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, 1946[1]*—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 than 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 antimonial 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 antimonial 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 competitiors 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.—

(*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

located in different zones of paints, storage batteries and other products made by them and to create a trade advantage in favor of customers who had received the lower prices;

(*b*) Discriminated through different quantity prices in that their differing prices as between carloads and five-ton lots of oxides and as between five-ton lots and smaller quantities, and the extra zone charges for less-than-carload quantities sold in Montana, Wyoming, Colorado, and New Mexico were not justified by differences in cost of manufacture, sale or delivery and were discriminatory as between competing purchasers;

Effect of which discriminations was substantial and tended to lessen competition as between large and small customers of the sellers to the injury of the latter; and

(*c*) Discriminated through differing quantity prices in that their allowance of a difference of one-quarter cent per pound on shipments of dry white lead, basic carbonate, in carload quantities, was justified by the differences in the cost of delivery in those instances in which rail freight was a factor, but was not justified in cases of sales to purchasers in the proximity of their producing plants where the only transportation cost was local cartage;

To which extent and under which circumstances said differing prices to competing customers were discriminatory, and had the tendency to lessen competition as between their customers who received the different prices;

Effects of which discriminations, above set forth, engaged in by each of said respondents—

(1) Might be substantially to lessen competition in the interstate sale and distribution of lead pigments between the respondents and their competitors; to tend to create a monopoly in the lines of commerce in which they were engaged, and to injure, destroy, or prevent competition in prices and otherwise by said respondents and their competitors in the interstate sale and distribution of said products; and

(2) Might be substantially to lessen competition between the purchasers of lead pigments who received lower prices from respondents and their competitors who paid the higher prices; to tend to create a monopoly in the lines of commerce in which purchasers from the respondents were engaged; and to injure, destroy, or prevent competition between the beneficiaries of the lower prices and competing purchasers who were required to pay the higher prices:

Held, That such discriminations in price, by each of said respondents, constituted violations of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

As respects the fact that each of the respondents, following their meetings in various subcommittees of the Lead Industries Association for the ostensible purpose of drafting a supplemental Code of Fair Competition for the Lead Pigments Industry under the N. I. R. A., and their action in taking advantage of the opportunity to appraise generally the methods of selling theretofore employed in the industry and in proceeding cooperatively to revise their pricing practices in a manner far beyond the sanction of the N. I. R. A., and

their action thereafter, in the case of each, in following the pricing practices and adhering to the terms and conditions of sale then agreed upon:

The Commission was of the opinion and found—notwithstanding testimony of various officials that to their knowledge there were no agreements by any of them to employ particular methods or to fix and maintain terms and conditions of sale of their products other than agreements of what should be recommended for the supplemental code, and notwithstanding the fact that the record did not show the existence of any categorical agreements other than those entered into at the time of the code discussions—that there existed among the respondents a mutual understanding which constiuted a conspiracy to fix and maintain prices, differentials, and terms and conditions for the sale of lead pigments, which was carried out by all of them through the various methods set forth.

In the foregoing connection the Commission noted that the arbitrary nature of the zones was even more apparent than it was in the *Fort Howard Paper Co.* case, 156 F. (2d) 899, in which, as noted by the court at pages 906, 907, the zoning system there concerned—which came into being under N. R. A.—was saved from "illegality for the statutorily exempt period", following which its "illegality was again apparent", and as to which the court observed that it was "more than an inference to say that parties continuing to utilize that zoning system, born of agreement, suddenly utilized it in order to meet competition, rather than by tacit agreement".

In connection with the use by the respondents of the agency or consignment method of selling, the various differentials employed, and the issuance of uniform suggested resale prices, the evidence disclosed understandings and cooperative endeavors which, when considered in the light of the surrounding circumstances, led the Commission to the conclusion that there was on the part of respondents a mutual understanding and acceptance of an overall plan and an intention on the part of each of them to follow it.

As regards the charge of the complaint that certain price discriminations in violation of Sec. 2(a) occurred as a result of the use of the zone method of pricing and selling to competing customers in the same zone: the complaint failed to state a cause of action, since the allegations were that each of the respondents sold its products in accordance with a delivered pricing system, but the alleged discriminations occurred as a result of differing net prices received by each of the respondents at its factory, and the complaint did not show that the alleged unlawful discrimination as between purchasers located in the same zone occurred as a result of differences in actual prices at which the respondents' products were sold.

As respects certain of the other price differences which resulted from the classification of customers to receive different quantity, trade and regional discounts: it appeared that such differences either were no more than those allowable in the costs of containers or were not shown to have resulted in any substantial adverse competitive effects, and none of said practices were covered by the order to cease and desist.

As respects effects on competition, among other things, of respondents' discriminations in the storage battery industry, which consisted of more than 200 companies, ranging in size from multiple plant operations to small proprietorships whose total production might be less than fifty batteries

per day; and in which certain of the manufacturers, including the larger ones, were located in respondents' par price zone while others competing with them were located in premium zones where the delivered price of oxides to purchasers in lots smaller than five tons was almost $6 per barrel higher than the price to the manufacturer in the par zone purchasing his oxide in carload lots; it appeared—

That the differences in interzone prices were not justified as equaling or exceeding the additional freight or other transportation costs; and that in a substantial number of cases, differences between carload price and the price for smaller quantities were much more than the differences between carload and less-than-carload freight rates and resulted in an excess charge over delivery costs as high as 88 cents per hundredweight against the purchaser of smaller quantities;

That during the period from 1934 to 1941, when the storage battery industry was characterized by particularly sharp price competition, a saving to a manufacturer of from five to ten cents per battery on material costs often would mean the difference between a profit and a loss on low-priced batteries; and,

That respondents' price differentials between zones, together with the added amounts charged less-than-carload purchasers in both the par zones and the premium zones, made a difference in the cost of oxide of from four and a half to six cents per battery against the smaller battery manufacturers located in premium zones; and that during the period referred to, large manufacturers located at a considerable distance from the factories of respondents regularly offered for sale storage batteries in Chicago, St. Louis, and other lead pigment producing centers, at prices which were actually below the cost of manufacture of comparable products to the smaller battery producers located in such centers.

As respects the effect of respondents' discriminations on the mixed paint industry, where, as in the storage battery industry, competitive conditions were severe during the same period: it further appeared—

That, in the case of dry white lead, the price difference as between carload shipments and less-than-carload shipments was one-quarter cent per pound; that in most cases in which rail freight was a factor, such difference was justifiable on the basis of differences between carload and less-than-carload freight; that no effort was made, however, by any respondent to justify on a cost-of-delivery basis or otherwise said differential as to customers in areas in which the mode of delivery was local cartage and rail freight was not a cost factor;

That at the principal paint manufacturing centers of the United States located in and around St. Louis, Chicago, Philadelphia, and New York—in each of which is found one or more plants of respondents producing white lead, and each of which is also among the most substantial consuming areas for dry white lead in the country—the mode of delivery of lead pigments is local cartage and rail freight is not a cost factor; and,

That in said case, as in the case of the storage battery industry, respondents' price differentials between zones, together with the added amounts charged less-than-carload purchasers in both the par and premium zones, had the

tendency to injure competition as between the larger and smaller manufacturers of oxides and also of white lead, both dry and in-oil.

As respects the question of relief, and the Commission's requirement not only that respondents cease and desist from "entering into, continuing * * * any planned common course of action," etc., to engage in the practices found to have been engaged in, but also that each of the respondents individually cease and desist from selling its lead pigments at prices calculated in accordance with a zone delivered system "for the purpose or with the effect of systematically matching the delivered prices quoted or the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another;

Such a prohibition was necessary, not because it is unlawful in all circumstances for an individual seller acting independently to sell its products on a delivered price basis in a specified territory, but to make the order fully effective against the trade-restraining conspiracy in which each of the respondents participated; and

Such a prohibition was also fully justified under the complaint which, while it did not in Count I attack the zone pricing practices of each of the respondents aside from the conspiracy, did in effect allege that each of the respondents used the zone method of selling pursuant to and in furtherance of the conspiracy, with the intent and effect of enabling them to match exactly their offers to sell to any prospective purchasers at any destination and thereby eliminate competition.

In said further connection, the maintenance of the delivered prize zones and the quotation of delivered prices therein constituted the very cornerstone of the conspiracy of the respondents, which together accounted for practically the entire production of lead pigments in the country; and unless the respondents, representing practically the entire economic power in the industry, shall be deprived of the device which made their combination effective, an order merely prohibiting the combination might well be a useless gesture.

The Commission was also of the opinion in said connection in view of the decisions of the courts, that the prohibition in the order against the persistent, continuing and intended matching of prices, through the use by each respondent of a zone delivered pricing system, was particularly appropriate, and it was hoped that the order, as was its intent, would aid in substituting for the lethargy which had existed in the industry in question in recent years, a condition of sharp and healthy competition.

In said further connection, the only way to have competition is to compete, and should any of the respondents, after restoration of competition, be able to make a proper showing to the Commission that the prohibition in question or any other prohibition in the order was no longer necessary or desirable, the Commission would, of course, at such time take such action as might be appropriate in the light of the facts and the law.

As respects certain evidence offered by respondent National Lead to show that on an average basis and taken for each of its selling branches separately, the zone differentials for white lead reflected no more than average differences in freight costs in doing business as between the zones: it was

the view of the Commission that the fact that the average costs of shipping to customers over an area of a dozen or more States amounting to some arbitrary figure did not justify the discrimination which resulted in particular transactions with individual customers located in border territories.

Before *Mr. Webster Ballinger* and *Mr. John W. Norwood*, hearing examiners.

Mr. Paul R. Dixon for the Commission.

Alexander & Green, of New York City, for National Lead Co.

Wood, Arey, Herron & Evans and *Mr. Richard Serviss*, of Cincinnati, Ohio, for Eagle-Picher Lead Co. and Eagle-Picher Sales Co.

Chadbourne, Wallace, Parke & Whiteside, of New York City, for Anaconda Copper Mining Co. and International Smelting & Refining Co.

Davies, Richberg, Beebe, Busick & Richardson, of Washington, D. C., and *Mr. Thomas J. McDowell*, of Cleveland, Ohio, for The Sherwin-Williams Co.

M. B. & H. H. Johnson, of Cleveland, Ohio, and *Strange, Myers, Hinds & Wight*, of New York City, for The Glidden Co.

Amended Complaint

This amended complaint is filed to obtain relief from acts of respondents because of their violations, jointly and severally, as hereinafter alleged in Count I herein, of Section 5 of an act of Congress entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," commonly referred to as the Federal Trade Commission Act, as approved September 26, 1914, and amended March 21, 1938 (38 Stat. 717; 15 U. S. C. A. sec. 41; 52 Stat. 111), and because of their violations, as alleged in Count II herein, of Section 2 (a) of an act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," commonly referred to as the "Clayton Act," as approved October 15, 1914, and amended June 19, 1936 (38 Stat. 730; 15 U. S. C. A. sec. 12, 49 Stat. 1526; 15 U. S. C. A. sec. 13, as amended).

COUNT I

The Charge Under the Federal Trade Commission Act

Paragraph 1. Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the parties named in the caption hereof, and more particularly described and referred to hereinafter as respondents, have violated the provi-

sions of Section 5 of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its amended complaint, stating its charges in that respect as follows:

Nature of Charges

PAR. 2. Respondent National Lead Company is charged in this Count I of the amended complaint with having monopolized and attempted to monopolize the interstate sale of lead pigments and with having acted unlawfully to secure a monopolistic control over the prices of lead pigments in the United States, and with having combined, conspired and cooperated with the other respondents to hinder, lessen and eliminate price competition in the sale of lead pigments in the United States. It and each of the other respondents are charged with using unfair, oppressive and discriminatory acts, methods and practices in connection with the sale of lead pigments in the United States.

Description of Respondents

PAR. 3. Each of the respondents is particularly named and described as follows: (a) National Lead Company, a New Jersey corporation with its principal offices at 111 Broadway, New York, N. Y. (sometimes hereinafter referred to merely as National). (b) Eagle-Picher Lead Company, an Ohio corporation with its principal offices at 901 Temple Bar Building, Cincinnati, Ohio, parent corporation of respondent Eagle-Picher Sales Company. (c) Eagle-Picher Sales Company, a Delaware corporation with its principal offices at 901 Temple Bar Building, Cincinnati, Ohio, the wholly-owned subsidiary of respondent Eagle-Picher Lead Company (sometimes hereinafter respondents Eagle-Picher Lead Company and Eagle-Picher Sales Company both are referred to merely as Eagle-Picher). (d) Anaconda Copper Mining Company, a Montana corporation with its principal office located at 25 Broadway, New York, N. Y., parent corporation of respondent International Smelting & Refining Company (sometimes hereinafter referred to merely as Anaconda). (e) International Smelting & Refining Company, a Montana corporation with its principal office at 25 Broadway, New York, N. Y., a wholly-owned subsidiary of respondent Anaconda Copper Mining Company (sometimes hereinafter referred to merely as International). (f) The Sherwin-Williams Company, an Ohio corporation, with principal offices at 101 Prospect Avenue Northwest, Cleveland, Ohio (sometimes hereinafter referred to merely as Sherwin-Williams). (g) The Glidden Company,

an Ohio corporation with principal offices located at Union Commerce Building, Cleveland, Ohio (sometimes hereinafter referred to merely as Glidden).

Definitions and Explanation of Terms

PAR. 4. Some of the terms hereinafter used are defined and explained as follows:

A. "Lead Pigments": This term includes the lead pigments commonly known in the industry as white lead (both basic carbonate and basic sulfate of lead); blue lead; red lead (or red oxide of lead); litharge (or monoxide of lead); orange mineral and grinders' lead paste. Such pigments are marketed either as dry products, in the form of dry powder, or in oil, in the form of a paste after mixture with linseed or other oils.

B. "Pig lead": Pig lead is a product derived from the smelting and refining of lead ore or lead "concentrates." The pig lead is secured after the smelting and refining has removed sulphur and other impurities from the lead ore and which are found in it as it is taken from the mines.

C. "Commerce": The term commerce as hereinafter used means "commerce" as defined in the Federal Trade Commission Act.

Description and History of Industry and the Commerce of Respondents

PAR. 5. The respondents herein either directly or indirectly through subsidiary corporations or operating divisions, are engaged in the manufacture, sale and distribution of lead pigments in commerce, and some of them, including respondents National, Eagle-Picher, Sherwin-Williams and Glidden, are also engaged in the use of lead pigments in their manufacture of paint. The lead pigments thus produced are an important item in commerce between and among the several States. They are a principal item used in the manufacture of paint, and the paint produced from such pigments is held in high esteem by builders and users as of the highest possible quality for application to exteriors of buildings, ships and other structures. Such pigments have other important industrial and commercial uses too numerous to mention herein.

For a part of the period covered by this amended complaint the respondent Eagle-Picher Lead Company directly sold and distributed lead pigments in commerce, and it has also indirectly sold and distributed such products in commerce since the formation and incorporation in the State of Delaware of its wholly owned subsidiary, respondent Eagle-Picher Sales Company, which now serves respond-

ent Eagle-Picher Lead Company as a marketing medium for products of the parent company.

During a part of the period covered by this complaint, respondent Anaconda Copper Mining Company engaged in the production and distribution in commerce of lead pigments through a subsidiary corporation, Anaconda Lead Products Company, and since about 1936 Anaconda Copper Mining Company has distributed in commerce the lead pigments produced by its wholly-owned subsidiary, respondent International Smelting and Refining Company through Anaconda Sales Company, Pigments Division, a subsidiary of Anaconda Copper Mining Company.

The production of the National Lead Company and the other producing respondents accounts for substantially all of the lead pigments produced and sold in the United States, while that of National accounts for more than half of the total production of the respondents. Therefore, in the aggregate, the producing respondents are the manufacturers and primary sellers to whom purchasers and users of lead pigments must turn for supplies of lead pigments, and respondent National is the dominant producer in the field. The production and distribution of pig lead, from which lead pigments are produced, is also concentrated in the hands of a few corporations, including respondents National and Eagle-Picher.

Offenses Charged

PAR. 6. Respondent National Lead Company has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act by monopolizing, attempting to monopolize and acting to control the sale of lead pigments and the prices thereof in commerce. Respondents National Lead Company, Eagle-Picher Lead Company, Eagle-Picher Sales Company, Anaconda Copper Mining Company, International Smelting & Refining Company, The Sherwin-Williams Company and The Glidden Company have violated and are now violating the provisions of Section 5 of the Federal Trade Commission Act by combining, conspiring and cooperating between and among themselves and with each other for the purpose and with the effect of restraining, hindering, suppressing and eliminating competition in prices and terms of sale of lead pigments in commerce. Each of said respondents has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act by engaging in and continuing unfair, oppressive and discriminatory acts, methods and practices in connection with sales and offers to sell lead pigments in commerce.

Charges Particularized

PAR. 7. 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 lead pigments 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:

(*a*) Bought, merged and otherwise acquired control over or confederated with and secured the cooperation of other producers, buyers and sellers of pig lead destined for use in the manufacture of lead pigments. In furtherance of that part of its plan and program to monopolize the lead pigments industry and to secure control over the pricing of lead pigments in commerce:

(1) National, on or about December 7, 1891, succeeded to the control which had prior thereto been exercised by the National Lead Trust over the operations and activities of approximately sixteen previously independent firms engaged in the manufacture, sale and distribution of lead pigments, linseed oil and kindred products, and thereafter continued its expansion by acquiring control over additional units in the lead industry.

(2) National, in 1906, acquired control of the United Lead Company which had previously been formed through the acquisition of what had been numerous independent producers and refiners of lead.

(3) National, in 1907, acquired all of the stock of the Magnus Metal Company (Magnus Company, Inc.).

(4) National, shortly thereafter, acquired control of the business of Heath & Milligan Manufacturing Company of Chicago, the largest paint manufacturer in the West, but in 1919 transferred the control of that paint manufacturer to The Glidden Company, respondent herein.

(5) National, thereafter, acquired all of the stock of the Carter White Lead Company of Chicago and Omaha, the Matheson Lead Company, the River Smelting & Refining Company, Bass-Huerter Paint Company (then the second largest manufacturer of linseed paints and varnishes on the Pacific Coast), San Francisco, Calif., the National Lead Company of Argentina, and Hirst & Begley Company (an Illinois corporation engaged in the crushing of linseed oil which was subsequently reorganized into an operating branch of the National Lead Company).

(6) National has also secured control over a substantial part of the capital stock of respondent Eagle-Picher Lead Company. Up to February 1943, a still more substantial part of the Eagle-Picher Lead Company stock was held by one Edward J. Cornish, who had served as president of respondent National.

(7) National asserts and represents that the price of pig lead f. o. b. New York, N. Y., is the principal factor in its determination and fixing of its price for lead pigments, since pig lead is the principal item used in the manufacture of lead pigments.

(8) National through its acts, methods, practices and the relationships it has maintained and now maintains with American Smelting & Refining Company and others, through its employees, agents, representatives, officers, directors and owners, exerts a monopolistic influence upon and is an important factor in the determination and quotation of the "market" prices on pig lead in the United States and upon the pig lead prices that it incorporates as an element of and factor in computing its prices of lead pigments. American Smelting & Refining Company holds a dominant position in the sale and production of pig lead in the United States, as well as in other parts of the world and quotes prices on pig lead in terms of cents per pound f. o. b. New York City. The prices thus quoted are "accepted" and treated as the "market" prices of pig lead not only by American Smelting & Refining Company but also by respondent National Lead Company and are used by both corporations as a basis for trading in that important product throughout the United States.

(*b*) Respondent National has also combined and conspired with the few remaining small and ostensibly independent manufacturers and primary sellers of lead pigments 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 lead pigments;

(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 in some instances 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 lead pigments 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 lead pigments, including the respondents, in calculating, determining and announcing their offers to sell lead pigments 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 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;

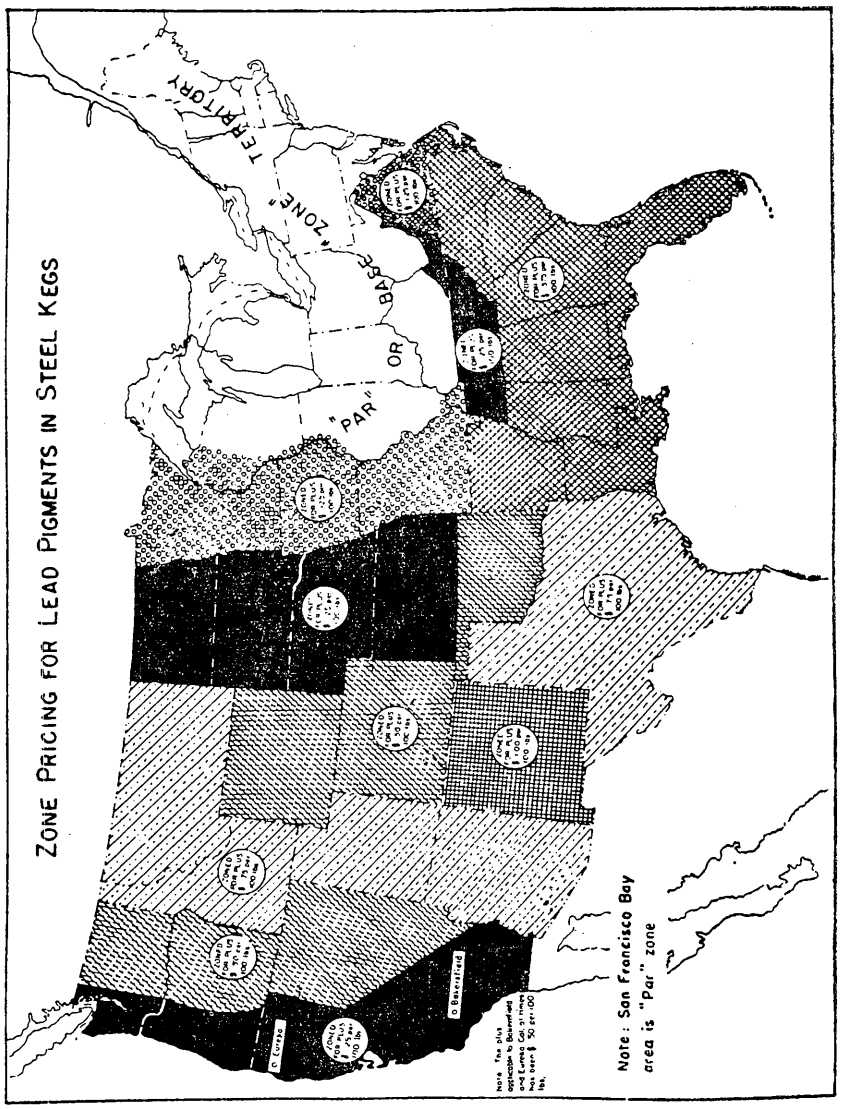
(6) Agreed to fix, and have fixed and included in offers to sell, the prices, terms and conditions at which lead pigments are sold and offered for sale in commerce;

(7) 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.

PAR. 8. Each respondent, in offering for sale and selling lead pigments, divides the country into geographical zones for the purpose of price quotations. To all buyers of the same class located in the same zone, each respondent quotes the same delivered cost, irrespective of the location of the buyer within the zone. A "par" or "base" price is quoted to buyers in the "par" or "base" zone, and buyers in other zones are quoted at a fixed differential above the "par" or "base" zone price,

irrespective of the transportation costs involved in selling and shipping to such customers on a delivered basis.

(*a*) In offering for sale and selling lead pigments in steel kegs of 100 pounds or less, each respondent quotes and sells upon the basis of the geographical divisions and delivered cost differentials set out in the map inserted herein immediately following this paragraph and made a part hereof.



(*b*) In offering for sale and selling dry white lead and lead sulphate in barrels or in bags, each respondent quotes and sells at the same delivered cost to all customers in the par or base zone, and 25¢ per 100 pounds is added to the par or base price for delivery to customers located in Arizona, California, Colorado, Idaho, Montana, Nevado, New Mexico, Utah, Washington and Wyoming, the par or base zone comprising all other States than those named.

(*c*) In offering for sale and selling dry red lead, litharge and other pigments in barrels or bags in less-than-carload lots, each respondent qoutes and sells at the same delivered cost to customers within the par or base zone; 25¢ per 100 pounds is added for delivery to customers in Alabama, Arkansas, California, Florida, Georgia, Louisiana, Mississippi, Oklahoma, Texas and west of the Cascade Mountains in Oregon and Washington: 50¢ per 100 pounds is added for delivery to customers in Colorado, Montana, New Mexico and Wyoming; 75¢ per 100 pounds is added for delivery to customers in Arizona, Idaho, Nevada, Utah and each of the Cascade Mountains in Oregon and Washington. The par or base zone comprises all other States than those named.

(*d*) In offering for sale and selling dry red lead, litharge and other lead pigments in barrels or bags in carload lots of 20 tons or more, each respondent offers to sell dry red lead at $2.50 and litharge at $1.50 per 100 pounds over the American Smelting and Refining Company's closing price of common pig lead at New York on the date the order is received, delivered to customers located in the par or base zone and 25¢ per 100 pounds is added for delivery to customers located in Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Louisiana, Mississippi, Montana, Nevada, New Mexico, Oklahoma, Texas, Utah, Wyoming and east of the Cascade Mountains in Oregon and Washington. The par or base zone comprises all other States and areas than those named.

PAR. 9. Terms and conditions of sale quoted by each respondent in selling and offering for sale lead pigments in commerce have included the following:

(*a*) Each of the respondents in selling and offering to sell lead pigments in commerce to agents or dealers for resale requires its customers to resell such products at prices and terms of sale fixed and determined and published by it, so that each of the respondents is responsible for the price levels to painters and consumers.

(*b*) Each of the respondents in selling and offering to sell lead pigments quotes standard container differentials on keg products, by which 50-pound kegs are sold at a 25¢ differential above 100-pound

kegs, 25-pound kegs at 25¢ above 50-pound kegs and 12½-pound kegs at 25¢ above 25-pound kegs.

(*c*) Each respondent, in connection with the sale and distribution of lead pigments to paint manufacturers and large industrial consumers enters into quarterly contracts covering terms of sale and delivery of lead pigments, either at current published quotations or at a fixed differential over the quotation of the American Smelting and Refining Co. for common pig lead at New York. Such quarterly contracts establish the grades and qualities of lead pigments covered, the discounts applicable and the time within which deliveries must be made.

(*d*) Each respondent issues cards or lists showing delivered quotations on lead pigments to various classes of customers for each type of pigment in various packages and quantities and applicable to the various zones and geographical divisions, and including the quotations which must be made by purchasers in reselling to consumers and others. Such "price cards" and other pricing information, when computed and calculated in accordance with the instructions and directions contained therein, cause to be presented to any given prospective purchaser of lead pigments, in any given quantity, in any given type of package, at any given destination, exactly matched offers to sell over the names of each of the respondents, except that in the case of white lead in oil the quotations to dealers or agents for resale of respondents Anaconda, Sherwin-Williams and, at times Glidden, are matched at a small differential below the matched offers of National and Eagle-Picher.

PAR. 10. Each of the respondents uses the systematic method of quoting delivered costs on lead pigments described in Paragraphs Eight and Nine of this Count I for the purpose and with the effect of enabling the respondents to match exactly their offers to sell lead pigments to any prospective purchaser at any destination, thereby eliminating competition between and among themselves. Inherently and necessarily involved is a systematic discrimination against purchasers located near the factory of any of the respondents and in favor of customers located, freightwise, at a considerable distance.

Effects of Respondents' Actions

PAR. 11. The inherent and necessary effects of the adoption, use and maintenance by each of the respondents of the zone delivered system of pricing and other practices set forth in Paragraphs Eight and Nine of this Count I include the following, to wit:

(*a*) Unfair and oppressive discrimination by respondents against the lead pigments purchasing and consuming public in large areas of

the United States by depriving such purchasers of the natural advantage otherwise accruing to them from proximity to the factories of respondents and by compelling such purchasers to pay increases over what the net price of lead pigments to such purchasers would have been if fixed by competition among respondents, such increment in net prices to respondents approximating the advantages in freight rates to which such purchasers are entitled over purchasers remote from such factories. Such nearby purchasers are thereby compelled to pay not only the actual freight rates on the products purchased by them respectively, but in effect also to pay portions of the cost of transportation of such products to other and more distant purchasers from the respective factories;

(*b*) A substantial lessening of competition among respondents in all parts of the United States, through action of each respondent voluntarily and reciprocally surrendering and cancelling the inherent advantage it has over all competitors within the territory nearer freightwise to its factory than to the factory of a competitor, in consideration of a similar surrender and cancellation by other respondents;

(*c*) The fixation and control through respondents' concurrent and parallel action of an arbitrary and substantial portion of the delivered cost of the product to any and every purchaser upon a basis having no relation to differences in cost of production, in selling costs, and in actual transportation cost, on particular sales. Such arbitrary result is accomplished notwithstanding substantial differences in the delivered cost to the respective respondents of raw materials shipped to them and of lead pigments shipped by them to their respective customers;

CONCLUSION

PAR. 12. The combinations, agreements and understandings of the respondents and their acts, practices, pricing methods, systems, devices and policies as hereinbefore alleged, all and singularly, are unfair and to the prejudice of the public; deprive the public of the benefit of competition; create discrimination against some buyers and users of lead pigments and lead pigment paint; have a dangerous tendency and capacity to restrain unreasonably commerce in said products; have actually hindered, frustrated, suppressed and eliminated competition in such products in commerce; and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

COUNT II

The Charge Under the Clayton Act

PARAGRAPH 1. Pursuant to the provisions of Section 2 (a) of an act of Congress approved October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," commonly known as the Clayton Act, as amended by an Act of Congress approved June 19, 1936, commonly known as the Robinson-Patman Act, the Commission, having reason to believe that the parties named in the caption hereof, and more particularly described and referred to hereinafter as respondents, have violated the provisions of said act of Congress as so amended, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, the Commission hereby issues its amended complaint, stating its charges in such respect as follows:

Nature of Charges

PAR. 2. The charges hereinafter contained in this Count II are that each of the respondents has been and is now unlawfully discriminating as between its customers in the prices it charges, demands, accepts and receives in connection with the sale of lead pigments in commerce.

