An Exception to the Noerr-Pennington Doctrine: Conspiracy to Utilize the Judicial and Administrative Agencies to Restrain Trade

Alan H. Melnicoe
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DOCTRINE: CONSPIRACY TO UTILIZE THE
JUDICIAL AND ADMINISTRATIVE
AGENCIES TO RESTRAND TRADE

The Sherman Act forbids conspiracies in restraint of interstate commerce\(^1\) and monopolization of or conspiracies to monopolize any area of interstate commerce.\(^2\) An important exception to the prohibition of conspiracies aimed at restraints of trade or monopolization was created by the Supreme Court in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*\(^3\) There the court held that a Sherman Act violation cannot be predicated on attempts to influence the passage or enforcement of laws. The *Noerr* principle was reiterated 4 years later in *United Mine Workers v. Pennington.*\(^4\) The claim of immunity under the *Noerr-Pennington* doctrine is frequently invoked by defendants whose alleged antitrust violations have consisted of soliciting governmental action.\(^5\)

In the recent case of *Trucking Unlimited v. California Motor Transport Co.*,\(^6\) the Court of Appeals for the Ninth Circuit reversed a district court decision which granted *Noerr-Pennington* immunity to a

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1. 15 U.S.C. § 1 (1964) provides in part: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations is declared to be illegal. . . . ."

2. 15 U.S.C. § 2 (1964) provides in part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . . ."


group of defendants who allegedly conspired to restrain trade by influencing judicial and administrative agencies. The Ninth Circuit's holding has imposed a significant new limitation on the Noerr-Pennington doctrine.

The Noerr-Pennington Doctrine

In 1961 the Supreme Court decided Eastern Railroad Presidents Conference v. Noerr Motor Freight, a case that was to have far-reaching effects on subsequent antitrust litigation. In Noerr a group of trucking companies and their trade association sued under section 4 of the Clayton Act for treble damages and injunctive relief against several railroads, a railroad trade association and a public relations firm. The plaintiffs charged that the defendants had conspired in violation of sections 1 and 2 of the Sherman Act to monopolize and restrain trade in the long-distance freight hauling business.

The truckers claimed that defendants had retained a public relations firm to conduct a "vicious, corrupt and fraudulent campaign" designed to encourage the passage of laws detrimental to the trucking business, to create "an atmosphere of distaste for the truckers among the general public," and to impair the relationships existing between the truckers and their customers. The sole purpose of the defendants' campaign, it was alleged, was to injure and eventually to destroy the truckers as competitors. The so-called "third-party technique" was employed—the defendants themselves prepared and funded the publicity programs while making it appear that these represented the spontaneously expressed views of independent individuals and civic groups.

The complaint cited several instances of attempts by the defendant railroads to influence particular legislation. One specifically mentioned case of successful lobbying had resulted in persuading the Governor of Pennsylvania to veto a bill favorable to truckers.

The district court ruled in favor of the truckers, and the court of appeals affirmed. The Supreme Court reversed on three grounds, one being the legislative intent underlying the Sherman Act:

10. 365 U.S. at 129.
11. Id.
12. Id. at 130.
To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would 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.\textsuperscript{14}

It was suggested that construing the Sherman Act to forbid concerted anticompetitive lobbying would deprive the Government of a valuable source of information.\textsuperscript{15}

The Court further observed that an important constitutional right was involved—the right to petition.\textsuperscript{16} As Mr. Justice Black stated, people have a right "to make their wishes known to their representatives . . .”,\textsuperscript{17} even though they may have anticompetitive motives,\textsuperscript{18} and even though their representations are misleading or their conduct unethical.\textsuperscript{19}

The Court did narrow the scope of its opinion somewhat by recognizing that:

There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental actions is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.\textsuperscript{20}

