 which occasioned the price discrimination was, in our
6 view, a legitimate functional discount, and since the jury
7 wasn't told to exclude that portion of damages, to that
8 extent the judgment is infirm.

9 The second --

10 QUESTION: Mr. Dreeben, at the petition stage, I
11 thought the brief of the Solicitor General said they
12 thought that they were acting as retailers during that
13 early period, and the position taken by the Solicitor
14 General in the brief at that stage is quite different than
15 what it is now.

16 MR. DREEBEN: Justice O'Connor, to clarify our
17 position --

18 QUESTION: I would appreciate it if you would.

19 MR. DREEBEN: At the petition stage, the
20 question was whether this Court's review was warranted,
21 and we believed that the ultimate importance of the issue
22 that is raised by Petitioner to the judgment in this case
23 is somewhat minor because the damages period ran from 1972
24 to 1981, and the portion of that period during which we
25 believe Dompier's discount was lawful was only a very

1 early part of the period.

2 Notwithstanding that, the jury was not given any
3 way to break out the lawful period from the unlawful
4 period, and thus, we believe on remand, the court of
5 appeals might conclude that the entire period is tainted.
6 This Court might also reach that judgment.

7 QUESTION: Did the -- did the defendant tender
8 instruction which would have required them to break out
9 those two periods?

10 MR. DREEBEN: The defendant objected to the
11 instructions that were given --

12 QUESTION: No, that's not my question.

13 MR. DREEBEN: Justice Stevens, I'm not aware
14 that they proposed a specific instruction that said you
15 have to look at the discount --

16 QUESTION: There's a material legal difference
17 between the two periods of time.

18 MR. DREEBEN: Well, yes, the defendant did
19 object to having any liability imposed on it for that
20 period, but it didn't request an instruction to the jury
21 to make that determination. It simply said the jury
22 shouldn't be given that information to decide.

23 At the cert stage, we also --

24 QUESTION: Do you take the position that the
25 size of the discount and its duration and effects would

1 ever matter?

2 MR. DREEBEN: Yes, they would matter. They
3 would bear, Your Honor, on the question of whether the
4 discount was indeed a legitimate functional discount. We
5 think that in addition to a requirement that the
6 wholesaler and the retailer not compete, there is also a
7 requirement that the wholesaler have to be performing some
8 functions that are characteristic of a wholesaler, such as
9 distributing the product, absorbing credit risks, actually
10 searching out customers to sell to on resale, and that
11 that inquiry is a qualitative kind of judgment that is
12 made, could be made by a court in the summary judgment
13 context and would not be difficult to administer.

14 But once it's determined that in fact a
15 wholesaler is receiving a functional discount, we don't
16 believe that there should be a further inquiry that
17 requires the supplier to justify that discount based on
18 the costs incurred by the wholesaler. We think that would
19 be completely impracticable.

20 QUESTION: Mr. Dreeben, you -- you answered the
21 Chief Justice, but -- I mean, you said it but I don't
22 understand why it's so. You say that the word "effect" of
23 such a discrimination, you say that it has no effect of
24 injuring the customers of -- why doesn't it have an effect
25 of injuring the customers of the seller if you sell it to

1 a wholesaler at a lower price who can thereafter sell it
2 at a lower price to other customers of his who compete
3 with customers of yours?

4 MR. DREEBEN: Well, there are two reasons,
5 Justice Scalia. The first is that there is the
6 independent decision of the wholesaler which the supplier
7 cannot control.

8 QUESTION: That's -- that's the same case when
9 you -- when you sell it to two individual people who then
10 resell. I mean, that happens often.

11 MR. DREEBEN: It's not quite the same as -- as
12 the case that this Court confronted in Falls City v.
13 Vanco, where there, in fact, were two different prices
14 given to people at the same functional level. It's
15 different when you give a cheaper price to a wholesaler.
16 That's the only way the wholesaler can be in business.

17 But more fundamentally, we think the word
18 "effect" has to be read in light of the purposes of the
19 Robinson-Patman Act. Congress passed this for the purpose
20 of protecting multi-leveled distribution systems.
21 Wholesalers were the very persons who came forward and
22 requested the act in the first place.

23 QUESTION: You're not relying on the language
24 then. You're just telling me, you know, effect doesn't
25 mean effect.

1 MR. DREEBEN: We're relying on an interpretation
2 of the language that would construe it in light of
3 Congress' purposes, which is pretty much the way this
4 Court has handled a number of Robinson-Patman issues in
5 the past. The language of the statute has been recognized
6 to be somewhat inexact, and in order to give effect to
7 what Congress intended, the Court has -- has taken a close
8 look at the precise types of pricing arrangements.

