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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 63

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

NATIONAL LEAD COMPANY, THE SHERWIN-WILLIAMS COMPANY, THE EAGLE-PICHER COMPANY, and THE EAGLE-PICHER SALES COMPANY,
Respondents.

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENTS

Opinion Below.

The opinion of the Court of Appeals, Seventh Circuit (R. 3887-3909), is reported in 227 F. 2d 825. The majority opinion of the Federal Trade Commission (R. 3803-20) is reported in 49 F. T. C. 875 and Commissioner Mason's dissenting opinion (R. 3820-41) is reported in 49 F. T. C. 889.

Jurisdiction.

The judgment of the Court of Appeals was entered on January 5, 1956 (R. 3911). The time for filing a petition for a writ of certiorari was extended by Mr. Justice MINTON on March 30, 1956 to April 19, 1956 (R. 3915). Certiorari was granted on June 4, 1956 (R. 3915, 351 U. S. 961). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Question Presented.

In a proceeding under Section 5 of the Federal Trade Commission Act, the Commission found that respondents and certain other companies[1] during the years 1933-1934 conspired to adopt certain specified pricing zones in the sale of lead pigments. There was no charge in the complaint and no finding made by the Commission that the individual use of such pricing zones or of any other method of zone delivered pricing constituted an unfair method of competition. The Commission entered a cease and desist order which, in addition to prohibiting conspiracy and concert of action, ordered each respondent individually to desist from quoting or selling lead pigments at prices calculated in whole or in part pursuant to any zone delivered price system where the purpose or effect would be systematically to match the delivered prices of other sellers. In its opinion the Commission stated that this portion of the order was necessary in order to eliminate the effects of the conspiracy and to guarantee against its continuation.

The question presented is whether, under these circumstances, the Commission had the power to direct each respondent individually to cease and desist from selling lead pigments in accordance with any zone delivered price method where the purpose or effect was systematically to match the delivered prices of any other seller.

[1]The other companies were Anaconda Copper Mining Company, International Smelting & Refining Company, and The Glidden Company. Glidden did not seek any review of the Commission's order and the Court of Appeals dismissed the proceeding as to Anaconda and International. Pursuant to stipulation, the latter two have been dismissed as respondents (351 U. S. 921).

Constitutional Provision and Statutes Involved.

The Due Process clause of the Fifth Amendment provides that

> "* * * nor shall any person * * * be deprived of life, liberty, or property without due process of law * * *."

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. § 45, provides in pertinent part as follows:

> "(a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
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> * * * * *
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> "(6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.
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> * * * * *
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> "(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. * * * The testimony in any such

proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice."

Section 9 of the Administrative Procedure Act (60 Stat. 242, 5 U. S. C. § 1008) provides in part that:

> "In the exercise of any power or authority—
>
> "(a) No sanction shall be impsed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law."

The proviso to Section 2(b) of the Clayton Act (49 Stat. 1526, 15 U. S. C. § 13) reads in part as follows:

> "* * * nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price * * * was made in good faith to meet an equally low price of a competitor * * *."

Statement.

Nature of the proceeding.

The amended complaint, issued on April 12, 1946, contained two counts. Count I charged respondents and others with a conspiracy to adopt certain specific arbitrary pricing zones in the sale of lead pigments (R. 60-74).[2]

[2] Count I also alleged that National Lead had attempted to monopolize the lead pigments field and the Commission's order contained a paragraph enjoining further acquisitions by that company. The Court of Appeals, however, set aside the injunction (R. 3912) and no review of that determination was sought by the Commission.

Count II was directed at illegal price discriminations and alleged, among other things, that respondents' intra-zone uniform delivered prices constituted illegal price discriminations in that there were variations in the "net" (i.e. "mill net") prices of each seller (R. 74-78).

The products involved.

There are three general types of lead pigments—white lead in oil, dry white lead, and lead oxides (R. 3889).

(1) *White lead in oil.*

White lead in oil (basic carbonate of lead mixed with linseed oil) is sold chiefly to the painter as a semi-mixed paint (R. 3739). Additional oils and thinners must be added before the material can be applied as paint. Ready-mixed paints directly compete with white lead in oil and have largely displaced the latter during the last 20 or 30 years as the standard exterior paint product (R. 1757, 1918, 1945, 1951).

(2) *Dry white lead.*

There are two kinds of dry white lead—basic carbonate and basic sulphate (R. 3739). Both are sold principally to paint manufacturers as a pigment used in the manufacture of ready-mixed paints (R. 3739). While traditionally dry white lead was the basic pigment employed in the formulation of outside ready-mixed paints, beginning with the 1930s its popularity steadily diminished and, in its place, paint manufacturers began to use, in increasing quantities, competitive pigments such as titanium dioxide, lithopone and leaded zinc oxide (R. 625, 630, 1313, 1557-8).

(3) *Lead oxides.*

The two types of lead oxides are litharge and red lead. Litharge is extensively used in the manufacture of electric storage battery plates (R. 3739). Red lead is also used for the same purpose and, in addition, constitutes the principal ingredient in red lead paint, commonly used as a protective coating for iron and steel structures (R. 3740). Many battery manufacturers produce oxides for their own consumption (R. 1823).

Admittedly, lead pigments were sold at low margins over the cost of the chief raw material, pig lead (R. 3747).[3]

While both prior to and after 1933 respondents sold most pigments at the same price, in the case of white lead in oil, where National Lead's "Dutch Boy" product was the quality leader, three companies (Sherwin-Williams Glidden and International) were compelled to sell at a slightly lower price in order to induce dealers to stock their comparatively unknown brands, although the suggested resale prices of this product were generally uniform for all manufacturers (R. 3772).

The lead pigment manufacturers.

The largest manufacturer is respondent National Lead with a number of plants located in various parts of the United States (R. 3733-3734, 3742). The other companies are relatively small producers of the products here involved, with only one or two plants located in the mid-west or eastern parts of the country (R. 3734-3737).

Pricing practices prior to 1933.

For many years prior to NRA, National Lead had sold white lead in oil on the basis of territorial differentials involving free delivery to specified towns and cities in a large par or base territory and differentials over the par territory for deliveries to certain cities in other areas. The differentials added to the base price were generally uniform in the case of listed cities in a large geographical area. The freight charge to purchasers in localities outside the

[3]White lead in oil, for example, had to be priced so as to be competitive with the more popular ready-mixed paints (R. 1558).

listed cities was "equalized" with freight to the nearest listed city in the particular territory (R. 3749). One witness, a National Lead branch manager, termed this a zone or territorial differential method and stated that such method had been employed by National Lead at least as far back as 1910 (R. 1495).

The record does not disclose what pricing systems were used by the other respondents prior to 1933 in the sale of white lead in oil.

The evidence relating to the methods employed in the sale of dry white lead and lead oxides prior to NRA is extremely fragmentary but it is probable that prior to 1933 dry white lead was sold at a uniform delivered price throughout a large part of the country, while in the sale of lead oxides frequently freight was paid by the purchaser (R. 3750).

Changes instituted during the NRA period, 1933-1934.

The Commission found that in 1933-1934 respondents and the other companies involved, while ostensibly engaged in the drafting of a code for the lead industry and a supplemental code for the lead pigments division of that industry, met and discussed plans to revolutionize their pricing methods. Among the matters discussed was the possible use of certain pricing zones in the sale of white lead in oil and other pigments. The Commission found that, as a result of these discussions, the respondents and the other companies in this proceeding reached agreement on the use of certain zones in the sale of the various lead pigments (R. 3750-3751, 3761-3766).

While respondents are bound by these findings, it nevertheless should be noted that the undisputed evidence, including contemporaneous documents, clearly establishes that the lead pigment manufacturers entered upon these discussions with the utmost reluctance and only at the urgent insistence of NRA officials (R. 1062-1063, 1204;

Resp. Ex. 50, R. 1133, 2840-2843; Resp. Ex. 81, R. 1150, 2851). There was no evidence that there were any meetings or discussions among respondents relating to prices or pricing methods after 1934.

The Commission found that the zone plan was probably put into effect around June, 1934, shortly after the NRA Lead Code received Presidential approval (R. 3769). The Commission also found that, with occasional exceptions, respondents and the other lead pigment manufacturers thereafter uniformly followed the zones so established by agreement (R. 3772-3773).

