IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 73

RADIANT BURNERS, INC.
Petitioner,

v.

PEOPLES GAS LIGHT AND COKE COMPANY, NATURAL GAS PIPELINE COMPANY OF AMERICA, TEXAS-ILLINOIS NATURAL GAS PIPELINE CO., CROWN STOVE WORKS, NORTHERN ILLINOIS GAS COMPANY, FLORENCE STOVE COMPANY, SELLERS ENGINEERING COMPANY, GAS APPLIANCE SERVICE, INC., AUTOGAS CORPORATION, NORGE SALES CORPORATION and AMERICAN GAS ASSOCIATION, INC.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT, AMERICAN GAS ASSOCIATION, INC.

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Constitutional Provisions and Statutes and Rules Involved

In addition to the statutes and rules cited by petitioner, the following constitutional provisions and statutes are involved:

(1) United States Constitution, Amendment I.

> "Congress shall make no law * * * abridging the freedom of speech * * * or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances".

(2) The following provisions of the Lanham Trade-Mark Act of 1946 (60 Stat. 427, 15 U.S.C. §§1051-1127 (1952)):

Section 4 (60 Stat. 429, 15 U.S.C. §1054).

> "Subject to the provisions relating to the registration of trade-marks, so far as they are applicable, collective and certification marks * * * shall be registrable under this chapter, in the same manner and with the same effect as are trade-marks, by persons, * * * exercising legitimate control over the use of the marks sought to be registered, * * *."

Section 14 (60 Stat. 433, 15 U.S.C. §1064):

> "Any person who believes that he is or will be damaged by the registration of a mark on the principal register * * * may * * * apply to cancel said registration—
>
> * * *
>
> "(d) at any time in the case of a certification mark on the ground that the registrant (1) does not control, or is not able legitimately to exercise control over, the use of such mark, or * * * (4) discriminately refuses to certify or to continue to certify the goods or services of any person who maintains the standards or conditions which such mark certifies."

Section 45 (15 U.S.C., §1127, 60 Stat. 443):

> "In the construction of this chapter, unless the contrary is plainly apparent from the context—
>
> * * *
>
> "The term 'person' * * * includes a juristic person * * *. The term 'juristic person' includes a * * * corporation, * * * association, or other organization capable of suing and being sued in a court of law.
>
> * * *

"The term 'certification mark' means a mark used upon or in connection with the products * * * of one or more persons other than the owner of the mark to certify * * * material, mode of manufacture, quality, * * * or other characteristics of such goods * * *."

Question Presented for Review

It is the position of this respondent that neither petitioner's nor the government's *amicus* statement of the "Question Presented" is an accurate statement, and we submit that they are not expressed in the true terms and circumstances of the case. The question on this review, of course, is, should the judgment of the court below be affirmed or reversed, i.e., does the second amended complaint state a claim for relief under the federal antitrust laws?

Stated in the terms and circumstances of the case, the question presented for review here is as follows:

Does the complaint state any claim for relief under the federal antitrust laws by alleging (a) that respondent American Gas Association, Inc. (AGA) has denied to petitioner the right to use AGA's certification mark on petitioner's gas burner; (b) that such refusal was based solely on the failure of petitioner's burner to comply with AGA's prescribed standards, as a condition of such use; (c) that in the opinion of petitioner, specifications are "not based on valid, unvarying, objective standards"; and (d) that acceptance by the public, governmental agencies and individual gas utility companies of AGA's specifications has injuriously affected petitioner's competitive sales of its non-certified gas burner?

Statement of Case

The United States District Court for the Northern District of Illinois, Eastern Division, dismissed petitioner's second amended complaint herein for insufficiency. This judgment of dismissal was unanimously affirmed by the United States Court of Appeals for the Seventh Circuit.

The second amended complaint relies wholly upon an alleged violation of the federal antitrust laws to sustain jurisdiction in the federal courts, no diversity of citizenship being alleged (R. 4-17). Unless the second amended complaint states a claim for relief under the federal antitrust laws, the dismissal below must be affirmed, regardless of whether any claim for relief under state laws may be abstracted from the complaint.

