UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of NATIONAL LEAD COMPANY, a corporation, et al.	Docket No. 5253

REPLY OF RESPONDENT, NATIONAL LEAD COMPANY, TO PROPOSALS SUBMITTED BY COUNSEL FOR THE COMMISSION

While counsel for respondent, National Lead Company, in their oral argument (4299-4376) discussed most of the points raised by counsel for the Commission in his argument and proposals, we here wish to emphasize certain points.

On pages 26 to 28, inclusive, of his proposals, counsel for the Commission lists the alleged illegal agreements claimed to have been made by respondents in 1933-1934 at the time of their meetings held to discuss proposals considered in connection with the drafting of the supplementary code to be filed with the Master Code for the Lead Industry. In our oral argument (4347-55) we pointed out that as to the claim that the practices listed were adopted by illegal agreement, the record shows either (1) that the practice was generally followed, without agreement, before 1933, or (2) that there was no proof of any agreement upon the practice, or (3) that the practice was found in Schedule A of the Code (Com. Ex. 809) which was incorporated in and made a part of Section 2, Article VII, thereof. While we were discussing the alleged agreement numbered "(11)" (on page 27 of the proposals of Commission's counsel), part of which is to the effect that there was an agreement in 1933 to adjust card prices of oxides in quantities of less than 20 tons with fluctuations in the pig lead market in multiples of not less than 25¢ per 100 pounds, we stated that, while Messrs. Zoller and Merson stated that such was customary, there was no proof as to whether that practice arose before or after 1933-1934. As a matter of fact, Respondents' Exhibit 154 A-I (the tabulation prepared by the witness, Tibbets) shows clearly that at least as early as 1927 respondent, National, itself customarily made card price changes for red lead and litharge when the pig lead market moved up or down as much as 25¢.

As we see it, to support the charge that there was a price fixing conspiracy which had its inception in the Code period, 1933-1934, counsel for the Commission relies upon three primary contentions: (1) that the agency system was adopted by illegal agreement among respondents; (2) that zones for oxides, dry white lead and white lead in oil were adopted by illegal agreement, and (3) that the terms and conditions of sale for oxides and dry white lead, basic carbonate, set forth in Schedule A of the Code were also adopted by illegal agreement. The other alleged agreements, as we have shown in our oral argument, for the most part relate to practices which were generally followed in the industry, without agreement, long prior to 1933.

As to agency, we have already shown in some detail that that method of selling was not adopted by agreement among the respondents and that, as a matter of fact, only two of the respondents, namely, National and Eagle-Picher, adopted this method, although a third, Glidden, used it from sometime in 1939 to sometime in 1941, only for limited purposes. The evidence also shows that, as far as National was concerned, it decided to use agency without regard to what any other respondent did. National made no attempt to coerce any other respondent to use that method. The most that can be said is that agency was discussed by the representatives of National with some of the other respondents as a legal method of stopping the vicious practice of using white lead in oil as a "loss leader".

With respect to zone or territorial differentials, we have shown that as far as white lead in oil and dry white lead are concerned, the system employed by respondent, National, of selling these products on the basis of territorial differentials antedated 1933 and, in the case of white lead in oil, went back at least as far as 1910. We have also shown that in May, 1934, National unilaterally and acting independently adopted zones for oxides, replacing the former cumbersome method of adding freight over 25¢ to the price on carload shipments and of adding freight from designated warehouses on l. c. l. shipments.