There were four specific zone methods adopted by the lead pigment manufacturers, a multi-zone method for white lead in oil, a two-zone method for dry white lead, and separate zone systems for the sale of lead oxides in less than carload and carload lots, respectively (R. 3763-3766).

The white lead in oil multiple zone system involved approximately thirteen zones with a large par or base zone comprising the eastern and north central states, a small par zone for the San Francisco Bay area, and premium zones where slightly higher differentials, ranging from ⅛ cent to 1 cent per pound, were charged. The zone boundaries were substantially the same as those employed by National Lead under its former "delivery point" method (R. 3763).

It is undisputed that the higher differentials charged in the premium zones approximated the average increased cost to National Lead of shipping white lead in oil to such zones (R. 3794).

The Commission found that the zones were highly artificial and that zone boundaries in some instances lead to bizarre results with purchasers located near the plants of respondents being charged higher prices than those located at a considerable distance (R. 3789, 3807).

The zones for dry white lead consisted of a par zone embracing all of the country up to the Rock Mountains and a differential zone extending from the Rocky Mountains to the Pacific Coast (R. 3764).

Oxides in less than carload quantities were sold on a multiple zone system consisting of a par zone and four differential zones, while carload quantities were sold in two par zones and one differential zone (R. 3765-3766).

There was no testimony concerning the effect of the zone methods employed by respondents. One witness, a paint manufacturer in Kansas City, however, testified that he approved of the uniform delivered intra-zone price for dry white lead because it permitted him to compete on equal terms with paint manufacturers located in the vicinity of white lead plants (R. 1912, 1914, 1915-1916).

The hearings and proceedings before the Trial Examiner.

During the hearings before the Trial Examiner, there was no suggestion or claim made by Commission's counsel that the individual use of zones was under attack or that the Commission would be asked to enjoin such use, apart from conspiracy. In his argument before the Trial Examiner after the close of testimony, Commission's counsel limited his remarks on pricing zones to the contention that the evidence established that zones were collusively adopted and maintained, and counsel merely asked for an order restraining concerted action in the use of zones (R. 2268-69, 2271-72, 2275, 2282-83, 2292). The order proposed by counsel for the Commission contained no provision relating to the individual use of zones (R. 3439-42) and the Trial Examiner's recommended order was similarly silent on the subject (R. 3556-58).

It was only after the filing of the Trial Examiner's recommended decision that counsel for the Commission raised the point in his exceptions. In these he complained of the failure of the Trial Examiner to list, as one of the issues in the case, the individual use of zone methods and the failure of the Trial Examiner to include in his recommended order a paragraph prohibiting such individual use. Both exceptions were based upon the contention that paragraphs Eight and Nine of Count I of the amended complaint charged that the individual use by respondents of zone methods of pricing, entirely apart from the question of conspiracy, constituted an unfair method of competition (R. 3559, 3575).

With respect to Count II of the amended complaint, relating to illegal price discriminations, the Trial Examiner ruled that respondents' uniform intra-zone prices, where the freight amounted to no more than 2½% to 3½% of the delivered price, did not result in illegal price discriminations since the insignificant differences in "mill nets" did not lessen competition between purchasers to any substantial degree (R. 3553).

The Trial Examiner found that the differing inter-zone prices charged by respondents were illegal price discriminations except where the higher premium zone prices were justified by the additional freight cost incurred (R. 3554).

In concluding his report upon the evidence, the Trial Examiner held that the law did not require the adoption of uniform f.o.b. mill prices and that the use in this industry of uniform intra-zone delivered pricing was not unlawful under the Clayton Act (R. 3515-17).

The Commission's rulings on exceptions, findings, and order.

In rejecting the first exception of Commission's counsel, based upon the argument that Count I charged that the individual use of pricing zones constituted an unfair method of competition, the Commission ruled (R. 3709-10):

> "The Commission does not so construe the amended complaint. The manner in which this document was prepared makes it apparent that *Paragraphs Eight and Nine of Count I were intended to allege, in effect, that pursuant to and in furtherance of the conspiracy alleged in general terms in Paragraph Seven, each of the respondents used the zone*

> *methods of selling therein described,* and that each of the respondents employed certain terms and conditions in selling their lead pigments. Paragraph Ten alleges that each of the respondents used the systematic method of quoting delivered costs on lead pigments described in Paragraphs Eight and Nine 'for the purpose and with the effect of enabling the respondents to match exactly their offers to sell lead pigments to any prospective purchaser at any destination, thereby eliminating competition between and among themselves', thus indicating that the allegations of Paragraphs Eight and Nine are not a charge in addition to the conspiracy but constitute only a description of the manner in which the conspiracy previously referred to was effectuated; and all doubt on the point is removed by the allegations of Paragraph Twelve (conclusion) to the effect that 'The combinations, agreements and understandings of the respondents and their acts, practices, pricing methods, systems, devices and policies as hereinbefore alleged, all and singularly, are unfair and to the prejudice of the public', etc. *If it had been the Commission's intention to charge that the acts of each of the respondents individually were unlawful, it could and undoubtedly would have so alleged in clear and unambiguous terms.* The hearing examiner's statement of the issues was not erroneous in the respect mentioned, and this exception is denied'' (Emphasis supplied.)

The Commission agreed that its order should contain a prohibition against the individual use of any zone method, but not upon the ground urged by Commission's counsel. It said (R. 3719):

> ''Counsel's request for a provision prohibiting each of the respondents from selling its lead pigments in accordance with a zone delivered price system is based upon his argument, made in support of his exception No. I, that the amended complaint charges, and the proof supports the charge, that each of the respondents individually has violated the Fed-

> eral Trade Commission Act through the use of the zone pricing system. As shown by the ruling on exception No. I, the Commission does not consider this to be one of the charges of the complaint. Thus, the Commission does not agree with counsel in his position that the order to cease and desist should contain any provision based on that theory. The Commission is of the opinion, however, in view of all of the facts and circumstances in the case, that in order to effectively prevent the respondents from continuing to attain certain of the objectives of their unlawful conspiracy and so continue to deprive the purchasers of lead pigments of the advantages of real price competition among the producers it is necessary for each of the respondents to be restrained from continuing to use the zone delivered price system and from using any other similar system for the purpose or with the effect of matching the prices of other lead pigment producers."

The Commission specifically found that the discussions from July, 1933 to June, 1944 resulted in an agreement, among other things, to sell white lead in oil in accordance with certain specified zones as depicted on the white lead in oil zone map included in the findings. It also found agreements to sell dry white lead, and lead oxides in less than carload and carload lots in accordance with certain specific zones as set forth in zone maps also included in the findings (R. 3761-66).

The Commission in addition found that from the early part of 1934, the accepted practice among respondents was to price lead pigments "in accordance with the zone delivered pricing system here described" (R. 3773), and it stated that this zone pricing system so agreed upon and so adopted was "a method which facilitated the meeting, or matching, of competitors' prices" (R. 3785). It therefore concluded that the agreement to adopt such zones constituted a violation of Section 5 of the Federal Trade Commission Act (R. 3796-3797).

There was no finding that the individual use of the zone methods described in the findings or of any other zone delivered pricing system constituted an unfair method of competition.

In considering the Robinson-Patman features of the proceeding, the Commission held that in so far as the amended complaint alleged that the variations in respondents' "mill" prices constituted illegal price discriminations, the amended complaint failed to state a cause of action (R. 3798). Thus, in effect, it rejected the "mill net" theory theretofore adhered to by former members of the Commission and it restricted its order to prohibiting differences in actual prices at which lead pigments were sold (R. 3795, 3801). While the Commission found that respondents' inter-zone prices "were in fact different prices" and constituted illegal price discriminations where the premium prices were not justified by transportation costs, it did not find that there was any competitive injury at the primary or sellers' level and found only injury to competing purchasers who paid different zone prices (R. 3795, 3797).

The order of the Commission prohibited any conspiracy or concert of action, among other things, to fix prices or to quote or sell at prices in accordance with a zone delivered price system or any other system resulting in identical price quotations (R. 3800). In addition, the order contained the following paragraph, the propriety of which is the issue before this Court (R. 3801):

> "It Is Further Ordered that each of the respondents, its officers, agents, representatives, and employees, in or in connection with the offering for sale, sale or distribution of lead pigments in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from quoting or selling lead pigments at prices calculated or determined in whole or in part pursuant to or in accordance with a zone delivered price system

> for the purpose or with the effect of systematically matching the delivered price quotations or the delivered prices of other sellers of lead pigments and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another."

