THE FEDERAL TRADE COMMISSION - PROTECTOR OF FREE COMPETITIVE ENTERPRISE

Remarks

of

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at

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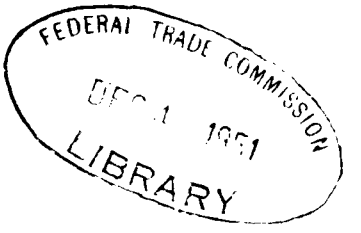
Motor and Equipment Wholesalers Association



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Ladies and Gentlemen of the Motor Equipment Wholesalers Association:

It is a great pleasure for me to have this opportunity to speak to you at this annual meeting of your association because, as you know, we, at the Federal Trade Commission, have a keen interest in you, in your business, and in the manner in which your business is conducted.

I am told your association consists of more than a thousand automotive wholesalers from all sections of the United States and Canada and in the aggregate you operate approximately 3,800 outlets. You handle automobile parts, accessories, rods, service-station equipment and general automotive supplies, selling your products to independent garages, service stations, car dealers, fleet operators and miscellaneous outlets. You compete directly with car factories, oil and rubber companies and indirectly with chain stores. You buy your products from many manufacturers who also sell to your competitors. Your ability to buy at fair and non-discriminatory prices is essential to your well-being and, in fact, to your ability to continue to serve the trade and through the trade, the motoring public. The importance of the independent wholesale distributor, automotive or otherwise, to our American free enterprise system is not always understood because the wholesaler rarely comes in contact with the consuming public. He does, however, perform an indispensable service to consumers by supplying retailers with the goods that the consumers need and want. The wholesaler is a specialist in making merchandise available. He is the bridge that connects thousands of manufacturers with hundreds of thousands of retailers. Few manufacturers can serve the retail trade directly as economically and as well as they can through wholesalers. On the other hand, many thousands of retailers simply could not exist if it were not for the services that the wholesalers provide.

I like to think the existence of independent business, large, medium and small, is the foundation of our democratic, competitive economy. Wholesale distribution makes that possible. It has been well said that the wholesaler is a principal bulwark against monopoly and a tremendously important factor in maintaining our free enterprise system. The Federal Trade Commission has become quite familiar with the problems of the automotive vehicle industry. In addition to making an investigation of the automotive vehicle industry, which was reported to Congress in 1939, the Commission issued an order against one of the larger car manufacturers requiring it to cease and desist the restrictive practice of requiring their dealers to handle the car manufacturers' parts and accessories exclusively, which practice injured the business of wholesalers of automotive products who were ready and willing to sell to such dealers.

President Truman, in a message on the state of the Union, said:

> "We must curb monopoly and provide aids to individual business so that it may have the credit and capital to compete in a system of free enterprise . . . I hope before this session is over to

transmit to the Congress a series of proposals to strengthen the Antimonopoly Laws, to assist small business, and to encourage the growth of new enterprises."

This statement and all that has been written into the so-called Antitrust Laws, to which I shall presently refer, clearly indicate that our whole economic order, and our commerce, are based upon the fundamental principle that interstate commerce must be kept free from illegal obstructions such as monopolies, combinations, conspiracies and unreasonable restraints of trade. All antitrust legislation, including the laws administered by the Federal Trade Commission, has for its fundamental purpose the regulation of interstate business with the end that unfair methods and deceptive acts and practices be eliminated from competitive enterprise. Monopolies are not a new development of our economic life. It is interesting to trace the history and development of monopolies.

The word "monopoly" is of Greek origin. It was first used about 347 B.C. in the writing of Aristotle to describe a financial device and was applied to the exclusive sale of commodities by a private trader or the state. The word was used by the Egyptians shortly afterward to designate the concept of exclusive sale and was at first restricted to state grants to raise funds to maintain standing armies, but later monopolies were given to individuals. They were abolished when Egypt became a Roman province.

The word "monopoly" was probably first used in Rome about 14-37 A.D. in a decree from the Roman Senate to describe instances where individuals secured the exclusive possession of commodities and sold them at enhanced prices. Later in about the third century A.D., grants of monopolies of certain commodities were made by the government to private enterprises as sources of revenue. Finally in the year 483 A.D., Emperor Zeno, then an emperor of the Eastern Roman Empire, in his famous edict attempted to put a stop to this practice by forbidding anyone to exercise a "monopoly" of any kind of certain commodities such as clothing and fish, or any other thing serving for food; also forbidding agreements that merchandise could not be sold at a less price than that agreed upon. The penalty for a monopoly violation was forfeiture of property and perpetual exile for the culprit; and for violation of illegal agreements, fixing prices and not selling at lower prices, a fine of forty pounds gold was provided. This edict was later included in Justinian's Code in 527-565 A.D. and became an integral part of the Roman law.