Description of Respondents; Definitions and Explanations of Terms: Description and History of Industry and the Commerce of Respondents

PARS. 3 TO 5, INCLUSIVE. As Paragraphs Three to Five, inclusive, of Count II, the Commission incorporates Paragraphs Three to Five, inclusive, of Count I of this amended complaint to precisely the same extent and effect as if each and all of them were set forth in full and repeated verbatim in this Count II, except the definition of the term "commerce." The term "commerce" as hereinafter used means "commerce" as defined and set forth in the Clayton Act.

Offenses Charged

PAR. 6. Since June 19, 1936, and while engaged as aforesaid in commerce among the several States of the United States and the District of Columbia, each of the respondents National, Eagle-Picher, Anaconda, International, Sherwin-Williams and Glidden, has been and is now, in the course of such commerce, discriminating in price between purchasers of said commodities of like grade and quality, sold for use, consumption or resale within the several States of the United

States and the District of Columbia, in that each of the respondents has been and is now systematically selling such commodities to many purchasers at a price higher than the price at which commodities of like grade and quality are sold by it to other purchasers and users, including purchasers competitively engaged with others who pay either the lower or the higher discriminatory prices.

PAR. 7. Each of the respondents uses a "Zone Delivered Pricing Method and Practice" in calculating, determining, making up, announcing, publishing, and distributing its offers to its respective customers to sell them lead pigments in commerce. As an incident to and a part of such method and practice, the entire territory of continental United States has been and is now divided by each of such respondents for pricing purposes into geographical "Zones," as alleged in Paragraph Eight of Count I of this amended complaint and the map appearing at page 8. Paragraph Eight of Count I is hereby incorporated in this Count II to the same extent and effect as if such Paragraph were set forth in full and repeated verbatim herein.

PAR. 8. In using its aforesaid "Zone Delivered Pricing Method and Practice," each of the respondents, National, Eagle-Picher, Anaconda, International, Sherwin-Williams and Glidden, so quotes prices in its offers to sell that when it sells lead pigments in commerce in accordance and in connection therewith, the delivered cost on a specified quantity of lead pigments as paid by any one of its customers located at or near the factory door of such respondent, amounts to as much as the delivered cost on the same quantity of lead pigments as paid to such respondent by any one of other customers located hundreds of miles away in the same "Zone," although substantial differences are involved in the costs of delivery to such nearby customer and the more distantly located ones.

PAR. 9. Systematic discriminations in net prices against nearby customers and in favor of their more distantly located customers are inherent in the use of the aforesaid "Zone Delivered Pricing Method and Practice" when sales are effected and the buyers pay in accordance with quotations of Matched delivered costs as made by each of the respondents, National, Eagle-Picher, Anaconda, International, Sherwin-Williams and Glidden, to their respective customers.

PAR. 10. When sales are made by customers located at or near the borders of adjoining or contiguous "Zones" pursuant to the aforesaid "Zone Delivered Pricing Method and Practice," each of the respondents, National, Eagle-Picher, Anaconda, International, Sherwin-Williams and Glidden, charges, demands, accepts and receives higher prices from some purchasers than from other and competing purchasers in different zones and there is discrimination in the delivered

costs of lead pigments to different purchasers by each of such respondents in addition to substantial differences in the mill net prices received by each of them.

PAR. 11. Each of the respondents, National, Eagle-Picher, Anaconda, International, Sherwin-Williams and Glidden has been and is now classifying its customers to receive from such respondents quantity, trade and regional discounts and from quoted prices so that, by virtue of such classifications and action pursuant thereto by each such respondent, it charges, demands, accepts and receives higher prices in connection with sales of lead pigments in commerce from some of its customers than from other customers, even though said customers who pay such higher prices are competitively engaged with the customers who pay such lower prices.

PAR. 12. Each of the respondents practices the aforesaid systematic discriminations in price for the purpose and with the effect of enabling respondents exactly to match their offers to sell lead pigments in commerce to any given prospective purchaser at any given destination, except that as to white lead in oil the purpose and effect has been to match exactly the offers to dealers and agents for resale of respondents Anaconda, Sherwin-Williams and Glidden at a prearranged differential below similar matched offers of respondents National and Eagle-Picher.

Effects of Price Discriminations Practiced by Respondents

PAR. 13. The discriminations in price practiced by respondents, as particularized and alleged in Paragraphs Six, Seven, Eight, Nine, Ten and Eleven of this Count II, include the results and effects set forth as follows:

(*a*) The allegations of the results and effects that are made and set out in subparagraphs (*a*), (*b*) and (*c*) of Paragraph Eleven of Count I hereof are hereby alleged as results and effects of respondents' price discriminations alleged in Paragraphs Six, Seven, Eight, Nine, Ten and Eleven of this Count II, and are hereby incorporated in this subparagraph of this Paragraph Thirteen of Count II to precisely the same extent as though each said subparagraph (*a*), (*b*) and (*c*) of Paragraph Eleven of Count I were set forth in full and repeated verbatim as a part hereof;

(*b*) A further effect of the aforesaid discriminations in price by said respondents may be substantially to lessen competition in the sale and distribution of lead pigments between said respondents and their competitors, tend to create a monopoly in the line of commerce in which the respondents are engaged; and to injure, destroy and

prevent competition between said respondents and their competitors in the sale and distribution of lead pigments;

(c) Further effects of the aforesaid discriminations in price by said respondents may be substantially to lessen competition between the buyers of lead pigments receiving the lower discriminatory prices from respondents and other buyers competitively engaged with such favored buyers and who pay higher discriminatory prices; tend to create a monopoly in the lines of commerce in which buyers from respondents are engaged; and to injure, destroy and prevent competition in the lines of commerce in which purchasers from respondents engage as between the beneficiaries of said discriminatory prices and competing buyers who are required to pay the higher discriminatory prices.

CONCLUSION

PAR. 14. Therefore the aforesaid discriminations in price by each of the respondents consititute violations of the provisions of sub-section (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (49 Stat. 1526; 15 U. S. C. A., sec. 13, as amended).

REPORT, FINDINGS AS TO THE FACTS, AND ORDER [1]

Pursuant to the provisions of the Federal Trade Commission Act and to the provisions of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by an Act approved June 19, 1936 (the Robinson-Patman Act), the Federal Trade Commission, on November 25, 1944, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging said respondents with the use of unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in the sale of white lead, in violation of the provisions of the Federal Trade Commission Act, and with having discriminated in price in the sale of white lead, in violation of the provisions of subsection (a) of Section 2 of the aforesaid Clayton Act, as amended.

After the filing of the respondents' answers to said complaint, certain testimony and other evidence in support of the allegations of the complaint were introduced before a hearing examiner of the Commission theretofore duly designated by it. Subsequently, on April 12, 1946, the Commission issued and afterwards served upon said respondents

[1] Paragraph 4 (d) of the Findings as to the Facts is published as corrected by the Commission's order of February 4, 1953, which substituted the word "turpentine" for the typographical error, "titanium".

an amended complaint, charging them with the use of unfair methods of competition in commerce and unfair acts and practices in commerce in the sale of various lead pigments, in violation of the provisions of the Federal Trade Commission Act, and with having discriminated in price in the sale of various lead pigments, in violation of the provisions of subsection (a) of Section 2 of said Clayton Act, as amended. The respondents' answers to said amended complaint were duly filed, and it was stipulated by and between counsel in support of the amended complaint and the respondents, by their respective counsel, that the testimony and other evidence theretofore received in support of the original complaint (with the exception of certain specified testimony and other evidence, which were excluded) might be considered as a part of the record under the amended complaint to the same extent and effect as if said testimony and evidence had been introduced after the issuance of said amended complaint.

Thereafter, further testimony and other evidence in support of and in opposition to the allegations of said amended complaint were introduced before a substitute hearing examiner (the respondents having consented to the substitution of hearing examiners), and said testimony and other evidence were duly recorded and filed in the office of the Commission. In due course the proceeding regularly came on for final hearing before the Commission upon the amended complaint, the respondents' answers thereto, the testimony and other evidence, the hearing examiner's recommended decision and exceptions thereto, briefs and oral arguments of counsel, including briefs and arguments in support of and in opposition to the respondents' appeals from a number of rulings of the hearing examiners with respect to the receipt of documentary evidence and other testimony; and the Commission, having duly considered the matter and having disposed of the exceptions to the recommended decision and the respondents' appeals, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. (*a*) Respondent National Lead Company, hereinafter sometimes referred to as "National," is a New Jersey corporation, with its principal offices located at 111 Broadway, New York, New York. This respondent is the largest producer and seller of lead pigments in the United States, and it presently operates factories producing lead pigments at Brooklyn, New York (white lead, red lead and litharge), Perth Amboy, New Jersey (white lead), Philadelphia, Pennsylvania (white lead, red lead and litharge), Charleston, West Virginia (red lead and litharge), Atlanta, Georgia (red lead and lith-

arge), Chicago, Illinois (white lead, red lead and litharge), St. Louis, Missouri (white lead, red lead and litharge), San Francisco, California (white lead, red lead and litharge), Los Angeles, California (red lead and litharge), and Dallas, Texas (red lead and litharge). During the period from 1936 to 1942, respondent National accounted for between 60 percent and 63 percent of the shipments of white lead-in-oil, from 30 percent to 35 percent of the dry white lead, basic carbonate, and approximately 50 percent of the red lead and litharge sold in the United States. In 1938, the percentage of white lead-in-oil and dry white lead, basic carbonate, combined, sold by this respondent was 58.8 percent of the total of these products sold, and in 1941, its share of the total sales of the same two products was 53 percent. Respondent National is also a very large producer of titanium pigments, and in addition produces linseed oil and many different products composed principally of lead.

(*b*) Respondent The Eagle-Picher Company, erroneously named in the amended complaint as "Eagle-Picher Lead Company," is an Ohio corporation, with its principal offices located in the American Building, Cincinnati, Ohio. Respondent The Eagle-Picher Sales Company is a Delaware corporation, with its principal offices at the same address and is a wholly-owned subsidiary of respondent The Eagle-Picher Company. All of the acts of respondent The Eagle-Picher Sales Company referred to herein have been for the benefit and in behalf of respondent The Eagle-Picher Company and, for the purpose of these findings, will be treated hereinafter as the acts of The Eagle-Picher Company. Both of these respondents are hereinafter sometimes referred to collectively simply as "Eagle-Picher."

Respondent Eagle-Picher is engaged in the business of mining, smelting, refining and selling metallic lead products, lead pigments and other articles of commerce. It maintains a factory producing basic carbonate of white lead, both dry and in oil, at East Chicago, Indiana (a factory formerly operated by respondent International Smelting and Refining Company and acquired by Eagle-Picher in 1946). Its factories producing red lead and litharge are operated at Joplin, Missouri and at Newark, New Jersey, and it produces basic sulphate of white lead at Galena, Kansas and Joplin, Missouri. Eagle-Picher is engaged in mining lead ores in the so-called "Tri-State" area (a geographical area comprising the contiguous sections of Missouri, Kansas and Oklahoma) and operates plants reducing such ores to concentrates and metallic lead in and around Joplin, Missouri. This respondent is the second largest producer of lead pigments in the United States, and during the period from 1930 to 1946, it accounted for from 15 percent to 20 percent of the white

lead-in-oil and from 8 percent to 12 percent of the dry white lead, basic carbonate, sold in the United States. Eagle-Picher is also a producer of lithopone, a product apparently sold in competition with lead pigments, and is a large producer and seller of zinc oxide and leaded zinc pigments consisting of a combination of white lead, basic sulphate, and zinc oxide.

(*c*) Respondent Anaconda Copper Mining Company, hereinafter sometimes referred to as "Anaconda," is a Montana corporation, with its principal office located at 25 Broadway, New York, New York. Respondent International Smelting and Refining Company, hereinafter sometimes referred to as "International," is a Montana corporation, with its principal office at the same location, and it is a wholly-owned subsidiary of respondent Anaconda Copper Mining Company.

Respondent Anaconda is one of the world's largest producers and fabricators of non-ferrous metals, including copper, lead and zinc. Prior to 1936, dry white lead and white lead-in-oil were produced by Anaconda Lead Products Company, a subsidiary of Anaconda, and were sold and distributed in commerce by Anaconda Lead Products Company and Anaconda Sales Company, another wholly-owned and controlled Anaconda subsidiary. In 1936, the assets and properties of Anaconda Lead Products Company were acquired by respondent International, and the former company was dissolved after having been engaged in the production and sale of white lead since 1920. From 1936 to the fall of 1946, lead pigments produced by respondent International were sold and distributed by that company or by Anaconda Sales Company, the division of business between the two depending upon the States in which business was done. From 1937 to 1941, respondent Anaconda (International) sold from 3 percent to 4 percent of the white lead-in-oil and from 10 percent to 19 percent of the dry white lead, basic carbonate, sold in the country. Its percentage of the national sales of white lead-in-oil and dry white lead, basic carbonate, combined, was 6.6 percent in 1938 and 8.8 percent in 1941. Neither respondent Anaconda nor any of its subsidiaries has ever produced red lead or litharge.

The principal officers of respondents Anaconda and International have always been the same, and it is apparent from the record that respondent International and the former Anaconda Lead Products Company were in fact mere operating divisions of respondent Anaconda, with no substantial separate identity of their own. All of the acts of respondent International, of Anaconda Lead Products Company, and of Anaconda Sales Company referred to in these findings were for and in behalf of respondent Anaconda, and such acts will hereafter be treated as the acts of respondent Anaconda.

Respondent Anaconda (International) ceased the manufacture and sale of white lead, both dry and in oil, in July or August 1946, but it still produces lead ores and refined metallic lead.

(*d*) Respondent The Sherwin-Williams Company, hereinafter sometimes referred to as "Sherwin-Williams," is an Ohio corporation, with its principal office located at 101 Prospect Avenue, N. W., Cleveland, Ohio. This respondent operates a factory producing white lead, red lead and litharge in the metropolitan area of Chicago, Illinois, and is one of the largest, if not the largest, manufacturers and sellers of mixed paints and related items in the United States, operating numerous paint producing plants and warehouses throughout the country. Respondent Sherwin-Williams operates more than two hundred retail stores located throughout the country selling mixed paints, lead pigments and related items to consumers and the general public.

A substantial portion of the lead pigments produced by Sherwin-Williams is used by it directly in the manufacture of paint and related products, and the remainder of its production is sold and shipped to others. This respondent is not engaged in the sale of red lead or litharge to the battery manufacturing industry, but it is engaged in the sale of such products to paint manufacturers and other users. Sherwin-Williams is also a producer of a number of pigments said to be in competition with lead pigments, including lithopone.

(*e*) Respondent The Glidden Company, hereinafter sometimes referred to as "Glidden," is an Ohio corporation, with its principal offices in the Union Commerce Building, Cleveland, Ohio. This respondent operates a white lead producing plant in Scranton, Pennsylvania, and a lead refining and red lead and litharge producing plant in Hammond, Indiana, in the Chicago, Illinois, switching area. Like Sherwin-Williams, respondent Glidden is a large producer and seller of mixed paints and related items and operates some thirty retail stores selling mixed paint, lead pigments and related products directly to consumers and the general public. From 1932 to 1943, it accounted for from 2 percent to 9 percent of the national sales of white lead-in-oil, from 8 percent to 18 percent of the sales of dry white lead, basic carbonate, and from 4 percent to 8 percent of the red lead and litharge sales in the country. Glidden's white lead producing plant was formerly operated by the Euston Lead Company, now a division of Glidden, and was acquired by Glidden in 1925; and its red lead and litharge producing plant was formerly operated by Metals Refining Company, now also a division of Glidden, and was acquired by Glidden in 1929. Respondent Glidden probably is the largest domestic producer in the United States of lithopone.

(*f*) Other organizations to which references will be made in these findings which are not respondents herein are Lead Industries Association and American Smelting and Refining Company.

Lead Industries Association is a voluntary unincorporated trade association organized in 1928 to serve the interests of those who mine, smelt, refine and manufacture lead and lead products, including lead pigments. It is composed of a mining division, a smelting and refining division, a lead pigments division and a metallic lead products division. During and preceding the period of the National Recovery Administration, the lead pigments division of the association was further separated into a white lead-in-oil committee and a dry products committee, the latter being further divided into an oxide committee and a dry white lead committee. Members of the Lead Industries Association comprise practically the entire lead mining, smelting and refining industry of the United States, as well as most of the industries using lead as a basic raw material, including manufacturers of lead pigments, lead sheets, pipe, shot, solder and related items.

American Smelting and Refining Company is a corporation, with its principal office and place of business located in New York, New York. This company, hereinafter sometimes referred to as "A. S. & R.," is the world's largest smelter and refiner of lead, producing between 30 percent and 40 percent of the entire world's supply of refined lead and accounting for more than half of the domestic supply. A. S. & R. operates lead smelters at East Helena, Montana, Selby (San Francisco), California, El Paso, Texas, Leadville, Colorado, Murray, Utah and East St. Louis, Illinois, which process ores and concentrates from four hundred to five hundred lead mines. This company purchases from the mines 80 percent to 90 percent of the lead ore which it processes and most of its ore of United States origin is so purchased. It publishes daily the prices at which it buys lead ore and the prices at which it sells pig lead on the same day. The position of A. S. & R. in the domestic lead market is demonstrated by the fact that the respondents herein agreed to use its daily quotations of lead prices as the basis for quoting spot carload prices on red lead and litharge.

PAR. 2. Each of the respondents named in subparagraphs (a) to (e), inclusive, of Paragraph One is now and for many years last past has been engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act and in the Clayton Act, selling and shipping lead pigments manufactured at the various producing points hereinabove set forth to customers located in States of the United States other than the States of production (except that respondents Anaconda and International have not been engaged in the lead pig-

ments business since the fall of 1946). Each of said respondents seeks to enjoy and does enjoy national distribution of lead pigments and other products manufactured by it, except that respondents Eagle-Picher and Anaconda do only a limited amount of business on the Pacific Coast and in the states west of the Rocky Mountains and except that respondent Sherwin-Williams does not sell dry red lead or litharge on the Pacific Coast.

Together the respondents account for practically the entire production of lead pigments in the country, there being only a few small producers of such products for sale in commerce in the United States other than said respondents. It is to these respondents that purchasers and consumers throughout the country must look for their supplies of lead pigments, and the respondents have the power to and do control the supply of lead pigments available for shipment in commerce. The respondents also account for a substantial portion of the national production of and trade in commerce in a number of competing products, including lithopone, zinc oxide and titanium, used as pigments in mixed paints and for other similar purposes.

PAR. 3. The term "lead pigments" as used in these findings includes all of the various carbonates and sulphates of lead, and oxides, hereinafter more particularly described, whether or not such products are actually used as pigments.

(*a*) Dry white lead, basic carbonate, is a fine white powder produced from metallic lead, used extensively as a pigment in paints and protective coverings as well as in the manufacture of ceramics, putty and other products. It is sold principally to paint and ceramic manufacturers for use by them as a raw material in further manufacturing processes, and as so sold is customarily packaged in 600-pound containers.

(*b*) Dry white lead, basic sulphate, is a white pigment similar in appearance to dry white lead, basic carbonate, which may be produced either by processing metallic lead or by fuming lead concentrates without reducing the basic raw material to metallic lead. It is marketed in bags of fifty pounds or steel containers of from four hundred and twenty-five to six hundred and twenty-five pounds, and is used extensively either alone or as combined with zinc oxide to form leaded zinc oxide in the manufacture of mixed paints.

(*c*) White lead-in-oil is the term customarily used to refer to white lead, basic carbonate, with linseed oil added to form a paste. It is sold principally to dealers for resale to painters and members of the general public, and its primary ultimate use, after being mixed with additional oil, mineral spirits and dryers, is as an exterior house paint. White lead-in-oil, when so mixed, is now and for many years has been

known in the trade and by consumers as a protective covering of the finest quality for houses and other wooden structures.

(*d*) Litharge is a sub-oxide of lead having the approximate chemical formula PbO, which is produced by heating metallic lead in the presence of air in a furnace. There are many different grades and types of litharges, depending upon the use for which they are manufactured. Litharge is used in the manufacture of paints and varnishes, in the "sweetening" of gasoline by the petroleum refining industry, and in the production of agricultural insecticides. The largest use of litharge is in the manufacture of electric storage batteries where it is the basic raw material for both the negative and positive battery plates. The litharges sold to the battery manufacturing industry by the respondents (except for the respondent Anaconda (International), who has never sold litharges, and the respondent Sherwin-Williams, who sells no litharge to battery manufacturers) are sometimes referred to in the trade and by the respondents as oxides of lead. Litharge is customarily sold to industrial consumers in containers of six hundred pounds.

(*e*) Red lead, having the approximate chemical formula Pb_3O_4, is produced by a further heating and oxidation of litharge, and is manufactured in several grades and qualities, depending upon the extent to which the roasting and refining processes are carried. Red lead is now and for many years has been regarded as the finest pigment for metal protective paint and is used to a large extent as a pigment in the paint manufacturing industry. It is also used extensively in the manufacture of electric storage batteries, in producing agricultural insecticides, and in petroleum refining. Red lead is also mixed with linseed oil to form a paste known as red lead-in-oil which is sold largely to dealers for resale to painters and consumers for use directly as a paint after the addition of oils and dryers.

(*f*) A number of other miscellaneous products are likewise known to the industry as lead pigments, including blue lead, a form of basic sulphate of lead produced by the fuming of lead concentrates; orange mineral, a pigment produced by further processing red lead or white lead, basic carbonate; and grinders' lead-in-oil, which is white lead, basic carbonate, mixed with linseed oil to form a paste of thinner consistency than white lead-in-oil, and is ordinarily sold to the paint manufacturing industry.

(*g*) Pig lead is not a lead pigment, but is the term used to describe metallic lead which is customarily marketed in the form of pigs or bars containing approximately ninety pounds each. It is the basic raw material from which lead pigments are manufactured, except

that some basic sulphates and litharges are produced from fuming lead concentrates. Except as to respondent Anaconda, whose supplies of lead were derived from its own smelters and refineries, all of the respondents herein during all of the time covered by these findings have purchased the major part of their requirements of pig lead on the open market. It appears, however, that during the period from 1930 to the date of the hearings in this proceeding respondent Eagle-Picher at various times produced as much as 66⅔ percent and as little as 10 percent or 15 percent of its own requirements of lead.

PAR. 4. (a) Respondent National Lead Company was formed on or about December 8, 1891, by the acquisition of the physical properties and stock ownership of Cornell Lead Company, of Buffalo, New York, The National Lead & Oil Company, of New York, New York, Atlantic White Lead & Linseed Oil Company, of New York, New York, Salem Lead Company, of Salem, Massachusetts, The J. H. Morley Lead Company, of Cleveland, Ohio, The Eckstein White Lead Company, of Cincinnati, Ohio, Anchor White Lead Company, of Cincinnati, Ohio, Maryland White Lead Company, of Baltimore, Maryland, American White Lead Company, of Louisville, Kentucky, Kentucky Lead and Oil Company, of Louisville, Kentucky, Southern White Lead Company, of Chicago, Illinois, D. B. Shipman White Lead Works, of Chicago, Illinois, Southern White Lead Company, of St. Louis, Missouri, St. Louis Lead and Oil Company, of St. Louis, Missouri, Collier White Lead and Oil Company, of St. Louis, Missouri, and Red Seal Castor Oil Company, of St. Louis, Missouri, all of which companies were previously engaged in the manufacture and in the sale and distribution of white lead, linseed oil and kindred products, and the stock ownership of which had been in or controlled by the National Lead Trust. In addition and at the same time National Lead Company acquired controlling stock interests in St. Louis and Zocatecas Ore Company, St. Louis Smelting and Refining Company, Western White Lead Company, John T. Lewis & Bros. Company, Beymer Bauman Lead Company, Fahnstock White Lead Company, Pennsylvania White Lead Company, Armstrong-McKelvy Lead & Oil Company, Davis-Chambers Lead Company, The American Oxide Company, Union White Lead Manufacturing Company, Brooklyn White Lead Company, Bradley White Lead Company, Lenox Smelting Company, Jewett White Lead Company, Ulster Lead Company, and Rio Grande Smelting Company.

In February 1906, respondent National acquired all of the stock of United Lead Company, which company had been organized in 1903 by Messrs. Grant Hugh Brown, Daniel Guggenheim and Thomas Fortune

Ryan, and which had acquired thirteen other companies controlling many of the principal lead alloy factories and lead works of the United States, including the American Shot and Lead Company, which was itself a consolidation of the principal shot towers of the country. Most of the concerns so acquired by National through the purchase of United had been previously offered to National by Messrs. Guggenheim, Ryan and H. H. Rogers, the first named individuals being directors of American Smelting and Refining Company. At this time and until 1911, American Smelting and Refining Company was represented on respondent National's Board of Directors by Daniel Guggenheim, Murray Guggenheim and Edward Brush, who were also directors of American Smelting and Refining Company. In March 1906, National acquired all of the stock of Carter White Lead Company, which had properties in Chicago, Illinois, and Omaha, Nebraska, and in July 1912, it acquired all of the stock of Matheson Lead Company. In 1915, the River Smelting and Refining Company was organized jointly by National and Stone & Webster. In 1916, National acquired all of the stock of Bass-Hueter Paint Company; in January 1919, it acquired the properties and assets of Hirst & Begley Company; and sometime between 1931 and 1933, it acquired the properties of the Evans Lead Company, a concern producing red lead and litharge in Charleston, West Virginia. In the 1930's, also, respondent National acquired the properties of Wetherill & Bros., producing lead pigments in Philadelphia, Pennsylvania.

Prior to these several acquisitions by National Lead Company there were in the United States eighteen or twenty producers of white lead who were selling their products in the various localities where they could operate economically. National closed many of these plants, amalgamated others and enlarged a number of the existing plants. The names of some of the acquired properties were retained and the properties were thereafter operated by National as branches.

(*b*) By 1930, National Lead Company had become a predominant factor in the lead pigments industry. There is evidence that at about this time National sought to further enhance its position in the industry by the acquisition of the assets and properties of its largest competitor, respondent Eagle-Picher. It was shown that beginning in July of 1930 and continuing from time to time through June 13, 1932, respondent National bought in the name of E. J. Cornish, Chairman of the Board of Directors of National Lead Company, 44,900 shares of the common stock of respondent Eagle-Picher, and that in 1931 National made an unsuccessful attempt to purchase the entire assets and good will of The Eagle-Picher Company. It was not shown that National ever actually controlled respondent Eagle-Picher or that it

was ever represented on the latter's Board of Directors, but there is evidence that as late as 1935 Mr. Cornish and F. M. Carter, then president of National, were seeking to secure for National a controlling stock interest in respondent Eagle-Picher. There is further evidence of close relations between these two respondents, particularly during the period from 1931 to 1941. In 1937, for example, Eagle-Picher's executive vice president, Mr. W. R. Dice, discussed policies with Messrs. Wilson and Martino, National officials, at a club luncheon to which Mr. F. E. Wormser, secretary of the Lead Industries Association, had invited him. The record further shows that Eagle-Picher's files contained National's price changes on the Pacific Coast and that in 1940, Eagle-Picher submitted labels, prices, and descriptions of its new white lead paint to National and referred to a previous conversation over the telephone about this matter. This was followed by a luncheon between the interested parties. At one time Eagle-Picher's chief chemist, Mr. Frank L. Chinery, wrote to Mr. Rose of National suggesting an increase in Federal specifications of the nonvolatile content of flatting oil to 12 percent "in order to make it harder on the chiselers and others who go out and get flatting oil business on bids based upon specifications" (Comm. Ex. 691), and in 1941, National wired Eagle-Picher its Manila prices for white lead-in-oil and red lead as follows:

> Effective immediately prices Manila white lead-in-oil and red lead dry in twenty-five pounds increased half cent now ten and a half cents C1F terms net 60 days. (Comm. Ex. 701).

Various other instances of similar cooperation between these two competitors were shown to have occurred.

(*c*) In February 1906, at the time National Lead Company acquired the stock of United Lead Company, respondent National entered into a contract with American Smelting and Refining Company under the terms of which A. S. & R. was to sell and National was to buy (a) all of the latter's requirements of corroding pig lead (a very pure form of lead) except so much as National's plant located at Collinsville, Illinois, supplied, not exceeding 30,000 tons per year, and (b) 85 percent of all of its pig lead requirements, exclusive of corroding lead, less so much chemical lead of other brands as might be demanded by its trade. A. S. & R. was to furnish these requirements up to 85 percent of its production from domestic ores of all kinds of pig lead, excluding the production of the Selby Company. If National's Collinsville smelting plant (formerly belonging to the St. Louis Smelting and Refining Company) produced more than the stipulated 30,000 tons per year, National was to sell the surplus to A. S. & R. at 5 percent less than the latter's prevailing price. For common pig lead, the price to be paid

by National under this contract was to be the average of A. S. & R.'s lowest daily schedule of prices for the respective qualities and brands specified in National's orders for the calendar month preceding the month of shipment for fifty tons or more, on 30-day delivery, at St. Louis and New York City, respectively, provided that if this price was more than 1.075 cents per pound above the average daily spot quotations for soft Spanish lead on the London Metal Exchange for the month in which shipment was made, then the price was to be adjusted to the said London average, plus the differential of 7.075 cents, which differential was based on the prevailing tariff. The price for corroding pig lead was to be $2 per ton in excess of the price for common pig lead (Comm. Ex. 93–A—G, inc.). The significance of this contract in relation to the future prices of white lead in the industry is shown by stipulation entered into by and between counsel that "the cost of its (National's) inventories of corroding quality pig lead and of the lead content of white lead in process and in finished stock is the most important single factor in its (National's) determination and fixing of its price for white lead since pig lead is the principal material used in the manufacture of white lead" (Tr. 20).