On pages 20 and 21 of his proposals, counsel refers to the correspondence of Maston with Wormser, Secretary of Lead Industries Association (Com. Exs. 513 B, 519 B). The first related to the Code discussions with regard to zones and, as we have shown, in the meeting of October 28, 1933, following Maston's letter, freight and zoning problems were discussed without any understanding or agreement being made (Com. Ex. 505 A). As far as the letter from Maston to Wormser of January 31, 1934 (Com. Ex. 519 B) is concerned, we covered this in the rider to page 27 of our brief filed on February 25, 1947 in support of our motion to dismiss the amended complaint. We there pointed out that the record does not show what map Maston was talking about and that, as a matter of fact, there never was at any time any "Zone Map for the White Lead in Oil Industry". The record actually shows that the maps used by National and Eagle-Picher differed, that International Smelting & Refining Company adopted no map until January, 1937 and that Glidden and Sherwin-Williams never used a map. For all that appears this letter was another attempt by Maston to have the others adopt the original map which he forwarded in his letter of September 14, 1933 (Com. Ex. 513 E) a map which was wholly different from the one ultimately adopted by National (compare Com. Ex. 580) as a graphic, pictorial presentation of its territorial differentials. Maps, in and of themselves, as counsel for the Commission recognizes, are meaningless. It is the selling method depicted by a map that is under attack.

Reverting to the fourteen alleged illegal agreements claimed to have been entered into by the respondents from July, 1933 to June, 1934, we shall quote each of the said agreements (as set forth at pages 26-28 of proposals of Commission's counsel) and follow it with a concise summary of the relevant proof.

The Alleged Agreements

(1)

Agreement to

"Sell white lead-in-oil and other lead pigments packaged in kegs or cans of 100 pounds or less on the basis of flat delivered prices to customers within designated zones, and with uniform differentials applicable within such zones, as set forth in the white lead-in-oil and keg products zone map attached hereto and made a part hereof;".

The proof establishes that National sold white lead-in-oil on a territorial zone differential basis substantially similar to that depicted on the so-called white lead-in-oil and keg products map at least as far back as 1920 (Resp. Ex. 147; Com. Ex. 659C-P) and on the same general basis at least as far back as 1910 (2893).

(2)

Agreement to

"Sell white lead-in-oil on the basis of consignment contracts or arrangements for the purpose of controlling resale prices in the trade and preventing competition between themselves and their customers (except that Sherwin-Williams and Glidden did not take part in this understanding);".

The proof shows that National adopted the agency method or plan of selling white lead-in-oil in an attempt to combat the vicious practice obtaining among some dealers of selling its Dutch Boy products as "loss leaders" (2905-07). It adopted the agency plan without regard to the action of any other respondent and independently of any other respondent. Only one other respondent, Eagle-Picher, had any similar method which it used to any great extent, and while Eagle-Picher and National exchanged information, there is not an iota of proof that their respective agency plans were the result of an agreement between them. National discontinued the use of its agency method in 1944 (Com. Ex. 624A-B, Resp. Ex. 158).

(3)

Agreement to

> "Sell lead pigments in kegs and cans at uniform differentials of 25¢ per 100 pounds between keg sizes of 12½, 25, 50 and 100 pounds;".

There is no proof that the practice started in 1933 or 1934, and counsel for the Commission refers to none in his proposals.

(4)

Agreement to

> "Eliminate and refrain from permitting guarantees against declines in price upon lead pigments packaged in kegs or cans and red lead and litharge in less than carload lots;".

Schedule A, Article I B. (4) (c), of the Supplementary Code provided that there should be no protection against decline in seller's prices in the case of lead oxides in less than carload lots. There is no similar provision in the Code with respect to lead pigments packaged in kegs or cans; there is no proof on that subject, and, again, counsel for the Commission refers to none in his proposals.

(5)

Agreement to

> "Sell dry white lead (both basic carbonate and basic sulphate) upon the basis of flat delivered price quotations to customers; within designated zones, and with uniform differentials applicable to such zones, as set forth in the dry white lead zone map attached hereto and made a part hereof;".

There is testimony (Sprague, 2625) that some time prior to 1933 dry white lead, basic carbonate, sold at a higher price of ¼¢ per lb. in the Pacific Coast area. At the time National determined to use its dry white zone map in June, 1934, it simply added to the differential territory four more States, namely, New Mexico, Colorado, Wyoming and Montana (Resp. Ex. 159A).

