CASE NOTES

ANTITRUST—THE SHERMAN ACT IS INAPPLICABLE TO A POLITICALLY MOTIVATED BUT ECONOMICALLY TOOLED BOYCOTT WHERE ANTICOMPETITIVE METHODS ABUT THE FIRST AMENDMENT RIGHT TO PETITION THE GOVERNMENT—*Missouri v. National Organization for Women, Inc.* (8th Cir. 1980).

Pursuant to an economic boycott campaign directed at convention centers in states that had not ratified the proposed Equal Rights Amendment,[1] the State of Missouri brought suit in district court against the defendant, the National Organization for Women (NOW), seeking injunctive relief.[2] The plaintiff alleged that the defendant's boycott activities constituted a combination in restraint of trade[3] in violation of section one of the Sherman Act.[4] The aim of the NOW boycott action was to pressure those persons and industries financially crippled as a result of lost revenue from convention cancellations to influence legislators in order to gain the necessary votes for the passage of the amendment.[5] The boycott was successful to the extent that the action significantly reduced the amount of revenue derived from convention-orientated businesses.[6]

The district court concluded that the boycott was noncommercial and non-economic, since its purpose was not to increase profits, but was for purely political reasons, and that it was not undertaken to advance the economic self-interests of the particular groups involved.[7] The court concluded

---

1. The proposed twenty-seventh amendment to the United States Constitution reads as follows: "Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. Section 2. The Congress shall have the power to enforce by appropriate legislation, the provisions of this article." U.S. CONST. amend. XXVII, §§ 1, 2 (proposed).

2. Missouri v. National Organization for Women, Inc., 467 F. Supp. 289, 291 (W.D. Mo. 1979).

3. *Id.*

4. *Id.* "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." 15 U.S.C. § 1 (1976). Missouri also alleged that NOW's activities violated the Missouri antitrust statute and constituted a "tortious intentional infliction of economic harm without legal justification or excuse." 467 F. Supp. at 291. Their contentions were summarily dismissed. *Id.* at 305-06.

5. *Id.* at 295.

6. *Id.* at 297. "The estimate of revenue loss due to the convention boycott published by NOW in January, 1978, listed revenue loss to St. Louis of $11 million and revenue loss to Kansas City of $8 million." *Id.*

7. *Id.* at 304.

that as such, NOW's activities were not within the scope of the Sherman Act.[8] Resting its opinion on an analysis of the Supreme Court's decision in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,[9] the district court held that the exclusion first recognized in *Noerr*, affording protection against Sherman antitrust violations to those persons "associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or monopoly,"[10] was applicable to the factual situation in *NOW*.[11] Application of the Sherman Act to the boycott would, in the court's opinion, severely impinge NOW's first amendment right to petition the government.[12] The State of Missouri appealed the decision to the Eighth Circuit.[13]

Recognizing the uniqueness of the case, the absence of any Supreme Court decision on the issue[14] and drawing upon the legislative history of the Sherman Act,[15] the Eighth Circuit *held*, affirmed.[16] NOW's conduct was not violative of the Sherman Act in that their activity was "privileged on the basis of the First Amendment right to petition and the Supreme Court's recognition of that important right when it collides with commercial effects of trade restraints." *Missouri v. National Organization for Women, Inc.*, 620 F.2d 1301, 1319 (8th Cir.), *cert. denied*, 101 S. Ct. 122 (1980).

Initially, the Eighth Circuit attempted to define the scope of the Sherman Act in its determination of whether NOW's activities were within the purview of the act by examining previous case law.[17] It had been suggested that the Sherman Act was deliberately drafted in broad terms, rather than with specificity, in order to avoid "providing loopholes for escape."[18] However, the Supreme Court has rejected such an all-encompassing interpretation of the Sherman Act.[19]

In its examination, the circuit court cited the landmark decision, *Klor's, Inc. v. Broadway-Hale Stores, Inc.*,[20] which adopted the proposition first

---

8. *Id.* The court deduced its conclusion from Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

9. 365 U.S. 127 (1961).

10. *Id.* at 136.

11. 467 F. Supp. at 305.

12. *Id.* at 304.

13. Missouri v. National Organization for Women, Inc., 620 F.2d 1301 (8th Cir. 1980).

14. *Id.* at 1304.

15. *See* 21 CONG. REC. 2658-59 (1890).

16. 620 F.2d at 1319 (a dissenting opinion was filed by Judge Gibson).

17. *Id.* at 1309-10.

18. Appalachian Coals v. United States, 288 U.S. 344, 360 (1932), *quoted in* Cantor v. Detroit Edison Co., 428 U.S. 579, 599 n.40 (1976).

19. *See* Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); Parker v. Brown, 317 U.S. 341 (1943).

