

CHAPTER VII: CDC FILES THE LAWSUIT AGAINST IBM

THERE IS A TIDE IN THE AFFAIRS OF MEN, WHICH, TAKEN AT THE FLOOD, LEADS ON TO FORTUNE,---- (Shakespeare).

HIGH TIDE FOR THE DECISION TO SUE IBM WAS APPROACHING IN THE FALL OF 1968. A KEY DATE WAS THAT OF THE ANNOUNCEMENT OF THE IBM 360 SERIES IN APRIL OF 1964. SINCE THE STATUTE OF LIMITATIONS ON EVIDENCE IN A LAWSUIT IS FOUR YEARS, IT WAS IMPORTANT TO FILE THE SUIT IN 1968.

ALSO WITH THE PASSAGE OF TIME THE TRAIL LEFT BY IBM DEPREDATIONS WOULD FADE. PEOPLE'S MEMORIES WOULD DIM AND FILES WOULD BE SCATTERED.

THERE WAS BOTH THE SUBSTANTIVE AND THE SUBJECTIVE ON WHICH TO BASE A DECISION. ALTHOUGH THE SUBSTANTIVE WAS IMPORTANT AND SUPPCRTIVE, THE CLINCHER IN THE DECISION WAS THE SUBJECTIVE.

ON THE SUBSTANTIVE SIDE THERE WERE PUBLICLY AVAILABLE MARKET SHARE STUDIES WHICH SHOWED IBM'S SHARE IN THE SEVENTY TO EIGHTY PERCENT RANGE IN IMPORTANT SEGMENTS. THEN THERE WAS IBM'S HUGE SIZE, HUGE PROFITS, THE EVIDENCE OF PAPER MACHINES AND BUNDLED PRICING.

ON THE OTHER HAND, IN THE CONTEXT OF A LAWSUIT, THE SUBSTANTIVE WAS SKIMPY. OUR LAWYERS WARNED THAT THERE WOULD

BE GREAT DIFFICULTY WITH MARKET DEFINITION DUE TO ITS COMPLEXITY. IBM WOULD CERTAINLY CLAIM SPECIAL PURPOSE COMPUTERS, SUCH AS THOSE USED IN THE MILITARY, AS PART OF THE RELEVANT MARKET TO REDUCE ITS MARKET SHARE.

THE LAWYERS ALSO MADE IT CLEAR THAT SECTIONS OF THE SHERMAN ANTI-TRUST ACT CONTAINED SOME OF THE MOST VAGUE AND IMPRECISE LEGAL STANDARDS OF ANY STATUTE. THE EVIDENCE REQUIRED TO WIN A CASE IS EXTENSIVE IN BOTH QUALITY AND QUANTITY. WOULD THE EVIDENCE BE FOUND TO SUPPORT OUR CASE? ONLY BY GOING THROUGH THE ACTUAL LEGAL DISCOVERY PROCESS WOULD WE KNOW.

NOT INCONSEQUENTIAL WAS THE TECHNICAL COMPLEXITY OF THE CASE. EXPERTS COULD GRASP THE MAGNITUDE OF IBM'S WRONGDOINGS, WOULD THE JUDGE? OR OF MORE CONCERN WERE THE JURY MEMBERS WHO WOULD HAVE EVEN GREATER DIFFICULTY BECAUSE OF LACK OF THE JUDGE'S BACKGROUND IN LAW. IN OTHER WORDS, CDC MIGHT HAVE A COMPELLING CASE, BUT IF THE JUDGE OR JURY DIDN'T SEE IT, THEN IT WAS ALL TO NO AVAIL.

THE BASIS OF THE SUBJECTIVE WAS LARGELY A DISTILLATION OF THE IDEAS, OBSERVATIONS AND CONVICTIONS GAINED FROM SEVERAL LAWYERS, TRULY GREAT PERSONS WITH WHOM I HAD FORTUNATELY BEEN ASSOCIATED FOR MANY YEARS. THESE MEN WERE MUCH MORE THAN HIGHLY COMPETENT LAWYERS -- THEY HAD THE ACCUMULATION OF WISDOM THAT IS ONLY GAINED FROM HIGHLY VARIED EXPERIENCES -- THEY WERE OF HIGH MORAL CHARACTER -- MOST IMPORTANT THEY WERE MEN OF HEART.

