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about in quiet coves," "with your wings close-furled," or whether, as your extraordinary endowment of energy presages, you shall again heed the call to public service, perhaps of a less secluded kind, let me certify to you that the Members of this Bar will remain your friends, and that their interest, their respect, their admiration, and the best of their wishes will always follow you.

The Basing Point Pricing System

By ROBERT E. FREER

Chairman, Federal Trade Commission

EDITOR'S NOTE: Last spring, in the case of *Federal Trade Commission vs. The Cement Institute*, 68 S. Ct. 793, the U. S. Supreme Court supported the Federal Trade Commission in outlawing the use of the basing point system as a means of unfair competition. The controversy over the wisdom, if not the law, of that decision has been raging ever since. During the latter part of November, S. Arthur Henry, attorney for the Colorado Manufacturers' Association, graciously consented to write an article for DICTA on this controversial subject. In casting about for someone equally competent to support the other side of this question, your Editor was happy to learn that the retiring Chairman of the FTC himself had been invited to Denver to speak before the City Club on December 28, 1948. Commissioner Freer's speech on that occasion is reprinted below, with thanks to him and to the City Club, which thereupon invited Mr. Henry to present his views on the following Tuesday, January 4, 1949. Mr. Henry's remarks will appear in the February DICTA.

A little over a year ago I came to Denver and spoke to the Purchasing Agents' Association of Denver on the subject "Markets—Managed or Free." In that talk I sought to explain some of the Commission's cases and decisions involving so-called basing point pricing systems and other forms of price-fixing by a geographical formula.

Since that time a great deal of water has flowed over the dam, and these activities of the Commission, which had very little public notice at the time I spoke, have become the center of a veritable storm of controversy in the press and in business circles. I have re-read that 1947 Denver speech in the light of all the unkind things which have been said about the Federal Trade Commission since then, and would not change a word of it now.

I will be a member of the Federal Trade Commission for just three more days now, after which I will resume the private practice of law, a decision which was forced upon me by some thirteen years of trying to live in Washington on a salary which was fixed at a not too munificent level back in 1914. Since this is my swan song as a member of the Commission, I want to speak as frankly and forthrightly on this question as I can, free from the fear that anything I say will be thrown back at me either in a Congressional hearing or in the brief of some party before the Commission in a later case.

There is a great and burning question which has been posed to the small business man and the general public in recent months and it is that sort of a question which supplies its own answer. The entire business community

appears to have been blanketed by questionnaires from Congressional committees and various trade organizations either stating or implying that the Supreme Court and the Federal Trade Commission have now declared freight absorption to be illegal and have required that every business man sell uniformly at f.o.b. prices and refrain from competitively meeting lower prices in distant areas. On the basis of this startling pronouncement business men are asked what the effect of this decision will be upon them; will competition be stimulated or will business be affected adversely?

During all of the time that this uproar has been going on officials of the Federal Trade Commission have been stating that the law does *not* require uniform f.o.b. mill prices, that the law does *not* prevent the absorption of freight to meet competition, and that the recent decisions, apply *only* to situations in which there is organized monopoly and conspiracy to suppress and restrain competition.

History of the Case

I would like to tell you how this whole controversy started and explain some of the factors which may be behind the attempts to confuse the business community about the state of the law.

In 1937 the Federal Trade Commission, after several years of investigation and study, issued a complaint charging the entire Portland cement industry with having engaged in a combination to fix prices and restrain competition. Public hearings were conducted for more than three years, the record consisting of some 50,000 pages of transcript of sworn testimony and about an equal number of pages of documentary evidence. The largest bulk of this record is that which was offered by the cement companies by way of defense to the charge of price-fixing and discrimination. After an exhaustive study of the record, the Commission made detailed findings of fact, consisting of nearly 200 printed pages. The various overt acts so found to have been done by the industry clearly indicated that there existed a combination to fix prices, effectuated principally through cooperative employment of the basing point system. Based upon these findings, the Commission entered an order requiring the industry to cease doing certain things pursuant to "*any planned common course of action, understanding, agreement, combination or conspiracy.*"

This case was litigated fully before the Commission, the Circuit Court of Appeals and finally before the Supreme Court of the United States.

