

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 VOLVO TRUCKS NORTH AMERICA, INC., :

4 Petitioner, :

5 v. : No. 04-905

6 REEDER-SIMCO GMC, INC. :

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8 Washington, D.C.

9 Monday, October 31, 2005

10 The above-entitled matter came on for oral argument
11 before the Supreme Court of the United States at 10:04 a.m.

12 APPEARANCES:

13 ROY T. ENGLERT, JR., ESQ., Washington, D.C.; on behalf of
14 the Petitioner.

15 THOMAS G. HUNGAR, ESQ., Deputy Solicitor General,
16 Department of Justice, Washington, D.C.; for United
17 States, as amicus curiae, supporting the Petitioner.

18 CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf of
19 the Respondent.

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P R O C E E D I N G S

[10:04 a.m.]

CHIEF JUSTICE ROBERTS: We'll hear argument first
today in Volvo Trucks North America versus Reeder-Simco GMC.

Mr. Englert.

ORAL ARGUMENT OF ROY T. ENGLERT, JR.

ON BEHALF OF PETITIONER

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

Sixty-six years elapsed between the passage of the
Robinson-Patman Act and the judgment of the District Court in
this case. In that time, there is no reported instance of a
finding of a violation by a seller operating in an industry like
this one in which a sale is made to the plaintiff distributor
if, and only if, it has already secured a contract for resale to
a particular end user. Courts have long understood that mere
offers at different prices cannot violate the Act, because it
requires two purchases, and that successful purchases in
winner-take-all bidding cannot have the requisite effect on
competition. To affirm the judgment below would open up new
vistas for application of the Robinson-Patman Act where it has
never been applied before.

This case --

CHIEF JUSTICE ROBERTS: You concede, though, don't
you, Mr. Englert, that the language of the statute covers the

1 conduct here?

2 MR. ENGLERT: Very much the opposite, Your Honor.

3 CHIEF JUSTICE ROBERTS: Well, you have a person
4 who's engaged in commerce, who's discriminating in the price
5 that they offer to different purchasers. Now, I know your
6 argument about the structure, but the actual language does seem
7 to encompass the activity.

8 MR. ENGLERT: Well, I don't agree, with respect,
9 Your Honor. With respect to mere offers, offering a price to
10 different purchasers is not covered by the statutory language.
11 With respect to the sales-to-sales comparisons, there is not the
12 requisite effect of such discrimination --

13 CHIEF JUSTICE ROBERTS: Well, just to --

14 MR. ENGLERT: -- on competition.

15 CHIEF JUSTICE ROBERTS: -- get to your first point,
16 the statute talks about discrimination in price between
17 different purchasers, and not different actual purchases.

18 MR. ENGLERT: But this --

19 CHIEF JUSTICE ROBERTS: It doesn't seem it's that
20 much of a stretch to cover would-be purchasers, potential
21 purchasers.

22 MR. ENGLERT: Well, except that, back in 1947, this
23 Court, in the Bruce's Juices case, made clear, in the early days
24 of the Act, that it takes two completed sales to violate the
25 Act. No one sale can violate the Act. Even earlier than that,

1 the Third Circuit, in the Shaw's case, in 1939, laid down that
2 rule, and it's been an accepted rule of Robinson-Patman Act
3 jurisprudence for that entire time. And it is a natural reading
4 of the statute, and in accordance with the general principle,
5 that this statute should be construed consistently with the
6 larger body of antitrust law.

7 JUSTICE STEVENS: But may I not ask, Isn't it true
8 that each of the parties here, over a long period of time, was a
9 purchaser? I mean, the -- Reeder was a purchaser, was he not?
10 They were a dealer.

11 MR. ENGLERT: Yes.

12 JUSTICE STEVENS: So, they were a purchaser. And
13 were not the other people who purchased from Volvo also
14 purchasers?

15 MR. ENGLERT: Yes. With respect to the sales- --

16 JUSTICE STEVENS: So there were --

17 MR. ENGLERT: -- -to-sales transactions --

18 JUSTICE STEVENS: -- two purchasers.

19 MR. ENGLERT: Well, with respect to the
20 sales-to-sales transactions in which there were --

21 JUSTICE STEVENS: Over a --

22 MR. ENGLERT: -- two purchases --

23 JUSTICE STEVENS: -- period of time, you had two
24 purchasers.

25 MR. ENGLERT: Yes. But the statutory language is

1 the effect of "such discrimination" must be to harm competition
2 in one of these justified instances.

3 JUSTICE STEVENS: And the discrimination occurred
4 over a period of a couple of years, as I understand it.

5 MR. ENGLERT: No, Your Honor. This case was tried
6 on the basis of several discrete transaction comparisons. It
7 was not tried on the basis of any systematic study of every
8 offer to Reeder and every offer to --

9 JUSTICE STEVENS: Well, if --

10 MR. ENGLERT: -- another --

11 JUSTICE STEVENS: -- these are ordinary automobile
12 dealers who sold out of inventory, would you agree that they
13 were -- you had two purchasers?

14 MR. ENGLERT: Sure.

15 JUSTICE STEVENS: So that the whole point of your
16 case is they're negotiated transactions?

17 MR. ENGLERT: The whole point of the case is the --
18 is twofold. Each transaction is one in which there is a
19 purchase if, and only if, there is already a contract for
20 resale, so that when there is an offer compared to a purchase,
21 you don't have two purchases. And when you've already got the
22 contract for resale --

23 JUSTICE KENNEDY: Well, but -- I mean, you say that,
24 but the title goes to the dealer. The dealer makes the
25 purchase. Aren't you -- as I understand your answer to Justice

1 Stevens, and also your answer to the Chief Justice, if these
2 were automobile dealers that sold some inventory, there would be
3 a cause of action if you extrapolate this -- these kind of
4 facts. One dealer being discriminated against, vis-a-vis
5 another dealer.

6 MR. ENGLERT: If the requisite effect on competition
7 is shown, yes.

8 JUSTICE SCALIA: Well, and if there was a sale to
9 the other dealer. You would say that there had to be a sale to
10 the other dealer.

11 MR. ENGLERT: There have to be two sales.

12 JUSTICE SCALIA: Not just an --

13 MR. ENGLERT: But there would --

14 JUSTICE SCALIA: -- not just an offer to the other
15 dealer --

16 MR. ENGLERT: Correct.

17 JUSTICE SCALIA: -- of higher prices.

18 JUSTICE SOUTER: Yes, but there would be sales if
19 they were selling from inventory. I mean, there would have been
20 a preceding sale, and the sale would have been at differential
21 prices, as between two dealers.

22 MR. ENGLERT: And that's the typical --

23 JUSTICE SOUTER: Yes.

24 MR. ENGLERT: -- Robinson-Patman case. That's the
25 case in which there is a potential violation. The case in which

1 JUSTICE BREYER: So, you go back to the language --
2 are you finished with that answer? Go ahead and finish, if you
3 want.

4 MR. ENGLERT: Enough for now, Justice Breyer --

5 JUSTICE BREYER: All right.

6 MR. ENGLERT: -- yes.

7 JUSTICE BREYER: In respect to the language, how do
8 you read it? I think it's ambiguous. "To discriminate in price
9 between different purchasers of commodities." Do you read it --
10 "different purchaser" -- "to discriminate in price in respect to
11 that commodity that is purchased"? Do you read it "to
12 discriminate in price between different purchasers of
13 commodities -- i.e., the commodity, the particular item -- the
14 commodity there refers to the particular item in respect to
15 which there is the discrimination"? How do you want to read it,
16 literally? I just want your --

17 MR. ENGLERT: Well --

18 JUSTICE BREYER: -- literal reading of the statute
19 to -- I agree with you, 60 years, nobody's questioned it. I
20 agree with you, policy reasons, very strongly on your side. I
21 agree with you, at least hypothetically, but for the particular
22 language. So, look at the phrase and read the language as you
23 want me to read it.

24 MR. ENGLERT: Well, two different issues, Justice
25 Breyer. With respect to the two-purchase rule, if the statutory

1 language is ambiguous, and if it can be read to say "purchaser
2 status is enough," then I think the principle stated in all of
3 this Court's cases, that the Robinson-Patman Act --

4 JUSTICE BREYER: You're giving --

5 MR. ENGLERT: -- should be construed --

6 JUSTICE BREYER: -- me a policy argument. I don't
7 want a policy argument, for the moment. I want to know -- what
8 you're saying is that the word "purchaser" means "purchaser in
9 respect to the particular commodity -- this one that is
10 purchased, there has to be a discrimination in price."

