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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter
of
NATIONAL LEAD COMPANY, a corporation, et al.

DEC 29 1947
Records
SECRETARY
Docket No. 5253

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND REASONS THEREFOR, OF RESPONDENT,
NATIONAL LEAD COMPANY

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December 29, 1947.

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Comes now the respondent, National Lead Company, by its attorneys, Alexander & Green, and submits the following proposed findings of fact, conclusions of law, and the reasons therefor:

FINDINGS OF FACT.

THE RESPONDENTS.

1. (a) National Lead Company (hereinafter referred to as "National") is a New Jersey corporation with its principal offices at 111 Broadway, New York, N. Y. (answer of respondent National).

(b) The Eagle-Picher Company (hereinafter referred to as "Eagle-Picher") referred to in the amended complaint as "Eagle-Picher Lead Company", is an Ohio corporation with its principal offices at The American Building, Cincinnati, Ohio. Eagle-Picher Sales Company, a Delaware corporation having its principal offices at the same address, is a wholly-owned subsidiary of Eagle-Picher (answer of respondent Eagle-Picher).

(c) The Glidden Company (hereinafter referred to as "Glidden") is an Ohio corporation having its principal offices at Union Commerce Building, Cleveland, Ohio (answer of respondent Glidden).

(d) The Sherwin-Williams Company (hereinafter referred to as "Sherwin-Williams") is an Ohio corporation having its principal offices at 101 Prospect Avenue, N. W., Cleveland, Ohio (answer of respondent Sherwin-Williams).

(e) International Smelting & Refining Company (hereinafter referred to as "I. S. & R."), a Montana corporation with its principal offices at 25 Broadway, New York, N. Y., is a wholly-owned subsidiary of Anaconda Copper Mining Company (hereinafter referred to as "Anaconda"), a Montana corporation having its principal offices at the same address (answers of respondent Anaconda and I. S. & R.).

THE PRODUCTS INVOLVED IN THIS PROCEEDING.

2. (a) The term "Lead Pigments", as defined in the amended complaint, includes the following:

- (1) "White lead", both basic carbonate and basic sulphate of lead;
- (2) "Blue lead";
- (3) "Red lead" (also known as an "oxide" of lead);
- (4) "Litharge" (also known as an "oxide" of lead);
- (5) "Orange mineral";
- (6) "Grinders' lead paste".

Such products have been sold by some of the respondents in either dry form or in oil in the form of paste when mixed with linseed or other oils (Paragraph Four, Amended Complaint).

(b) "Pig lead" is derived from smelting and refining lead ore and lead concentrates which are the forms in which lead is produced by the mines. Lead ore and lead concentrates are mined at various points in the United States and other countries, notably Mexico, and the more important mines in the United States are located in the Rocky Mountain States and in the so-called "Tri-State area" formed by the intersection of the boundaries of Missouri, Oklahoma and Kansas. The lead ore and concentrates so mined are shipped to smelters and refineries where the impurities are removed to form common desilverized pig lead and corroding pig lead. Common desilverized pig lead and corroding pig lead are sold by the smelters and refineries to various manufacturers of lead products, including lead pigments, oxides, cables, ammunition, extruded and rolled lead

products, and various alloys and other products (2123-24, 2125-27, 2129-40, 4091).

3. The lead pigments, including oxides, so manufactured from pig lead are sold by some or all of the respondents herein and other companies to various types of purchasers, including the paint trade, paint manufacturers, industrial concerns for their own consumption, battery manufacturers, ceramic and pottery manufacturers and the oil and gasoline industry (1070, 1073, 1566, 1599, 1628-32, 2547, 2765, 3073).

4. (a) Basic carbonate of white lead has been made from corroding pig lead by various methods, including the Dutch, Lenox, Carter and electrolytic processes. The process is slow and involves many steps. Although most basic carbonate of white lead differs only slightly chemically, the physical characteristics of the material as made by the various methods or by different manufacturers vary considerably, particularly with relation to size of particle, whiteness, hiding power, ease of application or the particular use to which the purchaser may wish to put the product (1660, 2882; Resp. Ex. 156; 1073, 2903-05, 3615-16).

(b) Red lead and litharge are made by roasting pig lead in ovens or furnaces. Litharge is the result of the first step of roasting and red lead is made by further roasting (2943-44). Red lead is made in grades of 95%, 97% and 98% red lead. 98% red lead is the highest quality red lead and can be made in 48 hours (3872). The red lead and litharge manufactured by some of the respondents and other companies are not identical products but vary according to the particular method of manufacture and the use to which the purchaser may wish to put the particular product (1736-40, 1767-68, 1817-20, 1854-56, 2767-68, 3439-41, 3443-44, 3467-70, 3621-22).

5. (a) Dry white lead, basic carbonate, has been sold by the respondents to paint grinders or manufacturers for use as one of the ingredients in the manufacture of ready-mixed paints (1070, 2999). While formerly basic carbonate of lead was used as one of the principal

ingredients in some of the best paints, beginning with 1930 and in subsequent years, basic carbonate of lead in dry form has been used in smaller quantities and in place thereof paint manufacturers have used basic sulphate of lead, lithopone, leaded zinc oxide, titanium dioxide, or a combination of two or more such products with basic carbonate of lead (1408-09, 1424, 1661, 2583, 2998-99, 3337, 3340-42, 3346, 3354-55).

(b) Dry white lead, basic sulphate, has also been sold by some of the respondents to paint manufacturers for the same use either alone or as combined with zinc oxide to form leaded zinc oxide (3349, 3354-55).

(c) White lead in oil is basic carbonate of white lead mixed with linseed oil to form a paste (Resp. Ex. 156; 2879-80, 2889) and this has been sold by the respondents either through agents to dealers, painters, industrial consumers, governmental agencies and individual householders or directly to distributors and the same classes of customers (Answers of respondents). White lead in oil has been used, when mixed with other oils and thinners, as an exterior house paint of high quality (2887-88). The mixing of white lead in oil with the other ingredients necessary to render it ready for application requires some skill on the part of the consumer (2236). During the last fifteen or twenty years the sales of white lead in oil have steadily declined as the result of the competition furnished by ready-mixed paints which offer the consumer a paint ready for application (Resp. Ex. 140; Com. Ex. 851-A; 3617-18, 3662-63, 3672). During the past decade at least one of the respondents has sold a ready-mixed pure white lead paint ready for use by the painter or other consumer (3662-63, 3665). White lead in oil has also been sold in the form of grinders' paste to manufacturers of paint products (3985).

(d) Red lead in the form of red lead in oil is used as one of the principal ingredients in red lead paint and has been sold to railroads, steamships, industrial accounts and to the paint trade (3000; Com. Ex. 615A-D). Dry red lead is also used in the manufacture of electric storage battery plates and by the paint and varnish trade (2999).

(e) Litharge is used in the manufacture of electric storage battery plates and to some extent by the paint trade, pottery business and the oil and gasoline industry (2547, 2765, 3000, 3073).

(f) Blue lead and orange mineral are insignificant items of commerce.

THE BUSINESS OF RESPONDENTS.

6. During the period from 1936 to 1941, respondent, National, produced approximately 60% of the white lead in oil sold on the market, from 30% to 35% of the dry white lead, basic carbonate, sold on the market and approximately 50% of the oxides, red lead and litharge, sold on the market (1647, 1665-66; Com. Ex. 664). The combined total percentage of dry white lead, basic carbonate, and white lead in oil sold on the market for this respondent was 58.8% in 1938 and 53% in 1941 (Com. Ex. 669). In addition, respondent, National, sold small quantities of basic sulphate of lead but it has never been a significant factor in the industry with respect to this product (3349). Respondent, National, manufactures basic carbonate of white lead at plants located at Perth Amboy, New Jersey, Philadelphia, Chicago, St. Louis and Oakland, California (1071-72). Its oxide plants are located in Brooklyn, Philadelphia, Charleston, West Virginia, St. Louis, Chicago, Dallas, Atlanta, Los Angeles and San Francisco (1625). The Dallas plant was put into operation in 1940 or 1941 and the Atlanta plant in 1942 (1625). While, prior to 1921, respondent, National, secured the bulk of its pig lead requirements from American Smelting and Refining Company (Com. Ex. 93A-I), in more recent years it has purchased pig lead from a number of smelters and refineries, including St. Joseph Lead Co., U. S. Smelting & Refining Co., American Smelting and Refining Company, Anaconda Sales Co., and others (1068; Resp. Ex. 173).

7. During the period from 1930 to 1946, respondent, Eagle-Picher, produced from 15% to 20% of the white lead in oil sold on the market and approximately 10% of the dry white lead, basic carbonate, sold in the United States (1560-61). In addition, this respondent produced

and sold substantial quantities of basic sulphate of lead either as such or as mixed with zinc oxide to form leaded zinc oxide (3357, 4129). During the period from 1937 to 1944, respondent, Eagle-Picher, produced and sold the following quantities of dry white lead, basic carbonate, and basic sulphate of lead (4129):

SALES TONNAGES.

<i>Year</i>	<i>Basic White Lead Carbonate</i>	<i>Basic White Lead Sulphate</i>
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

In addition, respondent Eagle-Picher's production of leaded zinc oxide (basic sulphate of lead combined with zinc oxide [3355]) during 1941-1942 was approximately three and one-half times its production of basic white lead sulphate (3357). Respondent, Eagle-Picher, produced white lead at its plant in Cincinnati, Ohio, and its oxides, red lead and litharge, at plants located in Joplin, Missouri, and Newark, New Jersey (1552, 1564). In addition, it manufactured basic white lead sulphate and leaded zinc oxide at its Galena, Kansas plant (3421). It also manufactures leaded zinc oxide at Hillsboro, Illinois (3600). The bulk of its pig lead is purchased from U. S. Smelting & Refining Co., East Chicago, Indiana, although respondent, Eagle-Picher, produces a high grade ore itself in the Tri-State area from which it manufactures basic sulphate of lead and zinc oxide (1561-62, 3437).

Prior to World War II and in 1945 and 1946, respondent, Eagle-Picher, produced and sold a ready-mixed pure white lead paint known as R. T. U. (3662-63, 3665).