(6)

Agreement to

> "Sell dry white lead upon uniform discounts and terms of sale, with a uniform addition to price quotations for delivery in lots of less than twenty tons;".

Schedule A, Article III 2. (c), provided for a quantity discount for carload lots of not more than ¼¢ per lb. in the case of dry white lead, basic carbonate, and for terms of sale for that product.

(7)

Agreement to

> "Eliminate and refrain from entering into contracts to supply dry white lead at a stated differential over the price of pig lead;".

Schedule A, Article III B. (4) (b), provided that on contract sales the price was to be the seller's price on date of contract with protection against advance or decline on the undelivered portion to the end of the current calendar quarter. The record contains no proof that National ever sold dry white lead on contract at a stated differential over the price of pig. The record authority cited by Commission's counsel in his proposed findings and conclusions is Com. Ex. 754 Z-54-Z-60. These are tabulations relating to Eagle-Picher invoices. There is no evidence of any agreement to the effect stated and certainly National never agreed to eliminate and refrain from doing something it never did.

(8)

Agreement to

> "Sell red lead and litharge in drums or barrels and in quantities of less than twenty tons upon the basis of flat delivered price quotations to customers within designated zones, and with uniform differentials applicable to such zones, as set forth in the less-than-carload red lead and litharge zone map attached hereto and made a part hereof;".

The record shows that National, acting independently and without regard to the action of the industry and prior to the formal approval of the Code, determined upon the sale of oxides in less than carload lots on a territorial differential basis (Resp. Ex. 159B-D).

(9)

Agreement to

> "Sell red lead and litharge in drums or barrels and in quantities of more than twenty tons upon the basis of flat delivered price quotations to customers within designated zones, and with uniform differentials applicable to such zones, as set forth in the carload red lead and litharge zone map attached hereto and made a part hereof;".

The record shows that National, acting independently and without regard to the action of the industry and prior to the formal approval of the Code, determined upon the sale of oxides in carload lots on a territorial differential basis (Resp. Ex. 159B-E).

(10)

Agreement to

> "Eliminate and refrain from entering into contracts to supply red lead and litharge in quantities less than 20 tons at a stated differential over the price of pig lead;".

Schedule A, Article I B. (4), provided that the price of oxides in less than carload lots should be the seller's card or quoted price on the date the order was received. National had established card prices governing the sale of oxides in less than carload lots in 1927 at a differential over pig lead of 2½¢ per pound for litharge and 3½¢ per pound for red lead (Resp. Ex. 177A-B).

(11)

Agreement to

> "Quote and sell red lead and litharge in quantities of less than 20 tons on the basis of price cards distributed to the trade and

calculated on a differential over pig lead prices to move up or down with fluctuations in the lead market in multiples of not less than 25¢ per hundred pounds;".

As we have stated, Schedule A of the Code provided for the quotation on the basis of card prices of the price for the sale of oxides in less than carload lots. The record shows (Resp. Ex. 154A-I) that at least as far back as 1927 National quoted and sold lead oxides in less than carload lots on the basis of card prices, the prices moving up and down with fluctuations in the pig lead market in multiples of not less than 25¢ per 100 pounds. Obviously in this case National entered into no such agreement as that charged in either 1933 or 1934.

(12)

Agreement to

"Quote and sell red lead and litharge in 20 ton quantities on the basis of differentials over the price of pig lead as quoted by the American Smelting and Refining Co. for delivery in New York as follows, to move up or down with fluctuations of pig lead prices in multiples of not less than 5¢ per hundred pounds:

Litharge	$1.50 per cwt.
Litharge (75%) Red Lead (25%)	1.75 " "
95% Red Lead	2.50 " "
97% Red Lead	2.75 " "
98% Red Lead	3.00 " ".''

