Syllabus

IN THE MATTER OF

NATIONAL LEAD COMPANY ET AL.

COMPLAINT, FINDINGS, ORDER, AND COMMISSION AND DISSENTING OPINIONS IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914, AND OF SUBSEC. (a) OF SEC. 2 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED BY AN ACT APPROVED JUNE 19, 1936

Docket 5253. Complaint, Apr. 12, 1946[1]*—Decision, Jan. 12, 1953*

It is well settled that no formal agreement is necessary to bring into existence an unlawful conspiracy and that a combination prohibited by law may, and often must be, found in the course of dealings or other circumstances, in the absence of any exchange of words. And it is also settled that "acceptance by competitors without previous agreement of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish unlawful conspiracy under the Sherman Act" and is also "sufficient to establish unfair methods of competition under the Federal Trade Commission Act". *Eugene Dietzgen v. F. T. C.*, 142 F. (2d) 321, 332, citing and quoting *Interstate Circuit v. U. S.*, 306 U. S. 227, and *U. S. v. Masonite*, 316 U. S. 265.

In a proceeding under Sec. 5 in which the Commission found from evidence before it that the acquisitions of competitors by respondent corporation, aided by its arrangements with another concern, had had the tendency and effect of restraining trade, suppressing price competition, and tending dangerously to create a monopoly in the industry concerned, the Commission was of the opinion that it not only had the authority but that it was under a duty to prohibit the further aggrandizement of said corporation through additional acquisitions.

In such a situation the determination of the question of whether the corporation concerned had already attained such a monopolistic position as to require its dissolution was not necessary to support the Commission's authority to act, since, as the legislative history of the F. T. C. Act clearly shows and as the courts have uniformly held, the primary object of the Act was not to provide a means of breaking up an accomplished monopoly but rather to enable the Commission to stop monopoly in its incipiency.

In any case in which activity violative of the statutes of the Commission is found to exist, it is the Commission's duty to determine to the best of its ability the remedy necessary to suppress such activity and to make every precaution to preclude its revival. And in many cases, and particularly in trade-restraining conspiracies, a solution of said problem involves a consideration of many factors, including the history of the collective activity and the manner in which it originated.

In the typical basing-point conspiracy case, the conspirators (the sellers) must determine the bid price of the commodity delivered at the door of each

[1] Amended.

buyer and such price usually varies with the cost of rail freight from the basing point to the point of delivery. Each seller, therefore, under the basing-point system must usually have and use the same freight rate book or other device used by each of the other sellers so that to quote identical prices each seller will use the same figure for the cost of the freight. And under that system, which results in bids with identical prices to the fraction of a cent, the conspirators must be continually alert and careful in figuring their bids in order to quote identical delivered prices.

By comparison, the zone conspiracy pricing system operates rather simply since in the zone system of pricing the delivered price is the same for every point of delivery within a zone, and once the price in the par zone and the relative price graduations in the other zones have been established, the system operates substantially automatically and with a minimum of conspiratorial guidance, as compared with the basing-point delivered prices which, while usually automatic at each point of delivery, vary in the same amounts as do the estimated costs of rail freight from the basing point.

A competitive industry is a self-disciplined industry, and a non-competitive and therefore a non-disciplined industry becomes lethargic and clings to the status quo. Under an expanding dynamic economy, an industry cannot maintain a status quo—it must either move forward or lose ground. Competition supplies the needed dynamics, and the less alert industry with its blunt blade of competition lags behind and may lose its relative place in the market to a newer and more aggressive industry which will accomplish the same end at a lower price.

The condition sometimes referred to as "cut-throat competition" is very often plain, unvarnished price competition, and while the hard price competition of the market places may not be gentlemanly, it is usually fair, particularly to consumers. In such competition, the weak may get hurt, but social security is not the province of the Commission.

As respects identity of prices, the Commission is cognizant of the fact that such a condition may result from competitive or noncompetitive situations, that intensity of competitive factors may vary in degree in any industry, and than perfect competition, like the perfect price conspiracy, may be hoped for but is rarely obtained.

The price pattern used in the industry involved in the instant case was not the result of one secret meeting in a smoke-filled room, but was the result of many business experiences and compromises over a period of years.

