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ANTITRUST'S NEWEST QUAGMIRE: THE NOERR-PENNINGTON DEFENSE*

L. Barry Costilo**

IN recent years two relatively unheralded but sweeping antitrust decisions by the Supreme Court have given rise to ramifications far beyond their facts. Unless limited, they may be interpreted by business planners as providing safe havens in many areas of conduct where corporations and trade associations have previously feared to tread. The cases are *Eastern Railroad Presidents Corp. v. Noerr Motor Freight, Inc.*¹ and *United Mine Workers of America v. Pennington*.² The broad issue they raise is the extent to which business can concertedly seek to use the mechanism of government for the purpose of restraining trade without violating the antitrust laws.

These cases and their implications pose fundamental questions as to the types of permissible interaction between the public and private sectors of our economy. They underscore the dependency of federal, state, and local governments upon private business groups for the initiation of regulatory action which affects competition, and they highlight the potential dangers inherent in the formulation of rules and standards by industrial groups without careful governmental review.

I. THE CASES

The factual setting in *Noerr* centered on a battle royal between the railroad industry and the trucking industry over long-haul freight business. A group of truckers filed a treble damage action against twenty-four eastern railroads and a public relations firm, alleging, *inter alia*, that the defendant railroad conference had violated sections 1 and 2 of the Sherman Act by concertedly engaging in a massive public relations and lobbying campaign to oppose legislation favorable to the trucking industry.³ These efforts were

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1. 365 U.S. 127 (1961).

2. 381 U.S. 657 (1965).

3. In Pennsylvania, the truckers sought to have the 45,000-pound maximum load limit raised to 60,000 pounds.

capped by a presentation to the Governor of Pennsylvania at an executive hearing at which both sides were present, which resulted in the veto of the pro-trucking bill.⁴ The complaint alleged that the public relations materials circulated to the public were exaggerated and misleading and it took exception to the use of the third-party technique.⁵ Central to the truckers' case was the charge that the railroads' "sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors for the long-distance freight business."⁶ The district court ruled in favor of the truckers, and the court of appeals affirmed.⁷

The Supreme Court, however, reversed on several grounds, one being the right to petition. Justice Black stated that people have a right "to make their wishes known to their representatives . . .,"⁸ even though they may have anti-competitive motives and even though their representations are misleading. In order to avoid serious first amendment questions, the Court construed the Sherman Act as not intended to prohibit this type of political activity. Although such conduct may offend one's sense of fairness, it is in accord with the long-standing American political tradition of allowing all views on pending legislation to be heard, including slanted representations by self-interested lobbying and pressure groups.⁹ The fact that such materials may be misleading is unfortunate, but imposition of a standard of absolute accuracy would be impossible to administer. The remedy, if any, is at the ballot box, where, ideally, an informed electorate can determine how the public interest can best be served. At least in theory, the public clash of divergent views will somehow permit the truth to filter through. Such legislation as protective tariffs and federal subsidies of particular industries are notable products of this tradition. Limited to this ground the Noerr case is quite reasonable

4. See Brief for Appellant at 72 n.65, *Eastern R.R. Presidents Corp. v. Noerr*, 273 F.2d 218 (3d Cir. 1959).

5. This technique was described in *Noerr* as "giving propaganda actually circulated by a party in interest the appearance of being spontaneous declarations of independent groups." 365 U.S. at 140.

6. 365 U.S. at 138. Ancillary to this charge was the allegation that apart from legislative activities, the public relations campaign had an adverse effect upon the good will the truckers enjoyed with their customers. The Supreme Court dismissed this effect as being incidental to the campaign to influence governmental action.

7. 155 F. Supp. 768 (E.D. Pa. 1957), *aff'd*, 273 F.2d 218 (3d Cir. 1959).

8. 365 U.S. at 137.

9. See E. BERNAYS, *THE ENGINEERING OF CONSENT* 3, 4 (1955); D. BLAISDELL, *AMERICAN DEMOCRACY UNDER PRESSURE* 93, 94, 207 (1957); J. PIMLOTT, *PUBLIC RELATIONS AND AMERICAN DEMOCRACY* 237 (1951); K. SCHRIFTGIESSER, *THE LOBBYIST* 229 (1951).

in the political context in which it arose.¹⁰ As a corollary to the right of petition, the opinion stated that it is to the interest of a government operating in a representative democracy to be informed of the views of self-interested private groups.

The Court also indicated that a restraint of trade caused by valid governmental action would not violate the Sherman Act. It relied on the principle that federal and state governments may lawfully impose a restraint of trade in a given industry in the exercise of their broad legislative and executive powers, so long as their action is not unconstitutional.¹¹ The Court then reasoned that concerted efforts of private persons to secure such action should also be protected, for a contrary holding "would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade."¹² This logic has a certain appeal, but it should be applied with caution. The Court's exact language was guarded: "[W]here a restraint upon trade or monopolization is the result of valid government action, as opposed to private action, no violation of the Act can be made out."¹³ Note the caveats that the restraint of trade must not result from private action, and that the governmental action must be valid.

Noerr also reflects a general reluctance of the judiciary to use the antitrust laws as a vehicle to police conduct which, although regarded as unethical, does not fall within traditional antitrust categories.¹⁴ All of the above reasons coalesce in *Noerr* to impel the Court's result. However, their blanket extension to other fact situa-

10. At a later part of its opinion, the Court stated:

The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena. Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation. All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial import and involve conduct that can be termed unethical.

365 U.S. at 141. For a recent decision insulating lobbying from antitrust liability, see *Schenley Indus., Inc. v. New Jersey Wine & Spirit Wholesalers Ass'n*, 5 TRADE REG. REP. (1967 Trade Cases) ¶ 72,207, at 84,345 (D.N.J. Sept. 9, 1967).

11. See *Parker v. Brown*, 317 U.S. 341, 350 (1943); *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533, 559-60 (1939); *Olsen v. Smith*, 195 U.S. 332, 344-45 (1904). As early as 1895, a state monopoly of the liquor business was held not to violate the Sherman Act. *Lowenstein v. Evans*, 69 F. 908 (C.C.S.C. 1895).

12. 365 U.S. at 137.

13. 365 U.S. at 136.

14. See *Parmelee Transp. Co. v. Keeshin*, 292 F.2d 794, 804 (7th Cir. 1961), cert. denied, 368 U.S. 944 (1961); *Sterling Nelson & Sons v. Rangen, Inc.*, 235 F. Supp. 393, 400 (D. Idaho 1964), aff'd, 351 F.2d 851 (9th Cir. 1965).

tions where governmental action may be directly or even tangentially involved is questionable.

