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ADDRESS BY
HON. EWIN L. DAVIS, MEMBER OF FEDERAL TRADE COMMISSION
BEFORE THE
NINETEENTH ANNUAL CONVENTION OF THE
ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INCORPORATED,
AT THE WILLARD HOTEL, WASHINGTON, D. C.,
11:00 A. M., FEBRUARY 8, 1938.

TRADE PRACTICES

It is a pleasure to respond to the invitation to address the Nineteenth Annual Convention of your Association about the Federal Trade Commission and its relation to trade practices.

The Federal Trade Commission is an independent, bi-partisan, administrative and quasi-judicial tribunal, created by Act of Congress in 1914, upon the recommendation of President Woodrow Wilson. The Commission is composed of five members appointed by the President, by and with the aid and consent of the Senate, for terms of seven years. To aid the Commission in its labors, it has a staff of trained, efficient lawyers, economists, accounts, statisticians and clerical personnel.

FUNCTIONS OF THE COMMISSION

While the Commission has certain other powers and duties, its chief functions are:

- (1) To prevent unfair methods of competition in commerce;
- (2) To make investigations upon the direction of the President, the Congress, upon the request of the Attorney General, or upon its own initiative.
- (3) To enforce certain sections of the Clayton Antitrust Act, including an amendment to Section 2 of that Act recently enacted and generally referred to as the Robinson-Patman Act.

The processes of the Commission are injunctive or preventive, not punitive. The success of this procedure has been indicated by the fact that during the nearly twenty-two years since the Commission was established, it has seldom had to appeal to the courts to discipline respondents for disregarding its cease and desist orders.

UNFAIR METHODS OF COMPETITION

The Federal Trade Commission Act declares "unfair methods of competition in commerce" to be unlawful and directs the Commission to prevent same whenever "it shall appear to the Commission that proceedings by it in respect thereof will be to the interest of the public." The purpose of preventing unfair methods of competition is two-fold, namely, the protection of member industry from the harmful effects of unfair practices by competitors, and protection of the public interest.

Congress very wisely did not undertake to enumerate the various unfair methods against which the Act was directed; unfair competition is as infinite as human ingenuity, and constantly appears in new forms and guises.

Unfair methods of competition generally fall within two broad classes:

First, those which involve an element of fraud and dishonesty, and,

Secondly, those not inherently dishonest, but which are restrictive of fair competition.

In defining the words "unfair methods of competition" as used in the Federal Trade Commission Act, the Supreme Court in the Gratz case (253 U. S. 421) referred to them as practices "opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly."

The Federal Trade Commission handles thousands of cases annually involving a charge of misrepresentation, deception or fraud in the sale of products and various other unfair practices covering almost every conceivable character of commodities.

COMMISSION PROCEDURE

The procedure of the Commission in all such cases is simple and effective. A case may originate in several ways, although most generally it is through complaint of an unfair practice made by a competitor or consumer. This requires no formality. The complaint may be made by letter setting forth the facts. The identity of the complainant is kept confidential.

Whenever a matter is brought to the attention of the Commission indicating a probable law violation, the Commission directs an investigation by its own staff. If from the facts developed by such investigation it has reason to believe that the law is being violated, the Commission orders the preparation and service of a complaint. Such service is ordinarily made by sending a copy of the complaint by registered mail to the alleged offender, who is called the respondent, and who is granted twenty days within which to make answer, after which hearings are conducted, evidence taken, briefs filed and the case argued, if either side makes request to be heard before the Commission in oral argument. The Commission then takes the case under advisement and renders its decision. If the Commission finds that the evidence sustains the allegations in the complaint, it issues an order requiring the respondent to cease and desist from the unlawful practices in question.

If the respondent feels that the Commission's order is not justified, he has the right of appeal to the Circuit Court of Appeals of his own jurisdiction. The findings of fact by the Commission, if supported by evidence, are final, but the Court passes upon the validity of the legal conclusions applicable thereto. If the Court affirms the Commission, it directs the respondent to obey the Commission's order. Should he then fail to do so, the Court may proceed as in any other contempt of Court.

