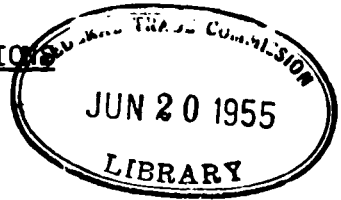


PRICE REPORTING BY TRADE ASSOCIATIONS



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Of all the economically useful activities which trade associations engage in, the most hazardous from an antitrust viewpoint is price reporting. Most other activities pursued by trade associations have no direct bearing upon the competitive relationships between association members and therefore pose no antitrust problems. Among these trade association activities are advertising for the purpose of promoting industry products, employment relations, technical and market research, government relations, and the maintaining of commercial arbitration tribunals.

On the other hand, pricing is one of the most important manifestations of competitive activity. Therefore, it is easy to see why price reporting by a trade association, which by definition is a combination, has often been held, when used for improper ends, to constitute unlawful restraint of trade.^{1/} The broad category of statistics, within which price reporting falls, includes information concerning prices, discounts, terms and conditions of sale, production, number of sales, inventories, shipments, costs and freight rates. The collection and dissemination of such information, in connection with product standardization and uniformity of prices,^{2/} has often spelled out a price fixing conspiracy in the minds of commissioners and judges.

Thus it should not be surprising that a survey by the Temporary National Economic Committee revealed that of the 125 Department of Justice and Federal Trade Commission cases involving trade associations which were pending or decided between June 1, 1935, and October 1, 1939, 85 were based on charges of price fixing. The collection and dissemination of pricing information was cited in 32 of these 85 cases.^{3/}

*The opinions contained in this paper reflect the personal views of the writer, and not necessarily the official policies of the Federal Trade Commission.

^{1/}American Column and Lumber Co. v. United States, 257 U.S. 377 (1921); United States v. American Linseed Oil Co., 262 U.S. 371 (1923); Sugar Institute v. United States, 297 U.S. 553 (1936); Salt Producers Assn. v. F.T.C., 134 F.2d 354 (7th Cir. 1943); United States Maltsters Assn. v. F.T.C., 152 F.2d 161 (7th Cir. 1945); Milk and Ice Cream Can Institute v. F.T.C., 152 F.2d 478 (7th Cir. 1946); Fort Howard Paper Co. v. F.T.C., 156 F.2d 899 (7th Cir. 1946).

^{2/}United States Maltsters Assn. v. F.T.C., supra note 1; Milk and Ice Cream Can Institute v. F.T.C., supra note 1; Fort Howard Paper Co. v. F.T.C., supra note 1.

^{3/}Charles A. Pearce, Trade Association Survey (TNEC Monograph No. 18, 1941) pp. 69, 82.

In spite of the risk involved in price reporting and the dissemination of statistical information generally by a trade association the same TNEC survey revealed that 187, or 15%, of 1244 trade associations provided some type of price or bid information to members.^{4/} A more recent survey conducted by the Chamber of Commerce of the United States indicated that the collecting and distribution of statistical information ranked fourth among 29 categories of trade association activities. 365, or 72%, of 509 trade associations reporting were found to engage in some form of statistical activity.^{5/}

Why, in view of the risks involved, do so many trade associations engage in the reporting of pricing information to their members? The answer is quite clear. Price publicity is essential to effective competition in open markets. Buyers want to know whether they are paying prices which are currently in line and sellers wonder whether they are being deceived by reports on price reductions. Since, in an open market, prices reflect conditions of supply and demand, both sellers and buyers can make future plans more intelligently when informed as to current prices.

The importance of price information to sellers and buyers is no more readily apparent than in the daily operations of stock exchanges and boards of trade. In these market places sellers and buyers are brought together and can trade on the basis of complete knowledge with respect to current prices. As a result, stock market quotations are usually an accurate indicia of market conditions. The intensive competitive activity observable on the floors of stock exchanges and boards of trade is striking evidence that knowledge of current prices does not necessarily result in the suppression of competition.

Newspapers and trade journals provide daily information with respect to stock market quotations and the prices of certain commodities and thereby apprise geographically scattered sellers and buyers of current market conditions who would be otherwise unable to ascertain such information.

In order to supply buyers and sellers of the principal agricultural products with reliable pricing information, the United States Department of Agriculture maintains an extensive price reporting service. Daily reports are issued by the department on shipments, supplies, and prices with respect to actual transactions. Thus, the value of information as to prices is acknowledged by the federal government itself.

Trade association price reporting plans, when legally formulated and properly employed, are a substitute for the various media of market information referred to above. They are designed to simulate to some degree the conditions of the market place as they exist in the stock exchanges and boards of trade for industries comprising widely separated sellers and buyers and involving great varieties of products which may be sold in relatively few or in a great many transactions. To accomplish this result, trade association price reports must be made available to all of the sellers and buyers within an industry and to the public generally.

^{4/}Pearce, op. cit. supra note 3, at 194.

^{5/}Chamber of Commerce of the United States, Association Activities, a classification and statistical survey of the activities and services of 509 trade associations, (1951).