Opinion of Commission.

In discussing the paragraph of its order above quoted, the majority opinion of the Commission,[4] written by Commissioner Mead, stated (R. 3814-15):

> "* * * Such a prohibition is necessary, not because it is unlawful in all circumstances for an individual seller, acting independently, to sell its products on a delivered price basis in specified territories, but to make the order fully effective against the trade restraining conspiracy in which each of the respondents participated."

It also said (R. 3815):

> "* * * It is to these respondents that purchasers in commerce throughout the country must look for their supplies of lead pigments, and the respondents have the power to and do control the supply of lead pigments available. The maintenance of the delivered price zones and the quotation of delivered prices therein constituted the very cornerstone of the respondents' conspiracy. It was the adherence by each of them to this system of pricing that made the combination work. It was in this way that the matching of prices, one of the objectives of the conspiracy, was accomplished. Unless and until each of the respondents is prohibited from so adhering to the system and from so using the zones, the evils springing from the combination, one of which is to eliminate price competition, may well continue in-

[4]There was a vigorous dissent by Commissioner Mason (R. 3820-41). Commissioner Carretta did not participate in the decision for the stated reason that oral argument on the merits was heard prior to his appointment (R. 3802). Commissioner Spingarn, however, who was also appointed to the Commission after the oral argument, did not see fit to disqualify himself.

> definitely. Unless the respondents, representing practically the entire economic power in the industry, are deprived of the device which made their combination effective, an order merely prohibiting the combination may well be a useless gesture."

The majority further stated (R. 3816):

> "* * * What would be the situation if the Commission issued only the usual type of conspiracy order in this case—that is, to discontinue agreeing to fix prices, etc.
>
> "After the order is issued the respondents might continue to use the same zone pricing system and when questioned by the Commission as to compliance with the order they might truthfully reply that they had not corresponded or conversed with their former conspirators since the issuance of the Commission's order to cease and desist. The respondents, however, would be enjoying all the fruits of their conspiracy—the rigged pricing pattern—and the momentum of the system, so firmly and maturely established, might last for some time unless effective measures to break it up were taken. That is the purpose of the paragraph of the order to cease and desist directed against each of the respondents individually. * * *"

The Commission said that if, after competition is restored, respondents "can make a proper showing" that the prohibition is no longer necessary the Commission will take such action "as may be appropriate in the light of the facts and the law" (R. 3817).

Opinion of Court of Appeals.

The Court below set aside the paragraph of the Commission's order under consideration, and held that under the specific language of Section 5 of the Federal Trade Commission Act and prior decisions of this Court, the Commission was limited to proscribing unlawful acts only.

It observed that in the instant proceeding there had been no complaint, no hearing and no findings relating to the effect of the individual employment of any zone system (227 F. 2d 825, 840-843). It also said (id. at 843-844):

> "Clearly, the Commission was concerned here with enforcement of its order prohibiting concerted action. In justifying the paragraph in question, it pointed up 'the likelihood' that petitioners might continue to use the same zone systems and plead that they have abandoned the unlawful agreement and that such use is merely individual parallel conduct. It seems to us that this is an unwarranted anticipation of a situation which may never arise and an attempt to decide, by an anticipatory order, questions which will be a subject for this court to consider should some future enforcement proceeding become necessary. We refuse to sustain such a sweeping inroad on individual liberty of competitive action, without a prior determination by the Commission, after an appropriate hearing, that such activity is a violation of the Act. Lawful acts do not become automatically unlawful because of an administrative guess that a declaration of their illegality may facilitate enforcement of a valid order.
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> "If individual use of the zone system by petitioners is to be restrained, that result must be achieved by a proper order in a proceeding conducted in conformity with the statute, in which the invalidity of such conduct is determined. The Commission's power to act is conditioned on such a determination. [Citing cases.]"

Summary of Argument.

The zone method of pricing, one of several generic types of pricing employed in American industry, is a lawful, competitive method of doing business. The contested paragraph of the Commission's order, which effectively bans the non-collusive, individual use of zone pricing in the lead pigments field, was beyond the Commission's authority since there was no charge in the complaint and there were no findings or evidence that such use was unlawful. *Humphrey's Executor* v. *U. S.,* 295 U. S. 602, 620; *Trade Comm'n* v. *Cement Institute,* 333 U. S. 683, 709.

The Commission was created by Congress and given only limited and specific authority. *Federal Trade Comm.* v. *Klesner,* 280 U. S. 19, 27. Where, as here, the Commission purports to act under Section 5 of the Federal Trade Commission Act, it can prohibit only those practices which it finds are unfair methods of competition within the meaning of that section and, in the absence of any such finding, the Commission lacks the power to act. *Federal Trade Commission* v. *Sinclair Refining Co.,* 261 U. S. 463, 475-476.

In testing the propriety of any injunction issued by the Commission, it is necessary to see whether the complaint alleges that the action enjoined constitutes an unfair method of competition. If there is no such allegation, then it follows that the injunction violates Due Process, for in that event the respondent is given no opportunity to defend himself. *Federal Trade Commission* v. *Gratz,* 253 U. S. 421, 427-428. Here, as the Commission expressly ruled, the complaint contained no charge that the individual use of zone pricing was unlawful and, since the point was raised for the first time after the filing of the Trial Examiner's recommended decision and order, the respondents were denied the privilege of offering evidence designed to show that the use of zone pricing in this industry was a logical, economical, and competitive method of doing business. Under these circumstances, the contested paragraph of the Commission's order was properly stricken by the Court below.

If the contested paragraph were restored to the Commission's order it would effectively prevent competition in the lead pigments field for if any respondent were to adopt his own non-discriminatory zone method, no other seller could meet the lower prices of such manufacturer for in so doing he would be employing "in part * * * a zone delivered price system * * * for the purpose or effect" of matching his competitor's price. This would follow despite the fact that Section 2(b) of the Clayton Act (   ) expressly permits the meeting of the lower prices of a competitor in good faith competition.

There is no such thing as "the" zone delivered pricing system except in the broad generic sense, for zone methods may differ radically in the size and number of zones, in the placing of zone boundaries, and in the price differentials between zones. Here the "device" or "cornerstone" of the conspiracy was not the zone type of pricing *per se,* but was rather the particular highly artificial and precise zones which were established by conspiracy in 1933-1934 and which effectively prevented each manufacturer from exploiting his own competitive advantages in any particular territory. There was thus no necessity for prohibiting the use of any and all zone methods of pricing since the principal paragraph of the Commission's order effectively banned combination and concert of action to use a zone method or any other pricing system which resulted in identical prices. The Commission's fear that without the proscription of individual action the respondents would merely continue to use the same pricing system used in the past is wholly unfounded and unrealistic. There is no basis for the assumption that the respondents will ignore the paragraph of the order forbidding conspiratorial action. Furthermore, if respondents were to continue to employ the same system, the Commission would have the right to seek statutory penalties for the violation of the valid portion of its order, since it is clear that the continued performance of acts having their origin in illegal agreement constitutes a renewal of the pre-existing conspiracy. *United States* v. *Borden Co.,* 308 U. S. 188, 202; *U. S.* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 227.

The contested paragraph of the Commission's order and the similar paragraph in the *Chain Institute* order (49 F. T. C. ......) are unprecedented in the history of the Federal Trade Commission and find no support in the authorities. While the Commission has an "allowable choice of remedy", it may not enter orders prohibiting individual, lawful conduct, or even unlawful acts unless they bear a reasonable relation to the specific illegal acts under attack in the complaint. *Federal Trade Comm.* v. *Beech-nut Co.,* 257 U. S. 441, 455-456; *Trade Comm'n* v. *Cement Institute,* 333 U. S. 683, 721, 727, 729. See also, *Labor Board* v. *Express Pub. Co.,* 312 U. S. 426, 435-439; *Siegel Co.* v. *Trade Comm'n,* 327 U. S. 608, 613-614.

In the light of the circumstances here presented, the Court below was clearly correct in setting aside the contested paragraph and in describing it as "a sweeping inroad on individual liberty of competitive action" (R. 3909, 227 F. 2d 825, 844).

POINT I.

The Commission was without power to enjoin the individual use of zone methods. Zone pricing is lawful. There was no charge in the complaint, and there was no evidence or finding that the individual use of zone pricing in this case constituted an unfair method of competition.

