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RECORDS DIVISION

UNITED STATES OF AMERICA

Before the

FEDERAL TRADE COMMISSION

In the Matter

of

National Lead Company, a corporation, et al

Docket No. 5253

Now come the respondents, The Eagle-Picher Company and The Eagle-Picher Sales Company, by their attorneys, Edmund P. Wood and Richard Serviss, and pursuant to the invitation of the Trial Examiner at the hearing on January 7, 1948, request these further findings of fact specific to these respondents as part of Paragraph 2 of the proposed findings of fact submitted by Eagle-Picher on January 29, 1947.

(g) Eagle-Picher has not acted in concert with the other respondents herein or any of them since the invalidation of the National Industrial Recovery Act, in respect to terms or conditions of sale of lead pigments, and there is no evidence that it has. More specifically, the current situation was correctly summarized by Joel M. Bowlby, President of Eagle-Picher, who testified that since the time he became president of the company, September, 1941, down to the present, no agreements have existed with the other respondents herein or any of them, affecting prices

(h) The pricing policies of Eagle-Picher have not had the effect of substantially lessening competition or tending to create a monopoly in the sale of lead pigments, and the record does not purport to evidence a single specific instance of such effect.

(i) The competition of the customers of Eagle-Picher which purchase lead pigments from Eagle-Picher, has not been injured, destroyed or prevented by the pricing policy followed by Eagle-Picher, and the record does not purport to evidence a single specific instance of such effect.

(j) No lead pigment customer of Eagle-Picher has knowingly received the benefit of discrimination from Eagle-Picher which injured, destroyed or prevented competition and the record does not purport to evidence a single specific instance of such effect.

(k) The record shows that Eagle-Picher followed the pricing practices and policies of the National Lead Company from 1934 on with but a single exception -- that in some instances Eagle-Picher did not follow certain quantity allowances as to white lead-in-oil sold direct to painters, a very minor part of the business in white lead-in-oil.

4. BASIS FOR PROPOSED FINDINGS

The proposed finding, 2-g, is predicated upon the negative aspects of the record as a whole, and upon the testimony of Mr. Bowlby, page 3636, line 15, through page 3637, line 16, which reads as follows:

"Q. And when you became president of the company in September, 1941, did you further familiarize yourself with competitive policies?

A. I have, since becoming president, kept myself informed on competitive policies of the various divisions.

Q. What was your purpose in familiarizing yourself with those policies?

A. Something that is obviously necessary to an understanding of the business and the establishment of other general policies which are dependent upon the competitive position of the company.

Q. Now, did you at any time find any agreements or understandings between your company and National Lead Company, or any of the other companies engaged in the sale of lead pigments, affecting prices or terms or conditions of sale?

A. No, I never found any such agreements.

Q. At the time you became president of the company, were you concerned in any respect as to whether such agreements existed or not?

A. No, I don't believe it ever crossed my mind that such agreements might exist.

Q. If you had found any such agreements, what would have been your policy in respect to them?

A. Well, I certainly would have looked into their propriety, and if I had found that there were any improper agreements of that nature in existence, I would have taken the necessary steps to terminate them."

The findings, 2-h, i, and j, are based upon the negative aspects of both the record and the Proposed Findings of Fact filed by the attorneys for the Commission on December 29, 1947. Neither suggests any specific instance of alleged substantial lessening, injury, destruction, or prevention of competition by Eagle-Picher's pricing policy. No instance is cited or relied upon by the Commission. Since the proposed findings are negative, there can be no specific citation to the record, which, as a whole, is barren of what ought to be there, if the Commission is to succeed in this action.

Eagle-Picher's proposed finding, 2-k, is copied from Page 29 of the Commission's Proposed Findings and Conclusions, and is a facsimile of the first sentence of the last paragraph on that page.

5. Counsel for Eagle-Picher respectfully request that the Trial Examiner pass upon Eagle-Picher's proposed findings, 2-a through 2-k, under the provisions of the Administrative Procedure Act.

6. ARGUMENT

a. Eagle-Picher Has Followed National's Pricing Policy Without Agreement

The Findings of Fact proposed on behalf of the Commission in part follow the theory stated by counsel for the Commission at the conclusion of its case:

> ".... In other words, that paragraph (Seven B) charges a combination and a conspiracy between and among the various respondents, not individual conspiracies each with National.
>
> .... Now as to the specific dates and acts, I believe it is plain from the proof which has been offered in this case exactly the period of the conspiracy which is covered by it. Certainly the evidence introduced in the form of documentary evidence covering the activities of the respondents shows the conspiracy which is the subject of this complaint to be one which was initiated sometime around the year 1933, and which we contend has been in existence from that time until the present.
>
> .... It is my theory of this case that all of the respondents were engaged in a conspiracy to do the acts which are set forth in Paragraph Seven-B of Count I, and it was a conspiracy by and with each other and for the benefit of all of the alleged conspirators." (R 2088, 2089)

As to Eagle-Picher, counsel for the Commission has altered his position critically, in that he now asks the Trial Examiner to find, not that Eagle-Picher has an agreement or understanding with the other respondents herein, but that Eagle-Picher has been following National's pricing policy. The latter position is the correct one,

775

and hence, Eagle-Picher has adopted the Commission's phraseology on page 29 of its Proposed Findings, and is requesting that finding as its own finding, 2-k.

