Signed Original

United States of America

Before the Federal Trade Commission

Docket No. 5253.

FEDERAL TRADE COMMISSION
DEC 29 1947
SECRETARY

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 SHERWIN-WILLIAMS COMPANY

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Comes now, The Sherwin-Williams Company, one of the respondents herein, and moves the Trial Examiner, under Rule XXI of the Commission's Rules of Practice, that he include the proposed findings herein later set forth in the recommended decision he is required to file under Rule XXII of the aforesaid Rules of Practice. The evidentiary facts, and reasons, supporting such findings are set out immediately in conjunction with each finding requested.

Requested Findings as to Charges Stated in Count I.

PARAGRAPH ONE: With respect to the general charge stated in Paragraph One of Count I Sherwin-Williams requests the following finding:

> "The record does not establish by the greater weight of reliable, probative and substantial evidence that Sherwin-Williams has violated the provisions of Section 5 of the Federal Trade Commission Act."

The evidentiary facts, and reasons, supporting the foregoing finding are set forth in detail in connection with specific factual findings hereinafter requested.

PARAGRAPH TWO: With respect to the charge stated in Paragraph Two of Count I Sherwin-Williams requests the following finding:

> "The record does not establish by the greater weight of reliable, probative and substantial evidence that Sherwin-Williams has combined, conspired or cooperated with the other respondents to hinder, lessen or eliminate price competition in the sale of lead pigments or has used unfair, oppressive or discriminatory acts, methods or practices in the sale thereof in interstate commerce."

The evidentiary facts, and reasons, supporting the foregoing finding are set forth in detail in connection with specific factual findings hereinafter requested but a brief statement of Sherwin-Williams' overall contention is as follows:

1. Sherwin-Williams sets its price on the basis of free delivery at one of its 50 odd shipping points with the customer paying the actual freight therefrom to his own destination except when car load orders are involved. This system is very different from the delivered price system used by other respondents in that it does reflect differences in cost of delivery from Sherwin-Williams' shipping points to the various customer's respective destinations.
2. Sherwin-Williams has not set up a zone system whereby the total cost to its customers is matched with, or at a differential below, the delivered price quoted by any other respondent. Its freight policy, as outlined, precludes such matching. The plan used by Sherwin-Williams is contrary to a zone delivered price system.
3. Sherwin-Williams has not engaged in any unlawful activity with the aid of Lead Industries Association. It has retained its bare membership therein for many years but has not participated in the type of activities sponsored during the N.R.A.

Code days since the N.R.A. Code system was held to be illegal. The information it furnishes to, and receives from Lead Industries Association does not concern prices or price factors or terms or conditions of sale.

4. Sherwin-Williams never adopted or used the consignment method of selling white lead.

5. Sherwin-Williams has not exchanged price information with any other respondent and has not agreed with any other respondent relative to prices or terms or conditions of sale for lead pigments.

PARAGRAPH THREE: Sherwin-Williams has no objection to a finding conforming to the allegations of Paragraph Three of Count I.

PARAGRAPH FOUR: Sherwin-Williams has no objection to a finding conforming to the allegations of Paragraph Four of Count I.

PARAGRAPH FIVE: With respect to the charges stated in Paragraph Five of Count I, Sherwin-Williams requests the following findings:

> "Sherwin-Williams Company produces only white lead carbonate, (dry and in oil) red lead, (dry and in oil) and litharge, which are manufactured only in its Chicago plant from pig lead obtained in the open market from practically all suppliers. It does not produce the other lead pigments involved. It sells and distributes such products in interstate commerce to various classes of customers but the volume of such sales constitutes a very small and negligible part of the total sales of such products by all producers. It also sells such products, particularly white lead in oil, in its own several hundred retail stores in transactions which originate and are completed entirely within the confines of a single state. While Sherwin-Williams uses white lead and red lead in the manufacture of some types of paint there is no evidence that its use of such products in the manufacture of paint is pertinent to this proceeding."

The evidentiary facts supporting the foregoing findings are as follows:

Sherwin-Williams Company produces only white lead carbonate, (dry and in oil) red lead, (dry and in oil) and litharge (Tr. 1313), which are manufactured only in its Chicago plant (Tr. 1313, Tr. 3746) from pig lead obtained in the open market from practically all suppliers (Tr. 1313). It does not produce the other lead pigments involved (Tr. 1313). In 1943 Sherwin-Williams shipped about 5% of the white lead in oil shipped by the industry and approximately the same percentage for many years prior thereto (Tr. 1331). For many years its dry white lead and litharge shipments to customers represented less than 1%, respectively, of the total shipments while its dry red lead and red lead in oil shipments to customers were approximately nil (Tr. 1331-1332). Sherwin-Williams does not sell dry red lead or litharge on the Pacific Coast (Tr. 1314, Tr. 2066). Its sales of litharge are confined almost entirely to points in the Chicago area with a few isolated shipments to Kentucky and Ohio. (Tr. 2066). It does not sell red lead or litharge to the battery manufacturing industry (Tr. 1648, Tr. 4070), and is not an important factor in the sale of lead pigments, particularly red lead and litharge (Tr. 1648).

PARAGRAPH SIX: With respect to the charges stated in Paragraph Six of Count I, Sherwin-Williams requests the following finding:

> "Sherwin-Williams has not violated, and is not now violating, the provisions of Section 5 of the Federal Trade Commission Act by combining, conspiring or cooperating with any of the other respondents herein for the purpose or with the effect of restraining, hindering, suppressing or eliminating competition in prices or terms of sale for lead pigments in interstate commerce or by engaging in or continuing unfair, oppressive or discriminatory acts, methods or practices in connection with its sales of lead pigments."

The evidentiary facts supporting the foregoing findings are set forth in detail elsewhere in connection with various requests for specific factual findings.

PARAGRAPH SEVEN: Sherwin-Williams makes no request for any findings with respect to the charges stated in subparagraph A of Paragraph Seven of Count I.

With respect to the charges stated in subparagraph B of Paragraph Seven of Count I, Sherwin-Williams requests the following finding:

> "Sherwin-Williams has not combined or conspired with any of the other respondents to do or perform, and has not performed, any of the acts, methods or practices set forth in items 1 through 7, inclusive, of subparagraph B of Paragraph Seven of Count I."

The evidentiary facts, and reasons, supporting the foregoing finding are set out in connection with requests for specific findings relative to items 1 through 7, inclusive.

As to items 1 and 2 of subparagraph B of Paragraph Seven of Count I, Sherwin-Williams requests the following findings:

"Sherwin-Williams has not agreed to adopt, and has not adopted or maintained, a system of delivered price quotations which prevents reflection of any difference in the cost of delivery of lead pigments to the respective locations of the purchasers thereof. In arriving at its prices for lead pigments Sherwin-Williams has designated 53 (as of September 1939) major cities located strategically in all sections of the United States as shipping points and has established warehouses and shipping facilities thereat. The price quoted at 21 of such cities which are located east of the Mississippi River and north of Kentucky and Virginia is a base price and the price quoted at each of the other designated cities includes an added differential which varies according to the location of such shipping points relative to Chicago. These differentials are not arbitrary mark-ups but are applied for the purpose of recouping, in whole or in substantial part, the freight cost involved in shipping from Sherwin-Williams' sole lead pigment manufacturing plant at Chicago to its various shipping points. Purchasers generally pay the price applicable at the nearest shipping point plus actual freight therefrom to destination. While Sherwin-Williams' price to customers in cities served by the same shipping point or by shipping points having the same price is the same, purchasers in all of such cities have a different total cost to the extent of the difference in the freight costs from such shipping points to the purchasers' respective destinations. Except on orders from governmental agencies and railroad and marine accounts, Sherwin-Williams' price for less than carload quantities is the same as the purchaser's delivered cost only when the purchaser receives delivery at a shipping point or in the suburbs thereof or in contiguous locations thereto or in one of a very few cities which are accorded F. O. B. prices. Purchasers accepting delivery at or near any of Sherwin-Williams' shipping points obtain a lower delivered cost, but not price, than other purchasers located farther, freight-wise, from the same shipping point or from any other shipping point having the same applicable price. Sherwin-Williams pays the freight on carload or truck load orders but, due to Sherwin-Williams position in the industry, there are relatively few such orders. Other respondents generally sell on a delivered price basis to all classes of customers in any quantity. To the extent that any purchaser from Sherwin-Williams pays any freight his total cost will not be the same as the total cost of similar purchases from such other respondents as sell on a delivered price basis even if there should be any identity of price quotations. Sherwin-Williams has not agreed to adopt and has not adopted or maintained a zoning system whereby price quotations made by it to all purchasers of a class are matched to, or at a set or agreed differential below, the price quotations of any other respondent and differences in location and freight costs from shipping point to destination are disregarded. Sherwin-Williams' policy of charging freight on less than carload orders precludes a matching of its customers total cost with the delivered prices quoted by other respondents except in those cities where Sherwin-Williams maintains a warehouse and no freight cost is incurred and in those very few cities which are quoted on an F. O. B. basis. Further, there is not substantial identity of Sherwin-Williams' prices with the other respondents' prices to customers generally even in those cities or even where carload orders are involved.''