EACH IN HIS OWN WAY MADE CONTRIBUTIONS THAT IN THE AGGREGATE GAVE ME EXTRA INNER COMFORT REGARDING THE DECISION TO PROCEED WITH THE LAWSUIT.

RUSSELL BAKER WAS THE MOST SENIOR OF THOSE CONSULTED. AT THE TIME HE HEADED THE WORLD'S LARGEST LAW FIRM -- BAKER & MCKENZIE, HEADQUARTERED IN CHICAGO. WHEN HE WAS SEVENTEEN YEARS OLD RUSSELL BAKER CAME TO CHICAGO FROM NEW MEXICO ON A CATTLE TRAIN. "IT WAS COLDER THAN HELL", HE RECALLS, "BUT I COULD SIT ON THE BACKS OF THOSE FAT STEERS. THEY WERE NICE AND WARM". HE WORKED HIS WAY THROUGH THE UNIVERSITY OF CHICAGO LAW SCHOOL, SWEEPING FLOORS. UPON GRADUATION, HE DECIDED TO START A FIRM PRACTICING INTERNATIONAL LAW. HIS FIRST CLIENTS WERE MEXICAN NATIONALS, WHO HAD BEEN DISCRIMINATED AGAINST ON THE BASIS OF PREJUDICE AND NOT EVIDENCE. BAKER'S DEFENSE OF ONE MEXICAN WAS SO SPIRITED THAT A ROUGHNECK JUDGE PUT HIM IN JAIL. DEFENDING THESE ECONOMIC REFUGEES DIDN'T PAY VERY WELL, BUT RUSSELL BAKER BEGAN TO GAIN THE EXPERIENCE THAT HELPED TO BUILD THE LARGEST INTERNATIONAL LAW FIRM.

WHEN CONTROL DATA EMBARKED ON MAJOR EXPANSION OVERSEAS, WE ENGAGED RUSSELL BAKER TO HELP US STRUCTURE OUR MANY FOREIGN SUBSIDIARIES. AS A RESULT, HE BECAME VERY FAMILIAR WITH

OUR BUSINESS. BECAUSE OF THIS AND HIS BROAD ARRAY OF EXPERIENCES WE SOUGHT HIS ADVICE WITH RESPECT TO IBM. HIS RESPONSE WAS TERSE -- "BILL, YOU OWE IT TO IBM TO SUE THEM." NOT ONLY WAS THIS THE MOST SUCCINCT LEGAL ADVICE I EVER RECEIVED, IT WAS MY ONE AND ONLY EXPERIENCE WHERE I RECEIVED UNEQUIVOCAL ADVICE BY A LAWYER OF HIGH REPUTE TO SUE.

RUSSELL BAKER WAS INTRODUCED TO ME AND CONTROL DATA BY ROBERT LEACH, A MEMBER OF CONTROL DATA'S BOARD OF DIRECTORS FROM ALMOST DAY ONE OF THE COMPANY. BOB LEACH WAS ALSO THE CONNECTING LINK, AS WILL BE EVIDENT LATER, WITH THE OTHER TWO LAWYERS THAT CONTRIBUTED TO THE SUBJECTIVE.

BOB GREW UP IN A SMALL TOWN IN NORTHERN MINNESOTA AND CAME INTO THE PRACTICE OF LAW VIA HARVARD LAW SCHOOL AND A PARTNERSHIP IN THE ST. PAUL OPPENHEIMER LAW FIRM.

ABOUT A YEAR AFTER CONTROL DATA HAD OPENED ITS DOORS FOR BUSINESS IN 1957, SPERRY RAND FILED A LAWSUIT ALLEGING THAT CONTROL DATA HAD MISAPPROPRIATED COMPUTER TRADE SECRETS. THIS COULD HAVE BEEN A FATAL BLOW TO A FLEDGLING COMPANY STRUGGLING FOR SURVIVAL WITH BARELY ENOUGH CASH TO MEET THE PAYROLL AT TIMES, LET ALONE ENOUGH TO FINANCE A COSTLY DEFENSE IN A LAWSUIT.

