OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. No. 82-1922

TITLE SOUTHERN MOTOR CARRIERS RATE CONFERENCE INC., ET AL. Petitioners v. UNITED STATES

PLACE Washington, D. C.

DATE Monday, November 26, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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SOUTHERN MOTOR CARRIERS :

RATE CONFERENCE, INC., :

ET AL. :

Petitioners, :

V. : No. 82-1922

UNITED STATES :

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Washington, D.C.

Monday, November 26, 1984

The above-entitled matter came on for cral argument before the Supreme Court of the United States at 1:57 o'clock p.m.

APPEARANCES:

ALLEN I. HIRSCH, ESQ., Atlanta, Georgia; on behalf of the petitioners.

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Southern Motor Carriers Rate Conference, Inc., and others, against the United States.

Mr. Hirsch, I think you may proceed when you are ready.

ORAL ARGUMENT OF ALLEN I. HIRSCH, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. HIRSCH: Mr. Chief Justice, and may it please the Court, while there are many directions one can take when answering the question posed by this case in a manner which would be favorable to the petitioners, the question itself, we believe, is rather simply put: Does a state's clearly articulated and affirmatively expressed policy to displace competition with a mandatory and pervasive regulatory system which it actively supervises shield from antistrust liability the private regulated parties acting in a manner contemplated and authorized but not literally compelled by the state system?

In order to answer this question, it is useful not only to examine the state action doctrine as it commenced with Parker v. Brown and as it has been discussed by this Court in subsequent opinions, but to look closely at the underlying concept of federalism

upon which Parker v. Brown was based.

To begin this examination, we should look briefly at the state regulatory systems as well as the pertinent federal statutes in this area. Each state in this case has legislatively mandated regulation of motor carriers with pervasive regulatory schemes setting forth what the motor carrier operators must do in order to comply with the state schemes and in order to be motor carriers within the state bounds.

Each state has established a public service commission to administer that regulation in order to achieve these legislatively articulated purposes and goals for the benefit of the public and the citizens of those states.

On the federal level, at the same time, the Congress of the United States first in 1935 specifically reserved to the states the right to regulate motor carriers within their state boundaries, and subsequently in 1948 the Congress of the United States specifically exempted activity which if not identical is very, very similar when engaged in by interstate motor carriers subject to the regulation of the Interstate Commerce Commission.

The unique aspect of this case is that under the federal scheme, in order to avail oneself of the

exemption from the federal antitrust laws, carriers had to petition the Interstate Commerce Commission for a collective agreement, and in order to receive the exemption by use of this agreement, they had to reserve the right to independent action by each of the carriers who were parties to the agreement.

What the government proposes in this situation is that contrary to the federal scheme which required the reservation of the right to independent action in order to obtain relief from the antitrust laws, that the states, because they do not remove that right, because they do not compel collective activity, but only allow and authorize collective activity while still allowing this independent action, have lost the right to exemption from the antitrust laws.

We submit that in the context of this case, pervasive regulatory schemes coupled with this federal background of an explicit reservation to the states of the right to regulate in this area, and Congressional action in the same arena attempting to accomplish the same goals, and not to allow the states to do the same, is to stand the doctrine of federalism on its head.

Now, under the doctrine of federalism as addressed in Parker v. Brown, this Court has stated in the oft quoted phrase that when we are dealing in a

system of dual sovereignty, where the federal govenment is a sovereign and the state is a sovereign, it is not easily to be implied that the federal government has intended to remove the state right to act and to subject it to federal law.

In this case when we couple this proposition of the Parker case with the specific reservation of the right to the states to regulate in this area, we believe that this substantiates the position that the federal Congress does not intend to apply the Sherman Act in this area.

In Parker you had no statement of a reservation of rights to the states to regulate their agricultural crops. They went ahead and regulated. In fact, in Parker there was federal legislation which was comparable to the regulation that was being engaged in by the state itself.

In this case, we don't deal with just the silence of the Congress of the United States in the Sherman Act with respect to its applicability to the states. We deal with the subsequent explicit statement of the intent of the Congress of the United States not to apply the federal laws to the states when it comes to the regulation of motor carriers.

In this arena, we then turn to the state

action doctrine, and see if the doctrine as evolved by this Court does apply in fact to the regulatory schemes of the states we have before you.

The issue has evolved over the term compulsion, that the activity in question when engaged in by a private party must be compelled by the state. We believe this is a narrow and wooden approach to the state action doctrine. We believe that the state action doctrine means exactly what it says.

