Signed Original

United States of America

Before the Federal Trade Commission

Docket No. 5253.

FEDERAL TRADE COMMISSION RECEIVED NOV 16 1948 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.

BRIEF ON BEHALF OF THE SHERWIN-WILLIAMS COMPANY

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I. PRELIMINARY STATEMENT.

The record in this case is voluminous, consisting of 4,398 pages of testimony and several thousand pages of documentary exhibits, but only a small part directly involves this respondent. Counsel for The Sherwin-Williams Company, hereafter called Sherwin, contend that the record discloses Sherwin's activities and pricing policies were different from those of any other respondent and that a careful and individual study must be made of those portions of the record dealing with Sherwin's practices if the Commission is to have before it a correct understanding of what the record contains, and fails to contain, so far as Sherwin is concerned. We believe that we can assist the Commission best by submitting briefs directed prinarily to a detailed presentation of the pertinent facts with a minimum of supporting argument. Thus, the Commission, having a full understanding of the record facts, will know to just what extent Commission's Counsel, as proponents of an order, have, or have not, met the various burdens, jurisdictional and other, placed upon them by the various Acts of Congress here involved. This approach to the record should make the Commission's adjudicative burden, as stated in Rule XXV, an easier one.

Essentially this case involves a charge that all of the respondents herein have entered into and carried out an illegal agreement to fix and maintain uniform and identical delivered prices for lead pigments through the adoption and use of zone pricing systems whereby all purchasers in each zone pay the same delivered price to all respondents.

Sherwin has denied that it uses a zone pricing system and has also denied that any of its pricing practices which may be similar to those of any of the other respondents were adopted by it as a result of any agreement, direct or tacit, to do so. The record will show that Sherwin's pricing system, which is known as a shipping point system, is very different from a zone pricing system. Sherwin's pricing system, which it began using many years before the adoption of a zone system by any of the other respondents, is built around its warehouse system under which it maintains more than fifty warehouses strategically located throughout the United States for the purpose of distributing its paint and other products. The sale of the lead pigments involved in this proceeding forms a very insignificant part of the overall business transacted by Sherwin through these warehouses. Sherwin sets its price on the basis of free delivery at all of its fifty-three warehouse points with each customer paying the freight cost therefrom to its own destination. Under this system it is impossible for the delivered cost to purchasers located at all points other than those few cities to be matched with, or at a fixed differential from, the delivered cost to purchasers who buy from the other respondents on a delivered price basis. This system is very different from a delivered price system in that it does reflect the differences in cost of delivery from Sherwin's warehouse points to the various purchaser's respective locations and in that purchasers located at, or near, the warehouse points do obtain the benefit thereof.

Further, the record will show that Sherwin is in a different position from any other respondent herein due to the fact that its single manufacturing plant is located in the same city where other

respondents have plants. So, Sherwin has no territory whatever where it has a freight advantage over the other respondents. In all the previous cases involving zone, basing point and freight equalization systems decided by the Commission and the Courts each of the respondents had some territory surrounding its plant where it had a freight advantage which it refrained from utilizing in return for the reciprocal forbearance of the other respondents in their respective freight advantage territories. Under such circumstances the Commission inferred the existence of an agreement from such mutual forbearance. Here the Commission is confronted, so far as Sherwin is concerned, with an entirely different situation. Sherwin has no territorial advantage giving it a leverage which it could use on the other respondents. The Commission has no basis for indulging in any inference, as to Sherwin, such as the one above described. The Commission should be aware, at the outset, that this industry has fewer producing units and a higher degree of concentration in the two leaders, National and Eagle, than any industry against which the Commission has proceeded heretofore. One respondent has given up the lead pigment business since this proceeding began and sold its plant to Eagle which is the second largest producer. Sherwin's position is already precarious due to the small volume of its lead pigment business.

Any action which the Commission might consider taking herein will have to be predicated upon the proposition that the public interest will be served best thereby. The Congressional mandate from which its right to proceed in this case arises requires the Commission to consider and determine what action is in the public interest. Obviously this requirement refers to public interest in its broad sense and includes consideration of the impact upon the public generally, as well as upon the respondents, of any corrective action which might be contemplated. The final and total effect of an order may produce, under some circumstances, results which create new situations of much greater potential injury, from the standpoint of the over-all public interest, than any which might arise from the acts complained of. If the Commission should issue an order against Sherwin, it probably will be driven out of the industry with the result that there will be an even greater concentration in the hands of two or three producers. If the Commission should issue an order which requires, in effect, that all manufacturers operate on a mill price basis then the Commission will hand over to some respondents large geographical sections of the country as their exclusive territories and take away from Sherwin the right and the ability to compete and sell in any portion of the United States except the relatively small territory in which Chicago has a freight advantage. Even there it will be competing with producers who also have exclusive territories. We contend that the public interest does not require such action, and, under the situation here prevailing, does not warrant it and will not be served best thereby. The record will also show there has been a complete failure of proof insofar as the charges of the Amended Complaint apply to Sherwin.

We will develop these various points by presenting a detailed statement, supported by adequate citations, as to just what the record shows concerning Sherwin's activities. What Sherwin did, and did not do, are the only criteria as to what action should be taken relative to it. We contend that the record is devoid of substantial evidence that Sherwin followed the pricing practices of the other respondents or that Sherwin unlawfully discriminated in price between competing customers to the injury of any of them, or of any of their respective customers, or to the injury of any of its own competitors. We propose to show that as directly and plainly as possible.

II. PLEADINGS.

A. Scope of Count I of Amended Complaint.

Paragraph Seven of Count I of the Amended Complaint (Subparagraph B) sets forth in general terms the activities which were allegedly pursued through cooperation, combination and conspiracy and which constitute the basis of the charges in Count I. Paragraphs Eight and Nine specify the detailed procedures which were allegedly used in carrying out certain of those activities, particularly those generally described in Items 1, 2, 5 and 6 of Subparagraph B of Paragraph Seven. Paragraph Ten of Count I charges that the acts specified in Paragraphs Eight and Nine were utilized in furtherance of an alleged effort to match prices of all respondents at all destinations which effort is described in Item 2 in Subparagraph B of Paragraph Seven. The remaining paragraphs of Count I detail the alleged effects of such practices and aver that such practices violate Section 5 of the Federal Trade Commission Act. All of the foregoing paragraphs are concerned only with activities allegedly pursued under a common plan of action which was conspiratorial in character. They are not concerned with individual action.

Sherwin takes sharp issue with the contention stated in the last five lines of the first paragraph of that portion of the Commission's brief entitled "The Pleadings" wherein counsel have substantially enlarged their previous contentions as to the scope of the charges in Count I of the Amended Complaint by urging—

> "that each of the respondents individually has violated the law by engaging in and continuing unfair, oppressive, and discriminatory acts, methods, and practices in the sale of lead pigments for the purpose of suppressing and restraining competition"

Such enlargement, if now permitted, will place an unfair burden on the respondents by subjecting them to the threat of an order to cease and desist from individual action along certain lines without regard to whether such action arises from a planned common course of action or produces an identical result. In the proceeding against the Rigid Steel Conduit Association (Docket 4452) simultaneous, but individual, action was attacked as a violation of the Federal Trade Commission Act and was litigated (Count II) but there is no similar count in the complaint herein and the issue is not raised in the pleadings. The only charge with respect to individual action in this case arises under Count II which charges each respondent with violation of Sec. 2(a) of the Clayton Act, as amended. An enlargement of the scope of Count I, in the manner attempted, is not authorized under either the Administrative Procedure Act or the Federal Trade Commission Act and violates the Fifth Amendment to the Constitution.

Commission's Counsel did not make their present contention in their proposed findings. Such proposed findings contain three sections devoted to the charges under Count I. There is no reference to any claimed unlawful individual activity either in those sections or in that portion of Section VII devoted to alleged violations of the Federal Trade Commission Act. Similarly, when arguments in support of proposed findings were made before the Examiner, they did not urge such contention in outlining the scope of the order recommended (Tr. 4250-4251). This contention appears for the first time in their proposed order (Section II, page 2).

The Trial Examiner did not consider that the pleadings raise such issue. The pertinent portions of Section II of the Trial Examiner's Recommended Decision (pages 3-6) clearly demonstrate that the Examiner considered Count I as involving only cooperative activities and the order recommended by him contained no prohibition similar to the one proposed by Counsel for the Commission (Ex. Rec. Dec. pages 96-98, incl.).

While Commission's Counsel took exception to the Examiner's failure to include such contention as an issue under Count I (Com. Exc. I), they took no specific exception to his exclusion of Section II of the Order recommended by them. In view of this state of the record, we urge that it would be unlawful for the respondents to be forced to defend the proposition now urged that each respondent has violated the Federal Trade Commission Act by **engaging individually** in the acts and practices charged in Count I. See also Section VIII hereof.

B. Affirmative Defenses Raised in Sherwin's Answer.

The brief of Commission's Counsel (Com. Brief P. 2-3) ignores the extent to which Sherwin took issue with the Amended Complaint through affirmative matter set out in its three special defenses. (Sherwin's Answer.)

One special defense is that Sherwin's position in the lead pigments industry is so small and precarious, under the circumstances prevailing, as to preclude any of its activities from having any detrimental competitive effect which would not come under the *de minimus* rule. There can be no dispute that Sherwin was by far the smallest producer in the industry. A full discussion of this point is set out in Paragraph G of Section VI hereof.

Another special defense is to the effect that any pricing system for standardized products which results, irrespective of the respective purchaser's distance from the seller's factory, or of the relative location of the seller's factory and the factories of its competitors, or of other competitive factors, in a uniform net return on all sales, has the necessary tendency to create territorial spheres of monopoly for some manufacturers within which spheres they can set or determine, within broad limits, the price at which they are able to sell and still prevent any competitor having a freight disadvantage from competing in such territory and also to ultimately eliminate the smaller manufacturers, such as Sherwin, and thereby to substantially lessen, hinder, restrict and suppress competition and to create and encourage monopolies. A full discussion of this point is set out in Paragraph G of Section VI hereof.

The third special defense raises a point of law concerning the definition to be given to the word "price" in applying Sec. 2(a) of the Clayton Act, as amended.

III. PROCEEDINGS BEFORE TRIAL EXAMINER.

A. Exceptions to and Appeals From Rulings.

By agreement of Counsel (Tr. 4073-4074) which was approved by the Commission (Order of November 18, 1947) exceptions to and appeals from rulings of the Trial Examiner are to be submitted simultaneously with the briefs herein. Sherwin's appeals from such rulings will be filed simultaneously with this brief.

B. The Trial Examiner's Recommended Decision.

Sherwin agrees with the Examiner's Recommended Decision insofar as the Examiner found that Sherwin did use a shipping point system, rather than a zone system (Ex. Rec. Dec. par. 4d, p. 19; par. 5c5, p. 30 and par. 7a3, p. 39), but objects and excepts to the Examiner's conclusion, in the face of such findings, that all respondents conspired and agreed to adopt uniform prices and an identical zone system. Sherwin also agrees with the Examiner's Recommended Decision insofar as the Examiner found that, under the facts here, the charge of a flat uniform price within a particular zone did not violate the Clayton Act as amended by the Robinson Patman Act for the reasons that there was no discrimination in price and no injury to or lessening of competition (Ex. Rec. Dec. par. 10 g, p. 58; par. 11c, p. 58-60). Further, Sherwin agrees with the finding that the white lead quantity discounts, the container differentials and the red lead quality differentials were not discriminatory and had no adverse effect on competition (Ex. Rec. Dec. par. 10-i, par. 10-k, par. 10-c, par. 11-d).

Sherwin objects to and disagrees with the Examiner's Recommended Decision in certain other respects, and, pursuant to Rule XXIII, has filed its exceptions to such specific findings and conclusions. Some are predicated upon the proposition that the Examiner did not conform to the requirements of Rule XXII. Many, however, are based on the fact that the Examiner erroneously reported the status of the record with respect to uncontradicted testimony. It is requested that each of these exceptions be evaluated before any conclusions are reached as to what Sherwin did or did not do. A supplemental statement of the basis for some of such exceptions appears as Appendix I hereto.

IV. BACKGROUND OF PARTIES AND THE INDUSTRY INVOLVED.

Sherwin objects to that portion of the Commission's brief entitled "Background of Parties and the Industry Involved", in the following particulars:

1. It is not revealed that sulphate white lead is used interchangeably and competitively with carbonate white lead by Eagle (Tr. 3344-3352); that when Eagle's production of sulphate is added to its production of carbonate, its position in the industry more nearly approaches National's position than originally indicated in the early stages of the proceedings and that, as a consequence thereof, Sherwin's percentage position in white lead production and sale is even lower than was originally indicated.

2. In describing Sherwin's distribution of lead pigments the statement is made that such distribution is "throughout the country". Actually Sherwin 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).

3. Sherwin objects to reference to its sales of lead pigments through its wholly owned retail stores. Sherwin's sales in its own retail stores originate, and are completed, within the confines of a single state and are purely intrastate sales. While the Examiner obviously misconstrued the extent of the findings of fact (Sherwin's Proposed Findings, Par. 5) and the Conclusion of Law (#1) proposed by Sherwin concerning its retail store sales he did actually grant the finding and the conclusion of law to the extent requested. As to these proposals the Examiner ruled "Paragraph 5 (Sherwin's Proposed Findings of Fact) is allowed except as to the term 'negligible' and as to all transactions being intrastate. The record shows that Sherwin sold interstate," and "Paragraph 1 (Sherwin's Proposed Conclusions of Law) is allowed as applying to a large portion of its business but not to all, but the evidence is sufficient to show that Sherwin is in commerce as defined and is therefore subject to the Acts specified". No claim was ever made that Sherwin was not engaged in interstate commerce as to some types of sales. It was only contended that the sales in Sherwin's retail stores were intrastate transactions and, for that reason, not subject to the Commission's jurisdiction. That contention is proper and

should be sustained. (*Fed. Trade Com.* v. *Bunte Bros.* 312 U. S. 349.) Assuming, but not conceding, that an order to cease and desist is to be issued against Sherwin, it is perfectly obvious that such order should specifically exempt transactions growing out of Sherwin's retail store operations.

4. It is stated that Sherwin accounts for 5% or 6% of the total shipments. This statement applies only to carbonate white lead-in-oil and not to any of the other products (Tr. 1331-1332). When sulphate is taken into account Sherwin's percentage is even lower. For many years its dry carbonate and lithrage shipments to customers represented less than 1%, respectively, of total industry shipments while its red lead, dry and in oil, shipments to customers were "practically nil" (Tr. 1331-1332).

V. The Issues.

For brevity Sherwin adopts the statements by Counsel for National Lead Company as to the issues actually involved in the proceeding, but calls attention to Item C in Section VI of the Commission's brief which involves the same proposition as is raised in the last five lines of the first paragraph of Section II thereof and which is disposed of in Paragraph A of Section II and in Section VIII hereof.

VI. STATEMENT OF FACTS—COUNT I.

A. Preliminary Statement.

Count I raises the basic issue of whether there was an agreement among and between all of the respondents to follow a planned common course of action through the adoption and maintenance of "a fixed plan or formula of quoting delivered prices according to zones or territories, and in support thereof * * * agreed terms and conditions of sale by which competition has been reduced, nullified and eliminated" (Com. Brief, pages 6 and 7). Commission's Counsel concede (Com. Brief, page 16) that the record reflects no actual agreement whereby each of the respondents undertook to agree with each of the others to maintain the zone system, the agency plan or the other trade practices involved. They contend, however, that when the respondents, and others not parties hereto, were holding various meetings in 1933 and 1934 for the purpose of formulating an N. R. A. Code for the industry the respondents discussed and simultaneously adopted and subsequently followed the practices specified in Subparagraph B of Paragraph Seven and in Paragraph Eight and Nine of Count I and that such simultaneous action was equivalent to and constituted the agreement charged in Paragraph Six of Count I. (Com. Brief, page 16; Com. Proposed Findings, Sec. III, pages 13-28).

B. Sherwin's Participation in Lead Industries Association and the Meetings Held Under Its Sponsorship in 1933-1934.

Other respondents will present full statements relative to the nature and scope of the activities of the respondents during the N. R. A. Code period and the legal effect thereof. In order to minimize repetition, we adopt such factual statements and supporting arguments.

Throughout the Commission's brief the theme is that the respondents held these meetings for the ostensible purpose of drafting a code for the industry under N. R. A. but actually and unlawfully "treated this opportunity of drafting a code as one of completely overhauling, cooperatively and by agreement and understanding, all of the trade practices in the industry" (Com. Brief, page 11). Unquestionably there was discussion of the agency plan and zones and the Code, as finally approved, did not include provisions relative to those subjects or to some others that were discussed. Such discussion, however, affords no basis for the claim that all of the respondents, despite the elimination of such provisions from the Code after discussion, agreed to adopt and maintain various trade practices outside the scope of the Code. Of course, the N. R. A. legislation was later invalidated by the Supreme Court but at the time these meetings were held N. R. A. was the law of the land. To the extent trade practices were incorporated in a code which was approved by the N. R. A. Administrator, some relief from the threat of prosecution under the Antitrust laws was afforded. There was no reason for eliminating these practices from the Code if they were to be made the subject of some other agreement. In fact, there was every reason for including them in the Code if all were in agreement. At the very least a color of legality would have been obtained.

It is apparent from the minutes of the meetings that there was not complete agreement by all as to the agency plan or as to some other matters discussed. We contend that this lack of agreement, rather than a desire to accomplish illegal acts by secret agreements, was the cause for the omission. Throughout the meetings the members evidenced every intent to do only what could be

done legally. The Uniform Bases of Sale which later became "Schedule A" and which included many of the practices here challenged was "submitted to N. R. A. subject to approval of its legality" (CX 504B).

Commission's Counsel contend that there was agreement by all to adopt and follow the terms and conditions of sale set forth therein irrespective of the Code. How can that contention be sound when the record shows that the industry obtained at least two extensions for the effective date of Schedule A (CX 507C, CX 507A-M) and fails to show that it ever became an effective part of the Code? What possible reason could be members of the industry have for obtaining these extensions if they had actually agreed to adopt and follow the standard terms and conditions of sale included in Schedule A? The questions answer themselves. It would have been ridiculous, when the inclusion of these provisions in the Code would have afforded at least a measure of immunity, for respondents to petition for and obtain the exemptions if they actually planned, as a group, to adopt and follow such provisions. There was no such agreement outside of the Code negotiations and there is no evidence of the existence of any such agreement.

Legal advice was requested as to whether the Uniform Bases of Sale (Schedule A) could be installed by agreement before final adoption and approval of the Code. A recommendation was made that the procedure should not be undertaken but that one member could adopt it and then the others could voluntarily follow it if it was to their best individual interest to do so (CX 522B). This was in October 1933. The Code was approved on May 24, 1934 (CX 809). There was no legal advice that such provisions were not ones which could properly be included in the Code. It was only recommended that there should be no adoption thereof prior to the approval of the Code by the Government (CX 522B). The suggestion for voluntary action was obviously intended as a temporary expediency until the Code was approved. It was approved and the inclusion of Schedule A was also approved. Yet for six months or more thereafter the industry was active in preventing Schedule A from becoming effective. If there was any real and continuing desire on the part of all to follow the provisions thereof then certainly no effort would have been made to delay the effectiveness thereof under the protection of the N. R. A. Code. The truth of the matter is there was no such agreement by all.

We do not question the right of the Commission to draw inferences but we contend that the Commission, in drawing inferences, must follow the principles announced by the courts. We call attention to the decision of the Circuit Court of Appeals (3rd) in the case of *J. B. Lippincott v. F. T. C.* (137 F. 2nd 490) wherein the court held:

> "Evidence which is entirely circumstantial and which equally supports either of two opposed or inconsistent inferences cannot of itself be deemed to furnish substantial support for one of such inferences to the exclusion of the other. See *Pennsylvania Railroad Co. v. Chamberlin*, 288 U. S. 333, 339, and cases there cited. In connection with findings of an administrative body, it was said in *Appalachian Electric Power Co. v. National Labor Relations Board*, 93 F. (2d) 985, 989 (C. C. A. 4), that evidence 'which gives equal support to inconsistent inferences' is not substantial. See also *National Labor Relations Board v. Sun Shipbuilding & Dry Dock Co.*, 135 F. (2d) 15 (C. C. A. 3)."

When that principle is applied to the facts herein, there is no proper basis for an inference that the meetings served as a cloak for the adoption of illegal activities and agreements.

Sherwin has been a member of LIA since its inception in 1928 (CX 498 A-K, Tr. 996, 1010), but has never been represented on its board of directors or its executive committee (CX 499 A-H, Tr. 1011). Sherwin was not represented at the first meeting of the Lead Pigments Division of LIA held on July 20, 1933, where there was "A discussion of suitable trade practices to incorporate in a supplemental code for the Lead Pigments Division" (CX 799). Immediately after this first meeting representatives of all producers, including some who are not respondents herein, were notified "Will you kindly supply the Committee * * * with those items that might properly be discussed at the meeting on August 8 with respect to a supplementary code of fair competition" (CX 508D). Sherwin was represented, as were other concerns not respondents herein, at subsequent meetings of subcommittees of the Lead Pigments Division of LIA (CX 501 A-D, 502 A-C, 504 AB, 505 AB, 800 A-C, 801 AB, 803, 805, Tr. 1330), but there is no evidence that Sherwin's representative did anything other than attend such meetings and write one letter merely stating approval of the second draft of the code (CX 515 F). We do not propose to discuss here the agency plan but the record is clear that Sherwin openly opposed it when it was discussed and did not ever adopt it (CX 506

E, 712 A, Tr. 3701). There was much correspondence between the representatives of all other respondents concerning the various matters discussed at the meetings, such as zoning, the agency plan and terms and conditions of sale, but there is no testimony that Sherwin participated therein. All activities of these committees ceased in 1935 after the decision of the Supreme Court in the Schechter case (Tr. 998).

