THE FEDERAL TRADE COMMISSION'S RELATION TO BUSINESS AND INDUSTRY

Paper submitted by Hon. Robert E. Freer, member of the Federal Trade Commission, for publication in the Proceedings of the Round Table of the Institute of Public Affairs, held at Charlottsville, Virginia, in July, 1936.

Invitation to contribute to the Institute's program is appreciated, not only for the opportunity it gives me to describe the function and role of the Federal Trade Commission in the field of business and industry, but also to eliminate some popular misconceptions.

ORIGIN AND PURPOSE OF COMMISSION

The Federal Trade Commission is one of the independent and bi-partisan federal agencies. It is not a regulatory commission except in a very broad sense. It is an administrative and quasi-judicial body created by Act of Congress approved September 26, 1914, having general power of inquiry, and being charged with the specific duty of preventing unfair methods of competition in interstate commerce to the end that business and the public may enjoy the benefits of free and fair competition.

In the Commission's organic Act, Congress declared unfair methods of competition in commerce to be unlawful, and empowered the Commission to prevent them whenever "it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public." From this legislative pronouncement, it follows that the purpose of eliminating unfair methods of competition is twofold, namely, the protection of members of industry generally from the harmful effects of any unfair practices by competitors, and the protection of the public interest. Manifestly, the public interest suffers whenever the honest business man is not protected from dishonest, monopolistic or oppressive practices of competitors, because the public is entitled to quality and price founded upon free and fair competition--which is the life of trade.

Congress, wisely, it appears, did not attempt to define "unfair methods of competition" because such methods include practices as infinite in number as human ingenuity can devise. The courts have said in this regard, "In the nature of things, it was impossible to describe and define in advance just what constituted unfair competition, and in the final analysis it became a question of law, after the facts were ascertained." (1)

The public and business should and do cooperate with the assist the Commission in its efforts to improve the plane of competition. An honest competitor always should be free to conduct his business in a fair and honorable way, without fear or favor, and not be tempted to descend to the level of the

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(1) Curtiss Publishing Co. v. Federal Trade Commission, 270 Fed. 881.

dishonest, unfair or unethical. To that end, the law, in the words of the Supreme Court, is that - "The careless and the unscrupulous must rise to the standards of the scrupulous and diligent." (2)

Machinery is provided in the Federal Trade Commission for preventing unfair competition through compulsory proceedings where necessary, and through voluntary cooperative effort, where possible.

FORMAL PROCEDURE

How the Commission goes about its job of eliminating unfair competition may be explained by a brief description of procedure. A case may originate in any one of many ways. The most common origin is through complaint of an unfair trade practice made by a competitor or consumer. No formality is required. Complaint may be filed in the form of a letter setting forth the facts, or by a personal call at any of the Commission's offices. In no instance is the identity of the complainant revealed.

The Commission makes its own investigation of such complaints. If the facts indicate a violation of the law, the Commission either negotiates a stipulation by which the respondent assures the Commission of his permanent discontinuance of the practice complained of, or orders its formal complaint to be served upon him. In the latter event, the respondent is permitted a reasonable time in which to answer, after which hearings are conducted, evidence is taken, briefs are filed, and the case is argued, much as in ordinary court procedure. The Commission then takes the case under advisement and renders its decision. If the Commission finds that the evidence bears out the allegations of the complaint, it issues an order requiring the respondent to cease and desist from the unlawful practices described in the formal complaint. Thereafter the Federal Circuit Courts of Appeal are open either to the respondent to review the Commission's order or to the Commission to seek its enforcement.

As a quasi-judicial body, the Federal Trade Commission, like a court, is obliged to decide specific cases on their own merits and facts. Like a court, it acts as referee, not as adviser. The Commission is the umpire in the game, to enforce the rules of fair play, to rule out the fouls, prevent cutting of bases, and insist upon an honest score. The responsibility of the individual to keep his conduct within the law rests upon his own shoulders.

