

Legitimate Trade Association Activities

Address by Abram F. Myers,
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Under the Federal Antitrust Laws this country is committed to a policy of free and open competition, an ideal which found fullest expression in the local markets and fairs at which the domestic commerce of England was largely carried on between the twelfth and fourteenth centuries.

To those markets trudged the producers and traders from the country around to dispense their wares. They haggled openly and loudly and information concerning supply and demand conditions, offers and bids, was available to all present, buyers and sellers alike.

But the dusty-footed traders soon devised means for intercepting produce and diverting it from the market, and for cornering the market. Exploitation of the consumer early became not merely a pastime, but a fine art, and as the result the hardships inflicted upon the people were past endurance.

The demands of an outraged public for unrestricted markets led to the enactment of those quaintly worded statutes against

forestalling, engrossing and regrating which constitute so fascinating a chapter in the history of trade.

The struggle in England against monopoly and restraint of trade continued for several centuries, particularly against the crown patents, until finally it was submerged in the united effort at world trade domination.

America, with her seemingly inexhaustible resources and amazing productivity, was not troubled with this problem until the corporation reached a high state of development as an instrument of commerce. Corporations achieved what individuals could not, -- mastery of the great basic industries of the country; and the main purpose of the antitrust legislation was the protection of the public against combinations of those impersonal monsters and their monopolistic practices.

Antitrust laws aimed at combination,
not cooperation.

However confusing and conflicting the interpretations of the antitrust laws may seem, it is clear that those laws were aimed at corporate combinations, not at cooperative effort through trade organizations. This abundantly appears from the history of the times and the reports and debates on the measures; but the obvious argument is that trade associations were comparatively unknown when the antitrust legislation was under consideration, and regulation of their activities presented no problem to the legislative mind.

Consoling these reflections may be, the fact remains that the provisions of the antitrust acts ~~have~~^{have} been applied to trade association activities, and the problem of reconciling such activities with the law has engaged the best thought of association executives, law enforcing officers and the courts.

For several years the Department of Justice apparently accepted the dictum of Adam Smith, that business men seldom foregather without plotting against the public good, and all trade association activity was regarded with suspicion. In a number of cases the position taken was that the mere collection and dissemination of trade statistics was in and of itself unlawful. This position, had it been sustained, would have denied the modern business man information such as was readily available to the ancient tradesman, dealing on the open market, under conditions of unfettered competition.

But the Supreme Court in the Maple Flooring and Cement cases gave final interment to the view that "ignorance is a virtue and knowledge a crime"; that competition means mortal combat with bowie knives in the dark; that a business man may not find out what is on the other side of the wall before he leaps.

Trade association an effective
stabilizing agency.

It can not have escaped the notice of even casual observers that distinct processes of stabilization are at work in both industry and finance. There are many reasons for this, but chief among them are the enactment of wise banking legislation and the

legitimate activities of trade associations. Another substantial factor is the standardization and grading work promoted by the Department of Commerce and Agriculture, which gradually is reducing the aggregate of inventory losses.

The old order changeth and economists and statesmen today recognize that our great national prosperity can not be maintained on principles of jungle competition; that its perpetuation necessarily entails some measure of stabilization of production and employment. Hence it is with no sense of alarm that we view these innovations for we realize that they mark the gradual passing of the business cycle, with its alternating extremes of overproduction and underproduction, employment and unemployment, high prices and low prices.

This does not mean that the Government or the people have grown more tolerant of monopoly. ~~On the contrary~~ On the contrary, it indicates a growing recognition of the fact that there must be a certain degree of cooperation and forbearance among independent producers and traders if monopoly is to be averted and competition preserved. For unrestricted competition inevitably leads to the elimination of the independent units and the concentration of business and wealth in the hands of a powerful few, not always representing the highest thought or finest character in the industry. And the public prefers to rely for its protection upon an enlightened competition which retains the independent trader, than upon regulated monopoly or socialism.

Again, there is growing evidence of a widespread recognition of the social (as distinguished from the purely economic) evils

resulting from the gradual elimination of the independent business man. Napoleon once sneeringly remarked that England was a nation of shopkeepers, and I sometimes wonder if it may not be said of us that we are becoming a nation of employees. The Supreme Court many years ago, in expounding the underlying principles of the Sherman Act, spoke of the dire results to the country of the absorption of independent business men by the trusts in this way:

x x x the result in any event is unfortunate for the country by depriving it of the services of a large number of small but independent dealers who were familiar with the business and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein. Whether they be able to find other avenues to earn their livelihood is not so material, for it is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it might be into a mere servant or agent of a corporation for selling the commodities which he once manufactured or dealt in, having no voice in shaping the business policy of the company and bound to obey orders issued by others (United States v. Freight Association, 1897, 166 U. S. 290, 324).