11 MR. ENGLERT: And there's a textual reason --

12 JUSTICE BREYER: And what you're hearing, I think,
13 is, well, this person, the dealer, bought other items in respect
14 to which there was no discrimination in price. So, he is a
15 purchaser of that commodity. You see, "commodity" could refer
16 to the kind of thing -- Volvo trucks -- or it could refer to the
17 particular thing -- this truck. And I want to know how you read
18 the literal language.

19 MR. ENGLERT: The textual answer to your question is
20 --

21 JUSTICE BREYER: That's all I want --

22 MR. ENGLERT: -- the phrase --

23 JUSTICE BREYER: -- the textual answer.

24 MR. ENGLERT: -- the phrase "the effect of such
25 competition" ties --

1 JUSTICE BREYER: Oh, no, no. I'm very --

2 MR. ENGLERT: I'm sorry, the effect of such --

3 JUSTICE BREYER: -- sorry. The effect of such
4 competition --

5 MR. ENGLERT: -- discrimination.

6 JUSTICE BREYER: -- was conceded in this case, that
7 there's the effect on the competition. There are two separate
8 things. There is the truck that was purchased by the disfavored
9 dealer. In respect to that, he wasn't hurt, in the sense of the
10 statute, because, even though he got a lower profit margin, that
11 doesn't count. I'm not focusing on that.

12 I am focusing upon the truck that he did not
13 purchase. The reason that the disfavored dealer did not
14 purchase that truck is that he had a rival -- maybe there's only
15 one case of it, but there's at least one -- he had a rival, the
16 favored dealer, who got the purchase. He got the order from the
17 customer, and then ordered the truck. Now, in that one, I take
18 it, the problem is that there was no purchase by the disfavored
19 dealer.

20 MR. ENGLERT: Correct.

21 JUSTICE BREYER: All right. But what you're hearing
22 is, "So what? He was a dealer whose line of business was to
23 purchase Volvo trucks, and, therefore, he is a purchaser of a
24 commodity -- namely, Volvo trucks."

25 MR. ENGLERT: Well --

1 JUSTICE BREYER: And there was a discrimination --
2 namely, the offer was discriminatory. And there was a harm to
3 competition, in the -- in the Robinson-Patman sense -- his rival
4 got the sale.

5 MR. ENGLERT: Well, I still question whether --

6 JUSTICE BREYER: So, I want the textual answer.

7 MR. ENGLERT: Okay. I still question whether the --
8 under the text -- the effect of such discrimination was the
9 requisite effect on --

10 JUSTICE BREYER: Yes.

11 MR. ENGLERT: -- competition. But --

12 JUSTICE BREYER: The effect of such discrimination
13 is that his next-door rival, in effect, "got the sale." Do you
14 want to say that isn't enough?

15 MR. ENGLERT: Yes, I do want to say that isn't
16 enough. And, Justice Breyer, first of all, I --

17 JUSTICE BREYER: Let's assume I don't agree with you
18 about that. Now --

19 MR. ENGLERT: Well --

20 JUSTICE BREYER: -- what?

21 JUSTICE SCALIA: Mr. Englert, I thought you were
22 relying on the succeeding phrase, where "either or any of the
23 purchases involved in such discrimination are in commerce,"
24 which seems to require that -- "to discriminate in price between
25 different purchasers where either or any of the purchases

1 involved in such discrimination" -- I thought that's what you
2 were hanging your hat on, to say that there has to be a
3 discrimination in particular sales.

4 MR. ENGLERT: I think the statute, read as a whole,
5 compels that conclusion. But if I'm wrong about that, and if
6 there is enough ambiguity to admit of a different conclusion,
7 then the principle comes into play that cases of ambiguity in
8 the Robinson-Patman Act are construed to be more consistent with
9 the overall --

10 JUSTICE KENNEDY: Well, of course, if we can go back
11 to the language, it's between different purchases of commodities
12 of "like grade and quality." And that seems to me to indicate
13 that Volvo Trucks, generically, must be looked at -- the policy,
14 with reference to Volvo trucks, generically. Suppose one dealer
15 always got a 10 percent discount, the other dealer always got a
16 20 percent discount over a period of time.

17 MR. ENGLERT: Well, Your Honor, I think everyone,
18 including the lower courts in this case, agrees that you don't
19 look at the goods generically. You have to look at their
20 characteristics to determine like grade and quality. And I
21 would actually think that the grade --

22 JUSTICE KENNEDY: It has to be purchase-by-purchase
23 to determine like grade or quality?

24 MR. ENGLERT: Yes. Every Robinson-Patman case
25 there's ever been has been purchase-by-purchase at the level of

1 --

2 JUSTICE BREYER: Fine. That's --

3 MR. ENGLERT: -- sale from the manufacturer to the
4 dealer.

5 JUSTICE BREYER: You've put your finger right on it.

6 My question is so obvious that you're not giving me an answer.
7 Every case for 60 years has been on your side of it. Those
8 judges, though, were -- must have been reading some language.
9 And how did they interpret that language? That's all I'm asking
10 you. A very literal question. It has nothing to do with policy
11 or anything. And all I want you to do is take the statute and
12 read the language so that it is possible for you to win this
13 case.

14 MR. ENGLERT: Okay.

15 JUSTICE BREYER: Okay.

16 MR. ENGLERT: I'm a manufacturer. I'm reading the
17 statute. I have to give a price on a particular deal. I
18 realize I can't discriminate in price between different
19 purchasers of like grade and quality, where the effect of such
20 discrimination may be one of the prohibited effects. I say,
21 "Okay, can I give a different price to one dealer or to
22 another?" Yes, I can, because it says "different purchasers of
23 commodities of like grade and quality." It is a specific
24 instance of a purchase, a specific instance of discrimination.
25 The very words in the statute are what judges have read

1 consistently to compel that result.

2 JUSTICE STEVENS: May I ask this question, just to
3 get it in the -- Supposing volvo had a policy of granting
4 everybody a 20 percent concession, and they had -- except
5 Reeder -- and they always granted Reeder just a 15 percent
6 concession, and the -- you had the same sales pattern you have
7 here. Would there be a violation of the Robinson-Patman Act?

8 MR. ENGLERT: Well, again --

9 JUSTICE STEVENS: Prima facie violation.

10 MR. ENGLERT: I think the answer is no, Your Honor,
11 although that -- although that would be a closer case --

12 JUSTICE STEVENS: Even if there --

13 MR. ENGLERT: -- than this case.

14 JUSTICE STEVENS: -- were dozens and dozens --

15 MR. ENGLERT: This case was tried on the basis of
16 the same transactions.

17 JUSTICE STEVENS: -- of sales to both.

18 MR. ENGLERT: Yes. Yes. That would be a closer
19 case. But the -- it might fit the policy of the Act, but it's a
20 very poor fit with the words of the statute. And --

21 JUSTICE STEVENS: Well, it depends on how -- whether
22 you regard the purchase as on a single -- each single
23 transaction as a separate purchase or if you look at a course of
24 dealing and say that, over a period of years, the favored dealer
25 is one purchaser and the disfavored dealer is the other

1 purchaser. Why can't you look at the pattern of dealing by
2 automobile dealers over a period of time?

3 MR. ENGLERT: That would be the argument in favor of
4 an expansive reading of the language in the hypothetical example
5 to cover that case. But it would not be consistent with the
6 general policies of antitrust law.

7 JUSTICE STEVENS: It would be consistent with the
8 literal language, wouldn't it? If you treat it, the purchaser,
9 as a -- as -- look not at just individual transactions, but what
10 they do over a period of years, just like any other -- any
11 ordinary automobile dealer. Two dealers in this market, one in
12 Arlington and one in Bethesda, are both purchasers, even though
13 they may not compete on the same transactions, aren't they?

14 MR. ENGLERT: No. The effect of such discrimination
15 has to be to harm competition with the favored purchaser. And
16 if all transactions are hermetically sealed from one another,
17 yes, the buyer might like a better price, but it's not
18 complaining about the effect of such discrimination on
19 competition with the favored purchaser.