The evidentiary facts, and reasons, supporting the foregoing findings are as follows:

As to Items 1 and 2:

Sherwin-Williams sells less than car or truck load quantities of its lead pigments on a shipping point system (Tr. 1318-1319, Tr. 4105-4106, Tr. 3704, Tr. 3754-3756). It has a number of warehouses in strategically located major cities throughout the United States from which it fills its orders (Tr. 3747, Tr. 3754-3756). In September 1939 there were 53 such shipping points (R.X. 198 A-H, C.X. 662 Z21, Tr. 3756). Eight (Spokane and Seattle, Washington; Portland, Oregon; Sacramento, Santa Rosa, Los Angeles and Oakland, California and Phoenix, Arizona) are located in the far West (Tr. 3756, Tr. 3850). Sherwin-Williams' other 45 shipping points were strategically located in major cities east of the Rocky Mountains (5 in Texas; 3 each in Ohio and New York; 2 each in Minnesota, Missouri, Oklahoma, Florida, Tennessee, West Virginia, North Carolina and Pennsylvania; and one each in Colorado, Iowa, Nebraska, Louisiana, Alabama, Georgia, South Carolina, Kentucky, Illinois, Indiana, Michigan, Virginia, Maryland, New Jersey, Connecticut, Rhode Island, Massachusetts and Maine) (R.X. 198 A-H and C.X. 662 Z-21). The warehouse or shipping points in each district are named on the dealer cards used in such district (CX 662W, Tr. 3702). With certain exceptions hereinafter noted Sherwin-Williams ships all less than carload shipments from the shipping point nearest the purchaser on a collect basis or freight is prepaid and added to the invoice (Tr. 3758-3759, Tr. 3836-3838, Tr. 3842, Tr. 3849-3850, Tr. 3855, Tr. 4105-4106). The exceptions are:

(1) On all purchases by federal, state, county and municipal governments and agencies connected therewith, Sherwin-Williams pays the freight to destination because such purchasers will not buy on any basis other than a delivered one (Tr. 3746-3747, Tr. 3841-3842);

(2) On all purchases by railroad or marine accounts Sherwin-Williams pays the freight to the nearest point on the purchaser's line (Tr. 3747, Tr. 3842);

(3) On purchases for delivery at any one of its shipping points Sherwin-Williams makes no charge for delivery from its warehouse by its own truck or for cartage (Tr. 3756, Tr. 3768, Tr. 3776, Tr. 3836-3838);

(4) On purchases for delivery in Washington, D. C., Gadsden, Alabama, Pensacola, Florida, San Diego, California, Chattanooga, Tennessee or Salem, Oregon, Sherwin-Williams, under authority of its general office, pays the freight from shipping point to such destination (Tr. 3757-3758, Tr. 3852-3855, C.X. 782 F), but such cities are not classified as shipping points for other cities (Tr. 3759);

(5) On purchases for delivery to a suburb of or a contiguous location to, one of its shipping points or one of the six cities specified in item 4, Sherwin-Williams makes no charge for delivery from its warehouse by its own truck or for cartage (Tr. 3768-3769, Tr. 3836-3838), and

(6) Less than carload shipments in the eight far Western states appear to be handled differently from those elsewhere. Commission's Exhibit 782 D indicates that there are several cities in each of these states in addition to those previously identified as being shipping points or as being within the free delivery area thereof to which deliveries may be made on an F.O.B. basis but there is no indication that they also serve as shipping points. Eight are in Montana, three each are in Washington and Idaho, two each are in Arizona and Utah, one is in Nevada and there are several in California (C.X. 782 D). A number of those in California are obviously within the respective free delivery areas of the Oakland and Los Angeles warehouses. Sherwin-Williams appears to have made flat price increases over the San Francisco price (C.X. 782 D). Apparently no other respondent has a similar system in effect on the West Coast.

In rare cases the shipment may not actually go from the nearest shipping point because of lack of stock (Tr. 3759, Tr. 3699-3700). In such cases the freight is adjusted and equalized between the points involved with the customer paying the difference (Tr. 3760, Tr. 3838-3840), but never more than if the shipment came from his normal shipping point (Tr. 3767-3768, Tr. 3839), since the location of the shipping points prevents this happening (Tr. 3768). Such equalization is not predicated upon any competitive situation (Tr. 3700). In a few instances, as an occasional accommodation to dealer customers with respect to special rush orders, Sherwin-Williams makes deliveries to such customers from stores which are not classified as shipping points and which do not carry warehouse stocks. The tabulation of 845 invoices (C. X. 794) reveals 44 instances of deliveries made from stores which were not shipping points. Fifteen shipments were made by the Salt Lake City & Ogden, Utah stores; fifteen by nine different stores in Texas of which twelve were local deliveries and fourteen by eight other stores of which eight were local deliveries. Local deliveries accounted for one-half of the total (C. X. 794, R. X. 205). If the customer is located in the same city as the store, there is no charge for such delivery but if the customer is located in some other city then the shipment is made on a collect basis (Tr. 3844-3845, Tr. 3769).

The Commission prepared and introduced into evidence as C. X. 794 A-Z8 a tabulation of information taken from 845 white lead (dry and in oil in containers of 100 pounds or less) invoices, during three separate three month periods, from all (C. X. 793, Tr. 887) of Sherwin-Williams' ten district offices to various destinations which, together with the time periods, were selected by the Commission's investigator (Tr. 887-891). The investigator who made this tabulation testified "we found that it was necessary to request that all invoices or house copies showing the sale and shipment of white lead be taken from the files of the divisional offices and sent to us as the white lead sales of the Sherwin-Williams Company were very insignificant as far as their total sales of other merchandise was concerned." (Tr. 836). Invoices covering shipments of white lead from all district offices during the three separate periods were submitted and examined (Tr. 887-889). Apparently the invoices not tabulated involved only small quantities of one to five pounds of white lead (Tr. 889). This tabulation did not show who actually paid the freight on the shipments (Tr. 894) so Sherwin-Williams prepared and introduced into evidence a tabulation (R. X. 205 A-X) which shows all information on the same invoices (except 12 which were missing) relative to identifying the method of shipment so far as payment of freight is concerned (Tr. 3771). This tabulation was also supplemented by uncontradicted testimony based both upon a physical examination of the original invoices during the hearing and upon the witnesses' knowledge of Sherwin-Williams' freight and shipping point policies. The examination of invoices was directed particularly to those which did not affirmatively show that the order was to be shipped collect or show the tonnage of the entire order was sufficient for a car or truck load, or the relative location of destination to shipping point (Tr. 3771-3804, Tr. 3836-3856, Tr. 4113). Thirty-three invoices involved governmental orders; 10 involved railroad or marine account orders; 336 (40% of total tabulated) involved deliveries in cities where Sherwin-Williams maintained warehouses; 8 involved deliveries in the six cities which were treated as F.O.B. points; 100 involved deliveries in suburbs or contiguous locations to cities in which Sherwin-Williams maintained warehouses; 4 involved freight equalizations arising through shipment from warehouses other than the one nearest to the customer and 213 invoices involved payment of freight by the respective customers (R.X. 205). In addition there was testimony to the effect that in connection with 16 invoices Sherwin-Williams policy as to charging freight on less than carload shipments was waived because of competitive necessity (Tr. 4104-4113). Excluding the invoices which involved deliveries within a city where Sherwin-Williams maintained a warehouse or in a suburb or contiguous area thereof more than 50% of the invoices involved payment of freight from shipping point by the purchasers thereof (R.X. 205 A-X).

When a customer's order amounts to a carload or truck load then Sherwin-Williams ships from its factory in Chicago and pays the freight (Tr. 3707-3709, Tr. 3746, Tr. 3756, Tr. 3840-3841), even though it may not be able to ship the entire order at one time (Tr. 4114). An examination of the 90 invoices wherein Sherwin-Williams paid the freight to destination because the order involved a carload order shows that the total amount of white lead involved in the entire 90 carloads was 225,241 pounds (113 tons) which is equal to between six and seven actual carloads. The largest amount in any one invoice was 4,050 pounds. What actually happened in these 90 instances is that the purchaser ordered a carload of paint products from Sherwin-Williams and the lead pigments included in the order amounted to a relatively small proportion thereof. For the convenience of the examiner in checking the accuracy of the foregoing statement we submit herewith as "Exhibit A" a tabulation of the invoices covering shipments where Sherwin-Williams paid the freight to destination because a carload order was involved which gives the invoice number and the total amount of white lead billed. Another tabulation has been prepared from the information shown on C.X. 794 A-Z8 to demonstrate the fact that Sherwin-Williams' participation in the lead busines is largely restricted to small orders. Of the 845 invoices tabulated only 78 involved orders for 1000 to 2000 pounds of lead; only 52 involved orders for from 2000 pounds to 4000 pounds; only 11 involved orders for from 4000 pounds to 6000 pounds; only 6 involved orders for from 6000 pounds to 10,000 pounds and only 11 involved orders for as much as 5 tons and only 3 of these were for more than 5 tons (one for 15,000 pounds, one for 20,000 pounds, and one for 25,000 pounds). The facts as to the orders involving as much as 5 tons are as follows: one was a local delivery to a governmental agency from the St. Louis warehouse; one was a delivery from the Newark, New Jersey warehouse to the Bronx in New York City, which involved a free delivery area as part of metropolitan New York; three were shipments from the Oakland, California warehouse free alongside steamer dock in San Francisco; one involved a shipment from the plant in Chicago to the United States Government at Fort Douglas, Utah; one involved a shipment from Chicago to a painting contractor in New Orleans, Louisiana and four involved local deliveries from the plant in Chicago to a governmental agency in Chicago. The tabulation has been designated as "Exhibit B". These two tabulations establish that in three separate three month periods selected by the Commission's staff, Sherwin-Williams (1) shipped only 113 tons of white lead in 100 pound or smaller containers which was delivered without a freight charge because it formed part of carload orders including paint products, and (2) shipped only eleven orders for as much as 5 tons of white lead in such containers.

