In the

Supreme Court of the United States

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CALIFORNIA MOTOR TRANSPORT CO. ET AL.,

Petitioners,

v.

TRUCKING UNLIMITED ET AL.,

Respondents.

No. 70-92

Washington, D. C.
November 10, 1971

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Wednesday, November 10,1971

The above-entitled matter came on for argument at 11:02 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

BORIS H. LAKUSTA, ESQ., 310 Sansome Street, San Francisco, California, 94104, for Petitioners.

MICHAEL N. KHOURIE, ESQ., 425 California Street, San Francisco California, 94104, for Respondents.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 92, California Motor Transport Company against Trucking Unlimited.

Mr. Lakusta, you may proceed whenever you're ready.

ORAL ARGUMENT OF BORIS H. LAKUSTA, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. LAKUSTA: Mr. Chief Justice, and may it please the Court:

The issue in this proceeding is whether the facts in a treble damage antitrust complaint constitute a violation under the Sherman Act. In this case, a group of 15 certificated motor carriers brought the complaint against a group of 19 certificated motor carriers, alleging that the defendants had violated the Sherman Act. The complaint was amended, and the first amended complaint is the one with which we are concerned. I shall refer to it simply as "the complaint."

They moved to dismiss it on the ground that it fails to state a cause of action under the Sherman Act. Judge Sweigert of the Federal District Court agreed with our position and wrote an extensive opinion in support of his views. He gave the plaintiffs an opportunity to amend. They did not avail themselves of that, and instead appealed to the Ninth Circuit. The Ninth Circuit reversed by a two to one vote. The dissenting judge, Senior Judge Hamlin wrote a dissenting

opinion.

We then petitioned for a writ of certiorari to this Court.

Now I turn to the complaint, and I will summarize the facts which it alleges.

It alleges that these defending carriers got together in early 1961 and agreed on a program of protesting all certificate proceedings which might result in competition to the defendants, all certificate proceedings brought before either the Interstate Commerce Commission or the California Public Utilities Commission. The program was to include court review in the event the protest before the administrative body should prove unsuccessful.

The allegation is that the defendants agreed to finance the program jointly under an arrangement under which each carrier would contribute monthly a sum based on his gross annual revenues, rather than according to his interest or participation in any given case.

The agreement was that the program should be publicized through the carrier industry. The complaint goes on to allege the agreement was carried out and has been carried out consistently since 1961. As to the purpose, the allegation is that the agreement and program were designed to reduce or eliminate competition, and that to achieve that anticompetitive result, the complaint alleges if we accept

plaintiffs' version, as I think we must, for the purposes of this case, that defendants' primary intent was, to use the words of the complaint, to discourage and deter the plaintiffs and others in like position from filing certificate applications or from pursuing those applications, which they did file.

In this connection, the plaintiffs say that the defendant carriers intended to make as effective a presentation in each case before the relevant commission as possible; in fact, they recognized that such an intent was essential to the primary purpose of giving authority to the desire to discourage or deter plaintiffs and others in like position from coming before the Commission.

There is no suggestion in the complaint that the defendants were at any time guilty of dishonesty or deception. There is no suggestion in the complaint that the defendants at any time offered false or irrelevant testimony.

I would like to turn now to the reasons why we believe the Sherman Act should not be extended to the facts as alleged. The two cases on which we chiefly rely are Eastern Railroad Presidents Conference v. Noerr, decided in 1961 by this Court. It was a unanimous decision, and Justice Black wrote the decision. The other case is United Mine Workers versus Pennington decided four years later in 1965. Mr. Justice White wrote the opinion for the majority in that

case.

We start with a proposition in Noerr that a restraint imposed by government is immune from the antitrust act. That has been held in Parker v. Brown and in U.S. v. Rock Royal. It would seem to follow reasonably that the efforts to influence government to impose such governmental restraint should also be immune from the Sherman Act. I think that is, at least in broad terms, the holding in Noerr and Pennington.