The various species of pricing information have been identified in a Federal Trade Commission study as follows: price lists and any revisions thereof; specific prices on individual transactions; price variations; average prices; indexes of price changes; and aggregate dollar volume and quantities of sales.^{6/}

Special conditions in the construction industry have resulted in the development of a different type of price reporting known as bid filing. Due to the fact that construction work is done according to specification, the dissemination of information as to bids on completed projects would have little value. To be useful the information must relate to current construction work. A legal bid filing system involves the submitting of bids on current construction projects to a bid repository after they have been submitted to the awarding authority.

A Chicago attorney, A. J. Eddy, is generally credited with having first formulated a plan for price reporting by trade associations in 1911. Those manufacturers who had previously repressed competition by direct restraint, became weary of such practices following the government's suit against the U. S. Steel Company in 1911. The open price association presented a means for accomplishing indirectly what could no longer be done directly since, according to the Chamberlinian theory, in an industry comprised of a few concerns selling a standardized product, sellers having identical demand and cost curves would, if fully informed and rational, behave like monopolists, even though acting independently.^{7/} The open price system was first utilized in 1911 in the iron and steel industry and in 1912 in the lumber industry. With this background it is not surprising that the Supreme Court condemned, as being in violation of the Sherman Act, the first two trade association price reporting systems to come to its attention.

The rule enunciated by the Supreme Court in the Hardwood ^{3/} and Linseed ^{9/} cases is, in essence, that trade association price reporting activities violate the Sherman Act if they are part of a combination to suppress competition which actually results in or has a necessary tendency to restrain trade. Since such a combination would amount to an agreement to fix prices, proof of the agreement alone establishes an unreasonable restraint violative of the

^{6/}Letter from the Chairman of the Federal Trade Commission transmitting, in response to Senate Resolution No. 28 (Sixty-Ninth Congress, Special Session), a report on open-price trade associations, p. 36 (1929).

^{7/}Stocking, The Rule of Reason, Workable Competition, and the Legality of Trade Association Activities, 21 Univ. Chi. L. Rev. 527, 535 (1954).

^{8/}American Column and Lumber Co. v. United States, 257 U.S. 377 (1921).

^{9/}United States v. American Linseed Oil Co., 262 U.S. 371 (1923).

Sherman Act under the rule of the Socony-Vacuum case.^{10/} Thus, the function of the court in adjudging the legality of a trade association price reporting plan is not to ascertain whether it results in a reasonable restraint of trade, but rather if it causes any restraint of trade.

After the two set backs encountered by price reporting at the hands of the Supreme Court in the Hardwood and Linseed cases, this form of trade association activity received that Court's approbation in the Maple Flooring 11/ case, which was decided in 1925. There, the Supreme Court, in upholding price reporting activity which was in many respects similar to that condemned in the two prior price reporting cases decided by the Court, stated:

"It is the concensus of opinion of economists and of many of the most important agencies of Government that the public interest is served by the gathering and dissemination, in the widest possible manner, of information with respect to production and distribution, cost and prices in actual sales, of market commodities, because the making available of such information tends to stabilize trade and industry, to produce fairer price levels and to avoid the waste which inevitably attends the unintelligent conduct of economic enterprise. Free competition means a free and open market among both buyers and sellers for the sale and distribution of commodities. Competition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction."^{12/}

The majority distinguished the facts of the case from those of the Hardwood and Linseed cases and, relying on the rule enunciated in those cases, held that that in the absence of proof of agreement or concert of action to lessen production or raise prices it could not be inferred that the petitioners' activities would necessarily result in undue restraint of competition.

Although it is possible to distinguish some of the facts of the Maple Flooring case from those of the two previous cases in which trade association price reporting practices were condemned, the different result must be primarily attributed to the fact that the then majority of the court drew

^{10/}United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). In United States v. Aluminum Company of America, 148 F. 2d 416, 427 (2nd Cir. 1945), Judge Hand stated:

"It is settled, at least as to #1, that there are some contracts restricting competition which are unlawful, no matter how beneficent they may be; no industrial exigency will justify them; they are absolutely forbidden... The Supreme Court unconditionally condemned all contracts fixing prices in United States v. Trenton Potteries Co., 273 U.S. 392, 397, 398, 47 S. Ct. 377, 71 L. Ed. 700, 50 A.L.R. 989; and whatever doubts may have arisen as to that decision from Appalachian Coals Inc. v. United States., 288 U.S. 344, 53 S. Ct. 471, 77 L. Ed. 825, they were laid by United States v. Socony-Vacuum Co., 310 U.S. 150, 220-224, 60 S. Ct. 811, 84 L. Ed. 1129 * * * (Underscore supplied)

^{11/}Maple Flooring Mfrs'. Assn. v. United States, 268 U.S. 563 (1925).

^{12/}Id. at 582-583.

different inferences from the evidence than had been drawn in the Hardwood and Linseed cases. This would seem to be the only explanation for the fact that the majority in the Maple Flooring case decided that the petitioners' activities did not come within the rule of the Hardwood and Linseed cases, while Mr. Justice McReynolds, who wrote the majority opinion in the latter case, dissented, along with Chief Justice Taft and Mr. Justice Sanford, on the ground that they did.^{13/}

There is no simple rule of thumb for adjudging the legality of trade association price reporting activities. This can only be done by examining the features of the plan itself and the setting in which it is employed. In the following paragraphs I shall point out a few of the features of price reporting plans which have been the subject of critical examination by the Supreme Court and a number of industry practices which, together with price reporting, have led the Commission and the courts to infer the existence of unlawful conspiracy.

