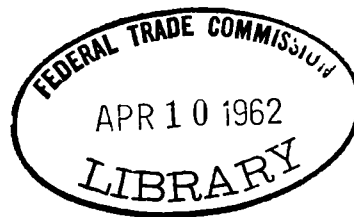


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REMARKS OF
WILLIAM C. KERN, COMMISSIONER
FEDERAL TRADE COMMISSION

Before the
NATIONAL INDEPENDENT DAIRIES ASSOCIATION
Washington, D. C.
April 9, 1962



Mr. Chairman, Members of the National Independent Dairies Association:

Your fifth annual meeting brings you to Washington, D. C. at a time when your Government is moving determinedly to assist and preserve the milk industry.

Your Executive Vice President, Mr. D. C. Daniel, "Scotty" to many of us, is a strong advocate for many of these efforts. He is a friend of long standing. He is a former associate of the members and staff of the Federal Trade Commission. He is our constant companion on trade problems in the milk industry. And I am pleased and honored by his invitation to address your group.

Speakers at prior annual meetings have called your attention to the activities of the Government with relation to milk producing, processing and distributing problems. The Special Subcommittee of the Select Committee on Small Business of the House of Representatives, in its report released in December, 1960, concluded:

"The information presented to the Special Subcommittee during the course of the public hearings it has held and in the many field investigations it has made, makes inescapable the conclusion that unfair trade practices are being pursued in the sale and distribution of dairy products, and with deleterious effects including the following:

1. The survival and growth of small and independent business firms engaged in the processing and distribution of dairy products is endangered.
2. It can be expected that when independent competitive business enterprises are destroyed, the public will suffer the loss of this competition and pay higher prices for dairy products.
3. Price wars, involving the sale of milk at prices below cost have unfavorably affected the quality of milk and have, therefore, in that respect, been against the public interest.

4. The testimony indicates that price wars also adversely and unfavorably affect dairy farmers, even though they are organized into cooperative producers associations." 1/

These conclusions of the subcommittee are significant. They point up the necessity for action on trade problems in your industry. When your survival is at stake, the trade problems require fast action. When higher prices to the consumer caused by the elimination of competition are at stake, the trade problems require fast action. When the quality of milk, a staple commodity for the healthy, the weak and the infirm, the infant and the aged, is at stake, the trade problems require immediate action.

The milk price war in Indianapolis is a case in point.

Public investigational hearings were held in Indianapolis beginning on March 13, 1962 to probe the price war in that area. Witnesses were invited and subpoenaed to present evidence bearing on trade practices used by the companies involved. A public record was made. Any person deeming himself aggrieved by the evidence in the record was permitted to submit countervailing proof in person or by affidavit. This, too, was made part of the record.

I would be less than frank if I did not state to you that ordinarily I am opposed to public hearings of this nature for a number of reasons. However, the instant matter involved a serious pricing dislocation over a concentrated but highly populous area - with potentially harmful consequences to competition - and with ultimate potential injury to the entire population in that area. Unusual circumstances sometimes may justify unusual remedies. Of one thing I am certain - the Commission acted with one overriding motive - the protection of the public interest.

The purpose of this hearing was to develop expeditiously all of the relevant facts concerning the alleged pricing practices in order that the Commission may take appropriate action. If violations are discovered, and if formal proceedings are commenced after examination of the record, the full constitutional protections inherent in adjudicative proceedings will be accorded any respondent.

1/ Underlining supplied. 86th Congress, 2d Session, House Report No. 2231, Dec. 22, 1960.

Indeed, I wish to make my position crystal clear that as long as I am Commissioner I intend to see that the rights of each and every respondent are fully protected; I intend to see that no order is issued against any respondent unless it is justified by the greater weight of reliable evidence in the record. While I am an advocate of firm law enforcement, I hope always to adhere to fundamental principles of fairness and impartiality. Only in this way can the Administrative Process remain a responsible vehicle of governmental regulation.

Now I am fully aware of your problems and I am sympathetic with them. The independent dairyman, I submit, must not be driven out of business. The public must not be compelled to pay higher prices caused by the death of competition and the public health must not be endangered by the deteriorating in milk quality caused by price war practices, especially, from my viewpoint, when such practices contravene any statute the Commission administers. The Federal Trade Commission has a duty to exercise its full powers to preserve a free, independent dairy industry and the public interest.

Now, let us consider how we have employed these powers in connection with your industry.

Consider the public records in the Commission on the milk price wars. (You understand, of course, that formal complaints mentioned here which have not reached an initial decision, or have not reached the Commission on appeal, may only be considered as allegations. It yet remains to be determined by proof whether the respondents are engaged in the practices alleged and that such practices are illegal.) The records show a pattern of anti-trust charges against chain stores, with or without dairy products company combinations, and a pattern of concentration of dairy products companies in the relevant markets.

