ADVANCE CAUTION ADVANCE

ADDRESS BY
HON. ROBERT E. FREER, MEMBER OF FEDERAL TRADE COMMISSION,
BEFORE
ANNUAL CONVENTION OF INTERNATIONAL BABY CHICK ASSOCIATION,
CONVENTION HALL, KANSAS CITY, MO.,
DURING MORNING SESSION OF
TUESDAY, JULY 21, 1936.

FOR RELEASE ON DELIVERY

FAIR TRADE PRACTICES

Ladies and Gentlemen:

It is my pleasure to bring to you the greetings and the good wishes of members of the Federal Trade Commission and its staff. While this is the first opportunity I have had to meet with you personally, certainly members of the Commission and its staff and of your industry meet on a common ground and have a common interest. As members of a great and important industry, as well as American citizens having at heart the interests of the country and of all of the people, you are interested in the Federal Trade Commission as an agency for the protection of honest business and the public. We, as members of that agency of Government, charged with certain definite responsibilities and duties, are interested in the welfare of your industry and in the happiness and well-being of those who are engaged in it or are dependent upon it.

Your industry has made great strides from its infancy of a few years ago, when only a few hundred chicks were sold in a year. You have so built up your business that today the farmers and chicken growers practically depend upon you to supply them with enough healthy chicks to feed the nation.

It is a particular pleasure for me to talk to the Baby Chick Industry upon the subject of fair trade practices, because you have sought advancement, not in the elimination of competition, but in the cooperative improvement of its standards under trade practice conference rules approved by our commission.

Probably all of you in this hall participated in the trade practice conference held at Grand Rapids about two years ago, or have been directly affected by what was done there.

While the old "setting hen" is today just another victim of technological unemployment, I trust that I may be pardoned for comparing you to her when I express the hope that you of the Baby Chick Industry, in cooperation with our Commission, will continue to "set" as often as necessary to "hatch" new standards of business conduct as time out-dates the old.

For the benefit of those present in the hall or on the air who have not read them, let us look at some of your rules. Rule 1 of your set of rules reads as follows:

"The making or causing or permitting to be made or published of any false, untrue or deceptive statement by way of advertisement or otherwise concerning the grade, quality, quantity, substance, character, nature, origin, size or preparation of any product of the industry having the tendency and capacity to mislead or deceive purchasers or prospective purchasers, is an unfair trade practice."

This is a general rule against misrepresentation. It provides protection for the public as well as for the honest members of the industry. Stated in Old Testament language, it would read:

"Thou shalt not deceive any customer as to the grade, quality, substance, origin, or otherwise, of thy merchandise."

Illegal Deceptive Practices

Deceiving a customer as to the grade, quality, quantity, origin, or otherwise, of any product sold is an unfair trade practice and a violation of law. By adopting a rule upon the subject you did not change the law. But you did serve notice that any member of your industry practicing deception, not only violates the law, but breaks faith with fellow members of the industry.

Another of the rules which is worthy of special mention is Rule 10. This rule prohibits selling below cost, with the intent and where the effect may be to substantially lessen competition or tend to create a monopoly or to unreasonably restrain trade. Consumers are apt to look at this rule as an encouragement to hold out for higher prices. It is not that. Providing his motives are proper, it is a producer's legal privilege to sell below cost if he wishes. However, few people will deny that selling below cost is an uneconomic practice. I daresay there are but a very limited number of those in the radio audience who desire to purchase baby chicks at prices which mean an actual loss to the hatchery.

There are in all sixteen Group I rules in the set of trade practice rules which your industry adopted. Others are directed against "advertising that very high yields of eggs are made by the flocks of the seller, when the said statement is only true as to a small percent of his flocks," selling all baby chicks as from blood tested stock when the truth is that only a very few are from "blood tested stock," "maliciously inducing or attempting to induce the breach of existing contracts," and "defamation of competitors by false imputing to them dishonrable conduct."

By way of explanation, I might say that in Group I are placed those rules which prohibit infractions of law; Group II rules are expressions of the industry on matters of policy.

In the Group II rules which the Baby Chick Industry adopted, we find such rules as these:

"Rule A. Failure to ship baby chicks promptly as agreed to the customer is condemned by the industry."

"Rule D. Advertising baby chicks at a price and later adding transportation charges without the consent of the purchaser, is condemned by the industry "

"Rule F. The practice of refusing to accept shipments of baby chicks ordered C.O.D. when the baby chicks received comply with the order, is condemned by the industry."

The first two of these Group II rules, you will note, protect the public and the third is a condemnation of a practice which is obviously very unfair to the industry. The members of this industry, or the members of any other industry, who try to play fair with the public, expect the public to likewise play fair with them.