Where a corporation, constituting the largest producer and seller of lead pigments in the United States, and operator of factories in numerous cities, originally formed in 1891 by the acquisition of the physical properties and stock ownership of numerous companies theretofore engaged in the manufacture, sale and distribution of white lead, linseed oil, and kindred products;

With intent and effect of substantially controlling the lead pigments industry and regulating prices of pig lead and lead pigments, and with restrictive and monopolistic effects—

(*a*) Acquired over a period of years—prior to which there had been eighteen or twenty producers of white lead selling their products in the various localities where they could operate economically—all or controlling stock interests in numerous companies, and properties and assets of others, closed

many of such plants, amalgamated and enlarged others, and operated as branches several, the names of which it retained;

With the result that from 1891 to 1935 some fifty competitors disappeared from the field, and it acquired a dominant position in the lead pigments industry;

(*b*) Sought to further enhance its position in said industry, in which by 1930 it had become a dominant factor, through continuing unsuccessful attempts from 1930 to 1935 to acquire a controlling stock interest in its largest competitor, the E.-P. Co., in which it bought stock in the name of the Chairman of its Board of Directors and with which it maintained close relations, particularly during the period from 1931 to 1941;

(*c*) Entered into a contract in 1906 with the A. S. & R. Co. (world's largest smelter and refiner of lead, producer of between 30 percent and 40 percent of the world's supply and responsible for more than half of the domestic, and publisher daily of the prices at which it bought lead ore and sold pig lead), under provisions whereby, with certain exceptions, it was to purchase from said A. S. & R. all its requirements of corroding pig lead, and 85 percent of its pig lead; said A. S. & R. was to furnish such requirements up to 85 percent of the latter's production from domestic ores of all kinds of pig lead; it was to sell any surplus production of its Collinsville plant to said A. S. & R. at 5 percent less than the latter's prevailing price; and prices for common pig lead were based on the average of A. S. & R.'s lowest daily schedule of prices for the preceding month subject to certain adjustments based on the London Metal Exchange price, plus the tariff differential:

(*d*) Following the expiration of its aforesaid contract in 1921, effected and carried out arrangements which had the same effect; and

(*e*) Concurrently with the execution of said contract, entered into a second one with said A. S. & R. through a constituent company whereby said company was to purchase and said A. S. & R. was to sell it for fifteen years all of the latter's domestic output of antimonial lead, subject to the average daily price of common desilverized lead, as quoted by said A. S. & R. for specified quantities for delivery in St. Louis and New York, and similarly subject to such London Metal Exchange adjustment;

With the result that its dominant power was further materially increased through its close cooperation with said E.-P. and its aforesaid contracts, under which it acquired control of 85 percent of A. S. & R.'s domestic production of pig lead, and restricted its own use of pig lead produced by its subsidiary to 30,000 tons per year, and thereby limited said plant's competition with with said A. S. & R.; latter secured 85 percent of its consumption of common pig lead and all its requirements of corroding pig lead subject to exceptions referred to; it acquired control of all of A. S. & R.'s output of antimonial lead and latter took no further interest in the manufacture of lead pigments; supply of pig lead subject to bids and daily market fluctuations was contracted by more than 32 percent of the domestic production; a monthly price average, which tended to prevent quantity sales of pig lead on a price rise and consequently tended to reduce returns to miners of lead ores, was fixed; and a monthly average price was fixed through substantial contraction of the supply for a major part of the United States consumption of pig lead, and the basing of prices on daily market fluctuations was thus prevented, and opportunities for buying pig lead at lower prices were restricted;

(*f*) With intent and effect of establishing an understanding with E. I. duPont de Nemours & Co. that the latter would not deviate from its prices in the sale of white lead-in-oil and would cooperate with it to maintain price uniformity in the sale of said product (which it processed for duPont under contract under which it was to convert the raw material furnished by duPont into white lead-in-oil to the amount of duPont's total requirements), supplied, in response to duPont's request, its current prices for lead-in-oil, upon which duPont based its calculations of the amounts to be paid, and thereafter, in response to duPont's request, supplied a periodical letter "covering the price to be in effect for the quarter," and gave its approval to a change in discount terms announced by duPont; and, in discussions concerning a proposed supplemental code for the lead pigments division of the lead industry under the N. R. A., represented said duPont, which did not belong to the Lead Industries Association, but was "willing to go along with anything which was agreeable to the others";