20. 359 U.S. 207 (1959). Klor's, a retailer of appliances brought suit against a competitor, Broadway-Hale Stores, charging that the defendant had conspired with manufacturers and their distributors to refuse to do business with Klor's or to do so at a highly inflated price. The

stated in *Apex Hosiery Co. v. Leader*,[21] that the Sherman Act "[was] aimed primarily at combinations having commercial objectives and . . . applied only to a very limited extent to organizations . . . which normally have other objectives."[22] While the focus of the Sherman Act may be, as the court in NOW suggested, upon commercial activities, limiting its coverage solely to those types of enterprises amounts to a misconstruction of the term "primarily."

The use of the word "primarily" in reference to the intended coverage of the Sherman Act would seem to indicate that coverage is not limited exclusively to business or commercial combinations. The *Apex* decision itself suggests that the status of the parties imposing the restraint is not determinative of Sherman Act application, but rather that the critical factor is the nature of the restraint.[23] Adopting the view of *Apex*, that it is the nature of the restraint that determines the legality of the action, the restraint challenged in the present case should have been regarded as violative of the Sherman Act.

The circuit court made note of an Eighth Circuit opinion, *Council of Defense v. International Magazine Co.*,[24] which held that a boycott that had both political and economic motivations, and had an economic effect, was violative of the Sherman Act.[25] While the boycott hinged on political reasons and would, therefore, be similar in objective to *NOW*, the court dispelled any similarity between the two cases by noting two significant differences.[26] In *Council of Defense*, the court held that, "the declared and obvious purpose was to destroy complainant's business."[27] In *NOW*, the district court specifically found that no such purpose existed in the convention boycott.[28] The district court's factual findings concerning the motivation of the boycott are questionable. The ultimate goal concededly was the ratification of the ERA amendment.[29] Yet, it cannot be denied that the success of the boycott hinged on causing enough economic harm to the state and to its citizens, so that the Missouri legislature would be compelled to ratify the

---

Supreme Court held that the alleged combination was a restraint on trade violative of the Sherman Act. *Id.* at 210.

21. 310 U.S. 469 (1940). Apex brought suit against the defendant, Leader, charging that the defendant's labor organization's action in conducting a strike at plaintiff's factory was a conspiracy in restraint of trade. The Supreme Court held that labor organizations and/or their members activities could not be held or construed to be illegal conspiracies in restraint of trade in that "the labor of a human being is not a commodity or article of commerce." *Id.* at 503.

22. 359 U.S. at 213 n.7, *quoted in* Missouri v. National Organization for Women, Inc., 620 F.2d at 1310-11.

23. 310 U.S. at 506-07.

24. 267 F. 390 (8th Cir. 1920).

25. *Id.* at 412.

26. 620 F.2d at 1304 n.4.

27. 267 F. at 411.

28. 620 F.2d at 1304 n.4.

29. *Id.* at 1302.

amendment in order to alleviate that harm.

A second factual distinction stated by the *NOW* court was the absence of the right to petition issue in *Council of Defense*.[30] While it is true that *Council of Defense* did not involve the issue of the right to petition, the appellants contended that their actions were privileged on the basis of the first amendment right to free speech.[31] Their contention was summarily dismissed.[32]

The survey of case law presented by the circuit court helps to define what activities are covered under the Sherman Act, but should not be read to restrict violations to specific types of activities. Case law asserting the illegality of economic boycotts does not absolve from prosecution non-economic boycotts.[33] A case not cited by the *NOW* court, but one which established that the Sherman Act has application beyond the traditional boycott setting in which the parties are in a competitive relationship is *United States v. Bechtel Corp.*[34] In *Bechtel*, the corporation's participation in the Arab boycott was challenged as violative of the Sherman Act.[35] The defendant corporation raised the affirmative defense that since the Arab boycott was political in nature, its participation in the boycott was beyond the scope of the Sherman Act.[36] The court disregarded the political motivation of the boycott and held that Bechtel's participation had an anticompetitive effect on commerce and was thus subject to prosecution under the Sherman Act.[37]

The circuit court in *NOW* conceded that the Sherman Act may apply in some situations to noncommercial and non-economic boycotts.[38] However, the court's conclusion that its decision did not rest upon the basis that the boycott was non-economic and noncommercial, but upon the right to use political activities to petition the government,[39] raises the question of whether antitrust infractions are afforded unlimited protection against a finding of a Sherman Act violation when first amendment rights are at issue.[40]

---

30. *Id.* at 1304 n.4.

31. 267 F. at 407-08.

32. *Id.* at 412.

