ADDRESS BY
HON. ROBERT E. FREER, MEMBER OF THE FEDERAL TRADE COMMISSION
OPENING THE TRADE PRACTICE CONFERENCE OF
TOILET GOODS MANUFACTURING INDUSTRY
HOTEL ASTOR, NEW YORK
THURSDAY, NOVEMBER 19, 1936, 10 A.M. E.S.T.

I am pleased to meet with you here today, and I am hopeful that our meeting will be productive of great good for your industry. Members and staff of the Federal Trade Commission are always glad of an opportunity to meet with the members of an industry such as yours, and to assist in any way consistent with the law and their official duty in the friendly solution of its problems.

This conference typifies a great cooperative movement in industry. I might even refer to it as a cooperative corrective movement, since it has for its objective the correction or the eradication of such trade abuses and unfair trade practices as may have grown up through the years, and which, unless they be abated or eliminated, may threaten the health, if they do not destroy the life, of the industry they poison.

It is not my purpose to trespass long on your time or patience. Nevertheless, I wish to say something to you about the trade practice conference procedure of the Federal Trade Commission, by reason of which you are assembled here today to discuss, and, I hope, adopt, trade practice rules for your industry.

The Federal Trade Commission has a duty to prevent unfair methods of competition in commerce. The principle upon which the Commission's Act is based is that honest competitors always should be free to conduct their business in a fair and honorable way, and that the general public should be permitted to enjoy all the benefits flowing from free and fair competition. In the Federal Trade Commission Act, Congress directed the Commission to proceed against persons engaged in unfair methods of competition whenever "it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public".

Machinery is provided in the Commission for attaining this objective, through compulsory proceedings, where they are necessary, and through voluntary, cooperative effort, whenever possible. Compulsory correction often requires formal complaint, presentation of testimony, arguments, and briefs, and finally, sometimes, appeals to the courts for review or enforcement of the resulting cease and desist order.

To accomplish in a great many cases, by wholesale, and at a great saving both to the Government and to business, what would take many separate and time-consuming trials on formal complaint, the Commission sought and finally developed its trade practice conference procedure.

Under this plan, members of a given business or industry take the initiative. As has been done in the case of this conference, a substantial majority of the members of an industry, either through their trade association, through a committee of the industry, or in some other way, request the

Commission to sponsor a trade practice conference. If the Commission finds that there is a preponderant sentiment in the industry for such a conference, it authorizes one to be held. At that conference, the industry submits proposed rules for the Commission's consideration.

Rules proposed may be of two different types. Group I rules may be defined as those which proscribe methods of competition which are unfair under the law.

While the Federal Trade Commission Act does not define unfair methods of competition, the courts have generally looked to see if the method of competition in question is either opposed to good morals because characterized by deception, bad faith, fraud or oppression, or is against public policy because of its dangerous tendency unduly to hinder competition or create monopoly.

In the last twenty years, many business practices have been definitely determined to be unfair methods of competition by the Commission and the courts. The Group I rules afford an industry means of having these practices cataloged in plain language and of entering into an agreement for their cooperative and simultaneous elimination.

Approved Group I rules are enforceable against any offender engaged in interstate commerce, regardless of the fact that such offender may not have taken part in the conference or agreed to abide by the rules. This is true, because practices proscribed by approved Group I rules have been held to be illegal in and of themselves under existing court decisions.

Group II rules may be styled a voluntary undertaking by an industry to further elevate its business standards. True, the Commission cannot be called upon to enforce these standards, since their infraction is not violative of law; still the very fact that a substantial majority of members of an industry sit down together and agree among themselves that they urge the adoption or the condemnation of this or that practice has an important moral weight; and, provided they are within the law, the Commission will receive such rules as expressions of the industry.

While a trade practice conference is one of and for an industry, it is the Commission's concern to see that the rules are conducive to fair play and within the law. The Commission can neither approve nor receive as expressions of the industry any rules which directly or indirectly sanction or condone unfair or illegal conduct.

