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Remarks

on

THE TRADE PRACTICE CONFERENCE PROCEDURE

of

THE FEDERAL TRADE COMMISSION

Before the

FLOOR MACHINERY MANUFACTURERS ASSOCIATION

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by

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practices are being followed by competitors of the party complained against, the inquiry may be expanded to industry-wide proportions. In such event, formal corrective action might necessitate a multiplicity of time-consuming separate proceedings. In lieu of this, if simultaneous uniform cooperative action appears appropriate to the accomplishment of mass correction and practicable of execution, the trade practice conference procedure will be invoked.

But the conferences usually have originated upon application of an interested party or group in the manner prescribed in Rule XXVIII of the Commission's published rules of practice. A controlling consideration in determining whether an application will be granted is the possibility for real good in advancing the best interests of industry and the public.

I am considerably ahead of my narrative when I remark in passing that rules heretofore issued may be amended or rescinded in the same ways, viz., upon Commission motion or pursuant to application.

I will now turn from the general to the concrete myself and describe the procedure itself. The name is apt. When a conference is called by the Commission, all known members of the industry are invited to participate by taking part in the discussions with representatives of the Commission or by submitting proposed rules. There are expressions as to troublesome practices which may prevail in any of the industry's segments. These may bear on consumer or trade differences as to the understanding of trade terms. The application and interpretation of any orders to cease and desist which may have been issued by the Commission against industry members is explored. It can readily be seen that one or more of the subjects may be highly controversial. Occasionally there may come about periods when all is not sweetness and light. Nevertheless, these practices can be intelligently weighed and appraised by reasonable men in frank and open discussion. On the other hand, these meetings are not expected to evolve into the ritual of confession in the sense that culprit identity may become an issue.

At the conclusion of the first conference, usually presided over by a Commissioner, the proceedings, the proposals and any alternative courses deemed desirable in the public interest are studied by the staff of the Bureau of Trade Practice Conferences and Wool Act Administration. After study by the Commission proposed rules in a form deemed tentatively appropriate for discussion are released. Notice of further hearings then ensues and comment, suggestions or objections are invited from industry members and the public as well. Again, the entire proceedings, embracing the hearing records and other information submitted, are considered and the Director, Bureau of Trade Practice Conferences and Wool Act Administration makes his report to the Commission, together with recommendation. If rules are accepted and approved, they are promulgated in the Federal Register and a copy is sent to each industry member whose name and address is available inviting acceptance of the rules and expression of intention to abide thereby.

The rules as usually promulgated after a conference are divided into two groups. One interprets the meaning of the law applicable to conditions in a particular industry specifying expressly as unfair those practices believed

to fall within the statutory proscriptions. The other group expresses further standards of business conduct which are proposed by the industry and accepted by the Commission as desirable. Usually the effectiveness of the rules in the second category depends upon voluntary compliance, but under certain circumstances conduct counter to their provisions may constitute an actionable transgression of law. Sometimes these rules are designed to encourage industry members to afford consumers more information than that required by the law, or by the first group of rules. Concerns engaging in practices characterized as unfair in the first group are subject to formal proceedings by the Commission.

However, in such case the Commission does not proceed on the basis of violation of the rules, but because the law itself upon which the rules are based has been violated. This calls for issuance of formal complaint and hearings, respondents being accorded the right to cross examine and adduce evidence, to make objections, exceptions, motions, appeals, to submit briefs and oral argument, and finally to review in the courts if order to cease and desist is entered. It is the full dress statutory procedure.