The joint efforts involved in Noerr were efforts to influence at least one state governor and more than one state legislature, and also certain law enforcement agencies. The joint effort in Pennington involves joint efforts to influence the Secretary of Labor and officials of the Tennessee Valley Authority.

The Noerr case sets forth three reasons for holding that the Sherman Act should not apply to these joint efforts.

The first reason was essential dissimilarity; in other words, that appeals to governmental bodies are essentially dissimilar from the kind of trade restraint which Congress had in mind when it enacted the Sherman Act.

The second reason given in Noerr was that there is indeed a strong policy of government to encourage the free flow of information to government officials charged with adopting or imposing restrictive action.

The third reason given was that if the Sherman Act were extended to apply in these joint efforts, it would raise serious questions of whether the First Amendment right to petition would be jeopardized.

The second reason deserves our particular attention; namely, the strong policy of government to encourage the free flow of information to governmental offices charged with action which may have a restrictive effect. The concept is that in such an area, the government can do its job best in this very discretionary sphere if it can call upon the information of members of the public who have an interest. As noted in Noerr, it is those with competitive interest who can be best counted on; they are the most motivated to furnish the very kind of information which will be of assistance to the government. I suppose it is paradoxical that that should be true, but it is true that those with an anti-competitive motive can often be most useful in assisting the governmental body make its determination.

Mr. Khourie, counsel for the Plaintiffs, recognizes that reason in the Noerr case, but he says the doctrine should apply only to legislative and executive activity, and in any event, not to applications for certificates of public convenience and necessity, the general certificating process engaged in by the Interstate Commerce Commission and the Public Utilities Commission. He goes to great efforts to say

that their activities are judicial in nature and he points to the fact that certainly the procedures of those bodies have many of the overtones of proceedings before a court: the calling of witnesses, the swearing of witnesses, the receipt of evidence which is not hearsay, and so on. Then he turns to say that what these bodies do is to adjudicate in the realm of certification. He then turns to the patent cases which he relies on very heavily for the proposition that efforts to obtain a restraint of the use of judicial machinery may be actionable under the Sherman Act. I submit that the patent cases which involved the grant of an absolute monopoly have little relevance to the case we have here, and that all of them can be readily explained to the extent they do present any conflict with the Noerr-Pennington doctrine.

Well, I submit that it is immaterial whether the action of the Public Utilities Commission and Interstate Commerce Commission be described as adjudication or adjudicatory or by any other name. The pertinent question is whether the agency is substantially aided by the kind of information which competitive interests can be expected to produce, if they are protected by the Sherman Act. I submit that the answer is yes, vis-a-vis the ICC and the PUC.

So to substantiate that, I point out what the certificate regulating function is. Senior Judge Hamlin, the same judge in the Ninth Circuit, correctly characterized

it as "one akin to policy making." The concept of public convenience and necessity commands a very broad discretion. This Court has repeatedly said so. The content can vary a great deal according to time and circumstances. I would suggest that in practical effect, there is very little difference between what I might describe as the public interest standards which a legislature or a governor employs when he takes action of a restrictive nature, and the public convenience and necessity standard, which an agency such as ICC or PUC applies. The agency, contrary to what Mr. Khourie would say, does not adjudicate rights; there is no such thing as a right by Carrier A to a certificate. On the contrary, the agency is regulating in the public interest, and the grant or denial of a certificate is simply an incident to that overall regulation of one segment of the public utility industry.

Now, with such understanding of the certificating function, it is perhaps no surprise that protests from existing carriers are sanctioned and encouraged. The Interstate Commerce Act and the Public Utilities Code both contain provisions which indicate an anticipation that the protests and participation of competitors in the form of those already holding certificates shall be entertained.

Then very specifically the procedures of the two agencies provide for the intervention of competitors. Every

competitor is, so far as the California Commission goes at least, required to, entitled to receive notice of the application, if the application is for certification in his area, and such carrier is entitled to come in and protest and say his piece.

Indeed, it is customary before both the ICC and the PUC for groups of carriers to come in and protest as the defendants are alleged to have done here. The only difference that I can see is that in this case, the program was a concerted program to participate in all proceedings that come along, rather than sporadically.

