Statement of

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Supplementing the Commission's
Answers to Questions submitted
to it on June 26, 1950, by

THE WATCHDOG SUBCOMMITTEE OF THE COMMITTEE

ON INTERSTATE AND FOREIGN COMMERCE OF THE

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APPENDIX A - SUPPLEMENTING THE ANSWER TO QUESTION ONE

In the cases now pending before the Commission involving the basing point question, price fixing conspiracies are charged. Of course, until they are submitted to the Commission for final determination I cannot know whether the charges have been proved. These cases are:

(1) Chain Institute Inc., et al., Docket No. 4878. In this case some twenty manufacturers are charged with having combined and conspired to restrain trade in the sale of chain and chain parts. Among the charges are:

> "The charges as hereinafter set forth are to the effect that the respondents have combined and conspired to restrain trade and commerce in the sale of chain and chain parts among the several States of the United States, that they have been and are making effective such combination and conspiracy through cooperative and collective action between and among themselves and with others, and that each respondent engaged in the manufacture and sale of chain uses methods and practices to make the combination and conspiracy more effective."

> "Basing Point Pricing System: Each Respondent Member in arriving at the sums or amounts quoted in its published price lists relating to Welded Chain provides that the delivered cost to any intending purchaser or user at the latter's destination shall be the figure or sum resulting from the use of a formula composed of a basing price plus freight from a single basing point (Pittsburgh, Pennsylvania) to the destination of such purchaser or user irrespective of whether shipment is to be made or is made from such basing point or another location from which other and different freight rates actually apply.

> "Each Respondent Member uses and specifies in its price lists relating to Welded Chain, the same base point and the same base price for such base point used that is used and specified by other Respondent Members. The result is that when the same base prices of each Respondent Member are so used as factors in the formula of base price plus the same freight factor from the base point to a purchaser's destination, their quoted delivered cost or price on Welded Chain to any intending purchaser or user at his destination is exactly matched and made identical by all Respondent Members at any given time.

> "Said Respondent Members produce Welded Chain and ship same to their respective customers from numerous points other than the point used, as aforesaid, as a basing point.

> "Each Respondent Member, in its use of the aforesaid basing point practice, notwithstanding differences in the actual freight rates from its place of business and manufacture to the different locations of its different customers with lower rates applying to those nearby than to those more distantly located, habitually and systematically demands, charges, accepts and receives as an inherent and necessary incident to the said basing point practice of delivered price quotations, larger sums and amounts for products of equal quality and quantity from its customers located at or near its place of business or manufacture than from other customers located at greated distances. Such nearby

customers are thereby required to pay more, and the more distant customers to pay less, to each Respondent Member for Welded Chain than would be the case if the forces of competition made and determined the prices at which Respondent Members sell chain and chain products.

"Each Respondent Member, as aforesaid, uses said basing point pricing practice as a device by which it not only suppresses price competition and deprives its nearby customers of price advantages which they would, under competitive conditions, enjoy by reason of their proximity to points of production, but also as an inherent and necessary incident to the operation of the aforesaid basing point method of pricing, unfairly discriminates against its nearby customers in favor of those more distantly located."

"Freight Equalization Pricing System: Each Respondent Member, in arriving at the sums or amounts quoted in its published price lists relating to Weldless Chain, provides that the delivered costs to any intending purchaser or user at the latter's destination shall be the figure or sum resulting from the use or application of a formula of an f.o.b. factory price quotation plus whatever freight factor is necessary to exactly equalize or match the sum of a base price at four specified basing points, namely, f.o.b. York, Pennsylvania; Cleveland, Ohio; Cincinnati, Ohio; or Bridgeport, Connecticut, plus freight therefrom to the buyers' destination as announced by it or other of the Respondent Members in such manner, form and substance as to enable, and which does enable, all Respondent Members to match their delivered costs on Weldless Chain as quoted by them to any intending purchaser or user at his destination at any given point of time.

"Said Respondent Members produce Weldless Chain and ship same to their respective customers from points other than the points named as aforesaid as f.o.b. points from which freight is equalized and delivered costs matched.

"Each Respondent Member, in its use of the aforesaid freight equalization pricing practice, notwithstanding differences in the actual freight rates from its place of business and manufacture to the different locations of its different customers with lower rates applying to those nearby than to those more distantly located, habitually and systematically demands, charges, accepts and receives as an inherent and necessary incident to the said freight equalization practice of price quotations, larger sums and amounts for products of the same quality and quantity from its customers located at or near its place of business and manufacture than from other customers located at greater distances. Such nearby customers are thereby required to pay more, and its more distant customers to pay less, to such Respondent Member for Weldless Chain and chain products than would be the case were its price quotations determined by the forces of competition.

"Each Respondent Member as aforesaid uses said freight equalization pricing practice as a device by which it not only suppresses price competition and deprives its nearby customers of price advantages which otherwise they would naturally enjoy by reason of their proximity to

places of productions, but also discriminates against such nearby customers in favor of those more distantly located."

"Zone Pricing System: Each Respondent Member in arriving at the sums or amounts quoted in its published price lists relating to Tire Chains provides that the delivered cost of tire chains to any intending purchaser or user at the latter's destination shall be identically the same delivered cost quoted to all other purchasers or users in the United States wherever located, irrespective of the fact that some such intending purchasers and users are located at or near such Respondent Member's place of manufacture and shipment and other purchasers and users are located thousands or miles away; also irrespective of the fact that the cost of shipping tire chains from its place of manufacture ranges from zero, with respect to those customers who take delivery at its place of manufacture, to an amount equal to a substantial part of the net price realized from the delivered price of Tire Chains sold to customers located at distances of 1,000 miles or more from the place of manufacture.

"Each Respondent Member uses the aforesaid zone pricing practice in order that it and other Respondent Members might match, and through its use they are enabled to match, the delivered cost quoted by each of the others to any intending purchaser or user of Tire Chains at any destination at a given time.

"Each Respondent Member, through the use of the aforesaid zone pricing practice, notwithstanding differences in the actual freight rates from its place of business and manufacture to the different locations of its different customers with lower rates applying to those nearby than to those more distantly located, habitually and systematically demands, charges, accepts and receives as a necessary incident to the aforesaid zone pricing practice of delivered price quotations, larger sums and amounts for products of equal quality and quantity from its respective customers located at or near its place of business or manufacture, than from other customers located at greater distances. Such nearby customers are thereby required to pay more, and the more distant customers to pay less, to it for Tire Chains than would otherwise be the case if the forces of competition made and determined the price quotations of each such Respondent Member.

"Each Respondent Member as aforesaid uses said zone pricing practice as a device by which it not only suppresses price competition and deprives its nearby customers of price advantages which otherwise they would naturally enjoy by reason of their proximity to points of production, but as a necessary incident to said zone pricing practice discriminates against its nearby customers in favor of other customers more distantly located."

(2) National Lead Co., et al., Docket No. 5253. In this case the National Lead Company is charged with having monopolized and attempted to monopolize the interstate sale of lead pigments and with having combined, conspired, and cooperated with six other respondents to hinder, lessen, and eliminate price competition in the sale of lead pigments in the United States.

The respondents are also charged with having an agreement to use an identical zone pricing system which results in each selling at identical prices in various geographical areas. I quote from portions of the complaint:

"Respondent National Lead Company at the time of its inception, in 1891, embarked upon the execution of a plan and program to secure unto it a monopoly of and a monopoly power and control over the manufacture, pricing, sale and distribution of white lead in commerce. Pursuant to, in furtherance of, and in order to effectuate the purposes of that plan and program, respondent National has engaged in, continued and is now doing and performing and carrying on the following acts, methods and practices."

"Respondent National has also combined and conspired with the few remaining small and ostensibly independent manufacturers and primary sellers of white lead in the United States. In so doing, it has cooperated with and received assistance and cooperation from respondents Eagle-Picher Lead Company, Eagle-Picher Sales Company, Anaconda Copper Mining Company, International Smelting & Refining Company, The Sherwin-Williams Company, The Glidden Company, and the Lead Industries Association in which organization all respondents are members, in doing and performing the following acts and engaging in the following methods and practices.

(1) Agreed to adopt and have adopted and maintained a system of delivered price quotations which prevents reflection of any differences in the cost of delivery between the respective places of manufacture of respondent producers, the primary sellers and to the respective locations of intending purchasers of white lead;

(2) Agreed to adopt and have adopted and maintained a plan whereby the United States is divided into so-called zones whereby price offers made by the producing and primary selling respondents to all purchasers of a class throughout any one of such zones, regardless of location and the differences in freight rates from shipping point to destination, are matched, except that by prearrangement and understanding the offers made by respondents Glidden, Sherwin-Williams and International are permitted to be made and maintained at fixed differentials below the matched offers of respondents National and Eagle-Picher;

(3) Agreed to seek and secure and have sought and secured the advice, assistance and cooperation of the Lead Industries Association, its officers, employees, and agents in fixing, adopting, publishing and using noncompetitive terms and conditions of sale in connection with sales and offers to sell white lead in commerce;

(4) Exchanged directly and through the office of the Lead Industries Association and with the cooperation of officials of that Association price factors and information concerning price factors expected by respondents to be used and which at times have been used by the primary sellers of white lead, including the respondents, in calculating, determining and announcing their offers to sell white lead in commerce;

(5) Agreed to adopt and have adopted, maintained and used terms and conditions of sale embodied in so-called "consignment" or "agency"

agreements under the leadership of respondent National Lead Company for the purpose of preventing dealers selling white lead and white lead paint from making offers to sell such products at levels lower than the offers made by the respective respondent producers whose names were affixed to such "consignment" or "agency" agreements;

(6) Agreed to fix, and have fixed and included in offers to sell, the prices, terms and conditions at which white lead is sold and offered for sale in commerce;

(7) Respondents National and Eagle-Picher have discussed and collaborated upon carefully considered ways and means to have written into Federal specifications provisions, designed by respondent Eagle-Picher to eliminate from bidding on Federal Government proposals to buy their industry's products, prospective biders who were known to solicit Federal Government business through bids based upon specifications different from those applicable to the products of respondents National and Eagle-Picher; and

(8) Respondent National entered into contracts and understandings with E. I. du Pont de Nemours Company, Inc., a large paint manufacturer, for the purpose and with the effect of promoting maintenance of the levels of price fixed by National and other producing and primary sellers of white lead."

(3) Clay Products Association, Inc., et al., Docket No. 5483. In this case some eighteen manufacturers of clay products and their trade association are charged with fixing and maintaining prices and one of the methods alleged to have been used was that of establishing geographical zones for pricing purposes. It is charged in part:

"For more than five years last past respondents have done and performed, and are now doing and performing, unfair acts and practices, have engaged in and are now engaging in unfair methods of competition in violation of section 5 of the Federal Trade Commission Act in that they have acted, and are still acting, wrongfully and unlawfully by cooperating between and among themselves in establishing, adopting and continuing a common course of action, concert of action and agreement, resulting in substantial hindrance, frustration, restraint, suppression and prevention of competition in the sale and distribution of vitrified sewer pipe in trade and commerce, as "commerce" is defined in the Federal Trade Commission Act.

Pursuant to, in furtherance of, and in order to effectuate the purposes and objectives of the aforesaid cooperation and common course of action, and as part of their said cooperation, common course of action and agreement, respondents have formulated, adopted, performed and put into effect, among others, the overt acts and used the methods, systems, practices and policies listed, described and set forth in the immediately succeeding subparagraphs numbered 1 to 4, inclusive, of this PARAGRAPH SEVEN:

1. Respondents have fixed, established and maintained prices for vitrified sewer pipe in most of the trade area in which they do business. A method used in that connection is that of dividing the trade area into delivered price zones and agreeing upon and jointly publishing a master price list known generally in the

trade as the western price list, which said price list sets forth a basic price for each type of product for sale, together with discount rates which are applicable to the several delivered price zones, according to an agreed upon schedule of freight rate differentials. The delivered prices in any given zone do not reflect the true and actual freight rates to all destinations in the zone, but are averages of freight rates to the zone from the basing area, which is Uhrichsville, Ohio.

2. Respondents have established and maintained a common course of action regarding dealers which includes the designation of dealers, the terms and conditions of sale, including the discount or commission to be allowed to dealers; and the allocation of sales between themselves and dealers.

3. Respondents have established and maintained a list of jobbers, terms and conditions of sale to jobbers, and agreed upon the allocation of sales between jobbers and themsleves.

4. Respondents have made use of respondent Clay Products Association as a medium for establishing and agreeing upon prices, pricing methods, preparation of price sheets for publication, delivered price zones, prices in delivered price zones, defining and classifying dealers and jobbers, establishing uniform terms and conditions of sale and otherwise lessening, restricting and suppressing competition between and among themselves in the sale and distribution of vitrified clay sewer pipe.