Effect and tendency of which acquisitions by said corporation of the major portion of the lead pigments processing industry, of its control by contract of the major portion of the domestic production of pig lead, and of its cooperation with said E.-P. in maintaining identical prices and terms of sale of lead pigments between them, and in circumscribing the price competition of their smaller competitiors and inducing conformity on the part of such competitors with their prices, terms and conditions of sale, were to restrain trade, suppress price competition and create monopolistic conditions in the lead pigments industry; and

Where aforesaid corporation and six others, including two subsidiaries, which were engaged in the interstate sale and shipment of lead pigments made at various producing points in the United States; and which—

I. Comprised (1) aforesaid producer and seller of lead pigments; (2) said E.-P., engaged in the mining, smelting, refining, and sale of metallic lead products, lead pigments and other articles, and its sales subsidiary; (3) A. C. M. Co., one of the world's largest producers and fabricators of non-ferrous metal, including copper, lead and zinc, and a wholly-owned subsidiary; (4) S-W, one of the largest, if not the largest of manufacturers and sellers of mixed paints and related items in the United States, with numerous plants and warehouses and 200 retail stores, and producer, at its factory, of white lead, red lead, and litharge; and (5) G., another large producer and seller of mixed paints and related items, with some thirty retail stores, and with plants in Scranton and Hammond at which it refined and produced white lead, red lead, and litharge; and which—

II. (1) Accounted for practically the country's entire production of such pigments and had the power to and did control the supply available for shipment in commerce; (2) accounted also for a substantial portion of the national production of and trade in commerce in a number of competing products, namely, lithopone, zinc oxide and titanium; and (3) were members, at the time of the N. R. A., of the White Lead-in-Oil Committee and the Dry Products Committee of the Lead Pigments Division of the Lead Industries Association, which met between July 1933 and January 1934 to draft a supplemental Code of Fair Competition for the lead pigments division of the lead industry under the N. I. R. A.—

(*a*) Entered into and reached understandings and agreements as a result of meetings and discussions incident to the activities of committees of said lead pigments division, to do things which were not included in the Code of Fair Competition for the lead industry, as thereafter approved on May 24, 1934, or included in any preliminary draft of a code produced at meetings of any of the committees; and which, insofar as certain price matters were concerned, were, at their request and that of other manufacturers expressly exempted from the provisions of the code; and specifically—

(1) Agreed to and did sell white lead-in-oil and other lead pigments packaged in kegs or cans of 100 pounds or less, dry white lead (both basic carbonate and basic sulphate), and red lead and litharge in drums or barrels and in quantities of twenty tons or less and twenty tons or more, on the basis of a flat par price for all deliveries in a par zone (which included several states), and flat delivered price quotations to customers within designated zones, with uniform differentials applicable as between such zones, and under arrangements whereby the sellers prepaid or allowed deductions for all transportation charges and made no allowances or adjustments in differentials in delivery costs as between various destinations in each of the zones;

(2) For the purpose and with the effect of controlling resale prices in the trade and preventing competition between themselves and their customers, agreed to and did sell white lead-in-oil on the basis of consignment contracts or arrangements, pursuant to which dealers appointed as "agents" or "distributors" (whose authority was limited to the custody and sale of goods consigned to them), made sales as consignees of the stocks sent them, settled monthly for goods sold, and received as their compensation the difference between the prices set forth for the consignee and the resale prices charged dealers and consumers;

(3) Agreed to and did sell lead pigments in kegs and cans at uniform differentials per hundred pounds between keg sizes, and agreed to and did allow uniform discounts and terms of sale in transactions involving the sale of dry white lead, with a uniform addition to price quotations for delivery in lots of less than twenty tons;