The white lead group of LIA became active again in the late 1930's in promotional work to stimulate the use of white lead (Tr. 998), but Sherwin was not represented (CX 500 B). There is no evidence that any representative of Sherwin ever took any part in any activity of this Committee or of the Association subsequent to May 1935 or attended its meetings thereafter (Tr. 1330).

So far as the record discloses the only contact which Sherwin has maintained with LIA since 1935 is the filing of monthly reports showing its volume of sales, production and stocks on hand (Tr. 1330) and the receipt of a composite report, such as CX 670, from the Association which contains merely a combined total figure for each product category without revealing in any manner individual producer's shipments, production or stocks on hand (Tr. 1330-1331, 2161, 2186-2190). The Association reports are also furnished to various departments of the U. S. Government, such as the Department of Justice, Federal Trade Commission, Bureau of Mines, Geological Survey, U. S. Tariff Commission and Bureau of Foreign and Domestic Commerce (Tr. 2168). Sherwin has never filed either current or historical price information or statements as to its terms and conditions of sale with LIA before, during or subsequent to N. R. A. (Tr. 2162, 2188). The Trial Examiner's Recommended Decision confirms the foregoing statements (Ex. Rec. Dec. Par. 5nG). Commission's Counsel has conceded that price filing is not an issue in the case (Tr. 2163). Even though Sherwin can determine its own percentage position in the industry by using the LIA reports, (Tr. 1331) there is no evidence that Sherwin is thereby furnished with information which it could unlawfully use in calculating, determining and announcing its quotations.

The foregoing constitutes a full recital of all the evidence concerning Sherwin's participation in the 1933-1934 meetings held under the sponsorship of LIA and its relationship to LIA from its inception to the present date. The charges in Items 3 and 4 of Subparagraph B of Paragraph Seven of Count I cannot be sustained as to Sherwin on the basis of such evidence.

C. Sherwin's Pricing Plan For Keg Products.

The Amended Complaint charges that the respondents have adopted and maintained (1) a delivered price system which prevents reflection of any differences in the cost of delivery from the respective places of manufacture of respondent producers to the respective locations of purchasers and (2) a zone system whereby price offers to all purchasers of a class throughout any one of such zones, regardless of location and the differences in freight rates from shiping point to destination, are matched, except that by prearrangement and understanding the offers made by Glidden, Sherwin and International are permitted, in some instances, to be made and maintained at fixed differentials below the matched offers of National and Eagle (Items 1 and 2, Subparagraph B, Paragraph Seven, Count I).

Any realistic approach to whether illegal agreements relative to pricing plans were entered into and subsequently pursued and to whether any particular concern participated in and became a beneficiary of such illegal agreements must be predicated primarily upon (1) the extent to which the particular concern's pricing plan conforms to the pricing plan allegedly agreed upon and activated, and (2) upon the particular concern's competitive ability to pursue any inconsistent course of action.

1. Less than carload shipments—F. O. B. shipping point.

a. Description of Sherwin's Shipping Point System.

While Sherwin is one of the largest manufacturers of mixed paint, it is by far the smallest producer of the products involved here (Tr. 1331-1332). Its sole plant for the production of lead pigments is located in Chicago (Tr. 1313, 3746). It has a number of warehouses at strategically located major cities throughout the United States from which it fills its less than carload requirements of paint and lead pigments (Tr. 3754-3756). Less than car lot orders account for about 90% of Sherwin's lead pigment business. In September 1939 there were 53 such cities which are hereafter called shipping points though they are warehouse points in every sense of the word (see Appendix II for map showing location of these cities) (CX 662 Z21, RX 198 A-H, Tr. 3756).

Each of Sherwin's ten district offices prints price cards for use in such district and the only authorized f. o. b. shipping points for such district are named thereon (CX 662 Z21, Tr. 3702, 3704). It is expressly stated that the prices quoted are f. o. b. the named

cities (CX 662 Z21). With certain exceptions hereinafter noted, Sherwin ships all less than carload shipments from the shipping point nearest the purchaser on a freight collect basis or the freight is prepaid and added to the invoice. (Tr. 3754-3755, 3759, 3836-3838, 3849-3850, 3855, and 4105-4106). This policy applies equally to white lead (dry and in oil), red lead (dry and in oil) and litharge when shipped in less than carload shipments (Tr. 3746). This method was used by Sherwin prior to the first meetings in the summer of 1933 (CX 662W) and has been used by Sherwin for twenty-five years (Tr. 1312, 1316-1317, 3695). There is no evidence to the contrary.

As to this system the Examiner found "Sherwin sold f. o. b. various shipping points in the par zone and elsewhere * * *" (Ex. Rec. Dec. par. 4d, p. 19): "To make accurate comparisons as to purchaser's costs, small freight costs from * * * Sherwin's shipping points to each destination would have to be ascertained and added to their lower quotations and these would be different for each location" (Ex. Rec. Dec. par. 5c5, p. 30) and "Sherwin departed from the zoning method by quoting f. o. b. various shipping and equalization points to many customers * * *" (Ex. Rec. Dec., par. 7a3, p. 39).

In the first paragraph on page 45 of their brief, Commission's Counsel adroitly intimate that the Examiner found that Sherwin was not using the shipping point system as represented yet they took exception to each of the above quoted findings (Com. Ex. VII). So, they cannot be under such misapprehension.

b. Is Sherwin's Shipping Point System Different From National's Old Free Delivery and Equalization Point System?

In their proposed findings Commission's Counsel state that Sherwin contends "* * * the present method is one of free delivery and equalization points as previously utilized in the industry prior to the conspiracy" (p. 32), and in their brief that "Sherwin is urging the unique theory that * * * its present method of selling is very much like the old 'differential' point system" (p. 45). These two statements do not correctly state Sherwin's contention. Sherwin's only free delivery points are (1) those 50 odd cities where it maintains warehouses and can make delivery either by its own trucks or local cartage (Tr. 3756, 3768, 3776); (2) those six cities (Washington, D. C., Gadsden, Alabama, Pensacola, Florida, San Diego, California, Chattanooga, Tennessee, and Salem, Oregon) which Sherwin has placed on an f. o. b. basis (Tr. 3757-3758, 3852-3855, CX 782 F), but which are not shipping points for other cities (Tr. 3759) and (3) those suburbs and environs of the cities included in (1) and (2) (Tr. 3768-3769, 3836-3838). Sherwin's free delivery points are directly related to the location of its warehouse stocks and its freight equalization involves not a system of points but only occasional equalization against its own normal shipping point for individual customers when such point is unable to ship. The record does not show that Sherwin has ever had any equalization points. In rare cases, because of lack of stock, a shipment may not actually move from the nearest shipping point (Tr. 3759). In such cases the freight is adjusted and equalized between the points involved with the customer paying no more than if the shipment had come from his normal shipping point (Tr. 3760, 3767-3768, 3839). This equalization is not predicated upon any competitive situation (Tr. 3700) and is not based upon any predetermined list of cities. It arises only in individual situations and is readily distinguished from the so-called freight equalization involved in the recent cases decided by the Circuit Court of Appeals for the Seventh Circuit: *United States Malsters Association, et al. v. Federal Trade Commission*, 152 F. (2nd), 161; *The Milk and Ice Cream Can Institute, et al., v. Federal Trade Commission*, 152 F. (2nd), 478, and *Triangle Conduit & Cable Co., Inc. v. Federal Trade Commission*, 168 F. (2nd) 175.

For many years prior to 1933 National maintained a delivery and equalization point system which is illustrated by CX 659 C-P. There were approximately six hundred such points in the forty states east of the Rocky Mountains. When deliveries were made to other towns the freight was equalized with the nearest equalization point (CX 659 N). We do not know how National made its selections as to which cities were to be designated, but it is patent that the selection was not made on the basis of actual location of its warehouse stocks and actual shipping points. The system used by Eagle before 1933 was also based on delivery and equalization points which had no relation to the location of its warehouse stocks or actual shipping points.

There can be no doubt but that prior to 1933 Sherwin used, and now uses, its own shipping point system and that such system differs from the delivery point and equalization systems formerly used by National and Eagle.

c. Is Sherwin's Shipping Point System Different From the Zone System Used by National and Eagle Since 1933?

The systems are different and produce different results. Under a zone system purchasers at every point within the zone receive the same price, and also the same total cost, from a seller using such system. (Ex. Rec. Dec. par. 4a, p. 14-15). The map appearing in Paragraph Eight of Count I of the Amended Complaint reveals that the zones are large in area and each covers a number of states. In the par zone (Wisconsin, Illinois, Indiana, Ohio, Kentucky, West Virginia, Maryland, Delaware, Pennsylvania, New York, New Jersey and all the New England states) Sherwin has only 21 shipping points; in the one-eighth cent zone (Virginia, Minnesota, Iowa and Missouri), it has five; in the one-quarter cent zone (Tennessee, Nebraska, Kansas, North Dakota and South Dakota), it has three; in the three-eighths cent zone (North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana and Arkansas) it has eight; in the one-half cent zone (Oklahoma, Colorado and Wyoming) it has three; in the three-quarter cent zone (Texas) it has five; and in the one cent zone (New Mexico) it has none. In the eight Pacific Coast States (Oregon, Washington, California, Arizona, Nevada, Utah, Idaho and Montana), which are in several zones according to the complaint, it has eight shipping points (CX 662 Z21, RX 198 A-H, Tr. 3756, 3850; Appendix II hereof).

Sherwin's reason for locating its shipping points in these cities is obvious. In each of the twelve most densely populated states where there is great dealer and industrial demand for its paint products it has located from two to five warehouses from which it distributes its products. In most other states it has located only one and in eleven states it has located none. **The location of these warehouses was dictated solely by the distribution problem in Sherwin's major line—the sale of ready mixed paint.**

Commission's Counsel contend that Sherwin's bulletins such as CX 662 ST actually list Sherwin's shipping points and that its shipping points are not limited to the 53 cities previously named. The only difficulty is there is no evidence whatever to support the theory and there is substantial evidence to the contrary. Actually Sherwin's bulletins, such as CX 662 ST, serve an entirely different purpose for Sherwin than CX 659 C-P (list of delivery, equalization and differential points) served for National and are not part of a zone system. Sherwin's bulletins are applicable only to

Sherwin's own warehouses and retail stores while National used its list of 600 cities as a guide in pricing its products to its customers generally. Since prior to 1924 (Tr. 1312, 1316-1317) Sherwin has circulated to its district sales staff and representatives in its own branch stores its General Trade Sales Bulletins (CX 662 ST) 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). Such bulletins serve no purpose for quoting prices or making billings to any customers (Tr. 3697) and do not constitute a list of Sherwin's shipping points (Tr. 3713-3714, Tr. 3846). Less than carload shipments to customers located in the cities listed on CX 662 ST which are not shipping points are made on a freight collect basis from shipping point (Tr. 3850).

The net result is that only in these 53 shipping point cities and the suburbs or environs thereof, where deliveries can be made by Sherwin's own trucks or by local cartage, and in those few cities which are sold on an f. o. b. basis is it possible for a less than carload customer of Sherwin's to receive the same delivered cost as a purchaser who buys on a zone delivered price basis. For delivery in all the other thousands of cities, town and localities, actual freight from the shipping point is paid by Sherwin's less than carload customers. When such freight cost is added to the shipping point price, the delivered cost to Sherwin's customers located away from its shipping points cannot be the same as the delivered price paid by customers of other sellers who sell on a delivered price basis and cannot be at a fixed differential therefrom.

d. Difference in Results From Operation of Two Systems.

Does the record show such identity of price, or fixed differentials in price, even in these few shipping point cities? The answer can be obtained by comparison of (1) quotations, and (2) actual sales. There is no such identity and no fixed differential. The examiner made an analysis of quotations by all respondents for white lead in oil during four periods (Ex. Rec. Doc. par. 5c5, p. 29). Practically all parties excepted thereto (Com. Ex. XII, Nat. Ex. 97, Glid. Ex. 40, Sher. Ex. 32), but it is correct to the extent of establishing the fact that in the four periods specified Sherwin quoted a price to its dealers which was 25¢, or more, lower per 100 lbs. than National and Eagle received from their agents and which was $1.25, or more, lower per 100 lbs. than the price quoted by National and Eagle to their dealers.

Comparisons of quotations during other periods show that this difference was not static. Beginning in March 1935 and extending for approximately one year National had three classes of agents and received from them $8.15, $8.30 and $8.45 per 100 lbs. for white lead (RX 158, CX 655B) while Sherwin was charging its dealers $9.00 per 100 lbs. (CX 662Y). In January, 1937, Sherwin's quotations to dealers for white lead in oil in any quantity was 9¼¢ per pound in 100 lb. kegs (CX 622 Z5), while National's quotation to dealers ranged from 11½¢ per pound for less than 500 lbs. in 100 lb. kegs to 10¾¢ per pound for 1,000 lb. shipments (RX 158). During this period the spread between National's agents and dealers was from $1.50 to $2.25 per 100 lbs. In March 1937 Sherwin's quotations to dealers in any quantity was $9.80 per 100 lbs (CX 662 Z7), while National's quotation to dealers ranged from $12.50 per 100 lbs. for less than 500 lbs. to $11.75 per 100 lbs. for 1,000 lb. shipments. Its quotation to agents was $10.05. Its spread between agents and dealers during this period varied from $1.70 to $2.45 per 100 lbs. (RX. 158). At other times it was a minimum of $1.00 per 100 lbs. (RX. 158). National had 500 lb. quantity and 1,000 lb. quantity discounts during these last two periods while Sherwin offered no quantity discount.

The Examiner also made an analysis of actual prices obtained by all respondents for white lead in oil during three separate three month periods (Ex. Rec. Dec. par. 5c6, and par. 5c7, pages 30-33). Both Sherwin (Sher. Ex. 36, 37, 38, and 39) and Counsel for the Commission (Com. Ex. XIII and XIV) excepted to the analysis and the findings made as a result thereof. Reference is made to Appendix I hereof for a correct statement of Sherwin's relative position. It is enough here to state that a true analysis of this sales data confirms completely the fact that in actual sales Sherwin followed its price quotation policy hereinabove described.

In the foregoing paragraphs we have referred only to National and Eagle because these two used the agency plan almost exclusively for the 1933-1944 period, but actually all respondents other than Sherwin used an agency or consignment method of selling. Sherwin has only one dealer class (CX 662E-V). Beginning about 1932 International sold 50% to 60% of its white lead in oil on the consignment plan (Tr. 3536). Glidden also used it partially for several years (Tr. 2518-2525).

Does the record show that the total cost to Sherwin's customers in these shipping point cities, who have no freight cost, is lower than the total cost to customers of National and Eagle?

Due to the peculiar situation arising through the agency or consignment method followed to some extent by International and Glidden and to a very predominant extent by National and Eagle (see Ex. Rec. Dec. par. 5c6, p. 31 and 32 for comparison of number of transactions by those respondents with their respective agents or distributors and with dealers), it is improper to evaluate the situation on a price basis alone. Sherwin's dealers must invest their own money in the outright purchase of their stock requirements and bear costs that agents of the other respondents do not (Ex. Rec. Dec. par. 5b3, 5b5, pages 23-25). Under such plan the manufacturer-seller bears the substantial cost of the inventory carried by the agent-dealers. The agents pay only after the merchandise is sold. It is impossible to minutely compare Sherwin's prices to its dealers in these cities with the charges made by other respondents to agents since the two classes function very differently. It is clear that, despite any apparent slight price advantage Sherwin's dealers in such cities might have, agents of the other respondents had a very definite advantage which eliminated for them certain costs which Sherwin's dealers had. Further, since January 1937 (CX 662 Z5) Sherwin has granted no quantity discounts whatever to dealers (except on the Pacific Coast) and National and Eagle, at various subsequent periods, have granted 500 lb. and/or 1,000 lb. discounts to their respective agents and distributors in all of the United States (Ex. Rec. Dec. par. 5c5, page 29; RX 158, CX 624 AB, CX 660). Such discounts completely overcome any advantage Sherwin's dealers might have started with even if we ignore the disadvantage to Sherwin's dealers due to a difference in the way the dealers and agents function. In comparing the cost to Sherwin's dealers with the charge to agents of Glidden and International, the situation is even more acute because there is less difference in price but the same advantage, from a total cost basis, to those dealers of Glidden and International who operate on a consignment basis.

At all points other than the shipping point cities and their respective environs, there is also a further disadvantage arising from the fact that Sherwin's dealers must pay freight on less than carload shipments from the shipping point and the agents and dealers of other respondents have a delivered price no matter what quantity is delivered or where they are located. In the many thousands of such locations the total cost to Sherwin's dealers will be greater than that of customers of other respondents for this reason—irrespective of all other factors. It must be remembered that in eleven states Sherwin has no shipping point and in about 20 others has only one in each state (see Appendix II).

The next question is whether this difference in price by Sherwin was a result of "prearrangement and understanding". The Amended Complaint and Commission's Counsel contend in the affirmative. There is no testimony to such effect. If such a finding were to be made it would have to rest solely on an inference drawn solely from the fact that National and Eagle permitted such lower price quotation to continue despite their predominance in the field and despite Sherwin's inability to reciprocate. The fact that Sherwin, which maintains fifty-three warehouses, always ships (Tr. 3777) to its shipping points in carload quantities at carload freight rates (which it pays), while the others, not having such extensive warehouse facilities, must fill less than carload orders by shipping from their plants at the higher less than carload rates (which they pay) supports a contrary inference and is better grounded. The difference in the two freight rates will average substantially more than 25¢ per 100 lbs., which is the closest that Sherwin's quotations approach National's and Eagle's quotations (see Appendix III hereof and also CX 791 B-J, CX 792 A-D). In setting its prices for these shipping points Sherwin takes into account only its carload freight rates to such cities while other respondents must take into account the less than carload freight rates throughout large areas. Thus Sherwin is able to pass the saving along to its customers.

c. Extent of Use of Shipping Point System for L. C. L. Shipments.

Commission's Counsel concede that Sherwin uses the shipping point system but urge, without showing the basis therefor, that the tabulations of Sherwin's invoices (CX 794 A-Z7 and RX 206 A-X) reveal that 91.97% of all the white lead-in-oil covered by the invoice tabulation was sold on a basis contrary to the shipping point basis and in conformity with the delivered price basis used by other respondents (Com. Brief, p. 45).

In reply we urge two propositions. First, no matter what percentages may be shown by these tabulations they do not, because of the type of selective process used, form any proper basis for making any determination as to what percentage of Sherwin's white lead was sold on a delivered price basis and what percentage was sold on a freight collect basis. Second, the percentages quoted by Commission's counsel do not correctly reflect the situation even as to the invoices tabulated.

In an effort to establish identity of price by some respondents and uniform variations therefrom by others, and to establish the differences in freight rates to particular cities from the differently located plants of respondents, the Commission's staff decided to obtain such price and freight rate information by an examination of a great number of invoices of all respondents. Sixty-seven cities located throughout the United States were selected. This selection was not a random one. Particular cities were selected because of their location relative to zone boundaries or because of their location relative to plants of the various respondents or for other reasons related to the price and freight rate information desired. (Tr. 887-891). The staff members were not interested then in who paid the freight—for all other respondents paid all the freight no matter where the shipment went. The special character of Sherwin's situation apparently was not then realized. The Commission prepared and introduced into evidence as CX 794 A-Z7 a tabulation of information taken from 845 invoices (white lead in containers of 100 pounds or less), during three separate three month periods, from all (CX 793, Tr. 887) of Sherwin's ten district offices to various destinations which were selected by the Commission's investigator (Tr. 887-891).

The staff members did not tabulate all invoices of lead for the periods used. The excess not tabulated ranged from 33-1/3% to 10% (Tr. 888-889). In the Cleveland area the percentage not used appears to have been much greater (Tr. 887-889). Counsel for the Commission was not concerned with who paid the freight and the tabulation (CX 794) as received in evidence contained no information on this subject (Tr. 893-894). As far as freight was concerned they were interested only in the applicable rate (Tr. 875, 891).

It is clear why the Commission's investigator eliminated the 33⅓% to 10% from the tabulation. He was only trying to establish *the fact of shipments from a warehouse point to particular cities at certain prices and the applicable freight rates.* So, once he had several invoices from one city to another he discarded invoices for similar shipments. If this happened to be a situation where the purchaser paid freight from the shipping point then other invoices showing an identical situation would be discarded. No attempt was made to determine how much lead moved on a freight collect basis from any shipping point to any other city. The selective process which involved the discarding of substantial numbers of invoices (without regard to amount of lead included) precludes the use of the tabulations as a basis for contending how much lead was sold on a freight collect basis or on any other basis. The simple fact is that

this problem was not in the minds of the Commission's staff when the tabulations were made.

Even as to these invoices alone the percentages stated by Counsel for the Commission are deceptive. Sherwin prepared and introduced into evidence a tabulation (RX 205 A-X) which shows all information on the same invoices (except 12 which were missing) relative to the payment of freight (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's 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 that 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, 3853-3856, 4113).