The holding in \textit{Noerr} elicited considerable criticism.\textsuperscript{21} Nevertheless in \textit{United Mine Workers v. Pennington},\textsuperscript{22} decided 4 years after \textit{Noerr}, the Supreme Court restated the \textit{Noerr} principle and extended it to attempts to influence appointed, rather than elected, officials. In \textit{Pennington} the plaintiff mine workers union sued the operators of a small bituminous coal mine for royalty payments due under a wage

\begin{itemize}
  \item 14. 365 U.S. at 137.
  \item 15. \textit{Id.} at 139.
  \item 16. \textit{Id.} at 138. Congress is forbidden from making any law which would abridge the right of the people "to petition the Government for a redress of grievances." U.S. CONST. amend. I.
  \item 17. 365 U.S. at 137.
  \item 18. \textit{Id.} at 138.
  \item 19. \textit{Id.} at 141.
  \item 20. \textit{Id.} at 144 (emphasis added). This has become known as the "sham exception" to the \textit{Noerr} doctrine. Note that this statement was dictum as the actions of the railroads were not held to fall within this exception.
  \item 22. 381 U.S. 657 (1965).
\end{itemize}
agreement. A counterclaim was filed which alleged that the union and certain large coal mining companies had conspired to restrain and monopolize commerce in violation of sections 1 and 2 of the Sherman Act. It was alleged that the aim of the conspiracy was to place great financial burdens on small, non-unionized mines, thereby making it impossible for them to compete. One of the acts complained of was the plaintiffs’ successful attempt to convince the Secretary of Labor to adopt a high minimum wage for employees of contractors selling to TVA. TVA was urged to curtail its spot market purchases, most of which were exempt from minimum wage requirements, and several of the large coal companies engaged in a ruinous price-cutting campaign.

The district court found the union liable for $90,000 damages and the court of appeals affirmed. The Supreme Court granted certiorari and reversed. After a lengthy discussion, the Court concluded that the union was not exempt from liability under the antitrust laws. The Court went on to say that the lower courts failed to take proper account of the Noerr case. The union’s bad purpose in attempting to influence the Secretary of Labor was not in itself enough to make its actions, though otherwise legal, violative of the antitrust laws:

Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.

The “Bad Purpose” Doctrine

This rule of the Pennington case is entirely inconsistent with the general rule of conspiracy as enunciated in American Tobacco Co.
v. United States\textsuperscript{33} and many other cases.\textsuperscript{34} The \textit{American Tobacco} case involved a Government prosecution under sections 1 and 2 of the Sherman Act. It was charged that the defendants had fixed prices and excluded competition in the distribution and sale of tobacco products. With regard to certain defenses to the conspiracy charge, the court commented:

\begin{quote}
It is not the form of the combination or the particular means used but the \textit{result to be achieved} that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition.\textsuperscript{35}
\end{quote}

In other words, the general rule of conspiracy is that if individuals or corporations engage in concerted activities for a bad purpose (e.g. to restrain trade or monopolize the industry) they are guilty of a conspiracy even though the means used to effectuate the bad purpose are \textit{legal}. The Court in \textit{Pennington} made no attempt to reconcile its decision with this principle and the cases supporting it. The only conclusion that can be reached is that the bad purpose doctrine of the \textit{American Tobacco} case does not apply where there is a conspiracy to restrain trade or monopolize an industry through inducement of governmental action.

Previous to the \textit{Noerr} case, the lower courts consistently applied the bad purpose doctrine and found an illegal conspiracy whenever defendants joined together to effectuate anticompetitive plans by influencing the executive, legislative, judicial or administrative branches of government. In \textit{Slick Airways, Inc. v. American Airlines, Inc.},\textsuperscript{36} for example, the defendants allegedly attempted to block licensing of potential competitors by intervening in licensing proceedings before the Civil Aeronautics Board and by carrying on a well-planned campaign of appealing licensing decisions and disseminating false and misleading propaganda.\textsuperscript{37} Although the methods used by the defen-

\textsuperscript{33} 328 U.S. 781 (1946).
\textsuperscript{35} 328 U.S. at 809 (emphasis added).
\textsuperscript{37} 107 F. Supp. at 213-14.
dants were legal, the court held, the Sherman Act was nonetheless violated—assuming the plaintiff's allegations were true—on account of the defendant's illegal purpose. 38

Just 4 years before the Noerr case, a law review note summarized the law with regard to concerted efforts to influence legislation as follows:

[Where the inducement of state legislative activity is merely part of a larger conspiracy to restrain trade or where the lobbyist resorts to measures designed to deceive or corrupt the legislature, first amendment protection may be withdrawn thereby exposing the lobbyist to the far reaching provisions of the Sherman Act. 39

**Criticism of the Noerr-Pennington Doctrine**

The radical departure made in Noerr and Pennington from the preexisting rule of conspiracy was severely criticized. The reasoning