The Commission contends that Sherwin-Williams' bulletins such as C.X. 662 C-D and C.X. 662S-T serve the same purpose as a zone system but actually such bulletins serve an entirely different purpose for Sherwin-Williams than C.X. 659 C-P (list of delivery, equalization and differential points) served for National before it adopted a zone system, Sherwin-Williams' bulletins were applicable only to the 226 cities in which it had retail stores while National used its list of more than 1000 cities as a guide in pricing its products to its customers generally. Since prior to 1924 (Tr. 1312, 1316-1317) Sherwin-Williams has circulated to its district sales staff and representatives in its own branch stores its General Trade Sales Bulletins (C.X. 594 A-B, C.X. 662 C-D, C.X. 662G-H and C.X. 662 S-T) for the sole purpose of advising them as to the price differentials in effect on the date thereof "For Sherwin-Williams' warehouses and stores" (Tr. 3697). The same list is used for white lead in oil, dry white lead, dry red lead, red lead in oil and litharge (Tr. 1318). Such bulletins serve no purpose for quoting prices or making billings to any customers (Tr. 3697). Sherwin-Williams' roster of retail stores as of June 1, 1943 shows that Sherwin-Williams had 270 retail stores located in 245 different cities of the United States (C.X. 652 A-K). The Trade Sales Bulletin bearing the nearest date (May 21, 1942) lists the same cities but does not include those on the Pacific Coast (C.X. 594 A-B, C.X. 662 S-T). The roster of retail stores includes ten cities not shown on the bulletin but the roster is almost a full year later in date. Apparently, these ten cities are ones where no stores were operated by Sherwin-Williams in May 1942 but were in June 1943 (See C.X. 652 D, Emporia, Kansas is one of the ten). Stores were increasing in number as there were 322 on October 1, 1944 (C.X. 776). The bulletin includes eleven cities not listed on the roster. Five of them (Boston, Charleston, Minneapolis, Philadelphia and Sioux City) were warehouse points and were not classified as retail stores (C.X. 654). One is an obvious mistake in printing. (Danbury, Illinois is listed on bulletin and Danbury, Connecticut is listed on roster.) Apparently the other five (Fargo, Indianapolis, (which was a shipping point in 1939, R.X. 198 A), New York, Shreveport and Sioux Falls) represent stores closed between May 21, 1942 and June 1, 1943. A comparison of cities named on the roster of stores and warehouses (C.X. 652 A-K, C.X. 654) with those named on the bulletin (C.X. 594 A-B, C.X. 662 C-D, C.X. 662 S-T) supports Sherwin-Williams contention that such bulletins serve no purpose other than as above stated. These exhibits do not constitute a list of Sherwin-Williams shipping points (Tr. 3713-3714, Tr. 3846). Less than carload shipments to customers located in the cities listed on C.X. 662 S-T which are not shipping points are made on a freight collect basis from shipping point (Tr. 3850).

On December 30, 1932, National Lead began its system of selling white lead in oil through agents as well as through dealers and in the fall of 1933 expanded the system to cover all of the United States except the Pacific Coast (R.X. 158, C.X. 685, C.X. 706 D, C.X. 506 D-F). In 1933 Eagle-Picher began selling white lead in oil in the same manner (C.X. 712 A, C.X. 626-628). Glidden later adopted the consignment method for selling white lead in oil (C.X. 649 A-C, C.X.

650 A-C). Apparently all abandoned the system later. Sherwin-Williams has never used the agency or consignment method of selling white lead in oil (Tr. 3701). A comparison of National's prices and Sherwin-Williams' prices for white lead in oil discloses substantial differences in the prices charged to those who purchased such products for resale. National's price announcements for this period are shown on respondent's Exhibit 158 and Sherwin-Williams' prices for the same period are shown on Commission's Exhibits 662 Z5 through 662 Z26. In January 1937 Sherwin-Williams' quotation to dealers in any quantity was 9-1/4¢ per pound but National's quotation ranged from 11-1/2¢ per pound for less than 500 pounds to 10-3/4¢ per pound for 1000 pounds. In March 1937 Sherwin-Williams' quotation to dealers in any quantity was $9.80 per 100 pounds but National's quotation ranged from 12-1/2¢ per pound to 11-3/4¢ per pound for 1000 pounds. In September 1937 Sherwin-Williams' quotation to dealers in any quantity was $9.75 per 100 pounds but National's quotation was $11.00 per 100 pounds. In all subsequent quotations both National and Sherwin-Williams quoted dealers only one price for any quantity and Sherwin-Williams' quotations were more than 1¢ per pound lower than National's. (October 1937, January 1938, March 1938, September 1938, February 1939, September 1939, April 1941 and January 1942). National's charge against its agents was always lower than its price to dealers (R.X. 158). Sherwin-Williams' dealers compete with both National's dealers and agents. Sherwin-Williams' lower quotation is offset to varying amounts since National's quotations are for delivery at the purchaser's destination and Sherwin-Williams' quotations are for delivery at a shipping point and the purchaser must pay the freight therefrom on less than carload orders. The result, therefore, is that the delivered price to a customer of National's and the delivered cost to a customer of Sherwin-Williams' varies with each transaction depending not only on the difference in prices but also on the amount of freight paid by Sherwin-Williams' customers. The delivered cost to Sherwin-Williams' dealers might even be higher than National's delivered price to its dealers. There is no satisfactory way to compare Sherwin-Williams' prices to its dealers and their delivered costs with the charges made by National against its agents because the two classes function so differently. Sherwin-Williams' dealers have to bear additional costs and assume additional risks which National's agents did not have to assume. (C.X. 613) The same relation existed as between Sherwin-Williams' dealer customers and the agents of Glidden (C.X. 650) and Eagle Picher (C.X. 626-C.X. 631 F).

As to items 3 and 4 of subparagraph B of Paragraph Seven of Count I, Sherwin-Williams requests the following findings:

"There is no evidence that Sherwin-Williams sought or secured, or agreed with any of the other respondents to seek or secure, from Lead Industries Association, its officers, employees or agents any advice, assistance or cooperation in fixing, adopting, publishing or using non-competitive terms and conditions for the sale of lead pigments or that any representatives of Lead Industries Association ever participated in any discussions concerning prices, price factors or terms and conditions of sale with Sherwin-Williams or any of its representatives subsequent to the meetings held during the Code days in 1933 and 1934. There is no evidence that the Association was ever used in any way by Sherwin-Williams to exchange price factors or information concerning such factors or that Sherwin-Williams ever furnished any of its prices or any price information to any other respondent or ever received any such information from such sources or that its prices and terms and conditions of sale of lead pigments in interstate commerce are not competitive."

The evidentiary facts, and reasons, supporting the foregoing findings are as follows:

Lead Industries Association was organized in 1928 as an unincorporated association (Tr. 996-997) and during the period involved its membership included more than fifty miners, smelters and refiners of lead and manufacturers of various lead products, including manufacturers of lead pigments (C.X. 498 A-K) (Tr. 997). Sherwin-Williams has been a member of the Association since its inception (C.X. 498 A-K, Tr. 1010) but has never been represented on its Board of Directors or Executive Committee (Tr. 1011, C.X. 499 A-H). The White Lead in Oil and Dry Products Committees of the Association first became active in the summer of 1933 as a result of a meeting of the Lead Pigments Division on July 20, 1933, where there was discussion as to suitable trade practices to be included in the Supplemental Code (N.R.A.) (C.X. 508 C, C.X. 508 D, C.X. 799, Tr. 997). Sherwin-Williams was not represented at this meeting but was represented at subsequent meetings (C.X. 500 A, C.X. 501 A-D, C.X. 502 A-C, C.X. 504 A-B, C.X. 505 A-B, C.X. 800 A-C, C.X. 801 A-B, C.X. 803 and C.X. 805 A, Tr. 1330). Discussions of trade practices at these meetings were for the purpose of formulating acceptable rules for a supplementary code under N.R.A. (C.X. 508 D, also minutes of all meetings of two Committees). The activities of these Committees ceased in 1935 after the decision of the Supreme Court in the Schechter case (Tr. 998). The white lead group became active in the late 1930's in some promotional work to stimulate the use of white lead. (Tr. 998). Sherwin-Williams was not represented on this Committee (C.X. 500-B) and there is no evidence that Sherwin-Williams' representative in the Association ever took any part in any activity of this Committee or of the Association subsequent to May, 1935 (Tr. 1330). When the White Lead in Oil and Dry Products Committees were considering the provisions which would be submitted to the N.R.A. for inclusion in a supplemental code for the industry, there was discussion and tentative action as to price filing provisions and as to standard terms and conditions for the sale of lead oxides (red lead and litharge) and dry white lead. (C.X. 501 A-D, C.X. 502 A-C, C.X. 504 A-B, C.X. 505 A-B, C.X. 800 A-C, C.X. 801 A-B, C.X. 803 and C.X. 805 A). The Deputy Administrator of N.R.A. suggested a substitute price filing section (C.X. 518 A-B) which was Section 2 of Article VII and which was not approved by the industry. A less restrictive section was adopted and submitted to N.R.A. (C.X. 803). The Code, approved May 24, 1934, (C.X. 809) contained the price filing provision proposed by the industry (Art. VII, Sec. 2). A three month extension for beginning the enforcement of Art. VII, Sec. 2 and of Schedule "A" was requested and obtained (C.X. 507 C) and a further extension was requested in September 1934, (C.X. 507 A-M). There is no evidence they ever became effective. Sherwin-Williams has never filed any prices or price information in conformity with said Art. VII of the Code during Code days or thereafter (Tr. 2187-2188) and there is no evidence that it ever put Schedule "A" into effect in the sale of its lead oxides or dry white lead.

For many years some of the manufacturers of lead pigments have filed with Lead Industries Association monthly reports showing volume of sales, production and stocks on hand, but prices were never reported to the Association (Tr. 1083, Tr. 1330, C.X. 836 J). The report from the Association to the members did not in any case show individual shipments, production, or stocks on hand, and it merely gave an overall total combined figure for each respective category (Tr. 1330-1331, C.X. 670, C.X. 856 J). It did not issue any publication to the trade setting forth purported current market quotations on lead pigments (Tr. 1039), and it did not furnish information or quotations on lead pigments to any trade publication (Tr. 1040). Even though Sherwin-Williams can determine its own position, percentagewise, in the industry (Tr. 1331) by using such reports, there is no evidence that such reports furnished Sherwin-Williams with information which it could use unlawfully in calculating, determining and announcing its quotations.

There is no evidence in the record that C.X. 525, which is a carbon copy of a letter under date of December 14, 1933, from Harold Rowe of National Lead Company addressed to Sherwin-Williams Company of Canada at 897 Centre Street, Montreal, Canada, was ever brought to the attention of the respondent, Sherwin-Williams Company; that the addressee of such letter was owned, controlled or dominated in any way by Sherwin-Williams Company; that the addressee had any relationship with National Lead Company other than that of a purchaser or that the letter involved any illegal exchange of information.