(4) In Clay Sewer Pipe Assoc., Inc., et al., Docket No. 5484 some twenty manufacturers of sewer pipe and their trade association are charged with conspiracy to fix prices and one of the methods alleged to have been used was the method of agreeing upon prices in particular geographical zones. I quote from the complaint:

"For more than five years last past respondents have done and performed, and are now doing and performing, unfair acts and practices, have engaged in and are now engaging in unfair methods of competition, in violation of section 5 of the Federal Trade Commission Act in that they have acted and are still acting wrongfully and unlawfully by cooperating between and among themselves in establishing, adopting and continuing a common course of action and agreement, resulting in substantial hindrance, frustration, restraint, suppression and prevention of competition in the sale and distribution of vitrified sewer pipe in trade and commerce, as "commerce" is defined in the Federal Trade Act.

Pursuant to, in furtherance of, and in order to effectuate the purposes and objectives of the aforesaid cooperation and common course of action, respondents as a part of their said cooperation, common course of action and agreement, have formulated, adopted, performed and put into effect, among others, the overt acts and used the methods, systems, practices and policies listed, described and set forth in the immediately succeeding subparagraphs numbered 1 to 5 inclusive, of this PARAGRAPH SEVEN:

1. Respondents by combination have fixed and maintained prices.

2. Respondents in combination, compose and announce prices for vitrified clay sewer pipe and allied products at each and all destinations at which they sell, by using and maintaining, concertedly

and collusively, a basic price list (known in the trade as the Eastern or Standard Price List for vitrified clay sewer pipe and allied products), a freight rate compilation showing certain rates from Akron, Ohio, to destinations in respondents' trade area, and the practice of announcing prices at any given destination in terms of percentage discounts from the basic list on the basis of the carload freight rate to the freight zone in which the destination is located, as shown in the freight rate compilation.

3. Respondents, by combination, concertedly and collusively establish and maintain uniform terms and conditions of sale to dealers, and the allocation of sales between themselves and dealers.

4. Respondents, by combination, concertedly and collusively establish and maintain a list of jobbers, the terms and conditions of sale to jobbers, and allocate sales between themselves and jobbers.

5. Members of respondent association as set forth above, by combination, collectively and concertedly maintain respondent Clay Sewer Pipe Association, Inc., and use said association as a medium for promoting, aiding and rendering more effective concerted efforts to suppress and eliminate competition as described in the preceding subparagraphs 1, 2, 3, and 4 of this PARAGRAPH SEVEN.

(5) In Corn Products Refining Co., et al, Docket No. 5502, which I referred to a few moments ago, it is alleged that the nine major manufacturers of corn derivatives who manufacture and sell 95% of these products in this country engaged in a combination to fix and maintain prices. I quote from the complaint:

"Respondents are now and for many years past have been engaged in a combination, conspiracy and a common course of action in fixing and maintaining prices, terms and conditions of sale of corn derivatives sold by them in interstate commerce. Said combination, conspiracy and common course of action has been supported and maintained by agreements, concert of action and cooperation entered into and carried on for the purpose and with the effect of promoting a system of delivered price quotations in connection with the sale and delivery of corn derivatives and the matching of said delivered price quotations, terms and conditions by all of the manufacturing and primary selling respondents, as set forth in quotations by two or more sellers to any customer or prospective customer. Pursuant to, in furtherance and in effectuation of the purposes and objectives of the aforesaid combination, common course of action and cooperation, respondents have formulated, adopted and performed and put into effect among others the practices and used the methods, systems and policies listed, described and set forth in the immediately succeeding subparagraphs numbered 1 to 21, inclusive of this PARAGRAPH SEVEN, all and singularly for purpose and with the effect of eliminating and suppressing competition between and among themselves.

"Pursuant to the common purpose of matching delivered price quotations alleged in the preceding PARAGRAPH SEVEN, respondents have systematically prevented differing transportation charges involved in

shipping to differently located customers from affecting the cost of goods to customers by selling corn derivatives on the basis of delivered price quotations made up, in the case of the bulk goods, of a price f.o.b. designated basing points plus the rail freight rate to customers' destinations, and in the case of packaged goods, by dividing the country into numerous arbitrary geographical zones or territories, within certain of which a flat delivered price is quoted irrespective of location of the customer within the zone while to customers within certain other zones prices are quoted on a basis of a price f.o.b. designated basing points plus rail freight to destination.

"In employing the zone and basing point methods of quoting and selling corn derivatives in commerce, as set forth in PARAGRAPH SEVEN of this Count II above, each of the respondents systematically accepts and receives higher prices from some customers than from others, depending on the location of such customers from the basing points and within the zones upon which delivered price quotations are calculated; and each of the respondents adds arbitrary amounts to base prices in some cases, or deducts arbitrary amounts from base prices in other cases depending on the location of the customer from the basing points or within the zones. Such arbitrary additions and deductions have no relation, in many cases, to differences in the cost of transporting corn derivatives to the purchasers thereof, and are discriminations in price practiced by the respondents with the effect of eliminating competition between and among themselves."

(6) In American Iron and Steel Institute, et al., Docket No. 5508, one hundred and one manufacturers of steel products and their trade association were charged with agreeing to fix prices of such products and in so doing are alleged to have made use of a basing point system of pricing. I quote from the complaint:

"The steel industry is one of the basic industries of the nation. Respondent Producers produce and sell substantially all of the steel that is produced and sold in the country. According to reports of Respondent Institute, its members produce more than 96 percent of the country's total output of steel. The total dollar volume of their sales of the products involved herein in 1946 was approximately $5,000,000,000. The steel products which they produce and sell are regularly used in the production of automobiles, agricultural implements, tools and machinery, hardware, plumbing supplies, metal cans and containers, railroad equipment, homes, buildings, public buildings, bridges, dams, and other products and things and are of great importance to the public generally. The Federal, State and municipal governments of the nation purchase large quantities of steel annually.

Producer Respondents, in the regular course of their business, are engaged in interstate commerce, as "commerce" is defined in the Federal Trade Commission Act, and in that connection have used the acts, policies and methods hereinafter alleged. They sell and deliver across State boundary lines and in the District of Columbia large quantities

of their products and supplies, and, in addition, sell and export steel products to purchasers thereof in foreign countries.

Respondents have the power to dominate and manipulate the markets in which their unorganized customers and consumers must buy their products and to frustrate, destroy suppress, and eliminate competition between themselves. The American Iron and Steel Institute is made use of by Producer Respondents as a vehicle or medium for collective action and it assists the Producer Respondents in dominating and manipulating markets and in the carrying on of the unfair methods of competition hereinafter alleged. Collective action taken by Producer Respondents through respondent Institute in connection with the increase in steel prices which was announced during July 1947 is an instance in point.

"Producer Respondents have followed and do now follow a planned common and cooperative course of action in their employment and use of basing point practices, as hereinafter particularized, set forth and alleged in this PARAGRAPH FOUR. The practices involved the designating of a certain location or a limited number of locations as basing points for pricing purposes. Such locations will hereinafter sometimes be referred to as basing points. For each such basing point a factor "base price" is announced. Such factor will hereinafter sometimes be referred to as "base price" or "basing point price." The factor of "base price" thus used is announced by respondents as f.o.b. Pittsburgh, Pennsylvania, on some products. On other steel products with respect to a given delivered price quotation, the factor "base price," as announced by Producer Respondents, is announced as f.o.b. one or two or more locations (namely, a basing point) plus "freight applicator" therefor to said destination. Regularly, and in many instances, Producer Respondent produce steel at and make shipments from locations other than those designated and used as basing points in calculating the applicable delivered price quotations.

In calculating, arriving at and announcing delivered price quotations, Producer Respondents use a formula, including the factor "base price" and a factor designated by respondents as "freight rate." The latter factor, when used by Producer Respondents for pricing purposes, is taken from a compilation cooperatively and collectively produced by respondents through Respondent Institute. The factor thus designated by Respondents as "freight rate" is herein sometimes referred to as "freight applicator." Thus, the delivered price quotations of Producer Respondents involve the use of a formula, namely, "base price" plus "freight applicator." The factor "freight applicator" thus utilized purports to represent the applicable freight rate on a given shipment. However, in no instance except by happenstance does it represent the sum of the applicable freight rate on a shipment by a Producer Respondent where the delivered price therefor was based on the basing point price f.o.b. a location other than that from which shipment was made. Furthermore, variances thus arising in many instances on some steel products occur because Producer Respondents making quotations in such instances have utilized the factor "base price" at a basing

point plus the factor "base price" at a basing point plus the factor "freight applicator" supposedly representing freight charges from the basing point thus selected to the destination involved, although shipment is actually made from a production point much nearer freightwise and at substantially lower actual transportation cost than the sum represented by said "freight applicator" used as a part of the formula for the delivered price. In other instances, Producer Respondents, although making shipments from one of the aforesaid basing points calculates delivered price quotations with respect thereto through the use of the formula of base plus freight applicator applicable from an entirely different basing point than the point of shipment.

Russellville Canning Co. v. American Can Co. F. Supp. (D. C., W.D. Ark., 194

This was an action for triple damages for injury suffered by a canning company by being forced to pay the American Can Co. a higher price for its cans than was paid by competing canning companies which discrimination the court held to be in violation of Sec. 2(a) of the Clayton Act, as amended.

APPENDIX B - SUPPLEMENTING THE ANSWER TO QUESTION 2(b)

I assume that the President in referring to a recent decision had in mind the opinion of Judge Parker of the United States Circuit Court of Appeals for the 4th Circuit, in the Bond Crown & Cork Company case in which it was stated:

"Innocent explanations are offered as to each of the circumstances relied on by the Commission, and if it were permissible to consider each of the circumstances out of connection with the others, there would be much force in the argument of the petitioners. When all of the circumstances are considered together, as they must be, however, there can be no question as to their sufficiency to support the findings and conclusions of the Commission. The standardization of product, for example, would be innocent enough by itself, but not when taken in connection with standardization of discounts and differentials, publication of prices with agreements not to charge less than a minimum under patent license agreements affecting practically the entire industry, the freight equalization which we have described and such uniformity of prices throughout the industry as to leave no price competition of any sort anywhere. The practice of freight equalization might be all right if used by the manufacturers individually, but not when used in connection with standardization of product, patent control, price publication and uniformity of discounts and trade practices in such way as to destroy price competition. As in the case of most conspiracies to restrain trade and destroy competition, there is no direct evidence of any express agreement to do what the law forbids; but no such evidence is required, nor is the Commission required to accept the denials of those charged with the conspiracy merely because there is no direct evidence to establish it, for it is well settled that 'The essential combination or conspiracy may be found in a course of dealings or other circumstances as well as in any exchange of words.'"

APPENDIX C - SUPPLEMENTING THE ANSWER TO QUESTION 3(a)

I think I should note that these issues grew out of Commission proceedings in which conspiracy was central. The controversy which began in 1948 appears to have been prompted by the decision of the U. S. Supreme Court in the Cement case. After that Court, in April 1948, decided the Cement Institute case and upheld the Government by a 6-to-1 decision, various trade journals and industry spokesmen expressed concern as to the significance of the decision. On May 20, 1948, Senator Capehart of Indiana introduced Senate Resolution 241, "to investigate the impact upon consumers and business of recent Federal court decisions." The preamble of that Resolution, and the hearings which were held under it, made it clear that the Federal court decisions referred to were those dealing with cases of the Cement Institute and the other basing point situations. It is also clear that those in industries using basing point systems were dissatisfied with those decisions. Many of them sought enlistment of aid of their customers and others in urging Congress to legalize the use of basing point systems which they designated the practice of "freight absorption." For example, there appeared on page 8, Section R, of the Washington Post, Sunday, September 5, 1948, an item entitled "Basing-Point Return, Goal of E. T. Weir." Under that headline the item included the following statements:

> "One of the Nation's biggest steel masters today asked his customers to help the campaign to legalize the steel industry's traditional pricing methods.
>
> "He is Ernest T. Weir, chairman of the board of National Steel Corp., who armed his salesmen with personal letters to customers. Weir urged steel buyers to induce Congress to pass legislation permitting a return to the basing-point method of selling.
>
> "To Weir and the other steel leaders, it appeared that the only recourse was to seek new legislation which would restore the former policy.
>
> "Declaring Congressmen can only learn the portent of the ruling from businessmen, Weir urged customers to discuss the issue with legislators. He asked trade associations to take constructive action and added: 'you can keep in continuous touch with them (Congress Members) at each step. * * * You can communicate with your trade associations to urge that they make legislative contact and public information on this subject a first order of business.'"

On July 21, 1948, the president of Jones & Laughlin Steel Corporation directed a letter to each of its thousands of customers in which it complained about the decisions in the Cement and Rigid Steel Conduit cases and, as did Mr. Weir and other leaders in the steel and cement industries, stated:

> "We urge our customers and all others interested in the welfare of the country to give serious consideration to this matter. We believe that all will conclude, as we have, that prompt action by the Congress is essential if we are to continue to have the vigorous competition in this country which has been so fundamental to our national development."

As a part of that campaign contentions were advanced by a number of leaders in industry that basing point systems as they were using them did not lessen competition but instead promoted competition. They also contended that the Federal Trade Commission in the Cement case had held, and had succeeded in getting the Federal courts to hold, that basing point systems which industry described as a practice of "freight absorption" were illegal per se. Now, let us turn to those cases in an effort to determine what they actually involve.

