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AUTHORITIES

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 86-6208, 86-6470

SESSIONS TANK LINERS, INC.,
d/b/a Southwest Tank Liners, Inc.,

Plaintiff-Appellant,

v.

JOOR MANUFACTURING, INC., et al.,

Defendant-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF OF THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AMICUS CURIAE

CHARLES F. RULE
Acting Assistant Attorney General

W. STEPHEN CANNON
Deputy Assistant Attorney General

CATHERINE G. O'SULLIVAN
MARION L. JETTON
Attorneys

DEPARTMENT OF JUSTICE
Washington, D.C. 20530

ROBERT D. PAUL
General Counsel

ERNEST J. ISENSTADT
Assistant General Counsel

DEAN C. GRAYBILL
MICHAEL GOLDENBERG
Attorneys

FEDERAL TRADE COMMISSION
Washington, D.C. 20580
(202) 523-3463

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STATEMENT OF THE ISSUE

Whether a commercial firm's attempts to influence standards established by a non-profit voluntary membership association and a private certification organization constitute petitioning of government protected by the Noerr-Pennington doctrine merely because state and local governments incorporate these standards in their codes.

STANDARD OF REVIEW

The district court's application of the Noerr-Pennington doctrine to the participation of commercial firms in private standards-setting is a legal determination reviewed de novo on appeal.

INTEREST OF THE UNITED STATES AND THE FEDERAL TRADE COMMISSION

The United States and the Federal Trade Commission ("Commission") file this brief pursuant to Rule 29 of the Federal Rules of Appellate Procedure in support of the position of appellant Sessions Tank Liners, Inc. ("Southwest") that the Noerr-Pennington doctrine[1] does not apply to efforts to influence private standards-setting organizations.

The Department of Justice and the Commission enforce the federal antitrust laws. 15 U.S.C. 1, 2, 4, 26; 15 U.S.C. 41 et seq. The courts traditionally have applied the antitrust laws to private standards organizations and their members,[2] and the Commission and the Department have engaged in enforcement actions against such organizations.[3] The Commission also has studied the standards industry extensively in connection with a proposed rulemaking. 43 Fed. Reg. 57,269 (1978).

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[1] See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers of America v. Pennington, 381 U.S. 657 (1965).

[2] See, e.g., American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961).

[3] See, e.g., American Society of Sanitary Engineering, C-3169 (F.T.C., Oct. 3, 1985)(consent decree); United States v. American Society of Mechanical Engineers, Inc., 1972 Trade Cas. (CCH) ¶¶74,028, 74,029 (S.D.N.Y. 1972)(consent decree).

In this case, the district court has interpreted the Noerr-Pennington doctrine to exempt "lobbying" of private standards-setting organizations from antitrust scrutiny when governments rely on these organizations' standards. The court's theory has far-reaching implications for antitrust review of the standards industry.[4] The standards involved in this case are among some 32,000 standards promulgated by over 420 private organizations.[5] Industry relies heavily on these standards, and government regulations incorporate many of them by reference. Although private standards can promote competition and consumer welfare, standards also can erect barriers to entry for innovative products and otherwise restrict competition. Government efforts to preserve competition in the many industries that rely upon privately developed standards would be impeded significantly if the Noerr-Pennington doctrine is interpreted totally to exempt this private standards-setting from antitrust scrutiny.

The district court recognized that its ruling involves complex issues likely to be "hotly debated" in the Court of Appeals.[6] The United States and the Commission submit this brief

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[4] The United States and the Federal Trade Commission have recently filed an amicus brief in the Second Circuit in a case raising similar issues, Indian Head, Inc. v. Allied Tube & Conduit Corp., No. 81 Civ. 6250, slip op. (S.D.N.Y. June 27, 1986), appeal docketed Nos. 86-7734, 86-7758 (2d Cir.).

[5] See National Bureau of Standards, Special Pub. No. 681, Standards Activities of Organizations in the United States 1 (Aug. 1984).

[6] Reporter's Transcript of Proceedings, December 16, 1985, at 3-4 (See Appendix).

to assist this Court in its determination.