As to item 5 of subparagraph B of Paragraph Seven of Count I, Sherwin-Williams requests the following finding:

> "Sherwin-Williams did not adopt or use the agency or consignment method of selling white lead and did not conform to the terms and conditions used by such other respondents as did adopt and use such method."

The evidentiary facts, and reasons, supporting the foregoing finding are as follows:

The agency or consignment plan of selling white lead in oil was adopted by National in January 1933 (C.X. 685, C.X. 706 D, C.X. 506 D-F). About the same time Eagle-Picher adopted the plan (C.X. 712 A, C.X. 626, C.X. 627, C.X. 628). This plan was discussed at the meetings of the White Lead in Oil Committee held on August 9, 1933 (C.X. 501 A-D) and on October 28, 1933 (C.X. 505 A-B). On November 15, 1933, National put the plan into effect in all its branches, except the Pacific Coast Branch (C.X. 598, Tr. 1091). Eagle-Picher did likewise. (C.X. 629 A-C, C.X. 704). Sherwin-Williams was opposed to the plan and openly so stated at the time (C.X. 506-E, C.X. 712 A), and never adopted or used the agency or consignment plan of selling, Tr. 3701).

As to item 6 of subparagraph B of Paragraph Seven of Count I, Sherwin-Williams requests the following finding:

> "Sherwin-Williams has not agreed with any of the other respondents to fix and include in its offers to sell lead pigments common prices, terms or conditions of sale for such products."

The evidentiary facts, and reasons, supporting such finding are set out in detail elsewhere herein in connection with requests for specific findings.

As to item 7 of subparagraph B of Paragraph Seven of Count I, Sherwin-Williams requests the following finding:

> "Sherwin-Williams did not participate in or have any knowledge of any contracts or agreements between National Lead Company and DuPont."

In support of the foregoing finding it is merely necessary to state that there is no testimony or other evidence connecting Sherwin-Williams with any knowledge of, or participation in, the relations and contracts between National Lead and DuPont, nor is there any evidence from which any such inference can be drawn.

PARAGRAPH EIGHT: With respect to the charges stated in Paragraph Eight of Count I, Sherwin-Williams requests the following finding:

> "In quoting and selling lead pigments in less than carload lots Sherwin-Williams has not divided the entire country into geographical zones whereby it quotes the same delivered cost to all buyers of the same class without regard to the location of such buyers or of the transportation costs involved."

The evidentiary facts, and reasons, supporting such finding are set out in connection with other specific finding requested as to each subparagraph.

As to subparagraph A of Paragraph Eight of Count I, Sherwin-Williams requests the following finding:

> "Sherwin-Williams does not quote or sell lead pigments in steel kegs of 100 pounds or less upon the basis of the geographical divisions and delivered cost differentials set out in the map inserted immediately following subparagraph A of Paragraph Eight of Count I and does not follow the pricing formula therein set forth."

The evidentiary facts and reasons supporting the foregoing finding are as follows:

The map included as part of subparagraph A of Paragraph Eight alleges that each respondent charges a premium of $.75 per 100 pounds over its base prices in Arizona, Utah, Idaho and Montana; a premium of $.25 per 100 pounds over its base price in California and the western one-half (approximately) of Oregon and Washington and a premium of $.50 per 100 pounds over its base price in Nevada and the eastern one-half of Washington and Oregon (See map). The only price information from Sherwin-Williams' South Pacific Coast (Los Angeles) area is shown on Commission's Exhibits 785-790, inclusive, and 794 EFG. Sherwin-Williams' freight policy applies to the Pacific Coast as well as elsewhere (C.X. 785-790). Commission's Exhibits 785-786 and 790 are of no assistance because there is no evidence as to Sherwin-Williams' base prices for lead pigments during the periods involved. Commission's Exhibits 787 and 788 were put into effect on April 26, 1941, and remained in effect until January 26, 1942 (C.X. 789). At the same time Sherwin-Williams' General Trade Sales Bulletin No. 177 (C.X. 662 MN) was in effect in all areas but the Pacific Coast. A comparison of C.X. 787 and 788 with Commission's Exhibits 662 MN shows that the prices quoted for the various products do not conform at all to the formula charged. The base price for white lead in oil in 100 pounds kegs to dealers was $10.00 on C.X. 662 MN. Adding the differential of $.25 per 100 pounds charged in the Complaint would result in a California price of $10.25 to a dealer. However, the lowest Los Angeles price was actually $11.75 (orders for less than 500 pounds in 100 pound kegs). In Commission's Exhibits 662 MN the prices quoted for white lead in oil, dry white lead, red lead in oil, dry red lead and litharge vary greatly (at dealer level dry white lead is $9.25 per 100 pounds, dry red lead is $10.25 per 100 pounds and red lead in oil is $11.00 per 100 pounds), but in Commission's Exhibits 787 and 788 all lead pigments, with the exception of red lead in oil which is $1.00 per 100 pounds higher, were offered at the same price. A comparison between Commission's Exhibits 789 and 662 OP reveals the same situation. The Complaint charges that Arizona carries a differential of $.75 per 100 pounds over the base price (See map Paragraph Eight). Actually, Sherwin-Williams' price in Phoenix, Arizona is $.50 per 100 pounds over its actual price in Los Angeles, which is more than $.25 higher than its base price. Its price is still higher in other Arizona cities due to freight costs to purchasers on less than carload shipments from Phoenix (C.X. 787 and 788). Further, a comparison of C.X. 794-G (tabulation of Sherwin-Williams' invoices from the Los Angeles district in the last three months of 1941) with C.X. 787 and 788 which were then in effect in that area, shows that of the 43 different listings, 34 conformed thereto exactly, 5 conformed to the price quoted for different classifications or for different amounts than actually shipped (Phx. 495, L.A. 13214, L.A. 7262, L.A. 12928 and L.A. 9573) and only 4 failed to conform (L.A. 10859(2), L.A. 7687 and 8653). Even these 4 did not conform to the formula charged in the Complaint.

Sherwin-Williams' price bulletins for Sherwin-Williams' Central Pacific Coast (Oakland) district are Commission's Exhibits 784 BDF, but, with the exception of C.X. 784 D which was in effect in the last three months of 1941, are of no assistance because there is no evidence as to Sherwin-Williams' base prices for lead pigments during the periods involved. Sherwin-Williams' General Trade Sales Bulletin of April 25, 1941 (C.X. 662 MN) was in effect during the same period except on the Pacific Coast. A comparison of these exhibits show that the prices quoted by the Oakland office of Sherwin-Williams for the various products do not conform to the formula charged. Dry white lead, white lead in oil, dry red lead and litharge carried the same price while red read in oil was $1.00 per 100 pounds higher (C.X. 784 B, D, F). This price identity for such products did not exist in the East (C.X. 662MN). The dealer price for white lead in oil on C.X. 784 D was $11.50 per 100 pounds for less than 500 pounds and on C.X. 662 MN it was $10.00 per 100 pounds and the prices to painters and to retail purchasers, though different, were the same in both areas. A comparison of C.X. 794 K, L, M and N (tabulation of Sherwin-Williams' invoices from the Oakland district) in so far as they reflect shipments for the last three months in 1941 with the prices quoted in that area during that period (C.X. 784 D) shows that of the 71 different listings 38 conformed exactly, 8 conformed to the prices quoted for other classifications or different amounts, 18 were the result of bids (where quoted prices are not generally followed) and only 7 failed to conform. Further, the prices quoted in the Los Angeles district and in the San Francisco district were not the same, San Francisco being uniformly $.25 per 100 pounds lower according to bulletins in effect at the same time (C.X. 784 D and C.X. 787). The price information from Sherwin-Williams' Portland, Oregon district does not furnish an entirely clear picture of its pricing policy but does supply sufficient information to establish that its policy does not conform to the formula charged (C.X. 781 A-C and C.X. 662OP). All lead pigments, except red lead in oil, carried the same price (C.X. 781 A-C) but this price identity did not exist in the East, litharge to dealers being $9.75 per 100 pounds and dry red lead $10.75 per 100 pounds and dry white lead and white lead in oil also varying (C.X. 662 O). Red lead in oil was $1.25 per 100 pounds more than white lead in oil in the East (C.X. 6620) but only $1.00 more in the Portland area (C.X. 781 A-C). The entire price range for sales to dealers in the Portland district (C.X. 781 A-C) was more than $.25 and $.50 greater than the price range in effect in the East at the same time (C.X. 662-OP). This differential does not agree with the one charged. The offices at Los Angeles and Oakland, California and Portland, Oregon serve at least the eight far western states (C.X. 782 D). In 1941 Sherwin-Williams sold only 318 tons of white lead in oil on the Pacific Coast, some of which was purchased by Sherwin-Williams there from W. P. Fuller Company and from Premier Paint and Color Works and a substantial portion was shipped from Sherwin-Williams' Chicago plant in mixed carload lots with paint. In the forty states east of the Rocky Mountains, Sherwin-Williams had 45 shipping points. (R.X. 198 A-H, C.X. 622 Z21). There are none in eleven states. (New Mexico, Wyoming, North Dakota, South Dakota, Kansas, Arkansas, Wisconsin, Mississippi, Delaware, Vermont and New Hampshire) The result is that in those eleven states there are no cities wherein Sherwin-Williams has any delivered price. Of course, governmental agencies and purchasers, if any, buying in carload quantities obtain delivered prices but all other purchasers in these states must pay the freight from shipping point to destination. Unquestionably some cities in one of these states will be served by one shipping point and others by another and the two shipping points may have different prices. In the other 29 states the customers located in the 45 shipping point cities or in areas contiguous thereto obtain delivered prices but purchasers in all other cities pay freight on less than carload orders. It is obvious, therefore, that the total cost to each purchaser from Sherwin-Williams varies (1) as to the price in effect at the shipping point which services the account, and (2) as to his relative distance, freightwise, from such shipping point. The price may be the same to two different customers yet they may have very different total costs due to differences in freight paid. The charge that Sherwin-Williams quotes on a delivered price basis according to the zones described in Paragraph Eight of Count I cannot be sustained.