Does the state as a sovereign intend to occupy a particular field and regulate that field to the extent of displacing competition? And is that intention clearly stated, clearly articulated? And when dealing with private parties who are necessary to the realization of the regulatory goals set forth by the regulatory scheme, whether the state merely says, go do as you will, or whether the state remains actively involved --

QUESTION: Mr. Hirsch --

MR. HIRSCH: Yes, sir.

QUESTION: -- hasn't the state said to every single independent motor carrier, go do as you will?

MR. HIRSCH: No, sir, they have not.

QUESTION: Don't they all have an independent right of action?

MR. HIRSCH: No, what they have said to the carriers is this. They have said, you must submit any rate that you intend to charge or wish to charge to the public service commission of this state for review and interpretation and examination, and unless and until that rate or a modification of that rate is issued by the public service commission, you can't do anything.

Under that scheme, the states have then further said, we wish to assist the public service commission in realizing this ratesetting charge that we have given them, that we have delegated to the public service commission. They need the assistance of the carriers coupled with this assistance.

Each of the states has expressed a desire to have uniformity with respect to rates charged. Each of the five states appeared in the District Court at the invitation of the court and supported thoroughly the activity in question, stating not only was the activity advantageous to their carrying out their legislative goals, but was necessary to the carrying out of the legislative goal.

Now, what the government says is solely because the states also at the same time intend to allow a carrier who is dissident or disagrees with the information or the rate that results from the collective

activity can come forward with his own information or his own proposal for whatever specific reasons he may have and underlying these reasons are certainly those areas of anticompetitive conduct that the states don't intend to authorize or approve, such as coersion, refusal to interline.

These dangers which do not enhance the public policy of the state to have uniform rates and to have competition for service as opposed to a cost plus competition, the state wants to engage these individuals who are dissident into the process, much as the Congress of the United States said in 1948.

The only way you can obtain the exemption is to allow the individual carriers to come forward and speak when they disagree with the collective proposal.

QUESTION: Under the state schemes, is the right of independent action of the independent carrier different from what it is under the federal scheme, in your view?

MR. HIRSCH: I don't believe it is, Your Honor.

QUESTION: It's the same right?

MR. HIRSCH: I believe it is the same right. The way both of the rights evolved is that all rates under the conference system are proposed to the

conference rate committee. The committee then reviews the information and makes the determination. If they accept it on a majority vote, then it is proposed as a collective rate.

If they reject it, or if any member who participates in the rate that is involved or the classification that is involved decides that he doesn't agree with it, if he is in the minority, then either the original proposing party or anyone who is in the minority has the right once the committee has stated what it intends to do and makes a public announcement of that has the right to come to the Commission and say, we want a different treatment.

Now, the Commission has the right and often does entertain both the independent proposal and the collective proposal simultaneously in order to avail itself of the information provided by the collective carriers and the information provided by the independent carrier.

They go through all the evidence presented, the cost data, and they come out with a rate, not always the rate proposed collectively or the individual rate.

QUESTION: Can they come out with one rate for the majority and a separate rate for the independent?

MR. HIRSCH: Not necessarily.

QUESTION: But can they?

MR. HIRSCH: They can. Yes, sir. If they find that the independent has stated a reason why in its particular circumstances it should have a special rate --

QUESTION: Well, isn't it true that within the zone of reasonableness there can be more than one rate?

MR. HIRSCH: That is true. That is true.

QUESTION: Which might include both one rate for the majority and either a higher or lower rate for the independent.

MR. HIRSCH: For the independent. That is correct. But the underlying reasoning and the underlying purpose of this case is that this is specifically what the states intend. What is going on, what is happening, what is resulting, it is coming out the other end of the Commission, this regulatory scheme, with a series of uniform rates accept that to -- only to the extent that individuals have presented specific documentation or evidence or cost data to except themselves from the general rate, this is what the Commissions and the states have intended in the regulation of motor carriers.

To disallow this independent action renders the activity as designated by the states unavailable. They can't regulate in the manner they see fit. And

this is why we contend that the Parker doctrine, when we sift under the verbage and the words that have come down in the various cases as applied to the specific fact situation in each case, and the Court surely recognizes, as the Chief Justice pointed out in his concurring opinion in City of Lafayette, this area is evolving.