STATEMENT OF THE CASE

In this case, Southwest, pursuant to certification under 28 U.S.C. § 1292(b),[7] appeals a ruling by the District Court for the Central District of California granting defendant Joor Manufacturing, Inc. ("Joor") partial summary judgment on portions of Southwest's complaint. The order dismisses Southwest's claims that Joor violated the Sherman Act through its efforts to influence two standards-setting organizations, the Western Fire Chiefs Association ("WFCA") and Underwriters Laboratories ("UL").

Southwest is a California corporation engaged in the business of lining underground storage tanks used to store hazardous or volatile materials such as gasoline. Tank lining is the process by which storage tanks that have developed leaks are lined while still in their original underground location. Joor, a California corporation, manufactures and sells underground storage tanks (Memorandum of Decision and Order Granting Summary Judgment, January 15, 1986 ("Opinion") at 1-2, Excerpts of Record ("E.R.") 73).

Southwest alleges that Joor conspired to restrain competition by forcing customers who had leaking storage tanks to purchase replacement tanks from defendant, rather than to purchase lining goods and services for their tanks from

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[7] Order and Certificate of Partial Summary Judgment Order Pursuant to F.R.C.P. 54(b) and 28 U.S.C. § 1292(b), May 12, 1986 (E.R. 93).

Southwest. Plaintiff alleges that this restraint on competition was largely accomplished through Joor's membership in, and dealings with, the Article 79 Subcommittee of WFCA (Opinion at 2, E.R. 73).

WFCA is a non-profit voluntary membership organization, one purpose of which is to promote fire safety by developing, publishing and disseminating the Uniform Fire Code ("UFC"). State and local authorities often rely on the safety standards set forth in the UFC, and frequently these standards are incorporated into state or municipal codes (Opinion 2-3, E.R. 73). The WFCA has a number of specialized committees which review the UFC and recommend changes to this code. These committees are composed of interested parties from private industry and public fire safety officials. Committee proposals are submitted for approval by WFCA at its annual convention (Joor Memorandum at 4, E.R. 43).[8] Both private industry and public official representatives on these specialized committees were permitted to vote on UFC proposals during the relevant period (Southwest Memorandum at 4, E.R. 53).[9] Only public fire officials could vote at the annual meeting (Joor Memorandum at 4, E.R. 43).

Southwest contends that, as a result of Joor's conspiracy,

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[8] "Joor Memorandum" refers to the Memorandum of Points and Authorities in Support of Defendant Joor Manufacturing, Inc.'s Motion for Summary Judgment [F.R. Civ. P. 56], May 31, 1986 (E.R. 43).

[9] "Sessions Memorandum" refers to the Opposition of Sessions Tank Liners, Inc. to Motion for Summary Judgment of Joor Manufacturing Inc., June 7, 1985 (E.R. 53).

WFCA promulgated an amendment to Article 79 of the 1982 UFC that, without reasonable basis, required the removal of leaking tanks and prohibited the lining of existing tanks as practiced by Southwest (Complaint, para. 17, E.R. 1). Southwest contends that in 1981 Joor, a voting member of the Article 79 Subcommittee, was instrumental in causing the Subcommittee to propose such an amendment. Southwest seeks to prove, inter alia, that the WFCA's amendment of the UFC was merely a "rubber stamp" of the Subcommittee's proposal (Southwest Memorandum at 5-9, 14, E.R. 53).

UL is a private corporation which provides two relevant services. First, it develops a set of specifications, called a "product standard," for new products. This product standard is industry-wide and each competitor's product is measured by this objective standard. Second, UL tests products to determine safety. If UL finds that a manufacturer's product is safe, it permits the manufacturer to attach a UL "label" to that product and will "list" that manufacturer as an approved manufacturer of the particular product. Being listed, or having a label, is essential to the successful marketing of products (Opinion at 3, E.R. 73).

Southwest contends that, as a result of defendant's conspiracy, UL developed new standards that create the impression that they may be satisfied only by removal and replacement of leaking tanks, rather than by lining them (Opinion at 3, E.R. 73). Southwest also claims that a UL representative on the Article 79 Subcommittee gave false information to the Subcommittee that the use of Scuthwest's product voids existing

UL listings of underground storage tanks, and that the Joor and UL representatives at WFCA allowed this misinformation to "distort the decision-making of the * * * Subcommittee" (Southwest Memorandum at 27, E.R. 53).

