TRADE ASSOCIATIONS AND THEIR LEGAL RESPONSIBILITIES

(Address by Earl W. Kintner, General Counsel, Federal Trade Commission before First Annual Convention, National Association of Blueprint and Diazotype Coaters, Virginia Beach, May 16, 1955)

It is a pleasure for me to have this opportunity to talk to your group.*

As a new trade association you will want to know what is expected of you, what you can accomplish, and how to keep out of trouble with the local gendarmes. You will find that the legal rules of behavior for a trade association are not clear-cut. The definitions and specifications in the antitrust field are not as exact as in your own blueprints. Some activities of trade associations are clearly prohibited by law; other activities are unquestionably accepted and encouraged by the government. In between, lies a large dismal no-man's-land in which it cannot be said categorically that an activity is unlawful or lawful, black or white. We will explore these dim regions today and try to map them in at least a general way.

First you should become acquainted with some of your ancestors. In some respects you can be considered to be direct descendants of the "gild merchant" or market gild of medieval England. Some of the earliest gilds were brotherhoods of knights or thegns, who presumably gathered over mutton and ale, for lively discussions of jousting. As towns began to grow up, and trade became increasingly important, the king often granted to the burgesses and their heirs the privilege of forming a "gild merchant." King John granted such a charter to the burgesses of Ipswich in 1200.1/ The purpose of the "gild merchant" was to have a "community" of merchants which would back up an enterprising merchant who ventured far from home to a fair held in a distant town. Without the privileges of the charter, the visiting merchant would be subjected to a toll by the other town. In the charter to the men of Gloucester the King says:

> "And if any one in our whole land takes toll from the men of Gloucester of the gild merchant, and shall refuse justice, the sheriff of Gloucester or the reeve of Gloucester shall for this take a nam at Gloucester." 2/

Sometimes the gild merchant included a court of justice. The "gilda," or right to be a member of the gild, was a valuable property right and a prized possession which could be inherited. Disputes about these rights, in addition to other legal actions in debt, covenant or

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* The views herein are those of the speaker and are not necessarily official views of the Federal Trade Commission.

1/Pollock and Maitland, The History of English Law, Cambridge, 1952, i.p. 664. A "nam" (or naam) was a seizure of personal property by an officer of the law.

2/Idem, p. 666.

trespass, were brought to this court. One interesting legal privilege of a gildsman was the right to claim a share in any bargain that he saw a brother gildsman making.3/ I doubt that this would be a popular by-law in your own brotherhood of blueprinters.

Trade associations more closely akin to those we know today began to be formed in England around the middle of the 18th Century. In America, trade associations appeared as early as 1768, just eight years before Adam Smith, archenemy of trade restrictions, published the first edition of The Wealth of Nations. By the early 1900's, many trade associations were fixing prices, allocating production and entering into other restrictive agreements. With stricter antitrust laws, the pendulum swung the other way, until in the 1920's and in the late 1930's businessmen had good reason for feeling that all trade association activities would be condemned by the government.

At the present time I believe a fair balance is being struck between these two extremes. The agencies that enforce the antitrust laws recognize the need for trade associations but at the same time they scrutinize trade association activities for signs of violation of the antitrust laws.

There are more than 12,000 trade associations in this country today. Clearly, these associations perform a necessary function in business and they have shown their ability to exist within the framework of the antitrust laws.

Legitimate trade association activities are valuable not only to the individual members in giving them a picture of the industry as a whole, showing them new developments, and allowing them to compare individual progress with that of the entire industry, but also in maintaining competition on a nation-wide scale. In short, trade associations can provide a most necessary element in modern competition: a vehicle for the open communication of specialized information and ideas. As long as the trade association remains a forum for ideas and information, and each member preserves his right to think and act independently, it is useful. When the trade association begins to dictate policies, or to protect inefficient business at the expense of the consumer or the efficient businessman, the servant has become the master. In this connection Chairman Edward F. Howrey of the Federal Trade Commission recently stated:

> "... in a free business system, some concerns are bound to be injured in the competitive struggle. But this variety of injury - a necessary property of true competition - must not be confused with injury to the competitive system itself. Therefore trade associations ought to take care that in promoting the welfare of their members they do not overprotect them against competitive injury by devices that may destroy competition altogether. While they may gather, collate and publish certain types of information which will enable their members to market more intelligently, they must avoid any activity having the effect of prescribing prices or otherwise lessening competition." 4/

3/Idem, p. 668.

4/Address before Section of Antitrust Law of the American Bar Association, Washington, D. C., April 1, 1955.