BUT IT WASN'T FATAL. BOB LEACH STUDIED THE SPERRY RAND CHARGES FOR A FEW DAYS AND THEN ANNOUNCED THE FOLLOWING:

"YOU SAY THE CHARGES ARE UNFOUNDED. THE CASE IS TOO COMPLEX FOR THE OPPENHEIMER FIRM TO HAVE A PRELIMINARY OPINION. I HAVE DISCUSSED IT WITH MR. "O" (LEACH'S ALWAYS VERY REVERED REFERENCE TO THE SENIOR PARTNER, MR. OPPENHEIMER), AND OUR FIRM WILL REPRESENT CONTROL DATA. WE ARE IN IT ALL THE WAY, WIN OR LOSE. IF THE LEGAL BILL IS \$500,000 AND YOU CAN ONLY AFFORD \$5,000, WE WILL TAKE THAT IN FULL PAYMENT AND WON'T HOLD THE BALANCE OVER YOUR HEAD THE REST OF YOUR LIFE. HOWEVER, IF CONTROL DATA IS SUCCESSFUL, WE WOULD EXPECT THAT YOU WOULD GIVE US SOME BUSINESS." CONTROL DATA NOT ONLY WON THE CASE, BUT WAS ABLE TO PAY NORMAL LEGAL FEES.

TEN YEARS LATER, NORB BERG, ONE OF CONTROL DATA'S SENIOR EXECUTIVES, WROTE ME A MEMORANDUM -- SUBJECT MATTER: SOME THOUGHTS. HERE ARE SOME EXCERPTS FROM IT.

"AS YOU KNOW, THE TOWNSEND BOOK, UP THE ORGANIZATION, IS A CURRENT BEST SELLER. THE OTHER DAY I WAS BROWSING THROUGH THIS CONDENSATION AGAIN AND I RAN ACROSS THE ITEM ON DIRECTORS. TOWNSEND'S PRETTY HARD ON DIRECTORS AND HE SAYS AT ONE POINT, 'DIRECTORS AND THE LIKE SPEND VERY LITTLE TIME STUDYING AND WORRYING ABOUT YOUR COMPANY.' I THOUGHT ABOUT THIS, AND THIS STARTED A CHAIN OF THOUGHT ABOUT BOB LEACH AND HOW, BY WAY OF EXAMPLE, TOWNSEND'S COMMENTS REGARDING THE BOARD OF DIRECTORS JUST DON'T APPLY TO SOMEONE LIKE LEACH. OBVIOUSLY, TOWNSEND NEVER HAD A BOB LEACH ON HIS BOARD.

"I REMEMBER ALSO HIS INTENSE INVOLVEMENT IN STRAIGHTENING OUT THE BETTIS AND KAPL CONTRACT MESSAGES WHICH THREATENED TO CHOKE US THE LAST TIME THE COMPANY WAS SERIOUSLY IN TROUBLE.

"HIS JUDGMENT, HIS QUESTIONS, AND HIS ADVICE CERTAINLY HELPED MAKE THE IBM LAWSUIT DECISION A CLEARER DECISION.

"UNDOUBTEDLY, HOWEVER, HIS GREATEST CONTRIBUTION IS THAT OVER THE YEARS HE HAS SERVED AS SOMEONE THAT YOU CAN TURN TO WHEN YOU NEED FRANK ANSWERS AND SOUND ADVICE. HE HAS SERVED AS SOMEONE WHO WILL BE HONEST WITH YOU WHETHER OR NOT IT'S THE ANSWER YOU WANT TO HEAR. COUPLED WITH YOUR RESPECT FOR HIS JUDGMENT, THIS HAS MADE HIM AN INVALUABLE ALLY TO CONTROL DATA.

"I WONDER HOW MANY OTHER CHIEF EXECUTIVE OFFICERS HAVE SOMEONE LIKE THIS. I'M SURE THAT ALL WISH THEY DID. AS I SAID EARLIER, TOWNSEND DIDN'T HAVE A BOB LEACH ON HIS BOARD."