To comment on the concept of probable cause, the complaint alleges that protests were filed in all cases, and it goes on in the same vein to say, "with or without probable cause and regardless of the merits." I suggest, your Honors, that the concept of probable cause simply has no place in a proceeding which involves the issue of public convenience and necessity. It is not the adjudication of a private right. Probable cause is a concept which applies, for instance, in a suit on a contract involving the payment of money and most of the time it can be determined very quickly whether the complaint is frivolous or whether there is probable cause.

Q Mr. Lakusta, we are, I take it,-- you are approaching this case on the assumption that the allegations in the complaint are true?

MR. LAKUSTA: We must, your Honor, yes.

Q So we take this to mean in advance the defendants agreed to oppose every petition of the kind listed in the complaint?

MR. LAKUSTA: Without ever having seen it.

Q Yes, and I take it you think they did regardless of what it said.

MR. LAKUSTA: We accept that allegation.

Q If they had agreed to bribe one of the Commissioners in order to monopolize commerce, would you have a different outlook?

MR. LAKUSTA: I certainly would.

Q Well, I know they'd be guilty of bribery, but would they be guilty of a Sherman Act violation, if they got it by subverting the adjudicatory process for the purpose of achieving a monopoly?

MR. LAKUSTA: I should think they well might be.

Q Then you accept the Wood case?

MR. LAKUSTA: I accept the Wood case.

Q Where they agreed to file false information?

MR. LAKUSTA: Yes, assuming that the facts are as they were found by the Court of Appeals in that case, then I accept the Wood case. I say that in a proceeding before the Interstate Commerce Commission or the Public Utilities Commission, which has its own procedures and which is designed

to get at facts, the presentation of false information should very well come in a different category. Presentation of facts which are relevant and bear on that overall concept of what is in the public interest, on which any two people can differ--

Q How many defendants are there?

MR. LAKUSTA: There are nineteen.

Q Nineteen? They don't all operate in the same area, I take it?

MR. LAKUSTA: No, to some extent they do, but --

Q Would you say every single defendant who is named would really have a substantial interest in every single petition any time that was ever filed before the PUC or the ICC?

MR. LAKUSTA: Well, you will observe, your Honor, that the complaint alleges the protests were filed in every case where there was a competitive interest, not in every conceivable case.

Q I know, but what interest would A operating in Southern California have in agreeing with B in Northern California, for B helping him to oppose and jointly finance the opposition before the PUC to a transfer of some operating right in Southern California?

What interest does the Northern California man have in contributing?

MR. LAKUSTA: Well, I think I understand your question, Justice White, and the answer lies in the fact that what the Commission does is to regulate a whole industry and it is very much in the interest and was very much in the interest of these defendants to make an effort to persuade the Commission to apply a more restrictive policy, so that in every case since the Commission does determine policy on a case by case basis, it means that every case that comes along does involve an issue of the overall policy of the extent to which certification would be in the public interest.

Q But it is hard to conceive, if there were 500 petitions filed, that there wouldn't be a single one of them that was meritorious; that every one of them deserved joint opposition.

MR. LAKUSTA: Well, I think we have to bear in mind that the opposition was only to the extent and as permitted by the regulatory agency--

Q I understand.

MR. LAKUSTA:--if there is no allegation of abuse of the administrative process, so I would say that the interest of every carrier who participated in this program arises from the fact that he has an interest in the overall way in which the Commission formulates its continuing policy in determining the scope and content to be given.

Q In this respect, is it basically fundamentally any

different from collective enterprises by working men or collective enterprises of trade associations? This is in effect a trade association.

MR. LAKUSTA: Yes, it is, Mr. Chief Justice.

Q It is a trade association of the in's against the out's.

MR. LAKUSTA: It is not altogether the in's against the out's because it is certificated carriers.

Q But it is cast in this case.