In response to a motion for summary judgment filed by Joor, the district court ruled, inter alia, that Joor's actions with respect to WFCA and UL were protected by the Noerr-Pennington doctrine (Opinion, E.R. 73). See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961)("Noerr"); United Mine Workers of America v. Pennington, 381 U.S. 657 (1965)("Pennington").[10] In its memorandum granting summary judgment, the court concluded that lobbying WFCA and UL is the equivalent of lobbying government for purposes of the Noerr-Pennington doctrine on the ground that the reliance of state and local government on the standards of WFCA and UL "in practical effect has resulted in a delegation of government authority to these otherwise private entities."[11] The court also believed that Joor's conduct should be protected because "in order to have any effective influence on the government entities, Joor was required to lobby the WFCA and UL" (Opinion at 5, E.R.

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[10] The United States and the Commission express no view on the merits of Southwest's antitrust claims with respect to the paragraphs of the Complaint certified for appeal or whether Joor's alleged conduct is within the "sham" or "co-conspirator" exception to Noerr-Pennington.

[11] In referring to a "delegation" of authority by state and local governments to the WFCA and UL "in practical effect," the court apparently was stating a legal conclusion rather than suggesting that states and localities, in fact, have formally delegated governmental powers to these private entities. See discussion pp. 14-15 infra (state action exemption from the antitrust laws inapplicable in this case).

73).

The district court thereafter granted Southwest's motion for certification of an appeal of the court's Noerr-Pennington ruling (Order and Certificate of Partial Summary Judgment Order Pursuant to F.R.C.P. 54(b) and 28 U.S.C. § 1292(b), E.R. 93). This Court accepted the appeal by order of October 7, 1986.

ARGUMENT

The Noerr-Pennington doctrine is designed to avoid conflict between the antitrust laws and the governmental process. It does not afford an exemption for attempts to influence the decisions of a "non-profit voluntary membership association" like WFCA (Opinion at 2, E.R. 73) or a "private corporation" like UL (Id.) The fact that government authorities choose to rely on the standards promulgated by WFCA and UL does not transform these private organizations into governmental entities, or their standards-writing into a government process, for purposes of the Noerr-Pennington doctrine. The district court's contrary holding not only does not advance Noerr-Pennington values but, by implication, would immunize from antitrust scrutiny standards activity affecting billions of dollars in commerce. Guidelines promulgated by organizations like WFCA and UL "'may result in economic prosperity or economic failure, for a number of businesses of all sizes throughout the country,' as well as entire segments of an industry." American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 570 (1982) (quoting H.R. Rep. No. 1981, 90th Cong., 2d Sess. 75

(1968))("Hydrolevel").[12]

This is not to say that the activities of private standards-setting groups like WFCA and UL are inherently anticompetitive; indeed, they may be substantially procompetitive. Influencing the decisions of such groups by presenting accurate technical information concerning safety problems of a competitor's product generally would not be subject to antitrust condemnation under the rule of reason.[13] See Board of Trade of the City of Chicago v. United States, 246 U.S. 231 (1918). However, neither Noerr-Pennington principles nor Sherman Act precedent support the district court's ruling that attempts to influence the decisions of private standards-setting bodies are not subject to examination under the antitrust laws.

I. THE NOERR-PENNINGTON DOCTRINE DOES NOT PROTECT "PETITIONING" OF PRIVATE ORGANIZATIONS

There is no basis in the Noerr-Pennington doctrine for the district court's conclusion (Opinion at 5-7, E.R. 73) that influencing WFCA or UL is the equivalent of influencing a governmental body. In Noerr, the Supreme Court held that the

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[12] In Hydrolevel, the Supreme Court held that the American Society of Mechanical Engineers (ASME) was liable as principal under the Sherman Act for the anticompetitive acts of commercial members acting with ASME's apparent authority. ASME, like WFCA, is a nonprofit membership corporation that includes government officials and publishes standards. The standard involved in Hydrolevel was adopted by at least 45 states. 456 U.S. at 558-59.

