Some Other Views of Supreme Court Hearing of Casey Issues

By Monroe S. Miller

The significance of the pending Supreme Court decision in the Town of Casey vs. Mortier suit on the future of golf course management is formidable. The result may be a continuation of state and federal regulation of pesticide use, or it may mean that each of the over 80,000 local units of government in our country will present its own set of regulations.

To give GRASS ROOTS *readers a broader view of the Supreme Court proceedings, following you will find excerpts from a variety of publications on the Casey subject, the Supreme Court arguments and implications of the decision on American agriculture.*

Tree Trial: *Highest court to rule on spraying dispute*

(From the May 12, 1991 edition of *THE MILWAUKEE JOURNAL*)
By Mark Lisheron of The Journal staff

Spooner, Wis.—From the start, Ralph Mortier believed a town ordinance blocking herbicide use on his forest land was bad public policy and suspected it was plain bad law.

Now Mortier, who has fought the ordinance in the courts for five years, awaits a decision by the US Supreme Court.

Mortier, 68, a retired Department of Natural Resources forester, said he never envisioned standing before the august justices as he and his wife, Joyce, did during arguments heard last month in Washington. Once on his way, Mortier said, he never doubted the propriety of his fight or questioned the sacrifices he has had to make.

Mortier was told to expect a ruling earlier this summer. The decision will affect municipalities in Wisconsin and 11 other states that joined in the battle by filing briefs. The impact of his case is deeply satisfying to him.

"The simplest way to put it is that I am satisfied that I have had my day in court," he said at his rustic home overlooking a tree-lined field.

"I have had my dispute before a tribunal of the highest court in the land. It was very impressive."

Dressed in a plum-colored flannel shirt, he speaks cautiously. On the advice of his Madison attorneys, he declined to discuss specifics about the case or the cost of his court battle.

Ethics and Public Policy

He is more comfortable talking about ethics and public policy, concerns that brought him to court in the first place.

Before leaving the DNR for private forest consulting work in 1979, Mortier amassed 2,000 acres of forest in small parcels purchased throughout Washburn, Burnett, Douglas, and Bayfield Counties.

In the early 1960s, he had begun to improve the land by harvesting and selling for firewood the scrub oak that made up most of the trees on his property, clearing away the ground vegetation with herbicide and planting lumber-quality pine trees.

"It was a matter of an ethic. As a forester I wanted to see forest land produce at its highest potential," he said. "At the same time I was increasing the value of the land that will ultimately be a part of my estate."

In 1985, he intended to use a harvesting and herbicide method to alter 20 of the 200 acres of forest property he owns in the Town of Casey, 10 miles northwest of Spooner. The town had just adopted an ordinance giving it the power to approve herbicide use and to fine violators $5,000 a day.

Mortier studied the ordinance, selected a herbicide and a spraying method used by Washburn County foresters on county trees and informed the town of his intention. The Town Board denied his spraying application and limited ground application to 10 acres because the property was too close to a lake, he said.

In spite of claims that the herbicide was safe, the board upheld its decision. Mortier halted his herbicide use but decided to go to court.

"I believed they were imposing unreasonable constraints on my ability to manage my land effectively," he said. "I didn't have the guts to face up to the penalties so I organized a legal challenge."

Went to Court

With the legal aid of the Forestry, Right of Way and Turf Coalition of Madison, Mortier began in 1986 arguing in Washburn County Circuit Court and to the state Supreme Court that the town unjustly usurped federal authority over herbicide regulation. Both courts agreed with Mortier.

While he bears no grudge against Town Board members, he said they created an ordinance because they were "preyed upon by a coalition of anti-chemical and anti-management people." That is Mortier's definition of the country's environmental movement.

Mortier chooses his words, he said, to ensure that he does not sound like some embittered radical.

"These are good people, nice people who are being misled," he said of the Town Board. "I think it's poor public policy to force the responsibility of deciding technical issues on a level of government least equipped to make decisions on a scientific basis."

Mortier has in the past five years refrained from using herbicides until the case is decided. Washburn County is not waiting.

County Forest Administrator James Varro acknowledged that the county would be applying herbicides on forest land within the Town of Casey without approval sometime within the next week, in accordance with the state Supreme Court ruling.

