

Syllabus

IN THE MATTER OF
NATIONAL LEAD COMPANY ET AL.

COMPLAINT, FINDINGS, ORDER, AND COMMISSION AND DISSENTING OPINIONS
IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS
APPROVED SEPT. 26, 1914, AND OF SUBSEC. (a) OF SEC. 2 OF AN ACT OF
CONGRESS APPROVED OCT. 15, 1914, AS AMENDED BY AN ACT APPROVED
JUNE 19, 1936

Docket 5253. Complaint, Apr. 12, 1946¹—Decision, Jan. 12, 1953

It is well settled that no formal agreement is necessary to bring into existence an unlawful conspiracy and that a combination prohibited by law may, and often must be, found in the course of dealings or other circumstances, in the absence of any exchange of words. And it is also settled that "acceptance by competitors without previous agreement of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish unlawful conspiracy under the Sherman Act" and is also "sufficient to establish unfair methods of competition under the Federal Trade Commission Act". *Eugene Dietzgen v. F. T. C.*, 142 F. (2d) 321, 332, citing and quoting *Interstate Circuit v. U. S.*, 306 U. S. 227, and *U. S. v. Masonite*, 316 U. S. 265.

In a proceeding under Sec. 5 in which the Commission found from evidence before it that the acquisitions of competitors by respondent corporation, aided by its arrangements with another concern, had had the tendency and effect of restraining trade, suppressing price competition, and tending dangerously to create a monopoly in the industry concerned, the Commission was of the opinion that it not only had the authority but that it was under a duty to prohibit the further aggrandizement of said corporation through additional acquisitions.

In such a situation the determination of the question of whether the corporation concerned had already attained such a monopolistic position as to require its dissolution was not necessary to support the Commission's authority to act, since, as the legislative history of the F. T. C. Act clearly shows and as the courts have uniformly held, the primary object of the Act was not to provide a means of breaking up an accomplished monopoly but rather to enable the Commission to stop monopoly in its incipiency.

In any case in which activity violative of the statutes of the Commission is found to exist, it is the Commission's duty to determine to the best of its ability the remedy necessary to suppress such activity and to make every precaution to preclude its revival. And in many cases, and particularly in trade-restraining conspiracies, a solution of said problem involves a consideration of many factors, including the history of the collective activity and the manner in which it originated.

In the typical basing-point conspiracy case, the conspirators (the sellers) must determine the bid price of the commodity delivered at the door of each

¹ Amended.

buyer and such price usually varies with the cost of rail freight from the basing point to the point of delivery. Each seller, therefore, under the basing-point system must usually have and use the same freight rate book or other device used by each of the other sellers so that to quote identical prices each seller will use the same figure for the cost of the freight. And under that system, which results in bids with identical prices to the fraction of a cent, the conspirators must be continually alert and careful in figuring their bids in order to quote identical delivered prices.

By comparison, the zone conspiracy pricing system operates rather simply since in the zone system of pricing the delivered price is the same for every point of delivery within a zone, and once the price in the par zone and the relative price graduations in the other zones have been established, the system operates substantially automatically and with a minimum of conspiratorial guidance, as compared with the basing-point delivered prices which, while usually automatic at each point of delivery, vary in the same amounts as do the estimated costs of rail freight from the basing point.

A competitive industry is a self-disciplined industry, and a non-competitive and therefore a non-disciplined industry becomes lethargic and clings to the status quo. Under an expanding dynamic economy, an industry cannot maintain a status quo—it must either move forward or lose ground. Competition supplies the needed dynamics, and the less alert industry with its blunt blade of competition lags behind and may lose its relative place in the market to a newer and more aggressive industry which will accomplish the same end at a lower price.

The condition sometimes referred to as “cut-throat competition” is very often plain, unvarnished price competition, and while the hard price competition of the market places may not be gentlemanly, it is usually fair, particularly to consumers. In such competition, the weak may get hurt, but social security is not the province of the Commission.