The averments of the second amended complaint will be discussed more fully in the body of the argument. In summary, however, petitioner alleges that respondent, American Gas Association, Inc., a New York membership corporation (herein called AGA) tests gas burning heaters and other gas consuming equipment pursuant to its prescribed standards, which petitioner alleges are not "valid, unvarying, [or] objective", and affixes its "seal of approval" only on devices which it has determined have passed its test (R. 6). Acceptance of the AGA "seal of approval" by prospective purchasers, utilities, municipalities and other governmental agencies imports "power to influence * * * prospective purchasers" (R. 7) so that "It is not possible to successfully sell, market and distribute gas equipment, including Radiant Burners, manufactured by the plaintiff, which are not approved by AGA * * *" (R. 7).

Petitioner has tendered its gas heater to AGA for testing on two occasions, but each time has failed to receive the AGA seal of approval (R. 7).

Petitioner has nowhere alleged that its gas burner in fact met the standards which AGA applies to all gas burners in granting the "seal of approval", or that AGA has discriminatorily granted such approval to competitors' gas burners which did not meet AGA standards. It affirmatively appears from the complaint that petitioner's burner did not in fact meet AGA's prescribed standards in at least one particular, namely, that petitioner's burner employs ceramic material in the part of its burner where AGA standards require that metal be used. Petitioner disputes the validity of this AGA standard.

Summary of Argument

The allegations of the second amended complaint are largely statements of conclusions, arguments and expressions of the pleader's opinion. The specific allegations of fact negate such general averments and demonstrate that the petitioner has no claim for relief under the antitrust laws, in that petitioner fails to allege any unreasonable restraint of trade. On the contrary, the allegations show that the acts of this respondent, of which complaint is made, are lawful activities in accord with the provisions of the Lanham Act (15 U.S.C. §1051 et seq.).

This respondent does not undertake specifically to answer the arguments of petitioner or the *amicus* brief of the United States, which deal with the necessity of alleging a *per se* unreasonable restraint or an injury to the public, for the reason that, in the view of this respondent, those issues are not necessary to a decision in this case. However, those issues are dealt with at length in the separate brief filed on behalf of respondents other than AGA.

I

Specific allegations of a complaint which show petitioner has no claim for relief control over legal conclusions.

In the second amended complaint, in conclusory language, petitioner has attempted to charge that certain of the respondents, including AGA, have violated the federal antitrust laws. Whether these conclusory allegations, standing alone, would be a sufficient compliance with the requirements of Rule 8 of the Federal Rules of Civil Procedure is questionable. The answer to that question, however, is not decisive, because, in addition to the conclusions, petitioner has pleaded the facts upon which its conclusions are based.

Regardless of the degree of liberality with which a complaint is to be read under the Federal Rules of Civil Procedure, it is clear that if the specific facts alleged in an attempt to support the conclusions which have also been pleaded negate such conclusions, the complaint must be dismissed. Thus, in *Foshee* v. *Daoust Const. Co.*, 185 F. 2d 23 (7th Cir. 1950), the Court of Appeals sustained the dismissal of a complaint which attempted to state a claim based on a written contract, a copy of which was annexed as an exhibit to the complaint. The court held that the exhibit prevailed over inconsistent allegations contained in the body of the complaint, saying, in an opinion by Major, C. J. (at pp. 24-25):

> "We need not cite or discuss cases relied upon by the plaintiff to the effect that in passing upon a motion to dismiss the court will take as true all facts well pleaded and will not dismiss unless it

> appears that the plaintiff is not entitled to relief under any state of facts which could be proven. It is equally familiar doctrine *that if it clearly appears from the complaint that on the facts pleaded the plaintiff will not be entitled to any relief,* a motion to dismiss the claim is the proper procedure and should be sustained. Rule 12 (b) (6), Federal Rules of Civil Procedure, 28 U.S.C.A. See *Publicity Building Realty Corporation* v. *Hannegan,* 8 Cir., 139 F. 2d 583, 587." (Emphasis supplied.)

In a similar case, *Zeligson* v. *Hartman-Blair, Inc.,* 126 F. 2d 595 (10th Cir. 1942), the Court of Appeals said (at p. 597):

> "The motion to dismiss admitted all facts well pleaded, but it did not admit the legal effect ascribed by the pleader to the writing. The writing was attached to the first amended complaint as an exhibit and its legal effect is to be determined by its terms rather than by the allegations of the pleader."