Varro declined to discuss the county's herbicide program.

Mortier said he would return to his land improvement program with a favorable decision from the Supreme Court. Three of his four children work with him in forest consulting and on the family property.

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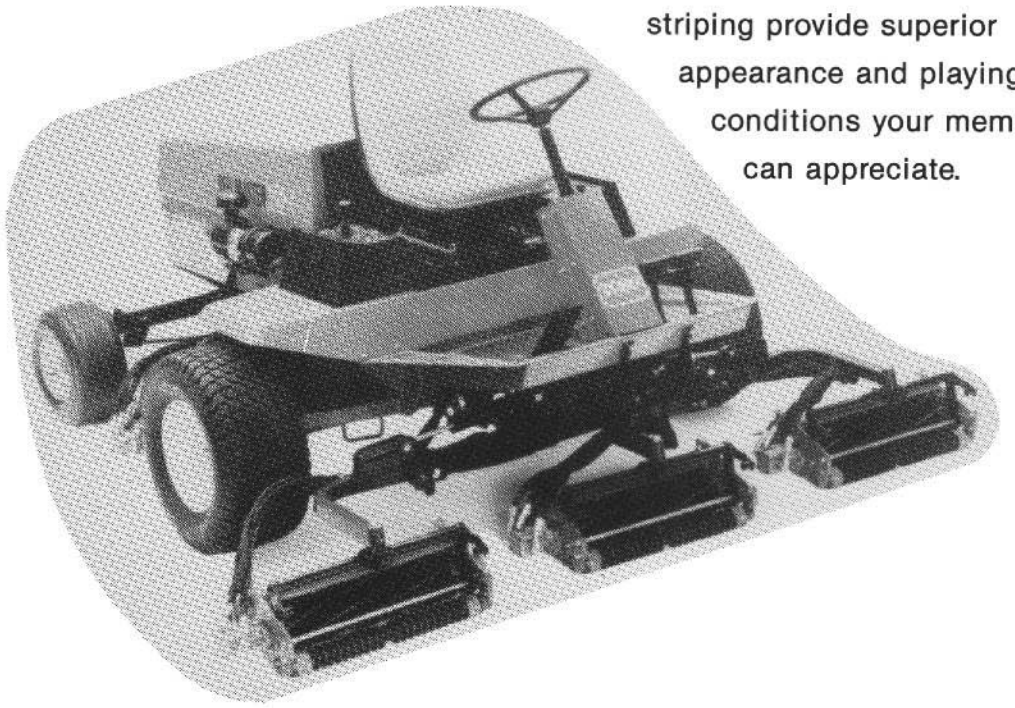

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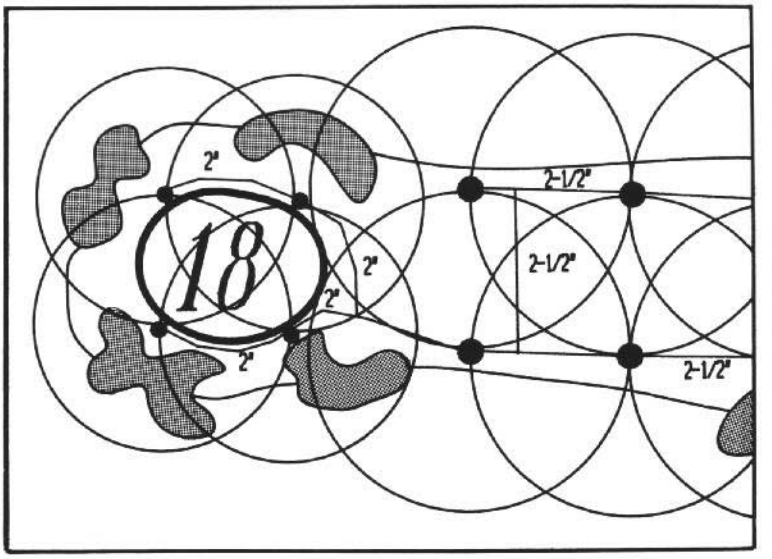

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(Continued from page 31)
"My family has been supportive," he said. "Sometimes I wonder why I did it. It's been a substantial part of my life and it ain't been free. But it is important."