ADVANCE OPINIONS

The Commission frequently is asked for advance opinions, but usually it must refuse to attempt to furnish any definite advice in advance to an industry desiring to experiment in a doubtful zone of cooperative effort. By reason of its organic Act, the Commission is a law enforcement agency. It has no choice or discretion in the matter. The Commission does not make the law. Its duty is to enforce the law as enacted by the Congress and interpreted by the Courts; it cannot prejudge any case, or give advance judgment in a matter that may subsequently come before it in a formal way.

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(2) Federal Trade Commission v. Algoma Lumber Co. (White Pine case), 291 U. S. 315.

The need of a full knowledge of the facts in each case upon which to predicate an opinion, whether advisory or binding, was indicated by the Court in the Sugar Institute decision when it said:

> "* * * each case demands a close scrutiny of its own facts." (3)

TRADE PRACTICE CONFERENCES

An ideal visualized by President Wilson in the creation of the Federal Trade Commission was that it was -

> "a means of inquiry and of accommodation in the field of commerce which ought to both coordinate the enterprises of our traders and manufacturers and to remove the barriers of misunderstanding and of a too technical interpretation of the law,"

and he stated that the Commission had been created with -

> "powers of guidance and accommodation which have relieved business men of unfounded fears and set them upon the road of helpful and confident enterprise." (4)

It is through its trade practice conference procedure that the Commission is able to furnish to business and industrial groups the "guidance and accommodation" which President Wilson had in mind.

Any industry or important group within an industry may have a trade practice conference if it appears to the Commission that it is desired by a substantial majority of members of the industry, and that there are prevalent in the industry practices which are prejudicial to the best interests of the industry as a whole and inimical to the public. Due and proper notice is given so that every member of an industry may have opportunity to be present and participate in such a conference.

SCOPE OF TRADE PRACTICE RULES

It is obvious that all industry cannot be poured into one mold. Hence, the members of an industry, with the aid and counsel of the Commission's staff, consider their peculiar problems, and such trade practice rules as fit the need of the industry are formulated. Proposed rules are formulated by industry itself for submission to the Commission. If within the law and otherwise acceptable, they are approved and promulgated by the Commission.

These rules may be of two different types. Group I rules may be defined as those restating or paraphrasing the law of the land and a violation of

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(3) 297 U. S. 553, decided March 30, 1936.

(4) Statement made public at time of signing the Act.

which would constitute a violation of law. For infraction of Group I rules, a member of an industry may be proceeded against under the law by the Commission.

Practices commonly dealt with in approved Group I rules include the following:

Misrepresentation and misbranding of products
Defamation of competitor and disparagement of his products
Illegal price discrimination
Commercial bribery
Illegal rebating
Inducing breach of contract wilfully to injure competitor
Circulating threats of infringement suits in bad faith
Full line forcing to suppress competition
Passing off goods as those of a competitor
Imitation of trade marks

The value of the group one rules of the trade practice conference to industry and the public has been demonstrated by experience. Their importance to trade association activities devoted to the laudable purpose of stamping out unfair practice is acknowledged. One authority on the subject has said:

"The trade practice conferences under the auspices of the Federal Trade Commission add in a measure the most necessary element which associations lacked; namely, enforcement.

He adds:

"* * * the success of this method depends upon the cooperation of associations both in preparing an industry for such a conference, and in the adoption and the enforcement of the rules." (5)

INDUSTRIAL SELF-REGULATION UNDER GROUP II RULES

Cooperative effort on the part of business and industry to put its own house in order is a growing and increasingly important thing.

A legal cue to the possibilities may be obtained from the decision of the Supreme Court in the Sugar Institute case. In that case the Court said:

"Voluntary action to end abuses and to foster fair competitive opportunities in the public interest may be more effective than legal processes. And cooperative endeavor may appropriately have wider objectives than merely the removal of evils which are infractions of positive law." (6)

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(5) Joseph H. Foth, "Trade Associations, Their Service to Industry," 1930.

(6) Sugar Institute case, 297 U. S. 553, decided March 30, 1936.