(4) Agreed to and did quote and sell red lead and litharge in twenty-ton quantities on the basis of fixed differentials over the price of pig lead as quoted by said A. S. & R., and agreed to and did quote and sell products in quantities of less than twenty tons on the basis of price cards distributed to the trade and calculated on a fixed differential over pig lead prices;

(5) Agreed to and did fix arbitrary price differentials between carload, five-ton, and less-than-five-ton purchasers of red lead and litharge in 600-pound barrels, by calculating card prices on the basis of fixed differentials over said A. S. & R.'s price of pig lead; and

(6) Agreed to and did refrain from entering into contracts to supply red lead in quantities of less than twenty tons at a stated differential over the price of pig lead, and agreed to and did eliminate guarantees against declines in price in sales of red lead and litharge in less-than-carload lots; and

Where each of the aforesaid corporations, with certain exceptions—

(*b*) Followed the pricing practices and adhered to the terms and conditions for the sale of lead pigments agreed upon, as above set forth, from 1934 to the present time, and individually adhered to such practices and methods;

With the result that substantially identical prices, terms and conditions of sale as between respondents N. and E.-P. were produced; substantial uniformity of price differentials, terms and conditions of sale among respondents A., G., and S.-W. followed and the prices of the latter three varied from those of the first two according to pattern and according to difference of brand and quality of products; said zone pricing feature facilitated the meeting, or matching, of competitors' prices; and said agency or consignment method of selling had the intended effect of controlling resale prices, preventing "loss leader" selling, and securing better profits for dealers; the various differentials operated to establish an inflexible price structure which eliminated variations in the prices of lead pigments based on quantity, quality, cost of delivery, container costs and other price factors which an unrestrained marketing system would provide for the purposes of bargain and sale; and said pricing system maintained in the sale of oxides was such that all delivered prices on the various grades, quantities and qualities of said products advanced or receded with the change of one price factor; and the continuous rigidity and uniformity in prices, terms and conditions of sale of white lead and other keg products not only illustrated the effectiveness of respondents' methods in connection with the sale of such products but also revealed the purposes underlying their employment;

Tendency, capacity and effect of which combinations, conspiracies, etc., entered into and maintained by said respondents, and of the acts, practices and methods performed in connection therewith, were to substantially hinder, frustrate, suppress, and eliminate competition among respondents in the interstate sale of lead pigments; to prevent price competition among and between respondents in the sale of such products among the various states; to deprive purchasers of such products of the benefits of price competition among the sellers; to create discriminations in price against some purchasers and users of lead pigments and lead pigment paints; and otherwise to promote their purposes to fix, adopt, and maintain uniform prices and terms and conditions of sale of lead pigments:

Held, That aforesaid acquisition by National Lead Company of the physical assets and stock ownership of its competitors and the combinations, conspiracies, etc., of all the respondents and the acts and practices pursuant thereto and in connection therewith and under the conditions and circumstances set forth, constituted unfair methods of competition in commerce, and unfair acts and practices therein; and

Where the aforesaid corporations, engaged in the sale and distribution of their said products, through use of said zone delivered price system, in which the inter-zone prices of lead pigments were in fact different prices, which differed to the extent of the zone premiums, and were justified only where the additional freight or other transportation costs equaled or exceeded said zone premiums and in other cases were discriminatory between competing purchasers—

(*a*) Discriminated in price as respects customers located at or near the border of adjoining or contiguous zones in that each demanded, accepted and received from some purchasers of its lead pigments, higher prices than it received from other and competing purchasers in different zones;

With the result that the employment by each of them of such inter-zone differentials had the tendency to lessen competition between competing sellers

located in different zones of paints, storage batteries and other products made by them and to create a trade advantage in favor of customers who had received the lower prices;

(*b*) Discriminated through different quantity prices in that their differing prices as between carloads and five-ton lots of oxides and as between five-ton lots and smaller quantities, and the extra zone charges for less-than-carload quantities sold in Montana, Wyoming, Colorado, and New Mexico were not justified by differences in cost of manufacture, sale or delivery and were discriminatory as between competing purchasers;

Effect of which discriminations was substantial and tended to lessen competition as between large and small customers of the sellers to the injury of the latter; and

