IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 73

RADIANT BURNERS, INC.,
Petitioner,

vs.

PEOPLES GAS LIGHT AND COKE COMPANY,
ET AL.,
Respondents.

PETITIONER'S REPLY BRIEF.

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INTRODUCTION.

Respondents' Activities Adversely Affect Competitive Conditions.

The brief for respondents[1] argues a case, but it is not this case. The argument is based on incomplete and seriously inaccurate references to the allegations of the complaint before this Court.

(a) The fact that respondents have forestalled petitioner's entry into the market is sought to be answered as follows:

"The complaint does not charge that the testing pro-

1. The reference is to the brief filed on behalf of all of the respondents except AGA. The AGA brief is considered separately at page 10 of this reply.

> gram and related activities had the purpose or effect of restricting entry (other than of petitioner) into the industry." (Resp. Br. 18.)

This is wrong; the complaint does allege that as a result of respondents' activities:

> "It is not possible to successfully sell * * * gas equipment, including Radiant Burners * * * which are not approved by AGA." (R. 7.)

The complaint contains at least seven additional allegations that respondents have foreclosed entry of *all* manufacturers of non-approved products. (R. 7, 8, 9.)

Furthermore, respondents are in error as a matter of law when they suggest that since "hundreds of manufacturers * * * scattered throughout at least thirty states are engaged in competition for a rapidly growing market," the complaint does not allege "the slightest effect on competitive conditions." (Resp. Br. 18.) Presumably the rule which respondents formulate is that so long as there are some competitors left, competitive conditions are not adversely affected.

But in *Klors*[2] this Court said:

> "Monopoly can surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups." 359 U. S. at 213.

(b) Arguing that mere withholding of the AGA seal of approval is insufficient to establish a violation of the Sherman Act, respondents state:

> "*Unless more is shown,* a court could not find an effect, much less a restraint, on competition from the mere inability to obtain the seal." (Resp. Br. 24.) (Emphasis added.)

The fact is that *more is shown.* Respondents' brief

2. *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207 (1959).

fails to discuss the allegations charging them with participating in a conspiracy to prevent the sale of non-approved products by:

(i) refusing to furnish gas (R. 7);

(ii) threatening to discipline dealers who handle non-approved products (R. 7, 16);

(iii) discouraging the purchase of all but approved products (R. 7-8); and

(iv) refusing to allow exhibition of non-approved products in the public areas of the offices of public utility respondents (R. 8).

(c) Speaking of the refusal to sell gas for use in non-approved products, respondents state:

> "that refusal is not, however, the focus of petitioner's grievance." (Resp. Br. 29.)

This assumption is wrong. The refusal to sell gas, and all of the other allegations which describe the method by which respondents make it impossible for petitioner to sell its non-approved products *are* the focus of petitioner's grievance. By these acts, respondents have required their rivals to obtain a license from them in order to compete effectively. This artificial barrier to competition almost by definition has an adverse effect on competitive conditions.

(d) After pointing out that the objectionable feature in *Associated Press*[3] was the power of its members to deny market access to their non-member competitors, respondents state:

> "No similar power, obviously intended to reduce competition, is exercised by AGA or any of its members." (Resp. Br. 28.)

Again respondents mis-state the facts. The complaint alleges that petitioner's competitors are members of the

3. *Associated Press* v. *United States*, 326 U. S. 1 (1945).

AGA committee which denied the seal of approval to petitioner (R. 5, 7, 9), and thereby subjected it to the unreasonable pressure program.

Respondents and petitioner agree that the Sherman Act is violated only if the restraint imposed by respondents is "unreasonable"—that is if it adversely affects competitive conditions in the market[4].

The narrow question facing this Court, then, is whether competitive conditions in the market are adversely affected by the restraint imposed by the trade association combination, which includes petitioner's direct competitors, and which is alleged to have deliberately and concertedly acquired and used the power of the combination to foreclose petitioner and others from the market. The combination charged involves both a horizontal and vertical organization of repressive power.

If it can be conclusively presumed that this restraint adversely affects competitive conditions, then it is *per se* unreasonable; if petitioner is required and is able to prove such adverse effect as a matter of fact it is then unreasonable. In either case, respondents have violated the Sherman Act.

Only if this restraint could not adversely affect competitive conditions under any circumstance is dismissal for failure to state a cause of action justified.