38. 107 F. Supp. at 214, accord, United States v. Ass'n of Am. R.R., 4 F.R.D. 510 (D. Neb. 1945); cf. Georgia v. Pennsylvania R.R., 324 U.S. 439, 457-58 (1945). The court in Slick relied on the American Tobacco case as authority. Slick and Pennsylvania R.R. were cited with approval in Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962), a case decided after Noerr but before Pennington. This has led to some confusion as to whether these cases are still good law. However, it is submitted that Continental can be distinguished. In Continental a subsidiary of Union Carbide was designated as exclusive purchasing agent of certain valuable metals for the Canadian government. The Noerr doctrine was not allowed as a defense because, although the subsidiary was acting for the Canadian Government, it was engaged in private commercial activity not involving the passage or enforcement of laws. The Court stated that "acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme" 370 U.S. at 707.

Slick and Pennsylvania R.R. would seem to be incorrectly used in support of this proposition in view of the Court's statement regarding a "broader scheme" in Pennington. See note 32 & accompanying text supra. Perhaps the Continental decision confused the "bad purpose" doctrine with the "sham exception" in Noerr. See note 20 & accompanying text supra. Or, more likely, the Court probably applied the general rule of American Tobacco because it held the Noerr immunity nonapplicable. At any rate, the Court caused a great deal of confusion by citing Slick and Pennsylvania R.R. since those cases involved attempts to influence government. See Trucking Unlimited v. California Motor Transport Co. 432 F.2d 755, 758-59 (9th Cir. 1970).

However, Pennington, which was decided after Continental, should make it clear that even when attempts to influence government are part of a broader scheme to restrain trade, the action is protected by Noerr unless the conduct falls within the sham exception. See notes 20 & 33 & accompanying text supra.

39. Note, Attempts to Secure State Legislative Restraints of Competition as a Violation of the Antitrust Laws, 106 U. Pa. L. Rev. 69, 82-83 (1957). But see Note, Appeals to the Electorate by Private Businesses: Injury to Competitors and the Right to Petition, 70 Yale L.J. 135 (1960), another per-Noerr Note which pointed out the hazards of unrestricted lobbying but noted the possible infringement of first amendment freedoms with restrictions on such activities.
underlying the Noerr decision has been attacked,40 and the case has been denounced as embracing an "unnecessarily restrictive view of the [Sherman] Act."41 In a number of cases, it has been observed, the Supreme Court has recognized valid restrictions on first amendment freedoms where such freedoms were used to effectuate an illegal purpose.42 One critic has objected to the Noerr Court's inclusion of so-called "third party techniques" within the scope of first amendment protected freedoms.43

One of the most convincing criticisms of Noerr is set forth in Professor Jerrold L. Walden's article More About Noerr—Lobbying, Antitrust and the Right to Petition.44 It is suggested that there may be strong policy arguments against allowing the first amendment to protect business groups with anticompetitive motives. During the early history of this country, Professor Walden points out, there was vigorous opposition to lobbying, and the Supreme Court condemned it on occasion.45 As lobbying gradually became accepted as a useful aid to the legislative process, the number of lobbyists increased46 and the amount of money expanded in lobbying reached mammoth pro-

40. 33 Rocky Mt. L. Rev. 413 (1961). The Court used United States v. Rock Royal Co-op, Inc., 307 U.S. 503 (1939), and Parker v. Brown, 317 U.S. 341, 351 (1943), to support the proposition that attempts to produce a restraint or monopoly through efforts to influence the course of legislation do not violate the Sherman Act. The Note points out that these cases held that state legislation in restraint of trade was valid, not that attempts to procure such legislation did not violate the act.

Although the Note recognizes that Okefenokee Rural Elec. Membership Corp. v. Florida Power & Light Co., 214 F.2d 413, 418 (5th Cir. 1954), and American Banana Co. v. United Fruit Co., 213 U.S. 347, 358 (1909), might give some support to the Supreme Court's holding in Noerr, it suggests that Northern Sec. Co. v. United States, 193 U.S. 197, 344 (1904), would give support to a contrary conclusion. But see U. Pitt. L. Rev. 216 (1960).


42. Id. at 253. In Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949), the Supreme Court restricted a union's right to picket where the union's purpose was to get an employer to refrain from selling ice to non-union peddlers. If the employer had acceded to the union's demand, he would have been guilty of a violation of a state antitrust statute. The Court said that first amendment freedoms do not grant immunity to actions or words which encourage the violation of a valid criminal statute.


