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THE FEDERAL TRADE COMMISSION LOOKS AT TRADE ASSOCIATIONS

Address by

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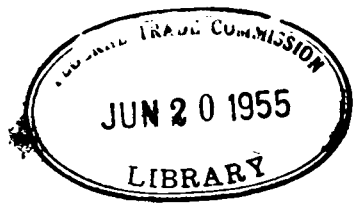

THE FEDERAL TRADE COMMISSION LOOKS AT TRADE ASSOCIATIONS

My assigned topic - "The Federal Trade Commission Looks at Trade Associations" - may possibly suggest that the Commission's attention has only lately turned to this subject. Actually the Commission has been "looking at trade associations" for quite some time. As long ago as 1917, it investigated certain segments of the paper industry and their trade associations, and nearly every succeeding year has seen some new Commission proceeding involving trade associations. Yet proportionally the number of such cases is fairly small and the circumstances brought to light should not be taken as reflecting typical trade association behavior.

The Commission deals with associations in a number of different ways and under a number of different statutes. These include (1) our regular case work, (2) the formulation and administration of trade practice rules, (3) the regulation and supervision of Export Trade Associations, and (4) the administration and enforcement of such special consumer statutes as the Wool Products Labeling Act, the Fur Products LabelingAct, and the Flammable Fabrics Act.

Let us briefly examine each of these:

Case Work

The activity that has done the most to bring trade associations into difficulty with the Commission has been the exchange of price information. This is still true even though the courts have, by now, fairly well defined the boundaries of permissible trade information reporting. Since 1953, for example, the Commission has issued cease and desist orders against eight trade associations; three more cases are now awaiting final action. They affect a variety of industries: imported lighting glass products, chains, blotting paper, radio parts, wire and tape recorders, public address systems, salmon canneries and fisheries, fine paper and wrapping paper, paint and wallpaper, and advertising novelties.

With but one exception these cases involved variations of the single theme of price fixing, in which the association supplied the coordination necessary for carrying out restrictive policies agreed upon at association meetings. Four of the proceedings also involved charges of boycott and coercion of dealers or suppliers.

During the same period, that is, since 1953, the Commission dismissed five cases against trade associations: one for failure of proof of recent price-fixing activities, or the likelihood of resumption of such conduct; another on the ground that the pooling of purchasing power by small concerns constituted, under the circumstances of the particular case, a "non-collusive effort to wage competition, not to

restrict it"; another because of lack of evidence that price-fixing resulted from the questioned practices; and the remaining two for the reason that the proof failed to connect the associations with the alleged illegal activity.

Any trade association program presenting a concerted adherence to announced prices, or to published terms and conditions of sale, will sooner or later attract notice as a price-fixing scheme. On the other hand, the courts have approved reporting plans which circulate genuine past prices - not "ideal" or "recommended" prices - and which leave the association members free to make their own prices and other terms of sale.1/

Reporting services which include price "interpretations" or "predictions" of future prices are suspect, particularly when they invite an industry-wide price policy.

In addition to plans that bring about price rigidity, trade association activities aimed at boycotting or excluding traders from the market, have been often condemned by the Federal Trade Commission. Some years ago, for example, the women's-wear and millinery industries contrived schemes for protecting their unpatented styles through agreements among their members which had the effect of severing commercial relations with merchants who handled so-called "pirated" fashions. Because creativeness and originality are property rights recognized by law only when they have been copyrighted or patented, those agreements were found by the Commission and the courts to have restrained trade.2/

Trade Practice Conferences

Happily the Commission's contacts with trade associations are not limited to litigated cases. Any discussion of the Commission's relations with trade associations must include the important part played by those organizations in our trade practice conference program. These conferences, as you know, look toward the drafting of sets of rules which interpret, as to particular industries, the various statutes enforced by the Commission, and which attempt to establish industry standards of fairness. This year new or revised rules have been approved for the waterproof paper, library binding, chemical soil conditioner, orthopedic appliance, fountain pen and pencil, cosmetics and toilet preparations, fire extinguishing appliances, millinery, bedding manufacturing, and pipe, cigar and cigarette holder industries. It is anticipated that these rules, together with others yet to be issued, will comprise a numerical record unsurpassed in more than twenty years.