Concurrently with the acquisition of the stock of United Lead Company by National Lead Company and with the execution of the foregoing contract between respondent National and American Smelting and Refining Company, American Smelting and Refining Company entered into a contract with Hoyt Metal Company, a constituent company of National, under which Hoyt was to purchase and A. S. & R. was to sell for a period of fifteen years all of the latter's domestic output of antimonial lead. This contract contemplated deliveries of not more than eight hundred tons of antimonial lead per month, and the price to be paid by Hoyt for lead shipped to it each month was to be the average daily price of common desilvered lead as quoted in said month by A. S. & R. for lots of fifty tons or more for delivery in St. Louis and New York City, respectively, within thirty days, with the same provision for adjustment with the London Metal Exchange quotations as that contained in the A. S. & R.-National contract with respect to common pig lead (Comm. Ex. 94–C—G, inc.).

The contract between National and A. S. & R. expired in 1921, whereupon the companies signed a contract of mutual release and made further arrangements whereby National thereafter purchased pig lead from A. S. & R. and from others on short-term contracts at a spot price or at an average monthly price based on A. S. & R.'s daily quotations. As stated by the former head of American Smelting and Refining Company, the reason given by National's president for not continuing the 1906 contract was that one company (A. S. & R.)

had more lead to sell than any other in the United States and the other company (National) was the largest consumer of lead in the United States, and "there isn't enough lead to supply the National Lead's demands unless we (National) buy from the A. S. & R. and there aren't enough consumers to use all of the A. S. & R. production unless the National Lead takes some of it," and, further, that "We, the National Lead, do not want to be bound by a certain amount from you (A. S. & R.)—that handicaps our ability to buy perhaps at the lowest price, which is our ultimate objective, and on that account we feel that it is wiser for us not to be bound to take any specific amount" (Tr. 4084).

(*d*) On February 3, 1938, respondent National Lead Company entered into a contract with E. I. du Pont de Nemours & Co., Inc., concerning the manufacture and packaging of white lead-in-oil by National for Du Pont, which contract was similar to one which had been in effect between the parties since 1924. The principal difference was that the payments to National by Du Pont were to be increased over those which would have been made under the 1924 contract by not more than $25,000 per year. Under the terms of the new contract Du Pont was to furnish National corroding pig lead, linseed oil and turpentine which National was to convert into white lead-in-oil to the amount of Du Pont's total requirements and package and ship the same to Du Pont's order at a stated charge for processing, packaging and shipping, with certain variations between different size packages. The raw material was furnished by Du Pont and the lead-in-oil belonged to it for sale or use, subject to payment of the aforesaid processing and shipping charges (Comm. Ex. 797–C and D). The contract contained no provision for the observance by Du Pont of prices charged by National or others for lead-in-oil, nor is there direct evidence of any express agreement between the parties to that effect. It is shown, however, that Du Pont based its calculations of the amounts to be paid under the new contract on National's card prices for lead-in-oil and subsequently requested National to furnish its card prices and changes to Du Pont's branches (Comm. Ex. 533). Thereafter, Du Pont requested a periodical letter from National "covering the price to be in effect for the quarter" (Comm. Ex. 534), and such a letter from National to Du Pont, dated September 13, 1940, is in evidence as Commission's Exhibit 535. Moreover, a subsequent change in discount terms announced by Du Pont met the full approval of Mr. Harold Rowe, one of National's vice presidents, who wrote National's Chicago branch about it and suggested that "Perhaps others in the industry will follow this good example * * * " (Comm. Ex. 538). National represented Du Pont in dis-

cussions concerning a proposed supplemental code for the load pigments division of the lead industry under the N. R. A., hereinafter discussed in more detail, and Du Pont was shown to have been "willing to go along with anything which was agreeable to the others" of the Lead Industries Association to which Du Pont did not belong (Comm. Ex. 506–D).

PAR. 5. As a direct result of the acquisitions hereinabove described, culminating in the disappearance from the field of some fifty competitors in the period from 1891 to 1935, respondent National Lead Company acquired a predominant position in the lead pigments industry, and as a result of its close cooperation with respondent Eagle-Picher and its contracts with American Smelting and Refining Company National's dominant power was materially increased. The record shows that by 1938 National and Eagle-Picher had obtained more than 68 percent of the white lead, dry and in oil, business (not including basic sulphate of lead) and more than 50 percent of the oxide business, in the United States. The consumption of pig lead by these two respondents was approximately 50 percent of the total produced and sold for the manufacture of lead pigments in the country. And the price of lead pigments announced and maintained by National and Eagle-Picher as a consequence of their dominating positions had the effect of placing a ceiling on prices which their smaller competitors could charge and of making profit margins sufficiently narrow to induce these competitors to sell at the highest prices they could get. Under its contract with American Smelting and Refining Company, National 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, the St. Louis Smelting & Refining Company, to 30,000 tons per year, thus limiting the competition with A. S. & R. from this plant. Under the same contract A. S. & R. secured 85 percent of National's consumption of common pig lead and all of its requirements of corroding pig lead, less so much chemical lead of other brands as National might require, and under the contract between A. S. & R. and Hoyt, National acquired control over all of A. S. & R.'s output of antimonial lead; and as a result of both of the contracts A. S. & R. thereafter refrained from taking any further interest in the manufacture of lead pigments. These arrangements contracted the supply of pig lead subject to bids and daily market fluctuations by more than 32 percent of the domestic production. They fixed a monthly 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. On the other hand, the arrangements, through a substantial contraction of supply, confined the price on a major part of the United States con-

sumption of pig lead to an average monthly price and thus prevented the basing of prices on daily market fluctuations and restricted oppotunities of buying pig lead at lower prices. These effects on prices of pig lead were obviously trade restraining and monopolistic. National's arrangements since 1921, when its 1906 contract with A. S. & R. expired, have been through short-period contracts which have had the same effect as the original contract.

In the light of the circumstances, the Commission is of the opinion, and finds, that the purpose and effect of National's acquisitions and of its arrangements and cooperation with American Smelting and Refining Company and with respondent Eagle-Picher was to substantially control the lead pigments industry and to regulate prices of pig lead and lead pigments; and that the purpose and effect of its relations with duPont was to establish an understanding that the latter would not deviate from National's prices in the sale of white lead-in-oil and would cooperate with National to maintain price uniformity in the sale of this product, which National processed for it under contract.

PAR. 6. (*a*) By 1933 there were still in operation in the United State less than a dozen white lead producing plants. At that time there remained plants in San Francisco, operated by respondent National and W. P. Fuller & Son, an independent; in Chicago, operated by National and respondent Sherwin-Williams; in East Chicago, Indiana, operated by respondent Anaconda's subsidiary, respondent International Smelting and Refining Company; in Perth Amboy, New Jersey, St. Louis and Philadelphia, all operated by National; in Scranton, Pennsylvania, operated by respondent Glidden; and in Cincinnati, operated by respondent Eagle-Picher. In 1933 there remained plants producing red lead or litharge for sale in commerce in Chicago, operated by National, Glidden, and Hammond Lead Products Company (former proprietors of Metals Refining Company, acquired by Glidden in 1929); in St. Louis, operated by National; in Joplin, Missouri, operated by Eagle-Picher; in Brooklyn, operated by National; in Newark, New Jersey, operated by Eagle-Picher; in Philadelphia, operated by National; in Charleston, West Virginia, operated by National (formerly belonging to Evans Lead Company); in San Francisco, operated by National and W. P. Fuller & Son; and in Los Angeles, operated by Morris P. Kirk & Sons, a subsidiary of National.

(*b*) Although the number of lead pigment producing plants had been reduced materially by 1933, it does appear that up to that time the industry had retained some vestiges of localized pricing of lead pigments. With respect to white lead-in-oil and other lead pigments

packaged in steel kegs containing one hundred pounds or less, a system of differential or warehouse points was commonly employed. Commission's Exhibit 659–C to P, inclusive, is a list of the delivery and equalization points of the Atlantic, Boston, Buffalo, Chicago, Cincinnati, Cleveland, Pittsburgh, Philadelphia and St. Louis branches of National Lead Company. The sheets comprising this list are dated as far back as December 30, 1920, but the notations thereon indicate that they were revised up to as late as March 30, 1933. They show five hundred and eighty-nine different towns and localities located in forty different states as free delivery or equalization points. To the points marked either "D" or "E" lead pigments were quoted at the base price, with the addition of whatever freight differential in fractional cents per pound appears opposite each point on the list. To all other towns and localities, excepting those otherwise designated, freight was equalized with the nearest equalization point, marked on the list with an "E". Thus, on Commission's Exhibit 659–O there appears only one town each in the States of Alabama, Arkansas, Kentucky and Louisiana. In quoting to a customer in Alabama, for example, one-quarter of a cent per pound was first added to the base quotation and then the freight was calculated to the customer's destination. In the event the rate to the destination was more than the freight rate to Mobile, the equalization point, the additional sum by which the freight rate was more than the rate to Mobile was added to the delivery price.

It is readily apparent that this method of quoting prices, requiring knowledge of all of the different free delivery and equalization points in the country and of the additions applicable to each of them, together with the freight rates to the points and to all of the other cities and towns not listed as delivery or equalization points for purposes of the freight equalization calculation, was a highly complicated method in which a seller could never be sure in advance of what his competitor was quoting unless he had advance knowledge of his competitor's listed points and of the freight rates used in making his calculations.

(*c*) Up to 1933, there were also prevalent in the industry other practices which naturally affected the cost of lead pigments to purchasers. At times, for instance, dry white lead was sold on differential contracts under which prices were quoted at fixed differentials over the prevailing market price of pig lead, the basic raw material. Guarantees were also customarily entered into by the sellers, protecting purchasers over quarterly periods against declines in prices, not only as to the dry pigments sold in barrels and drums but, also, as to white lead-in-oil and the so-called keg products. With respect to oxides, red lead and litharge, differential contracts had been employed

for several years covering sales to both carload and less-than-carload purchasers. The differentials to carload purchasers of these products had been in the range of $1.50 and $2.50 per hundred pounds, respectively, over the price of pig lead, but apparently there had been no common understanding in the industry as to which quoted price of pig lead was to be used, and the differentials were not uniformly $1.50 on litharge or $2.50 on red lead of standard grades. As nearly as can be determined from the fragmentary documents on this subject and the imperfect recollections of witnesses who testified on former practices in the sale of oxides, territorial differentials and zones were not employed prior to 1933, and on many transactions freight was charged to the customer or paid by him. Prior to 1933, prices on the Pacific Coast appear to have been below those in the East.

With respect to all of the lead pigments, there was before 1933 a diversity of practices among the various respondents as to the time within which orders might be accepted for shipment at the old price following an advance in price and as to datings of invoices, giving purchasers the benefit of such old price. As regards dry white lead, there was no provision for quantity discounts, nor was there a higher differential for the Pacific Coast.

(*d*) Such was the general condition with respect to prices and terms and conditions of sale of lead pigments in the industry at the time the respondents began meeting together in 1933 for the ostensible purpose of considering the drafting of a supplemental code of fair competition for the lead pigments industry.

PAR. 7. (*a*) The respondents in this proceeding, with the exception of respondents Anaconda and International, and a number of other companies, including mining companies, smelters, refiners and manufacturers of lead products generally, have been members of the Lead Industries Association since its organization in 1928. International Smelting Company, the predecessor of respondent International Smelting and Refining Company, became a member in 1929. The Lead Pigments Division of the Lead Industries Association, composed of the manufacturers of lead pigments, including the respondents, was the medium through which the discussions and group actions which were destined to revolutionize the pricing practices and methods of the respondents took place.

(*b*) The chairman of the Lead Pigments Division of the Association was Mr. F. M. Carter, president of respondent National Lead Company. The Chairman of the White Lead-in-Oil Committee of this division was at first Mr. Willard E. Maston, vice president of respondent Eagle-Picher, and later Mr. Carter. The chairman of the Dry Products Committee of the Lead Pigments Division was also

Mr. Carter, president of respondent National. In later meetings the Dry Products Committee apparently was further subdivided into a Lead Oxide Committee, which represented the red lead and litharge producers as distinguished from the white lead producers, and its chairman was Mr. Harold Rowe, then assistant to the president of respondent National Lead Company. In any event, the Lead Pigments Division of the Lead Industries Association and its various subdivisions all constituted practically the same group, respondent National being represented primarily by its president, F. M. Carter, and the assistant to its president, Harold Rowe; respondent Eagle-Picher, by Messrs. Bendelari, its president, and Roosevelt and Maston, its vice presidents; respondent Glidden, by its vice president, Paul E. Sprague; respondent Sherwin-Williams, by its vice president, S. B. Coolidge, Jr.; and Anaconda Lead Products Company, a subsidiary of respondent Anaconda Copper Mining Company, by its sales manager, F. O. Case. The participation of these representatives in various meetings is vividly shown by the minutes appearing in the record, and it is clear that all of the respondents (respondent Anaconda, by its subsidiaries) participated actively in the entire series of meetings hereinafter referred to, although one or more of the representatives may not have attended any one particular meeting. In connection with the activities of the association during the N. R. A. period, Mr. F. E. Wormser, secretary of the association, acted as secretary to the Code Authority and of the Committees and received reports and otherwise functioned as association representative.

PAR. 8. For the purpose of drafting a supplemental code of fair competition for the lead pigments division of the lead industry under the National Industrial Recovery Act, the White Lead-in-Oil Committee and the Dry Products Committee of the Lead Pigments Division of the Lead Industries Association met on various occasions between July 1933 and January 1934. A great many topics were discussed at those meetings, including terms and conditions of sale of lead pigments, the agency or consignment method of selling white lead-in-oil, freight and zoning problems, and others.

(*a*) At meetings held on July 19 and July 20, 1933, a draft of a supplemental code had been prepared, but the minutes of those meetings show that so many questions regarding trade practices were raised that it was agreed the committee should meet again on August 8 for further discussions. As disclosed by the minutes of its meeting held on August 8, the Dry Products Committee, presided over by Mr. Harold Rowe, adopted, among others, the following rules and took the following action applicable to lead oxides:

1. Red lead over 90 percent true red lead shall be sold at the following premiums over grades with lower true red lead content:

90 percent to 98 percent true red lead	$0.25 per cwt.
98 percent and over true red lead	.50 per cwt.

2. Only two grades of guaranteed red lead shall be sold; i. e., grinder's red lead guaranteed 95 percent and red lead guaranteed 98 percent. Under 95 percent red lead may be labeled as desired.

3. Price shall be a differential over the lead market in effect on (a) the date sale is made, or (b) some future date, or (c) the average during some future period, the basis to govern to be specified at the time each sale is made.

4. American Smelting & Refining Company's official price shall govern all spot sales, but either the A. S. & R. or Engineering and Mining Journal price may be used for average price contracts. The metal basis for spot orders on any day shall be the A. S. & R. price in effect at the close of business on the previous day.

5. Carload sales shall consist of at least one minimum carlot as defined in freight tariffs in effect on date of sale for freight movements from Member's shipping point to point where Buyer accepts delivery. Trust delivery of carload orders must be completed within three days from start of delivery.

6. On spot sales delivery or billing shall be complete in 30 days from date of sale.

7. As agreed between Member and Buyer, always with reasonable notice to Member, and in the case of sales on an average market basis, Member shall require Buyer to specify amount to be supplied on said basis prior to the beginning of the period whose average governs the price, and such sale is to constitute a firm sale. Deferred deliveries to be billed on the basis originally applicable to the sale and additional requirements are to take the spot price.

8. Terms shall be 1 percent for cash not beyond 10 days from date of shipment and net cash 30 days from date of shipment.

9. Delivery place shall be F. O. B. Member's shipping point.

10. Freight shall be equalized with the nearest manufacturing point, with allowance of actual carload rate up to 40¢ per 100 lbs., rail tariffs to govern.

11. Any tax or other governmental charge upon the production and/or sale and/or shipment of products of this Division imposed by the Federal authorities and hereafter becoming effective within the life of a sales contract shall be added to the price provided in the contract and shall be paid by the buyer.

12. The price paid for l. c. l. shipments shall be a flat price established by the seller.

13. Nothing in any part of the Code shall be deemed to hamper full freedom of action of any Member in settling accounts or extending delivery with buyers whose credit position may require special action or adjustment.

14. Maximum allowance to customers using their own carriers shall be the regular tariff rate.

15. No allowance shall be made for warehousing in customer's warehouses unless they are recognized commercial warehouses.

16. No allowance shall be made for cartage in excess of 10¢ per 100 lbs. except in New York metropolitan district and any in excess of this amount shall be reported to the Secretary.

17. No rebate on customers' stocks shall be allowed on account of price decline.

18. Options given to bidders on bid business shall be contingent upon award of the contract to the bidder.

19. On Government bids and on railroad (and industrial) business the following package differentials over l. c. l. barrel prices are hereby established:

100-lb. kegs	$.50
50-lb. kegs	$.75
25-lb. kegs	1.00

Consignment accounts were discussed. The general sense of the meeting was to abolish consignment accounts, but the explanation of one member for his use of consignments in certain inaccessible localities caused this question to be passed over for further consideration.

There was a difference of opinion as to whether no allowance or a limited allowance should be made on returnable packages.

It was felt that in the case of off-grade material sold as such, a satisfactory differential below the standard grades should be developed.

It was the sense of the meeting that grave danger for the lead oxide business existed in the manufacture of the oxides by the users themselves, this being particularly true of large battery manufacturers who now are manufacturing black oxide for their own use. It was felt that it would be contrary to the spirit of the N. R. A. for users of the oxides to install their own oxide manufacturing equipment when the capacity of the industry is already in excess of requirements and so long as oxides can be purchased at a fair price. Such a procedure could not increase employment and would be contrary to the declared purpose of the Act "to promote the fullest utilization of the present productive capacity of industries." It was felt that some means of licensing new productive equipment might be sought as provided for in the cotton textile and other codes. (Comm. Ex. 800–A, B and C.)

On the following day the Dry Products Committee took up the matter of practices to be included in a supplemental code for dry white lead, and it was then agreed to adopt as applicable to this product items Nos. 9, 11, 14, 15, 16, 17, 18, 19 and 20, as set forth in the minutes of the August 8 meeting of the oxide group (Resps.' Ex. 135–A). Meeting again on September 6 and 7, the Dry Products Committee discussed the subject of uniform sales contracts specifically designed for use in selling dry white lead and red lead and litharge, authorized the preparation of contract forms for this purpose, and discussed also the possibility of limiting the installation of facilities for the production of red lead and litharge. As to contracts covering the sale of dry white lead at a differential over pig lead prices it was agreed that the names of customers would be filed with the association (Comm. Ex. 801; Resps.' Ex. 136–B).

A further meeting of the Dry Products Committee was held on October 27, 1933, at which the third draft of a supplemental code was discussed and agreed upon. The following appears in the minutes of that meeting:

After much study and discussion outlines setting forth Uniform Bases for the Sale of Lead Oxides and Dry White Lead in Carlots and Less Than Carload Lots,

respectively, were drafted, subject to further study by the members. The suggested outlines appear on pages appended.

It was agreed, in deference to existing statutes, that no reference to prices should appear in the outlines except for the specification that "prices were to be agreed upon between buyer and seller."

A question arose as to the possibility of adopting the provisions of the Supplementary Code for the Pigments Division immediately rather than waiting for the approval of the President, but as the decision hinged upon the legality of the Code provisions, the Secretary was requested to procure a legal opinion on the subject, reporting to the Chairman. (Comm. Ex. 504–B)

Pursuant to the direction contained in these minutes, the secretary did consult counsel concerning the subject matter therein referred to, and, on October 30, 1933, he wrote to Mr. Carter, president of respondent National, as follows:

I called on Mr. Locke this afternoon to obtain his opinion with respect to the legality of immediately installing a Uniform Basis of Sale for the Lead oxides and Dry Products by agreement among the producers. Mr. Locke read the Supplementary Code provisions, Article II, and also the suggested outlines of the Uniform Basis for Sale. Although he noted that stipulations as to price had been omitted from the outlines, he felt that it might be unsafe to have an agreement prior to the approval of our Code as factors other than price in the Uniform Sales Contracts might possibly be picked up by the authorities as having a bearing on price and hence being in restraint of trade.

He suggested that the best practical solution for the moment seemed to be the adoption of the Uniform Basis of Sale by one or more of the interested members, which could be followed voluntarily by the others, without agreement on the subject but merely because it was individually to their best interests to do so.

I wired you the substance of Mr. Locke's views for no doubt you will wish to discuss the subject further with other members who now happen to be in Chicago. (Comm. Ex. 522–B)

The telegram referred to in this letter reads as follows:

Locke believes agreement upon suggested uniform basis of sale pending approval from Washington to code might place us on uncertain legal ground and might be embarrassing later stop He suggests one member use uniform basis and other follow voluntarily (Comm. Ex. 522–A)

On November 9, 1933, Mr. Carter wrote to Mr. Paul E. Sprague, vice president of Metals Refining Company (owned by respondent Glidden since 1929), sending copies to officials of respondents Eagle-Picher, International and Sherwin-Williams, concerning this subject, as follows:

While legal counsel did not give Mr. Wormser a go ahead signal on the question as to whether the adoption of a uniform sales contract would be in strict conformity with the Sherman Act, it is our own conclusion that the common use of a contract which sets forth general terms, specifices grades, etc., but is entirely free from any price agreement would not be subject to criticism or involve us in trouble with the Sherman Act, or similar legislation. (Comm. Ex. 523)

On the next day Mr. Carter wrote to Mr. W. P. Fuller, Jr., president of W. P. Fuller & Son, in San Francisco, to the same effect, including in his letter this statement:

Furthermore, it is believed by all members of the Pigment Section, who were present during the discussions, that it is desirable to have the privilege of using such uniform sales contract embodied as a feature in the code. (Comm. Ex. 517–A)

The Oxide Committee of the Lead Pigments Division met again on December 14 and 15 and on December 27 and 28, 1933. According to the minutes of the meetings of December 14 and 15, the following action was taken:

After considerable discussion, it was agreed that ninety day contracts should be discontinued because it had become a general practice in the trade not to enforce delivery and on that account they were really only options to buy. It was decided that an outline for the sale of oxides on the basis of manufacturer's card price should be drawn up including certain conditions agreeable to all concerned. In this connection some of the points considered were:

(1) Additional price for red leads containing 95, 97, and 98 per cent Pb_3O_4.

(2) Protection against decline on orders for shipment within thirty days.

(3) Allowance for deliveries to one destination in 5-ton and in 20-ton lots.

It was the opinion of all present that the practice of selling oxides at a differential over pig lead had spread to such an extent that it had become one of the most serious abuses in the trade. It was voted to have presented at the next meeting a basis for sale at the card price and also one at differentials over lead, one of the conditions of the latter to be that spot sales shall be based on pig lead at the close of the market on the date they are made.

Pending the adoption of our code, it was decided that no new commitments would be made:

(1) On card price beyond February 28, 1934.

(2) On differential basis beyond 60 days. (After January 1, 1934, the limit becomes February 28.) (Resps.' Ex. 137–A and B)

The minutes of the meetings of December 27 and 28 show the following:

There was further discussion of the advisability of making quarterly contracts with small buyers. It was decided that these should be eliminated. The basis for sale at card price was submitted and approved in the form attached. Consideration was given to the question of establishing zones in the West and South where manufacturers would make a uniform addition of their base prices to compensate for the high freight rates. It was suggested that all members investigate this matter so that action might be taken at the next meeting.

Regarding the clause in the code covering filing of price schedules, etc., it was agreed that exceptions reported to the Secretary should include all details and that in re-issuing the information to members of the group he shall give only the names of the buyer and the seller.

A basis for sale at differentials over lead was agreed upon but it was felt that there was no need of filing it with the code because all buyers in that classification would be considered as exceptions. (Resps.' Ex. 138–A)

(*b*) Simultaneously with the meetings of the dry products group hereinabove referred to, the White Lead-in-Oil Committee of the Lead Pigments Division of the association also held a number of meetings at which were discussed industry problems of selling white lead-in-oil and other lead pigments in kegs. Among the more important matters discussed at the initial meeting of this committee, held on August 9, 1933, and the actions taken thereon, as reflected by the minutes of that meeting, were the following:

The Agency or Consignment method of marketing White Lead-in-Oil, as now being used in a restricted territory, extending from New York City south to and including Washington, was thoroughly explained and discussed. At the present time the National Lead Co. and the Eagle-Picher Lead Co. are selling almost exclusively under this plan, report that jobbers and dealers with hardly a dissenting voice have approved the plan. The Agency plan is not the exclusive type designed to give certain rights or privileges, which competitors cannot meet, but one under which a Distributor may sell as many brands as he chooses. It is expected the two companies now using the Agency plan will extend it over a much wider area on or before October first. Under the Agency plan of selling, it is evident many of the abuses and non-profit sales among distributors can be corrected at the same time it removes the practice of—*Price Guarantees, Spring Datings*, deviation from terms, etc. This method of selling will in the future be described as the "Agency Plan."

Freight Differentials: There is a lack of just what points in the country take on advance differentials over the par list price. It was suggested that a zone basis similar to that used by the Linseed Oil group might be worked out and thus simplify the arrangement. The Chairman agreed to offer further suggestions at the next meeting.

The West Coast situation was briefly discussed, and it was agreed that the Committee should work out some plan for coordinating with this group of manufacturers whereby their territorial conditions as to prices, terms, etc. would not be disturbed. It might be necessary to establish a dividing line between East and West to avoid confusion.

The question of open quotations on Government and State business was thoroughly discussed. Any plan to eliminate excessively low bids would be helpful to the entire industry. The possibility of apportioning such business was discussed. There was a difference of opinion as to the method which might be used—the following being suggested:

Capacity
Last year's Government and State business
Average last three years Government and State business
Average last ten years Government and State business

The group was asked to give this further thought. (Comm. Ex. 501–B and C)

In the meeting of this committee, held on October 28, 1933, the following occurred:

The Chairman described the new Agency System which the National Lead Company was putting into effect for the sale of its lead-in-oil products, stating that it was an adaptation of a method used by General Electric and other companies and was designed to correct destructive price cutting in the white lead-in-

oil business which had seriously affected the marketing of the product. Some other members stated they too were planning to use the consignment system.

Freight and zoning problems were discussed without any understanding or agreement being made. (Comm. Ex. 505–A)

In a letter to the general manager of E. I. duPont de Nemours & Co., Inc., dated September 8, 1933 (following a meeting of the committee on September 6, the minutes of which contain no reference to the agency or zone plans), Mr. Carter, president of respondent National, in referring to the fact that National was representing duPont in the code discussions, stated as follows:

The only feature which I expect you will find it difficult to agree with is the Agency System for selling white lead, in oil, which we are expected to adopt later in the season. It has not been announced nor are we in a position to say anything about it, but we discussed it with members of the Pigment Section. Under this Agency System, we will follow the plan which we have been testing out during the current year in some of the eastern markets. Under this plan, we consign a stock to the dealer, and he acts as our agent. It is practically the same plan as had been in successful use for many years by the General Electric Co. for the sale of Mazda lamps. It permits us to control the resale price, which is a feature of vital importance to the corroder selling in markets like the New York district, for example; where, under present conditions, prices were absolutely demoralized, lead in oil being sold some times below the cost to the dealer. (Comm. Ex. 506–D)

On September 14, 1933, Mr. Maston, as chairman of the White Lead-in-Oil Committee, wrote Mr. Wormser, secretary of the association, and representatives of certain of the respondents, enclosing what purported to be a zone map and a list of old freight differentials used in marketing white lead-in-oil. In this letter Mr. Maston stated:

The National Lead Company is fully informed of the details, and are gathering further data on this important matter. When suggestions come in I shall endeavor to get them in shape so that a final report may be submitted for approval of the next group meeting.

For your information file I am sending you a map and list of freight differential points. (Comm. Ex. 513–B)

In another letter to the secretary of the association, dated January 31, 1934, following the last meeting of the White Lead-in-Oil Committee during the N. R. A. period, Mr. Maston referred to another zone map as follows:

I am enclosing Zone Map for the White Lead in Oil industry. I believe you will fined it self-explanatory.

When new points are set up or any suggested change in the differential made they can in the future be passed through your office.

From this map we will eventually build up an official freight arrangement for this division of the lead industry. (Comm. Ex. 519–B)

The secretary of the association acknowledged receipt of this letter on February 2, 1934, stating:

Thank you for mailing me a copy of the Zone Map for the White Lead-in-Oil Industry. (Comm. Ex. 519–A)

The map referred to in this letter was never produced and apparently was no longer in the files of the association, so that it does not appear in the record.

PAR. 9. The Code of Fair Competition for the Lead Industry was approved on May 24, 1934, and appears in the record as Commission's Exhibit 809. Article VII of this code, dealing with trade practice rules for the lead pigments division of the industry, was the final product of the meetings of the lead pigments committees of the Lead Industries Association above described. Section 1 of this article contained provisions against misbranding or misrepresentation of lead pigments, commercial bribery, inducing a breach or cancellation of contract, guaranteeing the life or service of lead pigments, making false or derogatory statements regarding competitors, and selling lead pigments at a concession or using them to influence the sale of other merchandise. Section 2 of Article VII required each member of the industry producing lead pigments to file with the Code Authority a list of prices at which his products would be sold and a memorandum of any of his conditions of sale at variance with those set forth in Schedule A of the code. Section 3 required that each producer of lead pigments submit to the secretary monthly reports of production, stocks on hand and total monthly shipments. Schedule A, attached to the code, contained three articles—one relating to conditions for the sale of lead oxides in lots of less than twenty tons, the second relating to conditions for the sale of lead oxides in lots of twenty tons or more, and the third relating to conditions for the sale of dry white lead, basic carbonate.

