A D V A N C E ** C A U T I O N

ADDRESS BY
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BEFORE NATIONAL CONFECTIONERS ASSOCIATION,
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EVILS OF MONOPOLY AND UNFAIR TRADE PRACTICES

It is indeed a great pleasure to have this opportunity to discuss with your important industry certain competitive problems and the facilities of the Federal Trade Commission in relation thereto.

Yours is a truly national industry with an almost unanimous appeal, touching the lives and habits of nearly every man, woman and child throughout the country. Nearly all of our people have had some share in bringing about the consumption of nearly one billion five hundred million pounds of candy, which, statistics indicate, was the nation's candy consumption in 1935. The manufacture and distribution of candy and confectionery products give employment to thousands of persons and add substantially to the country's volume of trade and commerce. The welfare of your industry necessarily affects the country's economic welfare, and we of the Federal Trade Commission have a very real interest in promoting this particular and general prosperity on a sound and lasting basis.

It is both the purpose and the function of the Commission to retain the benefits of the advances made to date and to continue to improve business, individually as well as collectively. To achieve this improvement, we must frankly and courageously notice and take corrective action as to those trade practices which are harmful, or which block or stifle improvement, or which are unfair to industry as a whole, or to the consuming public whose patronage and good will are vital for the existence and growth of all industry.

Perhaps there never was a time when the need for holding fast to old-fashioned truths, ideals and ethics was so emphasized and so necessary as at present. The public's growing consciousness of its right to, and its apparently determined insistence on, truth in advertising, decent and honest trade standards, money's worth for money paid out, and a fair deal, certainly never before were so strong.

A fair and reasonable profit is vital to healthy business but the picking of the public's pockets, by means of monopoly and its attendant exorbitant prices, by the sale of inferior goods, by false advertising, and by use of numerous other methods of that ilk, is little less than criminal larceny, on whatever scale it may be practiced.

American growth and prosperity have been founded upon competition, which in our economic system, is relied upon to insure the availability of goods at

prices representing efficient cost of production and of distribution, plus a fair profit. No economic system employed in any other part of the world has been so productive of blessings to the people as has ours. This reward of prosperity and progress has been accomplished by initiative, by intelligence, by honesty, and by everlasting industry and effort, and always with a wholesome regard for the rights of others. A competitive economy tends towards freedom and expansion of business activity. Monopoly stifles and restrains it.

Under a fair competitive system, the allocation of income adjusts itself among the various classes of our economic body. When competition ceases, prices tend to rise above honest values. Purchasers have only so much money with which to buy. They cannot, and will not, long pay the enhanced prices which result from over-capitalization of industry and trade, inefficiency of production and distribution, or the marketing of undesirable merchandise. When their purses have been emptied, trading must cease until they can again return to the markets as purchasers. Thus a failure on the part of producers to maintain a healthy state of competition dries up the very wells of their prosperity and results, in the end, to their own detriment as well as to the distress and injury of the public. "The public" is not merely a figure of speech, but is a very real, composite whole of you, and of me, and of our families, friends, neighbors, and of all our people throughout the land. Inflicting damage upon one part of the public body necessarily damages the whole.

Much sentiment seems to exist, particularly today in various branches of industry, for the theory that the principal self-help of competitors is an effective agreement to eliminate competition. Let me assure you that such a policy is fallacious, unsound in principle, and doubtless contrary to law. Controlled and stifled competition breeds monopoly with its attendant evils of arbitrarily fixed prices unrelated to costs. It leads to gouging of the public. Ultimately it brings about the collapse of business. The inevitable effect of stifling competition is to prevent the maintenance of the public's purchasing power which is the key to business prosperity. Any general monopolization of the means of production and distribution restricts the market. The inability of millions to purchase, to consume, or to produce, is likely to be the reflection of such monopolization.

You producers and distributors have as much at stake in this matter as the average citizen. If monopoly is allowed to grow, you and thousands of other businessmen must eventually go down as victims.