8. From 1932 to 1943, respondent Glidden produced between 2% and 9% of the white lead in oil sold in this country (Resp. Ex. 144),

between 8% and 18% of the dry white lead, basic carbonate, sales (Resp. Ex. 145), and between approximately 4% and 8% of the oxides, red lead and litharge, sold in the industry (Resp. Ex. 146). Respondent, Glidden, has two divisions, Euston Lead Co., Scranton, Pennsylvania, acquired in 1924, which produces basic carbonate of lead, and Metals Refining Co., Hammond, Indiana, acquired in 1929, which produces red lead and litharge (1230, 1231, 1233, 2455, 2732). Respondent, Glidden, is also a large manufacturer of ready-mixed paints (2553, 2661).

9. While respondent, Sherwin-Williams, produces white lead and oxides, red lead and litharge, at its plant in Chicago (1313), it does not sell oxides to battery manufacturers (1648). In 1944 and for many years prior thereto, respondent, Sherwin-Williams, sold about 5% of the white lead in oil and less than 1% of the dry white lead, litharge, and red lead sold in this country (1331-1332). Respondent, Sherwin-Williams, also manufactures ready-mixed paints.

10. Respondent, Anaconda, has never engaged in the business of the manufacture or sale of lead pigments. Neither respondent, Anaconda, nor any of its subsidiaries has ever produced any oxides, red lead or litharge. In 1919, Anaconda Lead Products Co., a subsidiary of respondent, Anaconda, began the production of dry white lead, basic carbonate, at its plant in East Chicago, Indiana, and the production of white lead in oil at the same plant in 1931. In 1936, respondent, I. S. & R., acquired the property and assets of Anaconda Lead Products Co. The principal source of pig lead for this respondent was lead bullion smelted in Utah and refined in East Chicago, Indiana (Com. Ex. 836A-N). From 1937 to 1941, respondent, I. S. & R., sold from 3% to 4% of the white lead in oil sold in this country and from 10% to 19% of the dry white lead, basic carbonate (Com. Exs. 741, 836-J). Its combined percentage of the white lead in oil and dry white lead, basic carbonate, sales was 6.6% in 1938 and 8.8% in 1941 (Com. Ex. 669).

In July, 1946, respondent I. S. & R. discontinued the production and sale of white lead in oil and dry white lead, basic carbonate (Com. Ex. 836-B), and on October 1, 1946, it sold the plant in East Chicago, Indiana, where these materials had been manufactured, to respondent Eagle-Picher (2035) after having received a number of bids from other companies, not respondents in this proceeding (3545).

11. Basic carbonate of white lead has been produced by companies other than respondents, including MacGregor and W. P. Fuller & Son (Com. Ex. 669); white lead in oil has been produced by many manufacturers of ready-mixed paints (2525); while oxides, red lead and litharge, have been produced by Hammond Lead Co., Hammond, Indiana (1647, 1676, 1702, 1760, 1881-82, 1915, 1918, 2022), and by storage battery manufacturers for their own consumption (1647).

RESPONDENT, NATIONAL LEAD COMPANY.

12. On or about December 8, 1891, respondent, National, was formed by the acquisition of properties formerly owned by Cornell Lead Co. of Buffalo, N. Y., The National Lead & Oil Co. of New York, N. Y., Atlantic White Lead & Linseed Oil Co. of New York, N. Y., Salem Lead Co. of Massachusetts, The J. H. Morley Lead Co. of Cleveland, Ohio, The Eckstein White Lead Co. of Cincinnati, Ohio, Anchor White Lead Co. of Cincinnati, Ohio, Maryland White Lead Co. of Baltimore, Maryland, American White Lead Co. of Louisville, Kentucky, Kentucky Lead & Oil Co. of Louisville, Kentucky, Southern White Lead Co. of Chicago, Illinois, D. B. Shipman White Lead Works of Chicago, Illinois, Southern White Lead Company of St. Louis, Missouri, St. Louis Lead and Oil Co. of St. Louis, Missouri, Collier White Lead & Oil Co. of St. Louis, Missouri, and Red Seal Castor Oil Co. of St. Louis, Missouri, together with the following shares of stock in the following companies:

1195 shares Cornell Lead Co.
 9993 shares The National Lead & Oil Co. of N. Y.
 495 shares Atlantic White Lead & Linseed Oil Co.
 670 shares Salem Lead Co.

1995 shares The J. H. Morley Lead Co.
 6495 shares The Eckstein White Lead Co.
 531 shares Anchor White Lead Co.
 295 shares Maryland White Lead Co.
 950 shares American White Lead Co.
 267 shares Kentucky Lead & Oil Co.
 9995 shares Southern White Lead Co. of Illinois
 2995 shares D. B. Shipman White Lead Works
 9993 shares Southern White Lead Co. of Missouri
 2995 shares St. Louis Lead & Oil Co.
 993 shares Collier White Lead & Oil Co.
 495 shares Red Seal Castor Oil Co.,

the sixteen companies whose properties were acquired as aforesaid having been previously engaged in the manufacture, sale and distribution of white lead, linseed oil and kindred products, the stock ownership of which had been in or controlled by the National Lead Trust.

In February, 1906, it acquired all of the stock of United Lead Company, which company was engaged principally in the manufacture, sale and distribution of metallic lead and lead alloy products.

In February, 1907, it acquired all of the stock of the Magnus Metal Company (Magnus Company, Inc.). This company never engaged in the manufacture, sale or distribution of white lead, linseed oil or kindred products.

In March, 1913, it acquired all of the stock of the Heath & Milligan Manufacturing Company, and in September, 1919, disposed of such stock to The Glidden Company.

In March, 1906, it acquired all of the stock of Carter White Lead Company, which had properties in Chicago, Illinois, and Omaha, Nebraska; in July, 1912, it acquired all of the stock of Matheson Lead Company; in 1915, the River Smelting & Refining Company was organized jointly by National Lead Company and Stone & Webster; in March, 1916, it acquired all of the stock of Bass-Hueter Paint Company; in December, 1917, it organized National Lead Company S. A. (Argentina) as a wholly owned subsidiary; in January, 1919, it acquired the properties and assets of Hirst & Begley Company (17-19).

13. From the date of its organization, it was the expressed intention of respondent, National, not to become a monopoly in any line of commerce nor to engage in any monopolistic activities (Resp. Ex. 179-E).

14. Early in its history, respondent, National, closed many of the plants manufacturing lead products, amalgamated others and enlarged existing plants, all of which was intended to and did promote more efficient and economical methods of manufacture and lower prices to the purchasing public (Resp. Exs. 175-A, 179-D).

15. Eventually respondent, National, established branch offices at the following points: New York, Philadelphia, Boston, Buffalo, Pittsburgh, Cincinnati, Cleveland, Chicago, St. Louis and San Francisco (Resp. Ex. 153). The territories served by these branches were in most instances the territories which theretofore had been served by the predecessor companies prior to acquisition by respondent, National (2891-92).

16. In the summer of 1930, officials of respondent, National, were approached by A. & J. Frank, brokers in Cincinnati, who called attention to the fact that shares of common stock of respondent, Eagle-Picher (then known as "Eagle-Picher Lead Company") were being offered for sale at low prices (3308, 3311). In accordance with its policy of occasionally making short-term investments in the stocks of other industrial companies, and taking into consideration the low price (3305), respondent, National, beginning on July 29, 1930 and continuing from time to time through June 13, 1932, bought for investment 44,900 shares of common stock of respondent, Eagle-Picher, at a total purchase price of \$226,630 (Resp. Ex. 183). These shares were purchased in the name of respondent National's nominee, E. J. Cornish, who was then its president (3308, 4121). At that time there were issued and outstanding approximately 900,000 shares of common stock of respondent, Eagle-Picher (4122-23). The bulk of the shares of stock of respondent, Eagle-Picher, so purchased by respondent, National, was sold by it in the early part of 1937 and by March 5, 1937, respondent, National, held only 3,500 shares of common stock of

respondent, Eagle-Picher (Resp. Ex. 183). These were subsequently transferred to the name of respondent, National, and were sold in June, 1944 (Com. Ex. 700-B, Resp. Ex. 183). The total sales price received by respondent, National, in the sale of the 44,900 shares of common stock of respondent, Eagle-Picher, was \$1,086,014.03 (Resp. Ex. 183), so that respondent, National, made a profit on this investment of \$859,384.03. In addition, on April 13, 1932 respondent, National purchased 50 shares of preferred stock of respondent, Eagle-Picher, for \$2,600 which it sold on February 27, 1937 for \$5,197.50 (Resp. Ex. 183). At no time was respondent, National, represented on the Board of Directors of respondent, Eagle-Picher, and respondent, National, voted the stock of respondent, Eagle-Picher, by proxy. Respondent, National, made no attempt at any time to exercise any sort of control over respondent, Eagle-Picher, and made no attempt at any time to influence respondent, Eagle-Picher, in the conduct or management of its business (3308-09). Following a suggestion made the early part of 1931 by one Frederick Hertenstein, a vice-president and director of respondent, Eagle-Picher, that E. J. Cornish, president of respondent, National, consider the purchase of a large block of stock of respondent, Eagle-Picher, respondent, National, on or about May 12, 1931 sent Hertenstein a letter, addressed to the President and Directors of respondent, Eagle-Picher, containing a proposal that respondent, National, purchase the assets and goodwill of respondent, Eagle-Picher, with the request that Hertenstein present it in proper form to the company. Hertenstein never delivered this letter as requested. He expressed the opinion that the offer was unsatisfactory, and returned the letter to respondent, National, without presenting it to the Board of Directors of respondent, Eagle-Picher, and nothing further came of the proposed transaction. The Department of Justice was kept informed as to all the negotiations in connection with this proposal and was asked to express its opinion as to the legality of the proposed transaction. The Department of Justice on or about May 8, 1931 stated that it preferred to express no opinion as to the legality of the transaction. A copy of the letter sent to Hertenstein was forwarded to the Department of Justice (Com. Ex. 866A-B; 4182-83).

17. Prior to January, 1942 when the Office of Price Administration was established, the cost to respondent, National, of its inventories of corroding pig lead and of the lead content of basic carbonate of lead in process and in finished stock was the most important single factor in its determination of its selling price of basic carbonate of white lead, both dry and in oil (Par. 6, answer of respondent, National; Resp. Ex. 154A-I). In addition, with respect to dry white lead, basic carbonate, the price at which respondent, National, sold this product also depended upon the price of competitive pigments such as basic sulphate of lead, leaded zinc oxide and titanium dioxide. In setting a price for white lead in oil, respondent, National, also took into consideration the prices at which competitive ready-mixed paints were being sold (2998-99). The price at which respondent, National, sold red lead and litharge depended upon the day to day market price for pig lead from which such oxides were made and to the price of pig lead was added a charge to cover the process of conversion from pig lead to litharge or red lead, as the case might be (1635-36).

