SUPREME COURT OF THE UNITED STATES

In the Matter of:

No. 87-157

ALLIED TUBE & CONDUIT CORPORATION

Petitioner

vs.

INDIAN HEAD, INC.

Pages: 1 through 43

Place: Washington DC

Date: February 24, 1988

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I N D E X

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Washington, D.C.

Wednesday, February 24, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 o'clock a.m.

APPEARANCES:

MARVIN E. FRANKEL, ESQ., New York, New York; on behalf of the petitioner.

FREDRIC W. YERMAN, ESQ., New York, New York; on behalf of the respondent.

P R O C E E D I N G S

(11:05 AM.)

CHIEF JUSTICE REHNQUIST: We will hear argument next in Number 87-157, Allied Tube and Conduit Corporation versus Indian Head, Inc.

Mr. Frankel, you may proceed whenever you are ready.

ORAL ARGUMENT OF MARVIN E. FRANKEL, ESQ.

ON BEHALF OF THE PETITIONER

MR. FRANKEL: Mr. Chief Justice, and may it please the Court, the Court's writ in this case to the second circuit brings up for review questions relating to the scope and meaning of the so-called Noerr, Pennington doctrine, a doctrine which, as this Court knows, made clear that the Sherman Act is not applicable to combinations of businessmen associated together for the purpose of attempting to influence or for the purpose of seeking legislation beneficial to themselves in association and unfavorable to their competitors.

That Noerr doctrine is based, as Your Honors know, on a construction of what the Sherman Act read by itself was meant to cover and not to cover, and on overtones of the first amendment affecting the right of association and the right to petition the government.

We are concerned in this case with the National Electrical Code, the NEC, which I shall call it, which I am

holding up, a 700 plus page compilation from antennas to ex-rays -- it doesn't have any y's or z's -- which is compiled every three years by the National Fire Protection Association, a private standard-setting organization. This code is, as the Second Circuit pointed out, the most widely disseminated and most widely adopted standards code in the world. It is adopted as legislation as it appears in this book, line by line, in a majority of the states of the United States, and in a majority of the large municipalities.

It is adopted by most of the other states with relatively modest amendments.

This controversy began when Carlon, as it has been called, a subsidiary of the respondent, and we have referred to Carlon throughout the case rather than Indian Head, Carlon undertook to have a new Article 331 added to this Code which would have included as suitable equipment electric nonmetallic tubing made of polyvinyl chloride. That tubing is a kind of raceway for carrying wires through the walls and floors of buildings. And the objective of Carlon was to have that product included in this Code because, as we all agree, without such inclusion it couldn't sell it in most of the places throughout the United States where that Code is law.

There has been evidence throughout this case that there is, was at all times that are material scientific evidence that this tubing made of polyvinyl chloride is

unsafe, that it was hazardous to human life in the event of fire, which is what that Code is, of course, ultimately concerned with. I might mention that since a footnote in our friend's brief suggests that that statement is misleading, I should say that at Page 4A of the petitioner's appendix you will find the circuit reflecting the concurrent findings of both lower courts that there was scientific evidence of the hazardousness of this product at the material times in this case.

Now, the way you get something into this Code is by a multistep process that the circuit described. First, the proposed article goes before a so-called Code-making panel. Whatever happens there is reviewable at a second step, a membership meeting of the members of the NFPA, the Fire Protection Association.

If there is a result which the party adversely affected wishes to complain there is an appeal to a Standards Council and to the Board of Directors, and then if there has been a rejection of a proposed article, there is a procedure for seeking a tentative interim amendment which would put the proposed article into the Code.

Now, this whole case centers on the second step, the membership vote, which took place in this case on May 20, 1980. The Code-making panel had at first rejected ENMT, their product, then changed its decision and approved it

subject to the membership meeting. At that next step, all members of the NFPA, and there were at the time 31,500 members, all members who had held membership for 30 days or more are eligible to vote.

Now, the members are explicitly and as everyone understands interest group representaitives. Quoting from the NFPA's description of itself, interested members, and most members are interested, as part of the process that the NFPA describes and extols, and I quote, "have the privilege of designating their representatives and instructing them how to vote."

Now, Allied within that rule as part of the effort of itself and other companies in competition with this poly-vinyl product collected 155 members for that May 20 meeting, and those members included executives of the company, employees, sales agents, and even the wife of a sales director.

Other steel companies also gathered whatever members they could, so that among them these alleged conspirators had 230 votes at that meeting. The final vote went 394 to 390 against Carlon. As I have said, however, and as the jury found, this was by no means the last step. The jury said in its finding, "This vote did not effectively determine that ENMT would not be in the Code." It said that vote was a substantial factor, but that Carlon had, and I am quoting

another finding, "a full and effective appeal from the vote of the membership and that the vote and Allied's, the petitioner's behavior had not, had not deprived Carlon of full and effective access to the NFPA."

QUESTION: Mr. Frankel, the case was submitted to the jury on interrogatories?

MR. FRANKEL: Yes, Your Honor, and the answers to those interrogatories will be found at Pages 23, 4, and 5 of this slender joint appendix.

Carlon took its appeal to the Standards Council and to the Board of Directors, where it was defeated on those appeals and the record shows there is plenary authority to consider whatever the appellant wishes to present, including even new evidence, and then Carlon sought as the last step in this process a tentative interim amendment. It was defeated at every stage, and the most interesting in some respects was the last stage, because in the denial of the tentative interim amendment, the TIA, the directors made clear that one of the serious considerations leading to that denial at that time was their still unresolved doubts about safety.