44. 14 U.C.L.A. L. Rev. 1211 (1967) [hereinafter cited as Walden].

45. See id. at 121, citing Trist v. Child, 88 U.S. (21 Wall.) 441 (1874).

portions. 47

Although lobbyists represent a cross section of interests, undoubtedly the most powerful and influential group has been that of lobbyists for the various business interests. 48 Few effective controls have been enacted or enforced to regulate lobbying. 49 The result, Professor Walden suggests, has been that "the public interest may be the last to receive consideration in the enactment of legislation." 50 He asserts that Noerr "points in the wrong direction" by extending the first amendment to group lobbying for unlawful purposes. 51 It is suggested that "there is a vast difference between lobbying, which often mobilizes political and economic pressures, and petitioning which is grounded in entreaty." 52

Another writer has suggested that attempts to influence governmental bodies other than legislatures should not be protected by the Noerr-Pennington doctrine. 53 It has also been asserted that the Noerr-Pennington doctrine should not apply to group attempts to influence governmental decisions made in an economic rather than political context. 54

To date, the Supreme Court has been silent on these suggested limitations of the Noerr-Pennington doctrine. Since the Noerr decision, the lower federal courts have consistently extended immunity to groups utilizing the legislative, executive, judicial or administrative branches of government to carry out an anticompetitive purpose. 55 Until the Ninth Circuit's decision in Trucking Unlimited v. California Motor Transport Co., 56 no court called upon to apply the Noerr doctrine had differentiated between attempts to influence the judiciary and administrative agencies in furtherance of an anticompetitive scheme. 57


48. Id. at 1222.

49. Id. at 1232-49.

50. Id. at 1231.

51. Id. at 1246.

52. Id. at 1243-44.


56. 432 F.2d 755 (9th Cir. 1970).

57. See Association of Western Rys. v. Riss & Co., 299 F.2d 133 (D.C.Cir.),
Trucking Unlimited v. California Motor Transport Co.

The District Court Decision

In Trucking Unlimited fourteen plaintiffs, each engaged in the transportation of goods by motor vehicles, brought an action under sections 4 and 16 of the Clayton Act\(^5\) for treble damages and injunctive relief. Nineteen defendant trucking firms were charged with violations of section 1 and 2 of the Sherman Act.\(^6\) The defendants moved to dismiss the First Amended Complaint for failure to state a claim upon which relief could be granted. No facts beyond those alleged in the original Complaint and the First Amended Complaint were submitted by either party.

Plaintiffs had alleged in their First Amended Complaint that since February, 1961, defendants have conspired to put plaintiffs and their other competitors out of business and for that purpose have combined their financial and other resources to carry out a consistent, systematic and uninterrupted program of instituting through the procedural machinery of the California PUC, the ICC and of the courts, opposition to every request of application . . . made by plaintiffs or by other competitors of defendants before such agency, and to appeal any rulings of those agencies to the courts, all "without probable cause" and "regardless of the merits of the cases of plaintiffs and defendants' other competitors or of the merits of defendants' opposition."\(^7\)

All common carriers using the public highways are regulated by the California Public Utilities Commission (PUC) and the Interstate Commerce Commission (ICC) and must secure licenses from these agencies as a precondition of doing business.\(^8\)

It was alleged that the defendants had set up a special trust fund to finance their program of concerted opposition to license applications. Contributions were made according to each defendant's yearly gross income.\(^9\) Plaintiffs contended that the fund was used not only to finance opposition to all license applications, requests for reviews,
rehearings and appeals made by defendants' competitors, but also to finance publicity campaigns designed to inform potential competitors that license applications would encounter vigorous opposition. The effect of the defendants' activities was to cause those with existing applications to abandon them and to deter others from making applications due to the great expense involved.