Supreme Court Takes On Local Pesticide Laws

(From the May 1991 issue of *FARM CHEMICALS* magazine)

In February, *FARM CHEMICALS* reported that the U.S. Supreme Court agreed to rule on a Casey, WI case, deciding if local units of government can make pesticide ordinances that preempt federal and state law (Feb. FC, page 12). On April 24, each side was allowed 30 minutes of oral arguments before the Court, and a decision by the justices should follow this summer.

The case involves a Casey town ordinance that requires a permit to apply herbicides. In 1984, Ralph Mortier requested a permit to aerially apply Roundup on a 20-acre Christmas tree planting. His permit was denied, and in September 1986, he joined with the Wisconsin Forestry/Rights-of-Way/Turf coalition to file a suit against the town of Casey in the county's circuit court.

So began the road to the U.S. Supreme Court. Both the circuit court and eventually the Wisconsin Supreme Court ruled in favor of Mortier, declaring the Casey ordinance void and preempted by federal law.

At the U.S. Supreme Court level several amicus or "friend of the court" briefs have been filed on both sides. These will be key in the Court's decision. For instance, the attorney generals of 10 states signed a brief submitted by the state of Hawaii that supported local authority—among them Illinois, Kansas, and Missouri. The state of California filed a brief, signed by five other states, in support of the original Wisconsin rulings.

Widespread Implications

Russ Weisensel, executive director of the Wisconsin Forestry/Rights-of-Way/Turf coalition, points out there is potential for 80,000 different sets of local ordinances in the U.S. A grower or applicator whose acreage spreads across multiple jurisdictions could need multiple permits.

The Wisconsin State Department of Agriculture, Trade, and Consumer Protection is also concerned about such a complicated scenario, as is the state's Secretary of Natural Resources. "We make the point," says Weisensel "that there are some areas in FIFRA where Congress specifically granted coordination with local governments—and there are some places it stood silent. In those silent areas, local government authority was intended to be preempted."

You Can Help

As the Wisconsin Forestry/Rights-of-Way/Turf coalition faces the final phase of this landmark case, they need your help. Attorney fees, legal research, and travel have all been costly, and coalition funds are low. If you can help, contact the coalition at 608-249-2323.

Supreme Court will review case of applicator vs. city

(From the May 1991 issue of *LANDSCAPE MANAGEMENT*)

WASHINGTON—A case heard by the U.S. Supreme Court on April 24 will affect the green industry. The case was to decide if local governments are permitted to restrict pesticide and other chemical applications, or if state or federal laws override local ordinances.

The high court was to hear an appeal stemming from Casey, Wisc., and the state's Office of Public Intervenor.

With local governments nationwide often enacting stricter pesticide laws than those contained in the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), the Casey suit is seen by many to be precedent-setting. Conflicting court rulings from state supreme courts and federal appeal courts have also clouded this issue.

In "Wisconsin Public Intervenor vs. Mortier," the Supreme Court could uphold or reverse a March, 1991 Wisconsin State Supreme Court ruling which in a 4-3 vote upheld two previous lower court rulings that local pesticide regulations are pre-empted by federal and state laws.

In 1981, the City of Casey passed a resolution prohibiting pesticide and herbicide use on public lands and along roadways in the adjacent township. In 1983, a similar law regarding herbicides was included a public hearing clause.

A July, 1984 local resolution modifies procedures for herbicide application on public lands or private lands which the public might use. It also specifies aerial application procedures.

In the specific case before the court, local land owner Ralph Mortier applied to the township to spray 20 acres to prepare the site for Christmas tree plantings. Casey officials denied Mortier's permit, but allowed him to spray 10 acres by hand.

Mortier challenges the local ordinance which was updated in 1985 to include all pesticides and fungicides not included in the original law.

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(Continued from page 33)

Mortier has been supported by the Wisconsin Forestry/Rights-of-Way/Turf Coalition. The state's Office of Public Intervenor represents the city.