In *Leggett* v. *Montgomery Ward & Co.,* 178 F. 2d 436 (10th Cir. 1949), the Court of Appeals upheld the dismissal of a complaint which attempted to state a claim for malicious prosecution, holding, in effect, that while the complaint might have stated a claim for relief, the plaintiff in going further had pleaded himself out of court. The Court said (at p. 439):

> "It is the general rule of pleading that where a complaint alleges facts constituting a cause of action and also alleges facts which constitute a valid defense, unless it alleges further facts avoiding such defense, it may be attacked by demurrer or motion to dismiss."

In *Simmons* v. *Peavy-Welsh Lumber Co.*, 113 F. 2d 812 (5th Cir. 1940), in affirming the dismissal of the complaint on motion, the Court said (at p. 813) that:

> "This is not a case where the plaintiff has pleaded too little, but where he has pleaded too much and has refuted his own allegations by setting forth the evidence relied on to sustain them."

See also, to the same effect, *Ott* v. *Home Savings & Loan Ass'n*, 265 F. 2d 643, 646 (9th Cir. 1958).

As indicated *infra*, in attempting to sustain the conclusory allegations, petitioner has stated facts in the complaint which refute the conclusions.

II

No unreasonable restraint of trade is shown by the specific allegations of the complaint and thus petitioner has no claim for relief under the antitrust laws.

In summary the complaint alleges the following:

Petitioner is an Illinois corporation in the business of manufacturing, selling and distributing gas conversion burners which are assembled and manufactured in Lombard, Illinois (R. 4). AGA is a New York membership corporation having laboratories in Cleveland, Ohio and Los Angeles, California "each of which purports to test the utility, durability and safety of gas burners and other gas equipment. These tests made by AGA are not based on valid, unvarying, objective standards, and AGA can make and arbitrarily and capriciously does make determinations in respect of whether a given gas burner or equipment has passed its test. AGA then affixes its seal of approval only on those gas burners and appliances which it has determined have passed its test" (R. 6).

The complaint also alleges these facts:

All burners approved by AGA are metal (R. 13). Petitioner's burners are made of ceramic radiants (R. 13). Petitioner has on two occasions tendered its burner to AGA for approval and AGA has not approved petitioner's burner (R. 9). Certain public utility gas companies have refused to provide gas service for petitioner's burner either on the ground that it was not approved by AGA or on the ground that it violated a city ordinance which provides that no gas burner other than those approved by AGA or equal could be used (R. 7; 15). Such refusals have caused damage to petitioner and loss of profits (R. 17).

It is the elementary and long settled rule that a complaint does not state a violation of the Sherman Act (15 U.S.C. §§1-6), whether in an action by a private plaintiff or by the United States, unless the facts stated therein show an unreasonable restraint of interstate commerce, by which is meant a restraint which "operated to the prejudice of the public interests" (*United States* v. *American Tobacco Co.*, 221 U. S. 106, 179 (1911)). The provisions of the statutes and the numerous leading decisions of this Court construing them are fully discussed in *Northern Pacific Ry. Co.* v. *United States*, 356 U. S. 1 (1957); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207 (1959).

This Court has expressly pointed out that "in the application of the Sherman Act, * * * it is the nature of the restraint and its effect on interstate commerce * * * which are the tests of violation." (*Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 485 (1940)). Here the allegations of the complaint do not state a claim of unreasonable restraint of interstate commerce under the Sherman Act. The restraints alleged are permissible and sanctioned under the provisions of the Lanham Act (15 U.S.C. §§1051-1127).

It is the position of this respondent that, since the allegations of the complaint do not show an unreasonable restraint, this Court is not required to rule on the question whether this complaint pleads a *per se* violation of the Sherman Act or whether, in a non *per se* case, allegations of public injury or facts from which public injury can be inferred are required (Cf. *Rogers* v. *Douglas Tobacco Board of Trade, Inc.*, 266 F. 2d 636, 644 (5th Cir. 1959), *cert. denied*, 361 U. S. 833 (1959)).