In the Spring of 1948 the Supreme Court handed down a decision affirming the Commission's order in the Cement case, the opinion agreeing wholeheartedly with the Commission's conclusion that the basing point method had been employed in the industry pursuant to a combination and conspiracy and for the purpose of fixing prices. The same arguments were made to the Supreme Court that are now being made to the Capehart Committee—that

the Commission's order had the effect of preventing any freight absorption in individual situations and would require uniform f.o.b. mill selling. The opinion of the Supreme Court specifically pointed out that this was not the case and that the Commission's order only forbade acts done pursuant to the conspiracy and combination.

Shortly after the Supreme Court decision, the Commission was sustained in a case against the producers of rigid steel conduit on review in the Circuit Court of Appeals. In this case it had entered an order against a well-defined conspiracy and combination to fix prices through the basing point system, and the Commission's order forbade the future use of that basing point system by *each* of the companies for the purpose of matching delivered prices and suppressing competition.

There is now pending before the Commission a similar proceeding involving the entire iron and steel industry on charges of a combination and conspiracy to fix and maintain prices through a basing point system and other practices, and testimony therein still remains to be taken before a trial examiner.

The Opposition

Frankly, it was no surprise to me that the Commission's success in the Cement case in the Supreme Court generated so much heat in the business community. I was certain that success in this case would result in organized pressure on the public and on Congress for an amendment to the anti-trust laws which would permit the practices of the cement industry. After the Cement decision Mr. Irving S. Olds, the Chairman of the Board of U. S. Steel Corporation, was quoted in the New Your Journal of Commerce as announcing a drive for legislation to legalize basing point methods of pricing, and Mr. Benjamin Fairless, the President of U. S. Steel, announced on the same day not only that the steel company was abandoning the basing point system but also that one of the considerations motivating the abandonment was the plan to get immediate Congressional action to legalize basing points.

The type of pressure that was immediately applied is typified by a letter which Mr. E. T. Weir, Chairman of the Board of National Steel Corporation, dispatched to that company's customers at a time when steel was in extremely short supply and customers were fighting for favors. Mr. Weir's letter contained the following description of the basing point system:

> "The basing point system permitted the buyer to secure required materials from any steel-producing plant at delivered prices competitive with the prices of the steel producer closest to the buyer's plant. This was possible, of course, because distant steel producers absorbed the excess in the cost of freight from their plants to the buyer's plant over the cost of freight from the plant of the closest steel producer.
>
> "The Court decided that this could no longer be done. Instead,

one f.o.b. price must now be established for each product at each point of production which each and every buyer must pay. The actual cost to the buyer, therefore, must be this price plus freight from the point of production to the buyer's plant, because, under the decision, there can be no systematic freight absorption on the part of the steel producer."

Of the Supreme Court's decision in the Cement case, Mr. Weir stated:

"Now, with one stroke, the Supreme Court has wiped out these systems at the behest of bureaucrats and on a basis of theory which has never been proved by practical experience anywhere or at any time. In doing this, the Supreme Court has usurped legislative functions to establish a rule which Congress, the proper agency, explicitly refused to enact time and again, although strongly urged to do so by the bureaucrats of the Federal Trade Commission."

Mr. Weir then proceeded to give his solution for the problem in the following language:

"Congressmen, therefore, should be contacted promptly. All trade associations should be aroused to the seriousness of this situation and the necessity for constructive action. The public should be shown that this is not a mere legal action with limited effect of a technical nature, but a matter of vital importance to everyone.

"Your help is not only important; it is essential. You can communicate with your Congressmen and Senators to give them specific information regarding the effect of this Supreme Court decision on your business and, therefore, on your employees and community. You can keep in continuous touch with them at each step as this matter progresses to final legislative action. You can communicate with your trade associations to urge that they make legislative contact and public information on this subject a first order of business. You can talk with the editors of your community newspapers and give them information which will be the basis for editorials and articles which will educate the public as to the vital importance of this situation and the necessity for its correction."

The above instances, multiplied many times, have led me to the conclusion that a great deal of the so-called confusion about the state of the law has been deliberately created by parties who have been using the basing point system as a price-fixing device, in the hope that some amendment can be written into the law which will legalize the basing point system.

The industries from which the initial clamour has come are those which do not want competition and whose leaders have in the past expressed their idea that price competition is a ruinous process which must be systematically restrained and prevented. This type of thinking is completely foreign to the fundamental policy of the law of the land, and it is not at all surprising to see these persons in the front ranks of those who cry that the law is confused.