In May, 1988, a U.S. Circuit Court of Appeals voided the Casey regulations, ruling federal and state laws pre-empt local ordinances. That decision was upheld by the Wisconsin Supreme Court in March, 1990.

Russel R. Weisensel, executive director of the Forestry/Rights-of-Way/Turf Coalition, says that allowing such local controls makes it impossible for pesticide applicators to operate.

"If special local laws are needed, they should be part of an overall state plan," says Weisensel.

The coalition is a division of the Wisconsin Agri-Business Council, Inc.

"We are also concerned what this means for agriculture as well," says Weisensel, arguing a single farm tract could stretch over two or more local jurisdictions with differing application laws.

But Tom Dawson, the intervenor in the case, says the central issue is "whether local governments will continue to exercise their traditional role of protecting their areas locally.

"The floodgates are not about to open and if that (were true), the answer is not pre-emptive regulations. It is uniformity (in regulations) that everyone can be familiar and comfortable with," says Dawson.

Memorandum

(From a May 19, 1991 Memorandum from the NATIONAL AGRICULTURAL CHEMICALS ASSOCIATION)

Also on April 24, oral arguments were heard before The Supreme Court of the Wisconsin vs. Mortier case involving questions of FIFRA preemption of local pesticide regulation.

Arguing against preemption was Thomas Dawson for the Wisconsin Public Intervenor, and Lawrence Wallace for the United States. Paul Kent, an environmental law professor and private attorney from Wisconsin, presented argument for the landowner, Mr. Mortier.

The justices had obviously read the various briefs including NACA's, and were well armed with thoughtful questions. The most notable opening line was from the Solicitor General, Mr. Wallace, who began "No matter how well we register, regulate or restrict them, above all, pesticides are still poisons!" That statement reflects their theme: that dangerous chemicals are getting into our food and water, and local governments are in the best position to regulate and address local problems. The federal government, they argued, was too slow and too far removed from local concerns to be an effective regulator. However, when Justice Scalia asked whether FIFRA contained any penalty provisions for violation of the Act, the Solicitor admitted that he did not know.

On the other hand, Mr. Kent took the position that some regulation by localities might not conflict with FIFRA (e.g. if the town were regulating use pursuant to a state-wide record keeping program). However, he argued emphatically that the regulation in question here, for which use could be denied altogether, was in conflict with FIFRA. Mr. Kent was successful in explaining how a use restriction in one county could create a situation in a neighboring county where twice the amount of pesticide had to be used to control the pest or disease. He also explained very well how conflicting regulations and overlapping jurisdictions could create an unworkable patchwork of regulation.

Because the Court plays a form of "devil's advocate" during oral argument, it is difficult to predict how they will actually vote. However, Justice Scalia (earlier thought to be a strong vote the other way), revealed his position by asking the Public Intervenor "Don't you think that 83,000 separate regulating bodies with little or no scientific background is a bad way to regulate pesticides?" The only safe prediction to make is that either extreme—complete preemption or no preemption—is unlikely. In all probability, the Court will reach some type of middle ground. A decision before the end of the term in July is possible, and even likely given the rate at which other decisions have been published this term.

Casey Heard by U.S. Supreme Court

(From the May 1991 issue of *AGRI ACTION*)

The U.S. Supreme Court on 4/24 heard our Wisconsin case that questions whether local units of government can pass pesticide regulations to protect the health and welfare of their citizens.

In a case that originated in the Washburn County town of Casey, Wisconsin Public Intervenor, Thomas Dawson, argued that the police powers of local governments allow them to pass such regulations above and beyond the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).

In September of 1986, the Wisconsin Forestry/Rights-of-Way/Turf Coalition, a division of the Wisconsin Agri-Business Council, joined Spooner forester Ralph Mortier in challenging a Town of Casey ordinance restricting application of herbicides on public and private forest lands. The state's public intervenor joined the town in filing briefs in support of the ordinance.

In May of 1988, the Washburn County Circuit Court declared the Casey ordinance void, ruling that it was preempted by state and federal pesticide laws. The town and public intervenor appealed the ruling, but it was affirmed by the Wisconsin State Supreme Court in March of 1990, in a 4 to 3 decision. On Jan. 14, 1991, the U.S. Supreme Court agreed to hear the public intervenor's appeal of the state ruling.

