# F. T. C. v. NATIONAL LEAD COMPANY

## Summary of Opinion of Court of Appeals, Seventh Circuit

On December 1, the Seventh Circuit decided the appeal in the above entitled action. The opinion was written by Judge Lindley and concurred in by Judges Swaim and Schnackenberg. In substance, the Court held:

1. That it was beyond the province of the Court to disturb the Commission's finding that respondents (National Lead, Eagle-Picher, Glidden, Sherwin-Williams and International Smelting & Refining)[1] had conspired during the NRA period to establish uniform zone prices and certain terms and conditions of sale of lead pigments;

2. That the Commission's findings of price discrimination resulting from the use of differing zone prices and quantity discounts were supported by the evidence, or the reasonable inferences to be drawn therefrom, except that there was no proof that the two zone system used in the sale of dry white lead resulted in illegal price discriminations;

3. That the permanent injunction against any and all future acquisitions by National Lead in the lead pigment field was "so wanting in evidentiary support and so arbitrary that it cannot stand"; and

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1. Neither Anaconda nor International manufactured or sold lead oxides. The Court dismissed the order against Anaconda, the parent of International, holding that Anaconda was a separate corporate entity. It also dismissed the proceeding against International since the record showed that International had sold its white lead plant in 1946, and that there was no reason to believe that it would ever reenter the lead pigments field.

4. That the portion of the Commission's order which prohibited respondents individually (as distinguished from collusively) from employing any zone method in the saleof the various lead pigments was beyond the scope of the Commission's authority, since this part of the order in effect sought to prohibit lawful conduct.

The Court ordered the Commission to submit within 20 days a proposed decree modifying its present order and the respondents were directed to file, within 10 days thereafter, their consent or objections to the Commission's proposed decree.

In order to weigh the effect of this decision, it would perhaps be helpful briefly to review the proceedings to date.

The amended complaint of the Commission (filed in April, 1946) contained three major charges:

1. That the respondents during 1933-34 (the NRA code period) conspired to establish uniform prices, uniform zones, and certain uniform terms and conditions of sale, in the sale of white lead in oil and keg products, dry white lead and lead oxides;

2. That National Lead through its acquisitions of competitors was monopolizing or attempting to monopolize the sale of lead pigments; and

3. That the prices of each respondent constituted illegal price discriminations in that (a) different customers within the same zone were charged different "mill net" prices (i.e., the delivered price less cost of transportation), (b) customers in different zones were charged different delivered prices, and (c) there were unjustifiable quantity

differentials.

Hearings were held before the Trial Examiner in 1946 and 1947. Briefs were then submitted and, after oral argument, the Trial Examiner filed his recommended decision, upholding the major charges of the amended complaint, except that he found that respondents' prices were not their "mill net" prices and that, therefore, the uniform intra-zone delivered prices of respondents were not discriminatory. He also held that the red lead quality differentials, the container differentials and the 500 lb. white lead in oil quantity differential were either cost-justified or had no adverse competitive effects.

Two "final" arguments were had before the Commission, the first in May, 1949 and the second, fixed by the Commission on its own motion, in February, 1950. On January 12, 1953, the Commission filed its findings and issued its cease and desist order enjoining conspiracy, the individual use of the zone method, and price discrimination, and permanently enjoining National Lead from acquiring any stock or assets of a competitor (regardless of the size of the competitor or the circumstances surrounding the acquisition).[2] The majority upheld the Trial Examiner's recommended decision. Commissioner Mason dissented from the findings of conspiracy as well as from those portions of the order which enjoined individual use of the zone method and further acquisitions by National Lead. He concurred, however, in the findings of price discrimination.

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Following this decision, a conference was held in Mr. Martino's office at which we pointed out that while it was very

2. This might have prevented the Pacific Coast Branch, for example, from acquiring any independent paint store, large or small, since such store would probably be a competitor of Company-owned paint stores in the sale of white lead in oil, red lead in oil and other lead pigments.

difficult to persuade a Court to set aside findings of the Commission, and particularly findings of conspiracy based on conflicting evidence from which different inferences could be drawn,[3] there was, nevertheless, a good "fighting" chance of reversing the Commission on the prohibition against individual use of the zone method and the injunction against National Lead.