Federal Trade Commission Powers and Duties

It may be pertinent at this time to give you a thumb-nail sketch of the Federal Trade Commission, together with some idea of its authority, and its powers. Such a picture should make for more intelligent cooperation between your industry and the Commission, which, as many of you know, is one of the older independent Federal agencies. It is an administrative and quasi-judicial body created by Act of Congress approved September 26, 1914, having a general power of inquiry and being charged with the specific duty of preventing unfair methods of competition in interstate commerce to the end that business and the public may enjoy the benefits of free and fair competition. Competition of the free and fair sort is the very life blood of trade. Our common purpose - your industry and our Commission - is the elimination of unfair competition.

The objective of the elimination of unfair competition is twofold:

1 - Protection of members of industry, generally, from the harmful, and often disastrous, effects of unfair practices by competitors.

2 - Protection of the public interest.

What is an unfair trade practice, and how does the Federal Trade Commission go about its elimination? These are pertinent questions, and certainly they are frequently asked. Congress, wisely, I think, did not attempt to define the term "unfair competition", because such competition may take any one of a thousand or more forms; in this ever-changing world what is regarded as one thing today may be looked upon as something else tomorrow. The Supreme Court 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 it becomes the duty of the Commission to consider and determine each case coming before it in the light of the facts pertinent to that particular case, subject, of course, to review by the courts.

The question as to how the Commission goes about its job of eliminating unfair competition, may be answered by a recitation of routine procedure. This procedure is both simple and effective. A case may originate in any one of many ways. However, the most common origin is through complaint of an unfair trade practice made by a competitor or consumer. This requires no formality. It may be done in a letter setting forth the facts, or it may be

done by a personal call at the Commission's offices in Washington or at any of its branch offices. In every case the identity of the complainant is confidential.

When a matter is brought to the Commission's attention it makes its own investigation. If the facts make it appear that the law is being violated, the Commission orders a complaint to be served upon the alleged offender. He is permitted a reasonable time in which to make answer, after which the case goes to trial. Hearings are conducted, evidence taken, briefs filed, and the case argued, much as in the ordinary court procedure. The Commission then takes the case under advisement and renders its decision. If the Commission finds that the facts bear out the allegations of the complaint, it issues an order requiring the respondent to cease and desist from the unlawful practices therein set out.

Trade Practice Conference Procedure

What I have just described is the formal, and formerly the only procedure of the Commission. However, to accomplish in a great many cases, by wholesale and at great saving to the Government and to business, what would require many separate and time-consuming trials on formal complaint, the Commission some years ago developed its trade practice conference procedure. 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 unscrupulous men who are willing to resort to any scheme or method that gives promise of dollar and cent profit. Under this plan members of a business or industry establish a voluntary code of business ethics, subject only to legal limitations.

Where there is a preponderant sentiment in an industry for such a conference, the Commission authorizes it to be held. At such conferences an industry agrees upon and submits to the Commission rules of two different types. Group One rules may be defined as rules a violation of which constitutes a violation of law. For infraction of such rules, members of an industry may be proceeded against by the Commission in a formal way. Group Two rules constitute a sort of code of ethics, voluntarily adopted by an industry. While these Group Two rules are not enforceable because they are not violative of any law, nevertheless the moral effect of their adoption by an overwhelming majority of the members of a business or industry is very great, and unfailingly results in elevating the standard of ethics within an industry.

Up to this time, the Commission has sponsored nearly 200 such trade practice conferences, and they, without exception, have been of great help to business and industry, and of incalculable value to the public, whose interest it is equally the Commission's duty to conserve and protect.

In contrast to the view which some members of industry take that competition itself is an evil, it is refreshing to read in the January 1936 issue of the Hatchery Tribune an article entitled "Competition in 1936". It begins with the sentence,

"What businessman has not wished for freedom from competition?"

The article then quotes the following from a recent advertisement of the Kalamazoo Vegetable Parchment Company, manufacturers of parchment and wax paper at Parchment, Michigan:

> "Thank God, we say, for competition . . . Afraid of competition? Not on your life! It makes us make better papers; it compels us to give better service; it is good for our customers and it is good for us. Dime stores aren't happy until a competitor moves in next door. Drug stores flock to adjacent corners as if their lives depended upon it — and they often do!"

It goes on to say:

> ". . . obviously there are forms of competition which punch below the belt line, but good, clean competition, like good, clean fighting in the ring, stimulates interest, and helps the participants rise to new heights of achievement."

The Commission's trade practice conferences are not held to eliminate competition, but to eliminate by cooperative action those forms of competition which "punch below the belt line," in conformity with the view that the welfare of industry and the country depends upon free and fair competition.

The trader who engages in monopolistic practices is employing an unfair method of competition, just as much as the man who induces the breach of a contract, misbrands his goods, or engages in any other of the category of unfair business methods.