[13] As this Court has stated: "'The absence of an immunity does not itself establish an antitrust offense.'" Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc, 690 F.2d 1240, 1247 n. 7 (9th Cir. 1982), cert. denied, 459 U.S. 1227 (1983)(quoting Areeda & Turner, Antitrust Law §201 (1978)).

antitrust laws, properly construed, do not apply to private solicitation of government action, including government action that has the effect of restraining competition. The Court observed that it had earlier held, in Parker v. Brown, 317 U.S. 341 (1943), that the Sherman Act was not intended to apply to anticompetitive state action. The Court reasoned that a representative government "depends upon the ability of the people to make their wishes known to their representatives" and it would not "impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act." Noerr, 365 U.S. at 137. Moreover, application of the Sherman Act in such circumstances would have raised serious issues under the First Amendment: "The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." Id. at 138. See also Pennington, 381 U.S. at 669, 671; California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510-11 (1972)("California Motor Transport")(Noerr-Pennington doctrine based explicitly on First Amendment); Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1263 (9th Cir. 1982), cert. denied, 459 U.S. 1227 (1983).

Thus, the Noerr-Pennington doctrine protects attempts by citizens to persuade the government -- not private organizations -- to take actions that may have the effect of restraining trade. The Noerr-Pennington doctrine does not protect solicitation of private organizations to impose restraints on trade, because these organizations are not part of our

representative form of government, and the constitutional right to petition the government does not protect access to such groups. See generally McDonald v. Smith, 105 S. Ct. 2787, 2789-90 (1985)(discussing the origin and scope of the right to petition). There is no reason to think that Congress excluded from the Sherman Act attempts to influence the standards adopted by private standards-setting organizations, since such exclusion is unnecessary to avoid regulation of political activities "in the halls of legislative bodies," Noerr, 365 U.S. at 144, or to meet constitutional concerns.

Indeed, in Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962)("Continental Ore"), the Supreme Court rejected the claim that Noerr-Pennington protected "petitioning" of private entities. The Canadian Government had appointed Union Carbide's subsidiary, Electro Met, as its wartime agent for purchasing and allocating vanadium for Canadian industry. The plaintiff alleged that Union Carbide had directed Electro Met to exclude the plaintiff from the Canadian market, as part of a conspiracy to restrain and monopolize the vanadium industry. The Court rejected Union Carbide's Noerr-Pennington defense, finding that its conduct was "wholly dissimilar to that of the defendants in Noerr." Id. at 707. The Court stated that subjecting Union Carbide to liability "for eliminating a competitor from the Canadian market by exercise of the discretionary power conferred upon Electro Met of Canada by the Canadian Government would effectuate the purposes of the Sherman Act and would not remotely infringe upon any of the constitutionally protected freedoms spoken of in Noerr." Id. at 707-08.

Subsequently, in Pennington, the Court reaffirmed that its holding in Continental Ore was based on the fact that Electro Met was a private entity. The Court in Pennington distinguished Continental Ore, noting that in the earlier case the purchasing agent, Electro Met, was not governmental, but rather was a wholly-owned subsidiary of a company alleged to be the principal actor in the conspiracy, and that there was no indication that the Canadian Government "approved or would have approved" of the monopolistic practices. 381 U.S. at 671 n.4.

Continental Ore's teaching is that the Noerr-Pennington doctrine does not reach attempts to influence private parties to take actions that restrain trade -- even where that private party is acting in the particular circumstances as a government-appointed agent. Clearly, then, Noerr-Pennington does not protect attempts to influence private standards-setting organizations. See also Feminist Women's Health Center, Inc. v. Mohammad, 586 F.2d 530, 544-45 (5th Cir. 1978), cert. denied, 444 U.S. 924 (1979)(medical review organizations whose recommendations were followed by statutory board are not governmental bodies for purposes of Noerr-Pennington).[14]