18. Respondent, National, has never at any time exerted any influence upon American Smelting and Refining Company or any other producer of pig lead with respect to the determination of the price at which such producers would sell pig lead on the market (1220-21, 3278, 4087). It was to the interest of respondent, National, to obtain pig lead at the lowest possible price to it, while it was to the interest of American Smelting and Refining Company and the miners from whom that company purchased lead ore or lead concentrates to obtain the highest possible price for its pig lead (4087, 4088*). In so doing, American Smelting and Refining Company, the largest producer of pig lead in the world (4091), attempted to sell on the market pig lead in the same quantities and upon the same price basis as it was then purchasing the raw material, lead ore or lead concentrates, from the miners (4088, 4088*). American Smelting and Refining Company determined the price at which it sold pig lead and from time to time quoted prices f. o. b. New York, which was one of the chief markets for such product (1220, 2386, 4088).

* There are two pages of the Transcript marked 4088. The reference is to the second of such pages marked 4088.

In 1906 respondent, National, entered into a contract with American Smelting and Refining Company requiring respondent, National, for a period of fifteen years to purchase the bulk of its pig lead requirements from American Smelting and Refining Company (Com. Ex. 93A-I). This contract expired in 1921 and, although American Smelting and Refining Company attempted to obtain an extension thereof, respondent, National, refused to give one on the ground that such a contract was too onerous a burden upon it (4083-84). Thereupon, respondent, National, and American Smelting and Refining Company signed a mutual release with respect to the obligations created by said 1906 contract (4085; Resp. Ex. 228) and from 1921 on respondent, National, purchased pig lead from American Smelting and Refining Company and other producers of pig lead on a month to month basis at a spot price or at an average monthly price (3279-80, 4085-86). From 1936 to 1941, respondent, National, made purchases of pig lead as follows (Resp. Ex. 173):

PIG LEAD PURCHASES						
	(Tons)					
	1936	1937	1938	1939	1940	1941
A. S. & R. Company**	48,422	51,113	39,126	41,819	47,885	77,010
St. Joseph Lead Company	53,217	58,305	43,181	48,623	53,734	51,994
St. Joseph Lead Company (Mine La Motte)	—	—	—	—	—	871
Bunker Hill Smelter	—	—	3,000	4,806	4,175	5,133
St. Louis Smelting & Refining Works	10,263	7,282	2,269	11,791	8,624	5,112
Cerro de Pasco ...	—	—	1,624	2,750	3,480	11,270
Others	9,920	13,131	7,820	12,415	15,297	*60,005
Totals	<u>121,822</u>	<u>129,831</u>	<u>97,020</u>	<u>122,204</u>	<u>133,195</u>	<u>211,395</u>

* Anaconda Sales Co. 5,000
 U. S. Smelting 2,000
 American Metal Co. 8,000
 C. Tennant Sons & Co. 45,005

** American Smelting & Refining Company.

19. During its entire history, respondent, National, has never attempted to obtain, nor has it obtained, a monopoly of or monopoly power or control over the manufacture, pricing, sale or distribution of lead pigments in commerce or any of them (See Reasons for Proposed Findings).

LEAD INDUSTRIES ASSOCIATION AND THE N. R. A. PERIOD.

20. Respondents (with the exception of respondents, Anaconda and I. S. & R.) and more than forty other companies have been members of the Lead Industries Association since its organization in 1928. International Smelting Company, the predecessor of respondent I. S. & R., became a member in 1929 (Com. Exs. 498A-K, 499A-H).

21. Lead Industries Association was formed in November, 1928 to foster scientific research and promotional work for the lead industry and to disseminate pertinent information concerning lead products and to act as representative of the lead industry before the public (Resp. Ex. 1). From its inception, its membership has included practically all of the mining companies, smelters, refiners and manufacturers of lead products (2131-48; Resp. Exs. 15A-B) of which the miners, smelters and refiners have constituted the dominant group (2536).

22. Article 3 of the constitution of Lead Industries Association reads as follows (Resp. Ex. 1):

"ARTICLE 3

Limitations

No agreement, understanding, combination or arrangement or any form of concerted action to curtail production, fix prices, suppress competition, or in any other manner to restrain trade or commerce, or to monopolize, or attempt to monopolize any part of the trade or commerce of the country shall be permitted in the Lead Industries Association, nor any other act or acts which may be in contravention of law or good business practice. Each member of the association shall be wholly free to conduct its business without legal or moral accountability to the association or to any member thereof."

23. Shortly after the formation of Lead Industries Association, its Secretary, Felix E. Wormser, was requested to furnish and did furnish the Department of Justice with the details of the Association's organization and proposed activity (Resp. Exs. 14, 15A-B, 16, 17, 18, 19, 20, 21, 22, 23), and from the time of its organization the Department of Justice and the Federal Trade Commission, as well as other public agencies, were furnished with copies of the statistical reports issued by the Lead Industries Association to its members (2188-89).

24. Since its organization, Lead Industries Association has received from respondents (other than respondent Anaconda) and other manufacturers of lead pigments monthly reports showing individual statistics as to production, shipment, and stock on hand and in turn each month Lead Industries Association has furnished its members with reports of the total of such figures for the entire industry (2186-87; Com. Ex. 670). No individual report by any member has ever been furnished to any other member (2186-87) and at no time has Lead Industries Association ever received from its members or disseminated to such members any price data, whether as to past or future transactions (2187-88). Lead Industries Association did not issue any publication to the trade setting forth current market quotations on lead pigments (1039) and it did not furnish information or quotations on lead pigments to any trade publication (1040).

25. Lead Industries Association has done notable work in connection with the subject of lead poisoning, both as to research and public education (2537), and from time to time has engaged in promotional campaigns designed to increase the production of and to widen the market for lead pigments and other lead products (Resp. Exs. 31C, 50B-D, 52G, 59C; 2296, 2298, 2372). In addition, Lead Industries Association has represented the lead industry before various scientific and medical associations and has appeared for the lead industry before various legislative bodies (2537).

26. In 1933, after the enactment of the National Industrial Recovery Act, the members of Lead Industries Association expressed

reluctance to the formulation of any Code for the lead industry, but at the urgent insistence of N. R. A. officials the Lead Industries Association in July, 1933 drafted a so-called "Master Code" which dealt primarily with wages and hours and had no provisions with respect to trade practices (Resp. Exs. 50K, L, O; 2153-54; Resp. Ex. 77A-F; 2308). This was presented for approval to officials of the N. R. A., but these officials insisted that the Code for the lead industry include schedules for trade practices and price reporting (Resp. Exs. 81A-B; 2170; Com. Ex. 518A, 2397-98). Complying with this insistence, the members of the lead industry attempted to draft supplementary codes for the lead pigment manufacturers containing such provisions (Resp. Ex. 50K-L). The manufacturers of lead pigments constituted the Lead Pigments Division for Code purposes and in connection with the drafting of schedules of trade practices two committees were appointed, one, the White Lead in Oil Committee, and the other, the Dry Products Committee (Com. Exs. 501A-D, 508C, 800A-C). The Dry Products Committee, in turn, was subdivided into two groups, one representing the manufacturers of dry white lead and the other, producers of oxides (2175). Respondents, with the exception of respondent, Anaconda, and other companies not respondents in this proceeding, were represented on both committees.

27. The White Lead in Oil Committee and the Dry Products Committee met on various occasions between July, 1933 and January, 1934 in an attempt to draft supplementary codes acceptable to the N. R. A. (Com. Exs. 501A-D, 502A-C, 504A-B, 505A-B, 799, 800A-C, 801A-B, 802A-B, 803, 805A-C; Resp. Exs. 83A-Z-3, 85A-Z-13, 134A-E, 135A-B, 136A-B, 137A-B, 138A-B). Many topics were discussed at those meetings, including terms and conditions of sale, the agency method of selling, and freight and zoning problems (id.). Various proposed supplementary codes were drafted and submitted to the N. R. A. which, in turn, made many suggestions as to the final wording (id.; Resp. Ex. 159D). One of the suggestions of Deputy Administrator Janssen concerned the filing of prices and terms of sale with the Code Authority and the provision suggested would have had the

effect of requiring rigid adherence to announced prices and terms of sale (Com. Ex. 518A-B). The Lead Pigments Division, while reluctant to the adoption of any price filing provision (Resp. Ex. 50-O), rejected the suggested provision and, instead, substituted a provision which merely required the filing of prices and deviations from the terms of sale for oxides and dry white lead, basic carbonate, set forth in Schedule A of the Lead Code (Com. Ex. 803). No agreement or understanding was reached by or among any of the respondents as to the use of the agency method of selling or zones (Com. Exs. 506E, 505A). Schedule A of the Lead Code (Com. Ex. 809), setting forth the terms of sale for oxides and dry white lead, contained no reference to prices because the respondents and other manufacturers of lead pigments did not wish to contravene the anti-trust statutes even for Code purposes (Com. Ex. 504B).

28. The Code for the Lead Industry was approved on May 24, 1934 (Com. Ex. 809) and shortly thereafter the respondents and other manufacturers of lead pigments, being unwilling to report prices or to be required to follow the terms of sale of Schedule A, requested and obtained a temporary exemption from Section 2 of Article VII of the Lead Code dealing with the filling of prices and deviations from the terms of sale set forth in Schedule A as well as from the requirements of Schedule A (Resp. Exs. 6A-I, 7A-C, 8A-B). A further exemption was requested in September, 1934 (Com. Ex. 507A-C, Resp. Ex. 9A-F) and neither Section 2 of Article ~~XII~~ of the Lead Code nor Schedule A ever became enforceable or effective under the terms of the Lead Code (Resp. Ex. 9E-F; 222S-30). V.L.

29. From June, 1934 until the N. R. A. was declared unconstitutional, the Lead Code was administered by a Code Authority composed of the Executive Committee of Lead Industries Association and the chairmen of the various divisions of the Association (Resp. Exs. 127A-G, 13A-D).