The Commission has sponsored nearly 200 trade practice conferences for a great variety of business and industry. It is very gratifying to report to you that the rules adopted at these conferences, whether Group I or Group II rules, have been observed by an overwhelming majority of the members of those industries.

There has been recently a very substantial increase in the number of industries seeking sponsorship by the Commission for such conferences. This I regard as a most healthful sign. It is substantial evidence that American

businessmen are uniting in lawful cooperative efforts to raise their standards; that they not only wish to observe the law, but actively to cooperate in promoting practices fair to all branches of their respective industries and to the public as well.

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ADDRESS BY
HON. ROBERT E. FREER, MEMBER OF FEDERAL TRADE COMMISSION,
BEFORE THE "INQUIRENDO"
WEDNESDAY EVENING, DECEMBER 9, 1936.

Introduction

As a prologue to an informal discussion of the functions of the Federal Trade Commission, it might be well that I sketch for you a little of its background and practical operation.

The Federal Trade Commission Act, as one of the Anti-trust Laws, is founded on the legislative policy of maintaining fair and free competition.

Under the Sherman Act, conspiring and combining to suppress competition was made a criminal offense, and a private right to triple damages was given to injured parties. Under the Clayton Act, certain specific methods and practices were made illegal.

Believing that unfair methods of competition were always weapons of monopoly and restraint of trade, the Congress, in 1914, established a commission to prevent their use in interstate commerce.

Nature of the Commission

The nature of the commission thus created has been aptly described in a recent opinion of the Supreme Court:

> "The commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative. Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts 'appointed by law and informed by experience'." (Rathbun, etc. v. U. S., 295 U. S. 602.)

Functions of the Commission

While the Commission has certain other powers and duties, its chief functions are:

(1) To prevent unfair methods of competition in commerce;

(2) To make investigations upon the direction of the President, the Congress, upon the request of the Attorney General, or upon its own initiative.

(3) To enforce certain sections of the Clayton Anti-trust Act, including an amendment to Section 2 of that Act recently enacted and generally referred to as the Robinson-Patman Act.

Duty of the Commission as to Unfair Methods of Competition

At common law, the unethical competitor could continue to use an unfair practice unless and until an equity court would issue an injunction on the plea of a competitor whose property rights were being irreparably injured. Under the Federal Trade Commission Act, the Circuit Court of Appeals has directed that:-

> "The Commissioners,.....are to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or a tendency to injure competitors directly or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been denounced in common-law cases." (Sears, Roebuck & Co. v. Federal Trade Commission, 285 Fed. 307.)

Common sense and experience dictate that society should not permit practices ordinarily "regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly". (Gratz Case, 253 U. S. 421)

It was to fill these needs of a governmental body to order competitors to cease and desist from such unfair and monopolistic practices in their incipiency that the Federal Trade Commission was created and charged with the specific duty of issuing a complaint, whenever the public interest requires it, against any person, partnership or corporation whom it has reason to believe is using any unfair method of competition.

Meaning of the term "Unfair Methods of Competition"

The Supreme Court, in the Schechter decision, pointed out that the term "unfair methods of competition" in the Federal Trade Commission Act is "an expression new in law", and one which "does not admit of precise definition, its scope being left to judicial determination as controversies arise". "What are 'unfair methods of competition'," said the court, "are thus to be determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest". (A.L.A. Schechter Poultry Corp. vs. U. S. 295 U. S. 495).

The Commission's jurisdiction extends only to interstate commerce; and the Commission is to proceed against an unfair practice only when "it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public". A third limitation pointed out by the Supreme Court is that a trade practice, before it falls under the interdiction of the Act, must result in the suppression of or injury to competition.