MR. LAKUSTA: Yes, it is, Mr. Chief Justice, but I think basically it's what trade associations do when they group together to produce a joint result. I believe that so long as the evidence offered by these protestants is honest and relevant, and they are helping the agency to formulate the policy, their activity should not be allowed to fall under the Sherman Act.

Q Don't you have to argue to make your case that the First Amendment right which underlies the case includes the right to act in bad faith? And for improper motives? To find under the Sherman Act?

MR. LAKUSTA: Well, it includes the right to act for that kind of motive, yes, provided the intent, the one intent, namely to influence the governmental body is genuine. Now, in the Noerr case, all sorts of devious means were used to influence the legislature and governor. That kind of thing

would not be allowed in an administrative body such as the ICC or PUC. I would say that in that category, it has to be shown that the intent was to be as effective as possible with honest evidence and relevant evidence, in order to come within the purview of the Noerr doctrine.

Q And also isn't that the base of the matter, the question of whether the PUC, if it in taking the action can-- well, I'll put it this way: Assume the ICC or PUC decided to reduce the number of carriers in a certain area, [illegible] giving a monopoly. How can the state PUC body do that under the antitrust laws? You have to get back to Parker, don't you?

MR. LAKUSTA: Yes, you have the Parker case holding, of course, that any action by government is --

Q They can't authorize private individuals to violate antitrust laws, I suppose?

MR. LAKUSTA: No.

Q But it can take action that isn't reached by the antitrust laws?

MR. LAKUSTA: That is quite true. Now, I suggest that the action in this case, any restraint in this case is fundamentally imposed because the final result of what the Commission does, based upon evidence in granting or denying certificates, as to the value of participation by the defendants, the complaint makes the markedly revealing allegation that there were instances in which certificates were

denied only because the defendants and only because the defendants were present. I think Judge Sweigert put his finger on it when he said that if you don't have protests, these applications otherwise become one-sided affairs, the Commission is rendered more or less helpless, it does not have the manpower to go out and make all the investigations which the defendants are motivated to come in and give evidence on, and unless you permit them to come in, the Commission is in the very unhappy position of having to give certificates based only on what they see in the application.

Q So we don't have in this case an instance where there is joint effort to persuade a governmental body or an administrative body to do something it does not have power to do?

MR. LAKUSTA: No, there's no allegation of that kind. I think that is the fatal weakness in this complaint. There is no allegation that the administrative body ever lacked complete power to control their processes that prevent abuses in the form of redundancy or excessive protest. There's no allegation that the agencies lack power to make determinations upon the merits.

Q I see in the comment in the California Law Review in this case that what this amounts to is the defendants--I am reading just one sentence here--that the defendants substituted themselves for the Public Utilities Commission,

and regulated for their own profit the registration of certificates--is that correct?

MR. LAKUSTA: Well, I don't think that it is correct, unless you--

Q It was fortified by the decline in applications.

MR. LAKUSTA: Yes, well, the decline in applications is most significant because it shows that the agency was-- first of all, that there was an effect of discouraging and deterring those from coming before the agency who did not -- who were not willing to stand the chance of making a presentation. I submit, your Honor, that the real crux of the matter is that a person who comes in and presents an application to the Commission should expect to have to undergo the burden of having to prove up. Now the effect of the program of the defendants was to keep out those who did not have the responsibility or the sense of responsibility to be willing to prove up; what they wanted, in a sense, was a free ride. They wanted to take advantage of the situation that had obtained before, when the Commission had nothing to go on but the application, and therefore was granting certificates more or less freely, and I think --

Q Did your organization intervene in those PUC cases?

MR. LAKUSTA: It did, yes.

Q I mean prior to the time you were doing the things you are charged with doing here?

MR. LAKUSTA: No, prior to the time of the activity alleged here, there were virtually no protests. In fact, I think that's alleged in the complaint, certainly in the Plaintiff's brief; there were virtually no protests and the Commission was granting certificates, as they say, under a liberal policy. The Commission does not have any liberal policy as such, on the books; contrary to what Mr. Khourie says, there was indeed a grace period to clean up a bad situation, but after that, the policy was public convenience and necessity, and during the period until the defendants came, the certificates were granted very freely, not because of any liberal policy but because of the absence of the kind of counter-evidence which is very useful to the governmental body in making its determinations.