Introduction.

The zone method of pricing is one of several generic types employed in American industry. The Report of the Attorney General's National Committee to Study the Antitrust Laws (March 31, 1955) describes these as follows (pp. 209-10):

> "Characteristic of the geographical range encompassed by the American system of distribution, many

> sellers supply distant markets through 'delivered' prices which reflect some element of freight. Unlike an f.o.b. mill quotation which sets a price effective at the *seller's plant*, 'delivered' prices incorporate transportation charges and hence refer to the point of delivery, i.e. the buyer's location. Such 'delivered' price quotations are customarily computed by four essential formulas. In single or multiple basing-point pricing, one or several mills serve as referents for a price to which is added the actual freight charge to the buyer's door; likewise, in freight equalization, the most favorably located seller's mill serves as the basis to which the actual freight to the buyer's door is added; in zone pricing, the country is carved into geographic sectors within which all buyers pay the same price regardless of location, though the price varies among the several zones; a uniform 'delivered' price system treats the entire nation as a single market, charging the identical price to all buyers anywhere."

It is clear from the Commission's findings that it has defined the zone delivered price method in the same terms. The Commission stated that the "territorial zone delivered price basis" involved "a flat par price for all deliveries in a par zone, which included several states, and fixed differentials over the par price applicable to the various zones outside of the par zone" (R. 3769).

In this proceeding, unlike the *New Cement* case[5], there is no question but that the delivered price was the actual price under the Federal Trade Commission Act and the Clayton Act. Here the Commission expressly rejected the "mill net" theory in the light of the practices as they existed in this industry (R.). In other words, price here was not what was netted by each seller at its plants (i. e., the delivered price less freight cost), but in actuality was the price paid by the purchasers at the point of delivery. Furthermore, it is to be noted that, under the

[5]*Trade Comm'n* v. *Cement Institute,* 333 U. S. 683, 696-97.

Robinson-Patman aspects of this case, there was no finding that the zone delivered price method resulted in competitive injury at the seller's level.

A. The zone delivered price method, individually employed, constitutes a lawful method of pricing.

The Courts have never held that any method of zone delivered pricing, individually employed and not involving illegal price discriminations, was unlawful.

In 1932 the Federal Trade Commission published its *"Price Bases Inquiry; The Basing Point Formula and Cement Prices"*, in which it made the following observations (p. 13):

> "Probably the most important single determinative factor in adopting the use of the delivered price uniform for all destinations is the ratio of the delivered cost to total production and delivery cost. If this is low, with only slight differences in delivery cost as between destinations freightwise differently located, *a delivered price uniform* for the country or *for zones may be a method of quoting more convenient to buyer and seller and less costly than an f.o.b. point of origin price. In that case such a price would not be inconsistent with price competition and would not be indicative of any lack of such competition."* (Emphasis supplied.)

In the instant case, the evidence established, and the Trial Examiner found, that the transportation costs latent in the delivered price represented only a small fraction of the delivered price running from approximately 2½% to 3½%, depending upon the product and the zones involved (R.   ). Use of zones in this industry, therefore, does not involve a disproportionately large freight factor.

In its *"Statement of Policy Toward Delivered Pricing Practices"*, dated October 12, 1948, the Federal Trade Commission said:

> "Where uniformity of delivered prices within a zone or throughout the country has simple and logical explanations in the nature of the market, the product, and the transportation costs, *the observance of such uniformity, even in the parallel action of a number of competitors, does not in and of itself create inference of collusion.* * * * While nation-wide delivered pricing though superficially simple and not inherently persuasive of collusion may be a concomitant factor in a broad pricing conspiracy, *it is not per se unlawful.* * * *" (Emphasis supplied.)

Thus, we start out with the proposition that in the lead pigments industry there is nothing inherently unlawful in the employment of a zone delivered price method. Indeed, the Commission in its opinion recognized that it was not "unlawful in all circumstances for an individual seller, acting independently, to sell its products on a delivered price basis in specified territories" (R. 3814).

B. The court below correctly held that in the absence of any charge in the complaint, supporting evidence and finding that the individual use of zone methods of pricing constituted an unfair method of competition, the Commission had no power to enjoin such use.

The Congressional grant of power to the Federal Trade Commission is contained in Section 5(a) of the Federal Trade Commission Act, which provides (15 U. S. C. § 45(a)):

> "The Commission is empowered and directed to prevent persons, partnerships or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

It is to be noted that the power is only one to prevent "unfair methods of competition" and nothing is said about prohibition of methods not condemned as unfair.

Section 5(b) of the Act provides (15 U. S. C. 45(b)):

> "*Whenever the Commission shall have reason to believe that* any such person, partnership or *corporation has been or is using any unfair method of competition* or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it *shall issue and serve upon such* person, partnership, or *corporation a complaint stating its charges in that respect* and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. *The* person, partnership, or *corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such* person, partnership, or *corporation to cease and desist from the violation of the law so charged in said complaint.*
>
> "* * * The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership or corporation *an order requiring such* person, partnership or *corporation to cease and desist from using such method of competition or such act or practice.*" (Emphasis supplied.)

Thus, under Section 5(b), the Commission must issue a complaint stating in what way a particular practice constitutes an unfair method of competition; the respondent may appear and contest the violation of law "so charged"; a hearing is to be held; the Commission must find that the practice constitutes a method of competition prohibited by the Act; the Commission must state its findings in writing;

and finally the Commission must issue an order directing the respondent to cease and desist "from using *such* method of competition" (i.e. such *unfair* method).

The statutory provisions are, therefore, unambiguous and specific. The complaint must charge an unfair method of competition; hearings must be had upon this issue; and the Commission must find that the practice involved is an unfair method of competition.

These are not merely insignificant procedural requirements but involve fundamental concepts of Due Process. A person or corporation haled before an administrative agency should have the right to know, clearly and without equivocation, what the specific charges are in order that he may be in a position to meet and contest them by producing evidence in a duly convened adversary proceeding. Congress clearly had these considerations in mind when it conferred upon the Commission the specific powers set forth in Section 5 of the Trade Commission Act.

In discussing the Commission's power under Section 5 to prohibit unfair methods of competition, this Court in *Humphrey's Executor* v. *U. S.,* 295 U. S. 602, 620, declared:

> "In exercising this power, the commission must issue a complaint stating its charges and giving notice of hearing upon a day to be fixed. A person, partnership, or corporation proceeded against is given the right to appear at the time and place fixed and show cause why an order to cease and desist should not be issued. There is provision for intervention by others interested. If the commission finds the method of competition is one prohibited by the act, it is directed to make a report in writing stating its findings as to the facts, and to issue and cause to be served a cease and desist order."

It also said (id. at 628):

> "The Federal Trade Commission is an administrative body created by Congress to carry into effect

legislative policies embodied in the statute *in accordance with the legislative standard therein prescribed* and to perform other specified duties as a legislative or as a judicial aid." (Emphasis supplied.)

In *Trade Comm'n* v. *Cement Institute,* 333 U. S. 683, 709, this Court observed:

> "These marked differences between what a court must decide in a Sherman Act proceeding and *the duty of the Commission in determining whether conduct is to be classified as an unfair method of competition* are enough in and of themselves to make the *Old Cement* decision wholly inapplicable to our problem in reviewing the findings in this case. *That basic problem is whether the Commission made findings of concerted action, whether those findings are supported by evidence, and if so whether the findings are adequate as a matter of law to sustain the Commission's conclusion that the multiple basing point system as practiced constitutes an 'unfair method of competition,'* because it either restrains free competition or is an incipient menace to it." (Emphasis supplied.)

Mr. Justice Brandeis, speaking for a unanimous court in *Federal Trade Comm.* v. *Klesner,* 280 U. S. 19, 27, said:

> "While the Federal Trade Commission exercises under § 5 the functions of both prosecutor and judge, *the scope of its authority is strictly limited.*" (Emphasis supplied.)

Similarly, in *Federal Trade Commission* v. *Eastman Kodak Co.,* 274 U. S. 619, 623, this Court said:

> "The Commission exercises only the administrative functions delegated to it by the Act, not judicial powers. *National Harness, etc. Association* v. *Federal Trade Commission* (C. C. A.), 268 Fed. 705, 707; *Chamber of Commerce* v. *Federal Trade Commission* (C. C. A.), 280 Fed. 45, 48."