Appendix V hereof is a tabulation of the 833 invoices into selected groups which will be discussed. We are presently concerned with whether Sherwin substantially follows its f. o. b. shipping point policy on less than car lot shipments. As far as less than carload orders are concerned there are 742 invoices involving 508,693 lbs. How many of these involve shipments to purchasers located in shipping points and suburbs and environs thereof? First, there were 342 shipments (217,480 lbs.) which involved deliveries in the same cities where the respective shipments originated. (Of this total 71 invoices (89,085 lbs.) involved deliveries in Chicago where Sherwin has its plant. (See notes C, G, H and I of Appendix V). Second, there were 12 shipments (18,077 lbs.) which involved deliveries from one shipping point to a customer located in another. (As part of its shipping point policy it is necessary for Sherwin to supply customers at a shipping point with an f. o. b. price even though it is necessary in rare cases, because of a temporary shortage, to make delivery from another shipping point. Otherwise the individual customers would be penalized for Sherwin's inability to always maintain adequate stocks at all points. These shipments were so few as not to upset the percentages substantially in any event.) Third, there were 101 shipments (136,719 lbs.) which involved deliveries in the free delivery environs of the shipping points where the shipments originated. Thus 60% (455) of the transactions tabulated and 73% (372,276 lbs.) of the poundage involved deliveries in connection with which no freight would have been incurred by the purchasers under any sales plan. The lead had previously been shipped by Sherwin to its warehouses and stored awaiting ultimate sale. The payment of freight by Sherwin to such warehouses, under such circumstances, is certainly not under attack here. We cannot believe that the Commission is prepared to contend that Sherwin must charge this type of freight cost to the individual customers who may buy small amounts of lead weeks and months after it has come to rest in Sherwin's warehouses. So, in determining the extent to which Sherwin has, or has not, followed its pricing plan as above outlined these transactions should be excluded.

There may be some question as to why such a large percentage of Sherwin's business arises from local deliveries in shipping point cities and their environs. First, it is perfectly normal for Sherwin to locate its warehouses in those cities when it has the heaviest demand for its products. Second, the selection of approximately 65 cities to be included in the tabulation was deliberately made by the Commission' staff so as to include 35 of Sherwin's 53 shipping points. This ratio was greatly out of line. There were not enough non-shipping point cities in the selection to form any basis for determining what percentage of Sherwin's business was local shipping point business and what percentage involved payment of freight by Sherwin or anyone else. This particular problem was not considered when the selection of cities was made.

It is possible that Counsel for the Commission may attack the principle of free delivery in the suburbs and environs of shipping point cities by contending it is improperly extended beyond the normal scope of such principle. Three sheets of the tabulation (RX 206F, J and K) include 46 of the total 101 transactions of this class and 115,643 lbs. of the total 130,710 lbs. We find that 2 shipments, totalling 20,100 lbs., went from Newark, N. J., to the Bronx in New York City; that 20 shipments, totalling 60,268 lbs., went from Oakland to San Francisco; that 12 shipments, totalling 28, 750 lbs., went from Oakland to Alameda and that 6 shipments, totalling 2,075 lbs., went from Oakland to Berkeley. (See Notes J and K of Appendix V hereof). It is perfectly obvious that these four destinations (where 85% of the lead in this group went) are well within the metropolitan areas of the respective shipping points. Delivery at such points, and the other points disclosed, is entirely justified as part of the shipping point system and does not constitute an improper extension thereof.

The remaining invoices, therefore, actually involve 287 transactions and 154,494 lbs. upon which there could be any question as to whether Sherwin followed its shipping point policy by requiring the purchaser to pay freight from shipping point to destination.

The record shows, by the uncontradicted testimony of witnesses who examined the tabulations and the original invoices during their testimony, that 211 shipments involved payment of freight from the respective shipping points to destinations. These transactions amounted to 70% of the number and accounted for approximately one-third of the total remaining poundage. (Tr. 3771-3804, 3836-3850, 4103-4117).

Into what groups do the remaining 76 transactions fall? We have heretofore indicated there are certain exceptions to the f. o. b. shipping point system for less than car load orders. One type of exception, to which reference has been made previously, involves free delivery at six cities which do not serve as shipping points for other cities (Tr. 3758-3759). This exception is of no moment as the tabulation (CX 794) shows only 8 shipments of lead pigments to four of such cities during the nine months involved which were delivered free of freight for this reason alone. The amount totaled 5150 lbs. (see Appendix V hereof). Another type of exception involves free delivery to transportation companies (railroads and steamship lines) at the nearest point on the purchaser's line. There were no shipments during the nine month period where this type of exception was applied. There were several shipments to railroads but in all cases the delivery point on the purchaser's line was a shipping point, so actually no exception was involved.

The third type of exception involves free delivery on sales to federal, state and municipal governments and the respective agencies thereof for the reason that such agencies will not purchase on any other basis than a delivered price basis (Tr. 3746-3747, 3841-3842). There were only 27 transactions of this type involving 48,854 lbs. (see Appendix V hereof).

The fourth type of exception arises when the competitive situation is such that Sherwin must relax its regular system of charging freight from shipping point to destination on less than carload orders if it is to hold its old accounts or secure new ones. We do not want any misunderstandings to arise at this point. We are not now considering the "meeting competition" defense under Sec. 2 (b) of the Clayton Act. We are now concerned solely with the question of the extent to which Sherwin's pricing system is the same as that of the other respondents and whether the extent to which such identity does exist is a sufficient basis for a finding that the two systems are both operated as a result of an agreement. We are discussing 22 individual transactions and not a general policy of "meeting competition" at all points at all cost. With respect to the first six (RX

205 B, C, D & E—Appendix V) the record shows that three (CX 794 E—Inv. 13050, CX 794 F—Inv. 2094 and 4091) involved 13,000 pounds sold to one purchaser on the basis of "Special Bid Quotation for Government Project" and for that reason, if for no other, a departure from Sherwin's usual and normal pricing methods is justified. The other three involved a total of less than 150 pounds (CX 794 D—Inv. 4600; CX 794 F—Inv. 657 and CX 794 G—Inv. 660).

What does the record show as to the remaining 16 (RX 205 F and G; Appendix V hereof)? There were 6 shipments (5,402½ lbs.) from Newark, N. J. to Henry R. Bollinger who operates stores at Cornwall-on-Hudson, Poughkeepsie and Newburgh, New York. During the same period he purchased three carload orders (RX 205F). There were five shipments (1,806 lbs.) from Newark, N. J., and Syracuse, N. Y., to G. P. Barney who operates stores at Watertown and Pine Camp, N. Y. During the same period he purchased four carload orders (RX 205F). There were four shipments (4,449 lbs.) from Newark, N. J., to Pelton Hdw. Co. at Middletown, N. Y. There was one shipment (6 lbs.) from Syracuse to Mohawk Wallpaper & Paint Co. at Utica, N. Y. It is to be noted that in three of the foregoing instances (Pelton) the tabulation (RX 205G) reveals that the freight was paid because the shipments involved more than 200 lbs. each. In the Barney transactions only one-half of the freight was allowed (RX 205F). The concessions varied with the customer involved.

The Divisional Sales Manager for the Newark, N. J., division examined these sixteen invoices and then testified that the general freight policy on less than carload shipments was f. o. b. shipping point (Tr. 4105, 4113); that he was personally familiar with all of these accounts, and that all of those instances where Sherwin paid some part or all of the freight represented exceptions necessitated by the keen competitive conditions existing at Middletown, Newburgh, Watertown and Poughkeepsie, N. Y., brought about by the sale of National's and Eagle's brands of white lead by dealers in those cities (Tr. 4103-4113). He also stated there were a number of cities where Sherwin has accounts and all the other respondents have accounts in which Sherwin does not have to deviate from its general freight policy in order to continue selling and "We only delivered that where we were forced to make important accounts competitive, particularly in the larger centers," and that the number in which the concession would have to be made would be very small as compared to those where it would not have to be made (Tr. 4117).

Certainly the showing made as to these 16 transactions, is sufficient to establish beyond all doubt that such transactions were

exceptions to a general policy which were made necessary by competition and that even then Sherwin did not give up more than necessary to retain the business. This is well demonstrated by those transactions where only one-half of the freight was allowed.

The next group does not involve an exception. These invoices should be added to the group of 211 transactions where the purchaser paid freight. We have heretofore referred to the fact that in rare cases a shipment may not go from the nearest shipping point because of lack of stock (Tr. 3759, 3699-3700). In such cases the freight is adjusted and equalized between the points involved with the customer paying only the difference (Tr. 3760, 3838-3840) but never more than that if the shipment came from his normal shipping point (Tr. 3707-3768, 3839). The principle is perfectly illustrated by two shipments from Atlanta, Georgia to Athens and Huntsville, Alabama. These cities are normally served by the Nashville, Tennessee, warehouse, but the shipments from Atlanta carried the freight charge as if shipment were made from Nashville. This policy is necessary in order to prevent the customer from being penalized on these occasions when his normal shipping point cannot ship (Tr. 3799). It is of no moment here as there were only five instances involving only 5,150 lbs. (see Appendix V).

The last group consists of fourteen transactions (6,665 lbs.) for which no adequate explanation was readily available as to why Sherwin paid the freight cost. They amount to less than 2% of the number and 1% of the volume and, therefore are of no significance.

The net result is that Sherwin's (1) payment of all freight on government purchases, (2) payment of all freight on shipments to six cities which are sold on a f. o. b. basis, and (3) payment of some, or all, freight in special and individual cases in order to meet specific competitive situations, together with the fourteen unexplained transactions, constitute exceptions to its general policy of requiring the purchaser to pay freight on less than car load from shipping point to destination. These amount to only seventy-one transactions—less than 10% of the total.

This general policy, as operated, is so substantially different from the delivered price system of other respondents as to constitute it a separate and distinct system. There is no evidence that this system was set up for the purpose of providing Sherwin with a substantial counterpart to the zone system since the uncontradicted testimony shows it has been used by Sherwin in its present form for twenty-five years. (Tr. 1312, 1316-1317, 3695.)

1. Keg Products on Pacific Coast.

Sherwin's keg product sales on the Pacific Coast are extremely limited. In 1941 only 318 tons of white lead in oil was sold by Sherwin in this area (Tr. 4207). Shipments in the eight Pacific Coast states appear to be handled differently from those elsewhere. Commission's Exhibit 782D indicates that there are several cities in each of those states, in addition to those previously identified as being shipping points or as being within the normal 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. However, even if they should serve as shipping points, shipments to all other cities in such states would be handled on the same basis as shipments from other shipping points and purchasers would pay the freight cost therefrom to destination (Tr. 3862). Eight are in Montana, three are in Washington and Idaho each, two are in Arizona and Utah each, one is in Nevada and there are several in California (CX 782D). A number of those in California are obviously within the respective free delivery areas of the Oakland and Los Angeles warehouses. In these various cities Sherwin appears to have made flat increases over the San Francisco price and then added freight on shipments to all points except those named.

In the findings proposed by Sherwin a complete analysis was made of Sherwin's price announcements for the Pacific Coast area and of actual prices obtained in white lead-in-oil transactions there. Such analysis (Sher. Proposed Findings—line 22, page 15 through line 19, page 17) is incorporated herein by reference to the same extent as if fully set out hereat. This analysis fully and completely supports our contention that Sherwin's Pacific Coast business is not conducted on a pattern which conforms to the one alleged in Paragraph Eight of Count I. There appears to be a slight modification of the pattern used by Sherwin throughout the remainder of the United States but it is not the same as the zone delivered price system used by other respondents and does not produce prices which correspond to the prices obtained by others or to the differentials alleged in said Paragraph Eight.

2. Carload shipments of keg products—F. O. B. destination.

When a customer's order amounts to a carload or truck load then Sherwin ships from its factory in Chicago and pays the freight (Tr. 3707-3709, 3740, 3756, 3840-3841), but these shipments amount to only 10% of the total tabulated. An examination of the 91 invoices wherein Sherwin paid the freight to destination because the order was for a carload or truckload shows that the total amount of white lead involved was 102,262 lbs. (51 tons), which is equal to less than three actual carloads. The largest amount in any one invoice was 4,800 pounds. What actually happened in these 91 instances is that the purchaser ordered a carload of paint products from Sherwin and the lead pigments included in the order amounted to a relatively small proportion thereof. These 91 invoices involve only 80 separate shipments, because in 11 instances two or more invoices were included in one shipment. (See Appendix V and Appendix VI hereto.)

This f. o. b. policy is entirely consistent with Sherwin's basic policy of selling less than car lot orders f. o. b. warehouse points. In arriving at the price applicable at a warehouse point Sherwin has taken into account the cost of delivery to its warehouses in carload lots, since that is the way shipments are always made thereto (Tr. 3777). The carload rates from Chicago to any particular shipping point and to the other cities normally serviced by such point do not vary in any wide range. In order to illustrate how small a factor freight really is when all shipments are made in carload lots, we have made a tabulation of the carload freight rates to all of the cities which appear on Commission's Exhibit 791 BCD and which are located in the area comprising the so-called par zone, irrespective of whether they are shipping points or not. The average carload rate from Chicago to such destinations in the par zone area is 32¢ per 100 lbs., the lowest rate being 20¢ and the highest 42¢ per 100 lbs. (Appendix IV hereto). In support of our statement that the rates to shipping points and other destinations within the normal shipping area therefrom do not vary substantially, we call attention to the fact that the rate from Chicago to New York City and to Boston is identical, though the distances between the cities is quite substantial. Since each shipping point serves a concentric area around it at least one half of its trade area will have the same freight rate or a slightly lower one. So, as far as freight is concerned, it is a matter of indifference to Sherwin whether it pays freight on a carload to its warehouse or to other cities in the same area. Obviously it would be uneconomical to service carload customers from a warehouse because Sherwin would then have to pay the cost of loading the reshipment at the warehouse as well as its normal warehouse costs. It is an entirely proper business practice to eliminate this cost by shipping carloads direct. No price concession is made by Sherwin on carload orders. Sherwin merely pays the freight cost. It is true that other respondents also ship carload orders on a delivered price basis the same as they do on all less than car shipments and some of them make price concessions for carloads, but there is no evidence whatever that any of the other respondents and Sherwin have any agreement to do so. There is no evidence that the independent action of Sherwin in this regard represents any change from its freight policy before 1933, or is in any way inconsistent with its basic f. o. b. shipping point system for less than car lots. The only price information for this period in the record is a price announcement issued by Sherwin in 1932 relative to litharge and red lead in drums but this announcement stated "Carlots actual freight allowed not to exceed 50¢ per 100 lbs. Less than car lots f. o. b. nearest warehouse" (CX 823 A). There simply is no basis upon which the Commission can predicate an inference that Sherwin adopted in 1933 and 1934 any agreed method relative to this freight cost. It is still doing what it was doing all the time.

D. Dry Products.

"Dry products" are the same as "keg products" but are packed in bags, drums or barrels of 500 lbs. or 600 lbs. capacity instead of containers of 100 lbs. or less as in the case of "keg products." We have excepted to the Examiner's Findings (Ex. Rec. Dec. par. 4a, p. 15-16; par. 5c9, p. 33; par. 6d, p. 37-38 and par. 7b4, p. 42-43) which sustain the charges stated in Subparagraphs B, C, and D of Paragraph Eight of Count I to the effect that, as a result of the alleged agreement, dry white lead, dry red lead and litharge, when packed in barrels or bags, are sold by all respondents on a zone basis and that the prices for red lead and litharge in car lots of 20 tons or more are agreed differentials over American Smelting and Refining Company's quotation for pig lead (Sher. Exs. 17, 41, 62 and 63). We refer to Appendix I for a full statement of the record basis for such exceptions. Insofar as Sherwin is concerned the Examiner's Findings are not supported by the record or by the citations relied upon. Briefly we call attention to the record showing as to each type of product.

1. Dry White Lead.

For many years Sherwin's shipments of dry white lead, irrespective of size or type of container, to customers has amounted to "practically nothing— less than 1% (of the industry)" (Tr. 1331-1332). Sherwin does not make or sell sulphate (Tr. 1313). There is no evidence that Sherwin ever announced, even to its own em-

ployees, that it would sell dry white lead in barrels or bags on the Pacific Coast at a 25¢ per cwt. added differential over a base price before January 28, 1942 (CX 823 G) or has done so subsequently. (Tr. 1325) This single exhibit states "prices for the first quarter of 1942 will be as follows," and "we will not accept any contracts or open order business except as approved by this office." This bulletin was for use only by certain of Sherwin's employees in connection with soliciting quarterly requirement business (Tr. 1325-1326). There is no evidence it was ever circulated to the trade.

The record contains no evidence relative to a single sale of dry white lead in barrels, drums or bags by Sherwin to any customer anywhere in the United States at a differential price over a base zone price.

None of the paint manufacturers, who are large users of dry white lead for making mixed paint, included Sherwin as ever being one of their sources of supply for this product (Tr. 1335-1480). In this state of the record how can it be contended that Sherwin's single announcement of a quarterly price for dry white lead in barrels eight years after the conspiracy was allegedly entered into is evidence that Sherwin has participated in a conspiracy to sell dry white lead in barrels on an agreed zone system? If there is any burden of proof on the Commission, and we contend there is, it takes more than this to meet it.

2. Dry Red Lead and Litharge in L. C. L. lots.

3. Dry Red Lead and Litharge in car lots.

Sherwin's shipments of red lead and litharge, irrespective of size or type of container, to customers for many years has ranged from less than 1% of the industry shipments of litharge to "practically nil" for dry lead (Tr. 1332). Sherwin does not sell these products on the Pacific Coast (T. 1314). Sherwin does not make or sell red lead or litharge for use by the battery industry which is the largest user of such products and is not a competitor in that field (Tr. 1648, 4070, 4093). None of the battery manufacturers included Sherwin as ever being one of their sources of supply (Tr. 1673-2024).

While Sherwin sells these products in car lots (Tr. 1327), there is no evidence that it has made carload shipments of red lead or litharge to any customer at any point at a differential above its base price. Its officials have no information that such shipments have been made (Tr. 2065-2066). There is no evidence in the record that Sherwin ever had a car lot price which formed the basis for its charges for lesser amounts in different containers.

There is no evidence that Sherwin granted any 5 ton discount as a result of any agreement with any other respondent and there is evidence that it did not do so. The Commission contends that in the meetings in 1933 the respondents agreed to put the provisions of Schedule "A" of the Code into effect irrespective of whether the Code was ever approved and that they did so prior to the approval thereof. The Code was approved May 24, 1934 (CX 809). Anticipating this action National put a 5 ton discount into effect a few days earlier (RX 159 B). Some of the other respondents followed this action yet the evidence shows that Sherwin did not do so (CX 832 C). According to the record it did not grant a 5 ton discount until September 1935 more than a year later (CX 823 D). If Sherwin had been involved in a conspiracy to use an agreed discount for 5 ton lots when its representatives were attending the 1933 meetings why would it have waited over a year to do so?

The Examiner has found "Smeltings published prices on common pig lead are the New York market prices and are accepted by pigment producers as a basis for pricing their products" (Ex. Rec. Dec. par. 2a, p. 11). Sherwin knows nothing about whether Smelting is responsible for the New York market price of pig lead—that is, whether Smelting makes the market price or merely has a known policy of selling at the market. There is no evidence that Sherwin has accepted Smelting's prices for pig lead as a basis for pricing its products. In fact, there is uncontradicted testimony to the contrary (Tr. 1328). Sherwin prices its dry red lead in carlots on the New York market quotation as it appears in Engineering Mining Journal, a trade organ (Tr. 1328). We contend that Sherwin has individually decided to base its prices for dry red lead and litharge on the market price of pig lead because the production of these products is merely a conversion process for pig lead (Tr. 2563). There is no evidence that Sherwin did not use this system prior to 1933. There is some evidence that it did because Sherwin maintained the same differential of $1.00 per hundred pounds between dry red lead and litharge at least as early as 1932 (CX 823 A) which was prior to the date of the inception of the alleged conspiracy. Here again, Sherwin continued doing only what it was doing prior to the 1933 meetings.

The Examiner's evidentiary findings (Ex. Rec. Dec. par. 4a, p. 15-16 and par. 5e10, p. 33-34) upon which he bases his findings entitled "Evidence of Effects" (par. 6d, p. 37-38) and "Conclusions as to Agreements" (par. 7b4) do not contain a single reference to Sherwin or its prices for these products. There is no tabulation of

invoices issued by Sherwin and there is no evidence with reference to any specific sale by Sherwin of these products in car lots or otherwise.

E. Terms and Conditions of Sale.

1. Resale prices.

Subparagraph A of Paragraph Nine of Count I charges that each of the respondents, in selling lead pigments to dealers for resale, requires such customers to resell such products at prices and terms of sale fixed and determined by such respondent so that each of the respondents is responsible for the price levels to painters and consumers.

The Examiner found that the agency or consignment method of selling was a perfect tool for the control of the agent's prices by retailers to painters and other consumers and effectively accomplished that objective (CX 501 BC, 506 DE, 601 B; Tr. 2935). The Examiner's Recommended Decision sets forth in considerable detail the motivating factors which prompted the various respondents who used the consignment method to adopt it in the first place and then later substantially extend its operation (Ex. Rec. Dec. par 5b1 through 5b5). Sherwin opposed the consignment or agency method of selling and never adopted it (CX 506 E, 712 A; Tr. 3701). Counsel for the Commission so concede (Com. Brief, p. 45).

The Examiner also found that the use of fair trade agreements is also an effective method for controlling prices at the retail level. National used fair trade agreements for the sale of white lead in oil by retailers in at least nine of the states comprising its par zone (CX 576 A-E). There is no evidence whatever that Sherwin ever entered into fair trade contracts with dealers.

Sherwin distributes only one type of price card to its dealers (CX 662, 725, Tr. 3701). Such price cards show suggested prices for white lead-in-oil to consumers and painters which the individual dealers may or may not use at their discretion (Tr. 3696, 3700-3701). No suggestions are made to dealers with respect to dry white lead, red lead (dry or in oil) or litharge. There is no evidence that Sherwin ever took any action to control the resale price of any lead pigments to painters or consumers except in retail stores which it owned and operated. There is no evidence that Sherwin's dealer customers ever felt under any compulsion to, or did, follow the resale prices suggested by Sherwin or that Sherwin possessed, or attempted to exercise, any power to enforce its suggestions or policed its dealers for the purpose of ascertaining the extent to which they complied therewith. Consequently, there is no basis in this record whatever, so far as Sherwin is concerned, for the findings contained in the Examiner's Recommended Decision in Paragraph 7a9, p. 25; par. 7b4, p. 42 and par. 7c5, p. 44. Counsel for the Commission did not ask for an order against Sherwin on this point (Com. Proposed Order, Section I, par. 5) and specifically exempted Sherwin therefrom.