The statute provides that Federal Trade Commission cases "in the Circuit Court of Appeals shall be given precedence over other cases pending therein, and shall be in every way expedited."

There is, too, the right of petition for certiorari by either the Commission or the respondent to the United States Supreme Court, and during its history, a considerable number of the Commission's cases have been carried to that tribunal.

A reversal of the Commission's orders by the Courts is a rare occurrence. The Commission has been reversed by the United States Supreme Court but once in the last seven years, and that was by a five to four decision in a Section 7 Clayton Act case; during the last four years final decisions have been rendered by the Circuit Courts of Appeals and/or the Supreme Court in 62 of the Commission's cases. The Commission was affirmed by the Circuit Courts of Appeals in 58 of these cases, reversed in 3, and partially affirmed and partially reversed in 1. The four latter mentioned cases were carried by certiorari to the Supreme Court which reversed the Circuit Courts of Appeals and affirmed the Commission in all four cases. Counsel for respondents have filed petitions for certiorari in numerous cases in which the Courts of Appeals had affirmed the Commission, but all of them were denied except in the Clayton Act case before mentioned.

STIPULATIONS

I have described the Commission's formal case procedure. We have an informal procedure by which the Commission has been able to expedite its work and save much time and expense both to the Commission and to persons charged with violations of Section 5 of the Federal Trade Commission Act. This is known as our stipulation procedure. A large percentage of our cases are satisfactorily adjusted in this manner. It often happens that a member of industry commits an offense against the Federal Trade Commission Act through ignorance of the law, or that such practices have been indulged in by advertising agents or employes of the manufacturer or merchant without the knowledge of the executive. When such complaints are brought to his attention, it frequently happens that the violator expresses a desire to refrain from any violation, advises that he does not wish to resist the proceeding, but wishes to adjust the matter in the simplest manner possible. Ordinarily he is given the opportunity to sign a written stipulation of the facts and an agreement to cease and desist from the practices involved. If the respondent observes his agreement, no further procedure is had. Violations of these stipulations are extremely rare.

As indicated, the stipulation procedure is a privilege and not a right. Whether an offender is permitted to sign a stipulation is a matter within the discretion of the Commission. Such privilege is not accorded where the Commission is convinced that the practices in question are fraudulent or of a serious nature.

TRADE PRACTICE CONFERENCES

After several years experience under its organic Act, the Commission developed still a third method of eliminating unfair trade practices. I refer

to the Commission's trade practice conference procedure. The purpose of the trade practice conference procedure is to afford industries a means whereby they may more effectively cooperate under Government supervision in the elimination of practices which are unfair and harmful. It mobilizes and implements the forces for good to elevate the standards of fair dealing with the consuming and purchasing public.

Under this procedure, if a representative and substantial number of the members of an industry propose a trade practice conference and the proposal appears feasible to the Commission, a conference is arranged for the consideration of the problems of the industry. With the aid and counsel of members of the Commission's staff, trade practice conference rules covering the problems are formulated, considered, and such as may be adopted are submitted to the Commission for its consideration. The Commission frequently suggests revisions in the proposed rules, in which event the revised rules are referred back to the industry for further consideration. The rules are entirely voluntary, so that no member of industry is under any compulsion to agree thereto. If the Commission finds that the rules as finally proposed are in conformity with the law, it gives its approval. Upon such approval, the 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 effectuating a proper compliance with the rules.

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.

The Commission has sponsored upward of two hundred trade practice conference agreements, and now has under consideration a substantial number and inquiries with regard to many more. Many of these conference agreements have been adopted by large industries, with investments running into hundreds of millions of dollars, and employing large numbers of workers. By this conference method, the unfair and dishonest practices, which are frequently the result of economic and competitive forces rather than deliberate design, are often corrected by wholesale, where otherwise it might be necessary to take action against each individual offender, with the effort, time and expense incident thereto.

Generally speaking an overwhelming majority of the members of an industry are honest and are desirous of employing only fair and honorable methods. These conference agreements usually lead to prompt abandonment of unfair practices by the entire industry.

