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ADDRESS OF
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BEFORE
AMERICAN GROCERY SPECIALTIES ASSOCIATION

AT
CHICAGO, ILLINOIS,
October 22, 1928.

TRADE PRACTICE CONFERENCES

In response to the request of your President I am very happy to be here today and to add my mite towards clarifying the atmosphere by telling those assembled what the purpose of the Trade Practice Conference is; how it will be conducted; and the part the Federal Trade Commission, and consequently the Government, will play therein and thereafter. That is a rather large order, but my word is out, and I will do my best to keep my promise.

The Federal Trade Commission Act creating the Federal Trade Commission was approved by the President on September 26, 1914. Section 5 of the Act begins with a declaration that unfair methods of competition in commerce are hereby declared unlawful and the Commission, composed of five commissioners, is empowered and directed to prevent persons, partnerships and corporations, except banks and common carriers subject to the acts to regulate commerce, from using such unfair methods of competition. There has been much debate as to just what acts in interstate commerce constitute unfair methods of competition.

Judge Brandeis in his dissenting opinion in Federal Trade Commission v. Gratz says in part: "The question whether a method of competitive practice was unfair would ordinarily depend upon special facts, Congress imposed upon the Commission the duty of finding the facts; and it declared that the findings of facts so made (if duly supported by evidence) were to be taken as final."

The Federal Trade Commission Act was something new and Congress acted in response to a demand that a government body be created with authority to protect the public interest and promote fair competition in interstate trade. The decisions of the courts prior to the enactment of the law under which the Commission functions had established a precedent to the effect that a person who manufactured a product

and truthfully advertised and sold the same could not invoke the equitable jurisdiction of the courts to enjoin all competitors whose goods were misbranded so as to deceive the purchasing public. The Commission was without a precedent as to procedure in the enforcement of the Act. Naturally it followed the one direction laid down by Congress in Section 5, to prevent persons, partnerships and corporations, subject to the Act, from using unfair methods of competition. Congress decreed in effect that whenever the Commission shall have reason to believe that anyone subject to the jurisdiction of the Act has been or is using any unfair methods of competition in commerce, and if it shall appear to the Commission that a proceeding by it would be in the public interest, it shall issue and serve upon proposed respondent a complaint. This procedure called for a long drawn out contest in many cases which resulted in large expenditures of time and money and the piling up of cases until many of them were aged and gray.

The above situation was cured by new rules of procedure, adopted by the Commission in 1925, the most important of which are the rules granting a proposed respondent a hearing or day in court before the Board of Review before issuing complaint and providing for the settling cases of minor importance by stipulation. I discussed these rules of procedure in an address before this body at its last annual convention, held in Atlantic City one year ago, and do not think it necessary to make further mention here.

The student in geometry after stating a proposition is called upon to prove it, so I am called upon in substance to define what constitutes a Trade Practice Conference and demonstrate its value to the Government and the industry as administered by the Commission.

A Trade Practice Conference is an offer on the part of the Commission to cooperate with the members of an industry who find themselves in this predicament, namely, that they are using unfair trade practices to such an extent that every unit in the trade finds itself unable to successfully abandon the practices unless a large percent agree to do so by adopting rules declaring such practices unfair and call upon the Commission to provide the time and place when and where rules may be adopted condemning the practices complained of, said rules to be made a part of the Commission's Trade Practice Conference file after having been approved by the Commission, or received as an expression of the trade.

The Commission held its first Trade Practice Conference with the creamery industry at Omaha, Nebraska, in 1919. A few other conferences were held at intervals up until 1926 when the subject was made a separate division with Mr. M. M. Flannery, director in charge. Since 1926, when the division became active, it has gained rapidly in favor and has been one of the leading factors in the elimination of unfair trade practices. The Trade Practice Conference division is now receiving the entire time of Mr. Flannery and his force of seven employees checking up on the resolutions adopted or in the course of being adopted, in some forty conferences of different industries.

The division reports any violations of the conference rules to the Commission so that the separate conferences are not just pigeon-holed and forgotten but are checked for any violation of rules adopted. Following a conference with an industry, any person, partnership or corporation in the industry who refuses to observe rules adopted at the conference that are unlawful per se are subject to be proceeded against by the Commission.