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[14] See generally MCI Communications Corp. v. American Telephone & Telegraph Co., 708 F.2d 1081, 1159-60 (7th Cir.), cert. denied, 464 U.S. 891 (1983)(Noerr "immunizes only those actions directed toward governmental agencies or officials"); Mid-Texas Communications Systems, Inc. v. American Telephone & Telegraph Co., 615 F.2d 1372, 1382 (5th Cir.), cert. denied, 449 U.S. 912 (1980)("[t]he crux of the Noerr-Pennington immunity is the need to protect efforts directed at governmental officials for the purpose of seeking redress"); Welch v. American Psychoanalytic Association, 1986-1 Trade Cas. (CCH) ¶67,037 at 62,373 (S.D.N.Y. 1986)(quoting Mid-Texas); Ashley Meadows Farm, Inc. v. American Horse Shows Association, 1983-2 Trade Cas. (CCH) ¶65,653, at 69,352-53 (S.D.N.Y. 1983)(Noerr-Pennington does not extend to the (footnote continued)

Both WFCA and UL are private entities. The court itself describes WFCA as a "non-profit voluntary membership association" (Opinion at 2, E.R. 73). Under the tax laws, WFCA is treated as a private charitable organization.[15] Although government as well as industry may rely on the standards of organizations like WFCA, they are "in reality * * * extra-governmental agenc[ies], which prescrib[e] rules for the regulation and restraint of interstate commerce." Hydrolevel, 456 U.S. at 570 (quoting Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457, 465 (1941))(emphasis added).

The fact that government officials participate in WFCA activities does not make WFCA a government entity.[16] The court did not rely on the participation of individual government officials as a basis for its decision (Opinion, E.R. 73), and was correct in regarding this fact as irrelevant. The WFCA, although it has government officials as members, is not armed with

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internal procedures of private associations).

[15] WFCA is a charitable organization under § 170(c) of the Internal Revenue Code, 26 U.S.C. 170(c). See Internal Revenue Service, Pub. No. 78, Cumulative List of Organizations described in Section 170(c) of the Internal Revenue Code of 1954 1211 (1985). WFCA's tax status also rebuts Joor's statements to the effect that the WFCA process is itself a "forum" by which parties petition state and local government (Joor Memorandum at 13, E.R. 43). Joor cites no evidence that WFCA lobbied government and WFCA cannot engage in substantial lobbying efforts without risking its charitable status under 501(c)(3) for "attempting to influence legislation." See 26 U.S.C. 170(c)(2)(D), 501(c)(3). An organization is charitable under 501(c)(3) only if "no substantial part" of its activities comprises attempts to influence legislation. 26 U.S.C. 501(c)(3); see also Treas. Reg. 1.501(c)(3)-1(c)(3)(ii) (1986).

[16] The Supreme Court referred to the American Society of Mechanical Engineers as "extra-governmental" despite the fact that "much of [ASME's] work is done through volunteers from industry and government." 456 U.S. at 559 (emphasis supplied).

governmental powers and subject to all the constraints on government. The participation of commercial firms in WFCA committees -- in this case, Southwest's competitor -- and the absence of any evidence of a formal delegation of authority, with accompanying administrative and judicial review, leave room for anticompetitive conduct not subject to correction through channels available in the case of purely governmental conduct.[17]

In this connection, we note that the court made no findings that WFCA standards-setting is authorized and actively supervised by the states, facts that might immunize WFCA standards-setting from antitrust scrutiny under the state action doctrine. Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 57 (1985) ("Southern Motor Carriers").[18] This is further reason, on this record, to view WFCA standards-setting as outside the government process for purposes of Noerr-Pennington. See City of Lafayette v. Louisiana Power and Light Co., 435 U.S. 389, 399-400 (1978)(state action and Noerr-Pennington exclusions are based on common concern of avoiding

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[17] See Hurwitz, Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr, 74 Geo. L.J. 65, 92 (1985).

[18] The state action doctrine is "premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce," and is intended to permit a state to utilize the powers reserved to it by the Constitution to impose restraints on competition either through its officers or agents. Southern Motor Carriers, 471 U.S. at 56. Thus, if the actions of a private organization are not taken pursuant to a clearly articulated state policy to restrain competition and are nct actively supervised by the state, the organization can properly be regulated by the Sherman Act without undue interference with a state's exercise of its legislative powers. Southern Motor Carriers, 105 S. Ct. at 57.