9 Now a discount to a wholesaler being exactly
10 what Congress wanted to foster and preserve multi-layered
11 distribution systems, it seems to me that it would be
12 inconsistent with that intent to then give effect the kind
13 of reading that was given to it by the court of appeals.

14 QUESTION: Maybe -- maybe Congress only wanted
15 to foster such discounts to the extent that the discounts
16 take into account the function that the distribution
17 system performs, which means to the extent that they're
18 properly price based.

19 MR. DREEBEN: Well, to the extent that Congress
20 took a look at that issue, it did not prescribe any kind
21 of a test that would be workable. It would not be a
22 workable test for suppliers to have to investigate the
23 cost of their wholesalers. Wholesale discounts are set
24 with the aggregate -- I see that my time is up.

25 QUESTION: Finish answering the question.

1 MR. DREEBEN: Thank you, Your Honor.

2 Wholesale discounts are set in the aggregate
3 looking at the average cost that a supplier is going to
4 face looking at a number of different wholesalers who he
5 deals with over a long period of time. The Ninth
6 Circuit's test really requires an ongoing adjustment of
7 the wholesale discount as the wholesaler becomes more
8 efficient.

9 So to the extent that the wholesaler decides to
10 become price aggressive or more efficient in -- in
11 performing his distribution function, the Ninth Circuit
12 would require that the wholesale discount be contracted,
13 and then you would have wholesale discounts that varied
14 between every different wholesaler, and you would be right
15 back in the situation of price discrimination between
16 wholesalers, which is something that the act also
17 prohibits.

18 QUESTION: Thank you, Mr. Dreeben.

19 Mr. Whaley, we'll hear now from you.

20 ORAL ARGUMENT OF ROBERT H. WHALEY

21 ON BEHALF OF THE RESPONDENT

22 MR. WHALEY: Mr. Chief Justice, and may it
23 please the Court:

24 I want to divert from my prepared remarks for a
25 moment to answer a couple of questions I think were

1 important that were asked by the Justices.

2 First, there is no instruction before this Court
3 that you are asked to rule should have been given and was
4 not given. The only objection to the instruction that
5 permitted damages to be awarded for the pass-on of a
6 discount to the retail level was instruction 18.

7 Texaco proposed an instruction that was
8 virtually identical to that instruction, and it's attached
9 to our brief. Texaco's only objection to that instruction
10 was based upon proximate cause.

11 Justice O'Connor, you asked about instruction 20
12 and whether there was a proper objection in 23(A). You
13 were told by Texaco that they objected to 23(A) and that
14 is before the Court. That is not true.

15 If you go to the transcript of the testimony at
16 pages 3156 through 3158, you will find that the day
17 before, Texaco had proposed a factual functional discount
18 instruction that the -- that the jury should be given to
19 review the functional discount as a matter of fact. The
20 next day -- the court the day before refused to give that
21 instruction.

22 The next day the court wrote its own
23 instruction, and it became 23(A). I asked the court not
24 to give the instruction unless Texaco wanted it to be
25 given because it would just create error if they didn't

1 want it. It would be unnecessary.

2 The judge then asked Texaco on the next
3 page -- we're now looking at 3156 through 3158 -- whether
4 or not that instruction should be given. This is what the
5 court said. Coming back to the court's proposed
6 instruction, then --

7 QUESTION: Where are you reading from, Mr.
8 Whaley?

9 MR. WHALEY: The record, Your Honor. It's not
10 in the joint appendix.

11 QUESTION: Not the appendix?

12 MR. WHALEY: No, sir. The record is downstairs.

13 The question was asked whether that -- that
14 instruction, the court's instruction 23(A), should be
15 given. The court said, coming back to the court's
16 proposed instruction, even though Texaco does not agree
17 with the language, what is Texaco's position as to whether
18 or not it should or should not be given. Texaco replied
19 that they reserve their objection to the instruction had
20 not been given the day before.

21 So without waiving the argument as to that prior
22 instruction, I would prefer that this instruction be given
23 rather than no instruction.

24 There is no instruction here. You are being
25 asked to grant an immunity as a matter of law that

1 Congress didn't grant to assail to a purchaser that Texaco
2 denominates as a wholesaler regardless of the impact on
3 the retail level of competition.

4 This immunity has never been extended by the
5 Court in the past. This Court is loathe to grant
6 immunities to antitrust statutes. It typically looks at
7 the language of the statute to see if the violation fits
8 within the statutory language.

9 QUESTION: (Inaudible) that you rely on
10 especially for your position?

11 MR. WHALEY: Yes, Your Honor. There's at least
12 two. Perkins v. Standard Oil, this Court considered a
13 varied distribution circumstance that's involved in this
14 case.