20 To put this point in perspective, imagine that Volvo
21 raised its price to every so-called favored purchaser --

22 JUSTICE STEVENS: But --

23 MR. ENGLERT: -- in this case.

24 JUSTICE STEVENS: You would agree, in my
25 hypothetical, there's discrimination, but you'd say there's no

1 injury to competition.

2 MR. ENGLERT: There's no injury to competition that
3 is the effect of such --

4 JUSTICE STEVENS: Even if you --

5 MR. ENGLERT: -- competition with --

6 JUSTICE STEVENS: -- got an expert to --

7 MR. ENGLERT: -- a favored purchaser that is the
8 effect of such --

9 JUSTICE STEVENS: -- even if you got an expert to
10 come and say, "Well, these two dealers are in the same relevant
11 market, and there's a likelihood that customers go to the
12 favored dealer," that would not be a prima facie --

13 MR. ENGLERT: Oh, if you have that evidence?

14 JUSTICE STEVENS: Yes.

15 MR. ENGLERT: That there is a likelihood that, in a
16 pattern, customers have gone to the favored dealer? That's --
17 that begins to come within the statutory language in a way this
18 case does not.

19 CHIEF JUSTICE ROBERTS: I understand --

20 MR. ENGLERT: There is no customer testimony, no
21 evidence of diversion to any favored dealer in this case, no
22 evidence that Reeder lost profits because of the price given to
23 any favored dealer, only evidence that if Reeder had gotten a
24 price, it would have -- better price -- it would have made more
25 money. Well, every dealer can show that.

1 CHIEF JUSTICE ROBERTS: I understand your argument
2 that there's no injury or impact in competition for resale of
3 the trucks. What's wrong with looking at the statute as being
4 concerned to protect competition to be the Volvo dealer? In
5 other words, you know, they're competing -- if Volvo's
6 restructuring its approach, they're competing to be the favored
7 dealer, even though they don't compete with other Volvo dealers
8 directly.

9 MR. ENGLERT: The main problem with that
10 interpretation of the statute is, it takes the last phrase of
11 the statute and makes it no longer a limiting phrase. It
12 essentially makes all price discrimination illegal. And this
13 Court said, in Brooke Group, and has said in many other cases,
14 that it is not -- not all price discrimination is made illegal
15 by this statute. It does require the requisite effect on
16 competition.

17 I'd like to reserve the balance of my time.

18 CHIEF JUSTICE ROBERTS: Thank you.

19 Mr. Hungar.

20 ORAL ARGUMENT OF THOMAS G. HUNGAR

21 FOR UNITED STATES, AS AMICUS CURIAE,

22 SUPPORTING THE PETITIONER

23 MR. HUNGAR: Thank you, Mr. Chief Justice, and may
24 it please the Court:

25 The fundamental question in this case is whether a

1 plaintiff who did not purchase goods for resale in competition
2 with a favored purchaser can, nonetheless, establish all the
3 elements of a Robinson-Patman Act claim by picking and choosing
4 from among different aspects of unrelated transactions. The
5 position of the United States is --

6 JUSTICE STEVENS: But how can you say --

7 MR. HUNGAR: -- that the answer is no.

8 JUSTICE STEVENS: -- that the dealer didn't purchase
9 goods for resale in competition with other Volvo dealers?
10 That's exactly what they do every day, isn't it?

11 MR. HUNGAR: No, Your Honor. When they purchase the
12 goods, they are not in competition with any other Volvo dealer.
13 By definition, they have the sale. And so, if --

14 JUSTICE STEVENS: Can't they be --

15 MR. HUNGAR: That's the point that I'm making.

16 JUSTICE STEVENS: -- in competition just from -- on
17 a day-to-day basis over the years, over a period of time, trying
18 to get business?

19 MR. HUNGAR: In a different sense, they may be in
20 competition --

21 JUSTICE STEVENS: Assuming --

22 MR. HUNGAR: -- with other --

23 JUSTICE STEVENS: -- they're in the same relevant
24 market, of course.

25 MR. HUNGAR: In a different sense, yes. But the

1 point is, the price discrimination does not occur when there is
2 any competition. And, therefore, the requirements of the Act
3 are not satisfied.

4 JUSTICE STEVENS: You're assuming they're not in
5 competition on a continuing basis, they're only in competition
6 for one isolated transaction after another.

7 MR. HUNGAR: No, Your Honor. The -- they may be, in
8 other senses, and in -- and in seeking other customers, in a --
9 in some sense, in competition with other Volvo dealers. But, at
10 the point that the price discrimination occurs, they are not.
11 And, therefore, even in the -- in the -- in the -- well, in any
12 of the examples offered by the Respondents in this case, they
13 don't show price discrimination between competing purchasers,
14 which is what this Court, in the Morton Salt case and in other
15 cases, have indicated the Act was aimed at. And as Mr. Englert
16 indicated, that is why, in the 70 years since the
17 Robinson-Patman Act was enacted, we haven't seen cases like
18 this, because it is understood that the Act has no application
19 in these circumstances, and --

20 JUSTICE KENNEDY: Two --

21 MR. HUNGAR: -- I would --

22 JUSTICE KENNEDY: -- two dealers within 10 miles of
23 each other, customers frequently go to both dealers to check out
24 -- to get the lowest price. Dealer A gets 10 percent discount
25 routinely; Dealer B, 20 percent discount routinely. Over a

1 period of time, would there be a violation of the
2 Robinson-Patman Act?

3 MR. HUNGAR: And all the same structure as this --

4 JUSTICE KENNEDY: Yes.

5 MR. HUNGAR: -- hypothetical? Well, the answer is
6 no, but only for, I think, one of the several reasons why in
7 this case the answer is no. That is, in your hypothetical they
8 are, in a sense -- and I'm assuming that there might be direct
9 head-to-head competition, but the offers are different -- or
10 affected by the differing differentials. So, there is -- there
11 is competition between the purchasers, and there is
12 discrimination in offers, although not in purchases. So, there
13 is still the two-purchaser requirement which is not satisfied in
14 that circumstance. There is the -- Reeder is not purchasing in
15 -- assuming it loses the sale to the other customer, it's not
16 purchasing in competition with a favored customer, a favored
17 dealer, because it's not purchasing at all.

18 CHIEF JUSTICE ROBERTS: Just so --

19 MR. HUNGAR: But I would point out that even if the
20 Court is unwilling to go that far in this case, that you don't
21 need to go that far to resolve this case and to reverse the
22 judgment below for the other -- because of the other failings in
23 the plaintiff's case here.

24 CHIEF JUSTICE ROBERTS: And the -- and the main
25 failing there is that Volvo Trucks and Reeder-Simco do not

1 compete in the same market for sales of Volvo trucks. Is that a
2 correct statement of the record?

3 MR. HUNGAR: Well, I don't think I would put it that
4 way. I think, again, they don't compete at the point at which
5 the price --

6 CHIEF JUSTICE ROBERTS: For any --

7 MR. HUNGAR: -- discrimination occurs.

8 CHIEF JUSTICE ROBERTS: -- particular sales.

9 MR. HUNGAR: Right. Yes.

10 CHIEF JUSTICE ROBERTS: I see.

11 MR. HUNGAR: And that's --

12 CHIEF JUSTICE ROBERTS: Okay.

13 MR. HUNGAR: -- right. Other than -- there are the
14 -- the two examples of what have been called head-to-head
15 competition, in one of which there was clearly no price
16 discrimination, in the other of which our reading of the record
17 is that a reasonable jury could not have found that there was
18 price discrimination. And even if there were price
19 discrimination, that one instance, standing alone, could not
20 support a finding of a Robinson-Patman Act --

21 JUSTICE BREYER: Why not?

22 MR. HUNGAR: -- violation.

23 JUSTICE BREYER: Why not? The -- Hiland -- is that
24 the one?

25 MR. HUNGAR: Because there --

1 JUSTICE BREYER: Hiland Dairy?

2 MR. HUNGAR: -- because there's no substantial
3 injury to competition.

4 JUSTICE BREYER: In other words, a -- I mean, you
5 could go in -- I see that. But what -- is there any authority
6 for that, that just one -- a head-to-head competition, he bought
7 the truck. Let's -- keep that out of it, so imagine they bought
8 the truck, they resold it, and the market structure is such
9 there probably is quite a lot of competition, in fact, with
10 other dealers, and they lost at least one sale. That's not
11 enough to prove an injury to competition?

