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COMPLIANCE WITH COMMISSION ORDERS

Address of

Hon. Edward F. Howrey, Chairman
Federal Trade Commission

Before the

AMERICAN INSTITUTE OF WHOLESALE
PLUMBING AND HEATING SUPPLY ASSOCIATIONS

New York, N. Y.

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Mr. Chairman:

It is a distinct pleasure to take part in the national convention of the American Institute of Wholesale Plumbing and Heating Supply Associations.

I have read with interest and profit the history of the Wholesale Associations in your industry and noted the progress since the formation of your first association some sixty years ago. I congratulate you upon your steady and successful growth. I agree with you that the country's economic structure, if indeed it could long survive without the products of your industry, could not survive in comfort.

In my first statement as Chairman of the Federal Trade Commission, made in June at Ann Arbor, I discussed certain phases of the Commission's activities which needed immediate revaluation.

Some of the suggestions there made have already been put into effect; others will follow. Although it has not been possible during the few months I have been in office to revaluate and make improvements in all phases of the Commission's activities, we have made a substantial beginning.

Today I want to discuss another and very important phase of the Commission's work which needs improvement, namely, compliance with existing Federal Trade Commission orders.

In looking through a recent bulletin of your association, I found the following: "It was brought out at this meeting [of the Board of Directors] that Trade Practice Rules which were adopted in 1929 are still effective. Apparently our industry had forgotten such rules existed and it was not until Mr. Dennison recalled that 24 years ago the Federal Trade Commission had promulgated a set of Trade Practice Rules for the plumbing and heating industry that anyone had the faintest recollection of their existence."

This is hardly a question of the law's delay of which Hamlet complained - it is more nearly a case of law's labor lost. But perhaps I should remind you that the lost is sometimes found. Only last term the Supreme Court, in the Thompson restaurant case, resurrected a District of Columbia civil rights statute that had been "lost" or "buried" for more than three-quarters of a century.

Mr. Dennison's statement, I confess, made me pause and consider. If you (and apparently the Commission) had forgotten the very existence of the trade practice rules for your industry, how many others had done the same? Worse than that, how many individual respondents had forgotten, or were ignoring, F.T.C. stipulations and formal orders to cease and desist?

I reflected on these questions and decided to make an immediate study of Federal Trade Commission compliance. The scope of such a study is indicated by the fact that the Commission has outstanding about 180 sets of trade practice rules, 8,400 stipulations and 4,500 orders to cease and desist. They cover almost every segment of American business. They range from baby chicks to steel and steel products, from liver pills and cancer cures to printing, insecticides, products of mines and wells, lumber and wool products, automobiles, foodstuffs, building materials, and a thousand other items of every type and description.

A substantial number of the 4,500 orders prohibit industry-wide price fixing, conspiracies to restrain trade, price and service discriminations, and other monopolistic and predatory practices violative of the Federal Trade Commission and Clayton Acts.

In order to highlight the problem of compliance let us deal today, not with trade practice rules or stipulations which involve voluntary compliance, but with formal orders entered by the Commission after extended hearings, briefs and argument.

The prosecution of a single case of this type requires the expenditure of much time and money. Each order to cease and desist represents a substantial investment of public funds, the anticipated dividends of which are promotion of competition, savings to consumers, and the protection of business (large and small) from unfair competitive practices. The orders are not an end in themselves. They are a means to the attainment of the Commission's ultimate objective - the preservation of our basic system of private enterprise.

In final analysis, the American people are, or should be, the beneficiaries of each such investment. It is the duty of the Commission not only to make sound investments but also, and of equal importance, to protect those investments.

As stated by the Supreme Court, the Commission "has a continuing duty to prevent unfair methods of competition and unfair or deceptive acts or practices in commerce. That responsibility ... is not suspended or exhausted as to any violator whose guilt is once established."

With respect to most of its orders, the Commission does not now know with any degree of certainty whether or not the respondents have continued to be in substantial compliance. An initial report of compliance is required within 60 days of the date of the order, but no further check is made unless and until a complaint is received from an outside source.

With a staff of hundreds of lawyers and economists working to obtain effective orders in the public interest, the Commission has employed a mere handful to see that the orders are obeyed. It has depended, in large part, on surveillance of respondents by competitors

and local Better Business Bureaus. Only when prodded by complaints from these and other sources has the Commission checked on compliance.

I am certain that many of the Commission's orders have proved ineffectual because of this inadequate review. In 1946 a House Committee reported:

> "What seems to be really crucial is that the Federal Trade Commission appears to go ahead issuing the cease and desist orders in the expectation that an ... order and a compliance report solve the problem. Without any independent and systematic follow up the Commission is unable to answer (a) is the respondent actually complying with the precise terms of the order, or (b) has the respondent found another means by which to continue the same offense through a technique not covered by the original F.T.C. complaint."