The antitrust laws have evolved. The commerce clause has evolved. The state action doctrine must also evolve. And while the term "compulsion" may have cropped up in a particular factual situation, underlying Parker v. Brown was a recognition that if we demonstrate, as we submit we have, that the state intends the activity which is taking place to take place, clearly articulates it, and definitely intends it to take place, and then actively participates in that activity as it goes forward, then that is state action.

QUESTION: May I ask just one other question, Mr. Hirsch? Would it be your view that even if Congress had not passed the Reed Bullwinkle Act in 1948 that your argument would be equally strong?

MR. HIRSCH: Yes, Your Honor, absolutely. I saw, all I address the Reed Bullwinkle Act for is to add one more rung to the federalism ladder, because if federalism in total Congressional silence still means

that Congress does not intend to displace the right of the state as sovereign to enact laws within its bounds, then surely when Congress later speaks in the same area and does that which the states do, it is absurd to argue that under a federalism doctrine they can prohibit the states from doing just what they are doing, that coupled with the fact that they have already said, we are going to leave you alone.

Now, the government points at this and says, it was Congressional intent to allow the antitrust laws to continue to apply to states, and that could be inferred from the fact that they did not give the exemption stated in the Reed Bullwinkle bill to the states.

And I again say, much as the silence with respect to the Sherman Act is not to be inferred to apply to the states as sovereign, neither is the silence in Congress in giving the exemption only on the federal level to be implied that that exemption is unavailable.

What it says to us is that Congress had already reserved the right to the state to regulate this area, and we are not going to interfere with their rates, so therefore we are not going to go in and tell them whether they are exempt or not. That is within the right of the state as a sovereign. And the states

responded by enacting this legislation.

The most recent -- not the most recent case, but the most recent synthesis of the state action doctrine, of course, occurred in the Mid-Cal case. This case came up while this case was in the appellate courts.

In Mid-Cal, we find it to be very clear that this Court, after going through each of the state action cases which preceded it and discussing the specific holdings found in very definite language that the result of all the state action cases was a two-pronged test, clear articulation of an affirmative intent to displace competition coupled with active supervision.

Nowhere in Mid-Cal does it say that by the way there will be a separate test for private regulated parties responding to the regulatory schemes of their states, and they must be compelled, nor does it say that there are private or different tests for anyone who comes before this Court.

The only differentiation that has been reached and made more explicit was in Hoover versus Ronwin, in which this Court said, when the activity is in fact the activity of the state itself, and the state is the very actor, that is the end of the inquiry. We will not attack the states.

But if the actor be a non-sovereign, then we apply the Mid-Cal test, and we submit that the Mid-Cal test has been met, as Judge Hill said both in his dissent in the three-judge Court of Appeals and in his dissenting opinion in the en banc hearing in this case.

Whether he agrees with the majority's feelings that the activity in question may be anticompetitive is irrelevant. The issue is what this Court has said, and this Court has stated a two-pronged standard, and the carriers in this situation, the regulatory schemes in this situation meet that two-pronged standard thoroughly.

QUESTION: Mr. Hirsch, can you distinguish the rate bureaus in this case from those the Court was considering in the Georgia Railroad Company case?

MR. HIRSCH: In Georgia versus Pennsylvania Railroad, the issue that came before this Court actually was a question of whether the State of Georgia could bring the case. It was on a motion for failure to state a claim, and whether they had original jurisdiction in this Court, whether they had in fact stated a cause of action.

In reaching only that conclusion, this Court stated in dicta that collective activity when coupled

with coercion and refusals to interline, some of the activities that I have previously referred to as the reason for maintaining independent action, that there may be violations of the antitrust laws. Nothing in that case --

QUESTION: Well, my question was whether the rate bureaus operate in the same fashion here as in that case.

MR. HIRSCH: No, not at all. What was occurring in that case, the reason that case came before this Court was that by reason of coersion and reasons of refusing to interline or exchange cargoes with railroads in the south and railroads in the north, the south was being charged a discriminatory rate.

As a matter of fact, the regulatory schemes as they now exist address some of those very problems, the discrimination that was resulting. I believe Georgia versus Pennsylvania Railroad emphasizes -- the underlying factual background, emphasizes the need for regulation, both on the inter and intrastate level in this area, because it was being abused, and there was an entire section of the country which was being discriminated against in its rates because of abuse of the process.

These abuses which occurred in the Georgia v.