*United Mine Workers of America v. Pennington*¹⁵ enlarged *Noerr* by holding that concerted efforts to induce public officials to take action detrimental to competition, although motivated by anti-competitive purposes, do "not violate the antitrust laws, either standing alone [as in *Noerr*] or as a part of a broader scheme itself violative of the Sherman Act."¹⁶ This precise issue was not present in *Noerr* since there "the evidence consist[ed] *entirely* of activities of competitors seeking to influence public officials."¹⁷ *Pennington* involved a treble damage counterclaim under the Sherman Act filed by a small bituminous coal mine operator who was allegedly forced out of business by a conspiracy between the union and large coal mining companies to place such financial burdens on small, marginal, non-unionized mines that they would be unable to compete. It was alleged that as part of this scheme the large mine owners had successfully induced the Secretary of Labor to establish under the Walsh-Healy Act¹⁸ a minimum wage for employees of contractors selling coal to the Tennessee Valley Authority (TVA), "such minimum wage being higher than in other industries . . . making it difficult for small companies to compete in the TVA term contract market."¹⁹ It was further alleged that defendants had urged the TVA to abide by the spirit of the Walsh-Healy Act by curtailing its spot market purchases, thereby foreclosing the small mine owners from bidding on the remaining TVA business. The pertinent non-governmental aspect of this case consisted of the allegation that the large mine owners conspired to dump large tonnages of coal on the TVA spot market at extremely low prices in order to drive the small non-unionized mines out of this business. Although the *Noerr* issue was somewhat submerged by the discussion in the opinion dealing with the labor exemption to the antitrust laws, the Court overturned a jury verdict for the operator of the small mine, partially on the ground that the efforts to influence the Secretary of Labor and the TVA were protected by *Noerr* and that evidence should not have been submitted to the jury with instructions that they could find this conduct to be one among several means of effect-

15. 381 U.S. 657 (1965).

16. *Id.* at 670.

17. *Id.* at 669 (emphasis added).

18. 41 U.S.C. §§ 35-45 (1964).

19. 381 U.S. at 660.

ing the overall conspiracy. Justice White did take some of the sting out of *Pennington* by indicating in a footnote that "[i]t would of course still be within the province of the trial judge to admit this evidence . . . if it tends reasonably to show the purpose and character of the particular transactions under scrutiny."²⁰ However, admissibility of this evidence would depend upon the favor of the trial judge and would not be as of right.²¹

This holding is inconsistent with the general rule of conspiracy which is enunciated in *American Tobacco Co. v. United States*²² and a score of other antitrust cases²³ that:

It is not the form of the combination or the particular means used but the 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.²⁴

The Court in *Pennington* made no attempt to reconcile this principle or these cases with its opinion; indeed, it is difficult to see how this principle can be reconciled with *Pennington*, especially when there is no *Noerr*-type constitutional issue present.

If the concerted efforts to influence the Secretary of Labor and

20. *Id.* at 670 n.3.

21. In *United States v. Singer Mfg. Co.*, 374 U.S. 174 (1962), the Court sustained a charge that defendant sewing machine company had violated §§ 1 and 2 of the Sherman Act by, *inter alia*, attempting to exclude Japanese sewing machines from competing with them in the American market. The case centered on collusive patent assignments and infringement suits. Plaintiff also introduced evidence that Singer had brought a proceeding before the Tariff Commission under § 337 of the Tariff Act of 1930 seeking a Presidential Order excluding all imported machines which fell within Singer's patent. This proceeding was stayed while the case was pending in the courts. The Court viewed the tariff proceeding as evidence of Singer's "overriding common design to exclude the Japanese machines in the United States . . ." *Id.* at 195. Thus stated, the language is consistent with Justice White's statement in *Pennington* that efforts to secure governmental restraints may be admissible in the discretion of the trial judge to show motive or purpose. Since the *Singer* case was heard by a judge without a jury there was no issue, as in *Pennington*, as to whether such evidence should have been admitted to prove the means of effecting the conspiracy.

22. 328 U.S. 781 (1946).

23. *See, e.g.*, *United States v. Patten*, 226 U.S. 525, 544 (1913); *United States v. Reading Co.*, 226 U.S. 324, 357-58 (1912); *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905); *United States v. Great Atl. and Pac. Tea Co.*, 137 F.2d 459, 464 (5th Cir. 1943), *cert. denied*, 320 U.S. 783 (1943); *United States v. Vehicular Parking Ltd.*, 54 F. Supp. 828, 830 (D. Del. 1944).

24. 328 U.S. at 809 (emphasis added).

the TVA are constitutionally protected, then this general rule of conspiracy, as stated in *American Tobacco*, must of course bow to a superior right, and such evidence should not be admissible even to prove part of a broader anticompetitive scheme. However, unlike *Noerr*, it is difficult to establish a constitutional case in *Pennington*. The large mine owners sought a Department of Labor ruling on minimum wages in accordance with the procedures set forth in the Walsh-Healy Act. Their rights were solely the creature of statute. The procedures for presenting their views were also governed by statute, subject only to due process requirements. It is doubtful whether a constitutional argument would have been sustained if the Walsh-Healy Act had contained an express prohibition against joint requests by members of the industry for minimum wage rulings. The right "to petition the Government for redress of grievances,"²⁵ like most constitutional rights, is not absolute,²⁶ but must be reasonably exercised within the framework of existing governmental arrangements and procedures. So long as there is some government entity to which aggrieved persons can have recourse, it would seem that this constitutional right is secured. If there had been no Walsh-Healy Act, the mineowners would have been remitted to the legislature, where they could have freely exercised their *Noerr* right to petition. As will be discussed below, the determination of whether the mineowners' joint conduct violated the antitrust laws should turn on an analysis of whether the applicable statutes expressly or impliedly permitted such conduct²⁷—and not on constitutional grounds.

Regardless of the view one takes as to the correctness of *Pennington*, it stands as the most recent pronouncement of the Court on this problem. Of more than passing significance is the fact that in *Noerr* and *Pennington* the Court did not receive the views of the Justice Department.²⁸ Perhaps the language of these cases might

25. U.S. CONST. amend. I.

26. See, e.g., *Adderley v. Florida*, 385 U.S. 39 (1966) (civil rights demonstration on jailhouse property); *Kovacs v. Cooper*, 336 U.S. 77, 88-89 (1949).

27. With respect to the mineowners urging the TVA to abide by the spirit and letter of the Walsh-Healy Act and to curtail TVA spot market purchases, nothing in either the Supreme Court or court of appeals opinions indicates that TVA rules or regulations prohibited such an approach. These efforts were reasonably ancillary to defendants' main conduct of securing wage rulings from the Secretary of Labor.

28. The Department of Justice did file an amicus brief in the companion case of *Local 189, Amal. Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676 (1965), but this brief was confined to a discussion of the labor exemption from the antitrust laws.

have been narrower had the Court been apprised of their widespread ramifications. But this will have to await future cases.

The implications of *Noerr* and *Pennington* are only limited by one's imagination²⁹ and may extend to concerted action to secure governmental acceptance of discriminatory product or safety specifications;³⁰ to secure public approval of discriminatory rates in order to eliminate competition;³¹ to induce public authorities not to license competitors;³² to seek restrictive production and sales quotas³³ and wage levels for competitors; to urge customers not to deal with a competitor, under the guise of seeking legislative action; to obtain a patent monopoly by practicing fraud on the Patent Office;³⁴ to rig bids³⁵ or make other misrepresentations to government in order to injure competition; to bribe or corrupt government officials;³⁶ and to any other practice by which businessmen

29. In view of these implications, it is surprising that there has been so little written on the subject. The *Noerr* case has been noted in 47 CORNELL L.Q. 250 (1962); 106 U. PA. L. REV. 69 (1957); 23 U. PITT. L. REV. 216 (1961); 33 ROCKY MT. L. REV. 131 (1961); 70 YALE L.J. 135 (1960). For a recent article critical of the *Noerr* decision, as it pertains to lobbying, see Walden, *More About Noerr—Lobbying, Antitrust and the Right To Petition*, 14 U.C.L.A.L. REV. 1211, 1246-49 (1967). In this article, Dean Walden suggests that the Sherman Act be utilized to prevent horizontal combinations of large competitors who jointly pursue common legislative programs.