33. *See* Bird, *Sherman Act Limitations on Non-Commercial Concerted Refusals to Deal*, 1970 DUKE L.J. 247; Kestenbaum, *The Antitrust Challenge to the Arab Boycott: Per Se Theory, Middle East Politics, & United States v. Bechtel Corporation*, 54 TEX. L. REV. 1411 (1976); Note, *Use of Economic Sanctions by Private Groups: Illegality Under the Sherman Act*, 30 U. CHI. L. REV. 171 (1962); Note, *Political Blacklisting in the Motion Picture Industry: A Sherman Act Violation*, 74 YALE L.J. 567 (1965).

34. [1979-1 Trade Cases] TRADE REG. REP. (CCH) ¶ 62,429 (N.D. Cal. Jan. 5, 1979).

35. *Id.*

36. 42 Fed. Reg. 3716, 3718 (1977).

37. *Id.* at 3719.

38. 620 F.2d at 1315 n.16.

39. *Id.*

40. *See* Osborn v. Pennsylvania-Delaware Serv. Station Dealers Ass'n, 499 F. Supp. 553 (D. Del 1980).

One recognized exemption from Sherman Act prosecution was stated in *Parker v. Brown*.[41] The Court in *Parker* held that a California raisin "prorate program,"[42] instituted by the State of California was not within the scope of the Sherman Act.[43] The Supreme Court drew its conclusion that the state action was exempt from Sherman antitrust violation, "not from the literal meaning of the words,"[44] of the Act, but from"the purpose, the subject matter, the context and the legislative history of the statute."[45] While the Sherman Act cannot be taken literally,[46] the Supreme Court has been hestitant to rule in favor of implied exemptions.[47]

The only other exemption recognized by the Supreme Court was stated in *Noerr*.[48] The *Noerr* Court stated that "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or monopoly."[49] The extent of coverage of the *Noerr* exclusion was reconsidered in *United Mine Workers v. Pennington*.[50] As clarified, the *Noerr* exclusion "shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose."[51] However, invoking the *Noerr-Pennington* doctrine is not an absolute defense.[52] Individuals cannot engage in anticompetitive activity with the expectation of receiving automatic and total coverage under the cloak of the first amendment.[53] Immunization from antitrust liability under the *Noerr-Pennington* doctrine is afforded to those persons or organizations petitioning the passage or enforcement of laws of an anticompetitive nature,

---

41. 317 U.S. 341 (1943).

42. "The California Agricultural Prorate Act authorized the establishment, through action of state officials, of programs for the marketing of agricultural commodities produced in the state, so as to restrict competition among the growers and maintain prices in the distribution of their commodities to packers." *Id.* at 346.

43. *Id.* at 368.

44. *Id.* at 351.

45. *Id.*

46. *See* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 687 (1978).

47. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 399 (1978).

48. 365 U.S. at 136.

49. *Id.*

50. 381 U.S. 657 (1965). Although the issue of the right to petition the government when in conflict with a restraint of trade was not considered in *Pennington*, the Court's reliance on *Noerr* suggests that first amendment policies underly its rationale. Holzer, *An Analysis for Reconciling the Antitrust Laws with the Right to Petition: Noerr-Pennington in Light of Cantor v. Detroit Edison*, 27 EMORY L.J. 673, 682-83 (1978) [hereinafter referred to as Holzer].

51. 381 U.S. 670 (the *Noerr* exclusion is often referred to as the *Noerr-Pennington* doctrine).

52. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 511 (1972) (Sherman Act applied when the alleged activities were a mere sham to cover an attempt to interfere directly with the business relationships of competitors).

53. *See id.* at 513-14; Israel v. Baxter Laboratories, Inc., 466 F.2d 272, 275 (D.C. Cir. 1972).

but only to the "extent necessary to assure the proper functioning of the government decision maker involved."[54]

The *NOW* court, while noting factual differences between the *NOW* case and *Noerr*, felt that "the overriding policy implications of *Noerr* [were] persuasive,"[55] and cited *Noerr* as its authority in ruling that NOW's activities were not within the scope of the Sherman Act.[56] Although commentators have been quick to note that the Court in *Noerr* did not directly rely on the first amendment right to petition the government as the basis of its decision,[57] the Court's subsequent decision in *California Motor Transportation Co. v. Trucking Unlimited*[58] has suggested the contrary.[59] While *California Motor* was factually analagous to *Noerr*,[60] the Court reached the opposite result, holding that the Sherman Act was applicable where the alleged conspiracy was "a mere sham to cover what [was] actually nothing more than an attempt to interfere directly with the business relationships of a competitor."[61] The conclusion required in *Noerr* "in order to preserve the informed operation of government processes and to protect the right to petition guaranteed by the First Amendment"[62] was retreated from and the Court in *California Motor* recognized that "First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute."[63] While commentators are hesitant to proclaim that the *California Motor* decision has limited the policies ex-

---

54. Holzer, *supra* note 50, at 693. *See also* Note, *The Quagmire Thickens: A Post-California Motors View of the Antitrust and Constitutional Ramifications of Petitioning the Government*, 42 U. CIN. L. REV. 281, 316-17 (1973) [hereinafter referred to as *Quagmire*]. "However, attempts to influence when used as an integral part of action otherwise made illegal by the antitrust laws is not protected." *Id.* at 317 (this qualification seems to suggest that NOW's boycott is not protected).