A price reporting system which supplies association members with too much detailed information concerning the business of their competitors is, for obvious reasons, open to suspicion. This was one of the objectionable features of the Hardwood Association's price reporting plan. There, 365 concerns operating mills which produced one-third of the hardwood manufactured in the United States furnished the Secretary of the American Hardwood Manufacturers Association with complete daily sales and shipping reports, monthly price lists and production and stock reports. New prices were immediately filed with the Association. Inspection reports pertaining to the grades of the various manufacturers were also made to the Association. All of these reports were subject to audit by representatives of the Association. Any member who failed to report was no longer furnished with the reports of the secretary and could be deprived of his membership in the Association. The information thus furnished to the Association was condensed, interpreted and disseminated to the members in the form of weekly shipment reports and sales reports, indicating prices and names of purchasers; monthly production and stock reports; and a monthly summary of members' price lists. Members were immediately informed by the Association of changes in price lists by any other member. A monthly market report was also sent to each member containing an analysis of market conditions. Regular meetings were held to afford members an opportunity to discuss all subjects of interest to them. Prior to each meeting questionnaires were sent out to all members calling for estimates as to their future production and their prognostications of future market conditions.

Other features of the Hardwood Association's price reporting plan which convinced the Court that its purpose and effect were to restrict competition were the auditing of members' books and records by the Secretary of the Association and his practice of interpreting the data supplied by members and exhorting them to restrict production and maintain prices. The Court pointed out that:

"Genuine competitors do not make daily, weekly and monthly reports of the minutest details of their business to their rivals, as the defendants did; they do not contract, as was done here, to submit their books to the discretionary audit and their stocks to the discretionary

^{13/}Id. at 587.

inspection of their rivals for the purpose of successfully competing with them; and they do not submit the details of their business to the analysis of an expert, jointly employed, and obtain from him a 'harmonized' estimate of the market as it is and as, in his specially and confidentially informed judgment, it promises to be. This is not the conduct of competitors but is so clearly that of men united in an agreement, express or implied, to act together and pursue a common purpose under a common guide that, if it did not stand confessed a combination to restrict production and increase prices in interstate commerce and as, therefore, a direct restraint upon that commerce, as we have seen that it is, that conclusion must inevitably have been inferred from the facts which were proved."14/

The examination of members' books and records was approved in the Tag case 15/ where the purpose was not to compel adherence to list prices filed with the Institute, but to determine whether members were reporting off-list transactions --- after the event---as required by the agreement.

Since the illegality of any trade association price reporting system hinges upon the finding of an agreement to fix prices, it is to state the obvious that a price reporting plan should not include an agreement on the part of members to adhere to the prices filed with the Association. An express agreement to this effect was included in the Hardwood Association price reporting plan which was condemned by the Supreme Court. The absence of proof of an agreement to fix prices was cited in the Maple Flooring case 16/ in support of the Court's holding that the Association's reporting system did not transgress the law.

The Federal Trade Commission has consistently opposed agreements among competitors to adhere to list prices and it criticized this practice even when governmentally sanctioned under the National Industrial Recovery Act.17/

A total of 444 NRA codes, merely two-thirds of the total number, contained price filing provisions. Most of these provisions required industry members to file prices, discounts, and conditions of sale with the proper code authority and to adhere to such prices until price changes had been filed and put into effect.18/ Many codes provided that prices were not to become effective until ten days after filing. Thus, under the codes price reporting was utilized in furtherance of industry-wide price fixing agreements - a use which the courts had consistently condemned as being in violation of the Sherman Act.

A typical example of an early NRA code was that promulgated for the iron and steel industry. This code provided that:

14/American Column and Lumber Co. v. United States, 257 U.S. 377, 410 (1921).

15/Tag Manufacturers Institute v. FTC, 174 F. 2d 452 (1st Cir. 1949).

16/Maple Flooring Mfrs.' Assn. v. United States, 268 U.S. 563 (1925).

17/Act of June 16, 1933, c. 90, 48 Stat. 195, invalidated May 27, 1935, in A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

18/Pearce, op. cit supra note 3, at 194.

"Each member of the code shall, within ten days after the effective date of the code, file with the Secretary a list showing the base prices for all its products, and from and after the expiration of such ten days such member shall at all times maintain on file with the Secretary a list showing the base prices for all its products and shall not make any change in such base prices except as provided in this Schedule E. Each such list shall state the date upon which it shall become effective, which date shall be not less than ten days after the date of filing of such list with the Secretary; provided, however, that the first list of base prices filed by any member of the code as above provided shall take effect on the date of filing thereof. None of the base prices shown in any list filed by any member of the code as herein provided shall be changed except by the filing by such member with the Secretary of a new list of its base prices, which shall become effective on the effective date therein specified which shall not be less than ten days after the date on which such new price list shall have been so filed..."^{19/}

