N.D.A.G. Letter to Roach (Aug. 22, 1988)

August 22, 1988

Mr. Robert Roach
Seed Certification Specialist
North Dakota State Seed Department
State University Station
Fargo, ND 58105

Dear Mr. Roach:

Thank you for your letter to me dated July 26, 1988.

In that letter you ask whether the state, by statute, may prohibit the sale in North Dakota of dry edible bean seed that does not pass the "Dome Test," a laboratory test which detects the presence and level of seed borne bacteria. You also ask whether such a restriction may be imposed on the sale of 1) certified seed only, 2) all edible bean seed, or 3) edible bean seed eligible for recertification only. You state that at present North Dakota is the only state which requires this test as a prerequisite to certification of dry edible bean seed.

Based on discussions between you and Assistant Attorney General David Huey, it is my understanding that bacterial blight is a significant problem to the developing North Dakota dry edible bean certified seed industry. Apparently, our growing conditions are more conducive to bacterial blight than those in some of the western states. For this reason, you point out, Washington state restricts importation of bean seed from states east of a particular line, a group of states which includes North Dakota. Presumably, this greater susceptibility to bacteria is one of the reasons you require the Dome Test and other states do not.

You indicated to Mr. Huey that, in your view, requiring a Dome Test for out-of-state seed would have a negligible effect on the cost of the seed but might effectively preclude the import of some out-of-state seed, at least initially, because of the limited availability of facilities performing the Dome Test. Further, I understand that you estimate that over 90% of North Dakota's certified dry edible bean seed comes from out-of-state sources. Finally, you are of the opinion that requiring a Dome Test on out-of-state seed is not likely to have a significant disease control effect.

You are correct in your assumption that efforts by a trade association to impede the import into a state of a competing product would normally violate the antitrust laws. However, the Supreme Court has created an implied exception to these laws for state action. That exception was first articulated in the case of Parker v. Brown, 317 U.S. 341 (1943). In that case, the Supreme Court upheld a California statute which permitted a state commission to impose mandatory marketing restrictions on private raisin producers.

Since California produced some 95% of the nation's and about one-half of the world's raisin supply, such action would undoubtedly have a significant effect on the supply and price of raisins. The statute had been challenged as a violation of the Sherman Antitrust Act.

The Court's conclusion that state action was no~ preempted by the antitrust laws rested both on statutory history and language, and on considerations of federalism. The Court could find no congressional intent, in the language or history of the Sherman Act, to restrain a state or its officers or agents from activities directed by its legislature. Absent a clear expression of such a purpose by Congress, the doctrine of federalism requires the conclusion that state action is exempt from antitrust regulation. Therefore, it is probable that any action by the North Dakota Legislature with respect to restrictions on the sale or import of dry edible bean seed would be exempt under the Parker state action doctrine.

The rationale of Parker, however, would not necessarily protect the North Dakota Dry Edible Bean Seed Growers Association from antitrust liability for proposing the legislation. Nonetheless, the Supreme Court in Eastern R.R. Pres. Conf. v. Noerr Motor Freight, 365 U.S. 127 (1961), carved out a similar exemption from antitrust regulation for political action and other dealings by private individuals and groups with government. That exemption was further articulated in United Mine Workers v. Pennington, 381 U.S. 657 (1965), and is known as the Noerr-Pennington Doctrine. Under that doctrine, joint efforts to influence public officials, with minor exceptions not relevant here, do not violate the antitrust laws even though intended to eliminate competition. Thus, any lobbying efforts by the Seed Growers Association are likely to be protected from antitrust liability as well.

The more difficult question is whether or not such a statute would violate the Constitution. The Constitution gives Congress the power to regulate commerce "among the several states," U.S. CONST. art. I, 8, and prohibits states from imposing "any imposts or duties on imports or exports, except that may be absolutely necessary for executing its inspection laws," U.S. CONST. art. I, 10. Neither may "any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. ~ 1.

These restrictions on state authority over interstate commerce have been held not to impose any absolute prohibition on state regulation, but rather to require a balancing of the significance of the burden on out-of-state interests as against the "legitimate" local benefits from a particular regulatory scheme. Pike v~ Bruce Church, 397 U.S. 137 (1970). The use of such a balancing test makes predicting a court's reaction to any particular proposed legislative scheme an inexact science at best. One commentator has pointed out:

> The case law on what constitutes a "legitimate local public interest" is complex and inconsistent. Clearly, state regulations whose primary purpose is to benefit local producers at the expense of out-of-staters do not serve a "legitimate" interest and will not offset a burden on interstate commerce. But, when such exploitation is not the obvious or express purpose of a

challenged state regulation, the law becomes very murky indeed.

I P. Areeda and D. Turner, Antitrust Law 220d (1978).

My research reveals no case where the constitutionality of a state's certified seed standards has been challenged. Consequently, it is necessary to look to other cases for guidance in this area. In Ex Parte Hawley, 115 N.W. 93 (S.D. 1908), the South Dakota Supreme Court held that it was within the police power of the state to provide regulations calculated to prevent the spread of disease among plants and trees, whether grown and sold within the state or raised in foreign nurseries and transported and sold for planting within this state. In that case the representative of an Iowa nursery was prosecuted criminally for the unlicensed sale of nursery stock to be shipped to South Dakota from Iowa.

On the other hand, the United States Supreme Court overturned the North Dakota Grain Grading and Inspection Act as an unconstitutional burden on interstate commerce. Lemke v. Farmers Grain Company, 258 U.S. 50 (1922). The Court found that, by seeking to regulate the buying of grain in interstate commerce, the levy of a license tax on the privilege of buying grain and by fixing the profit on grain bought, shipped, and sold in interstate commerce, the state had "clearly encroach[ed] upon the field of interstate commerce, placed by the Constitution under federal control." Id. at 61. In arriving at its decision, the Court noted that virtually all of the grain produced in North Dakota was sold out of state. Thus, nearly all of the burden of the state regulation would fall on out-of-state interests while all of the benefit would redound to in-state farmers.

Because, as you indicate, more than 90% of the state's certified seed comes from out of state, you can expect that a court would look very closely at any regulatory scheme which placed burdens on out-of-state certified seed in addition to those placed by the state of origin and the federal government. For such restrictions to be sustained in the face of constitutional challenge, the legitimate state purpose behind their enactment would have to outweigh the significance of the burden placed on out-of-state interests.

For this reason, your question regarding the reason for requiring the Dome Test is particularly significant. Clearly, the state may act to prevent the spread of disease among its dry edible bean plants. If banning the sale in North Dakota of all seed that has not been Dome Tested is reasonably required to protect North Dakota edible beans from bacterial disease, then it is probable that a court would find such a ban to be a valid exercise of the state's police power. Limiting the test requirement to certified seed or seed eligible for recertification would likewise need to be grounded in some legitimate disease control purpose to be valid.

However, if disease prevention is found to be a secondary consideration to marketing purposes, as your letter appears to indicate (that is, if requiring a successful Dome Test for out of state seed is not reasonably necessary to control disease but rather is an effort to offset by legislative action the natural advantage of seeds grown in dryer climates), then it is likely that a court would find the restrictions to be an unconstitutional burden on

interstate commerce.

I hope this discussion has been helpful. If you have any further questions, please do not hesitate to contact my office.

Sincerely,

Nicholas J. Spaeth