ear Congressman:

The attached analysis of S. 1008, repared at my request by Robert Elliott reer, merits your consideration.

Mr. Freer not only was Chairman of the ederal Trade Commission until last year ut also bears a fine reputation as a con- ervative and careful lawyer.

I am sure that anyone who digests he facts as set forth in this carefully rawn opinion will readily understand why e should vote to kill S. 1008.

Sincerely,

Rankin Peck

Rankin Peck

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March 8, 1950

r. Rankin P. Peck, President,
ational Congress of Petroleum Retailers,
05 East Adams Avenue,
etroit, Michigan.

Re: Second Conference Committee Report S. 1008

ear Mr. Peck:

In response to your request, the following brief analysis is ubmitted of the provisions and probable effects of S.1008 in the form in hich the second Conference Committee will report it,[1] as indicated by an nnouncement[2] of the conferee's agreement published at page D.199 in the ongressional Record of March 2, 1950:

Section 1

Intended apparently to be a legislative declaration of that hich the Federal Trade Commission states the present law to be, Section 1 ould amend Section 5 of the Federal Trade Commission Act so as to legisatively declare the right of sellers to absorb freight in the absence of onspiracy or collusive agreement. The question is whether such legislatve declaration is necessary. No decision of the Commission challenges hat right, nor can freight absorption, competitively employed, logically e challenged as an unfair method of competition under Section 5 of the ederal Trade Commission Act. In denying a motion to modify Count II of he order in the Rigid Steel Conduit Case (D.4452), the Commission, on uly 12, 1949, specifically stated that that order did not prohibit ndependent as distinguished from collusive use of freight absorption.

While Sections 2, 3 and 4 of S.1008 would amend the Clayton Robinson-Patman) Act, their inclusion in S.1008, along with Section 1 hich would amend the F.T.C. Act, might tend to add to rather than to dissiate any confusion existing as to the status of freight absorption under he latter Act.

Additional construction of the new law by F.T.C. and the ourt's would be required before the Commission could speak with the assurnce it did in its previous statements, as to the legality of individual se of freight absorption under the F.T.C. Act and the illegality thereunder f industry-wide employment of freight absorption (or other geographic ystem) as a means of matching delivered prices to all customers at any iven destination.

Section 2

Section 2 A would exempt from possible challenge under the layton Act the limited-zone method of delivered pricing as well as the ne-zone or so-called "postage stamp" method.

Dicta in the late Chief Justice Stone's opinion in the Staley ase (324 U.S. at p.751) indicates that the "postage stamp" method may be xempt without necessity of this amendment.

The test applied by F.T.C. under the Robinson-Patman Act to eographic pricing is injury to competition. In the Cement case (333 U.S. 83) it was destruction of competition between sellers; in the Staley ase (324 U.S. 746) the injury was to those buyers paying "phantom freight" harges. Section 2 B would exempt from challenge under the Clayton, reight absorption employed to meet the equally low price of a competitor. hat has been said about Section 1 and Section 2 A is applicable here also. f freight absorption is neither collusively employed as a device for elim- nating price competition among sellers, nor systematically used to the njury of mill-side purchasers in competition with their more distant ompetitors, it is not subject to challenge under the Robinson-Patman Act.

Section 3

Section 3 apparently would legislatively reverse not only the ecision of the U.S. Court of Appeals in the Standard Oil of Indiana case 173 Fed (2nd) 210), but also the considered judgment of the 74th Congress egarding the effect of meeting competition in good faith as a defense to charge of discrimination injuring competition. In the Standard Oil case, f Standard had only reduced its price in good faith to meet the equally ow price of another major oil company the result would have been competi- ion. Standard, however gave unjustified quantity discounts to four ustomers and not to several hundred other competing customers. The defense as that other oil companies either had offered to meet or would have met he demands of these four favored customers for a "jobber Classification" nd a lower price. The good faith of such a meeting of a lower price might ave been a defense, despite the resulting injurious discrimination, under he good faith proviso of old Section 2 of the Clayton Act prior to the 936 Robinson-Patman Amendments; Congress, however, deliberately changed hat proviso's status to a procedural status by the Robinson-Patman Act.

Section 2 B did not provide that such good faith lower price ould justify an injurious discrimination only that it might serve to rebut e prima facie case made by a mere showing of price differences. Section despite the Carrol Amendment, not only might restore this defect in en- rcement of the old Section 2, but also might add even more difficulties enforcement than existed in the administration of old Section 2. For ample, predatory price cutting, a tool of monopoly rather than that of ealthy competition, is presently hard to reach because it is defended as

defensive meeting of local competition; under Section 3, it might become almost impossible.

Section 4

Sections 4 A, B and C provide definitions of some but not all of the new terms employed in Sections 1, 2 and 3, and are of importance in appraising the changes wrought in the law by use, in those sections, of the terms which are here defined.