The record does not even suggest that Eagle-Picher's pricing policies have at any time been influenced by those of any respondent other than National, and Eagle-Picher has at all times conceded that it followed National. But following is not the equivalent of agreement to follow, and while agreement is one of several possible inferences from a parallel course of conduct, it is by no means the only one, nor is it obligatory. Mr. Bowlby, President of Eagle-Picher, testified in no uncertain terms, under oath, not only that Eagle-Picher did follow National, but that there were no agreements between Eagle-Picher and National or others affecting prices or terms or conditions of the sale of lead pigments. It is respectfully submitted that the evidence in this case does not compel an inference of agreement, and that to do so, it would have to be overwhelming, which it is not. The technicalities of evidence apart, the responsible head of a national corporation should not be constructively adjudged a perjurer, except where the weight of the adverse evidence positively requires the conclusion. In this case it does not, as counsel for the Commission spontaneously recognized in requesting his finding that Eagle-Picher <u>followed</u> National in its pricing policy.

Further, the Commission alleged in its complaint, Paragraph Seven-B, that Eagle-Picher was too comparatively weak to be more than "ostensibly independent". The record as a whole tends to confirm this allegation of the complaint, and the Eagle-Picher witnesses have admitted that the company cannot price most of its products independently. The only thing which can be said against Eagle-Picher is that it has not taken the initiative in altering pricing methods and practices adopted at about the time alleged by the Commission, that is, during the N. R. A. period. Only National could or can do that, and if the Commission has made out the case it asserted in its complaint, namely, that National's policy has not only been monopolistic, but successfully so, then no blame attaches to Eagle-Picher for not attempting the impossible and it is superfluous to infer any sort of agreement by Eagle-Picher.

b. Eagle-Picher Has Acted in Good Faith, Competing Where Possible, Conforming Where Necessary

Eagle-Picher refuted the averment in Paragraph Twelve of the complaint, that "respondents' acts, practices, pricing methods, systems, devices and policies .... have actually hindered, frustrated, suppressed and eliminated competition ....". Eagle-Picher proved that it has at all times been actively and aggressively competing with National, by conducting extensive research to differentiate its products from National's and to secure the greatest consumer acceptance and utilization of its new products, which are for the most part chemically equivalent to National's, but superior in physical properties and in their adaptability to the specific problems peculiar to the individual customer. Eagle-Picher's testimony establishes uncontestably that it is competing in good faith with National by the only means available to it. No other means is possible, according to the Commission's own theory of this case.

There is and can be no charge that Eagle-Picher adopted pricing policies which it now follows in 1933-34 in anything but good faith. The record shows that National, or at least its president, did not believe that the N. R. A. was legal, so National may have been collaborating under coercion with its tongue in its cheek, but there is no evidence that the Eagle-Picher executives did not follow the directives of the White House and its boisterous subordinates without a qualm of doubt. True, the zone system for white lead in oil and consignment selling were discussed, but omitted from the codes, because some companies, such as Sherwin-Williams, preferred different selling methods, and did not choose to bind themselves, but Eagle-Picher's choice of following National's practices was not only in accord with the spirit of the N. R. A. days, but compelled by Eagle-Picher's relative position in the industry. The standardization of selling practices to eliminate chiseling and price cutting was the objective of the codes, and the conduct of the docile, if gullible, conformers should be judged only against the background of that time, in so far as good faith or bad faith is concerned. Eagle-Picher commenced to follow National's pricing policies in good faith during the N. R. A. period, and has continued to do so since, not by agreement, but as a matter of necessity, because it lacks the power and capacity to do otherwise.

c. Eagle-Picher Justified under Section 2-b of the Robinson-Patman Act as to Quantity Discounts

It cannot be seriously argued that Eagle-Picher would not price itself out of the market if it failed to offer quantity discounts equal to those published by National. Hence, as to quantity discounts, Eagle-Picher is and has been meeting the equally low price of National in good faith.

Counsel for the Commission and for Eagle-Picher have joined in requesting the finding of fact that Eagle-Picher has followed National as to pricing policies, and Eagle-Picher has adopted the Commission's proposed finding as its own 2-k. Unless the Trial Examiner chooses to reject this agreed statement of fact, it follows that Eagle-Picher's position in respect to quantity discounts is completely justified under Section 2-b of the Robinson-Patman Act.