55. 620 F.2d at 1311.

56. *Id.*

57. Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80, 88, 104-06 (1977) [hereinafter referred to as Fischel]; Handler, *Twenty-Five Years of Antitrust*, 73 COLUM. L. REV. 415, 434-35 (1973) [hereinafter referred to as Handler]; Holzer, *supra* note 50, at 681.

58. 404 U.S. 508 (1972).

59. Fischel, *supra* note 57, at 107 ("*California Motor Transport* squarely placed the *Noerr-Pennington* doctrine on a first amendment footing"); Handler, *supra* note 57, at 434, 435 (*California Motor* rests directly on first amendment policies as evidence of Congressional intent. "In so doing [Justice Douglas] elevates *Noerr* to the status of a constitutional principle."); Holzer, *supra* note 50, at 684 & n.78 ("by acknowledging the First Amendment policies inherent in *Noerr* and *Pennington*, Justice Douglas raised the *Noerr-Pennington* doctrine to a constitutional level").

60. California Motor Transport Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

61. *Id.* at 511 (citing Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961)).

62. 404 U.S. at 516 (Stewart, J., concurring).

63. *Id.* at 514 (citing Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949)).

pounded in *Noerr*,[64] the emphasis the Court placed on the first amendment right to petition cannot be ignored.[65]

The Eighth Circuit's reliance on the *Noerr* decision requires an inquiry into the factual similarities and dissimilarities with the case at hand. In *Noerr*, trucking companies joined by their trade associations sought injunctive relief against a group of railroads, their trade associations, and a public relations firm, charging that the defendants had conspired to restrain trade and monopolize the long distance freight business, in violation of the Sherman Act.[66] The defendants assertedly engaged a public relations firm to conduct a campaign which the defendants hoped would result in the adoption of legislation detrimental to the trucking business.[67] The defendant railroad claimed that the campaign was not conducted for competitive reasons, but was simply an exercise of their right to inform the public and the state of the damage resulting from the traffic of trucks on the highway.[68]

The *Noerr* defendants also counterclaimed against the plaintiff truckers charging "that the truckers had themselves violated sections one and two of the Sherman Act by conspiring to destroy the railroads' competition in the long-freight business and to monopolize that business for heavy trucks."[69] The means employed by the truckers paralleled those of the railroads.[70]

While the railroads' publicity campaign was held by the trial court to be violative of the Sherman Act, the trucker's campaign was not.[71] The basis of this finding rested on the nature of the attack of the campaign.[72] In what has become often quoted language, the Supreme Court stated that "no violations of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws."[73] Therefore, a problem arises as to what constitutes mere attempts to influence and what types of conduct are considered to be more than mere attempts.

---

64. Fischel, *supra* note 57, at 88 (though the language in *Noerr* and *California Motors* is inconsistent, no subsequent case has interpreted *California Motors* as limiting *Noerr*); Handler, *supra* note 57, at 439 (*California Motors* was not meant to undercut the policy of *Noerr*).

65. *See* Holzer, *supra* note 50, at 681. Holzer comments on the inconsistency of the protected status of the right to petition while disclaiming reliance on the first amendment.

66. 365 U.S. at 127.

67. *Id.* at 129.

68. *Id.* at 131.

69. *Id.* at 132 n.6.

70. *Id.*

71. Noerr Motor Freight v. Eastern R.R. Presidents Conference, 155 F. Supp. 768 (E.D. Pa. 1957).

72. 365 U.S. at 134. The railroads' campaign was deemed malicious and destructive in nature, while the truckers' campaign was held defensive in nature, in that it was not aimed at passing legislation harmful to the railroads but at passing legislation beneficial to themselves. *Id.* The Supreme Court granted certiorari after the railroads' unsuccessful appeal, limiting the issue to the correctness of the judgment holding the railroads' actions violative of the Sherman Act. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 362 U.S. 947 (1960).

73. 365 U.S. at 135.