The Cement case involved the charge of the Federal Trade Commission th The Cement Institute and some 70 of its corporate members had engaged in a combination and conspiracy to fix prices through the use of the basing poin system. The proof in that case and the Commission's findings based thereon sustained those charges. The Supreme Court of the United States, in a 6-to-1 decision, held that the charges had been sustained and that the fixi of prices by agreement through the use of the basing point system was a vio lation of law. In connection with the showing in that case that prices had been fixed, the showing was conclusive that competition in price had been eliminated. The fact was demonstrated not only to the satisfaction of the Commission and the courts in the case; it was also made a matter of record during the course of the hearings before Senator Capehart's Subcommittee under Senate Resolution 241.

Because of the denunciation of the Commission's action on basing point cases that arose in some quarters I naturally was concerned as to why the Commission had undertaken this case. In pursuing this phase of the matter I found that the Federal Trade Commission did not undertake the handling of the basing point cases in the spirit of a crusader or with any novel idea of its own. Basing point systems presented a problem to the Federal Trade Commission more than 30 years ago, when representatives of the people and the governments of more than 20 Western and Midwestern States appealed to the Federal Trade Commission to act with a view to stopping the United Stat Steel Corporation and its subsidiaries from using the basing point system to unfairly discriminate against the people in the West and Midwest. After investigation of that matter, the Commission issued its complaint in Docket 760, in the matter of United States Steel Corporation, et al., and on July 21, 1924, issued its findings of the facts and an order therein (8FTC 1-65).

In that connection the Commission made findings of facts which read in part as follows:

(FINDINGS OF FACT FROM THE PITTSBURGH PLUS CASE)

Respondents' discriminatory or Pittsburgh Plus Prices are not made in good faith to meet competition. -- Pittsburgh Plus prices are not made in good faith to meet competition. They were originally adopted by the steel producers generally as the basis for their price-fixing activities, and are still used for the same purpose. It was, and still is, only necessary for the steel producers to use the same Pittsburgh price as the basis for their prices covering their various rolled steel products in order to maintain uniform Pittsburgh Plus discriminatory prices. The price at every locality in the United States automatically becomes the Pittsburgh price, plus an amount which would equal the freight on the steel from Pittsburgh

to destination, if the steel were actually shipped from Pittsburgh. The system has worked very effectively. While the Pittsburgh Plus system was used as the basis for the agreed prices fixed by the original pools, trade meetings and Gary dinners, it was found later than such price system obviated the necessity of such pools, price-fixing trade meetings and Gary dinners; so it finally succeeded these three plans, and as such successor it still continues.

(a) No systematic Pittsburgh Plus system has been adopted by the steel producers at the time of Pittsburgh's greatest predominance in the steel industry or until after 1900. From 1873 or earlier, to 1903, steel producers attempted, generally, with some success, to fix prices for steel products through pools, price-fixing trade meetings and, later on, through what are known as the Gary dinners. From 1903 to 1909 the Pittsburgh Plus system of quoting and selling said steel products was used in connection with and as a basis for the price-fixing activities of the steel producers. From 1909 to the present time, with minor interruptions the Pittsburgh Plus system has been used by the steel producers independently of such pools, price-fixing trade meetings and Gary dinners for the purpose and with the effect of reaching uniform delivered prices. In 1921 with the advent of price competition on plates, shapes and bars, the Pittsburgh Plus system was discontinued by the Chicago district mills in their sales of those products, but not in their sales of sheets and tin plate and wire and wire products, as to which articles in that district and everywhere else Pittsburgh Plus Prices still prevail.

(b) The bar manufacturers, including the respondents, Illinois Steel Company and Carnegie Steel Company, met in 1902, and agreed upon the Pittsburgh Plus system as a basis for fixing and maintaining uniform delivered prices. Such action was wholly inconsistent with making prices in good faith to meet competition.

(c) The plate manufacturers and structural shape manufacturers respectively, including the said last-named respondents, met in December 1903, and agreed upon the Pittsburgh Plus system as a basis for fixing and maintaining uniform delivered prices on plates and shapes, respectively. Such action was likewise wholly inconsistent with making prices in good faith to meet competition.

(d) The wire nail producers, including the respondent, American Steel & Wire Company, agreed on zone prices in 1898; in 1904 the large wire producers agreed to maintain uniform zone prices by means of the Pittsburgh Plus system. Such action was wholly inconsistent with making prices in good faith to meet competition.

(e) The Pittsburgh Plus system was adopted in 1900 in the selling of tubes by the respondent, National Tube Company, because Pittsburgh was regarded as the point of lowest cost of production. Notwithstanding the relative changes in the cost of production in the various districts as hereinabove indicated, the respondent tube companies and all tube companies still sell their pipe and other products on the Pittsburgh Plus system. The prices thus made were not and are not in good faith to meet competition.

(f) The Pittsburgh Plus system was adopted by the billet manufacturers in 1900, as the basis for their agreed prices.

(g) The bolt, nut and rivet manufacturers adopted the Pittsburgh Plus system in 1918 by agreement.

(h) Prior to the year 1900, sheet steel was not sold on the Pittsburgh Plus system, and even after the absorption of a large number of sheet mills by the American Sheet Steel Company, (which was later taken over by the respondent, American Sheet & Tin Plate Company), that company sold its sheets in the Chicago district f.o.b. its mills in that district. In the fall of 1900 however, that company inaugurated the Pittsburgh Plus system in selling its sheets, and the respondent, American Sheet & Tin Plate Company has followed the system ever since, practically without exception.

(i) Prior to 1900 to 1903, the tin mills sold their product generally f.o.b. the mill, but after the absorption of many tin mills by the American Tin Plate Company (which was shortly afterward taken over by the respondent, American Sheet & Tin Plate Company), that company inaugurated the Pittsburgh Plus system in selling its tin plate from its various mills. In 1903, it announced as to its Indiana mills, that tin plate would no longer be sold f.o.b. the Indiana mills, but would be sold thereafter on the Pittsburgh Plus system because of the higher cost of production at the Indiana mills. The respondent, American Sheet & Tin Plate Company has continued the Pittsburgh Plus system ever since on tin plate. Such prices were not and are not made in good faith to meet competition.

(j) Uniform Pittsburgh Plus prices on sheets have been effectually maintained by the sheet steel producers, not withstanding the fact that there are many small sheet mills. It has proved difficult for the steel producers to hold a number of small mills to price agreements or understandings during periods of business depression. But the sheet producers of the United States are members of an organization known as the National Association of Sheet & Tin Plate Manufacturers. Nearly every independent sheet producer is a member. The respondent, American Sheet & Tin Plate Company, is not a member, but actively cooperates with the association in its price-fixing activities, which constitute an important part of the association's work. The prices of the said last named respondent company are furnished to the association and by the association wired to all of its members generally before they are announced to the public. The members generally adopt the new prices as their own. Without the leadership of respondent company, in announcing its prices, the association finds it difficult to maintain uniform Pittsburgh Plus prices among its members.

(k) The said respondent company and its competitors exchange letters regarding prices charged and to be charged by them. If a producer is found to be cutting prices, the matter is diligently pursued by both respondent and its competitors with a view of discouraging such price cutting.

(l) All of the foregoing mentioned price-fixing activities are wholly inconsistent with making prices in good faith to meet competition.

(m) The respondent steel-producing subsidiaries and their competitors use the same extras and differentials, and the respondent, American Sheet & Tin Plate Company has helped the said association distribute the booklets containing the uniform extras among the members of the association. All the

steel producers use uniform extras and differentials in order to arrive at uniform delivered prices. They could not reach such uniform delivered prices without maintaining uniform extras and differentials. The use of these uniform extras and differentials is wholly inconsistent with making prices in good faith to meet competition.

(n) The respondent, American Sheet & Tin Plate Company, at great expense to itself, prepares a compilation of freight rates on sheets from Pittsburgh to practically every consuming point in the United States. It furnishes copies of this freight rate book, and all subsequent changes made from time to time, to its competitors. At first it gave these books to its competitors, but now it charges a nominal price for them. The respondent company expects the recipients of these books to use them. The use of them by all steel producers is necessary if all such producers are to arrive at exactly the same Pittsburgh Plus price at each given point. The freight tariffs are complicated and oftentimes there are two or more different freight rates between two points given in the different tariffs. The freight traffic expert's duty under the Pittsburgh Plus system is to find the lowest rate existing from Pittsburgh to every consuming point. Different traffic experts might not arrive at the same results, and therefore a uniform freight rate book is absolutely necessary in order that the steel producers may reach absolutely uniform Pittsburgh Plus prices. The use of this common freight rate book prepared at respondents' expense is wholly inconsistent with making prices in good faith to meet competition.

(o) The respondent company, as above indicated, supplies this necessary link in the making of ultimate uniform discriminatory prices by all steel producers.

(p) The respondent and its competitors likewise use the same table of tolerances and the same sheet bar weight book, each of which has a bearing on the ultimate prices charged for their products and each of which permits them to reach absolutely uniform delivered prices at all points in conjunction with a due observance of a uniform base price, uniform freight rates and uniform extras and differentials, as above mentioned. The use of all these adjuncts for the purpose of reaching uniform Pittsburgh Plus prices is wholly inconsistent with making prices in good faith to meet competition.
(8 F.T.C. pp. 36-40.)

It should be noted that those findings as to the facts have never been successfully challenged. In fact, the United States Circuit Court of Appeals for the Third Circuit has affirmed the Commission's findings and order in that case.

Confirmation of the Commission's position as expressed in this matter may be found in many places. For example, a report made by the so-called "Darrow Board" (The U. S. National Recovery Review Board, First Report for the President of the United States, under date of May 4, 1934) dealt in part with the effect of basing point systems upon small business enterprises and also the effect of basing point practices upon the consuming public. In that connection, it was stated:

"Effect Upon Small Steel Mill Enterprises

"Such concerns do not have a wide prestige for meeting the competition of larger better known concerns at a distance. They need to be able to make some price concessions. The basing point system, as already pointed out, forbids and penalizes such price concessions. Hence a small or new enterprise is seriously handicapped by the Code in its local territory. No matter how economically it may be able to produce, it is debarred from making any price reduction. It must shar the home market with large and long established concerns shipping from long distances.

"We believe that it is clear that the basing point system tends seriously to handicap new and comparatively small concerns in obtainin a foothold in the Industry. And this is true although they may be abl to install more modern equipment, may be located more in harmony with existing markets and productive trends and may be less infected with the nepotism which is a frequent handicap to older concerns and particularly to those which have enjoyed price fixing systems over long periods. (Page 40)

"The Effect of the System on the Consuming Public

"The effect of the multiple basing point system, however, on the consuming public is still more important. The public is deprived of the benefits of price competition in the steel industry, is charged the excessive base prices inherent in the practice, together with "imaginary" freight charges or the cost of the cross-hauling of materials which is inseparable from a nation-wide market for steel products This system would not be devised, enforced and defended by the steel mills unless it resulted in bringing in at least as much revenue, in their belief as would be brought in by other price systems.

"But these charges are not all that the consumer loses under the system. The high base price and real or "imaginary" freight charges ar of course paid in the first instance by the fabricator.

"The fabricator thereupon includes them in his own costs and covers them into his price with a percentage of profit added. Likewise the jobbers, of fabricated merchandise, having paid the pyramided steel costs, add their own percentage of margin to their purchasing price and sell the merchandise to the retailer who possibly adds 33 to 50% to his purchase price for selling purposes.

"Hence the consumer pays excessive base prices and actual cross-hauling or "imaginary" freight charges, as the case may be, with successive additions throughout the distributive system." (Pages 48-49)

Even before the date of that Report to the President, instructions were issued at the White House for the Federal Trade Commission to investigate pricing practices in the cement industry. In that connection reference is made to the letter of Harold L. Ickes, Secretary of the Interior, to the

Chairman of the Federal Trade Commission, under date of April 12, 1933, which I quote as follows:

"I am writing you under instructions from the President.

"It is reported that bids for concrete for road work in Illinois and one or two surrounding States, are collusive and at a figure that is not warranted by the present state of the industry and the general economic situation. Bids have been rejected two or three times, but on re-advertisements, precisely the same bids, from precisely the same concerns, keep coming in. In building or repairing roads, the more money that is spent for material necessarily means the less money spent for labor. The Administration is concerned about employing as much labor as possible, at as good wages as possible.

"It was suggested that an investigation by your Commission of this situation at as early a date as possible would be justified."

On May 1, 1933, the Secretary of the Interior again wrote the Chairman of the Federal Trade Commission as follows:

"For your information, I am enclosing a letter just received from Governor Hornor, with accompanying memoranda, in the matter of the bids submitted by cement manufacturers for road-building purposes in that State."

The prices and the bids thus referred to served as the basis of a complaint by Governor Henry Hornor of Illinois that there had been an "extraordinary" increase in price of cement, that the cement companies "in open defiance of our request that bids be made f.o.b. factory absolutely refused to bid on that basis," and that he considered prices had been fixed through the use of the basing point system in violation of law.

