Secretary
4th floor

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.

SUPPLEMENT
TO FINDINGS, CONCLUSIONS AND REASONS PROPOSED BY THE GLIDDEN COMPANY

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The respondent Glidden, pursuant to leave granted by the Examiner at the hearing on January 7, 1948, supplements the proposed findings, conclusions and reasons heretofore filed by it, as follows:

REASONS.

In addition to the reasons set forth in paragraph 1 of its Findings of Fact, it submits, as reasons for adopting its proposed Findings of Fact numbered 2 to 35, inclusive, (1) that each such fact is established by the testimony of Paul Sprague and by the exhibits prepared and described by him; (2) that none of said evidence has been in any way disputed, controverted or rebutted; and (3) that none of said evidence is inherently improbable, but on the contrary is inherently probable.

In addition to the reasons set forth in the paragraph preceding its proposed conclusion of law numbered 1, it submits as reasons supporting its proposed conclusion numbered 4 the following:

In the case of goods delivered at a place other than Glidden's factory or warehouse, Glidden (as the Examiner has pointed out) not only sells merchandise (which costs Glidden its raw materials, labor, machinery, research, technical skill, packing, selling and overhead expenses, etc.) but, in a certain sense, Glidden "sells transportation" (which costs Glidden the amount of the railroad freight, trucking charges, carriage by boat or other means of transportation).

The "price," under the Robinson-Patman Act, is the consideration (ordinarily in money) which the buyer pays the seller for delivering the goods *at an agreed place,* whether such place be the seller's factory or warehouse or some remote place. In the former case the seller's *costs* of his performance of the agreement of sale include the costs of manufacture, packing, selling, etc., but do not include any cost of transportation. In the latter case the cost of transportation is one of the seller's costs of his performance. In neither case does the *price* include *any* of the seller's costs. There is no more justification, in determining the "price" under the Act, for deducting from the agreed price the cost of transportation than for deducting any of the *other* costs to which the seller is put in performing his agreement to deliver specified goods at a specified place.

Congress has clearly so defined "price" (1) by expressly refusing to define "price" as the agreed price less the amount of the seller's transportation cost, if any, and (2) by expressly listing the cost of transportation as one of the seller's costs (the others being the cost of manufacture and the cost of selling) differences in which will justify as costs differences in the *price.* If "price" had meant agreed-price-less-cost-of-transportation obviously the provision for justifying "price" differences by differences in the cost of transportation would be meaningless and nonsensical.

Hence the Supreme Court has twice rejected the Commission's contention that in refusing to quote a lower price to a buyer nearer its factory the seller is "discriminating" against that buyer.

The Act *permits* price differences where justified by differences in transportation cost, but it does not *require* such differences. A seller, so far as the Robinson-Patman Act is concerned, may charge the same delivered price to a buyer 200 miles away that he charges at his factory door, and make his competitive area as large and wide as he pleases.

Every price is a delivered price, whether the place agreed upon for delivery be the seller's factory or the buyer's place of business or some other place. The specification of the place of delivery is as necessary a feature of an agreement of sale as the specification of the merchandise. There can be no discrimination between two delivered prices if there is no difference between them. The nearby buyer has no legal or natural "right" to a "freight advantage" over the more remote competing buyer. Congress has evidently concluded that if the two buyers are competing it may be beneficial, not harmful, that they should pay the same delivered price for their manufactured raw materials, regardless of their exact location in the competitive area. The one who is nearer to the source of supply of one material may be farther away from the source of supply of another. Some of his *own* competing customers may be more remote from *his* factory or store than others.

The United States is the largest free-trade area in the world. Congress has refused to chop it up into local freight-walled monopolistic areas, and the Commission should not attempt to do what Congress has refused to do.

In thus arguing, Glidden, as a small single-plant producer in the field of each of the lead pigments, is arguing in its own small-producer interest, against the requirement of an F. O. B. "mill-net" uniformity which would drive Glidden from the field in favor of the multiple-plant producers.