Pennsylvania Railroad context cannot occur because of the second prong of Mid-Cal, which is the active state supervision of the activity in question. It will be argued, I am sure, that the Reed Bullwinkle bill was an attempt to eliminate this Court's determination that collective ratemaking was a per se violation of the antitrust laws.

What the legislative history of that bill specifically says is that it is designed to remove the questions raised by Georgia versus Pennsylvania Railroad, to clear the air, not to reverse this Court, not to change this Court, but say questions have been raised, and therefore under this context if you have an agreement approved by the Interstate Commerce Commission and you reserve the right to independent action, then you are entitled to an exemption from the antitrust laws because you are a regulated industry.

The states who had engaged in this same type of practice and regulation came forward and have subsequently issued their own state regulatory schemes which address the same problems, and the result is that they have clearly articulated the intent to allow the activity in question as long as the independent carrier has the right to file independently, and they police any abuses of this system either in a collective nature or

in an individual nature or in the use of coersion by pervasively regulating and actively supervising.

The bottom line is, as I believe Justice Powell said in Hoover versus Ronwin, conspire as they will, the carriers in this case can do nothing without the subsequent review and approval of the state commissions.

They can sit around and agree on every price, every rate, everything they want to agree on, and when they walk away from that room, they have accomplished nothing other than reaching an agreement to present to the public service commissions for hearing, for review, for requests for additional information, and after that hearing and after that review, the public service commissions meet and they set the rate.

Every one of the state statutes is clear in that instance that it is not the carriers who are setting the rates. It is the public service commission. That, the rate itself, is the act of the state.

I likewise submit for those same reasons that were the party before this Court today the public service commissions, who are represented in an intervenor capacity by the National Association of Regulatory Utility Commissioners, this Court nor the lower courts could have found them to be in violation of

the antitrust laws.

So, this clearly emphasizes the position that if the regulatory commissions are not violating the antitrust laws, that merely because those responding to the regulation and subjecting themselves to the regulation because they are mandated to subject themselves to the regulation can be violating the antitrust laws is again classifying Parker v. Brown as a case standing for nothing more, as Justice Stewart pointed out in his dissent in Cantor, nothing more than the proposition that Porter Brown sued the wrong party.

QUESTION: Do you rely on the dissenting position in Cantor? Your argument is very close to it.

MR. HIRSCH: I am not relying on the dissenting position as applied in Cantor, Your Honor. No, sir, I believe Cantor --

QUESTION: What is the difference between this case and Cantor?

MR. HIRSCH: The difference is that in Cantor, the state regulatory system was not only silent with respect to the regulation of lightbulbs, but lightbulbs had absolutely nothing to do with the regulation of electric utilities in the State of Michigan. This case goes to the very heart --

QUESTION: The Commission thought it had something to do with it, because they approved the tariff, the lightbulb --

MR. HIRSCH: Their approval of the tariff proved two factors which would have been their downfall even under the Mid-Cal test, and one is, there wasn't a clear articulation, we submit. It wasn't there with regard to lightbulbs. And secondly, there was no active supervision with respect to lightbulbs. It was merely a rubber stamp.

Here we have the heart of the regulatory system, the rates themselves, clearly articulated to be regulated and actively supervised to the extent that the Commission does in fact make the rates.

I will reserve five minutes to respond.

CHIEF JUSTICE BURGER: Very well.

Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. WALLACE: Mr. Chief Justice, and may it please the Court -- forgive my cold -- one of the concerns manifested in the legislative history of the Sherman Act and that prompted the Act's passage was concern over price collusion in railroad rates that was then prevalent, and railroads were at that time the

predominant form of freight transportation in the United States.

The very first Sherman Act cases to reach this Court were two suits by the United States under Section 1 of the Sherman Act to enjoin railroad cartel practices. These were United States against Trans-Missouri Freight Asscciation, 166 US in 1897, and United States against Joint Traffic Association, 171 US in 1898.

In both cases the Court ruled that the United States was entitled to an injunction against these practices. In the Trans-Missouri case it was a cartel created by 18 railroads which provided service west of the Mississippi, and Joint Traffic was a similar cartel among lines serving between Chicago and the east coast.

And they had through the cartel promulgated a freight rate structure to which they would all adhere, although they could compete among themselves by means other than rate competition.