The defendants contended that the case should be dismissed on the ground that the activities of which the plaintiffs complained were protected under the Noerr-Pennington doctrine. Judge Sweigert of the Northern District of California interpreted Noerr and Pennington to establish the rule that:

Violation of the Sherman Act cannot be predicated upon combined attempts to influence public officials in the enforcement of laws even when the sole purpose and intent of the persons engaging in such activities is, and the result may be to destroy their competitors.64

The court rejected the plaintiffs' contention that the rule of Noerr and Pennington applies only to concerted efforts to influence the legislative and executive branches of government and not to activities intended to influence the courts or the regulatory agencies.65

The plaintiffs also contended that the defendants' use of the regulatory agencies and the courts was a "sham" as the term was used in Noerr and that the real underlying purpose of the court actions was to restrain trade and create a monopoly.66 The district court disposed of this contention by pointing out that the plaintiffs did not allege that all or any of the oppositions were filed without probable cause, and that some of the oppositions were in fact successful.67

63. Id.
64. Id. at 84,742.
65. Id. at 84,743. The court cited NAACP v. Button, 371 U.S. 415, 430 (1963) as support for the contention that the right of access to courts and regulatory agencies is a political right, as is the right of access to the legislative and executive branches. It has been argued that the court used Button improperly as it involved the right of the state to forbid the solicitation of legal business and not the right to band together to participate in adjudicatory proceedings. Note, Antitrust: The Brakes Fail on the Noerr Doctrine 57 CALIF. L. REV. 518, 536-42 (1969).
66. 1967 Trade Cas. at 84,743. "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." Eastern R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127, 144 (1961) (dictum) (emphasis added).
67. 1967 Trade Cas. at 84,744.
The plaintiffs relied mainly on a line of patent-antitrust cases to support their contention that a conspiracy to bring or threaten suits for the purpose of maintaining monopoly power is a violation of the antitrust laws. These decisions were interpreted by the district court as limited to the narrow context of patent cases and hence not applicable to the Trucking Unlimited case.

The Ninth Circuit Decision

The Ninth Circuit reversed the district court's decision on two grounds:

1. First, concerted employment of judicial and administrative processes as part of a scheme to restrain trade . . . is not excluded from the Sherman Act by the Noerr-Pennington doctrine.
2. Second, even if the Noerr-Pennington rule does apply to the use of judicial and administrative adjudicative processes in a scheme to restrain trade, relief is not barred if . . . the real purpose of defendants' joint activity was to restrain competitors directly, rather than to restrain them indirectly by inducing restrictive governmental action.

To justify excluding joint efforts to influence the judiciary and administrative agencies from the protection of the Noerr-Pennington doctrine, Judge Browning pointed out that it is not the function of the courts or administrative agencies to "determine whether laws restraining trade will be adopted or . . . whether such laws will be enforced." Several patent cases and the Slick Airways case, a pre-Noerr decision, were cited as authority for this proposition.

The court also decided that the defendants' alleged activities fell within the "sham" exception of the Noerr case. It was determined that the defendants' real purpose was not to induce action by governmental agencies but to preclude such action by opposing all applicable influences.

69. 1967 Trade Cas. at 84,746.
71. Id. at 758 (emphasis added).
74. 432 F.2d at 761-63. See text accompanying note 70 supra.
tions with the PUC or ICC by competitors and by encouraging competitors not to make applications. This conduct, it was held, constituted a direct restraint of trade, as distinguished from an indirect restraint of trade through governmental action. Only the latter is protected by the Noerr-Pennington doctrine.

Judge Hamlin dissented, stating that the PUC was governed by a broad statutory standard that give it powers closely akin to legislative policy making powers. Hence, he argued, the Noerr-Pennington immunity should apply, and the plaintiff's sole remedy should lie in the good judgment of the PUC.

Inducement of Judicial or Administrative Action

The Noerr-Pennington doctrine should not apply in cases where the defendants' concerted activities are designed to induce anticompetitive judicial or administrative adjudicative action, the court concluded, because:

The fundamental reason for the Noerr-Pennington exception does not apply. It is not the function of the courts to determine whether laws restraining trade will be adopted or, having been adopted, whether they will be enforced; nor is this the function of an administrative agency engaged in adjudication, as the PUC and the ICC are here. It would be pointless to limit the reach of the Sherman Act in order to protect the access of courts and agencies engaged in adjudicative functions to information and opinion relevant to determinations which they have no power to make.

The proposition that it is not the "function" of the courts and the quasi-judicial administrative agencies to adopt or enforce laws raises certain difficulties. It is almost too obvious for statement that the courts, at least, make law. For example, the Sherman Act is silent as to what specific practices are forbidden, but the courts have interpreted the act to prohibit price fixing, allocation of territories among competitors, resale price maintenance and group boycotts. It is also clear that the courts have ultimate responsibility for deciding which laws are constitutional and should be enforced.

