ADDRESS BY
HON. ROBERT E. FREER, MEMBER OF FEDERAL TRADE COMMISSION,
AT ANNUAL MEETING OF
TRADE ASSOCIATION EXECUTIVES OF NEW YORK CITY,
AT THE HOTEL PENNSYLVANIA IN NEW YORK,
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THE FEDERAL TRADE COMMISSION AS A CONSTRUCTIVE INFLUENCE IN THE TRADE ASSOCIATION MOVEMENT

Mr. Chairman, Ladies and Gentlemen:

I appreciate this opportunity to discuss with you some of the means whereby trade associations and the Federal Trade Commission may be of mutual assistance in serving the interests of business and the public.

I also hope to convince you trade association executives that members of the Federal Trade Commission do not wear horns. For your sake, I shall undertake to do this convincing quickly, for I am sure no souls are ever saved after the first twenty minutes.

The Federal Trade Commission, as you know, is one of the independent Federal agencies. It is an administrative and quasi judicial body created by Act of Congress approved September 26, 1914, having the general power of inquiry, and the specific duty of preventing unfair methods of competition in interstate commerce to the end that business and the public may enjoy the benefits of free and fair competition. Free and fair competition is the life of trade. In the elimination of unfair competition, Trade Associations and the Commission can and do make common cause.

In the Commission's organic Act, Congress declared unfair methods of competition in commerce to be unlawful, and empowered the Commission to prevent them whenever "it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public". From this it will be seen that the purpose of eliminating unfair methods of competition is twofold, namely, the protection of members of industry generally, from the harmful effects of any unfair practices by competitors, and the protection of the public interest. The public interest also suffers whenever the honest business man is not protected from the dishonest, monopolistic, oppressive or otherwise harmful practices of competitors.

The public and business should and do uphold the Commission's hand in its efforts to improve the plane of competition. Honest competitors always should be free to conduct their business in a fair and honorable way and not feel that they may be forced to descend to the level of the dishonest, unfair or unethical trader. To that end the law in the words of the Supreme Court p[illegible]poses that - "The careless and the unscrupulous must rise to the standards of the scrupulous and diligent". (White Pine case).

Machinery is provided in the Federal Trade Commission for bringing about the improvement of competition through compulsory proceedings, - where necessary, and through voluntary cooperative effort, where possible.

Compulsory correction requires litigation upon formal charges, and either the execution of a stipulation or a trial, leading to findings of fact and an order to cease and desist, subject to review and enforcement by the court.

Means of voluntary self-correction are provided in the trade practice conference procedure which the Commission has established to assist industrial groups in accomplishing the elimination of unfair practices through cooperative effort. An industry, or a representative group thereof, may initiate such action. In this the trade association usually plays an important part. An application for a trade practice conference is usually filed by the trade association of the particular industry concerned, or it may be filed by any representative group thereof. If the proposal appears feasible to the Commission, a conference is arranged at which the industry's members may consider their problems. With the aid and counsel of members of the Commission's staff, trade practice rules covering the problems are formulated, considered, and such as are adopted are submitted to the Commission for its approval. Upon approval, such rules are submitted by the Commission to each member of the industry who is afforded an opportunity to signify his agreement to abide by the rules in the conduct of his business. It is also customary for the industry to appoint a trade practice committee to cooperate with the Commission in taking all proper action in putting the rules into effect.

In passing upon trade practice rules which an industry submits, the Commission applies the test of law. To receive approval, the rules must be such as will not permit a practice contrary to the law or public interest. For example, approval of the Commission would not be given to a rule which establishes a monopolistic practice or which tends to fix prices or otherwise illegally restrain trade or bring about the suppression of fair competitive opportunity for all. The public interest requires that no rule be approved by the Commission which would work undue hardship on the public or any member of the industry.

Trade practice conference rules approved by the Commission fall into two groups. In Group I are placed such provisions as proscribe practices which are illegal as constituting unfair methods of competition or other violations of law over which the Commission has corrective jurisdiction. In Group II are placed such rules as the industry deems desirable to foster and promote in the interest of fair and equitable conduct, but which do not involve practices necessarily illegal.