In a letter of March 20, 1934, to the United States Senate the Chairman of the Federal Trade Commission criticized the "open price method of announcing quotations, generally identical, in advance; and (3) a ten day 'waiting period,' which has the effect of preventing any individual action toward moderating prices or terms in any manner."^{20/}

Until the Supreme Court decided the Sugar Institute ^{21/} case it had been generally assumed that one indication of the legality of a price reporting plan was whether the reported prices related to past and closed transactions or whether they were current or future prices. The former was cited as negating any purpose to fix prices, while the latter was deemed to be evidence of a price-fixing arrangement. This distinction was drawn in the Maple Flooring case where Mr. Justice Stone, in contrasting the objectionable features of the price reporting system which was held unlawful in the Linseed case with the practices of the Maple Flooring Association, referred to the fact that current prices had been filed with the bureau in the former case, while pointing out that in the case then under consideration "all reports of sales and prices dealt exclusively with past and closed transactions."^{22/}

As would be expected, the Court's approval of announcements as to future prices in the Sugar Institute case engendered considerable controversy at the time among members of the legal profession. Three leading members of the Bar placed different and conflicting interpretations upon the Court's decision in this regard in published commentaries.^{23/}

^{19/}NRA Code of Fair Competition for the Iron and Steel Industry, Code No. 11, Schedule E. Sec. 2., approved August 19, 1933.

^{20/}Federal Trade Commission, Report on the Steel Industry and the "Code of Fair Competition" in response to Senate Resolution No. 166 (March 20, 1934).

^{21/}Sugar Institute v. United States, 297 U.S. 553 (1936).

^{22/}Maple Flooring Mfrs. Assn. v. United States, 268 U.S. 563, 573.

^{23/}Handler, Trade Regulation Comments (Commerce Clearing House), No. 2 (July 1938), p. 2; Donovan, The Effect of the Decision in the Sugar Institute Case upon Trade Association Activities, 84 Univ. Pa. L. Rev. 929 (1936); Fly, Observations on the Anti-Trust Laws, Economic Theory and the Sugar Institute Decisions, 45 Yale L. J. 46 (1936).

In the light of later developments, it would seem that the judicial sanction given announcements as to future prices in the Sugar Institute case does not extend beyond the special circumstances of that case. These included a trade practice known as "moves" under which the great bulk of sugar was purchased. A "move" occurred when a refiner made a public announcement to the trade and notified the Institute, which would relay the information, that the selling price of sugar would be advanced to a certain figure at a specified time in the future. Buyers would thereupon contract for their needs of sugar at the price prevailing before the advance.

Although it left untouched most of the injunctive provisions of the District Court's decree against the Sugar Institute and its members, the Supreme Court eliminated that paragraph enjoining the reporting or relaying of information as to current or future prices. Speaking through Chief Justice Hughes, the Court stated:

"In determining the relief to be afforded, appropriate regard should be had to the special and historic practice of the sugar industry. The restraints, found to be unreasonable, were the offspring of the basic agreement. The vice in that agreement was not in the mere open announcement of prices and terms in accordance with the custom of the trade. That practice which had grown out of the special character of the industry did not restrain competition. The trial court did not hold that practice to be illegal and we see no reason for condemning it. The unreasonable restraints which defendants imposed lay not in advance announcements, but in the steps taken to secure adherence, without deviation, to prices and terms thus announced."24/

Thus, the decision in the Sugar Institute case constitutes no more than a refusal by the Court to condemn "a special and historic practice of the sugar industry," which did not "threaten competitive opportunities," and which the lower court had not found to be illegal apart from the steps taken to secure adherence to prices and terms thus announced.

However, it cannot be assumed from the Court's ruling in the Sugar Institute case that the reporting of future prices will receive judicial approbation in all instances. Such a practice has in other surroundings been considered sufficient to compel an inference of conspiracy to fix prices. For example, in Phelps Dodge Refining Corporation v. FTC,25/ the 2nd Circuit Court of Appeals stated:

"The stipulation of facts states that the Association, organized in 1934, has acted as a clearing house for the exchange of information submitted by its members, including reports as to the sales of various types of insecticides, fungicides and related items, together with the prices, terms, and discounts at which said items are sold, or offered to be sold, and in some instances including advance notices of future prices. Thus, it admits of no doubt that the Association and some of its members were engaged in price fixing, which violated the Act. U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1229..." (Underscoring supplied) 26/

24/Sugar Institute v. United States, 297 U.S. 553, 601 (1936).

25/139 F. 2d 393 (2nd Cir. 1943).

26/Id. at 396.

Unless special circumstances exist such as were revealed in the Sugar Institute case, the former distinction between the reporting of past and future prices would still seem to have validity in determining the legality of trade association price reporting activities. Government antitrust agencies have acted on this assumption and have obtained consent decrees limiting the collecting and disseminating of pricing information to that ascertained from past transactions 27/ and forbidding the filing of bids on construction work in a bid repository prior to their submission to the awarding authority.28/

All pricing information must be fairly compiled and present an accurate record of actual transactions.29/ "A restriction of reported sales to only the 'best sales' renders the plan a convenient means to bolster up a declining market or to assist in the maintenance of high prices. Such 'salting' of statistical reports is merely a fraudulent manipulation of market prices, which could scarcely commend itself to favorable judgment by the law."30/

The reporting of deviations from list prices to the Association was cited in the Linseed case as evidence pointing toward the illegality of the system there under consideration. Although the price reporting plan of the Tag Manufacturers Institute, which was upheld by the 1st Circuit Court of Appeals, involved the reporting of off-list sales, whatever inferences might have been drawn from this fact were dispelled by other evidence that the tag manufacturers had not conspired.