30. See generally *Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co.*, 364 U.S. 656 (1961); *United States v. Johns-Manville Corp.*, 259 F. Supp. 440, 452-53 (E.D. Pa. 1966) (*sub judice*); *Application of Am. Soc'y for Testing & Materials*, 231 F. Supp. 686 (E.D. Pa. 1964); cases cited in notes 96-105 *infra*.

31. See generally *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945); *Slick Airways, Inc. v. American Airlines, Inc.*, 107 F. Supp. 199, 214 (D.N.J. 1951), *appeal dismissed sub nom.*, *American Airlines, Inc. v. Forman*, 204 F.2d 230 (3d Cir.), *cert. denied*, 346 U.S. 806 (1953); *Marnell v. United Parcel Service of America, Inc.*, 1966 Trade Cas. ¶ 71,913 (N.D. Cal. 1966).

32. See generally *E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority*, 362 F.2d 52 (1st Cir. 1966), *cert. denied*, 385 U.S. 947 (1966); *Harman v. Valley Nat'l Bank*, 339 F.2d 564 (9th Cir. 1964); *Parmelee Transp. Co. v. Keeshin*, 292 F.2d 794 (7th Cir. 1961); *Okefenokee Rural Elec. Mem. Corp. v. Florida Power & Light Co.*, 214 F.2d 413 (5th Cir. 1954); *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947); *cf.* *Union Pac. R.R. v. United States*, 313 U.S. 450 (1941) (*Elkins Act*); *A.B.T. Sightseeing Tours v. Gray Line N.Y. Tours*, 242 F. Supp. 365, 369 (S.D.N.Y. 1965).

33. See generally *Woods Exploration Co. v. Alcoa*, 36 F.R.D. 107, 111-12 (S.D. Tex. 1963); *Woods Exploration Co. v. Alcoa*, 382 S.W.2d 343 (Tex. Civ. App. 1964); *Asheville Tobacco Bd. of Trade, Inc. v. FTC*, 263 F.2d 502, 509-10 (4th Cir. 1959).

34. See generally *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965); *American Cyanamid Co. v. FTC*, 3 TRADE REG. REP. ¶ 16257 (FTC 1963), *vac. and rem'd*, 1966 Trade Cas. ¶ 71807 (6th Cir.).

35. See generally *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943); *Georgia v. Evans*, 316 U.S. 159 (1942).

36. See generally *Sterling Nelson & Sons v. Rangen, Inc.*, 235 F. Supp. 393, 400 (D. Idaho 1964), *aff'd*, 351 F.2d 851 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966).

might seek advantages over their competitors through governmental action.

What analytical tools can be used to cut through this thicket?

II. INDIVIDUALS ACTING UNDER COLOR OF GOVERNMENT AUTHORITY

Restraints of trade are often imposed by private persons acting under color of law in official or quasi-official capacities. It is sometimes charged, for example, that state medical and dental examining boards consisting of local practitioners exclude out-of-state applicants from practice within their states to eliminate competition which the local physicians and dentists would otherwise face. A similar problem has occurred in the tobacco industry, where sellers already established in a market have utilized the statutory power given them to regulate selling time at local auction markets to discriminate against new entrants into the market. These and other like restraints commonly arise under statutes which authorize private commercial groups to pass rules and regulations governing the conduct of their trade or profession.

Since state and local governments often lack the expertise and manpower to carry out all of their regulatory functions, delegations of this kind are necessary. Such delegations must be watched carefully, however, lest they be used to by-pass the antitrust laws. Although this is not purely a *Noerr* problem, the following language of *Noerr* may be helpful: "where a restraint upon trade or monopolization is the result of *valid governmental action, as opposed to private action*, no violation of the Act can be made out."³⁷ Therefore, even under *Noerr*, a course of conduct would not be protected as governmental action if pursued outside the scope of delegated statutory authority in order to further an independent business interest.

The federal government, of course, has the power specifically to authorize conduct which would otherwise violate the antitrust laws.³⁸ Similarly, as to the states, the Supreme Court held in *Parker v. Brown* that it is not the purpose of the antitrust laws to restrain "a state or its officers or agents from activities directed by its legislature" in the exercise of its police power.³⁹ At the other extreme, it is just as clear that where there is no statute or regulation from

37. 365 U.S. at 136 (emphasis added).

38. *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533 (1939).

39. 317 U.S. 341, 350 (1943).

which to claim governmental authorization, courts will give short shrift to an assertion of privilege on the grounds that the government acquiesced in anti-competitive conduct.⁴⁰ Most cases are not so clear-cut.

Typically, there may be a broad state statutory or even constitutional provision which could be construed to authorize a multitude of sins. Had the state legislators contemplated that their act would legalize the particular restraint of trade in question? Most likely the thought never came to their minds. If a state clearly enunciates a policy of eliminating competition in a given industry, the task may be easier.⁴¹ But even then the particular type of restraint may not have been one of the forms of restraint contemplated.⁴² State medical and dental examining boards are illustrations. It is clear under *Parker v. Brown* that if a statutory provision explicitly directed the exclusion of nonresident physicians, such conduct would not violate the antitrust laws.⁴³ However, it is doubtful whether any states have such blatant statutory provisions. The typical statute is phrased in broad terms and is left to the wide discretion of the state medical board to administer. Without commenting on the merits of this type of question,⁴⁴ it does highlight the difficulty of proving that state officers have acted outside the scope of their broad legislative authority.

However, it can be done. In *Asheville Tobacco Board of Trade, Inc. v. FTC*,⁴⁵ an action under section 5 of the Federal Trade Commission Act, it was held that although a North Carolina statute authorized local tobacco boards of trade "to make reasonable rules

40. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 (1940), which stated:

Though employees of the government may have known of these programs and winked at them or tacitly approved of them, no immunity would have thereby been obtained. For Congress had specified the precise manner and method of securing immunity. None other would suffice.

41. See *Hitchcock v. Collenberg*, 140 F. Supp. 894 (D. Md. 1956).

42. See *United States v. Borden Co.*, 308 U.S. 188, 198-200 (1939).

43. 317 U.S. 341 (1943). However, such a provision may interfere with a citizen's constitutional right to travel among states and earn a livelihood. Cf. *Edwards v. California*, 314 U.S. 160 (1941).

44. In antitrust cases involving the medical profession the issues are often raised that there is no restraint of interstate commerce and that the professions are not considered commerce. See *United States v. Oregon State Medical Soc'y*, 343 U.S. 326 (1952); *Riggal v. Washington County Medical Soc'y*, 249 F.2d 266 (8th Cir. 1957), cert. denied, 355 U.S. 954 (1958); *Spears Free Clinic & Hosp. for Poor Children v. Cleere*, 197 F.2d 125 (10th Cir. 1952). But see *American Medical Ass'n v. United States*, 317 U.S. 519 (1943); *United States v. College of American Pathologists*, Civil No. 66C1253 (N.D. Ill., filed July 7, 1966).

45. 263 F.2d 502 (4th Cir. 1959).

and regulations for the economical and efficient handling of the sale of leaf tobacco"⁴⁶ at auction markets, it did not authorize the warehouses which operated these auctions to restrict unnecessarily⁴⁷ selling time in a way that discriminated against new warehouses⁴⁸ seeking to compete with those already established.⁴⁹

Should the anti-competitive acts of private individuals be automatically protected if they fall within the broad ambit of governmental authorization, or should they satisfy some higher standard? The court in *Asheville* felt that the private activities must be "adequately supervised by independent state officials"⁵⁰ and relied on the fact that the businessmen who operated the tobacco market were not required to comply with the North Carolina statute which directs each *state agency* to file its rules and regulations with the Secretary of State.

