

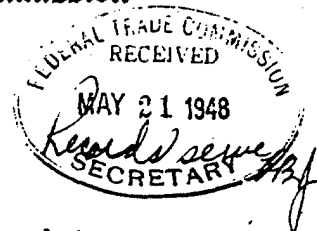
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United States of America
Before the Federal Trade Commission

Docket No. 5253.

In the Matter of

NATIONAL LEAD COMPANY, ET AL., *Respondents.*



**EXCEPTIONS ON BEHALF OF THE SHERWIN-WILLIAMS
COMPANY TO THE TRIAL EXAMINER'S RECOMMENDED
DECISION.**

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REPRODUCED AT THE NATIONAL ARCHIVES

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United States
Before the Federal

Docket No.

In the Matter of

NATIONAL LEAD COMPANY

EXCEPTIONS ON BEHALF OF
NATIONAL LEAD COMPANY TO THE TRIAL
DECISION.

Comes now the respondent, National Lead Company, by its attorneys, pursuant to Rule 10 of the Rules of Practice, and submits its exceptions to the Recommended Decision herein and to include therein the findings and conclusions of the Trial Examiner pursuant to Rule XXI of said Rules of Practice.

A. In so far as Section II, entitled "Findings of Fact," of the Trial Examiner's Recommended Decision, the Trial Examiner takes the following exceptions:

1. Sherwin excepts to Item 5(c) of the Recommended Decision (Paragraph 9(B), Count 1).
2. Sherwin excepts to Item 5(d) of the Recommended Decision (Paragraph 9(C), Count 2).
3. Sherwin excepts to the third paragraph of Section II of the Recommended Decision (the complete and accurate summary of the facts of the Amended Complaint).

4. Sherwin excerpts to the Trial Examiner's failure to include in Section II of the Recommended Decision a summary of its special defenses (Sherwin's Answer to Amended Complaint, pages 16-19).

5. Sherwin excerpts to that portion of Section II of the Trial Examiner's Recommended Decision entitled "The Issues" in its entirety (compare Trial Examiner's statement with Amended Complaint and Sherwin's Answer thereto; also see Federal Trade Commission Act, Sec. 5; Clayton Act, Sec. 2(a) and Tr. 4266-4252).

6. Sherwin excerpts to the Trial Examiner's failure to include in that portion of Section II of the Recommended Decision entitled "The Issues" a statement relative to the issues raised by Sherwin in its special defenses. (Compare Trial Examiner's statement with Sherwin's Answer to Amended Complaint, pages 16-19).

7. Sherwin excerpts to the first three full sentences appearing at the top of page 7 of the Recommended Decision for the reasons that important portions of the evidence have not been set forth in the Recommended Decision, much reliable and substantial evidence has been ignored and no reasonable regard has been had for the greater weight of the evidence herein.

B. In so far as Section III, entitled "Report Upon the Evidence", and Section IV, entitled "Recommended Findings and Conclusions", and concerned, Sherwin takes the following exceptions:

8. Sherwin excerpts to the Trial Examiner's failure to state in the second paragraph of that portion of Section III of the Recommended Decision, which is entitled "Count One", that Sherwin does not manufacture or sell basic lead sulphate or any other lead pigments except red lead, litharge and basic lead carbonate and also excerpts to the Examiner's failure to include a statement to such effect in Paragraph 1-B of Section IV of the Recommended Decision (Tr. 1313).

9. Sherwin excerpts to the Trial Examiner's failure to state in that portion of Section III of the Recommended Decision, which is entitled "Count One", that for over twenty years Sherwin has not manufactured red lead or litharge for use by the battery manufacturing industry and is not a competitor in that field which has been an increasingly important one since the advent of the automobile and the internal combustion engine (Tr. 1649, 1648, 4070, 4093).

10. Sherwin excerpts to the last sentence in the second paragraph of that portion of Section III of the Recommended Decision entitled "Count One" for the reason that the record does not establish the fact that it purchases lead pigments from others for the purpose stated, and also excerpts to the last sentence of Paragraph 1-B of Section IV of the Recommended Decision for the same reason.