The Supreme Court has generally frowned upon the practice of revealing the identity of customers in sales reports. This practice was a feature of the statistical programs declared unlawful in the Hardwood and Linseed cases. In Maple Flooring, where the price reporting activities were upheld, the Court considered it significant that the names of purchasers were not reported. However, where special circumstances warranted the identification of customers in sales reports, the Supreme Court, in the Cement Manufacturers Association case,31/ gave its approval to this practice.

In this case, commonly known as the Old Cement case, the Supreme Court upheld a system for providing cement manufacturers with information as to purchases of cement by contractors under specific job contracts. These contracts enabled contractors to bid on construction work to be performed in the future with the assurance that the requisite amount of cement would be available at the price prevailing at the time of making the bid. According to the custom of the trade, specific job contracts were treated as options whereby the manufacturer was obligated to supply the cement contracted for at the stipulated price even though prices had advanced in the interim, but only in the amount required for the specific job covered by the contract. On the other hand, contractors were not held to the price named in the contract in the event of a decline in the market price and were free to cancel the contract for any reason.

27/United States v. National Retail Lumber Dealers Assn. (D.C. Colo. 1942); United States v. W. C. Bell Services, Inc. (D.C. Colo. 1941); United States v. West Coast Lumbermen's Assn. (L.D. Cal. 1941)

28/United States v. Reno Merchant Plumbing and Heating Contractors, Inc. (D. C. Nev. 1952).

29/Sugar Institute v. United States, 297 U.S. 553, 586 (1936).

30/Kirsh and Shapiro, Trade Association Reporting under the Anti-Trust Laws, United States Law Review p. 456 (August 1938).

31/Cement Mfrs. Protective Assn. v. United States, 268 U.S. 588 (1925).

Frequently, contractors took advantage of the option feature of the specific job contract by contracting with several manufacturers for a specific job and cancelling all except one of the contracts if there was a downward trend in the market price, but accepting delivery under all of the contracts when there was a rise in price and thus obtaining cement at less than its market value.

In order to detect this practice and prevent contractors from obtaining cement which, under the terms of the specific job contract, they were not entitled to and cement manufacturers were not obligated to supply, defendant Cement Manufacturers made prompt and detailed reports of all specific job contracts to the secretary of the Institute, giving the name and address of the purchaser, the amount of cement required, the price and delivery point, and the date of expiration of the contract. Changes in the contract, including increases in the amount of cement to be delivered and cancellations, were also reported in detail. The Institute employed inspectors who ascertained the amount of cement actually required for construction work covered by specific job contracts and whether cement delivered under such contracts was actually used. There was evidence in the record that defendant cement manufacturers had cancelled deliveries on the ground that contractors were not entitled, under the terms of their contracts, to receive the cement contracted for.

Although the activities of the Institute included many features previously and subsequently considered objectionable, the Supreme Court ruled that in the absence of agreement on the part of members to use the specific job contract there had been no unlawful restraint of commerce.

The Court explained:

"...But for reasons stated more at length in our opinion in Maple Flooring Association v. United States, *supra*, we cannot regard the procuring and dissemination of information which tends to prevent the procuring of fraudulent contracts or to prevent the fraudulent securing of deliveries of merchandise on the pretense that the seller is bound to deliver it by his contract, as an unlawful restraint of trade even though such information be gathered and disseminated by those who are engaged in the trade or business principally concerned.

"Nor, for the reasons stated, can we regard the gathering and reporting of information, through the corporation of the defendants in this case, with reference to production, price of cement in actual closed specific job contracts and of transportation costs from chief points of production in the cement trade, as an unlawful restraint of commerce; even though it be assumed that the result of the gathering and reporting of such information tends to bring about uniformity in price."^{32/}

No penalties should be imposed upon trade association members for deviating from the prices, terms and conditions of sale filed with the association. This much is made clear by the Supreme Court's opinion in the Linseed case where any member who failed to comply with the terms of the agreement, which included adherence to prices and terms filed with the bureau, was required to forfeit a sum of money previously deposited with the bureau. Although judicial approval was given to the statistical plan involved in the Tag case, which

^{32/}Id. at 604.

provided for the payment of liquidated damages to members upon the failure of any member to comply with the terms of the agreement, the court was careful to point out that penalties were imposed thereunder only for failure to make reports as required by the agreement.