As members of a trade association, you will be vitally concerned with two federal statutes: the Sherman Act and the Federal Trade Commission Act. Under the Sherman Act a "combination . . . or conspiracy in restraint of trade" is unlawful. The Federal Trade Commission Act forbids "unfair methods of competition." An unfair method of competition may be something less than a conspiracy in restraint of trade. Since both statutes are purposely broad, they do not throw much light upon what particular activities of a trade association are legal. However, by looking at the court cases which have involved trade associations in the past it is possible to glean some information from the activities that have been held unlawful.

1. Purposes of the trade association

If a trade association is organized for an illegal purpose (such as to fix prices, to eliminate competition, etc.), its price-reporting activities are likely to be found illegal.5/

2. Lawful activities

A trade association which has no illegal intent reasonably may expect to carry on, without government interference, activities such as health and safety programs, general publicity campaigns, and research programs. Some problems may grow out of a research program unless the results of the research are made available to all competitors on reasonable terms, whether or not they are members of the association.

3. Members

It may be dangerous to exclude certain companies in an industry from membership in an association which covers the same business activity for some benefits are bound to accrue only to members, and non-members might be injured.6/ On the other hand, it may be unwise to include manufacturers, wholesalers and retailers in a single association, since this offers opportunity for vertical price-fixing.7/

4. Unlawful activities

These include:

a. price-fixing.
b. limiting production.
c. deciding what will be produced.
d. allocating production, geographically or otherwise.
e. allocating markets, geographically or otherwise.
f. excluding certain customers from buying any product.

5. Activities which may be lawful or unlawful

When an industry appears to have uniform prices, unusually high prices, a scarcity of certain products, or some other sign of agreements

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5/Sugar Institute, Inc. v. United States (1936) 297 U.S. 553.
6/Associated Press v. United States 326 U.S. 1 (1945).
7/Advertising Specialty National Association, (1955) F.T.C. Dkt. 5952.

in restraint of trade, the law enforcement agencies are faced with a serious problem of proof. The situation may result from natural economic causes or unlawful agreements. Malcolm I. Ruddock points out 8/ that a similarity of prices in an industry can be the result of vigorous competition in which the seller, by getting immediate information about his competitor's price, meets that price. This would be especially true where the industry product is standardized and trade-mark appeal is not an important influence on consumer choice. The similarity of prices also could be the result of price fixing, use of uniform contracts, or some other unlawful agreement which would have a highly undesirable effect upon competition.

Hence, the pattern of activities 9/ of the trade association or even the language used becomes important to the courts and the Commission, for there is no other way to determine what caused the identical prices. The trade association is not likely to admit doing any of the clearly unlawful activities. In order to prevent industry from doing indirectly what it cannot do directly, the courts and the Commission will scrutinize otherwise lawful activities of the trade association to ascertain whether they are being used in furtherance of a restraint of trade or an unfair practice in commerce.

This is the area of activities which is neither white nor black but could perhaps be described as gray. As a result, certain trade association activities seem to be evidentiary mugwumps. They may appear in one case as part of the proof of restraint of trade and in another case as innocent and useful activities which encourage competition or stabilize industry.

a. One of these legal chameleons is price reporting. Chairman Howrey has stated that "the activity that has done the most to bring trade associations into difficulty with the Commission has been the exchange of price information." 10/ Reporting of past prices appears to be lawful, as long as the past prices have no direct effect on future prices, and as long as prices are not recommended, interpreted, or predicted. Widespread price information may even help to maintain competition, when it is as available to purchasers as to sellers.

Some have commented that it is "remarkable thought transference" when all the manufacturers in a certain industry raise their prices by a fraction of a cent on the same day. 11/ This would make a clearer case for finding concerted action than if the price were lowered on the same day. The necessity of relating the cause to the effect is what makes these functions of a trade association important links of evidence in an antitrust case.

8/Ruddock, The Organization and Activities of a Trade Association, Address before the Section of Antitrust Law of the American Bar Association, Washington, D. C., April 1, 1955.

9/Idem. Mr. Ruddock suggests that a "certain grouping of legal trees may create an illegal forest."

10/Howrey, The Federal Trade Commission Looks at Trade Associations, Address before the Section of Antitrust Law of the American Bar Association, Washington, D. C., April 1, 1955.