Thereafter, as the briefs show, and nobody disagrees on this, in 1984 Carlon's product was allowed into the Code but with a limitation to three-story buildings, again reflecting three years later the still lingering concerns

about safety in the event of fire. However, going back to October, 1981, Carlon, as a result of that rejection of its article, brought this lawsuit against Allied and the NFPA, later dropped the NFPA, pursued the case against Carlon. The gist of the lawsuit as we think is perfectly clear is stated in the language of the complaint quoted at Pages 13 and 14 of the joint appendix that this suit was brought, and I quote, "because of the adoption and application of the NEC by states and municipalities," and I end the quote there, without their Article 331, and they say, because of that adoption of that Code without 331 by all these states and municipalities, they lost a tremendous lot of sales,which is not disputed.

Our client asserted the Noerr, Pennington doctrine as a defense, and I will try to abbreviate. The judge, the trial judge reserved on that, let the case go to the jury. There was a verdict for Carlon including the quaint finding by the jury that Allied, our client, had subverted the NFPA process. After that verdict and then a second portion of the trial -- I should have said it was a bifurcated trial, liability first, then damages -- there was a verdict for $3.8 million, trebled plus, of course, attorney's fees.

The trial judge set that verdict aside, holding that the Noerr, Pennington defense was after all a valid defense. On Carlon's appeal the circuit unanimously reversed

and held that Noerr, Pennington does not apply, and that is what brings us here. We think that the Court of Appeals by the time it got to this legal aspect of the case lost sight of the facts it had so carefully stated and utterly, with all deference, utterly misconceived what Noerr, Pennington -- what the Noerr decision itself was about, what its facts were, and what it held.

The Court will recall that the Noerr decision, which had its 27th anniversary last Saturday, related to what the Court, all three courts describe as a vicious, corrupt, and fraudulent publicity campaign addressed to the general public by a railroad association in an effort to poison public opinion against the trucking industry and thereby as the hoped for next step to achieve legislation hostile to truckers.

The Court said that the campaign by the railroads included conduct that Justice Black described for a unanimous bench as reprehensible. The so-called third party technique of representing opinions and expressions coming actually from the railroads were the emanations of citizens and civic associations. The Court held nevertheless that all this was a part of an attempt to influence legislation by means of that publicity campaign and therefore --

QUESTION: Mr. Frankel, what does the Court's holding in Noerr rest on? Is it the right to petition the government? Is that the constitutional basis of it?

MR. FRANKEL: No, I think strictly, Justice O'Connor, Noerr rests on a construction of the Sherman strictly, that whatever else you might say about that reprehensible conduct, it was not conduct at which the Sherman Act was aimed. It was not --

QUESTION: Well, is that interpretation of the Sherman Act required because of some constitutional provision, do you suppose?

MR. FRANKEL: Well, I would say, to try my best to report Justicue Black's opinion accurately, that after saying that this is not Sherman Act conduct, he went on to say in that many words that if we were to rule otherwise, we would run into serious concerns under the First Amendment because we would be cutting into or we might be cutting into the right of association and the right through association to petition the government.

But I think scholars have agreed, and I think it is fair to say htat it was only two cases later in the California Trucking Case that this Court came down and explicitly said that one leg of the Noerr, Pennington doctrine is indeed the First Amendment.

I have concentrated on the Court's principle as I understand them initially on the Sherman Act, because I think Noerr did concentrate that way, and what Justice Black said is, whatever else you say about this conduct, which, by the

way, is illegal conduct, as the Third Circuit had held, whatever else you say about it, this isn't what the Sherman Act was about. It is not a case of people giving up their trade freedom. It is not a case of price fixing or boycotts or market divisions or any other kind of market behavior about which Senator Sherman and his friends were thinking.

It is an attempt to influence public opinion with the goal of getting legislation, and that is not Sherman Act conduct even before you reach the First Amendment, and then, of course, the Justice and this Court unanimously did reach the First Amendment.

Now, in the opinion for the Second Circuit of Judge Lumbar, they ran a series of distinctions of Noerr, and again with great respect it is our submission that every one of them is clearly wrong. They say, first, that Noerr's holding, in the language of the circuit, depended upon the unique nature of petitions directed to the government in our political system.

Well, that is a mistake. There were no petitions directed to the government at all in the Noerr case. The Noerr case, as Justice Black wrote over and over again, was about this campagin of publicity addressed to the general public with the hope or anticipation that the public in turn would have an impact on the legislature.

Now, that was indirect. And Judge Lumbard writes

that our conduct is somehow distinguishable because it is indirect. Well, we say it is not distinguishable at all.

QUESTION: Well, I suppose in a sense it is direct insofar as Members of Congress are also members of the public.

MR. FRANKEL: In that sense, Justice O'Connor, it is direct, but I don't think there is a word in the Noerr opinion that describes directness in any such sense. The opinion is about this broad effort, vicious and corrupt, to poison the public mind, and to be sure, that includes members of legislatures.

But then when you speak of directness and indirectness, let's compare the cases. This book goes directly into the statute books, and everybody knows that influencing the contents or exclusions from this NEC leads directly, certainly, and predictably to legislation, and our friends knew that, and that is why when they sued, leaving aside certain --

QUESTION: Judge Frankel, it is true that it goes directly into the statute books but only after the various legislatures decide to put it in the statute books.