So completely have ideas changed on this general subject that we can with confidence assert that which a few years ago would have been regarded as a hopeless contradiction or foolish paradox, namely, that the preservation of competition is depend-

ent on cooperation. And in a few industries we see the enlightening spectacle of the more powerful members, possessing advantages and resources denied to their smaller competitors, holding aloof from and even opposing legitimate cooperative undertakings which tend to neutralize in some degree the advantages inherent in their size and wealth.

Cost accounting work.

The proper pricing of products is naturally the first concern of the business man, and one on which he needs all the information and help that he can get. His responsibility in this particular is very great; and while he must quote a price at which he can sell his goods, he should act wisely and with due regard for the welfare of the industry as a whole.

It is a mistake to suppose that the average American wants something for nothing. Deep-seated as is his objection to being gouged, he does not demand that anyone do business with him at a loss. On the contrary, he is glad to pay for an article what it is fairly worth, and he knows and expects that the seller will profit by the sale. It is unfortunate that during the late war the expression "fair price" was given a one-sided application. Under wartime regulations prices were to be "fair" from the standpoint of the buyer, and the term has continued to have that narrow signification. But the proper conception of a "fair price" is one that is fair to buyer and seller alike; and once this view is generally accepted and adhered to, complaints against "profitless prosperity" will cease and the term will fall into disuse.

Every business man owes it to himself and to all others engaged in competition with him to ascertain his costs as accurately as possible before pricing his goods. The man who undertakes to fix prices without adequate cost data may be likened to the man who drives a high-powered car into a crowded thoroughfare without previous instruction in driving. He will very likely run amuck; and while the danger to himself is great, the danger to his competitors may even be greater, and a whole industry may be imperiled and impoverished as a result of his recklessness and improvidence.

Trade associations can and do render a valuable service in the promotion of cost accounting work. This is a recognized legitimate function of trade associations and is contributing substantially to the prosperity and stability of the nation's business. So long as this activity is confined to the advocacy and installation of approved cost accounting methods, it should and will be encouraged. If, as has sometimes happened, the members become overheated and err by substituting uniform items of cost for uniform methods of cost accounting, the Government is bound to step in with a prescription designed to reduce their fever.

Selling below cost for the purpose of driving a particular competitor or group of competitors out of business is a conspicuous example of unfair competition. The time may come when selling below cost, even through ignorance, will be made positively unlawful, save in the comparatively few instances, such as the reduction of surplus stocks, where the necessity for the practice is

generally recognized. Such a regulation would seem, at first blush, to be extreme; but it would seem to be in keeping with the fundamental principle that one may not so use his property as to inflict unnecessary injury upon others.

Information service.

I imagine that you gentlemen have attended few gatherings of this kind in the last three years that some lawyer has not undertaken to expound the decisions in the Maple Flooring and Cement cases.

As a result of those decisions the business of the country needs no longer to be conducted by moles, groping in the dark, with no knowledge of what is going on in the world about them. A manufacturer may now cooperate with his fellows to obtain such knowledge of supply and demand conditions as will enable him to steer a true course between the rocks of bankruptcy and failure-- provided, always, that his initiative and efficiency are not conspicuously below the mean for the industry.

The concluding paragraph of the opinion in the Maple Flooring case says, in effect, the court decides only that trade associations may do thus and so, enumerating the activities of the particular association involved in that case. There is some disposition to treat that passage as fixing the extreme limit to which trade associations may go in the collection and dissemination of trade statistics. But it would really seem that the court merely took the usual precaution to confine its decision to the facts of the particular case, which presented no element of

conspiracy or agreement as to the use of such statistics, without attempting to prejudge other cases involving different states of fact that might arise in the future.

For instance, the opinion specifies that information may be circulated as to "the actual price which the product has brought in past transactions". Now there are industries in which a great deal of negotiating might take place on a given day without a single sale being consummated. In such cases it often is of the utmost importance to the trade and to the public to have knowledge of such bids and offers. Speaking wholly as an individual, and without recourse to the institution of which I am a member, I can not believe that the Supreme Court had in mind or meant to exclude the collection and dissemination of information of that kind under proper conditions such as were approved in those cases.

Since agreements and conspiracies need not be expressed in writing, but may be inferred from the nature of a given activity or the facts surrounding it, it is quite as important to avoid the appearance of evil as the evil itself. Thus there are activities which seem to come clearly within the principle of those decisions but which inevitably lead to unity of action which is outwardly indistinguishable from agreement. As an illustration of this we may cite the dissemination by an association of prices paid by members for raw materials on a declining market. No matter what degree of independence may be observed by the members in acting on such information, individual members will not continue to pay more for raw materials than their competitors are

paying, and the effect upon the suppliers of raw materials will be practically the same as if an agreement existed among them.