Three complaints issued in September 1959 allege that Adams Dairy Company and its subsidiary, Adams Dairy, Inc. -- and Kroger Company, a grocery chain, Safeway Stores, Inc., and The Great Atlantic and Pacific Tea Company, 2/ each

2/ In the Matter of Adams Dairy Co., Adams Dairy, Inc. and The Kroger Company, D. 7596; In the Matter of Adams Dairy Co., Adams Dairy, Inc. and Safeway Stores, Inc., D. 7597; In the Matter of Adams Dairy Co., Adams Dairy, Inc. and The Great Atlantic and Pacific Tea Co., D. 7598.

named in separate complaints -- have violated Section 5 of the Federal Trade Commission Act by engaging in the following practices in certain areas other than Indianapolis in the Middle West:

1. Conspiring and agreeing to fix prices and price differentials;
2. Conspiring and agreeing to coerce competitors into maintaining price and price differentials.

The grocery chains are also charged in effect with territorial price discrimination, in that they are reselling dairy products at retail for a lower price in some trading areas than in others, to the injury of local competition in those products. These three chains are also charged with giving certain dairies preferential treatment and denying to other dairy competitors a "reasonable opportunity" to compete for the chain business.

It is charged that the Adams dairies assisted in these practices by similar discriminations in price, including prices below cost; by guaranteeing a fixed profit margin to the chains regardless of the retail selling price; and by furnishing disproportionate advertising allowances to them.

You will appreciate, of course, that I am not at liberty to discuss pending matters with respect to the merits -- and I reiterate that I shall see that the rights of every respondent are fully protected -- and, indeed, shall vote to dismiss any proceeding where the charges, in my judgment, are not fully proven.

It is an economic truism that price wars cause rapid deterioration in customer and trade relationships. And while justice should not be denied to respondents, neither should justice be denied to the independent dairyman and the consumer who must bear the brunt of harsh and illicit trade practices. Where justice delayed is justice denied, as in a milk price war, a quasi-judicial and investigatory agency with a public duty and adequate power must not fail to act promptly for protection of the public.

The Commission issued its complaint against H. P. Hood and Sons, Inc., the largest dairy concern in New England,

and The Great Atlantic and Pacific Tea Company, 3/ the nation's largest grocery chain, in January, 1961. The complaint charges the parties with combining and agreeing to a planned common course of action to restrain trade in dairy products in New England by:

1. Fixing in-store wholesale and out-of-store retail prices;
2. Territorial price discriminations;
3. Engaging in price wars including sales below cost;
4. Fixing and maintaining arbitrary and artificial retail prices unrelated to prices paid farmer-producers for raw fluid milk;
5. Coercing the dairy respondent's competitors to sell dairy products at prices fixed by respondents including prices below cost;
6. Making preferential payments to the grocery chain, thus denying a reasonable opportunity to other dairy concerns to compete for the chain business;
7. Agreeing to pricing formulas and terms and conditions;
8. Diverting home-delivery sales to retail stores;
9. Attempting to monopolize the dairy products industry in various New England marketing areas.

If these charges are proven, a cease and desist order of proper scope should issue. If not fully proven, I have made my own position clear. Cases must be decided upon the record - sympathy has no place in any quasi-judicial determination.

The suppression and regulation of illicit trade practices in these economic disorders is a mountainous task. Other charges being prosecuted against dairy products companies

3/ In the Matter of H. P. Hood and Sons, Inc. and The Great Atlantic and Pacific Tea Co., Inc., D. 8273.

illustrate the enormity of the problem. The complaint in National Dairy Products Corporation, 4/ issued December 31, 1957. It alleged the company used a sliding scale discount plan which favored chain customers over small retailers. The complaint alleges the discounts and price differentials are in violation of Section 2(a) of the Clayton Act, as amended. It also alleges the company has granted certain large customers advertising allowances which are not available on proportionally equal terms to small customers.

This case is still at trial. The Commission's case was completed on March 13, 1959 and the respondent's case is now being presented. The transcript of record is now 6,411 pages long. It discloses \$450,000 has been spent by the respondent on cost justification defenses alone. This does not include attorney's fees or other costs.

The Commission's complaint against Beatrice Foods, Inc., 5/ issued on September 28, 1959, and charges violation of Sections 2(a) and (d) of the Clayton Act, as amended. It alleges the company not only engaged in territorial price discrimination, but also was involved in a secondary line discrimination between competing purchasers. Illegal advertising allowances are also alleged in this case.