Undoubtedly, the use of the consignment or agency plan and the use of fair trade contracts by various of the respondents, acting individually, caused those sellers' respective agents and customers to comply, in large measure, with the manufacturers' desires concerning the retail price level for such lead pigments but there is no evidence whatever that Sherwin's dealers were similarly influenced. As a matter of fact, Sherwin is primarily interested in the sale of ready mixed paint which is highly competitive with white lead-in-oil (Tr. 3343-3344). The increased use of ready mixed paint in the last twenty-five years has been largely responsible for the decrease in the demand for white lead-in-oil. Sherwin's dealers are also primarily interested in the sale of ready mixed paints because their heavy volume of sales lies in that field. For that reason neither Sherwin nor its dealers are interested in resale price maintenance for white lead-in-oil, which is carried in stock by Sherwin's dealers primarily so that they will be in a position to supply the product upon request, in the event they cannot sell ready mixed paint to the particular customer. In view of this situation, it is little short of fantastic to conclude that Sherwin, or its dealers, have sufficient interest in the maintenance of resale prices for white lead-in-oil for Sherwin to become a party to an agreement or understanding or common course of action which has such result as its objective.

2. Container differentials.

On August 8, 1933, the Dry Products Committee of LIA tentatively approved for inclusion in the N. R. A. Code a provision setting up a differential on red lead and litharge of 50¢ per 100 lbs. over barrel prices for 100 lb. kegs; a differential of 75¢ for 50 lb. kegs; and a differential of $1.00 for 25 lb. kegs in sales to certain classes of purchasers (CX 800 C). So far as we can ascertain there was no further discussion of these provisions and they were not included in the Code as finally adopted and approved (CX 80C). At least since January 6, 1933, which was prior to the first Code meetings, Sherwin quoted a price differential of 25¢ per 100 lbs. when all lead pigments are packaged either in 50 lb. or 25 lb. pails instead of 100 lb. kegs and a differential of 50¢ per 100 lbs. when packaged in 12½ lb. pails (CX 662-W).

Thus, we find that Sherwin was following the basic practice of charging an additional price per 100 lbs. for red lead and litharge and the other lead pigments when they were packaged in containers of less than 100 lbs. capacity long before the first discussion reflected in the Committee minutes of August 8, 1933. In view of this fact and in view of the further fact that there is an actual difference in the cost of such containers, which is approximately the same as the differential charged (RX 210, Tr. 3882-3885), we contend there is no warrant whatever for drawing any adverse inference from the mere fact that Sherwin continued to charge these same differentials after the meeting in August 1933. The record simply shows that Sherwin has pursued the same course of conduct both before the meeting and thereafter. In fact, it was not until more than two years later, to-wit: January 4, 1937, that Sherwin made any distinction between the 50 lb. and the 25 lb. containers (CX 662 AB, EF). Does the Commission propose to infer that this action by Sherwin in 1937 was predicated upon a discussion and agreement more than two years earlier in point of time when there is nothing more? That is the situation here.

3. Quarterly contracts.

The Examiner has found that Sherwin entered into quarterly contracts for oxides and in support thereof cites CX 823 A-G (Ex. Rec. Dec. par. 5c, p. 35). Sherwin excepted to this finding on the basis that it is entirely unsupported by the exhibits relied upon and is contrary to the only evidence on the subject (Sher. Exc. 47). The record does show that Sherwin had quarterly contracts for dry white lead but not for oxides (Tr. 1326). There is no evidence as to the basis upon which Sherwin negotiates such quarterly contracts other than CX 823 G and there is no indication that the prices there quoted had any relationship to Smelting's price for pig lead. It will be noted that specific prices for both carload and less than carload orders are quoted for a quarter of a year to Sherwin's representatives who must submit contracts obtained in connection therewith to the home office for final approval. There is no testimony concerning the terms and conditions of any of such contracts so no inference that they are identical with or substantially similar to those of the other respondents is warranted. The Examiner found that no uniform sales contract was agreed upon or used generally (Ex. Rec. Dec. par. 5c, p. 35).

E. Red Lead quality differentials.

The Examiner has found that Sherwin, as well as all of the other respondents except International, quoted and sold red lead on the differentials agreed on for Schedule "A" (Ex. Rec. Dec. par. 5f). Sherwin excepted to this finding (Sher. Exc. 49). It is true that Schedule "A" of the Code, which never became effective, contained a provision reading:

> "(d) Red Lead containing ninety-seven per cent (97%) or ninety-eight per cent (98%) Pb_3O_4 shall be so marked on the package and shall be sold at not less than one-quarter cent (¼¢) and one-half cent (½¢) per pound, respectively, over Seller's price for grades of lower Pb_3O_4 content" (CX 809).

There is no evidence that Sherwin adopted the policy of quoting those three grades of red lead at different prices prior to January 14, 1942 (CX 823 F), and there is no evidence it was done then as a result of any agreement or understanding with any other respondent. The record contains three similar bulletins which were issued by Sherwin subsequent to the date of the approval of the Code in May 1934 and none of them quoted red lead in three different qualities (CX 823 C-E). It is obvious, therefore, that as late as the last of these, December 21, 1936, Sherwin had not adopted the practice of selling three different grades of red lead at differential prices. As far as the record discloses this was first done in 1942, but in any event it was first done sometime subsequent to December 21, 1936. Sherwin made a study as to the cost of making the three grades of red lead and it was found that the respective differentials quoted by Sherwin for 97% and 98% red lead were slightly less in each case than the additional cost of producing such grades over the cost of producing 95% red lead (RX 209, Tr. 3881). The Examiner sustained Sherwin's contention in this regard (Ex. Rec. Dec. par. 9c, p. 51). Does the Commission propose to infer that this action by Sherwin subsequent to December 1936 was predicated upon a discussion more than two years earlier in point of time when there is nothing more? That is the situation here.

F. Agency or Consignment Plan.

It is charged that one of the practices adopted as a result of the alleged conspiracy was the use of a plan of selling white lead through dealers who are appointed as agents and who sell from consigned stocks. (Item 5, Subparagraph B, Paragraph Seven, Count I). Sherwin's representative was present when the use of

such plan by some of the respondents was discussed during the N. R. A. period meetings (CX 501 A-D, 505 AB, 800 A-C), but was openly opposed to the plan (CX 506 E, 712 A) and Sherwin never adopted or used the plan in any form (Tr. 5701). The Examiner so found (Ex. Rec. Dec. par. 5b5, p. 25, par. 7a5, p. 39) and Commission's Counsel so concede (Com. Proposed Order, Par. I, Item 5, Com. Brief, p. 45). **Therefore, the charge set forth in Item 5, Subparagraph B of Paragraph Seven cannot be sustained as to Sherwin.**

G. Sherwin's Position in the Lead Pigments Industry.

In some cases the Commission has been able to establish a meeting of the minds among a group of respondents by proving the existence of an actual agreement by direct evidence, but in this case it is absent. In such event the Commission's only alternative is to establish facts from which the meeting of the minds and the agreement may be inferred. In doing so the Commission must appraise each respondent's incentive by evaluating the advantages surrendered by each respondent for the common benefit of all.

First, what is Sherwin's position in the industry from the standpoint of size? So far as the lead pigments industry is concerned Sherwin is, by far, the smallest unit. As previously stated, its percentage of white lead-in-oil will not exceed 5% to 6% of the total industry shipments and its shipments of all other products involved here are 1%, or less, of the industry shipments. **Many witnesses from the primary classes of purchasers of dry white lead, dry red lead and litharge testified and not a single one identified Sherwin as ever being one of its sources of supply for these products.** Further, Sherwin's participation in the lead pigment business is largely restricted to small orders. Of the 845 white lead-in-oil invoices tabulated by the Commission's staff, 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 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). (See Appendix VII.)

Sherwin is admittedly one of the largest, if not the largest, ready mixed paint manufacturer in the United States. Its promotional efforts are directed exclusively to the sale of ready mixed paints. The record is replete with testimony to the effect that ready mixed paints are highly competitive with the lead pigments involved in this proceeding, particularly white lead-in-oil and red lead-in-oil, and that the increased use of ready mixed paints in the last twenty-five years has been largely responsible for the decrease in the demand for white lead and red lead at the painter and consumer levels. The major portion of Sherwin's production of lead pigments is used in manufacturing its own mixed paints. Sherwin is really a negligible factor in the lead pigment industry.

Second, what was Sherwin's relation to the other respondents in 1933-1934? The record shows that during the 1933-1934 period, the Code for the paint, varnish and lacquer industry, also was being drafted. That industry, of which Sherwin is a leading member, was using every effort to bring the lead pigments industry under the paint code. The lead pigments industry resisted this effort and successfully prevented its inclusion under the paint Code (CX 705 A-D, 706 A-F). It is obvious, therefore, that Sherwin's primary interest lay with the paint industry and not the lead pigments industry. See also RX 201-204 for an interesting exposé of National's attitude towards Sherwin in 1942 which is not compatible with the attitude generally found among co-conspirators.

Counsel for the Commission have well put it "As a large manufacturer and seller of mixed paints, it (Sherwin) was opposed to consignment selling and never did adopt this phase of the conspiracy" (Com. Brief p. 45). The same reasoning is applicable to the other phases of the alleged conspiracy. Sherwin is a very important member of the paint industry and a very unimportant member of the lead pigments industry in which it has no substantial and no real interest. If the members of an industry, such as the lead pigments industry, should propose to enter into any agreement to control and dictate the prices and terms and conditions of sale for their products they certainly would not have any desire to include, or feel any necessity for including, a member of the industry who (1) was a very small and negligible factor in such industry and who (2) was a very large producer and seller of competitive products which would not be included within the scope of the agreement. There could be an incentive for so doing only if the other member of the industry was in a position to obstruct the full operation of such plan. Sherwin was certainly not in such position in an industry of which it was in fact a very minor factor and with which it was in substantial competition as to its major sales efforts. The only other possible incentive would arise from the fact that Sherwin's plant location was such as to impede the full operation of the plan. We will demonstrate conclusively that it was not in such position.

Assuming there was an agreement on the part of some of the respondents, which we deny, there was no incentive from a plant location standpoint, for including Sherwin.

During the period from 1936 to 1941, National produced approximately 60% of the basic carbonate of white lead in oil sold on the market, from 30% to 35% of the dry white lead, basic carbonate, sold on the market (Tr. 1647, 1665-66; Com. Ex. 664). The combined total percentage of dry white lead, basic carbonate, and basic carbonate of white lead in oil sold on the market for this respondent was 58.5% in 1938 and 53% in 1941 (Com. Ex. 669).

However, the Amended Complaint defines white lead as including both basic carbonate of lead and basic sulphate of lead. Eagle is the largest producer of basic sulphate of lead and National produces it in relatively small quantities. Therefore, in determining National's overall position in the white lead market account must be taken of the production of basic sulphate. Based upon the figures in the record National's overall percentage of white lead production including both basic carbonate and basic sulphate, represents approximately 50% of the production of such products.

During the same period National's production of red lead and litharge amounted to approximately 50% of the total production of such products by manufacturers for resale. In arriving at this percentage the production of such products by battery manufacturers for their own use is not taken into account (Tr. 1646-1647, 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 nine plants located in Brooklyn, New York; Philadelphia, Pennsylvania; 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 produced (exclusive of its sulphate production) from 15% to 20% of the white lead in oil and approximately 10% of the basic carbonate dry white lead (Tr. 1560-1561). In addition, this respondent produced and sold substantial quantities of basic sulphate of lead (Tr. 3357, 4129). During the period from 1937 to 1944, Eagle-Picher produced and sold the following quantities of basic carbonate of lead and basic sulphate of lead respectively (Tr. 4129):

SALES TONNAGES.

Year	Basic White Lead Carbonate	Basic White Lead Sulphate
1937	4,533	7,348
1938	3,356	5,955
1939	3,246	5,315
1940	2,769	4,986
1941	5,163	8,066
1942	3,116	5,820
1943	3,113	3,889
1944	3,666	4,342

Eagle-Picher produced basic carbonate of white lead at its plant in Cincinnati, Ohio (recently dismantled), and its oxides, red lead and litharge, at plants located in Joplin, Missouri, and Newark, New Jersey (Tr. 1552, 1564). In addition, it manufactured blue lead and basic white lead sulphate at its plants in Galena, Kansas, Hillsboro, Illinois and Joplin, Missouri (Tr. 3386, et seq., 3421, 3600). Thus, Eagle-Picher had three plants manufacturing basic white lead sulphate, leaded zinc oxide and blue lead, two plants manufacturing oxides, and one plant manufacturing basic carbonate of white lead (Chicago has now been substituted for Cincinnati as the point of manufacture of basic carbonate).

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 sold from 3% to 4% of the white lead in oil and from 10% to 12% of the dry white lead (CX 741, 822-J). International discontinued production and sale of white lead and on October 1, 1946 sold its plant at East Chicago, Indiana, which is within the Chicago switching area, to Eagle so that Eagle now also has a plant located in the Chicago area for the production of white lead.

Obviously the location of such plants as above described results in some of the respondents having a territory surrounding their respective plants where they have an advantage, due to freight rates, over other producers located elsewhere. The size of the area of advantage varies with the distance to the location of the nearest plant operated by a competitor. The Commission contends that all of

the respondents have given up and surrendered their respective areas of advantage in return for a mutual surrender of advantage by each other and proposes to issue an order which will require, in effect, each respondent to retire to its own freight advantage territory and sell there alone. National's Oakland, Saint Louis and Philadelphia plants have a freight advantage in a major portion of the United States over any other white lead plant operated by a respondent herein. National 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. Eagle's Cincinnati white lead plant had a freight advantage over any other white lead plant in a substantial area while in operation. Due to the recent abandonment of that plant the major portion of that territory will be controlled by either St. Louis or Philadelphia with small portions going to Chicago and Scranton. 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, International's plant (now owned by Eagle) and Sherwin all have the same freight advantages in a relatively small and lightly populated area surrounding Chicago. The net result is that Glidden, National and Eagle have a freight advantage in various territories, but Sherwin has no advantage in any territory. This is due to the fact that National and Eagle (since its acquisition of International's plant) both have white lead plants in Chicago where Sherwin's sole plant is located and also have plants elsewhere.

In a large portion of the United States National has a freight advantage over red lead and litharge plants of all competitors due to the fact that it operates nine red lead and litharge plants strategically placed throughout the whole United States. Eagle has a freight advantage in part of the country by reason of its plant at Joplin, Missouri. Sherwin has no advantage in any territory. National, Glidden and Sherwin 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 respondents other than Sherwin have plants.

Sherwin has only four shipping points (Detroit, 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 48 shipping points, or to areas served y such shipping points, Sherwin is at a freight disadvantage to ne or more of the other respondents. The identity of the specific roducer who has the advantage over Sherwin in each such situa-on will vary depending upon which one has a plant located closer, reightwise, to such shipping point than Sherwin's plant at Chi-ago. Sherwin is at a disadvantage, freightwise, to at least one of he other respondents in the entire United States except North and outh Dakota, Iowa, Minnesota, Wisconsin, Michigan and the north-rn parts of Illinois, Indiana and Ohio, and even in this area it does ot have an advantage, freightwise, over all other respondents. It hares that area with other respondents.

II. NO INFERENCE WARRANTED THAT SHERWIN PARTI-CIPATED IN A PLANNED COMMON COURSE OF ACTION.

We do not propose to argue the basic questions of law arising nder Count I but adopt and rely upon the briefs filed on behalf f other respondents, particularly National, for an adequate pres-ntation thereof. We do wish, however, to discuss one proposi-on which applies peculiarly to Sherwin.

Counsel for the Commission have relied heavily upon the case f *Fort Howard Paper Co., et al. v. Federal Trade Commission*, 56 Fed. (2nd) 899, and have stated that the facts in the two cases ear a striking resemblance. (Com. Brief, p. 18.) We cannot gree with that statement and we challenge its correctness. We all attention to the fact that the Circuit Court of Appeals in de-iding that case first stated the basic proposition that "The mere ing of price lists, or the use of pricing zones, or the existence f an identical or substantially similar price for a standard prod-t is not conclusive evidence of an allegal conspiracy". There ust be something more before an inference of illegality is war-nted. We contend that Sherwin's pricing practices, in the main, re so different from those of the other respondents that no in-rence of agreement is warranted. We contend further that there lacking, so far as Sherwin is concerned, one important element hich has been present in all of the cases decided by the Courts here agreement has been inferred from identity of pricing prac-ces.

Since November, 1945, the Circuit Court of Appeals for the venth Circuit has had occasion to review and uphold five deci-ons in which the Commission had predicated its findings upon ferences arising through the use of freight equalization systems

and zone price systems whereby each manufacturer surrendered a freight advantage in the territory nearest its own plant in return for a corresponding surrender of freight advantage by each other respondent.

In *United States Maltsters Association, et al. v. Federal Trade Commission*, 152 Fed. (2nd) 161, an order was issued by the Commission (Docket 3555) against eighteen maltsters who control more than 65% of the domestic market for brewers' malt. Eleven respondents have their plants in Wisconsin, three in Illinois; two in New York; and one each in Pennsylvania and Michigan. They sold malt only f. o. b. point of delivery. Price uniformity was obtained by the use of Chicago as a freight basing point in reporting to the Association. Upon appeal, the Circuit Court of Appeals in upholding the Commission's order, stated:

> "We are of the view that the Commission's findings that a price fixing agreement existed must be accepted. Any other conclusion would do violence to common sense and the realities of the situation. The fact that petitioners utilized a system which enabled them to deliver malt at every point of destination at exactly the same price is a persuasive circumstance in itself. Especially is this so when it is considered that petitioner's plants are located in four different states and that the barley from which the malt is manufactured is procured from eight or nine different states" (p. 164).

In *The Milk and Ice Cream Can Institute, et al., v. Federal Trade Commission*, 152 Fed. (2nd) 478, an order was issued by the Commission (Docket 4551) against eight manufacturers who manufacture approximately 95% of the metal milk and ice cream cans distributed in the United States. Two respondents have their plants in New York; two in Illinois; and one each in Michigan, Pennsylvania, Minnesota and Wisconsin. They sold on a freight equalization basis whereby the delivered cost to a purchaser was the same regardless from whom the purchase was made or from which producers' point shipment was made. The Commission found that the freight equalization plan, as used by these respondents, was not used on a competitive basis when reaching into a competitor's territory but was used only to match competitors' prices (Par. 7). Due to the wide diversity of location each respondent actually had a substantial territory in which it had a freight advantage. Upon appeal, the Circuit Court of Appeals, in upholding the Commission's order, stated:

". . . a customer located in St. Paul could purchase cans at the same delivered price irrespective of whether the purchase was made from a member located in Chicago or St. Paul. Just how such an unnatural situation could be brought about by members of an industry without a plan or agreement is difficult, if not impossible, to visualize. The mere fact that the situation did exist in and of itself furnishes strong support that the Institute and its members were acting cooperatively and by agreement.

* * * *

"On the face of the situation, it taxes our credulity to believe, as argued, that petitioners employed this system without any agreement or plan among themselves." (P. 481, 482.)

In *Fort Howard Paper Company, et al.* v. *Federal Trade Commission*, 156 Fed. (2nd) 899, an order was issued by the Commission (Docket 4606) against eight concerns who comprise all of the manufacturers of crepe paper. Two of the respondents have their plants in Massachusetts; two in Pennsylvania; two in Wisconsin, and one each in New York and New Jersey. They sold crepe paper on a zone price system with uniform delivered prices to all purchasers within a particular zone and uniform price differentials among the zones. There was an unquestioned freight advantage by the two manufacturers located in Wisconsin in a substantial territory and a corresponding advantage on the part of the manufacturers located in New York, Pennsylvania, New Jersey and Massachusetts. *On appeal the Circuit Court of Appeals*, in upholding the Commission's order, stated:

"The existence of substantial similarity in delivered prices to zoned territories having identical zone price differentials, by six manufacturers located at different places, was not a happenstance. Nor, looking at the situation objectively, was it the inevitable and unescapable result of keen competition in a standard product of invariable qualities. To be sure, a keen competitor strives to meet a lowered price of a competitor immediately upon becoming aware of it, but he does not strive to and invariably match a price which is *higher* than that at which he needs profitably to sell, unless by express, or tacit agreement, all manufacturers have found existence to be less strenuous for all concerned by merely setting a price for three zones in the whole United States, and except for such (identical) zone differentials, discarding and ignoring the substantial item of freight. We are unable to comprehend a manufacturer's disdain of a natural advantage utilizing the same to gain local business, unless he were indoctrinated with the belief (or forced by superior economic competitors to align himself to

concerted action of identical delivered prices) that elimination of all competition was economically preferable. (P. 906.)

* * * *

"One glance at the three zone map for bulk crepe will show the artificiality of the zone structure and intention to obviate any natural advantage of location from price determination. (P. 906.)

* * * *

"We think the artificiality and arbitrariness of the zone structure is so apparent it can not withstand the inference of agreement. The Commission evidently could not believe that Wisconsin companies would deprive themselves of the natural benefit of location in the midwest, and proximity to the west over eastern competitors, were it not agreed that they would have equal chance for the eastern business, where most of the crepe paper manufacturers were located." (P. 907.)