As an example of the confusion that exists on this subject, I have here the front page of the New York Journal of Commerce for December 8, 1948. Side by side on that front page there are two stories. One of them has a headline "FTC Chief Confusing Issue, Business Says in Demand For Clearer Pricing Rules." This story refers to a speech which I made in New York the day before and contains the following statement:

> "Business men said in reply that they are not trying to obtain legalization of the basing point system, as charged by Mr. Freer."

Exactly one-half inch away, in the next column, is the following statement:

> "Two railroad management officials and one labor leader urged the Senate Interstate Commerce subcommittee investigating Federal Trade Commission pricing policies to preserve the use of free pricing systems in determining the cost of consumer goods by legalizing specifically the basing point method in the coming session."

The Real Question Involved

The real question in this controversy is not whether uniform f.o.b. mill selling is desirable—it is not whether freight equalization should be permitted —it is not whether one particular area has been benefiited by the basing point system or whether another has been hurt by it. The real question is whether the Federal Trade Commission and the courts are to remain free to examine the facts in each individual case and, on the basis of a public record of evidence taken and considered according to law, ascertain whether particular pricing systems have been used as cooperative price-fixing devices or whether discriminatory prices under the Clayton Act have had the effect of injuring or suppressing competition. Thus, while Senator Capehart and Mr. Simon, the General Counsel of his Committee, have repeatedly stated that they are against conspiracy to restrain trade and that they have no sympathy for the steel and cement industries and the basing point practices that have been employed by them, the fact remains that this whole controversy has been generated by the large producers in the steel and the cement industries for the openly announced purpose of persuading Congress to legalize their basing point practices.

The Advisory Council of the Capehart Committee numbers among its members officials of nearly a dozen large corporations which are or have been party to price-fixing cases involving geographic price-fixing systems before the Commission, and the General Counsel of the Committee was, until the time of his employment by the Committee, representing clients in price-fixing cases before the Commission.

I am giving you these facts, not to indicate any lack of good faith on the part of the Members of the Capehart Committee or of its Staff or the witnesses who have appeared before it, but only to show that in some quarters at least there is more than meets the eye in the present cry of confusion.

Basing Point System Detrimental to West

As I mentioned, the question of whether the basing point system penalizes or benefits any particular section of the country is really not a part of the controversy, but since so many statements have been made to the effect that elimination of the basing point system would penalize the inter-mountain territory, I wish to point out some of the means by which, in my opinion, the basing point system has held back the industrial development of the West.

The best illustration can be found in the basing point system of the iron and steel industry. At Pueblo the Colorado Fuel and Iron Corporation maintains a plant with a present ingot capacity of more than 1,200,000 tons. During the late thirties, a study was made by the Temporary National Economic Committee of the operations of this company in relation to the industry, and the figures I shall cite are those to be found in its proceedings. The Temporary National Economic Committee, I might explain, was a non-partisan agency consisting of representatives of the United States Senate and House of Representatives, and of various Government departments which studied the whole question of pricing practices as they relate to our economic system just prior to the war. Among the committee's members whom I might mention were such leading Westerners as Senator Joseph C. O'Mahoney of Wyoming and such conservative Republicans as Representative Carroll Reece of Tennessee, subsequently Chairman of the Republican National Committee. This National Economic Committee recommended unanimously that the basing point system be made illegal, *per se*. Such a law would go far beyond anything the Federal Trade Commission has ever required by any decision or order.

In 1938, the Colorado Fuel and Iron Corporation, which had been through the "wringer" just a few years before, had an ingot capacity of 888,000 tons and was operating at only 38 percent of this capacity. Its prices in the Western States were calculated on the base prices of the Eastern producers at such points as Chicago, Pittsburgh, Buffalo, and Cleveland, with the addition of full rail freight to destination. The effect of this situation was that, although Colorado Fuel and Iron Corporation was operating at only 38 percent of capacity, nearly half the steel sold in Colorado in 1938 originated with Eastern producers who could realize fully as much for steel sold in Colorado as for steel sold in the Eastern producing centers. While it was required to share the Colorado and inter-mountain market with Eastern producers, Colorado Fuel and Iron Corporation found itself shut off from Eastern markets since delivered prices went down sharply, with freight rates from Pittsburgh or Chicago, and in order to do business to the East, the company was required to quote a lower delivered price, and, on top of that, to further reduce its mill realization by the full amount of East-bound freight.

