IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 204

UNITED STATES OF AMERICA, *Appellant*,

v.

ALUMINUM COMPANY OF AMERICA and
ROME CABLE CORPORATION

APPELLEES' PETITION FOR REHEARING

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Appellees petition for rehearing of this Court's decision reversing the District Court's judgment dismissing the Government's complaint under Section 7 of the Clayton Act (15 U.S.C. 18, as amended). Rehearing is requested because this Court has either misconceived or failed to consider basic market and economic facts found and relied upon by the District Court.

1. LINE OF COMMERCE

Meticulously applying the guidelines laid down by this Court in *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 325 (1962), the District Court found and concluded that the wire and cable insulating business is not divisible into separate copper and aluminum "areas of effective competition" and that "aluminum conductor," a composite of bare and insulated aluminum products, also is not a proper line of commerce. In overturning those determinations, this Court has either ignored or repudiated the District Court's unchallenged findings of fact, notwithstanding the mandate of Rule 52(a), Fed. Rules of Civil Procedure, and has substituted its subjective, *ad hoc* judgment for the pragmatic appraisal based on established criteria called for by *Brown Shoe.*

(a) Insulated Aluminum Conductor

This Court's conclusion that insulated aluminum conductor is a separate "area of effective competition" rests entirely on the price differential between aluminum and copper in two simple products. Appellees concede, and the District Court found, that a price difference exists; but, as the dissent points out, to characterize price as "the single, most important, practical factor in the business" (Slip Op. 5), is utterly incompatible with the District Court's unchallenged finding of fact that in the purchase of these products, the utility customer's decision "requires evaluation of numerous economic factors in addition to the cost of the wire or cable itself" (Fdg. 28, R. 1289; Dissent, Slip Op. 5).

But even if price actually were the "single, most important, practical factor" in the purchasing of wire

and cable, it would still be erroneous to define line of commerce without regard to the many other relevant economic factors enumerated by this Court in *Brown Shoe*. It is only by ignoring these factors, and the District Court's unchallenged findings relating thereto, that this Court is able to make the following assertion:

> As the record shows, utilizing a high cost metal, *fabricators of insulated copper conductor* are powerless to eliminate the price disadvantage under which they labor and thus can do little to make their product competitive, *unless they enter the aluminum field.* (Slip Op. 4) (Emphasis added)

This assertion, which is central to this Court's line of commerce conclusion, conflicts irreconcilably with the District Court's findings as to the nature of competition in the insulating business.

First. Contrary to the Court's question begging assumptions, there is neither a separate group of "fabricators of insulated copper conductor" nor a separate "aluminum field." This is shown, *inter alia,* by the District Court's undisputed findings that manufacturers regard themselves simply as "insulators of wire and cable products, not as insulators of copper wire and cable on the one hand, or of aluminum wire and cable on the other" (Fdg. 26, R. 1288); that insulated products are defined according to their function or type, "not according to the metal used as conductor" (Fdg. 25, R. 1288); and that the aluminum field "is not recognized in the industry as a separate economic entity" (Opin., R. 1316).

Second. The inability of producers to make their products competitive, except by entering a new field,

is unquestionably a meaningful factor in defining submarket boundaries. Indeed, this was recognized in *Brown Shoe* where this Court included among the practical indicia to be examined in determining such boundaries "unique production facilities," "distinct customers," and "specialized vendors." The significance of these indicia is that where one or more of them exists, manufacturers of product B cannot easily make and sell product A, and, therefore, the two products need not be combined in a single submarket.

Here, however, the District Court's uncontested findings make clear that not one of these practical factors operates to place "fabricators of insulated copper conductor" outside "the aluminum field." Thus, for example, the District Court found that there are not unique production facilities, specialized vendors, or distinct customers (Opin., R. 1316); that "the numerous manufacturers of insulated wire and cable constantly review their product lines and switch readily from one product or conductor metal to another in accordance with market conditions" (Fdg. 56, R. 1294-95), using "the same equipment and . . . the same personnel" on either copper or aluminum (Fdg. 27, R. 1288); and that manufacturers not presently making insulated aluminum products would do so if profitable orders were obtained (Fdg. 56, R. 1294-95). These and other findings (e.g., Fdgs. 55, 84, 85, R. 1294, 1299, 1300) leave no doubt that there is only a single insulating business, and that all insulating fabricators can readily commence the manufacture of aluminum line wire and multiplex cable without "entering" into a new or different "area of effective competition."