As respects identity of prices, the Commission is cognizant of the fact that such a condition may result from competitive or noncompetitive situations, that intensity of competitive factors may vary in degree in any industry, and that perfect competition, like the perfect price conspiracy, may be hoped for but is rarely obtained.

The price pattern used in the industry involved in the instant case was not the result of one secret meeting in a smoke-filled room, but was the result of many business experiences and compromises over a period of years.

Where a corporation, constituting the largest producer and seller of lead pigments in the United States, and operator of factories in numerous cities, originally formed in 1891 by the acquisition of the physical properties and stock ownership of numerous companies theretofore engaged in the manufacture, sale and distribution of white lead, linseed oil, and kindred products; With intent and effect of substantially controlling the lead pigments industry and regulating prices of pig lead and lead pigments, and with restrictive and monopolistic effects—

(a) Acquired over a period of years—prior to which there had been eighteen or twenty producers of white lead selling their products in the various localities where they could operate economically—all or controlling stock interests in numerous companies, and properties and assets of others, closed

many of such plants, amalgamated and enlarged others, and operated as branches several, the names of which it retained;

With the result that from 1891 to 1935 some fifty competitors disappeared from the field, and it acquired a dominant position in the lead pigments industry;

(b) Sought to further enhance its position in said industry, in which by 1930 it had become a dominant factor, through continuing unsuccessful attempts from 1930 to 1935 to acquire a controlling stock interest in its largest competitor, the E.-P. Co., in which it bought stock in the name of the Chairman of its Board of Directors and with which it maintained close relations, particularly during the period from 1931 to 1941;

(c) Entered into a contract in 1906 with the A. S. & R. Co. (world's largest smelter and refiner of lead, producer of between 30 percent and 40 percent of the world's supply and responsible for more than half of the domestic, and publisher daily of the prices at which it bought lead ore and sold pig lead), under provisions whereby, with certain exceptions, it was to purchase from said A. S. & R. all its requirements of corroding pig lead, and 85 percent of its pig lead; said A. S. & R. was to furnish such requirements up to 85 percent of the latter's production from domestic ores of all kinds of pig lead; it was to sell any surplus production of its Collinsville plant to said A. S. & R. at 5 percent less than the latter's prevailing price; and prices for common pig lead were based on the average of A. S. & R.'s lowest daily schedule of prices for the preceding month subject to certain adjustments based on the London Metal Exchange price, plus the tariff differential;

(d) Following the expiration of its aforesaid contract in 1921, effected and carried out arrangements which had the same effect; and

(e) Concurrently with the execution of said contract, entered into a second one with said A. S. & R. through a constituent company whereby said company was to purchase and said A. S. & R. was to sell it for fifteen years all of the latter's domestic output of antimomial lead, subject to the average daily price of common desilverized lead, as quoted by said A. S. & R. for specified quantities for delivery in St. Louis and New York, and similarly subject to such London Metal Exchange adjustment;

With the result that its dominant power was further materially increased through its close cooperation with said E.-P. and its aforesaid contracts, under which it acquired control of 85 percent of A. S. & R.'s domestic production of pig lead, and restricted its own use of pig lead produced by its subsidiary to 30,000 tons per year, and thereby limited said plant's competition with with said A. S. & R.; latter secured 85 percent of its consumption of common pig lead and all its requirements of corroding pig lead subject to exceptions referred to; it acquired control of all of A. S. & R.'s output of antimomial lead and latter took no further interest in the manufacture of lead pigments; supply of pig lead subject to bids and daily market fluctuations was contracted by more than 32 percent of the domestic production; a monthly price average, which tended to prevent quantity sales of pig lead on a price rise and consequently tended to reduce returns to miners of lead ores, was fixed; and a monthly average price was fixed through substantial contraction of the supply for a major part of the United States consumption of pig lead, and the basing of prices on daily market fluctuations was thus prevented, and opportunities for buying pig lead at lower prices were restricted;

