United States of America

Before the Federal Trade Commission

Docket No. 5253.

In the Matter of

NATIONAL LEAD COMPANY, a corporation,
EAGLE-PICHER LEAD COMPANY, a corporation,
EAGLE-PICHER SALES COMPANY, a corporation,
ANACONDA COPPER MINING COMPANY, a corporation,
INTERNATIONAL SMELTING & REFINING COMPANY, a corporation,
THE SHERWIN-WILLIAMS COMPANY, a corporation, and
THE GLIDDEN COMPANY, a corporation.

FINDINGS AND CONCLUSIONS PROPOSED BY THE GLIDDEN COMPANY

ROGER HINDS,
165 Broadway,
New York 6, New York,

JOHN A. DUNCAN of
M. B. & H. H. JOHNSON,
1649 Union Commerce Bldg.,
Cleveland 14, Ohio,
Attorneys for The Glidden Company.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 8647

United States of America

Before the Federal Trade Commission

Docket No. 5253.

In the Matter of

NATIONAL LEAD COMPANY, a corporation,
EAGLE-PICHER LEAD COMPANY, a corporation,
EAGLE-PICHER SALES COMPANY, a corporation,
ANACONDA COPPER MINING COMPANY, a corporation,
INTERNATIONAL SMELTING & REFINING COMPANY, a corporation,
THE SHERWIN-WILLIAMS COMPANY, a corporation, and
THE GLIDDEN COMPANY, a corporation.

FINDINGS AND CONCLUSIONS PROPOSED BY THE GLIDDEN COMPANY

Comes now, The Glidden Company (one of the respondents herein) by its attorneys, Roger Hinds and John A. Duncan, and submits the following proposed findings of fact, conclusions of law, and the reasons therefor:

FINDINGS OF FACT.

1. The respondent, The Glidden Company (hereinafter referred to as "Glidden"), joins in the request that findings Nos. 1 to 9 (inclusive); Nos. 20 to 88 (inclusive); Nos. 91 to 96 (inclusive); and Nos. 98 to 103 (inclusive), together with all applicable Reasons for Findings, submitted by respondent, National Lead Company, be found and adopted, with the same effect as though separately submitted and proposed by defendant, Glidden.

2. Glidden did not at any time enter into any agreement, arrangement or understanding, written or oral, express or implied, with any other respondent or producer or seller of lead pigments with respect to the prices thereof or the method of pricing or selling lead pigments.

3. Glidden was not at any time constrained or limited in the determination of its prices for lead pigments or in any differentials between its prices in different areas or to different classes of customers or on sales in different quantities by any understanding, sense of obligation (moral or otherwise), gentlemen's agreement, friendship, esprit de corps or solidarity with any other respondents or producers or sellers thereof.

4. Glidden at all times mentioned in the amended complaint produced and sold only a small fraction of the volume of lead pigments produced and sold by its leading competitors, and to the extent that its prices and pricing and selling methods were similar to those of its leading competitors, such similarity was the result solely of Glidden's belief, based on its experience, that by following to that extent said competitor's prices and pricing and selling methods, Glidden would be best serving its own individual commercial interests and realizing the maximum obtainable gross profit from the production and selling of said lead pigments.

5. Throughout the period mentioned in the amended complaint, the marked prices of the various lead pigments followed closely up and down (though with a time lag) the market price of pig lead, which is the overwhelmingly predominant factor in the cost of producing lead pigments.

6. After learning by experience the last-mentioned fact, Glidden was able to forecast the direction (up or down), though not the exact date, of the next change of market price of each of the lead pigments and thereby to adjust its purchases of pig lead so as to reduce to a minimum its inventory losses or gains.

7. Glidden determined for itself the time and amount of each downward change in Glidden's price for each of its lead pigments by reference to the time and amount of a downward change in National's price (or to a lesser extent Eagle-Picher's price), and any failure on Glidden's part to follow such downward change promptly resulted inevitably in a loss of sales.

8. Each downward change in Glidden's price inevitably increased the percentage cost of pig lead as an element of the lead pigment sold until the existing inventory was used up and reduced gross profit accordingly.

9. In order to continue profitably to produce and sell its lead pigments, it was necessary for Glidden to derive the maximum obtainable average gross profit therefrom within the margin between the market price of pig lead and the competitors' ceiling prices for lead pigments, and that in turn could not be done unless Glidden's prices promptly followed each upward price change of its leading competitors.