MR. FRANKEL: Yes, Your Honor, that is correct, and similarly, whatever public influence was exerted by that vicious publicity campaign in Noerr only eventuated in the legislative conduct that the railroads sought when the legislators took the action that is for them to take.

QUESTION: And your position is, Mr. Frankel, that because of Noerr, Pennington the defendants here could act unreasonably in influencing that Code.

MR. FRANKEL: Yes, Your Honor. Whatever unreasonably means, I think it is clear under Noerr and under the decisions since then that though we would not use such characterizations, the defendants could have acted viciously and reprehensibly and perhaps, though I don't want to press this, illegally as long as what they were doing was attempting to influence legislation.

The solicitor General says some place that of course the Noerr doctrine would not cover kidnapping legislators. I think that takes us away from our subject, because I don't think everybody has thought until now that the Sherman Act related to kidnapping legislators, but where the conduct is arguably Sherman Act, and Justice Black said this kind of attempt to influence the legislature is not, the fact that it turns out to be such an attempt because of what are found in the end to be the real meanings of the Sherman Act in the light of the First Amendment preclude Sherman Act liability.

I might say there's a Seventh Circuit case cited in our brief which involved actual bribery of city council members. It's the MetroCable case in 1975. And there again, going much farther than we have to go in this case, the Court read Noerr to apply.

Judge Lombard said that there is a distinction that is important here between the submission of a group's, and I am quoting, "of a group's recommendations to the government and the antecedent conduct which generated those recommendations." Now, again, that is a similar, in our view a similar misapprehension of what Noerr was about. There was no submission of a group's recommendations to the legislature so far as the Noerr analysis of the problem was concerned. There was only the antecedent conduct. If anything, if you are looking to the submission to a legislature, this Code as a practical matter everyone knows is a submission to the legislature.

Now, in a number of states, although there is indeed the intervening official act of the legislature, it is a fact, undisputed in this record, that the adoption of this Code is automatic, and I suppose everyone who knows more about the --

QUESTION: Mr. Frankel, I thought it was not really undisputed, that the adoption of the Code was automatic. I forget whether it is Judge Lombard's opinion or the respondent's brief said that it is amended in places, and that only half the states adopt it verbatim.

MR. FRANKEL: Yes, I said in a number of states.

QUESTION: Oh, I am sorry.

MR. FRANKEL: Actually, in Judge Lombard's opinion,

I believe it may be the first footnote, you will find him saying that this is the most widely adopted Code, and if I just find his first footnote rather than mine I might be able to read to Your Honor, and he cites specifics from an affidavit on our behalf, that is, that 26 states adopted verbatim, 19 adopted with amendments, and if you pursue that it appears that maybe ten or eleven of the 114 articles in this Code tend to be amended, and the municipalities, which are very important in this regard, also widely adopt it, and it says here, and I think the survey was of municipalities of over 100,000 population, 232 adopted this Code exactly as written, 256 adopted it and made changes on average changing only eleven articles, but compare --

QUESTION: Mr. Frankel, could you clarify that? When it says that 26 adopted it through the process of incorporation by reference, is that a process which is what you might call year by year incorporation? Does the statute say that this Code as amended from year to year shall be the governing Code, or does the legislature each year pass a separate statute?

MR. FRANKEL: Your Honor, the Code comes out every three years, but I am stalling just a bit. I have not read one of those statutes and seen exactly how they adopted --

QUESTION: It would be much more impressive, of course, if it is automatic and if you know when you get an

amendment to this it will automatically go into the law.

MR. FRANKEL: I would in ignorance settle for its not being automatic and for the legislators looking at it every three years and looking at these 700 pages and deciding that they can do no better or other than adopt this Code as it is written.

I want to touch on one final point of Judge Lombard's. He said you wouldn't know where to cut this off if you made this process subject to Noerr, because you wouldn't know how many legislatures had to adopt it before Noerr applied. Again, I want to say of Justice Black's opinion that there you have a result that comprised only one legislative veto in Pennsylvania flowing as the evidence showed from that reprehensible publicity campaign.

If results count, and we don't think they do, because the opinion spoke of attempts to influence legislation, but if results count, then this case is more clearly within the principles of Noerr than the facts of Noerr itself. I do want to add --

QUESTION: Mr. Frankel --

MR. FRANKEL: Your Honor.

QUESTION: -- if we find that the jury was properly instructed, and if we find that the evidence supports the verdict on liability, do we still have before us here the question of damages, or is your case then concluded against

you based on the finding that liability was properly found?

MR. FRANKEL: Your Honor, we had not brought up the question of damages as such. Our petition seeks a reversal of the judgment below, and -- or a direction to reinstate the judgment notwithstanding the verdict.

I want to say one word, because I have been very abstract, which I regret, about what really happened in this case. We have a lot of talk in the briefs about a polluted Code and a tained Code and a corrupted Code. What happened in this case is, you had a vote that was what it was within the rules that stalled this process, that led to another look on appeal and led to a realization in fact that they hadn't taken enough account of the safety problem. They denied the appeal.

Three years later, as a result of this delaying action, they were still worried about safety. This isn't a very elegant process, the stacking or packing or whatever it is called, but it is akin to the kind of democratic process with which the Justices of this Court are certainly familiar. Not always elegant. Not always what a philosopher would prescribe if he wrote a democratic system. But it works, and it worked here, and in any event, above all, it is in our submission squarely within the Noerr doctrine.