75. Id. at 762.
76. See id. at 763.
77. Id.
78. Id. at 758-59.
79. Id. at 758.
82. E.g., Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).
84. See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
Administrative agencies, as well as the courts, exercise policy-making powers. The *Trucking Unlimited* court was careful to limit the non-applicability of the *Noerr-Pennington* defense to concerted attempts to influence administrative *adjudicative* processes.\(^{85}\) In so doing, the court made an important distinction. Many agencies have quasi-legislative powers which may be exercised in a rule-making capacity. When an administrative agency is acting in such a capacity, the rationale of the *Noerr-Pennington* doctrine would seem to apply. To restrict access to administrative agencies exercising quasi-legislative, as opposed to adjudicative powers, might well constitute an abridgement of the right to petition and would tend to deprive the agency of a valuable source of information.

Drawing the line between adjudicative administrative processes and quasi-legislative functions may not be an easy task at times. The Ninth Circuit carefully tried to distinguish the fact situation concerning TVA in *United Mine Workers of America v. Pennington*.\(^{86}\) It was held in *Pennington* that attempts to persuade TVA officials to curtail spot market purchases, a policy which would injure the plaintiffs, were protected by the *Noerr* doctrine. TVA acts as an administrative agency in many of its functions,\(^{87}\) but the Ninth Circuit pointed out that the decisions sought to be influenced in *Pennington* were not *adjudicatory* in nature.\(^{88}\)

The cases cited by the Ninth Circuit as authority for removing *Noerr-Pennington* immunity from concerted attempts to influence judicial or administrative adjudicative action are all patent-antitrust cases (with the exception of the pre-*Noerr Slick Airways* cases).\(^{89}\) In each of these cases some illegal use of patents was involved, such as a cross-licensing agreement with competitors, an unlawful patent pool, or fraudulent procurement of the patent.

The first case cited by the court is *Walker Process Equipment*,

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\(^{86}\) 381 U.S. 657.

\(^{87}\) For instance, TVA has the power to award contracts. 16 U.S.C. § 831h(b) (1964) provides in part: "[I]n comparing bids and making awards the Board may consider such factors as relative quality and adaptability of supplies or services, the bidder's financial responsibility, skill, experience, record of integrity in dealing, ability to furnish repair and maintenance services. . . ."


\(^{89}\) It is submitted that *Slick Airways* is no longer good law. At the very least, it would seem distinguishable. See note 38 *supra*. 
Inc. v. Food Machinery and Chemical Corp. There the defendant's amended counterclaim to a patent infringement suit charged the plaintiff with monopolization in violation of section 2 of the Sherman Act. It was alleged that the plaintiff had "illegally monopolized interstate and foreign commerce by fraudulently and in bad faith obtaining and maintaining... its patent... well knowing that it had no basis for... a patent." The district court dismissed the counterclaim, and the court of appeals affirmed. The Supreme Court reversed, holding that "the enforcement of a patent procured by fraud on the Patent Office may be violative of § 2 of the Sherman Act provided the other elements necessary to a § 2 case are present."

In Trucking Unlimited, Judge Browning cited Walker for the broad proposition that "the Sherman Act is violated by a conspiracy to unreasonably restrain or monopolize trade through the use of judicial and administrative adjudicative proceedings." Walker clearly does not go that far; it merely says that a patent holder violates section 2 when he instigates suit to enforce a patent which he knows was obtained by intentional fraud on the Patent Office. It would seem that the patent holder in a case like Walker commits the crime of perjury and compounds a fraud by his very act of filing an infringement suit. His claim to Noerr-Pennington protection is therefore considerably weaker than that of the defendants in Trucking Unlimited, whose resort to the courts and the agencies was in many instances supported by probable cause, was not alleged to have been fraudulent, and could therefore be illegal only because of the defendants' ulterior anticompetitive purpose.

In United States v. Singer Manufacturing Co., the Justice Department sued to restrain Singer, the sole American manufacturer of "zigzag" sewing machines, from conspiring to restrain trade. It was alleged that Singer conspired with an Italian and a Swiss manufacturer to exclude Japanese competition from the American market through cross-licensing agreements, patent assignments, infringement actions and proceedings before the United States Tariff Commission. The Supreme Court ruled that although it is not unlawful to use a patent to

90. 382 U.S. 172 (1965).
91. Id. at 174.
92. Id.
93. Id.
95. Id. at 176-88.
exclude competitors, the conspiracy to eliminate competition by assigning to Singer the duty of maintaining the oligopoly of the three parties through infringement suits and Tariff Commission proceedings constituted a violation of section 1 of the Sherman Act. Although the Noerr defense was not specifically discussed, it was apparent that defendants were relying on the proposition that everything they did was within the law. However, it cannot be said that the defendants' scheme, apart from the illegal enforcement plan, was entirely lawful since they were enforcing an illegal cross-licensing agreement.