10. Glidden determined for itself the time and amount of each upward change in Glidden's price for each of its lead pigments by reference to the time and amount of an upward change in National Lead's price, and any failure on Glidden's part to follow such upward change promptly resulted inevitably in a loss of gross profits otherwise obtainable by Glidden.

11. Glidden learned promptly of the price changes of its competitors through their public announcements to the trade, and through the reports of Glidden's salesmen in the field. It was also obvious to Glidden from watching the pig lead market whether the next ensuing price change would be upward or downward and the trend could be predicted or anticipated in advance.

12. Glidden never employed a map in connection with its pricing of lead pigments in different areas or so-called "zones."

13. As Glidden expanded its sales of lead pigments in wider markets, it discovered that its leading competitors were customarily pricing their lead pigments according to certain differentials above a so-called "base price" for delivery within so-called "zones," and Glidden followed as closely as possible the prices of its leading competitors in each so-called "zone." In the case of white-lead-in-oil, Glidden found upon first starting the sale thereof that prices had been established by National in the manner described by National's proposed Findings of Fact Nos. 50 and 51 expressly adopted herein by Glidden, and Glidden was forced to follow as closely as possible the prices of its leading competitors in each so-called "zone."

14. After Glidden had learned from experience that it could not follow an independent pricing practice at a profit and when later Glidden discovered that its leading competitors were pricing certain of their lead pigments in certain "zones" or areas by adding a so-called "differential" to the so-called "base price,"

Glidden was forced to follow as closely as possible the prices of its leading competitors in each such so-called "zone" in which it customarily made any sales whatsoever.

15. Within each such so-called "zone," Glidden's delivered prices were uniform for each lead pigment product to the same class of customer in the same quantity bracket.

16. Glidden's gross profits on its sales of lead pigments delivered in each of said so-called "zones" other than the base "zone" were, despite the so-called "differentials," less than its profits from sales in said base "zone."

17. Glidden did not adopt the consignment or so-called "agency" plan of selling white-lead-in-oil until more than four years after its adoption by National Lead, and then only as an optional alternative to outright sales.

18. The printed blank for consignment agreements used by Glidden was substantially different in form and substance from those used by its competitors.

19. Glidden abandoned the consignment or so-called "agency" plan of selling white-lead-in-oil in 1942, because, in Glidden's case, it proved unproductive, inconvenient and wasteful.

20. Glidden, from the beginning, regarded the so-called "agency" plan with disfavor and finally adopted it as an alternative to outright selling, solely because certain of its dealers demanded it and its leading competitors offered it.

21. Prior to 1921, Glidden had, as jobber, sold to the trade at market prices white lead and white-lead-in-oil made by National and Eagle-Picher, and also, at lower prices because of below standard quality, a brand made by Glidden.

22. In 1924, Glidden acquired Euston Lead Company and continued the latter's production and sale of white lead and white-lead-in-oil at prices below those of its leading competitors. The Euston product had been inferior and the business unprofitable.

23. Though Glidden improved the quality of its Euston white lead and Euston white-lead-in-oil, its lack of recognition and acceptance by the trade and by painters made it necessary for Glidden, until 1936, to accept from paint manufacturers a price below the market price, but thereafter, by stressing quality, Glidden was able to sell a certain amount of white lead and white-

lead-in-oil in competition with National and Eagle-Picher at approximately the market price, but has never been able to sell the entire capacity of its plant.

24. Glidden manufactures and sells numerous products, of which lead pigments are an inconsiderable fraction, and its policy is to diversify its production and to protect its supply of certain of its manufactured raw materials by its own production thereof.

25. Glidden is a large producer of paints, and consumes a minor portion of its own production of lead pigments in its production of ready-mixed paints and other paint products, and consequently Glidden was at all times obliged to maintain a strictly competitive position in the sale of lead pigments.

26. Throughout the period mentioned in the amended complaint, there was keen competition between Glidden and its competitors, and among its competitors, in the production and sale of lead pigments, and the entire lead pigments industry encountered keen competition from the producers of other pigments including lithopone, titanium oxide, zinc oxide, and leaded zinc oxide, some of which were produced in large volume by strong competitors not respondents herein.

27. While in the legal and technical sense Glidden and other producers of lead oxides have been manufacturers and sellers thereof, the actual economic role of all Glidden's lead oxide production has been equivalent to that of a converter in that to a substantial extent its customers have paid a price for lead oxides stipulated as the sum of the market price of pig lead (defined by the agreement with reference to times and places) plus an agreed converter's "differential." In a few instances, Glidden actually converted pig lead owned by its customers.