This failure of the Commission has likewise been scored by representatives of small business. They have found that the promise of relief from unfair competitive acts given by an order to cease and desist has too often proved illusory because of inadequate follow-up.

It is useless, I submit, for the Commission to enter orders unless it sees that they are obeyed, either voluntarily or through appropriate enforcement proceedings against those who deliberately or willfully ignore them. Failure to obtain compliance constitutes a waste of money, has a demoralizing effect on competitors and members of the public who have been injured, and tends to encourage a general disregard by the business community of antitrust and trade regulation laws.

This past softness of the Commission in its program of compliance is contrary to my purpose to bring about a vigorous and fair enforcement of antitrust and related statutes. One of my primary aims, as Chairman, will be to correct this situation.

Accordingly, I have this day appointed a qualified staff committee to survey and make recommendations to the Commission for improved compliance procedures.

This committee consists of Mr. PGad B. Morehouse, Assistant General Counsel, Mr. William Snow, Director of Stipulations, and Mr. Alex. Akerman, Jr., Secretary of the Commission. I have asked Mr. Akerman, a former judge, to serve as Chairman.

As a part of the Committee's study, and as a partial frame of reference, I suggest the following:

First. An analysis of the Commission's powers under the recent decision of the Supreme Court in United States v. Morton Salt Company (338 U. S. 632). In that case it was established that the

Commission has authority to require corporations, subject to cease and desist orders, to file special reports of compliance; that failure to file may result in mandatory injunction and money forfeiture. The feasibility and authority of the Commission to inaugurate and maintain a systematic and continuous check on compliance by use of periodic special reports should be studied. Perhaps the orders themselves should incorporate a requirement for supplemental compliance reports at specified times.

Second. A survey of past antimonopoly orders to ascertain if they are still adequate in form and scope. Changed conditions may have rendered some of them inoperative or insufficient to accomplish the Commission's purpose of promoting and maintaining competition. In such cases they should be reopened and strengthened.

Third. A review of outstanding orders in order to reduce the number to be checked. It is probable, for example, that a large number of old orders may be classified as dead or inactive because of discontinuance of business or for other reasons. Also, certain types of orders may not require the same vigilant attention as others. In certain types of false advertising cases there may be reason to assume that the order is being obeyed in the absence of a complaint by a competitor or the public. On the other hand, there may be no reason to make such an assumption with respect to other orders involving complex issues where competitors or the public have insufficient factual information to form the basis of a complaint.

Fourth. Segregation or arrangement of orders requiring field investigation into groups by industries, geographical location of respondents, or other appropriate groupings. The investigating division could then be supplied with these groupings and requested to assign them to field examiners for prompt investigation. In this manner compliance can be checked on a systematic basis with a minimum expenditure of time.

Last, and perhaps most important. The procedures of the Commission with respect to filing initial compliance reports should be reexamined. Orders uniformly contain a provision requiring the filing of a written report within 60 days, setting forth in detail the manner and form in which respondent has complied with the order. This is sometimes a difficult assignment, particularly in cases involving restraint of trade or Clayton Act violations. Pricing schedules, pricing formulae, and sales policies may need revision.

Orders of the Commission are "negative" - they require the discontinuance of the illegal practice and do not set forth affirmatively what practices a respondent can follow in the future without fear of violating the order. For this reason personal conferences between respondents and Commission attorneys, to discuss methods of effecting compliance, should be encouraged. Such conferences will be helpful to both sides. Standards of fair play require that

respondents be informed, insofar as possible, as to what they can and cannot do under the order.

On the other hand, it must be remembered that it is not within the province of the Commission, and certainly beyond its ability and qualifications, to formulate affirmative business practices for a particular industry.

The staff committee, which I have today set up, will also study procedures for obtaining compliance with trade practice rules and stipulations to cease and desist. These, of course, depend on voluntary measures.

Of the 8,400 stipulations outstanding, it is estimated that the Commission is without current compliance information in 95 percent or over 8,000 of the cases.

It is my firm belief that business policy favors voluntary compliance with the law, and certainly favors compliance with up-to-date rules and stipulations. In cases like yours, where the trade practice rules were formulated 24 years ago, they should either be revitalized or stricken from the books.

In closing, I want to stress the fact that it is my goal to obtain better and wider compliance with the laws administered by the Federal Trade Commission.

Voluntary compliance, through consultation and such informal procedures as trade practice rules and stipulations, will be promoted and encouraged. However, where the public interest requires it, compulsory compliance will be vigorously enforced.