In sum, this Court's conclusion that there is a separate, self-contained insulated aluminum conductor sub-

market cannot be reconciled with the District Court's detailed and uncontroverted findings that insulating fabricators move freely between copper and aluminum, shifting easily from one product and conductor metal to another in accordance with market conditions.

(b) Aluminum Conductor

This Court has declared the combination of noncompetitive bare and insulated aluminum conductor products to be a line of commerce (Slip Op. 5). Since, as the Solicitor General conceded in oral argument, this conclusion depends on also finding insulated aluminum conductor to be a separate line of commerce, we believe it is erroneous for all of the reasons set forth above. But even if insulated aluminum were separable from insulated copper, it does not follow that the mathematical sum of bare and insulated aluminum conductor products would be a proper line of commerce.

The Court defends this grouping on the ground that it "is a logical extension of the District Court's findings" since aluminum and copper wire and cable, both bare and insulated, were grouped together in a broad composite line of commerce. That combination, however, corresponds to the well-recognized wire and cable industry, whereas the District Court expressly found that the aluminum conductor composite is not "generally recognized in the industry as a separate economic entity or submarket" (Add'l Fdg. 4, R. 1336-37). Thus, as the dissent points out, this Court's holding on this point is not " 'a logical extension of the District Court's findings,' but a repudiation of those findings" (Dissent, Slip Op. 6).

Moreover, except for this Court's declaration that it "seems to us proper" to combine bare and insulated aluminum conductor products into one line of commerce, there is no basis in law, economics, or logic for holding this mathematical composite of noncompeting products to be a line of commerce. It does not meet the *Brown Shoe* submarket indicia; it is not a broad market since it does not embrace all reasonable interchangeable products (*Brown Shoe,* 370 U.S. at 325); nor, in view of the District Court's finding that it is not a recognized economic entity, can it properly be said that this amalgamation of non-competitive products forms a recognized industry, such as, the commercial banking and steel industries which were held to be lines of commerce in the *Philadelphia Bank* and *Bethlehem Steel* cases,[1] or, for that matter, the wire and cable industry. With all deference, we respectfully submit that it is nothing but a mathematical device originated by the Government for the purpose of giving this acquisition a deceptive and misleading appearance of numerical substantiality.

2. COMPETITIVE EFFECT

In *Brown Shoe,* this Court recognized that Congress did not enact a blanket prohibition of all mergers, but sought only to prevent "mergers having demonstrable anticompetitive effects" (370 U.S. at 319); while Congress was concerned with "probabilities, not certainties," nevertheless, "no statute was sought for dealing with ephemeral possibilities" (370 U.S. at 323). In *Philadelphia Bank,* the Court recognized the com-

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[1] *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 357 (1963); *United States* v. *Bethlehem Steel Corp.,* 168 F. Supp. 576, 593 (1958).

plexity and difficulty of the competitive effect question "in most cases," and established a carefully circumscribed simplified test of illegality (374 U.S. at 362-63).

In the present case, the Court has departed from the cautious, analytical approach charted in *Brown Shoe* and *Philadelphia Bank,* and has reversed the District Court on the basis of market share statistics which have absolutely no competitive significance. To the extent the Court has attempted to confer such significance by relying on the acquisition's economic setting, we respectfully submit that its opinion repudiates the District Court's findings of fact.

(a) This Court has based its conclusion of illegality on market percentages that have absolutely no competitive significance. Alcoa's 27.8 per cent in 1958 consisted predominantly (more than 90 per cent) of bare aluminum cable, while Rome's 1.3 per cent consisted predominantly (more than 80 per cent) of insulated aluminum conductor. Since bare and insulated products are used for different purposes and are not even claimed to be competitive with each other, the composite percentages do not manifest any "inherently anticompetitive tendency." *Philadelphia Bank,* 374 U.S. at 366. Rather, they obscure the fact that Alcoa and Rome had fundamentally different interests and strengths in the wire cable field, and, as the District Court found, were not substantially competitive with each other (Fdg. 52, R. 1294; Fdgs. 77 and 78, R. 1298-99).

(b) Nearly 80 per cent of the composite aluminum conductor line consists of bare aluminum cable. With respect to this product, Alcoa, in 1958, held a leading, though rapidly declining, position. Rome, however,

which was and is primarily a manufacturer of insulated copper products, was *de minimis,* with only .3 per cent of the market, and no appeal was taken from the District Court's ruling that the prohibited anticompetitive effect had not been shown with respect to bare aluminum cable. Nevertheless, this Court's reversal of the District Court rests almost entirely on Alcoa's bare aluminum cable shipments, which account for more than 90 per cent of its total aluminum conductor shipments.