I can only suggest that if confronted by a situation such as I have just described, you take the necessary precautions to negate every inference of collusion and avoid everything that savors of undue secrecy. The widest publicity should prevail in cases of this kind. Indeed it would be a distinct contribution to the economic welfare of the country, and in the long run would be equally beneficial to individual associations, if all statistics gathered by them could be made available to the public, or, at least, to that portion of the public interested therein. Information as to bids and offers, and of the character just noted, may lawfully be published through the medium of an exchange; and the function of an exchange could be approximated by giving proper publicity to statistics gathered through association effort.

The need for full publicity is all the greater in an industry such as yours, where the buyers are organized and have an efficient information service, while the sellers, the farmers, possess no such advantages and often must rely on the buyers for information as to market conditions and prices. It is only natural that such a condition should give rise to suspicion and distrust, and it explains why so many complaints are received in Washington relative to the price of cotton-seed. The report of the Federal Trade Commission on the cottonseed industry, dated March 5, 1928, shows strikingly the relationship between production and price. But the uninformed farmer can only speculate as to why he received an average of \$34.16 per ton for cottonseed in 1922 when 4,336,000

tons were produced, and only \$21.63 in 1926 when the production reached 7,989,000 tons.

Speaking as an outsider who has only peeped in on your industry, I should say that every step taken by you towards a wider dissemination of the essential facts as to supply and demand conditions would be a step in the right direction. The Commission concluded as a result of its inquiry that one of the main causes of dissatisfaction to both the producer of cottonseed and those engaged in its purchase and manufacture is the lack of a uniform system of grading. So far as practicable standards should be established for cottonseed as have been established for cotton and other products, so that those dealing in seed may arrive at a fair value, which should, in some measure at least, be reflected in the price paid the producer.

Self-regulation.

The industry that possesses a strong trade association is equipped for self-regulation in a degree which, if wisely directed, will effectively preclude governmental interference by rendering it unnecessary. Organizations of professional men exercise an effective control over the conduct of their members and see to it that they conform to well-established ethical standards. A strong movement is on foot to extend this method of self-regulation to all industry, to be exercised independently in some instances, and in others in cooperation with government agencies.

It is highly desirable that industry proceed independently of the government in such undertakings as far as practicable. The

weakness of this character of self-regulation is that the standards of conduct prescribed have no positive sanction beyond the fact that one who violates them will merit and receive the scorn of his associates. The obligation to observe standards worked out in cooperation with and approved by the government generally will be regarded as more binding, even though unenforceable as a matter of law. The Federal Trade Commission is seeking to cooperate with business in this way through the medium of trade practice conferences.

To date approximately thirty such conferences have been held with varying degrees of success. For the most part the practices resolved against at these conferences have constituted unfair methods of competition within the meaning of the Trade Commission Act as construed by the courts. When such resolutions are violated the Commission proceeds against the offender, not for infraction of the resolution, but under the organic act. Resolutions covering practices not violative of the act within any previous interpretation thereof, generally are not approved by the Commission, but are received as "expressions of the trade". It is greatly to be regretted that the status of resolutions of this class has not been judicially defined.

Codes of ethics can and frequently do take a wide range and vary as do the details of the various industries. Sixteen trade abuses are listed by the Department of Commerce in its recent volume on Trade Association Activities, as common to practically every industry. The real difficulty with these codes is that they are too often drafted in broad terms to allay the fears or overcome

the opposition of particular groups, with the result that they are too general to serve as an effective means for the elimination of trade abuses. Codes framed and adopted in this fashion constitute a mere gesture, and in the long run may give birth to more disputes than they settle. Before adopting a code the members of an association should decide definitely and specifically the practices they intend to proscribe, and then declare against them in terms which can not be misunderstood.

Public relations.

Public relations are a variety of "in laws" that are constantly demanding attention. Important industries have points of contact with virtually all governmental agencies, both state and national. They are affected in many ways by the quantities of legislation which Congress and the State Legislatures yearly grind out, as well as by the incredible number of rules and regulations annually promulgated by the executive and administrative branches.

The right to petition the government for protection and redress is one of the most sacred vouchsafed by the fundamental law of the land. It may often be exercised through trade organizations more effectively than by individual action. Scores of trade organizations maintain offices and representatives in Washington to see that the interests of the industries they represent are properly safeguarded. Much has been said in recent years about insidious lobbying, and undoubtedly it exists. No industry can afford to engage in questionable lobbying practices, for the reaction against such methods will in the long run overcome

whatever advantage has been gained.