Formal Procedure - Orders

Procedure by and before the Commission is both simple and effective. A case may arise in any one of several ways. The most common origin is through complaint of an unfair trade practice made by a competitor or a consumer, who claims to have suffered injury because of the practice in question. No formality is required to bring a matter to the Commission's attention. It may be done by letter, setting forth a simple statement of the facts, or it may be done by personal call. The Commission treats all such matters in confidence, and in no case is the identity of the complainant made public. The reason for this is obvious.

When complaint of an alleged unfair or unlawful trade practice is made to the Commission, it directs an independent investigation to be made by its staff. The person, or firm, against whom such complaint is lodged is, of course, put on notice and given full opportunity to present his side of the case.

After ascertaining and assembling the facts, the Commission determines whether or not there is a basis for further action. If there is reason to believe that the law probably is being violated and that a proceeding by it would be to the interest of the public, it directs the issuance of a formal complaint setting forth the charges, and this is served upon the alleged offender, who is given a reasonable time within which to make answer. If he decides to contest the proceeding, hearings are ordered, testimony is taken, and a report of all the facts made to the Commission, which then weighs the evidence and renders its decision. If it finds that the law has been violated, it makes its findings of fact and issues an order, requiring the respondent to forever cease and desist from the unlawful practices in question.

Judicial Review

If the respondent feels that the Commission's order is not justified, he has the right of appeal to the Circuit Court of Appeals of appropriate jurisdiction. That court passes upon the validity of the Commission's order. The Commission's findings of fact, if supported by evidence, are conclusive on the court. If it finds the order to be valid, it directs the respondent to obey it. Should he fail to do so, the court may proceed as in a case of contempt of court.

There is, too, the right of petition for certiorari by either the Commission or the respondent to the United States Supreme Court, and during its history, a good many of the Commission's cases have reached that tribunal.

The processes of the Commission are injunctive or preventive, not punitive. The success of this procedure has been indicated by the fact that during the nearly twenty-two years since the Commission was established, it has seldom had to appeal to the courts to discipline respondents for disregarding its cease and desist orders.

Informal Procedure - Stipulations

What I have described is the Commission's formal procedure. It frequently appears that a merchant or manufacturer is engaging in minor unfair trade practices through ignorance of the law. Where such an offender displays a willingness to abide by the law, the Commission offers him an opportunity to sign a stipulation of the facts and an agreement to cease and desist from his illegal practices. The filing of this stipulation results in a suspension of the action. This practical method of settling such minor cases saves time and eliminates unnecessary expense both for the Commission and for the persons complained of.

Investigations

The second principal function of the Commission is that of making investigations. In this function the Commission is successor to the powers and duties of the Bureau of Corporations of the old Department of Commerce and Labor. Its investigations have been a very important factor in the legislation of our country in the last twenty years. The Meat Packing Report, made during the World War, led directly to the passage of the Packers and Stockyard Act, as well as furnishing a basis for the Packers' Consent Decree which, among other things, occasioned the withdrawal of the packers from the wholesale grocery trade. Similarly, the report of the Commission upon Corporations in Export Trade led to the passage of the Webb-Pomerene Act. The recent chain store inquiry played an important part in the passage of the Robinson-Patman Act.

The Commission's inquiries have had a corrective influence on economic life. Publicity given to many unsavory situations has often, of itself, accomplished what neither the federal or state governments had been empowered to do. Long before the conclusion of the Commission's recent inquiry into power and gas utilities, numerous voluntary reductions of service charges, construction fees, and the like were made by holding companies. These resulted in reducing the costs of operating companies by millions of dollars, and a large number of rate reductions to consumers were made effective by these operating companies. Past experience suggests the possibility that it would have taken a huge corps of lawyers, engineers, and accountants a decade or so to enforce such a "purge" as the utilities found expedient in the face of informed public opinion.

Robinson-Patman Act

The Robinson-Patman Act, approved June 19, 1936, is essentially an amendment to Section 2 of the Clayton Act and is directed primarily against price discrimination. Evidently recognizing price discrimination as being one of the strongest weapons of monopoly, the Act quite clearly undertakes to outlaw it as such.