30. In the fall of 1933 (Com. Exs. 705A-D, 706A-D) and again in November, 1934, the paint industry attempted to persuade the N. R. A.

that the manufacturers of white lead should be subject to the provisions of the Paint Code but some of the respondents and the Code Authority for the Lead Code successfully resisted both attempts (Resp. Ex. 11A-F; 2238-39). Some of the respondents and other manufacturers of white lead felt that if lead pigments were brought under the Paint Code, the prices for white lead would be raised to the detriment of the public and their own competitive position with respect to the paint industry (id.). This feeling was based upon the fact that the Paint Code (Resp. Ex. 12) contained a provision prohibiting sales below cost and cost was defined in such an arbitrary fashion as to make it inevitable that white lead prices would be greatly increased over their customary level (2239-45).

31. On June 11, 1935, shortly after the N. R. A. was declared unconstitutional, the Code Authority met informally and wound up its affairs (Resp. Ex. 13A-D).

32. In November, 1935, George L. Berry, Esq., Coordinator for Industrial Cooperation, invited representatives from Lead Industries Association to Washington to consider voluntary action to continue the activities of the N. R. A., and the Executive Committee of Lead Industries Association, at a meeting held on November 22, 1935, resolved as follows (Resp. Ex. 92A-B):

"WHEREAS, the Lead Industries Association was invited, under date of October 9, 1935, to attend a conference in Washington, called by Mr. George L. Berry, Coordinator for Industrial Cooperation, 'for the purpose of conferring upon the advisability of developing a permanent structure contemplating the furtherance of prosperity and stability in our industrial life', and 'for consideration of the best means of accelerating industrial recovery, eliminating unemployment and maintaining business and labor standards'; and

WHEREAS, the Lead Industries Association in reply declared itself as opposed to the aforesaid governmental conference at this time as tending to confuse and disturb industry, although indicating a willingness to send a representative if desired; and

WHEREAS, Mr. Berry's letter of November 7, 1935, giving details of the conference, undisclosed by the invitation of October 9, from which it appears that the meeting will be so conducted that representatives of the Lead Industries Association might be held to have committed the industry and its members to a program adopted at the conference because of participation in it; and

WHEREAS, majority action upon matters placed before the conference might by implication bind an unwilling minority; and

WHEREAS, the Lead Industries Association basically represents a natural resource industry, producing diversified lead products from mine to finished material, with mining and smelting operations generally conducted in remote localities under operating conditions dissimilar to those usually found in other industries, and with problems peculiarly its own; and

WHEREAS, the lead industry has made greater progress out of the depression from the standpoint of both employer and employee since the termination of N. R. A. than it did before;

Now, THEREFORE, BE IT RESOLVED, that it is undesirable for the lead industry as a unit to send a representative to the meeting called by Mr. George L. Berry, to be held in Washington on December 9, 1935."

33. During the course of N. R. A., respondent, National, through its president, E. J. Cornish, expressed its policy to the effect that N. R. A. was only temporary and should not be made the cloak for price-fixing activities (Resp. Ex. 168; 3067) and on June 6, 1935, the Executive Committee of respondent, National, resolved that the termination of N. R. A. did not require any change in company practices theretofore followed (Resp. Ex. 182).

THE AGENCY METHOD.

34. In December, 1932, the Atlantic Branch (in New York) of respondent, National, first began to employ the agency method of selling white lead in oil in an attempt to forestall the wide-spread practice of certain dealers who were using Dutch Boy white lead in oil

produced by respondent, National, as a "loss leader" to attract the retail trade by selling the product at retail at cost or very little above cost (2905-07).

35. The agency method of selling white lead in oil was to enter into written contracts with reliable dealers (Com. Ex. 595) who, under the terms of the contract, were to act as the manufacturer's agent in selling the product, title to which remained in the manufacturer (Com. Ex. 613A-C). Under the terms of the agency contract, the agent agreed to sell the product at a stated price and he was to be compensated for his services by receiving the difference between a stated amount (sometimes called the "agen.'s price" [Com. Ex. 656A-B]) and the price at which he sold the product to purchasers in the retail market. Sales were periodically reported by the agent to the manufacturer who thereafter billed the agent for the goods sold by him upon the basis of the commission differential just described (638; Com. Ex. 752A-Z-144).

36. The agency method as originally employed by the Atlantic Branch of respondent, National, and as later extended, was based upon a similar method that had been used by the General Electric Company in its sale of Mazda lamps (Com. Ex. 506-D). The agency, however, was not exclusive and the agent was free to handle the goods of manufacturers other than respondent, National (Com. Ex. 706B-D).

37. Following the inauguration of the agency plan by the Atlantic Branch of respondent, National, in the early part of 1933, respondent, National, extended the use of the plan to its eastern territories (Com. Ex. 712A).

38. About the same time, respondent, Eagle-Picher, also experimented with the use of the agency method of selling white lead in oil (Com. Ex. 712A) and during the summer of 1933 respondent, Eagle-Picher, was informed by respondent, National, that the latter's agents for the most part were in favor of the continuation of the agency method (Com. Exs. 684, 686).

39. When in October, 1933, it became apparent that the initial attempt of the paint industry, which was opposed to the use of the agency method, to have the white lead industry brought under the Paint Code would not be successful, respondent, National, thereupon determined to extend the use of the agency method of selling white lead in oil to all of its branches, with the exception of the Pacific Coast, and the method was so extended in November, 1933 (Com. Exs. 596A-B, 597, 598).

40. At the time respondent, National, determined to extend the use of the agency method on a nation-wide basis, it so informed respondent, Eagle-Picher (Com. Ex. 599) and the latter also extended the method on a nation-wide basis at or about the same time (Com. Ex. 629A-C).

41. There was no agreement at any time between respondent, National, and respondent, Eagle-Picher, or any other respondent as to the use of the agency method nor was participation by the other respondents in the use of the plan invited or suggested at any time by respondent, National, which determined to employ the agency plan regardless of the action of any other manufacturer of white lead in oil (See Reasons for Findings).

42. Although the agency method was discussed when supplementary codes were being drafted by the Lead Pigments Division during N. R. A. days, no agreement as to the inclusion of this plan in the Code could be reached since some of the manufacturers of white lead in oil, notably, respondent, Sherwin-Williams, and respondent, Glidden, were opposed to the plan because of its consignment feature (Com. Ex. 506-E).

43. Admittedly, consignment of goods under the agency method was an economic evil from the manufacturer's standpoint since it resulted in tying up inventories scattered throughout the territories in which agents were located (2909), but in the view of respondent, National, this disadvantage was more than outweighed by the ad-

vantage of eradicating the demoralizing situation created by the retailers' practice of selling white lead in oil as a "loss leader" (2907).

44. Respondent, Glidden, employed the agency method for only a short time between 1939 and 1941 or 1942 (Com. Ex. 649A-C; 2522), but it sold no substantial percentage of white lead in oil by this method (Com. Ex. 772A-Z-31).

45. Respondent, Sherwin-Williams, never used the agency method.

46. Respondent, I. S. & R., did not employ the agency method but did use a so-called "consignment arrangement" for the sale of white lead in oil beginning in November, 1932 (Com. Ex. 836E).

47. In January, 1944, respondent, National, discontinued the use of the agency method and it has not employed that method since that time (Com. Ex. 624A-B; Resp. Ex. 158).

48. Since the discontinuance of the agency method, respondent, National, has sold white lead in oil to distributors to whom resale prices have been suggested but not required (Resp. Ex. 158; 3939).

49. The agency method of selling was never used by any respondent in selling any lead pigments other than white lead in oil.

ZONES.

A. White Lead in Oil.

50. Since at least as early as 1910, respondent, National, has sold white lead in oil on the basis of zone or territorial differentials (2893). From 1910 up until the adoption of a zone map in the latter part of 1933, these territorial differentials were expressed in terms of delivery, differential and equalization points (2894; Com. Ex. 659C-P). Delivery points were those cities and towns in the par territory of the Northeastern and Midwestern States which repre-

sented the chief markets for white lead in oil where free delivery was made to the customer or distributor, i. e., where a flat price with no additional charge for freight was made, regardless of the location of the delivery point. Differential points were towns and cities located in other areas of the United States where a differential premium over the base price was charged to compensate in part for the greater freight charges incurred by respondent, National (Com. Ex. 659C-P). Differential points carrying the same, or nearly the same, differential premium would be included in the same territory so that in one group of States the differential points would carry a premium of $\frac{1}{8}\text{¢}$ per lb. over the base price, while other groups of States would contain respectively differential points carrying a premium of $\frac{1}{4}\text{¢}$, $\frac{3}{8}\text{¢}$, $\frac{1}{2}\text{¢}$, $\frac{5}{8}\text{¢}$, $\frac{7}{8}\text{¢}$, $\frac{3}{4}\text{¢}$ or 1¢ per lb. over the base price as the case might be (Resp. Ex. 147). Equalization points were towns located both in par and in differential territories with which freight would be equalized in case shipments of white lead in oil were made to points which were not either delivery or differential points. In other words, if a shipment were made to a customer located in a town other than a delivery or differential point, the customer would pay a freight charge in addition to the price, equivalent to the difference between the freight to destination and the freight to the equalization point, but the freight charge in no case would be greater than the applicable freight between the equalization point and the destination of the shipment (2948).

51. From time to time new delivery or differential points were added and changes were made in differential premiums (Com. Ex. 659C-P).

52. The possibility of setting up zones under the proposed supplemental code for the manufacturers of lead pigments was discussed at meetings of the White Lead in Oil Committee of the Lead Pigments Division during the latter part of 1933, but no agreement among respondents and the other manufacturers of white lead in oil could be reached, and therefore zones for white lead in oil were not included in the proposed supplemental code (Com. Exs. 501A-D, 505A-B).

53. During the course of the discussions in the White Lead in Oil Committee meetings, respondent, National, gathered various material to be presented to the White Lead in Oil Committee with respect to the zones for white lead in oil (Com. Ex. 513A-B).

54. When it became apparent that the members of the White Lead in Oil Committee could not agree on the use of zones as a part of the supplemental code for the manufacturers of lead pigments, respondent, National, determined itself to employ a zone map setting forth in a convenient form a modification of the territorial or zone differentials which had been employed by it at least as far back as 1910 (2916; Resp. Ex. 147).

55. Instead of using the old and cumbersome method of delivery, differential and equalization points, respondent, National, determined to set forth by territorial division flat differentials and to portray the zones pictorially upon a map (Com. Ex. 580). This was done shortly after the agency method was established on a nationwide basis by respondent, National, in November, 1933, and one of the reasons for the use of the zone map as such was to simplify the agency set up (2916).