As to subparagraph B of Paragraph Eight of Count I, Sherwin-Williams requests the following findings:

"The record establishes that Sherwin-Williams has not engaged in the practice charged in so far as quotations and sales of less than car or truck load orders are concerned and there is no evidence that it has sold carload or truck load lots of dry white lead in barrels on the basis charged. Sherwin-Williams' sale of dry white lead, irrespective of type of container, are negligible."

The evidentiary facts, and reasons, supporting the foregoing findings are as follows:

Sherwin-Williams does not manufacture or sell lead sulphate (Tr. 1313). So far as Sherwin-Williams' practices in selling dry white lead in barrels and bags are concerned the record shows only that on January 28, 1942, Sherwin-Williams quoted this product on the Pacific Coast at a differential of $.25 per 100 pounds over its quotation throughout the rest of the country (C.X. 823 G); that this "Pacific Coast" area included all of the states west of the Rocky Mountains (Tr. 1325); that on February 5, 1943, it issued a quotation to the Federal Government for this product in lots of less than 20 tons (less than car lot) without any indication that such quotation involved any differential (C.X. 782 C), and that the relative position of Sherwin-Williams in shipments of dry white lead (irrespective of size or type of container) to customers in 1943 and for a considerable period prior thereto amounted to "practically nothing —less than one per cent" (Tr. 1331-1332). Sherwin-Williams' policy of requiring purchasers to pay freight on all less than carload orders from its nearest shipping point to destination applies to this product (Tr. 3746) and there is no evidence that any sales were made to customers whose less than carload purchases would fall within the recognized minor exceptions. The reasons why Sherwin-Williams' freight policy cannot result in the same delivered cost, as distinguished from price, to customers differently located, freightwise, from the shipping point have been set out in detail previously in support of findings requested under Paragraph Seven of Count I. Also, it has been shown that when any purchaser from Sherwin-Williams pays any freight his total cost will not be the same as the total cost of similar purchases by similarly located customers of such other respondents as sell on a delivered price basis. There is no evidence that Sherwin-Williams ever used the differential shown in C.X. 823 G in any previous or subsequent bulletin.

As to subparagraphs C and D of Paragraph Eight of Count I, Sherwin-Williams requests the following findings:

"In quoting and selling dry red lead and litharge in barrels in less than carload lots Sherwin-Williams has not quoted or sold said products to customers within the geographical areas described at the delivered cost alleged. In quoting dry red lead and litharge in barrels in carload lots of 20 tons or more it has not quoted such products at differentials over the American Smelting and Refining Company's closing price of common pig lead at New York on the date the order is received. Sherwin-Williams' sales of such products, irrespective of type or size of container, are negligible.''

The evidentiary facts and reasons supporting the foregoing findings are as follows:

Sherwin-Williams produces dry red lead and litharge only in Chicago, Illinois (Tr. 1313) and its relative position in shipments of these products (irrespective of type of containers) to customers in 1943, and for many years prior thereto, ranged from less than 1% for litharge to ''practically nil'' for dry red lead (Tr. 1332). It does not sell either of these products on the Pacific Coast (Tr. 1314, Tr. 1324, Tr. 2066), which includes all of the states west of the Rocky Mountains (Tr. 1325) and is not an important factor in the sale thereof elsewhere (Tr. 1648). For at least twenty years Sherwin-Williams has not manufactured red lead or litharge for use by the battery manufacturing industry (4070) and is not a competitor in that field (Tr. 1648) which was an increasingly important one prior to war time restrictions (Tr. 1640, Tr. 4093). While Sherwin-Williams sells oxides in carload lots (Tr. 1327), there is no evidence in the record that Sherwin-Williams has made carload shipments of red lead or litharge, other than shipments to its own plants, to any point which carries a differential above its own base price (Tr. 2066). Its sales of litharge are confined almost entirely to points in the Chicago area with a few isolated shipments to Kentucky and Ohio (Tr. 2066).

The only evidence in the record relative to Sherwin-Williams' practices in selling red lead and litharge in barrels or bags on either a carload or less than carload basis is C.X. 823 A-F and C.X. 782 C and the stipulation at pages 2065-2066 of the record. Sherwin-Williams' policy of requiring purchasers to pay freight on less than carload orders from its nearest shipping point to destination applies to these products (Tr. 3746). The reasons why Sherwin-Williams' freight policy as to less than carload orders cannot result in the same delivered cost, as distinguished from price, to customers differently located freightwise from a shipping point have been previously discussed. Also, it has been demonstrated previously that when any purchaser from Sherwin-Williams pays any freight his total cost will not be the same as the total cost of similar purchases by similarly located customers of such other respondents as sell on a delivered price basis. There is no evidence that any sales were made to customers whose less than carload purchases would fall within the minor exceptions to Sherwin-Williams' policy of requiring the purchaser to pay the freight from Sherwin-Williams' nearest shipping point to destination on all less than carload shipments.

There is uncontradicted evidence that Sherwin-Williams does not sell oxides on set differentials over the American Smelting and Refining Company's price of common pig lead at New York as alleged (Tr. 1328), but quotes its price therefor on a differential over the New York market quotation for pig lead (Tr. 1328). There is no evidence that Sherwin-Williams did not use this system before 1933. Sherwin-Williams has produced 95%, 97% and 98% red lead since 1932 at least (Tr. 3870), and in the past few years has quoted 97% at 25¢ per 100 pounds over the price of 95% and has quoted 98% at 50¢ per 100 pounds over the price of 95% (C.X. 823 F, C.X. 782 C, Tr. 2065). There is no evidence that Sherwin-Wiliams adopted the policy of quoting these three grades at different prices prior to January 14, 1942 (C.X. 823 F) and there is no evidence it was done then as a result of any agreement or understanding with any other respondent. The sole difference between the three grades is the extent to which oxidation has been completed (Tr. 3870) and this is accomplished by a longer burning for the two higher grades. (Tr. 3871, Tr. 3877-3878). Sherwin-Williams made studies as to the relative length of time required to burn the different grades (Tr. 3871) then ascertained the comparable production costs (R.X. 209) without regard to overhead burden (Tr. 3874-3882). It was found that the respective differentials quoted by Sherwin-Williams for 97% and 98% red lead were less in each case than the additional cost of producing such grades over the cost of producing 95% red lead (R.X. 209, Tr. 3881).

PARAGRAPH NINE: With respect to the charges stated in subparagraph A of Paragraph Nine of Count I Sherwin-Williams requests the following findings:

> "Sherwin-Williams does not require its customers to resell lead products at prices and terms of sale fixed, determined and published by it and does not control and is not responsible for price levels to consumers or painters except to the extent that consumers and painters purchase their requirements of such products direct from Sherwin-Williams either through its general office or through its retails stores."

The evidentiary facts, and reasons, supporting the foregoing findings are are follows:

In accordance with the policy set by Sherwin-Williams' officials, it has been, and is, the regular practice of Sherwin-Williams in making retail sales of white lead, through and at its own stores (270 in United States on June 1, 1943—C.X. 652 A-L) (321 on October 1, 1944—C.X. 776 A-L), to quote and charge the published delivered prices which were applicable at each such destination (Tr. 869-870) as exemplified by C.X. 662 S-T. There is no evidence that Sherwin-Williams ever adopted or used any so-called "Fair Trade Contracts" or took any action to control the resale price of any lead pigment to painters or consumers except in retail stores which it owned and operated. Bulletins such as C.X. 594 A-B, C.X. 662 C-D, C.X. 662 G-H and C.X. 662 S-T, do not contain consumer prices and they are furnished only to Sherwin-Williams' district sales staff and to representatives in its own branches (retail stores owned by Sherwin-Williams) and serve no other purpose (Tr. 3697). Bulletins of the type exemplified by C.X. 662 K-L obviously are not circulated to dealers or others outside Sherwin-Williams' organization because they show prices to dealers and also prices to various classes of customers sold directly by Sherwin-Williams. It never adopted or used the agency plan of selling (Tr. 3701). Sherwin-Williams does furnish to dealers price announcements (Tr. 3696) which suggest to such dealers certain resale prices for white lead in oil (C.X. 662 W-Z26), but not for any other lead pigments and there is no evidence that such dealers felt under any compulsion to, or did, follow such suggestion in reselling or that Sherwin-Williams possessed, or exercised, any power to enforce such suggestions or policed its dealers.

With respect to the charges stated in subparagraph B of Paragraph Nine of Count I Sherwin-Williams requests the following finding:

> "The record contains no evidence that Sherwin-Williams' price differentials, based on the size of containers, were instituted or maintained as a result of any agreement or understanding with any other respondent."

The evidentiary facts, and reasons, supporting the foregoing finding are as follows:

On December 28, 1936 Sherwin-Williams announced that white lead in oil in 50 pound kegs would cost one fourth a cent per pound more than in 100 pound kegs, in 25 pound kegs would cost one-half a cent per pound more and in 12-1/2 pound pails would cost three-fourths a cent per pound more (C.X. 662 E). The price list issued to the trade on January 4, 1937, confirmed this price structure (C.X. 662 Z5). From at least as early as January 6, 1933, which was prior to the meetings held to formulate a code, until January 4, 1937, Sherwin-Williams maintained the same structure except that there was no differential between 50 pound and 25 pound containers. (C.X. 662 W-Z3).

Sherwin-Williams made an analysis of its 1938, 1940 and 1943 contracts for white lead in oil containers and ascertained the actual cost of 100 containers and covers in each of the sizes involved, i.e., 100's, 50's, 25's and 12-1/2's. The container cost per 100 pounds of material was then computed. The cost of one container for 100 pounds of material was less than the cost of a sufficient number of the smaller size containers for 100 pounds of material. In only two instances was the differential charged ~~less~~ greater than the difference in actual container cost alone and in these two instances the cost was only three cents less than the differential (R.X. 210, Tr. 3882-3885). This cost analysis is also applicable to containers for red lead in oil as they are the same (Tr. 4112). In addition, filling and finishing costs increase as the size of the container decreases (Tr. 3885-3886). The N.R.A. Code contained no provision relative to this subject (C.X. 809). At one meeting there was some discussion as to a differential over barrel prices for 100 pound, 50 pound and 25 pound containers on government, railroad and industrial sales only but no decision appears to have been reached and the differentials discussed were not the ones actually used by Sherwin-Williams from 1933 to 1937 (C.X. 800 C).