I would like to reserve a couple of minutes, if I may.

CHIEF JUSTICE REHNIQUST: Thank you, Mr. Frankel.

We will hear now from you, Mr. Yerman.

ORAL ARGUMENT OF FREDRIC W. YERMAN, ESQ.

ON BEHALF OF THE RESPONDENT

MR. YERMAN: Mr. Chief Juistice, and may it please the Court, let me begin by turning directly to Noerr. As we have all heard, Justice Black focused in that case on what he described as the right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of law. With that in mind, the Court held that the railroad publicity campaign in that case, despite being deceiptful and underhanded, did not violate the antitrust laws because, in the words of Noerr, a publicity campaign to influence governmental action falls clearly within the category of political activity to which the Sherman Act does not apply.

Congress, the Court concluded, had not intended the Sherman Act for application in the political arena, and those are the key words, "the political arena," because none of that has anything to do with the conspiracy hatched by Allied within the confines of the National Fire Protection Assoication, a totally privage body, a private standard-making group accountable to no one, and in the words of this Court a group rife with opportunities for anticompetitive behavior.

What happened here was nothing like what happened

in Noerr. There the railroad's publicity campaign was aimed at getting at legislation to injure the truckers, and it was obviously a public campaign in the political arena aimed at the body politic. And if all Allied and its cohorts had done in this case was to engage in a publicity campaign against Carlon and its product, none of us would be here today.

But Allied did much more than that. First, they conspired with their competitors to exclude Carlon's product from the National Electrical Code, a private industry code that is a conceded fact, that conspiracy to exclude. And as the Court below found, that conspiracy caused independent marketplace injury to Carlon wholly independent of any injury caused by being excluded by law. In other words, in all of those jurisdictions where Carlon could otherwise have sold its product notwithstanding any state action, Carlon suffered independent marketplace injury. The record is abundantly clear that the trial court charged the jury that that was what the evidence was limited to, and if we want, a little bit later I will get to that specific evidence.

Now, Allied argues that what it did so long as its actions were ultimately in pursuit of legislation is somehow sheltered by Noerr. In effect, Allied seeks to duck under the Noerr umbrella by claiming that its conduct, an anti-trust violation committed within the National Fire Protection Association which standing alone caused injury to Carlon

was ultimately aimed at getting some states to enact this Code.

QUESTION: Mr. Yerman, just by way of clarification, do you concede that your client is not entitled to damages flowing from any governmental agency's decision to adopt the National Electrical Code?

MR. YERMAN: For purposes of this case, I am, Justice O'Connor. Allied --

QUESTION: Just the independent marketplace injury, for example, in states that didn't adopt the Code?

MR. YERMAN: That is all we are talking about, exactly. That is where we were injured. That is what the trial court limited our damage claim to, and that is the injury we were awarded by the --

QUESTION: And you didn't put evidence in of damages in states that adopted the code. Is that correct?

MR. YERMAN: Right. Correct. Correct. Allied's agument cannot hold water because violations of the anti-trust laws cannot fall by the wayside merely because conspirators claim that their violations were in pursuit of legislation. Even if that claim were true, for example, the conspirators in the Fashion Originators case would not have been exonerated if they had proven that they engaged in their group boycott in order to spur legislation banning the sale of pirated dress designs.

Such a violation stands alone, was a violation, and

that was a violation of the anti-trust laws, notwithstanding that maybe they did it in order to inspire Congress to pass the law. There have been District Court cases in the same area, as Your Honors may recall, the Pennylvania Service Station Dealers who all boycotted the sale of gasoline for a period of time in order to spur the government to increase price support. That was rejected. Not every antecedent, anti-trust violation on the weight of the legislature is sheltered ny Noerr, and it never has been.

Put simply, a private restraint does not come under Noerr merely because there is some hope or expectation of governmental endorsement, not as here in particular where we have an antecedent, completed anti-trust violation. Conspiracy, injury, damage all caused outside the political arena, having nothing to do with the state action, but because we were excluded from a private industry Code.

Allied may have hoped that by excluding us from the NEC it might in fact bar us from states that would adopt that into law, but that doesn't excuse them from the damage we suffered in all those other places where the law was never passed, and we are talking, incidentally, about roughly half the country.

It is really kind of ironic when you think about it. In Hydrolevel there was a misinterpretation of the Code. Not a word was mentioned of Noerr. In Hydrolevel the Code,

according to this Court, was adopted in whole by 46 states. In fact, this Court made a point of saying the thing that made that anti-trust violation in Hydrolevel so terrible, so pernicious was because of the governmental adoption, the importance and influence of the Code.

What this all comes down to is that the hold that Noerr applies here would be to conclude that the Congress that enacted the Sherman Act, because I agree with Mr. Frankel that in fact Noerr itself -- Justice Black was initially grounding it on a matter of statutory interpretation of the Sherman Act, would be to conclude that when Senator Sherman introduced the Sherman Act he intended to insulate from all anti-trust scrutiny all concerted activity in a private standard-making context in effect to license the blatant anticompetitive conspiracy found in this case, and I submit that that simply defies logic and reason, especially in light of the legion of anti-trust cases which have held over the years that private standard-making conspiracies are in fact subject to the rule of reason at least.

QUESTION: Mr. Yerman, you state as sort of a given that this would be an anti-trust violation absent the legislative involvement at the end of it all.