12 MR. HUNGAR: I don't think so, Your Honor. I mean,
13 clearly --

14 JUSTICE BREYER: What's the authority for that?

15 MR. HUNGAR: Well, certainly the Morton Salt
16 inference wouldn't apply, because there's no substantial --

17 JUSTICE BREYER: That's a different matter. That's a
18 -- what -- I'm saying, What authority is there -- have there
19 been cases in which that was not viewed? After all, let's
20 suppose the dealers are located geographically in about the same
21 place, and it's logical to think they'd go for the same
22 customers. They overlap. Their territories are close. Logical
23 to think people shop around for trucks. And we have in the
24 record one item where they -- one instance in which they found
25 the customer, and he said, "Yeah, I did -- I did go and shop in

1 both. I lost" -- the disfavored dealer lost the sale.

2 MR. HUNGAR: Well, I don't --

3 JUSTICE BREYER: Any authority?

4 MR. HUNGAR: Well, this Court's cases, and the lower
5 courts', have understood the Act to require a likelihood of a
6 substantial injury to competition --

7 JUSTICE BREYER: Well, they say, "This is our
8 evidence that it is likely." Just what I said.

9 MR. HUNGAR: But one sale is not substantial, Your
10 Honor, I would submit. And, moreover, in this case, of course,
11 they don't have that evidence of the close dealer with whom they
12 are in repeated competition for the same customers that -- and
13 so, I don't think we have that case. We don't have a
14 substantial injury, even if you assume -- even if you read the
15 evidence the way they do with respect to the one head-to-head
16 competition.

17 And it's important to understand that this -- the
18 two-purchaser rule is not the only flaw in the judgment below.
19 The Act requires causation. That is, the price differential
20 must cause the injury to competition. Here, it's not the price
21 differential that causes the injury, in the sense that the
22 Robinson-Patman Act addresses. The Act is addressed to the
23 situation where they're competing head to head, the favored
24 purchaser has a competitive -- a relative competitive advantage
25 which allows them to offer a lower price and, thereby, either

1 get the sale or reduce the profits of the competing purchaser.
2 But that's simply not the case here in these sales-to-sales or
3 offers-to-sales competitions. The fact that some other dealer
4 in some other transaction with some other customer got a better
5 price has absolutely no relevance, no significance, and no
6 effect on Reeder's ability to get a sale or make a profit in its
7 transactions with an unrelated customer. So, there -- the
8 causation element that's so crucial under the Act is absolutely
9 missing here.

10 And, in fact, Reeder's interpretation would simply
11 read the injury requirement out of the statute. They would say,
12 "Whenever there is a price differential, we've been injured,
13 because if we had gotten the lower price instead of the higher
14 price, we would have made more money." So, there's per se
15 injury. The Morton Salt inference is converted into an
16 irrebuttable presumption --

17 JUSTICE GINSBURG: Mr. --

18 MR. HUNGAR: -- contrary --

19 JUSTICE GINSBURG: -- Mr. Hungar, do you agree with
20 Mr. Englert that even if you had -- you could -- you had a case
21 based on two dealers, one consistently gets higher concessions,
22 one consistently gets lower concessions, and they're in roughly
23 the same market -- that even that would not be covered by
24 Robinson-Patman?

25 MR. HUNGAR: And they're in repeated head-to-head

1 competition for the same customers -- one gets -- they're
2 getting --

3 JUSTICE GINSBURG: But I --

4 MR. HUNGAR: -- differential offers? Is that --

5 JUSTICE GINSBURG: -- I'm not putting the
6 head-to-head in. Just, one of his sales gets lower concessions;
7 one, higher. That's --

8 MR. HUNGAR: I agree that that would not be
9 actionable under the Robinson-Patman Act. The reasons why --
10 the reason, or reasons, why depend on whether they are in
11 head-to-head competition or not. If they're never in
12 head-to-head competition, then they're never in competition --

13 JUSTICE STEVENS: Let me just --

14 MR. HUNGAR: -- and they would fail to have --

15 JUSTICE STEVENS: -- modify Justice Ginsburg's
16 question a little bit. Supposing, over a period of years, one
17 dealer always got 15 percent off, and the other one always got
18 20 percent, and there's testimony they're in the same relevant
19 market, so presumably customers can go to either one. What more
20 do they have to prove to establish a prima facie case?

21 MR. HUNGAR: They have to prove at least what Morton
22 Salt said, which is price differentials between competing
23 purchasers. And the way the purchasers were competing in Morton
24 Salt was that --

25 JUSTICE STEVENS: Well, I understand --

1 MR. HUNGAR: -- they were both competing --

2 JUSTICE STEVENS: -- I understand the Morton Salt
3 case, but do the -- I'm assuming they're in the same relevant
4 market in which customers patronize both of them from time to
5 time, but they can't identify that Mr. Smith was here on this
6 day, and the other dealer on the same day, but just an
7 overlapping in the -- in the same competitive market. Would
8 that not create a prima facie case? And if not, how much more
9 would they have to prove?

10 MR. HUNGAR: Well, in this market, they'd have to
11 show that they were purchasers --

12 JUSTICE STEVENS: Well --

13 MR. HUNGAR: -- at --

14 JUSTICE STEVENS: -- they're both purchasers.
15 They're dealers, in my hypothesis. Each of them buys a hundred
16 cars a year, and one of them pays a higher price than the other,
17 and they're in the same relevant market --

18 MR. HUNGAR: Yes, Your Honor, but they haven't
19 purchased --

20 JUSTICE STEVENS: What?

21 MR. HUNGAR: They haven't purchased in connection
22 with the --

23 JUSTICE STEVENS: They all purchased --

24 MR. HUNGAR: -- a price discrimination --

25 JUSTICE STEVENS: -- for the purpose of reselling,

1 if they can find customers.

2 MR. HUNGAR: Well, right. But, as Justice Scalia
3 pointed out, the Act clearly does not apply to offers. It
4 requires purchases --

5 JUSTICE STEVENS: Well, I understand.

6 MR. HUNGAR: -- and it requires --

7 JUSTICE STEVENS: In my case --

8 MR. HUNGAR: -- sales.

9 JUSTICE STEVENS: -- there are a hundred purchases
10 by each of them at different prices. What more do they have to
11 prove, other than that they were in the same relevant market?

12 MR. HUNGAR: They have to prove that they were in
13 competition with each other and that competition was --

14 JUSTICE STEVENS: Now, isn't the fact they're --

15 MR. HUNGAR: -- injured by --

16 JUSTICE STEVENS: -- in the same --

17 MR. HUNGAR: -- the differential.

18 JUSTICE STEVENS: -- relevant market enough to prove
19 they're in competition with each other?

20 MR. HUNGAR: No, Your Honor, because -- it's not
21 enough to prove they're in competition with each other. They
22 have to prove that they are in -- that the price differential
23 injured, or was likely to injure, substantially, that
24 competition. And that is not true if they aren't competing in
25 connection with the transactions --

1 JUSTICE SOUTER: No, but if you're looking at --

2 MR. HUNGAR: -- in which the price discrimination
3 occurs.

4 JUSTICE SOUTER: -- if you're looking at broad
5 market competition, you don't normally require them to identify
6 competition on a customer -- on a per-customer basis. The only
7 reason we get into the per-customer basis is that we have this
8 odd -- not an odd situation, but the situation with Volvo trucks
9 that no dealer ever buys unless he's already got a -- got a sale
10 waiting. But in Justice Stevens' hypothetical, we -- as long as
11 the market was identified, and as long as they were buying, we
12 wouldn't require anything more to show competition, would we?

13 MR. HUNGAR: May I answer?

14 CHIEF JUSTICE ROBERTS: Sure.

15 MR. HUNGAR: Your Honor, if -- I understood Justice
16 Stevens' hypothetical to address the situation where, as in this
17 circumstance, they are not competing at the point at which they
18 actually purchase --

19 JUSTICE SOUTER: No.

20 MR. HUNGAR: -- the product. If it were the
21 traditional Robinson-Patman Act case, where they purchase for
22 inventory and are both trying to sell the same goods to the same
23 customers, then yes, the problems that we've identified here
24 would not exist.