With respect to the charges stated in subparagraph C of Paragraph Nine of Count I, Sherwin-Williams requests the following findings:

> "So far as requirements contracts are concerned the record shows only that for many years Sherwin-Williams has entered into contracts with purchasers of dry white lead covering quarterly requirements and that Sherwin-Williams does not enter into contracts covering quarterly requirements of dry red lead or litharge. The record contains no published quotations by Sherwin-Williams for dry white lead under such contracts and there is no evidence as to how its price was determined or as to what the terms or conditions of such contracts were. There is no evidence that the quotations of A.S.&R. Co. were used by Sherwin-Williams as a basis for its prices or that the terms and conditions of its contracts were in any way similar to those of the other respondents."

In view of the character of the finding requested it is necessary to refer only to page 1326 of the record. The affirmative portion of the finding is there supported.

With respect to the charges stated in subparagraph D of Paragraph Nine of Count I, Sherwin-Williams requests the following finding:

> "Sherwin-Williams does not issue cards or lists of the types charged which show delivered quotations to various classes of customers and which include the quotations which such purchasers must make in reselling such products to consumers or others. Sherwin-Williams does not issue any price cards which provide a formula whereby all prospective customers at any

given destination are presented with price quotations which are matched to, or at a set differential below, the price of other respondents for the same quantities, in the same containers, to the same classes of customers."

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The evidentiary facts, and reasons, supporting the foregoing finding have been set out in detail in connection with the supporting facts and reasons urged under Items 1 and 2 of Paragraph Seven, under subparagraph A of Paragraph Eight and under subparagraphs A and B of Paragraph Nine. Briefly summarized they are:

1. Sherwin-Williams sells on a basis of shipping points from which the purchaser pays freight to destination.
2. Sherwin-Williams does not sell lead pigments in containers of 100lb capacity or less throughout the United States on a zone basis without regard to freight costs.
3. Sherwin-Williams does not have agents and does not use "Fair Trade" contracts with dealers so is unable to, and does not, control the prices obtained in sales by such dealers.
4. Sherwin-Williams has explained and justified its reason for certain differentials as to container sizes.
5. Sherwin-Williams does control the resale price obtained in transactions taking place in the retail stores it operates but not elsewhere.
6. Sherwin-Williams places only one type of price card in the hands of its dealers and the prices therein shown are merely "suggested" and no action is threatened or taken to secure adherence thereto.
7. The shipping point system used by Sherwin-Williams cannot result in the same total cost to Sherwin-Williams' customers as that for similarly situated customers of such respondents as quote and sell on a delivered price basis.

Sherwin-Williams issues to dealers in its products price announcements which show its prices for white lead in oil to such dealers and which also contain suggested resale prices therefor to consumers and to painters. (Tr. 3696, Tr. 3700-3701, C.X. 662 W-Z26). These lists show the F.O.B. prices applicable at the several shipping points listed. When deliveries are to be made to destinations other than such shipping points the price quoted is F.O.B. the shipping point and the purchaser pays the freight therefrom to destination. There is no evidence that Sherwin-Williams places any other type of price announcement in the hands of dealers or makes any suggestions (other than as to white lead in oil) to such dealers relative to their resale price to consumers, painters or any other purchasers.

PARAGRAPH TEN: With respect to the charges stated in Paragraph Ten of Count I, Sherwin-Williams requests the following findings:

> "Sherwin-Williams does not use the systematic method of quoting delivered costs on lead pigments described in Paragraphs Eight and Nine of Count I for the purpose or with the effect of enabling it to match exactly its offers to sell lead pigments with the offers of the other respondents herein. Sherwin-Williams does not quote lead pigments on a delivered cost basis. It delivers carload orders and orders by governmental agencies free of delivery cost and also delivers orders where the destination is one of Sherwin-Williams' fifty odd shipping points or a contiguous location thereto or one of the few cities accorded an F.O.B. policy free of delivery costs, but, in general, its customers who are located away from the shipping point by which they are serviced must pay the freight from such shipping point to destination. Sherwin-Williams does not systematically discriminate against purchasers located near its various shipping points in favor of customers located, freightwise, at a considerable distance therefrom."

The evidentiary facts and reasons supporting the findings requested are set forth in detail in connection with the specific findings requested in Paragraphs Seven, Eight and Nine hereof and are incorporated herein by reference.

PARAGRAPH ELEVEN: With respect to the charges stated in Paragraph Eleven of Count I, Sherwin-Williams requests the following findings:

> "Sherwin-Williams has not adopted, used or maintained the zone delivered system of pricing described in subparagraph A of Paragraph Eight of Count I. The system adopted, used and maintained by Sherwin-Williams in selling lead pigments does not have the effects alleged in subparagraphs A, B and C of Paragraph Eleven. Sherwin-Williams has not voluntarily or reciprocally surrendered or cancelled any inherent advantage within any territory in consideration of a similar surrender and cancellation of a similar advantage by other respondents. The various respondents have different delivery costs in shipping lead pigments to their respective customers which is attributable primarily to the location of the plants of the various respondents. In approximately 80% of the United States respondents other than Sherwin-Williams have a freight advantage. In that portion of the United States closer to Chicago, freightwise, than to cities wherein other lead pigment plants are located, all of the respondents who have plants in Chicago or in the Chicago switching area are on an equal footing freightwise. Since Sherwin-

Williams' only plant for producing either white lead or red lead and litharge is located in Chicago, it has no territory within which it has a freight advantage."

Some of the evidentiary facts and reasons supporting the finding requested are set forth in detail in connection with the specific findings requested in Paragraphs Seven, Eight and Nine hereof. Other evidentiary facts, and reasons, supporting the findings requested are as follows:

National Lead Company is the largest producer of white lead (dry and in oil), red lead (dry and in oil) and litharge. During the period denominated by Trial Counsel for the Commission as the "normal period" from 1936 to 1941, National Lead produced over 60% of the white lead in oil, from 30% to 35% of the dry white lead and 50% of the red lead and litharge (C.X. 578, C.X. 664, Tr. 1647, Tr. 1665-1666). Its white lead plants are located in Perth Amboy, New Jersey; Philadelphia, Pennsylvania; Chicago, Illinois (where it produces 40% of its white lead); St. Louis, Missouri; and Oakland, California (Tr. 1071-1072). It produces red lead and litharge in plants located in Brooklyn, New York; Philadelphia, Penna.; Charleston, West Virginia; St. Louis, Missouri; Chicago, Illinois; Dallas, Texas; Atlanta, Georgia and Los Angeles and San Francisco, California (Tr. 1625). For the period from 1930-1946 Eagle-Picher produced from 15% to 20% of the white lead in oil and approximately 10% of the dry white lead (Tr. 1560-1561). Eagle-Picher produced white lead in its plant in Cincinnati, Ohio (plant recently dismantled) and red lead and litharge in Joplin, Missouri and Newark, New Jersey (Tr. 1552, Tr. 1564). In 1943 Glidden produced between 8% and 9% of the white lead in oil and approximately 15% to 18% of the dry white lead (Tr. 1307-1308). It produces red lead and litharge at Hammond, Indiana, which is in the Chicago switching area and produces white lead at Scranton, Pennsylvania (Tr. 1230-1233). In the period from 1937-1943 International Smelting & Refining Company sold from 3% to 4% of the white lead in oil and from 10% to 19% of the dry white lead (C.X. 741, C.X. 822-J). These products were manufactured at its plant in East Chicago, Indiana, which is within the Chicago switching area. International Smelting & Refining Company discontinued production and sale of white lead and on October 1, 1946 sold its plant at East Chicago, Indiana to Eagle-Picher so that Eagle-Picher now has a plant located in the Chicago area for the production of white lead.

Sherwin-Williams prepared and introduced in evidence as R.X. 199 a map which shows the areas within which each plant may ship white lead (dry and in oil) at a freight advantage over any other white lead plant on the basis of carload and less than carload railroad freight rates in effect on January 15, 1941. (Tr. 3721-3732) An examination of this exhibit clearly shows that National Lead's Oakland, Saint Louis and Philadelphia plants have a freight advantage over any other white lead plant in a major portion of the United States. Eagle-Picher's Cincinnati white lead plant had a freight advantage over any other white lead plant in a substantial area while in operation. Glidden's white lead plant in Scranton, Pennsylvania has a freight advantage over any other white lead plant in the major portions of Pennsylvania and New York. National Lead has a white lead plant in the New York City area and therefore has a freight advantage in New England and the lower portion of New York State over any other plants. National Lead, International Smelting & Refining Company's plant (now owned by Eagle-Picher) and Sherwin-Williams all have the same freight advantage in an area surrounding Chicago. The net result is that Glidden has a freight advantage in some territory, Eagle-Picher had a freight advantage in some territory and National Lead has a freight advantage in some territory but Sherwin-Williams has no advantage in any territory. This is due to the fact that National Lead and Eagle-Picher (since its acquisition of International Smelting and Refining Company's plant) both have white lead plants in Chicago where Sherwin-Williams' sole plant is located and also have one or more plants elsewhere. A similar map relative to red lead (dry and in oil), was introduced as R.X. 200. (Tr. 3732-3740) The map is equally applicable to litharge. An examination of this exhibit shows that in a major portion of the United States, National Lead has a freight advantage over other red lead and litharge plants due to the fact that it operates nine red lead and litharge plants strategically placed throughout the whole United States. Eagle-Picher has a freight advantage in part of the country by reason of its plant at Joplin, Missouri. National, Glidden and Sherwin-Williams all have red lead and litharge plants in Chicago so they share any freight advantage accruing to Chicago over St. Louis, Missouri; Charleston, West Virginia and Oakland, California, in all of which cities National Lead has plants. Sherwin-Williams has only six shipping points (Detroit, Indianapolis, Minneapolis, Duluth and Sioux City) in the area where Chicago has a freight advantage over other cities in which lead pigment plants (either white lead or red lead and litharge) are located. In shipping lead pigments to each of its other more than 45 shipping points or to areas served by such shipping points, Sherwin-Williams is at a freight disadvantage to one or more of the other respondents. The identity of the specific producer who has the advantage over Sherwin-Williams in each such situation will vary depending upon which one has a plant located closer, freightwise, to such shipping point than Sherwin-Williams' plant at Chicago. In those instances where Sherwin-Williams ships direct from Chicago to purchasers without charging any freight (irrespective of quantity), it is at a disadvantage, freightwise, to at least one of the other respondents in the entire United States except North and South Dakota, Iowa, Minnesota, Wisconsin, Michigan and the northern parts of Illinois, Indiana and Ohio, and even in this area it does not have an advantage, freightwise, over all other respondents.