One example of trade practice rules designed to aid the consumer is illustrated by those promulgated February 26, 1948, for the Office Machine Marketing Industry, defining such terms as "demonstrator," "factory rebuilt," "rebuilt" and "reconditioned" as applied to typewriters. In this category too are those issued January 26, 1948, for the Watch Case Industry prescribing a certain minimum fineness of alloy or a minimum thickness of rolled plate or electroplate as a condition for nondeceptive use of the word gold. Those for the Household Fabric Dye Industry promulgated May 29, 1947, define such expressions as "all fabric," "all purpose," "fade-proof" and "sun fast" among others. Another example of trade practice conference rules designed to aid the consumer and scrupulous business is illustrated by those promulgated for and accepted by many members of the fur industry. These rules require that the seller disclose the true name of the furs which have been dyed to resemble other fur peltries, together with information as to whether the furs have been tipped or blended if such be the case. They also require disclosure of the facts if the garment is made of pieces, tails, paws, or scraps rather than of full skins. By the development of such rules the honest merchant and the consumer are informed as to the meaning of terms which they use in their dealings with each other. The concern which would seek to benefit from consumer ignorance is put on warning as to what it should not do.

It is obvious then that prime subjects for treatment in rules are misrepresentation of industry products pertaining to quality, purity, origin, attributes, or properties or nature of manufacture. Others may concern false and disparaging statements of a competitor's product, or his business, or false promises made in obtaining agents or representatives to distribute the products respecting guarantees, exclusive territories, or overstatements as to earnings or opportunities inherent in the employment.

Rules may include expressions respecting practices violative of the Clayton Act as amended which relates, among other things, to price discriminations and other discriminations, tie-in sales and exclusive dealing

contracts. Included too, may be provisions condemning conspiracies and agreements in restraint of trade. Necessarily these are general in treatment and coverage. Insofar as the rules and the conference discussions with staff members may be informative to industry members in interpreting the spirit and basic philosophy of the antimonopoly laws, it is felt they have substantial value. Because, for the most part, conspiracies and monopolistic practices are adopted with the objective of restraining competition, and intricate questions must be resolved in deciding whether the acts have had the adverse effects proscribed in the statutes, these are matters peculiarly appropriate for quasi-judicial determination. Cessation of such practices and protection for the public against resumption are best assured by the statutory remedies.

You will not be astounded when I state that the Commission does not approve provisions sanctioning or aiding or abetting practices contrary to law. The same goes for proposals which would evade or change a Congressional enactment. Conversely we want to stay clear of narrow, distorted and unreasonable constructions ourselves.

Upon promulgation of rules for an industry, the Commission examines all pending charges of law violation on the part of industry members which have not reached the formal complaint or trial stage. If the rules adequately cover the charges, the Commission will give consideration to closing the files without prejudice to their being reopened whenever such action appears warranted. Among the factors considered is whether there is adequate reason to believe the party is complying with the rules or will so continue, whether he is a signatory to such rules and whether there are circumstances indicative that further proceedings are required in the public interest. The same consideration may be had upon motion in matters which have reached the trial stage. Exceptions, however, are instances of Clayton Act violations or practices in restraint of trade.

Rules have been promulgated for over 150 industries. Administration, after their promulgation, has as its object maintenance of continuing cooperation between the Commission and the industry to promote law observance. Rules for some industries create a committee on trade practices to cooperate with the Commission and to perform such acts as may be legal and proper to put the rules into effect.

Plans for increased utilization of this procedure are high on our agenda. It deserves the greater emphasis now being accorded to it. Among the industries in which proceedings are being initiated or are pending are floor wax and cosmetics and toiletries. Subjects to be considered in others are proper designation of water repellent fabrics in rainwear garments and wool shrinkage.

In the last analysis, the conference procedure has demonstrated its usefulness by actual experience. It is unsurpassed for developing widespread understanding of trade term meanings and of the circumstances under which a seller has a duty to avoid deception by disclosing the facts concerning his product. Encouragement of simultaneous and wholesale abandonment of unethical practices accords with the policy of the law.

It is good business too. Both uniform law observance and flagrant disregard of its concepts are chain reaction phenomena. It stands to reason that the conferences can contribute significantly to the preservation of fair competition as the primary regulatory force of our free enterprise system of capitalistic economy.

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