MR. YERMAN: Yes.

QUESTION: Is that entirely clear? What if the jury here did find in response to the interrogatories that

these defendants believed that there was a safety problem, that that was at least part of their motivation? Now, what if these people had instead of stacking the house simply done all they could to speak eloquently, and shared information and what-not, and maybe took a three-month course on public speaking in order to get across to the body that this thing really is dangerous? Now, would that be a violation?

MR. YERMAN: Justice Scalia, I am really glad to asked that question, because I think it goes to the heart of why Noerr doesn't apply here. Let's think about this. Why are we talking about Noerr? We are talking about Noerr apart from statutory intepretation because of the First Amendment implications of Noerr, the right to petition, the right to assemble, the right to speak, to debate, to persuade, to disseminate information.

QUESTION: I am not asking about Noerr, you understand.

MR. YERMAN: Well, I do understand, and I think in this respect both the rule of reason and Noerr in a way come together, because I think I can answer your question two ways.

In a private standard-making organization -- the answer to your question is no, there would be no problem. Let me do that first. The answer to your question is no. They can say anything they want. Yes, they can speak in a

private standard-making context. They can speak and give their views, and as far as I am concerned, even if they were wrong, even if they made a mistake --

QUESTION: What if they were evilly motivated, that they gave their views but their intent was to suppress competition?

MR. YERMAN: I think at that point I would have a problem. Now, I mean, I don't have that case here. I think in a private standard-making context which is subject to the rule of reason, the intentional submission of incorrect data in a conspiratorial context to exclude a product from the marketplace I think is something a jury, a finder of fact, would weigh heavily --

QUESTION: Oh, no, but correct data. We are talking correct data here.

QUESTION: Well, wait a minute. Correct data.

QUESTION: Not incorrect data.

MR. YERMAN: Then I have no problem atall.

QUESTION: Even though they talk with one another, and of course to say that they are not motivated by anti-competitive considerations is absurd. I mean, you know, otherwise they'd say, yes, it is unsafe, but I am not going to make a big deal about it. What really gets them motivated to take the rhetoric courses and to share the information is the competitive -- that would still be all right.

MR. YERMAN: Absolutely. I mean, that is the essence of private standard-making.

QUESTION: Even if they get together and publish a pamphlet?

MR. YERMAN: Yes.

QUESTION: Jointly?

MR. YERMAN: Yes.

QUESTION: To present, to express their views?

MR. YERMAN: Yes, Justice O'Connor, that goes on every day in private standard-making, and I have no problem with that.

QUESTION: So does stacking meetings. If it happened in the Congress you would say, boy, what a legislative genius, you know, whoever put that together was, or if it happened in the Iowa caucuses you would say somebody was really thinking, that is very clever democratic politicking. Now, this was not in the rules here, wasn't it?

MR. YERMAN: That's the root of the issue. Okay. First of all, within the rules, Allied conceded in its brief in the Court of Appeals below that what we had here was a potential for abuse. That is how they described the rule situation of the NFPA.

The NFPA had rules that allowed someone, unfortunately in this case, to circumvent their procedures and to subvert the consensus standard-making process in order to

come up with a consensus on this issue that was different from the consensus that otherwise would have been achieved if they had followed the NFPA procedures. I would urge you to review the briefs and the record on this, because that was the specific jury finding. They talk a lot in their brief about this subversion thing being somewhat ambiguous, or vague, or what does it mean? Well, A, let's remember a couple of things.

First, they never objected to the question being put to the jury. B, they never objected to the instruction to the jury on what it was all about. And C, what was it all about? What it was all about was, and the jury was instructed to a fare-thee-well on this and they put in evidence to a fare-thee-well on this that the NFPA operates under certain standards and procedures. Sure it has some rules, but there was a loophole and they drove a truck through the loophole and thereby subverted the procedures and produced a result that otherwise would not have been producible.

Now, they came in and they argued, just like they are talking here, this was everyday stuff, it goes on all the time, there was a history of this at the NFPA and nobody considered it wrong, nobody thought there was anything improper about it. They argued all of that to the jury, and the judge told the jury to consider all that, in a rule of reason context consider whether this was all correct or

proper, and the jury rejected it out of hand. They said absolutely not. This was a subversion of the process. Now, I will agree there were --

QUESTION: How does that constitute an anti-trust violation? I mean, maybe we can put them in jail if there is some statute that says you shall not subvert the rules of private organizations, but we are talking here about an unreasonable restraint of trade. Now, the effect is reasonable or unreasonable no matter how it is achieved. The motivation, safety or no safety, is either reasonable or unreasonble no matter what techniques are used. How does the fact that they violate, you know, the rules of the Marquis of Salisbury or whoever makes rules for not packing organization, how does that make this an unreasonable restraint of trade?

MR. YERMAN: The jury was instructed on this as well, and it is the same way you do any rule of reason analysis. Let me begin, first of all, by pointing out that in the Hydro-level case there was a misinterpretation of the standard. It was not, as Mr. Frankel points out, price fixing. It wasn't a classic group boycott like in Fashion Originators. This Court in Hydrolevel had no problem understanding and holding that when a couple of competitors fool around with the Code and put out some phony interpretation, that that was clearly a conspriacy to exclude the competitor's product by making it impossible for him to sell it, and that is what

they did in Hydrolevel, and that was a violation, but let me answer your question on the Rule of reason, Judge Scalia, if you would like me to, please. What happened here was, there was a rule of reason analysis. You start out with the fundamentals of private standard-making.