Section 2, as it originally appeared in the Clayton Act and has been construed by the courts, prohibited price discrimination where the effect thereof might be to substantially lessen competition in any line of commerce or tend to

create a monopoly therein. Under the amendment enacted in the Robinson-Patman Act, price discrimination is declared unlawful not only under these circumstances, but also 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".

The act of course exempts differentials in price which make only "due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing quantities". Moreover, there is a provision authorizing the Federal Trade Commission to fix the quantity limits beyond which discrimination shall not be permitted "where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce".

The old Section 2 contained an express provision exempting price discrimination which was "made in good faith to meet competition". This language is no longer retained in the law. There is, however, a provision in the Robinson-Patman Act affording a defense to an alleged discriminator by his showing that the discrimination was made "in good faith to meet an equally low price of a competitor or the services or facilities furnished by a competitor".

Provision is also made for non-interference with certain rights one has in relation to making differentials justified by differences in cost of manufacture, sale or delivery; in selecting one's customers in bona fide transactions; and in making price changes from time to time in response to changing market conditions or marketability of goods.

In this connection, it may be of interest to note that the burden of showing that a proven discrimination is of the type coming within one of the exceptions to the statute is upon the discriminator. In other words, the discriminator must shoulder the burden of establishing such definite defenses as are specified in the statute; for example, proof that the discrimination was made "in good faith to meet an equally low price of a competitor".

The Robinson-Patman Act also singles out and condemns a number of specific discriminatory practices, notwithstanding the fact that these practices might be considered as indirect price discriminations. It is declared 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".

It is also declared unlawful for any person "knowingly to induce or receive" a prohibited discrimination in price.

These few remarks are made merely by way of general description of the act and in no sense as an interpretation. Neither the Commission nor I can undertake to express an informal opinion concerning application of the Act to the facts of a particular case. The Commission is required by statute to exercise the quasi-judicial function of officially and formally deciding actual cases of alleged discrimination presented to it under the procedure specified by the statute. In this procedure the facts and the competitive effect must be ascertained after trial or stipulation upon formal charges and after full hearing of the accused. Advance interpretations or opinions upon hypothetical situations by those charged with administering the law are often misleading and impracticable.

In order, however, to be of as much assistance to business as possible in getting its bearings under the new statute, the Commission immediately upon passage of the Act created a committee headed by our Chief Counsel and composed of some of our ablest lawyers and economists to study the Act and to confer with and advise within necessary limits those affected by it. From all over the country business men and lawyers have come to Washington to consult this committee and hundreds of others have written us in regard to the effect of the Act upon their activities. We have undertaken to be as helpful to those who desire to comply with the law as is possible to be, consistent with our duty as an enforcing agency.

Moreover, the Commission has taken every means at its command to expedite cases in an effort to reach decisions as promptly as possible for the guidance of industry. Thus far it has issued 10 formal complaints under this statute involving about twenty respondents. These complaints bring up some of the most controversial points in the statute. For that reason it might be expected that decisions thereon will be of great importance in clearing up doubtful questions.

It is not possible for me to state what the decisions might be, nor do I wish by any means to be understood as indicating in the slightest what my opinion or the view of the Commission might be when the time comes to decide these cases. Our decisions will be based wholly upon the record, including the pleadings, the evidence or stipulated facts, as it will have been presented to us when the cases reach the point where they are ready for final argument and decision. We have no preconceived notion of what the decisions might be and are maintaining an open mind.

The first group of complaints issued under the Robinson-Patman Act involves the sale of cheese products by Kraft-Phenix Corporation, and the Shefford Cheese Company. This is small package goods usually delivered by truck or wagon to local retail stores. It is alleged that certain differences in price are allowed on a graduated scale based upon the number of pounds purchased.

For example, on loaf cheese the schedule is alleged to be as follows:

5 to 29 lbs..... base price

30 to 149 lbs..... 1¢ less per lb.

150 to 749 lbs..... 2¢ less per lb.