At least as far back as 1927 National quoted and sold red lead and litharge in carload quantities on the basis of differentials of $1.50 per cwt. in the case of litharge and $2.50 per cwt. in the case of 95% red lead over the price of pig lead (Resp. Ex. 177A-B). Schedule A, Article II B. (5) (d), provided for a differential of not less than 25¢ and 50¢ per cwt. over 95% red lead in the cases of 97% and 98% red lead, respectively.

(13)

Agreement to

"Fix arbitrary discriminations between carload, 5 ton and less than 5 ton purchasers of oxides in 600 pound barrels by calculating card prices, as set forth in (6) above, on the basis of the following differentials over the American Smelting and Refining Co.'s New York price of pig lead:

Litharge	$2.50
Litharge (75%)—Red Lead (25%)	2.75
95% Red Lead	3.50
97% Red Lead	3.75
98% Red Lead	4.00."

Schedule A, Article I B. (4) (a) (1), authorized a quantity discount of not more than ½¢ per lb. in the case of less than carload purchases of a minimum of 5 tons. As far back as 1927, National sold litharge and 95% red lead in less than carload lots at differentials of $2.50 and $3.50 per cwt., respectively, over pig lead (Resp. Ex. 177A-B). Schedule A, Article I B. (4) (d), authorized the sale of 97% and 98% red lead at differentials of not less than 25¢ and 50¢ per cwt., respectively, over 95% red lead.

(14)

Agreement to

> "Establish arbitrary prices, terms and conditions of sale applicable to sales to customers classified as government, railroads, steamship lines and industrial."

There is no proof of any such agreement among the respondents. As far as government sales are concerned, the record shows wide differences in the bids and great variations in quoted prices (4095-96; Resp. Exs. 306A-B, 307A-B, 308A-C). As far as customers classified as railroads, steamship lines and industrials are concerned, there is, as we have said, no proof of any agreement among respondents and, as a matter of fact, National never published prices for those classes of customers. It simply notified its branches as to what prices should be charged. There were no published or announced prices and no distributed price cards (Com. Ex. 615A-D; 3961).

In discussing the fourteen alleged agreements, we have pointed out that in many instances the practice under attack had been established by National long prior to 1933-1934. The testimony of the other respondents shows that, generally, the marketing practices of National have been followed, without agreement, in the industry for many years. This shows conclusively, we believe, that as to those practices antedating 1933-1934 there was simply no agreement among respondents and no proof from which an inference of agreement could be drawn. There is not one shred of evidence in the record of any attempt on National's part to force or coerce any other respondent to follow any practice of National's at any time. The other respondents did just as they pleased and National did likewise.

The position of Commission's counsel is therefore reduced to the following proposition, namely, that the respondents in this proceeding could not follow the terms and conditions of sale for oxides and dry white lead, basic carbonate, which were set forth in Schedule A of the Code (Com. Ex. 809) without violating the Sherman Act or the Federal Trade Commission Act. In the first place, it should be noted that there are no price fixing provisions in Schedule A, although minimum differentials for oxides in 5 ton lots and for dry white lead, basic carbonate, in carload lots are provided for, in addition to minimum differentials over 95% red lead for 97% and 98% red lead.

Counsel states that respondents can claim no protection from Section 5 of the National Industrial Recovery Act as far as the terms and conditions set forth in Schedule A are concerned, because: (1) the Code did not require the following of such terms and conditions; and (2) in any event, exemption from Schedule A was obtained by respondents during the life of the Code. Counsel's contentions in support of this argument are hypertechnical, self-contradictory and, in addition, would lead to grossly inequitable results, to say the least. He admits that the contention that, since Schedule A was not mandatory, no exemption under Section 5 of the N. I. R. A. can be claimed, is one ~~invloving~~ INVOLVING the "literal terms" of Section 5 of the N. I. R. A. While we maintain exactly the contrary, nevertheless counsel's statement is illustrative of the strained interpretation which he seeks to place upon Section 5 of the N. I. R. A.