15 QUESTION: That's the closest?

16 MR. WHALEY: That's the closest. A lower court
17 in FTC v. Standard Oil took the same position.

18 I might tell the Court that the FTC has not been
19 consistent in its position on this type of injury. Prior
20 to the passage of the Robinson-Patman amendments, that FTC
21 took the position that mere pricing at wholesale versus
22 retail versus the jobber level was unlawful unless it was
23 cost-justified because it could impact competition. You
24 will find those cases in South Bend Bake Company v. FTC in
25 the 1920s.

1 The FTC took the exact same position in 1941
2 when it sued Standard Oil. It has taken the same position
3 in the Doubleday case, saying that a functional discount
4 must be viewed under the statutory language, does it
5 impact competition?

6 In the Mueller case, it held that a functional
7 discount was not immune as a matter of law because it
8 could be abused. In the latest Boise Cascade case the
9 Ninth Circuit said -- excuse me. The FTC said that a
10 functional discount should be reviewed by the cost
11 justification language of the statute.

12 If this Court is disposed to consider whether or
13 not a 12(b)(6) type motion could be made in these
14 circumstances, it should look at the evidence in this case
15 of what type "legitimate functional discount" was
16 allegedly involved.

17 For instance, Texaco's president said in a
18 letter that the distributors such as Mr. Dompier had shed
19 their wholesaler functions and were no longer performing
20 those functions, and they were not using them in the
21 distribution process itself. He said, the president of
22 Texaco, that the magnitude of that discount which was not
23 being used was causing dramatic shifts of sales from the
24 two classes of trade we have in conflict right here; and
25 he said that it was threatening the viability of thousands

1 of Texaco retailers.

2 QUESTION: Was that after '74?

3 MR. WHALEY: He said that this trend had begun
4 in several years --

5 QUESTION: The letter was after 1974?

6 MR. WHALEY: Yes, ma'am, the letter was --

7 QUESTION: And -- and is it true that the
8 district court found that Dompier was selling only as a
9 wholesaler prior to July '74? Is that correct?

10 MR. WHALEY: Justice O'Connor, I believe that
11 was a factual issue in the -- in the district court --

12 QUESTION: And that was the finding of the
13 district court?

14 MR. WHALEY: The district court never had to
15 enter a finding on that because the jury considered that.
16 The evidence was that Dompier was retailing since about
17 1969 through two stations known as Red Carpet where his
18 father set the price at both retail and wholesale, and
19 that was a -- that was a highly protested issue.

20 QUESTION: Can we accept it as a fact that they
21 were acting only as wholesalers during that interval of --

22 MR. WHALEY: You certainly can't accept it as to
23 Gull Oil Company.

24 QUESTION: Based on this record?

25 MR. WHALEY: No, ma'am.

1 QUESTION: Dompier?

2 MR. WHALEY: I believe it doesn't make any
3 difference to the outcome of this case, but I --

4 QUESTION: Well, be that as it may, may we
5 accept that as a given in our resolution of it?

6 MR. WHALEY: You can if you so desire. I
7 believe it was a factual issue that was highly contested.
8 The -- there was a contention that -- that -- that Red
9 Carpet was not a -- a retail outlet, and it was obvious
10 that from the evidence that it was completely controlled
11 by Dompier, and he set the price at the retail pump. Gull
12 distributed it at retail throughout the period of time
13 from 1972 until 1981.

14 The -- the evidence also showed that Texaco's
15 vice president --

16 QUESTION: Excuse me. I'm just a little unclear
17 to your answer to Justice O'Connor. Do you say that the
18 question whether the -- if it was a mixed function for
19 both Gull and Dompier was -- there was -- there was a
20 dispute between the parties on that issue for the entire
21 period?

22 MR. WHALEY: Yes. We contended that Gull --

23 QUESTION: Then -- then doesn't your answer have
24 to be that no, we cannot assume there was a period in
25 which it was exclusively a wholesaler?

1 MR. WHALEY: Well, I don't believe you can from
2 the evidence. I believe it was a jury issue.

3 She asked me what the district judge did, and
4 it -- it was not a judge-tried case.

5 QUESTION: I understand that.

6 MR. WHALEY: And so I believe from the evidence
7 that went to the jury that the jury could properly, as the
8 Solicitor General pointed out, have concluded that Dompier
9 and Gull were retailing throughout the case, and they
10 were. Red Carpet was owned solely by Mr. Dompier. He
11 said that

12 --

13 QUESTION: So that we cannot accept as a fact
14 the essential predicate of your opponent's argument is
15 what --

16 MR. WHALEY: That's correct. I don't believe
17 you can.

18 QUESTION: And the jury made no finding on it,
19 and the district judge didn't -- didn't assume that the
20 jury made a finding on it?