Restraints of Trade Violative of Common Law

It was unlawful to restrain trade at common law. Restraint in the early days took the same form that it does today, namely, price fixing and the use of unfair methods. In 1758, in England, a suit was filed against the Salt Works at Droitwich for a conspiracy to raise the price of salt there by entering into an agreement whereby they bound themselves under penalty of two hundred pounds not to sell salt under a certain price. The information was granted, and Lord Mansfield declared:

> " . . . that if any agreement was made to fix the price of salt or any other necessary of life . . . by people dealing in that commodity, the court would be glad to lay hold of an opportunity, from what quarter soever the complaint came, to show their sense of the crime; and that at what rate soever the price was fixed, high or low, made no difference, for all such agreements were of bad consequence and ought to be discountenanced . . ." (King v. Norris, et al, 2 Kenyon, 300)

The Federal Trade Commission Act in general and the trade practice conference in particular, are predicated upon the thought that "an ounce of prevention is worth a pound of cure."

In our American economy competition is relied upon to insure the availability of goods at prices which represent cost of production plus a fair profit. In order to insure the free play of the competitive theory, the anti-trust laws were passed to protect competition from all artificial

restraints and the Commission was directed to stop many restraints in their incipiency as unfair methods of competition.

In an article appearing in Fortune Magazine for November 1935, Dr. Harold G. Moulton, President of the Brookings Institution said:

> "If we want a static society, we can have it by permitting policies of price maintenance to check the flow of real income to the masses. If we want a dynamic society, we shall have to remove such basic obstructions to the wide distribution of the fruits of our productive plan.
>
> "The more acute minds within the ranks of business leadership have perceived these basic facts of the economic process and recognize that only by acting in conformity with them can they assure the long-time success and growth of their own companies as well as administer to general wellbeing. The voices of such business leaders are still sounding in the economic wilderness of lesser men who have not as yet seen their place in the larger picture of national economic progress."

Under a free competitive system the allocation of income among the various groups of producers adjusts itself. When competition ceases, prices tend to rise above the value given. The public, however, can pay only so much for over-capitalization and inefficiency. Purchasers have only so much money with which to buy. They can pay only so much tribute. When their purses are empty, trading must cease until they earn more money. Thus a failure on the part of producers to maintain healthy competition results in the end to their own disadvantage as well as to the disadvantage of those from whom the tribute is exacted.

I am not changing the subject when I speak of anti-trust laws. The Federal Trade Commission Act is one of the anti-trust laws.

To quote Senator Cummins, Chairman of the Senate Committee which reported the Act in 1914, the Federal Trade Commission Act was designed "to more effectively put into the industrial life of America the principle of the antitrust law, which is fair, reasonable competition, independence to the individual and disassociation among the corporations."

Many members of industry labor under the misapprehension that the only self-help for competitors is an agreement to eliminate competition. Emphatically that is a mistaken notion. It is neither valid in law nor sound in principle.

The fact that it is the policy of our laws to protect and promote the competitive system does not mean there is not a great deal of room for cooperative endeavor. In its decision condemning certain concert of activities by the Sugar Institute, the Supreme Court suggested that -

> "cooperative endeavor may appropriately have wider objectives than merely the removal of evils which are infractions of positive law."

The worst enemies of the capitalistic system are those who overlook the obvious benefits of taking cooperative action toward correcting the abuses which have rendered their business unprofitable under the competitive system, and seek rather to eliminate all price competition.

Cooperative Effort Necessary

To restore the flow of commerce -- free, undammed, and unrestricted in the great rivers and in the smallest tributaries, industry and the Commission must work together to knock out the dams and keep the channels clear. Industry, with the Commission's help, can build up the side walls, deepen the channels, and increase the tributaries of the streams of commerce by adopting and observing fair trade practice rules.

If illegally destructive price cutting, if misbranding, if misrepresentation through advertisement or otherwise, are stopped; if large distributors are precluded from arbitrarily favoring certain customers; if there is an end to commercial bribery, inducing breach of contract, the setting up of bogus independent concerns to obtain secrets of competitors, of securing the product of competitors and advertising it at greatly reduced prices to injure the reputation of the product, exclusive sales and purchasing arrangements, rebates and preferential contracts, acquisition of exclusive or dominant control of machinery or goods used in the manufacturing process; if there is an end to stealing copyrights, imitating patented articles, merges to suppress competition, or interlocking directorates to create monopoly; if there is an end to these and to the other practices of a similar character which, by judicial decision have been condemned from time immemorial, -- and if there is an end to combinations in restraint of trade -- that is, combinations in which members of an industry voluntarily agree to restrict unduly their own right to trade, as well as those combinations which effect an undue extraneous restraint, -- is it not reasonable to expect that the forces of supply and demand once more will function as they did before these evils disturbed the competitive equilibrium?

If you have been reading the papers recently, you probably noticed some comment about a report which the Federal Trade Commission made to the President concerning collusive bidding by certain steel producers.

I wish to close by repeating a statement made by the Commission in that report to the President:

> "If the capitalistic system does not function as a competitive economy, there will be increasing question whether it can or should endure. The real friends of capitalism are those who insist on preserving its competitive character."

I thank you.

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