Again, in *Arrow-Hart & Hegeman Co.* v. *Federal Trade Comm'n*, 291 U. S. 587, 598, this Court declared:

> "The Commission is an administrative body possessing only such powers as are granted by statute. It may make only such orders as the Act authorizes; may order a practice to be discontinued and shares held in violation of the Act to be disposed of; *but, that accomplished, has not the additional powers of a court of equity to grant other than and further relief* by ordering property of a different sort to be conveyed or distributed, *on the theory that this is necessary to render effective the prescribed statutory remedy.*" (Emphasis supplied.)[6]

In enacting Section 9 of the Administrative Procedure Act (60 Stat. 242, 5 U. S. C. § 1008), Congress clearly recognized the limited nature of the authority of administrative agencies when it provided that:

> "In the exercise of any power or authority—
>
> "(a) No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law."

In a proceeding under Section 5 of the Trade Commission Act, the initial inquiry relating to the propriety of the Commission's order is necessarily whether the complaint alleges that the practice banned by the order constitutes an unfair method of competition. In *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 427-428, this Court said:

> "If, when liberally construed, the complaint is plainly insufficient to show unfair competition within the proper meaning of these words there is no foundation for an order to desist—the thing which may be prohibited is the method of competition specified in the complaint. Such an order should

[6]See also, *Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U. S. 463, 475-476.

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> follow the complaint; otherwise it is improvident and, when challenged, will be annulled by the court.'"[7]

Here the complaint did not attack the individual, non-collusive employment of zones. Furthermore, the point was not raised until after the hearings and after the filing of the Trial Examiner's recommended decision and then only upon the ground, expressly rejected by the Commission, that Count I of the amended complaint did in fact charge that such individual use constituted a violation of Section 5. Had respondents been apprised of the fact that the Commission would seek to bar the individual use of zones, they might have been able to offer testimony showing that zone delivered prices were desired by customers, that competitive products such as ready-mixed paints and other pigments were sold on a similar basis, and that other conditions in the market made such pricing a logical and economical method of doing business. That opportunity was denied. We submit that under these circumstances Due Process was thereby violated and that the paragraph of the order under consideration was properly stricken by the court below.

POINT II.

Even if it be assumed that the Commission has broad powers to take such action as may be necessary to insure the effectiveness of its orders and to prevent evasion, the prohibition of the individual use of zone pricing in this case exceeded the authority of the Commission and was properly set aside by the court below.

A. The injunction against the individual use of zones would hamper competition in this industry.

At the outset we must determine precisely what the paragraph of the order under consideration would require.

[7]See also, *Western Sugar Refinery* v. *Federal Trade Commission*, 275 F. 725, 732 (9th Cir.); *Heuser* v. *Federal Trade Comm.*, 4 F. 2d 632, 634 (7th Cir.); *Salt Producers Assn.* v. *Federal Trade Commission*, 134 F. 2d 354, 358 (7th Cir.). Compare *Standard Containers Mfrs. Ass'n* v. *Federal Trade Commission*, 119 F. 2d 262, 264, 266 (5th Cir.).

It would prohibit "each respondent" individually, without regard to the existence of combination or conspiracy, from selling lead pigments at prices calculated "in whole or in part", according to "a zone delivered price system" (i.e., *any* such system)[8] "for the purpose or effect of systematically matching" the delivered prices of any other seller.

If the stricken paragraph were restored to the order, the following might take place:

(1) In an effort to comply with the paragraph prohibiting continuation of the conspiracy, each pigment manufacturer, without consultation or discussion with any other producer, might adopt his own, non-discriminatory zone delivered price method based upon his own costs of delivery. If, as a coincidental result, any two sellers arrived at the same price in any particular locality in the country, under the paragraph in question one of these two sellers would have the choice of making no sales in that locality or of selling at a different, and necessarily lower, price, for otherwise he would be using "in part" a zone system which had the "purpose or effect" of "matching" his competitor's prices in that area. By the same token, if the first seller were to lower his price, then the other seller would be faced with the same dilemma for he too would be forbidden to meet or match the lower price of his competitor.

(2) One seller might adopt an f. o. b. method, with a single mill or plant price to which actual delivery costs were added. In a particular area, however, he might find that the zone prices of a competitor were lower. If the first seller were to lower his delivered price in that area to meet his competitor's price, he might be held to have violated the prohibition for in such case he would be employing "in part" a zone method (i.e. his com-

[8]It is thus clear that the paragraph in question does not merely prohibit use of "the same kind of zone delivered price system which [respondents] had long been using by agreement" as claimed by the Commission (Com. Br. p. 2).

petitor's) with the "purpose or effect" of "systematically matching" (albeit competitively) the delivered prices of his competitor.

(3) As a result of the adoption of individual separate zones by the lead pigment manufacturers, one seller might discover that his zone prices were higher than those of one or more of his competitors in certain areas where the latter were more favorably situated. This seller could not meet the equally low zone price of his competitors in those areas for both the "purpose" and "effect" of such action would be to "match" the delivered prices of the latter, despite the fact that "matching" of prices would be the result of normal competitive pressures and despite the fact that Section 2(b) of the Clayton Act (   ) by its terms permits such action.[9]

The record indicates that there is considerable likelihood that the last-mentioned situation would arise in this industry. Here there is a large multi-plant producer, National Lead, and several relatively small producers with only one or two manufacturing points (   ). Under the circumstances, it is obvious that National Lead would have a freight advantage in the areas contiguous to its respective plants. If the smaller producers are to be denied the opportunity of meeting their larger rival's zone prices, then they face the choice of losing a large share of business which they otherwise might be able to retain or of going out of business altogether.

In an attempt to justify its order, the Commission contended below that the stricken paragraph did not outlaw all zone pricing but merely forbade zone delivered pricing

[9]Any of these methods would involve "pricing individually on a basis different from the 'arbitrary and artificial' pricing system which respondents have used in the past" which the Commission now claims its contested paragraph "makes explicit" (Com. Br. pp. 12, 17). And the adoption of such pricing methods would obviously be the result of competitive forces and not "a *de facto* continuation of concerted action" as the Commission contends (Com. Br. p. 16).

where there was the "purpose or effect" of "systematically matching" prices (Respondent's Brief before Court of Appeals, pp. 87-88). Apparently, the Commission used the words "purpose", "effect", "systematically" and "matching" in an attempt to create an aura of illegality but in reality no such sinister meaning should attach to these words.

Where one deliberately lowers his price to meet a competitive offer, he obviously does so with the "purpose" of "matching" that price in a competitive manner. Where, as a result of competitive forces, prices are all lowered to a certain uniform level, the act of selling at that the going price will undoubtedly have the "effect" of "matching" competitors' prices.

Again, there is no warrant for suggesting that the words "systematically matching" are synonymous with illegal activity. The same meaning would result from the use of the innocuous words "regularly meeting".

In the *Staley* case,[10] this Court indicated that a seller could adopt his own non-discriminatory method of delivered pricing and then lower that price in certain areas to meet a particular competitive situation. In view of the fact that business is rarely done sporadically in any given area, to meet or match a lower delivered price of a competitor in any given territory in response to a particular competitive problem, one must do so "regularly" or "systematically". The Commission's injunction, however, would prevent that sort of competitive behavior, at least where the competitive weapon is a zone method of pricing.

B. The prohibition of any and all zone methods of pricing is unnecessary to insure effectiveness of the order banning combination and conspiracy.

The Commission has consistently maintained that the injunction against employment of zone methods is neces-

[10] *Trade Comm'n* v. *Staley Co.*, 324 U. S. 746, 754-55.

sary to extirpate the effects of the conspiracy. It argues that in so doing it is merely requiring respondents to abstain from employing the vehicle or "device" which forms the "cornerstone" of the conspiracy (Com. Br. p. 15). This contention cannot withstand analysis.

While zone pricing is a type of pricing and as such differs from other generic types—f. o. b., basing point, freight equalization, and universal delivered pricing—there is no such thing as "a" or "the" zone delivered pricing system, except in the broad generic sense. For example, no one could realistically equate the two-zone system heretofore used in the sale of dry white lead with the multiple zone method (employing thirteen zones) used in the sale of white lead in oil (see R. 3763-3764). True, both are "zone" systems but there all similarity ends. The zones differed in number, there was no similarity in zones boundaries, the zone areas were of different sizes and the zone differentials were completely dissimilar. Indeed the Commission here concedes that the zones used in the sale of dry white lead and lead oxides were "Altogether different" from the white lead in oil zones (Com. Br. p. 9).