Group II rules may be styled a code of business ethics, voluntarily presented and adopted by an industry for the elevation of its business standards and practices, and received by the Commission as expressions of the industry, if consistent with the purposes of the law. While such rules cannot be enforced since they do not proscribe practices violative of law, the very fact that a substantial majority of members of an industry or a business sit down together and agree among themselves to adopt, or to abandon this or that practice, has a moral weight almost as forceful as that of law itself.

The Commission's trade practice conferences are not held to eliminate competition, but to eliminate by cooperative action those forms of competition which "punch below the belt line", in conformity with the view that the welfare of industry and the country depends upon "the maintenance of equal opportunity for all under fair, unrestricted competitive conditions." (7)

I hope the foregoing remarks on the benefits of cooperative activities to eliminate unfair practices will not be construed to apply to cooperative restraints of trade which stifle legitimate competition. The trade practice conference procedure is intended rather to supplement the enforcement of the provisions of the anti-trust laws under which unreasonable restraints of trade are illegal.

HISTORICAL BACKGROUND OF FAIR PRACTICES AND COMPETITIVE PRICES

To make clear those restraints of trade which are clearly condemned when accomplished in concert, it would be well to outline some of the historical background on the subject of government's relation to business and industry.

In the fourteenth century in England - the period of guilds and of the evolution of the "Law Merchant" - the custom of the realm implied a contract with specific duties imposed upon the craftsman to perform his services in a careful and honest manner and for a fair price. A fair price demanded a fair measure of worth of product.

The law of England of the fourteenth and fifteenth centuries was largely customary, and one of the most deep-seated concepts of economics embodied in law and morality was the idea that all goods and services - everything - had a just price. It was both a sin and a violation of law to charge more than this just price regardless of the state of supply and demand for goods and services.

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(7) Jones, "Trade Association Activities and the Law," says:

> "It cannot be too strongly emphasized that the Supreme Court of the United States is determined that no subterfuge, no indirection, shall be employed to evade the laws and public policy of our government, which require the maintenance of equal opportunity for all under fair, unrestricted competitive conditions." (p. 274)

The sixteenth and seventeenth centuries, however, opened vast new territories to commerce and the eighteenth century brought reaction against the minute regulation of the earlier "Mercantilistic" policy. The new money economy considered competition the regulator of prices and the life of trade, the individual the key-note of the nation's wealth, and much of the former regulation of prices unnecessary. Under this economic theory, the State was presumed to prosper in the aggregate as individual effort and individual accumulation and use of property were successful in a regime of free production and free commerce. In that dawning day of democracy of political and economic endeavor, the pursuit of individual gain and production for exchange were the dominant factors in industry. The theory of just price was replaced by that of market price. (8)

In consonance with the economic theory of competitive price, restraint of trade was unlawful at common law. During old English days, restraint took the same form that it does today, namely, price-fixing and the use of unfair methods. In 1758, in England, a classic case was filed against the Salt Works at Droitwich for a conspiracy to raise the price of salt through the medium of an unlawful agreement between the salt producers whereby they bound themselves under penalty of two hundred pounds not to sell salt under a certain price. The judge in that case, Lord Mansfield, ruled:

> " * * * that if any agreement was made to fix the price of salt or any other necessary of life * * * by people dealing in that commodity, the court would be glad to lay hold of an opportunity, from what quarter soever the complaint came, to show their sense of the crime; and that at what rate soever the price was fixed, high or low, made no difference, for all such agreements were of bad consequence and ought to be discountenanced." (9)

LEGISLATION AGAINST MONOPOLIES

When the tendency toward monopoly, in the form of trusts and mergers, assumed such proportions in this country as to threaten to destroy the competitive system, Congress enacted the Sherman law with only one dissenting vote in either house of Congress.

