

THE BASING POINT DECISION

Remarks of

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Thank you, Mr. Bowditch. Ladies and Gentlemen, I am glad to be here. My wife is a New Englander. My grandmother was a New Englander. My great-grandmother was a New Englander. I am not going to waste any time telling you about those people, but I just want you to know that I am glad to be here.

I have had no time to write a speech. I told that to these gentlemen when they asked me to come up here. It seems that I have been kept pretty busy going around to various meetings, without time to really write a speech. But I have gone before the Business Advisory Council. I have gone before the National Council on Distribution, and a number of other organizations, and I have said a few words, and then I have answered questions. And I am prepared to do that this morning.

The publicity folks of this Council, however, wanted something in writing, in advance, and something you could take away with you, so Corwin Edwards, our Chief Economist, is here with me. He has a prepared speech, copies of which will be available to you, and I understand also that he is going to give you some highlights of that speech here today.

I am a lawyer. I am not an economist. I am not a doctor. I have been a lawyer for more than thirty years. Right now I am occupying what you might call a judicial position with respect to these matters. And anything within that province I am here to answer for to the best of my ability.

The first thing I want to say is a word regarding the Commission's position. The Federal Trade Commission is not seeking to enforce any arbitrary methods of pricing, and it is suggesting no formula to replace any of the pricing practices, the legality of which has been questioned.

Statements that the Commission seeks to enforce universal f.o.b. mill pricing, or to set up local monopolies, are without foundation.

The Commission has questioned delivered price systems when these systems are used by a group of concerns in an industry to establish identical prices at each delivery point, and thus to eliminate price competition -- the oldest, most fundamental violation of the anti-trust laws. That is price fixing.

If competitors agree to fix prices, they have violated the Federal Trade Commission Act, no matter what means they use to bring about that result. In the Cement Case the Commission found and the Supreme Court sustained the finding, that an important means had been an agreement to abide by the basing point formula.

I might say this about the Cement Case -- there were 99,000 pages of testimony and exhibits. I have with me the pamphlet copy of the Supreme Court decision. I know there are a number of lawyers here who would be interested in the complaint, Counts 1 and 2, the Commission's Order, the findings of fact upon evidence, and particularly the detailed findings which

relation to the overt acts that were found to have been done to implement and carry out the conspiracy and agreement.

I had a lawyer in New York call me up after I had testified before the Capehart Committee on June 2. I had just gotten back from the Committee. He was at his club.

He said, "Congratulations."

I said, "What about?"

He said, "Why, it came over the ticker that you testified before the Committee."

I said, "Yes, that is true. Why do you congratulate me about that?"

He said, "Well, I want to congratulate you because the report goes on to say that you mentioned the ugly word 'conspiracy.' Nobody has ever mentioned that in connection with the case around here."

I said, "All right. Thanks." And I hung up.

The next afternoon I got an air mail special delivery letter from him enclosing a copy of the New York Times statement on the subject. He said, "This sounds like a very accurate statement, but you will note that the ugly word 'conspiracy' does not appear."

Now I am not going into a description of cases. As I told you, I did not come prepared to make a speech, but I want to recapitulate for you just a minute what is in those cases that we have decided, and in which we have been affirmed by the courts. Those proceedings have involved the legality of the methods of pricing, and they have been based squarely on price-fixing conspiracy or on price discriminations which injured or destroyed competition, and which cannot be justified by legitimate differences in the cost of manufacture, distributing, or selling.

There is no new strange theory of law or of economics in these proceedings. The Commission is not seeking to confine industries to local territories, prevent national distribution by any concerns which can achieve that distribution without either entering into agreements, or tacit understandings with their competitors, to eliminate competition or resorting to unjustifiable price discriminations.

Now in the light of that analysis, I would just like to offer two conclusions for you. The first is that basing point and delivered price systems, as such, are under no special attack. In proceeding against collusive price fixing, and injurious price discrimination, the Commission has attacked those delivered price systems where they appeared to be the core of price fixing conspiracies or destructive of competition.

Second, it has been too broadly asserted that all delivered prices are unlawful. No Commission order has yet required f.o.b. mill pricing, nor

forbidden freight absorption, except in a context of price fixing or destruction of competition, and since, of course, the Commission has entered no such order, the courts have sustained none.

I want to say also that I appreciate the opportunity to answer questions, and I shall do that later. Thank you.