28. Besides the competition between Glidden and its leading competitors as converters of lead oxides, there has, throughout the period mentioned in the amended complaint, been effective actual or potential competition from storage battery manufacturers, some of whom convert their own lead oxides and many others of whom will do so if and when the converter's prices increase to the point which makes it economical for them to do so.

29. Glidden has never occupied a sufficiently important position in the lead pigments industry to be able, by any act or inaction

on its part, consistent with its profitable production, to affect substantially either the market price or the competitive practices in pricing or selling lead pigments.

30. Glidden has never consulted with any of the respondents or any other competitor with respect to the determination of any lead pigment price or except during the period of N.R.A. with respect to the employment of any pricing or selling practice.

31. Prior to 1936 or thereabouts, Glidden attempted unsuccessfully to derive a satisfactory gross profit from its lead pigments and white-lead-in-oil business by out-guessing the pig lead market; by mail-order selling; by conducting painters' meetings; by seeking isolated tonnage purchasers; and by the improvement of single-product salesmen; but, as the result of its unfavorable experiences in such attempts, Glidden has concentrated its efforts on improvement in quality, offering technical services, economical distribution, watchful adjustment of a minimum working pig lead inventory to the pig lead market, and closely following, up and down, the lead pigment prices of its leading competitors, as well as their practices respecting pricing, selling and differentials in different areas and in different quantities and to different classes of customers; and has found that to be the only course by which Glidden can continue to produce and sell or convert lead pigments at a reasonable profit and continue in the business.

32. Glidden's practice of selling in each so-called "zone" at a uniform delivered price has not been the result of any agreement or understanding with its competitors, or of any concerted course of action, but has been necessitated by its status as a single-plant producer (as to each lead pigment), and the fact that it would have immediately and fatally lost sales in favor of its multiple-plant competitors, if it had sold on any other basis than a uniform delivered price.

33. Because of greater credit losses, credit investigation expenses, warehousing expense, transportation costs, bookkeeping expense, unit handling costs, technical-service expense, and sales expense, Glidden's sales of lead oxides, despite the quantity differentials, in less-than-500 pound lots have been less profitable than its sales in less-than-carload lots (over 500 pounds) and the latter have been less profitable than its sales in car-load or truck-load lots.

34. Because of the higher cost and smaller profit in less-than-carload sales of lead oxides, Glidden would have preferred to make all, or at least a much larger proportion, of its sales to carload buyers, but has been obliged to continue its sales in smaller lots solely because of its need to continue the production of lead oxides for its own consumption; because a reliable large volume of sales to carload buyers is made impracticable by the competition of large multiple-plant competitors; and because its relatively unprofitable sales to the small buyers is indispensable to its maintaining production at its single plant at an economical minimum percentage of capacity.

35. It has rarely, if ever, been commercially advantageous to Glidden to initiate a change in the competitive price of any lead pigment. Any increase initiated by Glidden would price Glidden out of the market, and any reduction initiated by it would lose it profits otherwise obtainable.

CONCLUSIONS OF LAW.

Respondent Glidden adopts all applicable Reasons for Findings advanced and submitted by respondent National Lead Company, and requests that said reasons be regarded as made herein, with the same effect as though expressly and separately stated herein.

1. This proceeding is subject to the provisions of the Administrative Procedure Act.

2. None of the material allegations of the amended complaint is supported by or is in accordance with the reliable, probative and substantial evidence adduced by the hearings in this matter, nor are the material allegations of the amended complaint supported by the greater weight of the evidence so adduced at the hearings in this matter.

3. The acts of the respondents herein in connection with the preparation of the Lead Code and the supplementary code for the manufacturers of lead pigments and the acts taken in connection with the Lead Code itself cannot be made the basis of a charge of violation of Section 5 of the Federal Trade Commission Act.

4. The price paid by purchasers of lead pigments is that sum paid to the manufacturers, including these respondents, by the pur-

chaser in consideration of the sale and delivery to the purchaser by the manufacturer of specified goods delivered at a place and at a time specified, expressly or impliedly, by the agreement of sale.

5. Respondents have not violated and are not violating the provisions of Section 5 of the Federal Trade Commission Act.

6. Respondents have not violated and are not violating the provisions of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.

7. This proceeding is not in the public interest.

8. The Federal Trade Commission should enter an order herein dismissing the amended complaint on the merits.

Respectfully submitted,

Roger Hinds

[illegible]

Attorneys for Respondent
The Glidden Company.

M. B. & H. H. Johnson,
Of Counsel.