JAMES ROWE, A MEMBER OF THE WASHINGTON, D.C. LAW FIRM OF CORCORAN, YOUNGMAN & ROWE, WAS IN THE SAME HARVARD LAW SCHOOL CLASS WITH BOB LEACH.

JIM WAS BORN IN MONTANA. AS A YOUNG LAWYER HE WAS A CLERK FOR JUDGE OLIVER WENDELL HOLMES. HE HAD A GREAT INTEREST IN POLITICS, NOT AS A PUBLIC OFFICE HOLDER, BUT IN THE PROCESSES OF POLITICS AND GOVERNMENT. HE DIVIDED HIS TIME BETWEEN THE PRACTICE OF LAW AND PARTICIPATION IN MANY POLITICAL CAMPAIGNS BY BEING THE MANAGER, OR PARTICIPATING ON A CAMPAIGN COMMITTEE.

FOR EXAMPLE, HE MANAGED ELECTION CAMPAIGNS FOR MONTANA'S SENATOR MANSFIELD. HE MANAGED HUBERT HUMPHREY'S UNSUCCESSFUL CAMPAIGN FOR THE VICE PRESIDENCY AGAINST JACK KENNEDY.

JIM AGREED TO BECOME WASHINGTON COUNSEL FOR CONTROL DATA AT THE REQUEST OF BOB LEACH. CONTROL DATA WAS HAVING TOUGH-SLEDDING IN THE MIDDLE SIXTIES FROM THE RELENTLESS, UNFAIR COMPETITIVE PRACTICES OF IBM. AS POINTED OUT EARLIER, IN OUR ALMOST FRANTIC STRUGGLES FOR SURVIVAL, WE AGREED TO ACCEPT TWO ONEROUS GOVERNMENT CONTRACTS -- BETTIS AND KAPL. BOB LEACH WAS TERRIBLY CONCERNED THAT THESE CONTRACTS WOULD CAUSE CONTROL DATA IRREPARABLE HARM AND URGED THAT WE ENGAGE JAMES ROWE TO HELP GET EQUITABLE TREATMENT BY THE GOVERNMENT. WE AGREED.

WHEN APPROACHED, JIM INDICATED THAT HE HAD REACHED THE POINT IN HIS PRACTICE WHERE HE HAD STOPPED ACCEPTING NEW CLIENTS, BUT THAT HE WOULD AT LEAST CONSIDER CONTROL DATA'S NEEDS. HE FINALLY DECIDED TO ACCEPT ON THE BASIS "I BELIEVE I CAN HELP THAT COMPANY, AND THAT IS THE SORT OF THING I MOST WANT TO BE DOING."

JIM ROWE DID INDEED HELP CONTROL DATA. HE WAS ABLE TO KEEP US ABREAST OF THE THINKING IN THE U.S. DEPARTMENT OF JUSTICE REGARDING ACTION TO CORRECT THE UNBALANCED COMPETITIVE SITUATION IN THE COMPUTER INDUSTRY. EQUALLY IMPORTANT, HE WAS ALWAYS ALERT TO A BROAD SPECTRUM OF SIGNALS AND HE MORE THAN

ANYONE ELSE PERCEIVED THAT IBM WAS SMARTING FROM MY FREQUENT PUBLIC AND HIGHLY UNCOMPLIMENTARY STATEMENTS ABOUT THEIR RUTHLESS MARKET TACTICS. HIS OCCASIONAL OBSERVATION, "BILL, YOU ARE GETTING UNDER THEIR SKIN", WAS GREAT ENCOURAGEMENT TO ME AND I INTENSIFIED MY BLASTS. IT WAS ONLY AFTER SETTLEMENT TALKS GOT HUNG UP ON THE LACK OF ASSURANCE THAT THIS WOULD STOP DID I APPRECIATE FULLY HOW RIGHT JIM ROWE WAS.

LAST, BUT BY NO MEANS LEAST, WAS JOHN ROBERTSON, WHO WAS A PARTNER IN LEACH'S LAW FIRM. HE WAS SELECTED BY BOB LEACH TO LEAD THE INVESTIGATIVE EFFORT LEADING UP TO THE IBM LAWSUIT.