This Court has also held that the Sherman Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives. (*Klor's, Inc.* v. *Broadway-Hale Stores, Inc., supra*, p. 213; *United States* v. *Hutcheson*, 312 U. S. 219 (1941); *Allen Bradley Co. et al.* v. *Local Union No. 3*, 325 U. S. 797 (1945)).

The case of *Fashion Originators' Guild of America* v. *Federal Trade Commission*, 312 U. S. 457 (1941), on which petitioner heavily relies, is clearly distinguishable. There the Guild imposed specific prohibitions in the form of a boycott on its members' commercial activities in order to protect the styles designed by the Guild. No such element is present in the case at bar. Likewise, *United States* v. *Employing Plasterers Association of Chicago*, 347 U. S. 186 (1954), and similar cases on which the government relies, are distinguishable because there the acts of the defendants were solely intended to and, in fact, did unreasonably restrain commerce.

III

The restraint, if any, results from AGA's lawful control of its registered certification mark, as provided in the Lanham Act.

The complaint here shows that the gas burner testing and certification activities at the Cleveland and Los

Angeles laboratories of AGA and the inspecting of approved products have no commercial objective other than the promotion of gas consuming appliances. AGA is not alleged to be engaged in the manufacture and sale of any products, and thus qualifies under the Lanham Act (15 U.S.C., §1054) to own and grant rights under a certification mark.

There is no allegation that AGA refused to test petitioner's burner or the burner of any other applicant engaged in the manufacture and sale of such appliances, or refused to certify any burner which satisfied AGA standards. On the contrary, the complaint alleges that on two occasions petitioner voluntarily submitted its gas burner for tests by AGA, but, even after changes and modifications in design, it failed to pass AGA prescribed tests.

There is no allegation that AGA published a report of its tests or did any other act to injure the business of petitioner or any other manufacturer of gas burners.

Section 4 of the Lanham Act (15 U.S.C. §1054) authorizes the registration of certification marks, defined in Section 45 of the Act (15 U.S.C. §1127) to be a mark used upon the products of persons other than the owner of the mark to certify, among other things, "material, mode of manufacture, quality * * * or other characteristics" of such goods. Both Section 4 and Section 14 (15 U.S.C. §1064) of the Act affirmatively require that the owner of such mark exercise legitimate "control" over its use. Section 14 further prohibits a discriminatory refusal to certify the goods of any person "who maintains the standards or conditions which such mark certifies".

Moreover, if, under pressure of the threat of litigation, or otherwise, AGA should certify a product which does not meet its established standards, AGA would not be "exercising legitimate control over the use of" its certification mark

and the registration thereof would be subject to cancellation under the Lanham Act, Sections 4 and 14(d)(1).

Such a certification mark program is effective only to the extent that the consuming public accepts the mark as certifying desirable characteristics. If the program obtains public acceptance, there is, of course, some restraint on the sale of goods not bearing the mark. This is true wherever a trademark is successfully promoted; and, as is also the case with a trademark, the adverse effect on the manufacturer whose goods do not qualify for the certification mark is not an injury to the public and is not an unreasonable restraint of trade. This private restraint is the essence of the competition which the Sherman Act seeks to promote. *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238 (1918).

Concededly, there may be a wrongful use of a certification mark program, an attempt to use a proper means of competition in an improper manner. Thus, to obtain public acceptance of a mark as certifying certain stated characteristics, such as the conformity of a gas burner with prescribed standards of design or materials, and then to refuse discriminatorily to certify a burner which has those characteristics would be an abuse of the certification mark and a ground for cancellation of the mark under Section 14(d)(4) of the Lanham Act. But it is not a violation of either the Lanham Act or the Sherman Act to refuse to certify a product which does not meet the prescribed characteristics, or which is manufactured according to different standards or of materials which differ from the characteristics for which the certification mark stands, irrespective of whether such characteristics are, in the opinion of the mauufacturer of an uncertified product, as good, almost as good, or better than the certified product.

In the Lanham Act, Congress has not required that the standards be the best possible, or even that they be valid

indicia of quality (regional origin may be a standard under the Act); nor has Congress empowered the courts to pass upon these issues or to award or grant the use of the certification mark to a manufacturer who chooses not to conform to the specified standards of the owner of the certification mark because he deems them incorrect. The proper forum is the marketplace, and the public is the only judge that may pass upon the relative merits of the products.