It goes without saying that prices should not be discussed or agreed upon at association meetings. It is noteworthy that the linseed product manufacturers, whose price reporting activities were found to have transgressed the law, held monthly meetings at which they discussed "matters pertaining to the industry," among which were zone differentials, prices, terms and conditions of sale. Although some of the maple flooring manufacturers discussed the trend of current and future prices outside of association meetings, the Court pointed out that it was not charged, or contended, "that there was any understanding or agreement, either express or implied, at the meetings or elsewhere, with respect to prices."^{33/}

Finally, compelling evidence that trade association price reporting activities are being carried out for a legitimate purpose is the fact that pricing information is made available to all members of the industry, including sellers and buyers and those who are not members of the association, as well as to the public generally. Failure to openly disseminate pricing information was the subject of critical comment in both the Harwood and Linseed cases. In the former case the Court stated:

"In the presence of this record it is futile to argue that the purpose of the 'Plan' was simply to furnish those engaged in this industry, with widely scattered units, the equivalent of such information as is contained in the newspaper and government publications with respect to the market for commodities sold on boards of trade or stock exchanges. One distinguishing and sufficient difference is that the published reports go to both seller and buyer, but these reports go to the seller only."^{34/}

And in the Linseed case, Mr. Justice McReynolds, speaking for the Court, said:

"With intimate knowledge of the affairs of other producers and obligated as stated, but proclaiming themselves competitors, the subscribers went forth to deal with widely separated and unorganized customers necessarily ignorant of the true conditions."^{35/}

But this is not to say that every item of information pertaining to the affairs of manufacturers which is collected by a trade association must be divulged to customers. The Supreme Court recognized the confidential nature of some data when, in modifying that provision in the lower court's decree in the Sugar Institute case which required the full disclosure of certain data to the purchasing and distributing trade, it stated:

^{33/}Maple Flooring Mfrs. Assn. v. United States, 268 U.S. 563, 575 (1925).

^{34/}American Column and Lumber Co. v. United States, 257 U.S. 377, 411 (1921).

^{35/}United States v. American Linseed Oil Co., 262 U.S. 371, 389-390 (1923).

"But it does not follow that the purchasing and distributing trade have such an interest in every detail of information which may be received by the Institute. Information may be received in relation to the affairs of refiners which may rightly be treated as having a confidential character and in which distributors and purchasers have no proper interest. To require, under the penalties of disobedience of the injunction, the dissemination of everything that the Institute may learn might well prejudice rather than serve the interest of fair competition and obstruct the useful and entirely lawful activities of the refiners."36/

On the other hand, the Supreme Court considered it indicative of a lawful purpose that the pricing information collected by the Maple Flooring Manufacturer's Association was widely distributed, stating that:

"The statistics gathered by the defendant Association are given wide publicity. They are published in trade journals which are read by from 90 to 95% of the persons who purchase the products of Association members. They are sent to the Department of Commerce which publishes a monthly survey of current business. They are forwarded to the Federal Reserve and other banks and are available to anyone at any time desiring to use them. * * *Nor do they differ in any essential respect from trade or business statistics which are freely gathered and publicly disseminated in numerous branches of industry producing a standardized product such as grain, cotton, coal oil, and involving interstate commerce, whose statistics disclose volume and material elements affecting costs of production, sales price and stock on hand."37/

36/Sugar Institute v. United States, 297 U.S. 553, 604 (1936).

37/Maple Flooring Mfrs. Assn. v. United States, 268 U.S. 563, 573-574 (1925).

Of equal importance as are the details of the plan to the legality of trade association statistical activity is the setting in which it is carried out. One writer has stated: "...In some instances you will find that the trade association statistical activity is but one item--and even a small one--in a broad pattern. What might appear to be squarely within the borders of legality under a Supreme Court decision may fall because it is but a part--and, standing alone, a lawful part--of an illegal whole. It is all too familiar law today that a lawful act becomes unlawful when done in furtherance of an unlawful end."^{38/}

During the last decade trade association price reporting activity was challenged in a number of Federal Trade Commission proceedings as being part of and in furtherance of industry-wide price-fixing arrangements. In each case the Commission and the courts were able to draw inferences of conspiracy wholly apart from the features of the particular price reporting plan employed. In such circumstances it was of no consequence that the statistical activity might have come squarely within the borders of legality as defined in the cases, for it was but part of an unlawful whole.

Thus, in the Maltsters case, ^{39/} the court did not agree with the petitioners' contention that the statistical plan of the Association of malt producers was clearly within the scope of those activities expressly approved in the Maple Flooring and Cement Manufacturers cases. The court pointed out that in both the Maple Flooring and the Cement Manufacturers cases there had been no agreement to fix prices and, in fact, no uniformity of prices. Here, the Commission had found uniformity of selling price among manufacturers located in four different States having varying manufacturing costs and different costs in transporting barley from the points of purchase to their plants and from their plants to customers. Among the other circumstances relied upon by the Commission in finding the existence of an agreement to fix prices were the use of Chicago as a common basing point by all members of the industry, testimony by the president of the Association to the effect that members were expected to maintain the prices filed with the Association until the latter was notified of a change, and the uniformity by which prices were increased and decreased. With respect to the latter, the court stated:

"It may be true, as pointed out by petitioners, that a decrease in price by all members is necessary when such decrease is announced by any one member in order to meet competition. It certainly cannot be claimed, however, that it is necessary that all members increase their price upon announcement of an increase by one member in order to meet competition."^{40/}

^{38/}McAllister, Legal Aspects of Trade Association Statistics, No. 4, Current Business Studies, Trade and Industry Law Institute, 19 (1949).

^{39/}United States Maltsters Assn. v. FTC, 152 F. 2d 161 (7th Cir. 1945).