The Commission's case in chief was completed this year; the respondent has not put in its case yet. The record in this case is 1,821 pages, and the Commission itself has submitted over three thousand exhibits.

The Borden Company complaint 6/ was issued April 30, 1959, and charged a violation of Section 2(a) by price discrimination in the sale of milk at higher prices in one area to permit lower prices in another, to the injury of local competition in the latter area. The hearings in this matter closed on March 9 of this year after 1,300 pages of

4/ In the Matter of National Dairy Products Corporation, D. 7018.

5/ In the Matter of Beatrice Foods, Inc., D. 7599.

6/ In the Matter of Borden Company, D. 7474.

transcript, 220 Commission exhibits, 696 Respondent's exhibits, and 8 stipulations of fact. The matter is now pending, awaiting proposed findings of fact and an initial decision by the hearing examiner.

The Foremost Dairies, Inc. complaint 7/ alleged similar practices and has been completed through the hearing stage. It awaits proposed findings and an initial decision based on 1,448 pages of record, 67 Commission exhibits and 39 Respondent's exhibits.

I mention these details of trial to you to demonstrate the Commission staff is in fact exerting tremendous effort within the limit of its financial and personnel resources in dealing with issues involving your industry. I suggest with candor, accelerated investigative and trial procedures must be used in matters of this kind. The Commission's new rules of procedure are designed to accomplish this end.

Now, let us consider for a moment the problem of increasing concentration in your industry. Substantial and far reaching technological and market changes have occurred in the dairy industry in recent years. In the past many producer-distributors operated in the various markets located throughout the country. Much of the remainder of the industry was composed of single plant independent dairy concerns. Many developments have conspired to work against the small processor, including technological changes favoring large scale processing plants, public health regulations setting higher quality standards, bonding of milk plants to insure payment of producers, and the advent and expansion of Federal and State marketing orders. The result has been a continuing decline in the number of independent dairy firms. One listens most nostalgically but in vain for the long gone patter of horses' hooves signaling the early morning arrival of the milkman. The old time producer-distributor with a few cows and a delivery route is a thing of the past.

I know that you are aware of the statistics on concentration in your industry. The most recent tabulation prepared by the Special Subcommittee of the Select Committee

7/ In the Matter of Foremost Dairies, Inc., D. 7475.

on Small Business of the House, in 1960, shows that the industry's leaders have acquired some 585 dairy processors within a limited period of time, and have absorbed some 43.8% of the market for dairy products.

I consider the rapid disappearance of the number of small independent businesses in your industry an alarming condition of trade. The production, processing and distribution of milk is an essential function which must be protected. It is directly related to the health and well-being of the citizens of this country. To the extent that death of competition in this vital industry means higher prices to the consumer and lowered quality of milk, as concluded in the previously cited House Report, the entire country as well as the Federal Trade Commission have a direct interest.

No agency of government, in any of its branches, can remain unconcerned. No regulatory agency, for fear of public censure or attack, can fail to use its full powers to cope with this threat.

The Commission has issued a number of complaints attacking alleged illegal acquisitions by the large dairy concerns. The Commission's complaint against the Borden Company 8/ charges Borden with the acquisition of all or part of the assets or stock of some 33 dairy product corporations. In addition, it charges Borden acquired all or part of the assets of some 47 non-corporate dairy product businesses. Similar complaints have been issued against Foremost Dairies, Inc., National Dairy Products Corporation, and Beatrice Foods Company. 9/ These cases are all pending, and it would be inappropriate for me to comment thereon.

While we have weapons in the Federal Trade Commission arsenal with which to fight some of the unfair business problems that confront your industry, the Commission cannot by itself assure the continuation of small, independent dairy enterprises.

8/ In the Matter of The Borden Company, D. 6652.

9/ In the Matter of Foremost Dairies, Inc., D. 6495; In the Matter of National Dairy Products Corporation, D. 6651; and In the Matter of Beatrice Foods Company, D. 6653.

You are a vital cog in the successful enforcement of the anti-trust laws. You can help in the investigation and prosecution of cases involving your industry. You can furnish the essential facts on which our efforts can be mobilized.

You will find the Commission always interested and ready to assist you in your struggle against unfair methods of competition. However, one final word of caution. No industry can place sole reliance upon governmental support. The ancient American spirit of independence and self-reliance is essential. Needed, also, is the will to fight it out fairly as vigorous competitors in the market place, protected only by being assured that the competition required to be met is itself fair, free, and open. I conceive this to be the paramount duty of the Commission -- to preserve and foster such a wholesome competitive climate.

Again, my thanks to your Association and its Executive Vice President for its invitation to talk with you today.