As indicated, zone methods may differ radically in the number and area of zones, in the placing of zone boundaries, and in the price differentials between zones. Indeed, a zone system may be so designed, with many zones and small zone differentials, as to resemble an f. o. b. method of pricing.

The system employed by National Lead in the sale of white lead in oil prior to the time of the conspiracy could be described as a zone method, for in that system there were many free delivery points in a large par or base territory and differential points, usually carrying the same differential, in other large areas, with the premiums varying from one area to another. Indeed, a National Lead official described this as a zone or territorial method (R. 1495). If National Lead, however, were again to employ this concededly valid method of pricing, which was used by it for many years before the formation of the conspiracy, it is not at all certain that, under the stricken paragraph, any other seller would be permitted to meet National Lead's lower prices in any particular area even though such might be the only way the smaller producer could compete with National Lead.

In the final analysis, it was not the "zone method", with its many possible variations which formed the "cornerstone" of the conspiracy; rather it was the *agreement upon precise and highly artificial pricing zones and zone differentials* which formed the essence of the unlawful arrangement.[11] Again, the vehicle or device was not the zone method of pricing *per se*; instead, the device by which the conspiracy was carried out was the particular arbitrary zone methods so adopted and put into effect through the concerted action of all manufacturers, the use of which prevented sellers from fully exploiting the competitive advantages they might individually have enjoyed by reason of their favorable location in any given territory.

Analysis of the Commission's opinion reveals that ultimately the Commission attempts to justify the injunction in question by contending that without it "* * * the respondents might continue to use *the same zone pricing system* and when questioned by the Commission as to compliance with the order they might truthfully reply that they had not corresponded or conversed with their former conspirators since the issuance of the Commission's order to cease and desist" (R. 3816; see also, Com. Br. pp. 2, 12, 16, 17).

In other words, the Commission fears that without the injunction against individual action, respondents will

[11]The Commission's Brief (p. 8) refers to the fact that the Commission found that during the discussions of the Code counsel was consulted on the use prior to Code approval of a "Uniform Basis of Sale" and that he gave the advice there reported (R. 3755-56). The "Uniform Basis of Sale" contained no reference to the use of zone pricing and the finding thus has no bearing whatever on the issue before the Court.

blithely ignore the prohibition of concerted action contained in the first part of the Commission's order (R. 3800) and will continue to use the precise artificial pricing pattern which was collusively established in 1933-34. To us that fear seems completely unfounded and unrealistic. Not only is there no basis whatever for the assumption that respondents will ignore the paragraph of the order prohibiting continuation of the conspiracy, but the fact is that if respondents were to continue to employ the same or substantially similar zones and zone differentials after the order and judgment below became effective, the Commission would clearly have the right to recover statutory penalties for violation of its order, since it would appear to be well settled that the continued performance of acts having their origin in illegal agreement constitutes a renewal of the pre-existing conspiracy.[12]

We submit that under these circumstances the court below correctly termed the Commission's fear "an unwarranted anticipation of a situation which may never arise and an attempt to decide, by an anticipatory order, questions which will be a subject for this court to consider should some future enforcement proceeding become necessary" (227 F. 2d 825, 844).

In addition, there is no reason to assume that with the restraint of conspiracy removed from the lead pigments field competition will not be as vigorous under individually established zone methods (should any manufacturer wish to employ such a system) as it would under any other method of pricing.[13]

Furthermore, if in the future the facts before the Com-

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[12] *United States* v. *Borden Co.,* 308 U. S. 188, 202; *U. S.* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 227.

[13] In Landon, *Geographic Price Structures,* 15 Law & Contemp. Prob. 125, 133 (1950), the author states:

> "So long as producers act spontaneously and are free to change prices to meet the individual producer's own conditions or markets, most delivered price systems tend to bring actual pricing close to the level that would prevail under a condition of individual competition."

mission should indicate that the new zone methods or any other pricing systems adopted by respondents were established through collusion, the Commission again would have an appropriate remedy since the first paragraph of its order prohibits concerted action to sell according to a zone system or "any other plan or system which results in identical price quotations or prices" (R. 3800).

It would thus seem clear that there is no necessity for the proscription of the individual use of zone methods under the circumstances of this case and that such an order would needlessly restrict the lead pigment manufacturers and deprive them of a valid competitive weapon.

In concluding its discussion of "Delivered Pricing", the Report of the Attorney General's National Committee To Study the Antitrust Laws (March 31, 1955) reads as follows (p. 219):

> "*At any rate, since any competitive 'unfairness' caused by 'delivered' pricing rests primarily in collusion, antitrust policy is not furthered by penalizing it as an 'unfair method of competition' forbidden by Section 5 of the Federal Trade Commission Act unless the elements of conspiracy appear.*
>
> "Therefore, the Committee recommends that the law carefully differentiate competitive and collusive 'delivered' pricing. It is our view that overall antitrust policy is served when sellers are free to meet competition in distant markets by quoting 'delivered' prices to equalize the freight advantages of more favorably situated competitors. Conversely, however, basic antitrust considerations firmly dictate that 'delivered' pricing employed to effectuate price-fixing conspiracies be relentlessly pursued. This delicate adjustment should be guided by recent adjudications defining the essence of antitrust conspiracy as well as the legally relevant concept of 'price.'
>
> "At the same time, since under current legal doctrines the test of 'delivered' prices as an instrument of business rivalry often comes in the context of a 'meeting competition' justification, the Section

> 2(b) proviso as interpreted by the Committee should correspondingly foster the competitive 'delivered' pricing which comports with overall antitrust policy.'' (Emphasis supplied.)

C. Under the authorities, the prohibition of the individual, non-collusive use of the pricing zones was clearly improper.

Until the entry of its orders in this case and another proceeding[14], decided 35 days after the order here was filed, the Commission in all of its history had never entered a similar injunction under the circumstances here disclosed.

It is interesting to note that the Federal Trade Commission, even as it was constituted prior to the 1953 change of membership, was willing to accept, in settlement of a case against the steel industry, a cease and desist order which merely prohibited the further use of that industry's multiple basing point system pursuant to conspiracy. *Matter of American Iron & Steel Institute, et al.* (F. T. C. Docket No. 5508), 48 F. T. C. 123 (1951). Not only was there no prohibition of the individual use of the system, but the *Steel* order contained the following paragraph:

> ''III. PROVIDED, HOWEVER, that, in interpreting and construing the foregoing provisions of this order, it is understood that:
>
> * * * * *
>
> ''(3) The Federal Trade Commission is not acting to prohibit or interfere with delivered pricing or freight absorption as such when innocently and independently pursued, regularly or otherwise, with the result of promoting competition''. (48 F. T. C. at 154)

The consent order in the *Steel* case was in all respects consistent with the Commission's *''Statement of Policy*

[14]*Matter of Chain Institute,* 49 F. T. C. (decided February , 1953), now awaiting decision in the Court of Appeals, Eighth Circuit. In *Chain Institute* the same majority of the Commission (Mead, Carson, and Spingarn) did not even bother to write an opinion.

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Toward Delivered Pricing Practices'' of October 12, 1948, quoted above (p.). The contested paragraph of the order here reflects a diametrically opposed view.

The Commission here contends that the stricken paragraph of its order bans merely conduct which ''is, at best, of doubtful legality'' and urges that it simply prohibits sales according to a zone ''system'' which results in ''systematically matching'' of delivered prices (Com. Br. p. 18). Again, it would appear that the Commission seeks to suggest that a pricing ''system'' is tinged with illegality, although if one were to use the synonomous word ''method'', the suggestion of illegality disappears. And, as we have seen (*supra* p.), prohibition of ''systematic matching'' of delivered prices effectively eliminates the very type of competitive behavior which the antitrust laws were designed to foster.

Despite the fact that the Commission here has abandoned its questionable ''mill net'' theory (R.), it would appear that the stricken paragraph of the orders represents simply another weapon in the Commission's long fight against the delivered pricing in American industry.[15] This battle has been waged by the Commission in the face of clearly expressed Congressional intention that delivered pricing, individually employed in a non-collusive fashion, should not be outlawed.[16]

[15]The fight culminated in the Commission's sweeping vistory in *Trade Comm'n* v. *Cement Institute,* 333 U. S. 683, but the issue there involved combination and concert of action, not individual behavior.