*Kobe, Inc. v. Dempsey Pump Co.* was an action for patent infringement. The defendants counterclaimed charging abuse of the patent monopoly in violation of sections 1 and 2 of the Sherman Act. Shortly after the defendant introduced its pump into the market, the plaintiff brought suit alleging that no one could build a pump without infringing its patents. The plaintiff sent letters to major purchasers of pumps telling of the infringement suit. The court, however, found evidence of an illegal patent pool and awarded damages to the defendant on its counterclaim:

> We fully recognize that free and unrestricted access to the courts should not be denied or imperiled in any manner. At the same time we must not permit the courts to be a vehicle for maintaining and carrying out an unlawful monopoly which has for its purpose the elimination and prevention of competition.

It was held that the infringement action and other activities were not in themselves illegal, but "when considered with the entire monopolistic scheme . . . they may be considered as having been done to give effect to the unlawful scheme."

The *American Tobacco* case was cited as authority. But under the Noerr doctrine, the rule of the *American Tobacco* case does not apply in a Noerr-type situation. Moreover, *Pennington* made clear that Noerr-type activities, even when part of a "broader scheme," do not violate the Sherman Act.

96. *Id.* at 189.
97. *Id.* at 195.
99. 374 U.S. at 177-79.
100. 198 F.2d 416 (10th Cir. 1952).
101. *Id.* at 421-22.
102. *Id.* at 422.
103. *Id.* at 419-20.
104. *Id.* at 424 (emphasis added).
105. *Id.* at 425.
106. See text accompanying notes 34-36 supra.
Perhaps Dempsey could be explained on the basis that the plaintiffs there sued to enforce an illegal patent pool. It might also be interpreted as a "sham exception" case.\textsuperscript{108} But the most plausible explanation of Dempsey seems to be that it rested on the pre-Noerr "bad purpose" doctrine, which was expressly rejected by Noerr and Pennington.\textsuperscript{109} It might well be concluded, therefore, that Noerr and Pennington impliedly overruled much of the language in Dempsey.

Lynch v. Magnavox\textsuperscript{110} was another pre-Noerr case cited by the court in Trucking Unlimited. There the plaintiff alleged that the defendants conspired to monopolize the manufacture, sale and distribution of radio loud speakers in interstate commerce. Under the conspiracy, competitors allegedly cross-licensed each other illegally, threatened infringement suits to discourage others from manufacturing, and actually instituted a number of suits.\textsuperscript{111} An extensive letter-writing campaign to retail outlets was carried on to discourage the sale of competitive products.\textsuperscript{112} The district court sustained the demurrer. The appellate court reversed, holding that "if the purpose was unlawful, there is a violation."\textsuperscript{113} This is clearly an articulation of the old "bad purpose" doctrine. Therefore Lynch was also impliedly overruled by Pennington, although the case might still be good law as respects use of illegal cross-licensing agreements among competitors to create a monopoly.

In none of the foregoing patent-antitrust cases did the courts hold that a conspiracy actuated by anticompetitive motives, to bring or to threaten to bring an infringement suit was, without more, an antitrust violation. In fact, it has long been recognized that the mere bringing of an infringement suit with the intent to monopolize the industry does not constitute a violation of section 2 of the Sherman Act.\textsuperscript{114} A contrary rule would amount to an acceptance of the old bad purpose doctrine, which was decisively rejected in Pennington. Hence it is clear that the holding in Trucking Unlimited rests on a paucity of precedent.

\begin{itemize}
\item \textsuperscript{108} See notes 20 & 102 & accompanying text supra (letters to purchasers telling of suit).
\item \textsuperscript{109} See text accompanying notes 34-40 supra.
\item \textsuperscript{110} 94 F.2d 883 (9th Cir. 1938).
\item \textsuperscript{111} \textit{id.} at 886-87.
\item \textsuperscript{112} \textit{id.} at 887.
\item \textsuperscript{113} \textit{id.} at 890.
\end{itemize}
Sham Exception

The Ninth Circuit's interpretation of the "sham exception" clears up the district court's confusion on this subject. Although the defendants sought to influence official action by intervening in Public Utilities Commission hearings to oppose the issuance of operating certificates, their real objective was to deter other truckers' applications. They publicized their intention to oppose all new applications to influence competitors' conduct, not the government's. If the plan had worked perfectly, there would have been no applications and hence no need for the defendants to appear before the PUC or the courts. To this extent, the defendant truckers sought to restrain trade directly by means other than influencing governmental action and were not subject to Noerr-Pennington immunity.