In *Triangle Conduit & Cable Co., Inc.* v. *Federal Trade Commission*, 168 Fed. (2nd) 175, an order was issued by the Commission (Docket 4452) against thirteen manufacturers of rigid steel conduit who control approximately 93% of the capacity for the manufacture of rigid steel conduit (Com. Brief CCA p. 4). Their respective plants are located primarily in New York, Pennsylvania, Illinois, Indiana, West Virginia, and Ohio. They sold rigid steel conduit on a basing point system which resulted in a uniform delivered price. Upon appeal, the Circuit Court of Appeals, in upholding the Commission's order, stated:

"And the existence of a plan or method which equalizes the delivered costs or prices of competitors having widely different freight costs to given destinations constitutes strong evidence in itself of an agreement to use such plan or system. (P. 179)

* * *

"The record clearly establishes . . . that purchasers at or near a place of production could not buy more cheaply from their nearby producer than from producers located at greater distances, and producers located at great distances from any given purchaser quoted as low a delivered price as that quoted by the nearest producer. (P. 180)

* * *

"Each seller consciously intends not to attempt the exclusion of any competition from his natural freight advantage territory by reducing the price, and in effect invites the others to share the available business at matched prices in his natural market in return for a reciprocal invitation." (P. 181.)

In *Allied Paper Mills, et al.* v. *Federal Trade Commission* (Decided June 11, 1948), an order was issued by the Commission (Docket 3760) against forty-two corporations engaged in the manufacture and distribution of book paper who control approximately 80% of the production capacity (Com. Brief CCA p. 2). Eight have their plants in Ohio; seven in New York; seven in Massachusetts; five in Michigan; four in Pennsylvania; three in Wisconsin; two each in Virginia, Washington, and Minnesota, and one each in California and Illinois. They sold on a zone system in which the states of North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, Arkansas, Louisiana, Mississippi, Alabama, Georgia, South Carolina and Florida were in zone 2—all states east and north of these states were in zone 1. Wyoming, Colorado and Texas were in zone 3—all other states were in zone 4. Upon appeal, the Circuit Court of Appeals, in upholding the Commission's order, stated:

> "The petitioners did with varying uniformity use the zoning system of price quoting, and the existence of this plan which equalizes delivered prices of competitors having widely different costs at a given destination, is strong evidence in itself of an agreement to use such plan."

It is clear that in each of these cases the Circuit Court of Appeals gave great weight and consideration to the fact that each of the respondents subjected itself to the restraint of not using a freight advantage which it had in selling in the territory surrounding its own plant in return for a reciprocal restraint by each other respondent.

In the briefs before the Circuit Court of Appeals in these cases the Commission's Counsel stressed and relied upon this same basic situation which was characterized as a "very important competitive factor". (See Com. Brief before C. C. A. in *U. S. Malsters Ass'n. et al.* v. *Federal Trade Commission*, pages 18 and 19; Com. Brief before C. C. A. in *The Milk & Ice Cream Can Institute, et al.* v. *Federal Trade Commission* pages 25 and 26; Com. Brief before C. C. A. in *Triangle Conduit & Cable Co., et al.* v. *Federal Trade Commission*, pages 28, 32, 33, 63, 68; and Com. Brief before C. C. A. in *Allied Paper Mills, et al.* v. *Federal Trade Commission*, pages 18, 27, 38-41).

In several of these briefs the Commission's attorneys have stated the proposition of law as follows:

> "Uniform participation by competitors in a particular system of doing business where each is aware of the other's activities is sufficient to establish an unlawful conspiracy if the effect be restraint of interstate commerce."

and have relied upon the foregoing cases and upon *Wm. Goldman Theatres* v. *Loew's Inc.*, 150 Fed. 738 (CCA 3, 1945); *Bigelow* v. *R. K. O. Radio Pictures*, 150 Fed. 2nd, 877 (CCA 7, 1945), and *Interstate Circuit* v. *United States*, 306 U. S. 208. These three cases, while not concerned with freight problems, involve situations where each of the defendants voluntarily surrendered certain exclusive trading rights in return for a reciprocal surrender on the part of each other defendant. Consequently, these decisions do not detract in the slightest from the position here taken by Sherwin.

In the case against the Cement Institute, et al. (Docket 3167), Paragraph Eight of Count II of the Commission's Complaint contains the following language:

> "* * * Each said producer knows that, in reciprocity for its omission to offer competitive prices to prospective customers located in the consuming areas adjacent to its mill (where it has a natural advantage and receives its highest actual price), each respective producer will receive the same immunity from price competition when it sells in the consuming areas adjacent to other mills. A difference in delivered price of only one cent (1¢) a barrel will deflect the business away from one manufacturer to another. Thus each reciprocally waives the advantages and neutralizes the disadvantages which it has in certain consuming areas as aforesaid in order that there may not anywhere be genuine competition in price between producers which, except for such reciprocal waiver and neutralization, would be in normal and active competition in price."

In its Findings as to the Facts in the Cement case the Commission found:

> "This count (Count II) further alleges that such discrimination in price is the result of respondents' combination to use the multiple basing-point delivered-price system and that under this system each respondent knows that in reciprocity for its omission to offer a competitive price to customers located in areas adjacent to its mill, where it has a natural advantage and receives its highest actual price, other respondents will reciprocally waive their advantages and thus the advantages and disadvantages of each will be neutralized 'in order that there may not anywhere be genuine competition in price.'
>
> "(b) Upon consideration of the record, the Commission finds that each material allegation of Count II, and in particular each of the above-described allegations, is sustained by the evidence." (Par. 24)

The above quoted language advances the same theory which runs through the series of cases hereinabove discussed. Thus, the Commission itself has recognized what the situation must be if the Commission is to successfully infer the existence of an illegal agreement from similarity of pricing practices.

That situation is not present here. The Supreme Court, in the case of *U. S. v. International Harvester Company*, 274 U. S. 693 held:

"And the fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination. *United States* v. *Steel Corporation*, supra, 448. And see *Cement Mfg. Protective Association* v. *United States*, 268 U. S. 588, 606." (p. 708).

It is one thing when the Commission may have some basis for drawing an inference that price similarity was the result of an agreement, either express or implied; but it is quite another thing when there is only the price similarity and no basis for inferring a sinister aspect. We have already demonstrated that Sherwin's pricing policy results in prices which are not identical, to any substantial extent, with the prices of other respondents. We contend, however, that to the extent such similarity does exist it represents nothing more than the exercise of Sherwin's independent judgment and prudence to get as good a price for its product as possible under the circumstances prevailing. This is not enough to warrant any inference of participation in any unlawful action.

Irrespective of what the situation may be with respect to the other respondents in this case, it is an undisputed fact that Sherwin had no territorial advantage at any time over all other respondents. At all times it has had to share whatever freight advantage Chicago may have had over other manufacturing points with other respondents. (See Paragraph G of Section VI hereof for factual justification of these statements.)

In view of that situation, we contend that the Commission is not warranted in drawing any inference that Sherwin participated in any planned common course of action. If such arrangement was actually planned, it could, and would, have functioned fully without cooperation from Sherwin since its sole plant was covered, freightwise, by other respondents at all times. There would have been no inducement for including Sherwin. It had nothing to contribute. Further, its primary distribution set up through its warehouse and retail stores was entirely different from that of any of the principal producers and produced different prices. Under the circumstances here prevailing, we insist that Sherwin is entitled to a dismissal of Count I of the Amended Complaint.

VIII. INDIVIDUAL ACTS OF SHERWIN NOT A VIOLATION OF SECTION 5 OF FEDERAL TRADE COMMISSION ACT.

It is proposed that each respondent be required to cease and desist from "acting individually, or otherwise, so as knowingly to contribute to the accomplishment of any of the acts, practices or things listed in paragraphs numbered 1 through 5 of Section I of this order". (Sec. II—Order Proposed by Counsel for Commission). We have previously taken the position that there is no such issue as is contended (Com. Brief, Sec. VI, par. C, p. 5) and argued (Com. Brief, Sec. VII, par. C, p. 22-25) by Counsel for the Commission.

Even if there were such an issue, the proposed order (Section II), if entered, would be illegal. Such order would prohibit, for example, an individual respondent from independently selling lead pigments at specified price differentials depending upon size or type of container; or upon size or type of shipment to customers; or upon the type of business in which customers may be engaged. **Thus the order would ban all functional differentials and ban all quantity differentials even when respondents individually determine the amount of any differentials granted and even though such differentials differ as to each respondent.**

Since this section of the proposed order is predicated upon a claimed violation of the Federal Trade Commission Act, the protection afforded by the proviso clauses of Section 2 (a) of the Clayton Act would not be available. It cannot be the law that, by proceeding under the Federal Trade Commission Act rather than under the Clayton Act in cases involving alleged individual price discriminations, the Commission can avoid the impact of the Congressional intent which is stated in Sec. 2 (a) of the Clayton Act as follows:

"*Provided*, that nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

We cannot believe Counsel for the Commission are seriously urging a proposition which nullifies that provision of the Clayton Act.

Counsel for the Commission predicate their request for the entry of Section II of the order proposed by them squarely and solely upon the case of *Triangle Conduit and Cable Co., et al.* v. *Federal Trade Commission* (C. C. A. 7th, May 12, 1948). They state at page 23 of their brief as follows:

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"Each respondent shares his business in the territories in which he has an advantage, freightwise, knowing well that he will have reciprocal rights in distant areas contiguous to plants of the other respondents."

The above quoted statement is a rephrasing of a statement made by the Circuit Court of Appeals in the *Triangle Conduit & Cable Company* case, which statement is also quoted on page 24 of the brief as follows:

"* * * Each seller consciously intends not to attempt the exclusion of any competition from his natural freight advantage territory by reducing the price, and in effect invites the others to share the available business at matched prices in his natural market in return for a reciprocal invitation.* * *"

While Counsel for the Commission rely upon this decision completely, they choose to ignore the vital difference in the facts. The above quoted statement from their brief does not reflect correctly Sherwin's position in the industry and the preceding sections of this brief demonstrate the statement's fallacy.

Unquestionably the Court considered the facts there set out as determinative of the Commission's right to enjoin individual action as an auxiliary relief in cases primarily resting upon a charge of conspiracy and agreement. There the respondents individually were enjoined from doing certain acts *only if done* "*for the purpose or with the effect* of systematically matching delivered-price quotations with other of said respondents or producing the equivalent of such matched delivered prices through systematic discriminations in the mill nets received on sales to different purchasers." (Commission Order in Docket 4452). The Commission's purpose in entering such an order is obvious. It desired to prevent the effect above quoted no matter how achieved. The Court agreed to the extent of holding that parallel and simultaneous action of the respondents, under certain circumstances, might constitute an unfair method of competition. One circumstance which was persuasive is set out in that part of the decision above quoted. In our opinion, it is the crucial one because if a manufacturer voluntarily gives up an exclusive territory that fact is sufficient to raise a question as to why it was done. All other factors being equal, it might then be proper to decide that it was because such manufacturer obtained something in return—entry into some other concern's exclusive territory.

Even if that was the correct decision in that case, it is not authority for what is attempted here. First, Counsel for the Commis-

sion are seeking an entirely different kind of order. This is no effort to prevent uniformity of purpose or effect in certain fields through individual action. It is a plain effort to prevent the respondents from individually engaging in the acts specified in paragraphs 1 through 5 of Section I without regard to purpose or effect. In so doing it is very different from the order approved in the Conduit case. Second, even if an order similar to the one approved in that case is contemplated, it should not apply to Sherwin. It has no territory which it can trade for entry into a competitive trade territory and so does not meet one of the primary and necessary qualifications.

The case of *Salt Producers Assn. et al, v. Federal Trade Commission* 134 Fed. 2nd 354 also involved an alleged conspiracy to fix prices through use of a zone system. In its order the Commission used the phrase "common course of action" instead of the traditional phrase "planned common course of action". Petitioners raised before the Court the question of whether individual action was prohibited by reason of the omission of the word "planned". In its brief in that Court the Commission stated:

"Needless to say the Commission has no thought that it can or should interfere with the independent or competitive determination of prices or production policy by the petitioners and the order is not fairly susceptible of such interpretation. The legal and economic concept of price fixing automatically excludes independent action. Petitioners assume without warrant for purposes of their argument that the legal and economic concept may include it. The idea that petitioners might be proceeded against for violation of the order because of such independent competitive determination is grotesque and would hardly occur to any one who in good faith acts independently and competitively." (Page 21)

The position there taken cannot be reconciled with the one now presented. They are diametrically opposed. The position taken in the Salt Producers case is the only correct one.

IX. PRICE DISCRIMINATIONS—COUNT II.

A. Preliminary Statement.

Count II of the Amended Complaint which charges the respondents with several types of alleged unlawful price discriminations, relies upon the same acts and practices as are relied upon to sustain the planned course of action and conspiracy charge of Count I. We, too, rely upon the facts detailed in Section VI hereof, together with such additional facts as may appear, to support our contention that Sherwin has not violated the Clayton Act. We also rely upon the briefs submitted on behalf of other respondents, particularly National, for a general discussion of the applicable legal principles and the pertinent decisions relative thereto and confine ourselves to matters which peculiarly concern Sherwin. So far as Count II is concerned there is almost no reference to Sherwin in the Findings proposed by Counsel for the Commission, in the Examiner's Recommended Decision, or in the Commission's brief.

In Section V of the proposed findings submitted by Counsel for the Commission, which is devoted exclusively to "Discriminations Under Count II", we find a statement which reads:

> "Examining Respondent's Exhibit 200, which relates to red lead, it will be seen that each of the respondents has some territory within which it has an advantage, except that Glidden and Sherwin-Williams are located in Chicago where National also has a plant so that in the territory including northwest Ohio, portions of Indiana, Illinois, Iowa, Nebraska, North and South Dakota, and in Minnesota, Wisconsin and Michigan the three producers share an advantage over other plants." (p. 41)

That is a grossly unfair and misleading statement for the simple reason that Counsel fail to point out to the Commission that all of the plants whose freight advantage territories adjoin the area there described are plants of National—one of the three producers located in Chicago. With that single exception there is no reference whatever concerning Sherwin or its pricing practices or the competitive effect of such practices upon its customers in such section.

In Paragraphs 9-b and 9-c of that section of the Trial Examiner's Recommended Decision which is entitled "Count II" (pages 46-60) reference is made to the practice of charging a premium for pigments when packed in 50 lb., 25 lb. and 12½ lb. containers and to the practice of charging premiums for 97% and 98% red lead over the price charged for 95%. The Examiner held both practices were justified on the basis of added cost. With those two exceptions there is no specific reference concerning Sherwin, or its pricing practices or the competitive effect of such practices upon its customers in such section. Occasionally reference is made to "all respondents", but there are no supporting record or exhibit citations justifying Sherwin's inclusion.

Section D, which is entitled "The Zone Prices of the Respondents are Unlawful Discriminations Within the Meaning of Section II of the Clayton Act, as Amended", and Section E, which is entitled "The Quantity Discounts Applicable to Red Lead and

Litharge are Unlawful Discriminations Under Section 2A" of Counsel for the Commission's brief contain no specific reference to Sherwin or its pricing practices or the competitive effect of such practices upon its customers although Section G, in general terms, requests the issuance of an order against Sherwin.

Those portions of these three documents which deal with alleged violations of the Clayton Act are concerned exclusively with the pricing practices of National and Eagle in the sale of dry lead to paint manufacturers; the practices of National, Eagle and Glidden in the sale of dry red lead and litharge to battery manufacturers and discrepancies between premiums charged and freight incurred by National in shipping from its St. Louis, Dallas and Atlanta plants and by Eagle in shipping from its Joplin, Missouri, plant. Except as above mentioned there is no reference to Sherwin. With that being the situation we can only discuss (1) the fact that the findings of price discrimination against the other respondents are not applicable to Sherwin in view of its different pricing system, and (2) failure of proof as to similarity of practices engaged in and as to competitive effect. In doing so we will follow the same patterns as used by the Examiner in his Recommended Decision (P. 46-60), so that the Commission may readily see that the Examiner has not based his Findings as to Count II upon any sound record showing of Sherwin's activities in the categories considered by him. First, the Trial Examiner discusses alleged discriminations arising through the zone pricing system (a) between customers located in the same zone, and (b) between customers located in different zones, the customers being in competition with each other (Ex. Rec. Dec. p. 46). Second, he discusses alleged discriminations arising out of differences in price effected through different trade, regional and quantity discounts (Ex. Rec. Dec. p. 46).

B. Zone Discriminations.

1. Evidence concerning zone price system.

The Examiner discusses alleged discriminations arising through flat delivered prices throughout a par zone with added differentials in other zones in Paragraphs 8a-1, 8a-2, 8a-3 and 8a-4 of the Recommended Decision (Ex. Rec. Dec. p. 46-50).

We do not think it necessary to repeat in detail Sherwin's contentions which have been set out in Section VI hereof to the effect that Sherwin operates on a shipping point system and not upon a zone system. We wish to recall, however, that there are only

21 cities in the area which comprises the so-called par zone in which Sherwin has a delivered price for less than carload quantities; that it delivers carload quantities to the purchaser's destination away from a shipping point at the same delivered price which would be applicable at the shipping point; that the payment of freight on carload shipments to destinations other than shipping points is paid by Sherwin simply because such freight does not vary in any appreciable amount from the carload rates to its shipping points which it normally pays; that at all destinations other than shipping points Sherwin charges for less than carload deliveries its shipping point price plus actual freight therefrom to destination.

In Paragraph 8a-1 of the Recommended Decision the Examiner describes the formula by which he proposes to ascertain whether there is a price discrimination through the use of a zone delivered price system.

In Paragraph 8a-2 the Examiner illustrates the amount of variance in mill net in making shipments to cities in the par zone and each of the differential zones. The illustration given for the par zone is the only one which possibly could apply to Sherwin because it is the only one which involves shipments from Chicago to two different cities. The rates used, however, are for less than carload shipments. Sherwin would ship to those two shipping points only upon a carload basis and the difference then between Milwaukee and Wheeling is only 11¢ instead of 27¢ per 100 lbs. (CX 792 BCD). In the fourth zone illustration there is a comparison of shipments from Chicago, Illinois, to Atlanta, Georgia, and from Philadelphia, Pennsylvania, to Charleston, S. C. This illustration is not applicable to Sherwin. The other illustrations all involve shipments from St. Louis which is where National, but not Sherwin, has a plant.

In Paragraph 8a-3 the Examiner discusses (1) the effects of the discriminations illustrated in the preceding paragraph upon paint manufacturer and battery manufacturer customers who ship products made from lead pigments into areas where competitors are located who secure an advantage because they do not pay the full freight from the factory and (2) the effects arising due to shipments by National from plants located in differential zones to nearby battery manufacturer's at an added differential over its par zone price.

So far as the record shows the effect here related arises only in the case of paint, battery or other manufacturers who use large

quantities of lead pigments in manufacturing their own end products which are sold over wide areas in competition with similar end products manufactured by their competitors. There is no evidence whatever in this record that Sherwin sells to battery or paint manufacturers or to any customer who uses lead pigments in manufacturing processes for products sold in national or interstate competition. Sherwin's only sales for resale are to local paint dealers who operate in restricted trade areas. The effect produced by shipment from a plant located in a differential zone to nearby customers at a differential price cannot arise with Sherwin as it has a single plant in Chicago. The competitive problems among manufacturers engaging in wide distribution of their own end products are vastly different from local ones and no cross inference from one field to the other is warranted.

In paragraph 8a-4 the Examiner discusses the effect of Eagle's shipment of oxides from its plant at Joplin, Missouri, into various nearby premium zones, particularly to battery manufacturers. He also stated, in referring to oxide zones, "freight differences do not appear to bear any relation to price differences" (Ex. Rec. Doc. par. 8a-4, p. 50). The record contains no evidence that Sherwin sells these products to the class of customers under consideration. Sherwin does not sell to battery manufacturers (Tr. 1648, 4070).

2. Evidence as to effects of zone pricing as stated by Examiner.

In paragraph 10-a the Examiner found that zone differentials in the border territory of two adjoining zones and added differentials for shipments originating and terminating in the same premium zone increased the cost of oxides to some customers over and above differences in transportation and other costs. So far as Sherwin is concerned the record contains no evidence whatever that it has ever made any sale of any lead pigment to any customer who is a competitor of another customer who paid a different price by reason of location. As to shipments originating from plants located in a premium zone and terminating in the same or another premium zone, we again say it is impossible for this situation to exist for Sherwin as all of its products are originally shipped from Chicago.

In paragraph 10-b the Examiner discusses the testimony relative to the competitive effect of the zone pricing system and quantity differentials in the sale of oxides to battery manufacturers. In paragraph 10-c the Examiner discusses the testimony relative to the competitive effect of the zone pricing system and quantity real freight difference either from the various shipping points or from Chicago to cities that are located within fifty miles of each other—and that is the maximum trade territory for any local paint dealer.

Even if one dealer buys in carload lots direct from Chicago and the other buys in smaller quantities from a shipping point, the actual freight cost from the shipping point represents the only saving the carload purchaser obtains because Sherwin has no carload quantity discount on keg products which are the ones sold to dealers. This additional freight from shipping point to destination would be extremely small because Sherwin's average freight cost in the entire par zone area on shipments from Chicago to the destinations listed (including New York City, Boston, Philadelphia and Baltimore) is only 32¢ per 100 lbs. (Appendix IV). Further, the Commission offered no proof whatever concerning the competitive advantage to retail dealers who buy in carload lots as opposed to those who buy in small quantities where the freight difference would be as small as here and where the competitive fields are restricted. The only evidence as to competitive effect is that of paint manufacturers and battery manufacturers who use tremendous quantities of lead pigments in manufacturing products which they resell in wide territorial competition. The record shows *no sales by Sherwin to such manufacturers.*

The Commission also offered no testimony tending to show any competitive effect whatever between Sherwin's customers who buy for maintenance purposes and who may pay different prices because of location. The impact of the small difference here involved in the cost of a maintenance item, such as lead pigments, on the competitive effort of the respective purchasers in their respective fields and areas is so small that it simply cannot be measured.