- (f) With intent and effect of establishing an understanding with E. I. duPont de Nemours & Co. that the latter would not deviate from its prices in the sale of white lead-in-oil and would cooperate with it to maintain price uniformity in the sale of said product (which it processed for duPont under contract under which it was to convert the raw material furnished by duPont into white lead-in-oil to the amount of duPont's total requirements), supplied, in response to duPont's request, its current prices for lead-in-oil, upon which duPont based its calculations of the amounts to be paid, and thereafter, in response to duPont's request, supplied a periodical letter "covering the price to be in effect for the quarter," and gave its approval to a change in discount terms announced by duPont; and, in discussions concerning a proposed supplemental code for the lead pigments division of the lead industry under the N. R. A., represented said duPont, which did not belong to the Lead Industries Association, but was "willing to go along with anything which was agreeable to the others";

Effect and tendency of which acquisitions by said corporation of the major portion of the lead pigments processing industry, of its control by contract of the major portion of the domestic production of pig lead, and of its cooperation with said E.-P. in maintaining identical prices and terms of sale of lead pigments between them, and in circumscribing the price competition of their smaller competitors and inducing conformity on the part of such competitors with their prices, terms and conditions of sale, were to restrain trade, suppress price competition and create monopolistic conditions in the lead pigments industry; and

Where aforesaid corporation and six others, including two subsidiaries, which were engaged in the interstate sale and shipment of lead pigments made at various producing points in the United States; and which—

- I. Comprised (1) aforesaid producer and seller of lead pigments; (2) said E.-P., engaged in the mining, smelting, refining, and sale of metallic lead products, lead pigments and other articles, and its sales subsidiary; (3) A. C. M. Co., one of the world's largest producers and fabricators of non-ferrous metal, including copper, lead and zinc, and a wholly-owned subsidiary; (4) S-W, one of the largest, if not the largest of manufacturers and sellers of mixed paints and related items in the United States, with numerous plants and warehouses and 200 retail stores, and producer, at its factory, of white lead, red lead, and litharge; and (5) G., another large producer and seller of mixed paints and related items, with some thirty retail stores, and with plants in Scranton and Hammond at which it refined and produced white lead, red lead, and litharge; and which—
- II. (1) Accounted for practically the country's entire production of such pigments and had the power to and did control the supply available for shipment in commerce; (2) accounted also for a substantial portion of the national production of and trade in commerce in a number of competing products, namely, lithopone, zinc oxide and titanium; and (3) were members, at the time of the N. R. A., of the White Lead-in-Oil Committee and the Dry Products Committee of the Lead Pigments Division of the Lead Industries Association, which met between July 1933 and January 1934 to draft a supplemental Code of Fair Competition for the lead pigments division of the lead industry under the N. I. R. A.—