11. Sherwin excerpts to the Trial Examiner's failure to report in that portion of Section III of the Recommended Decision entitled "Count One" as follows: "Sherwin's only lead pigment plant is located in Chicago, Illinois. In 1943, and for many years prior thereto, Sherwin shipped about 5% of the white lead in oil shipped by the industry. For many years its shipments of dry white lead and litharge to customers represented less than 1%, respectively, of the total industry shipments, while its shipments of dry red lead and red lead in oil were approximately nil. Sherwin is not an important factor in the sale of lead pigments, particularly red lead and litharge, and it does not sell dry red lead or litharge on the Pacific Coast. Its sales of litharge are confined almost entirely to points in the Chicago area with a few isolated shipments to Kentucky and Ohio. The record contains no evidence that carload shipments of red lead and litharge are made by Sherwin to purchasers located in different territories." Sherwin also excerpts to the Trial Examiner's failure to include in Paragraph 1-B of Section IV of the Recommended Decision a finding to the foregoing effect (Tr. 1313, 1332, 1648, 2065-2066, 2746).

12. Sherwin excerpts to the sentence which immediately precedes the second tabulation in Paragraph 1-C of Section III, and also in Paragraph 1-J of Section IV, of the Recommended Decision, for the reason that such sentences do not indicate that the term "white lead, dry and in oil" includes only basic carbonate (NX 666, CX 669), and also excerpts to the Examiner's failure (1) to report that basic lead sulphate is used to a substantial extent by Eagle, and to some extent by National, as an alternative product to basic carbonate in sales to paint manufacturers, and (2) to report, in so far as the record discloses, the extent of the production and sale of basic sulphate by Eagle and National (Tr. 1460-1461, 3344-3352, 3354-3357, 4129).

13. Sherwin excerpts to the second tabulation in Paragraph 1-C of Section III, and also in Paragraph 1-J of Section IV, of the

Recommended Decision (CX 669, Tr. 1560-1561, 2193, 3344-3352, 3354-3357, 4129).

14. Sherwin excerpts to the sentence immediately following the second tabulation in Paragraph 1-c of Section III, and also in Paragraph 1-J of Section IV, of the Recommended Decision for the reason that there is not included therein an additional statement relative to Eagle's and National's production and sale of basic lead sulphate as an alternative product for basic carbonate (Tr. 1560-1561, 3344-3352, 3354-3357, 4129).

15. Sherwin excerpts to the first two sentences in the last subparagraph in Paragraph 1-c of Section III, and in the last subparagraph of Paragraph 1-J of Section IV, of the Recommended Decision, except the statement to the effect that National became a predominant factor in the industry. (The citations urged in connection with exception 17 are relied upon in support of the foregoing exception).

16. Sherwin excerpts to the last sentence in Paragraph 2-a of Section III, and in Paragraph 2-A of Section IV, of the Recommended Decision (Tr. 1327-1328, 2065-2068).

17. Sherwin excerpts to Paragraph 4-a of Section III, and to Paragraph 4-A of Section IV, of the Recommended Findings in that the first sentence thereof erroneously indicates, by use of the term "the other respondents", that Sherwin followed the salient features of the zone pricing system therein described and in that the description of the system and the citations set forth on pages 14, 15 and 16 (which description and maps are incorporated in Paragraph 4-A of Section IV by reference) do not accurately reflect Sherwin's pricing and freight practices as established by the record. Sherwin also excerpts to the Examiner's failure to include in Section III an accurate statement of its pricing practices and to include in Section IV a recommended finding based thereon (Tr. 836, 887-891, 894, 1312-1319, 1324-1325, 1327-1328, 1331-1332, 1640, 1648, 2065-2066, 3697, 3701-3702, 3704, 3707-3709, 3746-3747, 3754-3759, 3768-3769, 3771-3804, 3836-3856, 4073, 4093, 4104-4113; CX 506 B, 504, AB, CX 613, CX 626-631-F, CX 650, CX 659 C-P, CX 662, A-226, CX 781 A-C, CX 782 C-D, CX 784 B-D, CX 787-789, CX 793, CX 794, A-78, CX 823 A-G; RX 138, RX 198 A-II, RX 205 A-X, RX 209; Answers of Sherwin, Glidden and International to Amended Complaint; For an

accurate summary of Sherwin's pricing and freight practices see Proposed Findings submitted by Sherwin and especially Paragraphs Seven, Eight and Nine under Count 1).