The term "monopoly" to designate exclusive privilege was not used to any appreciable extent in continental Europe during the sixth century following the downfall of the Western Roman Empire. It was not until after the twelfth century, when Aristotle's works became available that the word "monoooly" appeared in continental literature. This does not mean that during this period there were no restrictions on trade, but simply that the word "monopoly" was not used to designate such restrictions.

During the latter part of the Middle Ages, with the return of strong governments to continental Europe, the phenomenon of exclusive sale of commodities by one person returned and was termed "privatives," the Latin word designating privation or absence of something. For instance, in the kingdom of Naples, Frederick II (1194-1250) reserved to himself the exclusive sale of salt, iron and other commodities.

Queen Elizabeth of England granted many monopolies to reward her subjects for services rendered. She granted patents for monopolies to servants and courtiers who sold them to others, thereby raising the prices on commodities.

In the United States monopoly was early described as the concentration of business in the hands of a few. It was held in an early decision that monopolies had the following characteristics which were against public policy: (1) prices would be raised; (2) quality of products would be poor; and (3) other artisans and traders who maintained themselves in manufacturing or selling the articles monopolized would be driven out.

Prior to 1890 the usual kind of contracts in restraint of trade in the United States were agreements regarding the curtailment of production, or the fixing of prices, or the operation of what was known as a "pool." Such pools took various forms but generally provided for some system of restricting the output, cornering the supply, dividing the market, fixing prices, dividing profits, or the establishment of a common selling agency. Due to the fact that agreements to fix prices were generally held invalid at common law, the use of legal trusts to accomplish the unlawful purpose was begun about 1879, which trust was an ancient device by which legal ownership and management of property could be put in the hands of one person, a trustee, for the benefit of another. The first application of this device for the purpose of forming a combination to control the market is attributed to the old Standard Oil Company.

The formation of the trusts attracted great public attention during the 1880's. As early as 1888 bills were introduced in both branches of Congress to prevent the creation of trusts, and combinations in restraint of trade. Finally, the Sherman Antitrust Act was passed by Congress and became a law in 1890. The principal reasons for the passage of this Act was the prevention and control of industrial combinations for the purpose of preventing competition or restraining trade or increasing the profits of the producer at the cost of the consumer.

In the now-famous Standard Oil decision decided in 1911 the United States Supreme Court construed the Sherman Act as prohibiting only "unreasonable" restraint of trade. Thereafter, Congress, displeased with this decision, considered the enactment of legislation which would set up a body of men to carry out the legislative policy with respect to combinations and monopolies to be known as a Trade Commission.

Finally, in 1914, after much debate, Congress indicated the necessity for the passage of legislation to supplement the Sherman Act and to provide such tests and standards as would limit the scope of jurisdictional discretion. The old Bureau of Corporations was converted into the Federal Trade Commission and it was empowered to prohibit unfair methods of competition in commerce. The House report said: "The most certain way to stop monopoly at the threshold is to prevent unfair competition. This can be best accomplished through the action of an administrative body of practical men."

At about the same time that Congress passed the Federal Trade Commission Act, the Clayton Act was passed, by which Congress legislated, among other things, against the lessening of competition and restraining of trade by certain specific trade practices; such as (1) discriminating in price; (2) the use of tying contracts; (3) the practice of one competitor gaining control of another through stock acquisitions or mergers, and (4) the use of interlocking directorates between normally competing corporations. Primary authority to enforce the provisions of the Clayton Act prescribing these several inhibited trade practices was vested in the Commission, with certain concurrent authority conferred upon the Department of Justice.

In 1936, Congress added to the jurisdiction of the Commission by enacting the Robinson-Patman Anti-Discrimination Act. Section 2 of the Clayton Act of 1914 as thus amended prohibits the practice of selling in commerce at discriminatory prices where the effect may be to substantially lessen competition, tend to create a monopoly, injure, destroy, or prevent competition. It also catalogues as unfair and illegal trade practices, the granting of certain types of brokerage, commissions, advertising, promotional allowances, and discriminatory services, or facilities.

In 1938, Congress passed the Wheeler-Lea Act which further expanded the Federal Trade Commission authority to deal with unfair trade practices. The primary purpose of the Wheeler-Lea Amendment was to afford consumers the same protection against unfair and deceptive acts and practices that competitors were theretofore given against unfair competition.