Q Are there allegations of conduct on the part of your clients to discourage applicants ever going after certificates and threatening them if they did, they would be involved with the kind of resistance which would make it very, very expensive?

MR. LAKUSTA: Well, if I read the factual context--

Q But aren't there allegations of that?

MR. LAKUSTA: Yes.

Q Is that within the defense you are making?

MR.LAKUSTA: Well, the allegation is that the way in which that threat occurs was, say, to publicize,"We will

go and we will protest," so I say any discouragement or deterrence is a result of governmental action.

Q Do you think that is within --

MR.LAKUSTA: Yes, I think it is because unless this kind of activity is protected, it means the agency is deprived of the kind of information--

Q I thought this was conduct, as I understood the allegations, to discourage applicants from ever going to these, by threatening him if he did he was going to be met with the kind of resistance which would make the proceeding a very, very expensive one for him?

MR. LAKUSTA: Well, there's nothing wrong in imposing upon an applicant the requirement that he make out his case. Certainly he has no right to receive a certificate without proving up his case, and I think that that is what justifies whatever discouragement or deterrence may have arisen in the program.

Q Certainly the fact situation (inaudible) to include that aspect.

MR. LAKUSTA: No, it is quite true it is different in that respect.

Q There is much more here than merely your practice of intervening in the cases.

MR. LAKUSTA: I didn't understand, your Honor.

Q As Justice Brennan points out, there's much more

than merely intervening in these PUC proceedings?

MR. LAKUSTA: No, on the contrary, your Honor, the factual allegations, Mr. Justice Brennan has referred to conclusions, but the factual allegations to support it are simply that the defendants publicized this program and said if you come in, we shall protest. Now, the expense can always be controlled by the agency itself; there's no problem of an inability on the part of the plaintiffs to complain to the Commission and say that this proceeding is becoming too burdensome, the evidence is being repetitious. I've seen many a case where such allegation has been made, and the proceeding has been carefully restricted, and there's no allegation here that the defendants or that the agencies in question were rendered powerless to control any abuses.

Q Are you suggesting that this is essentially the same as though a newspaper carried a box on the front page saying if anyone sues us for libel by virtue of what we say, we'll keep them in litigation for years, and it will not be profitable to sue us for libel? Something of that kind? Are you suggesting this First Amendment right is the same as this hypothetical I am giving you?

MR. LAKUSA: No, your hypothetical goes a little bit far. If they say, "If you sue us for libel, we'll fight you and fight you hard all the way," then I would say that is perhaps what we have here.

Q And you say that is what your clients are doing?

MR. LAKUSTA: That is the allegation.

Q The allegation as distinguished from the conclusions and inferences drawn from those allegations?

MR. LAKUSTA: Yes, I think it's true to say that the allegation is that the defendants would protest in every case, but always with that caveat that the protest would be within the realms of the administrative processes and would not transgress those processes, and that the protest would be for thepurpose of offering honest evidence and never falsifying. I say that that caveat is there because there is no allegation in the complaint to the contrary.

MR. CHIEF JUSTICE BURGER: Very well, you have consumed your entire time, Mr. Lakusta.

Mr. Khourie.

ORAL ARGUMENT OF MICHAEL N. KHOURIE, ESQ.

ON BEHALF OF THE RESPONDENTS

MR. KHOURIE: Thank you, your Honor. Mr. Chief Justice, may it please the Court:

I think from Mr. Lakusta's remarks about the content of the complaint, it certainly emphasizes in my mind that a trial is needed in this case to determine what this plan embraced; whether it embraced as you posited this ad in the paper saying, "We'll sue anyone," or whether it said in effect, "If you sue us, we'll defend on good grounds,"

because although we admit in our complaint, in our brief that no lies were told, because we don't know of any, we do not say that relevant information was given in all protests because many of the protests were made without any cause at all. We have alleged this agreement was made in advance at one point, the Coronado Hotel in 1961, in San Diego, which said that we would protest each and every application, irrespective of what it is, where its location is, which is hereafter filed by any applicant.