Whether the size of National's published discounts transcends the legal must be determined in respect to National alone because Eagle-Picher has had no choice but to meet the discount of its stronger competitor or price itself out of the market. It may be argued that if National's quantity discounts are illegal, then Eagle-Picher's are, too, under the doctrine of the Staley case, which held that the adoption of the unlawful pricing practice of another was no excuse for conduct otherwise illegal. But on simple analysis, the quantity discount aspect of this case is clearly distinguished from the holding of the Staley case, in which the court discussed the scope of 2-b, as follows:

> "....But it (Section 2-b) does not concern itself with pricing systems or even with all the seller's discriminatory prices to buyers. It speaks only of the seller's 'lower' price and of that only to the extent that it is made 'in good faith to meet an equally low price of a competitor.'"

In the Staley case, the respondent was guilty of extorting phantom freight, that is, charging its neighbor in Peoria phantom freight from Chicago to Peoria, and the Supreme Court held that this had nothing to do with meeting a competitor's low price. In this regard, the Court stated:

> "....Instead they maintained their own prices at the level of their competitors' high prices, based upon the competitors' higher costs of delivery, by including phantom freight in their own delivered prices.
>
> ....We cannot say that a seller acts in good faith when it chooses to adopt such a clearly discriminatory pricing system, at least where it has never attempted to set up a non-discriminatory system, giving to purchasers, who have the natural advantage of proximity to its plant, the price advantages which they are entitled to expect over purchasers at a distance .... But it does not follow that respondents may never absorb freight when their factory price plus actual freight is

higher than their competitors' price, or that sellers, by so doing, may not maintain a uniform delivered price at all points of delivery, for in that event there is no discrimination in price."

In effect, the Court held that in the Corn Products and Staley case, the extortion of phantom freight in a single basing point system was illegal per se, and that the adoption of a competitor's illegal system could not be condoned on the pretext that equally low prices were being met, because, in fact, it was equally high prices which were being met.

In the present case, in so far as quantity discounts are concerned, we are dealing solely with low prices. National publishes and has published its quantity discounts, which are available to all. Eagle-Picher must meet these low prices to stay in business, irrespective of whether National's theory of justification of them is sound or unsound legally. This aspect of the case has nothing to do with Eagle-Picher's adoption of others of National's pricing policies and is specific in National's quantity discounts and the low prices at which it thus publicly offers to sell its wares. Eagle-Picher is meeting its competitors' low prices, and nothing more.

Quantity discounts unlike extortion of phantom freight, are not illegal per se, and National's discounts are beyond criticism, unless its mathematical calculations have been faulty. In any event, Eagle-Picher has merely followed National's quantity discounts to meet National's low prices, and has had to do so blindly, regardless of the soundness of National's accounting methods, for which Eagle-Picher is in nowise responsible.

Otherwise expressed, while National may be obligated to justify its published quantity discounts under Section 2-a of the Robinson-Patman Act, Eagle-Picher has a complete defense for its quantity discounts under Section 2-b. As a practical matter, if

National's quantity discounts require correction, Eagle-Picher's will follow automatically, or Eagle-Picher will be proceeding at its peril, and it is unnecessary, as well as improper, for Eagle-Picher to be a party to an order from which it is legally entitled to exemption under the express provisions of 2-b.

d. Eagle-Picher is Justified in Following National's Delivered Price Zone Selling Unless it is Illegal per se.

If delivered price zone selling is akin to extortion of phantom freight and hence, is illegal per se, then Eagle-Picher cannot defend its adoption of National's marketing system under 2-b, in view of the Staley decision. The legality of this type of selling was briefed at length in connection with Eagle-Picher's motion to dismiss, filed at the conclusion of the Commission's case.

If, on the other hand, delivered price zone selling is not illegal per se, but only National's choice of zones or premiums for zones is unjustified, then is Eagle-Picher vulnerable legally for not proceeding independently to hara-kiri economically? While the dicta of the Corn Products and Staley decisions seem to make it abundantly clear that delivered price zone selling cannot violate the provisions of the Robinson-Patman Act, still it may be the Trial Examiner's conclusion that there is not adequate legal justification for each zone and mark-up utilized in respect to each product sold. The question is whether Eagle-Picher, in adhering to National's zones, may defend under 2-b, as is clearly proper in respect to quantity differentials, or whether the Staley test extinguishes such defense. The question is a close one, because while Eagle-Picher is always meeting National's price, it is not always as clearly meeting National's low price out of par territory, as was the case in considering quantity discounts.