Well, there are, of course, differences between those cases and this one. The present suit by the government to enjoin price collusion in the now dominant field of motor carrier freight transportation is in the tradition of these earlier cases, and like the earlier cases, our suit reflects not just concern about

the familiar evils of price collusion among competitors, but the particular economic concern about the ripple effects of price competition in a service industry like freight transportation, ripples which can be intensified as they are added to at various stages of the process of manufacturing and distributing goods, if the price is increased of getting supplies to the manufacturer, getting the manufactured goods to the wholesaler, of getting the goods from the distributor to the retailer, and so forth.

Now, we saw a very dramatic example of these ripple effects in a comparable situation during the time of rapid price rises in the cost of energy imposed by the OPEC cartel. Here we are dealing with a much more limited economic effect. It is what this Court recognized in Georgia against the Pennsylvania Railroad Company.

It is price collusion within the zone of reasonableness for regulated rates, but nonetheless it is a matter of considerable economic concern, and the Justice Department has investigations in other geographic areas, and the Federal Trade Commission has also acted in this field now, and three amicus briefs have been filed in our support in this Court, two by associations of shippers and one by a group of state

attorneys general.

And we are talking about something of considerable economic effect, and the point of my introducing the subject this way is that it is in a context not at the periphery, but at the very heart of Sherman Act concerns that the petitioners here who can claim no express exemption from the antitrust laws are asking this Court to take a more generous view of the implied exemption for state action than has heretofore been established in this Court's decisions.

And I want to make very clear that they are not claiming and cannot claim an express exemption. Reference has been made to the Motor Carrier Act of 1935, which was the first federal law that conferred authority on the Interstate Commerce Commission to regulate motor carrier rates at all.

By that time, under this Court's Shreveport decision, the jurisdiction of the Interstate Commerce Commission had been extended to intrastate railroad rates that could affect interstate commerce, and Congress decided in 1935 to confine the newly conferred rate regulation authority on the Interstate Commerce Commission to the field of interstate rates, and to leave rate regulation over intrastate rates to state public utility commissions.

There was no mention for interstate or intrastate rates of any exemption from the Sherman Act. There was no delegation to the states comparable to the McCarren-Ferguson Act that would have exempted expressly any practices from the Sherman Act, and indeed ten years later this Court in the Georgia case held that the 1935 Act did not confer an implied immunity even with respect to interstate rates.

That was a case heard on motion for leave to file a bill of complaint, and one of the grounds on which that motion was opposed was that the bill of complaint did not state a cause of action. Because of rate regulation by the Interstate Commerce Commission, there was no cause of action left under the Sherman Act, and this Court explicitly in a section devoted to the cause of action question rejected that claim, which gave rise to the Reed Bullwinkle Act, which again had no express provision with respect to state rate regulation.

Now, another irony of the claim for an exemption here is that it comes just at a time when Congress in the 1980 Motor Carrier Act, which we have described in some detail on Page 32 of our brief and in the footnote there has eliminated in large part the exemptions for rate collusion in interstate rates that existed under Reed Bullwinkle with respect to interstate

motor freight transportation.

With very limited exceptions, the Interstate Commerce Commission can no longer confer exemption for price collusion with respect to single line rates. Much of the discussion about the previous scheme that was featured in the courts below and in the briefs is quite outmoded since these provisions have taken effect in July of this year.

And indeed, even though the Act reserves the ability of two carriers to agree on a joint rate as a joint venture between themselves, it even eliminates the exemption for collusion about joint rates between two different groups of carriers offering the same joint rate between two points for the same commodity.

So, there is considerable irony in the plea that it is necessary to take a generous view of the exemption in order to have something commensurate at the state level with what we have with respect to interstate motor traffic.

The motor carrier freight industry is a $150 billion annual industry in this country, and it is a matter of considerable economic concern. This is what our -- I can't give you a breakdown between interstate and intrastate, but the total, according to our most recent studies, is that we are dealing with a $150

billion industry.

Now, with this background, I would like to turn to the question of the legal standard under Parker that governs here. Parker is based on dual principles of federalism stated by the Court in Parker itself that the Sherman Act broadly prohibits restraints of trade imposed by individuals and corporations but was not intended to prohibit state action or official action directed by a state.

Now, in the Court's previous decisions, there has been much discussion of criteria, and we have rehearsed that in some detail in our brief. The Court has stated that the action, when we are talking about action of private individuals, has to be something required by the state.

It has talked about compulsion. It has said that the Court has rejected the idea that state authorization, approval, encouragement, or participation or prompting of the privately imposed restraint won't suffice. It has rejected those criteria.