"conflict with policies of signal importance in our national traditions and governmental structure of federalism").[19]

The court's conclusion that UL is governmental for purposes of Noerr-Pennington is similarly misplaced. UL, a "private" company (Opinion at 3, E.R. 73), is an "independent, not-for-profit corporation" that sets standards and certifies products as meeting standards. ECOS Electronics Corp. v. Underwriters Laboratories, 743 F.2d 498, 500 (7th Cir. 1984), cert. denied, 469 U.S. 1210 (1985). Like WFCA, UL is a private charitable organization under the tax laws.[20] As in the case of WFCA, the court made no findings that UL standards-setting is authorized or supervised by the states. In fact, courts confronted with antitrust claims against UL and similar organizations have assumed that they are private organizations subject to the antitrust laws. E.g., ECOS Electronics Corp. v. Underwriters Laboratories, 743 F.2d at 501 ("To state a claim [against UL] * * * ECOS must allege anticompetitive conduct and injury resulting from that conduct").

In sum, attempting to influence WFCA and UL is not the

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[19] There may be some circumstances in which it is appropriate to afford Noerr protection to solicitation of governmental action that does not satisfy all of the requirements of the state action doctrine. See generally In re Airport Car Rental Antitrust Litigation, 693 F.2d 84, 87 (9th Cir. 1982), cert. denied, 462 U.S. 1133 (1983). For example, private parties might petition a city council to take action of a governmental nature. Such municipal action would not constitute state action if the state had not authorized it (Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985)), yet Noerr-Pennington protection might be appropriate. This case presents no such issue, however.

[20] Internal Revenue Service Pub. No. 78, Cumulative List of Organizations described in Section 170(c) of the Internal Revenue Code of 1954 1140 (1985).

equivalent of attempting to influence the government. The policies of the Noerr-Pennington doctrine -- avoiding interference with the functioning of a representative government and protecting constitutional rights -- are not served by exempting from antitrust scrutiny Joor's alleged efforts to influence these private organizations.

II. THE COURT'S FINDING THAT STATE AND LOCAL GOVERNMENTS RELY ON WFCA AND UL STANDARDS IS NOT REASON TO EXPAND NOERR-PENNINGTON PROTECTION BEYOND PETITIONING OF GOVERNMENT ENTITIES

In this case the court has extended Noerr-Pennington protection to "lobbying" of non-governmental entities in part on the grounds that state and local governments "have accepted and relied on" WFCA and UL standards, and that "in order to have any effective influence on the government entities, Joor was required to lobby the WFCA and UL" (Opinion at 5, E.R. 73).

These considerations have no basis in Noerr-Pennington doctrine. First, the mere fact of government adoption of private decisions does not bring into play Noerr-Pennington protection. A plurality of the Supreme Court rejected such a claim in Cantor v. Detroit Edison Co., 428 U.S. 579 (1976). In that case the defendant utility submitted tariffs to a state public commission requesting commission approval of an allegedly anticompetitive marketing program. The commission approved these tariffs without investigation. The Court held that Noerr-Pennington did not protect the utility's actions, stating that "nothing in the Noerr opinion implies that the mere fact that a state regulatory agency may approve a proposal * * * is a sufficient reason for conferring antitrust immunity on the conduct." 428 U.S. at 601-

02.[21]

The Second Circuit held likewise in Litton Systems, Inc. v. American Telephone & Telegraph Co., 700 F.2d 785 (2d Cir. 1983), cert. denied, 464 U.S. 1073 (1984). In that case, AT&T argued that its tariffs, which required AT&T customers to use an interface device if they employed equipment supplied by AT&T competitors, were Noerr-Pennington protected because AT&T filed the tariffs with the Federal Communications Commission. The Court rejected this claim, holding that the tariff filing did not amount "to a request for governmental action" because the decision to impose and maintain the interface tariff "was made in the AT&T boardroom, not at the FCC." Id. at 807. The possibility of ultimate government review and adoption, pursuant to a private complaint or upon the FCC's initiative, did not exempt from the antitrust laws a decision that was basically private. See also, Mid-Texas Communication Systems, Inc. v. American Telephone & Telegraph Co., 615 F.2d 1372, 1382-83 (5th Cir.), cert. denied, 449 U.S. 912 (1980)(AT&T refusal to interconnect, made prior to FCC involvement, not covered by Noerr-Pennington); City of Kirkwood v. Union Electric Co., 671 F.2d 1173, 1180-81 (8th Cir. 1982), cert. denied, 459 U.S. 1170 (1983)(filing of rate request not entitled to Noerr-Pennington exemption).