21 MR. WHALEY: Well, I don't know. There was no
22 specific finding with respect to Red Carpet or any of the
23 stations.

24 QUESTION: There were no interrogatories.

25 MR. WHALEY: There were no interrogatories.

1 There were none asked for. Now, there's no issue up here
2 about special interrogatories.

3 When determining whether Congress would have
4 wanted to exempt this, this type of conduct, you should
5 consider this. In the evidence in this case, Texaco's own
6 market study showed that the entire discount, the 4 cent
7 discount, was being passed on by some wholesalers, and
8 they were only taking their wholesale profit from the
9 hauling allowance; that the hauling allowance alone that
10 was given separate from the discount was sufficient for
11 them to take a wholesale profit.

12 Query whether Congress ever would have contended
13 or suggested that that type of discount would be immune
14 from scrutiny by this Court.

15 We know that the -- the storage facilities of
16 Dompier Oil Company were smaller than the storage
17 facilities of the plaintiffs' own stations. There was no
18 bulk storage that was used in the distribution of
19 gasoline.

20 QUESTION: Aren't you saying this is -- that
21 this is just sort of a sham wholesaler?

22 MR. WHALEY: Your Honor, I believe he is. I
23 believe the only thing you can say that he is doing at
24 wholesale is he is technically selling the product, but
25 he -- he's being paid for the delivery separately, and

1 he's performing no other function. In fact, the functions
2 are -- are totally meaningless in this transaction.

3 This discount was not cost-justified, although
4 Texaco asserted that -- that defense.

5 QUESTION: Cost-justified by what?

6 MR. WHALEY: By the -- the statutory defense
7 that if -- if a discount takes into account the seller's
8 cost, then it's cost-justified.

9 They were unable to do that.

10 They were unable to show their competitors
11 required them to do it, that they were meeting the
12 competitive offer of Exxon or Shell or someone else.

13 And there is a substantial injury to
14 competition; that is, the economic viability of thousands
15 of stations were admittedly affected by this.

16 Given that posture, it is -- it seems to me
17 beyond dispute that a court could not say that you would
18 consider that type of discount as a matter of law would be
19 immune from scrutiny by this Court.

20 The Robinson-Patman Act's language prescribes by
21 its very terms this type of discount, this type of price
22 difference.

23 This Court in Morton Salt in 1947 said that
24 Congress' intention that they -- that they -- that
25 Congress considered it an evil that large purchasers could

1 get discounts merely because of their size over small
2 retail purchasers, and they prescribed such price
3 differences unless they were cost-justified under the
4 statute or meeting competition.

5 This Court later, in Henry Broch and Fred Meyer,
6 said that it was Congress' intention to outlaw all devices
7 by which larger purchasers could get better prices.

8 In this case, Texaco is submitting to the Court
9 that it has come up with a device that will work; and that
10 is, it can favor large retail purchasers by calling the
11 discount a legitimate functional discount.

12 In this case, the Court will find the evidence,
13 in fact, involved Texaco in the very effort to have this
14 discount reach the retail level. Texaco in the early
15 1970s wanted to begin to supply a high volume market in
16 Spokane and elsewhere. They knew from their own records
17 that it could not be done by anyone who was paying retail
18 tank wagon, which our clients were paying. That retail
19 tank wagon was -- in Spokane was the highest traditionally
20 posted retail tank wagon in town.

21 How did they go about doing --

22 QUESTION: But suppose -- suppose that you did
23 show that? To what legal theory does that go? Knowledge
24 isn't required, is it, for a violation here?

25 MR. WHALEY: The -- the knowledge element

1 is -- is being addressed, Your Honor, one, because Texaco
2 is saying they have a 12(b)(6) defense, and I'm showing
3 the facts of this case.

4 And secondly, where they say that they should be
5 immune from the independent decision of an intervening
6 buyer, I want to show that they were involved in that
7 decision. They knew about it. They intended to start
8 supplying a volume market; and thereby to suggest that it
9 is somehow an intervening independent decision --

10 QUESTION: Well -- well -- well, how do you
11 formulate the legal theory that makes that inquiry
12 relevant? What do we -- what do we -- what does that go
13 to show?

14 MR. WHALEY: It goes to show that this Court
15 should not grant an immunity as a matter of law because in
16 this -- on the facts of this case you have a seller that
17 was intentionally trying to serve a market by secretly
18 giving discounts. It's not necessary for liability, but
19 it seems to me it is if you were -- the United States has
20 not given you any other rules you should put in here
21 except absolute immunity, and what I'm suggesting is this
22 record would never justify immunity because you had a
23 seller that in fact was intentionally trying to get this
24 price to large chain buyers.