Private standard-making, with all due respect, are walking conspiracies. They are a bunch of competitors who sit around deciding which of their competitor's products will be allowed in and which are going to be excluded. The law over the years has evolved under the rule of reason to permit private satndard-making because the dissemination of information, in a nutshell, the dissemination of information, the promulgation of meritorious standards is thought to be pro-competitive, and it is that pro-competitive benefit that outweighs the anti-competitive side of having some products excluded.

This is all rather run of the mill. Now, what happened here? What happened here was, a bunch of competitors get together and conspire to subvert this meritorious standard-making process to come up with a satndard, in effect, with an exclusion that wasn't based on the merits, to use this as a way to block someone's product. All right? Just like the conspirators in Hydrolevel got together to misinterpret the Code to exclude their competitor's product.

QUESTION: Excuse me. You are stacking it by

saying that it wasn't based on the merits. The jury found that they truly believed it was unsafe. As far as they were concerned, it was based on the merits. Some of the subsequent history seems to indicate that it may have been based on the merits. The only thing you are complaining about is using rules which didn't really violate any of the principles of the association but which you think are unfair.

QUESTION: Justice Scalia, I don't think I am stacking it because, as Justice Stevens held in Professional Engineers, and especially in a standard-making context, your own view of the safety of te product, your reason for violating the anti-trust laws because you think it is unsafe is irrelevant. As Justice Stevens described it, that type of philosophy would be a frontal assault on the Sherman Act, and that is totally rejected, whether they thought it was safe or unsafe does not license them to subvert the standard and come up with a non-meritorious standard.

When I say meritorious, Justice Scalia, what I mean, and let me be clear on this, is the consensus that otherwise would have been reached in that private standard-making body but for the corruption. In any private standard-making debate one side is going to be right --

QUESTION: What is your definition of corruption, though?

MR. YERMAN: In this case, corruption in this case

was in effect the dilution of the votes, of all --

QUESTION: But there was no rule against dilution of votes.

MR. YERMAN: There was no specific rule that said that. That is correct. But I don't think you can hold the private standard-making process and the rule of reason analysis of whether private standard-making is lawful or not up to a standard where the organization promulgates rules, and if their rule isn't violated, everything they do is okay.

QUESTION: Well, is it just a question then the jury decides on all the evidence whether something was "corrupt" or not?

MR. YERMAN: In this case, in effect, yes. That's right. That's right. I mean, it's a tough case to prove. I think you have a --

QUESTION: (Inaudible) any question, or is there any issue here before us as to the correctness of the legal rules the District Court applied?

MR. YERMAN: The charge was never objected to. The rule of reason charge came in without objection.

QUESTION: So the issue is just whether any jury could have found under these instructions --

MR. YERMAN: That is not an issue either, Justice White. That has not been questioned. The jury verdicts have not been questioned in terms of sufficiency.

QUESTION: What question about the Sherman Act is involved here?

MR. YERMAN: I think that they argue that there is no rule of reason violation here based upon the evidence as a matter of law.

QUESTION: All right, then the question is, is there enough evidence to support the jury's verdict?

MR. YERMAN: Well, I mean, I really don't think that's the question, because I think that the jury sufficiency issue is already resolved. I think perhaps you could look at all this, I suppose, take the whole case, and say, we think that on this record this is not a rule of reason violation.

QUESTION: Well, I take it your brief, this red brief, the second question you listed is, if petitioner's conspiracy was not immunized by the Noerr doctrine, was there evidence to support the jury's determination that the conspiracy in question unreasonably restrained trade?

MR. YERMAN: I think --

QUESTION: Now, that is -- I just asked you if that is in issue.

MR. YERMAN: Fair enough. That is fair enough. And I am not trying to walk away from that. All I am saying is, I don't think there's an issue of evidentiary sufficiency here, and I think perhaps you are right, that could have been put more felicitously.

QUESTION: I think it was put more felicitiously in the petition. The second question was whether, even without regard to the Noerr doctirne, such lobbying and voting tactics otherwise lawful and in compliance with the rules of a Code-making association are proscribed by the Sherman Act if a jury finds they "subvert the rules." You would agree with that?

MR. YERMAN: Fair enough. Fair enough. And I apologize for the ambiguity, Justice White, but I really think that is what the issue is.

On the issue of the inconsistency of the verdicts in talking about no violation of rules and so forth, the jury and the trial court had no problem understanding based upon the evidence here why even though there were these rules under all of the evidence put in concerning how the NFPA operated, what the NFPA's overall policies, standards, and what everybody in that organization understood its objectives and standards to be, that this was in fact a corruption of the process, that this was in fact the achievement of a consensus other than the consensus that would have been achieved. When the plaintiff argued below that the verdicts were inconsistent, something not before you today, the judge held that it is not inconsistent, the fact that there was a finding of subversion even though there was a finding that the rules weren't violated or there wasn't effective appeal.

He said, that is not consistent. You know it. You

argued to the jury there was no violation of the rules and the jury found that, but I told the jury they were entitled to consider on a rule of reason analysis whether or not even though you technically complied with the rules whether you subverted the spirit of the rules as well as their letter, so that finding is totally not consistent. Indeed, that is precisely the answer we contemplated when we put it to the jury, and he goes on that way, to point out that he found there was nothing inconsistent, and I would point out, of course, that at this level it is hardly the time to start looking into inconsistencies, especially where the rule is very clear that if the verdicts can be read in any way to be consistent, then the verdict is to be sustained, and I think the trial court and the court of appeals both have reviewed that issue, and both have found the jury's verdicts were consistent.