## Opinion of Judge Lindley

### (1) The issue of conspiracy

After reviewing the Commission's findings showing that during the NRA period the respondents discussed certain changes in their methods of sale, the Court said that from the evidence the Commission "could well find" that all respondents adopted the zone system shortly after the NRA discussions, and that the Commission had "resolved the conflict in the evidence adversely to petitioners [respondents below] and it is beyond our province to substitute our judgment in that respect".

The Court said that while there was no direct evidence of agreement, there were discussions of zones and other sales methods among the respondents during 1933 and 1934 followed by the adoption of such methods in 1934. It stated: "The inference of agreement, if not necessarily impelled by this evidence, is certainly a reasonable one which the Commission as the trier of fact was entitled to draw therefrom."

3. Under the Federal Trade Commission Act, the findings of the Commission, if supported by evidence, are conclusive. The Courts have said that the findings must be based on "substantial" evidence, but a review of the cases will show that generally the Commission's findings are sustained if there is any supporting evidence, direct or circumstantial.

(2) The issue of price discrimination

The Commission had found that the differing zone delivered prices for white lead in oil, dry white lead and lead oxides constituted illegal price discriminations. It also found that the oxide five-ton and less-than-five-ton quantity differentials, as well as the 25¢ per cwt. l.c.l. dry white lead differential (except where rail transportation was employed) constituted illegal price discriminations. It held that National Lead's evidence, based on freight and invoicing costs, justified the dry white l.c.l. differential where rail transportation was involved, but not where delivery was made by local trucking.

The Court upheld most of the Commission's findings but it found that there was no evidence that the dry white lead two zone system resulted in illegal price discriminations, since there was no proof that paint manufacturers (the principal purchasers of this commodity) East and West of the Rockies (the dividing line for the dry white lead zones) were in competition with each other. (It is to be noted that in this respect the dry white lead zones are similar to the zones used in the sale of titanium pigment.)

With respect to our argument that, in any event, the zone and quantity differentials resulted in insignificant price differences, which could have no competitive effect, the Court stated: "We believe, however, that this raises a question peculiarly within the competence of the Commission, and that its determination thereon, as an expert administrative body, should be accorded full respect."

(3) The charge of "incipient monopoly" against National Lead

The Court here adopted the contentions advanced in our brief and oral agrument to the effect that the facts simply did not warrant a perpetual injunction against National Lead's further acquisitions in the lead pigments field. In view of this, the Court said it was not necessary to pass upon our additional, legal argument that the Commission had no authority to enjoin acquisitions which did not violate Section 7 of the Clayton Act.

The Court in effect held that the Commission was not warranted in concluding that National Lead was motivated by an intent to monopolize simply because of certain transactions which occurred in the 1890's or in the early 1900's, or because National Lead in the 1930's purchased and thereafter sold, at a gross profit of $800,000, certain stock of Eagle-Picher. It stated: "We find the assertion that occurrences concluded more than twenty years before the order was entered can justify a perpetual injunction against any future acquisition of stock or physical assets of National's competitors a startling one". The Court further said:

> "The Commission has concluded from its findings of past activities, which may have had monopolistic overtones long ago, that petitioner presently harbors a desire to swallow up all competition and that, at some undisclosed time in the future, it intends to do so. Presumably the evidence of this intent is too delicate to stand the light of day, since it cannot be found in the record. Drafted on this basis, the order before us seeks to spank the child, not for naughty acts done or threatened, but on the general principle that he, may somewhere, somehow, in the future engage in mischief. This presumes the existence of a power even broader than that residing in a court of equity."

(4) <u>The prohibition against the individual use of any zone method</u>

Here the Court adopted our argument practically verbatim and held that the Commission had no authority to enjoin the individual use of the zone system, which was a <u>lawful</u> method of sale. It held that the Commission had the power to enjoin illegal acts only, and that it could not, as a matter of law, seek to justify this portion of the order on the theory that such an order was necessary to make the injunction against conspiratorial action effective.