(c) Even if Rome's 1.3 per cent is considered without regard to its composition, it is concededly small. Nevertheless, the Court pronounces that "in this setting [it] seems to us reasonably likely to produce a substantial lessening of competition . . ." (Slip Op. 8). We respectfully submit that this Court's conception of the "setting" of this acquisition conflicts at every material point with the District Court's concrete and thoroughly substantiated findings:

(i) An important factor in the "setting" of this merger is the substantial decline in Alcoa's market share, both before and after the Rome acquisition,[2]

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[2] These declines are summarized in the following table (based on Fdg. 45, R. 1292-93):

	1954		1958		1961	
	Alcoa	Rome	Alcoa	Rome	Alcoa	Rome
ACSR and Aluminum Cable, Bare	48.4	0.2	32.5	0.3	26.1	..
Aluminum Wire and Cable, Insulated or Covered	10.0	6.9	11.6	4.7	7.3	5.7
Aluminum Conductor Wire and Cable	42.8	1.1	27.8	1.3	23.5	1.3

as a result of which the Alcoa-Rome 1961 market share was more than 40 per cent below that held by Alcoa alone in 1954 and about 15 per cent below its 1958 share. This decline demonstrates not only that Alcoa does not hold a dominant or controlling position in the aluminum conductor field (Opin., R. 1326-27), but that this acquisition did not produce the "significant increase in the concentration of firms in" the relevant market upon which this Court based the rebuttable presumption of illegality in *Philadelphia Bank,* 374 U.S. at 363.[3]

(ii) Though acknowledging that decentralization has occurred, the Court asserts that it "resulted from the establishment of a few new companies through federal intervention, not from normal, competitive decentralizing forces" (Slip Op. 7). It should be noted, first of all, that charges that Alcoa monopolized aluminum cable were not sustained (*United States* v. *Aluminum Company of America,* 148 F. 2d 416, 438 (2d Cir. 1945)), and that federal intervention related primarily to the establishment of competitive ingot capacity. Only with respect to Kaiser may it be said that competition in the aluminum conductor field could, in any part, be attributed to government action. Moreover, the unsupported assertion that government intervention is the only decentralizing

[3] As Professor Bok states:

> [W]hile a declining market share may not imply that domination has ceased or is about to cease, it does interfere with the finding of a trend toward *increased* domination to which the merger can be related. Hence, it is hard to condemn such a merger otherwise than as a penalty for size and power achieved by other means at some other time. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics,* 74 Harv. L. Rev. 226, 282, n. 206 (1960).

factor operating is flatly contradicted by the District Court's undisputed finding that most of the nearly 30 companies that have "entered" the so-called aluminum conductor market were previously established wire and cable fabricators (Opin. R. 1323; Fdgs. 54, 57, R. 1294-95).[4] There is every reason to expect that the vigorous competition and complete ease of entry found by the District Court will facilitate still further decentralization (see note 5, *infra*).

(iii) As part of the "setting" in which Alcoa's acquisition of Rome's 1.3 per cent is said to be unlawful, the Court observes: "It would seem that the situation in the aluminum industry may be oligopolistic" (Slip Op. 8). Whatever might be the validity of this tentative and equivocal appraisal of the aluminum industry, this case involves the so-called aluminum conductor market. As to it, the District Court found that "there is vigorous competition among all manufacturers of aluminum conductor . . . products" (Fdg. 62, R. 1295), that there is great ease of entry (Opin. R. 1323), and that this acquisition neither diminished the vigor of competition (Fdg. 69, R. 1297) nor changed the condition of entry (Fdg. 58, R. 1295).

(iv) As further justification for condemning this acquisition, nothwithstanding Rome's small market share, the Court observes that a tendency to oligopoly

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[4] In 1955, prior to becoming a primary aluminum producer, Anaconda accounted for 10.7 per cent of total aluminum conductor shipments. In addition, Southern Electrical, which was an 8.1 per cent factor prior to being acquired by Olin-Mathieson in 1957, and numerous other companies, e.g., General Cable, Central Cable, Essex, Southwire, Nehring, also became vigorous competitors in aluminum conductor wholly without government intervention (Gx 434; R. 2713-14).