56. When respondent, Eagle-Picher, learned that National had begun to use a zone map for the sale and distribution of white lead in oil, it also employed a similar method of distribution (1551). In addition, respondent, Glidden, and in 1936, respondent, I. S. & R., followed the practices established by National in connection with the use of the zone map (2508-09, 3512-13), with the exception that these respondents did not employ a zone map as such and apparently it was not until 1937 that respondent, I. S. & R., employed any zone map for the sale and distribution of white lead in oil (Com. Ex. 836-E). Respondent, Glidden, on the other hand, has never used any zone map as such for the sale and distribution of white lead in oil (Com. Ex. 593; 1254, 1289, 1293, 2590).

57. There was no agreement between respondent, National, or any of the other respondents in this proceeding as to the use of a zone map for the sale and distribution of white lead in oil, nor was participation in the use of such a map invited or suggested at any time by respondent, National, to any of the other respondents in this proceeding (2561-62, 2916, 3539, 3662).

B. Dry White Lead, Basic Carbonate.

58. For some time prior to 1933, dry white lead, basic carbonate, sold at a higher price of $\frac{1}{4}\phi$ per pound in the Pacific Coast area and in the other States west of the Rocky Mountains, 2625).

59. In June, 1934, respondent, National, made a slight change and included in the Pacific Coast area the States of New Mexico, Colorado, Wyoming and Montana, so that from that time on respondent, National, charged a differential of $\frac{1}{4}\phi$ a pound higher for sales of dry white lead, basic carbonate, in States west of the line formed by the eastern boundary of the States just mentioned than it did throughout the rest of the country where a flat price was charged (Resp. Ex. 159A).

60. Some of the other respondents made sales of dry white lead, basic carbonate, in the far western States and when on occasion they did some of them followed the competitive price established for those States (1576, 2624, 3497-98).

61. There was no agreement at any time between respondent, National, or any other respondent in this proceeding as to the establishment of a differential price for dry white lead, basic carbonate, in the far western States, nor was participation in the employment of this method of sale invited or suggested by respondent, National, to any of the other respondents at any time (2561-62, 2921, 2996, 3508, 3662).

C. Oxides, Red Lead and Litharge.

62. In December, 1933, there was some discussion among respondents (respondents Anaconda and I. S. & R. were not parties to this

discussion and neither company has ever manufactured or sold red lead or litharge) and other manufacturers of red lead and litharge as to the possibility of including the supplementary code for oxides (red lead and litharge) differential zones for the southern and western States, but no agreement among respondents or the other manufacturers of oxides was made (Resp. Ex. 138A-B; 2561-62, 2595, 3059, 3637).

63. On or about May 11, 1934, respondent, National, in connection with the terms and conditions of sale for oxides set forth in Articles I and II of Schedule A of the Lead Code, which was approved shortly thereafter on May 24, 1934, determined to set up zones for the sale and distribution of oxides in southern and western territories to compensate in part for the increased freight charges in those areas (Resp. Ex. 159B-I). Prior to 1934, respondent, National, had on occasion charged freight in addition to a flat price where the freight was more than 25¢ per cwt. for carload shipments and, in connection with less than carload shipments, had charged freight in addition to the price from certain designated warehouses (3060-62, 3075-76).

64. In the early part of June, 1934, respondent, National, made certain changes in the zones for oxides, so that the zones as revised were as follows (Resp. Ex. 159A):

For lots of less than 20 tons $\frac{1}{4}$ ¢ per pound was added in Florida, Georgia, Alabama, Mississippi, Louisiana, Arkansas, Texas, Oklahoma, California and west of the Cascade Mountains in Oregon and Washington; $\frac{1}{2}$ ¢ per pound was added in New Mexico, Colorado, Wyoming and Montana; $\frac{3}{4}$ ¢ per pound was added in Arizona, Idaho, Nevada, Utah and west of the Cascade Mountains in Oregon and Washington. In addition, for shipments in lots of 20 tons or more, $\frac{1}{4}$ ¢ per pound was added in Florida, Georgia, Alabama, Mississippi, Louisiana, Arkansas, Texas, Oklahoma, New Mexico, Colorado, Wyoming, Montana, Idaho, Utah, Arizona, Nevada and east of the Cascade Mountains in Oregon and Washington.

65. When these terms were announced to the trade in the latter part of May and the early part of June, 1934 by respondent, National,

respondents Glidden and Eagle-Picher, as well as other manufacturers of oxides, began to quote similar differentials in the sale and distribution of oxides in the southern and western States just mentioned (1580, 2552-53, 2686). These respondents did not do any considerable business in oxides in the far western States and in quoting similar differentials for the southern and southwestern States these other respondents, who did make sales of oxides, quoted such differentials to meet the terms established by respondent, National, and to obtain some compensation for the greater freight charges incurred by such respondents (id.).

66. There was no agreement at any time between respondent, National, or any of the other respondents engaged in the sale and distribution of oxides as to the use of zones for the sale and distribution of oxides, nor was participation in the use of such zones invited or suggested by respondent, National, to any of the other respondents at any time (2561-62, 2595, 3059, 3637).

PRICES.

67. There was no uniformity or identity of prices among respondents and other manufacturers of lead pigments with respect to the sale and distribution of lead pigments as defined in the amended complaint.

A. White Lead in Oil.

68. Some of the respondents* from time to time issued and published price cards or bulletins in connection with the sale and distribution of white lead in oil (Com. Exs. 659A, B, Q-Z-51, 660A-Z-2, 663A-K, 738A-M) and while, from time to time, the published so-called "list" prices of the respondents were the same, no substantial percentage of the sales of white lead in oil of the respondents was made at list prices (2995). For the most part these respondents received a net return represented by the price at which respondents sold to their dealers or distributors for resale or the sum which they received

* The methods employed by respondent, Sherwin-Williams are described in the proposed findings submitted by counsel for that company.

from their agents who sold to the trade on behalf of such respondents from consigned goods in the hands of the agents (Com. Exs. 752A-Z-144, 754A-Z-60, 772A-Z-31, 795A-Z-14).

69. From time to time after the employment of its agency method in November, 1933, respondent, National, changed the net amount which its agents were required to return to it and determined various quantity and trade prices which the agent under his agency contract agreed to observe (Com. Ex. 656A-B).

70. Respondent, National, has produced white lead in oil under its Dutch Boy label which for a period of more than 35 years has had the highest consumer acceptance and has been recognized in the trade and by the competitors of respondent, National, as being the criterion of quality in the white lead in oil market (2499, 2525, 2895-97, 3513).

71. Respondent, Eagle-Picher, produced white lead in oil under the Eagle brand and under the Hammer brand (1554) and its Eagle brand of white lead in oil was recognized in the trade and by its competitors as occupying a position next to Dutch Boy in consumer acceptance and quality (2525). In setting the amount which it would receive from its agents in the sale of Eagle brand white lead in oil, respondent, Eagle-Picher, usually obtained the same net return which was received by respondent, National, from its agents selling Dutch Boy white lead in oil (Com. Ex. 754A-Z-60). However, although its published prices to the trade were in general similar to those of respondent, National, respondent, Eagle-Picher, did not at all times receive the same or as high a price in its direct sales to the trade of Eagle and Hammer brands of white lead in oil (id.; 3667, 3681). Moreover, in the sale of its Hammer brand of white lead in oil, respondent, Eagle-Picher, received from its agents a net sum which in most instances was $\frac{1}{4}$ ¢ a pound less than the net sum received by respondent, National, from its agents in the sale of Dutch Boy white lead in oil (1554).

72. Respondent, Glidden, produced white lead in oil under the Euston label and from 1936 through 1941 respondent, Glidden, custo-

marily received from its dealers or distributors 1/4¢ to 1/5¢ per pound less than respondent, National, received from its agents in the sale of Dutch Boy white lead in oil (Com. Ex. 772A-Z-31).

73. Respondent, Sherwin-Williams, customarily received prices for its white lead in oil which differed from those of respondent, National (see Proposed Findings of Respondent Sherwin-Williams).

74. Respondent, I. S. & R., produced white lead in oil under the "Anaconda" label and customarily received from its dealers a price 1/4¢ per pound less than the net sum received by respondent, National, from its agents in the sale of Dutch Boy white lead in oil (3513).

B. Dry White Lead, Basic Carbonate.

75. In the sale of dry white lead, basic carbonate, respondent, National's Dutch Boy brand was again the criterion of quality with the highest consumer acceptance among paint manufacturers, the chief purchasers of this product (2499, 2525).

76. While, for the most part (Com. Ex. 754A-Z-60), respondent, Eagle-Picher, was able to secure for its dry white lead, basic carbonate, a price as high or in most instances nearly as high as the price received by respondent, National, for its dry white lead, basic carbonate, on occasion Eagle-Picher received from purchasers in large quantities a price for its dry white lead, basic carbonate, which was 1/4¢ per pound less than that received by respondent, National, for its dry white lead, basic carbonate (id.). In addition, respondent, Eagle-Picher, could produce more cheaply than its competitors basic sulphate of lead from its own mines in the Tri-State area and beginning about 1930 respondent, Eagle-Picher, stressed the sale of basic sulphate of lead (either as such or as combined with zinc oxide to form leaded zinc oxide) to paint manufacturers, and from 1936 to 1941 its sales of basic sulphate of lead were in excess of its sales of dry white lead, basic carbonate (1561-62, 3421, 3437, 3352, 3357, 4129). In addition, its production of leaded zinc oxide during 1941-1942 was three and one-half times its production of basic sulphate of lead (3357). None of the

other respondents stressed the sale of basic sulphate of lead and none had facilities for the production of basic sulphate of lead in the same quantities produced by respondent, Eagle-Picher. Respondent, Eagle-Picher, customarily sold basic sulphate of lead to paint manufacturers at $\frac{1}{2}\text{¢}$ per pound less than it sold dry white lead, basic carbonate (3347, 3382).

77. Respondent, Glidden, up until 1941 customarily sold dry white lead, basic carbonate, at $1/5\text{¢}$ per pound less than the price at which respondent, National, sold its dry white lead, basic carbonate (Com. Ex. 772A-Z-31). By 1941, respondent, Glidden, having improved the quality of its dry white lead, basic carbonate (2489, 2534), was then able to command a price as high but no higher than the price of respondent, National, for its dry white lead, basic carbonate (Com. Ex. 772A-Z-31).