18. Sherwin excerpts to the last subparagraph of Paragraph 4-a of Section III, and to the last sentence in the last subparagraph of Paragraph 4-A of Section IV, of the Recommended Decision for the reason that the Examiner fails to state which respondents have plants located in each of the various cities therein named and which pigments are produced in each of such plants and also fails to affirmatively state that Sherwin's only lead pigment plant is located in Chicago, Illinois (Tr. 1313 and Examiner's citations).

19. Sherwin excerpts to the first two sentences of the second subparagraph of Paragraph 4-b of Section III, and the first two sentences of Paragraph 4-B of Section IV, of the Recommended Decision (RX 6 A-1, 7 A-C, 8 AB, 9 A-E, 12, 13 A-D, 50 K1A), 77 A-F, 81 AB, 83 A-723, 85 A-713, 92 AB, 127 A-G, 134 A-H, 135 AB, 136 AB, 137 AB, 138 AB, 159 D, 198 A-1; CX 501 A-D, 502 A-C, 504 AB, 505 AB, 507 A-M, 508 C, 518 AB, 524 AB, 624, 632 A-K, 639 C-P, 662 C-D, 681ST, 705 A-D, 706 A-D, 776, 799, 800 A-C, 801 AB, 802 AB, 803, 805 A-C, 809; Tr. 1313, 1316-1318, 2153-2174, 2170, 2173, 2228-2230, 2238-2245, 2308, 2307-2308, 3697, 3699-3700, 3713-3716, 3739-3760, 3767-3768, 3838-3840, 3846, 3850; in addition, the citations urged in connection with exception 17 are also relied upon in support of the foregoing exception).

20. Sherwin excerpts to Paragraph 4-c of Section III, and of Paragraph 4-C of Section IV, of the Recommended Decision (CX 504 B, CX 505 A, CX 507 A-M, CX 517 A, CX 518 AB, CX 523, CX 803 and Examiner's citation).

21. Sherwin excerpts to Paragraph 4-d of Section III, and to Paragraph 4-D of Section IV, of the Recommended Decision. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 17 and 19).

22. Sherwin excerpts to the second sentence of Paragraph 5 of Section III of the Recommended Decision, for the reason that the record establishes substantial variance between the practices employed by it individually as compared to practices employed by the other respondents herein. (Citations relied upon for the foregoing

exception are the same as those urged in connection with exceptions 17 and 19).

23. In so far as Paragraphs 5-a-1, 5-a-2, 5-a-3, 5-a-4, 5-a-5 and 5-a-6 of Section III, and Paragraphs 5-A-1, 5-A-2, 5-A-3, and 5-A-4 of Section IV, of the Recommended Decision are concerned, Sherwin, for brevity and in order to avoid duplication, adopts and incorporates herein by reference the exceptions taken to said paragraphs by respondent National and relies upon the same citations, together with the citations appearing herein in connection with exception 19, as support for such exceptions.

24. Sherwin excerpts to Paragraphs 5-a-1, 5-a-2, 5-a-3, 5-a-4, 5-a-5 and 5-a-6 of Section III, and to Paragraphs 5-A-1, 5-A-2, 5-A-3 and 5-A-4 of Section IV, of the Recommended Decision in so far as such paragraphs may infer that Sherwin actually agreed to employ the provisions of Schedule "A", except if and when said Schedule "A" became an effective part of the N. R. A. Code for the Industry (which it did not), or that Sherwin actually employed the provisions of said Schedule "A" as a result of any agreement to do so or otherwise. (Tr. 1327, 2066, CX 823 (1); in addition, the citation urged in connection with exceptions 17 and 26 are relied upon in support of the foregoing exception).

25. Sherwin excerpts to Paragraphs 5-b-6 of Section III, and to Paragraph 5-B-6 of Section IV, of the Recommended Decision. (Tr. 869-870, 3636-3637, 3700-3701; RX 229-305; CX 506 E, CX 539, CX 576 A-E, CX 594 AB, CX 652 A-1, CX 662 CDGHKIST, CX 662 Z5-Z26, CX 684-685, CX 776 A-1; in addition, the citations urged in connection with exception 17 are relied upon in support of the foregoing exception).