25 QUESTION: But -- but is there anything in the

1 language of the statute that justifies that?

2 MR. WHALEY: The statute doesn't require that
3 for liability, Your Honor, no. It only requires a price
4 difference that affects competition.

5 QUESTION: (Inaudible) ask you about what you
6 were saying before about -- about whether these people
7 were wholesalers or not.

8 The opinion of the Ninth Circuit that we're
9 concerned about here certainly discussed the case as
10 though it involved a case of sales to wholesalers.

11 We recognize that generally selling at different
12 prices to customers who at different levels of
13 distribution -- who are at different levels will not
14 constitute a violation, blah blah blah, and then they go
15 on to analyze that.

16 The question presented by your opponent in this
17 case was whether the Robinson-Patman Act is violated by
18 selling to wholesalers at a lower price.

19 Your opposition to that petition for writ of
20 certiorari, as -- as I read it, did not come in and say
21 this is not a case involving sales to wholesalers, and now
22 you're raising this -- this issue for the first time here,
23 as far as I can understand it, telling us that we -- we
24 have before us a case quite different from what we -- what
25 we thought we had.

1 MR. WHALEY: Justice Scalia, the way I read our
2 brief was that we specifically said this did not involve
3 general wholesale discounts, that it -- that it was not
4 the case that had been presented --

5 QUESTION: General wholesale discounts, but
6 I -- I'd like to know the part of it where you say that
7 these individuals who got the discounts were not
8 wholesalers. I don't see it.

9 MR. WHALEY: It's -- Your Honor, it would take
10 me some time to dig it out of the Respondent's petition.

11 QUESTION: Are you sure it's in there?

12 MR. WHALEY: Yes. We -- We contended that there
13 was a basic sham, that the discount was just a conduit
14 to -- to get a lower price to the -- to the retail class
15 of trade.

16 QUESTION: Contended that in your response, your
17 opposition to the petition for certiorari?

18 MR. WHALEY: Yes, Your Honor. The -- even if
19 that's not true, the only defense that Texaco has -- has
20 suggested to you --

21 QUESTION: Even if what's not true?

22 MR. WHALEY: Even if the mere resale of a
23 product would say someone is a wholesaler. In other
24 words, if you accept the government's position, the
25 functions make no difference. If he has resold the

1 product, he's a wholesaler.

2 And so we -- we said that what he was doing was
3 no more than being a conduit, but if you accept that
4 proposition that if you have resold the product you're a
5 wholesaler, then you must consider whether that as a
6 matter of a law gives you an immunity. And it does not.
7 And that, it seemed to us, was the question you granted
8 certiorari on, was whether a wholesale discount
9 that -- that was immune as a matter of law regardless of
10 whether or not the discount was justified under the
11 statute or whether an impact of competition.

12 In this case, the very evil that Congress was
13 attempting to remedy occurred. Large chains in 1971 in
14 Spokane in the Spokane -- in the Texaco brand received
15 lower prices. Their sales soared 270 percent. The sales
16 at the stations operated by my clients declined.

17 Old, favored customers who purchased business
18 volumes of gasoline a day testified that they stopped
19 doing business with our clients because of the price
20 difference. That information was put on by 10 or 15
21 witnesses. An example was a man named Leo Green that had
22 a produce company, and he had eight or ten vehicles that
23 he was using one of my clients for. He stopped buying
24 gasoline there because of a 3 to 5 cent price difference
25 between the stations that Mr. Dompier supplied and my

1 clients.

2 The stations supplied by Mr. Dompier, if you
3 assume he was a wholesaler, got a 3.5 cent discount off of
4 retail tank wagon, and when they opened in 1971 the price
5 was .7 of a cent above my clients' cost.

6 The consequences were obvious. By the end of
7 the damage period, eight of my clients were out of
8 business. The only person selling Texaco gas today is the
9 John Dompier Oil Company of Spokane.

10 Texaco defended this case as a matter of fact.
11 They -- they -- they put up three factual defenses: cost
12 justification; meeting competition, both of which were
13 rejected; and that the discount did not affect competition
14 because the services would have eaten up the discount.
15 They were all rejected by the jury.

16 The legislative history of this statute, if one
17 needs to get to it, clearly supports liability in this
18 case. The Congress was asked by specific language to
19 exempt discounts based upon the level of resale,
20 wholesaler, wholesaler, retailer, retailer and rejected it
21 in the 1936

22 --

23 QUESTION: Mr. Whaley, can I ask you a question?
24 I can't seem to find it in the opinion right now, but
25 there was a good deal of argument to the effect that the

1 rule the Ninth Circuit laid down, or seemed to be laying
2 down, was that one of the important elements of the issue
3 was whether or not the discount was justified by the costs
4 of the wholesaler, not the costs of the seller, and
5 that -- that in order to show that it was unlawful, the
6 plaintiff had the burden of showing that the wholesaler's
7 cost somehow didn't justify it.