78. Respondent, Sherwin-Williams, accounted for less than 1% of the sales of dry white lead, basic carbonate, for the period from 1930 to 1941.

79. In the latter part of the decade 1930-1940 respondent, I. S. & R., customarily sold its dry white lead, basic carbonate, at the same price that respondent, National, received for its dry white lead, basic carbonate (3505).

80. With respect to both dry white lead, basic carbonate, and white lead in oil, in the early part of the twentieth century and through the decade from 1920 to 1930 the market had been flooded by many adulterated products purporting to be pure white lead in oil or pure dry white lead, basic carbonate (2502-03, 3514-15). There thus had been created in the minds of the trade, which had come to recognize Dutch Boy dry white lead, basic carbonate, and white lead in oil as the criterion of quality, a feeling that any brand of white lead in oil or dry white lead, basic carbonate, which sold for prices substantially lower than the prevailing prices at which Dutch Boy white lead in oil and dry white lead were being sold, was in all probability an adul-

terated product (id.). Thus the constant endeavor of respondents, other than respondent, National, was to improve the quality of their product so that they might receive the same or approximately the same price (id.). In addition, respondent, National, was the only multiple producer of basic carbonate of white lead, dry and in oil, and had efficient methods of production as well as a large production of such products (2500). At no time could the respondents (other than respondent Sherwin-Williams) get a price higher than that obtained by respondent, National, and they could not afford to charge a price much lower without losing money or without incurring the resistance of the trade from the feeling that such products were probably adulterated (2502-03, 3514-15).

C. Oxides.

81. In 1927 respondent, National, established minimum differentials over pig lead for the sale of litharge and red lead of $1\frac{1}{2}\text{¢}$ and $2\frac{1}{2}\text{¢}$ per pound respectively (Resp. Ex. 177A-B). The prices charged for red lead and litharge were changed when pig lead changed as much as 5¢ per cwt. and usually published price changes were made when pig lead advanced or decreased as much as 25¢ per 100 pounds (1637-38). In 1927 the respondent, National, also adopted a price for less than carload lots for litharge and red lead of $2\frac{1}{2}\text{¢}$ and $3\frac{1}{2}\text{¢}$ per pound over pig lead (Resp. Ex. 177A-B).

82. Since 1927, respondent, Eagle-Picher, and since shortly after 1929 when it acquired Metals Refining Company, respondent, Glidden, have customarily followed the prices set by respondent, National, in the sale of red lead and litharge (1618, 2545, 2552-53). In addition, Hammond Lead Company, Hammond, Indiana, not a respondent in this proceeding, has produced and sold red lead and litharge (1647, 1676, 1702, 1760, 1881-82, 1915, 1918, 2022). Some of the larger battery manufacturers have also produced red lead and litharge for their own use (1647).

83. The chief purchasers of red lead and litharge in dry form have been battery manufacturers who purchased the material as one

of the chief raw materials used in the manufacture of electric storage battery plates (1601-02, 1641-42). The red lead and litharge produced by respondent, Glidden, respondent, Eagle-Picher, and respondent, National, as well as by the other manufacturers of litharge and red lead, have not been identical and while many manufacturers prefer the products manufactured by respondent, National, others have preferred those manufactured by respondent, Eagle-Picher, or respondent, Glidden, or the products produced by other manufacturers of red lead and litharge who are not respondents in this proceeding (1736-40, 1767-68, 1817-20, 1854-56, 2767-68, 3439-41, 3443-44, 3467-70, 3621-22). In addition, respondents, National, Eagle-Picher and Glidden, have offered technical services and advice on methods of manufacture of storage batteries and both respondent, Eagle-Picher, and respondent, National, have well staffed technical and laboratory departments whose chief duty it is to consult with battery manufacturers on the type of red lead or litharge needed by any such manufacturer and who give technical advice as to methods of manufacture (3443, 3453, 3464-65).

84. In the sale of lead pigments and oxides to governmental agencies, all of the respondents who produce and sell such products have made bids to governmental agencies and have sold to such governmental agencies at prices greatly at variance with each other where the governmental award involved quantities varying from 5,000 pounds to 1,000,000 pounds and covered such products as white lead in oil, dry white lead, basic carbonate, dry red lead and litharge (4095-96; Resp. Exs. 306A-B, 307A-B, 308A-C).

85. Sales to governmental agencies by manufacturers engaged in interstate commerce are not subject to the provisions of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.

TERMS AND CONDITIONS OF SALE.

86. Respondents have never agreed to fix nor has there been any common or concerted action among respondents (other than action taken in connection with the formulation of supplementary codes during

N. R. A. days) to fix terms and conditions at which lead pigments are sold and offered for sale in commerce (2561-62, 2996, 3508-09, 3539, 3637, 3662).

87. Some of the respondents and other manufacturers of oxides, red lead and litharge and dry white lead, basic carbonate, did agree, for purposes of the Code, to include as Schedule A of the Lead Code (Com. Ex. 809) certain conditions for the sale of oxides in less than 20 tons, for the sale of oxides in lots of at least 20 tons and for the sale of basic lead carbonate, dry white lead. Many of the terms and conditions set forth in Schedule A of the Lead Code had been used by respondent, National, and followed by some of the other respondents prior to 1933 (Resp. Exs. 181A-B; Com. Exs. 659A, B, Q-Z-51). The only significant changes set forth in Schedule A of the Lead Code were with respect to the sale of lead oxides in 5 ton lots and in connection with the sale of dry white lead, basic carbonate, in lots of less than 20 tons. With respect to the price for the sale of oxides in 5 ton lots, Article 1 of Schedule A provided that the price thereof be not more than $\frac{1}{2}\text{¢}$ per pound less than the seller's card or quoted price. Article 3 of Schedule A provided that the price for a minimum of 20 ton lots of dry white lead, basic carbonate, should be not more than $\frac{1}{4}\text{¢}$ less per pound than that charged for smaller quantities (Com. Ex. 809).

88. While exemption was obtained by respondents and other manufacturers of lead pigments from the requirements of Schedule A, while the Code was in effect (Com. Ex. 507A-C, Resp. Exs. 6A-I, 7A-C, 8A-B, 9A-F), respondents were permitted to follow the terms thereof (Section 5, National Industrial Recovery Act, 48 Stat. 195, 198) and in general respondent, National, and respondent, Eagle-Picher, did follow the terms and conditions of sale set forth in Schedule A during the time that the Lead Code was effective (Resp. Ex. 159A-J; 1617).

89. After the N. R. A. was declared unconstitutional, respondent, National, as a matter of individual choice followed most of the terms and conditions of sale theretofore set forth in Schedule A of the Lead

Code with respect to oxides and dry white lead, basic carbonate, but not all the terms have been followed nor has there been any rigid adherence to such terms on the part of respondent, National (Resp. Ex. 182; 1650-54, 1657-58).

90. Since June, 1935 respondent, Eagle-Picher, as a matter of individual choice has in general followed some of the terms and conditions theretofore set forth in Schedule A of the Lead Code but not all of such conditions (1612-17).

91. There was no agreement or understanding between respondent, National, and respondent, Eagle-Picher, or any other respondent since June, 1935 with respect to the terms and conditions of sale of lead oxides, dry white lead, basic carbonate, or any other lead pigment (2561-62, 2996, 3508-09, 3539, 3637, 3662).

92. There was no exchange of price information between respondents either through Lead Industries Association or otherwise at any time even during the N. R. A. days (2187-88).

93. There was no agreement to fix prices nor any planned common course of action among respondents which resulted in the adoption of uniform prices for lead pigments at any time even during the N. R. A. days (see Reasons for Findings).

94. There was no agreement or concerted action among respondents to curtail production at any time even during the N. R. A. days (see Reasons for Findings).

95. At no time did respondents either through Lead Industries Association or by any other method exchange freight factors, freight rates, individual production data, items of past, present or future individual transactions, prices, or any other individual sales, freight or production factors (2186-88).

96. There was no agreement nor planned common course of action among respondents at any time to adopt or maintain any system

of delivered price quotations with respect to lead pigments (see Reasons for Findings).

97. Respondent, National, heretofore has entered into contracts with E. I. duPont de Nemours Co., Inc. in which respondent, National, agreed to convert pig lead belonging to E. I. duPont de Nemours Co., Inc. into basic carbonate of white lead (Com. Ex. 797C-Z-6), but these contracts have had no effect upon the prices charged by respondent, National in its sale of white lead products.

98. Respondents have customarily sent to dealers or distributors who purchase direct from them suggested resale prices in connection with the sale of white lead in oil and lead pigments in kegs of 100 pounds or less (Answers of Respondents).

99. Respondent, National, and some of the other respondents, in the sale and distribution of lead pigments in kegs of 100 pounds or less, have employed the same zone basis as is used by respondent, National, in the sale and distribution of white lead in oil (Answers of Respondents).

100. Respondent, National, has sold keg products in 12½ pound, 25 pound, 50 pound and 100 pound kegs, for which customarily it has charged a 25¢ differential above 100 pound kegs for 50 pound kegs, a 25¢ differential above 50 pound kegs for 25 pound kegs, and a 25¢ differential above 25 pound kegs for 12½ pound kegs and some of the other respondents who produce such keg products have followed the differentials established by respondent, National (Answers of Respondents).

101. In connection with the sale of white lead, basic carbonate, whether dry or in oil, some of the respondents have entered into quarterly contracts covering terms of sale and delivery with paint manufacturers and with industrial consumers of such products and in connection with all lead pigments and oxides respondents have from time to time issued price cards or price bulletins to the trade (Answers of Re-

spondents; Com. Exs. 659A, B, Q-Z-51, 660A-Z-2, 663A-K, 662A-Z-26, 661A-M, 738A-M).

102. None of the above practices or acts of the respondents has been unfair or to the prejudice of the public; none has deprived the public of the benefit of competition; none has created discrimination against any buyers of lead-pigments or lead pigment paint; none has had any tendency or capacity unreasonably to restrain commerce in said products or has actually hindered, frustrated, suppressed or eliminated competition in lead pigments in commerce; and none of the acts or activities of the respondents has constituted unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act (see Reasons For Findings).

103. There has been at all times and there continues to be active competition among respondents and others in the production and sale of lead pigments, with respect to prices, quality, services and the different commodities produced by the respective respondents (see Reasons For Findings).

AS TO THE CHARGE OF PRICE DISCRIMINATIONS.