In reviewing the specific allegations of the complaint, therefore, respondent AGA respectfully submits that the promotion of public acceptance of a certification mark is not an unreasonable restraint of trade, even if the promotion is successful and results in a restraint on a manufacturer whose product concededly is not manufactured in accordance with the certified standards.

IV

The specific allegations of Paragraph 7 do not support the violations charged therein.

Paragraph 7 of the complaint (R. 6-9) purports to state the specific allegations on which petitioner relies to establish an unlawful restraint of trade. This paragraph alleges that each of the AGA laboratories in Cleveland and Los Angeles "purports to test the utility, durability and safety of gas burners and other gas equipment"; that these tests are "not based on valid, unvarying, objective standards, and AGA can make and arbitrarily and capriciously does make determinations in respect of whether a given gas burner * * * has passed its test" (R. 6) and, that AGA then affixes its seal of approval only on gas burners which it determines have passed its test (R. 6).

Even accepting as a fact the petitioner's opinion that the standards are not "valid", this does not allege an

actionable wrong against petitioner. As has been noted above, the Lanham Act does not require that standards be "valid", merely that they relate to "regional or other origin, material, mode of manufacture, quality, accuracy or other characteristics" of goods (15 U.S.C. §1054).

Moreover, the Lanham Act does not require that the standards be "unvarying"; no standards in an age of continuing scientific advancement can ever remain "unvarying" for any given period.

Similarly, there is no requirement in the Act that standards be "objective". Although, concededly, non-objective standards are more easily subject to the abuse of discriminatory application, no such abuse is alleged here. It may be noted that throughout the complaint petitioner fails to allege a discrimination against petitioner, i.e., that its burner met the standards which the AGA mark certifies and certification was wrongfully denied. On the contrary, it is affirmatively alleged in paragraph 8B of the complaint that "All gas burners approved by AGA are metal * * *", and petitioner's burner "is made of ceramic radiants * * *" (R. 13).

The difference between gas burners made of metal and gas burners made of ceramics is clearly objective. Since "all" AGA approved burners are metal, it is also clearly shown by the complaint that the AGA prescribed standard was not varied in order to discriminate against petitioner.

There is thus no complaint of the manner or the method in which the AGA standards were applied to petitioner's burner, but rather with the validity of AGA's prescribed standards for certification. As noted above, nothing in the Lanham Act or in the Sherman Act constitutes such an objection a valid ground on which the courts may grant any relief.

Petitioner further alleges that the defendant gas burner and equipment manufacturers, some of whom are in com-

petition with the petitioner, "are, or have been represented on the committee of AGA which decides whether or not given gas burners * * * warrant AGA approval" (R. 7). There is no allegation that these competitors of the petitioner control such committee, or that the committee's decisions are in any way influenced by these competitors to petitioner's detriment, nor, as has been previously noted, is there any allegation that the standards prescribed have been designed to discriminate against the petitioner. Not only is such committee representation proper, but a membership corporation such as AGA, which is not itself engaged in any manufacturing activities, should not attempt to formulate standards for gas burners without consultation with others having practical production experience.

In paragraph 7C, petitioner charges that the "Utility defendants * * * have power to influence, and do influence, prospective purchasers of gas burners * * * in respect of the gas burners * * * which are to be installed and used in communities each serves gas" (R. 7). There is no claim that such influence, if any, is applied improperly, or dishonestly, or discriminatorily against petitioner; or that such utilities in using such influence are directed or controlled by AGA.

Paragraph 7D (R. 7) of the complaint apparently contains the heart of petitioner's claim. There petitioner claims that "It is not possible to successfully sell" petitioner's burner without AGA approval "because AGA and its Utility members, including Peoples and Northern, effectuate the plan and purpose of the unlawful combination and conspiracy alleged herein by the following conduct and action * * *."

Then follow allegations of specific conduct stated in five sub-paragraphs.