(*c*) Discriminated through differing quantity prices in that their allowance of a difference of one-quarter cent per pound on shipments of dry white lead, basic carbonate, in carload quantities, was justified by the differences in the cost of delivery in those instances in which rail freight was a factor, but was not justified in cases of sales to purchasers in the proximity of their producing plants where the only transportation cost was local cartage;

To which extent and under which circumstances said differing prices to competing customers were discriminatory, and had the tendency to lessen competition as between their customers who received the different prices;

Effects of which discriminations, above set forth, engaged in by each of said respondents—

(1) Might be substantially to lessen competition in the interstate sale and distribution of lead pigments between the respondents and their competitors; to tend to create a monopoly in the lines of commerce in which they were engaged, and to injure, destroy, or prevent competition in prices and otherwise by said respondents and their competitors in the interstate sale and distribution of said products; and

(2) Might be substantially to lessen competition between the purchasers of lead pigments who received lower prices from respondents and their competitors who paid the higher prices; to tend to create a monopoly in the lines of commerce in which purchasers from the respondents were engaged; and to injure, destroy, or prevent competition between the beneficiaries of the lower prices and competing purchasers who were required to pay the higher prices:

Held, That such discriminations in price, by each of said respondents, constituted violations of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

As respects the fact that each of the respondents, following their meetings in various subcommittees of the Lead Industries Association for the ostensible purpose of drafting a supplemental Code of Fair Competition for the Lead Pigments Industry under the N. I. R. A., and their action in taking advantage of the opportunity to appraise generally the methods of selling theretofore employed in the industry and in proceeding cooperatively to revise their pricing practices in a manner far beyond the sanction of the N. I. R. A., and

their action thereafter, in the case of each, in following the pricing practices and adhering to the terms and conditions of sale then agreed upon:

The Commission was of the opinion and found—notwithstanding testimony of various officials that to their knowledge there were no agreements by any of them to employ particular methods or to fix and maintain terms and conditions of sale of their products other than agreements of what should be recommended for the supplemental code, and notwithstanding the fact that the record did not show the existence of any categorical agreements other than those entered into at the time of the code discussions—that there existed among the respondents a mutual understanding which constiuted a conspiracy to fix and maintain prices, differentials, and terms and conditions for the sale of lead pigments, which was carried out by all of them through the various methods set forth.

In the foregoing connection the Commission noted that the arbitrary nature of the zones was even more apparent than it was in the *Fort Howard Paper Co.* case, 156 F. (2d) 899, in which, as noted by the court at pages 906, 907, the zoning system there concerned—which came into being under N. R. A.—was saved from "illegality for the statutorily exempt period", following which its "illegality was again apparent", and as to which the court observed that it was "more than an inference to say that parties continuing to utilize that zoning system, born of agreement, suddenly utilized it in order to meet competition, rather than by tacit agreement".

In connection with the use by the respondents of the agency or consignment method of selling, the various differentials employed, and the issuance of uniform suggested resale prices, the evidence disclosed understandings and cooperative endeavors which, when considered in the light of the surrounding circumstances, led the Commission to the conclusion that there was on the part of respondents a mutual understanding and acceptance of an overall plan and an intention on the part of each of them to follow it.

As regards the charge of the complaint that certain price discriminations in violation of Sec. 2(a) occurred as a result of the use of the zone method of pricing and selling to competing customers in the same zone: the complaint failed to state a cause of action, since the allegations were that each of the respondents sold its products in accordance with a delivered pricing system, but the alleged discriminations occurred as a result of differing net prices received by each of the respondents at its factory, and the complaint did not show that the alleged unlawful discrimination as between purchasers located in the same zone occurred as a result of differences in actual prices at which the respondents' products were sold.

As respects certain of the other price differences which resulted from the classification of customers to receive different quantity, trade and regional discounts: it appeared that such differences either were no more than those allowable in the costs of containers or were not shown to have resulted in any substantial adverse competitive effects, and none of said practices were covered by the order to cease and desist.