104. The practice and custom of respondent, National, in selling lead pigments at the same flat price to purchasers located in any given zone were not and do not constitute discriminations in price as to such purchasers of lead pigments (see Reasons For Findings).

105. The practice and custom of respondent, National, in selling lead pigments to purchasers located in different zones carrying different prices were not and do not constitute discriminations in price as to such purchasers of lead pigments (see Reasons For Findings).

106. The practice and custom of respondent, National, in selling lead pigments at different prices to various classes of customers were not and do not constitute discriminations in price as to such classes of customers purchasing lead pigments (see Reasons For Findings).

107. The practice and custom of respondent, National, in selling lead pigments at different prices for different quantities of such pigments were not and do not constitute discriminations in price with respect to purchasers of such lead pigments in different quantities (see Reasons for Findings).

108. None of the customs and practices of respondent, National, nor the methods of sale employed by respondent, National, in the sale and distribution of lead pigments have constituted or result in discriminations in price within the meaning of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (see Reasons for Findings).

CONCLUSIONS OF LAW.

1. This proceeding is subject to the provisions of the Administrative Procedure Act (see Reasons for Findings).

2. None of the material allegations of the amended complaint is supported by or is in accordance with the reliable, probative and substantial evidence adduced by the hearings in this matter, nor are the material allegations of the amended complaint supported by the greater weight of the evidence so adduced at the hearings in this matter (see Reasons for Findings).

3. The acts of the respondents herein in connection with the preparation of the Lead Code and the supplementary code for the manufacturers of lead pigments and the acts taken in connection with the Lead Code itself cannot be made the basis of a charge of violation of Section 5 of the Federal Trade Commission Act (see Reasons for Findings).

4. The price paid by purchasers of lead pigments is that sum paid to the manufacturers, including these respondents, by the purchaser for delivery of the product to such purchaser (see Reasons for Findings).

5. Respondents have not violated and are not violating the provisions of Section 5 of the Federal Trade Commission Act (see Reasons for Findings).

6. Respondents have not violated and are not violating the provisions of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (see Reasons for Findings).

7. This proceeding is not in the public interest (see Reasons for Findings).

8. The Federal Trade Commission should enter an order herein dismissing the amended complaint on the merits (see Reasons for Findings).

REASONS FOR FINDINGS

1. As to Findings of Fact 1 and 2:

The pleadings and the uncontroverted testimony.

2. As to Findings of Fact 3 to 18, inclusive, 20 to 40, inclusive, 42 to 92, inclusive, 95, and 97 to 101, inclusive:

The pleadings, the uncontroverted evidence and the reliable, probative and substantial evidence herein. Some of these findings will be discussed in more detail hereinafter.

3. As to Finding of Fact 19:

This is a finding of ultimate fact which is a necessary conclusion following from the other Findings of Fact herein.

4. As to Finding of Fact 41:

The record contains no evidence, nor does it contain reliable, probative and substantial evidence from which an inference could reasonably be drawn, that there was any agreement at any time between respondent, National, and respondent, Eagle-Picher, or any

other respondent as to the use of the agency method in the sale and distribution of white lead in oil or that participation by the other respondents in the use of the agency method was at any time invited or suggested by respondent, National and it is the reasonable inference from the uncontroverted evidence and the reliable, probative and substantial evidence herein that respondent, National, determined to employ the agency method in the sale and distribution of white lead in oil, regardless of the action of any other manufacturer of white lead in oil.

5. With respect to Findings of Fact 50 to 66, inclusive, respondent, National, refers to and incorporates herein the arguments it made in its statement and brief in support of its motion to dismiss the amended complaint filed with the Federal Trade Commission on February 25, 1947, at pages 24 to 27, inclusive, thereof.

With respect to Findings of Fact 62 to 66, inclusive, set forth above, respondent, National, submits that the said findings are fully supported by the reliable, probative and substantial evidence therein referred to. It further submits that Com. Ex. 808 A-N is entitled to no weight whatsoever in connection with the establishment by respondent, National, of zones for oxides (red lead and litharge). In the first place, respondents objected to the offer of this document in evidence and the record clearly shows that the statements therein contained were purely hearsay (1112, 1116, 1134-38). More particularly, certain statements in Com. Ex. 808 E and F to the effect that the manufacturers of oxides had not definitely established the proposed zones for red lead and litharge as of June 4, 1934 ^{are} directly contrary to the reliable, probative and substantial evidence contained in Res. Ex. 159 B-J, which shows that respondent, National, itself adopted zones for red lead and litharge on May 11, 1934 without agreement or understanding with any other manufacturer of such products.

6. With respect to Finding of Fact 84, the record contains uncontroverted evidence (therein specifically referred to) that on bids to the United States Treasury Department, the United States Navy and the Panama Canal the respondents and others made the following bids:

2/17	U. S. NAVY	128,400 lbs.—50—100—bbls. Dry Red	1939	*Evans E-P S-W Metals Ref. Heyward Pt.	\$9562.50 1%—30 except ("") 9854.50 1%—30 except ("") 9854.52 1%—10 except ("") 9754.50 net 10393.98 ¼%—10
4/ 3	PANAMA CANAL	200,000 lbs.—bbls. Dry White		*S-W J. T. Lewis E-P Mamolith	6.84 1%—10 6.93 net 7.00 1%—30 7.25 1%—10
7/18	U. S. NAVY	100,000 lbs.—100s Wh. L-in-O.		*Wetherill & Bro. E-P Mamolith S-W	\$7670 7690. 7700. 8580.
		12,300 lbs. 100s—25s Litharge		*S-W E-P J. T. Lewis Metals Ref. Hammond	\$847.05 1%—10 905.50 1%—30 907.50 1%—30 968.75 1%—10 971.00 net
	# # Except 600 lbs.— net cash.	123,200 lbs.—100s—50s—25s Dry Red bbls.		*S-W E-P J. T. Lewis Metals Ref. Hammond	9151.45 1%—10 9353.00 1%—30 # 9356.25 1%—10 # 9472.25 1%—10 9467.00 net
12/12	PANAMA CANAL	200,000 lbs.—bbls. Dry White		*S-W J. T. Lewis Mamolith E-P	\$6.85 1%—10 7.00 1%—10 7.00 1%—30 7.00 1%—30
		100,000 lbs.—100s Wh. L-in-O.		*J. T. Lewis E-P Mamolith S-W	7.94 8.04 8.50 9.00
7/19	PANAMA CANAL	200,000 # Wh. L-in-O. 50,000 # Dry Red	1940	E-P Evans Hammond J. T. Lewis Mamolith S-W	D. R. 8.00 8.00 8.50 8.00 — * 7.95 9.00
				W/L-O	7.69 — — 7.63 * 7.62 — 8.60

1940 (Continued)	
7/30 U. S. NAVY	360,200 lbs.—all sizes Dry Red
	*E-P Evans Metals Ref. Hammond J. T. Lewis S-W
	28,645.25 28,669.50 28,669.50 29,500.50 28,669.50 29,175.42
	*E-P Evans Metals Ref. Hammond J. T. Lewis
	8.25 1% 8.25 1% 8.75 net 8.91 net 8.25 1%
	*Kraft Chem. Co. (MacGregor)
	6.80 1%—20
9/9 PANAMA CANAL	400,000 lbs.—100's Wh. L-in-O.
	E-P J. T. Lewis Mamolith S-W
	6.90 net 6.93 net 6.74 net 7.25 1%—20
	J. T. Lewis E-P Mamolith S-W
	7.47 net 7.47 net 7.42 net 7.98 1%—20
	*S-W J. T. Lewis E-P Evans Hammond
	8.15 1%—20 8.25 1%—30 8.25 net 8.25 1%—30 8.75 1%—20
12/10 PANAMA CANAL	200,000 lbs. Wh. L-in-O. 60,000 lbs. Dry Red
	E-P J. T. Lewis Mamolith S-W Evans Metals Ref. Hammond
	7.68 8.50 8.45 1%—20 — — — —
	DR 8.50 — 9.00 * 8.45 8.75 10.00
1941	
1/9 U. S. NAVY	261,800 lbs.—100's Dry Red
	*Evans E-P Metals Ref. S-W Hammond
	8.40 net 8.50 net 8.50 net 9.50 1%—20 10.00 net
	*Mamolith J. T. Lewis E-P S-W
	7.38 net 7.42 net 7.50 1%—30 7.50 1%—30

1941 (Continued)

3/28 U. S. NAVY	200,000 lbs.—100s Wh. L-in-O.	*Mamolith Int. Sm. & Ref. J. T. Lewis S-W E-P	7.28 7.49 7.59 7.74 8.75
5/22 U. S. NAVY	348,900 lbs.—100s Dry Red	*J. T. Lewis S-W Metals Ref. Hammond E-P	9.70 1%—30 10.25 1%—20 10.00 net 10.25 net 9.75 1%—30
7/18 U. S. TREAS. DEPT.	500,000 lbs.—bbls. Dry White	*J. R. MacGregor J. T. Lewis Mamolith E-P S-W	7.38 7.39 7.42 7.42 7.50
9/23 U. S. TREAS. DEPT.	200,000 lbs.—100s Wh. L-in-O.	*J. T. Lewis Mamolith E-P Int. Sm. & Ref.	8.47 8.80 8.79 9.49
10/24 U. S. NAVY	440,000 lbs.—100s Wh. L-in-O.	*Mamolith J. T. Lewis E-P	8.57 8.82 9.80
	1,000,000 lbs.—bbls. Dry White	J. R. MacGregor J. T. Lewis E-P Mamolith S-W	7.50 2%—10 # 7.40 7.50 1%—30 % 7.35 7.50 # Awarded 800,000 lbs. % " 200,000 lbs.

NOTE: Mamolith & S-W both restricted their quantity to 200,000 lbs.
Navy would not accept MacGregor quotation because it was based on \$5.85 pig lead with adjustment in case of an advance.

200,000 lbs.—100s Dry Red	*Evans E-P Hammond Metals Ref. S-W	8.30 8.35 8.35 9.10 Could not quote.
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* Awarded bids.

In the above tabulations, "Mamolith" is a trade name of respondent, Glidden; "E-P" stands for respondent, Eagle-Picher; "S-W" refers to respondent, Sherwin-Williams; "J. T. Lewis" and "Evans" refer to respondent, National, and "Metals Ref." refers to Metals Refining Company, a division of respondent, Glidden.

Sales to governmental agencies are not governed by Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. Therefore, where the strictures of the Robinson-Patman Act did not apply, it is obvious that the respondents engaged in vigorous and active price competition.