That a state may have to do something more than merely give its authorization is also suggested in *Schwegmann v. Calvert Distillers Corp.*,⁵¹ a case referred to in *Asheville*.⁵² In *Schwegmann* a state fair trade law delegating the resale price-setting function to private persons was held not to immunize this type of price fixing from the Sherman Act. Although *Schwegmann* is generally considered inconsistent with *Parker v. Brown*,⁵³ perhaps had there been

46. N.C. GEN. STAT. §§ 106-465 (1960).

47. For other examples of rule-making by quasi-public stock or commodity exchanges which were attacked on antitrust grounds, see *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963); *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918).

48. It should be noted that the court's task in *Asheville* was apparently made easier by the fact that the North Carolina statute contained a proviso that: "Nothing in this section shall authorize the organization of any association having for its purpose the control of prices or the making of rules and regulations in restraint of trade." N.C. GEN. STAT. § 106-465 (1952). The rules regulating selling time at the Danville, Virginia-Carolina tobacco auction market were upheld as reasonable in *Danville Tobacco Ass'n v. Bryant-Buckner Associates*, 5 TRADE REG. REP. (1967 Trade Cas.) ¶ 72000 (4th Cir. Jan. 25, 1967). There are numerous state cases holding that particular tobacco market rules are not unreasonable restraints of trade. See, e.g., *Fayette Tobacco Warehouse Co. v. Lexington Tobacco Bd. of Trade*, 229 S.W.2d 640 (Ky. Ct. App. 1957); *Day v. Asheville Tobacco Bd. of Trade*, 242 N.C. 136, 87 S.E.2d 18 (1955); *Cooperative Warehouse, Inc. v. Lumberton Tobacco Bd. of Trade, Inc.*, 242 N.C. 123, 87 S.E.2d 25 (1955). For a comprehensive review of this subject, see Note, 106 U. PA. L. REV. 568 (1958).

49. For a recent example of a court giving careful scrutiny to trade regulation by private persons acting in public capacities, see *Schenley Indus., Inc. v. New Jersey Wine & Spirit Wholesalers Ass'n*, 5 TRADE REG. REP. (1967 Trade Cases) ¶ 72,207 at 84,352 (D.N.J. Sept. 9, 1967).

50. 293 F.2d at 511.

51. *Id.*

52. 341 U.S. 384 (1951).

53. See Rahl, *Resale Price Maintenance, State Action, and the Antitrust Laws*, 46 NW. U.L. REV. 349, 360-67 (1951).

governmental review of particular resale price maintenance contracts containing non-signer clauses, the Court might have been more willing to exempt this conduct.⁵⁴ However, these are still unanswered questions which must await Supreme Court clarification.

III. EFFORTS TO OBTAIN GOVERNMENTAL RESTRAINTS

In addition to restraints imposed by private individuals acting under color of law, there is the broader and more difficult class of *Noerr-Pennington* problems involving efforts to induce the government to impose restraints of trade. Such efforts may take the form of filings, presentations, or solicitations to administrative agencies or executive departments under pertinent statutory provisions and agency regulations. For example, a petition to the Civil Aeronautics Board to require non-scheduled airlines to have more regular flights which contain false and defamatory material could be one element of a broader conspiracy on the part of the large airlines to drive the smaller airlines out of business.⁵⁵ Many of the pre-*Noerr* and *Pennington* cases arose in the context of regulated industries, where the issue was cast in terms of whether the regulatory agency had primary or exclusive jurisdiction⁵⁶ and the extent of statutory delegation.⁵⁷ Similar considerations applied to conduct at the state level, with the additional issue of federal-state relations being present.⁵⁸

Whether anticompetitive conduct of this nature is exempt from the strictures of the antitrust laws depends on whether it is expressly or impliedly authorized by the applicable regulatory statute, and this question, in turn, may often depend on the degree of detailed regulation which the agency imposes.⁵⁹ *Noerr* and *Pennington* are judge-made rather than statutory exemptions. Unfortunately, courts have not always been clear and consistent in articulating their rationale for implying exemptions to the antitrust laws.⁶⁰ The closer the

54. The McGuire Amendment was subsequently enacted in 1952 to permit state authorization of non-signer clauses. 15 U.S.C. § 45(a) (1964).

55. Cf. *Slick Airways, Inc. v. American Airlines, Inc.*, 107 F. Supp. 199 (D.N.J. 1951), *appeal dismissed sub nom.*, *American Airlines, Inc. v. Forman*, 204 F.2d 230 (3d Cir.), *cert. denied*, 346 U.S. 806 (1953).

56. *Hale & Hale, Competition or Control VI: Application of the Antitrust Laws to Regulated Industries*, 111 U. PA. L. REV. 46, 48-51 (1962). See generally K. DAVIS, *ADMINISTRATIVE LAW* § 19.01 (1959).

57. *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533 (1939).

58. *Parker v. Brown*, 317 U.S. 341, 350 (1943).

59. *United States v. Radio Corp. of America*, 358 U.S. 334, 350-51 (1959).

60. Compare *Far East Conference v. United States*, 342 U.S. 570 (1952), and *Terminal Warehouse Co. v. Pennsylvania R.R.*, 297 U.S. 500 (1936), and *United States Navigation*

agency supervision of the anticompetitive conduct in question, the greater the justification for removing the protections of the antitrust laws, because of the added assurance that the conduct is subject to the careful review of some public body—even if it is not a court. Thus, in *United States v. Socony-Vacuum Oil Co.*, it was stated that “the typical method adopted by Congress when it has lifted the ban of the Sherman Act is the scrutiny and approval of designated public representatives.”⁶¹ A fundamental inquiry, therefore, in many pre-*Noerr* cases was whether the governmental mechanism for supervising competition provided an adequate safeguard in place of the antitrust laws.⁶²

In addition to the closeness of regulation, courts have also been influenced by whether the governmental apparatus provided procedural safeguards to prevent groups of competitors from taking advantage of smaller, non-allied competitors having adverse commercial interests.⁶³ Although these considerations have become somewhat obscured by *Noerr*, an analysis of *Pennington* and the main cases cited in support of the broad language in the *Noerr* opinion indicates they are very much with us—although not always articulated.

In *Pennington*, the minimum wage rules promulgated by the Secretary of Labor were required to be in conformity with the Administrative Procedure Act.⁶⁴ Before a hearing was held, there was a panel meeting with representatives from the industry at which ground rules were set. Notice of the hearing was published and personal notice was sent to those interested parties who had evidenced a desire to be heard. Those who appeared at the hearing had the right of cross-examination and the right to apply for issuance of

v. *Cunard S.S. Co.*, 284 U.S. 474, 488 (1932), and *Atchison, T. & S.F. Ry. v. Aircoach Transp. Ass'n*, 253 F.2d 877 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 930 (1960), with *United States v. Radio Corp. of America*, 358 U.S. 334, 350-51 (1959), and *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945), and *Slick Airways, Inc. v. American Airlines, Inc.*, 107 F. Supp. 199 (D.N.J. 1951), *appeal dismissed sub nom.*, *American Airlines, Inc. v. Forman*, 204 F.2d 230 (3d Cir.), *cert. denied*, 346 U.S. 806 (1953). See generally *Hale & Hale, Competition or Control I: The Chaos in the Cases*, 106 U. PA. L. REV. 641 (1958).