^{40/}Id. at 164.

The activities under judicial scrutiny in the Milk & Ice Cream Can Institute 41/ case were similar to those considered by the same court in the Maltsters case and the legal issues presented by both cases were identical.

Practices which formed the basis for the Commission's finding of conspiracy in this case were the use of a freight equalization plan which resulted in uniformity of prices among members of the Institute, the discussion of freight equalization at meetings of the members, the distribution by the Institute of freight-rate books to the members, the classifying of buyers for discount purposes, a meticulous effort to standardize products, and restrictions placed upon the sale of "seconds" to prevent first quality cans from being sold as seconds at lower prices. In upholding the Commission's order the court quoted from the Commission's finding that the price reporting system employed by the Institute was used in order "to assure the maintenance of uniform prices."42/ The court also pointed out that deviations from list prices which appeared in the reports of members were called to their attention by the secretary of the Institute.

Although the filing of price lists was deemed not to be conclusive evidence of conspiracy by the Seventh Circuit Court of Appeals in the Fort Howard Paper Company 43/ case, the court was persuaded that petitioners had engaged in an unlawful conspiracy to fix prices by the artificiality and arbitrariness of the structure of the zone system employed by them, which the court said could not withstand the inference of agreement.

Just as Waterloc is the most famous of Napoleon's battles, the Tag case, 44/ which the Commission lost in the Court of Appeals for the First Circuit, seems destined to become the most celebrated of the Commission's trade association price reporting cases. However, too much reliance should not be placed upon this case in evaluating the legality of the details of a price reporting plan employed in another industry under different circumstances, for the court's decision was predicated upon evidence which dispelled the inferences of conspiracy that the Commission had drawn from practices of the tag manufacturers similar to those which had supported findings of conspiracy in prior cases.

The court's opinion contains references to numerous factors which, in its view, militated against the Commission's findings of conspiracy. The court pointed out that the large number of daily orders for tags, generally small in dollar value, placed with manufacturers necessitated the use of price lists, due to the impracticability of giving a price on each order based upon an individual cost estimate of that order. Furthermore, the court stated that "(t)he issuance of price lists by tag manufacturers had become established as a general practice in the industry prior to the formation of the Institute."45/

41/Milk and Ice Cream Can Institute v. FTC, 152 F. 2d 478 (7th Cir. 1946).

42/Id. at 482.

43/Fort Howard Paper Co. v. FTC, 156 F. 2d 899 (7th Cir. 1946).

44/Tag Manufacturers Institute v. FTC, 174 F. 2d 452 (1st Cir. 1949).

45/Id. at 454.

The court said that members had not agreed to adhere to their published list prices and that 25% of the dollar volume of all their sales had actually been made at off-list prices.

The Commission's evidence of price uniformity was rejected by the court on the grounds that it was unfairly weighted in favor of standard types of tags which would tend toward uniformity of price but which represented only 20% of the tag manufacturers' business. The court pointed out that the only evidence in the record showing actual competition between members for given items of business revealed that there was non-uniformity in 95% of the 400 instances in which two or more members quoted off-list prices to the same customer at the same time on the same piece of business.^{46/} Although conceding that during the life of the agreements between the tag manufacturers, there had been substantial list price uniformity, the court said that this couldn't be attributed to the agreements, since it did not appear from the record whether there had been an increase or a decrease of uniformity in list prices or in selling prices since the agreements went into effect.

The court attached great significance to the fact that the price data compiled and disseminated by the Association was made available to buyers, who were notified on each invoice as to the place where records of tag prices were filed and that such records were open for inspection. It was also pointed out by the court that one party to the agreement in question was a tag jobber who was a customer of the other members.

The court stated that the Commission's conclusion that the purpose of the tag industry agreements "was to keep in force and effect the open price-reporting plan originally adopted under the National Industrial Recovery Act," ^{47/} was not inferrable from the evidence. It pointed out that under the code adopted for the Tag Industry it was unlawful for a tag manufacturer to make sales at less than the list prices which had been filed with the Code Authority and that a revised schedule could not become effective until several days after filing, whereas under the Tag Industry Agreement a manufacturer could put a new price list into effect without prior notice to the Associates and could also make sales at lower prices than those filed with the Associates.

Only the existence of such affirmative proof that the members of the tag industry had not agreed to suppress competition among themselves could have saved their price reporting activity from the sanctions of Section 5 of the Federal Trade Commission Act in the face of numerous practices, such as the auditing of members books and records, the imposition of penalties for non-compliance and the reporting of off-list sales, which had established the illegality of price reporting activity in prior cases.

The cases and consent decrees entered in proceedings instituted by the Department of Justice suggest that trade association price

^{46/}Id. at 461.

^{47/}Id. at 458.

reporting activity conducted along the following lines will have the likeliest chance of avoiding entanglement with the antitrust laws.