The first of these reads:

> "(1) By refusing to provide gas for use in the plaintiff's Radiant Burner and other gas heating devices and equipment produced by other manufacturers which are not approved by AGA." (R. 7)

There is no allegation that AGA sells any gas. Thus the foregoing allegation is meaningless, as applied to AGA, and there is no allegation that AGA has induced, agreed, or conspired with any of its utility members to refuse gas to the petitioner's Radiant Burner. The Court may take judicial notice of the fact that public utility gas suppliers are not legally free to pick and choose arbitrarily which customers they shall serve or not serve; they are universally under common law and statutory duties to serve in a non-discriminatory manner.

It nowhere appears that any individual gas utility company which refused gas service for petitioner's burner did not have a valid reason for such refusal. The complaint in fact establishes such a valid reason by affirmatively alleging, in paragraph 7D(5)(R. 8), that "municipalities and other governmental agencies" have ordinances which require that no gas burner or equipment shall be used within their limits unless such burner or equipment bears the AGA seal of approval. It may also be noted that in paragraph 9A (R. 15), it is alleged that in 1957 a gas utility, not named as a defendant, which distributes gas to customers in Milwaukee, Wisconsin, refused to provide gas service for petitioner's burners "on the ground that it was not approved by AGA and it violated a city ordinance which provided that no gas burner could be used other than those approved by AGA *or equal* * * *." (Emphasis supplied.) In this instance, it is clear that the utility's action was based upon a failure of petitioner's burner to be "equal" to those approved by AGA, within the meaning of the ordinance, and not on mere absence of AGA approval.

Furthermore, an individual gas utility may, in good faith, disagree with petitioner's evaluation of the AGA standards, and honestly conclude that it cannot be sure that a burner not meeting those standards can safely be connected to its gas service. Such conclusion would, of course, be subject to review by local authorities having jurisdiction over gas utilities. See, for example, *William De Carlo* v. *Public Service Electric & Gas Company*, 33 P.U.R. 3d 174 (N. J. Bd. of Pub. Util. Commissioners, 1960).

The second specific allegation of wrongful conduct is:

> "(2) By refusing or withdrawing authorization and certification of dealers in gas burners and equipment who handle or sell the plaintiff's Radiant Burner or other gas heating devices and equipment produced by other manufacturers which are not approved by AGA." (R. 7)

The complaint does not state the nature of the alleged "authorization" or "certification" which is supposedly withdrawn. There is no allegation that an appliance dealer must be authorized or certified by AGA in order to sell gas appliances, or that the lack of any authorization or certification by AGA is of any effect, or that, as a result thereof, the dealers have acted in any manner adverse to petitioner. This clearly cannot be a claim of violation of exclusive dealing restrictions, since it is not alleged that either AGA or the gas utilities manufacture or sell anything that dealers buy.

The third specific allegation of wrongful conduct is:

> "(3) By causing the preparation and circulation of false and misleading reports to the effect that unless gas devices, equipment, mechanisms and products are approved or listed by AGA, they are unsafe or unreliable or are lacking in durability." (R. 7)

There is no claim that either AGA or the utilities believe these alleged reports to be untrue. There is no indication as to whom the alleged reports are circulated, whether to dealers, to the public, or to manufacturers in order to persuade them to comply voluntarily with AGA's prescribed standards. There is no allegation that such alleged reports have any competitive effect.

However, even if it were alleged that AGA circulated reports to the public, no antitrust violation would have been pleaded, since there is no showing that AGA's activities are in any way competitive with the petitioners.

In *Scientific Manufacturing Co.* v. *Federal Trade Commission,* 124 F. 2d 640 (3d Cir. 1941), the court set aside an order of the Federal Trade Commission which attempted to enjoin an alleged unfair trade practice in the publication and distribution of pamphlets by a publishing company, which pamphlets contained articles alleging dangers to health from poisoning attendant upon the use of aluminum utensils in the preparation or storage of food for human consumption. These pamphlets were sold and distributed to the public, and to various manufacturers, distributors, dealers and salesmen of cooking and storage utensils competitive with aluminum utensils. The court said (at p. 644):

> "* * * the publication, sale and distribution of matter concerning an article of trade by a person not engaged or financially interested in commerce in that trade is not an unfair or deceptive act or practice within the contemplation of the Federal Trade Commission Act, as amended, if the published matter, even though unfounded or untrue, represents the publisher's honest opinion or belief."