The Chairman of the Federal Trade Commission wrote the Governor of Illinois acknowledging the information which had thus been submitted and expressing doubt concerning the authority and power of the Federal Trade Commission under the law to bring to a halt the pricing practices complained about. In that connection, reference was made to the fact that basing point cases had been carried to the Supreme Court of the United States by the Department of Justice in which it was alleged that the Sherman Act had been violated but in which it had been held that the practices were not violative of the Sherman Act (citing the Maple Flooring and the old Cement Cases (268 U. S. 563 and 586). To that the Governor of Illinois replied that it should be remembered the Supreme Court had often announced that each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record. The Governor then went on to say he believed the facts in this particular situation were such as to afford relief through action by the Federal Trade Commission. In that connection, he stated:

"Many suggestions have been made to us as to how we ought to meet the situation. We can build a plant or plants and make our own cement. I am hesitating in this because I want to encourage fair

private industry, and would build only as a necessary resort to meet the unfair forces that are against fair prices on cement.

"It has also been suggested that the State, by condemnation, acquire cement plants and their product in this State. It has even been urged that we employ the inmates of our penitentiaries in cement making. This, to my mind, would not be fair to the working men in the cement manufacturing centers of the State, and I hope we will never have to do that. If necessary, to meet the problem, we will cease building roads in Illinois. The attitude of the cement manufacturers would justify most any action to prevent the State and Nation from being subjected to slavery by this unlawful combination in an industry which is protected by the tariff and other circumstances which makes it feel that it can act arbitrarily and tyrannically in the matter.

"A combination of this kind is inimical to free and fair industry and competition. If our Federal anti-trust and price fixing laws mean anything at all they mean that such an unlawful combination should not be allowed to impose on the public any longer.

"If the Federal Trade Commission desires any information in our possession or accessible to us, I shall only be too glad to see that it is forwarded to it."

The date of that letter was April 29, 1933. Three days later, on May 2, 1933, the Secretary of the Interior again wrote the Chairman of the Federal Trade Commission as follows:

"A memorandum has just come to me from Dr. Mead, Commissioner of the Bureau of Reclamation, advising me that the Acting Chief Engineer at Denver, who a short time ago asked for bids on 400,000 barrels of cement for the Boulder Canyon Project, recommends that all bids be rejected because they are higher than he believes the Government ought to pay. I am sending you this information in connection with what I have already told you of the situation in Illinois."

Hon. Barton Murray, who served as a Deputy Administrator and later as a Division Administrator of the NRA, and in that connection dealt with representatives of the cement industry, testified to the effect that the President of the United States had, through the offices of the NRA, requested officials of the cement companies to submit bids to agencies of the Federal Government on a competitive basis f.o.b. the mills, but that the officials of the cement companies had refused to accede to that request as made by the President of United States. (See testimony of Barton W. Murray, Record pp. 376-381 and Commission Exhibits 6A, 6B, and 7A and B, FTC Docket 3167.)

Thereafter, on December 14, 1936, the City Manager of a Western city wrote the Federal Trade Commission as follows:

"I have been authorized by the City Council of the City of Colorado Springs, Colorado, to direct your attention to the fact that there seem to be collusion on the part of cement manufacturers selling Portland cement to contractors and others in this territory.

"In support of this statement I wish to submit the following facts:

"For some years past and as far as I know continuing up to the present time, prices submitted by the various dealers in Colorado Springs on Portland cement in car load lots sold to the city, and originating either in Wyoming or Colorado, have been identical, and attempts to secure quotations from cement firms in Oklahoma, Kansas and Nebraska have met with refusal to bid upon our requirements.

* * * * * * * * * * *

"We believe the information given you herewith indicates that some trade agreement exists between the various cement manufacturing corporations in this portion of the Rocky Mountain territory and that this agreement operates adversely to the interests of both private and public users of cement. It seems strange indeed that we should be required to pay the highest price for cement listed in the United States when we are located less than forty-five miles by highway from one of the largest cement mills in the inter-mountain territory.

"We will be glad to furnish you with certified copies of the bids in question or any other information which we may have available in case you desire to make inquiries into this condition."

The Federal Trade Commission acknowledged that letter and requested the City Manager of the City of Colorado Springs, Colorado, to submit evidence in support of the complaint he had made. He submitted several pieces of documentary evidence and answered a number of questions. In his letter of March 19, 1937, in reply to the questions the Federal Trade Commission had submitted to him, he wrote in part as follows:

"In answering Question No. 7, I can only say that it is my firm belief that prices on cement in this territory are dictated by the Colorado Portland Cement Company and that the factor of different freight rates entering into that price control is but one phase of the problem. However, I have no proof for such belief and can only refer you to the letter written by Mr. H. O. Warner, Vice President and Sales Manager of the Colorado Portland Cement Company under date of December 13, 1934, copy of which is included with the other correspondence attached hereto."

Of course, it was appreciated that the City Manager of the City of Colorado Springs, Colorado, would not likely be in the position of submitting conclusive evidence of agreements between and among officials of the cement companies. Consequently, the Federal Trade Commission sought evidence dealing with that point through field investigations made by its own investigators. In that connection, evidence was secured in the form of letters and copies of letters which passed between the Monolith Midwest Portland Cement Company and The Lehigh Portland Cement Company concerning price advances on a basis of changes in base prices. Copies of some of those letters appear in the Findings of the Federal Trade Commission in the Cement Case. Two of them are quoted from those Findings, in part, as follows:

"Yesterday morning Mr. Morse of the Colorado Portland Cement Co. phoned and said that Mason City base was up 25¢, that he had heard of no changes. Immediately on receipt of this information I telephoned to Mr. Hartley and he told me that he had quotations out raising his mill base 25¢ at points where it applied in Wyoming, Nebraska, North and South Dakota, but that he was having difficulty in the eastern part of his territory and he did not know whether or not he would stand by these quotations. It all depended on whether or not the other manufacturers were going to follow. I assured him that we would follow in Wyoming but that we could not speak for the rest of the industry, although I would take the matter up with the Colorado Portland Cement Co. This I did, and Mr. Morse assured me that he would raise his price in Wyoming 25¢, wherever the Rapid City base governed.

"I telephoned this information to Mr. Hartley and he said that he would let his quotations stand but he wanted the Colorado Portland Cement Co. to commit themselves to him and asked me to have Mr. Warner telephone him. This I did and late in the afternoon Mr. Morse called me and said that he had been talking to Chicago and had learned from them (I suppose he meant Universal) that Rapid City had quotations out on the new figure but that they accepted business at the old price for shipment during April. Morse said that in view of this he was reluctant to change his quotations until he was sure that Rapid City would stay in line. This morning Mr. Warner telephoned me and said that he was leaving tonight for Chicago to attend a meeting and endeavor to straighten up the situation."

A second letter between the same competitors a few days later states in part:

"This morning Mr. Warner, of Colorado Portland Cement Co., advised me by phone that the gas belt mills had increased their base 20¢ per barrel. This means a general increase in prices in practically all of our shipping territory. The basing point will move from Iola to Kansas City. As yet there has been no changes reported from either Sugar Creek or Bonner Springs so we are basing our new prices on $1.55 Kansas City.

"Warner had just returned from Chicago and he says that the powers in the East are inclined to let the Rapid City base stay where it is; in other words, they will not increase price where Rapid City controls until they have some definite assurance from Rapid City that they will abide by it. Warner says that they put out quotations on a base of $1.65, their mill, and then were willing to accept business for delivery during April. As long as this condition is in effect, it means there will be no change in prices at any Wyoming points controlled by Rapid City. Warner further said that the industry as a whole hesitates to take this matter up with the South Dakota officials because their experience in the past has been that the Governor of South Dakota broadcasts anything that is told to the officials of the cement plant and makes the statement that the cement trusts are trying to control their mill (Comm. Ex. 1202-K)." (37 FTC 179-180)

The Federal Trade Commission was thus beseiged with complaints, and requests for action from the White House, the Bureau of Reclamation, the Secretary of the Interior, the Governor of Illinois, and the City Manager of Colorado Springs, Colorado. Moreover, there were many other complaints and appeals for action. One of the others came from the Chairman of the Oklahoma State Highway Commission, Hon. Scott Ferris. On September 2, 1936, he wrote the Federal Trade Commission as follows:

"The State Highway Commission of Oklahoma today passed the following resolution and incorporated in the official minutes of the State Highway Commission of Oklahoma:

"'It was moved and seconded that the State Highway Commission most respectfully request the Trade Commission to use their influence and make the necessary and proper investigation to determine the question of extortion charges by the cement industry to the State Highway Commission of the State of Oklahoma, and that the Trade Commission be requested to go into the question of combinations and fraudulent agreements in restraint of trade and every other phase of or bearing on an unlawful action in connection with the sale of their product, to-wit: Cement.'

"The necessity for taking this action and requesting the assistance of your Honorable body has arisen by reason of the fact that in the construction of roads and highways in this State we spent about $20,000,000 last year and will spend about $6,000,000 this year and on each and every occasion when we asked for bids on cement, every bid comes in identical in form.

"A copy of numerous and sundry such bids are attached hereto and made a part hereof.

"The State Highway Commission on its own account and on behalf and in the interest of the taxpayers of the State has made a cursory investigation as to whether or not the Commission is being overcharged and we are of the opinion we are, for the reason that we have positive proof that cement is being retailed out through the remote corners of the State through lumber yards and other local selling agencies at a price much less than the price being quoted to us.

"It is the feeling of the State Highway Commission that an agreement in restraint of trade is in effect between these cement companies which is working to the disadvantage of the public and very great detriment to the taxpayers.

"The State Highway Commission feels a great wholesome service would be rendered in the public interest if your Commission would cause an investigation to be made of the conditions that prevail in this State and we most respectfully ask that your body take such action and such steps as you have at your command to prevent this apparent monopoly - this apparent agreement in restraint of trade, which is working to the detriment of and against the public interests of this State and the citizens thereof."

Under date of September 10, 1936, he again wrote a member of the Federal Trade Commission with reference to this problem, in part, as follows:

> "You will observe that every bid is exactly alike, no matter from what corner of the State or adjoining States it is to be shipped from. I am also sure it will be to your dismay when I tell you they are selling cement at retail much cheaper than they are willing to sell it to the Highway Commission, which of course is wrong on the face of it.
>
> "I may not have power enough to accomplish the good that the State deserves, but I do have the power to appeal to the Federal Trade Commission, which was established for just such a purpose as this - to help us get the matter straightened out, and I beg of you with this in mind to see what can be done for us."

The Minutes of the Oklahoma State Highway Commission of October 21, 193[illegible] contain the following statement:

> "CEMENT - Purchase: The Commission under pressure of necessity recently purchased 30,000 sacks of cement and the bids in this case, as in all others, were identical, and the Commission under pressure of circumstances and not being able to break the trust or get cement any other way awarded this purchase to the Ash Grove Lime & Cement Company, to which I, Scott Ferris, protest and urge that the Federal Trade Commission go on with the investigation and try to break the trust and I urge an additional and continued and unbounded investigation by the Trade Commission until this is done. I was in Congress when the Federal Trade Commission was created and it was created for the purpose of destroying just such trust methods as are employed here and I protest any such combined or trust as now seems to exist, and this is done not in the spirit of criticism of the Federal Trade Commission, but because of the necessity for an immediate and complete investigation."

Under the pressure of the complaints thus made and on the basis of appeals from the sources above stated and many others to the Federal Trade Commission for it to investigate and act to stop alleged unfair and unlawful pricing of cement, the Commission undertook its investigation of the facts. While it was thus engaged in an investigation of the cement industry to determine the facts, the President of the United States directed the Attorney General to investigate concerning a similar problem said to exist in the steel industry. The Attorney General studied the problem and reported to the President, on April 26, 1937, as is shown in a press release issued at the White House, April 27, 1937, to the following effect:

"The President has received the following letter from the Attorney General:

April 26, 1937

The President
The White House
Washington, D. C.

My dear Mr. President:

By direction of the President this Department has considered the question of identical sealed bids received by government agencies seeking to purchase steel products to determine whether court proceedings should be instituted under the Antitrust Laws.

The Federal Trade Commission made a report to the President dated June 10, 1936, reaching the conclusion that collusion in maintaining prices accounted for identical bids and that this collusion was particularly evidenced by an agreement of steel producers on June 6, 1935, when, following the decision of the Supreme Court invalidating the NRA codes, they adopted a resolution declaring their intention "during the present uncertainty to maintain *** the standards of fair competition which are described in the Steel Code."

The question therefore in which this Department is concerned is whether the administrative remedies in the control of the Federal Trade Commission, by way of a cease and desist order, should be superseded by criminal or civil proceedings instituted in the courts by this department.

This Department has conducted an extensive investigation over a large part of the country which included examination of the correspondence, files, minutes of directors' meetings and other records of 38 large steel producers, and interviews with 48 steel fabricators, 66 jobbers, many large consumers and the directors who were present at the June meetings of the American Iron and Steel Institute.