Now I would like in a moment, if I may, to review what I believe the allegations clearly say, but I think it is important that at least I communicate to this Court what the charge is here, that there's an abuse of processes by which government receives information by these defendants for anticompetitive purposes.

Now, the processes in this case are the processes which follow, happens to be the way it was set up, for certification; the processes are in the judicial model. We have filled our appendix perhaps over-full with regulatory processes and rules which show that it is in the judicial model, and of course this is the way the California and the United States Congress and legislature has set up certification. This is done because these are individually decided cases based upon, as Judge Browning said in the Ninth Circuit, standards of more or less generality, but they still are

individually decided cases which much more are in the-- not in the political rough-and-tumble which I believe is all Noerr dealt with, and all Noerr meant to deal with.

Now the processes I am speaking of are not government action. They are self-actuating. In other words, just like all court processes, you file a protest and things start happening without any government official making any kind of decision, and those things are things which cause delay and expense, and it is knowledge of these things and their impact on competitors which the defendants relied upon to harass and make expensive any protests.

Now when a notice of appeal is filed, that sets things in motion, and no government official or authority has made any kind of decision, so --

Q Isn't every adjudicatory body possessed of inherent powers to deal with what we might call abuses of its process?

MR. KHOURIE: It certainly is, Mr. Chief Justice Burger.

Q Isn't that the factor that backstops this situation?

MR. KHOURIE: It is. It's the--

Q Why isn't that enough, then, without the Sherman Act?

MR. KHOURIE: Because the abuse of the judicial process was designed to restrain competition. Now, I don't think the law is that if there is another remedy, that the

Sherman Act is thereby ousted of jurisdiction. I believe that unless there's a specific exemption in legislation, as in some of the Interstate Commerce Commission Acts, exemptions, the Rebul-Winkle (phonetic) exception, et cetera, or unless there is an implied immunity, as there was in the Pan American case, where there is a collision between the regulatory scheme and the antitrust laws, or unless there is a Parker against Brown type of immunity, which is a judge-created immunity which holds the Sherman Act not to apply to valid state action, or unless there's the kind of immunity given in Noerr-Pennington, I do believe sincerely there is no immunity for tortfeasors who commit other torts, and as against whom a competitor may have a tort action that that tortfeasor is thereby entitled to immunity from the Sherman Act. I believe the Sherman Act is a law of general application, and you can violate it by lawful means and unlawful means. The mere fact, for example, that slander is perhaps a remedy which is available, perhaps the Public Utilities Commission, although I don't think is within their _____ to remedy this situation, because they'd have to have a hearing on standing first to see if there is probable cause for this person to be there.

But to answer your question, as I see it, I don't believe the mere fact that the regulatory body may have and prospectively, I might say, the right to remedy this situation,

can be used to deny these defendants the right to certain damages, if they've been found to be damaged, and I don't think it ousts the federal courts of jurisdiction. I don't think that was the Congressional intent.

I think these rules, these rules which are actuated byprivate citizens, because in Noerr you had two things in Noerr: you had genuine attempts to influence government for the purpose of restraining trade, and that's what was protected. Here there are no genuine attempts, in our view. The plan can not be segmented between those applications which are protested, in which there is probable cause, and those applications which are protested, in which there are none. What the defendants' plan embraced was to protest everything and to appeal everything and take everything to the highest level without exception, and the thing that separates the plan from Noerr, I think, is that they knew that these government processes they were using would act directly upon the applicants, and they also didn't let the Public Utilities Commission know of their plan, nor the public, nor others; they let their competitors know. They let their competitors know that as we say, they would appeal all the way. The plan we say was a plan which was devised solely to deter the filing of applications. It wasn't devised for any other reason, and Mr. Lakusta is incorrect in saying that we allege the plan was to provide information to government in every

case. That's not what we've alleged at all. We have alleged and believe we can prove that the plan was to deter other people from informing government and from coming before government, and to intensify the -- and here again we admit there is a burden to litigation, there's a burden to meeting the legitimate protests of your competitor, but the plan here was to intensify it to such a degree to let competitors know the wealth and the determination and the binding agreement that these 20 or so carriers had to take every protest and to protest it to the degree that they did. This was made known immediately after the 1961 meeting.