Second, the court's finding that the government's reliance on WFCA and UL precludes "effective" direct lobbying of government (Opinion at 5, E.R. 73) is simply irrelevant under the

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[21] See Fischel, Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine, 45 U. Chi. L. Rev. 80, 92 (1977).

Noerr-Pennington doctrine.[22] An action is not protected by the doctrine merely because it is an effective way of achieving an end. Cf. United States v. O'Brien, 391 U.S. 367 (1968)(First Amendment does not extend to all communication of ideas). The question under Noerr-Pennington is much narrower -- whether the application of the antitrust laws to Joor's conduct at WFCA and UL would interfere with the government's deliberative process or materially infringe Joor's First Amendment right to express its views to state and local government. Noerr, 365 U.S. at 137-38; California Motor Transport, 404 U.S. at 510-11. Southwest's allegations concerning Joor's conduct at WFCA and UL do not challenge any efforts by Joor to invoke a government's decision-making process or to express its views to state and local government. Therefore, there is no basis under Noerr-Pennington for concluding that the antitrust laws should not apply. The Noerr-Pennington doctrine, designed to protect citizens' conveyance to government of their views and desires for government action, does not extend to other forms of conduct merely because the other conduct might be a more effective means of producing government action.[23] See Superior Court Trial

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[22] We also note that the court's view that direct petitioning of state and local governments would be ineffective is rebutted to some degree by Joor's allegations that Southwest successfully persuaded the California state legislature to approve use of its product and "effectively lobbied local fire services and fire chiefs" (Joor Memorandum at 27-28, E.R. 43).

[23] The authorities cited by the district court, Wheeling-Pittsburgh Steel Corporation v. Allied Tube & Conduit Corp., 573 F. Supp. 833 (N.D. Ill. 1983) and Rush-Hampton Industries, Inc. v. Home Ventilating Institute, 419 F. Supp. 19 (M.D. Fla. 1976), similarly misapply Noerr-Pennington in ruling that the reliance of state and local governments on standards organizations makes (footnote continued)

Lawyers Association, No. 9171 at 62 (F.T.C. 1986), reprinted in 51 Antitrust & Trade Reg. Rep. No. 1272, 28, 41 (BNA, July 3, 1986), appeal filed, No. 86-1465 (D.C. Cir.). Such an expansion of the Noerr doctrine would "make it practically impossible ever to enforce the laws against agreements in restraint of trade" in the standards-setting area. California Motor Transport, 404 U.S. at 514 (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949)).[24]

In sum, the district court's ruling improperly expands the scope of Noerr-Pennington protection. Lobbying WFCA and UL is not the equivalent of lobbying government for purposes of Noerr-Pennington. The court's finding that state and local governments rely on WFCA and UL standards does not make standards-setting by WFCA and UL a government process protected by Noerr-Pennington. Accordingly, the district court's ruling that Joor's alleged conduct with respect to WFCA and UL was protected under Noerr-Pennington should be reversed and the case should be remanded for a determination of Southwest's antitrust claims.

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them quasi-governmental for purposes of the doctrine.

[24] In Giboney, the Court held that the First Amendment right of free speech does not prohibit government regulation of anticompetitive agreements. 336 U.S. at 499. See also National Society of Professional Engineers v. United States, 435 U.S. 679, 697-98 n.27 (1978)(First Amendment right of free speech and petition did not prohibit enforcement of injunction prohibiting anticompetitive provisions in an industry code).

CONCLUSION

The district court's decision that the Noerr-Pennington doctrine exempted Joor's activities with respect to UL and WFCA from antitrust scrutiny should be reversed.