61. 310 U.S. 150, at 227 n.60 (1940). See *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 459 (1944) (stating that if the combination there involved was exempted from Sherman Act liability, “[a] monopoly power . . . [would be] created under the aegis of private parties without Congressional sanction and without governmental supervision or control.”).

62. Pogue, *Rationale of Exemptions From Antitrust*, 19 ABA ANTITRUST SECTION 313, 328 (1961-1962).

63. Cf. *Silver v. New York Stock Exch.*, 373 U.S. 341 (1962).

64. 41 U.S.C. § 43a (1964).

subpoenas. The hearing examiner was required to set forth the evidence he relied upon at the hearing, plus findings required by the statute. A record of the proceedings was certified to the Secretary, who issued a proposed decision containing his findings and the reasons for his proposed wage determination. After lapse of an appropriate period of time for the filing of exceptions, the Secretary's determination became final. Parties who were still aggrieved had a right to judicial review.⁶⁵ Prior to *Pennington* the Secretary's wage determinations in the bituminous coal industry had been tested in court and upheld.⁶⁶

This was the background in *Pennington* which was not mentioned in the Court's opinion, but of which the Court undoubtedly must have been aware. The likelihood of overreaching by private groups in such a context is greatly reduced.⁶⁷

*United States v. Rock Royal Co-operative, Inc.*⁶⁸ and *Parker v. Brown*⁶⁹ were the main cases cited in *Noerr*. In both of these cases there were elaborate safeguards to insure that there would be no competitive overreaching by private groups. *Rock Royal* was a case arising out of the government-authorized price-fixing days of the New Deal. The Agricultural Marketing Agreement Act, a successor of the Agricultural Adjustment Act, provided that an order by the Secretary of Agriculture fixing the price of milk must be based upon a vote of two-thirds of the affected producers; that due notice must be given to all those affected by the order, along with an opportunity for a hearing; that the Secretary must set forth the evidence relied upon at the hearing, plus findings required by the statute; and that aggrieved parties could petition for administrative review of the order.⁷⁰ In this case certain large cooperative dairy producers proposed that the uniform prices of the Act not apply to them, and after the above procedures were followed, the Secretary of Agriculture issued such an order.

Again, in *Parker v. Brown* the following safeguards were part

65. 41 U.S.C. § 43c (1964).

66. *Ruth Elkhorn Coals, Inc. v. Mitchell*, 248 F.2d 635 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 953 (1958).

67. For a general discussion of rule-making by private groups, see Note, *Private Lawmaking by Trade Associations*, 62 HARV. L. REV. 1346 (1949). For a broad treatment of the subject from the standpoint of constitutionality of delegation, see Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937).

68. 307 U.S. 533 (1939).

69. 317 U.S. 341 (1943).

70. Act of May 12, 1933, 48 Stat. 31, *as amended*, Aug. 24, 1935, 49 Stat. 750.

of the California raisin prorate program. An Agricultural Prorate Advisory Commission composed of members of the industry was appointed by the Governor to hold a public hearing. They were required to make findings showing that the statutory objectives of the Prorate Act were met. Thereafter the State Director of Agriculture was required to select a committee to formulate a proration marketing program, composed of a representative cross-section of different industry interests. The program formulated by them could be approved by the Commission only after another public hearing and only after sixty-five per cent of the producers in the largest acreage zone had given their assent. The danger of misrule by so-called "private governments" in these situations is minimized. Even in *Noerr*, before the Governor vetoed pro-trucking legislation, an executive hearing was held where both sides presented their views.⁷¹ No such safeguards were present in *Schwegmann Bros. v. Calvert Distillers Corp.*, discussed earlier.

It is not suggested that this rationale will apply to all *Noerr-Pennington* type issues. But in those cases where the pertinent statutory provisions are ambiguous it is useful to determine whether the government merely adds its rubber stamp to the private anti-competitive scheme, or whether there is a more searching independent inquiry.

IV. CONTINENTAL ORE AS AN AUTHORITY

Sandwiched between *Noerr* in 1961 and *Pennington* in 1965 is the case of *Continental Ore Co. v. Union Carbide & Carbon*.⁷² In *Continental Ore*, a private company was appointed exclusive purchasing agent of vanadium products on behalf of the Canadian Government during World War II. This company was a wholly-owned subsidiary of defendant, Union Carbide, which was a large seller of vanadium oxide. The private treble damage claimant, an American seller of vanadium oxide in competition with Union Carbide and the other defendants, sought to prove that as part of an over-all conspiracy with defendants to monopolize the vanadium industry, the purchasing agent had refused to make any purchases from plaintiff. On appeal it was maintained that the purchasing agent was acting as an arm of the Canadian Government and that

71. It is recognized, however, that even absent this factor, *Noerr* would have been decided in the same manner because of the political context in which it arose.

72. 370 U.S. 690 (1962).

its conduct was therefore privileged under *Noerr*, *Rock Royal*, and *Parker v. Brown*.

A unanimous Court rejected this argument on the ground, *inter alia*, that the broad delegation to the purchasing agent was no indication that the Canadian Government would have approved joint efforts to monopolize the vanadium industry. In short, as in the *Asheville Tobacco Board of Trade* case, above, the purchasing agent here acted outside the scope of its statutory authority when it took actions to advance its own commercial interests.

Some people have difficulty in reconciling *Pennington* with *Continental Ore*. However, a distinction should be drawn between efforts to secure governmental action, and efforts by private persons to carry out in an anti-competitive manner the discretion vested in them by a broad governmental grant. As to the former conduct, *Noerr* and *Pennington* make clear that there is a right to petition jointly the government regardless of an anticompetitive motive. This facet was not at issue in *Continental Ore*, as there was no allegation that the appointment of the purchasing agent was obtained as part of the conspiracy to monopolize. If the defendants in *Continental Ore* had boldly sought executive or legislative action declaring that ore purchases were only to be made from a certain class of large sellers, to the exclusion of small companies such as the plaintiff, this would probably have been held to be privileged conduct. The very act of bringing such a proposal to the attention of public officials would at least have caused the proposal to be subjected to some scrutiny, and perhaps rejection. In fact, however, the purchasing agent, whose appointment was conceded to be lawful, allegedly engaged in anti-competitive conduct in the course of exercising its broad discretionary power "to purchase and allocate to Canadian industries all vanadium products required by them."⁷³ What checks and safeguards were available to the public under these circumstances? Surely the purchasing agent was not going to inform the Canadian Metals Controller that it was engaging in such a conspiracy.

Continental Ore may also be distinguishable from *Noerr* on the ground that the latter does not apply to concerted efforts to influence foreign governments. However, the extraterritorial application of *Noerr* is an interesting question which is beyond the compass of this article.⁷⁴ It should be emphasized that *Continental Ore* was a

73. 370 U.S. at 703 n.11.

74. Compare *United States v. Sisal Sales Corp.*, 274 U.S. 268, 274 (1927), with

unanimous opinion which followed *Noerr*. It is doubtful whether *Pennington*, decided four years later by a Court which was badly split on the labor issue, should be considered as undermining its authority.⁷⁵

V. OTHER LIMITATIONS

The Court in *Noerr* stated that "where a restraint upon trade or monopolization is the result of valid governmental action, . . . no violation of the Act can be made out,"⁷⁶ and then reasoned that attempts to secure such legally approved restraints should also be protected. This generalization is too sweeping. It cannot, for example, be applied to all joint efforts aimed at inducing a regulatory agency to set rates at a given level. There are cases in which the validity of rates established by administrative agencies were not challenged, but which nevertheless upheld antitrust attacks against concerted efforts to obtain those rates.⁷⁷

A. False Statements and Withholding of Information

Willfully false statements of material fact made to governmental agencies do not appear to be protected by *Noerr*. Although deceptive statements to the voting public and legislators were made during the public relations campaign in *Noerr*, this situation is *sui generis*.