As respects effects on competition, among other things, of respondents' discriminations in the storage battery industry, which consisted of more than 200 companies, ranging in size from multiple plant operations to small proprietorships whose total production might be less than fifty batteries

per day; and in which certain of the manufacturers, including the larger ones, were located in respondents' par price zone while others competing with them were located in premium zones where the delivered price of oxides to purchasers in lots smaller than five tons was almost $6 per barrel higher than the price to the manufacturer in the par zone purchasing his oxide in carload lots; it appeared—

That the differences in interzone prices were not justified as equaling or exceeding the additional freight or other transportation costs; and that in a substantial number of cases, differences between carload price and the price for smaller quantities were much more than the differences between carload and less-than-carload freight rates and resulted in an excess charge over delivery costs as high as 88 cents per hundredweight against the purchaser of smaller quantities;

That during the period from 1934 to 1941, when the storage battery industry was characterized by particularly sharp price competition, a saving to a manufacturer of from five to ten cents per battery on material costs often would mean the difference between a profit and a loss on low-priced batteries; and,

That respondents' price differentials between zones, together with the added amounts charged less-than-carload purchasers in both the par zones and the premium zones, made a difference in the cost of oxide of from four and a half to six cents per battery against the smaller battery manufacturers located in premium zones; and that during the period referred to, large manufacturers located at a considerable distance from the factories of respondents regularly offered for sale storage batteries in Chicago, St. Louis, and other lead pigment producing centers, at prices which were actually below the cost of manufacture of comparable products to the smaller battery producers located in such centers.

As respects the effect of respondents' discriminations on the mixed paint industry, where, as in the storage battery industry, competitive conditions were severe during the same period: it further appeared—

That, in the case of dry white lead, the price difference as between carload shipments and less-than-carload shipments was one-quarter cent per pound; that in most cases in which rail freight was a factor, such difference was justifiable on the basis of differences between carload and less-than-carload freight; that no effort was made, however, by any respondent to justify on a cost-of-delivery basis or otherwise said differential as to customers in areas in which the mode of delivery was local cartage and rail freight was not a cost factor;

That at the principal paint manufacturing centers of the United States located in and around St. Louis, Chicago, Philadelphia, and New York—in each of which is found one or more plants of respondents producing white lead, and each of which is also among the most substantial consuming areas for dry white lead in the country—the mode of delivery of lead pigments is local cartage and rail freight is not a cost factor; and,

That in said case, as in the case of the storage battery industry, respondents' price differentials between zones, together with the added amounts charged less-than-carload purchasers in both the par and premium zones, had the

tendency to injure competition as between the larger and smaller manufacturers of oxides and also of white lead, both dry and in-oil.

As respects the question of relief, and the Commission's requirement not only that respondents cease and desist from "entering into, continuing * * * any planned common course of action," etc., to engage in the practices found to have been engaged in, but also that each of the respondents individually cease and desist from selling its lead pigments at prices calculated in accordance with a zone delivered system "for the purpose or with the effect of systematically matching the delivered prices quoted or the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another;

Such a prohibition was necessary, not because it is unlawful in all circumstances for an individual seller acting independently to sell its products on a delivered price basis in a specified territory, but to make the order fully effective against the trade-restraining conspiracy in which each of the respondents participated; and

Such a prohibition was also fully justified under the complaint which, while it did not in Count I attack the zone pricing practices of each of the respondents aside from the conspiracy, did in effect allege that each of the respondents used the zone method of selling pursuant to and in furtherance of the conspiracy, with the intent and effect of enabling them to match exactly their offers to sell to any prospective purchasers at any destination and thereby eliminate competition.

In said further connection, the maintenance of the delivered prize zones and the quotation of delivered prices therein constituted the very cornerstone of the conspiracy of the respondents, which together accounted for practically the entire production of lead pigments in the country; and unless the respondents, representing practically the entire economic power in the industry, shall be deprived of the device which made their combination effective, an order merely prohibiting the combination might well be a useless gesture.

The Commission was also of the opinion in said connection in view of the decisions of the courts, that the prohibition in the order against the persistent, continuing and intended matching of prices, through the use by each respondent of a zone delivered pricing system, was particularly appropriate, and it was hoped that the order, as was its intent, would aid in substituting for the lethargy which had existed in the industry in question in recent years, a condition of sharp and healthy competition.