After examining the information obtained in the above manner, I conclude that the investigation has not produced sufficient evidence admissible in civil and criminal litigations to make advisable proceedings in court or under the Antitrust Acts, as they have been construed by the courts.

The administrative and quasi-judicial remedies in the hands of the Federal Trade Commission may be better adapted to the control of the subject matter of this particular complaint than action by the Department of Justice. The identical bids in the steel industry are produced, in part, by the basing point system of price determination. This system, long used in the steel industry, not only affects the manufacturers who utilize it and the consumers who are subject to it, but it also presents economic and social questions due to the fact that communities as well

as plants have been located and developed with reference to the price structure developed by this system. The machinery of the courts is not geared to the handling of the social and economic factors necessarily involved; and many persons and communities seriously affected cannot be parties to a court proceeding under the Antitrust Laws. It appears therefore that a problem is presented which can be more satisfactorily investigated and dealt with through the more flexible remedies of the Federal Trade Commission.

The question before us is broader, however, than that of identical bidding in the steel industry. The type of practices complained of in this instance is widespread throughout many of the basic industries of the country. The difficulty in correcting this situation raises the whole question as to the adequacy of the present Antitrust Laws for the solution of the monopoly problem as it now exists in the United States.

In my opinion, the time has come for the Federal government to undertake a restatement of the law designed to prevent monopoly and unfair competition. This proceeds from the conviction that the present laws have not operated to give adequate protection to the public against monopolistic practices.

After 24 years' experience with the Sherman Law and its judicial interpretations, the Congress enacted the Clayton Act and set up the Federal Trade Commission. After nearly 20 years' experience, in 1933, the National Recovery Administration was established. Many other laws dealing with phases of the industrial question have been enacted and others are in contemplation. A review of the accumulated experience of the last 47 years would indicate many things to be avoided, as well as many to be accomplished, by a revision of our Antitrust Laws.

Moreover, these laws have been subjected to court interpretations which from time to time have limited their application, modified their meaning and imposed upon the government impossible burdens of proof.

A long experience with the difficulties of enforcement furnishes a sound basis for improving the enforcement machinery. This Department has labored with inadequate means to enforce laws that do not provide sufficient legal weapons to make enforcement effective. In the face of a present tendency to increase prices and a necessity for a corresponding increase in the vigilance of the Department the question is forcibly presented as to whether the country can afford to leave the enforcement of a vital economic policy so poorly sustained. The present machinery of enforcement through the Federal Trade Commission also should be made more adequate and effective, and the devitalizing effect of some of the court interpretations upon its powers should be overcome by legislation.

I therefore recommend that there be set up a Committee to study the Antitrust Laws as to their adequacy, their enforcement and the desirability of amendment, extension and clarification. The Committee should have power to enlist the aid of consultant groups both within

and without the government, as the studies will naturally cover a wide area including the relation of antimonopoly policies of such subjects as patents, taxation, commerce, manufacturing, farming and labor.

Respectfully,

HOMER CUMMINGS,
Attorney General."

Within three months following that report, the Federal Trade Commission had completed its investigation and July 2, 1937, it issued its complaint in Docket 3167, in the matter of The Cement Institute, et al. After one of the hardest fought legal battles in history in which respondents were represented by more than 40 of the top law firms of the country, the Commission made its findings as to the facts and issued its order commanding the respondents in the Cement Case to cease and desist from using various practices which had been engaged in among the members through conspiracy in the industry. Incidentally, the practices thus found by the Commission upon the basis of a a record of clear evidence were in support of the complaints which had been made to the Commission by the President of the United States, the Secretary of the Interior, the City Manager of Colorado Springs, Colorado, the Governor of Illinois, the Chairman of the Highway Commission of the State of Oklahoma, and others.

I should like at this time to offer for insertion in the record copies of a few of the exhibits from the record in the Cement case. These show graphically the end result flowing from the use of the price fixing conspiracy that existed in that industry.

I should like also to offer for inclusion in the record similar exhibits from the official record of the Rigid Steel Conduit case. These likewise show the result of the operation of a price fixing conspiracy in that industry.

I further offer for inclusion in the record the findings of fact and order in the Cement case. These findings and order were subjected to review by the Courts.

The Supreme Court of the United States, as I have said heretofore, sustained the Commission's findings and decision by vote of six to one. In that connection the court, in discussing the Commission's findings as to the facts, stated:

> "It is strongly urged that the Commission failed to find, as charged in both counts of the Complaint, that the respondents had by combination, agreements, or understandings among themselves utilized the multiple basing point delivered price system as a restraint to accomplish uniform prices and terms of sale. A subsidiary contention is that assuming the Commission did so find, there is no substantial evidence to support such a finding. We think that adequate findings of combination were made and that the findings have support in the evidence.

"The Commission's findings of fact set out at great length and with painstaking detail numerous concerted activities carried on in order to make the multiple basing point system work in such way that competition in quality, price and terms of sale of cement would be non-existent, and that uniform prices, job contracts, discounts, and terms of sale would be continuously maintained. The Commission found that many of these activities were carried on by the Cement Institute, the industry's unincorporated trade association, and that in other instances the activities were under the immediate control of groups of respondents. Among the collective methods used to accomplish these purposes, according to the findings, were boycotts; discharge of uncooperative employees; organized opposition to the erection of new cement plants; selling cement in a recalcitrant price cutter's sales territory at a price so low that the recalcitrant was forced to adhere to the established basing point prices; discouraging the shipment of cement by truck or barge; and preparing and distributing freight rate books which provided respondents with similar figures to use as actual or "phantom" freight factors, thus guaranteeing that their delivered prices (base prices plus freight factors) would be identical on all sales whether made to individual purchasers under open bids or to governmental agencies under sealed bids. These are but a few of the many activities of respondents which the Commission found to have been done in combination to reduce or destroy price competition in cement. After having made these detailed findings of concerted action, the Commission followed them by a general finding that "the capacity, tendency, and effect of the combination maintained by the respondents herein in the manner aforesaid is to . . . promote and maintain their multiple basing point delivered-price system and obstruct and defeat any form of competition which threatens or tends to threaten the continued use and maintenance of said system and the uniformity of prices created and maintained by its use." The Commission then concluded that "The aforesaid combination and acts and practices of respondents pursuant thereto and in connection therewith, as hereinabove found, under the conditions and circumstances set forth, constitute unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act." And the Commission's cease and desist order prohibited respondents "from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between and among any two or more of said respondents . . . to do certain things there enumerated.

"Thus we have a complaint which charged collective action by respondents designed to maintain a sales technique that restrained competition, detailed findings of collective activities by groups of respondents to achieve that end then a general finding that respondents maintained the combination, and finally an order prohibiting the continuance of the combination. It seems impossible to conceive that anyone reading these findings in their entirety could doubt that the Commission found that respondents, collectively maintained a multiple basing point delivered price system for the purpose of suppressing competition in cement sales. The findings are sufficient. The contention that they are not is without substance."

I cannot believe that the Congress would have wanted the Commission to have acted differently than the manner in which it did act in those cases. It is my understanding that the Congress desires that trade-restraining acts and practices be stopped. It is my understanding that this country's anti-monopoly policy, as declared by the Congress more than 60 years ago, is one that should be enforced. The Federal Trade Commission had a definite and important duty in that respect.

It is my understanding that the President in his veto message on S. 1008 stated his expectations that the Federal Trade Commission would continue to do its duty in the enforcement of the laws entrusted to it.

Let me repeat this point for emphasis. In every case where the Commission has ordered any company to stop conspiring to fix prices through the use of freight absorption, that company has been a party to a price fixing conspiracy of which freight absorption was only one of the tools used to effectuate the conspiracy. Many of these business practices used to make the conspiracy work would be legal and proper if used independently. But when used as an agreed upon means to fix prices, its use for that purpose must be stopped.

To use a very homely analogy - a brick is a very useful building material. No one has any desire to eliminate the manufacture of bricks. But when someone has been found to be continually using bricks to weaken the resistance of others to the removal of their purses, the policeman on the corner would, I am sure, quickly order than man to cease and desist from using bricks for that purpose. That is what the Commission has done in its price fixing cases where the companies have been found to be using freight absorption as a tool to weaken or destroy competition.

To further illustrate my point that in the price-fixing cases involving freight absorption, it was only one of many means used simultaneously by these companies to fix prices, I am going to quote from the court's opinions in several of these cases.

For example in the Cement Case, one of the cases which seems to have raised so much controversy, the Supreme Court of the United States stated:

> "When the Commission rendered its decision there were about 80 cement manufacturing companies in the United States operating about 150 mills. Ten companies controlled more than half of the mills and there were substantial corporate affiliations among many of the others. This concentration of productive capacity made concerted action far less difficult than it would otherwise have been. The belief is prevalent in the industry that because of the standardized nature of cement, among other reasons, price competition is wholly unsuited to it. That belief is historic. It has resulted in concerted activities to devise means and measures to do away with competition in the industry. Out of those activities came the multiple basing point delivered price system. Evidence shows it to be a handy instrument to bring about elimination of any kind of price competition. The use of the multiple basing point delivered price system by the cement producers has been coincident with a situation whereby for many years, with rare exceptions, cement has been offered for sale in every given locality at identical prices and terms by all producers. Thousands of secret sealed bids have been received by public agencies which corresponded in prices of cement down to a fractional part of a penny.
>
> "Occasionally foreign cement has been imported, and cement dealers have sold it below the delivered price of the domestic product. Dealers who persisted in selling foreign cement were boycotted by the domestic producers. Officers of the Institute took the lead in securing pledges by producers not to permit sales f.o.b. mill to purchasers who furnished

their own trucks a practice regarded as seriously disruptive of the entire delivered price structure of the industry.

"During the depression in the 1930's, slow business prompted some producers to deviate from the prices fixed by the delivered price system. Meetings were held by other producers; an effective plan was devised to punish the recalcitrants and bring them into line. The plan was simple but successful. Other producers made the recalcitrant's plant an involuntary base point. The base price was driven down with relatively insignificant losses to the producers who imposed the punitive basing point, but with heavy losses to the recalcitrant who had to make all of its sales on this basis. In one instance, where a producer had made a low public bid, a punitive base point price was put on its plant and cement was reduced 10¢ per barrel, further reductions quickly followed until the base price at which this recalcitrant had to sell its cement dropped to 75¢ per barrel, scarcely one-half of its former base price of $1.45. Within six weeks after the base price hit 75¢, capitulation occurred and the recalcitrant joined a portland cement association. Cement in that locality then bounced back to $1.15, later to $1.35 and finally to $1.75."

Now gentlemen, that's just an old-fashioned price-fixing conspiracy and certainly no one would defend such practices.

Another example was the Allied Paper Mills Case. The opinion in that case was written by our former colleague Sherman Minton, now a Justice of the Supreme Court of the United States, while still a judge on the Circuit Court of Appeals out in Chicago. In that opinion, he said:

"The evidence here which supports the findings of combination and conspiracy is legion; all the petitioners expressly pledged their continued cooperation with the Association upon the termination of the N.R.A.; the petitioners continued to file price changes with the Association on forms provided by the Association therefor and these changes were disseminated by the Association; many petitioners mailed their new base prices directly to other petitioners; the Association prepared standard contract forms containing specified provisions relating to ultimate prices, and most of the petitioners used these forms with or without minor variations; and the Association held frequent and well attended meetings. The petitioners do not controvert the truth of this evidence, but address arguments to its weight and the inferences that should have been drawn therefrom. We cannot say that the Commission's inferences are unreasonable. The petitioners did with varying uniformity use the zoning system of price quoting, and the existence of this plan which equalizes delivered prices of competitors having widely different costs at a given destination, is strong evidence in itself of an agreement to use such plan....

"The record is replete with documentary evidence composed of correspondence, Association minutes, and oral testimony, from all of which combination and conspiracy is the reasonable, if not required, conclusion.

"The petitioners finally contend that various findings of agreement among them as to the means and methods used to accomplish the total combination and conspiracy are not supported by the evidence. It is these several activities, used for the purpose of continuing the petitioner's combination and conspiracy to fix prices, which are prohibited in the Commission's order. Without setting out all of these findings, let us examine several pertinent ones to see if there is substantial evidence to support them. The Commission found that the corporate petitioners by agreement adopted so-called trade customs in 1933, when such adoption was legal by virtue of the N.R.A. These trade customs included price differentials for coated and uncoated paper, according to size, weight, and packaging. The Commission found further that these trade customers were revised and expanded by means of agreement in 1936, after the N.R.A. period, and that they have been and are in general use. To support this finding, without going into detail, are the minutes of the Association and the testimony of witnesses, manifestly capable of supporting a finding of collusion and agreement.

"The Commission further found that the zoning system was continued after the N.R.A. by mutual understanding and consent, and that despite minor variations it is in general use. This finding is based in part upon the minutes of the Association and also on the testimony of a witness to the effect that it had been continued by mutual consent. 'We think the artificiality and arbitrariness of the zone structure is so apparent it cannot withstand the inference of agreement' ....