QUESTION: Was the word "consensus" in the organization's bylaws?

MR. YERMAN: Oh, absolutely. It is all over the place. That is what this organization is all about, is consensus. Now, let me just say one --

QUESTION: Mr. Yerman, just let me ask before we get off --

MR. YERMAN: Yes.

QUESTION: Suppose they hadn't gotten new members

within the 30 -- you know, before the 30-day deadline, but had simply called up all of the people, all of their steel-making conduit buddies and said it is an important vote, we think this stuff is unsafe, but more important, it is really going to hurt our business. Make sure that all of your people who are members get out for this meeting. Would that have been a subversion?

MR. YERMAN: Well, you know, it is kind of hard to answer that, because the issue of that wasn't necessarily raised. My tendency would be to think probably not, unless --

QUESTION: But you see, that is my difficulty. I am concerned about these organizations. I think they fulfill an important role, and it seems to me we have to adopt a rule that makes the people that participate in them know what constitutes a treble damage liability or not.

MR. YERMAN: And I agree, Justice Scalia. I don't mean to not try to answer your question. Let me just say that I think it is a tough case, and I started to say that before. It will be a very tough case to persuade a jury that in the context of all of the proceedings that go on, in the context of the history of the organization and so forth, that someone corrupted the process by producing a consensus that otherwise wouldn't have been achieved. I think that is going to be a very hard thing to get a jury verdict on. It

wasn't easy for us. What made it easy here in this case was because the action was so far away from anything that this organization had ever seen or done, was so far outside what we consider to be acceptable behavior in this organization under their procedures that it was clearly a violation. If you can --

QUESTION: How can you tell that it was so far outside of what was considered acceptable behavior?

MR. YERMAN: Chief Justice Rehnquist, you tell that by submitting to the jury, as Allied did, a history of what went on in that organization, of what kinds of things were being done, of what people understood was permissible and what people understood was not permissible. By putting in --

QUESTION: Even though not based on any rule of the organization?

MR. YERMAN: Well, I know there was no rule that said --

QUESTION: Just a minute.

MR. YERMAN: Yes, sir.

QUESTION: I asked you a question.

MR. YERMAN: Yes.

QUESTION: Was it or was it not based on any rule of the organization?

MR. YERMAN: It was based -- it was not based on a specific rule, as I say.

QUESTION: Well, was it based on an unspecific rule?

MR. YERMAN: Yes, it was based upon a standard that everyone understood in that organization, that you are not supposed to achieve a result on a vote in that organization by dominating the meeting with a commercial interest. That is what everyone understood. They were not supposed to take a standard which is up for review by that organization and bring in as many people as are allied to you, pay their expenses to Boston for the meeting, 220 votes, so that you can achieve a consensus that is different from what otherwise would have been achieved on the merits. You can lobby. You can speak. You can talk to all the people who would otherwise be coming. You can try to make sure there is an important discussion of this. But you shouldn't change what the vote otherwise would have been.

QUESTION: How do you know whether you are changing what the vote would otherwise have been?

MR. YERMAN: You know it when you bring in 220 people, you pay their expenses, they are know-nothing voters, they don't know what they are voting on, they are not participating in the debate, they have nothing to say about anything other than they were trucked up to Boston to vote no on the product. Nothing like that has ever happened before, and everyone in the meeting --

QUESTION: No expenses had ever been paid before, of

anyone had ever been paid before?

MR. YERMAN: Not for 220 people.

QUESTION: Well, what is the cutoff?

MR. YERMAN: There were 300 -- the vote turned out to be 394 to 390. Okay? If they had brought ten people and if they could have shown that over the years they normally brought five, I don't think we would have a lawsuit.

QUESTION: So every one of these questions then goes to the jury, because there is no such thing as a summary judgment for a defense because it is always a question of degree that has to be answered by the jury.

MR. YERMAN: Well, let me turn it around for just a second, Justice Rehnquist, because I don't suggest that this is that easy a question, but let's think about the alternative for a second. You have a private standard-making association. Put Noerr aside for a minute. You have a private standard-making association that has the power to exclude the product from the marketplace. Are we saying that under the anti-trust laws the question of whether a new and innovative product gets into the Code, gets into the marketplace is strictly a matter of which company has enough money to bring enough people to private standard-making meetings to block it or not block it?

I mean, is that what the result is, because that is the result you are left with unless you are prepared to deal with this question, and simply to say, well, the

organization didn't have a rule against it leaves us at sea.

QUESTION: Not quite. You still have to have a jury finding that these people were motivated, at least in part, although that may not have been worth the plane fare, at least in part by the fact they really believed this stuff was unsafe. And that doesn't create such a terrible system. You say, you know, we are harnessing the power of greed to make sure that unsafe products don't get onto the marketplace. Of course the competitors will be the one who a re interested about it, but that achieves some social good, you might say.