Nowhere in the code, nor in any preliminary draft of a code produced at the meetings of any of the committees, is there any reference to the use of zones or to territorial differences in the prices of lead pigments, or to the use of agency or consignment contracts or arrangements in the sale of white lead-in-oil. Schedule A did provide that in the sale of oxides in carload lots the price should be determined by adding a differential to the pig lead price quotations of American Smelting and Refining Company, and did set forth differentials between the different grades of red lead, but the matter of how prices were to be arrived at was for the most part entirely omitted. Furthermore, the record shows that shortly after the code was approved the respondents and other manufacturers of lead pigments requested and obtained from the National Recovery Administration an express exemption from all of the provisions of Section 2 of Article VII and from all of the requirements of Schedule A, so that at no time were

prices or variations filed with the secretary of the association and at no time were the provisions of Article VII of the code or of Schedule A attached to the code in force or effect.

PAR. 10. (*a*) The evidence in the record discloses that the meetings and discussions hereinabove referred to, during the period from July 1933 to June 1934, resulted in understandings and agreements between and among the respondents to do the following specific things (except that respondents Anaconda and International did not participate in the agreements concerning red lead and litharge, which products they did not sell, and except that respondents Glidden and Sherwin-Williams did not take part in the agreement to use the agency or consignment method of selling white lead-in-oil):

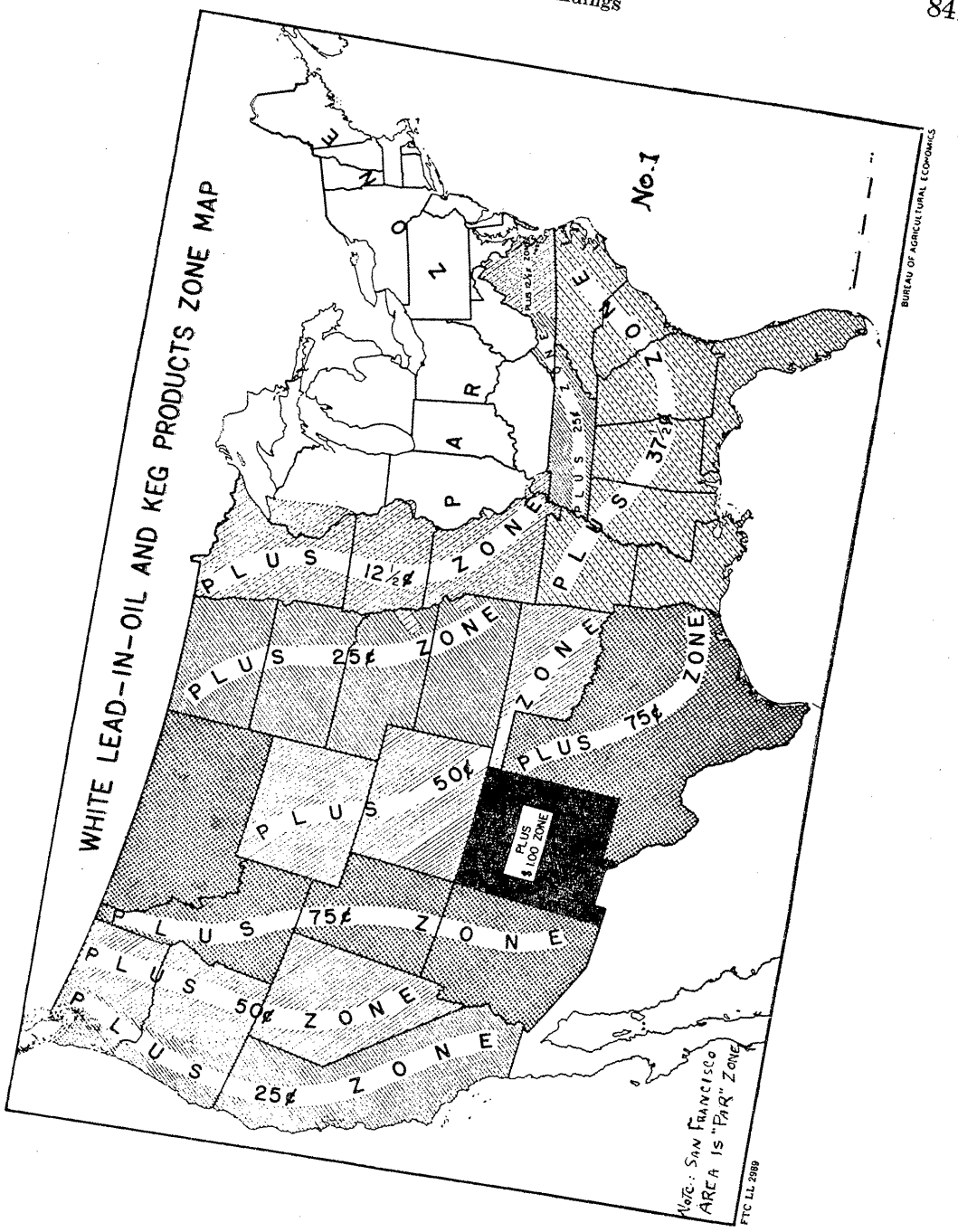
(1) To sell white lead-in-oil and other lead pigments packaged in kegs or cans of one hundred pounds or less on the basis of flat delivered prices to customers within designated zones, with uniform differentials applicable as between such zones, the approximate boundaries of which zones and the differentials applicable thereto are shown on the White Lead-in-Oil and Keg Products Zone Map included in these findings.

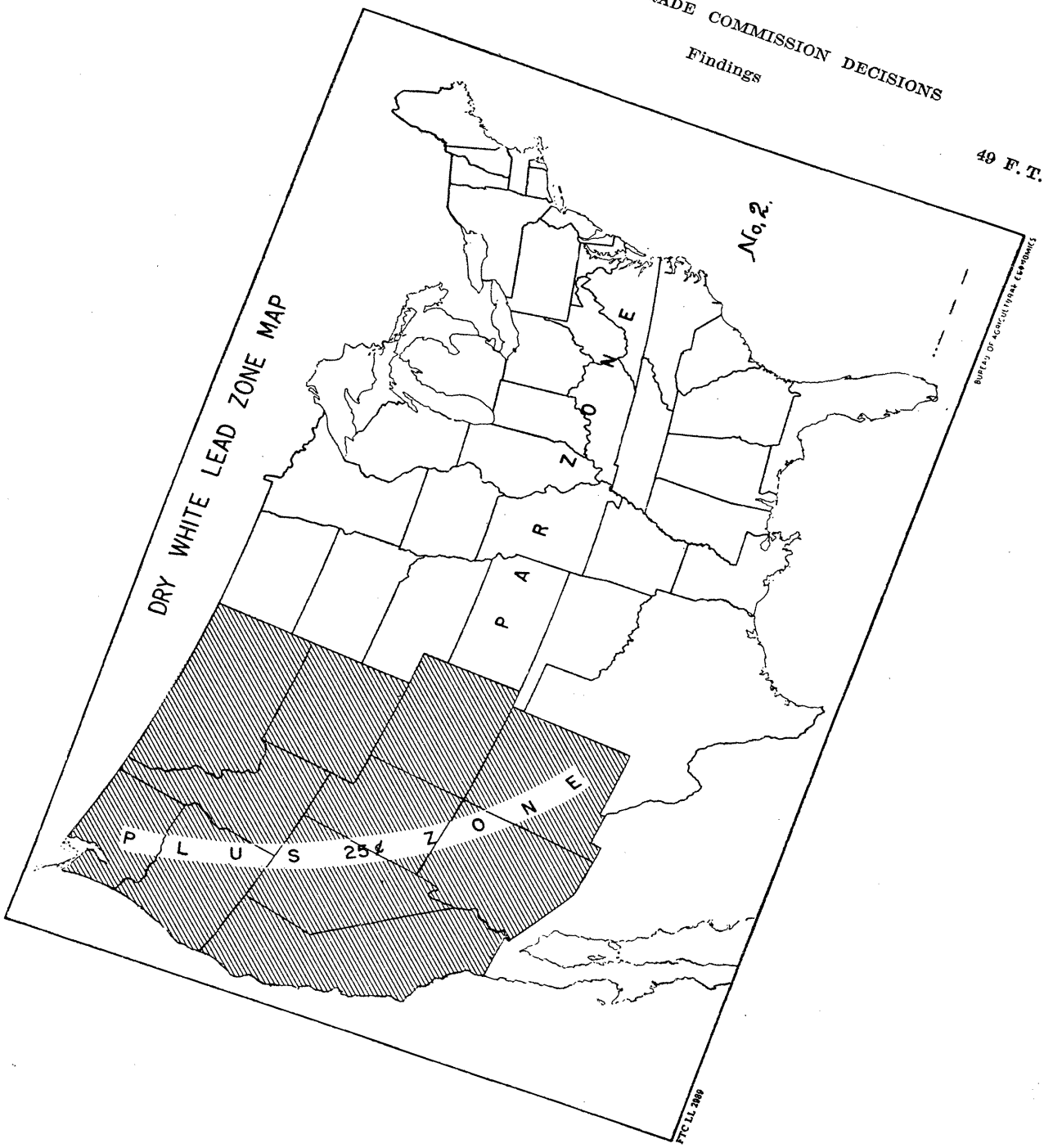
(2) To sell dry white lead (both basic carbonate and basic sulphate) on the basis of flat delivered price quotations to customers within designated zones, with uniform differentials applicable as between such zones, the approximate boundaries of which zones and the differentials applicable thereto are shown on the Dry White Lead Zone Map incuded in these findings.

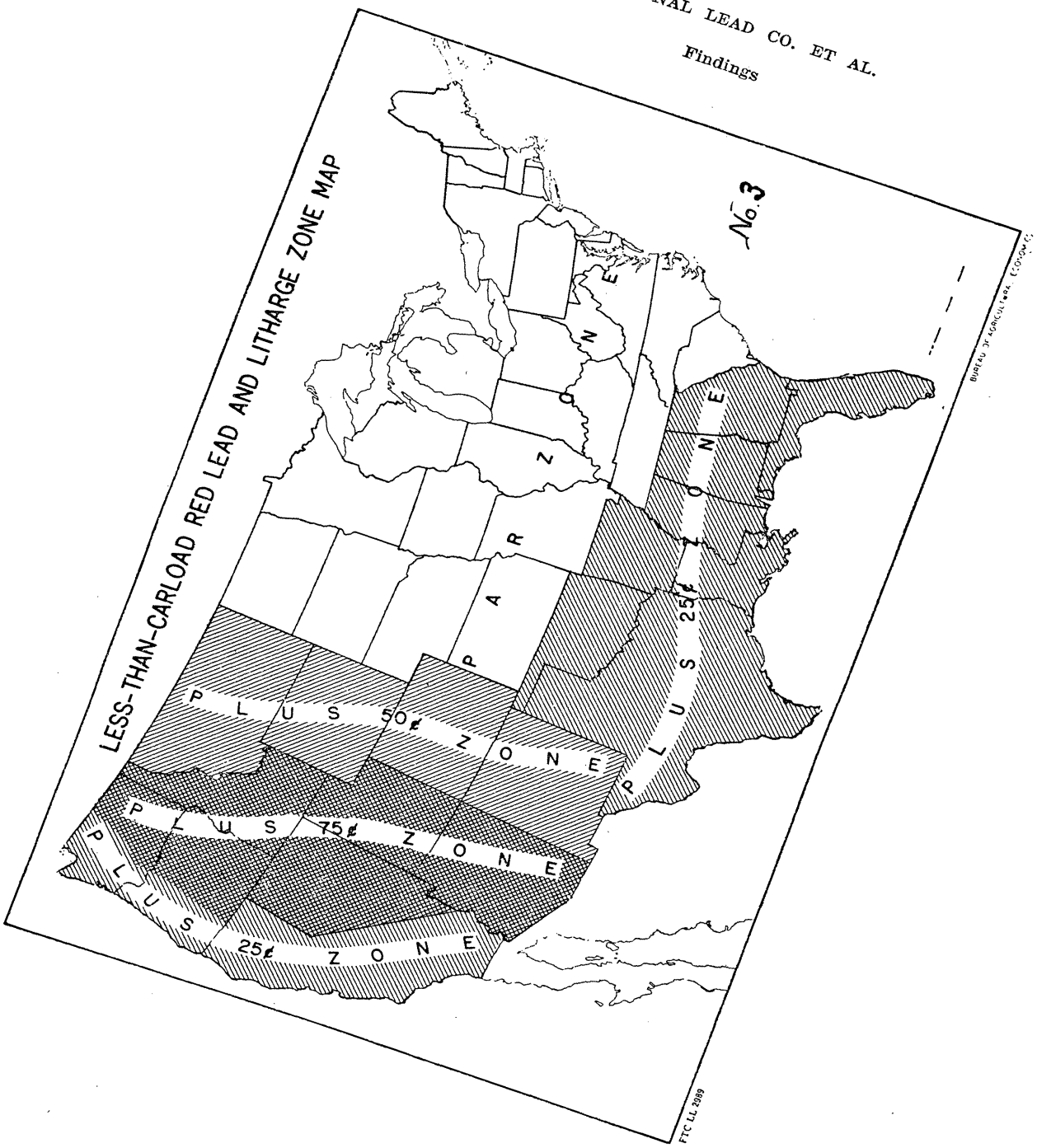
(3) To sell red lead and litharge in drums or barrels and in quantities of less than twenty tons on the basis of flat delivered price quotations to customs within designated zones, with uniform differentials applicable as between such zones, the approximate boundaries of which zones and the differentials applicable thereto are shown on the Less-Than-Carload Red Lead and Litharge Zone Map included in these findings.

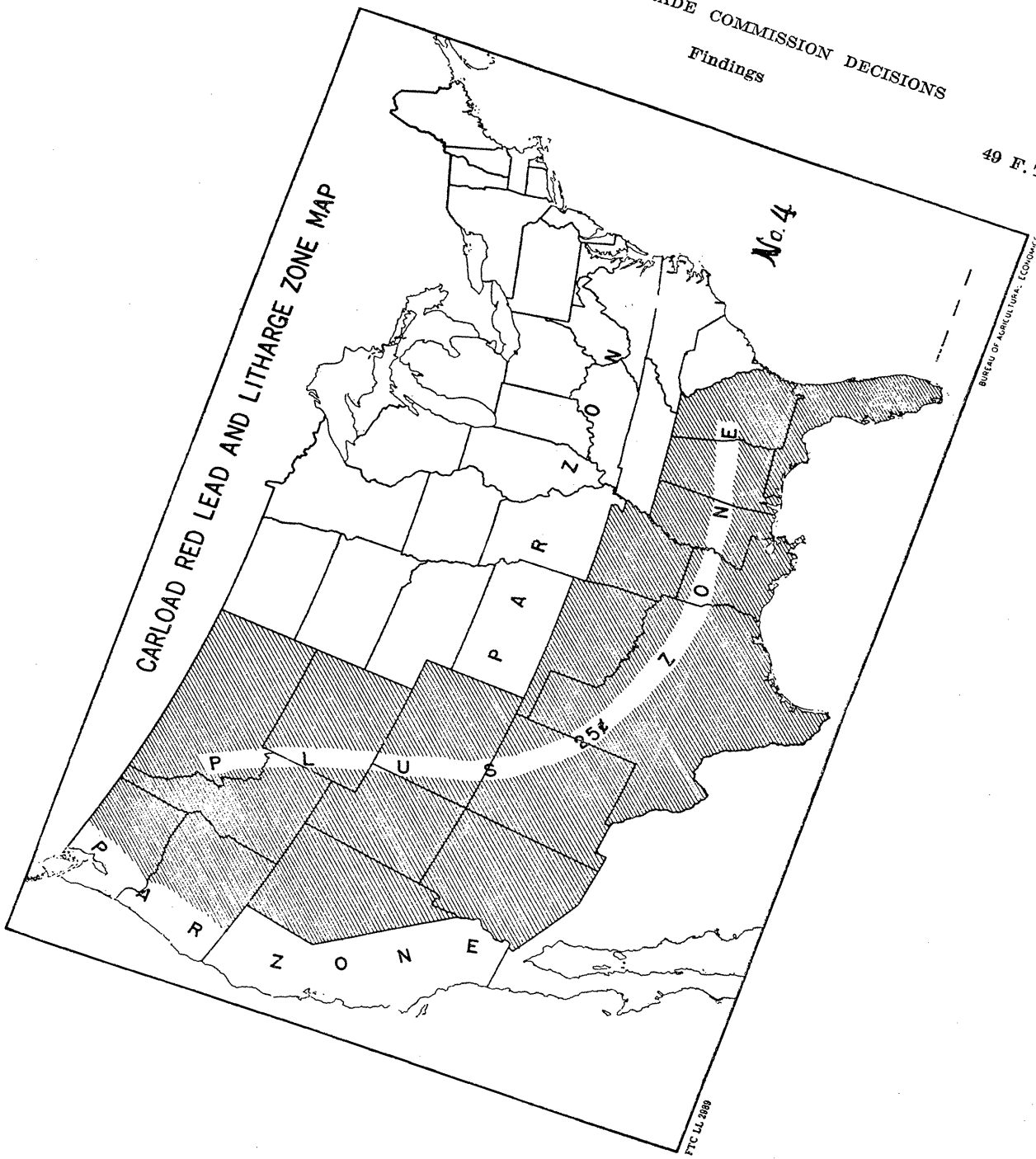
(4) To sell red lead and litharge in drums or barrels and in quantities of twenty tons or more on the basis of flat delivered price quotations to customers within designated zones, with uniform differentials applicable as between such zones, the approximate boundaries of which zones and the differentials applicable thereto are shown on the Carload Red Lead and Litharge Zone Map included in these findings.

(5) To sell white lead-in-oil on the basis of consignment contracts or arrangements for the purpose of controlling resale prices in the trade and preventing competition between themselves and their customers.


WHITE LEAD-IN-OIL AND KEG PRODUCTS ZONE MAP
No. 1
BUREAU OF AGRICULTURAL ECONOMICS
PLUS 12½¢ ZONE
PLUS 25¢ ZONE
PLUS 37½¢ ZONE
PLUS 50¢ ZONE
PLUS 75¢ ZONE
PLUS $1.00 ZONE
NOTE: SAN FRANCISCO AREA IS "PAR" ZONE
FTC LL 2989


DRY WHITE LEAD ZONE MAP
No. 2.
PARZONE
PLUS 25¢ ZONE
BUREAU OF AGRICULTURAL ECONOMICS
FTC LL 2880


LESS-THAN-CARLOAD RED LEAD AND LITHARGE ZONE MAP
No. 3
PLUS 50¢ ZONE
PLUS 75¢ ZONE
PLUS 25¢ ZONE
PLUS 25¢ ZONE
FTC LL 2989


CARLOAD RED LEAD AND LITHARGE ZONE MAP
No. 4
PARENT ZONE
PLUS 25¢ ZONE
BUREAU OF AGRICULTURAL ECONOMICS
FTC LL 2888

(6) To sell lead pigments in kegs and cans at uniform differentials of twenty-five cents per hundred pounds between keg sizes of twelve and one-half, twenty-five, fifty and one hundred pounds.

(7) To 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.

(8) To quote and sell red lead and litharge in 20-ton quantities on the basis of fixed differentials over the price of pig lead as quoted by the American Smelting and Refining Company.

(9) To quote and sell red lead and litharge 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.

(10) To fix arbitrary price differences 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 the American Smelting and Refining Company's price of pig lead.

(11) To refrain from entering into contracts to supply red lead and litharge in quantities of less than twenty tons at a stated differential over the price of pig lead.

(12) To eliminate guarantees against declines in price in sales of red lead and litharge in less-than-carload lots.

Two of the practices covered by these agreements and understandings, namely, the use of the zone delivered pricing system and the agency or consignment method of selling, require further explanation, and these explanations are being set forth in the following Paragraphs Eleven and Twelve. The other practices embodied in the understandings are self-explanatory and are sufficiently described in the recitations hereinafter made concerning their use.

(*b*) From the foregoing it is apparent that the discussions between the respondents and the agreements for concerted action reached by them in 1933 and 1934 had to do in part with practices which were never covered in any draft of a supplemental code and which apparently were never intended to be covered in a code, as well as with practices which were covered by provisions of a code but which the respondents never permitted to become operative. Therefore, it is the Commission's conclusion that the discussions engaged in for the ostensible purpose of adopting a supplemental code of fair competition were actually engaged in for the purpose, and certainly they had the effect, of cooperatively revising the pricing practices in the industry in a manner far beyond the sanction of the National Industrial Recovery Act. Nor is the Commission impressed by the respondents' argument that they were being invited by the Government to enter into a price-fixing conspiracy. The evidence discloses that the re-

spondents were well aware of the provisions of the antitrust laws and of their duties and responsibilities thereunder. In the Minutes of the Dry Products Committee meeting of October 27, 1933, for example, there appeared the following notation:

> It was agreed, in deference to existing statutes, that no reference to prices should appear in the outlines except for the specification that "prices were to be agreed upon between buyer and seller. (Comm.. Ex. 504–B.)

It further appears that the respondents were careful to consult their counsel with respect to the adoption of the various practices prior to the approval of the code, and that they were advised that such action "by agreement" might be a violation of law but that one company might announce a change in practices and the rest of them follow such change "without agreement on the subject but merely because it was individually to their best interests to do so" (Comm. Ex. 522–B). It also further appears that on July 28, 1934, the president of respondent National made a public announcement to the press in which he said, among other things:

> The suspension of the anti-trust laws which was effected by the National Industrial Recovery Act is only temporary, in my opinion. When the anti-trust laws return many companies may again have to learn to operate on an efficient, economical basis. (Resps.' Ex. 168.)

Thus, the Commission is of the opinion, and finds, that the respondents' contention that their price fixing activities were solely in response to Governmental demands and that their meetings were devoted exclusively to efforts to formulate a supplemental code of fair competition under the National Industrial Recovery Act has no foundation in fact.

PAR. 11. The uniform zone pricing system as devised by the respondents in 1933 and 1934 and thereafter employed by respondents National and Eagle-Picher and followed in salient features by the other respondents involved the sale of lead pigments on a territorial zone delivered price basis, with a flat par price for all deliveries in a par zone, which included several States, and fixed differentials over the par price applicable to the farious zones outside of the par zone. The sellers prepaid or allowed deductions for all transportation charges and made no allowances or adjustments for differentials in delivery costs as between various destinations in each of the zones. The record shows that shipments of lead pigments were made by the respondents on this basis from the following, among other, points: Chicago, Illinois; St. Louis, Missouri; Perth Amboy, New Jersey; Philadelphia, Pennsylvania; Oakland, California; Cincinnati, Ohio; Scranton, Pennsylvania; Hammond, Indiana; Collinsville, Illinois; Baltimore, Maryland; Joplin, Missouri; and Galena, Kansas.

The exact date on which the zone delivered price systems for selling the various lead pigments involved were first put into operation by the respondents is not clearly shown. It is probable, however, that they were initiated sometime in May or June 1934, for on June 9, 1934, Mr. Harold Rowe, assistant to the president of respondent National, in a letter advising all of National's branch managers of the new zone schedules for oxides and dry white lead, among other things, said:

> We appreciate that the whole zone set-up is very confusing, particularly in view of the fact that there is a different arrangement for oxides, dry white lead and white lead-in-oil. Fortunately you are only concerned with the States in your territory. It seems important, however, that you should have full information available in your office. In the hope that it will help to simplify this complicated matter we are planning to make up colored maps for each product which will be sent to you as soon as they can be completed. (Resps.' Ex. 159–A.)

PAR. 12. The agency or consignment plan of selling white lead-in-oil was inaugurated by the Atlantic branch of respondent National Lead Company early in 1932, and in 1933 was extended to National's other eastern territories. The record shows that from the beginning respondent National kept Eagle-Picher fully informed as to its practices and the results that were obtained in connection with the use of this method, and shows further that in November 1933, when National decided to extend the plan on a nationwide basis, it informed Eagle-Picher of that intention. Eagle-Picher had begun using the plan itself at about the time National had extended its use to all of the eastern territories, and when Naional extended its use on a nationwide basis Eagle-Picher did likewise.

Under the consignment plan of selling as employed by respondents National and Eagle-Picher, the sellers appointed dealers as "agents" (in the case of National) and as "distributors" (in the case of Eagle-Picher), and under the terms of the contracts with the dealers, stocks were consigned to the "agent" or "distributor" for resale at prices and terms specified by the consignor. Sales were made by the consignees from these stocks and monthly settlements for the goods sold during the month were made with the consignor for the total amounts so sold, less the differences between the prices set forth for the consignee and the resale prices charged dealers and consumers. This difference between the consignee's cost and his resale price was his compensation. Expenses of storing, shipping, selling and handling the goods were met by the consignee, who also paid all taxes. The contracts strictly limited the consignee's authority to the custody and sale of such goods as were consigned to him. Consignees could not bind consignors respecting any other than consigned goods or in any other particulars. National's contracts ran between "manufacturer"

and "agent." Some of Eagle-Picher's referred to "seller" and "distributor," while others specified the "manufacturer" and "distributor." Consignments were subject to withdrawal at any time, and the consignees were required to report periodically their stocks on hand. The acknowledged purpose of the consignment plan of selling was resale price control. The plan involved the extra expense to the producer of carrying large inventories of goods stocked in distributors' warehouses, however, and was otherwise objectionable. In writing to duPont about the plan in September 1933, Mr. Carter, president of respondent National, said in part:

> It permits us to control the resale price, which is a feature of vital importance to the corroder selling in markets like the New York district * * * While selling on consignment is admittedly an evil, I now feel confident that of the two evils with which we are confronted, we have chosen the lesser in selecting the agency system. (Comm. Ex. 504–D and E)

And in a circular to branch managers, dated November 9, 1933, Mr. Rowe, of National, said in part:

> It should be kept in mind that the purpose of the whole Agency Plan is to control the dealers' selling price of white lead, so that he may be assured of a reasonable profit. (Comm. Ex. 601–B)

The record is clear that the agency or consignment plan was effective in preventing sales of white lead-in-oil below cost and other price cutting practices.

Respondent National employed the consignment plan of selling white lead-in-oil from the early part of 1932 to January 1944, when government restrictions caused it to terminate its agency agreements. Respondent Eagle-Picher conformed to National's methods in every essential particular until March 9, 1942, when it modified its contracts to meet war conditions and reduce stocks. Thereafter, Eagle-Picher required consignees to pay at the end of each month for all stocks held by them, but it indicated that in other respects the old contracts would be kept in force.

Respondent Anaconda, at first through its subsidiary, Anaconda Lead Products Company, and later through its subsidiary, respondent International Smelting and Refining Company, sold lead-in-oil on the consignment plan from 1933 to 1946, when International went out of the lead pigments business. No particular contract form appears to have been used by these respondents, except in the case of shipments consigned to dealers in the State of Wisconsin, where a contract was necessary in order to protect the owner of consigned goods in case of bankruptcy of the consignee, and this contract was not shown to have been similar to those of National and Eagle-Picher. In other territories their consignment was on a plan of their own, without writ-

ten contracts and without agreement on the part of the consignee to sell only at retail prices suggested by the consignor.

Respondent Glidden, who had opposed the consignment plan, did not consign stocks until some six years after the plan was inaugurated. At the insistence of its salesmen and managers it furnished forms and instructions for consignment selling on July 17, 1939. Glidden's contracts and its instructions to salesmen indicated a departure from the plan followed by National and Eagle-Picher in that Glidden offered distributors an exclusive agreement, whereas the others permitted their consignees to carry consigned stocks of competitors, and they often did so. Glidden abandoned the plan in 1942, and prior to that time consignments were not offered except where it was deemed necessary. Glidden's price under the plan, when it was used, was the same as that of other corroders.

Respondent Sherwin-Williams never sold on the agency or consignment plan at any time.

PAR. 13. With certain exceptions, the respondents have followed the pricing practices and have adhered to the terms and conditions for the sale of lead pigments agreed upon in 1933 and 1934 as herein found from 1934 to the present time. Illustrative of the manner and extent to which this has been done are the following facts and circumstances.

(*a*) The record shows that at all times during the period from 1933 to at least 1942 the prices of respondents National and Eagle-Picher on white lead and other keg products of comparable grades sold to comparable classes of dealers were substantially the same, and on such products the prices of respondents Glidden, Sherwin-Williams and Anaconda were customarily twenty-five cents per hundred pounds below the prices of National's "Dutch Boy" and Eagle-Picher's "Eagle" brands of white lead. This difference of twenty-five cents was due primarily to the wide demand which National had created through its prestige, advertising and greater ability to supply the trade with its well known "Dutch Boy" brand of white lead-in-oil, and it was felt by Glidden, Sherwin-Williams and Anaconda (International) that their products could not command the same price. (In all cases, however, the dealer's resale or list prices were the same as those of National and Eagle-Picher, and the twenty-five cents concessions were made to the dealer to encourage extra sales effort on his part to sell the lesser known brands. This has been true not only as to sales in the par zone but also as to sales in all of the other zones. Invoices covering three hundred and four sales of white lead-in-oil during the period from January through March 1941 by National and Eagle-Picher to agents and distributors in Zones 2, 3, 4, 5, 6 and 7, as shown

on the White Lead-in-Oil Map, tabulated in Commission's Exhibits 752–A to Z–16, inclusive, and 754–A to R, inclusive, reveal a strict observance of zone differentials by both of these respondents and identical prices in all but six sales, three of which were over the card price and three under the card price by National. Commission's Exhibits 772–Z–15, 794–D, I, Y and Z, and 795–M, P and Q disclose thirty-four lead-in-oil sales to dealers in Zones 2 to 6 by respondents Glidden, Anaconda and Sherwin-Williams during the same period, which reveal the strict observance by these respondents of all zone differentials, price uniformity between them in all premium zones into which two or more of them shipped and the same uniform variance from National's and Eagle-Picher's prices that is reflected in their par zones prices. Sales of dry white lead in carload lots and in quantities less than carloads to manufacturers in the par and twenty-five cent zones during the first quarter of 1941 are shown by four hundred and forty-eight invoices in the record (Comm. Exs. 752–G to Z–120, inclusive; 754–W to Z–9, inclusive; 772–Z; 794–Z; 795–M to Z–7, inclusive). In making these sales the respondents conformed strictly to the zone pricing system, including the zone differentials provided therein, and followed, with few exceptions, a price pattern which involved quantity differentials between carloads and less than carloads sold to manufacturer customers. It is thus clearly established that from and after the early part of 1934 the pricing of lead pigments in accordance with the zone delivered pricing system herein described was the accepted practice among the respondents, and, in fact, the only respondent in this proceeding to seriously deny that it has used such system in the sale of its products is respondent Sherwin-Williams. The contention of this respondent in this respect is separately treated hereinafter.