The Examiner concluded that the inter-zone prices are, in fact, different prices and are justified only when the additional freight equals or exceeds the zone premium (Ex. Rec. Dec. par. 10h, p. 56). We contend that Sherwin's shipping point system is so different from the zone system that the foregoing statement is not applicable to it. Including the shipping point cities and six f. o. b. point cities, there are fewer than fifty cities located in the entire United States outside of that area described as the par zone, in which Sherwin offers delivered prices. There are varying differentials applicable to these cities but these differentials, insofar as Sherwin is concerned, are applied for the purpose of enabling it to recoup, in whole or in part, the additional freight.

ost paid by it in shipping from Chicago to such distant points. Sherwin's justification for added differentials to these shipping points is different from that of any other respondent because it ships originally only from Chicago, whereas the two largest producers, National and Eagle, ship all products to all of their premium zones from plants located much nearer thereto than Chicago. For example, the carload rates from Chicago to the eight cities listed on CX 791 BCD which are located in National's *three-eighths* cent zone average 73¢ per cwt. Sherwin charges 37½¢ per cwt. premium for shipment to these cities, thus leaving 35¢ per cwt. to be paid by Sherwin for its freight cost. This compares favorably with the 32¢ average freight cost which it has to the 22 cities in the area comprising National's par zone (see Appendix IV). Further, the Commission offered no testimony whatever that Sherwin's dealers served by one shipping point and those served by another which had a different price ever competed with each other.

Lastly, Counsel for the Commission has admitted "there has been actual evidence of injury to competition in the secondary line only in paint and in the battery field. That is the only direct evidence that there is in the record, that is direct evidence of injury in the secondary line flowing from these discriminations". (Tr. 2096.) The record does not show such sales by Sherwin.

Consequently we contend that the Examiner's conclusions as to the effect of inter-zone differentials does not apply to Sherwin for the several reasons stated.

C. Trade, Quantity and Quality Differentials.

1. Trade differentials.

The Examiner has *found* that the *consignment method* of selling white lead in oil by some respondents provided a differential of substantial competitive value for which no justification was made. (Ex. Rec. Dec. par. 9-a, p. 50; par. 10-e, p. 55). Since Sherwin never sold on this basis, it is unnecessary to comment further (Tr. 3701). Since December 1936, at least, Sherwin has had only one dealer class (CX 662 E).

2. Quantity differentials.

a. Due to Container Size.

The Examiner has found that added differentials for keg products when packed in containers of 50, 25 and 12½ lb. capacities

were justified by Sherwin on the basis of additional cost for the larger number of containers required (Ex. Rec. Dec. par. 9-b, p. 50; par. 10-i, p. 56). Counsel for the Commission did not except to such finding and have not requested the entry of an order with respect to this practice insofar as the Clayton Act is concerned.

b. As to Carload Discount for Dry Carbonate.

The Examiner has found that all respondents sold dry carbonate in car lots at a discount of ¼¢ per pound under the price for smaller quantities and that in the majority of cases this difference is less than the difference between carload and less than carload freight rates and that no lessening of competition among customers was shown (Ex. Rec. Dec. par. 9-e, p. 52; par. 10-k, p. 57).

Despite the Examiner's favorable finding we must call attention *to certain facts since Counsel for the Commission has excepted* thereto (Com. Exc. XX). **The record contains evidence of only one sale of one barrel of dry carbonate by Sherwin (CX 794Z).** There is no testimony or other evidence that Sherwin ever sold carload quantities at a discount of ¼¢ per pound or, even if it did, ever sold to the only classes of customers who testified as to the competitive effect thereof. It may be contended that an inference can be drawn from CX 823 G that such sales did take place. This exhibit is a bulletin which was sent to Sherwin's sales department relative to prices on quarterly requirements (Tr. 1320). It was never placed in the hands of dealers or other prospective customers so as to become a general offer. Even a "quotation of prices" to customers is not an offer to sell in the sense that a complete contract will arise out of the mere acceptance of the rate offered or the giving of an order for merchandise in accordance with the proposed terms. *Backberg v. Washburn-Crosby Co.*, 92 SW 733. This bulletin was for the information of the sales staff only and all orders, contract or otherwise, were subject to approval. **In order for discrimination under the Clayton Act to be established there must be actual sales at the two prices to two purchasers.** See *Shaw's Inc. v. Wilson-Jones Co.*, 105 F. (2d) 331 (CCA 3rd); *Package Closure Corp. v. Sealright Co., Inc., et al.*, 141 F. (2nd) 972 (CCA 2nd); *Sorrentino v. Glen-Gery Shale Brick Corp.*, 46 F. Supp. 709. **Further, the two purchasers must be competitors.** (Clayton Act, Sec. 2 (a)). The only testimony on this point is that of the aforementioned paint and battery manufacturers who were not shown to be purchasers, individually or as a class, from Sherwin.

c. As to 500 lb. Quantities of Keg Products.

The Examiner has found that all respondents employed a price differential of ¼¢ per pound for keg products when purchased in 500# quantities which bore no relation to freight differences but that no substantial effects were shown since all purchasers could qualify by purchasing about $50 worth (Ex. Rec. Dec. par. 9-f, p. 53; par. 10-e, p. 57). Sherwin used this practice only in its Pacific Coast sales. (CX 662E, CX784B).

d. As to Car Load and 5 Ton Discounts for Oxides.

The Examiner has found that all respondents granted a 90¢ per cwt. discount for car load and a 50¢ per cwt. discount for 5 ton orders of red lead and litharge which were greater, in a substantial number of cases, than the differences between car and less than car freight rates. (Ex. Rec. Dec. par. 9-d, p. 51-52; par. 10-d, p. 55).

Again, in order to establish competitive effect among purchasers from such discounts Counsel for the Commission and the Examiner rely upon the testimony solely of the paint and battery manufacturers to whom Sherwin was not shown to have made sales either individually or as a class. Further, even if CX 823DEF do show a discount of 50¢ per cwt. on 5 ton orders, we rely upon the proposition that these bulletins which are circulated only to Sherwin's sales staff are not sufficient to establish any price for the varying quantities in actual sales. Quotations, and these bulletins are not even that, are not sufficient to meet the requirements of the Act. There must be at least one sale at each of the two prices to purchasers who are competitors. No actual sales by Sherwin at any specified price or at any specified discount were established. That being true it was not necessary for Sherwin to undertake the burden of justification, which arises only after a *prima facie* case has been developed.

3. Red Lead quality differentials.

The Examiner found that premium differentials of 25¢ per 100 pounds for 97% red lead and 50¢ per 100 pounds for 98% were charged and that these higher grades of red lead required extra processing which involved extra cost amounting to as much or more than the differentials charged (Ex. Rec. Dec. par. 9-c, par. 10-i). Counsel for the Commission did not except to this finding and did not request the entry of an order with respect thereto insofar as the Clayton Act is concerned.

X. DISCRIMINATIONS AND EFFECT THEREOF MUST BE MEASURED ON INDIVIDUAL BASIS.

Counsel for the Commission has taken the position that violation of the Clayton Act can be established by proof only that the respondents had practiced discriminations "for the purpose and with the effect of enabling the respondents to suppress and eliminate competition between and among themselves". (Com. Brief, p. 25; Tr. 2096-2097). This contention is predicated upon the theory expressed in Paragraph Twelve of Count II of the Amended Complaint. The Examiner did not accept this theory and stated:

> "The question of discrimination involved in this case is individual and must be considered with respect to each respondent acting alone from the standpoint of effects as between its customers. Effects arising from cooperatively employing the same discriminations, or from employing the same methods which are not discriminatory but which produce identical prices, are considered and disposed of under Count I. It is not thought, therefore, that the discriminatory acts of any individual respondent had the effect of lessening competition between it and other respondents except as the same were collusively employed." (Ex. Rec. Dec. par. 10m, p. 57).

We are in complete agreement with the foregoing statement by the Trial Examiner and are confident that it correctly expresses the meaning to be given the terms "lessen competition" and "tend to create a monopoly" as those terms appear in section 2(a) of the Clayton Act, as amended.

The Clayton Act was under consideration in Congress as early as 1913. The House Committee on the Judiciary made a report on the measure on May 6, 1914. The Committee's comment on Section 2 is, in part, as follows:

> "Section 2 of the bill is intended to prevent unfair discriminations. It is expressly designed with the view of correcting and forbidding a common and widespread unfair trade practice whereby certain great corporations and also certain smaller concerns which seek to secure a monopoly in trade and commerce by apeing the methods of the great corporations, have heretofore endeavored to destroy competition and render unprofitable the business of competitors by selling their goods, wares, and merchandise at a less price in the particular communities where their rivals are engaged in business than at other places throughout the country. This section expressly forbids discrimination in price between different dealers of commodities that are sold for use, consumption, or resale within the United States or any

place within its jurisdiction, when such discrimination is made with the purpose or intent to thereby destroy or wrongfully injure the business of a competitor, either of such dealer or seller. * * * In the past it has been a most common practice of great and powerful combinations engaged in commerce—notably the Standard Oil Co., and the American Tobacco Co., and others of less notoriety, but of great influence—to lower prices of their commodities, oftentimes below the cost of production in certain communities and sections where they had competition, with the intent to destroy and make unprofitable the business of their competitors, and with the ultimate purpose in view of thereby acquiring a monopoly in the particular locality or section in which the discriminating price is made. Every concern that engages in this evil practice must of necessity recoup its losses in the particular communities or sections where their commodities are sold below cost or without a fair profit by raising the price of this same class of commodities above their fair market value in other sections or communities. Such a system or practice is so manifestly unfair and unjust, not only to competitors who are directly injured thereby but to the general public, that your committee is strongly of the opinion that the present antitrust laws ought to be supplemented by making this particular form of discrimination a specific offense under the law when practiced by those engaged in commerce."

The above quoted excerpt from the committee report makes it clear that what the committee had in contemplation was a destruction of competition by a manufacturer discriminating in such a way as to injure its competitors. There is not the slightest intimation in any of the committee reports or conference reports indicating any different purpose. The whole history of the legislation shows that the injury contemplated was to be inflicted by directly taking business from a competitor as a result of lower prices. It did not contemplate injury arising out of a mere advantage to the buyer receiving a lower price. It was directed at the proposition that the buyer who received the lower price employed it so as to cut prices in competition with less favored buyers from the same seller or from that seller's competitors. The case of *American Can Co. v. Ladoga Canning Company*, 44 F. (2d) 763, demonstrates unquestionably that the term "lessening of competition" refers to a direct injury which tends to drive a competitor out of business.

In construing the same words, as they appear in section 3 of the Clayton Act, as amended, the Supreme Court, in the case of *Standard Company v. Magrane-Houston Co.*, 258 U. S. 346, took the position that contracts which directly injure the business of a competitor had the effect of lessening competition and of creating a tendency to monopoly.

When the original Clayton Act was amended by the enactment of the Robinson-Patman Act, the words "or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with the customers of either of them" were added to Section 2 (a). We think that the use of the words *injure, destroy,* and *prevent* spell out specifically the meaning to be attributed to the preceding phrases "to lessen competition" and "tend to create a monopoly".

The same acts which are relied upon to establish a voluntary restraint which may be an unfair method of competition under Section 5 of the Federal Trade Commission Act may not be held to involve price discriminations which lessen competition or tend to create a monopoly under the Clayton Act. The two theories are incompatible.

It is obvious that Sherwin was never in any position to injure any of its competitors so as to adversely affect their ability to compete with it at any point in the entire country, and there is no proof whatever that Sherwin's pricing practices have caused any injury among its customers so as to injure the ability of any of them to compete with other customers or with customers of other producers.

Even if the Commission should hold that the theory of its counsel is correct, it still would not be applicable to Sherwin by reason of the facts set forth in Sections VI and VII hereof. Since Sherwin did not participate in any planned common course of action, then Sherwin also is not guilty of the cooperative acts which constitute the only claimed basis for a violation of the Clayton Act insofar as Sherwin is concerned.

XI. CONCLUSION.

In the foregoing brief we have demonstrated the following propositions:

1. Sherwin has based its price schedules upon free delivery at its various 50 odd bona fide warehouse points, or in the environs thereof, with each customer paying the actual freight therefrom to his own destination on less than car load orders. This system is contrary to a zone delivered price system.

2. By far the predominant percentage of Sherwin's sales of lead pigments involve quantities of less than five tons shipped in less than car lots.

3. Sherwin has not set up a zone system for keg products, which are the only items sold by it in substantial volume, and its freight

at such warehouse points with purchasers paying freight on less than car lots *therefrom to destination.* If Sherwin is not to be permitted to continue to operate on this basis, which is substantially different from that upon which the other respondents operate, then the Commission might just as well enter, as to Sherwin, a very simple order directing it to go out of the lead pigments business and leave it to the big producers.

We refuse to believe that the Commission can possibly hold that the public interest requires it to enter an order which, *in effect,* will result in an exclusive territory system for all respondents. This system, set up under the Commission's direction, would define the areas in which each producer was permitted generally to operate and would have a much more harmful effect than any now flowing from the zone system used by some of the respondents. Sherwin can compete, in some measure, with the zone system now in operation but cannot compete with the system the Commission proposes to substitute.

Public interest is not static and action which might be in the public interest in one situation is contra-indicated in another. What was ordered *in the other recent zone and freight equalization* cases might be in the public interest in such cases—having in mind the number of producers and the basic diversity of location.

But here the facts are different. There are two large multiple plant producers. The other respondents are single plant producers. Further Sherwin's single plant is located in the same city as plants of both of the multiple plant producers. The result of an order requiring all respondents to follow a mill pricing system will serve no good purpose—unless the Commission views it as a good purpose to further restrict the number of operators in this industry. The problem, at least so far as Sherwin is concerned, is just that simple. The Commission literally can force Sherwin's retirement from this particular field of competitive effort. We cannot believe the Commission desires that result or that the public interest requires it.

Respectfully submitted,

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APPENDIX I.

Sherwin has heretofore filed its exceptions to the Trial Examiner's Recommended Decision pursuant to Rule XXIII and in connection therewith has specified the portions of the record and the authorities relied on to sustain each exception. It is felt, however, that as to some of such exceptions a further explanation, in addition to the record references already submitted, will be helpful to the Commission in determining the validity of such exceptions. Each such explanatory statement will carry the same number as the exception to which it refers.

1. The Amended Complaint (Subparagraph B of Paragraph Nine of Count I) does not refer to containers of 75 lb. capacity and Sherwin did not use such containers (CX 662 A-Z26).

2. The Amended Complaint (Subparagraph C of Paragraph Nine of Count I) charges that each respondent "enters into quarterly contracts covering terms of sale and delivery of lead pigments, either at current published quotations or at a fixed differential over the quotation of the American Smelting and Refining Company for common pig lead at New York". The Examiner's analysis omits that portion of the foregoing statement which concedes that some of the respondents determine their price under quarterly contracts without regard to Smelting's quotation for pig lead. *Sherwin did not use* Smelting's quotations (Tr. 1328) and entered into quarterly contracts for dry white lead on the basis of published price quotations (CX 823 O). It did not sell any other lead pigments on a quarterly contract basis (Tr. 1326).

3. The Examiner's summary of the answers omits Sherwin's contentions (1) that the major portion of its production of white lead and red lead is used in the manufacture of paint products not involved in this proceeding; (2) that a substantial portion of its remaining production of white lead and red lead is sold by it at its retail stores in transactions which originate and are completed entirely within the confines of *a single state* and which are not subject to the jurisdiction of the Federal Trade Commission; (3) that its production of litharge is not substantial and is sold, with few exceptions, if any, only to large industrial concerns purchasing for use and not for resale; (4) that its sales of the lead pigments involved in this proceeding constitute a very small and negligible part of the

otal sale of such products by all producers; (5) that it sells the lead pigments involved in this proceeding on a shipping point system which is different, in its major aspects, from any system used by any of the other respondents herein; and (6) that it does not require its dealer customers to resell lead pigments bought for it at prices or terms of sale fixed and determined by it.

12. CX 669 gives the total production of "white lead" (both dry and in oil) for the years 1938-1941. The total tonnages there indicated are identical with the tonnage shown on CX 666 for "white lead" (dry and in oil). However, on CX 666 the tonnages of basic sulphate of lead are shown as separate items and are not included in the figures which are used to make the tonnage of "white lead" conform on the two exhibits. There can be no doubt, therefore, that the tonnage of basic sulphate is not included in CX 669 or in the table contained in Paragraph 1-e of the Examiner's Recommended Decision.

13. The second table which appears in Paragraph 1-e of the Examiner's Recommended Decision is erroneous—*even as to production percentages* of basic carbonate of white lead. MacGregor is stated as having a combined 4 year average of 1.2%. This figure was calculated by adding the percentages appearing under the heading "MacGregor" for two of the four years, and then dividing by 4. The tabulation was prepared from information contained in CX 669. For 2 of the 4 years reported, MacGregor's percentage was shown specifically but for the other 2 years an explanatory note stated "Shipments by MacGregor in 1938 and 1940 are included in 'Other'." Consequently it is impossible to determine the 4 year average for MacGregor. There is a *further error*. The Examiner has designated the 4 year average of the percentages shown in the column entitled "Other" as "Sherwin and Glidden combined". The exhibit merely stated "'Other' includes Euston Lead Co. (Glidden) and Sherwin-Williams". Wormser in identifying this exhibit, testified "the others including Euston and Sherwin" (Tr. 2193). There were other producers, such as Hammond Lead Co., which were not specifically named and for two of the four years MacGregor was specifically included in "Other". So, there is no justification whatever for translating the column entitled "Other" into a listing for Glidden and *Sherwin only*.

Further, Eagle-Picher's percentage of shipments of white lead, both dry and in oil, is stated as being 13.35%. William H. Hayt, General Manager of the White Lead Division of Eagle-Picher, stated

that Eagle-Picher's percentage of production and sales of white lead in oil to the industry total ran between 15% and 20% from 1930 to 1946 (Tr. 1560), and that its percentage of dry white lead basic carbonate was 10% plus or minus 2% for the same period (Tr. 1561). Eagle's production of basic sulphate of lead was not included (Tr. 1561). This would result in a combined percentage of 25% to 30%. Despite this testimony by a responsible official of the Eagle-Picher Company, the Examiner found that Eagle-Picher's combined percentage of white lead, dry and in oil, was only 13.35%.

The foregoing tabulation does not include basic sulphate which is admittedly used by some respondents, particularly Eagle-Picher, interchangeably with basic lead carbonate (Tr. 3344-3352). Eagle's production and sales of basic sulphate for the years 1937 to 1944, inclusive, greatly exceed its production and sales of basic carbonate (Tr. 3357). In this period Eagle-Picher's total production of basic lead carbonate was 28,962 tons and its production of basic lead sulphate was 45,721 tons (Tr. 4129). The inclusion of Eagle-Picher's tonnage of basic lead sulphate materially increases its competitive position on an overall basis, and, therefore, the tabulation does not correctly reflect the true relative position of the various producers.

15. So far as Sherwin is concerned the only cited basis for the statements in the last subparagraph of Paragraph 1-e of the Recommended Decision is Tr. 1317. Here the witness Coolidge described only Sherwin's own differential point system which has been in effect since 1924 (CX 594 AB, CX 662 CD, CX 662 GH, and CX 662 ST). Sherwin's bulletins (the foregoing exhibits) were applicable only to the cities in which it had retail stores and were circulated for the sole purpose of advising Sherwin's representatives of the price differentials in effect on the date thereof "for Sherwin-Williams' warehouses and stores" (Tr. 3697). These bulletins serve no purpose for quoting prices or making billings to any customers (Tr. 3697), and do not constitute a list of Sherwin's *shipping points* (Tr. 3713-3714, Tr. 3850). Commission's Exhibit 659 C-P, which lists National's delivery, equalization and differential points prior to its adoption of the zone system, and which lists six hundred cities, was used by National as a guide in pricing its products to its customers generally and served an entirely different purpose. As is demonstrated in Sherwin's brief, there is substantial evidence in the record that Sherwin did not follow National's prices, terms or conditions of sale and the weight of the evidence is undoubtedly to that effect.

16. So far as Sherwin is concerned there is no basis whatever [for] the last sentence in Paragraph 2-a of the Recommended Decision. [T]here is uncontradicted evidence that Sherwin bases its carload price [o]f red lead and litharge on the New York price of pig lead as re[p]orted in the Engineering & Mining Journal (Tr. 1327-1328, T. 2065-[2]066) and not on the quotations of Smelting (Tr. 1326). There was [n]o testimony as to what basis Sherwin used in pricing its other lead [pi]gments.

17. The Examiner found (Ex. Rec. Dec. Par. 4-a, pp. 14-16) that [th]e other respondents herein followed the salient features of the uni[f]orm pricing system substantially as employed by National and [E]agle. A number of record citations and exhibits are relied upon [a]s a basis for such finding. None of the record citations have any [r]eference to Sherwin and only one exhibit CX 594 AB, which is the [s]ame as CX 662 ST, has any reference whatever to Sherwin. The [e]xplanatory statement in connection with exception 15 and Section [V]I (pages 17 and 18) of Sherwin's brief explain in full detail the [e]ntire record showing as to the limited scope of this exhibit and the [r]estricted use to which it was put.