American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909). *See also* *United States v. Chemical Specialties Co.*, 1958 Trade Cas. ¶ 69186 (S.D.N.Y.) (consent decree enjoining attempts to procure legislation from the Mexican government). *See generally* W. FUGATE, *FOREIGN COMMERCE AND THE ANTITRUST LAWS* 50 (1958), stating that only acts required by foreign law constitute a defense. To similar effect is the language in *United States v. The Watchmakers of Switzerland Information Center, Inc.*, 1963 Trade Cases § 70,600 at 77,456-57 (S.D.N.Y. Dec. 20, 1962):

In the present case, however, the defendants' activities were not required by the laws of Switzerland. They were agreements formulated privately without compulsion on the part of the Swiss Government. It is clear that these private agreements were then recognized as facts of economic life and industrial life by that nation's government. Nonetheless, the fact that the Swiss Government may, as a practical matter, approve of the effects of this private activity cannot convert what is essentially a vulnerable private conspiracy into an unassailable system resulting from a foreign government mandate.

It is still an open question whether the Constitution protects concerted efforts of United States citizens to petition foreign governments for anticompetitive purposes.

75. Justices Goldberg, Harlan and Stewart dissented from the opinion of the Court per Justice White, but concurred in the reversal. Justices Black and Clark joined in Justice Douglas' concurring opinion.

76. 365 U.S. at 136.

77. *See* *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945); *United States v. Association of Am. R.Rs.*, 4 F.R.D. 510, 524-26 (D. Neb. 1945); *Slick Airways, Inc. v. American Airlines, Inc.*, 107 F. Supp. 199 (D.N.J. 1951), *appeal dismissed sub nom.*, *American Airlines, Inc. v. Forman*, 204 F.2d 230 (3d Cir.), *cert. denied*, 346 U.S. 806 (1953); *cf.* *Keough v. Chicago & N.W.R.R.*, 260 U.S. 156, 161-62 (1922) (dictum) (Brandeis, J.).

These statements and arguments were made to legislators in order to influence legislation. The Court stressed repeatedly in *Noerr* that this type of political activity has been traditionally accorded wide latitude by the courts.⁷⁸

A distinction may be drawn between clearly political activity, in which it is expected that there will be a certain amount of puffing and distortion, and the filing of highly technical factual data with an agency which expects absolute truthfulness.⁷⁹ Regulatory agencies often have no real opportunity to scrutinize such data for several reasons: the facts are in the exclusive control of those persons seeking agency action; there may be no party with an adverse interest to call attention to the factual discrepancies; and the agencies have neither the time nor manpower to review carefully the thousands of routine matters which are filed each week. Since the rationale of *Noerr* is aimed at "enlightening" and informing government, rather than impeding its operations, it would be a perversion of *Noerr* to extend its protection to this type of conduct. In addition, the constitutional right to petition does not seem applicable to agency practice, which is circumscribed by statutes prohibiting false statements. And in any event, the first amendment does not accord blanket protection to false statements.⁸⁰

It should be stated, however, that not every misleading statement submitted to an agency regulating competition would subject the maker to antitrust liability. Exaggerated and misleading arguments contained in briefs or other papers do not reach that level because they may be readily verified.⁸¹ Nor will unintentional or immaterial misstatements of fact be sufficient. Only willfully false statements

78. Despite the Court's intervention in reapportionment cases such as *Baker v. Carr*, 369 U.S. 186 (1962), it is generally not eager to intercede in the "political thicket," and the language of the *Noerr* opinion reflects this hesitancy. 365 U.S. at 140-41. See *Colegrove v. Green*, 328 U.S. 549, 556 (1946); cf. *United States v. Harriss*, 347 U.S. 612 (1954); *United States v. Rumely*, 345 U.S. 41 (1953).

79. *Pennington* is not apposite to this discussion since there were no allegations of false statements made in that case. Even if false statements had been made to the TVA and Secretary of Labor, it is likely that they would have been on the broad policy issue of extending the minimum wage to bituminous coal workers, rather than on willful misstatements of technical factual data. If they were on the broader issue, a strong argument could be made that the subject matter is of a quasi-political nature, and hence is akin to *Noerr*.

80. See *E. F. Drew & Co. v. FTC*, 235 F.2d 735, 739-40 (2d Cir. 1956), *cert. denied*, 352 U.S. 969 (1957), holding there is no constitutional right to disseminate false or misleading advertisements.

81. See *Okefenokee Rural Elec. Corp. v. Florida Power & Light Co.*, 214 F.2d 413, 416 (5th Cir. 1954), in which there was an allegation that false arguments were made to a governmental agency.

should subject their maker to antitrust attack, providing of course that the other requisites of an antitrust violation are present. By similar reasoning, it is submitted that a conspiracy to withhold information which is required to be submitted to a government regulatory agency may likewise be subject to antitrust attack, since such activity smacks of fraud.

Thus, concertedly filing false forecasts of natural gas production for the purpose of inducing a state agency to limit production quotas of competitors was held to state part of a cause of action under the Sherman Act.⁸² Fraudulent and misleading statements submitted to the Patent Office may be evidence of an antitrust violation.⁸³ And no one seriously argues that rigged bids submitted to government purchasing agencies are protected by *Noerr*.⁸⁴

B. Bribery and Corruption

Nor should more blatantly corrupt forms of inducing governmental action be immune from antitrust proceedings merely because the validity of the resultant governmental action is not challengeable. If willfully filing false reports and affidavits to an unwitting administrative agency is attackable on antitrust grounds, then it would surely seem that the use of bribery or other corrupt means to induce officials of an agency to grant an exclusive license or contract should also be actionable.⁸⁵ If a government official is acting as a co-conspirator, outside the scope of his authority, the cause of action should be treated like any other conspiracy.⁸⁶ But federal courts have

82. *Woods Exploration Producing Co. v. Alcoa*, 36 F.R.D. 107 (S.D. Texas 1963); see *Woods Exploration Producing Co. v. Alcoa*, 382 S.W.2d 343 (Tex. Civ. App. 1964).

83. See *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965); *FTC v. American Cyanamid Co.*, 3 TRADE REG. REP. ¶ 16,527 (FTC 1963), *vac. and rem'd*, 1966 Trade Cas. ¶ 71,807 (6th Cir.). See generally REPORT OF THE PRESIDENT'S COMMISSION ON THE PATENT SYSTEM 2 (1966); Cullen and Vickers, *Fraud in the Procurement of a Patent*, 29 GEO. WASH. L. REV. 110 (1960); Note, 77 HARV. L. REV. 1505 (1964). Reflected in these materials is the belief that the mass of complex data submitted to the Patent Office requires that greater care and attention be given to the processing of patent applications.

84. See note 27 *supra*.

85. *Sterling Nelson & Sons v. Rangen, Inc.*, 235 F. Supp. 393 (D. Idaho 1964), *aff'd*, 351 F.2d 851, *cert. denied*, 383 U.S. 936 (1966) (bribery attempt of state fishery purchasing agent held to be a violation of § 2(c) of the Robinson-Patman Act).