26. Sherwin excerpts to Paragraph 5-c-1 of Section III, and to Paragraph 5-C-1 of Section IV, of the Recommended Decision for the reason that neither the record references therein cited nor the record as a whole supports the statements therein made. (Tr. 1313-1314, 1324-1328, 1331-1332, 1648, 1650, 2065-2066, 3746, 3874-3882, 4070, 4083; CX 823 A-G, CX 782 C; RX 209; in addition, the citations urged in connection with exceptions 17 and 19 are relied upon in support of the foregoing exception).

27. Sherwin excerpts to the first sentence of Paragraph 5-c-2 of Section III, and of Paragraph 5-C-2 of Section IV, of the Recommended Decision in so far as such sentences imply an unlawful

mended Decision in so far as such sentences imply an unlawful purpose to the avoidance of reference to particular prices in Schedule "A" as such inference is entirely unwarranted by the record (Tr. 2218-2234, Tr. 2402-2403; RX 6-1, 8-AB, 9 A-A, 78-BC; CX 504-B, 507 A-M, 517-A, 523).

28. Sherwin excerpts to the third, fourth and fifth sentences of Paragraph 5-c-2 of Section III, and of Paragraph 5-C-2, of the Recommended Decision as not being supported either by the record citations therein given or by the record as a whole (Tr. 1326-1328, Tr. 2065-2066 and citations by Examiner).

29. Sherwin excerpts to the entire second subparagraph of Paragraph 5-c-2 of Section III, and of Paragraph 5-C-2 of Section IV, of the Recommended Decision for the reason that the statements made in such subparagraph are not sustained by the record citations therein given or by the record as a whole. (Citations relied upon for the foregoing exception are the same as those urged in connection with exceptions 17, 19 and 26).

30. Sherwin excerpts to the fourth sentence of Paragraph 5-c-4 of Section III, and of Paragraph 5-C-4 of Section IV, of the Recommended Decision for the reason that the statements contained therein are not supported by the citations given or by the record as a whole. (Citations relied upon for the foregoing exception are the same as those urged in connection with exceptions 17, 19 and 26).

31. Sherwin excerpts to the second sentence of Paragraph 5-c-5 of Section III, and of Paragraph 5-C-5 of Section IV, of the Recommended Decision for the reason that such sentence erroneously states that the table immediately following refers (1) to white lead in oil and *other key products*, and (2) involves ten pounds or *larger* containers. (The citations relied upon in support of the foregoing exception are those given by the Examiner in the table immediately following this sentence).

32. Sherwin excerpts to the completeness and accuracy of the table set out in Paragraph 5-c-5 of Section III, and incorporated by reference in Paragraph 5-C-5 of Section IV, of the Recommended Decision. (Tabulation pages 31 and 32 of Recommended Decision and exhibits thereto; Tr. 2095-2099; CX 565, CX 569, CX 613 A-C, CX 506 DE, CX 712 A, CX 506 AB, CX 507, CX 508, CX 685,

CX 629 A-C; in addition, the citations urged in connection with exception 17 are relied upon in support of the foregoing exception).

33. Sherwin excerpts to that portion of Paragraph 5-c5 of Section III and of Paragraph 5-C5 of Section IV, of the Recommended Decision which erroneously indicates that certain shipping points were used by Sherwin during the entire period reflected in the tabulation also appearing in such paragraphs. (The citations relied upon are those given by the Examiner in the tabulation).

34. Sherwin excerpts to the second sentence of the last subparagraph of 5-c5 of the Recommended Decision. (The citations urged in connection with exception 39 are relied upon in support of the foregoing exception).

35. Sherwin excerpts to the Examiner's failure to include in Paragraph 5-C5 a statement to the effect that freight costs from Sherwin's shipping points to purchasers' destination would have to be ascertained and added to the quotations appearing in the table set out in full in Paragraph 5-c5, and incorporated in Paragraph 5-C5 by reference, in order to make accurate comparison as to the purchasers' relative costs in buying from the various respondents. (Citations relied upon for the foregoing exception are the same as those urged in connection with exceptions 17 and 32).

36. Sherwin excerpts to the second sentence in Paragraph 5-c6 of Section III, and in Paragraph 5-C6 of Section IV, of the Recommended Decision, and to the correctness of the tabulations appearing in such paragraphs for the reason that the statements made therein and the figures in such tabulations are not supported by the Examiner's citations.