The court in *NOW* listed three considerations which led to the *Noerr* Court's conclusion that "activities which are comprised of mere solicitation of governmental action with respect to the passage of laws are not violative of the Sherman Act."[74] Those are:

> (1)The essential dissimilarity between an agreement to jointly seek legislation and the agreements traditionally condemned by the Sherman Act; (2)that such a holding would have the effect of recognizing that the government has the power to act in a representative capacity in refusing the people the right to freely inform the government of their wishes; and (3)generally, but "of at least equal significance such a construction of the Sherman Act would raise important constitutional questions."[75]

Noerr also utilized the additional factor of a publicity campaign.[76] This factor raised the question of whether such a campaign was sufficient to merit removal from the category of a mere attempt.[77] "In direct response to the use of the third-party technique, the *Noerr* Court emphasized that the Sherman Act condemns trade restraints and not political activity."[78] Yet the *Noerr* Court did not say that the additional factor in *Noerr* removed it from consideration as a mere attempt. Arguably, there would appear to be more involved with NOW's activities than mere solicitation of government action.[79]

The principle factual distinction between *NOW* and *Noerr* lies in the time frame in which the placement of harm ocurred. In *Noerr,* a publicity campaign was utilized to influence the passage of a law destructive to the trucking industry.[80] The NOW boycott was utilized to inflict harm on businesses of states that had failed to ratify the Equal Rights Amendment in order to facilitate passage of the amendment.[81] The resulting passage of the amendment would have neither a beneficial nor a harmful effect on the plaintiff state. The *Noerr* case was a combination to obtain legislation harmful to others, while the *NOW* case was a combination to harm others in order to get legislation.

The Supreme Court in *Noerr* explicitly stated that "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take a particular action

---

74. 620 F.2d at 1313.

75. *Id. See also* Noerr Motor Freight v. Eastern R.R. Presidents Conference, 365 U.S. at 137-38.

76. 365 U.S. at 138.

77. *Id.*

78. 620 F.2d at 1314. *See also* Noerr Motor Freight v. Eastern R.R. Presidents Conference, 365 U.S. at 140-41.

79. *See* New York v. Horsemen's Benevolent & Protective Ass'n, 55 A.D.2d 251, ___, 389 N.Y.S.2d 868, 869 (1976) (a boycott is not synomous with a mere attempt to influence legislation).

80. 365 U.S. at 131.

81. 620 F.2d at 1302.

with respect to *a law that would produce a restraint or a monopoly.*"[82] The progeny of the *Noerr* doctrine are numerous.[83] The protection afforded by the doctrine has been construed to include a number of different activities,[84] but one common denominator is shared by all cases. While the activities, petitioning in the form of lobbying, administrative proposals and appearances, and approaches to public officials or litigation, were not in themselves anticompetitive, the effects of the activities were anticompetitive.

The Eighth Circuit erroneously focused on the petitioning aspect of NOW's activity and closed its eyes to the restraint of trade that resulted from their conspiracy. NOW was only able to effectively petition the government because it had used an anticompetitive activity, the boycott, as leverage. The petitioning aspect of NOW's activity cannot repudiate the anticompetitive nature of the means employed. Construing the language in the *Noerr* opinion strictly, the *Noerr* exclusion was inapplicable to the present case.[85]

The dissent in *NOW* pointed out an additional distinction between *NOW* and *Noerr*[86] by noting the majority's superficial treatment of the distinction made by the *Noerr* court between the railroad's third-party technique and a direct concerted refusal to deal.[87]

While the railroads' ulterior motive in *Noerr* was economic gain by destroying their trucking competitors in the long distance freight business,[88] the activity aimed at meeting their objective, petitioning in the form of lobbying and the publicity campaign, was purely political. The Supreme Court

---

82. 365 U.S. at 136 (emphasis added).

83. *See* note 84 *infra*.

84. *Noerr* protection includes petitioning in the form of lobbying. *See, e.g.*, Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220 (7th Cir. 1975); Hays v. United Fireworks Mfg. Co., 420 F.2d 836 (9th Cir. 1969). Petitioning in the form of proposals and appearances are also protected under *Noerr*. *See, e.g.*, Rodgers v. FTC, 492 F.2d 228 (9th Cir. 1974); Lamb Enterprises, Inc. v. Toledo Blade Co., 461 F.2d 506 (6th Cir. 1972). Protection is afforded to approaches to public officials. *See, e.g.*, Stern v. United States Gypsum, Inc., 547 F.2d 1329 (7th Cir. 1977); Semke v. Enid Auto. Dealers Ass'n, 456 F.2d 1361 (10th Cir. 1972). Litigation is also afforded protection under *Noerr*. *See, e.g.*, Mountain Grove Cemetery Ass'n v. Norwalk Vault Co., 428 F. Supp. 951 (D. Conn. 1977); Bethlehem Plaza v. Campbell, 403 F. Supp. 966 (E.D. Pa. 1975).