(*b*) The respondents' price cards issued periodically during the period covered by this proceeding carried not only the prices at which products would be sold to dealers and others, but also complete lists of prices at which it was suggested that the dealers and others sell white lead-in-oil and other keg products to consumers and painters. The terms used on these cards for such suggested resale prices were "Dealers' Schedule," "Resale Prices," "Painters' Price List" and "Dealers' Recommended Selling Schedule," and the prices set forth under these designations by all of the respondents at comparable times were substantially identical. The following table contains the card resale prices of the respondents for white lead-in-oil as of the dates shown, which were the effective dates for each of the cards:

Respondent	In 100-pound kegs	In 50-pound kegs	In 25-pound kegs	In 12½-pound kegs	Date	Commission Exhibit
National	13.00	13.25	13.50	13.75	9/13/37	659-Z1
Eagle Picher	13.00	13.25	13.50	13.75	9/14/37	660-A
Anaconda	13.00	13.25	13.50	13.75	9/15/37	661-Z3
Glidden [1]						
Sherwin-Williams	13.00	13.25	13.50	13.75	9/15/37	662-Z9
National	11.75	12.00	12.25	12.50	1/10/38	659-Z15
Eagle-Picher [2]	11.75	12.00	12.28	12.56	1/11/38	660-C
Anaconda [2]	11.75	12.00	12.28	12.56	1/10/38	661-Z1
Glidden	11.75	12.00	12.25	12.50	1/11/38	663-F
Sherwin-Williams	11.75	12.00	12.25	12.50	1/11/38	662-Z13
National	12.25	12.50	12.75	13.00	2/27/39	659-Z31
Eagle-Picher [2]	12.25	12.50	12.76	13.04	3/ 1/39	660-F
Anaconda	12.25	12.50	12.75	13.00	3/ 3/39	661-X
Glidden	12.25	12.50	12.75	13.00	2/27/39	663-I
Sherwin-Williams	12.25	12.50	12.75	13.00	2/23/39	662-Z19
National	13.25	13.50	13.75	14.00	4/26/41	659-Z41
Eagle-Picher	13.25	13.50	13.75	14.00	5/ 1/41	660-H
Anaconda [2]	13.25	13.50	13.76	14.00	5/ 3/41	661-V
Glidden	13.25	13.50	13.75	14.00	4/26/41	663-K
Sherwin-Williams	13.25	13.50	13.75	14.00	4/25/41	662-Z23

On all cards the suggested prices to painters were $1.00 less than each quotation given above.

[1] The price card of respondent Glidden for this period was not furnished. This respondent's price cards for other dates, however, show that its resale prices were identical with those of the other respondents for the comparable dates.

[2] The apparent differences in the quotations of respondents Eagle-Picher and Anaconda for the 25-pound and 12½-pound kegs during January 1938, March 1939 and May 1941 may be explained, at least in part, by the fact that Eagle-Picher and Anaconda quoted on these smaller packages a price per unit of 25 or 12½ pounds, rather than a price based on 100 pounds, as did the other respondents. Since there is a fraction of a cent involved in dividing the hundredweight price by 4 or 8 to determine the 25- or 12½-pound container price, Eagle-Picher and Anaconda evidently used the even cent next above the fraction in quoting on such single containers for the periods mentioned. This does not necessarily represent a real price difference between Eagle-Picher and Anaconda on the one hand and the other respondents on the other, for it is entirely possible that any of the other respondents in quoting on a single unit would also use the cent above the fraction.

(*c*) The differentials over American Smelting and Refining Company's price on pig lead of $1.50 per hundredweight for litharge and $2.50 per hundredweight for red lead in carload quantities had been employed in the industry for some time prior to 1933, and each of the respondents, except Anaconda (International), who sold no oxides, used them uniformly thereafter (Tr. 1292, 1326–1328, 1618–1620, 2666, 2692–2697; Comm. Exs. 137–A, 762–B). Actual sales of red lead and litharge as evidenced by a large number of invoices in the record of respondents National, Eagle-Picher and Glidden for the last quarter of 1941 follow in regular patterns the formula of $1.50 for litharge and $2.50 for red lead over A. S. & R.'s pig lead quotations, and with occasional exceptions covered by contract sales and some sales to large battery manufacturers, the prices of the three were uniform. Prices of oxides in quantities smaller than carloads have been based on the aforesaid carload prices as determined by these differentials (Tr. 1618–1621, 2390–7). It is also shown that the quantity differentials stated in Schedule A attached to the supplemental code between

twenty tons and less on lead carbonates and between five tons and less on lead oxides were allowed on the price cards of all respondents quoting on these products after 1933 (Comm. Exs. 659–663, inclusive, 615–B). In addition, it appears that all of the other conditions provided in Schedule A for the sale of oxides, except the stated terms of sale and f. o. b. car deliveries at seller's plant, were consistently observed and practiced by all of the respondents during and after the code period. The dealers' price cards in the record indicate that the terms of sale used by the respondents have varied from 1 percent ten days, net thirty days, to 2 percent ten days, net sixty days, but that at any one period the terms of all of the respondents on similar products and quantities have been uniform, and deliveries, for the most part, have been to the buyer's location, to the seller's plant with freight allowed, or f. o. b. stated shipping or equalization points.

(*d*) As shown in Paragraph Eight (a) hereof, container price differentials were discussed in detail at the meeting of the Dry Products Committee of the Lead Pigments Division of the association on August 8, 1933, and the following provision was tentatively adopted, but was not thereafter incorporated into the code:

> On Government bids and on railroads (and industrial) business the following package differentials over l. c. l. barrel prices are hereby established:
>
> | | |
> |---|---|
> | 100-lb. kegs | $0. 50 |
> | 50-lb. kegs | .75 |
> | 25-lb. kegs | 1. 00 |
>
> (Comm. Ex. 800–C)

Both the testimony and the numerous price cards in the record show that thereafter all of the respondents quoted and charged a differential of twenty-five cents as between various container sizes used to contain one hundred pounds of pigments, that is, one hundred pounds of pigments in two 50-pound kegs or cans were sold at twenty-five cents more than the price for the same quantity in one container. For four 25-pound containers, fifty cents was added, and for eight 12½-pound containers, seventy-five cents was added. This practice was employed by all of the respondents without deviation, and both National Lead Company and The Sherwin-Williams Company introduced evidence purporting to show that the differentials so charged were less than the costs involved as between single containers requiring only one process of sealing, packing, labeling and handling and the additional containers, each of which has to be similarly processed.

(*e*) With respect to quarterly contracts for the sale of lead pigments, there was in the supplemental code for the lead pigments industry a provision for contract sales of dry white lead, basic carbonate, with specific provisions for the basing of prices on the seller's card

price on the first day of each quarter (Comm. Ex. 809, Schedule A, Article III). There was also in the code a provision for basing carload prices of oxides on A. S. & R.'s market prices on the dates orders were received. The matter of uniform sales contracts and conditions to carry these provisions into effect was discusssed in committee meetings prior to the adoption of the code, and some of the provisions were incorporated into the second draft (Comm. Ex. 800–C; 801–A; 802–A), but these were not adopted into the final draft of the code, and it was not shown that a uniform contract was ever finally agreed upon or used generally. The respondents, except respondent Anaconda (International), did continue to make quarterly contracts for sale of lead pigments, however, and the agreed upon formula for differentials over pig lead prices was applied by all of them to carload prices on oxides. On less than carloads of oxides, the card prices based on the carload prices were uniformly used.

(*f*) The supplemental code for the lead pigments industry, in Article I of Schedule A thereof, also contained a provision under which 97 percent or 98 percent red lead (Pb_3O_4) should be sold at not less than one-quarter cent and one-half cent per pound, respectively, over the seller's price for grades of lower Pb_3O_4 content. Both during and subsequent to the code period all of the respondents, except Anaconda (International) which sold no red lead or other oxides, quoted and sold red lead on the differentials agreed upon and so included in the code. For 97 percent Pb_3O_4, a charge of one-quarter cent per pound over lower grades was added and for 98 percent the charge was one-quarter cent over the price of the 97 percent grade. The fact that these differentials were uniformly applied was not denied, but the respondents did contend that the increased costs of manufacturing 97 percent and 98 percent red lead as compared with the costs of manufacturing 95 percent red lead fully justified the increased prices for those products. In this connection the record shows that the higher grades of red lead are made by extra burning and that their production does involve a difference in the most of manufacture, and this phase of the subject is more particularly referred to hereinafter.

(*g*) Means of eliminating low bids on government and state purchases had been discussed at a meeting of the White Lead-in-Oil Committee on August 9, 1933. The possibility of apportioning such business among the respondents and the method by which it might be accomplished were considered, and the group was asked to give the matter additional thought (Comm. Ex. 501–C). The record does not disclose any further joint discussion of this subject, but it does contain tabulations of a number of bids to purchasers in this category subsequent to 1933. It is shown, for example, that from 1935

to 1941, sixteen separate bids were submitted to the city of Cincinnati for the sale of basic carbonate of white lead by respondents National, Eagle-Picher and Sherwin-Williams. Eleven of these bids were identical to the fourth decimal (Comm. Ex. 864; Tr. 4095). Identical bids on white lead-in-oil were also submitted to the city of Milwaukee Board of Purchases as follows: In 1939, by National and Sherwin-Williams, both bidding $8.33 per hundred; in 1940, by Eagle-Picher, National and Sherwin-Williams, all bidding $8.57; in 1942, by Eagle-Picher and Sherwin-Williams, both bidding $9.80 (while National bid $10.05); and in 1943, by Eagle-Picher, National and Sherwin-Williams, all bidding $9.80 (Comm. Ex. 865–A to E, inclusive; Tr. 4096). The record further shows that in bids submitted during 1939, 1940 and 1941 to the United States Navy, the United States Treasury and the Panama Canal Zone there were twelve cases of unequal bids by the respondents, with only nine cases of identical prices by two or more of them, all respondents being involved in these bids (Resps.' Exs. 306–A and B, 307–A and B and 308–A, B and C; Tr. 4096), but in view of the background of the respondents' discussions where they sought to reach an understanding on a method of allocating government business between themselves by prearrangement and collusive bids, this evidence as to the dissimilar bids to the three government departments is not persuasive to show substantial competition among them. Price differences as to one particular type of customer does not detract from the illegality of the conspiracy found in the face of rigid adherence to the agreed system as to all other types of customers, including government agencies.

PAR. 14. The adherence by each of the respondents individually to the trade practices and pricing methods agreed upon by them in 1933 and 1934 is clearly demonstrated in the record.

(*a*) Commission's Exhibit 752–A to Z–144 is a tabulation of invoices compiled directly from the records of respondent National Lead Company, showing sales of lead pigments by that company in about sixty different cities during two quarters of 1941 and one quarter of 1943. The prices and the trade classifications shown on this tabulation covering thousands of transactions clearly demonstrates an inflexible use of the zone delivered pricing system by National Lead Company in strict conformity with that agreed upon. This company's practices in selling in accordance with its published prices were described by the manager of the Trade Sales Department, Mr. McCarthy, as follows:

Q. Mr. McCarthy, are the sales of lead pigments by the National Lead Company generally made at the published prices and announcements of the National Lead Company over the period of your experience with the company?

A. Definitely. (Tr. 1099)

The manager of National's Dry Products Department was called as a witness and testified that the company had generally followed, at least from 1938 when he assumed his present position, the terms and conditions of sale set forth in Schedule A of the supplemental code, and that National has generally employed the differentials of $1.50 for litharge and $2.50 for red lead over American Smelting and Refining Company's quotations on spot sales, or American Smelting and Refining Company's, American Metal Market's or Engineering and Mining Journal's average price quotations of pig lead. The prices, terms and conditions of sale generally employed by National during the period from 1934 to date of the hearings in this proceeding in the form of price cards, price announcements and instructions to branch managers as to pricing, showing adherence to the system, appear in the record as Commission's Exhibits 595, 659, 806, and 862 and Respondents' Exhibits 154, 158 and 167.

Insofar as respondent National is concerned, the only important deviations from the trade practices and pricing methods agreed upon by the respondents have been in some sales to very large battery manufacturers and in the bids to the three government departments referred to in Paragraph Thirteen (g) hereof. In the period of the last quarter of 1941, National did make concessions from the regular differentials on carload purchases of battery oxides by the large battery manufacturers. The record shows, however, that one of the problems of the industry was to overcome the possibility of large battery manufacturers producing their own oxides, and it may be assumed that National's concessions to these purchasers have been the result of pressure on it by the large consumers of these products who might have been in a position to produce their own red lead and litharge if the concessions were not allowed.

(*b*) With but a single exception, respondent Eagle-Picher followed the pricing practices and policies of National Lead Company in all aspects from and after 1934. The exception was that in some instances Eagle-Picher did not follow National in granting quantity allowances on white lead-in-oil sales direct to painters, which, however, was a very minor part of Eagle-Picher's business in white lead-in-oil. Like National, Eagle-Picher apparently found it necessary to depart on occasions from the regular carload differentials in selling battery oxides to very large battery manufacturers who were in a position to produce their own oxides. The manager of Eagle-Picher's White Lead Division testified unequivocally that Eagle-Picher had used the zones since 1933 or 1934 substantially as they are shown on the maps included herein. The same official also testified as follows:

Q. Well, then, if these prices of white lead-in-oil move on a whole scale, so that the list price, dealer price and painter price would be affected by any change, can you tell me of any changes now in the period up to the end of 1945 in that scale, in that whole scale of prices, leaving for the moment the question of quantities and quantity discounts, where such changes by National have not been followed by Eagle-Picher?

A. Not in that period you mentioned, I don't think there were any exceptions or occasions where they didn't follow it. (Tr. 3686 and 3687.)

Another official of the Eagle-Picher (manager of the Pigment Division and a director of the company) while testifying regarding the sale of dry products stated that the carload differentials, card prices and zones, as well as most of the terms and conditions of sale as set forth in Schedule A attached to the supplemental code have been followed by Eagle Picher in the period subsequent to the code's adoption (Tr. 1590–1621). When asked about adopting the two-zone system for selling their dry white lead, this witness testified as follows:

Q. Why did these companies adopt this two-zone system for selling dry white lead?

A. Well, we adopted it because it was adopted by our competitors, and we went along on the same basis.

The price cards, announcements to the trade, instructions to salesmen and branch officials and invoice records of respondent Eagle-Picher for the years subsequent to 1934 likewise clearly show adherence by this company to the agreed pricing methods and terms and conditions of sale (Comm. Exs. 585–590, 658, 660, 754, 838, and 840).

(*c*) The extent of the adherence of respondent Anaconda (Internation Smelting and Refining Company and the other subsidiaries of Anaconda Copper Mining Company) to the zone methods and pricing policies agreed upon in connection with sales of white lead-in-oil and dry white lead, the only two pigments produced by them, is best demonstrated by the testimony of one of the officials of respondent International. This witness testified in part as follows:

Q. Subsequent to the adoption of the two-zone system in the sale of dry white lead, did you ever sell that commodity at a price less than sold by your competitors?

A. No. (Tr. 3505.)

The same witness later testified:

Our prices were based on what our competitors were doing. (Tr. 3585.)

When asked about the adoption of the zone system for the sale of dry white lead, the witness responded as follows:

Q. Why did these companies adopt this two-zone system for selling dry white lead?

A. Well, we adopted it because it was adopted by our competitors, and we went along on the same basis. (Tr. 3498.)

The only deviation by these respondents from the agreed upon practices was in connection with sales of white lead-in-oil. The Anaconda brand of white lead-in-oil was relatively a newcomer into the industry, and difficulty was encountered in establishing it with dealers against the better known "Dutch Boy" brand of National and the "Eagle" brand of Eagle-Picher. Thus, while the same resale prices to consumers and painters were set by the Anaconda subsidiaries as were set by National and Eagle-Picher, their dealer price on white lead-in-oil was twenty-five cents per hundred pounds lower, for the purpose of giving the dealer an extra compensation of twenty-five cents per hundred pounds for handling the lesser known brand. The evidence in the form of price cards, price announcements, zone maps and stipulated facts shows that with the single exception noted the subsidiaries of respondent Anaconda Copper Mining Company acting for and on behalf of said respondent followed the practices adopted in 1933 and 1934 from the code period to 1946, when they ceased the manufacture and sale of lead pigments (Comm. Exs. 591, 592, 661, 738, 739, 795 and 836).

(*d*) The invoices, price cards, instructions to salesmen and other documents in the record, including tabulations of sales records (Comm. Exs. 757–767, inclusive, 771, 772, 798, 810, 829, 830, 831, and 841), show that respondent Glidden likewise adopted and followed the agreed pricing practices and terms and conditions of sale, with minor deviations, from the period of the code to the date of the hearings in this proceeding. The one major exception was that for a period of time respondent Glidden offered dealers purchasing white lead-in-oil outright a price twenty cents lower than the prices obtained by respondents National and Eagle-Picher for their brands of white lead-in-oil. Since resale prices to consumers and painters were identical with those of the other respondents, this concession, as was true with similar concessions by Anaconda and Sherwin-Williams, served primarily as an added incentive to the dealer to promote the sale of Glidden's products without disturbing the fixed resale price level. An indication of the extent to which Glidden followed the actions of its competitors is the statement of its vice president, Paul E. Sprague, a principal participant in the pigments division meetings in 1933, that it was never to Glidden's interest to initiate a change in the price of lead pigments (Tr. 2561). Mr. Sprague stated all through his testimony that it had been Glidden's practice from the code period onward to follow the prices of National. One exception was that in the period before 1936 Glidden allowed a differential of one-eighth cent per pound on dry white lead sales to permit paint manufacturers to overcome the reluctance of the manufacturers to purchase from a com-

petitor. The existence of a well understood policy on the part of Glidden to follow National and the other respondents in these matters is illustrated by Commission's Exhibit 774, which is a letter from the manager of Glidden's San Francisco branch under date of July 6, 1945, transmitting price information to the central office of Glidden and which contains the following note:

> Due to the fact that we have been unable to find any price list for the first and last quarters of 1941, Mr. Ehrke suggested that you may want the National Lead price list for Pacific Coast Branch which was effective May 28, 1940. He says these prices were the same as ours.

As noted elsewhere, respondent Glidden did not participate in the agreement to adopt the consignment plan of selling white lead-in-oil in 1933, and when it did use agency contracts in the period from 1939 to 1941 it apparently did so with some reluctance.

(*e*) It is the contention of respondent Sherwin-Williams that it does not at any time employ the zone system in quoting and selling its lead pigments and that its present method is one of free delivery and equalization points as previously utilized in the industry as a whole. It appears from the testimony of witnesses and from the price cards and announcements of the company, however, that Sherwin-Williams' deviations from the zone pricing methods since 1934 have been the exception rather than the rule. In selling to all of its company-owned stores, Sherwin-Williams has consistently used the zones and the differentials set forth in the maps included herein, and in selling to customers, wherever located, who purchase in truckload quantities, and to all other customers who could purchase from a competitive seller on the zone basis, its sales and differentials have been on the same basis. Moreover, a "truck load" under Sherwin-Williams' practice includes quantities as little as ten thousand pounds and may include paint or any other item sold by Sherwin-Williams.

An examination of Sherwin-Williams' white lead-in-oil price sheets in the record discloses on the face of each a list of shipping points (Comm. Ex. 662–Y to Z–25, inc.), which lists, without more, would indicate offers to sell at the listed points, with the customers paying the freight from such points to their locations. It is evident, however, that the so-called shipping points on the Sherwin-Williams price lists were not in fact f. o. b. points from which freight was added in any but a small number of instances. The General Trade Sales Bulletins from the headquarters of the Sherwin-Williams Company to the branches and sales personnel frequently referred to the zones. For instance, Commission's Exhibit 662–F, General Trade Sales Department Bulletin No. 24, under date of December 28, 1936, contained the following statement:

ZONE DIFFERENTIALS

On all the above prices where the delivery point is outside the Eastern territory add to these prices the full advance differential shown on the attached price list insert.

Other subsequent Trade Sales Department Bulletins contained similar instructions and above them the descriptions:

Consumers Prices—Eastern Zone
S-W Dealers—Eastern Zone (Comm. Ex. 662–I to V, inc.)

The adherence of Sherwin-Williams to the zone pricing system in at least a part of the country is illustrated by Commission's Exhibit 782–D, which is a price bulletin issued by the San Francisco office of Sherwin-Williams showing the application of the zone system as such to all of the business of Sherwin-Williams on the Pacific Coast. Commission's Exhibit 823–A to G, inclusive, shows that while Sherwin-Williams apparently did charge freight on less-than-carload shipments of red lead and litharge from warehouses during 1932 and 1933, beginning in 1934 when the zone system was adopted delivered price quotations on these products were made in accordance with the zone plan adopted by the industry, which practice continued down to 1942.

After it had been testified by a vice president of Sherwin-Williams that the company invariably added freight charges to sales of white lead-in-oil away from the shipping points appearing on its price cards, numerous invoices were produced (tabulated in Comm. Ex. 662–A to Z–26, inclusive) showing that in a large number of instances Sherwin-Williams did not require customers in towns away from its shipping points to pay additional transportation charges. Following this evidence, officials of Sherwin-Williams were called who modified the original statement of policy and testified that the company added freight charges to customers located away from the shipping points, except when such customers purchased in carload or truck load quantities and except when competitors' use of the zone method required the company to absorb or prepay freight charges in order to meet the local competitive situation (Tr. 3694, 3743, and 4103). The evidence shows that as a matter of fact these two exceptions from the policy embraced a majority of Sherwin-Williams' sales and that in most of its transactions Sherwin-Williams did sell in accordance with the zone system and did absorb the transportation charges. Except that Sherwin-Williams quoted a dealer price twenty-five cents per hundred pounds lower on white lead-in-oil than that quoted by respondents National and Eagle-Picher (in the same manner as did respondents Glidden and International), its use of the zone pricing methods and

other practices agreed upon in 1933 and 1934 has been in conformance with the similar actions of the other respondents.

PAR. 15. The combined results of the use by the respondents of the practices herein described have been to produce substantially identical prices, terms and conditions of sale as between respondents National and Eagle-Picher and to produce substantial uniformity of price differentials, terms and conditions of sale among respondents Anaconda, Glidden and Sherwin-Williams and prices by these three which varied from those of National and Eagle-Picher according to pattern and according to differences of brand and quality of products. The zone pricing feature was shown to be a method which facilitated the meeting, or matching, of competitors' prices. The agency or consignment method of selling was shown by conclusive evidence to have had the purpose and effect of controlling resale prices, preventing "loss leader" selling, and securing better profits for dealers. The various differentials have operated to establish an inflexible price structure which has eliminated variations in the prices of lead pigments based on quantity, quality, cost of delivery, container costs and other price factors which an unrestrained market system would provide for the purposes of bargain and sale. The pricing system which has been maintained in the sale of oxides is such that all delivered prices on the various grades, quantities and qualities of these products advance or recede 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 illustrates the effectiveness of the respondents' methods in connection with the sale of these products, but also reveals the purposes underlying their employment.

Officials of each of the respondents vigorously assert that they were not to their knowledge any agreements by any of the respondents to employ particular methods or to fix or maintain uniform prices and terms of sale of their products, other than the agreements as to what should be recommended for the supplemental code. It is true that the record does not show the existence of any categorical agreements other than those entered into at the time of the code discussions. The evidence does disclose understandings and cooperative activities, however, which, when considered in the light of the circumstances, leads the Commission to the conclusion, and it accordingly finds, that there was on the part of the respondents a mutual understanding and acceptance of an over-all plan and an intention on the part of each of the respondents to follow it. Such mutual understanding constituted a conspiracy on the part of all of the respondents to fix and maintain prices, differentials, terms and conditions of sale in the lead pigments industry, which conspiracy was carried out by all of the

respondents through the various methods herein set forth. While some of the respondents did not employ all of the particular methods, and while there were some variations in practices and results as between respondents, it is clear that each of the respondents has gone far beyond the requirements of competition, and beyond the necessities imposed by National's price leadership, in the practice of the various methods they discussed together and in the maintenance of uniformity of prices, terms and conditions of sale, all of which could not have resulted from other than agreement and conspiracy.

The respondents further contend that the practices found to have been employed by them are not subject to corrective action by the Commission by reason of the provision of Section 5 of the National Industrial Recovery Act (48 Stat. 198), reading as follows:

> While this title is in effect (or in the case of a license, while section 4 is in effect) and for sixty days thereafter, any code, agreement, or license approved, prescribed, or issued and in effect under this title, and any action complying with the provisions thereof taken during such period, shall be exempt from the provisions of the antitrust laws of the United States.

The Commission is of the opinion, however, that there is no merit in this contention. As hereinabove found, the provisions of the supplemental code for the lead pigments industry covering some of the practices involved were suspended by an exemption by the N. R. A. officials issued upon application of the respondents. This was extended at their request so that these code provisions were never effective. In the opinion of the Commission, this precludes the application of the exemptions provided for in Section 5 of the Act to the practices engaged in pursuant to these provisions. Other practices involved in this proceeding were never adopted and incorporated into the code, and obviously were not protected by Section 5 of the Act either during or after the code period. Moreover, the practices covered by the provisions which were adopted and suspended, as well as the other practices, were employed both before and for more than sixty days after the termination of the code and the expiration of the exemption period provided in Section 5. Such practices, having been initiated and continued as the result of a price-fixing conspiracy not entitled to any protection provided by the National Industrial Recovery Act or any other statute, are illegal per se and are not immune from the Commission's corrective action.

PAR. 16. In addition to charging the respondents with the use of unfair methods of competition in commerce and unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act, the amended complaint in this proceeding, in Count II thereof, alleges, among other things, that when sales are made to cus-

tomers located at or near the borders of adjoining or contiguous zones pursuant to the zone delivered pricing method herein described, each of the respondents charges, demands, accepts and receives from some purchasers of its lead pigments higher prices for such products than it receives from other and competing purchasers in different zones, and that as a result of said practice each of the respondents discriminates in the delivered costs of its lead pigments to different purchasers, all in violation of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. Said Count II also alleges that each of the respondents further discriminates in the prices of its lead pigments as between competing purchasers of said products by classifying its customers to receive quantity, trade and regional discounts from quoted prices, so that by virtue of such classifications and actions pursuant thereto each of the respondents charges, demands, accepts and receives in connection with sales of its lead pigments in commerce higher prices from some of its customers than from other competing customers. Upon its consideration of the record the Commission makes the following additional findings with respect to the issues raised by these particular allegations.

PAR. 17. (*a*) As hereinabove found, each of the respondents (except respondents Anaconda and Internationl) since 1934 has sold its dry red lead and litharge in barrels or bags in less-than-carload lots at the same delivered costs to all customers in a so-called par zone consisting of all of the States of the United States other than those specifically named below. In the States of Alabama, Arkansas, California, Florida, Georgia, Louisiana, Mississippi, Oklahoma, Texas and those portions of Oregon and Washington lying west of the Cascade Mountains, a differential of twenty-five cents per hundredweight was added for deliveries to all customers at all points. In the case of sales to customers in the States of Colorado, Montana, New Mexico, and Wyoming, a differential of fifty cents per hundredweight was added to the par zone price. For deliveries in Arizona, Idaho, Nevada, Utah and those portions of Oregon and Washington lying east of the Cascade Mountains, a differential of seventy-five cents over the par zone price was added. Since 1934, each of the respondents has also sold its dry red lead and litharge in barrels or bags in carload lots of twenty tons or more at a differential of $2.50 per hundredweight for red lead and $1.50 per hundredweight for litharge over American Smelting and Refining Company's closing price for common pig lead at New York on the date the order was received, and has delivered these products to customers in the par or base zone at the aforesaid delivered prices. For deliveries to customers in the States of Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Louisiana, Mississippi,

Montana, Nevada, New Mexico, Oklahoma, Texas, Utah, Wyoming, and those portions of Oregon and Washington lying east of the Cascade Mountains, a premium of twenty-five cents per hundredweight has been added to the par zone price. The record shows that shipments of dry red lead and litharge have been made by one or another of the respondents at the aforesaid prices and with the stated differentials added from the following, among other points: Chicago, Illinois; St. Louis, Missouri; Perth Amboy, New Jersey; Philadelphia, Pennsylvania; Oakland, California; Cincinnati, Ohio; Scranton, Pennsylvania; Hammond, Indiana; Collinsville, Illinois; Baltimore, Maryland; Joplin, Missouri; and Galena, Kansas (Tr. 1314, 1564 and Comm. Ex. 756–A).