In 1950, Congress passed an amendment to section 7 of the Clayton Act which will have the effect of remedying a grave defect in the antitrust laws. For many years this defect has been called annually to the attention of Congress by the Federal Trade Commission. Under the Clayton Act, it was illegal for a firm to buy capital stock of a competing corporation where the effect was to "substantially lessen competition between the corporations." But the same end might be, and indeed has been, achieved by the completely legal act of buying the physical assets of a rival. The new legislation plugs this gap by forbidding a firm to purchase the assets of business rivals if the transaction results in a reduction in competition or a tendency to create a monopoly "in any line of commerce in any section or community."

The statutes which I have cited constitute the source of the Federal Trade Commission's authority. They outline its duties with respect to the regulation of business practices in interstate commerce.

The maintenance of free competitive enterprise as the keystone of the American economic system is the primary objective of the Federal Trade Commission. More than a quarter of a century ago the Supreme Court of the United States charted the functions of the Commission in defining the words "unfair methods of competition" which the Commission was empowered to prohibit. The Court said in effect that unfair methods of competition included those practices regarded as "opposed to good morals because characterized by deception, bad faith, fraud or oppression," and those practices which were "against public policy because of their dangerous tendency unduly to hinder competition or create monopoly."

I should like to speak to you today with respect to some of the work which the Commission has done in carrying out the second phase of its authorized activities; that is, with respect to the prevention of practices which have a "dangerous tendency unduly to hinder competition or create a monopoly," including that portion of the Clayton Act, as amended by the Robinson-Patman Act, giving the Commission authority and power to prevent price discrimination between corporations in the sale of commodities, and also the use of tying contracts in the distribution of goods, wares or merchandise.

It so happens that two of the outstanding cases brought by the Commission in the enforcement of these laws were in the automotive industry. First, the General Motors case, mentioned earlier, in which the Commission required one of the large automobile manufacturers to cease and desist from requiring automobile dealers, by means of intimidation or coercion, to purchase or deal in accessories or supplies sold and distributed by the automobile manufacturer, and not to deal in accessories or supplies purchased from other sources, such as independent jobbers. This automobile manufacturer was further required to cease and desist from cancelling or threatening to cancel franchises with automobile retail dealers because they had purchased supplies and accessories from independent jobbers. Finally, the car manufacturer was required to cease and desist from entering into or enforcing any franchise or agreement for the sale of automobiles, or any contract for the sale of automobile parts in connection with such franchises, on the condition, agreement or understanding that the purchaser thereof should not use or sell automobile parts other than those acquired from the respondents. No appeal was taken by the car manufacturer from this order.

In a more recent case, where the facts alleged in the complaint were substantially admitted in substitute answers, the Commission issued an order against a group of oil companies which operated a chain of retail gasoline stations and also a common buying agency, requiring them to cease and desist from violating the provisions of Section 2(f) of the Clayton Act as amended by the Robinson-Patman Act, by knowingly

receiving or accepting from a seller any discrimination in price in the purchase from manufacturers of such commodities as automobile tires, tubes, batteries or other automobile parts or accessories through any common buying agency or any medium which is owned by these respondent oil companies. The respondents in that case were also required to cease and desist from, jointly or by agreement, exerting the influence of their combined purchasing power in jointly buying said products so as to obtain any price, discount, rebate, or other treatment from a seller, which is preferential to that allowed or made available by such seller to competitors of the respondents, or any of them.

There has been expressed in your industry and elsewhere a fear that the Commission has prohibited the granting of functional discounts or is moving in the direction of such prohibition. Now let me make one point clear. The position of the Federal Trade Commission on any matter is the position taken by a majority of its members. No individual is authorized to speak or purport to speak for the Commission except as such authority is conferred by a majority of that body. As Chairman of that Commission, however, I am in a position to assure you that the Commission has never issued an order to cease and desist in a price discrimination case under the Clayton Act, as amended by the Robinson-Patman Act, against a manufacturer forbidding the granting of functional or trade discounts as such. So much for the past. As to the future, I can assure you as Chairman of the Commission that I have no thought of attempting any such action and in my judgment the law would not permit the Commission to take such action.

Do not let anyone tell you that the Federal Trade Commission in its interpretation and enforcement of the Clayton Act as amended by the Robinson-Patman Act, has outlawed all price differences and is forcing a one price system in the automotive industry or any other industry. The law does not prohibit all price differences. It permits differentials in price when those differences result from varying and justifiable differences in cost of manufacture, in cost of sale, in cost of delivery, in cost of methods of packing, and in quantity sales. A seller is permitted to give a large buyer a lower price than is given to a competitor when that price can be justified by such differences. This we should keep in mind because some people have spread the word around that it is impossible for manufacturers to sell at different prices in your industry under the Robinson-Patman Act. The sort of discrimination that is forbidden by the Robinson-Patman Act is that discrimination between competitors which goes beyond the differentials making due allowances for differences in cost of manufacture, delivery, etc.