[16]The original draft of the so-called Robinson-Patman Act defined "price" as the amount received by the seller after the deduction of actual delivery costs. See H. R. Rep. No. 2287, Part 2, 74th Cong., 2d Sess. 16 (1936). After debate, however, the definition was withdrawn. 80 Cong. Rec. 8102 *et seq.,* 8140, 8223-8224 (1936). In *Corn Products Co.* v. *Comm'n,* 324 U. S. 726, 737, the Court observed that this legislative history indicated that Congress was unwilling to outlaw delivered price systems. In 1949, following this Court's affirmance by an equally divided vote of *Triangle Conduit & Cable Co.* v. *Federal Trade Commission,* 168 F. 2d 175 (7th Cir.), affirmed *sub. nom. Clayton Mark Co.* v. *Federal Trade Commission,* 336 U. S. 956, legislation was introduced designed expressly to permit non-collusive delivered pricing. While the bill was never enacted, nevertheless statements made during the course of Congressional consideration of the bill clearly indicate that Congress again was opposed to any attempt by the Commission and the Courts to prohibit individually employed, non-collusive delivered pricing. See 95 Cong. Rec. 7204-09, 7232, 9260, 14794-97 (1949).

The Commission urges that the individual use of such a pricing method has been condemned by the Commission as an unfair method of competition in *Triangle Conduit & Cable Co.* v. *Federal Trade Commission,* 168 F. 2d 175 (7th Cir.), affirmed by an equally divided court *sub nom. Clayton Mark Co.* v. *Federal Trade Commission,* 336 U. S. 956. The fact is that in the *Triangle Conduit* case there was a separate count of the complaint (Count II) specifically alleging that each of the respondent manufacturers of rigid steel conduit had violated Section 5 of the Federal Trade Commission Act through the concurrent use of a "formula method" of making delivered price quotations, with the knowledge that others did likewise. That issue was openly contested at the hearings and the Commission expressly found that the industry-wide use of the basing point method there involved under those circumstances violated the Trade Commission Act. In addition, the Court of Appeals stated that, "In this situation, and indeed all parties to these proceedings agree, the legal question presented is identical" with the one before this Court in the *New Cement*[17] case (168 F. 2d at). Of course, the Court of Appeals was in error since *New Cement* concerned the prohibition of concerted action only. Furthermore, the affirmance of *Triangle Conduit* by this Court through an equally divided vote (with Justice JACKSON not participating) suggests that the case is of doubtful authority. In any event, it offers no analogue to the instant case where there was no allegation and there was no finding that the individual use of zone methods constituted an unfair method of competition.

We wish to make our position crystal clear. It is our contention that the Commission has no power to prohibit the use of lawful delivered pricing, whether it be zone pricing or any other method of pricing, developed as a matter of competitive, individual choice. We particularly

[17] *Trade Comm'n* v. *Cement Institute,* 333 U. S. 683.

urge that the Commission should not be permitted to prohibit such lawful competitive conduct when there has been no complaint, no evidence, and no finding relating to the issue. The Commission "has no general authority * * * to interfere with ordinary business methods or to prescribe arbitrary standards for those engaged in the conflict for advantage called competition"; rather, "it is essential that those who adventure their time, skill and capital should have large freedom of action in the conduct of their own affairs". *Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U. S. 463, 475-476.

We do not dispute the fact that the choice of a remedy generally lies within the discretion of the Commission. *Siegel Co.* v. *Trade Comm'n,* 327 U. S. 608, 611-612. Analysis of the cases dealing with the subject, however, reveals that the Court in all cases has restricted administrative orders to the prohibition of unlawful conduct and has permitted the agency to prohibit only the unlawful conduct charged in the complaint and "like or related unlawful acts".[18]

While the Commission, like other administrative agencies, has broad discretion in framing its orders, and the courts will ordinarily refrain from substituting their judgment for that of the Commission, this Court has never hesitated to act where the orders of the Commission or some other administrative agency are too broad or seek to ban unlawful conduct in general terms, or unlawful acts having no reasonable relations to the practices under consideration. See, *Labor Board* v. *Express Pub. Co.,* 312 U. S. 426, 435-439; *May Stores Co.* v. *Labor Board,* 326 U. S. 376, 392-393; *Siegel Co.* v. *Trade Comm'n,* 327 U. S. 608,

[18]*Labor Board* v. *Express Pub. Co.*, 312 U. S. 426, 436. Similarly, courts of appeals have limited the Commission's orders to the prohibition of illegal practices closely related to those charged in the complaint. *Consumer Sales Corp.* v. *Fed. Trade Comm'n,* 198 F. 2d 404 (2nd Cir.), cert. denied 344 U. S. 912; *Independent Directory Corp.* v. *Federal Trade Comm'n,* 188 F. 2d 468 (2nd Cir.); *Hershey Chocolate Corp.* v. *Fed. Trade Comm'n,* 121 F. 2d 968 (3rd Cir.).

613-614. *A fortiori,* a court should not hesitate to set aside prohibitions of *lawful conduct,* particularly where, as here, there is no necessity for such a destructive provision and there has been no finding of a Section 5 violation.

In *Federal Trade Comm.* v. *Beech-Nut Co.,* 257 U. S. 441, the Beech-Nut Company was involved in an elaborate resale price maintenance scheme. Under the decision in the *Colgate* case,[19] Beech-Nut was legally entitled to refuse to deal with distributors who ignored its suggested resale prices. However, Beech-Nut went much further and, by the co-operation of many of its dealers, implemented by a system of policing, black lists, white lists, reports on price cutters, and pressure brought to bear on such price cutters, was enabled to maintain its suggested resale prices. The Commission held that the system as a whole violated Section 5 of the Trade Commission Act but its order prevented Beech-Nut *individually* from refusing to sell to distributors who failed to abide by the suggested resale prices or from carrying out a resale price maintenance policy by any other means (see 257 U. S. at 444, footnote 1). This Court ruled that the Commission's order was "too broad" and directed the lower court to enter judgment prohibiting Beech-Nut from carrying out its resale price policy by "coöperative methods" involving the company, its distributors, customers, and agents (257 U. S. at 455-456). It thus permitted the company to continue to refuse to sell to price cutters where such action was taken individually and it banned only co-operative (or concerted) action to implement its policy.

In the *Siegel* case, 327 U. S. 608, the Commission found that the respondent's use of the trade name "Alpacuna" was deceptive and misleading because it suggested that the respondent's products contained "vicuna". The Commission prohibited the use of the word "alpacuna" to describe respondent's product. The respondent argued that the Commission's order was too broad and that it should be

[19] *United States* v. *Colgate & Co.,* 250 U. S. 300.

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allowed to use its well established trade name together with some qualifying language which would remove the possibility of deception. This Court reversed and sent the case back to the Commission to consider the possibility of saving respondent's trade name through the use of some qualifying phrase (pp. 613-14).

In *Labor Board* v. *Express Pub. Co.,* 312 U. S. 426, this Court clearly stated that the Labor Board, having found that certain acts were an unfair labor practice, would be limited in its order to proscribing only those acts and "other like or related unlawful acts" (p. 436). It accordingly held that a provision in the Labor Board's order requiring the respondent to refrain from violating the National Labor Relations Act in any manner should be deleted (pp. 430, 439). Applying the same principle, this Court in *May Stores Co.* v. *Labor Board,* 326 U. S. 376, 392-93, struck from the Board's order a broadly worded paragraph prohibiting unlawful conduct which bore no reasonable relation to the specific illegal practices under attack.

In *Trade Comm'n* v. *Cement Institute,* 333 U. S. 683, where the industry-wide employment of a basing point system was involved, this Court, after pointing out that the findings of the Commission established that the system was maintained through concerted action (p. 721), took pains to observe that "the prohibitions in the order prohibit no activities except those which if continued would directly aid in perpetuating *the same old unlawful practices*" and noted that the order did *not* prohibit individual employment of delivered prices (p. 727). The respondents there also objected to another paragraph in the Commission's order prohibiting the use of any plan or system which resulted in identical prices. With respect to this objection, the Court observed (p. 729):

> "* * * This paragraph like all the others in the order is limited by the preamble which refers to concerted conduct in accordance with agreement or

> planned common course of action. The paragraph is merely designed to forbid respondents from acting in harmony to bring about national uniformity in whatever fashion they may seek by collective action to achieve that result. We think that no one would find ambiguity in this language who concluded in good faith to abandon the old practices. * * *"

The thought implicit in all of these cases would appear to be that the Commission, as any other administrative agency, may not enter broadly worded orders prohibiting lawful conduct, or even unlawful conduct unless such conduct bears some reasonable relation to the specific subject matter of the action.