25 CHIEF JUSTICE ROBERTS: Thank you, Mr. Hungar.

1 MR. HUNGAR: Thank you.

2 CHIEF JUSTICE ROBERTS: Mr. Phillips.

3 ORAL ARGUMENT OF CARTER G. PHILLIPS

4 ON BEHALF OF RESPONDENT

5 MR. PHILLIPS: Thank you, Mr. Chief Justice, and may
6 it please the Court:

7 It seems to me there are three issues that have been
8 posed by the way both this case has been argued by the parties
9 on the other side and as the questions have arisen. And the
10 first one is whether or not there is competition in this
11 particular case. And Justice Stevens' question, it seems to me,
12 posed the issue about as starkly as it can be: Is it not the
13 case that under traditional standards of Tampa Electric, this
14 Court's decision there, and a host of other cases, that we
15 define "competition" by reference to whether or not entities
16 compete for the same -- with respect to the same product in the
17 same market, same region, and if they're -- if that's what you
18 have by way of competition, then you look to the next level,
19 which is to see: Is there price discrimination, and is there
20 injury to that competition?

21 JUSTICE SCALIA: What evidence was there of
22 competition here? How -- did you bring forward instances where
23 they both bid for sale of special trucks to a single
24 repurchaser?

25 MR. PHILLIPS: Well, we clearly did that with the --

1 with the Hiland case. That was -- that was clear. But the
2 testimony was uncontested on both sides. Both Reeder's --
3 Reeder testified, "We compete against other dealers every day."
4 And Volvo's witness testified --

5 CHIEF JUSTICE ROBERTS: Not other Volvo dealers.

6 MR. PHILLIPS: Yes, other Volvo dealers.

7 CHIEF JUSTICE ROBERTS: I thought the Volvo policy
8 was, if you had two dealers competing for the same sale, they
9 gave the same discount to each dealer.

10 MR. PHILLIPS: Well, that's not the competition.
11 That's the question as whether there is discrimination. The
12 question is, Do Volvo dealers compete against other Volvo
13 dealers, in the first instance? And with respect to that, the
14 testimony was absolutely clear, it's in the -- witnesses for
15 Volvo -- are quoted in our brief at page 8 -- explicitly say,
16 "We compete, on a daily basis, in the region and the district,
17 Volvo dealer to Volvo dealer."

18 Now, there's a separate --

19 CHIEF JUSTICE ROBERTS: But there's never -- but, in
20 those situations, there's never two purchases, there's always
21 one -- there's only one completed purchase.

22 MR. PHILLIPS: Well, the -- again, there are lots of
23 situations where there are two purchasers. Again, you go back
24 to the -- to the four specific transactions that were
25 identified. For the 102 sales, 55 percent of the sales between

1 1996 and 2000 involve -- I mean, 1998 -- involved
2 direct-comparison sales, where we purchased from Volvo, and one
3 of our competitors 200 miles down the road -- and on interstate
4 highways, 200 miles down the road's the same as next door -- and
5 we -- we purchased exactly the same product, and we got a
6 significantly lower concession --

7 JUSTICE STEVENS: Well, but --

8 MR. PHILLIPS: -- under the circumstances.

9 CHIEF JUSTICE ROBERTS: But that was for a resale to
10 -- that was for resale to different purchasers.

11 MR. PHILLIPS: To be sure, it was --

12 CHIEF JUSTICE ROBERTS: Nobody's buying two --

13 MR. PHILLIPS: -- for resale.

14 CHIEF JUSTICE ROBERTS: -- nobody's buying two
15 trucks from two different purchasers.

16 MR. PHILLIPS: Right. Any more than anybody's buying
17 two cars from two different purchasers in the -- in the classic
18 inventory situation.

19 JUSTICE SCALIA: Yes, but it's very hard to compare
20 those two sales, because they all depend upon the special
21 features on the trucks that are ordered by the particular
22 individual, and also how -- you know, how much of a hard bargain
23 that individual is driving. I don't know how you can compare a
24 sale to one -- one person with XYZ features on the truck with a
25 sale to a totally different person with ABC features on the

1 truck.

2 MR. PHILLIPS: Justice Scalia, that was precisely
3 the defense that Volvo made at trial. They put it to the jury,
4 "Remember, it has to be like kind and quality. We are required
5 to demonstrate that the truck that we are getting a 10 percent
6 discount on and the truck that they're getting a 20 percent
7 discount on is exactly the same like kind and quality of truck."

8 And that was their defense. And our witness meticulously --
9 I'd commend the record to you if you want to read it -- but he
10 meticulously examined each of those trucks and showed that,
11 systematically, for 102 sales, they sold the exact same truck to
12 a dealer down the road, with a significantly better price than
13 the truck they sold to us, in order to implement the "Volvo
14 Vision" and drive my client --

15 JUSTICE SCALIA: For resale --

16 MR. PHILLIPS: -- out of the dealership business.

17 JUSTICE SCALIA: -- to a different purchaser, who
18 may have been in a better position with regard to the
19 negotiation than any of your customers were.

20 MR. PHILLIPS: Well, he -- but whatever that
21 person's position was, vis-a-vis its customer, doesn't affect
22 the relationship between Reeder-Simco and Volvo, and that
23 individual and Volvo.

24 JUSTICE SCALIA: Why is it --

25 MR. PHILLIPS: There, it has to be a level playing

1 field.

2 JUSTICE SCALIA: -- why is it --

3 MR. PHILLIPS: That is precisely what
4 Robinson-Patman is about.

5 JUSTICE SCALIA: -- why is it unreasonable -- why
6 does it violate the principle of Robinson-Patman, and why does
7 it destroy competition, for Volvo to say, "We'll make whatever
8 discount it takes to get the sale, and if this dealer needs a 20
9 percent discount for this sale, but this other fellow over here
10 only needs a 10 percent discount to make that sale, we're going
11 to have a differential discount"? Why -- I don't see why that
12 harms competition.

13 MR. PHILLIPS: Because the -- it wouldn't
14 necessarily, on an episodic basis. But what you have in this
15 case is substantial price discrimination across time, which this
16 Court held, under Morton Salt, triggers an inference of
17 competitive injury.

18 JUSTICE GINSBURG: Mr. Phillips, the problem that I
19 have with even accepting your theory is what the other side
20 calls the "mix and match" quality of your evidence. That is,
21 you say here's Reeder, disfavored, and here's someone else,
22 favored. But it's not consistently the same someone else. And,
23 for all we know, someone else could make a case saying, "We
24 compare ourselves with Reeder, and we say, oh, there was that
25 sale 7 months ago, where they got a whopping discount and we got

1 a much smaller one." You're not -- you don't have the same
2 favored customer. You're picking from a series of sales, and we
3 don't know how manipulative this proof is. And we I mean - and
4 we don't --

5 MR. PHILLIPS: Well, I mean, putting aside the fact,
6 Your Honor, that I think that that's essentially a jury question
7 -- I mean, I do think both sides get to put on the evidence that
8 shows that there's been discrimination and that there -- and
9 then we know what the market consequences will be. But if you
10 look at plaintiff's exhibit 104, which is in the appendix to the
11 Court of Appeals at 577, and you look down that list, you will
12 see that they are -- where they're specifically talking about
13 Reeder-Simco, and it has -- and it satisfies its 28 percent of
14 its overall objective in 1999; and then you go through the
15 testimony of Reeder-Simco's co-owner, and he's -- identifies
16 each of the four or five competing entities that were the
17 beneficiaries of those -- of the price discrimination of those
18 sales in the 102 sales that were the basis for liability; and
19 their percentages for the objectives during the next -- during
20 1999 are 71 percent, 81 percent, 97 percent, 107 percent, 92
21 percent -- those are -- those are huge differentials.

22 CHIEF JUSTICE ROBERTS: Mr. Phillips, when you lose
23 --

24 MR. PHILLIPS: And --

25 CHIEF JUSTICE ROBERTS: If I may. When you lose a

1 sale, it's because Volvo didn't give you a big enough discount.
2 It's not because they gave another Volvo dealer a bigger
3 discount.