"The Commission found that uniform quantity discounts had been adopted concertedly, were in general use with variations, and were continued by agreement. This is based in part and sufficiently on minutes of the Association and inferences therefrom.

"The Commission found that there was uniform though sealed bidding to the United States Government Printing Office, and that this was the result of agreement. This finding is buttressed by correspondence, the testimony of petitioner Allied's merchant-agent whose price cutting resulted in the petitioners' refusal to fill the order he had obtained, and the testimony of the Director of Purchases of the Government Printing Office.

"The evidence with sufficient clarity involves all petitioners, although, of course, various items of evidence pertain to various petitioners. The respective petitioners are not relieved from liability as conspirators merely because they all did not take part in the same acts ....

"Here the petitioners are proved to have agreed upon these factors; uniform quantity discounts, uniform finishing differentials, uniform base prices, and a uniform zoning system with uniform zone differentials, all without regard to a particular petitioner's costs of production and distribution. The pattern clearly provides a means of fixing uniform prices....."

From these facts, there can be no doubt that these companies were trying to avoid competing with each other. Agreements to restrain competition are clearly illegal and cannot be permitted to continue no matter what means are used to make them effective.

Another example of a case in which a study of all of the facts showed clearly that certain paper manufacturers were using freight absorption, along with other means to fix prices, is the Fort Howard Paper Company case. Here, Judge Kerner of the United States Circuit Court of Appeals out in Chicago, Illinois, stated in the court's opinion approving the Commission's ruling in this case:

> "This case concerns a relatively old industry, involving but eight companies. Trade practices were rarely varied, and with the use of the zone system the delivered prices were practically identical. The Association attempted to justify its existence and through promotional efforts sought to increase the volume of business, sought to aid the members in the obtaining of desired information, and acted as a unifying agent, in earlier times for prices, then, of invoice statistics. The documentary evidence touched upon in the findings of the Commission discloses not a few hints of its earlier value as a price exchange bureau; also as an aid to keep recalcitrant or derelict members in line with price policy."

In discussing the Commission's finding of an agreement in restraint of trade, the court stated:

> "This finding of the Commission was made upon all the evidence, including the conditions existing in the industry. It was not a finding based simply on inference. It was a finding of fact based on actualities. The existence of substantial similarity in delivered prices to zoned territories having identical zone price differentials, by six manufacturers located at different places, was not a happenstance. Nor, looking at the situation objectively, was it the inevitable and unescapable result of keen competition in a standard product of invariable qualities. To be sure, a keen competitor strives to meet a lowered price of a competitor immediately upon becoming aware of it, but he does not strive to and invariably match a price which is <u>higher</u> than that at which he needs profitably to sell, unless by express, or tacit agreement, all manufacturers have found existence to be less strenuous for all concerned by merely setting a price for three zones in the whole United States, and except for such (identical) zone differentials, discarding and ignoring the substantial item of freight. We are unable to comprehend a manufacturer's disdain of a natural advantage utilizing the same to gain local business, unless he were indoctrinated with the belief (or forced by superior economic competitors to align himself to concerted action of identical delivered prices) that elimination of all competition was economically preferable.

"True, convenience of the use of zones is not to be denied, but mere convenience does not induce competitors approximately one-third of the nation's width apart to consider themselves concentric in mapping of zones. One glance at the three zone map for bulk crepe will show the artificiality of the zone structure and intention to obviate any natural advantage of location from price determination. Two of the companies are located in Wisconsin, and the western limits of the zone run merely to the Mississippi River while the eastern boundary runs to the Atlantic Ocean. Zone I is obviously drawn to include all manufacturers and put them on a par. The unfairness of this is whown by the fact that a purchaser in the adjacent States of Minnesota and Iowa would pay the additional fixed price differential to that paid by purchasers in the remote New England States. The zoning system here employed is an enormous exaggeration of the basing point system, having nineteen States as the focal basing point. The packaged crepe zone system split the nation (but not into equal halves) into two parts. . . .

"We think the artificiality and arbitrariness of the zone structure is so apparent it can not withstand the inference of agreement . . ."

Another case, U.S. Maltsters Ass'n et al. v. Federal Trade Commission, reviewed by this same court involved eighteen manufacturers of malt. Here the court said:

"We are of the view that the Commission's findings that a price fixing agreement existed must be accepted. Any other conclusion would do violence to common sense and the realities of the situation. The fact that petitioners utilized a system which enabled them to deliver malt at every point of destination at exactly the same price is a persuasive circumstance in itself. Especially is this so when it is considered that petitioner's plants are located in four different States and that the barley from which the malt is manufactured is procured from eight or nine different States. Of further significance is the uniformity by which prices were increased and decreased. When a member announced an increase in price, that information was flashed by telegram to every other member and they immediately announced a like increase. When a member announced a decrease in price, such announcement was likewise flashed to all other members and they at once proceeded to announce a similar decrease. It may be true, as pointed out by petitioners, that a decrease in price by all members is necessary when such decrease is announced by any one member in order to meet competition. It certainly cannot be claimed, however, that it is necessary that all members increase their price upon announcement of an increase by one member in order to meet competition.

"It is asserted by petitioners that an increase under such circumstances is necessary in order that each member may secure from his regular customers contracts for their malt requirements at the same time that his competitors are taking contracts from their customers. This is on the theory, we suppose, that a customer is allowed a certain

time subsequent to the announcement of an increase in price to place his order at the old price. In other words, it appears that each member must follow, and always to the same extent, an upward move in the market in order to force its own customers to enter into contracts for malt. This may be the most available excuse for the uniformity in a price increase but it is scant, if any, justification. In this connection also, it is pertinent to note that when one member announced a discount to customers, all other members announced exactly the same discount. These circumstances and others, which could be mentioned, including the freight rate system without which a uniform delivered price could not have been achieved, furnish strong support for the finding that a price fixing agreement existed. In fact, it is difficult to discern how the various steps necessary to produce the result could have been taken with such meticulous care and regularity in the absence of an agreement."

I am certain that no one present, if a member of the Federal Trade Commission, would favor the continuation of such a price fixing agreement. Such agreements always lead to higher profits for the conspirators and higher prices for us consumers. Where the producers of a commodity get together by any means and, by agreeing not to compete, raise the price, the consumers' only defense is to call upon its government to break up that price fixing agreement. We at the Federal Trade Commission are charged by Congress to help break up these agreements. Believe me, gentlemen, when I tell you that we are doing our best.

Another example showing the clearly illegal use of freight absorption along with other means to get up a price fixing scheme is set out in the Milk and Ice Cream Can Institute Case. Here the court, in upholding the Commission's finding of price fixing conspiracy, said as follows:

"No good purpose would be served in a detailed discussion of the various activities of the Institute and its members, relied upon by the Commission in support of its finding that they acted in concert and by agreement. A study of the record is convincing not only that the finding is substantially supported but that it would be difficult to reach any other conclusion. We shall, therefore, briefly refer to some of such activities, the most import of which is the so-called freight equalization plan. The Commission found that this plan was maintained for the purpose and with the result that 'the delivered cost of their products was the same, regardless of from whom purchase was made or from which producing point the goods purchased were shipped,' and further that the plan was not used by petitioners 'on a competitive basis when reaching into a competitor's territory, since its use was solely to match competitor's prices,' and that it 'served only to maintain uniformity of delivered prices.' Petitioners do not dispute but that this freight equalization system was used for the express purpose of effecting a uniform delivered price. In one of petitioner's briefs, it is stated: 'As all cans are sold f.o.b. shipping point this equalization permits the manufacturers to submit their product to the prospective purchaser at a net delivery price unfettered by the distance between

shipping (point) and that of the nearest competitor.' This is merely another way of saying that by use of the freight equalization system all manufacturers are enabled to sell at the same delivered price.

"It is argued, perhaps correctly, that such a freight system had long been employed by industry so that members thereof might deliver their product at the same price. In fact, the Commission recognizes that this freight equalization plan was used by petitioners prior to the organization of the Institute. Such being the case, the fact still remains that it was employed by petitioners for the purpose of fixing the delivered price of their product and by such use price competition was eliminated or at any rate seriously impaired. On the face of the situation, it taxes our credulity to believe, as argued, that petitioners employed this system without any agreement or plan among themselves. Any doubt in this respect, however, is removed by reference to the minutes of the Institute and other evidence found in the record.

"In connection with the freight equalization plan, petitioners employed what is referred to as the Climax freight rate book, which was utilized for the purpose of determining and quoting freight rates on an equalized basis. The minutes of the Institute disclose that such a service was discussed at meetings of the members, and its importance was recognized as a means of carrying out the equalization program. A large number of such freight rate books were procured by the Institute and distributed to its members. The use of these freight rate books standing alone may not mean much, if anything, but when used in the manner disclosed, it is a reasonable inference that they were part of the plan by which the desired result was to be obtained.

"Another activity relied upon by the Commission which is not without weight is the so-called reporting system by which the activities of each of the members, including prices received from sales, is embodied in a daily report and sent to the Institute. The Commission found that such system was in order 'to assure the maintenance of uniform prices,' that it 'was designed to and did permit' petitioner Hunter 'to supervise the price activities' of manufacturing petitioners, that he 'would from time to time, upon evidence or suspicion of variation in price as developed from various reports, call such deviation or possible deviation to the attention of the members as a whole, and from time to time requested said members to review their data to determine if the discrepancies were due to errors in compilation.'

"The record shows that this reporting system was adopted at Institute meetings following discussion by the members relative thereto. That is, the members agreed to make reports and, when called upon by the Commissioner, were required to submit evidence as to the correctness thereof. There is also testimony that this reporting system was for the purpose of enabling a member to determine whether or not his competitors were adhering to the price list. The brief of the Institute concedes that such reports 'cannot be made to the Institute without a planned or agreed common course of action.' It is insisted, however, that such course

of action was not followed, pursuant to an agreement to fix and maintain prices. We think the record discloses to the contrary.

"Another activity which indicates petitioners were acting in concert arises from the action of the Institute in establishing a classification of buyers, with a determined discount allowable to each class. Jobbers, for instance, were allowed a rate of discount different from consumers and retail establishments. This information concerning classification was included in the reports made to Hunter as Commissioner of the Institute.

"Much is said by petitioners concerning their claim that milk and ice cream cans are a standardized product. From this it is argued that uniformity of price was a natural rather than an artificial result. An argument of this kind has some merit as to certain products, such as sugar, salt, oil, etc., where the product from its nature is standard. We doubt, however, if there is any merit in the contention that a can is in such a category. We think it is true that they were standardized in the instant situation, but this was the result of the activities of the Institute and its members. In fact, there was a continuing effort and urging on their part that the cans be manufactured in uniform classifications. It may be, as argued, that much of this effort was to comply with various governmental regulations and for health purposes, but the fact still remains that it was easier to reach the goal of uniform prices on a standard product than on one which was not. The meticulous effort disclosed by the record by which petitioners standardized their products is also a strong circumstance in support of the Commission's finding that their activities were the result of an agreement.

"It also is of importance to note that the minutes of the Institute meetings disclose that certain restrictions were placed on the sale of 'seconds.' The Commission finds that this was done in order to prevent first quality cans being sold at an off price. The record discloses that Commissioner Hunter on one occasion stated that the price differential on some sales of 'seconds' was so small 'as to suggest that 'firsts' were being sold as 'seconds.' Here again each member was required to report cans which were obsolete, as well as those which were sold as 'firsts' and those sold as 'seconds' together with the price received therefor. One of petitioners' officers testified that sales of 'first' as 'seconds' was a method of indirect price cutting.

"We have merely touched upon some of the circumstances relied upon by the Commission in support of its findings that petitioners acted concertedly and by agreement. It is futile to contend that all of these activities could have been carried on so scrupulously and metitulously without an understanding or agreement. Any other conclusion would do violence to common sense and the realities of the situation"

Even in the Rigid Steel Conduit Case, there was no doubt of the existence of a price fixing conspiracy. Indeed this question was not even argued before the Supreme Court. The only contest in that case was on Count Two of

the order which prohibited the use of freight absorption under the circumstances there found. On the existence of a price fixing conspiracy between the respondents, the United States Circuit Court of Appeals in Chicago, Illinois, in a unanimous opinion stated:

> "The argument is that there is no direct evidence of any conspiracy; that if the Commission made such finding, it is based upon a series of inferences; and that the general use of the basing point method of pricing and the uniformity of prices does not justify an inference of conspiracy. We think there was direct proof of the conspiracy. . .
>
> "In this case there was evidence showing collective action to eliminate the Evanston basing point, and collective activities in promoting the general use of the formula presently to be noted. The record clearly establishes the fact that conduit manufacturers controlling 93% of the industry use a system under which they quote only delivered prices, which are determined in accordance with a formula consisting of a base price at Pittsburgh or Chicago plus rail freight, depending upon which basing point price controls at any particular destination or in any particular section of the United States; that as a result of using that formula the conduit producers were enabled to match their delivered price quotations, and purchasers everywhere were unable to find price advantages anywhere; and that purchasers at or near a place of production could not buy more cheaply from their nearby producer than from producers located at greater distances, and producers located at great distances from any given purchaser quoted as low a delivered price as that quoted by the nearest producer.
>
> "An example of an instance where petitioners have matched their bids appears where the Bureau of Supplies and Accounts, United States Navy Department, requested bids under seal for the furnishing of one million feet of conduit for delivery at the Navy Yards in Philadelphia, Pennsylvania, Norfolk and Sewell's Point, Virginia. Seven of the petitioners submitted bids and matched their price quotations in terms of dollars per foot down to the fourth decimal point. Of course, there were other instances in the record showing identify of bids. Not only did petitioners match their bids when submitted under seal to agencies of public bodies, but each, with the knowledge of the others, did likewise -- used the formula for the purpose of presenting to prospective private purchasers conditions of matched price quotations."