Large quantities of red lead and litharge so sold by the respondents are sold to the manufacturers of storage batteries. The storage battery industry consists of more than two hundred companies, ranging in size from multiple plant operations of the United States Electric Storage Battery Company and its subsidiaries, Willard and Grant, to small proprietorships whose production of batteries may be less than fifty units per day. During the period from 1934 to 1941, one of the oxide customers of respondent National was Vitalic Battery Company, Inc., of Dallas, Texas, in the twenty-five cent premium zone, which purchased on the carload basis with deliveries being made by National out of the Dallas plant. It was stipulated between counsel that if an official of Vitalic Battery Company were called as a witness he would testify that red lead in litharge have been purchased by Vitalic from respondents National and Eagle-Picher at the published carload prices for delivery in Dallas; that the company markets storage batteries in Texas, Oklahoma, Missouri, Kansas, Arkansas, Louisiana and New Mexico; that the cost of lead oxides amounts to approximately 33 percent of the total material costs involved in the production of storage batteries; and that the following concerns are Vitalic's chief competitors: Willard Storage Battery Company, Exide Storage Battery Company, National Battery Company, and others. These large competitors of Vitalic are all located in the par zone where the delivered price of battery oxides is $1.50 per barrel less than in Dallas.

During the same period of time, 1934 to 1941, respondent Eagle-Picher shipped lead oxides to battery manufacturers from its borderline plant in Joplin, Missouri, to near and far points in different zones. For oxides, this plant is in the par zone and about ten miles from the borderline of Oklahoma, which is in the twenty-five cent premium zone. In the last quarter of 1941 particularly, Eagle-Picher was quoting and selling red lead and litharge at points on the Pacific Coast taking par zone price, while it was quoting and selling to

customers in Oklahoma and Arkansas, no more than fifteen miles away from its plant, at a differential of twenty-five cents per hundredweight over the par zone price. At the same time, respondents Glidden and Sherwin-Williams were selling red lead and litharge on the same zone delivered price basis (except that Sherwin-Williams did not sell to battery manufacturers).

(*b*) Since 1934, the respondents National Lead Company, The Eagle-Picher Company, The Glidden Company and the Sherwin-Williams Company have consistently quoted and charged different prices as between carload purchasers and less-than-carload purchasers of their oxides. As hereinabove found, the carload price was based on American Smelting and Refining Company's price for common pig lead, and the price for smaller quantities involved a difference of forty cents per hundredweight as between carloads and five tons and ninety cents per hundredweight as between carloads and quantities less than five tons. These price differences in a substantial number of cases were much more than the differences between car and less-than-car freight rates and resulted in an excess charge over delivery costs as high as eighty-eight cents per hundredweight against the purchasers of small quantities. The following prices and rates per hundredweight tabulated from Commission's Exhibits 852–A, B, F, and O. and 854–C, show representative results of these differences and include shipments by respondents National, Eagle-Picher, and Glidden:

Origin	Destination	Unit	Price difference	Freight difference	Lack of justification on basis of freight rates
			Cents	*Cents*	*Cents*
St. Louis	Bitmingham	CL	0		
St. Louis	Birmingham	5-ton	40	35	5
Dallas	San Antonio	CL	0		
Dallas	San Antonio	L 5-ton	90	50	40
San Francisco	San Francisco	CL	0	0	
San Francisco	San Francisco	5-ton	40	0	40
Hammond	Chicago	CL	0		
Hammond	Chicago	5-ton	40	4	36
Hammond	Chicago	L 5-ton	90	4	86
Detroit	Detroit	CL	0		
Detroit	Detroit	L 5-ton	90	2	88
Cleveland	Akron	5-ton	0		
Cleveland	Akron	L 5-ton	50	3	47
Chicago	Chicago	CL	0		
Chicago	Chicago	5-ton	40	2	38

All of the shipments included in this tabulation were of red lead. Rates and differentials on litharge were the same, and the prices were $1.00 less per one hundred pounds in all billings. The freight rates on 5-ton and smaller lots were the same. Thus, the lack of justification on shipments under five tons can be determined by adding fifty cents to the 5-ton differential, revealing a price difference of fifty

cents or more over freight differences at all points, and no case where the differential between 5-ton and smaller shipments was justified on the basis of freight rates. Respondents' own estimates shown for dry white lead indicate an increased cost of about one-fourth cent per pound against less-than-car lots, but this figure applied to oxides would fall far short of justifying the ninety cents differential in any case or the forty cents charge in most cases. An additional differential of twenty-five cents per hundredweight on less-than-car shipments of oxides was made in the case of shipments to customers in Montana, Wyoming, Colorado, and New Mexico, since these States are in the fifty-cent zone for small shipments and in the twenty-five-cent zone for car lots (Comm. Ex. 854–B, C).

The evidence in the record is that during the period from 1934 to 1941 the storage battery business was characterized by sharp price competition, particularly on the part of some of the large battery manufacturers, such as Globe-Union, Inc., a subsidiary of Sears-Roebuck and Company, National Battery Company and Bowers Battery Company. Illustrative of the competitive importance during this period of the price difference of nearly $6 per barrel allowed by the respondents in favor of the manufacturer who purchased his oxides in carload quantities as against the manufacturer who purchased in smaller lots was the following situation. In 1941, National sold to two small battery manufacturers located in St. Louis, Missouri, delivering by its own truck out of its St. Louis plant at the less-than-5-ton price, which was $5.40 per barrel higher than the carload price, and to two small battery manufacturers at the 5-ton price, which was $2.40 per barrel higher than the carload price (Comm. Ex. 853–F), and at the same time sold on the carload basis to larger manufacturers of batteries in Omaha, Nebraska, where the carload freight rate was $1.74 per barrel, Indianapolis, Indiana, where the rate was $1.32 per barrel, Muncie, Indiana, where the rate was $1.44 per barrel, and Niagara Falls, New York, where the rate was $2.36 per barrel (Comm. Ex. 853–F and G). Deliveries to the carload customers involved in the sales in Omaha, Indianapolis, Muncie and Niagara Falls were all made out of the St. Louis branch and the purchasers were Grant Storage Battery Company, Prest-o-lite Company, Inc., one of the largest manufacturers of batteries, and Delco-Remy Division of General Motors Corporation. The four less-than-carload accounts in St. Louis were manufacturers who produced batteries on a small scale with very limited distribution (Tr. 1919, 1920 and 1924). The proprietor of one of these customers, Sidney Battery Manufacturing Company, a purchaser in 5-ton quantities, was called as a witness and testified that he had been a customer of National Lead Company, receiv-

ing deliveries out of the St. Louis plant for approximately twelve to fifteen years, purchasing on either the 5-ton or the less-than-5-ton basis, and engaged in producing up to one hundred and thirty-five storage batteries per day, the capacity of its plant. This witness testified that during the period from 1936–1941, competitive conditions in the sale of storage batteries in the St. Louis area "were so bad that the only way we could get by and make a living was to use the old battery cases over again"; that the competition of Grant Storage Battery Company, Majestic and Monarch, of Chicago, and Sears-Roebuck and Company was such that the enterprise had gone "broke" in about 1933; and that in the following period his company could not manufacture batteries for sale at prices comparable with those offered at retail by Sears-Roebuck (Tr. 1926–28). Commission's Exhibit 853–A shows that during the same period of time, respondent National sold battery oxides to Globe-Union, Inc., the battery manufacturing subsidiary of Sears-Roebuck and Company, on the carload basis, shipping from St. Louis to Memphis, Tennessee, at a rail freight rate of $1.98 per barrel, and from St. Louis to Milwaukee, Wisconsin, at a rate of ninety-six cents per barrel.

(*c*) The price differentials between zones observed by the respondents in the sale of their oxides, as described in subparagraph (*a*), and the added amounts charged on shipments originating and terminating in the same premium zone over those originating and terminating in the par zone, was shown to increase the cost of oxides to the non-par zone purchaser from one-quarter cent to one-half cent per pound. To this difference was added, in the case of less-than-carload purchasers, the differential charged such purchasers over the carload price. Thus, in the case of small battery manufacturers in Birmingham, Alabama, who purchased in less-than-5-ton quantities, some of whom were shown to be in competition with chain and mail order battery manufacturers located in the par zone, the added quantity differential was fifty-five cents per hundredweight (ninety cents less a rate difference of thirty-five cents). The discriminations against the small dealer in Denver, Colorado, on shipments from Joplin, Missouri, were ninety cents quantity differential, plus a twenty-five cents difference between carload and less-than-carload zoning, less seventy-one cents freight difference, or forty-four cents per hundredweight (Comm. Ex. 854–B and G), as compared with nearby competitors in Kansas and in other locations carrying the same or less freight costs. These unjustified differentials amounted to one-half cent per pound or more in a substantial number of cases. Storage batteries contain from nine to twelve pounds of lead oxides each. Thus, the above-mentioned discriminations amounted to from four and one-half cents to six cents per battery

for the oxides alone. In view of the showing made that during the period from 1936 to 1941, a saving of from five cents to ten cents per battery on material costs often would mean the difference between a profit and a loss on low-priced batteries, the competitive effects of these discriminations are readily apparent. The record further shows that even during more normal competitive times, customers required to pay the higher prices under the respondents' schedules are at a distinct disadvantage in seeking to compete in the sale of their products with the respondents' more favored larger customers.

PAR. 18. In the same way that they sold red lead and litharge on a flat par price for all deliveries in a par zone, adding differentials thereto on sales outside of the par zone, each of the respondents after 1934 sold its white lead, both dry and in oil, at the same delivered prices to all customers in the par or base zones, with the differentials shown on the Dry White Lead and White Lead-in-Oil and Keg Products Maps included in these findings added to such prices on sales to all customers in locations outside of the par zones. Such differentials amounted to one-eighth cent or one-quarter cent per pound as between contiguous zones, with a maximum differential of three-quarters cent per pound as between the par zone and any other zone, and there is in the record evidence tending to show the competitive effect of these differences in sales to purchasers in the vicinities of zone borders. The record shows, for example, that white lead is used extensively in the manufacture of outside paints, and four paint manufacturers of St. Louis, Missouri, testified that they used variously from four and one-half to eight and one-quarter pounds of lead pigments to a gallon of white or tinted outside paint. The testimony of these and other witnesses shows that even in normal times the mixed paint business is one characterized by sharp competition; that outside house paint containing lead pigments is the leading competitive item in a paint line; and that in the period from 1936 to 1941, the margin of profit in the sale of ready-mixed outside paint containing lead pigments was so narrow that a saving of not more than five cents in the price of ingredients for a gallon of paint would amount to the entire profit on some items. It seems clear that in territories near the borders of contiguous price zones the respondents' different prices for their white lead amounting to one-eighth or one-quarter cent per pound involved discriminations as between the purchasers of such products located in the different zones, some of whom, particularly in the St. Louis area, were shown to be in competition with each other.

Respondent National Lead Company offered some evidence to show that on an average basis and taken for each of its selling branches separately, the zone differentials for white lead reflect no more than

average differences in freight costs in doing business as between the zones. In the view of the Commission, however, the fact that the average costs of shipping to customers over an area of a dozen or more States amounts to some arbitrary figure does not justify the discriminations which result in particular transactions with individual customers located in border territories.

PAR. 19. In selling dry white lead, basic carbonate, in both the par zone and the twenty-five cents premium zone, each of the respondents allowed a difference of one-quater cent per pound under its published card prices on carload shipments of twenty tons or more. Data submitted by the respondents shows that in most cases in which rail freight was a factor the difference between carload and less-than-carload freight rates on white lead were sufficient to justify this price difference. It appears, however, that all of the cost data in the record concerning this twenty-five cents price difference had to do with transactions in which rail freight was involved, and the claimed justification for the differentials is based exclusively on the showing that the price difference was less than the differences between the average freight costs. In this connection, the record shows that the principal paint manufacturing centers of the United States are located in and around St. Louis, Missouri, Chicago, Illinois, Philadelphia, Pennsylvania, and New York, New York, all of them cities containing a white lead producing plant of one or more of the respondents. Furthermore, each of these five [four] areas is among the most substantial consuming areas for dry white lead in the country, and in each of the areas the mode of delivery of lead pigments is local cartage and rail freight is not a cost factor. There are figures in the record, for example, showing that in 1941, 1,381,000 pounds of dry white lead were sold in St. Louis, in which only local deliveries were involved. The record contains no evidence whatever tending to justify on a cost of delivery basis or otherwise the one-quarter cent differential as to customers in these areas and under those circumstances, and apparently the respondents recognize that this is so since in the cost data introduced for the purpose of justifying the differential (Resps.' Ex. 215–A and B) all sales to customers in and around the manufacturing plant cities were pointedly omitted. In view of the competitive situation in the mixed paint industry, and particularly the evidence showing the effect on a paint manufacturer of a saving of as little as five cents in the cost of ingredients of a gallon of outside paint, it is clear that the differential of one-quarter cent per pound between carload and less-than-carload shipments of dry white lead allowed by each of the respondents in the producing areas was discriminatory.

PAR. 20. (*a*) The respondents' inter-zone prices of lead pigments were in fact different prices. They differed to the extent of the zone premiums, and were justified only where the additional freight or other transportation costs equaled or exceeded the zone premiums. Where the differences in freight or other transportation costs did not equal or exceed the differences in price, the different prices to competing purchasers were discriminatory. The employment by each of the respondents of these inter-zone differentials has had the tendency of lessening competition between customers of the sellers located in different zones who were in competition with each other in the sale of paints, storage batteries and other products manufactured by them and of creating a trade advantage in favor of customers in the par zones and elsewhere who have received the lower prices.

(*b*) The respondents' differing prices as between carloads and 5-ton lots of oxides and as between 5-ton lots and smaller quantities, and the extra zone charges for less-than-carload quantities sold in the States of Montana, Wyoming, Colorado, and New Mexico were not justified by differences in costs of manufacture, sale or delivery, and were discriminatory as between competing purchasers. The effect of these discriminations was shown to have been substantial and to have had the tendency of lessening competition as between large and small customers of the sellers to the injury of the latter.

(*c*) The allowance by the respondents of a difference of one-quarter cent per pound on shipments of dry white lead, basic carbonate, in carload quantities was justified on the basis of differences in the costs of delivery in those instances in which rail freight was a factor, but was not justified in cases of sales to purchasers in the proximity of the respondents' producing plants, where the only transportation cost was local cartage. To this extent and in these circumstances, the differing prices to competing customers as the result of such allowances were discriminatory and have had the tendency of lessening competition as between the respondents' customers receiving the different prices.

PAR. 21. (*a*) In response to Count I of the amended complaint, the Commission is of the opinion, and therefore finds, that the acquisition by the respondent National Lead Company of the major portion of the lead pigments processing industry, its control by contract of the major portion of the domestic production of pig lead, and its cooperation with the respondent The Eagle-Picher Company 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 had the tendency and effect of

restraining trade, suppressing price competition and creating monopolistic conditions in the lead pigments industry.

The Commission is of the further opinion, and finds, that the tendency, capacity and effect of the combinations, conspiracies, agreements and understandings entered into and maintained by all of the respondents, and the acts, practices and methods performed thereunder and in connection therewith, as herein set forth, have been to substantially hinder, frustrate, suppress and eliminate competition among the respondents in the interstate sale of lead pigments; to prevent price competition among and between the respondents in the sale of lead pigments in, among and between the various States of the United States; to deprive purchasers of lead pigments 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 the purposes of their combinations, conspiracies, agreements and understandings to fix, adopt and maintain uniform prices and terms and conditions of sale of lead pigments.

(*b*) In response to Count II of the amended complaint, the Commission is of the opinion, and therefore finds, that the effects of the discriminations in price described in these findings, engaged in by each of the respondents, may be substantially to lessen competition in the interstate sale and distribution of lead pigments between the respondents and their competitors; to tend to create a monopoly in the lines of commerce in which the respondents are engaged; and to injure, destroy or prevent competition in price and otherwise between said respondents and their competitors in the interstate sale and distribution of lead pigments.

The Commission is of the further opinion, and finds, that the additional effects of the aforesaid price discriminations by each of the respondents may be substantially to lessen competition between the purchasers of lead pigments receiving the lower prices from the respondents and other purchasers of such products competitively engaged with said favored purchasers and who pay the higher prices; to tend to create a monopoly in the lines of commerce in which purchasers from the respondents are engaged; and to injure, destroy, or prevent competition in the lines of commerce in which such purchasers from the respondents are engaged as between the beneficiaries of the lower prices and competing purchasers who are required to pay the higher prices.

CONCLUSION

(*a*) The aquisition by the respondent National Lead Company of the physical assets and stock ownership of its competitors and the

combinations, conspiracies, agreements and understandings of all of the respondents and the acts and practices pursuant thereto and in connection therewith, under the conditions and in the circumstances herein set forth, have constiuted unfair methods of competition in commerce and unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act; and the discriminations in price by each of the respondents as herein found have constituted violations of subsection (a) of Section 2 of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by an Act approved June 19, 1936 (the Robinson-Patman Act).

(*b*) The amended complaint in this proceeding also purported to charge that each of the respondents, through the use of the zone method of pricing and selling its lead pigments, has discriminated in the price of said pigments as between competing customers in the same territorial division or zone. In this connection, however, the amended complaint does not state a cause of action. The allegations are in effect that each of the respondents sells its products in accordance with a zone delivered pricing method and practice, but the alleged discriminations relied on as constituting injury to competition are the differences in the net prices received by each of the respondents at its mill. Thus, the complaint does not clearly show that the alleged unlawful discriminations as between purchasers of the respondents' products who are located in the same zone occur as the result of differences made in actual prices at which the respondents sell their products. For this reason, the Commission is of the opinion that this charge of the complaint should not be further considered.

In support of the allegation that each of the respondents also discriminates in the price of its lead pigments as between competing purchasers of such products by arbitrarily classifying its customers to receive different quantity, trade and regional discounts from quoted prices, certain evidence was introduced tending to show that each of the respondents (1) maintains differentials of twenty-five cents between 100-pound, 50-pound, 25-pound and 12½-pound containers of one hundred pounds of lead-in-oil and other keg products; (2) quotes and sells 97 percent red lead Pb_3O_4 at one-quarter cent per pound over lower grades and 98 percent red lead Pb_3O_4 at one-half cent per pound over lower grades (this practice was not engaged in by respondents Anaconda and International); and (3) employs a price differential of one-quarter cent per pound as between quantities of five hundred pounds and less of white lead-in-oil and other keg products. It appears from the record as a whole, however, that the different

charges based on sizes of containers for lead-in-oil and other keg products were no more than allowable differences in costs of the containers; that the differing changes between the grades of red lead probably did not exceed the differences in the costs of the extra processing required to produce the higher grades; and that the differential of one-quarter cent per pound as between five hundred pounds and smaller lots of white lead-in-oil was not shown to have resulted in any adverse competitive effects.

Commissioner Carretta not participating for the reason that oral argument on the merits was heard prior to his appointment to the Commission.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the amended complaint of the Commission, the respondents' answers thereto, testimony and other evidence in support of and in opposition to the allegations of said amended complaint taken before hearing examiners of the Commission theretofore duly designated by it (the respondents having consented to the substitution of hearing examiners), the recommended decision of the hearing examiner and exceptions thereto, the respondents' appeals from certain rulings of the hearing examiner, briefs in support of the amended complaint and in opposition thereto, and oral arguments of counsel, and the Commission having issued its orders disposing of the exceptions to the recommended decision and the appeals and having made its findings as to the facts and its conclusion that the respondents have violated the provisions of the Federal Trade Commission Act and the provisions of subsection (a) of Section 2 of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by an Act approved June 19, 1936 (the Robinson-Patman Act):

It is ordered, That the respondents, National Lead Company, The Eagle-Picher Company, The Eagle-Picher Sales Company, Anaconda Copper Mining Company, International Smelting and Refining Company, The Sherwin-Williams Company, and The Glidden Company, their respective officers, agents, representatives and employees, in or in connection with the offering for sale, sale or distribution of lead pigments in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between or among any two or more of said respondents, or between

any one or more of said respondents and others not parties hereto, to do or perform any of the following things:

1. Establish, fix, or maintain prices, terms, or conditions of sale for lead pigments, or adhere to any prices, terms, or conditions of sale so fixed or maintained.

2. Quote or sell lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system; or quote or sell lead pigments pursuant to or in accordance with any other plan or system which results in identical price quotations or prices for lead pigments at points of quotation or sale or to particular purchasers by any two or more sellers of lead pigments using such plan or system, or which prevents purchasers from finding any advantage in price in dealing with one or more as against another seller.

3. Quote or sell lead pigments at specified differentials over any particular quotation or quotations of pig lead prices.

4. Quote or sell lead pigments at specific price differentials based upon differing sizes or types of containers or based upon differing quantities in which such products are sold or delivered.

5. Enter into, employ, or continue in effect, any agency or consignment contract, plan or arrangement under which the resale prices or selling practices of any dealer or distributor are controlled or directed.

6. Issue to dealers suggested resale prices, dealers' price schedules, or list prices for the purpose or with the effect of inducting dealers to observe uniform resale prices and refrain from price competition among themselves.

It is further ordered, That nothing contained herein shall be construed as prohibiting the establishment or maintenance of bona fide agreements, understandings or other relations between any of the respondents and its officers, directors and employees, or between any of the respondents and any of its subsidiaries or affiliates, relating to the sole and separate business of said respondent and its subsidiaries or affiliates, when not for the purpose or with the effect of unlawfully restricting competition.

It is further ordered, That each of the respondents, its officers, agents, representatives, and employees, in or in connection with the offering for sale, sale or distribution of lead pigments in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from quoting or selling lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system for the purpose or with the effect of systematically matching the delivered price quotations or the delivered prices of other sellers of lead pigments and thereby

preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another.

It is further ordered, That each of said respondents, its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the sale of lead pigments in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of lead pigments of like grade and quality:

1. By selling such lead pigments at different zone delivered prices to purchasers located in different territorial zones when such purchasers are in competition with one another in the resale or distribution of said products, either as lead pigments or as components of other products.

2. By selling such lead pigments to purchasers competing in the resale or distribution thereof, either as lead pigments or as components of other products, at different prices which vary according to the quantities in which said products are to such purchasers sold or delivered, except at such differentials as were not shown in this proceeding to have resulted in adverse competitive effects or as were shown to have been justified on the basis of differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which the products were sold or delivered, as stated in the findings as to the facts and conclusion herein.

It is further ordered, That the respondent, National Lead Company, its officers, agents, representatives, and employees, do forthwith cease and desist from acquiring or attempting to acquire, directly or indirectly, any interest of ownership or control in the capital stock, or in the physical assets, plants, or other properties, of any concern or enterprise which at the time of such acquisition or attempted acquisition is a competitor of said National Lead Company in the manufacture or in the sale or distribution of lead pigments.

It is further ordered, That the respondents, National Lead Company, The Eagle-Picher Company, The Eagle-Picher Sales Company, Anaconda Copper Mining Company, International Smelting and Refining Company, The Sherwin-Williams Company, and The Glidden Company, shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

Commissioner Mason dissenting and Commissioner Carretta not participating for the reason that oral argument on the merits was heard prior to his appointment to the Commission.

OPINION OF THE COMMISSION

By MEAD, Commissioner:

The amended complaint on which this case was tried is in two counts. It charges in Count I that the respondent, National Lead Company, has violated the provisions of the Federal Trade Commission Act by monopolizing, and attempting to monopolize, and acting to control the sale of lead pigments and the prices thereof, through the acquisition of competitors, and otherwise; that the respondent National and the other six respondents have combined and conspired to suppress and eliminate competition in the sale of lead pigments through the use of a territorial or zone system of pricing and various other practices; and that each of the respondents in carrying out the alleged conspiracy, and for the purpose of suppressing competition in the sale of lead pigments, has engaged in and continued a number of unfair, oppressive and discriminatory acts, methods and practices in the sale of these products. In Count II, each of the respondents is charged with having violated subsection (a) of Section 2 of the amended Clayton Act through price discriminations resulting from the use of zone delivered pricing methods and the employment of various types of discounts granted to some of its customers and withheld from others. The answers filed by the several respondents admitted many of the factual allegations regarding the use of the zone pricing system and the acquisition of competitors by respondent National, but denied that any of the practices were in violation of law, and the case was fully tried before a hearing examiner, whose recommended decision, together with the exceptions thereto, have been carefully considered by the Commission.

On the conspiracy phase of the case, it is shown in the findings that in the late summer and fall of 1933 the respondents met together in various subcommittees of the Lead Industries Association for the ostensible purpose of drafting a supplemental code of fair competition for the Lead Pigments Industry under the National Industrial Recovery Act; that the respondents, however, did not confine their discussions to proposals to be included in the code, but rather availed themselves of the opportunity of appraising generally the methods of selling theretofore employed in the industry; and that they proceeded to cooperatively revise their pricing practices in a manner far beyond the sanction of the National Industrial Recovery Act. The fact that each of the respondents thereafter followed the pricing practices and adhered to the terms and conditions of sale agreed upon during this period, and the results of the use of these acts and practices, were clearly established.

Various officials of the respondent companies testified that there were not to their knowledge any agreements by any of the respondents to employ particular methods or to fix or maintain uniform prices and terms of sale of their products, other than the agreements as to what should be recommended for the supplemental code. It is true, as the respondents contend, that the record does not show the existence of any categorical agreements other than those entered into at the time of the code discussions. It is well settled, however, 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 a course of dealings or other circumstances in the absence of any exchange of words (*United States Maltsters Association, et al.* v. *Federal Trade Commisison*, 152 F. (2d) 161; *Milk and Ice Cream Can Institute, et al.* v. *Federal Trade Commission*, 152 F. (2d) 479). Moreover, as said by the Court of Appeals for the Seventh Circuit in the case of *Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F. (2d) 321, 332, "The rule stated in *Interstate Circuit* v. *United States*, 306 U. S. 227, and *U. S.* v. *Masonite*, 316 U. S. 265, applies here. '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.' It is also sufficient to establish unfair methods of competition under the Federal Trade Commission Act." In some respects, particularly in the respondents' use after 1933 of the zone pricing system, the facts in this case are strikingly similar to those before the Court in the case of *Fort Howard Paper Company, et al.* v. *Federal Trade Commission*, 156 F. (2d) 899. In discussing the situation there presented the Court said:

"As we have already observed, we have here a finding of the existence of an agreement to suppress competition. 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 inescapable result of keen competition in a standard product in 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 *higher* than that at which he needs profitably to sell, unless by express, or tacit agreement, all man-

ufacturers 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 1 is obviously drawn to include all manufacturers and put them on a par. The unfairness of this is shown 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.

"The zoning system arose under the NRA, which fact saved its illegality for the statutorily exempt period. When that immunity was lifted the illegality was again apparent and it is more than an inference to say that parties continuing to utilize that zoning system, born of agreement, suddenly utilized it in order to meet competition, rather than by tacit agreement." (PP. 906.907)

In this case, the arbitrary nature of the zones used by the respondents is even more apparent than it was in that case. As shown in the findings, respondent National maintains in St. Louis, Missouri, a large plant producing various lead pigments, and sales of white lead-in-oil and "keg products" in Missouri outside the city limits of St. Louis take the Zone 2 price, carrying a premium of 12½ cents per hundredweight over the par zone price. At the same time, shipments of these products are made to Minneapolis, Minnesota, at the basic or par price. A red lead and litharge plant is maintained by National in Dallas, Texas, where 75 cents per hundredweight is added on sales of such products in kegs or cans in that city. Another red lead plant is maintained by National in Atlanta, Georgia, which is in Zone 4 for "keg products,"

carrying a 37½ cents premium on price, and in Zone 2 for red lead and litharge sold as "dry products," carrying a 25 cents premium. Eagle-Picher maintains mining, smelting and pigment producing operations in the "Tri-State" field of Oklahoma, Kansas and Missouri, States which fall in Zones 5, 3 and 2, respectively, for "keg products." As the Court recognized in the Fort Howard Paper Company case, it is unreasonable to assume that this exaggeration of the basing point system could have arisen and been followed these many years without some understanding on the part of the respondents.

In connection with the use by the respondents of the agency or consignment method of selling, the various differentials employed, and the issuance of uniform suggested resale prices, the evidence discussed in the findings also discloses understandings and cooperative endeavors which, when considered in the light of the surrounding circumstances, leads the Commission to the conclusion that there was on the part of the respondents a mutual understanding and acceptance of an over-all plan and an intention on the part of each of them to follow it.

The Commission is of the opinion, therefore, and accordingly has found that there existed among the respondents an unlawful conspiracy to fix and maintain prices, differentials and terms and conditions for the sale of lead pigments, which conspiracy was carried out by all of the respondents through the various methods set forth in the findings.

Respondent National Lead Company, upon its organization in 1891, acquired the physical properties and stock ownership of sixteen different companies theretofore engaged in the business of producing lead pigments and other lead products, and at the same time acquired the controlling stock interests in seventeen other companies engaged in the lead pigments and related businesses. In 1906, it acquired all of the stock of United Lead Company, which had been organized in 1903 and which, in turn, had acquired thirteen other companies controlling many of the principal alloy factories and lead works of the United States, including the American Shot and Lead Company, which was itself a consolidation of the principal shot towers of the country. In the same year, National acquired Carter White Lead Company, of Chicago, Illinois, and Omaha, Nebraska, and in 1912 it acquired all of the stock of Mathieson Lead Company. The stock of Bass-Hueter Paint Company was acquired by National in 1916; the properties and assets of Hirst and Begley Company in 1919; the properties of Wetherill and Brothers in the 1930's; and some time between 1931 and 1933 National acquired the properties of the Evans Lead Company, a concern producing red lead and litharge in Charleston, West Virginia.

As a result of these acquisitions, culminating in the disappearance of over fifty competitors in the period from 1891 to 1935, respondent National emerged in a position of practical dominance in the Lead Pigments Industry. As an indication of this fact, the record discloses that during the period from 1936 to 1942, respondent National accounted for between 60 percent and 63 percent of the shipments of white lead-in-oil, from 30 percent to 35 percent of the dry white lead, basic carbonate, and approximately 50 percent of the red lead and litharge sold in the United States. In 1938, the percentage of white lead-in-oil and dry white lead, basic carbonate, combined, sold by this respondent was 58.8 percent of the total of these products sold, and in 1941, its share of the total sales of the same two products was 53 percent. The record further shows that after 1935 the only concern left in the lead pigments business with any practical ability to challenge National's supremacy was The Eagle-Picher Company, and that beginning in 1930 and continuing through 1935, efforts were made by National to acquire a controlling stock interest in this producer also.