Since inauguration of the Trade Practice Conference work, around one hundred and seventy-five such industry conferences have been held, under the Commission's auspices, for industries with membership up to many thousands.

Experience has shown that compliance with the rules established through the trade practice conference procedure is not a difficult problem. Business men usually respect their agreements. However, compulsory statutory processes are available for enforcement of the Group I rules against an offender, even though such offender has never formally accepted the rules or had any part in the conference at which they were adopted. This is because the practices prohibited by Group I rules constitute statutory offenses.

All industry cannot be poured in one mold. Some industries find a need for more rules than others. Wherever possible, rules are added or varied to meet the peculiar needs of the particular industry.

Practices commonly dealt with in approved Group I rules are:

Misrepresentation and misbranding of product.
Defamation of competitor and disparagement of his products.
Illegal price discrimination.
Illegal selling below cost.
Commercial Bribery.
Illegal use of loss leaders.
Illegal rebating.
Inducing breach of contract wilfully to injure competitor.
Circulating threats of infringement suits in bad faith.
Full Line forcing to suppress competition.
Passing off.
Imitation of trade marks.

The value of the trade practice conference to industry and the public has been demonstrated by experience. Its importance to trade association activities devoted to the laudable purposes of stamping out unfair practices, I believe, is apparent. On this subject, an informed student has said:

"The trade practice conferences under the auspices of the Federal Trade Commission add in a measure the most necessary element which associations lacked; namely, enforcement. * * * * * * Although the Commission must necessarily deal with the industry as a whole, trade associations form an indispensable part of the procedure. In fact, the success of this method depends upon the cooperation of associations both in preparing an industry for such a conference, and in the adoption and the enforcement of the rules." (Joseph H. Foth, on "Trade Associations, Their Service to Industry" - 1930)

Self Regulation Under Group II Rules

In the Sugar Institute case, the Supreme Court said: "Voluntary action to end abuses and to foster fair competitive opportunities in the public interest may be more effective than legal processes. And cooperative endeavor may appropriately have wider objectives than merely the removal of evils which are infractions of positive law."

Doubtless you are much interested in the question of open price as a trade association activity. The question of formulating a definite policy for the guidance of industry is now being studied by the Commission. We have not yet determined how far we may go under the law in sanctioning proposed Group II rules containing open price provisions.

Even after our studies are completed and pending rules either approved or rejected it cannot be expected that the Commission shall furnish such definite advice in advance as will assure an industry desiring to experiment in a doubtful zone of cooperative dealing with business questions that it

will not come into conflict with the law. The Commission is only an administrative agency. It does not make the law. Our duty is to enforce the law as enacted by the Congress and interpreted by the courts.

The Supreme Court has upon numerous occasions significantly pointed out the difficulty of deciding the legality of a particular plan except in the light of the acts done under it.

In the Appalachian Coal case, the Supreme Court dealt with a question of prediction. It said:

> "We recognize, however, that the case has been tried in advance of the operation of defendant's plan and that it has been necessary to test that plan with reference to purpose and anticipated consequences without the advantage of the demonstrations of experience. If in actual operation it should prove to be an undue restraint upon interstate commerce, if it should appear that the plan is used to the impairment of fair competitive opportunities, the decision upon the present record should not preclude the government from seeking the remedy which would be suited to such a state of facts."

In United States v. American Linseed Oil Company, the Court said:

> "If, looking at the entire contract by which they are bound together, in the light of what has been done under it, the Court can see that its necessary tendency is to suppress competition in trade between the states, the combination must be declared unlawful". (Emphasis supplied.)

Again, in the recent Sugar Institute decision, the Court said:

> " * * * each case demands a close scrutiny of its own facts".

The subject is one of great depth. Questions of economic policy as well as legal prohibitions are involved. Some of the considerations have appeared in official reports and studies that have been published. They are, of course, of a general nature. I can only attempt to give you in a general way some of these considerations.

The limits of action must be considered in the light of our established laws and economic policies which are to protect and foster free and fair competition.