The net effect was to build a one-way West-bound conveyor belt permitting Eastern mills to penetrate freely and to share profitably the inter-mountain territory market, while preventing Western producers from seeking busi-

ness to the East without sacrifice of profit. Not the least of the effects was to require every Colorado consumer of steel to pay a large amount of so-called "phantom freight," or freight charges included in the price over and above the actual freight charges involved in shipment.

As an illustration of how this system worked on consumers and its deadening effect upon the development of Western industries consuming steel, I would like to cite to you the recent testimony before the Capehart Committee of Miss Ann Olson, Secretary-Treasurer of Wire Specialties and Manufacturing Corporation of Denver, producers of wire coat hangers. Miss Olson traveled all the way from Denver to Washington to tell the Capehart Committee of the effect of this so-called "phantom freight" on her company's competition with Eastern competitors. She presented figures to show that her raw material and transportation cost in Denver, although using steel originating in Pueblo, was more than 25 percent greater than that of her Chicago competitors, while at the same time these Chicago competitors could lay down their finished products in Denver at raw material and transportation costs only one percent greater than hers. She stated:

> "Denver cannot even ship to nearby towns in Colorado and be competitive with Chicago, even though the raw materials and finished products were shipped some 2,000 miles less distance."

She also stated that:

> "If the old basing point system with its 'ghost' freight is reinstated we again will be handicapped or we will be forced to move into the large industrial centers where we can buy our raw products, now produced in Colorado, at the same prices our competitors pay."

Yet in the face of such testimony, it is proposed right here in Denver to support the drive for restoration of the basing point pricing system—or its equivalent—in industries where it has been condemned as a monopolistic price-fixing device.

To share in or dictate the management policies of industry is not the function of the Federal Trade Commission, nor that of any other Government agency, under our present system of free competitive enterprise. Whatever I might think personally of the wisdom of any Western steel company "going along" with the pricing methods of its Eastern brethren, the law requires only that its methods of pricing shall not be the product of conspiracy with other producers and, furthermore, that the company shall not make *unjustified* discriminations in price which have the effect of suppressing competition in any line of commerce. In other words, the law sets down certain basic standards of fair play. And subject only to these basic standards, it is entirely up to the steel producers, or the cement producers, or any other producers, to determine how they shall make their prices and conduct their business.

Alleged Confusion in Law, a Matter of Tactics

The Capehart inquiry appears to have started off on the premise that the Commission's order in the Cement case would revolutionize American industry, and reasoning from there, along the line taken by some steel and cement producers, it would seem that its conclusion would be that it would wreck our economy. As more and more details of the nature of the price-fixing conspiracies which the Commission found to exist in the Cement and Rigid Steel Conduit cases have come to be understood, however, this premise largely appears to have been abandoned, and now no one seems to have anything good to say about the former practices in either the steel conduit or cement industries. The present premise appears to be that the law is so confused that the small business men in other industries do not know whether, or to what extent, they can absorb freight or meet competition.

This question of confusion is nothing new. As early as 1912 there was a great wave of protest from many business men for amendment of the Sherman Act to make it certain just what a business man could or could not do. The plea for certainty has been renewed preiodically.

In no branch of American law is there an absolutely certain, hard and fast line that can be drawn which will inevitably separate violation of the law from full compliance with the law. In order to accomplish any such certainty, it would be necessary to sit down and draft a code of business law consisting of several volumes covering every situation or combination of circumtances which has been decided by the courts to be violative of the Federal Trade Commission, Clayton or Sherman Acts in the past fifty years. In addition, it would be necessary to anticipate and specifically prohibit future practices use of which appeared likely to restrict and restrain competition and tend to make our machine of free enterprise break down. And when we got done, it still would not be simple. In fact, it would be, I fear, a great deal more complicated than the present situation.

While I am in complete sympathy with any honest effort to make the law clear and understandable to those who must be subject to it, we must recognize that certainty in complex legal matters is impossible to attain.