Some people in your industry have contended that the Federal Trade Commission is attempting to eliminate all functional pricing insofar as sub-distribution is concerned, that is, distribution by sub-jobbers. Here again the Commission's position is the same. There is nothing in the law that will permit the Commission to take remedial action where all warehouse distributors are allowed the same functional or trade discounts for serving the sub-jobbers and where the warehouse

distributor is required to pay the same price for the merchandise as that which the sub-jobber pays when they both compete in the same market.

There has also come to my attention that there is a misunderstanding in the trade as to the effect and purpose of the Commission's proceedings in price discrimination cases involving what is known as "phantom freight" and "freight absorption." The Commission, in one of its important decisions, was successful in stamping out in an industry the practice of manufacturers charging their customers with a "phantom freight." In still other cases, the Commission has issued orders to cease and desist against respondents in price fixing conspiracies which involved the absorption of freight as a part of the conspiracy. Other cases are pending. There arises in the mind of the public the question of whether or not it is the intention of the Commission to issue complaints and orders to cease and desist in cases which involve only the question of freight absorption.

Inasmuch as this matter has been before hearings of Committees of Congress, it will be permissible for me to quote from some of the answers which the Chairman was authorized to make before such Committees:

> "The undersirability and illegality of the practices of respondents against whom the Commission has issued orders in basing-point cases was apparently a matter of general agreement during the recent congressional debates about freight absorption and delivered pricing, for the conduct of these respondents was not defended during the debates. The Commission has no intention of proceeding in the future against 'perfectly sensible and appropriate competitive action'; indeed it has authority to proceed only against conduct which constitutes an unfair method of competition or which injures competition."
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> "However, certain freight absorption and basing point practices have been found to be injurious to competition and hence held to be unlawful discriminations under the Clayton Act where practiced by individual action, Corn Products Refining Co. v. Federal Trade Commission (324 U. S. 726); F.T.C. v. A. E. Staley Manufacturing Co. (324 U. S. 746).
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> "Question 5 (a): Does the Commission view the law as permitting only occasional absorption of freight to given markets, or does it view the law as permitting continuous freight absorption to a distant market when it is necessary in order to sell in that market?
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> "Answer 5 (A): The Commission does not consider that the frequency with which freight is absorbed controls the legality of the absorption. However, the scope and frequency of any pricing practice

> may be of significance, along with many other circumstances, in determining the purpose or effect of a given pricing practice. If no unlawful purpose or effect is present, a pricing practice is lawful, no matter how frequently it may be engaged in."

I wish also to quote from the press release issued by the Commission in connection with the proposed order to cease and desist in the Corn Products case, wherein reference was made to "incorrect references to and misrepresentations of the proposed order to cease and desist in the Federal Trade Commission case relating to the pricing practices of 16 principal manufacturers and sellers of corn products in the United States. Some statements made in newspapers and over the radio failed to make clear that the proposed order would prohibit use of basing point and zone systems of pricing only when such systems involve concerted action, conspiracy or unlawful agreements among sellers of corn products." The following comment was made with respect to the foregoing:

> "Those misstatements and misinterpretations should be corrected. The public and the business community should not be left with the impression that the Federal Trade Commission is acting or has ever acted to prohibit or interfere with delivered pricing or freight absorption when innocently and independently pursued with the result of promoting competition. The Commission and the courts have acted to stop those practices only when they have involved collusion, conspiracy or unjust discriminations with resulting damage to competition and the public interest. The Commission understands the proposed order to cease and desist in the present Corn Products case to be within those bounds."

In closing I should like to sound a note of warning to all who honestly believe in our system of free competitive enterprise. To you I say: Examine carefully each proposed amendment to the antitrust laws or to the Federal Trade Commission Act. It has been my experience over the years that all too frequently proposed amendments to these laws contain features that would weaken them. Competition is the hallmark of a democracy. Don't look for it in a totalitarian state. It won't be there. One of the most effective means of preserving this hallmark is for all business, both big and small, to see to it that any proposed amendment to our antitrust laws be of a character that will strengthen and preserve them and not weaken or destroy them.

Before closing my remarks today, I should like to offer a slogan which might be suggested in connection with the activities of the Federal Trade Commission in its efforts to maintain and protect free competitive enterprise. That slogan is:

"KEEP SMALL BUSINESS IN BUSINESS.

KEEP ALL BUSINESS FAIR."

I thank you for your kind attention.