Section 5 of the N. I. R. A. reads in part as follows (48 Stat. 198):

"While this title is in effect * * * and for sixty days thereafter, any code, agreement, or license approved, prescribed, or issued and in effect under this title, and any action complying with the provisions thereof taken during such period, shall be exempt from the provisions of the antitrust laws of the United States."

Section 2 of Article VII of the Lead Code (Com. Ex. 809, page 373 thereof) provided that each member of the Lead Pigments industry should file with the Secretary, within 10 days after the effective date of the Code, a list of prices at which his products would be sold "and a memorandum of any of his conditions of sale at variance with those set forth in *Schedule 'A'* attached hereto and *which is made a part hereof.*" (Italics ours.)

During the Code discussion days, in the fall of 1933, the Oxide and Dry White Lead sub-committees made many drafts of schedules containing proposed terms and conditions of sale, and Schedule A, as ultimately adopted and approved, represented the final wording of the proposals which had been suggested by both the industry and the N. R. A. True, the Code did not make following Schedule A mandatory in so many words, but obviously it represented what both the industry and the N. R. A. felt were desirable terms and it became impliedly mandatory by reason of the requirement of filing a memorandum of deviations therefrom. But, says counsel for the Commission, since these terms were not specifically mandatory, you could not agree to follow them without violating the anti-trust laws. The argument is specious. The agreement in the Code discussion days was only to include such terms and conditions in the supplementary code. Obviously, once approved, these terms could be followed by any one or all of the industry since such would be "action complying" with a "provision" of the Code—namely, Schedule A, which was incorporated in and made "a part" of Section 2, Article VII. Exactly the same result would follow even had the respondents agreed to follow the terms, since again they would merely be agreeing to comply with a provision of the Code.

Counsel further argues that, because respondents secured an exemption from both Section 2 of Article VII and Schedule A, the Code to that extent was never effective and that hence Section 5 of the N. I. R. A. afforded them no protection. But the exemption did not revoke the formal approval by Administrator Hugh S. Johnson who, on behalf of the President, approved the Code on May 24, 1934. The exemption was granted by order dated June 27, 1934, so it cannot be said that the provision in question did not go into effect. When the exemption was granted, it did not delete or purport to delete Schedule A from the Code. The Schedule was as much a part of the Code as it had ever been. The effect of the exemption was to eliminate any requirement, implied or otherwise, that the industry comply with Schedule A. But that is not to say that individual members were prohibited from following the Schedule by the mere fact of exemption. This is clear, from the circumstances which gave rise to the granting of the exemption. The exemption was sought because of the reluctance of members of the Lead Pigments Division to comply with the "open price" provision of Section 2, Article VII (Resp. Ex. 50-0). In seeking exemption from Schedule A as well, respondents exhibited a similar "lukewarmness" in respect to any requirement that the industry follow the impliedly mandatory terms of the Schedule. The agreement with which counsel for the Commission charges the respondents is that they had agreed to follow Schedule A. While, as we have seen, such an agreement was perfectly legal, even had it been made, which is denied, the reasons for exemption clearly mark the termination of any such agreement. In other words, in obtaining an exemption the respondents put an end to any such agreement as that claimed to have existed by counsel for the Commission.

The claim that there was an agreement by the respondents to follow Schedule A is based in part upon certain statements appearing in Respondents' Exhibit 159 D (Mr. Rowe's letter to National's Branch Managers) to the effect that with respect to the sales of oxides in lots of less than 20 tons, "All sellers have agreed to discontinue the old 90-day card price contracts" and that as to the rule against protection against price decline "there was a great deal of discussion and it was finally decided to make a definite rule which is intended to mean that the price to apply on any order is that 'in effect on date order is received' ". These alleged so-called agreements are contained in Schedule A, Article I, of the Code. Mr. Rowe, in his letter, was interpreting the Code for his Branch Managers. There is no evidence that the respondents agreed to do these things or upon these matters as such. The agreement reached by the respondents was to include these matters in the Code, an entirely different matter.