MR. YERMAN: The answer to that, I think, Justice Scalia, is that the point made in Professional Engineers about safety was that people can't dictate what goes on the market or not because they think it is safe or not safe. You take this product. Mr. Frankel made a whole point about how it was excluded in '80, it came in in '83 with a three-story limit. In '87 the three-story limit was dropped. The product is not unsafe. There was a debate about it. There are debates about a lot of products. Just because you can marshall enough evidence to say I think there is something wrong with this product, what product is there out there that you could not legitimately prove, I genuinely think there is something wrong with it, and then I come into this private standard-making association with that finding, Justice Scalia, and please do not put aside the fact there was a concession in the case that

they had an anticompetitive motive, they conceded that they wanted to exclude the product for commercial reasons as well, so all they have to do is find one little piece of information, one scientist who says, I think there is a problem with this, and you are home free. Bring all the votes you can. Truck them up to Boston, and you are out of the Code, and forget the Sherman Act. I just don't think you can be left with that kind of result.

I agree, it is not that easy a line to draw when the consensus standard-making process and private standard-making is subverted, but I think a line has to be drawn, and I think it was easily drawn here. One last thing if I can just get this out on Noerr, and I don't want to forget this.

Noerr was brought to preserve speech, debate, persuasion, as I said before. Wouldn't it be the supreme irony if in the name of preserving the right to debate and give information you allow a procedure that says, and when all is said and done, all the debate is out the window, all the information that was disseminated, you can forget about because we are bringing in 220 know-nothings who don't care what the information is, they are voting no.

Don't I have Noerr rights, too? Don't I have a right to know that when I make an argument, when I make a debate, when I give information, that when the vote comes in people are going to vote on the merits and the vote will

reflect the information. In this case, my Noerr rights disappear because everything I said didn't matter. There were 220 people that came in and outvoted me not because of any information or anything else. One last word. If for any raeson, and I of course respectfully argue that it ought not to be, you were inclined to apply Noerr in this situation, then I would urge you to look closely at the sham ruling in the Sessions decision, which is also before you on a cert petition now in the Ninth Circuit on similar facts, although different. Sessions, all the people that were voters were government officials, and there was no injury other than injury from the state, and both of those are very important distinctions from us in Sessions. I am not rearguing Sessions, but what the Sessions court said was, we think, and they analyzed this out to say Noerr should apply, but they said, nevertheless, looking at the Second Circuit, we disagree with their Noerr reasoning, but clearly what happened in the Second Circuit would be a sham.

And I would say to you, this, too, should be a sham even if Noerr applies. What greater sham is there than after you have had all the Noerr protected speech, to in effect block us, take us out of the whole tribunal, take us out of this legislature, bring in 220 new legislators, and let them vote us down? If you are going to analogize this situation to a legislative situation, the NFPA is somehow

thought of like a legislature. You can say anything, you can give information, you can give wrong information. Maybe even you can lie, but what you can't do when all is said and done when that is finished is truck in 220 new legislators who are on your payroll and get them to vote it down. Where does that leave the Noerr protected speech? What is the sense of having Noerr if the speech doesn't matter?

Are there any other questions?

Okay. Thank you very much.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Yerman.

Mr. Frankel, you have two minutes remaining.

ORAL ARGUMENT OF MARVIN E. FRANKEL, ESQ.

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. FRANKEL: In two minutes I just be blunt, if the Court please. The answer Mr. Yerman gave to Justice O'Connor'r questions about independent marketplace injury are incorrect. The complaint rested on injury caused by the enactment of this Code into statutes. When they were trying to beat off a judgment NOV, Judge Sprizzo said, I think your theory of damages all along was that your damages flowed from the fact that you were not approved and therefore not adopted by state legislatures involved. As to the proof of damages, the Court will find no evidence, no evidence allegedly segregating so-called independent marketplace injury from the broad injury that their expert testified to which all came

from not being adopted. If you look at the verdict --

QUESTION: Mr. Frankel, may I ask you a question? I understand your argument about the damages. My I ask you a question about your Noerr theory?

MR. FRANKEL: Yes, Your Honor.

QUESTION: Would it apply equally if in this case they had adopted a rule giving the steel conduit people a veto over any change in specifications?

MR. FRANKEL: If the NFPA had such a rule?

QUESTION: By reason of, say, lobbying, the steel conduit people, instead of lobbying about this, got such a rule adopted.

MR. FRANKEL: In the NFPA?

QUESTION: Yes.

MR. FRANKEL: Your Honor, it would be a weird rule, and I would try very hard to help Mr. Yerman find a theory that would find it invalid, but it is impossible to have an interest-representing agency as this one is, frankly, continuing to function and giving that kind of dictatorial power to anyone at the interest --

QUESTION: Is this case really different from that?

MR. FRANKEL: Pardon?

QUESTION: Is this case really different from that?

MR. FRANKEL: I think the case is utterly different, Your Honor. I think as the NFPA says, this is a place where

all interests can come and debate. After their vote, the higher ups in the agency will review what has happened with plenary authority to overturn it if they think --

QUESTION: You rest on the proposition this case is different than the hypothetical one I give you. You don't argue that Noerr would apply in my hypothetical?

MR. FRANKEL: Your Honor, I don't argue that. I don't know with the red light on whether I can tell the Chief Justice that there was also --

QUESTION: I don't think you should, Mr. Frankel. Your time has expired.

The case is submitted.

(Whereupon, at 12:02 o'clock p.m., the case in the above-entitled matter was submitted.)

REPORTER'S CERTIFICATE

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HEARING DATE: February 24, 1988

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the United States Supreme Court.

Date: 3/1/88

Margaret Daly
Official Reporter

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