But in the matter of placing the important facts of the industry before agencies of the government to the end that the latter may act advisedly and with full knowledge thereof, the efficiency of trade organizations has been demonstrated. The organization secretary can demand information from all the members as a matter of right and present to the government not merely the situation as to individual members but complete data as to the entire industry. The well-nigh fatal mistake too often made is in relying on persons claiming to have contacts with individual government officers which will secure special consideration not warranted by the facts. These supposed contacts are, for the most part, non-existent; but even where they exist, schemes for securing special privileges undergo a checking process which generally results in their frustration, and the trusting client reaps disillusionment (and sometimes worse) for his venture into practical politics.

Open price investigation.

The studies of trade association activities heretofore made, for the most part, have been historical and little or no attempt has been made to ascertain the actual effect of such activities on price ranges and price levels. Under resolution of the United States Senate the Federal Trade Commission for many months has been engaged in an endeavor to ascertain (quoting said resolution):

First. The present number and nature of open price associations, the names of such associations, the number

of the members thereof, and the importance of such associations in the industry.

Second. To what extent, if any, the effect of such open-price associations has been to maintain among members thereof uniform prices to wholesalers or retailers, or to secure uniform or approximately uniform increases in such prices.

Third. Whether such open-price associations engage in other activities, and if so, the nature and effect thereof, with respect to alleged violations of the antitrust laws.

It is obvious that a literal compliance with this resolution would not afford the information desired, since there would be no data with which to compare or contrast the data relating to so-called open-price associations. The Commission, of its own motion, enlarged the scope of the inquiry to include other trade associations as well as open-price associations, and invited the full cooperation of all organizations to the end that a comprehensive statistical study might be made which would reflect the effect of the operations of all classes of trade organizations on prices, so far as obtainable information would permit.

The response of the trade association executives to this appeal for cooperation was most gratifying and the Commission expects shortly to complete its report. In addition to full information as to the number of trade associations and the character of their organization and activities, the Commission will endeavor for the first time to weigh the effect of those activities. The final tabulations have not been made and I do not know what the

figures will show, or whether they will involve so many variables as in effect to the negative. But this I know, and I believe you will agree with me, it is by far the most interesting as well as the most important survey that has been made of the field of industrial associations, for it will show, so far as figures are capable of showing, the effects of association activity both from the standpoint of industry and the public.

Interpreting the Commission.

The Federal Trade Commission more than any other government establishment has suffered from a plague of interpreters, both from within and without. Every self-appointed spokesman and prophet has sought to paint the Commission as he would have it if he had his way. It has, on the one hand, been depicted as an utterly reckless group of radicals seeking to discredit and undermine all legitimate enterprise. On the other hand, it has been represented as the subservient tool of wealth, groveling at the feet of big business. I counsel you to beware these prophets and expounders of the Commission's policy and to judge the Commission not by what is said about it but by what it does.

In the unfair competition cases the Commission has been clothed with quasi-judicial powers, and these powers must be exercised judicially if it is to command the confidence of the country. On the investigative side the work must be and generally is thoroughly and scientifically done. The policies of the Commission in administering the law, like those of a court, should be gleaned from a comprehensive study of its decisions and acts. The results

of such a survey will show that extreme views almost invariably are minority views; and that, so far as a policy may be deduced from majority action in concrete cases, it more nearly resembles a middle-of-the-road policy than any other.

But the fundamental policy established by the acts which the Commission administers is unrelenting warfare against unfair methods of competition and restraint of trade. Officers sworn to uphold those laws can not modify or deviate from the policy which they prescribe. If the requirements of the law are too exacting or oppressive, application should be made to the legislative department for their modernization or repeal. But the Federal Trade Commission as an administrative agency created to enforce the law can not substitute its judgment for that of Congress as to the wisdom or expediency of such legislation; and declarations or veiled intimations that the Commission has departed from the statutes in supposed accommodation of the policy of Congress to the needs or desires of the business world, that the lid is off and the sky is the limit, should be judged in the light of the ascertainable facts, to the end that those who are seeking to gain a competitive advantage by cutting the corners of the law may not be lulled into a false sense of security.

The Commission is a novel experiment in governmental regulation; the acts which it administers are general and even vague in terms. Precedents and even analogies are lacking. The existing rules and procedure represent a gradual evolution entailing much thought and experimentation by the Commission and its staff.

There is an impression abroad that the present rules constituted a startling innovation and were hurriedly devised and adopted in response to the demands of the business world. The point I would emphasize is that the present practice and rules are the product of years of thought and experience and were adopted solely to accomplish the efficient, equitable and expeditious enforcement of the law.

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