Before the U.S. Supreme Court, the Wisconsin public intervenor was joined in making oral arguments by the U.S. Solicitor General, who filed a friend of the court brief stating that FIFRA does not preempt local governments from passing pesticide regulations. Also signing onto the Solicitor General's brief was the general counsel of the Environmental Protection Agency, reversing an earlier position by the agency.

In addition, four briefs, representing 15 entities, have been filed in support of the Public Intervenor's position.

Seven briefs, representing some 42 entities, have been filed with the U.S. Supreme Court asking that the Wisconsin court ruling against the town of Casey ordinance be affirmed rather than overturned.

Our key argument is that allowing local governments to regulate pesticides could present pesticide applicators and farmers with hundreds of ordinances to obey and permits to obtain, when applying chemicals in more than one town or county.

A decision on the case is expected in June.

Contributions to pay legal costs are needed and cheerfully accepted! How much? Well—What would it cost if you had to apply for a permit for *each pesticide* you applied in *each township*? Make check payable to: WI Forestry/Rights-of-Way/Turf Coalition.

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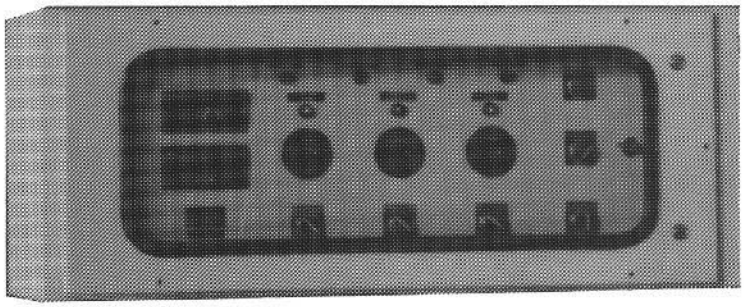

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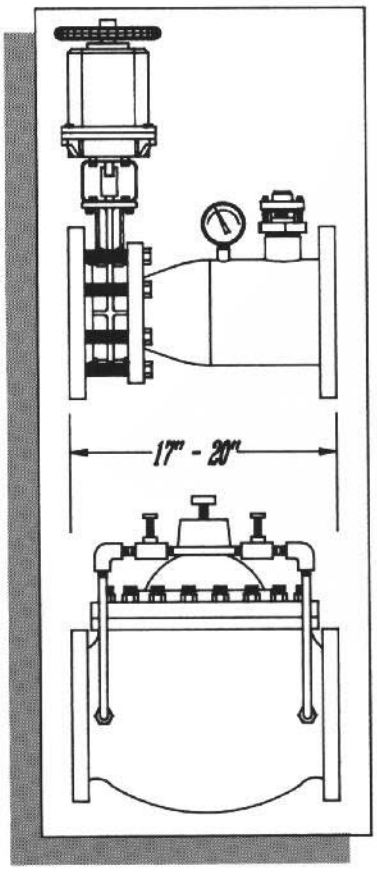