1/Maple Flooring Manufacturers' Association v. United States, 268 U.S. 563 (1925). See also Tag Manufacturers Institute, Inc. v. Federal Trade Commission, 174 F. 2d 452 (C.A. 1, 1949).

2/Fashion Originators Guild of America v. F.T.C., 312 U.S. 457 (1941); Millinery Creators' Guild, Inc. v. F.T.C., 312 U.S. 469 (1941).

More often than not it is the trade association which takes the initiative in arranging for a trade practice conference. Not only does the association act as a central clearing-house for bringing into open discussion industry practices inconsistent with law, but it frequently supplies the technical and statistical information needed as a basis for the rules.

It is important that the rules be kept abreast of current conditions within an industry and not be permitted to become obsolete or unrealistic. Technological developments and new and different marketing methods may render trade practice rules out of date. Trade associations can therefore make vital contributions by periodically reconsidering the adequacy of existing rules and advising the Commission whenever revision appears to be in order.

Recently, the Commission issued an order against members of an industry restraining them from abiding by employee "no switching" agreements.3/ Under these agreements, the members had pledged themselves not to employ persons presently working for a competitor or who had worked for a competitor within the past year. The Commission, speaking through Commissioner Gwynne, pointed out that a restraint on the right to work at a gainful occupation must be "cautiously considered, carefully scrutinized, looked upon with disfavor, strictly interpreted and reluctantly upheld."

In accordance with this decision the Commission's Bureau of Consultation had to insist upon rescission of a resolution in another industry which interpreted an "enticing away employees" rule as warranting an agreement among industry members that they would make no overtures to employees of a competitor.

Unfortunately the activities of trade associations in connection with our trade practice conference work have not always been on the plus side; sometimes their interest has been a disguised effort to circumvent the law. In one industry, for example, the Commission had to disapprove a resolution of a trade association which interpreted a rule as pledging its members not to indulge in any consignment sales under any conditions. On several other occasions, the Commission has had to correct situations where trade associations construed "selling below cost rules" as prohibiting all sales below cost regardless of their effect on competition, and where they decided that the individual seller's cost could be determined on the basis of average costs in the industry.

Several years ago, a certain industry (not then, but now under trade practice rules) was plagued by so-called deceptive guarantees. Through its trade association, a resolution was adopted limiting the period and scope of guarantees to be issued by industry members.

3/Docket No. 5978, Union Circulation Company, Inc., et al. (Commission decision January 25, 1955).

Subsequently, these industry members and the trade association were indicted and fined under the Sherman Act, one of the charges in the indictment being the adoption of the resolution dealing with guarantees.

To avoid any possibility of misuse of our trade practice conferences program, we have developed a closer liaison with the Department of Justice. Since I have been Chairman no conferences have been initiated, and no final trade practice rules have been promulgated, without prior clearance with the Department.

I have been told, by people within the Commission and by persons connected with industries operating under rules, that the Federal Trade Commission is at the cross-roads insofar as trade practice rules are concerned; that if the Commission fails to make the rules work, the whole trade practice conference program may bog down.

While statements like these may serve to needle the Commission - and it sometimes needs needling - they really place the emphasis on the wrong party. It must be apparent to anyone who gives thought to the problem that, in the last analysis, the members of the industry themselves are the only ones who can make the trade practice rules work.

Let me say in the same breath, however, that I intend to do everything in my power, as Chairman of the Commission, to help industry make them work.

Such misunderstanding as may exist in this connection probably arises from a misapprehension of the nature of the rules. They are not substantive rules, having the force and effect of law, like those of the Food and Drug Administration or those issued by the Commission under the new Flammable Fabrics Act. They are in the nature of advisory opinions, - an attempt by the Commission, for the guidance of businessmen, to interpret the various laws administered by the Commission in language applicable to the particular industry.

The rules are not and, under our statutes, cannot be enforced as such. When and if the Commission invokes its formal procedures, it must charge a violation of the law, not merely a violation of the rules. Of course, a violation of the rule may well be a violation of law, providing all the statutory elements are present, such as, for example, under the F.T.C. Act, public interest, interstate commerce, and injury to competition or deception of the public.