The exact cause of the depression, which too many businessmen seem prone to forget in the first flush of better times, has been the subject of much analysis and discussion. In my own mind there is no doubt but that one of the very serious contributing causes was interference with the normal operation of competition and its subsequent effect upon prices, supply and demand.

Business became too much characterized by excessive prices, based upon unsound and over-capitalized company set-ups. Monopolistic enterprises charged more than the traffic could bear. By eliminating competition, by levying highest possible prices, or by means of frenzied finance, too many companies

were attempting to chart their way to easy profits. As an inevitable effect, fewer people were able to buy so as to keep the products of industry moving through the channels of distribution. The result, which was so often called over-production, might more properly have been termed under-consumption.

The streams of commerce must be kept open and free to insure national well-being. Questionable or unfair trade practices are among the main obstructions to this steady flow of commerce which too frequently interfere with the forces of supply and demand and disturb the competitive balance. I refer principally to those acts of unfair competition which the Commission and the courts have held to be unlawful, such as:

Misrepresentation and misbranding of product;
Defamation of competitor and false disparagement of his products;
Illegal price discrimination;
Illegal selling below cost;
Commercial bribery;
Illegal use of loss leaders;
Illegal rebating;
Inducing breach of contract wilfully to injure competitor;
Circulating threats of infringement suits in bad faith;
Full-line forcing to suppress competition;
Passing off, and
Imitation of trade-marks.

Each and every one of these practices, together with others of the same class too numerous to mention here, is as harmful to the perpetrator in the long-run as it is to the industry as a whole. Each unfair act, whether it be an isolated instance or but one of a successive number, exacts its toll, and the price is usually too demoralizing to ethical trade and commerce, too costly in its economic consequences, and too hurtful in its general effect, to be tolerated.

Each member should take his part in effective housecleaning within an industry. He should give his cooperation and full share of fair dealing to his fellow members and in return merit fair treatment and a proper respect for his rights. I have said elsewhere that life is a mirror; we see what we reflect; we receive what we contribute - no more and no less.

The work of maintaining a wholesome competitive condition in your industry and preventing the inception and existence of unfair trade practices rests largely upon yourselves. The Federal Trade Commission is your law enforcement officer, prepared to give friendly counsel and to support your efforts to conduct your business within the law of good conscience and fairness. The Commission frequently has been characterized as the "policeman of business". If one's purposes are lawful, he will find the Commission to be a helpful friend. If one's purposes be objectionable, he will find the Commission determined to perform its duty, which is to give effect to the purposes and objectives of Congress as expressed in the various statutes whereby it clothed the Commission with its mandate on the question of fair conduct in business. The Commission will help you to the limit of its power to attain all proper and lawful objectives. That is our message of cooperation and good wishes for the successful outcome of your endeavors.

The Federal Trade Commission is an administrative and quasi-judicial tribunal. It is one of the oldest independent governmental agencies. Having been functioning for the last 22 years, it has accummulated a fund of valuable experience and information. Its work is both legal and economic and falls naturally into several divisions. While it has powers of general investigation and certain other duties, a principal function of the Commission is to prevent "unfair methods of competition in commerce".

In this work the purpose of the Commission is to protect honest competition and the consuming public from harmful or unfair practices in commerce. As to "unfair methods of competition in commerce", the Commission functions under a positive mandate from Congress to prevent those subject to its jurisdiction from using such methods. Wisely, Congress did not attempt to define the exact meaning of the phrase "unfair methods of competition in commerce". The Supreme Court, in construing the intent and purpose of Congress in enacting the provisions of the Trade Commission Act, has said:

> "In the nature of things, it was impossible to describe and define in advance just what constituted unfair competition and in the final analysis it became a question of law after the facts were ascertained."

Therefore, every case must be considered on its own facts. Whatever the guise or character of an alleged unfair practice, it is the intent or substance or effect of such practice that counts, and we must concern ourselves with all the facts in the case.