Section 4 D provides a definition meriting somewhat greater consideration since it would reverse the U.S. Supreme Court's decision in the Morton Salt case (334 U.S. 37) which interpreted the phrase "effect may be" in the Act as meaning "a reasonable possibility." Section 4 D's definition is that this phrase shall mean "reasonable probability" of the specified effect.

In practice, the F.T.C. has neither employed the "reasonable possibility" interpretation nor indicated any disposition to do so. Adoption of Section 4 D, therefore, appears to be a matter of legislative discretion, depending on whether Congress deems it necessary to take positive steps to prevent "possible" rather than "probable" F.T.C. implementation of this Supreme Court interpretation of the term "effect may be."

To fully appraise the changes in substantive law which S.1008 would produce there is submitted the following brief recitation of the decisions which led to its introduction:

GEOGRAPHICAL PRICING

Uniform Delivered Pricing Systems

In any industry where transportation charges are of real importance, some systematic method of equalizing transportation costs must be employed in determining the laid-down cost of the product to the customer so as to enable each seller to be able to match exactly his delivered price quotation to a distant customer with those of all his competitors. The key to this geographic price matching problem under the F.T.C. Act is "collusion." Various systems found to have been collusively used are: 1. single basing point, involving both "phantom freight" and systematic "freight absorption," e.g., the U. S. Steel (Pittsburgh Plus) (U. S. Court of Appeals (3rd) Oct. 5, 1948) and Rigid Steel Conduit (168 Fed (2nd) 175) cases; 2. Multiple basing point, likewise involving both "phantom freight" and systematic "freight absorption," e.g., The Cement case (33 U. S. 683); 3. Freight equalization, involving systematic freight absorption and similar to the multiple basing point except that technically no "phantom freight" is involved, since every mill is a base, e.g., Milk and Ice Cream Can (152 Fed (2nd) 478) and Bond Crown & Cork Cases (76 Fed (2nd) 974); 4. Zone pricing [illegible] iple

basing point used "to obviate any natural advantage of location from price determination," e.g., Fort Howard Paper (156 Fed. (2nd) 899) (crepe paper) case.

In all of these cases the evidence before F.T.C. has been held by the Courts to have established collusion in the maintenance of such geographic pricing systems contrary to Section 5 of the F.T.C. act. None of the cases forbids individual or competitive employment of freight absorption. It is the fixing of prices by collusion which is held to be per se illegal, not the means (system) employed in the particular case, despite intimations in some of the cases that those particular systems were so complex as to warrant a doubt that they could have been employed at all in the absence of the established collusion among the sellers.

The Robinson-Patman Act has sometimes been used by F.T.C. along with Section 5 of the F.T.C. Act in basing point cases. Geographic pricing under the various basing point systems generally means that customers in different localities are charged different prices which are systematically related to the distance from the controlling base but which bear no relation to the distance from the seller's mill. If these price differences are not shown to injure competition, they do not violate the Robinson-Patman Act. If they do injure competition they are illegal unless justified by the seller. And here it is that the perverse relationship which his price differences bear to his freight costs militates against the seller's successfully claiming that these price differences are not illegal discriminations because justified by differences in cost of delivery (one of the statutory justifications).

PRICE DISCRIMINATION

Just as collusion is the key to the problem under the F.T.C. Act, injury to competition is the key to the price discrimination problem under the Robinson-Patman Act.

Section 2a of the Robinson-Patman Amendment to the Clayton Act provides, in pertinent part, "That it shall be unlawful for any person...to discriminate in price between purchasers of commodities of like grade and quality....where the effect of such discrimination may be to substantially lessen competition....", excepting, however, by its proviso, "...differentials which make only due allowance for differences in the cost of manufacture, sale or delivery." This condemns price differences not justified by cost differences where the effect is to suppress competition among sellers or to injure competition among competing customers of the discriminating seller. Section 2b recites that a prima facie case is made by the mere showing of a "discrimination

in price," but, in its proviso, states that a seller may rebut such a prima facie case "by showing that his lower price...was made in good faith to meet an equally low price of a competitor..." In several cases, the Commission has found against this defense on the facts. In the Cement case, for example, collusion to avoid competition negatived the good faith of the multiple basing point system of matched prices as a meeting of competition (333 U.S. 683). In the Staley case, the matching of single basing point prices also failed to meet the good faith test (324 U.S. 746, 757). In Standard Oil of Indiana, however, the proof of injury to several hundred retailers of Standard's Red Crown gasoline resulting from Standard's subsidized discrimination practiced through its four so-called wholesalers (all of whom sold Standard's Red Crown gasoline at retail in competition, not with Standard, but with Standard's several hundred other retailers), was considered to counterbalance Standard's defense of good faith meeting competition of other sellers. Section 2b being held to be merely procedural, and not to provide a substantive defense, served only to offset the Commission's prima facie case; and since it did not outweigh the proof of injury to competition, no finding of either good faith or lack of it was found necessary in the case.