4 MR. PHILLIPS: That's today, Mr. Chief Justice, to
5 be sure. But tomorrow, when I go to the next dealer to -- go to
6 the next purchaser, the reason I didn't get that sale was
7 because I didn't have enough capital to have the same quality of
8 salesperson in place to make that sale.

9 CHIEF JUSTICE ROBERTS: Well, sure, but, I mean,
10 that's -- I mean, long term -- of course, Volvo can terminate
11 you, as a dealer, tomorrow. And --

12 MR. PHILLIPS: Well, it can't. Under the contract
13 --

14 CHIEF JUSTICE ROBERTS: Well --

15 MR. PHILLIPS: -- and under State -- Arkansas State
16 law, it can't.

17 CHIEF JUSTICE ROBERTS: -- well, what -- but it --
18 under the Robinson-Patman Act, it can.

19 MR. PHILLIPS: As long as it doesn't discriminate on
20 the basis of price --

21 CHIEF JUSTICE ROBERTS: The classic --

22 MR. PHILLIPS: -- you're right.

23 CHIEF JUSTICE ROBERTS: -- case that the
24 Robinson-Patman Act is directed to is when you lose sales
25 because they're giving bigger discounts to other sellers. And

1 that's just not the case here.

2 MR. PHILLIPS: But it -- it's not just sales. It's
3 always been lost profits, as well. And if we are paying more,
4 we're losing money, vis-a-vis our competitors. And then every
5 day after that, we're competing with our -- one arm tied behind
6 our back because we have less money. And is there any reason to
7 doubt that --

8 CHIEF JUSTICE ROBERTS: But Volvo's interest may be
9 in as -- making as much money off of sales this year, and they
10 may not be terribly concerned about whether you, as a reseller,
11 are making enough profit to last 3 years or 5 years.

12 MR. PHILLIPS: That's true. But we know from the
13 record that Volvo's purpose in this enterprise was to eliminate
14 50 percent of its dealers --

15 JUSTICE SCALIA: That -- that's a --

16 MR. PHILLIPS: -- and to do so by using price
17 discrimination.

18 JUSTICE SCALIA: -- that's a -- that's a broad
19 Robinson-Patman principle you're arguing for, that a -- that a
20 seller such as Volvo has to make sure that each of its
21 distributors makes the same profit?

22 MR. PHILLIPS: Oh, no. To be sure, no --

23 JUSTICE SCALIA: And if --

24 MR. PHILLIPS: -- of course not.

25 JUSTICE SCALIA: -- if it works its system in such a

1 way that one of them is making less profit than another, it's
2 liable?

3 MR. PHILLIPS: No, there are -- there are two
4 elements to this, Justice Scalia. You first have to demonstrate
5 that there's discrimination. And the way you demonstrate
6 anticompetitive discrimination is to show that there is a
7 consistent pattern. It has to be substantial discrimination
8 over a substantial period of time.

9 If we're trying to cut deals on a daily basis,
10 presumably today you got a deal with a customer, and I'll give
11 you a 10 percent, and then the Chief Justice got a deal
12 tomorrow, and I may give him 12 percent, but, 2 weeks down the
13 line, the situations will likely be flipped out. You're not
14 going to find, where you have 55 percent of your sales, 102
15 sales involving \$250,000-plus of sales differentials to be the
16 basis for the claim that there is price discrimination in the
17 first instance, Justice Scalia.

18 JUSTICE SCALIA: Do you have any instance where you
19 made an offer to a buyer assuming that you'd get the kind of a
20 break that Volvo gives to other dealers -- all right? -- you
21 made that offer, and the buyer says, "Yes, I'll take it at that
22 price" -- and then you go to Volvo, and they won't give you that?

23 MR. PHILLIPS: Oh, sure. We had thousands of those
24 examples.

25 JUSTICE SCALIA: Where you made the offer to the

1 buyer --

2 MR. PHILLIPS: Yes.

3 JUSTICE SCALIA: -- and the buyer had agreed to buy
4 it --

5 MR. PHILLIPS: Sure.

6 JUSTICE SCALIA: -- and you --

7 MR. PHILLIPS: Where we -- well, I -- had agreed to
8 buy it. We had a -- clearly, there was an understanding. Our
9 sales person thought that, "If I can get this discount at this
10 rate, I can cut this deal," went to -- went to Volvo, asked for
11 that rate, Volvo said no. Didn't get the deal.

12 JUSTICE BREYER: This is the Robinson --

13 MR. PHILLIPS: That happened literally more than a
14 thousand times. The testimony on that is rampant. And the
15 reason we don't make more of that, Justice Scalia, in this
16 particular case, is because the jury verdict is based on actual
17 sales. There is as very clear fidelity to the two-purchaser
18 rule in the way the jury verdict was rendered and the way the
19 Court of Appeals affirmed it. That said, I -- a lot of this
20 discussion about, you know: Is that two-purchaser rule, in its
21 most strict version, the right way to interpret the
22 Robinson-Patman Act? Our view is, it's not. But we don't have
23 to get there --

24 JUSTICE BREYER: If it's not, the -- the reason -- I
25 thought, for about 60 years, the words "different purchasers of

1 commodities," it forbids any person to discriminate in price
2 between different purchasers of commodities. Now, you have to
3 refer -- as soon as I ask the question, or start getting into
4 the language, I forget the statute, and it's so complicated that
5 I'm giving you time to think about it --

6 [Laughter.]

7 JUSTICE BREYER: -- and to think of those words in
8 your mind.

9 MR. PHILLIPS: All right.

10 JUSTICE BREYER: It's a -- it's forbidden to
11 discriminate in price between different purchasers of
12 commodities.

13 MR. PHILLIPS: Right.

14 JUSTICE BREYER: Now, I had always thought -- and I
15 think the Courts' decisions bear that out, or the absence of
16 decisions -- that the words "discriminate in price between
17 different purchasers of commodities" meant you can't
18 discriminate in price between different purchasers of the item,
19 or items, in respect to which the discrimination of price
20 exists. That's what I thought it meant. And it seems to me
21 that was the general understanding in the antitrust bar, that
22 was the general understanding of the courts. And either it's
23 not permissible to give such an interpretation -- I don't know
24 why it wouldn't be; it's literal -- or there's a good policy
25 reason for not doing it in respect to the policy.

1 And in respect to the policy, what worries me about
2 the broader interpretation is suddenly doing what Volvo --
3 forbidding Volvo from doing what it probably wants to do here.
4 If it wants to get rid of its dealers, it's because it wants to
5 compete better with other brands. And that means lower prices
6 for consumers, though individual dealers might be hurt.

7 So, if I'm trying to read that law consistent with
8 60 years of history, and the basic purposes of the antitrust
9 law, I guess I would -- might favor your opponents in this. I'm
10 exposing my entire line of thought. I'm trying to protect
11 interbrand competition, why -- while, at the same time, not
12 being -- not being unfair to the purposes of Robinson-Patman;
13 and, therefore, I'm reading this fairly literally, as it's been
14 read. So, what's your response?

15 MR. PHILLIPS: Well, I guess the difficulty I have,
16 Justice Breyer, is understanding why you don't think we are --
17 what we have here is precisely different purchasers of
18 commodities.

19 JUSTICE BREYER: No, I said -- I said they -- in --
20 the problem for you is that, in respect to discrimination
21 between the item, or items, the -- in respect to -- the purchase
22 of the item, or items, in respect to which the discrimination
23 existed. Insofar as there were items, or items, purchased,
24 there is no discrimination. At least there is no discrimination
25 that -- in terms of the injury of the statute, creates that kind

1 of injury. In respect to instances where you have a strong case
2 of the right kind of injury, there was no purchase, defined as I
3 just defined it.

4 MR. PHILLIPS: I apologize for being --

5 JUSTICE BREYER: No, let me deal --

6 MR. PHILLIPS: -- dense, Justice Breyer.

7 [Laughter.]

8 JUSTICE BREYER: -- with the latter. I will say --

9 MR. PHILLIPS: Let --

10 JUSTICE BREYER: -- there are some items where your
11 client bought the truck.

12 MR. PHILLIPS: Absolutely.

13 JUSTICE BREYER: When he bought the truck, he got
14 the sale, although he earned less profit. Put those to the
15 side.