86. See *Bankers Life & Cas. Co. v. Larsen*, 357 F.2d 377, 378 n.2, 381 (5th Cir. 1958) (a pre-*Noerr* case); cf. *Harman v. Valley Nat'l Bank*, 339 F.2d 546, 566 (9th Cir. 1964), in which the court of appeals upheld, against a motion to dismiss, an allegation that defendant banks induced the Arizona Attorney General to file a suit placing the plaintiff savings and loan in receivership, and that such suit was "fraudulent." There was an allegation that the Attorney General was a co-conspirator. Conversely, where

expressed a strong reluctance to intercede collaterally into these matters by means of the antitrust laws, even where the restraint affects interstate commerce; instead, at least where a state agency is involved, they prefer to leave the punishment of wrongdoing exclusively to state police power.⁸⁷ In balancing the federal and state interests, there seems to be no interference with the enforcement of state conflict-of-interest and criminal statutes which warrants such an exclusion of antitrust enforcement. Enforcement of both sets of laws should not be mutually exclusive.

C. *Who Is Suing Whom for What?*

Whether the action is a private treble damage suit or a government enforcement action may have some bearing on the scope which the Supreme Court might accord to *Pennington* in the future. Significantly, the major opinions which have been written in this area involve private damage claimants.⁸⁸ In several of these cases, courts have relied heavily on the rule that no damages are recoverable for injuries resulting from legal acts of government.⁸⁹ Even *Pennington* placed considerable emphasis on this ground.⁹⁰ This rule has been applied in the belief that the direct cause of plaintiff's injury and damages were the intervening acts of government—over which defendant had no control⁹¹—and not those of the defendant,⁹² and

the official or agency acts within the scope of its governmental duties, then no antitrust action lies. See *E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority*, 362 F.2d 52 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966). Justice White also alluded to this consideration in *Pennington* when he pointed out that the Secretary of Labor was not alleged to be a co-conspirator. 381 U.S. at 671.

87. See *Parmelee Transp. Co. v. Keeshin*, 292 F.2d 794, 804 (7th Cir.), *cert. denied*, 368 U.S. 944 (1961); *Schenley Indus., Inc. v. New Jersey Wine & Spirit Wholesalers Ass'n*, 5 TRADE REG. REP. (1967 Trade Cas.) ¶ 72,207, at 84,357 (D.N.J. Sept. 9, 1967), the former decision was criticized in Note, 62 COLUM. L. REV. 1091, 1095 (1962); cf. *Harman v. Valley Nat'l Bank*, 339 F.2d 564, 566 (9th Cir. 1964).

88. *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Corps. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *Keough v. Chicago & N.W.R.R.*, 250 U.S. 156 (1922); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); *Parmelee Transp. Co. v. Keeshin*, 292 F.2d 794, 804 (7th Cir. 1961), *cert. denied*, 383 U.S. 936 (1966); *Okefenokee Rural Elec. Corp. v. Florida Power & Light Co.*, 214 F.2d 413 (5th Cir. 1954).

89. See particularly *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 358 (1909); *Okefenokee Rural Elec. Corp. v. Florida Power & Light Co.*, 214 F.2d 417-18 (5th Cir. 1954).

90. 381 U.S. at 671-72.

91. The factors which actuate a legislative body are often too varied to attribute solely to defendant's conduct.

92. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 358 (1909).

that the valid acts of government cannot give rise to "legal injury."⁹³ Although the application of this reasoning may be subject to question,⁹⁴ it has had a strong influence in antitrust damages cases.

It is not clear what result would obtain in a criminal antitrust action or a government suit for injunctive relief where the question of causation of damages is not present. In an appropriate fact situation, such as one in which there are no safeguards against overreaching by private groups, or one in which the activity is not solely political as in *Noerr*, the Supreme Court could use this distinction to retrench from its present position. In view of the broad thrust of *Noerr* and *Pennington*, however, this distinction standing alone is not completely satisfying.

D. Sham Legislative Campaigns

Noerr adverted to other conduct which would not be protected: "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action is a mere sham to cover what is . . . nothing more than an attempt to interfere directly with the business relationships of a competitor."⁹⁵ The Court was referring here to interfering directly with the business relations of the truckers by inducing their customers not to deal with them, when such activity is not merely an incidental effect of the legislative campaign. Although the Court found no factual support for such a conclusion in *Noerr*, it recognized that the possibility of such a situation exists. Whether a public relations campaign is merely a blanket saturation of the public at large, or whether disparaging literature is sent to a limited group of customers for the purpose of inducing them not to deal with a competitor is a relevant consideration. These situations would largely be matters of factual characterization, and the defense would argue that it was intended that the

93. *Okefenokee Rural Elec. Corp. v. Florida Power & Light Co.*, 214 F.2d 413, 418 (5th Cir. 1954).

94. In an appropriate case, it could be argued that the acts of defendants in setting in motion the chain of events was the efficient cause of plaintiff's injury, and that the government was merely the tool which rendered the injurious blow. See *Angle v. Chicago, St. P., M. & O.R.R.*, 151 U.S. 1, 23 (1894). The *Angle* case also drew the distinction between granting plaintiff recovery (suit for malicious interference with contractual relations) and undermining the validity of the governmental action which was involved. It is rather surprising that this case was cited in support of the Court's opinion in *Pennington*, 381 U.S. at 671. There was also a weak attempt to distinguish this case in *Okefenokee*, 214 F.2d at 418.

95. 365 U.S. at 144.

recipients of the materials would bring pressure to bear on their elected representatives.

E. *Agreement Not To Seek Governmental Action*

Although *Noerr* says that persons can act in concert to secure a legislative restraint of trade, the converse is not true: if X intends to seek a license for a radio station and competitive stations enter into an agreement with him whereby he withdraws his application, this agreement not to compete would not be protected by *Noerr*.⁹⁶ Such an agreement would differ only in form from an agreement to allocate bids submitted to a government purchasing agency. The rationale of *Noerr* comprehends that government shall receive the views of all parties, those who disagree as well as those who are in accord—but it does not contemplate the stifling of free expression.

VI. PRODUCT SPECIFICATIONS

The formulation of product specifications is a common situation where *Noerr* issues may arise. Not infrequently, trade associations recommend specifications and technical standards for the industry to follow. These specifications are commonly promulgated to insure high standards of safety, or for purposes of standardization and simplification.⁹⁷ Uniform industry specifications may facilitate interchangeability of parts, permit objective testing and generally simplify matters for the consumer.⁹⁸ To the extent that these standards adversely affect the commercial success of competitors who are unable or unwilling to meet them, they are a restraint of trade. However, whether such restraints are unreasonable restraints of trade under the Sherman Act depends on whether the standards were promoted for an anticompetitive purpose.⁹⁹

96. Cf. *United States v. Yellow Cab Co.*, 332 U.S. 218, 228-29 (1947).

97. See *Structural Laminates, Inc. v. Douglas Fir Plywood Ass'n*, 261 F. Supp. 154 (D. Ore. 1966); *Roofire Alarm Co. v. Royal Indem. Co.*, 202 F. Supp. 166 (E.D. Tenn. 1962), *aff'd*, 313 F.2d 635 (6th Cir.), *cert. denied*, 373 U.S. 949 (1963); *Roofire Alarm Co. v. Underwriters' Laboratories, Inc.*, 188 F. Supp. 753, 754 (E.D. Tenn. 1959), *aff'd*, 284 F.2d 360 (6th Cir. 1960).