37. Sherwin excerpts to the statement in the first sentence in Paragraph 5-c7 of Section III, and in Paragraph 5-C7 of Section IV, of the Recommended Decision, to the effect that its customers have substantially the same delivered cost as do customers of Glidden and International. (Tr. 1249, 2639-2640, 3516; Answers of International and Glidden to Amended Complaint; in addition, the citations urged in connection with exception 17 are relied upon in support of the foregoing exception).

38. Sherwin excerpts to the statement in Paragraph 5-c7 of Section III of the Recommended Decision setting forth the number of sales made by it at varying amounts under National's lowest price, and also to the correctness of the variances stated (CX 794-D, 1, Z-7-1, and Z4, CX 613, CX 626-631 F, CX 630, CX 662 Z-5-Z-56; RX 158).

39. Sherwin excerpts to the statement in the last sentence in Paragraph 5-c7 of Section III, and in Paragraph 5-C7 of Section IV, of the Recommended Decision to the effect that the deviations by Sherwin are subject to the subtraction of a *small* freight factor which the customer *sometimes* paid from *weight* shipping points, as such statement does not fairly reflect the status of the record and is not supported by the greater weight of the reliable, probative and substantial evidence in the record. (CX 662-Z21, CX 793, CX 794-D, 1, J1, Z1, Z2, Z4, Z5, Z6 and Z7, CX 833 A-Z100; RX 198 A-11, RX 205 A-X; Tr. 836, 887-894, 1249, 2639-2640, 3516, 3746, 4104-4113; in addition, the citation urged in connection with exception 17 are relied upon in support of the foregoing exception).

40. Sherwin excerpts to the last sentence of Paragraph 5-c8 of Section III, and of Paragraph 5-C8 of Section IV, of the Recommended Decision, as not being supported by the record (CX 794, D-1, Y, Z; RX 198 A-11; Tr. 3801; in addition, the citations urged in connection with exception 17 are relied upon in support of the foregoing exception).

41. Sherwin excerpts to Paragraph 5-c9 of Section III, and to Paragraph 5-C9 of Section IV, of the Recommended Decision, as not being supported by the citations given or by the record as a whole. (The citations relied upon for the foregoing exception are the same as those urged in connection with exception 17; also Tr. 1337-1480).

42. Sherwin excerpts to the juxtaposition existing between the third sentence and the first and second sentences of Paragraph 5-c11 of Section III, and of Paragraph 5-C11 of Section IV, of the Recommended Decision for the reason that such juxtaposition gives rise to an improper inference that Sherwin's instructions in the third sentence were given as a result of the events described in the first two sentences and such inference is not warranted from the exhibits cited or from the record.

43. In the event the words "instructions are given for following large dealers' prices", in the third sentence of Paragraph 5-c-11 of Section III, and of Paragraph 5-c-11 of Section IV, of the Recommended Decision, are to be interpreted as meaning that Sherwin's managers and salesmen are instructed to follow its large competitors' (such as National and Eagle) prices on government, state and municipal bids, then Sherwin excerpts to such interpretation as not being warranted from the exhibits cited or from the record as a whole (CX 662 A and exhibits cited by Examiner.)

44. Sherwin excerpts to the third sentence of Paragraph 5-c-11 of Section III, and of Paragraph 5-c-11 of Section IV, of the Recommended Decision, in so far as such sentence indicates that such instructions are now in effect or were in effect over a substantial period of time extending at least from November 6, 1936, to May 1942.

45. Sherwin excerpts to the fourth, fifth, sixth and seventh sentences of Paragraph 5-c-11 of Section III, and of Paragraph 5-c-11 of Section IV, for the reason that such sentences do not correctly state all the facts with respect to the transactions therein referred to and do not correctly reflect the number of instances in which the respondents bid varying prices in competitive bids or the extent of such variance (Citations in support of the foregoing exceptions are the same as those relied upon by the Examiner).

46. Sherwin excerpts to all of Paragraph 5-d of Section III, and of Paragraph 5-D of Section IV, of the Recommended Decision, except that portion of the last sentence of such paragraph beginning with the words "and it was shown" in the seventh line from the end thereof, for the reason that the statements contained therein are not supported by the record (CX 662-V, Z3, Z5, O, CX 823-G).