85. *See* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. at 399 (presumption against implied exclusions to antitrust laws); Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286, 1296-97 (5th Cir. 1971) *Noerr* doctrine inapplicable unless the factors relied upon are "present and require the same result." *Id.* at 1297.

86. 620 F.2d at 1319 (Gibson, J., dissenting).

87. *Id.*

88. 365 U.S. at 138. *See* Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination*, 79 COLUM. L. REV. 685, 702 (1979). Labeling activity commercial and noncommercial is an inadequate basis for determining antitrust infractions. Categorizing activity as such fails "to make the distinction between conduct which is designed to have and will probably have, the condemned evil effect on competition and conduct not motivated by the requisite intent or having such an effect." *Id.*

was correct in holding that such political activities were not within the scope of the Sherman Act. The *NOW* case presented the opposite side of the coin. While the ultimate goal of NOW and those organizations that joined the boycott was a political result, the boycott activity that sought to realize this goal was economic. The end result did not satisfy the means employed. Economic activities have always been subject to Sherman Act prohibition.[89]

The *NOW* majority attempted to de-emphasize any economic ramifications of the convention boycott by resting its decision on the first amendment right to petition the government.[90] While the majority vehemently contended that the *Noerr* opinion was not the sole decisive factor in their conclusion that NOW's activities were outside the scope of the Sherman Act[91] their reliance on *Noerr* incited the dissent to state the obvious: "*Noerr* simply does not imply the conclusion that the first amendment immunizes politically motivated boycotts against antitrust attack."[92] *Noerr* dealt with a publicity campaign used to influence the legislature; neither a direct refusal to deal nor an economic boycott was involved.[93] The Eighth Circuit's holding that NOW's activities were privileged on the basis of the first amendment right to petition the government assumed that a boycott was an exercise of the right to petition.[94] It is questionable whether the above is a valid assumption.[95]

Even if NOW's activities can be deemed an exercise of their first amendment rights, NOW is not guaranteed absolute protection against prosecution for an antitrust infraction.[96] The Eighth Circuit's failure to balance

---

89. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213-14 (1959); Apex Hosiery Co. v. Leader, 310 U.S 469, 491-93 (1940).

90. 620 F.2d at 1315 n.16.

91. *Id.* at 1315.

92. *Id.* at 1324 (dissenting opinion).

93. *Id.* at 1323 (dissenting opinion).

94. "[N]ot all . . . attempts to influence the government will be protected by the right to petition embodied in the first amendment, a right whose boundaries remain uncertain." Fischel, *supra* note 58, at 81 & n.13.

95. "[E]xemption from antitrust laws established by *Noerr-Pennington* line of cases should be limited to conduct protected by the constitutional right to petition." Fischel, *supra* note 58, at 122. "The central inquiry is whether the conduct of the defendant asserting the *Noerr-Pennington* defense merits first amendment protection." *Id. See* Osborn v. Pennsylvania-Delaware Serv. Station Dealers Ass'n, 449 F. Supp. 553, 556 (D. Del. 1980) (gasoline dealers' alleged concerted refusal to deal undertaken in order to influence government to raise maximum retail price of gasoline not first amendment activity that warrants exemption from the Sherman Act). *But see* Crown Central Petroleum Corp. v. Waldman, 486 F. Supp. 759, 767-68 (M.D. Pa. 1980) (gasoline retailors' refusal to deal designed to express dissatisfaction with government maximum retail prices held exercise of first amendment rights protected from antitrust prosecution). *See also* United States v. O'Brien, 391 U.S. 367, 376 (1968) (refusal to label all conduct as "speech" simply because conduct was used to express an idea).

96. The first amendment guarantees do not afford absolute protection against agreements in restraint of trade. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 697 (1978); California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 515 (1972); Giboney

the impingement of NOW's first amendment rights against the anticompetitive effects of its activities was clearly in error.[97] The Supreme Court in *United States v. O'Brien*[98] stated that "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedom."[99] The *O'Brien* case set forth a four prong test to determine whether a government regulation/statute is sufficiently justified: the regulation/statute is within the constitutional power of the government, is in furtherance of an "important or substantial" governmental interest, that is unrelated to the supression of free expression and the incidental restriction on first amendment freedoms that results are no more than is necessary to further the "important or substantial governmental interest."[100]

The Sherman Act has clearly been established as a legitimate exercise of Congressional power.[101] The Sherman Act furthers an important governmental interest in the free enterprise system.[102] That governmental interest does not require the supression of free expression.[103] The incidental restriction on NOW's right to petition the government is no more than is necessary to further the government's interest in the preservation of the free enterprise system.[104]

In a recent opinion, *Crown Central Petroleum Corp. v. Waldman*,[105] the District Court of Pennsylvania, after balancing the defendant's first amendment right against the government's interest in free trade,[106] held that "a legitimately exercised First Amendment right, unquestionably conducted for the purpose of expression, outweighs the government's interest in free trade."[107] In *Crown*, the plaintiff oil company brought an action against the defendant gasoline retailer for violation of the antitrust laws.[108] The district court held that the defendant's action, and that of other retailers, in closing gasoline stations was undertaken solely for the purpose of political expres-

---

v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949).