8 Do you -- first of all, do you agree that's what
9 the court of appeals either said or held; and secondly, do
10 you think that's correct? What relevance, of any, is
11 the -- are the costs of the wholesaler?

12 MR. WHALEY: The Ninth Circuit was faced with
13 this argument. Texaco could not justify its discount
14 based upon its own costs.

15 QUESTION: Right.

16 MR. WHALEY: It could not justify its discount
17 based upon meeting competition.

18 QUESTION: Right.

19 MR. WHALEY: And it could not justify its
20 discount on the basis that it didn't impact competition at
21 the customer level.

22 So Texaco then said that, well, the discount was
23 eaten up by the cost of -- to the favored purchaser and,
24 therefore, it didn't affect competition. The Ninth
25 Circuit said that would be a factual matter if that were

1 true, and you didn't prove it because the costs that you
2 say would have been eaten up were not performed. There
3 was nothing there.

4 And so Texaco sort of created this issue by
5 suggesting that factually a functional discount would not
6 affect competition.

7 QUESTION: Well, whether -- whether Texaco
8 created it or you created it, do you think it is -- that
9 the Ninth Circuit, there are portions of the Ninth
10 Circuit's opinion that can be read to indicate that that
11 is a relevant test in determining whether a functional
12 discount is lawful or not?

13 MR. WHALEY: I believe this, Your Honor,
14 that -- that the determination of what a legitimate
15 functional discount is, the only thing being presented to
16 this Court is what is it not, and it's -- it's been said
17 to you that it's not a discount that is based upon the
18 buyer's cost.

19 And the Ninth Circuit didn't say it was based on
20 the buyer's cost. They're just saying that if that's how
21 you define it, you didn't prove it.

22 QUESTION: I see.

23 QUESTION: Is that the same as basing it on the
24 wholesaler's cost -- the same thing as inquiring about
25 what services the wholesaler performs?

1 MR. WHALEY: You mean would basing it on the
2 wholesaler's cost require you to --

3 QUESTION: No. Would -- would you be saying the
4 same thing if you say that, well, to justify the discount
5 you have to at least show what services the wholesaler
6 performed?

7 MR. WHALEY: If -- if you are not justifying a
8 discount under the statute -- and that is, you couldn't
9 cost justify, you weren't meeting competition, then all
10 you'd be trying to do is say, well, it didn't affect
11 competition between the favored and disfavored purchaser
12 or their customers, and the inquiry then would be, what
13 costs did the purchaser have that would have eliminated
14 the impact on competition.

15 QUESTION: And which -- and I suppose to figure
16 his costs you'd have to figure out what he was doing?

17 MR. WHALEY: That's correct.

18 QUESTION: What functions he was performing in
19 the distribution chain.

20 MR. WHALEY: Yes. What was it that caused you
21 to give him this discount that -- that you contend would
22 mean that it does not impact competition.

23 The issue has not been really given to you as to
24 what is a legitimate functional discount, at least by the
25 government or by Texaco, and I don't believe you have to

1 reach that because of a narrow issue that the United
2 States said was here, which is the knowing passing on of
3 this discount.

4 QUESTION: Well, I -- I suppose in your position
5 the -- any functional, any discount to a wholesaler that
6 is passed on that affects competition is going to be
7 actionable.

8 MR. WHALEY: No, Your Honor. At least there's
9 two -- two stages you have to get through before you get
10 there. If -- if Texaco had a difference in cost of
11 dealing with the wholesaler of 4 cents and they based
12 their price on that, then if he was able to pass it on
13 there'd be no liability. In other words, if he's more
14 efficient than Texaco, then there is no liability for that
15 -- that discount whatsoever.

16 If competition requires them to do that, if
17 Exxon says we're giving our distributors that and we'll
18 take this one away from you, then there's not any
19 liability even if it's passed on.

20 It's only when they give a discount that exceeds
21 their own cost of doing the -- the function and now
22 they're paying for something different that this problem
23 could ever arise, and that would only --

24 QUESTION: Unless they can cost justify within
25 the means of the statute or meet -- or prove you have to

1 meet competition, any discount that is passed on is
2 actionable.

3 MR. WHALEY: I -- I would not say it's
4 actionable, Your Honor. It may result in an inquiry. The
5 burden on the plaintiff to show that it impacted
6 competition and then show that it proximately caused
7 damage to him is -- is substantial. That's why you don't
8 see any of these cases since Perkins v. Standard Oil in
9 1969.