47. Sherwin excerpts to the sixth sentence of Paragraph 5-c of Section III of the Recommended Decision for the reason that the citation to the record in support thereof reveals that the testimony cited was directly to the contrary and the exhibits cited have no connection whatever with the subject matter.

48. Sherwin excerpts to the last three sentences of Paragraph 5-e of Section III for the reason that neither the citations given by the Examiner nor the record as a whole establish that its formula

for pricing oxides in carload quantities was the same as that of any other respondent or that its less than carload prices for oxides was based on a formula derived from its carload price for such products (CX 809, CX 823 A-F).

49. Sherwin excerpts to Paragraph 5-f of Section III, and of Paragraph 5-F of Section IV, of the Recommended Decision for the reason that neither the exhibits cited nor the record as a whole establishes the fact nor justifies the inference that Sherwin sells 97% and 98% red lead at the added differentials stated because of any provisions of Schedule "A" of the N. R. A. Code for the industry or pursuant to any agreement or understanding to do so. (CX 782 C, CX 823-EF; Tr. 3870).

50. Sherwin excerpts to the first sentence of Paragraph 6-a of Section III, and of Paragraph 6-A of Section IV, of the Recommended Decision for the reason that the extent of control stated for white lead does not include basic sulphate of lead which is used interchangeably with basic carbonate to a substantial extent by Eagle and to some extent by National. (Citations urged in support of the foregoing exceptions are the same as those relied upon in connection with exceptions 12, 13 and 14).

51. Sherwin excerpts to the second and third sentences of Paragraph 6-b of Section III of the Recommended Decision for the reason that the statements contained therein do not accurately or correctly describe Sherwin's pricing methods and excerpts to the Examiner's failure to set out in such paragraph and in Paragraph 6-B of Section IV a correct statement of Sherwin's practices. (Citations urged in support of the foregoing exception are the same as those relied upon in exceptions 17 and 26).

52. Sherwin excerpts to the second and third sentences in Paragraph 6-d of Section III, and in Paragraph 6-D of Section IV, of the Recommended Decision, for the reason that the statements therein contained are unsupported by the record in so far as Sherwin is concerned. (Citations urged in support of the foregoing exception are the same as those relied upon in exceptions 17, 26, 36, 37, 38, 39 and 40).

53. Sherwin excerpts to the Examiner's failure to include in Paragraph 6-D of Section IV of the Recommended Decision a find-

ing based upon the statements contained in the last six sentences of the first subparagraph of Paragraph 6-d of Section III.

54. Sherwin excerpts to Paragraph 7-a3 of Section III, and to Paragraph 7-A3 of Section IV, of the Recommended Decision for the reason that the statements contained therein are contrary to and not supported by the record. (Citations urged in support of the foregoing exception are the same as those relied upon in exceptions 17, 19, 25, 26, 37, 38, 39, 40 and 41.)

55. Sherwin excerpts to all of Paragraph 7-a4 of Section III, and of Paragraph 7-A4 of Section IV, of the Recommended Decision for the reason that the statements contained therein are contrary to the reliable, probative and substantial evidence contained in the record. (Citations urged in support of the foregoing exception are the same as those relied upon in exceptions 17, 19, 23, 24, and 26.)

56. Sherwin excerpts to Paragraph 7-a6 of Section III, and of Paragraph 7-A6 of Section IV, of the Recommended Decision for the reason that the statements contained therein are contrary to the reliable, probative and substantial evidence in the record. (Citations urged in support of exceptions 17, 26, 27, 28, 29, 31, 32, 33, 34, 36 and 46, whether set forth verbatim or by reference, are relied upon in support of the foregoing exception.)

57. Sherwin excerpts to Paragraph 7-a8 of Section III, and to Paragraph 7-A7 of Section IV, of the Recommended Decision for the reason that the conclusion therein stated is not warranted upon consideration of the weight of the reliable, probative and substantial evidence in the record. (Citations urged in support of exceptions 43 and 45, whether set forth verbatim or incorporated by reference, are relied upon in support of the foregoing exception.)