16 MR. PHILLIPS: It's difficult --

17 JUSTICE BREYER: Let's focus --

18 MR. PHILLIPS: -- for me to do that, Justice Breyer
19 --

20 JUSTICE BREYER: But you are.

21 MR. PHILLIPS: -- but I understand.

22 JUSTICE BREYER: Let's focus --

23 [Laughter.]

24 JUSTICE BREYER: -- on the items -- let's focus on
25 the items where he didn't get the sale.

1 MR. PHILLIPS: Right.

2 JUSTICE BREYER: When he didn't get the sale, there

3 was no purchase of the item, or items, from the manufacturer in

4 respect to which the discrimination existed.

5 MR. PHILLIPS: Right.

6 JUSTICE BREYER: Okay? Now, it's that second class

7 --

8 MR. PHILLIPS: That's what you want me to focus on.

9 JUSTICE BREYER: Yes.

10 MR. PHILLIPS: That's fine. As long as you accept

11 that the first class is a distinct one, and, as far as I'm

12 concerned --

13 JUSTICE BREYER: Of course it's distinct. Of course

14 --

15 MR. PHILLIPS: -- but -- and it totally makes my

16 case, as far as I'm concerned.

17 JUSTICE BREYER: Oh, well, you have a --

18 MR. PHILLIPS: I realize you may disagree with me on

19 that, but --

20 [Laughter.]

21 MR. PHILLIPS: -- we'll start there. But I just

22 want to be clear that that's a completely separate analysis.

23 Then, it seems to me, what you -- what you have to go back to is

24 the kind of analysis that Justice Stevens was saying, which is

25 that when you're talking about different purchasers of

1 commodities, there is no reason to be so focused on the -- on
2 the identical transaction, rather than recognizing, particularly
3 in the context of a dealership arrangement where you're -- have
4 continuous relationships between the -- between the seller --
5 the manufacturer and the dealer, where you have this enormous
6 disadvantage to the dealer, who has already sunk, you know, huge
7 amounts of money into this and is in -- essentially at the whim
8 of what is now a monopoly seller -- a monopsony -- a monopoly
9 seller. And, under those circumstances, it makes perfect sense
10 to say, "Look, if I'm going to systematically keep getting 20 --
11 10 percent discounts, where my competitor, a hundred miles away,
12 is always getting 20 percent discounts," that's a situation that
13 this statute seems clearly aimed at dealing with.

14 CHIEF JUSTICE ROBERTS: You're not at the whim of a
15 monopoly seller. You mentioned to me just a little while ago,
16 you've got a contract with them. You can put in that contract
17 whatever you want about pricing.

18 MR. PHILLIPS: I have a 5-year contract that's
19 already in place, so, at least for the 5 years, I'm pretty much
20 at the whim of my -- unless I want to breach the contract, which
21 --

22 JUSTICE SCALIA: You should have written a better
23 contract.

24 MR. PHILLIPS: Well, unfortunately --

25 [Laughter.]

1 the Court to revisit Morton Salt at this point, it seems to me
2 that that principle ought to be completely settled at this
3 stage. If there's to be any fix there, it ought to be a fix
4 that's offered up by Congress.

5 To go back to, then, your point, Justice Scalia, I
6 told you, first, you have this discrimination in price, you have
7 to show that it's substantial, lasts for a substantial period of
8 time, you get the Morton Salt inference. You -- then we still
9 have to show, under section 4 of the Clayton Act, that we have
10 actual injury to our business and property. And in this
11 context, it seems to me, the evidence is absolutely
12 overwhelming, because you have a situation where, in 1995, we
13 are next-to-none dealer for Volvo. In 1995, we're selling 66
14 cars, we're making \$165,000. Volvo implements its "Volvo
15 Vision," the purpose of which is to drive my client out of this
16 dealership. It engages in systematic discrimination, both with
17 respect to unquestionable purchases on both sides and, candidly,
18 more broadly than that. And the effect of that, at the end of
19 the day, is that our sales go from 65 to 34 to 18 to 8. Our
20 gross profits dropped to \$26,327.

21 You compare that to the kind of evidence this Court
22 looked at in the -- in the J. Truett Payne case, where it wasn't
23 clear that there was really any discrimination involved there,
24 there was no drop in the market, there was no evidence of any
25 diversion of any sales. And, even in that context, this Court

1 was unwilling to say that the Fifth Circuit's decision holding
2 that the evidence was flat-out inconsistent -- or inadequate to
3 sustain the verdict, was overturned, had to be sent back.

4 I submit to you, the evidence in this case is vastly
5 stronger. The jury reached the result that it did. That result
6 was approved in the face of a JMOL --

7 JUSTICE STEVENS: Well, let me ask you --

8 MR. PHILLIPS: -- and affirmed --

9 JUSTICE STEVENS: -- this question.

10 MR. PHILLIPS: -- on appeal.

11 JUSTICE STEVENS: Supposing you did have a contract,
12 such as Justice Scalia suggests, in which the manufacturer
13 agreed that, at any given point of time, you will get just as
14 favorable a concession as any other Volvo dealer could get at
15 the same time. If there were such a contract in place, would
16 the evidence show that it was breached?

17 MR. PHILLIPS: In this case, yes, it would have
18 been. We have evidence that they clearly didn't. Because they
19 have a policy of trying to accomplish the same thing, and didn't
20 achieve that in this particular case, in at least two instances.

21 JUSTICE GINSBURG: But you did -- you did get a
22 judgment on the -- whatever it was -- the State Franchises Act,
23 and that is not being contested --

24 MR. PHILLIPS: That's correct --

25 JUSTICE GINSBURG: -- on appeal.

1 MR. PHILLIPS: -- Justice Ginsburg.

2 JUSTICE GINSBURG: So that if -- the question is
3 whether fair franchising practices -- were there unfair
4 practices? You won a verdict that there was a violation of the
5 Fairness in Franchising Act.

6 MR. PHILLIPS: Right. We clearly aren't raising the
7 State law issue here. Our argument here is that the
8 Robinson-Patman --

9 JUSTICE GINSBURG: Well, you won on it.

10 MR. PHILLIPS: -- violation --

11 JUSTICE GINSBURG: You won on it. But the
12 difference is that that doesn't give you treble damages.

13 MR. PHILLIPS: Well, it also has a different statute
14 of limitations, Justice Ginsburg. There are a lot of
15 differences between the State law and the Federal claim that
16 we're --

17 JUSTICE GINSBURG: On --

18 MR. PHILLIPS: -- that we're pursuing here.

19 JUSTICE GINSBURG: -- limitations, one of the
20 aspects of this mismatches -- that in one case you went back as
21 much as -- there was a 7-month differential. Is there a
22 timeframe, if we adopt your theory, about -- in which you can
23 engage in this comparison?

24 MR. PHILLIPS: Oh, of course. You require the jury
25 to make a determination that it's within a reasonable period of

1 time and that it's in a reasonable adjustment. There is no
2 challenge to the jury instruction on whether or not the
3 comparisons that were made were legitimate in any way. So,
4 that's -- you know, there's no question that this Court can
5 certainly establish a rule that says certain timeframes are
6 either, per se, good or bad, but that issue is clearly not
7 raised by the way the jury -- this jury was instructed, because
8 there was no challenge to the instruction, in this case.

9 JUSTICE STEVENS: And it's also not disputed now
10 that these were goods of like grade and quality.

11 MR. PHILLIPS: Not disputed that these are goods of
12 like grade and quality, Your Honor.

13 JUSTICE SCALIA: Mr. Phillips, how many States have
14 these fair franchising laws? Are there any States that don't?

15 MR. PHILLIPS: Oh, I'm sure there are some States
16 that don't. I think there are about 30-some States that do, as
17 I recall.

18 CHIEF JUSTICE ROBERTS: Your argument that focuses
19 on the dealer's profits, I guess, doesn't depend upon you losing
20 those sales at all. I mean, if you -- you had made all the
21 sales, but you still thought you should have gotten a bigger
22 discount that would have allowed you to make more money, you'd
23 have the same argument, right?

24 MR. PHILLIPS: Well, I think if we had gotten all of
25 those sales the first time around, we would have ended up with

1 the profits that would have allowed us to make the sales --

2 CHIEF JUSTICE ROBERTS: Oh, no, you just go back and
3 look again, 7 months or a year down the road, and if somebody
4 else was getting a bigger discount -- if you had gotten the
5 bigger discount, you would have made more money on those sales,
6 and then you would have had more capital, and you'd be able to
7 be a dealer for a longer time.