On the latter point, the Court said:

> "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."

## The Effect of the Decision

As noted above the Commission is to submit by December 21 a proposed decree modifying its present order in accordance with the Court's opinion. This would require elimination of the injunction against National Lead, elimination of the prohibition against the individual use of the zone system, and elimination of dry white lead zone prices from that section of the order relating to price discriminations. The respondents have 10 days thereafter in which to consent to this proposed decree or file objections thereto.

After the final decree is approved by the Court and entered, the Commission or any of the respondents, may file a petition for a writ of certiorari in the Supreme Court seeking review in that Court. Our present opinion is that the respondents would have very little chance of upsetting the findings of conspiracy and price discrimination, for those findings essentially involve questions of fact which the Supreme Court generally does not review. The Commission may feel impelled to seek a review on the reversal as to the National Lead injunction and the individual use of the zone method.

It would appear that the same considerations should apply in the case of the National Lead injunction, that is, that since this was largely a question of fact, the Supreme Court would be likely to deny review, although the fact that the Seventh Circuit based its decision largely on uncontradicted evidence might lead the Supreme Court to view the matter as a question of law. Unfortunately, this particular question of law has never been considered by the Supreme Court. On the other hand, the Supreme Court might deny review, in any event, on the ground that the Seventh Circuit correctly decided that the Commission had no such broad powers of injunction.

The second question, relating to the individual use of zone methods, would appear to be purely a question of law. This question has not been decided by the Supreme Court. In the Rigid Steel Conduit case, the Supreme Court affirmed the Seventh Circuit where the latter had held that the Commission was justified in enjoining the individual use of a basing point method. The affirmance was by an equally divided Court, however, with Justice Jackson not participating. In addition, in the Rigid Steel Conduit case, the complaint specifically charged that the individual use of the basing point system constituted an unfair method of competition. No such charge is made in the amended complaint here. Again, however, we cannot now determine whether the Supreme Court would be interested in reviewing this point.

If the Commission does file a petition in the Supreme Court, consideration should be given to the advisability of filing a counter-petition stating, in effect, that if review be granted, it should also include the question of whether a finding of conspiracy may be based upon NRA evidence, i.e., upon activities undertaken at the specific request of the Government.

The cease and desist order of the Commission, which now is to be revised and modified in the light of the Court's opinion, required respondents to submit within sixty days a written report, showing compliance with the order. If the final decree to be entered by the Seventh Circuit contains the same provision and if the Commission does not seek review, then within approximately ninety days National Lead will be required to file a written report showing compliance with the order. This will necessitate a review by the Company of its methods used in the sale of white lead in oil and keg products, dry white lead and lead oxides.

It will undoubtedly be necessary eventually to revise white lead in oil zones either to draw the boundaries in such fashion that there could be no question of competition between dealers in different zones, or to use a flat uniform delivered price for the whole country. We understand that the Company no longer employs zones in the sale of oxides to battery manufacturers. It is our further understanding that sales to other customers, however, are on some zone basis. This should be checked and perhaps some changes will have to be made in the zone methods employed in such sale.

While the Court held that the dry white lead zones were not discriminatory perhaps some revisions of the zone boundaries should be made in order to show compliance with the order against conspiratorial use of zones. In the old days the Commission made very little effort to seek enforcement of its orders but there is now an enforcement division in the Commission and it is likely that this division would not accept any statement that we were using the same zones now on an individual rather than on a collusive basis. Other changes may have to be made in connection with container differentials, premiums for 97% and 98% red lead, and the differentials over pig lead employed in the pricing of oxides, although in the latter case, we understand, the present differentials differ from those established in 1933-34(allegedly by collusive action).

The other changes necessitated by the Seventh Circuit's opinion (again on the assumption that no review is sought or granted by the Supreme Court) relate to the quantity differentials used in dry white lead and oxides. Either the present quantity differentials will have to be justified by cost data or changes must be made which can be justified by a cost study.

December 5, 1955. ALEXANDER & GREEN