In short the trade practice conference is one - probably the most important one - of our voluntary procedures whereby the Commission, through consultation and cooperation, rather than prosecution, tries to help business help itself.

Wool, Fur and Flammable Fabrics Acts

In addition to our antimonopoly and false advertising work the Commission is charged by Congress with the administration of three separate and important pieces of consumer legislation: the Wool Products Labeling Act of 1939, the Fur Products Labeling Act of 1952, and the very recent Flammable Fabrics Act which became effective in July, 1954.

While little is heard about this phase of Commission activity other than in the industry and consumer circles directly affected, it provides a most fertile field for sound and constructive trade association work.

These Acts afford protection from misbranded wool and fur products, from false invoicing and labeling, and from the hazards surrounding the use of dangerously flammable fabrics and articles of wearing apparel.

Under the Wool Act, fiber content labels must accompany wool products from their raw stage through the processes of manufacture and distribution until the end product reaches the consumer. Approximately 70 industries are engaged in the manufacture and distribution of wool products including over 20,000 manufacturers and 260,000 distributors.

The Fur Products Labeling Act prohibits the use of false, fictitious and over-glamorized names for fur and fur products. It provides in substance that purchasers shall be informed on labels, invoices and in advertising of certain essential facts including the true English name of the animal that produced the fur and its country of origin if imported. If the fur product is composed of used, damaged, or scrap fur or fur that has been bleached or dyed, such facts must also be disclosed. Approximately 75,000 manufacturers and 175,000 distributors of fur products are subject to the provisions of this Act.

The Flammable Fabrics Act, the most recent legislation designed for Commission enforcement, affords protection to the public against bodily harm and hazards incurred in the use of wearing apparel and fabrics which are so highly flammable as to be dangerous when worn by individuals. Standards for determining dangerously flammable materials are expressly set forth in the statute. The marketing of materials that fail to meet the prescribed standard is made unlawful. This legislation has already barred from the market place the so-called "torch sweater" and "high pile cowboy suits" of a few years back. The scope of the Act is even broader than that of both the Wool and Fur Acts combined in that, with minor exception, all wearing apparel - regardless of material, fiber content, or construction - falls within its provisions.

Violation of any of the three statutes is subject to Commission cease and desist order. Condemnation and injunction proceedings as well as criminal prosecutions for willful violations are likewise authorized under certain circumstances. Under each of the statutes the Commission is directed to prepare and issue rules and regulations necessary and proper for the administration and enforcement of the Act. These regulations have been issued and are now integral parts of the legislation.

The issuance and acceptance of guaranties are provided for under all three Acts. Such guaranties, when relied upon in good faith, may be pleaded as an absolute defense to certain charges of violation on the theory that the recipients of the guaranties, being middlemen in the marketing of the goods, should be entitled to receive and pass on representations made by their suppliers.

I have briefly outlined some of the requirements of the Wool, Fur and Flammable Fabrics Acts as well as Commission responsibilities thereunder in order to indicate an area of activity wherein trade associations and the Commission may meet on common ground with resulting benefit to both.

In the enforcement of these Acts the services and assistance of trade associations have proven most valuable, especially during the early stages of administration when the Commission had to feel its way in establishing sound and practical compliance. During such periods, association representatives worked closely with the Commission in determining the responsibilities of their members under the legislation. They have upon numerous occasions supplied the Commission with important technical advice and research data together with highly specialized information necessary in understanding and solving problems encountered in substantive rule-making. For example: the highly technical rules and regulations under the Flammable Fabrics Act were drafted and promulgated only after study of industry problems with representatives of affected trade groups. The same was true in the preparation of the rules and regulations under the Fur Products Labeling Act, where knowledge of the technical and practical side of the fur industry was necessary. The drafting and publication by the Commission of the Fur Products Name Guide which constitutes the very backbone of the Fur Act itself would have been most difficult without the cooperation and expert counsel of trade associations in the fur industry.

It may be said that the high measure of compliance existing today with the provisions of all three of these consumer Acts is in large part the result of the combined efforts of industry trade associations and the Commission's staff.