The Trade Practice Conference affords a means through which representatives of an industry voluntarily assembled, either at their own instance or that of the Commission, but under auspices of the latter, for the purpose of considering unfair practices in their industry and collectively agreeing upon and providing for their abandonment in cooperation with the Commission. The procedure deals with the industry as a unit and is concerned only with practices and methods not with individual offenders.

The Commission has already contended that the grocery trade practice conference scheduled for the 24th of this month, is your meeting, and it is, for the resolutions adopted will come from your body; but the meeting is called by the Commission and a commissioner is designated by it to preside who may take part in the discussion in a spirit of cooperation and to caution against the adoption of rules which would adversely effect the public interest. Your industry through your various associations might assemble and adopt a code of ethics agreeing to eliminate trade abuses agreed to be unfair but I imagine the result would be a disappointment, as some farm agreements among groups of farmers to which I have been a part, have resulted in disappointments. They failed to stick together. We now hear much talk about creating through legislation a farm board to advise farmers and assist them to cooperate and "stay put".

Business already has the Federal Trade Commission to cooperate with it and help it to observe rules intended to promote fair competition. Thus far the result of the trade practice conferences has been very satisfactory and has eliminated bushels of unfair trade practices with large benefit to the trade and increased protection to the public interest.

It is the practice of the Commission in passing on the result of a conference to divide the rules adopted by the trade into two groups. Group I rules consist of those which the Commission affirmatively approve thereby declaring in effect that all parties engaging in the practices condemned are using unfair methods of competition within the meaning of the Federal Trade Commission Act and are subject to be proceeded against by the Commission.

Group II rules condemn practices with regard to the legality of which the Commission expresses no opinion, the rules being received by the Commission as expressing the opinion of the industry that the use of such practices constitute unfair methods of competition.

For some time past inquiries have been coming to the Commission asking as to the value of Group II rules. Some members of the industry who have participated in a trade practice conference and adopted and agreed to observe Group II rules are wondering what corrective action the Commission would bring against certain competitors in the industry in case they violated the rule. In answer to this query the majority of the Commission has adopted the following:

It is a matter of public importance that the question of the enforceability of Group II rules be judicially determined. To expedite such determination, a majority of the Commission has taken the position that the clandestine violation of any Group II resolutions by one who has subscribed thereto in consideration of the like subscription by others in the industry, is in and of itself an unfair method of competition, calling for action by the Commission, even though the practice condemned by such rule has not heretofore been held violative of the Act by the Commission or any court.

Commissioners Humphrey and Ferguson did not concur in the position taken by the Commission in the foregoing paragraph, being of opinion it is beyond the power of the Commission.

As to the minority members of an industry who refuse to subscribe to the Group II rules, it is not now apparent how such rules could be enforced against them, unless the Commission, in considering a specific complaint, should conclude that a proceeding could be sustained under the Act regardless of the rule.

The public interest dictates that no rule should be received by the Commission which would work an undue hardship on the public or on one who has agreed to abide thereby. Such a rule, if not rejected by the Commission in the first instance, would be disapproved when its true character became known.

The majority of the Commission adopted the above rules in an attempt to clarify the Rule II problem in the minds of the industry. I hope that the action of the Commission will be generally approved by the trade and by the public.

A trade practice conference, to be successful, should bring out the best that is in the participants. They should be actuated by a generous desire to promote the interests of their industry as a whole. It is not a place to jockey for advantage over competitors or other branches of the business. Whatever is accomplished must be by agreement, and to secure results a spirit of cooperation and tolerance must prevail.

The Commission acts in the public interest in all things, and will not permit its procedure to become an instrument of oppression or restraint of trade.

I would not feel that I had fully discharged my mission if I did not give voice to certain thoughts in regard to the forthcoming grocery trade conference. I have high hope that constructive action will be taken which will greatly benefit this great industry. But we can not, and will not, take action which will in any degree anticipate or prejudice the possible findings and recommendations of the Commission in the resale price maintenance and chain store investigations now being conducted by the Commission.

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