In said further connection, the only way to have competition is to compete, and should any of the respondents, after restoration of competition, be able to make a proper showing to the Commission that the prohibition in question or any other prohibition in the order was no longer necessary or desirable, the Commission would, of course, at such time take such action as might be appropriate in the light of the facts and the law.

As respects certain evidence offered by respondent National Lead to show that on an average basis and taken for each of its selling branches separately, the zone differentials for white lead reflected no more than average differences in freight costs in doing business as between the zones: it was

the view of the Commission that the fact that the average costs of shipping to customers over an area of a dozen or more States amounting to some arbitrary figure did not justify the discrimination which resulted in particular transactions with individual customers located in border territories.

Before *Mr. Webster Ballinger* and *Mr. John W. Norwood*, hearing examiners.

Mr. Paul R. Dixon for the Commission.

Alexander & Green, of New York City, for National Lead Co.

Wood, Arey, Herron & Evans and *Mr. Richard Serviss*, of Cincinnati, Ohio, for Eagle-Picher Lead Co. and Eagle-Picher Sales Co.

Chadbourne, Wallace, Parke & Whiteside, of New York City, for Anaconda Copper Mining Co. and International Smelting & Refining Co.

Davies, Richberg, Beebe, Busick & Richardson, of Washington, D. C., and *Mr. Thomas J. McDowell*, of Cleveland, Ohio, for The Sherwin-Williams Co.

M. B. & H. H. Johnson, of Cleveland, Ohio, and *Strange, Myers, Hinds & Wight*, of New York City, for The Glidden Co.

Amended Complaint

This amended complaint is filed to obtain relief from acts of respondents because of their violations, jointly and severally, as hereinafter alleged in Count I herein, of Section 5 of an act of Congress entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," commonly referred to as the Federal Trade Commission Act, as approved September 26, 1914, and amended March 21, 1938 (38 Stat. 717; 15 U. S. C. A. sec. 41; 52 Stat. 111), and because of their violations, as alleged in Count II herein, of Section 2 (a) of an act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," commonly referred to as the "Clayton Act," as approved October 15, 1914, and amended June 19, 1936 (38 Stat. 730; 15 U. S. C. A. sec. 12, 49 Stat. 1526; 15 U. S. C. A. sec. 13, as amended).

COUNT I

The Charge Under the Federal Trade Commission Act

Paragraph 1. Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the parties named in the caption hereof, and more particularly described and referred to hereinafter as respondents, have violated the provi-

sions of Section 5 of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its amended complaint, stating its charges in that respect as follows:

Nature of Charges

PAR. 2. Respondent National Lead Company is charged in this Count I of the amended complaint with having monopolized and attempted to monopolize the interstate sale of lead pigments and with having acted unlawfully to secure a monopolistic control over the prices of lead pigments in the United States, and with having combined, conspired and cooperated with the other respondents to hinder, lessen and eliminate price competition in the sale of lead pigments in the United States. It and each of the other respondents are charged with using unfair, oppressive and discriminatory acts, methods and practices in connection with the sale of lead pigments in the United States.

Description of Respondents

PAR. 3. Each of the respondents is particularly named and described as follows: (a) National Lead Company, a New Jersey corporation with its principal offices at 111 Broadway, New York, N. Y. (sometimes hereinafter referred to merely as National). (b) Eagle-Picher Lead Company, an Ohio corporation with its principal offices at 901 Temple Bar Building, Cincinnati, Ohio, parent corporation of respondent Eagle-Picher Sales Company. (c) Eagle-Picher Sales Company, a Delaware corporation with its principal offices at 901 Temple Bar Building, Cincinnati, Ohio, the wholly-owned subsidiary of respondent Eagle-Picher Lead Company (sometimes hereinafter respondents Eagle-Picher Lead Company and Eagle-Picher Sales Company both are referred to merely as Eagle-Picher). (d) Anaconda Copper Mining Company, a Montana corporation with its principal office located at 25 Broadway, New York, N. Y., parent corporation of respondent International Smelting & Refining Company (sometimes hereinafter referred to merely as Anaconda). (e) International Smelting & Refining Company, a Montana corporation with its principal office at 25 Broadway, New York, N. Y., a wholly-owned subsidiary of respondent Anaconda Copper Mining Company (sometimes hereinafter referred to merely as International). (f) The Sherwin-Williams Company, an Ohio corporation, with principal offices at 101 Prospect Avenue Northwest, Cleveland, Ohio (sometimes hereinafter referred to merely as Sherwin-Williams). (g) The Glidden Company,

an Ohio corporation with principal offices located at Union Commerce Building, Cleveland, Ohio (sometimes hereinafter referred to merely as Glidden).