It is difficult to see how the restraint alleged could *not* adversely affect competitive conditions. Petitioner's competitors, the manufacturer respondents, are able to deny the seal of approval to petitioner (R. 7), and thereby bring into play the vertical machinery which effectively forestalls petitioner's entry into the market. (R. 7-9.) From

4. See Handler, *Anti-Trust in Perspective*, 26 (1957). Professor Handler describes the rule of reason thus: "The actual and probably anti-competitive effects of a challenged arrangement are carefully measured to determine whether it will jeopardize the maintenance of healthy and vigorous competition in the market."

the economic point of view, it is "idle to expect effective competition" unless there is freedom of opportunity for entry of new rivals. Attorney General's Report, 326. The power to forestall entry of new rivals of the manufacturer respondents will inevitably result in respondents achieving a monopoly if they have not already done so—and this is certainly an end inconsonant with the maintenance of effective competitive conditions.

Whether or not exercised, respondents' forestalling power radiates a tremendous potential for future harm to competitive conditions by discouraging the initiative which brings newcomers into the field of business.

The brief for respondents avoids coming to grips with this issue. Their unsupported conclusion that the complaint does not allege an adverse effect on competitive conditions is not sufficient to deny plaintiff's right to a trial on the merits.

THE PER SE ISSUE.

Respondents' Conduct Should Be Conclusively Presumed to Cause Injury to Competitive Conditions.

Respondents concede that "there are some types of conduct which * * * by their very nature and character must be presumed to cause injury to competitive conditions." (Resp. Br. 6.)[5]

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5. Respondents cite *Northern Pac. R. Co.* v. *United States*, 356 U. S. 1, 5 (1958) for this proposition. In that case this Court said that:

> "* * * there are certain agreements or practices which because of their pernicious *effect* on competition * * * are conclusively presumed to be unreasonable * * *." (Emphasis added.)

Respondents argue, inconsistently, that the *per se* doctrine relies on the *nature* of the restraint rather than its *effect*, and charge petitioner with "shifting the *per se* doctrine away from its traditional rationale." They fail to observe (as this Court did in *Northern Pacific*) that the nature of a restraint cannot be tested in a vacuum; it is *per se* unreasonable only if its effect is inevitably to destroy competitive conditions.

Respondents fail to answer petitioner's argument that their conduct should be conclusively presumed to cause injury to competitive conditions. Instead respondents distort petitioner's argument by gross overstatement—and then attack the overstatement.

Petitioner does not seek, as respondents would have it, to "expand the scope of the *per se* doctrine to cover every act within the scope of Section 1 of the Sherman Act." (Resp. Br. 30.) While this Court did say that "it is unreasonable per se, to foreclose competitors from any substantial market."[6] this is not, as respondents suggest, the "crux of petitioner's argument" because petitioner need not go that far. Petitioner's argument is only that it is unreasonable *per se* to foreclose competitors when the foreclosure results from a conspiracy which is intended to give petitioner's competitors the power to determine what rivals may enter the market. This is so as a matter of precedent, *Klors; Associated Press*[7] (see Pet. Br. 23-33) and based on principles of economics, since it is unrealistic to assume that competitors who have the power to forestall new competition would use that power in any other way. Professor Handler states it most succinctly:

> "the sheer elimination of competition, having no * * * long term advantages, will find no refuge in the rule of reason."[8]

It follows that since respondents have the power—and have used the power—to exclude new rivals of the manufacturer respondents, their conduct should be conclusively presumed to affect competitive conditions adversely, within the existing framework of the *per se* doctrine.

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6. *International Salt Co.* v. *United States*, 332 U. S. 392, 396 (1947).

7. "The Sherman Act was specifically intended to prohibit independent businesses from becoming 'associates' in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete." 326 U. S. at 15 (1945).

8. Handler, *op. cit. supra* note 4 at page 28.

THE PUBLIC INJURY ISSUE AND THE RULE OF REASON.

At the outset, respondents' brief charges that petitioner and *amici* have fashioned "the most serious attack on the 'rule of reason' * * * since its formulation" and that petitioner's argument seeks to destroy the federal system. (Resp. Br. 8.) It is difficult to take these charges seriously. Petitioner attacks neither the rule of reason nor the federal system. Petitioner does attack a rule which requires proof of injury to the public *in addition* to proof that a restraint deprives the public of competitive conditions.

Respondents urge that "the Sherman Act proscribes only conduct which injures the public by depriving it of competitive conditions." (Resp. Br. 8.) Petitioner agrees, if respondents thereby equate public injury with a deprivation of competitive conditions—that is, if respondents mean that the public is injured or the public welfare is harmed when it is deprived of competitive conditions.