Therefore, it is clear that even in this highly controversial matter, the Commission acted only after receiving direct evidence of the existence of a conspiracy to fix prices. No one can properly question that that price fixing conspiracy should have been broken up.

APPENDIX E - SUPPLEMENTING THE ANSWER TO QUESTION 3(d)

The Commission and the Courts have found that certain companies have, by the use of a basing point method of selling, discriminated in price between their customers in violation of section 2(a) of the Clayton Act. The best known of these matters are the so-called glucose cases. In both of these cases, the respondents, the Corn Products Refining Company and the A. E. Staley Company, were found not only to have discriminated in price between competing candy manufacturers by absorbing freight, but also by adding a non-existent freight charge on sales to certain of the candy manufacturers which they did not add to all, and by permitting, after a price rise, their favored buyers to purchase at the old price and at the same time charging higher prices to other buyers. In these cases, the Commission and the courts held that these discriminations resulted in substantial harm to competition among the candy manufacturers.

In the Staley case, the then Chief Justice of the Supreme Court of the United States, Harlan F. Stone, described the prohibited practices of the Staley Company as follows:

> "The Commission found that at all relevant times respondents have sold glucose, shipped to purchasers from their plant at Decatur, Illinois, on a delivered price basis, the lowest price quoted being for delivery to Chicago purchasers. Respondents' Chicago price is not only a delivered price at that place, it is also a basing point price upon which all other delivered prices, including the price at Decatur, are computed by adding to the base price, freight from Chicago to the point of delivery. The Decatur price, as well as the delivered price at all points at which the freight from Decatur is less than the freight from Chicago, includes an item of unearned or 'phantom' freight, ranging in amount in instances mentioned by the Commission, from 1 cent per hundred pounds at St. Joseph, Missouri, to 18 cents at Decatur. The Chicago price, as well as that at points at which the freight from Decatur exceeds freight from Chicago, required respondents to 'absorb' freight, varying in instances cited by the Commission from 4 cents per one hundred pounds at St. Louis, Missouri, to 15½ cents per hundred pounds at Chicago.
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> "The Commission found that this inclusion of unearned freight or absorption of freight in calculating the delivered prices operated to discriminate against purchasers at all points where the freight rate from Decatur was less than that from Chicago and in favor of purchasers at points where the freight rate from Decatur was greater than that from Chicago. It also made findings comparable to those made in the Corn Products Refining Company case that the effect of these discriminations between purchasers, who are candy and syrup manufacturers competing with each other, was to diminish competition between them.
>
> "The Commission also found that respondents, during a period of from five to ten days after they advance the prices of the product, customarily permit purchasers generally to 'book orders or secure options to purchase glucose at the old price, for delivery within thirty days, but that they also have permitted certain favored purchasers to secure additional extensions of time for delivery upon such options. In consequence of

these time extensions, the favored buyers were enabled to secure glucose at a lower price than that concurrently being charged to other buyers. In some instances after a price advance, respondents also made fictitious bookings on which deliveries were later made, at the option of the favored buyers; and in still other cases sales were made to favored purchasers long after the expiration of the booking period. Respondents also book glucose in tank car lots to certain purchasers who lack storage facilities for such quantities; respondents then actually make deliveries in tank wagon lots over a period of many months, during which they are selling to others upon like deliveries at higher prices.

"These findings and the conclusion of the Commission that the price discriminations involved are prohibited by Sec. 2(a) are challenged here. But for the reasons we have given in our opinion in the Corn Products Refining Company case, the challenge must fail.

In the Corn Products Case, Chief Justice Stone described respondent's practice of charging certain of its purchasers a fictitious freight charge as follows:

"The Commission found from the evidence that petitioners have two plants for the manufacture of glucose or corn syrup, one at Argo, Illinois, within the Chicago switching district, and the other at Kansas City, Missouri. The Chicago plant has been in operation since 1910, and that at Kansas City since 1922. Petitioners' bulk sales of glucose are at delivered prices, which are computed, whether the shipments are from Chicago or Kansas City, at petitioner's Chicago prices, plus the freight rate from Chicago to the place of delivery. Thus purchasers in all places other than Chicago pay a higher price than do Chicago purchasers. And in the case of all shipments from Kansas City to purchasers in cities having a lower freight rate from Kansas City than from Chicago, the delivered price includes unearned or 'phantom' freight, to the extent of the difference in freight rates. Conversely, when the freight from Kansas City to the point of delivery is more than that from Chicago, petitioners must 'absorb' freight upon shipments from Kansas City, to the extent of the difference in freight.

"The Commission illustrated the operation of the system by petitioners' delivered prices for glucose in bulk in twelve western and southwestern cities, to which shipments were usually made from Kansas City. On August 1, 1939, the freight rates to those points of delivery from Chicago were found to exceed those from Kansas City by from 4 to 40 cents per hundred pounds, and to that extent the delivered prices included unearned or phantom freight. As petitioners' Chicago price was then $2.09 per hundred pounds, this phantom freight factor with respect to deliveries to these twelve cities represented from 2 to 19% of the Chicago base price. From this it follows, as will presently be seen, that petitioners' net return at their Kansas City factory on sales to these twelve cities, in effect their f.o.b. factory price, varied according to the amount of phantom freight included in the delivered price.

"Much of petitioners' glucose is sold to candy manufacturers who are in competition with each other in the sale of their candy. Glucose is the principal ingredient in many varieties of low priced candies, which are sold on narrow margins of profit. Customers for such candies may be diverted from one manufacturer to another by a difference in price of a small fraction of a cent per pound.

"The Commission found that the higher prices paid for gluclose purchased from petitioners by candy manufacturers located in cities other than Chicago, result in varying degree in higher costs of producing the candies. The degree in each instance varies with the difference in the delivered price of the glucose, and the proportion of glucose in the particular candy. Manufacturers who pay unearned or phantom freight under petitioners' basing point system necessarily pay relatively higher costs for their raw materials than do those manufacturers whose location with relation to the basing point is such that they are able to purchase at the base price plus only the freight actually paid."

The Court further described this company's discriminatory booking practices as follows:

"Ordinarily, when petitioners announce an advance in the price of glucose, they allow their customers a period of five days to 'book' orders, that is, secure options to purchase, at the old price, and a period of thirty days in which to take delivery upon the options. The Commission charged that petitioners have further violated Sec. 2(a) of the Clayton Act, as amended, by permitting certain favored customers to secure options for the purchase of glucose, and to take delivery at the old price, for periods longer than those usually permitted to other customers. The Commission also charged other violations of Sec. 2(a) in that petitioners favored certain tank wagon customers by permitting them to book orders at the lower prices charged for tank car deliveries, and to take deliveries by tank wagon over extended periods of time. The Commission found, upon ample evidence, that these discriminations were in fact made by petitioners."

A reading of these facts as set out by the Supreme Court of the United States in these cases can leave no reasonable man with any doubt as to the inevitability of injury which these practices would have among candy manufacturers when some had to pay that fictitious freight charge or had a rise in prices for raw materials take effect before it did for their competitors.

All of these factors were taken into account by the Commission and the courts in these cases. Freight absorption was only one element in these cases. They do not hold that all freight absorption in all cases is illegal.

APPENDIX F - SUPPLEMENTING THE ANSWER TO QUESTION 8(a)

The last release in point of time was on June 10 of this year and I quote from it:

The Federal Trade Commission today issued the following statement concerning the proposed order to cease and desist in the Corn Products Case:

In the last few days some portions of the press and radio have made incorrect references to and misrepresentations of the proposed order to cease and desist in the Federal Trade Commission case relating to the pricing practices of 16 principal manufacturers and sellers of corn products in the United States.

Some statements made in newspapers and over the radio failed to make clear that the proposed order would prohibit use of basing point and zone systems of pricing only when such systems involve concerted action, conspiracy or unlawful agreements among sellers of corn products.

The proposed order was submitted by counsel on June 6 to a Federal Trade Commission trial examiner for consideration. It was the subject of a press release issued by the Commission on June 7.

For the purpose of clarification, pertinent paragraphs from that release are quoted. In the following paragraphs, the Commission calls particular attention to those words and phrases which very explicitly limit the order to prohibiting price-fixing practices which are the result of conspiracy, mutual agreements, collusion or any planned common course of action among the respondents:

"Sixteen companies which account for 95 percent of the corn derivatives manufactured and sold in the United States have consented to entry of an order which, if accepted by the Federal Trade Commission trial examiner hearing the case, would prohibit them from conspiring to fix prices and from engaging in discriminatory pricing practices.

"The proposed order would require the respondents to cease and desist from entering into or continuing, among other things, any agreement whereby prices for their products are established and maintained through concerted use of a basing point or zone system of pricing.

"One part of the proposed order is directed against unfair methods of competition violative of the Federal Trade Commission Act. It would require the respondents to cease and desist from the following practices when engaged in pursuant to 'any planned common course of action, mutual agreement, understanding, combination or conspiracy':

"Establishing, fixing or maintaining prices, terms or conditions of sale.

"Establishing or maintaining a zone system or basing point system of prices.

"Failing to quote or sell and deliver corn derivatives f.o.b. at each production point.

"Exchanging or relaying among the respondents, directly or through any institute or central agency or private individual, or through any other media, information as to current prices for the purpose or with the effect of fixing or maintaining prices, terms or conditions of sale.

"Formulating or using any price reporting plan which has the tendency or effect of depriving the public of any benefit of competition in pricing among the manufacturing respondents or between any of them and any other manufacturer or seller of corn derivatives."

The incorrect statements about and misinterpretations placed upon the proposed order are similar to misstatements which have been made about the meaning of Federal Trade Commission orders in other cases dealing with basing point systems and price fixing arrangements over the last two years.

Those misstatements and misinterpretations should be corrected. The public and the business community should not be left with the impression that the Federal Trade Commission is acting or has ever acted to prohibit or interfere with delivered pricing or freight absorption when innocently and independently pursued with the result of promoting competition. The Commission and the courts have acted to stop those practices only when they have involved collusion, conspiracy or unjust discriminations with resulting damage to competition and the public interest. The Commission understands the proposed order to cease and desist in the present Corn Products Case to be within those bounds.

Another of the cases which caused concern to some was the Conduit case. In that case also there was a charge in one count of the complaint of conspiracy and the Commission found a conspiracy to exist. On July 7, 1949, the Commission in denying a motion to reopen and modify the order in this case clarified the order by stating in part:

"The purpose of the requested modification is said to be to make clear that the order does not prohibit any of the respondents, acting independently, from quoting or selling at delivered prices or from absorbing freight. The Commission does not consider that the order in its present form prohibits the independent practice of freight absorption or selling at delivered prices by individual sellers. What the questioned portion of the order does prohibit is the continuance of the basing-point, delivered price system, found to have been the subject of conspiracy, or any variation thereof which might be accomplished through the practices specified in sub-paragraphs (a), (b), (c), or (d) when done, as stated in the order, 'for the purpose or with the effect of systematically matching delivered price quotations.'"

Under section 2(a) of the Act, 124 cases have been adjudicated by the Commission. Of these, four were later decided by the Supreme Court, and petition for certiorari was denied in one, and one is still pending there for reargument. These cases are: Corn Products, Staley, Moss, Cement and Morton Salt, with the Standard Oil of Indiana case still pending. One additional case, E. B. Mueller & Company was decided by a Circuit Court of Appeals. In all of these cases, the Commission's orders were affirmed.

In the Morton Salt case the Court said:

"To support this argument, reference is made to the fact that salt is a small item in most wholesale and retail businesses and in consumers' budgets. For several reasons we cannot accept this contention.

"There are many articles in a grocery store that, considered separately, are comparatively small parts of a merchant's stock. Congress intended to protect a merchant from competitive injury attributable to discriminatory prices on any or all goods sold in interstate commerce, whether the particular goods constituted a major or minor portion of his stock. Since a grocery store consists of many comparatively small articles, there is no possible way effectively to protect a grocer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store.