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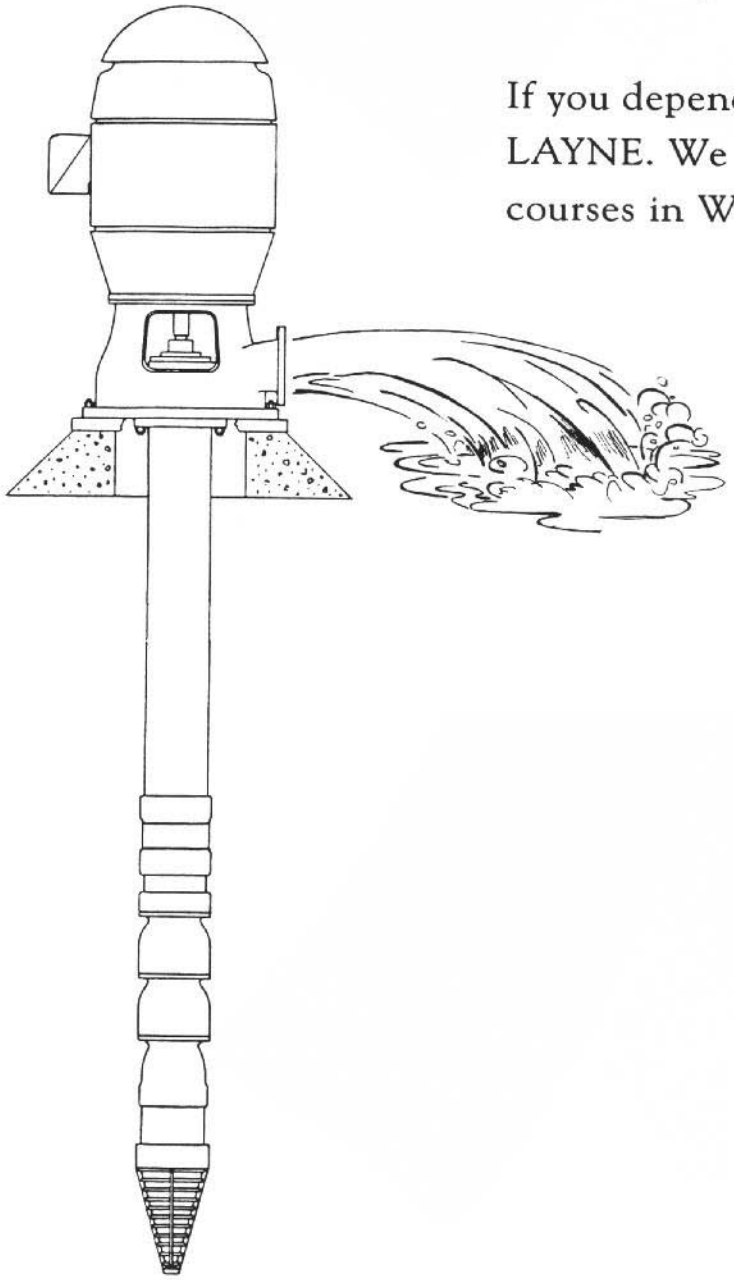

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BEDTIME

By Monroe S. Miller

This season, which has come on so strongly so soon, seemed to be a good time to take a look at about when a golf course superintendent in Wisconsin hits the hay at night.

It's a good question because it goes to the heart of the saying that our business is "a way of life." If you are going to bed at 9:00 pm or so, that is certainly influencing your evening activities and, therefore, your way of life.

I've always said that this is a tough business for those who aren't "morning" people. Much of the work that has to be done on a golf course has to be done before play begins. Often this tempts some of us to make use of every minute immediately after dawn, as soon as it is light enough to see, to stay ahead of the players.

Obviously, if one arrives at work around 4:45 am, this requires a significantly earlier bedtime than if one arrives at 8:00 am.

Generally, I am one of those who arrives at work near dawn. It is the best and most productive time of the day. Therefore, I'm also one of those who goes to bed early during the season, generally around 9:00 pm. Frankly, I have also discovered there is a lot of truth in George Herbert's observation that "one hour's sleep before midnight is worth three after."

It was Rod Johnson who suggested the question for this issue's survey question of "when do you go to bed?" We also asked the average number of hours worked per week during the season. Tom Schwab and I did the surveying.

The results really surprise me. Apparently, fewer guys go to bed early than I had believed. Hindsight makes me wish we'd asked "when do you get to work in the morning?" as a second part of the question.

I always figured most of my colleagues retired at about the same early hour I do, and that night owl Tom Harrison was an exception.

Turns out the situation is about the other way around. The average bedtime for the 24 WGCSA members surveyed was about 10:45 pm, with many more staying up until midnight than those crashing at 9:00 pm. In my case I simply have to have between seven and eight hours of sleep at night to properly function day in and day out. Back calculating from 4:00 am takes you to 9:00 pm to 9:30 pm. Maybe some guys are getting by on a lot less sleep than I can or maybe I'm just getting old!

The average number of hours worked didn't surprise me too much. Those same 24 interviewees averaged between 61 and 62 hours of work per week.

Regardless of when you go to bed, the important thing to note, as da Vinci did, is that "a well spent day brings happy sleep." Fortunately, in our business, that is usually the case.

Good night.