Article I of Schedule A, which had been included in the Code by agreement (that is, by agreement to include such a provision in the Code), in subdivision B (4) states that the price shall be seller's card or quoted price in effect on date order is received with an allowance of not more than ½¢ per pound for minimum shipments of 5 tons or more. Subdivision B (7) states:

> "*Shipment.*—Shall be made at least within thirty (30) days from date order is received."

With respect to this language, Respondents' Exhibit 159 D contains the following significant language:

> "The words 'at least' were put in at the request of the N. R. A., which is also responsible for some of the other phraseology in the schedules."

Thus it is apparent that the old method of selling oxides in less than carload lots on 90 day card price contracts was discontinued at the request of N. R. A. and was specifically provided for in Schedule A. We repeat that the only agreement was to include the provision in the language quoted in the Code. Compliance with Schedule A, as we have already shown, was protected by Section 5 of the N. I. R. A.

In any case, counsel for the Commission tacitly admits (4217) that his argument cannot be reconciled with the "estoppel" doctrine discussed in *Eugene Dietzgen Co.* v. *Federal Trade Com'n.*, 142 F. 2d 321, where the Court declared (footnote 8, p. 329):

> "We are convinced that notwithstanding this fact, the Government was estopped to prosecute citizens who complied with N. R. A. codes, for violations of either the Sherman Antitrust

> or the F. T. C. Acts, because the N. R. A. was presumably valid until by judicial pronouncement it was declared to be invalid, * * *."

So that aside from the specific exemption from the antitrust laws granted by Section 5 of the N. I. R. A., we maintain that the Commission, as an administrative agency of the Government, is without power to declare illegal that which was done at the "urgent representations" (Resp. Ex. 50-K) and "insistence" (Resp. Exs. 50-0. 81-A) of another administrative agency of the Government, the National Recovery Administration, particularly where many of the practices now sought to be termed illegal were suggested by the N. R. A. (Resp. Ex. 159 D) and where all such practices were formally made a part of the Code and approved by the Administrator on behalf of the President. Again we say with the Court in ***Aetna Portland*** *Cement Co.* v. *Federal Trade Com'n.,* 157 F. 2d 533, at 549:

> "To hold that members of an industry can be invited and perhaps required by the government to participate in a program for the general welfare under a promise of immunity and that evidence of their doings and activities in connection therewith can be used to hold them for a conspiracy would constitute a fraud, or perhaps confidence game would be a more appropriate designation."

The rule announced in the *Dietzgen* and *Cement* cases emphasizes the position of the respondents, which has been consistently maintained in this proceeding from the beginning, that conspiracy cannot be founded upon the activities of members of the industry occurring in 1933 and 1934 during the Code discussion days. And this applies to all the charges of conspiracy or illegal agreement raised by counsel for the Commission, whether related to agency, zones, the practices contained in Schedule A of the Code, or the other alleged agreements supposedly made in that period. That was the stated reason for our objection to all the evidence relating to the 1933-1934 N. R. A. Code period and, of course, by discussing the evidence relating to that period and in submitting proposed findings with respect thereto, respondents are not waiving any of their objections which have been specifically reserved to them. These objections will be urged before the Commission on the appeal from the Trial Examiner's rulings, to be heard at the time of briefing and argument before the Commission on the merits, pursuant to the stipulation herein (4073-74) approved by order of the Commission dated November 18, 1947.

In conclusion we direct attention to the fact that after N. R. A. was declared unconstitutional the respondents had no meetings relating to prices or trade practices and indulged in no "collective" activities with respect to the production and sale of lead pigments. The record shows conclusively that at all times there has been and continues to be active and vigorous competition between the respondents themselves and others in all phases of their business.

Respectfully submitted,

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