In the words of the Supreme Court, in the Linseed Oil case:

> " * * * concerted action through combination * * * is forbidden when the necessary tendency is to destroy the kind of competition to which the public has long looked for protection."

When the tendency toward monopoly, in the form of trusts and mergers, assumed such proportions as to threaten to tear the competitive system from its moorings, Congress enacted the Sherman law with only one dissenting vote in either house.

Mr. Justice Harlan has well described the background in the following words:

> "All who recall the condition of the country in 1890 will remember that there was everywhere, among the people generally, a deep feeling of unrest. The nation had been rid of human slavery - fortunately, as all now feel - but the conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people, namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessaries of life." (Standard Oil Co. v. U. S., 221 U.S. 83; Separate Opinion).

Concerted activity meets with like condemnation

> " . . . when the necessary tendency is to destroy the kind of competition to which the public has long looked for protection." (Linseed Oil case).

The Sherman law, however, proved an inadequate anchor against monopolistic trade winds of the early 1900's. All major political parties in 1912 adopted anti-monopoly planks and Congress, in 1914, reinforced the Sherman law with the Federal Trade and Clayton Acts.

Jones, in his book on Trade Association Activities and the Law, makes this statement in regard to the present Anti-trust laws:

> "It cannot be too strongly emphasized that the Supreme Court of the United States is determined that no subterfuge, no indirection, shall be employed to evade the laws and public policy of our government, which require the maintenance of equal opportunity for all under fair, unrestricted competitive conditions."

He adds:

> "The great future of our trade associations will be achieved in constructive efforts for the common good and not in attempted evasions of the law."

The basic factors to be considered in determining the legality of concerted dealing in price statistics are intent and purpose. Judge Mack made this significant statement in his decision in the Sugar Institute case in the district court:

> "While proper and wholesome restraint need not be illegal merely by reason of concealed or pretended motives (Board of Trade case, 246 U.S. at 238), this may well turn the scales against legality as to those practices the validity of which might otherwise be doubtful."

Pursuant to Senate Resolution, the Federal Trade Commission made a report to Congress in 1929 on open price trade associations. For purposes of the report, it was necessary to collect and digest a great deal of information regarding trade association work in general. The investigation served to

familiarize the Commission with the work of trade associations, and it showed that they have a potential capacity for great service. The report stated:

> "With reference to the fundamental questions of policy involved, it seems clear that trade associations have come to stay. They are evidently a permanent feature of our social organization because of characteristic possibilities of public service, and because they are instruments by which individuals are induced to transcend the point of view of merely private and personal interest."

Conversely, it also revealed that there appeared to be a tendency on the part of some association executives to direct their activities toward the accomplishment of ends beyond the limits of the law.

It is natural for members of industry who combine for a common purpose to be more concerned with their own purposes than with the general welfare. Overzealousness on the part of trade association executives may result in misinterpretation of the limitations to concerted activity. The Federal Trade Commissior is directed to serve the National interest by protecting the competitive system. It is proper that there should be some coordination between a government agency charged with the duty of protecting the public interest of the nation and a private organization pledged to the interest of a single group of citizenry. How well the possibilities of public service spoken of in the report from which I quoted will be availed of depends in a large measure upon the degree of cooperation between trade associations and the Federal Trade Commission.

In a textbook, "Business Organization and Control", by Charles S. Tippetts and Shaw Livermore, Professors of Economics, University of Buffalo, there appears a very apt reference to the need for cooperation between you and the Federal Trade Commission.

The reference is:

> ". . . It is to be hoped that the friendly support of many leaders in various industries which has been gained by means of the conferences will not be alienated. At the same time, it must be admitted that there is evidence of a lack of 'good faith' on the part of certain trade associations that have not lived up to the letter of the trade conference agreement and have endeavored to use it as a defense of certain practices which are clearly violations of the law. The future of the trade practice conference will depend largely on the willingness of the trade associations to play the game fairly."

The Commission welcomes the opportunity to serve and aid industry in its own efforts to foster more ethical competitive conditions through voluntary trade practice conferences and by the exercise of proper self-regulation under Group II Rules. The means is provided; it needs only to be availed of.

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