JOHN WAS A

JOHN ROBERTSON WAS THE LAWYER WHO HAD THE INITIAL CONVICTION THAT IBM WAS GUILTY OF ANTI-TRUST VIOLATIONS AND THAT IT COULD BE PROVEN. NOT ALL MEMBERS OF THE OPPENHEIMER FIRM SHARED HIS OPINION.

BOB LEACH'S FIRST REACTION WAS THAT IT WAS INCREDIBLE, THAT I MUST BE BEING MISLED BY SALESMEN, THAT IT'S WELL KNOWN THAT SALESMEN ARE POOR LOSERS AND THAT THEY CAN CONJURE UP LOTS



OF REASONS FOR LOSING, AND THAT AFTER ALL, IBM IS A VERY WELL KNOWN, HIGHLY RESPECTED COMPANY AND THAT THE MANY ALLEGATIONS OF MISCONDUCT AND ANTI-TRUST VIOLATIONS WEREN'T BELIEVABLE.

THERE WERE NUMEROUS MEETINGS WHERE JOHN AND I WOULD BE TALKING ABOUT IBM'S ACTIONS AND WE WOULD BUILD UP ENTHUSIASM FOR FILING A LAWSUIT. LEACH WOULD SAY, "NOW WAIT A MINUTE, JOHN, YOU'RE A LAWYER. IT'S YOUR JOB TO TAKE THE OPPOSITE POINT OF VIEW, TO BE EXTRA CAUTIOUS." ROBERTSON'S RETORT, "I BELIEVE THE EVIDENCE IS THERE." LATER ON, AS MORE INFORMATION BECAME AVAILABLE EVEN BOB LEACH CAME TO BELIEVE THAT THERE WAS A REASONABLE BASIS FOR A LAWSUIT.

BOB LEACH'S QUESTIONS, HIS DEEP CONCERN FOR NOT BEING MISLED BY QUICK ANSWERS AND HIS JUDGMENT, AS BERG CORRECTLY POINTED OUT, MADE THE IBM LAWSUIT DECISION A CLEARER DECISION.

AT THE SAME TIME JOHN ROBERTSON'S ABSOLUTELY UNWAVERING, EVER GROWING CONVICTION THAT THERE WERE ANTI-TRUST VIOLATIONS AND THAT THE EVIDENCE WOULD BE FOUND, WAS NEVER TO BE EVEN REMOTELY CHALLENGED BY THE MOST ARDENT DOUBTERS.

AS WILL BE MENTIONED LATER, THERE WERE ALSO OTHER LAWYERS IN THE OPPENHEIMER FIRM WHO WERE DOING BRILLIANT AND DEDICATED WORK IN SUPPORT OF ROBERTSON.

IN SUMMARY, THE SUBJECTIVE WAS: "YOU OWE IT TO IBM TO SUE THEM"... "YOU ARE GETTING UNDER THEIR SKIN"... "I'M CONVINCED THAT THERE ARE ANTI-TRUST VIOLATIONS AND THAT THE SUPPORTING EVIDENCE CAN BE FOUND"... "AT FIRST I DIDN'T BELIEVE IBM COULD BE DOING THOSE RUTHLESS THINGS". ALL SAID BY HIGHLY COMPETENT LAWYERS FOR WHOM I HAD THE GREATEST RESPECT, AND IT WAS OF TREMENDOUS BENEFIT IN HELPING ME TO CONCLUDE THAT A LAWSUIT SHOULD BE FILED.

IT IS ONE THING TO COME TO SUCH A CONCLUSION, BUT QUITE ANOTHER TO BE ASSURED OF THE MASSIVE SUPPORT THAT WOULD BE ESSENTIAL BY MANY OTHERS IN THE ORGANIZATION. THAT WAS THE NEXT TASK AT HAND.

THIS EFFORT BEGAN WITH THE MARKETING ORGANIZATION. THEY WERE THE ONES IN THE TRENCHES FIGHTING OFF THE RUTHLESS IBM ATTACKS.