97. *See* Crown Central Petroleum Corp. v. Waldman, 486 F. Supp. 759 (M. D. Pa. 1980).

98. 391 U.S. 367 (1968).

99. *Id.* at 376.

100. *Id.* at 377.

101. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. at 398 n.16; California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. at 515.

102. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 100 S. Ct. 937, 946 (1980); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. at 398 n.16.

103. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. at 398 n.16.

104. *See* National Soc'y of Professional Eng'rs v. United States, 435 U.S. at 697; California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. at 515-16; Osborn v. Pennsylvania-Delaware Serv. Station Dealer's Ass'n, 449 F. Supp. at 557.

105. 486 F. Supp. 759 (M.D. Pa. 1980).

106. *Id.* at 168.

107. *Id. See* Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1965).

108. 486 F. Supp. at 761.

sion, designed to express dissatisfaction with existing petroleum price regulations adopted by the Department of Energy and as such was exempt from antitrust prosecution under *Noerr*.[109]

Concededly, the *Crown* court did attempt to balance the competing interests of the retailers' first amendment rights and the government's right to restrain anticompetitive conduct.[110] Yet, their analysis does not constitute a true balancing test. The conflict between the competing interests of the retailers and the government was resolved not through a true balancing analysis, but upon identification of the retailers' actions as a "legitimately exercised" first amendment right rather than a "facial assertion" of a first amendment right.[111] The *Crown* case did no more than adopt the dichotomy presented by the Supreme Court decisions in *Noerr* and *California Motors*.[112]

Both *Crown* and *NOW* presented a novel approach to the analysis of an alleged antitrust violation. Once an actor's motive is deemed political, any economic infraction may be labeled political activity, enabling the actor to elude prosecution under the guise of a protected first amendment right. Trade restraints should not be judged on the basis of the motives of the actors, but upon the effect of the activity.[113] Allowing the "political activity" exclusion created by the *NOW* court to stand would subject any segment of the free enterprise system to coercive methods of organized interest groups trying to inflict the most harm to the public in order to secure desired legislation.

The Eighth Circuit's opinion in *NOW* was severely criticized in *Osborn v. Pennsylvania-Delaware Service Station Dealers Association*,[114] a Delaware district court opinion factually analogous to *Crown Central Petroleum Corp. v. Waldman*.[115] In *Osborn*, blanket immunity was denied[116] where the defendant dealers "planned and executed a group boycott of gasoline sales to the public"[117] in an effort to compel the Department of Energy to raise maximum prices for gasoline sales.[118] The court recognized that its decision was inconsistent with that reached in *Missouri v. National Organization for Women, Inc.*, but stated that the criteria, whether the motivation of the

---

109. *Id.* at 769.

110. *Id.* at 768.

111. *Id.* ("legitimately exercised" first amendment right outweighs government's interest in free trade, while a "facial assertion" of a first amendment right, connotates a sham, and does not outweigh government's interest).

112. *See* Crown Central Petroleum Corp. v. Waldman, 486 F. Supp. at 768. *But see* Osborn v. Pennsylvania-Delaware Serv. Station Dealers Ass'n, 449 F. Supp. at 556.

113. *See Quagmire, supra* note 54, at 316-17.

114. 499 F. Supp. 553 (D. Del. 1980).

115. 486 F. Supp. 759 (M.D. Pa. 1980).

116. 499 F. Supp. at 557-58.

117. *Id.* at 555.

118. *Id.*

parties seeking legislation was economic or political, utilized in *NOW* in ascertaining whether immunity from antitrust infractions existed was "both incapable of application and inconsistent with First Amendment case law."[119]

A concern was expressed that a reading of *Noerr* as conferring immunity from antitrust liability upon any activity aimed at influencing governmental action would amount to a sanction of restraints of trade that merely abut first amendment rights.[120] To infer that Congress' intention was to resolve conflicts between the free enterprise system and first amendment rights by merely affording unlimited protection to violators of antitrust laws whose anticompetitive activities included petitioning the government would, in the *Osborn* court's opinion, clearly be in error.[121]

The political activity exclusion from antitrust liability is a volatile issue in the courts. Undoubtedly, as more courts are faced with the problem the Supreme Court will be called upon to resolve the conflict. The denial of certiorari in *Missouri v. National Organization for Women, Inc.*[122] did not, of course, involve a decision on the merits.[123] Resolution of the conflict will involve more than the mechanical application of *Noerr* ordained by the Eighth Circuit in its decision in *Missouri v. National Organization for Women, Inc.* Balancing the competing interests will force the conclusion that the right to free speech and the protection of the free enterprise system can co-exist.