Among trade practice conference agreements for industries, which have been approved by the Commission and are now in effect, in which members of your Association are probably interested, may be mentioned the following industries: Electrical Contracting, Fabricators of Ornamental Iron, Bronze and Wire, Face Brick, Common Brick, Crushed Stone, Cut Stone (Building Stone), Reinforcing Steel Fabricators and Distributors, Millwork Industry, Concrete Mixers and Pavers, Fabricators of Structural Steel, Structural Clay Tile, Interior Marble, Barre Granite, Electrical Wholesalers, Plumbing and Heating, Lime Industry, Walnut Wood, Vulcanized Fiber, Solid Section Steel Windows, Wall Paper, China Recess Accessories, Metal Clad Door and Accessories Manufacturers, Cut Tack, Cut Nail, and Staple, Scrap Iron and Steel.

GENERAL INVESTIGATIONS

Another important feature of the work of the Federal Trade Commission is the function performed under Section 6 of the Commission's organic law which authorizes the Commission to make investigations upon the direction of the President or the Congress, or upon request of the Attorney General, or upon the initiative of the Commission.

Approximately one hundred investigations have been made under that authority, the greater portion of them pursuant to Congressional resolutions, a substantial number upon request of the President, and several upon request of the Attorney General. The Commission's reports on most of these investigations were printed as Government documents.

Among such investigations of possible interest to the members of your Association may be mentioned those relating to cement, steel, lumber, copper, electric and gas utilities, etc.

The mere publicity of the facts developed in these investigations generally proved beneficial, and often resulted in reforms forced by public sentiment or voluntarily adopted by those who were shown to have engaged in unlawful or unfair practices. Some of these investigations also resulted in prosecutions by the Department of Justice and a number of them resulted in the issuance of formal complaints by the Federal Trade Commission.

The investigations conducted by the Commission pursuant to Congressional resolution were primarily to develop facts in aid of legislation. Investigations by the Commission have resulted in the enactment of various important Congressional measures, among which may be mentioned the Packers and Stockyards Act, Export Trade Act, Grain Futures Act, Perishable Agricultural Commodities Act, Securities Act, 1933, Public Utility Holding Company Act, Federal Power Act, 1935, Robinson-Patman Anti-Price Discrimination Act, and numerous State statutes.

HUMAN NATURE

The vast majority of members of industry are honest and ethical. However, unfortunately, there is a small percentage in nearly every line of enterprise who persist in sharp practices. It has ever been thus. The desire to possess, a generally prevalent human instinct, has resulted in the employment of unfair and predatory practices throughout the life of mankind.

As aptly expressed by Kipling:

We are very slightly changed
From the semi-apes who ranged
 India's prehistoric clay;
Whoso drew the longest bow
Ran his brother down, you know,
 As we run men down to-day.

"Dowb", the first of all his race,
Met the Mammoth face to face
 On the lake or in the cave,
Stole the steadiest canoe,
Ate the quarry others slew,
 Died - and took the finest grave.

When they scratched the reindeer-bone,
Some one made the sketch his own,
 Filched it from the artist - then,
Even in those early days,
Won a simple Viceroy's praise
 Through the toil of other men.

It has too often been not a question of the "survival of the fittest", but the survival of the strongest.

Government can not ensure equality to all men, but it should ensure equality of opportunity. It should see to it that the game is played fairly.

PHILOSOPHY OF F. T. C.

The philosophy of the Federal Trade Commission and the laws it administers is that the channels of competition shall be kept open; that free and fair competition shall be preserved and protected. That is in accord with our American traditions.

If capitalism can not survive under such a system, it can not survive at all. In fact, it does not deserve to survive.

Let me remind you that the processes of the Federal Trade Commission are not punitive, but preventive or injunctive.

Last July, at exercises attendant upon laying the cornerstone of the permanent home soon to be occupied by the Commission, President Roosevelt said

of the Commission that it was established in the belief that "an ounce of prevention is worth a pound of cure", and that "prevention of unfair business practices is generally better than punishment administered after the fact of infringements, costly to the consuming public and to honest competitors."

It is the function and desire of the Commission to be helpful to honest business and to protect the public interest.

We cordially invite your cooperation.