may "be thwarted by the presence of small but significant competitors" (Slip Op. 9). Abstractly, this is true; as it relates to Rome, it is contrary to the District Court's undisputed findings that Rome "was not an aggressive price competitor," that it "adhered to a policy of not going below the prices of its competitors" (Fdg. 53, R. 1294), and that Alcoa had lost only an "insignificant" amount of aluminum conductor business to Rome in the two years preceding the acquisition (Fdg. 52, R. 1294). On the other hand, there are "many strong, well-financed and highly reputable concerns" in the wire and cable business (Fdg. 81, R. 1299), which either make aluminum conductor products or can "readily" do so with their "existing machinery and personnel" (Fdg. 56, R. 1294-95). These firms afford a potent safeguard against any tendency to oligopoly, and a broad potential for even further decentralization in the so-called aluminum conductor line of commerce.[5] These features of the competitive setting of this acquisition have been wholly disregarded by this Court.

(d) In *Philadelphia Bank,* this Court established a limited rebuttable presumption of illegality applicable only to a merger which produces "a firm controlling an undue percentage share of the relevant market, and results in a significant increase in . . . concentration . . ." (374 U.S. at 363). It found that this presumption applied to the bank merger there involved, and, after due consideration of the record evidence, con-

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[5] This process is already unfolding with General Electric and Circle having begun to expand their aluminum conductor sales, and Phelps Dodge planning to offer a line of aluminum conductor products (Appellees' Brief, pp. 68-69).

cluded that the presumption was not overcome (374 U.S. at 366-72).

Here the facts do not sustain a *Philadelphia Bank*-type presumption, since, among other things, the percentages combine noncompeting products and the merger did not produce a significant increase in concentration. But, apart from this basic deficiency, this Court has not even attempted to consider the District Court's unchallenged findings which, to a degree unparalleled in Section 7 cases, affirmatively establish the absence of probable anticompetitive effect. These findings, as more fully discussed in Appellees' Brief on the Merits (pp. 49-51, 78-83), establish, *inter alia,* that neither competitors nor purchasers have been or will be adversely affected by the acquistion; that there is extraordinary ease of entry; that the Alcoa and Rome market shares declined substantially before and after the acquisition; that Rome was not an aggressive price competitor; that there was not substantial competition between Alcoa and Rome in the sale of aluminum conductor products; that Alcoa's purpose was to secure insulating capability and diversification rather than expansion of its aluminum conductor facilities; that Alcoa has no history of prior acquisitions, or any plan for future expansion through mergers; and that there is vigorous competition which has not diminished as a result of the acquisition.

We respectfully submit that under the *Philadelphia Bank* decision, appellees are entitled to have these undisputed facts fairly considered before being subjected to "that most drastic . . . of antitrust remedies—divestiture." *United States* v. *E. I. duPont de Nemours & Co.,* 366 U.S. 316, 326 (1961).

3. RELIEF

With but one unique exception,[6] this Court has always held in antitrust cases that "[t]he determination of the scope of the decree to accomplish its purpose is peculiarly the responsibility of the trial court," *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 89 (1950), and that "[t]he framing of decrees should take place in the District rather than in Appellate Courts." *International Salt Co.* v. *United States*, 332 U.S. 392, 400 (1947). Thus, while it is clear that there will be careful scrutiny in this Court of the relief granted by a trial court in antitrust cases, "the responsibility *initially* to fashion the remedy" is in the District Court. *United States* v. *E. I. duPont de Nemours & Co., supra*, 366 U.S. at 323 (Court's emphasis).

Although divestiture is the usual remedy in Section 7 cases, *United States* v. *E. I. duPont de Nemours & Co., supra*, 366 U.S. at 328-29, circumstances may exist in which equitable relief short of divestiture may be adequate and appropriate. See *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), aff'd 365 U.S. 567 (1961); cf. *Brown Shoe*, 370 U.S. at 337, n. 65. In any event, the District Court should have an opportunity to determine in the first instance whether divestiture may be required.

For all of the foregoing reasons, we respectfully urge rehearing should be granted because, under the Court's opinion, appellees will be faced with the expense and dislocations of an enforced divestiture, notwithstanding the fact that by the objective standards

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[6] In *United States* v. *El Paso Natural Gas Co.*, 84 S. Ct. 1044 (1964) divestiture was ordered by this Court in unusual circumstances in no way comparable to those of this case.

established by this Court in prior cases, the District Court's dismissal of the Government's complaint was clearly correct.

Respectfully submitted,

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CERTIFICATE

The foregoing petition for rehearing is believed to be meritorious and is presented in good faith and not for delay.

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