One difficulty in this approach lies in the fact that defendants did make a genuine effort to induce governmental action. Many of the oppositions to the issuance of new licenses were in fact successful. However, the Ninth Circuit pointed out that the fact that a valid basis existed for opposing some applications was irrelevant since all applications were to be opposed regardless of merit.

Conclusion

Judge Browning limited the decision in Trucking Unlimited to subject only those groups that use the judicial and administrative adjudicative processes for restraining trade to Sherman Act liability. The courts have held that the PUC acts as both a quasi-legislative and an adjudicative body. In performing the licensing function, the PUC is exercising its adjudicative powers unless it is formulating a

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116. 432 F.2d at 763.
117. See note 71 & accompanying text supra.
118. Id.
119. Adjudicative matters have been defined as "facts about the parties and their activities, businesses, and properties. Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion." 1 K. Davis, Administrative Law Treatise § 7.02, at 413 (1958).
general policy. The defendants in *Trucking Unlimited* did not attempt to induce the PUC to change its general policy. Instead, they attempted to influence the PUC's adjudicative decisions for anticompetitive reasons. It is submitted that such activities should not be protected by the *Noerr-Pennington* doctrine.

It has been suggested that the broad language of *Noerr* and *Pennington* should be limited.\(^1\) Justice Black argued in *Noerr* that the Sherman Act was not meant to regulate political activity.\(^2\) However, the Sherman Act was intended to regulate economic activity. It follows that those who conspire to restrain trade by attempting to influence purely economic decisions of governmental decision-making agencies should be subject to Sherman Act prosecution. As one recent law review article put it:

> In determining the applicability of the Sherman Act to interest groups attempting to influence government decisions, the court should focus on the criteria which properly form the basis of the influenced decision. If the decision is essentially political, grounded in considerations which transcend economic data, invocation of the Sherman Act would be inapposite. However, when the decision is best made in an economic context, reliance on the Sherman Act would promote its goal of reducing the number of anticompetitive restraints in the economy without imposing upon the operation of the political process.\(^3\)

This thesis is not without support in the case law. *Woods Exploration & Producing Co. v. Aluminum Co. of America*\(^4\) makes the distinction between political and economic decisions. In this case, suit was brought against oil and gas leaseholders by competitors for treble damages and injunctive relief. The defendants' motion for summary judgment was denied by the district court.\(^5\) In support of their motion to dismiss, defendants argued that no violation of the antitrust laws had been stated. It was argued that defendants' attempt to influence the Railroad Commission by filing allegedly false "nominations" to restrict the production of oil by competitors was pro-

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122. See note 14 & accompanying text supra.


125. Id. at 109, 113.

126. "Nominations" are predictions of the amount of natural gas that could be pro-
ected by the Noerr doctrine. 127

The court rejected the argument, saying that Noerr probably did not apply because the actions complained of were not essentially political in nature. 128 However, the point is somewhat weakened by the court's further statement that even if this activity were protected by Noerr, the plaintiffs had alleged other facts sufficient to preclude dismissal. 129

In conclusion, it is submitted that the Noerr-Pennington doctrine should apply to concerted efforts to influence governmental decisions of an essentially political nature. However, when the decision sought to be influenced is basically "adjudicatory," the full power of the Sherman Act should be exerted. This is especially true when the conduct is part of a larger plan which seeks directly to restrain trade.

Alan H. Melnicoe*

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* Member, Third Year Class.

127. Id. at 111.
128. Id. at 111-12.
129. Id. at 112. The Woods case was recently affirmed, 39 U.S.L.W. 2413 (U.S. Feb. 2, 1971). The Fifth Circuit cited Trucking Unlimited as authority.

Produced in the coming month. Producers of natural gas were required by law to file such "nominations" in order for the Railroad Commission to determine if new wells were needed. Id. at 112.