PARAGRAPH TWELVE: With respect to the charges stated in Paragraph Twelve of Count I, Sherwin-Williams requests the following finding:

"Sherwin-Williams has not engaged in any unlawful combinations, agreements or understandings with any of the other respondents and its acts, practices, pricing methods, systems, devices and policies in selling lead pigments are not unfair and prejudicial to the public interest; do not deprive the public of the benefit of competition; do not discriminate against buyers or users of lead pigments and lead paint; do not have a dangerous tendency and capacity to restrain commerce in said products and have not actually hindered, frustrated, surpressed or eliminated competition in such products in commerce. Sherwin-Williams has not engaged in unfair acts or practices or unfair methods of competition within the intent and meaning of Section 5 of the Federal Trade Commission Act."

The evidentiary facts and reasons supporting the finding requested are set forth in detail in connection with the specific findings requested in Paragraphs One through Eleven, inclusive.

All evidentiary facts and reasons relied upon in Paragraphs One through Twelve, inclusive, as supporting specific requested findings are also relied upon, without specific reference, as support for all other findings requested. By setting forth such evidentiary facts and reasons specifically in connection with one requested finding, it is not intended to waive reliance upon such facts and reasons to the extent they support any other requested findings.

COUNT II.

PARAGRAPH ONE: With respect to the charges stated in Paragraph One of Count II, Sherwin-Williams requests the following finding:

"Sherwin-Williams has not violated the provisions of Sec- 2(A) of an Act of Congress approved October 15, 1914, entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies and For Other Purposes", as amended by an Act of Congress, approved June 19, 1936, commonly known as the 'Robinson-Patman Act'."

The evidentiary facts and reasons supporting the finding requested are set forth in detail in connection with the specific findings hereinafter requested.

PARAGRAPH TWO: With respect to the charges stated in Paragraph Two of Count II, Sherwin-Williams requests the following finding:

"Sherwin-Williams has not and is not now unlawfully discriminating as between its customers in the prices it charges, demands, accepts and receives in connection with the sale of lead pigments in commerce."

The evidentiary facts, and reasons, supporting the finding requested are set forth in detail in connection with the specific findings hereinafter requested.

PARAGRAPHS THREE TO FIVE, INCLUSIVE: With respect to the charges stated in Paragraphs Three to Five, inclusive, of Count II, Sherwin-Williams requests the same findings as it has heretofore requested in connection with Paragraphs Three to Five, inclusive, of Count I and relies upon the same evidentiary facts and supporting reasons therefor as previously set out in connection with its said requested findings.

PARAGRAPH SIX: With respect to the charges stated in Paragraph Six of Count II, Sherwin-Williams requests the following finding:

"In its sale of lead pigments in commerce, as commerce is defined in the Clayton Act, as amended by the Robinson-Patman Act, Sherwin-Williams has not been since June 19, 1936, and is not now, discriminating in price between purchasers of lead pigments of like grade and quality by systematically selling such lead pigments to many purchasers at a price higher than the price at which it sells the same products, or products of like grade and quality, to other competitively engaged customers."

The evidentiary facts and reasons supporting the foregoing requested finding are as follows:

The only testimony in the record from purchasers of lead pigments relative to the competitive effect upon their respective business operations of the pricing practices of the various respondents is that of battery manufacturers located in St. Louis, Missouri; Chicago, Illinois; Kansas City, Missouri; Nashville, Tennessee; Birmingham, Alabama; and Dallas, Texas, who buy red lead and litharge, and that of certain paint manufacturers located in St. Louis, Missouri who primarily buy dry white lead but also buy small amounts of dry red lead. Each of the battery manufacturers who was called as a witness named his own suppliers for red lead and litharge and none of them named Sherwin-Williams (Tr. 1672-2018). Sherwin-Williams does not sell red lead and litharge to the battery manufacturing industry (Tr. 1648, Tr. 4070) and, consequently, the testimony of battery manufacturers as to any effect of any pricing practices of suppliers to their industry forms no criterion as to what the effect of Sherwin-Williams' pricing practices may be in those industries to which it does sell red lead and litharge. Similarly, the paint manufacturers who were called as witnesses identified their respective sources of supply and none of them named Sherwin-Williams as a supplier (Tr. 1338-1478). Sales of lead pigments to paint manufacturers are generally made on a contract basis. The record affirmatively shows that Sherwin-Williams did not have any white lead, litharge or red lead contracts in St. Louis during the specific periods concerning which Counsel for the Commission inquired (Tr. 1320). There is no evidence in the record that Sherwin-Williams sold lead pigments to any of the competitors named by the paint manufacturer witnesses. In fact, there is no evidence identifying a single sale by Sherwin-Williams of white lead (dry and in oil) in containers larger than 100 pound kegs or of red lead (dry and in oil) or litharge in containers of any size to any specific purchaser or class of purchasers. Obviously, Sherwin-Williams has sold such products in interstate commerce but there is not a scintilla of evidence to the effect that such products have been sold to any specified class of customers, particularly paint manufacturers. Even if sales at different prices are established there must be a showing that the respective purchasers are in the same general line of business and operate in the same trade area. This has not been done. There must also be evidence that price difference was great enough to have a competitive effect for there to be a discrimination. No attempt was made to produce such evidence except as to battery and paint manufacturers where the products being brought are used by the purchasers in manufacturing their own end products. An amount which might cause that result in that one industry might not cause it in another. No analogy can be drawn without some comparative basis. Sherwin-Williams has the smallest volume of sales of lead pigments of any respondent so its sales practices could hardly harm any of its competitors. Sherwin-Williams sells primarily to those who use lead pigments in maintenance of their plants and equipment such as railroads, steamship lines, industrial concerns and governmental agencies. The respective lines of commerce of these users can hardly be said to be adversly affected to any appreciable, much less substantial, extent by Sherwin-Williams pricing practices no matter what they might be. At any event such result cannot be inferred from a complete lack of testimony relative thereto. Sherwin-Williams also sells to dealers for resale and to contracting painters for use in doing painting jobs under contract. There is no evidence that Sherwin-Williams has sold to purchasers in either class at a discriminatory price over its price to others who are competitive with such purchasers. In view of this state of the record, how can any inference be made or conclusion drawn as to what competitive effect may be produced by Sherwin-Williams' selling practices? Certainly no inference can be made that there has been a discrimination in price between purchasers competitively engaged when there has been no showing whatever as to what types of purchasers buy white lead (dry and in oil) in containers larger than 100 pound kegs, red lead (dry and in oil) and litharge from Sherwin-Williams. In so far as sales of lead pigments in containers of 100 pounds or less is concerned, there is no evidence that the purchasers to whom Sherwin-Williams sells such products at different prices are competitors. This cannot be assumed from the record. The contrary should be assumed because all purchasers serviced by the same shipping point are quoted the same price. The location of the shipping points reveals that each of them serves a substantial territory. There is no evidence that the sale of lead pigments in containers of 100 pounds or less by dealers who purchase from Sherwin-Williams covers any substantial territory or overlaps the territory of any other dealer purchasing such products at a different price.

PARAGRAPH SEVEN: With respect to the charges stated in Paragraph Seven of Count II, Sherwin-Williams requests the following finding:

> "The record establishes that Sherwin-Williams has not engaged in the practice charged in so far as quotations and sales of less than carload orders are concerned. In connection with the sale of lead pigments in containers of 100 pounds or less capacity, Sherwin-Williams has not divided the entire territory of the Continental United States into the geographical zones alleged in Paragraph Eight of Count I and in the map appearing immediately in conjunction therewith for pricing purposes. While Sherwin-Williams sometimes uses a zone system (but not a delivered price system except for carload orders) for quoting such lead pigments as it does sell in containers of more than 100 pounds capacity, the record contains no evidence of any sales of such products in such containers to any customers located in any territories which carry an added differential or at varying prices to customers who are in competition with each other."

The evidentiary facts and reasons supporting the finding requested are set forth fully herein in Paragraphs Seven, Eight and Nine under Count I and in Paragraph Six under Count II and are incorporated herein by reference to the same extent and effect as if such facts and reasons were set forth in full and repeated verbatim hereat.

PARAGRAPH EIGHT: With respect to the charges stated in Paragraph Eight of Count II, Sherwin-Williams requests the following finding:

> "Sherwin-Williams does not quote prices in its offers to sell in interstate commerce and does not sell in interstate commerce on a basis where the delivered cost on a specified quantity of lead pigments to any one of its customers located at or near its shipping point amounts to as much as the delivered cost on the same quantity of lead pigments to other customers located farther, freightwise, from the same shipping point, except in those few

instances where carload shipments are involved and Sherwin-Williams pays the freight irrespective of the location of the purchaser and in transactions with governmental agencies. Sherwin-Williams' carload shipments of lead pigments are negligible but occasionally relatively small amounts of lead pigments are shipped in connection with carload orders of paint products on which Sherwin-Williams pays the freight irrespective of the customers' location. Transactions with governmental agencies are not subject to restrictions of the Clayton Act, as amended by the Robinson-Patman Act."

The evidentiary facts, and reasons, supporting the foregoing finding requested are set forth fully in connection with the finding requested in Paragraphs Seven, Eight and Nine under Count I and are also incorporated herein by reference to the same extent and effect as if such facts and reasons were set forth in full and repeated verbatim hereat.