The inapplicability of the *Noerr* doctrine to situations where anticompetitive methods are utilized to obtain a non-anticompetitive result does not suggest the demise of *Noerr*, but to the contrary, suggests that the applicability of *Noerr* is narrowly drawn to situations where anticompetitive effects result from constitutionally proscribed behavior. There is nothing constitutionally proscribed about an economic boycott aimed at achieving an unrelated political result. The restraint of trade that results from NOW's boycott activity must be divorced from the political aspirations of its participants. The *Noerr-NOW* analysis is neither a complete nor a true reflection of the issues involved.

Katherine Schied

---

119. 499 F. Supp. at 558 n.8.

120. *Id.* at 556.

121. *Id.*

122. 620 F.2d 1301 (8th Cir.), *cert. denied*, 101 S. Ct. 122 (1980).

123. A denial of certiorari "simply means that fewer than four members of the Court deemed it desirable to review a decision of the lower court as a matter of 'sound judicial discretion.'" Maryland v. Baltimore Radio Show, 338 U.S. 912, 917 (1950). Such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. *Id.* at 919. Various reasons underlie a Court's refusal to grant certiorari. "A case may raise important questions but the record may be cloudy. It may be desirable to have different aspects of an issue further determined by the lower courts. Wise adjudication has its own time for ripening." *Id.* at 918.

EVIDENCE—WHEN THERE IS A CLOSE RELATIONSHIP BETWEEN THE WITNESS AND THE PROPERTY AND THE PROPERTY IS OF A UNIQUE QUALITY, ACTUAL VALUE TESTIMONY ON STOLEN PROPERTY IS PROPER WITHOUT SHOWING AN ABSENCE OF MARKET VALUE.—*State v. Savage* (Iowa 1980).

Appealing a conviction for second degree theft[1] for stealing seven rebuilt locomotive radiator cores and one new core, Kenneth B. Savage made a number of arguments,[2] including the contention that there was insufficient proof to convict him of having stolen property exceeding five hundred dollars in value.[3] The only evidence put on by the state as to the value of the radiator cores was the testimony of the storekeeper for the Chicago and Northwestern Transportation Company, which owned the stolen property.[4] The storekeeper stated in his testimony that the value of a new core was $370.00 and that he personally believed the rebuilt cores were each worth approximately $25.00 less than a new one.[5] The defendant challenged the admissibility of the state's witness's testimony concerning the stolen property; Savage argued that because the witness-storekeeper admitted to a lack of knowledge as to the rebuilt cores' market value, the storekeeper's testimony should have been stricken from the record.[6] The trial court overruled the motion.[7] The Supreme Court of Iowa *held*, affirmed. Market value is the

---

1. Under IOWA CODE § 714.2 (1979) a conviction for second degree theft requires that one must steal more than $500 in property but less than $5000. Hence, the grade of the offense charged as well as the severity of the sentence are determined by the value of the property.

2. In responding to one of Savage's contentions, the court held that since flight was not an element of the theft offense, the state was not required to prove flight "by proof beyond a reasonable doubt." State v. Savage, 288 N.W.2d 502, 507 (Iowa 1980). Therefore, it was not a denial of due process to instruct the jury that it could "find the fact of flight by a preponderance of the evidence." *Id.* This ruling does not conflict with the majority rule stated in In Re Winship, 397 U.S. 358, 364 (1970), where the accused is protected against conviction except upon proof beyond a reasonable doubt of every element of the crime charged. *See also* Patterson v. New York, 432 U.S. 197 (1977).

The court also dismissed the defendant's claim that the trial court erroneously instructed the jury on the issue of establishing the value of the goods beyond a reasonable doubt. 288 N.W.2d at 508. The court reasoned that the instructions were not ambiguous and that they fairly set forth the law. *Id.* Further, the court stated, "a defendant does not have the right to have instructions submitted in any particular form." *Id.*

Finally, in re-stating the established majority view that jury instructions "must be read and construed as a whole," the court held that the trial court did not erroneously instruct the jury on the reasonable doubt standard as applied to evidence not presented. *Id.* at 508-09.

3. *Id.* at 503.

4. The storekeeper was responsible for "purchasing, storing, issuing, and controlling anything to do with company material." *Id.* at 503.

5. *Id.* at 503-04.

6. *Id.* at 504.

7. *Id.*