Moreover, Findings of Fact 68 to 83, inclusive, set forth the reliable, probative and substantial evidence to show competition among respondents and other manufacturers of lead pigments and related products with respect to prices, quality, service and the different commodities produced by the respective companies. Price competition with respect to sales governed by the Robinson-Patman Act was not as vigorous or as marked as in those cases involving sales to governmental agencies where the Robinson-Patman Act does not apply. However, price competition does not mean price warfare. An attempt to indulge in such price competition by any of the respondents or other manufacturers of lead pigments might well have constituted a violation of Section 3 of the Robinson-Patman Act (49 Stat. 1528, 15 U. S. C. A. Sec. 13a), which makes it unlawful, under penalty of fine or imprisonment, for any person engaged in interstate commerce "to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."

7. As to Findings of Fact 93, 94 and 96:

The record contains no evidence, nor does it contain reliable, probative and substantial evidence from which an inference could reasonably be drawn, that there was any agreement to fix prices or any planned common course of action among respondents which resulted in the adoption of uniform prices for lead pigments at any time even during the N.R.A. days, or that there was any agreement or concerted action among respondents to curtail production at any time even during the N.R.A. days, or that there was any agreement or planned common course of action among respondents at any time to adopt or maintain any system of delivered price quotations with respect to lead pigments.

8. As to Finding of Fact 102:

This is a finding of ultimate fact which is a necessary conclusion following from the other Findings of Fact herein.

9. As to Finding of Fact 103:

The reliable, probative, substantial and uncontroverted evidence herein establishes that there has been at all times and that there continues to be active competition among respondents and others in the production and sale of lead pigments with respect to prices, quality, services and the different commodities produced by the respective respondents in this proceeding. In addition, this is also a finding of ultimate fact which is a necessary conclusion following from the other Findings of Fact herein.

10. As to Finding of Fact 104:

The practice and custom of respondent, National, in selling lead pigments at the same flat price to purchasers located in any given zone or territory do not constitute discriminations in price as to such purchasers. A flat uniform price to all purchasers cannot result in any discrimination in price since there is no difference in price to the respective purchasers. As was stated by the Supreme Court in *Trade Commission v. Staley Co.*, 324 U. S. 746, at page 757.

"But it does not follow that respondents may never absorb freight when their factory price plus actual freight is higher than their competitor's price, *or that sellers, by so doing, may not maintain a uniform delivered price at all points of delivery, for in that event there is no discrimination in price.*"
(Italics ours.)

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, contains the following proviso:

"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 differ-

ing methods or quantities in which such commodities are to such purchasers sold or delivered: ***".

In connection with the words in this proviso which read "***which make only due allowance***", the Senate Committee Report No. 1502, dated February 3, 1936, states in part as follows (CCH, Trade Regulation Service, Par. 2212):

"This phrase is carried over from the present act, but as coupled with the remainder of the clause, is here extended to limit quantity differentials, as well as those on account of selling and transportation costs. It marks the zone within which differentials may be granted. *The bill neither requires nor compels the granting of discriminations or differentials of any sort. It leaves any who wish to do so entirely free to sell to all at the same price regardless of differences in cost, or to grant any differentials not in excess of such differences.*" (Italics ours.)

11. As to Finding of Fact 105:

With respect to the custom and practice of respondent, National, in selling white lead in oil in different zones at differentials of fractions of a cent over the base or par price, there is no evidence nor any reliable, probative and substantial evidence that this method of sale in any way violates Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. The reliable, probative and substantial evidence establishes that the differentials over the base price charged in the differential zones do not exceed the difference between the average cost of delivering the white lead in oil to purchasers in the par or base zone and the similar average costs of delivering white lead in oil to purchasers in the respective differential zones. (Resp. Exs. 165A-O, 166A-B, 169A-N, 170A-B, 171, 162A-D, 213A-Q, 214.) The zones for white lead in oil were not artificial and in substance have been employed by the National Lead Company at least as far back as 1910 (Finding of Fact 50 above). Moreover, for many years respondent, National, has made between 75% and 80% of its sales of white lead in oil in the so-called par or base zone (Resp. Exs. 151A-B, 152, 153; 3966).

With respect to the two zones employed by respondent, National, in the sale and distribution of dry white lead, namely, the par zone, covering all of the States of the United States in the east, south and midwest, and a differential zone carrying a differential $\frac{1}{4}\text{¢}$ per pound for the States west of the line formed by the eastern boundaries of New Mexico, Colorado, Wyoming and Montana, there is no proof in the record nor any reliable, probative and substantial evidence that this method of sale and distribution involves any discrimination in price or may have the effect substantially to lessen competition or tend to create a monopoly in the sale and distribution of dry white lead or in any other way violates Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.

With respect to the practice and custom of respondent, National, in selling oxides (red lead and litharge) upon the zone basis referred to above in Finding of Fact 64 herein, there is no proof in the record nor any reliable, probative and substantial evidence that this method of sale and distribution involves any discrimination in price or may have the effect substantially to lessen competition or tend to create a monopoly in the sale and distribution of oxides (red lead and litharge) or in any other way violates Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.

12. As to Finding of Fact 106:

The practice and custom of respondent, National, in selling lead pigments at different prices to different classes of customers do not constitute discriminations in price with respect to such classes of customers within the meaning of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. The reliable, probative and substantial evidence establishes that there is no competition between such classes of customers and therefore the different prices to the different classes could not have any competitive effect as between purchasers belonging to the respective classes of customers (2994-95, 3964-65).

13. As to Finding of Fact 107:

The practice and custom of respondent, National, in selling white lead in oil at different prices for different quantities of such pigments (Com. Ex. 656A-B) do not constitute discriminations in price within the meaning of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. There is no evidence in the record nor any reliable, probative and substantial evidence from which an inference could reasonably be drawn that such practice and custom have any competitive effect upon purchasers of white lead in oil in the different quantities at the different quantity prices.

The practice and custom of respondent, National, in selling dry white lead at different prices for different quantities of such pigments do not constitute discriminations in price within the meaning of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. There is no evidence in the record nor any reliable, probative and substantial evidence from which an inference could reasonably be drawn that such practice and custom have any competitive effect upon purchasers of dry white lead in the different quantities at the different quantity prices. The evidence establishes that respondent, National, since 1934 has sold dry white lead in lots of less than 20 tons (less than carload lots) at a price of $\frac{1}{4}\text{¢}$ a pound more than the price charged by respondent, National, for lots of dry white lead in 20 tons or more (carload lots). The reliable, probative and substantial evidence herein establishes that this differential of $\frac{1}{4}\text{¢}$ per pound does not exceed the difference between the cost of sale and delivery of dry white lead in carload lots and the cost of sale and delivery of dry white lead in less than carload lots (4050-65; Res. Exs. 215A-B, 216, 217).

The practice and custom of respondent, National, in selling oxides (red lead and litharge) at different prices for different quantities of of such pigments do not constitute discriminations in price within the meaning of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. There is no evidence in the record nor any reliable, probative and substantial evidence from which an inference could reasonably be drawn that such practice and custom have any

competitive effect upon purchasers of oxides (red lead and litharge) in the different quantities at the different quantity prices. The testimony of battery manufacturers who purchased oxides in different quantities at the different quantity prices does not constitute reliable, probative and substantial evidence that there was any adverse effect upon competition as a result of such quantity prices. The evidence of such battery manufacturers herein shows even less competitive effect than did the testimony which was declared to be insufficient to show discriminations in price as the result of quantity differentials in *Morton Salt Co. v. Federal Trade Commission*, 162 F. 2d 949 (C.C.A. 7th, 1947).

With respect to the custom and practice of respondent, National, in selling lead pigments in kegs of 12½, 25, 50 and 100 pounds at differentials as set forth in Finding of Fact 100 above, the record contains no evidence nor any reliable, probative and substantial evidence from which an inference could reasonably be drawn that such differentials constituted discriminations in price within the meaning of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. The uncontroverted evidence is to the effect that such differentials in price do not exceed the differences in the costs of manufacture of such keg products in such quantities (Res. Ex. 309; 4175-76).

14. As to Finding of Fact 108:

This is a finding of ultimate fact which is a necessary conclusion following from the other Findings of Fact herein.

15. As to Conclusion of Law 1:

This is covered by the provisions of the Administrative Procedure Act itself and, in addition, the Trial Examiner has ruled that this proceeding is governed by the provisions of the Administrative Procedure Act (1903).

16. As to Conclusion of Law 2:

This follows as a conclusion of law from the Findings of Fact set forth above.

17. As to Conclusion of Law 3:

The National Industrial Recovery Act, by Section 5, provided:

"While this title is in effect ** and for sixty days thereafter, any code, under this title, and any action complying with the provisions thereof taken during such period, shall be exempt from the provisions of the anti-trust laws of the United States." (48 Stat. 195, 198, Act of June 16, 1933).

On June 14, 1935, Congress repealed the provisions of the NRA Act delegating power to the President of the United States to prescribe codes and to provide for enforcement, but in the same act Congress provided that the exemption from the anti-trust laws originally given in Section 5 of the National Industrial Recovery Act, above quoted, should continue with respect to agreements by members of an industry relating to labor conditions and unfair competitive practices which offend against existing laws (49 Stat. 375).

18. As to Conclusion of Law 4:

This follows as a conclusion of law for the reasons given above in connection with Finding of Fact 104 (Paragraph ^P above).

19. As to Conclusions of Law 5, 6, 7 and 8:

These follow as conclusions of law from the Findings of Fact set forth above.

The Administrative Procedure Act (Section 8[b]) provides that in hearings before an administrative agency the respondents shall have a "reasonable opportunity" to submit proposed findings and conclusions to the official who presided at the reception of the evidence. On November 20, 1947 the Trial Examiner herein ruled that all proposed findings, conclusions and the reasons therefor should be submitted to him on or before December 1, 1947. On the same day, namely, November 20, 1947, the respondents formally requested the Federal Trade Commission to extend their time to file such proposals and the reasons therefor until February 15, 1948. The Federal Trade Commission, by order dated December 5, 1947, denied such

request but extended respondents' time for filing such proposals and the reasons therefor until December 29, 1947. Respondent, National, respectfully submits that, in view of the size of the record herein and the importance of this proceeding, the time granted by the Federal Trade Commission for the submission of proposed findings and the reasons therefor is inadequate.

Respectfully submitted,

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