98. Timberlake, *Standardization and Simplification Under the Antitrust Laws*, 29 CORNELL L.Q. 301 (1944); Verleger, *Trade Association Participation in Standardization and Simplification Programs*, 27 ABA ANTITRUST SECTION 129 (1965); Note, 66 COLUM. L. REV. 1486 (1966).

99. *Radiant Burners v. Peoples Gas, Light & Coke Co.*, 364 U.S. 656 (1960) (*per curiam*). See also *Milk & Ice Cream Institute v. FTC*, 152 F.2d 478 (7th Cir. 1946). Frequently, defendants might have more than one motive in promulgating uniform specifications. They may have sound technical reasons for promoting the specifications

Noerr problems may arise when private trade groups seek to obtain governmental acceptance of these standards and thus foreclose government procurement agents from purchasing from competitors whose products do not meet these specifications. This and kindred questions are currently being litigated by the Department of Justice in *United States v. Johns Manville*.¹⁰⁰ One of the issues in dispute is whether *Noerr* and *Pennington* protect concerted efforts to induce government purchasing officials to accept product specifications which were allegedly promulgated to exclude foreign pipe from the American market. The Government has contended that purchasing agents do not have broad policy-making functions in buying asbestos pipe¹⁰¹ and should therefore be treated like any other purchaser for purposes of the antitrust laws.¹⁰²

and also wish at the same time to injure their competition. To the extent that their motives are mixed, difficult and often impossible factual problems of separating the dominant from the secondary motive are presented. It may be that Sherman Act liability will attach if any one of the motives is anticompetitive, so long as the motive is more than merely incidental. Analogies may be drawn to cases under the National Labor Relations Act in which an employee long on service but short on skill is fired shortly after he joins the union. It has been held that "to have a perfectly good motive genuinely followed is not enough if, on the facts, the motivation is two-fold, with the one being to eliminate the Union." *NLRB v. American Mfg. Co.*, 351 F.2d 406, 409 (2d Cir. 1966). A similar rule has been developed where an employer relocated his factory to lower his costs and also to discourage union organizing activity. See Note, *Labor Law Problems in Plant Relocation*, 77 HARV. L. REV. 1100 (1964). But cf. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965). This issue of mixed motives is not limited to the area of promulgation of product specifications, but arises in many of the other areas discussed in this article in which *Noerr-Pennington* issues arise.

100. The Government first prosecuted a criminal case against certain asbestos pipe manufacturers charging them with conspiring to keep foreign-made pipe out of the United States market, and attempting to monopolize. This case resulted in acquittals. See *United States v. Johns-Manville Corp.*, 1964 Trade Cas. ¶ 71,092 (E.D. Pa. 1964), for evidentiary rulings relating to the *Noerr* issue. In the Government civil suit which followed, the court granted partial summary judgment as to the allegations that Johns-Manville sought to influence local government officials to adopt restrictive specifications. It also dismissed the allegation that defendants promoted a discriminatory test in the American Society for Testing Materials (ASTM) and American Water Works Association (AWWA), on the grounds that the test was scientifically justified and there was no evidence the tests were proposed for the purpose of impeding foreign competition. The court left for trial, however, the issue of defendant Johns-Manville's activities in promoting the adoption by ASTM and AWWA of a requirement that all pipes be tested in the United States. 259 F. Supp. 440, 452-54 (E.D. Pa. 1966). This issue was resolved against the plaintiff after trial, the court finding that the testing requirement was not promulgated for anticompetitive motives. The Department had not decided whether to appeal this decision at the time this article went to publication. *United States v. Johns-Manville Corp.*, 5 TRADE REG. REP. (1967 Trade Cas.) ¶ 72,184 (E.D. Pa., July 13, 1967).

101. Purchasing agents cannot choose between purchasers because they personally subscribe to a "buy American" philosophy. They must work within the narrow confines of statute.

In an ancillary proceeding, the issue arose as to whether the American Society for Testing Materials (ASTM) could be vested with *Noerr* immunity. It was contended that since ASTM's specifications are automatically adopted and relied upon by many municipalities and state governments without independent investigation, concerted efforts by Johns-Manville and others who were members of the organization to secure ASTM adoption of specifications is tantamount to lobbying for governmental adoption of these standards. The court, in a somewhat ambiguous opinion, did not directly resolve this issue.¹⁰³ In the pending civil suit, defendants have not pressed this argument and evidence of efforts to promote ASTM adoption of a requirement that asbestos pipe be tested in the United States has been admitted in the case-in-chief.

This brief survey poses some of the issues which have been raised.¹⁰⁴ The widespread¹⁰⁵ private promulgation of specifications and safety standards does highlight the dependency of government on the technical experience of private groups and the correlative duty of these private groups to deal fairly with government and with their competitors in this area. Fairness and openness in adopting product specifications may provide some assurance of scientific objectivity.¹⁰⁶

CONCLUSION

In this excursion through the uncharted wilderness of *Noerr* and *Pennington* very few landmarks beckon. We can safely state that evidence of pure attempts to influence legislation is not admissible to prove any of the means of effecting a restraint of trade, although it may be admissible to establish anticompetitive intent. Joint efforts to influence the action of administrative agencies or executive departments raise different problems, since the operations

102. Plaintiff has also argued that even if the standards are technically justifiable, they are illegal if they are part of a conspiracy to exclude foreign asbestos pipe competition.

103. American Soc'y for Testing Materials, 231 F. Supp. 686 (E.D. Pa. 1964).

104. The author has sought to raise but not answer these issues since the *Johns-Manville* litigation is still pending in the courts.

105. There are approximately 300 standards writing organizations in the United States which have developed more than 13,000 standards. See address by Assistant Attorney General Donald F. Turner, *Consumer Protection by Private Joint Action*, delivered to the Antitrust Law Section of the New York State Bar Association on January, 26, 1967.

106. See *United States v. Southern Pine Ass'n*, 1940-43 Trade Cas. ¶ 56007, at 29 (E.D. La. 1940) (consent decree).

of such governmental bodies are largely circumscribed by statute. In the absence of clear statutory language, an argument can be made that *Noerr* protection should be extended to businessmen who concertedly seek to influence executive department or agency action on broad policy issues of a quasi-political nature. The difficulty with this approach, however, is that many routine agency matters of a technical nature can easily be stretched into "policy" questions. A more fundamental inquiry is whether the particular governmental structure has adequate safeguards to insure that it will not merely be used as a rubber stamp for a private anticompetitive scheme, but will rather be able to exercise independent review. Although this consideration has not been articulated by post-*Noerr* courts, as more cases involving *Noerr* and *Pennington* issues filter into the judicial system it will be necessary to set down a more satisfying rationale applicable outside of the legislative sphere.

In a speech in Great Britain, John Kenneth Galbraith was reported as describing the "new industrial state" in the United States as one in which "the line between the public sector and the private sector is already 'nearly imperceptible.'"¹⁰⁷ Although the line is more distinct than Mr. Galbraith might acknowledge, it is indeed true that our highly technicalized society has made government more dependent upon private industry and trade associations for information and self-regulation—and in some areas, vice versa.

With this interdependency comes a greater duty to be fair and open in dealings with government, and the antitrust laws can play an essential role in insuring the integrity of this relationship. It is submitted that in the future this will be recognized by the Supreme Court in appropriate cases in which the broad language of *Noerr* and *Pennington* will be limited.

107. *TIME*, Jan. 6, 1967, at 92.