Petitioner strongly disagrees if respondents mean that injury to the public must be alleged and proved apart from allegations and proof of deprivation of competitive conditions.

It is difficult to determine, however, just what respondents do mean. It would appear that their brief neither says what it means nor means what it says.[9]

At one point respondent's attempt to defend the Seventh Circuit opinion.[10] (Resp. Br. 16, *et seq.*) The lower court

9. Cf. Carroll, *Alice's Adventures in Wonderland*, 91 (Heritage Press Ed., New York 1941).

10. Note also that respondents state that "the question, however, is not whether an unreasonable restraint shall go uncondemned because it does not injure the public, but whether a restraint is unreasonable * * * if it does not 'cause such general injury to the competitive process *that* the public at large suffers economic harm.'" (Resp. Br. 15) (emphasis added). Presumably respondents can conceive of a situation in which a restraint does

dismissed the complaint because there were insufficient public injury allegations—and based its conclusion that there was no public injury on its finding that the complaint "failed to establish that there has been any appreciable lessening" in the availability of products of "over-all superiority." (R. 32.)

Certainly competitive injury could occur even if the public was not deprived of products of over-all superiority since this Court has made clear that an unreasonable restraint violates the Sherman Act even if it initially results in lower prices or superior products. *Kiefer-Stewart Co.* v. *Seagram & Sons,* 340 U. S. 211 (1951).

But then again, where respondents equate public injury with injury to competitive conditions (Resp. Br. 9)—they thereby abandon the Seventh Circuit opinion which requires proof of public injury beyond proof of competitive injury. If this is respondents' position, then dismissal of the complaint can be justified only if respondents' use of their power to eliminate new rivals could not, under any circumstances, injure competitive conditions.

Despite respondents' apparent abandonment of the lower court's determination, they reach the same result by indirection and obfuscation. Their argument that competitive conditions in the industry are not "affected in the slightest degree" because "hundreds of manufacturers * * * scattered throughout thirty states are engaged in competition for a growing market" (Resp. Br. 18) is nothing more nor less than support of the court of appeals requirement that

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cause "general injury to the competitive process" but does not cause the public to suffer economic harm. Compare with this, the formulation of Professor Handler quoted at page 16 of the Brief for Respondents, where public injury is *equated* with competitive injury: "Public injury—*that is* a substantial interference with competition * * *." (Emphasis added.)

a "lessening in the sale of gas conversion burners" must be alleged to show public injury.[11]

This public injury rule of the lower court in this case has already been applied with devastating effect in the cases in which *amici* are interested. In *Parmelee*, the district court, citing *Radiant*, ordered a separate preliminary jury trial on the issue of public economic injury and excluded all evidence of conspiracy. The jury was instructed that only if they found "an appreciable lessening in service to the public * * * of over-all superiority" could public injury be found. (Parmelee Br. 3.)[12]

The most significant failure of this public injury rule, is that it does not inquire into the effect on competitive conditions of respondents' *potential* power to injure competition. This power, exercised or not, is a substantial restraint on the entry of new capital and inventive effort into the field dominated by the association's activities. Under the rule of reason, inquiry into such potential effect is proper. *Cf. Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 622 (1953). But the court below did not make such inquiry because it is not part of the public injury rule.

Thus a conspiracy which is unreasonable because it destroys competitive conditions is unpunishable because the public has not yet been injured by an appreciable lessening

11. It is understandable that respondents find the court of appeals second requirement of public economic injury—a deprivation of a product of "over-all superiority"—undigestible and therefore seek to evade its meaning by claiming that the language does not mean what it says. But the court of appeals did state that no public injury was alleged because the public was not appreciably deprived of a product of "over-all superiority" and no amount of squirming by respondents can avoid the conclusion.

12. See also, *United States* v. *Bitz*, 179 F. Supp. 80 (S. D. N. Y., 1959), reversed, 282 F. 2d 465 (C. A. 2d 1960). Indictment charging a conspiracy in violation of Section 1 of the Sherman Act was dismissed because of lack of sufficient allegations of public injury.

in sales of a product of over-all superiority. This formulation—and not petitioner's position—is an attack on the rule of reason. The public injury rule, as it was applied by the court below, should be emphatically and explicitly rejected.

THE AGA BRIEF.