Q Does a protest automatically entitle the protester to intervention?

MR. KHOURIE: To a hearing, yes, it does.

Q That is true of the ICC and is also true of the PUC?

MR. KHOURIE: That's correct.

It entitles him also under the rules, to rehearing, entitles him to bring it before the full Commission, entitles him to go into the court system, entitles him to appeal to the highest courts, and that was a feature of the plan. That's what they said they were going to do. It was in effect a use of the processes to terrorize, I believe, the competitors, the smaller competitors by use of this gigantic force.

Q Do you conceive it to be part of the burden if you go to trial, to prove that there were prospective applicants

who did not apply because of this?

MR. KHOURIE: If we desire, Mr. Justice Brennan, to obtain damages for them, we will have to prove under the applicable rules of damages that they did not apply.

Q You ask for an injunction, too?

MR. KHOURIE: Yes.

Q At least you want that?

MR. KHOURIE: Yes, we want an injunction. Yes, we do, because we believe that the policy of the PUC has not changed. The policy is still a liberal policy. That is why we say they have subverted the policies of the PUC. They have done it by employing mechanisms which merely are expensive in coping.

Now the point is made that they made the best case possible in every case. Obviously they did, because we believe that part of their plan--and the plan could not have been effective unless they went before the Commission with competent counsel, which they did--they made every argument conceivable which they did, and I submit that even if there is no probable cause whatsoever to opposition, that counsel can always think of arguments, always arguments but the basic purpose was there, and the result on the policy basis was that information stopped flowing to government.

In 1961, if you can take that breadth of hands, there was this many applications, and there was the right to protest,

and the information was flowing to government. In 1962 there were that many applications, and information to that extent was flowing to government. In 1964 and 65, there were this many applications, and to that extent information to government was being curtailed. It got to the point where no information was flowing to government.

Q You mean it was so effective that no applications were filed?

MR. KHOURIE: Extremely few. I can tell you that we can prove, in my opinion, that applications went from a level of pure competition, because the policy of the Public Utilities Commission was that they were going to grant virtually every application upon a showing of fitness. They had adopted and in our brief we cite opinions of the Public Utilities Commission, whereby they have adopted a policy of open competition.

Q They have never changed that policy?

MR. KHOURIE: We do not believe that they have changed that policy. We believe that applications have dried up, and we believe that we can prove that applications have dried up. We can prove that applications have dried up.

Q Are there any allegations in the complaint that the defendants agreed to agree upon what transactions not to oppose? Let's assume there was a merger proposed between one of the defendants and some smaller carrier or something, did

they agree among themselves not to oppose certain transactions or you just don't allege that?

MR. KHOURIE: We allege, Mr. Justice White, that they agreed to oppose applications for certificates, applications to transfer certificates, and applications to register certificates with the Interstate Commerce Commission, and they agreed to oppose all of their applications and as far as we know, they didn't agree to do anything else.

Q All right. I suppose good arguments could be made, if you advance to trial in this case, on the part of your opponents, that it is not in the public interest to grant all applications and have this enormous number of people holding certificates, arguments emphasizing that?

MR. KHOURIE: Well, they could.

Q To that extent, further argument could be made that they serve public interest by keeping the operations confined to strong carriers.

MR. KHOURIE: Well, any monopolist I suppose could take that position and perhaps they sincerely feel that that is the correct position.

Q Almost the history of the railroads in the United States, isn't it?