And this has given rise, in accordance with the tendency in this country for an elaborately legalistic federalism that sometimes confuses people from elsewhere, it has given rise to discussion by the commentators about possible refinements of the meaning

of all these terms, including compulsion, which in our view tend to obscure as much as illuminate what is the basic question in these cases, and that is the intensely practical question that the Court addressed in Cantor, namely, who is it who exercises the choice under the state scheme, who exercises the choice between competition and collusion?

Is that choice made by private parties acting in their own economic self-interest, or is that choice made by the state acting in the public interest as part of a regulatory program that it is imposing?

QUESTION: Mr. Wallace, would you say if the state public utility commission had said, we will only accept joint filings, that that would be enough?

MR. WALLACE: Well, then you would get into the Mid-Cal question of whether there is adequate supervision, which is not contested.

QUESTION: Just in your own words, the private carriers are not making the choice.

MR. WALLACE: That's correct. That is what seems to us to be the criterion with respect this so-called compulsion aspect.

QUESTION: Well, if the public utility commissions said all you fellows have got to get together and file joint rates, that is --

MR. WALLACE: There might be another ground for contesting whether there was immunity, but the compulsion standard would be satisfied.

QUESTION: What other ground, would you say?

MR. WALLACE: The question of adequate supervision, which was the ground addressed in the Mid-Cal case, because the state can't just go around compelling conduct inconsistent with the Sherman Act --

QUESTION: I didn't think you -- what is your position in the Hallie case? Didn't you say that you didn't need active supervision of municipalities?

MR. WALLACE: That is with respect to municipalities.

QUESTION: But you think you have to have active supervision by rate bureaus, I mean by --

MR. WALLACE: By the --

QUESTION: No, public utilities commissions.

MR. WALLACE: Active supervision by the Commission of private conduct, whatever that would amount to.

QUESTION: But anyway, that is not involved here?

MR. WALLACE: That is not involved in this case.

QUESTION: Well, on this point, then, Mr.

Wallace, assuming that we have active supervision by the public utility commission, if the state has clearly articulated a policy of desiring to have joint rate proposals as part of the scheme, what more is gained by saying it has to be compelled?

MR. WALLACE: Our view, our understanding of the entire Parker line of decisions is that it is only state action, not state policy that is exempted from the Sherman Act. It isn't up to the states to decide that they would rather have private persons acting in their own economic self-interest make the decision whether there will be competition or collusion rather than have that decision made by Congress.

Congress has already made that decision in the exercise of its constitutional powers, and part of the genius of our Constitution is that Congress has the authority to legislate directly with respect to individuals. The state isn't free to second guess the Congressional policy with respect to that.

I do think --

QUESTION: Well, if the state is free to say we want all rates made as -- initiated as joint rate proposals, why can't the state say, we would like to have you do that but we aren't going to compel it in every case, we will leave an avenue for independent

application?

MR. WALLACE: There is a practical answer and there is a theoretical answer. The practical answer is that the states have hesitated to go that far because there are competing economic interests being asserted in these states as they are being asserted in this Court, and the states have temporized on that question.

It is not essential to the states' view of the public interest that there be collusion in freight rates, although they have permitted it within the zone of reasonableness under these schemes, and it by no means will automatically follow if the Court agrees with our position in this case that the states will then seriatim in any large numbers require rate collusion by intrastate carriers.

And if they did, then Congress would have to consider whether it would want to override that state judgment, just as it has overridden what it had previously authorized under Reed Bullwinkle in both the Motor Carrier Act of 1980 and with respect to railroads in the Harley Staggers Act.

The other answer is that I think the same result really is reached whether we talk about it as compulsion or whether we talk about it as whether there is a clearly articulated state policy. It is an

alternative way of reaching the result.

If the only clearly articulated state policy is that they would rather have the decision whether there will be competition or collusion made by private persons operating in their economic self-interest rather than made by Congress, that is not something that this Court has ever said is protected by the Parker doctrine.

And it would be quite inconsistent with the supremacy of federal law for the Parker doctrine to be extended to that point. Now, of course, in cases like City of Lafayette --

QUESTION: Well, didn't Parker itself leave up to the individual raisin producers some flexibility in deciding whether --

MR. WALLACE: With respect to whether the state would initiate the program.

QUESTION: Sure.

MR. WALLACE: But once the state did initiate the program, it was a state-compelled program, which is precisely the ground on which this Court in the opinion of the Court in Cantor, and that portion of Cantor distinguished Parker.