10 The burden on the plaintiff to show that that
11 discount impacted competition and then that there were
12 damage is extraordinary. Summary judgments are given
13 routinely on that basis.

14 The -- if you reach the issue of what is a
15 legitimate functional discount, it certainly isn't one
16 such as here that -- that the defendant admits that the
17 functions were not performed at all. The amicus brief
18 filed by 35 states tells you that it's cost-justified,
19 that that is a legitimate functional discount. They say
20 it's administratively easy to administer, requires no
21 Sherman Act problems, and that would be what is a
22 legitimate functional discount.

23 QUESTION: Well, costs justified in that sense
24 would be relying on the language of the statutory proviso,
25 then, wouldn't it?

1 MR. WHALEY: Yes, sir. On the statutory proviso
2 that it was cost-justified, it -- it's legitimate.

3 The Texaco wholesalers who were the ones that
4 were getting the discount in this case surprisingly filed
5 a brief saying the same thing; and that is, that they felt
6 that the only functional discount that was valid was one
7 that was based upon the savings to Texaco by dealing with
8 them; that anything else would not be a valid functional
9 discount.

10 QUESTION: And that would be something that
11 would have to be proved in every case, the amount of
12 the -- the amount of the savings to the supplier?

13 MR. WHALEY: If the -- if the supplier gave a
14 price difference and was trying to justify it in some
15 action, the wholesalers say that their defense would be
16 their own cost. They would know their own costs of
17 distribution. Their cost savings would be available to
18 them. They could easily put that forward.

19 QUESTION: Well, they could put it forward. One
20 might question how easily.

21 MR. WHALEY: Well, that is the -- the statutory
22 harbor for a -- a seller, which is cost justification of
23 meeting competition. And again, they've got even a much
24 bigger calm water, and that is the area of does it impact
25 competition. It's very difficult to prove.

1 For instance, Mr. Calvani says that a legitimate
2 functional discount is cost-justified plus a reasonable
3 profit. If that's what a legitimate functional discount
4 is, it doesn't apply to this case, but if that's what it
5 is, it would be very difficult to prove any injury of
6 meeting competition -- excuse me, injury to yourself or to
7 competition by that type of functional discount.

8 Texaco and the government are contending that
9 any functional discount, 25 cents, 50 cents, is
10 legitimate.

11 If the Court finds that the -- as a matter of
12 law you cannot excuse the price difference in this case;
13 the damages in this case, and the other questions upon
14 which certiorari were granted, really fall as well.

15 The -- the damage -- damages sought by the
16 plaintiffs were only those damages that were caused to
17 them by the discount that was passed through. And if you
18 look at the record, there was a period of time when Mr.
19 Dompier at the encouragement of Texaco bought these
20 stations, and the method he'd use was to raise the price
21 to them until they paid retail tank wagon. They couldn't
22 compete on the volume level, and then he bought them. In
23 that circumstance, we claim no damage when the price
24 reduction was reduced to nothing because it wasn't being
25 passed through the retail level.

1 The final portion of the damage claim that was
2 challenged by Texaco pertained to how did this Court mean
3 that competition -- excuse me, that a violation-free
4 environment would be tested. In J. Truett Payne, you said
5 that a plaintiff can recover those damages that they would
6 have not suffered had there been no violation; in other
7 words, the lost sales and profits they would have had had
8 there been no violation in the market.

9 Texaco had a number of ways that it considered
10 eliminating the -- the violation, one of which was to
11 raise the wholesaler's price some, one of which was to
12 lower the retail price some, and one is to do a
13 combination of the two. The jury was merely given a
14 number of calculations based upon Texaco's own methods of
15 eliminating the --

16 QUESTION: Is a -- is a discount for a
17 wholesaler ever justified just because he buys a lot of
18 volume at discount?

19 MR. WHALEY: No, Your Honor, unless it's cost-
20 justified. This Court rejected that specifically in
21 Morton Salt. In that case, they tried to justify the
22 discounts because the -- the chains were buying an awful
23 lot of -- of salt, and this Court specifically and
24 Congress said that's not a good enough reason to
25 discriminate against a smaller seller. If the smaller

1 seller, if you have cost savings in dealing with
2 the -- the volume buyer, then it's okay.

3 In conclusion, under the first issue that you
4 granted certiorari on, I don't believe you can reverse
5 this verdict without finding as a matter of law that a
6 legitimate functional discount is not judged by any facts.
7 It's merely judged by the fact that it's given to someone
8 that's nominated a wholesaler regardless of the functions
9 that have been performed.