MR. KHOURIE: That is correct, your Honor. However I think that is the job of the Commission and not the defendants. These defendants have, I believe, in California,

taken over the job of regulating carriers, and they have done so--they don't have to bribe, they're too powerful to have to bribe, they're too powerful to have to lie, they have taken this power and they have used and abused a procedure, a delicate proceeding of government which is not the Noerr-Pennington type of behavior.

Q Well, in Noerr, I suppose it was the prerogative of the Governor to veto or not to veto that so-called bill, but the allegation in that complaint was that defendants by their political clout and power had forced the Governor to veto that bill, and the complaint in Noerr was that whole course of conduct by the defendants was according to the complaint, vicious, corrupt, and fraudulent and that their whole purpose was to absolutely destroy their competitors and yet you know what the Court held in Noerr, despite those allegations, there was no violation of the Sherman Act.

MR. KHOURIE: That's right. I believe that the Court in Noerr held that the values protectable in the political process, where representative government is involved and where the free access to the elected representatives of people in the manner in which it was achieved in Noerr, was protected by the right to petition government.

Noerr did have, Mr. Justice Stewart, the caution that there must be a genuine effort to influence government. In other words, there is no doubt in Noerr , there is no doubt in Pennington , that the defendants sought to have the

government do their restraining for them.

Q There had to be a genuine effort?

MR. KHOURIE: Genuine effort.

Q My understanding is that your argument in this case is that the effort was all too genuine and all too effective, not just a threat. I am familiar with the language in Noerr that talks about a sham.

MR. KHOURIE: Yes. The effort in this case was not to have government restrained. The effort in this case was to make the processes of government , and I am talking about the self-initiating processes, where government doesn't have to act at all in a decision making kind of proceeding, where, by filing a protest, there is a hearing, and by filing petition for a rehearing, there has to be another hearing. That's what has restrained trade in this case, and not the decisions--

Q The governmental bodies of the regulatory Commissions?

MR. KHOURIE: That's correct. This is an abuse case, it's an abuse of process.

Q As I understand it, there is common ground that there was no misrepresentation of fact?

MR. KHOURIE: We know of none. We do not say by that that there was always relevant information given as Mr. Lakusta has argued. It would be very strange if there were. There never has been a law suit where everything was relevant. There are always objections on the grounds of irrelevancy.

Q Would the legislature of California have the power to meet your problem by providing that after one hearing, a decision of the Utilities Commission should be made and that would be unreviewable and then there could be no harassing? Would they have that power?

MR. KHOURIE: Yes. As a matter of fact, the Public Utilities Commission is a creature of the legislature.

Q That would be a solution to the harassment by representative appeals and that sort of thing, wouldn't it?

MR. KHOURIE: It would be a prospective solution which might be achieved by lobbying and persuading the legislature, which incidentally, these defendants could have tried to achieve this liberal policy, the shortening of the liberal policy they objected to.

Q Your opponents whould not like this kind of amendment to the statute?

MR. KHOURIE: No.

Q Presumably?

MR. KHOURIE: Exactly. I believe that prospectively, there is no question, Mr. Chief Justice, that you are right, and I don't think that the antitrust laws would or could apply in that situation. However, in the situation we have found ourselves in, where the legislature has decided to put this certificating function into the hands of the Public Utilities Commission, and they have decided to make certification and

adjucating procedure. It didn't have to do that but it did that, and it is an adjucated procedure, and they set up the rules of procedure which have to be followed, and we believe that the abuse of these procedures for anticompetitive purposes have put these defendants squarely within the Sherman Act. Certainly the mere fact they are public utilities and subject to regulation, and certainly the mere fact that there may be pervasive regulation, does not immunize them from the Sherman Act. We believe and we argue that the Sherman Act is applicable to them and that they are just like any other defendants, because they chose this method. They might have chosen lobbying and been protected by Noerr, but they did not choose the Noerr method.

Thank you very much.

CHIEF JUSTICE BURGER: Thank you Mr. Khourie.

Your time has been consumed, Mr. Lakusta.

The case is submitted.

(Whereupon, at 11:58 A.M., the case was submitted.)