11/Barnes, The Antitrust Division Looks at Trade Associations, Address before the Section of Antitrust Law of the American Bar Association, April 1, 1955.

b. Closely related to price-reporting is the collection of other data on costs, production, markets, and similar statistics. Such information may be exchanged lawfully under certain circumstances. It is advisable to have the information widely distributed and easily available to all interested persons on reasonable conditions.12/ No statistics should be compiled as to individual companies. If individual companies decide to act upon the information supplied, i.e. to increase or decrease production, change procedures, etc. such action would be lawful as long as it was apparent that there was no concert of action among various companies. One case held that the distribution of uniform freight rate schedules was one element in an illegal combination to fix prices, 13/ yet in other cases distribution of freight rate books was held to be legal.14/ Uniform costing procedures which are used in order to fix the ultimate price to the consumer are, of course, unlawful, but if the costing procedure may be rejected by an individual member it may be lawful. When the result of a uniform costing procedure means a substantial saving to an individual member, it may require a crystal ball to determine whether adoption of the procedure by all the members is the outcome of individual choice or the result of tacit joint agreement.

c. A third activity which may or may not be lawful is standardization. In an industry where products tend to be alike in quality, the antitrust hazards are increased, for prices on standardized goods will tend to reach one level as a result of consumer demand.15/ Nevertheless, standardization of a product is not necessarily bad, 16/ if it does not injure certain members of the industry, give the customer less quality, or lessen competition. One example of this, given by Ephraim Jacobs, is that it might be lawful to standardize shirt sizes which would save the expense of making 1/4 sizes yet not affect the quality of the shirts. But if the length of a roll of paper towels were standardized, the customer would have lost an element of quality, and a manufacturer would be prevented from making his product better than his competitor's. This would be clearly a restraint of trade.17/

There are many other trade association activities which for one reason or another may be held to be unlawful. Almost any exchange of information, agreement or joint project undertaken by a trade association may be struck down if it can be shown that it is part of a pattern in restraint of trade.

What course is open to an individual member of a trade association when he feels that the association has overstepped itself and may be

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12/Tag Manufacturers Institute v. Federal Trade Commission, (1 Cir. 1949) 174 F 2d 452.

13/Federal Trade Commission v. Cement Institute (1948) 333 U.S. 638.

14/Maple Flooring Manufacturers Association v. United States 268 U.S. 563 (1925).

15/See, for example, Bond Crown & Cork Company v. Federal Trade Commission 176 F. 2d 974 (4th Cir. 1949).

16/Tag Manufacturers Institute v. Federal Trade Commission, 174 F. 2d 452 (1 Cir. 1949).

17/Jacobs, Address before the Antitrust Section of the American Bar Association, Washington, D. C., April 1, 1955.

violating the antitrust laws? There was a time, not too long ago, when his attorney would advise him to resign from the trade association and to stay away from the meetings. Today resignation does not bring about an automatic immunity from antitrust prosecution laws even if you resign from the association.18/ Your safest course is to insist that your association retain able counsel and an able Secretary or Executive Director. Above all, the members should believe in and practice genuine competition. They should use their association as a means of sharpening competition and improving the quality of the industry products, rather than as a crutch to poor business methods.

The right objectives along with a carefully planned program avoiding dangerous topics of discussion will go a long way towards keeping your trade association out of trouble. George P. Lamb pointed out in a recent article that the misuse of such words as "agreement," "understanding," "standard price," and "keep in line," can spell the doom of a program which might otherwise be considered legal.19/

Certain language has acquired a connotation of antitrust conspiracy. When it is coupled with a number of questionable activities, any one of which might be lawful by itself, an illegal course of conduct may be inferred from the picture as a whole. It might be well for a trade association to follow the sage advice of the Red Queen to Alice, "Always speak the truth -- think before you speak -- and write it down afterwards." A trade association which is constantly looking for ways to camouflage its restrictive agreements and circumvent the antitrust laws will eventually run into them head-on.

The government is more than a policeman of trade associations; it has a stake in their activities. John Stuart Mill said in 1848:

> "A good government will give all its aid in such a shape as to encourage and nurture any rudiments it may find of a spirit of individual exertion. It will be assiduous in removing obstacles and discouragements to voluntary enterprise, and in giving whatever facilities and whatever direction and guidance may be necessary . . ."20/

I hope that your new trade association will contain the rudiments of the spirit of individual exertion and voluntary enterprise of which our country can be justly proud.

18/Phelps Dodge Refining Corp. v. F.T.C. 139 F. 2d 393 (2 Cir. 1943).

19/Lamb, Anti-trust Counseling of Today's Trade Association, American Trade Association Executives Journal, July 1953, V. no. 3, p. 10.

20/Mill, Principles of Political Economy, London, 1940, p. 978.