QUESTION: Okay, but here, doesn't the state leave it to the truckers to decide whether to initiate initially this joint rate proposal, and then if it is,

the state carries on from there and fixes the rate? How do you distinguish that?

MR. WALLACE: The same way the Court distinguished Parker and Cantor.

QUESTION: Was Cantor a Court opinion?

MR. WALLACE: I beg your -- there was -- Parts 1 and 3 were Court opinions, including the part where it distinguished Parker, and we distinguish it on the same grounds. The decision whether to take collusive action was being made by private persons, and all they did was ask the state to approve or acquiesce in their private initiative by having to get approval from the public utility commission, exactly what Cantor did, what the company did in Cantor.

QUESTION: Well, Mr. Wallace, it did seem to me that in Cantor it didn't make a bit of difference to the state whether the utility wanted to supply lightbulbs or not. The state absolutely didn't care. There seems to be an element here of the state wanting to encourage the utilization of these --

MR. WALLACE: Well, because it is portrayed that way by our opponents, but state law will be fully satisfied if no joint rates are submitted by any of these motor carrier rate bureaus, so one could argue about whether the state wishes to encourage it, but this

Court has said that encouragement of private conduct that doesn't meet Sherman Act norms is not sufficient to confer Parker immunity.

It still always comes back to the question of who it is that is making the choice between competition and collusion, whether the choice is made by the state or whether it is made by private persons acting in their own economic self-interest.

Now, there has been accommodation in the Parker standards in cases such as City of Boulder and City of Lafayette in recognition of the need to accommodate the distribution of governmental powers between a state and its geographic and other subunits, and contentions are made that similar accommodations should be made here.

We disagree with this, and urge the Court to maintain the distinctions it has heretofore observed. What comes to mind in responding to this argument is my student days studying antitrust at Columbia with Milton Handler.

He was fond of saying that this Court's Trenton Potteries decision condemned price fixing among competitors as illegal because it was a form of private taxation imposed by private persons for private purposes.

That is not the kind of distribution of governmental powers that the Parker doctrine should encourage. It is exactly the kind of distribution of economic power through collusion that Congress prohibited in the basic prohibition of the Sherman Act.

And there are sound reasons to observe an appropriate distinction between the cases that involve distribution of powers within state governments and the cases where the state is in some fashion disagreeing with the Congressional judgment about private economic conduct.

QUESTION: Mr. Wallace, I am sure you would concede that the public utility commissions are not private, would you not?

MR. WALLACE: That is correct, Mr. Justice.

QUESTION: And they certainly have the final authority with respect to the rates, do they not?

MR. WALLACE: They have exactly the authority that the Commission in Cantor had --

QUESTION: Yes.

MR. WALLACE: -- to approve or disapprove whether the tariff filed meets the standards of the state provision.

QUESTION: I was addressing my question to what seemed to me to be your argument that you had a

wholly private antitrust situation.

MR. WALLACE: Well, I don't believe it was wholly private. There is participation by the state of exactly the kind of participation that was involved in Cantor, where this Court in the Court's opinion in Cantor said that participation by the state is not enough to confer antitrust immunity.

QUESTION: My recollection of Cantor is that -- I forget now who made this suggestion. It may have been the dissent. But the Commission actually took a rather neutral position with respect to lightbulbs, which seems quite different from rates, certainly different in degrees.

May I ask you one final question, perhaps not a legal one, but is the government, the United States troubled at all by the fact that if we agree with you that a policy consistently followed by most states for 30 to 40 years would be declared unlawful and individual rates would have to be filed?

MR. WALLACE: It is not a policy that has uniformly been followed, but it is, so far as we are able to ascertain, and has been the predominant policy, although not one that we were by any means fully aware of, because there have been very few state statutes dealing with rate bureau practices.

In this case, none of the states involved in this case had statutes dealing with this subject when the suit was instigated, although some of them enacted statutes on the subject since that time.

I do think there is a considerable difference between questions such as that in the BankAmerica case, where the question was whether activity violated a provision of the antitrust laws, and it had been activity that had gone unquestioned for many years, and the question in this case, which is about the scope of an exemption, where we have activity that is clearly price collusion within the scope of a per se violation of Section 1 of the Sherman Act.

And there is much in the jurisprudence to indicate that the exemption does not extend that far, even though there may not have been heretofore as vigorous an enforcement policy as is now being pursued, but it is being pursued only in the form of seeking injunctive relief at this point.