A vivid description of the national background and need for such legislation is given by Mr. Justice Harlan in the case of Standard Oil Co. v. U. S. He said:

> "All who recall the condition of the country in 1890 will remember that there was everywhere, among the people generally, a deep feeling of unrest. The nation had been rid of human slavery, - fortunately, as all now feel, - but the conviction was universal that the country was in real danger from another kind of slavery sought to be fastened

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(8) Ogg & Sharp, "Economic Development of Modern Europe," pp. 62-82

(9) King v. Norris, et al, 2 Kenyon 300

> on the American people; namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessaries of life." (10)

Concerted activity meets with like condemnation by the Supreme Court, when, as in the Linseed Oil case, -

> " * * * the necessary tendency is to destroy the kind of competition to which the public has long looked for protection." (11)

The Sherman Law, however, proved to be an inadequate safeguard against monopolistic practices and tendencies of the early 1900's. All major political parties in 1912, as was done again this year, adopted anti-monopoly planks, and Congress in 1914 reinforced the original anti-trust law with the Federal Trade Commission and Clayton Acts.

IMPORTANCE OF COMPETITION

In our American economy, competition rather than regulation is relied upon to assure to the consumer protection in matters of quality and price. The Federal Trade Commission and Clayton Acts were enacted primarily to prevent the employment of such artificial restraints as tend to harden the arteries of trade and shut off or diminish the flow of such benefits of free and fair competition to the honest competitor and the consumer.

Under a free competitive system, allocation of income among the various groups of producers adjusts itself according to the relative efficiency of these producers. So long as business efficiency is permitted free play without restraint, this automatic competitive adjustment will tend toward better quality and lower prices. When competition ceases, prices tend to rise. The public, however, can pay only so much for over-capitalization and inefficiency. Purchasers have only so much money with which to buy. They can pay only so much tribute. When their purses are empty, trading must cease until they earn more money. Thus failure on the part of competitors to maintain healthy competition results in the end to their own disadvantage as well as to the disadvantage of those from whom the tribute is exacted.

COOPERATIVE EFFORT NECESSARY

To further the flow of commerce, industry should cooperate with the Commission to keep the channels clear. Industry can contribute to this end by adopting and observing fair trade practice rules.

If illegally destructive price cutting, if misbranding, if misrepresentation through advertisement or otherwise, are stopped; if large distributors

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(10) Standard Oil Co. vs. U. S., 221 U. S. 1, (Separate Opinion)

(11) U. S. vs. American Linseed Oil Co., 262 U. S. 371

are precluded from arbitrarily favoring certain customers; if there is an end to commercial bribery, to inducing breach of contract, to setting up bogus independent concerns to obtain secrets of competitors, to securing the products of competitors and advertising them at greatly reduced prices to injure their reputation, and to exclusive sales and purchasing arrangements; if there is an end to stealing copyrights, imitating patented articles, mergers to suppress competition, or interlocking directorates to create monopoly; if there is an end to these and to other practices of a similar character which, by judicial decision have been condemned from time immemorial; and if there is an end to combinations in restraint of trade, it is reasonable to suppose that success in business will depend more upon efficiency, to the advantage of honest business and the public alike.

It may be natural for members of industry who associate for a common purpose to be more concerned with their own than with the general welfare. Over-zealousness on the part of business and industrial executives may result in misinterpretation of the legal limitations upon concerted activity. The Federal Trade Commission is directed to serve the public by protecting the competitive system. A government agency charged with the duty of protecting the public interest is a necessary coordinating agent for private organizations pledged to the interest of particular groups. How well the possibilities of public service will be availed of depends in large measure upon the degree of cooperation between business and industry, individually and collectively, and the Commission.

How widespread is this cooperative movement, and how intimately this work of the Federal Trade Commission touches business and industry may be understood from the circumstance that the Commission has up to this time sponsored nearly 200 trade practice conferences, at which rules have been adopted, and subsequently approved in whole or in part by the Commission. Never was this cooperative movement more active than it now is. The Commission has before it between thirty and forty applications for conferences. Some of these industries are small; some, however, have an investment of millions or even billions of dollars and give employment to hundreds of thousands of workers.

Unquestionably, the Commission's trade practice conferences have been of great value to the industries concerned, and of commensurate benefit to the public. It is gratifying to add that, on the whole, the agreements entered into at these conferences have been observed with such fidelity that the Commission has found it necessary to proceed against only a relatively small number of violators.

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