PARAGRAPH NINE: With respect to the charges stated in Paragraph Nine of Count II, Sherwin-Williams requests the following finding:

"Sherwin-Williams does not effect sales in less than carload lots in accordance with the zone delivered pricing method and practice described in Paragraph Eight of Count I and buyers from it do not pay in accordance with quotations of delivered costs matched with delivered prices quoted by other respondents. Sherwin-Williams does not discriminate in price in favor of more distantly located customers who are competitive with customers more closely located to its shipping points."

The evidentiary facts, and reasons, supporting the finding requested are set forth fully herein in Paragraphs Seven, Eight and Nine under Count I and are also incorporated herein by reference to the same extent and effect as if such facts and reasons were set forth in full and repeated verbatim hereat.

PARAGRAPH TEN: With respect to the charges stated in Paragraph Ten of Count II, Sherwin-Williams requests the following finding:

"Sherwin-Williams does not make sales on less than car load orders to customers on the basis of a zone delivered pricing method and practice. Consequently, it does not make sales in such quantities to customers located at or near borders of adjoining or contiguous zones. There is no evidence that any of Sherwin-Williams' customers who are competitive with other of its customers pay prices different from the prices paid to Sherwin-Williams by such competitive customers.'

The evidentiary facts and reasons supporting the foregoing finding requested are set forth in connection with the finding requested in Paragraph Six hereof under Count II and in connection with the findings requested in Paragraphs Seven, Eight and Nine hereof under Count I and are also incorporated herein by reference to the same extent and effect as if such facts and reasons were set forth in full and repeated verbatim hereat.

PARAGRAPH ELEVEN: With respect to the charges stated in Paragraph Eleven of Count II, Sherwin-Williams requests the following finding:

> "In connection with the sale of lead pigments in commerce, Sherwin-Williams does not charge, demand, accept or receive higher prices from any of its customers than from other competitively engaged customers. There is no evidence that dealer customers of Sherwin-Williams serviced by shipping points having a different price applicable thereat are engaged in competition with each other."

The evidentiary facts, and reasons, supporting the foregoing requested finding are as follows:

Since December 28, 1936, Sherwin-Williams has had only one class of dealers and has made no distinction between any of its dealer customers except such distinction as may arise by reason of dealers being serviced by shipping points having different prices applicable thereat (C.X. 662 E-F, C.X. 662 I-R, C.X. 662 U-V). There is no evidence that such dealers as may pay different prices are in competition with each other. Sherwin-Williams has classified certain customers who purchase for use rather than resale into the following classifications:

(1) Contracting painters and large maintenance accounts sold direct;

(2) Industrial accounts (including public utilities, privately-owned street railways, petroleum industry);

(3) Railroad and marine accounts;

(4) Federal Government, States and Municipalities, and municipally-owned street railways and W.P.A. accounts, and

(5) Small consumers.

Obviously, the members of these classifications are not competitive in any way with the members of any other classification or with dealers. They use lead pigments purchased from Sherwin-Williams in maintenance of their plants and properties and not for resale either in the same form or as a substantial component of another product. Sherwin-Williams' stores are billed by it on the same basis as its dealers and such stores resell at the consumer prices set by Sherwin-Williams (Tr. 3709).

PARAGRAPH TWELVE: With respect to the charges stated in Paragraph Twelve of Count II, Sherwin-Williams requests the following finding:

> "Sherwin-Williams does not match its offer to sell lead pigments in commerce to prospective dealer purchasers at all, or any substantial number of, destinations at, or at a fixed differential below, the offers of other respondents."

The evidentiary facts, and reasons, supporting the requested finding are set forth fully herein in Paragraphs Seven, Eight and Nine under Count I and are also incorporated herein by reference to the same extent and effect as if such facts and reasons were set forth in full and repeated verbatim hereat.

PARAGRAPH THIRTEEN: With respect to the charges stated in Paragraph Thirteen of Count II, Sherwin-Williams requests the following finding:

> "Pricing practices followed by Sherwin-Williams have not had the effects alleged in subparagraphs A, B, and C of Paragraph Thirteen."

The evidentiary facts, and reasons, supporting the requested finding are set forth in detail in connection with the specific findings requested in Paragraphs Seven, Eight, Nine and Eleven under Count I and in Paragraph Six under Count II and are also incorporated herein by reference to the same extent and effect as if such facts and reasons were set forth in full and repeated verbatim hereat.

PARAGRAPH FOURTEEN: With respect to the charges stated in Paragraph Fourteen of Count II, Sherwin-Williams requests the following finding:

> "Pricing practices of Sherwin-Williams as disclosed in the record do not constitute violations of the provisions of sub-section (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act."

All evidentiary facts, and reasons, relied upon in Paragraphs One through Twelve, inclusive, under Count I and all evidentiary facts and reasons relied upon in Paragraphs One through Thirteen, inclusive, under Count II as supporting specific requested findings are relied upon without specific reference as support for the finding hereinabove requested.

CONCLUSIONS OF LAW.

Sherwin-Williams requests that the Examiner incorporate in his recommended decision the following conclusions of law:

1. Sales made by Sherwin-Williams at and through its several hundred retail stores located throughout the United States are intra-state transactions and are not subject to the provisions of the Federal Trade Commission Act or the Clayton Act, as amended by the Robinson-Patman Act.

2. Sales made by Sherwin-Williams to purchasers who do not buy for resale and who are not competitive with each other do not come within the provisions of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

3. The acts of Sherwin-Williams in connection with the preparation of the Lead Code and in connection with its operation prior to the invalidation of the National Recovery Act by the decision of the Supreme Court in the Schecter case cannot be made the basis of a charge of conspiracy to restrain trade in violation of Section 5 of the Federal Trade Commission Act.

4. The term "price" as used in Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, means "the sum paid by the purchaser to the seller for the products purchased."

5. Varying mill net returns from sales where customers paid the same price to Sherwin-Williams for the products purchased do not constitute price discriminations within the prohibitions of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. Mere difference in price is not a discrimination in price within the meaning of Section 2(A) of the Clayton Act, as amended by the Robinson-Patman Act.

6. Sherwin-Williams has not violated and is not now violating the provisions of Section 5 of the Federal Trade Commission Act.

7. Sherwin-Williams has not violated and is not now violating the provisions of Section 2(A) of the Clayton Act, as amended by the Robinson-Patman Act.

8. This proceeding is not in the public interest.

9. As a matter of law the Federal Trade Commission should enter an order dismissing the Amended Complaint as to the respondent Sherwin-Williams.

Respectfully submitted this 29th day of December, 1947.

Raymond N. Beebe
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Dec. 29, 1947

"EXHIBIT A"

Respondent's Exhibit No.	Commission's Exhibit No.	Invoice Number	White Lead Billed	Total Pounds White Lead Billed
205-A	794-C	4297	1035	
		4298	175	1210
205-C	794-E	11409	200	
		9741	400	
		14433	471	
		9068	100	1171
205-D	794-F	11415	348	
		13314	75	423
205-E	794-G	7262	1200	
		10859	156	
		495	400	1756
205-F	794-I	4111	400	
		23535	1000	
		25900	14½	
		25899	700	
		25898	15	
		25897	650	
		4625	150	
		4649	60	
		44312	500	
		16380	350	
		16376	500	
		17498	24	
		8908	2500	
		11574	4125	
		11645	862½	
		11605	4237½	
		35109	28	16,118
205-G	794-J-1	9555	60	
		14939	2400	
		14936	575	
		14938	50	
		37153	700	
		38336	200	
		15516	2400	
		15517	1200	7585
205-L	794-P	14435	783	
		1674	1626½	
		17085	912	
		17302	1340	
		17332	450	
		15672	3156	
		15501	1125	
		14294	2300	
		3830	730	
		1090	1540	13,963

"Exhibit A" Continued

Respondent's Exhibit No.	Commission's Exhibit No.	Invoice Number	White Lead Billed	Total Pounds White Lead Billed
205-M	794-Q	1138	500	
		4326	779½	
		11604	2000	
		12182	3690	
		7968	1300	
		25588	100	
		26344	210	8,580
205-N	794-R	17151	400	400
205-O	794-T	17481	500	500
205-P	794-U	7962	1800	
		4955	825	2,625
205-R	794-Y	13244	832	
		7325	1000	
		11232	612½	
		13026	48	
		1577	500	
		611	875	
		6786	1000	
		8373	4800	
		4708	150	
		8525	175	
		9445	850	
		7200	3025	13,868
205-S	794-Z	59529	630	
		59565	2500	3,130
205-U	794-Z-2	58983	525	
		4108	291	816
205-V	794-Z-4	14588	1100	
		4220	2000	
		14857	1050	4,150
205-W	794-Z-5	11188	300	
		11755	200	
		12346	700	
		49923	510	
		3326	2700	
		11417	1860	
		11199	2935	
		11386	2000	11,205
205-X	794-Z-6 & 7	12875	4050	
		14719	1592	
		11300	900	
		49575	2500	
		14622	1175	
		841	924	12,641
		10894	1500	
		Grand Total		225,241

"EXHIBIT B"

White Lead Shipments by Sherwin-Williams in Commission's Exhibit 794 A-Z8 Which Involved More Than 1000 Pounds Each

Comm. Ex. No.	1000# to 2000#	2000# to 4000#	4000# to 6000#	6000# to 10,000#	10,000# and over
794 C	3	1			1
794 D	2				
794 E		2		1	
794 F	3		1		
794 G	1				
794 I	10	6	2		1
794 J	2	2			
794 K		2			
794 M	8	2		2	3
794 N	8	12	3	1	
794 P	10	4	1	2	1
794 Q	2	2			
794 R	1	1			
794 T	2	1			
794 U	2				
794 Y	7	3	2		
794 Z	2	6			5
794 Z1	3	1			
794 Z2	4	2	1		
794 Z4	3	1			
794 Z5	2	3			
794 Z6-7	3	1	1		
	78	52	11	6	11