19. The meeting of the dry products committee on August 8, [1]933 did not adopt rules for the equalization of freight (CX 800 AC, [P]aragraphs 9, 10, 14). The foregoing exhibit states merely that cer[ta]in rules were tentatively adopted for inclusion in a code of fair com[p]etition and to be applicable to lead oxides only. There is no evi[d]ence that any of the respondents actually adopted and put into ef[f]ect the rules therein discussed. In fact some put into effect a zone [s]ystem which was quite different from the equalization plan dis[c]ussed.

20. The letter (CX 522 B) quoted by the Examiner in Paragraph [?]-e of the Recommended Decision was dated October 30, 1933 and [r]eferred to a conference between Wormser & Locke on that same [d]ay. Consequently, it could not have been reflected in the committee [m]inute of October 28, 1933 as indicated by the Examiner. The other [e]xhibits (CX 517 and 523) were written on November 10 and Novem[b]er 9, respectively. However, when the whole story is told the import [o]f the letter is quite different from that attributed to it by Counsel [f]or the Commission and the Examiner. Please also see pages 10-13 [o]f this brief.

25. The paragraph to which exception is here taken deals with the charge stated in subparagraph A of Paragraph Nine of Count I of the Amended Complaint which reads:

> "A. Each of the respondents in selling and offering to sell lead pigments in commerce to agents or dealers for resale requires its customers to resell such products at prices and terms of sale fixed and determined and published by it, so that each of the respondents is responsible for the price levels to painters and customers."

and which is a restatement of the charge stated in section (5) of Subparagraph B of Paragraph 7 of Count I to the effect that the respondents used consignment or agency contracts "for the purpose of preventing dealers selling white lead from making offers to sell such products at levels lower than the offers made by the respective respondent producers * * *". The Examiner considered these two statements as constituting only one charge (Ex. Rec. Dec. Sec. II, Paragraph 5, Subsection b) and relied solely upon the use of the agency or consignment plan to sustain such charge.

The Examiner has reported that all respondents, with the exception of Sherwin, used the consignment plan to varying degrees and for varying periods (paragraphs 5-b1 through 5-b5, Section III of Recommended Decision). The Examiner reported "Sherwin never sold on the consignment plan at any time (Tr. 3701)" but did not report why. Mr. Carter of National in advising Mr. Richter of DuPont of one of the various meetings referred to the consignment plan and wrote "found both Sherwin and Glidden radically opposed because of its consignment feature. I can well understand it and I would expect your reaction to it would be the same because it will involve you in embarrassing situations with paint customers. Sherwin frankly told us they could not follow such a method" (CX 506 E). The reason Sherwin couldn't follow the plan is obvious. Its dealers were selling both white lead in oil and paint in a highly competitive market against print manufactured by a hundred or more paint manufacturers and Sherwin could not tie their hands so that they could not compete on price. Particularly is this true when we recall that white lead in oil—in the hands of the dealer—is competitive with paints, many of which contain little or no lead. Under such conditions, Sherwin would not have any desire to attempt any forced pegging of the resale price of white lead in oil.

In accordance with the policy set by Sherwin's officials, it has ...n, and is, the regular practice of Sherwin in making retail sales ...white lead, through and at its own stores (270 in United States on ...ne 1, 1943—CX 652 A-L) (321 on October 1, 1944—CX 776 A-L), ...quote and charge the published delivered prices which were ap...rable at each such destination (Tr. 869-870) as exemplified by CX ...2 ST. Certainly it is within its rights in setting the price to be ...ained in its own stores. We contend further that such sales are ...t subject to the jurisdiction of the Federal Trade Commission in ...y event. There is no evidence that Sherwin ever adopted or used ...y so-called "Fair Trade Contracts" as did some of the other re...ondents (CX 576 A-E), or took any action to control the resale ...ice of any lead pigment to painters or consumers except in retail ...ores which it owned and operated. Bulletins such as CX 594 AB, ...X 662 CD, CX 662 GH and CX 662 ST, do not contain consumer ...ices and they are furnished only to Sherwin's district sales staff ...d to representatives in its own branches (retail stores owned by ...erwin) and serve no other purpose (Tr. 3697). Bulletins of the ...pe exemplified by CX 662 KL obviously are not circulated to ...alers or others outside Sherwin's organization because they show ...ices to dealers and also prices to various classes of customers sold di...ctly by Sherwin. Sherwin does furnish to dealers one type of price ...nouncement (Tr. 3696) which suggests to such dealers resale prices ...r white lead in oil only (CX 662 Z5-Z26), but not for any other lead ...gments. There is no evidence that such dealers felt under any com...ulsion to, or did, follow such suggestion in reselling or that Sherwin ...ssessed, or exercised, any power to enforce such suggestions or ...liced its dealers.

...Is the single fact that Sherwin "suggested" resale prices for ...hite lead in oil a sufficient basis for the inference that it, either in...dependently or otherwise, had any desire to control the resale price? ...hen we consider Sherwin's attitude as to consignment selling gen...erally, which was a perfect vehicle for any manufacturer to control ...e resale price of its own brand, and its attitude toward "Fair ...ade" contracts then there is no basis for any such inference.

28. Sherwin's exception is based on the fact that the citations ...lied upon by the Examiner do not support his findings. So far as ...herwin is concerned there is only one applicable record citation ...Tr. 1326-1328). The record shows that Sherwin bases its prices for ...rload lots of red lead and litharge upon the New York market ...otation for pig lead as reported in a trade journal, The Engineer-

ing and Mining Journal, and not upon A. S. & R. Company's quotations. There is no testimony that Sherwin's prices for smaller quantities of these products were based on any formula derived from the differentials referred to. The only exhibit which refers to Sherwin is the CX 662 series. On these documents there is no mention whatever of a price difference between 20 tons and less than 20 tons for lead carbonate.

30. CX 662 Z17 shows Sherwin's price to dealers for white lead in oil as being $8.50 per 100 pounds. CX 663 H shows Glidden's price to dealers, which is $8.55 per 100 pounds. CX 659 Z28 shows National's charge to agents, which is $8.75 per 100 pounds. Thus Glidden's price is 5¢ more than Sherwin's but still 20¢ under National's charge to agents. This 5¢ difference does not take into account differences in cost occasioned by reason of Sherwin's less than carload freight policy. At all points but its shipping points the cost to Sherwin's customers would be higher due to payment of freight from shipping point.

32. In the tabulation to which exception has been taken the Examiner has compared Sherwin's price to dealers with National's and Eagle's prices to dealers only. The comparison should have also reflected the charges made by National, Eagle and the other respondents to their respective agents or consignment accounts. Also, a comparison of other quotations, as reflected on page 19 of this brief, shows varying differences between the quotations of Sherwin and the other respondents. Further, no account is taken of the difference between dealers and agents which is reflected in this brief at pages 19 and 20.

33. The list of shipping points used by Sherwin was taken from CX 662-Z9 which was placed in effect on September 15, 1937. By January 11, 1938 these had been reduced to only seven (CX 662-Z13) in the area under consideration and there have never been more than seven since that date (CX 662-Z13-Z25).

36. These two tabulations are purportedly restricted to all less than carload deliveries to dealers in the par zone during the two quarterly periods stated. The first tabulation states that Sherwin made 8 sales to dealers in lots of less than 500 pounds and 4 sales to dealers in lots of 500 pounds or over—all at $9.50 per 100 pounds. This tabulation is incorrect. CX 794-D contains 6 invoices which involve shipments of less than 500 pounds (Nos. 8833, 9366, 9597, 9821, 8132 and 8403). CX 794-Z contains 3 invoices which involve shipments of less than 500 pounds (Nos. 59529, 59866 and 6202), but

ne of these (No. 59529) was shipped as part of a carload shipment nd should be excluded (RX 205-S). Two others (Nos. 8100 and 9565) involve shipments of 500 pounds or more, but one of them (No. 9565) involves a carload shipment (RX 205-S) and should be excluded. CX 794-Z4 contains only 4 invoices which involve shipments f less than 500 pounds (Nos. 10538, 1473, 14927 and 5014). One of hese (No. 14927) involves a price of $9.75, and one (No. 5014) involves a price of $10.00. Three invoices (Nos. 14588, 14857 and 0962) involve shipments of 500 pounds or more, but 2 of these (Nos. 4588 and 14857) involve carload shipments (RX 205-V) and should e excluded. Thus, the first tabulation should show 10 shipments of ess than 500 pounds at a price of $9.50 per 100 pounds; one shipment at $10.00 per 100 pounds and one at $9.75 per 100 pounds. It hould also show only two shipments of 500 pounds or more at $9.50 er 100 pounds instead of four.

The second tabulation states that Sherwin made 13 sales to dealrs in lots of less than 500 pounds and 9 sales to dealers in lots of 00 pounds or over—all at $10.00 per 100 pounds. This tabulation s not correct. Actually there were 24 sales to dealers in lots of less han 500 pounds (CX 794-I: Invoices 7948, 44126, 44228, 510 and 73) (CX 794-Z1: Invoices 14962, 15150, 15147, 15111 and 15024) CX 794-Z4: Invoices 10673, 4718, 6175, 7348, 8895, 9772, 10611, 10635, 1463, 11307, 4046, 4795, 10785 and 6734), and 13 sales to dealers in ots of 500 pounds or over (CX 794-I: Invoices 7966, 44122, 44312, 908, 11574, 11645, 11605, 509 and 9567) (CX 794-Z1: Invoices 51549 nd 15028) (CX 794-Z4: Invoices 10835 and 4220)—all at $10.00 per 00 pounds. The Examiner's analysis treats repeat sales to the same ealer as separate transactions (see CX 794-I with reference to 5 ales at $9.50 per 100 pounds and CX 794-Z1 with reference to 2 sales t $10.50). The same procedure has been followed. The tabulation s correct as to the sales at $9.50; $10.50 and $10.75, but there was lso 1 sale of less than 500 pounds at $9.75.

37. The Examiner's statement that the prices charged by International, Glidden and Sherwin were substantially uniform does not ake into account the fact that Sherwin's shipping point policy required purchasers of less than car lots to pay freight from such shipping points to other destinations. Sherwin's basic freight rate olicy, as herein described, was applied to dry white lead, red lead n oil, dry red lead and litharge as well as to white lead in oil (Tr. 746). In approximately 90% of the sales tabulated by the Examiner on pages 31 and 32 of his report Sherwin's prices were 25¢ per

cwt. under National's and Eagle's lowest quotations. Nevertheless, Sherwin's dealers, when buying in less than carload quantities and when located at points other than Sherwin's 21 shipping points or the suburbs or contiguous areas thereof, have a higher total cost than do National's and Eagle's agents. This is because National and Eagle deliver all quantities at all locations at a delivered price, whereas Sherwin charges freight, as above set forth in detail, which freight, on the average, substantially exceeds 25¢ per cwt. (For justification of the 25¢ per cwt. figure please refer to the statement herein in support of exception 39.) International and Glidden both sold generally on a delivered price basis which did not involve the payment of any freight by purchasers (Tr. 3516; Tr. 2639-2640; Tr. 1249 and answers of Glidden and International to Amended Complaint). Consequently, even if Sherwin should quote the same price to dealers as International and Glidden, the delivered cost to its customers would not be the same as the delivered cost to their respective customers except in those few cities where Sherwin maintains shipping and warehouse facilities and except in those few instances where carload orders are involved. The delivered price of these two concerns were generally lower than the delivered prices of National and Eagle but Sherwin's customers, with the exceptions noted, have a delivered cost which is as high as, or higher than, the delivered cost to agents of Eagle and National. When Glidden and International used the agency or consignment method of selling there were other resultant differences in total cost to such dealers as compared to Sherwin's dealers. See also pages 19 and 20 of this brief.

38. The Examiner's statement as to the number of sales Sherwin made at various amounts under National's lowest price is incorrect. Actually Sherwin made 49 sales at 25¢ under; 5 sales at 75¢ under; one sale at 50¢ under; 2 sales at 25¢ over and 2 sales at 50¢ over National's lowest charge to its agents. (See foregoing statement concerning exception 36.) Sherwin's lower price is offset to varying amounts since National's quotation is for delivery at the purchaser's destination and Sherwin's price is 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 cost to a customer of National's and the delivered cost to a customer of Sherwin's varies with each transaction depending not only on the difference in prices but also on the amount of freight paid by Sherwin's customers. The delivered cost to Sherwin's dealers were higher than that of National's consignment accounts. There is no

satisfactory way to compare Sherwin's 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's dealers have to bear additional costs and assume additional risks which National's agents did not have to assume (CX 613). The same relation existed as between Sherwin's dealer customers and the agents of Glidden (Tr. 2518-2525; CX 650), International (Tr. 3536) and Eagle-Picher (CX 626, CX 631 F). See also pages 18-20 of this brief.

39. Are the shipping points nearby? Actually, as of September 1939, Sherwin had only 53 shipping points throughout the entire United States (RX 198 A-H, CX 662 Z21, Tr. 3756). Only 21 (3 each in Ohio and New York; 2 each in Pennsylvania and West Virginia, and one each in Missouri, Kentucky, Illinois, Indiana, Michigan, Maryland, New Jersey, Connecticut, Rhode Island, Massachusetts and Maine) were located in the so-called par zone (RX 198 A-H and CX 662 Z21). Sherwin had no shipping points in 4 of the states included in such area (Wisconsin, Delaware, Vermont, New Hampshire), and only one in each of 11 other states. A map showing graphically the location of Sherwin's shipping points appears as Appendix II. Obviously there are vast areas in the so-called par zone serviced by shipping points which cannot be characterized as nearby. Only a very small part of the total area is serviced by nearby shipping points.

Does the customer only pay the freight sometimes? The Examiner has based his two tabulations on sales made to dealers in the so-called par zone during two 3 month periods in 1941. An analysis of all sales to dealers in such area during these periods disclosed that in 26 out of 131 transactions carload orders were involved. The total white lead involved was only 31,451 pounds (15 tons) for an average of 1210 pounds of white lead per carload order. The ratio remains the same even when the tabulation is expanded to show all sales to dealers in such area in all periods tabulated in CX 794. In 45 out of 227 transactions carload orders were involved. The total white lead was 54,829 pounds for an average of 1218 pounds per carload order. (See Exhibit "A" which is a tabulation of all the carload orders in the so-called par zone.) It must be remembered that the purchasers from Sherwin were primarily purchasing paint and the white lead formed a small part of the total shipment (CX 833 A-Z100). So, the great majority of Sherwin's sales to dealers in the so-called par zone were in less than carload lots.

The 21 shipping points (Tr. 3756, 3768, 3776), together with Washington, D. C. (Tr. 3757-3758) and the respective suburbs or contiguous locations to such cities (Tr. 3768-3769, Tr. 3836-3838) are the only cities in the so-called par zone to which Sherwin makes shipments of less than carload quantities without the addition of freight from the nearest one of the 21 shipping points. Consequently, in the majority of transactions in the so-called par zone Sherwin's customers must pay freight in addition to the price charged by Sherwin.

Is the added freight factor small? In many transactions there is a minimum freight charge which is in excess of the 25¢ difference between Sherwin's price to dealers at its shipping points and National's charge to its agents throughout the so-called par zone and Sherwin's dealers must pay it (CX 794 Z4 and Z5).

An analysis has been made of the freight charges shown on CX 794-I, J1, Z4, Z5 and Z6 and 7. The listed rate per cwt. has been eliminated in all instances of local delivery in the same city or in suburbs or contiguous areas thereto, in all carload orders, in all cases where the shipment was being made from one shipping point to another, and where the shipment went outside the so-called par zone. CX 794-I discloses 7 transactions with an average freight rate of 34½¢ per cwt.; CX 794 J1 discloses 11 transactions with an average freight rate of 39¢ per cwt.; CX 794 Z4 discloses 11 transactions with an average freight rate of 37½¢ per cwt.; CX 794 Z5 discloses 16 transactions with an average freight rate of 37½¢ per cwt.; and CX 794 Z6 and 7 disclose 4 transactions with an average freight rate of 48½¢ per cwt. The 49 transactions disclose an average freight cost of 34¢ per cwt. The lowest rate in any of these transactions was 22¢ per cwt. An examination of the L. C. L. freight rates shown on any of the exhibits in the CX 794 series will readily confirm the statement that in practically all instances recorded the rate from shipping points to actual destinations exceeds 25¢ per cwt. On any realistic basis whatever it must be conceded that the average freight per cwt. paid by Sherwin's dealers exceeds 25¢ per cwt. Therefore, the added freight factor referred to by the Examiner in the case of Sherwin is not small.

40. In so far as Sherwin is concerned the only citations in support of the foregoing statement are CX 794 D, I, Y and Z. During the period involved CX 794 D reflects two transactions with dealers at Charleston, South Carolina and two shipments from Richmond, Virginia to a dealer in Raleigh, North Carolina. Both Charleston and Raleigh are located in the area described by the Examiner as

zone 4. CX 794 I reflects no such shipments into so-called zones 2, 3, 4, 5, 6 or 7. CX 794 Y reflects five shipments from Chicago, Illinois to dealers in so-called zones 3 and 4 (Georgia, Tennessee and Alabama). CX 794 Z reflects one shipment from Chicago to a dealer in so-called zone 2 (Minn.). The total white lead in all 10 shipments was less than two tons. The exhibits cited form no foundation whatever for any statement as to the basis on which Sherwin made any sales in the areas described by the Examiner as zones 5, 6 and 7.

Excluding the Pacific Coast, the area described by the Examiner as zones 2, 3 and 4 comprises 17 states (see 12½¢, 25¢ and 37½¢ zones on map in Amended Complaint). Sherwin has 17 shipping points in this area (RX 198 A-H, Tr. 3891). There are two in each of the states of Minnesota, Tennessee, North Carolina, Georgia and Florida and one in each of the states of Louisiana, Missouri, Iowa, Alabama, South Carolina, Virginia and Nebraska. There are none in Arkansas, Mississippi, North Dakota, South Dakota or Kansas. Sherwin's policy of requiring the purchaser to pay freight on less than carload shipments when delivery is to be made at a point other than one of its shipping points or one of the three so-called f. o. b. points in this area (Gadsden, Alabama, Chattanooga, Tennessee and Pensacola, Florida) is equally applicable in this area as well as in the so-called par zone and the same argument as was advanced in support of exceptions 36, 37, 38 and 39 is again urged with respect to the present situation. The net of it is that as to less than carload shipments there are only 20 cities in a 17 state area where Sherwin's dealers can have a delivered cost that is equal to or at a fixed differential over or under the delivered cost to any customer of a competitor of Sherwin's. As far as carload orders were concerned there were only three and they involved a total of 1492 pounds of white lead (CX 794 Y: Nos. 11252, 13026 and 13244). So, the payment of freight on carload orders by Sherwin is of no real significance on an overall consideration.

The eight Pacific Coast states are in the area described by the Examiner as zones 3, 5 and 6. There is ample uncontroverted evidence that in these 8 states Sherwin does not maintain differentials which correspond with those charged in subparagraph A of Paragraph Eight of Count I of the Amended Complaint or which conform with such zone differentials as Glidden and Anaconda may use in such area or which vary on any set formula in relation to the prices obtained by National and Eagle either in the so-called par zone or elsewhere. In Sherwin's proposed findings this particular phase of Sherwin's pricing policy was set forth in considerable detail as re-

flected both in Sherwin's price bulletins and in actual invoices. However, the Examiner elected to completely ignore this evidence and to make the recommended finding to which exception is taken.

For a full analysis of such evidence reference is made to pages 15, 16 and 17 of the proposed findings submitted by Sherwin. Again it is urged that consideration must be given to the fact that the prices quoted by all other respondents, including International and Glidden, are delivered prices at any destination in the zone and that Sherwin's prices for less than carload amounts are only for delivery at a very few shipping points with the customer paying the freight therefrom to destination in addition to the prices charged by Sherwin.

41. Paragraph 5-c9 of the Recommended Decision obviously refers to sales of dry white lead in barrels or other containers of more than 100 lb. capacity and not to dry white lead as a keg product. So far as Sherwin is concerned the only citation relied upon by the Examiner is CX 794-Z. This exhibit shows only 2 sales of dry white lead. One involves a government order for 100 lb. kegs and the other involves a dealer order for one barrel. Neither of these involve sales to manufacturers as stated and the entire CX 794 series of invoices fails to show a single sale of dry white lead in containers of more than 100 lb. capacity by Sherwin to a manufacturer. Further, there is no testimony that there were such sales. The dealer order (Invoice 5681) for a single barrel is the only one in the entire CX 794 series that involves dry white lead in containers of more than 100 lbs. capacity and it is for delivery in Chicago, the city where Sherwin's single plant is located. There is not a single invoice showing a sale of this product by Sherwin at a differential price above a base price.

42.
43. } The Examiner refers, in paragraphs 5-c11 and 5-C11 of the
44.

Recommended Decision, to a discussion held by the White Lead in Oil Committee on August 9, 1933 wherein "the possibility of apportioning such business (government) was considered and the group was asked to give the matter further thought." There is no finding that the matter was ever discussed again or that any action was agreed upon but the Examiner did state in the following sentence: "On Sherwin's trade bulletins to its managers and salesmen, instructions are given for following large dealers' prices on government, state, and municipal bids (CX 662 B, F, J, R)". The implication inherent in the juxtaposition of these two statements is obvious. It s possible that the Examiner intended the implication. We prefer o attribute such juxtaposition to accident or oversight on the part f the Examiner rather than design because the record contains no upport whatever for such implication and we can demonstrate it onclusively. CX 662 AB is a bulletin issued by Sherwin on Novem-er 6, 1936. It shows that Sherwin had two classes of dealers 'SMALL DEALERS", and (2) "LARGE DEALERS" with different prices. This bulletin instructed Sherwin's agents that government bids car-ied the "A" Schedule of prices as reported under "LARGE DEAL-ERS". Another exhibit cited by the Examiner (CX 662 F) which was issued by Sherwin on December 28, 1936 shows that Sherwin hen had only one price for all dealers and Sherwin's representatives vere instructed to quote government accounts the "same prices as lealers". Two other exhibits cited (CX 662 J and B) show that Sherwin ultimately set up different price quotations for dealers ind for government agencies. At that time the previously given nstruction was withdrawn. It is obvious that the instruction para-phrased by the Examiner meant simply that Sherwin wanted its epresentatives to quote government agencies at the best price it hen gave to its largest dealers. It could not mean anything else and there is no support for the unwarranted implication that Sher-win instructed its agents to follow the price quotations of its large competitors in bidding on government business.