8 MR. PHILLIPS: Well, I think, at the end of the day,
9 what we're talking about is essentially a jury question: Were
10 we entitled to say these were lost profits, the margins were
11 reduced, we didn't have as much money? That interfered with our
12 ability to make sales in the future period, because you have the
13 complete before-and-after documented history in this particular
14 case.

15 JUSTICE SOUTER: So --

16 MR. PHILLIPS: It seems to me that's a jury
17 question. And the jury found in our favor.

18 JUSTICE SOUTER: Wouldn't --

19 JUSTICE BREYER: You suggest something very -- to
20 me, quite interesting, but it would be quite a departure, I
21 think, from prior law that --

22 MR. PHILLIPS: I hope not.

23 JUSTICE BREYER: If you want to go look at this, you
24 know, you say, all right, here's -- we should be realistic about
25 it. We're going to be realistic. Realistic, they -- we're only

1 now looking at the cases where they undoubtedly bought the item,
2 but the profit was lower. There's no purchaser problem.

3 MR. PHILLIPS: Right.

4 JUSTICE BREYER: But they got a lower profit. And I
5 think, there, the mine-run of cases is against you that that
6 counts as an injury.

7 MR. PHILLIPS: That, by itself, wouldn't count as an
8 injury.

9 JUSTICE BREYER: Yes. Yes, but it's -- you know, it
10 shows that they're going to be hurt, that they may be driven out
11 of business.

12 MR. PHILLIPS: Right.

13 JUSTICE BREYER: Indeed, the market in -- the
14 dealership market, whatever -- if that's a separate market,
15 which it might be -- becomes more concentrated, and the result
16 of -- you know, I could make a -- tell a little story there that
17 would be quite consistent with the purposes of the antitrust
18 law. So we follow that approach in this case and say goodbye to
19 Morton Salt, because Morton Salt, after all, was a case that was
20 quite formalistic. It didn't really look to the injury to
21 competition in a market. It had a formalistic slogan that
22 would, in fact, be a proxy for that.

23 MR. PHILLIPS: Right.

24 JUSTICE BREYER: So, what do you think of that? We
25 follow your -- we follow your advice, we say, "Okay, we're going

1 to be very realistic in the future. Forget the presumptions.
2 And, court, look to see whether competition, in the sense of
3 increased concentration through people going out of business,
4 will lead to higher prices with the ordinary antitrust proxies
5 there." What about that? I mean, I don't know if you -- you
6 know, I --

7 MR. PHILLIPS: Well, I'm not here to --

8 JUSTICE BREYER: -- I'm being a little --

9 MR. PHILLIPS: -- I'm not here, necessarily, as an
10 advocate for overturning Morton Salt, for obvious reasons. I
11 think the answer to your question is, under Morton Salt we
12 clearly win, because we -- we probably didn't need to show as
13 much as we did, in terms of the impact of this particular
14 discrimination on our ability to compete in the future. I think
15 we were entitled to a straight inference of that, in terms of
16 the substantial -- or reasonable possibility of injury in the
17 first instance. But, beyond that, I -- you know, you could
18 certainly hold, in this case, that Reeder-Simco has made more
19 than enough of a case in order to recover under the
20 Robinson-Patman Act. But --

21 JUSTICE KENNEDY: Well, in fact --

22 MR. PHILLIPS: -- we, neverthe- -- I'm sorry,
23 Justice --

24 JUSTICE KENNEDY: -- you almost have to show that.
25 But the evidence of the head-to-head competition, it seems to

1 me, too insubstantial to support liability here. Would you
2 agree? I -- and I --

3 MR. PHILLIPS: One --

4 JUSTICE KENNEDY: -- I -- your opposing counsel says
5 you almost concede that, right?

6 MR. PHILLIPS: Well, we -- I mean, we don't rely on
7 it. And part of this -- part of the problem is that it's not --
8 that head-to-head item wasn't part of the jury instruction. So,
9 that -- we -- I can't rely on it, in terms of supporting it. If
10 you ask me, outside of the context of this case, would I defend
11 that argument? I probably would try to defend the argument.
12 But it's obviously much tougher when you only have one
13 head-to-head. It's completely different when you're talking
14 about 102 sales-to-sales comparisons over years, with
15 significant differentials, that clearly caused the kind of
16 injury we have here.

17 If there are no further questions, Your Honors, I'd
18 give you back the rest of my time.

19 Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you, Mr. Phillips.

21 Mr. Englert, you have four minutes remaining.

22 REBUTTAL ARGUMENT OF ROY T. ENGLERT, JR.

23 ON BEHALF OF PETITIONER

24 MR. ENGLERT: Thank you, Mr. Chief Justice.

25 The heart of the theory of this case came up in

1 colloquy between the Chief Justice and Mr. Phillips. The Chief
2 Justice pointed out that Reeder doesn't lose a sale because of
3 the concession that Volvo gives to the other dealer, which makes
4 this quite different from every other Robinson-Patman case. Mr.
5 Phillips' response was, "That's today, Your Honor. But our
6 future ability to compete is impaired." Well, that's very
7 similar to the evidence this Court referred to as "weak" in J.
8 Truett Payne. The Court didn't go all the way and say that that
9 wasn't enough to give rise to damages under section 4 of the
10 Clayton Act, but the -- but all nine Justices agreed that such
11 evidence was very weak. The Fifth Circuit, on remand, threw out
12 the jury verdict, a case that arose in the same posture as this
13 case. And there is not -- as we said in the reply brief, Reeder
14 is complaining about price, not price discrimination.

15 Now, let me say a word or two about the record. Mr.
16 Phillips says the "Volvo Vision" was to get rid of dealers, and
17 to do so through price discrimination. That is a leap of faith
18 that Reeder asked the jury to make at trial, but there is not an
19 iota of evidence connecting Volvo's interest in making its
20 dealer network smaller and more efficient to price
21 discrimination. That's entirely a leap of faith. Mr. Phillips
22 says an inference should be made. That's not the kind of
23 inference we usually allow juries to draw in antitrust cases
24 without some evidence.

25 The evidence was actually that Reeder's biggest

1 customer, New Hi-Way, which was 82 percent of its business, was
2 bought by a Memphis company. So, just to point to Reeder's
3 before-and-after sales is really terribly misleading, in terms
4 of causation here between so-called discrimination and the
5 decline in Reeder's business.

6 The so-called 102 sales are four transactions.
7 There's one 77-truck transaction to New Hi-Way before it was
8 bought by the Memphis company, and 25 other trucks in the other
9 three transactions. They are all cases in which all Reeder did
10 was take its own completed sales and compare them to sales by
11 some other dealer in some other State. Reeder wasn't competing
12 for the sale to that dealer's customer. That customer wasn't
13 competing for the sale to Reeder's customer. So it is, as
14 Justice Ginsburg's questions pointed out, completely a
15 mix-and-match approach.

16 And Bill Heck conceded that there were times when
17 Reeder got better concessions than other dealers. If you have a
18 company that doesn't engage in uniform pricing, as Volvo does
19 not, it's not going to be hard for any plaintiff, whether it's
20 Reeder or Reeder's competitor, to come up with instances in
21 which it was the so-called disfavored dealer if it is admissible
22 to compare transactions to completely unrelated transactions,
23 which is what the proof at trial in this case was.

24 Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you --

1 JUSTICE STEVENS: Let me ask you, if you have a
2 minute left, is your central point that there was no proof of
3 damages or no proof of injury to competition?

4 MR. ENGLERT: Both, Your Honor. They need both.
5 They need --

6 JUSTICE STEVENS: I know they --

7 MR. ENGLERT: In 2(a) --

8 JUSTICE STEVENS: -- need both, but which is your
9 principal argument?

10 MR. ENGLERT: My principal argument is under 2(a),
11 but if I fail on that, I think they fail under Clayton Act,
12 section 4, as well. And --

13 JUSTICE STEVENS: Your principal argument, that
14 there was no injury to competition.

15 MR. ENGLERT: That was the effect of such
16 discrimination, yes.

17 JUSTICE STEVENS: Okay. Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

19 The case is submitted.

20 [Whereupon, at 10:59 a.m., the case in the
21 above-entitled matter was submitted.]

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