The same principle is applied in testing the propriety of court decrees in antitrust actions. Thus, in *Hartford-Empire Co.* v. *U. S.*, 323 U. S. 386, this Court struck from the District Court's decree provisions forbidding leases of machinery and requiring, among other things, royalty-free patent licenses, upon the ground that such paragraphs, under the circumstances there disclosed, "go beyond what is required to dissolve the combination and prevent future combinations of like character" (p. 414).

In *United States* v. *Gypsum Co.*, 340 U. S. 76, the District Court had entered a decree which prohibited the defendants from agreeing upon or "adhering" to any system of quoting prices for gypsum products calculated in accordance with a basing point system or any other system which resulted in identical prices (see 340 U. S. at 100). While this Court specifically stated that in framing its decree the trial court was "not limited to prohibition of the proven means by which the evil was accomplished, but may range broadly through practices connected with acts actually found to be illegal" (pp. 88-89), it nevertheless modified the decree, in view of defendants' apprehension that the paragraph in question would bar individual non-collusive delivered pricing, so that it should clearly and specifically prohibit only *agreement* upon prices calculated in accordance with a delivered price plan (p. 92)[20].

The cases relied upon by the Commission are not to the contrary. In the *Siegel* case, as we have seen, this Court obviously felt that the Commission's order was needlessly destructive of the seller's valuable property rights in its trade name "Alpacuna" (327 U. S. 608, 613).

Contrary to the Commission's suggestion (Com. Br. pp. 17-18), *Fed. Trade Comm'n* v. *Ruberoid Co.*, 343 U. S. 470, did *not* concern the prohibition of lawful conduct. Indeed, this Court there stated that orders of the Commission are not intended as punishment for past acts "but to prevent *illegal* practices in the future" (p. 473; emphasis supplied). The order there prohibited only illegal price discriminations. While the evidence before the Commission concerned price differentials of 5% or more, "the Commission found that very small differences in price were material factors in competition among Ruberoid's customers, and Ruberoid offered no evidence to the contrary" (pp. 473-474). Hence this Court refused to modify the order to allow price differentials of less than 5% and thereby permit the selling company to charge competing purchasers illegal discriminatory prices (id.). With respect to the company's contention that the order prohibited lawful price differentials (viz., price differentials which were cost-justified or made in good faith to meet equally low prices of competitors), this Court observed that the provisos of Section 2 (a) and (b) of the Clayton Act were "necessarily implicit" in the order (pp. 475-76). In our view *Ruberoid* emphasizes the point that the Commission has the power to suppress only illegal practices.

In *International Salt Co.* v. *U. S.*, 332 U. S. 392, the defendant objected to a provision of the decree which directed it to offer to lease or sell its machines on nondiscriminatory terms to any applicant. In discussing the

[20]See also *Swift and Company* v. *United States*, 196 U. S. 375, 396, 402.

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defendant's objection to this paragraph of the decree, the Court said (p. 399):

> "The specific ground of objection raised by appellant to paragraph sixth is that International may find it necessary in some sections of the country to reduce the rental rates of the machines in order that its machines may compete with those of others. Of course, the Clayton Act itself permits one charged with price discrimination to show that he lowered his price in good faith to meet competition. Obviously, the District Court was not intending to prevent competition or to disable the appellant from meeting or offering it. The Government, too, says it would not oppose permitting a lower price to meet, in good faith, the equally low price of a competitor if the need arose."

Here, on the other hand, the injunction which the Commission seeks to have reinserted in its order would prevent the use of any zone prices to meet competition as permitted by the Clayton Act (Section 2(b)).[21]

The Report of the Attorney General's Committee To Study the Antitrust Laws (March 31, 1955) had the following to say about the Commission's orders in this and the *Chain Institute* cases (p. 217, footnote 273):

> "In each case the Commission issued a cease and desist order on the basis of a Federal Trade Commission Act Section 5 violation rooted in collusive pricing conduct. To the extent that these orders deny sellers the right independently to quote 'delivered' prices in meeting rivals' offers, they not only fail to promote effective competition, but also may be vulnerable as probihiting what the law permits."

In *U. S.* v. *Crescent Amusement Co.*, 321 U. S. 173, the defendants had been found guilty of a conspiracy to re-

[21]There was a vigorous dissent in *International Salt* in which the action of the court below was compared with "burning * * * part of a house in order to roast a pig" (p. 403). As indicated, the action of the Commission here went far beyond that which was permitted by a divided Court in *International Salt.*

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strain trade and to monopolize the moving picture business in certain southern states. The conspiracy to monopolize having been established, this Court felt justified in modifying the decree to prevent further acquisitions except upon an affirmative showing that such acquisition would not unreasonably restrain competition (p. 185-87). Obviously, that decision bears no relation whatever to the injunction here which prohibits a lawful competitive method of doing business.[22]

U. S. v. *Bausch & Lomb Co.*, 321 U. S. 707, concerned the use by the defendant of a specific device, Fair Trade contracts, which " 'came as a patch upon an illegal system of distribution of which they have become an integral part' " (321 U. S. at 716). In that situation, the District Court was held not to have exceeded its discretionary powers in ordering the cancellation of Fair Trade contracts for a period of only six months. This Court, however, specifically denied the Government's request that the prohibition be made permanent. Here, on the other hand, not only was the ban on zone pricing made permanent,[23] but the prohibition

[22]The other cases involving decrees in antitrust cases are similarly inapplicable. In all a particular, specific device, usually not necessary to the defendants' business, which formed an integral part of the conspiracy, was banned, often for merely a limited period of time. See *Ethyl Gasoline Co.* v. *U. S.*, 309 U. S. 436, 450, 560; *U. S.* v. *Univis Lens Co.*, 316 U. S. 241, 254; *Associated Press* v. *United States*, 326 U. S. 1, 21-22. For like reasons, cases requiring a defendant to permit customers to purchase as well as lease its products, or to obtain patent licenses on a reasonable-royalty basis, are also inapplicable. *Besser Manufacturing Co.* v. *United States*, 343 U. S 444; *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass.), aff'd *per curiam*, 347 U. S. 521; *Hartford-Empire Co.* v. *United States*, 343 U. S. 444.

[23]The Commission here suggests that respondents may in the future apply for a modification of its order once competition has been restored (Com. Br., p. 24). Apart from our contention that the stricken paragraph is beyond the scope of the Commission's authority, we believe that the suggested relief which was first mentioned in the Commission's opinion (R. 3817) is largely illusory. In this connection it will be noted that the Commission merely stated that if respondents did make such an application in the future, it would take "such action as may be appropriate in the light of the facts and the law" (id.). Just what this means it is difficult to ascertain. Moreover, if this Court were to say that the Commission could ban a lawful method of pricing without any complaint, evidence or finding on the subject, then the "law" would be settled and an application to the Commission under these circumstances might well be fruitless.

covered any and all types of zone pricing, not merely the specific arbitrary zones which were collusively adopted in 1933-1934.

Under these circumstances, we submit that the court below was correct in denouncing the contested paragraph of the order here as "a sweeping inroad on individual liberty of competitive action" (227 F. 2d at 844).

Conclusion.

The complaint did not charge a violation of law in the individual employment of zone pricing methods; there was no evidence adduced at the hearings on the subject, and there were no findings that use of such a method violated Section 5 of the Federal Trade Commission Act. Under these circumstances, the Commission's order banning such use violated Due Process and was properly set aside by the court below. In addition, the offending paragraph would prevent a lawful competitive method of doing business and there is no merit whatever to the Commission's contention that such an injunction is necessary to prevent evasion of the paragraph of its order directed at conspiracy or combination. Finally, the cases all clearly indicate that such action on the Commission's part, not dealing with "like or related unlawful acts", extends far beyond the powers of the Commission.

For all of these reasons, we respectfully submit that the judgment below should be affirmed.