10 QUESTION: (Inaudible) on who isn't competing
11 with the plaintiff.

12 MR. WHALEY: I would contend that it's violated
13 even if the --

14 QUESTION: I know you would, but the -- the
15 position to reverse -- you, you could just say if it's
16 given to someone who isn't competing with the plaintiff,
17 then there's no violation.

18 MR. WHALEY: The Court could do that, but it
19 would be inconsistent --

20 QUESTION: Yes.

21 MR. WHALEY: -- with the Court's own opinion in
22 the Fred Meyer v. FTC, and that is where you had a
23 promotional allowance that was given to a retailer but not
24 a wholesaler that was then, this Court said that you could
25 not avoid the prescriptions of the Robinson-Patman Act

1 merely because the wholesaler and the retailer didn't
2 compete with each other.

3 That would certainly give a huge loophole, it
4 would be a truck through which one could drive to avoid
5 the Robinson-Patman Act. Where you wanted to sell to a
6 retailer at a lower price, all you would need to do is put
7 another link in the chain and sell at a lower price to
8 that link and have it passed on. That's exactly what
9 happened in Perkins v. Perkins.

10 QUESTION: In Perkins.

11 MR. WHALEY: Yes, sir.

12 In conclusion, as I said, the Robinson-Patman
13 Act's language and its legislative history and its policy
14 were designed to protect the small retailer such as I
15 represent in this case. The legitimate functional
16 discount has to be viewed by the statutory language of
17 either cost justification meeting competition or effect on
18 competition and injury. It cannot be given a per se
19 immunity.

20 The other issues involved in the case really
21 fall if that issue falls. The Morton Salt argument has
22 not been properly preserved. If it had been properly
23 preserved, it's a proper statement of the law as applied
24 to the facts of this case. This verdict, after two
25 trials, two trips to the Ninth Circuit, a petition for

1 certiorari here that was denied nine years ago, and this
2 current petition should stand. Texaco's defenses were
3 nothing but a flimsy piece of paper, and this Court should
4 not accept them.

5 QUESTION: Thank you, Mr. Whaley.

6 MR. WHALEY: Thank you.

7 QUESTION: Mr. Fishbein, you have two minutes
8 remaining.

9 REBUTTAL ARGUMENT OF PETER M. FISHBEIN

10 ON BEHALF OF THE PETITIONER

11 MR. FISHBEIN: To get to Justice Stevens'
12 earlier question about the premise of this case, Your
13 Honor, I think it is undisputed that the only damages on
14 which the plaintiffs have asserted bases for damages are
15 the sales by four stations which are supplied exclusively
16 by Dompier. Therefore, if the sales to Dompier are not
17 illegal, the damages for the early damage period for the
18 middle of 1974 cannot stand.

19 Since the damage evidence was presented from a
20 whole period without breakout, the entire judgment cannot
21 stand if the sales to Dompier solely as a wholesaler as
22 an -- who independently then sold to his retailers, it did
23 not violate the Robinson-Patman Act.

24 In terms of the post-1974 period, we do not
25 agree that it is automatically unlawful for a supplier to

1 give a wholesale discount to someone at the lower level
2 who operates both as a wholesaler and a retailer. The
3 case was not presented to the jury or tried on that basis.

4 Mr. Whaley, in his arguments to the jury at the
5 close, said specifically -- it's cited in our brief -- it
6 doesn't matter if Dompier operated these stations directly
7 or was selling to them independently. He had the same
8 theory, which was if there's a pass-through, there's a
9 violation. Therefore, the jury was never instructed, the
10 court never dealt with the, the district court in the
11 Ninth Circuit never discussed the Boise Cascade issue
12 which that would deal with, and the case has to be
13 remanded for that reason.

14 Finally, what's really at stake here is the fact
15 that anytime a supplier deals with wholesalers and retails
16 in a dual channel of distribution, it must charge a
17 high -- a lower price to the wholesaler; otherwise, the
18 wholesaler will not be in business. It cannot monitor the
19 costs of the wholesaler.

20 The reason for the wholesale discount is not to
21 compensate for any particular functions. It's a market
22 idea. It's a free market. It's the supplier's concept of
23 what he has to pay to the wholesaler to induce the
24 wholesaler to engage in those functions and up to the
25 point where the wholesaler is giving value. There's no

1 way of getting around that.

2 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
3 Fishbein.

4 The case is submitted.

5 (Whereupon, at 12:10 p.m., the case in the
6 above-entitled matter was submitted.)

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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:

NO. 87-2048 - TEXACO, INC., Petitioner V. RICKY HASBROUCK, dba

RICK'S TEXACO, ET AL.

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

BY *Gona M. May*

(REPORTER)

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