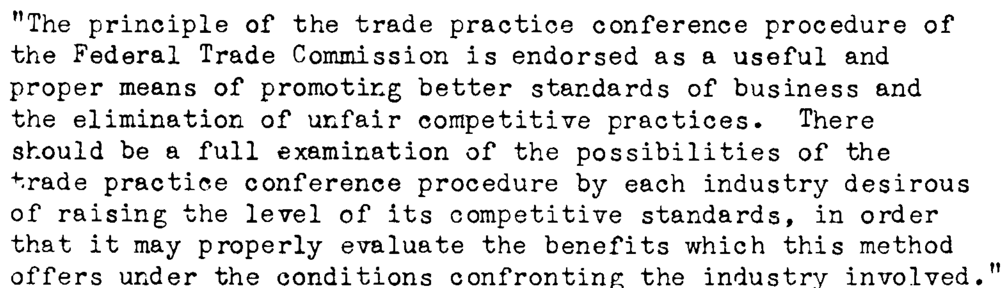
Generally, it has been our experience that unfair trade practices fall within two broad classes: (1) those which involve an element of fraud or dishonesty; (2) those not inherently dishonest, but which are restrictive of fair competition within the meaning of the anti-trust laws.

No honest businessman ever feared fair competition or asked for undue favor. The Commission subscribes to that tenet of good business and backs it to the limit of its powers. It has for its purpose the aiding of legitimate business in the establishment of standards of sound and honest business ethics and principles. It insists that the rules of business conduct must come within the law. In the eyes of the Commission, all members of a given industry are on the same basis of competitive rights, with equal opportunity for all. The role of the Commission is that of a disinterested and impartial umpire who insists that the game of competition be played fairly and within the boundaries of law.

The Commission's procedure is both informal and effective. Any interested party may write a letter to the Commission setting forth facts which he believes indicate a violation of law. Without disclosing at any time the identity of the complaining party, the Commission proceeds to obtain the facts and thereupon to form an opinion as to whether there is reason to believe that the party complained of is violating or has violated any of the provisions of the law and whether corrective proceedings would be to the interest of the public. The alleged offender in a proper case is afforded the opportunity to stipulate to cease and desist. If such fails of correcting the evil, the Commission issues a complaint stating its charges. If upon the evidence the

Commission finds that the facts bear out the allegations of the complaint, it may issue an order requiring the offending party to cease and desist from the practice in question. Right of appeal to the United States Circuit Court of Appeals for review or for enforcement of the order is provided by statute. Such cease and desist order proceeding is what might conveniently be termed the compulsory procedure for the prevention of unfair methods of competition.

The Commission, however, has made available to industries still another plan, that of a voluntary cooperative procedure whereunder members of an industry, with the aid of the Commission, may set up machinery for cooperation among themselves in establishing rules for the elimination of unfair methods of competition and trade abuses. This is known as the trade practice conference procedure of the Commission. It is this procedure as to which the United States Chamber of Commerce in its recent deliberations adopted the following resolution:



> "The principle of the trade practice conference procedure of the Federal Trade Commission is endorsed as a useful and proper means of promoting better standards of business and the elimination of unfair competitive practices. There should be a full examination of the possibilities of the trade practice conference procedure by each industry desirous of raising the level of its competitive standards, in order that it may properly evaluate the benefits which this method offers under the conditions confronting the industry involved."

Businessmen who are interested in taking voluntary group action to improve standards of ethical and fair practices in their industry will find the necessary governmental aid and assistance in the Commission to make such honest efforts workable and effective. Problems of general concern to an industry may be effectively dealt with. The unfair competitive practices of entire industries, many of which may be the unwitting results of over-zealousness rather than intentional wrongdoing, are corrected by such conference proceedings held under the auspices of the Commission. The adoption and observance of fair trade rules make unnecessary the institution of a multiplicity of compulsory proceedings against offending members.

Any group substantially reflecting the sentiment of the majority interests in an industry may file with the Commission an application for trade practice conference proceedings. There is no strict formality required in the application. The problems to be treated are studied by our staff, and informal discussions between the representatives of the industry and ourselves are usually arranged in the interest of a clear understanding of the questions and the assistance which may be rendered by the Commission in their solution.