On the other hand, Eagle-Picher, in following National, did not adopt a system illegal per se, so Eagle-Picher at most would be afoul of the law only adjacent to unwarranted zone boundaries. More specifically, National has plants located in New York, Chicago, Philadelphia, and St. Louis metropolitan areas, as well as elsewhere. Eagle-Picher has the right under Section 2-b to meet National's low prices in these major marketing areas. The question is whether or not Eagle-Picher is always meeting National's low price, or just its price in the premium zones. While the wording of Section 2-b is not completely apt as to such instances, neither is the holding of the Staley decision which condemns only conduct illegal per se as unavailable for defense under 2-b.

As a matter of logic, Eagle-Picher should be permitted to meet National's price, assuming, of course, that delivered price zone selling is not illegal per se, because Eagle-Picher has to meet National's price in order to stay in business and to prevent National from acquiring the monopoly to which it is alleged to aspire. In general, Eagle-Picher has had to absorb more freight relatively than National, because of its lesser number of plants; consequently, Eagle-Picher does not dare to exploit local situations where it has the advantage, because it is outnumbered by National's plants, and couldn't win in a price war.

Since Eagle-Picher is forced to follow National's zone pricing, Eagle-Picher itself cannot justify under 2-a; that is for National to do to the extent legally requisite. If the system is illegal only as to detail, rather than as a whole, then Eagle-Picher has not adopted a competitor's illegal system, but has merely met prices, some of which turned out to be unjustified. Under these conditions, Eagle-Picher should have the benefit of absolving its pricing under 2-b.

e. <u>The Record Establishes No Instance of Violation of Robinson-Patman by Eagle-Picher</u>

Section 2 of the Clayton Act, as originally adopted in 1914, prohibited price discriminations of the type intended to drive the seller's competition to the wall. This aspect of price cutting and discrimination was the main bone of contention in the original Standard Oil case, and many other cases of the period immediately preceding the Clayton Act. The purpose of the Robinson-Patman Act was to put more teeth into the original prohibition of the Clayton Act, and to include the customers of the seller in addition to that between the seller and his own competitors, as originally provided. In the present case, there is no charge of price discrimination violative of Section 2 of the original act; on the contrary, the charge is that prices are too nearly uniform.

The charge in this case is that the pricing policies of the respondents substantially lessen competition between the customers of each individual respondent. There must be interference with competition between two customers of a <u>specific respondent</u> with knowledge of the discrimination by its beneficiary, in order for there to be a violation of the Robinson-Patman Act.

The findings proposed by the Commission provide respondents with absolutely nothing specific to shoot at in this regard. There is no specific finding proposed that any two identified customers of Eagle-Picher have had their competition substantially affected by Eagle-Picher's pricing policies, regardless of whether we look at it from the angle of quantity discount, delivered price selling, or the zone system.

Obviously, no respondent can meet the burden of disproving alleged substantial lessening of competition, except in relation to a specific case. Lack of opportunity to defend constitutes denial of due process of law. This aspect of the case was discussed in the brief filed on behalf of Eagle-Picher in support of its Motion to Dismiss the amended complaint, filed at the conclusion of the defendant's case, approximately a year ago.

In short, Eagle-Picher denies that there is a single instance in the record in this case which establishes that Eagle-Picher has violated Section 2-a of the Robinson-Patman Act, and to the extent that the Commission is attempting to try sweeping generalities, Eagle-Picher must respond with the generality that it has been following the pricing policies of National and meeting its prices, as recognized by counsel for the Commission.

7. CONCLUSION

The evidence in this case is critically different from that in other adjudicated cases, after which the complaint herein was generally patterned, in four significant respects:

1. The Lead Industries Association has exercised no influence on prices or terms or conditions of sale, either directly or indirectly. This is due to the fact that the membership of the Association is made up on the one hand of mining and smelting interests which produce pig lead and sell it to respondents, and on the other hand, of users of lead pigments purchased from the respondents. The Association could not, if it wished, play the middle against the ends, that is, permit the pig lead pigment manufacturers to aggrandize their position at the expense of the other equally potent interests.

2. Eagle-Picher competes with National by every means possible, short of a price war, and while following prices generally,

expends large sums of money annually to differentiate its products and thus offer greater value to customers at standard prices. This circumstance negatives the notion that the industry is moribund, or controlled to the detriment of competition and the public.

3. The respondents sell at specified and uniform delivered prices within designated zones, and collect no phantom freight.

4. No diminution of competition between any two customers of Eagle-Picher has been specifically shown factually, nor has the evidence even provided any sort of hypothetical case sufficiently crystallized as to be susceptible to rebuttal, as is requisite for the observance of due process of law.

The evidence compels the conclusion that market dominance by National, and collusion of all respondents, both of which are pleaded, are not both necessary inferences, because dominance explains the practices of the respondents fully, whereas collusion is inconsistent with Eagle-Picher's keen competition with National in developing and pushing new and different products. Moreover, National's dominant position is asserted by the Commission itself, in the complaint and in its proposed findings, but the record is negative as to joint action after the N. R. A.

Respectfully submitted,

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