Mr. Justice Douglas of the Supreme Court recently made the following statement in a case wholly unrelated to this field:

> "* * * But there are few areas of the law in black and white. The greys are dominant and even among them the shades are innumerable. For the eternal problem of the law is one of making accommodations between conflicting interests. This is why most legal problems end as questions of degree." *(Estin v. Estin;* decided June 7, 1948, 68 S. Ct. 1213, 1216)

In an article in "Fortune Magazine" for October, 1948, there is a statement by Fowler Hamilton on this question of certainty:

> "True, if he cannot have freedom, the businessman generally will settle for certainty. But the lawyer must frequently frustrate even this

desire. The ifs and buts of legal opinion are inevitable results of the lawyer's awareness of the uncertainty of the law and of the even greater uncertainty of the future facts and forces upon which the legality of action may finally turn. Mr. Justice Brandeis, during his days of private practice, said to clients who insisted upon an unqualified opinion as to the legality of a proposed business program: 'I can tell you where the edge of the cliff is, but I cannot tell you how hard or in what direction the wind will be blowing when you pass by it.' "

The Crux of the Problem

This leads me to what I consider to be the crux of this whole problem—the extent to which the Government should interfere with the rights of the individual engaged in business. The Federal Trade Commission is not equipped to run the cement industry or the steel conduit industry—nor, for that matter, is any tight little group of men in or out of the Government. The basic principle of our system is freedom of enterprise, with the principal regulatory forces being those of the free market and real competition. It is "regulation" by forces other than those of competition in the free market which the Commission has proceeded against in some of our basic industries.

It is not enough, then, for us to say "keep the Government out of business." If we are to be successful in keeping the Government out of business, we must keep business free from monopolistic controls imposed by business men themselves. Monopolistic controls by private business have the sure and necessary effect of inviting Government regulation of all phases of business activity. If a little group of men is permitted to run the steel conduit industry or the cement industry pursuant to understanding and agreement among themselves and without regard to the forces of free competition in the market, then inevitably Government must control the actions of the monopolists. When that day comes, our system of free enterprise will have disappeared and we will have embarked upon the same course of paternalistic Government controls that have marked such States as Germany, Russia, Italy and Japan.

It is the principal characteristic of the American system that a man can still open up a retail store, a factory, or almost any other kind of business, on his own responsibility and take his chances in the market. It is obvious that an integral part of this right is also the real risk of failure and bankruptcy through mismanagement, insufficient capital, or for any one of a hundred different reasons, so that if we are to have the benefits of competition, we must endure also its temporary discomforts.

I feel very strongly that this problem of preserving our competitive system is the foremost domestic problem today and that the public must soon decide whether we honestly intend to try to obey the rules of the economic road we so far have travelled or whether we are willing to recognize that the alternative route is one of all-out Government regulation. Unfortunately,

there seems to be no middle road in this situation. If we continue to give lip service to the competitive system and provide only token enforcement agencies under the anti-trust laws; if we continue to cry against monopolies and at the same time refuse to provide the means of curbing them, we will continue to coast down hill without conscious resolution into a valley from which we must be towed because the spark of competition neither exists nor can be restored to its proper function in our economic motive power. When that point is reached we will have no choice but to acquiesce in a system of permanent peacetime Government controls which will shift the responsibility of management to the Government.

I am not concerned at all about the possibility of any such system of Government control resulting if it were left as matter of free choice to the American public today. My concern is that if there continues much longer the present trend of concentration of power in fewer and fewer hands and the present trend of sniping at the anti-trust laws and seeking by every means to avoid competition, the power of choice between all-out Government regulation and a free competitive system will have been removed. Thus, we will have actually made a choice of all-out Government control of business through our very lack of appreciation of the problem and our consequent failure to do anything about it.

Preservation of the competitive system is the basic philosophy which has moved the Federal Trade Commission. The Commission is not an agency which is seeking power or control over industrial decision and discretion. It has been motivated by the principle that the coming of the day of Government regulation can be postponed or forestalled by prevention of those practices which operate to destroy the competitive system by depriving the individual business man of his freedom.

In conclusion, let me express my opinion that the price of economic freedom, like that of political liberty, is eternal vigilance.

An Outline of "The Government in Housing"

By SYDNEY H. GROSSMAN
Of the Denver Bar

EDITOR'S NOTE: The following is largely based on the outline of a talk given by Mr. Grossman at the annual convention of the Colorado Conference of Social Welfare in November, 1948. In preparing his material, Mr. Grossman utilized the arrangement with the law school deans to provide students to assist bar members in legal research. In the present instance, it was through the efforts of Charles McCarthy, senior in the University of Denver College of Law, that the basic data was assembled for Mr. Grossman.

What will the 81st Congress do with regard to public housing? The portent of this question cannot be underestimated. It is generally agreed that the recent election has brought into focus even more forcibly than before the controversial question about government in housing. It must be presumed that legislation will be introduced in the present Congress, to the end that