If upon such application it appears that conference proceedings are feasible, in the light of all the circumstances, the Commission will authorize the holding of an industry conference. Official invitation is then extended to all members of the industry, inviting them to attend the conference and take part in the deliberations. At the conference the members propose trade practice rules and submit them to the Commission for its consideration and approval. In the Commission the provisions are studied in their relationship to the law and to determine whether they will accomplish constructive purposes and at the same time not work undue hardship or inequities.

Before final action is taken, the proposed rules are made available to all interested or affected parties upon public notice, affording them opportunity to express their views and suggestions, if any, and to have the same given due consideration. Thereafter the rules, if satisfactory, are approved by the Commission and officially promulgated as fair trade practice rules for the industry. Each member of the industry is supplied with a copy and afforded opportunity to signify his intention or willingness to observe the rules in the conduct of his business.

In this procedure the members of the industry have a voice in formulating their own regulations within the scope of the law and the public interest; and the rights of affected parties are amply safeguarded.

A question frequently asked is -- How can trade practice rules be enforced? Most of us know from past experience that unless rules in any worthwhile undertaking are enforceable, where necessary to bring about substantial compliance, they may become more honored in the breach than in the observance. Therefore means of effectuating compliance are quite important.

In approved rules under the Federal Trade Commission procedure, the means available for bringing about compliance have proved adequate in the test of experience. An explanation of enforceability brings up the matter of classification. Trade practice rules in their legal aspects naturally fall into two groups; and this classification is followed by the Commission. In

Group I the Commission places all rules which prohibit practices that are contrary to existing law. Therefore, those practices which are described as unfair and classified in Group I are illegal practices; and engaging therein subjects the offender to prosecution or corrective action under statute. Group I rules include all types of unfair methods of competition which are known to the law and which have been crystallized and determined by decisions of the courts and the Commission over the last twenty years. The number of these practices is large. You could easily count a score of important illegal business practices and by no means cover them all.

Group I rules also embrace those prohibiting all other types of illegal trade practices. Because Group I rules express law, it may be said that they are binding upon all as matters of law quite irrespective of the fact that the alleged offender may have refused to take part in the establishment of the rules or refused or failed to sign or pledge obedience thereto. We are all bound by the law whether we like it or not. And obedience to its requirements is not a matter of choice.

The enforceable "Group I" class of rules usually embraces all the more important rules for an industry. An average of 90 per cent of approved rules are of this class, and these have, in effect, the power and enforcement of the law behind them. Adequate means therefore are available to bring about compliance by compulsory proceedings against the recalcitrant few in cases where voluntary adherence is not forthcoming.

In Group II are placed rules as to which compliance ordinarily is voluntary. They are usually rules which recommend practices which the industry desires to foster and to promote as desirable in the interest of good business. The opportunity to adhere to such rules on a voluntary basis has proved to be adequate assurance of compliance. This may be accounted for by the fact that usually Group II rules are such that members of the industry generally are only too glad to follow, once they are assured, through Commission acceptance, that it is proper to follow, and to cooperate with others in observing them. If, however, Group II rules are violated in such a way as to bring about an infraction of the law, the offender may be subjected to compulsory corrective proceedings by the Commission. Experience has shown that observance of approved rules, whether of Group I or Group II is readily forthcoming and presents no great difficulty.

Trade practice conferences have proven to be of inestimable value to business. Roundly, two hundred industries have to date availed themselves of this voluntary cooperative procedure. It affords a means whereby the honest businessmen may join forces and cooperate among themselves, with governmental aid, to eliminate bad practices and keep competition on the high plane of justice and fairness. A combined effort to uphold the right is a powerful and effective weapon.

This procedure was the logical development of the Commission's efforts, in cooperation with business and industry, to protect honest competitors and the public from unlawful practices by an unscrupulous minority who are willing to resort to any scheme or method that gives promise of quick and ruthless profits.

The plan is not new or untried. It has been in use for many years and has long since passed beyond the experimental stage. In it, full protection of one's legal and Constitutional rights is adequately provided for and safeguarded.