In the meantime, National's relationships with American Smelting and Refining Company, the world's largest smelter and refiner of metallic lead, the basic raw material from which lead pigments are manufactured, is a matter of particular importance. In February 1906, at the time of its acquisition of the stock of United Lead Company, respondent National entered into a contract with American Smelting and Refining Company under the terms of which National acquired control of 85 percent of A. S. & R. Company's domestic production of pig lead, provisions for the price of which were included in the contract, and restricted its use of pig lead produced by its own subsidiary to 30,000 tons per year. Under the same contract A. S. & R. Co. secured 85 percent of National's requirements of common pig lead and all of its requirements of corroding pig lead, less so much chemical lead of other brands as National might need. This contract remained in effect until 1921, when it expired, whereupon the contracting parties made other arrangements. Simultaneously with the execution of the contract between respondent National and American Smelting and Refining Company, another contract was entered into between Hoyt Metal Company, a constituent company of respondent National, and American Smelting and Refining Company, under the terms of which National acquired control over all of A. S. & R. Company's output of antimonial lead.

Together, the above arrangements between National and A. S. & R. Co. contracted the supply of pig lead subject to bids and daily market fluctuations by more than 32 percent of the domestic production. They also fixed a monthly average price for pig lead which prevented the

basing of prices of this product on daily market fluctuations, and thus restricted opportunities of buying pig lead at lower prices. In addition, the agreements resulted in American Smelting and Refining Company taking no further interest in the manufacture of lead pigments.

In the circumstances, it is clear to the Commission that the purpose and effect of National's acquisitions, aided by its arrangements with American Smelting and Refining Company, were to substantially control the lead pigments industry and to regulate the price of the principal basic raw material used in the manufacture of lead pigments. It is equally clear that if in the future National should be successful in acquiring the capital stock control or the assets of The Eagle-Picher Company, or of any of the other concerns now engaged in the manufacture or sale of lead pigments, its position of dominance in the industry will be strengthened even more. The question whether National has already attained such a monopolistic position as to require its dissolution was not tried in this proceeding; nor is it necessary in support of the Commission's authority to act for this question to be determined. As the legislative history of the Federal Trade Commission Act clearly shows and as the courts have uniformly held, it was not the primary object of that Act to provide a means of breaking up an accomplished monopoly, but rather to enable the Commission to stop monopoly in its incipiency (*Federal Trade Commission* v. *Raladam Company*, 283 U. S. 643; *Fashion Originators' Guild of America, Inc., et al.* v. *Federal Trade Commission*, 312 U. S. 457). In 1920, the Supreme Court in the Gratz case recognized this Congressional intent by declaring that unfair methods of competition might include not only methods that involved deception, bad faith and fraud, but also methods that involved "oppression" or which are "against public policy because of their dangerous tendency to hinder competition or create monopoly" (253 U. S. 421, 427).

In the Beechnut case, decided in 1922, the Supreme Court made a distinction between combinations and conspiracies under the Sherman Act and unfair methods of competition under the Federal Trade Commission Act, and held that the practices of the single trader there involved was a "system" which "necessarily constitutes a scheme which restrains the natural flow of commerce and the freedom of competition in channels of interstate trade which it has been the purpose of all the antitrust acts to maintain," and that it was "within the power of the Commission to make an order forbidding its continuation" (257 U. S. 441, 454). And in the Cement Institute case, the Court stated the applicable law as follows:

"In the second place, individual conduct, or concerted conduct, which falls short of being a Sherman Act violation may as a matter of law constitute an 'unfair method of competition' prohibited by the Trade Commission Act. A major purpose of that Act, as we have frequently said, was to enable the Commission to restrain practices as 'unfair' which, although not yet having grown into Sherman Act dimensions would, most likely do so if left unrestrained. The Commission and the Courts were to determine what conduct, even though it might then be short of a Sherman Act violation, was an 'unfair method of competition.' This general language was deliberately left to the 'Commission and the courts' for definition because it was thought that 'There is no limit to human inventiveness in this field'; that consequently, a definition that fitted practices known to lead towards an unlawful restraint of trade today would not fit tomorrow's new inventions in the field; and that for Congress to try to keep its precise definitions abreast of this course of conduct would be an 'endless task.' See *Federal Trade Commission* v. *R. F. Keppel & Bro.*, 291 U. S. 304, 310–312, and congressional committee reports there quoted." (333 U. S. 683, 708).

Having found from the evidence before it that the acquisitions of competitors by respondent National, aided by its arrangements with American Smelting and Refining Company, have had the tendency and effect of restraining trade, suppressing price competition and tending dangerously to create a monopoly in the lead pigments industry, the Commission is of the opinion that it not only has the authority but that it is under a duty to prohibit the further aggrandisement of this respondent through additional acquisitions.

In addition to charging the respondents with the use of unfair methods of competition and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act, the amended complaint, in Count II, alleges that each of the respondents discriminates in the price of its lead pigments as between different purchasers, in violation of Section 2 (a) of the amended Clayton Act. Certain of the discriminations, it is alleged, occur as a result of the use of the zone method of pricing and selling to competing customers in the same zone. As stated in the conclusion appended to the findings, the Commission is of the opinion that on this phase of the case the complaint fails to state a cause of action. This is because the allegations are that each of the respondents sells its products in accordance with a delivered pricing system, but the alleged discriminations occur as a result of differing net prices received by each of the respondents at its factory. Thus, the complaint does not

show that the alleged unlawful discriminations as between purchasers located in the same zone occur as the result of differences in actual prices at which the respondents' product are sold. Certain of the other price differences resulting from the classification of customers to receive different quantity, trade and regional discounts either were no more than allowable differences in the costs of containers or were not shown to have resulted in any substantial adverse competitive effects. None of the practices involved in these charges is covered by the order to cease and desist.

As set forth in the findings, each of the respondents after 1934 sold its various lead pigments on the basis of flat delivered prices to customers located within designated zones, with uniform differentials added to these par zone prices in sales outside of the par zones. These inter-zone prices were in fact different prices, differing by the amount of the zone premiums, and could be justified only where the additional freight or other transportation costs exceeded the zone premiums. No such justification was made by any respondent.

The respondents since 1934 have also consistently quoted and charged different prices for their lead pigments as between carload purchasers and less-than-carload purchasers. In the case of oxides, the carload price has been based on American Smelting and Refining Company's price for common pig lead, and the price for smaller quantities has been 40 cents per hundredweight higher on quantities of five tons and 90 cents per hundredweight higher on quantities of less than five tons. In a substantial number of cases these price differences have been much more than the differences between car and less-than-car freight rates and have resulted in an excess charge over delivery costs as high as 88 cents per hundredweight against the purchasers of small quantities. In the case of dry white lead the price difference as between carload shipments and less-than-carload shipments has been one-fourth cent per pound. In most cases in which rail freight is a factor this price difference is justifiable on the basis of differences between carload and less-than-carload freight. However, no effort was made by any respondent to justify on a cost of delivery basis or otherwise the one-fourth cent differential as to customers in areas in which the mode of delivery is local cartage and rail freight is not a cost factor.

The record shows that large quantities of oxides are sold by the respondents to manufacturers of storage batteries and that large amounts of white lead are sold to manufacturers of mixed paints. During the period from 1934 to 1941, conditions in both the storage battery industry and the mixed paint industry were such that the

competitive effects of the respondents' discriminations were readily apparent.

The storage battery industry consists of more than 200 companies, ranging in size from multiple plant operations of the United States Electric Storage Battery Company and its subsidiaries, Willard and Grant, to small proprietorships whose total production may be less than 50 batteries per day. Certain of these manufacturers, including the larger ones, are located in the respondents' par price zone, while others competing with them in the sale of batteries are located in premium zones, where the delivered price of oxides to purchasers in lots smaller than five tons is almost $6 per barrel higher than the price to the manufacturer in the par zone purchasing his oxides in carload lots. The evidence is that during the period from 1934 to 1941 the storage battery industry was characterized by particularly sharp price competition and that a saving to a manufacturer of from 5 to 10 cents per battery on material costs often would mean the difference between a profit and a loss on low-priced batteries. So bad was the situation and so narrow were profits during this period, according to one small manufacturer from St. Louis (a purchaser of oxides in lots smaller than carloads), that "the only way we could get by and make a living was to use the old battery cases over again," that the competition of other sellers, including Sears-Roebuck Company (the battery manufacturing subsidiary of which was a purchaser of oxides in carload quantities), was such that his enterprise had gone "broke," and that his company could not manufacture batteries for sale at prices comparable with those offered at retail by Sears-Roebuck. By other evidence it is shown that during the period from 1935 to 1941 large battery manufacturers located at a considerable distance from the factories of the respondents regularly offered for sale storage batteries in Chicago, St. Louis, and other lead pigment producing centers, at prices which were actually below the cost of manufacture of comparable products to the smaller battery producers located in such centers.

In this situation, the respondents' price differentials between zones, together with the added amounts charged less-than-carload purchasers in both the par zones and the premium zones, making a difference in the cost of oxides of from 4½ to 6 cents per battery against the smaller battery manufacturers located in the premium zones, obviously has had the tendency to injure competition as between the larger and smaller manufacturers. Similar considerations lead to the same conclusion with respect to the price differences on sales of white lead, both dry and in oil.

In any case in which activity violative of the statutes administered by 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 take every precaution to preclude its revival. In many cases, and particularly in trade restraining conspiracies, a solution of this problem involves the consideration of many factors, including the history of the collective activity and the manner in which it originated. In this case, it was the purpose and the intent of the respondents during the NRA period to cooperatively revise the pricing practices in the lead pigments industry and as a principal part of this revision to establish a uniform zone pricing system. Detailed discussions of this matter were carried on in the meetings held in 1933 and 1934 at which the several respondents were represented. Maps showing the boundaries of the zones to be observed in fixing the delivered prices of the several products involved were distributed; and each of the respondents since that time, with minor variations, has followed the pricing system and adhered to the zone boundaries so discussed and shown on these maps. In this situation, and in order to effectively break up the conspiracy, the Commission in its order in this case is providing not only that the respondents cease and desist from "entering into, continuing, cooperating in or carrying out any planned common course of action, understanding, agreement, combination or conspiracy" to engage in the practices found to have been engaged in, but also that each of the respondents individually cease and desist from selling its lead pigments at prices calculated in accordance with a zone delivered price system "for the purpose or with the effect of systematically matching the delivered prices quoted or the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another." Such a prohibition is necessary, not because it is unlawful in all circumstances for an individual seller, acting independently, to sell its products on a delivered price basis in specified territories, but to make the order fully effective against the trade restraining conspiracy in which each of the respondents participated.

While the complaint did not in Count I attack the zone pricing practices of each of the respondents aside from the conspiracy, it did in effect allege that each of said respondents, acting pursuant to and in furtherance of the conspiracy, used the zone method of selling. It further alleged that each of them used that system "for the purpose and with the effect of enabling the respondents to match exactly their offers to sell lead pigments to any prospective purchaser at any destination, thereby eliminating competition between and among them-

selves." Thus, the prohibition against the use by each of the respondents of a zone delivered pricing system where the purpose or effect is to systematically match the quotations or prices of competitors runs directly against the pricing practices alleged to have been engaged in and is fully justified under the complaint. In the Commission's opinion, it is also appropriate to eliminate the effects of the respondents' price-fixing conspiracy and to guarantee against the continuation of that conspiracy.

The six respondents in this proceeding account for practically the entire production of lead pigments in the country, there being only a few small producers offering such products for sale in commerce in the United States other than said respondents. It is to those respondents that purchasers in commerce throughout the country must look for their supplies of lead pigments, and the respondents have the power to and do control the supply of lead pigments available. The maintenance of the delivered price zones and the quotation of delivered prices therein constituted the very cornerstone of the respondents' conspiracy. It was the adherence by each of them to this system of pricing that made the combination work. It was in this way that the matching of prices, one of the objectives of the conspiracy, was accomplished. Unless and until each of the respondents is prohibited from so adhering to the system and from so using the zones, the evils springing from the combination, one of which is to eliminate price competition, may well continue indefinitely. Unless the respondents, representing practically the entire economic power in the industry, are deprived of the device which made their combination effective, an order merely prohibiting the combination may well be a useless gesture.

The Commission is cognizant of the fact that identity of prices may result from either competitive or noncompetitive situations and that the intensity of competitive factors may vary in degree in any industry. Perfect competition, like the perfect price conspiracy, may be hoped for but is rarely obtained. The pricing pattern as used in this industry and as described in the findings as to the facts was not the result of one secret meeting in a smoke-filled room. It is the result of many business experiences and compromises over a period of years.

In the absence of direct admissions of guilt, allegations that sellers have established a zone pricing conspiracy usually present difficult problems for the finder of the facts. 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 buyer and this 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. That is the reason bids under that system have identical prices to the fraction of a cent. Under the basing point system 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. Under the basing point system delivered prices, while usually identical at each point of delivery, vary as between different delivery points in the same amounts as do the estimated costs of rail freight from the basing point. In a zone system of pricing the delivered price is the same for every point of delivery within a zone. A zone comprises several States. Once the price in the par zone has been established and the relative price graduations in the other zones have also been established, the system operates substantially automatically and with a minimum of conspiratorial guidance. What would be the situation if the Commission issued only the usual type of conspiracy order in this case—that is, to discontinue agreeing to fix prices, etc.?

After the order is issued the respondents might continue to use the same zone pricing system and when questioned by the Commission as to compliance with the order they might truthfully reply that they had not corresponded or conversed with their former conspirators since the issuance of the Commission's order to cease and desist. The respondents, however, would be enjoying all the fruits of their conspiracy—the rigged pricing pattern—and the momentum of the system, so firmly and maturely established, might last for some time unless effective measures to break it up were taken. That is the purpose of the paragraph of the order to cease and desist directed against each of the respondents individually. For purposes of illustration, let us assume that these seller-respondents were at one time struggling up the long and difficult hill of competition. Let us assume they were operating independently of one another, each one independently making his own decisions as to the production and asking price of his commodity. The road was hard. The potential rewards and the risks were great. There came upon the scene the siren song describing the advantages of "stabilizing the market" and the avoidance of what is sometimes referred to as "cut throat competition" but which very often is plain unvarnished price competition. The respondents succumbed to the blandishments of this siren song of claimed stability and were lulled into a false sense of security. A competitive industry is a self-disciplined industry. Competition also supplies the needed dynamics. A noncompetitive and therefore a non-disciplined industry becomes

lethargic and clings to the status quo. Under an expanding dynamic economy, an industry cannot maintain the status quo—it must either move forward or lose ground. 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 purpose therefore of this order is to aid in substituting for the competitive lethargy which has existed in this industry in recent years a condition of sharp and healthy competition. It is hoped that it will be effective in dissipating the dregs of the conspiratorial pricing pattern and that it will bring to this industry, not the gentlemanly understanding at the Country Club or the suave unexpressed agreements of the sales managers over a friendly Scotch and Soda, but the hard price competition of the market places which may not be gentlemanly but is usually fair, particularly to consumers. In such competition the weak might get hurt, but social security is not the province of this Commission. The only way to have competition is to compete. If after competition is restored any of the respondents can make a proper showing to the Commission that this prohibition or any other prohibition in the order is no longer necessary or desirable, the Commission will, of course, at that time take such action as may be appropriate in the light of the facts and the law.

The majority of the Commission believes that its power to take the steps it feels necessary to correct the evils found to exist in this industry cannot be seriously questioned. The courts in addition to recognizing the power of the Commission to stop any method of competition, even though individually pursued, if it has a dangerous tendency unduly to hinder competition or create a monopoly (cases previously cited), have also clearly indicated the extent to which the Commission may go in an effort to make its orders effective and to prevent evasion. In the case of *Hershey Chocolate Corporation* v. *Federal Trade Commission*, for example, the Court of Appeals for the Third Circuit in upholding the Commission's order notwithstanding attack on the ground that it went beyond the scope of the complaint, said:

"* * * the Commission's power would be limited indeed if it were restricted to enjoin unfair acts of competitors only as evidenced in the past. To be of any value the order must proscribe the method of unfair competition as well as the specific acts by which it has been manifested. In no other way could the Commission fulfill its remedial functions." (121 F. (2d) 968, 971–972.)

In the case of *Local 167* v. *United States*, 291 U. S. 293, 299, involving conspiracy among a number of defendants, the defendants sought

to eliminate from the injunction certain provisions enjoining conduct which they contended had not been proved to be a part of the conspiracy. The Court held—

"The United States is entitled to effective relief. To that end the decree should enjoin acts of the sort that are shown by the evidence to have been done or threatened in furtherance of the conspiracy. It should be broad enough to prevent evasion. In framing its provisions doubts should be resolved in favor of the Government and against conspirators."

In *National Labor Relations Board* v. *Express Publishing Company*, 312 U. S. 426, 435–437, the Supreme Court said—

"A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past.

"It is a salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts.

"Having found the acts which constitute the unfair labor practice the Board is free to restrain the practice and other like or related unlawful acts. * * * The breadth of the order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts * * * found to have been committed * * * in the past."

In the case of *Haskelite Mfg. Corporation* v. *Federal Trade Commission*, the Court of Appeals for the Seventh Circuit accepted and applied the same principle and held that the Commission could prescribe reasonable requirements and "guarantees against a recurrence of the past unfair and deceptive acts" and which "were calculated to aid in dispelling for the future the unfair and deceptive practices of the past" (127 F. (2d) 765, 766).

Nor is the relief to which the Commission is entitled limited to the performance of "other related unlawful acts," referred to by the Court in the Express Publishing Company case. Even acts lawful in themselves may be prohibited when they cannot be separated from the unlawful scheme of which they are a part. The applicable law has been settled by the Supreme Court. In the Ethyl Gasoline case (*Ethyl Gasoline Corporation, et al.* v. *United States*, 309 U. S. 436), the Supreme Court disposed of a contention that the decree should not extend to the prohibition of a device that could be lawfully used, as follows:

"Since the unlawful control over the jobbers was established and maintained by resort to the licensing device, the decree rightfully suppressed it even though it had been or might continue to be used for some lawful purposes. The court was bound to frame its decree so as to suppress the unlawful practices and to take such reasonable measures as would preclude their revival." (P. 461.)

Two years later in the case of *United States* v. *Univis Lens Company, Inc., et al.*, 316 U. S. 241, the Court again applied the same rule. It said that even assuming the validity of certain licensing restrictions, "these features are so interwoven with and identified with the price restrictions which are the core of the licensing system that the case is an appropriate one for the suppression of the entire licensing scheme even though some of its features, independently established, might have been used for lawful purposes." (P. 254.)

In view of all of the foregoing, the Commission is of the opinion that the prohibition in the order against the persistent, continuing and intended matching of prices through the use by each of the respondents of a zone delivered pricing system is particularly appropriate.

Dissenting Opinion of Commissioner Lowell B. Mason

Two important questions will be answered by what the reviewing courts do with the decision in this case.

First, does this agency have the same scope as a court of equity in the issuance of injunctions?

Second, may the implied conspiracy doctrine be extended to control the general pricing patterns of individuals unassociated with conspiracy? In other words, may the implied conspiracy doctrine be extended to prohibit non-conspiratorial but conscious parallel action?

The order in this case does both, frankly and without equivocation (a fact that should earn the gratitude of all interested in clarity).

Chairman Mead points out in his able opinion that the majority believes the Commission, like courts, may frame its decrees, not only to suppress unlawful practices, but may also take other measures to preclude any possible revival of prohibited acts.

The Commission does not have, and in my opinion it should not have, the general injunctive powers of a court. As was said by the Supreme Court in the Eastman Kodak case: "The Commission exercises only the administrative functions delegated to it by the Act, not judicial powers." [1]

The instant order would enjoin National Lead from acquiring competitors even if there was no adverse effect on competition, and it

[1] *Federal Trade Commission* vs. *Eastman Kodak Co.*, 274 U. S. 619.

would enjoin all defendants from "conscious price parallelism" [2] sans conspiracy.

If we may enjoin acts which are lawful, there will be no further occasion for the judicial process, so far as Government control of business is concerned. As it is now, we are unencumbered with the same rules of evidence [3] or the requirement of full disclosure of charges before trial that courts must observe. Moreover, our findings, embellished as they are with the stamp of expertise, do not attract the same vigilance reviewing justices give findings of *nisi prius* courts.[4]

With equity court powers, but untrammeled with their restrictions, we can make short shrift of those protections to men's liberties that courts so meticulously observe.

We may say with Lady Macbeth, "What need we fear who knows it, where non can call our power to account?"

On the side of speed there is much to recommend our replacing equity courts. On the side of justice there is much to give us pause, for the instant order assumes injunctive powers never dreamed of by the legislature that created us—authorities heretofore never invested in an agency already functioning as investigator, grand jury, prosecutor and petit jury combined.

We are not a court. We are simply a self-operating combination of a grand and petit jury.

Like a grand jury, if we believe the public interest warrants, we issue a presentment to be tried either before ourselves or our hearing examiners in lieu of a petit jury. But, sitting in our quasi-judicial robes, we may go no further than to inhibit those acts we found unlawful in our findings of fact while we sat in our expert jury box.

Thus we may prohibit a man, who advertised brass salt cellars as gold, from doing so again. By the same order, we may ban all related unlawful acts. But to say we may enjoin the man from ever selling salt cellars again is to exercise equity court powers not included in the budget of this agency.

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[2] This phrase has been so bruited about that what it means depends on who says it. One thing is certain, however. Everyone agrees it is not of itself illegal. See the Commission's agreed order in *Federal Trade Commission* vs. *U. S. Steel Corporation,* Docket 5508.

[3] The Commission is not "restricted to the taking of legally competent and relevant testimony."

[4] Federal Trade Commission findings will not be disturbed if on consideration of the whole record they are supported by "substantial evidence." *Universal Camera Corp.* vs. *National Labor Relations Board,* 340 U. S. 474. Equity court's findings are more vulnerable on appeal, and may be set aside under the "clearly erroneous" test. A reviewing court generally abdicates the right to review factual findings of a trial judge on the ground that it will not substitute its judgment on weight of the evidence for that of the judge who hears witnesses and observes their demeanor on the stand. In this respect we Commissioners are no better off than appellate courts. We do not see witnesses face to face. We only read the record of a case after it has been adduced before a trial examiner.

Thus we may prohibit defendants from conspiring together to fix prices but we cannot make one man's legal price illegal merely because others follow. Nor can we foreclose an entrepreneur from quoting any price he chooses merely because someone else got to the market place first with a similar price.

We may prohibit a company from acquiring a competitor if it impairs competition or tends to a monopoly, for that we know to be illegal; but we cannot gaze into a crystal ball and find as a fact today that any or all acquisitions in the near or distant future will be illegal.

The findings of fact and order based on count one violate this latter truism. National Lead is perpetually enjoined against acquiring any competitors. We have sought here to issue an injunction similar to those issued by courts.[5]

While the courts do not need to follow the statutory form required of the Federal Trade Commission by Section 7 of the Clayton Act, they have at times done so, as in *United States* vs. *Allied Van Lines* (D. C. N. D.—Illinois, No. 44–C–30), and in *United States* vs. *American Thread Company* (D. C. N. J.—Eq. No. 312). In these cases the courts limited their injunction to the acquisition of specific competitors named in the bills of complaint.

[5] The following equity court injunctions contain (in one or another respect) commands which neither Section 5 of the Federal Trade Commission Act nor Section 7 of the Clayton Act give the Federal Trade Commission the right to issue:

In *United States* vs. *National Cash Register Company* (D. C. S. C.—Ohio, Eq. No. 6802) the court prohibited defendants from acquiring any competitor engaged in the same kind of business as the defendants were engaged in, with a proviso that if it could be proved under a later petition that said acquired company could supplement the defendant's business, and that the such acquisition would not substantially lessen competition, the court reserved the right to give approval to such acquisition.

In *United States* vs. *Hartford Empire* (D. C. N. D.—Ohio, No. 4426) defendants were prohibited from acquiring the business of a competing firm, unless such acquisition was approved by the court.

In *United States* vs. *Foster Kleiser Company* (S. D.—California, Eq. No. R–31–M) defendants were prohibited from acquiring competitors *until further order of this court.*

In *United States* vs. *General Outdoor Advertising* (D. C. S. D.—New York, Eq. No. 46–50) the defendants were prohibited from acquiring any additional display plants (except by way of replacement of an existing plant now owned by the defendant) *where the purchase of such acquisition is primarily to exclude competition from the outdoor advertising industry.*

In *United States* vs. *Central West Publishing Company* (D. C. N. D.—Illinois, Eq. 3088—1912), the court prohibited the defendant from acquiring any other company engaged in the same type of business as defendant's.

In *United States* vs. *Eastman Kodak* (D. C. W. D.—New York, Eq. A–51) the defendants were enjoined from acquiring any competing plant, for *the purpose or with the effect of* restraining trade or creating an unlawful monopoly.

In *United States* vs. *California Associated Raisin Company* (D. C. S. D.—California, Eq. No. B–67), defendants were prohibited from acquisition of any competitor which would eliminate or decrease competition in interstate commerce.

On December 31, 1952, the Federal District Court of Massachusetts entered a consent judgment enjoining Hood & Sons and Whiting (milk companies) perpetually from selling the business of one to the other, and further enjoined the two Hood defendants *for a period of time* from acquiring any milk dealers in *specified localities.* Hood & Sons are also required to divest themselves of certain country milk stations located in Maine and Vermont, and to limit the use of others.

Generally speaking, however, equity injunctions are composed on the spot (played by ear, as it were) to fit the particular need of the case as the chancellor saw it. Take for instance, *United States* vs. *Gamewell Company* (D. C.—Massachusetts, No. 6150); there the defendant was prohibited from acquiring any company selling equipment (a) useful only in fire alarm systems, or (b) in connection with the manufacture of fire alarm systems.

As can be seen from a study of the above cases, courts often give blanket injunctions which forbid acquisitions of any corporations, even if future acquisitions, standing of themselves, might be legal.

There is no special harm in this because equity courts can maintain a continuing jurisdiction over the actions of their litigants. No one is called to book for disobedience of a mandate without having the opportunity to judicially challenge the same.

This same judicial safety valve is guaranteed defendants when the Federal Trade Commission issues a cease and desist order under the Clayton Act. But even while Section 7 of the Clayton Act in effect endows us with certain injunctive powers (we may order a company to disgorge stock or assets of a specific rival), our injunctive powers are circumscribed—as they should be for an agency holding both prosecuting and fact-finding powers. We may only condemn specific acquisitions. On top of this restriction, Congress permits judicial reviews, at any future time, of our Clayton Act orders.

Whether it be tomorrow, or a year's tomorrow, the Federal Trade Commission must go to a court for sanctions and penalties. So under the Clayton Act, Federal Trade Commission injunctions are always subject to judicial scrutiny.

But these judicial protections are skipped in the instant case by charging wrongful acquisitions under the Federal Trade Commission Act instead of under the Clayton Act,[6] Here the Commission evades the necessity of condemning specific acquisitions.

Here the Commission sidesteps certain presumptions of innocence defendants are entitled to when hailed before us under the Clayton Act. These presumptions of innocence would hold under the Clayton Act unless a preponderance of the evidence proved that:

1. The defendant acquired stock or assets of a certain company;
2. That company was in competition with defendant;
3. Such acquisition may have lessened competition or tended to monopoly, etc.

Lastly and perhaps the most vital curtailment of judicial protection found in the instant order is the fact that by arrogating general

[6] One must not confuse the Commission's order in *Western Meat,* Docket 456, with the instant case. The *Western Meat* order was not a general injunction. [See 5 F. T. C. 417.]

equity injunctive powers under Section 5 of our own Act, we forestall any judicial challenge to our commands sixty days after we have spoken. For the Federal Trade Commission Act is different from the Clayton Act in that its orders become final and not subject to judicial review if the defendants neglect to perfect an appeal within the time limit.

There are other fundamental dangers in endowing a quasi-judicial agency with equity court powers, as the instant case demonstrates. The law under which we operate has no statute of limitations. Statutes of limitation protect the citizen against charges based on ancient accusations, for the unreasonable delay in bringing a respondent to trial cheats him of the fair opportunity to marshall facts in his own defense.

The nexus of the first charge leveled at National Lead is based on events occurring from 1891 upwards. In a court of law, this evidence might be admissible as "background material"; yet it is difficult to imagine any court trained in the evaluation of evidence accepting the same with the hospitality the Federal Trade Commission has accorded it here. For the Commission in 1953 bases a perpetual injunction against defendant National Lead principally on evidence of consolidations taking place back in Benjamin Harrison's time.

What has been said with reference to the Commission's assumption of general equity powers to inhibit legal acquisitions applies with greater force to inhibiting legal pricing practices. For acquisitions are matters of single import, occurring but infrequently, whilst the right to set a price upon the fruits of one's labor is a continuous unbroken chain of rights that will be destroyed the minute one is commanded to change prices if he becomes conscious of the fact that others are charging the same.

Assuming for the sake of argument (and it is only on this basis that I can make such an assumption) that respondents conspired to fix prices, the Commission, exercising the administrative functions delegated to it under the Act, may only condemn and inhibit that which it finds to be illegal. In the instant case, however, it has not found individual conscious price parallelism sans conspiracy to be illegal. Nevertheless it has condemned conscious parallelism in its order to cease and desist.

Besides enjoining acts which the Commission has not found illegal, it has overstepped the injunctive authority approved by the Supreme Court in *Federal Trade Commission* vs. *Cement Institute* (April 26, 1948). There the defendants objected to paragraph one of an order which prohibited respondents from "quoting or selling cement pursuant to or in accordance with any other plan or system which results in

identical price quotations, or prices for cement at points of quotation, or sale, or to particular purchases by respondents using such plan or system, or which prevents purchasers from finding any advantage in price in dealing with one or more of the respondents against any of the other respondents."