Definitions and Explanation of Terms

PAR. 4. Some of the terms hereinafter used are defined and explained as follows:

A. "Lead Pigments": This term includes the lead pigments commonly known in the industry as white lead (both basic carbonate and basic sulfate of lead); blue lead; red lead (or red oxide of lead); litharge (or monoxide of lead); orange mineral and grinders' lead paste. Such pigments are marketed either as dry products, in the form of dry powder, or in oil, in the form of a paste after mixture with linseed or other oils.

B. "Pig lead": Pig lead is a product derived from the smelting and refining of lead ore or lead "concentrates." The pig lead is secured after the smelting and refining has removed sulphur and other impurities from the lead ore and which are found in it as it is taken from the mines.

C. "Commerce": The term commerce as hereinafter used means "commerce" as defined in the Federal Trade Commission Act.

Description and History of Industry and the Commerce of Respondents

PAR. 5. The respondents herein either directly or indirectly through subsidiary corporations or operating divisions, are engaged in the manufacture, sale and distribution of lead pigments in commerce, and some of them, including respondents National, Eagle-Picher, Sherwin-Williams and Glidden, are also engaged in the use of lead pigments in their manufacture of paint. The lead pigments thus produced are an important item in commerce between and among the several States. They are a principal item used in the manufacture of paint, and the paint produced from such pigments is held in high esteem by builders and users as of the highest possible quality for application to exteriors of buildings, ships and other structures. Such pigments have other important industrial and commercial uses too numerous to mention herein.

For a part of the period covered by this amended complaint the respondent Eagle-Picher Lead Company directly sold and distributed lead pigments in commerce, and it has also indirectly sold and distributed such products in commerce since the formation and incorporation in the State of Delaware of its wholly owned subsidiary, respondent Eagle-Picher Sales Company, which now serves respond-

ent Eagle-Picher Lead Company as a marketing medium for products of the parent company.

During a part of the period covered by this complaint, respondent Anaconda Copper Mining Company engaged in the production and distribution in commerce of lead pigments through a subsidiary corporation, Anaconda Lead Products Company, and since about 1936 Anaconda Copper Mining Company has distributed in commerce the lead pigments produced by its wholly-owned subsidiary, respondent International Smelting and Refining Company through Anaconda Sales Company, Pigments Division, a subsidiary of Anaconda Copper Mining Company.

The production of the National Lead Company and the other producing respondents accounts for substantially all of the lead pigments produced and sold in the United States, while that of National accounts for more than half of the total production of the respondents. Therefore, in the aggregate, the producing respondents are the manufacturers and primary sellers to whom purchasers and users of lead pigments must turn for supplies of lead pigments, and respondent National is the dominant producer in the field. The production and distribution of pig lead, from which lead pigments are produced, is also concentrated in the hands of a few corporations, including respondents National and Eagle-Picher.

Offenses Charged

PAR. 6. Respondent National Lead Company has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act by monopolizing, attempting to monopolize and acting to control the sale of lead pigments and the prices thereof in commerce. Respondents National Lead Company, Eagle-Picher Lead Company, Eagle-Picher Sales Company, Anaconda Copper Mining Company, International Smelting & Refining Company, The Sherwin-Williams Company and The Glidden Company have violated and are now violating the provisions of Section 5 of the Federal Trade Commission Act by combining, conspiring and cooperating between and among themselves and with each other for the purpose and with the effect of restraining, hindering, suppressing and eliminating competition in prices and terms of sale of lead pigments in commerce. Each of said respondents has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act by engaging in and continuing unfair, oppressive and discriminatory acts, methods and practices in connection with sales and offers to sell lead pigments in commerce.