We proceed on the principle that an unnecessary multiplicity of regulations is to be avoided; that American business has the right to grow and develop with as much freedom as possible subject only to the minimum of restriction necessary to insure protection of the public, and fair and honorable conduct in the exercise of every man's right to engage in legitimate activity.

In this work of correcting unfair trade practices, the applicable principle of law was well stated by the Supreme Court in a recent case when it said: "The careless and the unscrupulous must rise to the standards of the scrupulous and diligent." (F.T.C. v. Algoma Lumber Co., et al, 291 U.S. 67,79) Under our procedure the honest are afforded the opportunity of practising their ethics without being put to the disadvantage of contending with the unethical practices of the unscrupulous.

We receive many letters, from all sections of our business life, indicative of good fruits flowing from trade practice rules. Recently two such expressions came to my attention, one from an industrial counsel of wide experience and a deep student of business problems, who said:

> "It (the Commission) has made a real contribution to the guidance of industry in the trade practice conference rules approved under its present procedure -- which have been welcomed and approved by business men throughout the country."

In the other instance, the president of a large business concern wrote:

> "We feel that these conferences on trade practices are the most vital and worthwhile work any department in Washington can render the commercial interests. They are most timely and we are deeply interested in the results to be obtained."

The voluntary correction of bad practices is always preferable. Our Commission is only too glad to assist in bringing about such voluntary action. It avoids the necessity of calling into play compulsory legal processes against offenders, a procedure which is costly alike to business and the government. We all know how expensive litigation is and how disruptive it may be to business good-will. Friendly voluntary correction in the proper way serves the public interest and one's own interest.

In the Sugar Institute case last year, Chief Justice Hughes, speaking for the Supreme Court, recognized the value of voluntary cooperation in eliminating bad practices, when he said:

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

Self-correction of bad competitive practices through proper cooperative endeavor is a most wholesome thing. Its value in the avoidance of more expensive methods is tremendous. As a stimulant to sound and prosperous business its benevolent influence may be felt in every detail of operation. In it industry has much to gain and nothing to lose. I commend it to your consideration.

Robinson-Patman Act

Another major function of the Federal Trade Commission is the enforcement of the Robinson-Patman Act. This is one of our important anti-monopoly laws, and the most recently enacted. It prohibits certain forms of price discrimination and related practices. The Act is essentially an amendment to or revision of Section 2 of the Clayton Act, which was passed in 1914. Under the Clayton Act it has long been recognized that discrimination in price is one of the strongest weapons of monopoly. The dissolution suits against the Standard Oil and American Tobacco combinations strongly revealed this fact. There the Supreme Court specifically found that price discrimination had been an important factor in building up monopoly. Section 2 of the Clayton Act was intended to outlaw that method, and it was to strengthen such provisions of our antitrust laws that the Robinson-Patman Act was passed as the amending statute.

Under this new law price discrimination is now declared unlawful where the effect may be "to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them". There is also retained in the Robinson-Patman Act the provision of original Section 2 of the Clayton Act prohibiting discriminations in price where the effect thereof "may be to substantially lessen competition or tend to create a monopoly in any line of commerce".

On the whole, this new law in substance applies the philosophy which the Supreme Court held to underlie the Clayton Act, namely, to prevent practices, which if not stopped, tend toward monopoly. Its general effect is to enlarge enormously the ability of a competitor to protect himself when he is unlawfully discriminated against.

Proof of violation of the old law involved difficulties because of a proviso that discrimination in price was not unlawful when made "on account of" differences in the quantity sold, or which made "only due allowance" for differences in cost of selling or of transportation, or when made in good faith to meet competition.

In this respect the new law provides that upon proof that there has been a discrimination in price or in services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with the violation; and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination. It is also provided that the terms of the act shall not prevent the seller from rebutting the prima facie case proved against him by showing that his lower price was made or the services or facilities were furnished in good faith to meet an equally low price of a competitor or the services or facilities furnished by the competitor.