These words would have a familiar ring when compared with the order in the instant case but for one important variation—the order in the Cement case was directed solely at conspiratorial concerted action; the order in the instant case is directed at individual activities of each of the respondents—which have not been found to be illegal.

In the Cement case, the court was careful to point out that "This paragraph, like all the others in the order, is limited by the preamble which refers to concerted conduct in accordance with agreement or planned common course of action," and observed that "It is thus apparent that the order by its terms is directed solely at concerted, not individual activity on the part of the respondents."

Thus far we have dealt with the question, has the Commission exceeded its authority in the instant order.

Now we need to look at another phase of the case. Do the facts support a finding of conspiracy to fix prices?

Let us identify the realistic elements of conspiracy and see if any of them match the facts in this case. Till now there has never been a quasi-judicial cataloging of the same, nor have the reviews of our cases by courts been of much help in this quarter, for courts act strictly on an *ad hoc* basis. Their decisions (like the decisions of consulting physicians reviewing the diagnosis of a practicing doctor) give validity to a first judgment but lack value as a general text. Even the eight most important Federal Trade Commission decisions in the realm of conspiracy [7] serve only to tell whether the evidence in each case was substantial enough to carry the Commission's order.

When administrative agencies keep gauging their decisions on what the courts have refused to reverse, there is a general decline—a watering down, as it were—of the preponderance of evidence rule, especially in matters tried before us, for we are not subjected to the discipline of supporting our issues before a separate and disinterested body.[8]

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[7] I nominate these eight: *Salt Producers Assn.* vs. *Federal Trade Commission,* 134 F. (2d) 354; *Federal Trade Commission* vs. *Cement Institute, et al.,* 333 U. S. 683; *Phelps Dodge Refining Corp., et al.* vs. *Federal Trade Commission,* 139 F. (2d) 393; *Milk & Ice Cream Can Institute* vs. *Federal Trade Commission,* 152 F. (2d) 478; *Bond Crown & Cork Co.* vs. *Federal Trade Commission,* 176 F. (2d) 974; *Tag Manufacturers Institute* vs. *Federal Trade Commission,* 174 F. (2d) 452; *Allied Paper Mills* vs. *Federal Trade Commission,* 168 F. (2d) 600; *Fort Howard Paper Co.* vs. *Federal Trade Commission,* 156 F. (2d) 899.

[8] There are hopeful signs that courts are becoming aware of this. See: *Standard Oil Co.* vs. *Federal Trade Commission,* 340 U. S. 231; *Ada J. Alberty* vs. *Federal Trade Commission,* 182 F. (2d) 36; *Minneapolis-Honeywell Regulator Co.* vs. *Federal Trade Commission,* 191 F. (2d) 786, certiorari denied by Supreme Court, December 22, 1952; *Tag Manufac-*

In this matter let us apply the criterion of conspiracy to the facts on the basis of the preponderance of evidence rule, and perhaps at the outset even indulge in the presumption of innocence, a presumption that has become quite outmoded of late.

What constitutes a conspiracy?

No one definition seems adequate, but certain sign posts are always found along the conspiracy road. History records them and literature dramatizes them so many times that he who runs can read.

In conspiracy there must be secrecy—a Macbeth whispering to his lady; a group of Boston merchants disguised as Indians, a Guy Fawkes hiding with his fellow travelers in the basement of a Westminster house; Madame Defarge knitting the names of aristocrats in her shawls behind the counter of a wine shop in Saint Antoine.

When it is no longer secret, it's no longer a conspiracy—it's a revolution. The farmers who stood on the bridge at Concord, Washington at Valley Forge, Caesar crossing the Rubicon, Luther nailing his thesis on the cathedral door—these people had dropped secrecy of purpose and were no longer conspirators.

Conspiracy is surrounded with a vague and villainous aura, treachery, hidden plotting, surreptitious meetings and codes.

The law condemns conspiracy because it secretly unites the strength and resources of many to a criminal end and is more tolerant of inferences and conjectures of guilt because its insidious means of accomplishment make the conspirators more difficult to apprehend.

Because the law requires less proof at the same time it imposes greater sanctions against conspiracy, implied conspiracy charges have become a practice peculiar to Anglo-American law. This is especially true when a quasi-judicial agency of the Government seeks to prohibit individuals from doing things which are not illegal.

The growing habit of issuing complaints and orders based on the fiction of conspiracy when no substantive offense can be charged against the single acts involved, constitute a serious threat to fairness in our quasi-judicial procedure.[9]

If secrecy be one of the sign posts of a real conspiracy, what are its elements in the instant case?

During NRA under the spurring of the Federal Government, the defendants were required to draft a so-called Master Code, and later a supplemental code dealing with prices and terms.

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turers Institute vs. *Federal Trade Commission, supra; Carlay Co.* vs. *Federal Trade Commission,* 153 F. (2d) 493; *Federal Trade Commission* vs. *Motion Picture Advertising Service,* 194 F. (2d) 633, argument completed in Supreme Court this term; *New Standard Publishing Co.* vs. *Federal Trade Commission,* 194 F. (2d) 181; *and Dearborn Supply Co.* vs. *Federal Trade Commission,* 146 F. (2d) 5.

[9] My apologies go to Mr. Justice Jackson for purloining his phraseology in *Krulewitch* vs. *U. S.,* October Term 1948, No. 143, and adapting it to the rationale in this case.

These codes were drawn at NRA meetings held under the aegis of the Federal Government. Following the pattern of every one of the other 557 industrial conferences, price reporting, terms and conditions of sale, methods of selling, freight and zoning problems, as well as hours and labor conditions, were discussed.

These meetings and discussions are the basis for the findings of conspiracy in this case.[10]

Conspirators about to commit crimes conceal their activities in order to prevent detection, conviction and punishment.

With this in mind, nowhere has the *reductio ad absurdum* been so complete as in the instant case. Here the foundation of the so-called conspiracy was first heralded in a two-day parade down the main stem of New York City, and on the front pages of every newspaper in the United States. While the evidence in this case does not recite the nation's clamorous and enthusiastic participation in that great experiment in a controlled economy (including price-fixing, production controls, etc.) known as NRA, yet I think we can take judicial notice of the era where the illustrious head of NRA once said:

We " * * * had to have an aroused militant public opinion echoed like a muezzim over the house tops. * * * There was scarcely a national organization with local representation that was not enlisted and responded enthusiastically. * * * The whole radio system of the country was donated. * * * Influential leaders of every party and creed sponsored the drive. * * * The President asked that every one make his loyalty to the program known by exhibiting a blue eagle with the slogan, 'We do our part.' * * * More telegrams and letters poured into Washington than ever before in the history of government. * * * The enforcement of the law (NRA) was in the hands of the whole people. * * * Like the draft act, the whole law is written to depend on cooperation and popular support. * * * The drive was to get every company under the blue eagle—mobilization of public opinion. Those who cooperated were soldiers against the enemy and those who did not were considered the enemy. * * * Climaxed by blue eagle parades all over the country, the one in New York lasting all one day and most of the next night, 96 per cent of commerce and industry was under NIRA." [11]

Today if people were caught doing secretly what in 1934 Government demanded they do publicly, they would be instantly charged

[10] Paragraph 10 (a) of the majority findings of fact: "The evidence in the record discloses that the meetings and discussions hereinabove referred to during the period from July 1933 to June 1934, resulted in understandings and agreements between and among respondents * * *."

[11] "The Blue Eagle from Egg to Earth" by Hugh S. Johnson, pp. 255, 261, 203, 250, 267.

with violating the antitrust laws for, as the Administrator of NRA during its heyday said:

"We did not repeal the antitrust laws. We simply ignored them."

"There is not one single code that is not a combination in restraint of trade." [12]

This last statement may be more rhetorical than true. At any rate, the testimony in the instant case discloses that although the code for the lead industry (with all the fixings above described) was approved on May 24, 1934, the respondents and other manufacturers of lead pigments were unwilling to report prices or to follow the terms of sale set forth in the code. They requested the Government and obtained a temporary exemption from that portion of the lead code dealing with the filing of prices and deviations from the terms of sale as well as from other requirements of Schedule A, and at no time was any agreement or understanding reached among any of the respondents as to the use of methods of selling, or zones.

From the evidence in the case it does not appear that this reluctance to fix prices under the prodding of the Federal Government was generated from any fear that the Government was masquerading as an agens provocateur, and a decade later might base a conspiracy charge against the defendants because of these NRA meetings. (See *Federal Trade Commission* vs. *National Lead*, Docket 5253.) On the contrary, in my opinion the evidence indicates a healthy and skeptical attitude on the part of the lead pigment entrepreneurs who had no stomach for tying their hands in the competitive battle, no matter how much the NRA wanted them to.

Nor am I willing to cast the Government in such a role that it prosecute in '53 for what it spent millions in '33 to accomplish.

Of all the criticism leveled at Hugh Johnson's NRA, no one ever charged it with playing decoy to 96 per cent of the entire economy. And we do a great injustice to that well-meaning though ill-fated crusade (which, incidentally, put millions of people back to work and added billions of dollars to the market stream) by basing a conspiracy charge on NRA activities at this late date. If we must do this, it seems we have left out as party defendant the greatest conspirator of them all—ourselves.

Nor do I see any comfort in the prosecution's contention that the defendants are not entitled to NRA immunity, for I see no occasion for immunity. Shall those who refused to don the price-fixing paraphernalia the Government offered them be more put upon than the avid participants?

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[12] "The Blue Eagle from Egg to Earth" by Hugh S. Johnson, pp. 172, 177.

Another sign post along the conspiratorial road is that a conspiracy not only must have a general aim but must be coupled with a specific vehicle. It might be said that we all have the general aim to to live, but it will not do to say we are all conspiring to live, or that all businessmen are conspiring to exist, though these may be the planned common purposes of everyone. There must be some central illegal theme, whether the plot be one to carry out through legal means an illegal end, or a legal end through illegal means.[13]

What sign post was there of a central illegal theme in the alleged lead conspiracy? Unlike historic conspiracies which are closely knit and tied to a definite time,[14] the testimony relating to the alleged lead conspiracy (outside of that dealing with NRA) floats vaguely over many years.

As to this vagueness, I have read the briefs and the relevant testimony, and have listened twice to oral arguments on the merits (as senior Commissioner I sat first with the old Commission, which did not arrive at a decision, and then with the new Commission). I have never observed a charge of conspiracy based on so nebulous a melange of testimony as here presented.

No one claims the evidence has to show "one secret meeting in a smoke-filled room," or any number of meetings, nor do all the conspirators have to be present at any one time and sign their names in blood. But a charge of conspiracy must mean something besides a handle on which to hang orders, else we falter too close to thought control.

In my opinion, some kind of overt acts which implement a meeting of the minds, is a "must" in a conspiracy. In a real conspiracy they are not hard to find.

The truth is, the average price-fixer is about as stupid as his aims. If ostriches really hide their heads in the sand to avoid detection—

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[13] Sixteenth Century England was full of conspiracies. Nearly every year had its own infamous example. In 1571 there was the Ridolfi plot, in 1585 Parry's plot, the Babington plot of 1586 (which was the basis for the execution of Mary, Queen of Scots). In close succession there were Polwhele's, Collen's, Squire's, Lopez', Yorke's, and Williams' plots. These conspiracies all had one alleged common purpose—the assassination of Queen Elizabeth, but they were different conspiracies, varying widely in details and timing. Each plot culminated with the participants either at the gallows, in exile, imprisoned, or escaped. But each conspiracy had its own separate design or theme, not part of the others.

[14] Sempronius in Addison's Cato exclaims:

"Conspiracies no sooner should be formed than executed.
* * * we must work in haste;
Oh think what anxious moments pass between the birth of plots
And their last fatal periods.
Oh! 'tis a dreadful interval of time,
Filled up with horror all, and big with death!
Destruction hangs on every word we speak,
On every thought, till the concluding stroke
Determines all, and closes our design."

real price-fixing conspirators outdo the silliest Struthio Camelus on earth.

They use the same old repetitious and obvious ways to maintain concert of purpose—correspondence (let no one tell you price-fixers don't write), trade convention and committee meeting minutes, association records, black lists, white lists, all vulnerable to statements against interest, statements of disgruntled employees, statements of injured competitors, etc.

But if there is no conspiracy but only a fiction on which to base an order against legal acts, confederating evidence will be vague. Because it is difficult to find? No, because it isn't there.

Such is the state of affairs in this case. After the governmental NRA public hearings of 1933 and 1934, there is no evidence that could be seriously slanted to conspiracy. What is relied upon is interesting principally because it demonstrates the quality of evidence on which the Commission bases its findings. For instance, there is direct and uncontroverted testimony that four years after the NRA (in the year 1937) an official of Eagle Picher ate lunch with a couple of men from National at their club. Backing up this astonishing (?) evidence of intrigue are further facts, such as, three years later (in 1940) Eagle-Picher was caught red-handed with a copy of National Lead Company's price list in its files. (It should have hid it in a pumpkin.)

After reciting these "evidences" of conspiracy, the findings of fact concludes there were "Various other instances of similar cooperation between these two competitors * * *."

To which I can only ask, "What instances and what cooperation?"

I doubt a reviewing court will be receptive to a finding of conspiracy on such nonsense. As for myself, I'll not play Othello to the prosecution's Iago on such a silly pretext as Picher's price list being found in National's drawers.

Adverting to the sign post of a general aim (and its vehicle) for the alleged conspiracy in restraint of trade—one of the specific vehicles to carry out this restraint is tied to the alleged conspiratorial adoption and concerted maintenance of a common price-fixing factor, namely, the planned common use of zone differentials for the averaging of freight charges. Another vehicle is the alleged conspiratorial agreement to use agency methods of selling where distributors were consigned stocks for resale at terms collusively agreed upon by the defendants. Besides these, there are collateral references made to usual and ordinary trade customs followed in all industries, with the inference drawn that these trade customs were concertedly agreed upon. I know of no industry engaged in the distribution of any homogeneous products that does not universally and consciously fol-

low a historic pattern grown up in its own trade, dealing with cash discounts, terms of delivery, duration of supply contracts, the use of similar types of containers, with reference to size, weights or amounts,[15] as well as customary methods of billing, shipping, etc.

As to the first vehicle—zone methods had been used by National since 1910, but in 1933 National worked out for its own use a pictorial map of its zones and the differentials it would charge its customers. This method of averaging freight costs was consciously followed by others, though not all.

As for the second vehicle—conscious parallelism in the use of agency methods—National Lead began using agencies in December, 1932. Eagle-Picher used them in 1933, and Glidden followed the same method six years later, but shortly after discarded them. Sherwin-Williams never used the agency plan at all, while National abandoned it in 1944.

Thus we have as the two alleged central themes or vehicles to carry out the alleged conspiracy, substantially similar factors used in quoting prices, and a substantially similar agency factor.

One of the factors was adopted by one company in 1910, by some of the others in 1933, and by another never at all.

One defendant adopted the second factor in 1932, another in 1933, another in 1939 (but dropped it in 1942), another never utilized it at all. To say the least, this is a lackadaisical conspiracy, with acts you could hardly call contemporaneous.

With the same kind of a timetable, the Boston Tea Party would have been held when Cornwallis was surrendering to George Washington. Macbeth would have sunk the dagger into the King after Birnam Wood had already removed to Dunsinane, and Guy Fawkes would have never seen the basement of Parliament at all.

Another sign post is the presence of "enforcers."

Most conspiracies have weak sisters, who must be cajoled or browbeaten into line. Syphas had no stomach for deserting Cato when other Roman Senators sought to deliver Cato into Caesar's hands. It took Sempronius to keep him in line.

Even that bloody old rascal, Macbeth, turned out to be a Casper Milquetoast at heart and nearly flunked the murder of the King. If it hadn't been for his Lady, he would never have got any further than Thane of Cawdor.

Whether it be the Blackdot of Blind Beggar Pew, or the knife of Long John Silver, in the world of pirates, or whether it be punitive

[15] Simple examples are: Beer is sold in bottles or barrels; cement in bags or carloads; apples in bushel baskets; oranges in crates—all consciously parallel. The same is even more obvious in the similarity of credit and cash terms in any one trade as well as the particular buying and selling seasons prevalent in specific industries.

basing points, fighting brands, black lists or association penalties, in the world of commerce—threats, force, intimidation, or things of such ilk are important sign posts along the conspiracy road.

For every "gentlemanly understanding" and "suave unexpressed agreements of sales managers" to fix prices, there will be twice as many eager beavers gnawing the legs off their competitor's share of the market. And it takes more than a "friendly Scotch and soda" to stop them. Some kind of an "enforcer" comes into play.[16]

I have yet to read the record in a real price-fixing conspiracy where "enforcers" (and their methods to hold the laggards in line) were not part and parcel of the case.

We have no enforcers here.

There are no such sign posts in this record.

The prosecution claims this is because the conspirators, having once discussed zones and agencies in 1933 under NRA, no longer needed to consort and confederate. To accept such an argument belies the Commission's label of expertness. The truth is, unless a price-fixing agreement is armed by an "enforcer" with some private punitive method at hand, the conspiracy lasts no longer than it takes a sales manager to get to the phone to whisper his own private price cut. And this isn't from one to twenty years.

To the fool who subscribes, the glitter in any price-fixing scheme is the hope that all competitors will follow it, but himself.

Added to the lack of conspiratorial sign posts (secrecy, specific vehicles to carry out a general aim, enforcers, etc.) is the uncontradicted testimony of officials [17] that there were never any agreements or understandings by their respective companies with other respondents or with any competitors as to prices, terms, or selling methods.

Without proof of conspiracy, the question naturally arises, why was complaint filed, the case tried and an order entered?

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[16] The common garden variety of enforcers are:

Punitive basing points—*Cement* case, 333 U. S. 683.

Kangaroo court to prescribe rules and punish violators—*Fashion Originators' Guild of America, Inc.* vs. *Federal Trade Commission*, 312 U. S. 457.

Policing of job requirements—Count I of *Rigid Steel Conduit* case, 168 F. (2d) 175.

Requiring advance notice of price changes—*U. S. Maltsters Assn., et al.*, 152 F. (2d) 161.

Requiring suppliers to follow white lists—*Wholesale Dry Goods Institute, Inc.*, 139 F. (2d) 230.

Prevention of diversions in transit—*American Iron & Steel Institute*, Docket 5508.

Blacklisting—*Arkansas Wholesale Grocers Assn.*, 18 F. (2d) 866.

Reporting of price cutters—*Beechnut Packing Co.*, 257 U. S. 150.

Boycott—*Chamber of Commerce of Minneapolis*, 13 F. (2d) 673.

Espionage—*Special Accounting Supply Mfgrs. Assn.*, 35 F. T. C. 430.

Issuance of private "certificates of necessity"—*Building Material Dealers Alliance*, 26 F. T. C. 142.

[17] Wormser (Lead Industries Association), McCarthy (National Lead), Sprague (Glidden), Bowlby (Eagle-Picher) and Brown (Sherwin-Williams).

In my opinion, the complaint was filed and the case stands or falls on the concurrent knowledge of defendants that the substantial price similarity of their lead pigments was arrived at by substantially similar pricing factors—in short—"conscious parallelism."

For over two decades economic theorists have sought ways to condemn conscious parallelism. The old Federal Trade Commission originated this crusade in the early 1940's and filed numerous complaints accusing defendants with charging prices for their goods with knowledge that others charged the same price. The first order against conscious parallelism to reach the court was *Federal Trade Commission* vs. *Rigid Conduit.*[18] The Circuit Court of Appeals sustained the order and the Supreme Court refused to reverse on a tie vote. However, the decision was a pyrrhic victory, for congressional and public clamor against this decision was so strong that no court proceeding has even been initiated to enforce it. Until now, all subsequent disposition of cases where conscious parallelism was alleged in the complaint have carefully avoided the type of order issued in *Rigid Conduit.*[19]

But now conscious parallelism again raises its bureaucratic head in this and a companion case,[20] tentatively and collaterally, but not directly, for the instant cases do not find conscious parallelism illegal in their findings of fact, but prohibit it in the orders to cease and desist. The order is justified on what I call a spiral rationale, circular in motion but not coming out where it started:

1. Conscious parallelism is not of itself illegal;
2. But evidence of conscious price parallelism may give the Commission the power to imply conspiracy;
3. Conspiracy is illegal;
4. With a finding of conspiracy, the Commission assumes the power to prevent its continuation by prohibiting conscious price parallelism;
5. Conscious parallelism is illegal.

Ignoring for the moment the impracticality of carrying out an order against conscious parallelism, and casting aside the question as to whether the Federal Trade Commission is endowed with such complete equity court powers, let us see if there are sounder ways of testing the economic validity of conscious parallelism than all this legalistic folderol about conspiracies that don't exist.

We need tests which can be applied on a factual basis.

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[18] *Triangle Conduit and Cable Company* vs. *Federal Trade Commission,* 168 F. (2d) 175 (7th Cir. 1948), aff'd sub nom *Clayton Mark Co.* vs. *Federal Trade Commission,* 336 U. S. 956 (1949).

[19] *Clay Products Association, Inc.,* Docket 5483, 47 F. T. C. 1256; *Clay Sewer Pipe Association, Inc.,* Docket 5484, 48 F. T. C. 202.

[20] *Chain Institute, Inc., et al.,* Docket 4878. See infra, p. 1041.

At the same time the Commission originated its drive against conscious parallelism as the enemy of free enterprise, a more realistic concept of competition was being developed by economists which held where even if pricing formulas were known and substantially paralleled (as here), "the significant test was to look for the independence and competitiveness of the rivals." [21]

Workable competition, as developed by Professor J. M. Clark, Dean Edward S. Mason and the late Professor Joseph A. Schumpter, as well as Professors E. P. Lernerd, M. P. McNair and F. S. Teele, placed the emphasis on the longer range aspects of a progressive economy; not on an assumed unchanged equilibrium of demand and supply, but on changes which included population growth, the discovery of natural resources, developments in technology, advances in the art of management, and many others. Stress was laid on the constructive role of entrepreneurs in expanding demand and improving products. National brand advertising was something more than an effort to insulate against the price raids of competitors. It recognized that the businessman often made investments of time and money ahead of current demands. Under the doctrine of workable competition, large business units may have put more competitive pressure on small units than was desirable, but every injury to a small competitor was not necessarily an injury to competition. Competition in a growing economy was bound to put pressure on inefficient competitors, whatever their size.

Some tests under the theory of dynamic workable competition can be well applied to the case at hand. I have lifted these tests bodily from Professor Meriam's thesis and attempted to apply them to the facts in the instant case.

As for the facts, there is no reason to lose the crux of this case in long histories of the defendants, any one of which would fill a volume. The principal defendants are National Lead, Eagle-Picher, Glidden, Sherwin-Williams, and International Smelting and Refining Company.

The products involved are different kinds of pigments made from lead. Defendants are engaged in other fields of commerce where they may be better situated, but in the lead pigment industry National is by far and above the important producer and distributor. It was and is, in the parlance of the trade, the price leader. Its national advertised brand has developed a large public acceptance. National sold 58.8 percent of the total market in 1938. It was the Kilroy of the lead pigment industry. No matter where a competitor opened up

[21] R. H. Meriam's "Bigness in the Economic Analysis of Competition," Harvard Business Review, March 1950.

a new plant, National was already there with a production point serving that market area. It owned more production points than all of the other defendants put together.

No matter what you call them, lead pigments are lead pigments. The cost of the raw material that goes in them, the cost of packaging and shipping are substantially similar. Moreover, all manufacturers are consciously aware of the fact that their cost and selling prices are substantially similar to each other. That is to say, the prices of lead pigments in Bull Hook, Montana, are substantially similar to one another in that town, and the prices in New York City are substantially similar to each other in New York.

This, the Commission contends, is conspiracy.

Serious students of workable competition have a less dramatic but, I believe, a more considered answer to the problem. Their answer does not lend itself to cliché thinking. In fact, it requires a working knowledge of the industry in question and a weighing of several economic facts, all at one and the same time.

Though National called the tune on its own prices, there were legal and competitive directions it could not ignore. Handling hundreds of items in an unlimited range of quantities and qualities, with innumerable delivery costs involving not only freight cartage but different packaging charges, it could not let its salesmen free-lance on its price quotations. It had to follow, if it would live, a pricing formula and hope that the formula did not present a big enough error to lay the company open to a Robinson-Patman Act charge of price discrimination (a hope that was not fulfilled).

Whether National liked it or not, the differentials between their raw material cost and what they received for finished lead pigments were not only shrunk by their competition's desire for a greater percentage of the market, but also by the clamor of lithopone, titanium oxide, zinc oxide, and leaded zinc oxide to take over the same market.

These rival commodities are produced in large volume by strong competitors (not parties to this suit).

Under these conditions, any conspiracy by the lead pigment manufacturers to fix prices would have been a bootless venture.

Eagle-Picher, next to National in importance, with four production points, produced approximately one-third as much lead pigments as National. Glidden with three, and Sherwin-Williams with one production point, while strong in the ready-mix paint business, were relatively negligible factors in the production and sale of lead pigments, their interests being mostly in mixing and selling their own paints.

Anaconda never engaged in lead pigments but in 1936 was acquired by International Smelting and Refining, who permanently suspended its lead pigment business in 1946. There is no reason to believe that it will ever reenter the business of the manufacture and sale of lead pigments.

Lead pigments are made from lead. In fine, there is so much lead in lead pigments that the cost of the raw material determines within a few cents the price of the finished product. The price of raw lead is the same for everybody in any place in the United States.

To this structure we must add another layer of verities. Lead is heavy. No matter where it is dug out of the ground, those who control the price of lead (a phenomenon not under attack in this case) see to it that prices are quoted f. o. b. New York. Raw lead costs all defendants the New York price plus what it takes to haul it to their plant.

This is the famous basing point system of pricing (also not under attack in this case). It is the grandfather of all systems—multiple basing points, zone systems, warehouse shipping points, and a host of variations. It is amoral in itself—there is nothing good or bad about it.

It is the use of basing points (or its offspring) as factors to fix conspiratorial prices [22] that has been condemned by the courts.

The same can be said of zone pricing. When zones are used by concerns who have only one point of production and lack the financial strength to maintain distributive outlets of their own, it is an effective individual means of instantly meeting the price of their biggest rivals who own plants and warehouses all over the country.

In the instant case where one company had production points spread all over the country and held its selling price at a small margin above raw material cost, price followers with one or a few scattered plants found it not only inconvenient but impossible to do other than to consciously stay within price ranges similar to the leader in each locality.

There is no controversy over this business fact. The defendants, while not all utilizing the same methods of computing prices, followed some price structure which came out with either substantially similar prices or at least followed in a tandem arrangement a price that was consciously and uniformly below. For the most part, the companies making lesser known products tagged a respectful 25¢ per cwt. behind National's and Eagle-Picher's advertised brands. Their actions were undoubtedly consciously parallel.

[22] See *Federal Trade Commission* vs. *Cement Institute*, Nos. 23–24, October Term, 1947.

If conscious parallelism be a crime, it is an offense that pervades our entire protoplasmic system, from the amoeba in the Dismal Swamp to the most esoteric Government agency in Washington. It is as much a part of the highest attainments of humanity as it is of the lowest and most despicable forms of vice. To say that one who practices it belongs at either end of the scale is to deny its universality. To condemn it is like condemning the tide.

To determine whether the prohibition of conscious parallelism sans conspiracy comports with sound economic principles in the instant case, the following conclusions are reached.

The evidence shows the general uniformity of price movements in lead pigments lags close behind the movement of its raw material cost. There is a leveling of the peaks and lows by averaging gains against losses in inventory.

The evidence shows price changes are initiated in no regular pattern. The price leader is National Lead in most cases, and its price changes are followed generally. The evidence shows a changing division of the market amongst the various competitors with the principal producer, National Lead, losing its former higher percentage of the total share of the market.

The evidence shows individual companies explore the possibility of increasing or decreasing their positions in a particular part of the industry, either geographically or by product, as determined by their own views on profit possibilities.

The evidence shows the various defendants in the lead pigments industry act independently on investing in processes or using new manufacturing techniques.

The evidence shows the industry does not function to hold an umbrella over the inefficient as is witnessed by the mortality of many old companies and the entrance of new companies and new competitive commodities in the same market.

The evidence shows that the members of the industry cannot adapt themselves to a status quo because the entrance of new countervailing products affords no condition favorable to stagnation.

The evidence shows that constant and active participation in technological progress, production improvement, expansion of markets, and output and capacity are present.

As to the final test on price quotations and pricing formulas—the evidence shows that National's position as the price leader makes price comparison easier for buyers, but conversely, no system of price quotations can make the price comparison easier for buyers without also making it easier for the sellers. Hence the question must be posed in terms of the actual price behavior of the industry. Because the

price of lead pigments is so closely affected by the price of raw lead, the price leader cannot avoid price reductions or price raises.

The evidence shows most price followers have consistently charged less than the nationally accepted brands, and have neither feared nor been deterred by the threat of retaliation for they have cut into the price leader's share of total market.

In a free enterprise economy, new or smaller entrepreneurs have three choices in their use of prices as a means to enter or enlarge their share of a market. They may price above, meet or price below their rivals.

From the business facts in this case it is evident National's competitors have only two choices—to meet or bid below. Under the present order the opportunity for exercise of private judgment in pricing their wares is cut in half.[23]

They may not meet.

They may only bid below National.

In the last analysis, this gives them no choice. It puts those who aspire to supplant the leader in a sort of second class business citizenship.

To condemn conscious parallelism sans conspiracy is to disarm the smaller competitor in his already handicapped battle against multiple-point producers.

I am against it.

As to the Commission's order pertaining to price discrimination, I concur.

[23] "Do forthwith cease and desist from quoting or selling lead pigments * * * in accordance with a zone delivered price system * * * with the effect of systematically *matching* the delivered price quotations or the delivered prices of other sellers of lead pigments * * *."