The court went on to discuss the question of dissemination of opinion, which is pertinent to the present com-

plaint, because, as has been shown, petitioner relies primarily upon an alleged difference of opinion between petitioner and AGA as to what constitute proper characteristics of gas burning appliances. It also said (at page 644):

> "The petitioner Force dealt in opinions and no more. Nor does the Commission alter their category by tabulating them statements of fact. They are theories or ideas, false, it may well be, but sincerely held none the less, and that, too, in a field of knowledge where even experts at times must be content with approximations to verity. To the situation here presented the words of Mr. Justice Holmes are apposite,—'Certitude is not the test of certainty. We have been cocksure of many things that were not so. * * * But while one's experience thus makes certain preferences dogmatic for oneself, recognition of how they came to be so leaves one able to see that others, poor souls, may be equally dogmatic about something else.' Surely Congress did not intend to authorize the Federal Trade Commission to foreclose expression of honest opinion in the course of one's business of voicing opinion."

See also Point VI, *infra*, page 23.

The same rule we submit, is applicable in determining the sufficiency of a complaint under the Sherman Act.

Conceivably, the allegations of the complaint here might state an action in libel. But, in the absence of an allegation of complete diversity of citizenship, such action is not within the jurisdiction of the federal courts.

The fourth subparagraph of paragraph 7 of the complaint reads:

> "(4) Utilities, which have the first contact with prospective purchasers of gas burners and other gas equipment, discourage these prospective purchasers from purchasing and installing gas equipment, including the plaintiff's Radiant Burner,

> which are not approved by AGA, and by encouraging such prospective consumers to purchase AGA approved products, and by permitting the gas equipment, mechanisms, devices and products approved by AGA to be exhibited in the public areas of their offices and by refusing to permit gas equipment, mechanisms, devices and products of manufacturers, including the plaintiff, which have not been approved by AGA to be so exhibited." (R. 7, 8)

Again, there is no allegation that these actions by the utilities are induced by AGA, or that the utilities, which are not in competition with petitioner, are doing more than expressing their own honest opinions as to the merits of AGA approved appliances. All the petitioner alleges is that the AGA certification mark has been a success to the extent that there has been an acceptance of the mark by utilities. As noted above, it is conceded that every successful promotion of a trademark constitutes a restraint upon any seller whose goods do not bear the trademark. However, in enacting the Lanham Act, Congress cannot have meant to provide for the registration and enforcement of a certification mark, and at the same time to have deemed the successful promotion of such a mark, accompanied by public acceptance thereof to the detriment of unmarked goods, to be an unreasonable restraint of trade.

The fifth and final specific alleged wrongful act stated in paragraph 7D of the complaint is:

> "(5) The defendant, AGA, and the Utilities have used municipalities and other governmental agencies to pass ordinances which require that no gas burner or equipment shall be used within its limits unless such gas burner or equipment bears the seal of approval of AGA" (R. 8).

We respectfully suggest that this Court may take judicial notice of the fact that neither AGA nor any

utility has the power to "use[d] municipalities and other governmental agencies to pass ordinances."

If the foregoing allegation is to be construed as an attempt to charge that AGA has urged the adoption of such ordinances, it would still fail to state any claim for relief under the antitrust laws.

In *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347 (1909), it was held that inducing governmental seizure of private property is not ground for an action under the Sherman Act. This Court said (at p. 358):

> "* * * it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper."

Indeed, United States Constitution, Amendment I, expressly provides that Congress

> "shall make no law * * * abridging * * * the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Respondent AGA is aware of the decision in *Noerr Motor Freight, Inc.* v. *Eastern RR Presidents' Conference*, 273 F. 2d 218 (3rd Cir. 1959), certiorari granted, 362 U. S. 947, currently pending before this Court, and of the distinction attempted to be made in the majority opinion in the Court of Appeals between a "proper means" and an "improper end". However, this respondent submits that the attempted distinction is not a valid one as applied to the constitutional right to petition, and that in this respect the dissenting opinion by Chief Judge Biggs is a better statement of the applicable law. Since Congress cannot directly abridge the right to petition, it clearly has no power to do so by virtue of passing a law making the object of such petition unlawful.