Also the new law extends the principle of non-discrimination into other areas than price as such. Whether they might be regarded as forms of indirect price discrimination under Section 2(a), or not, the Act specifically declares it unlawful: (a) To grant or receive, "except for services rendered", anything in the way of commission, brokerage, or other compensation to an intermediary who is acting for or is subject to the control of any party to the transaction other than the one paying such compensation; (b) to pay or agree to pay compensation to, or for the benefit of, a customer for his services or facilities, unless the same compensation "is available on proportionally equal terms" to competing customers; (c) to furnish or agree to furnish any services or facilities to one purchaser that are not "accorded to all purchasers on proportionally equal terms."

The act concerns itself with transactions in commerce, as defined in the Clayton Act, which, in general, means interstate or foreign commerce and commerce in the various territories of the United States.

It also is declared unlawful for any person "knowingly to induce or receive" a prohibited discrimination in price. This provision is very important to buyers, and the word "knowingly" appears to have been inserted for their protection.

In the application of the law, the Commission to date has issued twenty-one formal complaints. These cover all the more important phases of the law. Many of the cases have advanced to trial and to other stages along the path of legal procedure which they must follow to final decision. In one case, the brokerage concern complained of was dissolved by its organizers, and, upon proper showing of discontinuance, the proceeding was closed without prejudice to reopening it if the circumstances should warrant. The proceedings in the several other cases are being expedited with the view of having decisions by the Commission rendered at as early a date as possible. These proceedings may be considered in the nature of test cases on many disputed points. One group of cases presents alleged direct discrimination in price. This practice, it will be recalled, becomes unlawful in commerce when it injuriously affects competition and exceeds savings in cost of manufacture, sale or delivery resulting from differing methods or quantities in which the commodities are sold or delivered.

Alleged discrimination in the selling price of raw materials with the alleged effect of injuring competition between competing purchasers engaged in selling finished products, is involved in some of the cases. The question of the legality of certain functional discounts also is raised. Likewise, violation of the brokerage section of the act is alleged. Two cases involve the question of the buyer's responsibility under Section 2 (f).

Under Sections 2 (d) and (e) falls the question of the legality of discrimination in advertising or promotional allowances. Certain of the pending cases raise these issues, and decision thereon will be entered in due course. Also, in relation to Section 2 (d), several of the complaints attack the practice of paying "push money" in the cosmetic trade.

The Commission has, through formal and informal action, effected compliance with the statute throughout various industries. We know that many have radically revised their selling prices and practices, resulting in compliance with the law to the benefit of the small businessman and the public.

In this brief sketch I have undertaken a description of the Robinson-Patman Act, and not an interpretation. Neither the Commission nor I can appropriately express in advance an opinion concerning application of the act to the facts of particular cases. One reason for that policy is that the Commission is required by statute to exercise the quasi-judicial function of officially and formally deciding specific cases of alleged discrimination presented to it under the procedure specified by the statute.

In devoting thought to the Robinson-Patman Act, as we have, and also to the questions of monopoly and unfair trade practices, it is well to be ever mindful of the fact that the broad general policy of our law is one of fairness and of equality of opportunity to all. That policy is of fundamental importance to the American people. It must be preserved.

Conclusion

And now, as a sincere friend may I, in closing, suggest that we avail ourselves of the means and opportunities already at hand for constructive work in protecting honest business and the public. Let us rid ourselves of monopoly. Let cooperative action be within the law and directed not toward monopolistic ends, but to bring about elimination of harmful restraints of trade and unfair practices. Thus may we merit the good will and support of all fair-minded people and avoid the necessity of more exacting and more stringent processes which may be required in compulsory correction. Let us actively proceed to protect the public and honest business.

The rights of the individual should be protected, and individual initiative and capacity should have a fair chance to assert themselves honestly and efficiently, and receive the just reward to which they are entitled.

In these aims the interest of the public, of the government and of business itself should be one. We can join forces and advance together. The men and women of business and those of that great body we call the public can depend upon the Federal Trade Commission to aid in such laudable undertakings.

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