A separate brief was filed on behalf of Respondent AGA. This brief urges that the restraint imposed by respondents was not unreasonable because "the restraints alleged are permissible and sanctioned under the provisions of the Lanham Act." (AGA Br. 9.) There is nothing in the record to indicate that respondents' trademark is registered under the Lanham Act, but their argument fails, in any event, because:

> "A trademark cannot be legally used as a device for a Sherman Act violation. Indeed the [Lanham Act] *** itself penalizes the use of a mark 'to violate the antitrust laws of the United States'." *Timken Roller Bearing* v. *United States*, 341 U. S. 593, 599 (1951).

The AGA euphemizes the refusal of the public utility respondents to provide gas, and all of the other conduct which respondents engage in to prevent the sale of non-AGA approved products, as "successful promotion of the trademark" (AGA Br. 12, 20)—and this it certainly is. But this trademark is granted or withheld by a committee which includes petitioner's competitors. (R. 5, 7, 9.) AGA says that the standards formulated by this committee need not be "objective". (AGA Br. 14.) It concedes that these non-objective standards require that all burners be made of metal—and that all burners made by the manufacturer competitors on the committee who establish these standards are metal. (AGA Br. 14.) It asks that respondents be permitted to continue to refuse the trademark and prevent the sale of non-approved products like petitioner's merely because they are made of ceramics.

The use of materials has undergone a dramatic upheaval in the last decade; ceramics are used extensively in high temperature applications to replace metal[13]—but petitioner's competitors, whose products are made of metal, stand as a competitive barrier to progress by refusing to approve a ceramic burner. This is not "practical production experience" as AGA suggests. (AGA Br. 15.) It is the natural desire of competitors to maximize their profits by excluding a new and possibly better product which they do not make.

AGA also attempts to excuse respondents' conduct by the familiar technique of segmenting the conspiracy charged into component parts and then asking that an independent and isolated analysis be made of each segment, which, standing alone, has the appearance of innocence. Thus, AGA argues that it does not sell gas (AGA Br. 16), that it is not competitive with petitioner (AGA Br. 18), and that it has "no commercial objectives." (AGA Br. 10, 11.) Its denial of the seal to petitioner is called "an expression of honest opinion." (AGA Br. 23.) The refusal of the public utility respondents to supply gas is excused because "it nowhere appears that any individual gas utility company * * * did not have a valid reason for such refusal." (AGA Br. 16.) Petitioner, however, does charge a conspiracy to unreasonably restrain competitive conditions and identifies significant though differing functions performed by each group of respondents in aid of

13. Eubank, "Some Recent Advantages in Ceramics," 72 *Scientific Monthly*, 120-125 (February, 1951).

"Advantages for the use of ceramics are the abundance, wide distribution and general low cost of raw materials * * * At elevated temperatures the ratio of the strength of ceramic to that of metal rapidly increases until the metal fails completely; * * *"

Business Week, 48 (October 6, 1951).

"Now ceramics are popping out with new and spectacular uses * * * because ceramic surfaces can stand more heat even than many alloys * * *."

the conspiracy through both the horizontal and vertical organization of restraints. The AGA is an essential element in the conspiracy since it is the device concocted by manufacturing competitors and gas utilities to effect the restraint.

Overlooked by AGA is the firmly established principle that acts which are otherwise legal violate the Sherman Act when they become part of the sum of acts relied upon to effectuate the conspiracy: *American Tobacco Co. v. United States,* 328 U. S. 781, 809 (1946). Further, that it is not necessary for each conspirator to act identically or perform in the same manner to be an effective and guilty party to an illegal conspiracy.

The AGA attempts to avoid these principles in rather an unclever way. They state that:

> "There is no allegation [in the complaint] that AGA has induced or conspired with any of its utility members to refuse gas to Petitioner's Radiant Burner." (AGA Br. 16.)

But the complaint does allege that:

> "* * * AGA and its utility members * * * effectuate the plan and purpose of the unlawful * * * conspiracy * * * by refusing to provide gas for use in Plaintiff's Radiant Burner." (R. 7.)

If the AGA is correct that violation is avoided because the AGA has no commercial objectives, then the course is clear for all those who would combine rather than compete: act through a non-profit trade association and all Sherman Act problems are disposed of—together with the competition which the Sherman Act was designed to protect.

It is submitted that this cannot be the law.

CONCLUSION.

For the reasons stated, the decision of the Court of Appeals should be reversed and the cause remanded for a trial on the merits.

Respectfully submitted,

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