750 lbs. or more..... 2½¢ less per lb.

There is also involved the question of the validity of a 5% discount on package cheese and salad products on lots of $5 worth or more in which one delivery is required, and the validity of a 5% discount on purchases of $100 worth per week to group buyers where store-door delivery is made and one billing only is required. Doubtlessly one of the questions which will be posed in the proceedings is whether or not the alleged discrimination is justified as quantity differentials which are the result of savings in cost of manufacture, sale or delivery.

In Docket 2937, complaint has been issued against Bird & Sons, Bird Floor Covering Sales Corp., and Montgomery Ward & Co., involving the question of discriminatory discounts or differentials to mail order houses. It is alleged that Bird linoleum products were sold in mail order house purchases and in mail order retail store purchases at more favorable discounts or net prices, which resulted in illegal discrimination against other competing purchasers.

The complaint against the United States Quarry Tile Co., Docket 2951, brings up the question of functional discounts where certain customers receive wholesale discounts but sell both at wholesale and retail in competition with retailers who do not receive the wholesale discount. It is alleged in the complaint that:

> "The discrimination in price herein referred to, is brought about by the respondent allowing a 15% discount on all glazed tile, regardless of quantity sold to so-called wholesalers, which discount of 15% is denied to tile contractors. The said so-called wholesalers are in fact retailers in that they resell said tile to the ultimate consumer and are thereby in direct competition in the sale of tile with the tile contractors."

The complaints against Standard Brands and Anheuser-Busch (Dockets 2986 and 2987) present the matter of alleged discrimination in the sale of yeast as a product used in the baking industry. The question of the effect of the alleged discrimination in the manufacture and sale of another product is raised. Moreover, there appears the question of the validity of differentials based on cumulative purchases.

The alleged differentials per unit are infinitesimal, but in the higher brackets which apply to large purchasers the differentials are said to be quite substantial. For instance, bakers who purchase 3,000 pounds per month pay 18¢ per pound, while those taking 10,000 pounds per month pay only 14½¢ per pound or 20% less.

The remaining 4 Robinson-Patman complaints involve the toilet goods business and twelve named manufacturers. They bring up the question of push money and the use of hidden demonstrators in marketing toilet goods as a form of indirect price discrimination. These complaints also cover the practices as alleged violations of Section 5 of the Federal Trade Commission Act.

Push money, as you may know, is money used by a manufacturer to subsidize the salesperson of a certain retailer to push that particular manufacturer's brand although the salesperson may have several manufacturers' products to sell. The use of hidden demonstrators is a somewhat similar practice involving the employment by a manufacturer of a sales person to demonstrate and sell his products in the retail store of his customer without disclosure of the fact that such clerk is not an employee of the retailer but is paid by the manufacturer for the purpose of inducing the public to buy his brands which are sold over the counter in competition with the brands of other manufacturers.

Trade Practice Conference Procedure

To accomplish in a great many cases, by wholesale, and at a great saving both to the Government and to business, what would take many separate and time-consuming trials on formal complaint, the Commission sought and finally developed its trade practice conference procedure.

Under this plan, members of a given business or industry take the initiative, and either through their trade association, through a committee of the industry, or in some other way, request the Commission to sponsor a trade practice conference. If the Commission finds that there is a preponderant sentiment in the industry for such a conference, it authorizes one to be held. At that conference, the industry submits proposed rules for the Commission's consideration.

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There has been recently a very substantial increase in the number of industries seeking sponsorship by the Commission for such conferences. This I regard as a most healthful sign. It is substantial evidence that American businessmen are uniting in lawful cooperative efforts to raise their standards; that they not only wish to observe the law, but actively to cooperate in promoting practices fair to all branches of their respective industries and to the public as well.

Adam Smith once said that: "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public or in some contrivance to raise prices." Through the Commission's supervision over trade practice conferences, this recent observation of the Supreme Court, in the Sugar Institute case, is, I believe, more appropriate:

> "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."

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