As stated by Representative Utterback, "a discrimination is more than a mere difference...some relationship... between the parties to the discrimination...entitles them to equal treatment..." The F.T.C., therefore, proceeds against a sellers' difference in price as an illegal discrimination only where its investigation indicates competition between his buyers or their customers and a "reasonable possibility" of injury thereto, or where, as in Count II in the Cement case, it finds the discrimination to be of collusive origin and to result in injury to competition among sellers. Under F.T.C. policy as a practical matter there must be more than a "reasonable possibility" of injury to some level of competition before the Commission will take action.

Conclusion

Instead of clarifying the law, enactment of S. 1008 may have the opposite effect. Price fixing is seldom accomplished by formal agreement "signed and sealed in the blood." The agreement usually is shown to have existed by reasonable inferences drawn from all the surrounding facts and circumstances, rather than by the introduction in evidence of a written agreement to fix prices. The nub of the controversy over the recent court decisions appears to be whether F.T.C. and the federal courts should continue to be able to draw a reasonable inference of the collusive agreement to fix prices from the other facts established by direct evidence, such as for example the collective efforts of the industry to main-

ain its price structure. In the Cement case these were summarized by ne Supreme Court at page 710 of its opinion, to include "...boycotts; ischarge of uncooperative employees; organized opposition to ... new ement plants; selling cement in a recalcitrant price cutter's sales erritory at a price so low that the recalcitrant was forced to adhere o the established basing point prices; discouraging the shipment of ment by truck or barge; and preparing and distributing freight rate ooks which provided respondents with similar figures to use as actual r 'phanton' freight factors, thus guaranteeing that their delivered rices (base prices plus freight factors) would be identical on all ales whether made to individual purchasers under open bids or to overnmental agencies under sealed bids..."

The Federal Trade Commission has not issued orders against nyone solely or even primarily on the basis of his individually quoting or selling at a price identical to or matched with that of a ompetitor. In cases where orders have issued they ran against atched prices maintained by collusion and generally were based on ome direct evidence of the collusion as well as upon reasonable inerences drawn from the collective efforts of the industry members to ffectuate certain programs such as those cited by the Supreme Court n the Cement Case.

Whatever the feeling of business men generally may be as to hether collusion may continue to be inferred from direct evidence of uch collective ac tivities, a part of the business community do not rge S. 1008 on that ground, but on the ground that its enactment ould legalize the kind of basing point selling found illegal as ollusive price fixing and in which the injuriously discriminatory eographic prices had the effect of suppressing price competition mong sellers.

No case holds freight absorption illegal under the F.T.C. ct in the absence of collusion. Nor can any hold it illegal under the obinson-Patman Act in the absence of a showing of unjustified injury o competition. Section 1 of S. 1008 in legislatively declaring the legality of freight absorption attempts to safeguard against a return f the Cement Case type of freight absorption maintained by conspiracy.

As pointed out earlier, the results of litigation to test the adequacy or inadequacy of the Section 1 safeguard would have to be predicted to appraise the real effectiveness of this effort to safeguard the public against a return of collusive geographic pricing. Delay and uncertainty in the interim, which is predictable, would handicap F.T.C. in enforcement of its orders against continued use of geographic pricing involving freight absorption, previously found to

ave been maintained by collusion contrary to Section 5 and/or to have esulted in unjustified discriminations destructive of competition con-rary to the Robinson-Patman Act.

S. 1008 would legislatively reverse not only several decisions f the U. S. Supreme and other federal courts but also, in so far as its endment of the Section 2 B--"good faith"--proviso of the Robinson-atman Act is concerned, the considered judgment and deliberate action f the 74th Congress taken after full hearings in both Houses held llowing submission to the Congress of F.T.C.'s Chain Store Investiga-ion (Senate Document No. 4, 74th Cong. 1st Sess.) showing the destructive ffect on competition of price discrimination in favor of large buyers. uch a legislative reversal should be based on a showing of real need for he change rather than the showing of confusion regarding what new ricing methods may legally be substituted for those collusive and njurious geographic systems held illegal in the cases evoking the bill.

Very truly yours,

Robert Elliott Freer

Robert Elliott Freer

A comprehensive analysis of S. 1008 as reported by the first onference committee (and still applicable except as to Sec. 4 D) is found t pages 636-641 of the Congressional Record of January 19, 1950.

The announcement reads as follows:

"PRICING PRACTICES

"In late session yesterday, the conferees on S. 1008 to define application of F.T.C. Act and Clayton Act to certain pricing practices, legalizing the basing point system in the absence of conspiracy to lessen competition, agreed to file a second conference report on the differences between the House and Senate passed versions of the bill, the first conference report having been recommitted by the Senate on January 20, 1950. The second conference report, as approved by conferees last night, reaffirms the action of the first conference committee except in the case of House amendment No. 4, an amendment to section 4 (d) of the bill, to which the Senate conferees receded, accepting the House amendment. The report is not expected to come up in the House until after March 13, with the House acting on the report first."