That basically is our submission. Unless there are further questions, we are prepared to submit the case.

CHIEF JUSTICE BURGER: I guess not.

Do you have anything further, Mr. Hirsch?

MR. HIRSCH: Yes, sir.

CHIEF JUSTICE BURGER: You have four minutes remaining.

ORAL ARGUMENT OF ALLEN I. HIRSCH, ESQ.,

ON BEHALF OF THE PETITIONERS - REBUTTAL

MR. HIRSCH: To briefly address a few of the questions that were addressed by my brother counsel, first, to expand upon Justice O'Connor's questioning, not only in Parker did the initiation of the regulatory program require the activity of the private party to begin at the choice of the private party, but once the growers petitioned the board for a pro-raisin program, it then had to be submitted, once adopted, back to the growers and voted on with a 65 percent vote in order to be enacted.

So the final word remained with the raisin growers in Parker. In this situation --

QUESTION: But it bound everybody.

MR. HIRSCH: Pardon?

QUESTION: It bound everybody.

MR. HIRSCH: In that zone, once 65 percent of them approved it, but --

QUESTION: It bound everybody. It bound 100 percent.

MR. HIRSCH: It bound 100 percent, but they did have --

QUESTION: And that was an imposed state policy at that point.

MR. HIRSCH: That is correct, but while binding all of them, it allowed them to retain 30 percent of their crop for pure competition, to compete purely with 30 percent of their crop, so therefore they had a blend of competitive and noncompetitive activity, but it is -- I think it is very important that before the program ever became effective it was the growers who eventually had to vote again, not the --

QUESTION: But here there would be no state policy violated if no one files joint rates.

MR. HIRSCH: That is correct, other than the fact --

QUESTION: And the public utility commission doesn't ask them to file joint rates, doesn't penalize them if they don't.

MR. HIRSCH: I disagree. They ask them, they persuade them, they encourage them to file joint rates.

QUESTION: How do they do that?

MR. HIRSCH: By their regulatory schemes, by their orders. In fact, the Alabama Public Service Commission in 1942 --

QUESTION: Well, is that covered in your brief?

MR. HIRSCH: Yes.

QUESTION: Are there regulations that say that you have to file joint rates?

MR. HIRSCH: It sets forth the procedures for doing so.

QUESTION: I know. I know.

MR. HIRSCH: Well, that would imply that they are requesting them to file this way, and each -- what is in the briefs, Your Honor, is each of the states --

QUESTION: Well, what happens to the fellow who doesn't file a joint rate? Is he violating the regulation?

MR. HIRSCH: No, sir. He is not violating the regulation.

QUESTION: Well, neither would anybody else.

MR. HIRSCH: That is correct, but the states have said that absent the collective activity, they could not regulate. They could not carry out their mandate from the state if they did not have the collective activity. They could not handle the individual rates, and they do not desire to have the individual rates.

QUESTION: Mr. Hirsch, which came first, the collective activity or the mandate from the states?

MR. HIRSCH: That is a very close question,

and it may vary with regard to each state. I would say that in general the mandate of the state for the regulatory procedures came before the collective activity.

Of course, the collective activity in the railroad industry predates the motor carrier industry, but the Motor Carrier Acts themselves in the states began anywhere from the 1920's up to the 1940's, and it is a very close parallel as to on a state-by-state basis which one is actually the first.

I would also say that the -- in response to the Cantor question, my brother stated that participation of the state is not enough, and I concur with that. The fallacy of Cantor under a Mid-Cal approach is that there is not a clearly articulated state policy regarding lightbulbs, and in this case there is a clearly articulated policy regarding rates, and it is pervasively and actively supervised.

I also question how active the supervision was with repsect to the lightbulbs.

The other interesting point my brother makes is that at the time this case was filed, no state had statutes regarding the specific activity.

Is this not the clearest articulation of their intent to have a combination of collective activity and

independent activity by the fact that they came forward in light of this case and enacted state legislation dealing with this specific area, and restating, we desire both?

In conclusion, I submit to the Court that no one, not the parties or the courts below, question this clear articulation or legislative intent. No one, not the courts below or the parties, question the active supervision. The only question here is whether it is compelled.

Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:52 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 82-1922 - SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC. ET AL.

Petitioners, v. UNITED STATES

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BY Paul A Richardson

(REPORTER)