45. We have made an analysis of the sealed bids submitted to various agencies of the Federal government in 1939, 1940 and 1941 as reflected in RX 306 AB, 307 AB and 308 A-C. In 1939 Sherwin bid on 11 of the 13 awards. It was the successful bidder on 4 awards. On the first it was more than 9¢ per barrel lower than the next low bidder (National). On the second it was $58.45 lower than the next ow bidder (Eagle) on an award for less than $900. On the third t was $201.55 lower than the next low bidder (Eagle) on an award for less than $10,000.00. On the fourth it was 15¢ per barrel lower han the other three bidders. On two occasions it was the high bidder by substantial amounts. On one occasion it submitted a bid which was the same as Eagle's but both were above the varying bids of National and Glidden. In the four other cases it did not submit a bid identical with that of any other respondent or of any other independent bidder. In 1940 Sherwin bid on 21 of the 22 awards. It was the successful bidder on three. On the first it was approximately 8¢ per barrel lower than the next bidder (Eagle). On the second it was 2¢ per 100 pounds lower than the next low bidder

(National) and on the third it was 10¢ per 100 pounds lower than the next low bidder (National). On seven occasions it was the highest bidder. On 10 occasions its bid was not substantially equivalent to those of any other respondent or any other bidder. On one occasion its bid was the same as that of other respondents.

In 1941 Sherwin bid on 11 of the 28 awards. It was not the successful bidder on any occasion. On two occasions it was high bidder. On eight occasions its bid was not substantially equivalent to that of any other respondent or any other bidder. On one occasion its bid was the same as Eagle's which was higher than Glidden's and National's bids. To sum it up—Sherwin bid in 43 of the 63 awards recorded. It was the successful bidder on 7 and was high bidder on 11. Its bid on 22 occasions when it was neither high nor low was different from those of all other respondents and all other independent bidders. On only 3 occasions out of 43 was its bid the same as that of another respondent. So, the last sentence of paragraph 5-c11 and of paragraph 5-C11 does not correctly reflect the extent to which Sherwin, at least, varied its bids from that of all other respondents. The correct statement is that its bid varied from that of all other respondents on 40 out of 43 occasions.

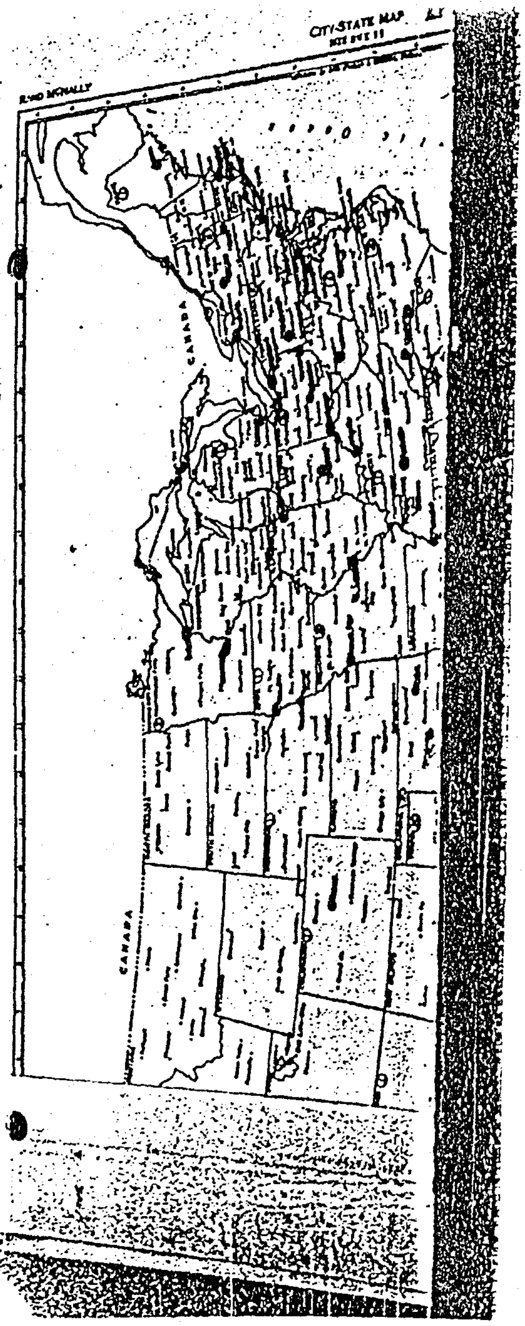
46. There is no support in the record for the inference that such container differentials as were used by Sherwin were used as a result of the August 8, 1933 meeting. See pages 34 and 35 of this brief.

69. None of the tabulations set out in Paragraph 8-a2 of the Recommended Decision, with the exception of the first one, could possibly apply to Sherwin since all of its products originally are shipped from its single plant in Chicago. The first tabulation does not apply because the rates used are L. C. L. rates and Sherwin would ship to such points only on a C. L. basis and the difference in freight rates would be much less. See page 54 of this brief.

EXHIBIT A.

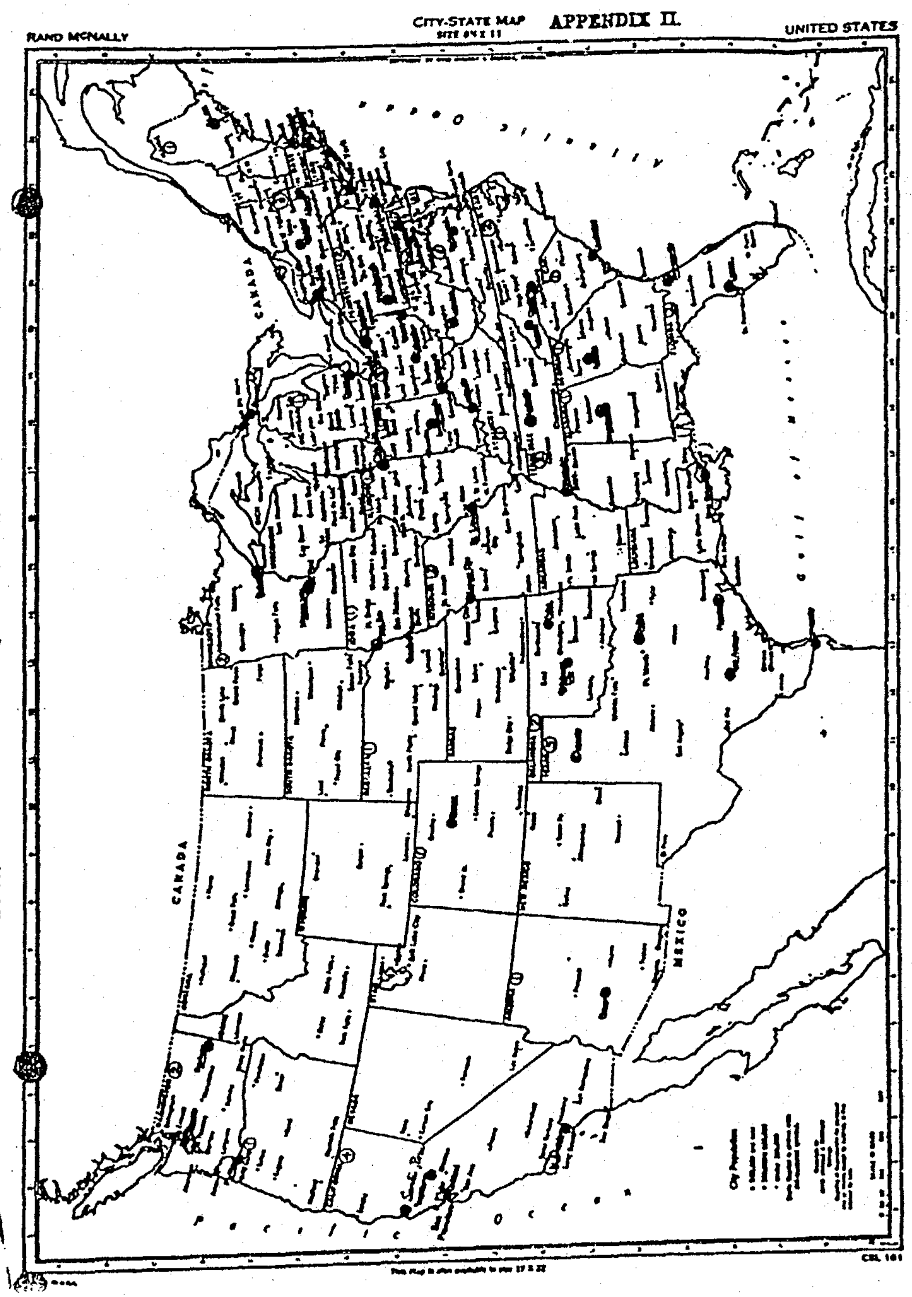
Commission Exhibits Which Show Sherwin's Sales in So-Called Par Zone	Sales to Dealers Jan.-Mar. 1941 Oct.-Dec. 1941	Sales to Dealers Jan.-Mar. 1941 Oct.-Dec. 1941 Which Involve Carload Shipments	Total White Lead in Carload Shipments Jan.-Mar. 1941 Oct.-Dec. 1941
794 D	14	0	0
794 I	39	13	15,216
794 J1	14	1	60
794 Z	9	2	3,130
794 Z1	9	0	0
794 Z2	3	0	0
794 Z4	28	3	4,150
794 Z5	8	6	7,995
794 Z6 & 7	7	1	900
	131	26	31,451

Commission Exhibits Which Show Sherwin's Sales in So-Called Par Zone	Sales to Dealers All Periods	Sales to Dealers All Periods Which Involve Carload Shipments	Total White Lead In Carload Shipments All Periods
794 D	17	0	0
794 I	49	17	16,118
794 J1	21	8	7,585
794 Z	9	2	3,130
794 Z1	14	0	0
794 Z2	6	0	0
794 Z4	47	3	4,150
794 Z5	46	8	11,205
794 Z6 & 7	18	7	12,641
	227	45	54,829



...l White Lead Carload Shipments Jan.-Mar. 1941 Oct.-Dec. 1941
0
15,216
60
3,130
0
0
4,150
7,995
900
31,451

...tal White Lead In Carload Shipments All Periods
0
16,118
7,585
3,130
0
0
4,150
11,205
12,641
54,829



APPENDIX III.

This tabulation shows the difference between less than car and carload freight rates (1) from Chicago (2) to certain cities (3) for white lead in oil and dry white lead.

From Chicago to	Dry White Lead L.C.L.	Dry White Lead C.L.	Difference	White Lead in Oil L.C.L.	White Lead in Oil C.L.	Difference
A. Detroit, Mich.....	46	23	23	51	32	19
Minneapolis, Minn.	72	32½	39½	72	32½	39½
Duluth, Minn.....	79	36	43	79	36	43
Sioux City, Iowa.	66	43	23	66	43	23
B. Aberdeen, S. D...	111	60	51	111	60	51
Des Moines, Iowa.	68	36	42	63	36	42
St. Paul, Minn....	72	32½	39½	72	32½	39½
Davenport, Iowa..	38	26	12	38	26	12

(1) Freight rates taken from CX 791 B-D.

(2) Chicago selected because it is location of Sherwin's only plant and is also location of white lead plants of National and International (now Eagle).

(3) Cities selected for following reasons:

A. These cities are the only warehouse points for Sherwin at which Chicago had a freight advantage on the date of the applicable rates over other cities in which respondents other than Sherwin had plants. See RX 198 A and D and CX 662 Z21 to establish warehouse points' identity. See RX 199 to establish area in which Chicago had advantage.

B. These cities are only ones in the Chicago freight advantage area, other than those listed in A, where freight information from Chicago is available.

APPENDIX IV.

CARLOAD FREIGHT RATES

January 15, 1941

Chicago To	*Dry White Lead*
Buffalo, N. Y.	30 cents per cwt.
Cincinnati, Ohio	24
Cleveland, Ohio	25
Detroit, Michigan	23
Indianapolis, Indiana	28
Louisville, Ky.	24
Newark, N. J.	42
New York, N. Y.	42
Pittsburg, Pa.	41
Rochester, N. Y.	32
Scranton, Pa.	38
Syracuse, N. Y.	35
Wheeling, W. Va.	28
Decatur, Ill.	20
Baltimore, Md.	38
Toledo, Ohio	22
Youngstown, Ohio	27
St. Louis, Mo.	20
Albany, N. Y.	38
Boston, Mass.	42
Philadelphia, Pa.	40
Brooklyn, N. Y.	42

The average of the foregoing Freight Rates is 32¢.
The cities and the rates indicated are taken from CX 791-BCD.

APPENDIX V

TABULATION OF DATA SHOWN ON CX794 AND RX205
AS SUPPLEMENTED BY PAROL TESTIMONY

TOTAL WHITE LEAD DELIVERED-610,955 POUNDS

ITEM	TOTAL INVOICES	Shipping point & delivery point same city — Less than carload lots — No freight involved (local cartage by S.W. or paid by S.W.)		Delivery point suburb of shipping point		Shipping point and delivery point in different cities — Less than carload lots — F.O.B. shipping pt.		F.O.B. delivery pt.		Freight paid by S.W.		Shipping pt. to shipping pt. (S.W.)		Freight payment equalized		Includes carload lots — Freight paid by S.W.		Govern... Freight...	
		INV.	POUNDS	INV.	POUNDS	INV.	POUNDS	INV.	POUNDS	INV.	POUNDS	INV.	POUNDS	INV.	POUNDS	INV.	POUNDS	INV.	PO...
RX 205-A CX 794 C	28	16	15663			5	775					1	100			2	1210	5	
RX 205 B CX 794 D	28	19	4788	2	1400	4	1150			1	100								
RX 205 C CX 794 E	47	31	9554	2	470	7	1151	(A) 1	2000	1	7000					4	1321		
RX 205 D CX 794 F	25	10	1225	6	2650	3	1450	(A) 1	200	3	6016					2	425	1	
RX 205 E CX 794 G	32	20	1457	6	429	1	500	(A) 1	100	1	30					3	2004		
RX 205 F CX 794 I	(A) 48	11	12800	(A) 2	20100	2	38			13	8179					17	17637		
RX 205 G CX 794 J	(A) 20	1	50			8	1359			3	2446					8	7588		
RX 205 H CX 794 K	(A) 34	4	625	13	5255	17	3047												
RX 205 I CX 794 L	38	8	730	10	1550	20	2333												
RX 205 J CX 794 M	45	14	12825	(A) 22	61175	9	412												
RX 205 K CX 794 N	42	13	24450	(A) 22	34318	2	800	(A) 1	200			1	4000					3	
RX 205 L CX 794 P	45	9	3025			12	3385					2	1659			10	13967	12	
RX 205 M CX 794 Q	48	17	4063			18	4166									7	8880	2	
RX 205 N CX 794 R	22	9	538			8	1725					1	300			1	400	1	
RX 205 O CX 794 T	43	(A) 27	6699			11	2038							2	2800	1	800		
RX 205 P CX 794 U	(A) 31	14	2025	1	100	10	1800					1	536			2	2628	1	
RX 205 Q CX 794 V	(A) 0																[illegible]		
RX 205 R CX 794 Y	44	3	2652			16	6005	(A) 4	2650			4	8800	3	2350	12	13868		
RX 205 S CX 794 Z	36	(A) 39	80885	6	2500	2	1401									2	3130	1	
RX 205 T CX 794 Z1	22	(A) 20	9300			1	150					1	2300				[illegible]		
RX 205 U CX 794 Z2	32	(A) 26	14000	2	4625	1	100					1	700			2	816		
RX 205 V CX 794 Z4	48	22	6001	4	1997	17	3578									3	4150		
RX 205 W CX 794 Z5	(A) 46	7	2135			30	7650									8	11205	1	
RX 205 X CX 794 Z6	18			1	50	10	1700									7	12641		
TOTALS	833	342	217480	101	156719	211	46731	8	5150	26	28807	16	16677	5	5150	91	102862	27	

00033

APPENDIX V

TABULATION OF DATA SHOWN ON CX794 AND RX205
AS SUPLEMENTED BY PAROL TESTIMONY

APPENDIX V.

TOTAL WHITE LEAD DELIVERED-610,955 POUNDS

... Point & ... Point, ... City	Delivery Point Suburb of Shipping Point		Shipping Point and Delivery Point in Different Cities												Government Orders		Unexplained		Notes
... Than Carload Lots			Less Than Carload Lots										Included in Carload Lots						
... Involved Local Part... or Paid by S.M.			R.R. Shipping Pt.		R.R. Delivery Pt.		Freight Paid by S.M.		Shipping Pt. to Shipping Pt. (S.M.)		Freight Payment Refunded		Freight Paid by S.M.		Freight Paid by S.M.				
Pounds	Inv.	Pounds	Inv.	Pounds	Inv.	Pounds	Inv.	Pounds	Inv.	Pounds	Inv.	Pounds	Inv.	Pounds	Inv.	Pounds	Inv.	Pounds	
5662			3	775					1	100			2	1210	5	1800	1	1000	(A) S.O.B. San Diego
4788	2	1400	4	1150			1	100									2	375	(B) Total Required,
9354	2	470	7	1151	(A) 1	2000	1	7000					4	1321			1	150	1 Invoice Missing
1225	6	2650	8	1450	(A) 1	200	3	6016					2	425	1	25			(C) Chicago to Chicago
1457	6	429	1	500	(A) 1	100	1	30					3	2004					1 Invoice 300 Pounds
2690	(J) 2	20100	2	38			13	2179					17	17837			3	3090	(D) Total Required,
750			8	1359			3	2442					8	7588					2 Invoices Missing
625	13	5385	17	3047															(E) Total Required,
730	10	1580	20	2333															6 Invoices Missing
2815	(K) 26	61175	9	412															(F) F.O.B. Points:—
9450	(L) 22	34318	2	800	(A) 1	200			1	4000					3	1800			Chattanooga, Tenn. Gadsden, Ala. Pensacola, Fla.
3025			12	3385					2	1039			10	13967	12	38979			(H) Chicago to Chicago
4065			18	4186									7	6580	2	1000	1	500	31 Inv. 70380 Pounds
538			8	1728					1	300			1	400	1	3000	2	650	(I) Chicago to Chicago
6699			11	2038							2	2000	1	500			2	700	12 Inv. 4050 Pounds
2028	1	100	19	1800					1	338			2	2625	1	130	2	200	(I) Chicago to Chicago
[illegible]																			22 Inv. 14350 Pounds
2652			16	6005	(M) 4	2650			4	8800	3	2330	12	13868					(J) 2 Shipments from
0885	16	2500	2	1401									2	3180	1	1000			Newark N.J. to ...
9800			1	150					1	2300									(K) 20 Shipments to.
4000	2	4628	1	100					1	700			2	816					San Francisco, Cal.
[illegible]	6	1997	17	3878									3	4150					12 to Alameda, Cal.
2725			30	7650									8	11205	1	100			6 to Berkeley, Cal.
[illegible]		[illegible]	10	7700									7	12941					All from Oakland, Cal.
7494	101	130719	311	46731	8	5150	32	23867	18	10077	6	8150	91	105266	17	48854	14	6665	

is less clear than this notice, it is due to the quality of the document being filmed

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APPENDIX VI.

Tabulation from CX 794 A-Z7 and RX 205 A-X and from supplementary parol testimony (Tr. 3771-3804, 3836-3856, 4113) which identifies the particular invoice in connection with which Sherwin paid all freight charges because carload or truck load order was involved.

Respondent's Exhibit No.	*Commission's Exhibit No.*	*Invoice Number*	*White Lead Billed*
205-A	794-C	4297	1035
		4298	175
205-C	794-E	11409	200
		9741	400
		14433	471
		9068	250
205-D	794-F	11415	348
		13314	75
205-E	794-G	7262	1448
		10859	156
		495	400
205-F	794-I	4111	400
		25900	14½
		25899	700
		25898	15
		25897	650
		4030	40
		4012	3181
		4625	150
		4649	60
		16380	350
		16376	500
		17498	24
		8908	2500
		11674	4125
		11645	862½
		11605	4237½
		35109	28
205-G	795 J-1	9555	60
		14939	2400
		14936	575
		14938	50
		37153	700
		38336	200
		15516	2400
		15517	1200
205-L	794-P	14435	783
		1674	1626½

Respondent's Exhibit No.	*Commission's Exhibit No.*	*Invoices Number*	*White Lead Billed*
205-X	794 Z-6 & 7	12875	4050
		14719	1592
		11300	900
		49575	2500
		14622	1175
		841	924
		10894	1600

TOTAL POUNDS WHITE LEAD BILLED - 102,262

NOTE: Where invoices are bracketed together, they involve only one shipment.

CORRECTION

The preceding document(s) has been refilmed to assure legibility and its image appears immediately hereafter.

Respondent's Exhibit No.	Commission's Exhibit No.	Invoices Number	White Lead Billed
205-X	794 Z-6 & 7	12875	4050
		14719	1592
		11300	900
		49575	2500
		14622	1175
		841	924
		10894	1500

TOTAL POUNDS WHITE LEAD BILLED - 102,262

NOTE: Where invoices are bracketed together, they involve only one shipment.

APPENDIX VII.

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