"Furthermore, in enacting the Robinson-Patman Act Congress was especially concerned with protecting small businesses which were unable to buy in quantities, such as the merchants here who purchased in less-than-carload lots. To this end it undertook to strengthen this very phase of the old Clayton Act. The committee reports on the Robinson-Patman Act emphasized a belief that § 2 of the Clayton Act had 'been too restrictive in requiring a showing of general injury to competitive conditions..." The new provision here controlling, was intended to justify a finding of injury to competition by a showing of 'injury to the competitor victimized by the discrimination.' Since there was evidence sufficient to show that the less-than-carload purchasers might have been handicapped in competing with the more favored carload purchasers by the differential in price established by respondent, the Commission was justified in finding that competition might have thereby been substantially lessened or have been injured within the meaning of the Act.

"Apprehension is expressed in this Court that enforcement of the Commission's order against respondent's continued violations of the Robinson-Patman Act might lead respondent to raise table salt prices to its carload purchasers. Such a conceivable, though, we think, highly improbable contingency, could afford us no reason for upsetting the Commission's findings and declining to direct compliance with a statute passed by Congress.

"The Commission here went much further in receiving evidence than the statute requires. It heard testimony from many witnesses in various parts of the country to show that they had suffered actual financial

losses on account of respondent's discriminatory prices. Experts were offered to prove the tendency of injury from such prices. The evidence covers about two thousand pages, largely devoted to this single issue--injury to competition. It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing in itself is sufficient to justify our conclusion that the Commission's findings of injury to competition were adequately supported by evidence."

In the footnote 18 the Court cited the following:

"In explaining this clause of the proposed Robinson-Patman Act, the Senate Judiciary Committee said:

> 'This clause represents a recommended addition to the bill as referred to your committee. It tends to exclude from the bill otherwise harmless violations of its letter, but accomplishes a substantial broadening of similar clause now contained in section 2 of the Clayton Act. The latter has in practice been too restrictive, in requiring a showing of general injury to competitive conditions in the line of commerce concerned; whereas the more immediately important concern is in injury to the competitor victimized by the discrimination. Only through such injuries, in fact, can the larger general injury result, and to catch the weed in the seed will keep it from coming to flower.' S. Rep. No. 1502, 74th Cong., 2d Sess. 4. See also H. Rep. No. 2287, 74th Cong., 2nd Sess. 8; 80 Cong. Rec. 9417."

The Commission has adjudicated 146 cases under section 2(c) of this Act, and of these, eight were appealed to the Circuit Courts of Appeal and certiorari was denied by the Supreme Court in one of these. In all of these cases the Commission's orders were affirmed.

The Commission has adjudicated 60 cases under section 2(d), none of which were appealed.

The Commission had adjudicated 41 cases under section 2(e), two of which were appealed. Of these, one was affirmed by the Supreme Court and the other was affirmed by the Circuit Court of Appeals and certiorari was denied by the Supreme Court.

The Commission has adjudicated 11 cases under section 2(f), only one of which has been appealed and is now pending.

APPENDIX G - SUPPLEMENTING THE ANSWER TO QUESTION 12(c)

The preceding question and the one immediately following present hypothetical factual situations. Such questions are extremely difficult to answer as they do not provide sufficient background to give the Commission all of the factual materials necessary to make a proper decision. Many times such questions have been presented to the Commission by business groups and experience has shown that a precise answer given upon such limited facts can often be twisted to apply to a situation never envisaged by the Commission. The Commission long ago concluded that it is unwise to attempt to generalize upon such hypothetical situations. While we are extremely anxious to help clarify the law as much as is possible, it necessarily must be the practice of the Commission, as it is of the Courts, to clarify the law through the decision of actual controversies.

In proceeding under section 5 of the Federal Trade Commission Act and under section 11 of the Clayton Act, the Commission acts much as a court in a quasi-judicial capacity. Its orders under section 5 of the Federal Trade Commission Act may assume the full force and effect of law and persons who violate them may be punished by imposition of civil penalties which are in many ways analogous to fines in criminal cases. The basic reasons for refusal by the courts to speculate about the legality of hypothetical situations apply with equal force to the work of the Federal Trade Commission, and for the Commission to pronounce the legality or illegality of any conduct except in the process of deciding cases coming before it would be wholly inconsistent with the fundamental concept of our judicial system.

During the debates over the Federal Trade Commission Act in 1914 the question of whether the Commission should undertake to give "advice in advance" and render advisory opinions received considerable attention. Shortly after its organization the Commission consulted with a number of very prominent jurists and attorneys seeking advice as to whether and to what extent the Commission was authorized to render advisory opinions. Among others, they called upon Louis D. Brandeis, and he attended a meeting of the Commission and that conference with the Commissioners was recorded in transcript form. The following statements of the late Justice Brandeis are excerpts from the transcript of this meeting on April 30, 1915, in the Commission's offices in Washington:

> "MR. BRANDEIS: That question which they bring up is a question which has been very much discussed as, on the one hand a thing that was desirable, and, on the other hand, as a thing that was dangerous. * * * From the business standpoint, it is desirable. It would be a very convenient thing if a man could come before your body and say, 'Here are the facts; is this right? Can we do this, or can we do that? It sounds very alluring. I believe it to be absolutely impossible of proper application, and for this Commission, I think it would be one of the most dangerous powers that it could possibly assume * * * Now this is a commission of business men - you have three business men and two lawyers; and the lawyers are not selected because they are to determine the law for the Board; they are selected as an aid. It never was intended, in the composition of the Board, and certainly not in the

legislation, for you to exercise this power. That was very much discussed, and the only strong argument that was put up against the Trade Commission was the danger of giving to the Commission just such power as this; that it was almost inevitable that if that power were given the public would be tricked; I mean, that the Commission, with the best of intent, would be hoodwinked; and it is really inevitable that it should be. For just see this situation - see just what this situation is. The difficulty in deciding any question that comes up is really the difficulty in getting at the facts. Most men can decide any problem correctly if all of the facts be properly set before them. The difficulty in this situation of you passing upon this condition is twofold. In the first place, the facts do not exist yet. You are to determine in advance, largely as prophets, what is going to happen. Assuming absolutely good faith on the part of the people who come before you, you are to determine whether that which they are planning to do is going to result in an improper restraint of trade. You cannot decide that fact because you do not know what the facts are going to be, nor the conditions to which they are going to apply them, because they do not even know; because they are going to act, and even in good faith, upon the circumstances as they arise from time to time. For you to say in advance, even if you got a full and fair statement from all of these people as to what they were planning to do, is to predict things on a state of facts which you do not know, because they are in the future.

"But the other point is, and that is the point that we lawyers have to deal with more frequently, and which is constantly impressed upon us, no statement of facts, however honest your people may be, can be relied upon until it has been subjected to the careful study and criticism of people who have a different point of view. Now, these people may be perfectly honest in laying this matter before you. They see it from their side. They do not know the whole field. They only see the difficulties which they have got and which they are trying to overcome. They do not see the other side - the evils which may attend their doing of this act. If we are going to get anywhere near the truth and justice in this action you have got to have the other side fully represented, and that never can be done in advance because the people who are going to be affected by this are not available. They may not exist, I mean. They may not be in existence as an industry or as a commercial force. But even if they are, they cannot be summoned here to take action, and you cannot possibly have the knowledge which would make you wise enough to deal with that situation in such a way as to make it safe. Everybody who has undertaken to deal with this in the past ten years has been confronted with that situation - the practical certainty that if any board - if the Attorney General - or if any board of any kind undertook to deal with this situation, the community would get tricked, even with the best of intent on the part of the government agency.

"Now, I do not believe, on the other hand, that the difficulty for the business man is nearly as great as he imagines it to be. I have been at times counsel for a few trusts. The president of one of the largest of them, when we were discussing the law some four or five years

ago, - and he was full of his attacks against the Sherman Law, - said to me, 'Now you have been speaking in favor of this Sherman Law, and I have been going around and trying to find out what I can do, and I can't get any advice as to what I can do.' And he said, in rather a pleasant enough way, but in certain ways rather sneering, 'Perhaps you can advise me.' I said, 'I can advise you perfectly, but it is a question what advice I can give you. If you ask me how near you can walk to the edge of a precipice without going over, I can't tell you, for you may walk on the edge, and all of a sudden you may step on a smooth stone, or strike against a little bit of root sticking out, and you may go over that precipice. But if you ask me, how near you can go to the precipice and still be safe, I can tell you, and I can guarantee that whatever mishap comes to you, you will not fall over that precipice. You have taken my advice, and other lawyers' advice about any number of things; and when we give you advice, you act on that advice; and you have given up many a good trade on questions that have had nothing to do with the Sherman Law, at all, becuase you were not willing to take the risk. When we pointed out the risk, you would not take it. You had the chance to invest in a mighty good value of real estate if you were willing to take the fair chance in that title. We said, 'Here is a doubt. Are you willing to take that doubt and take the chance of it? You may lose five hundred thousand dollars, and you may make six hundred thousand dollars if you win out on that chance.' And you said, 'No, I don't think it is worth while taking a chance of a lawsuit.' You are constantly taking chances in regard to the credit of individuals. Here is a chance that you are willing to take, and by putting in some money here, make a mightly good customer for yourself. You may lose a few hundred thousand, or you may make a million.' I said, 'You must not expect from the Sherman Law any more than you do from any other law you are dealing with. You must not expect that you can go to the verge of that law without running any risks. Why should you? You do not in any other relation of life that I know of. And your lawyers, if they are good lawyers, and experienced lawyers, can advise you. As a matter of fact, there have been mighty few relations in life where you could not have advised yourself. Your conscience, if you are honest with yourself, would tell you, nineteen times out of twenty, and without a lawyer, whether you intended to restrain trade; and if you could say to yourself, clearly, and honestly, that you did not intend a restraint of trade, you would not need to go to any lawyer at all. But if you want to know whether you can squeeze through, or something comes up that suggests to you that there is a very grave doubt that you can squeeze through, then you want to get some way to squeeze through.'

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"So, I believe that this Commission could not do anything which, in its real essence, would be more harmful to business, and more dangerous to the Commission itself, than to exercise this power, if you have it. But I think it is perfectly clear that you have not got it.

* * * * * * * *

"Commissioner PARRY: Men come to us and say they want to form an association for purposes such as you have just stated; and they say they are afraid to do it, and want to know from us whether they may lawfully form such an organization.

"Mr. BRANDEIS: I should say definitely to them, 'You have got an idea, generally, as to what you may do or may not do. Congress has not vested us with any power to tell you that. There are lawyers who can tell you that. You have lawyers in every other question that comes up in your business, and you have got to get your lawyers on that.' I think that is the only safe way, the only safe thing to do. I would be very certain to let them understand that you understand that it is not so difficult for a man who really wants to keep out of the law, to do it."

APPENDIX H - SUPPLEMENTING THE ANSWER TO QUESTION 14

May I quote from a few of the Court Interpretations of Unfair Methods of Competition? In Federal Trade Commission v. Beechnut Packing Company, the court said:

> "That act declares unlawful 'unfair methods of competition' and gives the Commission authority after hearing to make orders to compel the discontinuance of such methods. What shall constitute unfair methods of competition denounced by the Act is left without specific definition. Congress deemed it better to leave the subject without precise definition, and to have each case determined upon its own facts, owing to the multifarious means by which it is sought to effectuate such schemes. The Commission, in the first instance, subject to the judicial review provided, has the determination of practices which come within the scope of the Act. (See Report No. 597, Senate Committee on Interstate Commerce, June 13, 1914, 63rd Cong., 2d Sess.)

In Federal Trade Commission v. R. F. Keppel & Bro., Inc., the Court said:

> "The Act undoubtedly was aimed at all the familiar methods of law violation which prosecutions under the Sherman Act had disclosed. See Federal Trade Commission v. Raladam Co., supra, 649, 650. But as this Court has pointed out it also had a broader purpose, Federal Trade Commission v. Winsted Hosiery Co., 248 U.S. 483, 493; Federal Trade Commission v. Raladam Co., supra, 648. As proposed by the Senate Committee on Interstate Commerce and as introduced in the Senate, the bill which ultimately became the Federal Trade Commission Act declared 'unfair competition' to be unlawful. But it was because the meaning which the common law had given to those words was deemed too narrow that the broader and more flexible phrase 'unfair methods of competition' was substituted. Congress, in defining the powers of the Commission, thus advisedly adopted a phrase which, as this Court has said, does not 'admit of precise definition but the meaning and application of which must be arrived at by what this court elsewhere has called the "gradual process of judicial inclusion and exclusion."' Federal Trade Commission v. Raladam Co. supra, compare Davidson v. New Orleans, 96 U.S. 97, 104.
>
> "The argument that a method used by one competitor is not unfair if others may adopt it without any restriction of competition between them was rejected by this Court in Federal Trade Commission v. Winsted Hosiery Co., supra; compare Federal Trade Commission v. Algoma Lumber Co., ante, p. 67. There it was specifically held that a trader may not, by pursuing a dishonest practice, force his competitors to choose between its adoption or the loss of their trade. A method of competition which casts upon one's competitors the burden of loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt, even though it is not criminal, was thought to involve the kind of unfairness at which the statute was aimed."