Respectfully submitted,

CHARLES F. RULE
Acting Assistant Attorney General

W. STEPHEN CANNON
Deputy Assistant Attorney General

CATHERINE G. O'SULLIVAN
MARION L. JETTON
Attorneys

DEPARTMENT OF JUSTICE
Washington, D.C. 20530

ROBERT D. PAUL
General Counsel

ERNEST J. ISENSTADT
Assistant General Counsel

DEAN C. GRAYBILL
MICHAEL GOLDENBERG
Attorneys

FEDERAL TRADE COMMISSION
Washington, D.C. 20580
(202) 523-3463

November 20, 1986

APPENDIX

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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HONORABLE MARIANA R. PFAELZER, JUDGE PRESIDING

- - -

SESSIONS TANK LINERS, INC.,

Plaintiff,

vs.

JOOR MANUFACTURING, INC.,

Defendant.

Civil Action
No. 84-6363-MRP

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, December 16, 1985

COPY

BETH E. CULBERTSON, CSR
Official Reporter
414 U. S. Courthouse
312 North Spring Street
Los Angeles, CA 90012
(213) 626-2622

LOS ANGELES, CALIFORNIA; MONDAY, DECEMBER 16, 1985; 10:00 A.M.

THE CLERK: Item No. 11, Civil 84-6363. Sessions Tank Liners vs. Joor Manufacturing, Inc.

Counsel, please make your appearance.

MR. LUNDIN: David Lundin for the defendant.

MR. LINDQUIST: Good morning. Robert Lindquist, Blecher, Collins & Weinstein, for Sessions Tank Liners.

THE COURT: If you just sit down for a minute. I want to talk to you.

Several of us have looked at this motion for summary judgment because it looks -- I think four of us have looked at it separately without knowing what the other one thought. One of the four was the judge. This is not a particularly easy question. Noerr-Pennington is a very interesting doctrine and you have to keep working and working with the facts to find out what your conclusion is going to be if I decided to grant the motion for summary judgment. I don't need any more findings or statement of uncontroverted facts. I don't need any more paper from anybody.

We are going to give you a memorandum decision. The memorandum decision will -- all the parts of this motion are easy except the statements. There are a couple of statements that were in there, so we concluded that we would write a memorandum. You probably will get it in early January.

The memorandum will deal with the parts of it that would be the hardest for an appellate court to analyze. I wanted you to come down here and hear me discuss this with you because I know this is going to be hotly debated in the appellate court.

All right. Now if you feel, when you get this memorandum of decision, that there is anything which is lacking, so that there will be a complete record on it, you should let the Court know what it is and I will then conclude that it is necessary to add something to the memorandum or it is not.

Am I making myself clear?

MR. LUNDIN: Very much so.

THE COURT: Very often what happens is that we send out, not a statement of uncontroverted facts, but rather a memorandum, and when we do that sometimes we don't touch on every single point that the appellate court is interested in.

Remember, it is your case and it is not my case to litigate.

The main thing I am concerned about is that there be a totally complete record in front of the Ninth Circuit.

All right. Thank you.

MR. LINDQUIST: One moment, your Honor.

THE COURT: Yes.

MR. LINDQUIST: We had a motion for summary judgment on the counterclaim. Is that still --

THE COURT: We are going to deal with the counterclaim. The motion for summary judgment that was filed by the defendants, I am going to put that in shape so that it can go up and we will deal with the counterclaim.

MR. LINDQUIST: Thank you, your Honor.

MR. LUNDIN: Thank you, your Honor.

THE COURT: What would you do with the counterclaim?

MR. LUNDIN: Pending appeal, sit on it.

THE COURT: Because I think on this issue I am going to certify it.

MR. LUNDIN: We would ask you to.

THE COURT: Well, that will be my intention if I don't grant the motion for summary judgment. All right. Thank you.

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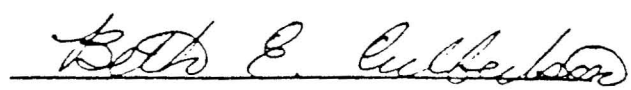
I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPTION FROM THE STENOGRAPHIC RECORD OF THESE PROCEEDINGS.

Dated: December 30, 1985.



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