The majority of the Court of Appeals in the *Noerr* case has confused the means and the end. The end is not an unlawful restraint, but a restraint which, if accomplished, will be lawful. To attain that end by petition is a right protected by the First Amendment to the Constitution.

V

The complaint shows that compliance with AGA standards is sought by voluntary action, not compulsion.

In Paragraph 7E of the complaint the petitioner alleges that the plan and purpose of AGA is shown by a statement taken from a brochure published by AGA, which reads as follows (R. 8):

> "The Approval Plan—Our Theme Song.
>
> "Our basic theme song is the Approval Plan. Through voluntary national standards, or as we call them, requirements, the plan seeks to provide consumers with safe gas appliances and accessories of substantial and durable construction which will give satisfactory performance when properly installed. Not only must we be familiar with the theme song, but we must all sing in tune if we would be successful."

The quoted language refers specifically to *voluntary* standards through which the plan seeks to provide consumers with safe gas appliances. It is apparent on its face that it is nothing more than an attempt to induce manufacturers to comply with the voluntary minimum standards, in the interests of the consumer. There is no hint or intimation of any coercion of or boycott against those manufacturers who do not wish to comply with such standards; but the quoted language does attempt to per-

suade them that they should "sing in tune" *i.e.*, voluntarily comply with these standards, if the plan is to be successful in its goal of seeking to provide consumers with safe gas appliances. There is no allegation that this invitation was not addressed as much to petitioner as to all other manufacturers. This, on its face, is nothing more than normal promotion of a certification mark by attempting to persuade manufacturers to comply with the standards and utilize the mark.

The remainder of paragraph 7E mentions "speeches, publications and meetings designed to emphasize" that the members of AGA should exclude unapproved appliances from sale, but there is no showing what, in the petitioner's mind, constitutes something "designed to emphasize" such an end, or that the "speeches, publications and meetings" propose or invite any course of action in that regard, or that the members of AGA are dealers in gas appliances with power to "exclude" appliances from sale.

VI

Expressions of honest opinion are not actionable.

The remainder of the complaint consists of allegations expressing the petitioner's opinion as to what constitutes valid safety standards, which differs from that of AGA (Par. 8, R. 9-14), and indicates that petitioner has suffered some loss of business because various persons accepted AGA's opinion of what constituted proper standards rather than the opinion of petitioner (R. 14-17).

The decision in *Appalachian Power Co.* v. *American Institute of Certified Public Accountants,* 268 F. 2d 844 (2d Cir. 1959), cert. denied, 361 U. S. 887 is peculiarly

relevant here. There the plaintiffs sought to enjoin the defendants, an association of accountants and its officers, from disseminating a letter to the effect that the Institute considered certain accounting procedures followed by the plaintiffs to be improper. The effect of the Institute's opinion was to label the plaintiffs' balance sheets inaccurate, in that certain amounts labeled surplus should have been carried as reserve. In holding that plaintiffs had no cause of action, the Court of Appeals for the Second Circuit said (at p. 845):

> "We think the courts may not dictate or control the procedures by which a private organization expresses its honestly held views. Defendants' action involves no breach of duty owed by them to the plaintiffs."

It affirmatively appears from the complaint that the petitioner sought approval for its burner from AGA, but that AGA, exercising its judgment with regard to the approval of appliances which are "safe, substantial, durable and efficient", has refused to approve petitioner's appliance (R. 9). Petitioner nowhere alleges that it, in fact, met the standards prescribed by AGA which in AGA's opinion best met the requirements of safety, substantiality, durability, and efficiency. Petitioner alleges non-compliance with AGA standards and requests that AGA be enjoined from expressing any opinion on these matters (R. 17). We respectfully point out that in the Lanham Act Congress did not intend that the courts should require the owner of a certification mark to change the standards prescribed for such mark or cease its use at the suit of every disappointed applicant for the right to use such mark; nor can a plaintiff claim that there has been a violation of the antitrust laws merely by claiming that the standards prescribed are erroneous.

Conclusion

The second amended complaint clearly shows on its face that the facts relied upon by petitioner, if proven, would not establish an unreasonable restraint of trade. Therefore this Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

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