Syllabus

- (a) Entered into and reached understandings and agreements as a result of meetings and discussions incident to the activities of committees of said lead pigments division, to do things which were not included in the Code of Fair Competition for the lead industry, as thereafter approved on May 24, 1934, or included in any preliminary draft of a code produced at meetings of any of the committees; and which, insofar as certain price matters were concerned, were, at their request and that of other manufacturers expressly exempted from the provisions of the code; and specifically—
- (1) Agreed to and did sell white lead-in-oil and other lead pigments packaged in kegs or cans of 100 pounds or less, dry white lead (both basic carbonate and basic sulphate), and red lead and litharge in drums or barrels and in quantities of twenty tons or less and twenty tons or more, on the basis of a flat par price for all deliveries in a par zone (which included several states), and flat delivered price quotations to customers within designated zones, with uniform differentials applicable as between such zones, and under arrangements whereby the sellers prepaid or allowed deductions for all transportation charges and made no allowances or adjustments in differentials in delivery costs as between various destinations in each of the zones;
 - (2) For the purpose and with the effect of controlling resale prices in the trade and preventing competition between themselves and their customers, agreed to and did sell white lead-in-oil on the basis of consignment contracts or arrangements, pursuant to which dealers appointed as "agents" or "distributors" (whose authority was limited to the custody and sale of goods consigned to them), made sales as consignees of the stocks sent them, settled monthly for goods sold, and received as their compensation the difference between the prices set forth for the consignee and the resale prices charged dealers and consumers;
 - (3) Agreed to and did sell lead pigments in kegs and cans at uniform differentials per hundred pounds between keg sizes, and agreed to and did allow uniform discounts and terms of sale in transactions involving the sale of dry white lead, with a uniform addition to price quotations for delivery in lots of less than twenty tons;
 - (4) Agreed to and did quote and sell red lead and litharge in twenty-ton quantities on the basis of fixed differentials over the price of pig lead as quoted by said A. S. & R., and agreed to and did quote and sell products in quantities of less than twenty tons on the basis of price cards distributed to the trade and calculated on a fixed differential over pig lead prices;
 - (5) Agreed to and did fix arbitrary price differentials between carload, five-ton, and less-than-five-ton purchasers of red lead and litharge in 600-pound barrels, by calculating card prices on the basis of fixed differentials over said A. S. & R.'s price of pig lead; and
 - (6) Agreed to and did refrain from entering into contracts to supply red lead in quantities of less than twenty tons at a stated differential over the price of pig lead, and agreed to and did eliminate guarantees against declines in price in sales of red lead and litharge in less-than-carload lots; and
- Where each of the aforesaid corporations, with certain exceptions—
- (b) Followed the pricing practices and adhered to the terms and conditions for the sale of lead pigments agreed upon, as above set forth, from 1934 to the present time, and individually adhered to such practices and methods;

With the result that substantially identical prices, terms and conditions of sale as between respondents N. and E.-P. were produced; substantial uniformity of price differentials, terms and conditions of sale among respondents A., G., and S.-W. followed and the prices of the latter three varied from those of the first two according to pattern and according to difference of brand and quality of products; said zone pricing feature facilitated the meeting, or matching, of competitors' prices; and said agency or consignment method of selling had the intended effect of controlling resale prices, preventing "loss leader" selling, and securing better profits for dealers; the various differentials operated to establish an inflexible price structure which eliminated variations in the prices of lead pigments based on quantity, quality, cost of delivery, container costs and other price factors which an unrestrained marketing system would provide for the purposes of bargain and sale; and said pricing system maintained in the sale of oxides was such that all delivered prices on the various grades, quantities and qualities of said products advanced or receded with the change of one price factor; and the continuous rigidity and uniformity in prices, terms and conditions of sale of white lead and other keg products not only illustrated the effectiveness of respondents' methods in connection with the sale of such products but also revealed the purposes underlying their employment;

Tendency, capacity and effect of which combinations, conspiracies, etc., entered into and maintained by said respondents, and of the acts, practices and methods performed in connection therewith, were to substantially hinder, frustrate, suppress, and eliminate competition among respondents in the interstate sale of lead pigments; to prevent price competition among and between respondents in the sale of such products among the various states; to deprive purchasers of such products of the benefits of price competition among the sellers; to create discriminations in price against some purchasers and users of lead pigments and lead pigment paints; and otherwise to promote their purposes to fix, adopt, and maintain uniform prices and terms and conditions of sale of lead pigments:

Held, That aforesaid acquisition by National Lead Company of the physical assets and stock ownership of its competitors and the combinations, conspiracies, etc., of all the respondents and the acts and practices pursuant thereto and in connection therewith and under the conditions and circumstances set forth, constituted unfair methods of competition in commerce, and unfair acts and practices therein; and

Where the aforesaid corporations, engaged in the sale and distribution of their said products, through use of said zone delivered price system, in which the inter-zone prices of lead pigments were in fact different prices, which differed to the extent of the zone premiums, and were justified only where the additional freight or other transportation costs equaled or exceeded said zone premiums and in other cases were discriminatory between competing purchasers—

- (a) Discriminated in price as respects customers located at or near the border of adjoining or contiguous zones in that each demanded, accepted and received from some purchasers of its lead pigments, higher prices than it received from other and competing purchasers in different zones;

With the result that the employment by each of them of such inter-zone differentials had the tendency to lessen competition between competing sellers