But it is interesting to note that in *other* fields, including lithophone, ready-mixed paints, and various food products, Glidden is one of the large *multiple-plant* producers, and that the acceptance of the contention of Commission's counsel (by legislation or interpretative perversion of the existing statute) would be to the selfish benefit of Glidden, like other multiple-plant producers, and would actually lessen the competition of its smaller single-plant competitors.

Glidden's argument is, therefore, based on the sincere belief, and the belief of its counsel, as to the true, anti-monopolistic meaning of "price" in the Robinson-Patman Act as interpreted by *obiter dicta* of the Supreme Court, and not on any long-range selfish advantage to Glidden.

CITATIONS FOR FINDINGS 2 TO 35.

Finding	*Pages of Transcript*
2	2561, 2591
3	2556, 2559, 2590, 2591
4	2502, 2503, 2559
5	2459, 2465, exls. 141, 142
6	2459, 2466, 2542, 2559, 2558
7	2509, 2511, 2513, 2525, 2639, 2677
8	2556, 2558
9	2501, 2504, 2513
10	2509, 2525, 2558, 2633
11	2510
12	2590
13	2457, 2588
14	2508, 2525
15	2516
16	2513, 2565, 2566
17	2511, 2519, 2520, 2660
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19	2522, 2524
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21	2456, 2457, 2507
22	2455, 2458, 2490, 2494
23	2488, 2490, 2499, 2510, 2516, 2517, 2541, 2542, 2560
24	2539, 2553
25	2553, 2659
26	2548, 2560, 2583, 2648, 2652
27	2542, 2564
28	2551, 2552
29	2532
30	2467, 2556
31	2484, 2485, 2486, 2490, 2494, 2496, 2497, 2498, 2504, 2505, 2544, 2546, 2559
32	2565, 2566, 2579, 2580
33	2739
34	2739 to 2745
35	2561

ADDITIONAL PROPOSED FINDINGS AND CITATIONS.

36. Glidden's painter customers, even after Glidden improved the quality of its white lead and white-lead-in-oil, continued for a time to regard a lower price as implying inferior quality, and Glidden was not able at first to obtain for its improved product as high a price as National and Eagle-Picher (Tr. 2503, 2509).

37. Glidden's interest in the formulation of the N. R. A. Code was to protect the small producers of lead pigments (Tr. 2515).

38. Glidden neither furnished to, nor received from, the Lead Industries Association any information or service concerning pricing methods or so-called "zones," except during the period of the N. R. A. Code, and never at any time furnished to, or received from, said Association any information concerning prices or freight rates (Tr. 2538, 2556), and Glidden opposed successfully the practice of reporting prices to the Code Authority (Tr. 2565, 2588).

39. Glidden's so-called "zone differentials" were not enough to lessen or substantially affect competition between its buyers in different zones, even in the rare (if any) instances where such competition existed (Tr. 2518).

40. Glidden did not adopt a practice of uniform F. O. B. "mill-net prices" because even if its competitors had done likewise, it would have made an "isolated island" of Glidden's selling field, limited to a small area around its plant and it would have fatally cost Glidden the good will of its manufacturing customers who wanted the same price for their manufactured raw materials as their competitors; and such a practice would have concentrated Glidden's efforts on cheap transportation, even requiring it to enter the trucking business, rather than on improving the quality of its product and service (Tr. 2579 to 2582).

41. Glidden encountered difficult competition from its neighbor, the Hammond Lead Company, operated by the former owners of its own plant, who offered at a lower price an inferior product made at lower cost, which competition Glidden met by improving its lead oxide products and service rather than by lowering its price to meet the Hammond price (Tr. 2548, 2549).

42. Glidden did not at any time have any agreement or understanding or concerted course of action with any respondent or

other competitor respecting so-called zones or zone differentials (Tr. 2593), but followed the practices in that respect of its principal competitor, National Lead (Tr. 2508, 2513).

REASONS.

The foregoing proposed additional findings of fact, numbered 36 to 42, inclusive, are (1) findings of fact each of which was established by the testimony of Paul Sprague; (2) required because said testimony was in no respect disputed or rebutted, and (3) because said testimony is not inherently improbable, but is inherently probable.

Respectfully submitted,

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John A Duncan

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