Export Trade Act

Before completing our discussion of trade associations we must consider the Webb-Pomerene Export Trade Act,4/ which gives limited exemption from the antitrust laws to associations engaged solely in export trade. Such associations are required to file with the Commission their organization papers and such other information as the Commission may require. These associations must not, under the statute, operate in such a way as to restrain domestic trade, or enhance or depress domestic prices.

During the thirty-seven years of the Act's existence, the number of associations filing under the Act has been relatively constant. A high of 57 was reached in 1929; and a low of 40 was recorded in 1953. Today 42 groups are being supervised by the Commission. Their annual foreign business, totaling about 1/2 billion dollars, represents a cross-section of our national product ranging from prunes and milk to Marilyn Monroe - not in person, of course, but in two dimensions on movie film.

The Act adapts the antitrust laws to the special situation of American export trade, that is, it adjusts them to that area in which our unique philosophy of free competition must co-exist with the different philosophies of foreign nations. It was designed not only to help American business compete in world markets against foreign cartels, but also to permit smaller businesses jointly to share the expense of entering foreign markets, to finance overseas businesses, and to present a common front in overcoming such obstacles in foreign trade as the lack of currency convertibility, the tendency to block dollar funds, and the necessity to negotiate with foreign governments for the privilege of doing business.

During the past two years we have given considerable thought and attention to the administration of the Export Trade Act. A pattern of close cooperation with the Department of Justice has been initiated and utilized. Encouragement for this special liaison was found in the Supreme Court's opinion in 1945 in the Alkali Export Association case where the Court said:

> "...there is no basis for interpreting the statute as though it had been contrived to prevent hostile action rather than to encourage efficient cooperation between the Commission and the Department of Justice."5/

Similar conversations have been held with the Departments of Commerce and State and have met with initial success. A routine of continuous surveillance of the business practices of the associations has been begun in accordance with the intent of Congress, and at the

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4/40 Stat. 516, 15 U.S.C. §§ 61-65, April 10, 1918.
5/United States Alkali Export Assn. v. United States, 325 U.S. 196, 209 (1945).

close of the last fiscal year the files of many of the associations had been brought up to date.

* * * *

In closing, let me stress the fact that our domestic policy of trade regulation assumes that the material needs of our society can be most abundantly supplied through an unrestricted flow of goods and services sold at prices which are competitively determined in the open market. Authentic price competition offers definite advantages to consumers. When sellers must constantly strive to meet or beat one another's competition, prices tend to move in the direction of costs. In consequence the public comes to share in savings resulting from improved methods, while management spurs the search for better and cheaper ways of producing goods. Where prices are determined by supply and demand, rather than by concerted action among competitors, there is always present an efficient, automatic preventive of monopoly and restraint of trade.

One cost of a free business system is a certain attrition of the individual concerns which are relatively inefficient or whose products or services do not find favor with the consumer. While the antitrust laws are by their spirit and intent a means of protecting the smaller businessman from the predatory methods of his larger rivals, they were never intended as an insurance against business failure. Not all can survive. This is an unpleasant prospect, to be sure, and serves in part to explain why some industries, acting through trade associations, have instituted programs aimed at "stabilizing" the market, or at abandoning price competition among their members in order that all might continue to live. Such programs are, of course, a retreat from the principle of free competitive enterprise.

And so, in a free business system, some concerns are bound to be injured in the competitive struggle. But this variety of injury - a necessary property of true competition - must not be confused with injury to the competitive system itself. Therefore trade associations ought to take care that in promoting the welfare of their members they do not overprotect them against competitive injury by devices that may destroy competition altogether. While they may gather, collate and publish certain types of information which will enable their members to market more intelligently, they must avoid any activity having the effect of prescribing prices or otherwise lessening competition.

The present-day trade association which foregoes the role of the price-fixing intermediary is not the master but the servant of its members. Unlike the European cartel, it does not aim at a static condition of divided markets and inflexible prices dictated by a governing body but rather seeks to perpetuate the traditional American

system of dynamic enterprise, which constantly adapts itself to changing technological and market conditions.

It is along lines such as these that I believe the trade association will attain its true destiny as a bulwark of American business freedom.