The pricing information to be collected, compiled, and disseminated should not be in too great detail.^{48/} The prices should relate to past and closed transactions.^{49/} If the plan calls for the filing of bids on construction work, the bids must not be reported to the bid repository prior to their submission to the awarding authority.^{50/} If individual sales are reported, the names of the sellers and buyers involved in the transactions should not be revealed.^{51/} There must be no agreement on the part of association members to adhere to the prices, terms, and conditions of sale filed with the association.^{52/} No information should be disseminated identifying individual sellers or buyers who are deviating from announced prices, terms, or conditions of sale.^{53/} There must be no functional classification of buyers for discount purposes.^{54/} Cost data, even in the form of averages, should be avoided.^{55/} If members' books and records are to be audited, this can be done only for the purpose of determining whether the information supplied is accurate and not for the purpose of discovering unreported price cutting.^{56/}

^{48/}American Column and Lumber Co. v. United States, 257 U.S. 377 (1921).

^{49/}Maple Flooring Mfrs.' Assn. v. United States, 268 U. S. 563 (1925); United States v. National Retail Lumber Dealers Assn., C.C.H. 1940-1943 Trade Cases, §56,181 (D. Colo. 1942); United States v. W. C. Bell Services, Inc., C.C.H. 1940-1943 Trade Cases, §56,171 (D. Colo. 1941); United States v. West Coast Lumbermen's Assn., C.C.H. 1940-1943 Trade Cases § 56,122 (S.D. Cal. 1941).

^{50/}United States v. Reno Merchant Plumbing and Heating Contractors, Inc., C.C.H. 1952-1953 Trade Cases §67,361 (D. Nev. 1952).

^{51/}American Column and Lumber Co. v. United States, 257 U. S. 377 (1921); United States v. American Linseed Oil Co., 262 U. S. 371 (1923); United States v. American Optical Co., C.C.H. 1948-1949 Trade Cases §62,308 (S. D. N. Y. 1948); United States v. American Locomotive Co., C.C.H. 1946-1947 Trade Cases §57,621 (N. D. Ind. 1947); United States v. W. C. Bell Services, Inc., C.C.H. 1940-1943 Trade Cases §56,171 (D. Colo. 1941).

^{52/}United States v. American Linseed Oil Co., 262 U. S. 371 (1923).

^{53/}United States v. American Linseed Oil Co., supra note 52; United States v. The Association of Knitted Glove and Mitten Mfrs., C.C.H. 1954 Trade Cases §67,638 (N. D. N. Y. 1953); United States v. Electrical Solderless Service Connector Institute, C.C.H. 1940-1943 Trade Cases §56,081 (S. D. N. Y. 1941).

^{54/}United States v. American Optical Co., C.C.H. 1948-1949 Trade Cases §62,308 (S. D. N. Y. 1948).

^{55/}United States v. W. C. Bell Services, Inc., C.C.H. 1940-1943 Trade Cases §56,171 (D. Colo. 1941).

^{56/}American Column and Lumber Co. v. United States, 257 U. S. 377 (1921); Tag Manufacturers Institute v. F. T. C., 174 F. 2d 452 (1st Cir. 1949).

The price reporting system should not provide for penalties to be imposed against anyone failing to comply with the terms of the agreement.^{57/}

The information collected and disseminated must be accurate and not intended to conceal actual market conditions.^{58/} It must be made available to all members of the industry, both sellers and buyers and non-association members, as well as to the public generally.^{59/} It goes without saying that industry members should, under no circumstances, discuss pricing information at association meetings.^{60/}

The trade association official administering the price reporting system should avoid interpreting the data collected and disseminated in such a way as to suggest future conduct on the part of association members.^{61/}

Although trade association counsel can aid their clients in avoiding antitrust consequences by pointing out the area of permissible trade association activity as it is defined in the cases, in the final analysis, the legality of any trade association activity will largely depend upon the fundamental attitude of association executives and members.^{62/} If the purpose of price reporting is to implement an agreement among industry members to stabilize prices and otherwise suppress competition, dire antitrust consequences can be expected. However, if price reporting activity is carried out for the purpose of acquainting all the members of the industry, both sellers and buyers, with market data in order that they can independently make intelligent decisions in carrying out their business, there need be little fear that the law will be transgressed.

^{57/}United States v. American Linseed Oil Co., 262 U. S. 371 (1923).

^{58/}Sugar Institute v. United States, 297 U. S. 553 (1936); United States v. National Retail Lumber Dealers Assn., C.C.H. 1940-1943 Trade Cases §56,181 (D. Colo. 1942); United States v. W. C. Bell Services, Inc., C.C.H. 1940-1943 Trade Cases §56,171 (D. Colo. 1941).

^{59/}American Column and Lumber Co. v. United States, 257 U. S. 377 (1921); United States v. American Linseed Oil Co., 262 U. S. 371 (1923); Maple Flooring Mfrs. Assn. v. United States, 268 U. S. 563 (1925); United States v. Outdoor Advertising Assn. of America, Inc., C.C.H. 1952-1953 Trade Cases §67,341 (N. D. Ill. 1952); United States v. National Retail Lumber Dealers Assn., C.C.H. 1940-1943 Trade Cases §56,181 (D. Colo. 1942).

^{60/}United States v. American Linseed Oil Co., 262 U. S. 371 (1923).

^{61/}American Column and Lumber Co. v. United States, 257 U. S. 377 (1921).

^{62/}Berge, Legality of Trade Association Activities Under the Anti-Trust Laws, address before the Washington Trade Association Executives, May 16, 1945.