58. Sherwin excerpts to Paragraph 7-a9 of Section III, and of Paragraph 7-A8 of Section IV, of the Recommended Decision for the reason that the conclusion therein stated is not warranted upon consideration of the weight of the reliable, probative and substantial evidence in the record. (Citations urged in support of exceptions 17 and 25 are relied upon in support of the foregoing exception.)

59. Sherwin excerpts to the second sentence of the second subparagraph of Paragraph 7-b1 of Section III of the Recommended Decision in so far as such sentence states that the evidence discloses that Sherwin had a mutual understanding with any of the other respondents concerning the plan described in Paragraph 7-b1 or accepted the plan and its objectives and agreed to follow it for the reason that neither the record nor the inferences reasonably to be drawn therefrom support such statements. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 17, 19, 26 and 27.)

60. Sherwin excerpts to that portion of Paragraph 7-b2 of Section III, and of Paragraph 7-B2 of Section IV, of the Recommended Decision, which state that its prices, though substantially lower than those of National and Eagle, were very close to the prices of Glidden and International for the reason that such statements are not supported by the record. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 17, 19, 26, 38, 39 and 40.)

61. Sherwin excerpts to the next to the last sentence in Paragraph 7-b2 in Section III, and in Paragraph 7-B2 of Section IV, of the Recommended Decision, in so far as such sentences state that there was an agreement between either Amcon or International to conform to Glidden's and Sherwin's prices with a minimum of deviation, for the reason that the statements contained therein are not supported by the reliable, probative and substantial evidence contained in the record. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 17, 19, 26, 38, 39 and 40.)

62. Sherwin excerpts to the third sentence in Paragraph 7-b3 of Section III, and in Paragraph 7-B3 of Section IV, of the Recommended Decision in so far as such sentences state that the practices therein attributed to Glidden were identical to those used by Sherwin for the reason that the statements contained therein are not supported by the reliable, probative and substantial evidence contained in the record. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 17, 19, 26, 37, 38, 39 and 40.)

63. Sherwin excerpts to Paragraph 7-D4 of Section III, and to Paragraph 7-B4 of Section IV, of the Recommended Decision, except that portion of the second sentences thereof which states that Sherwin did not use the consignment plan for controlling retail prices, for the reason that the statements contained therein are not supported by the reliable, probative and substantial evidence contained in the record. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 17, 19, 25, 26, 38, 39, 40 and 46.)

64. Sherwin excerpts to the first two sentences and the last sentence of Paragraph 7-c2 of Section III, and of Paragraph 7-C2 of Section IV, of the Recommended Decision, for the reason that the statements contained therein are not supported by the reliable, probative and substantial evidence contained in the record. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 17, 19, 25, 26, 38, 39, 40 and 46.)

65. Sherwin excerpts to Paragraphs 7-c4 and 7-c5 of Section III, and to Paragraph 7-D4 and 7-D5 of Section IV, of the Recommended Decision for the reason that the statements contained therein are not supported by the reliable, probative and substantial evidence contained in the record. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 17, 19, 25, 26, 38, 39, 40 and 46.)

66. Sherwin excerpts to Paragraphs 7-d1, 7-d2, 7-d4 and 7-d5 of Section III, and to Paragraphs 7-D1, 7-D2, 7-D4 and 7-D5 of Section IV, of the Recommended Decision for the reason that the conclusions stated in said paragraphs are either not supported by the record at all or are directly contrary to the weight of the reliable, probative and substantial evidence appearing in the record and are contrary to law. (Citations relied upon in connection with the foregoing exception are the same as those specifically relied upon in support of each and every specific exception herein stated, RX's. 6 through 8, inclusive; see also: *National Industrial Recovery Act*, Section 5, 48 Stat. 195, 198; *Regue Bietzgen Co. v. Federal Trade Commission*, 142 F. 2d 321, 329; *Arden Portland Cement Co. v. Federal Trade Commission*, 157 F. 2d 533, 549; *Sugar Institute v. United States*, 297 U. S. 563; *General Motors, Assoc. v. United States*, 208 U. S. 488; *Maple Flooring Assoc. v. United States*, 265 U. S. 363; *U. S. v.*

Seoeng-Yacuum Oil Co., 310 U. S. 198-199; *U. S. v. U. S. Steel Corporation*, 251 U. S. 417; *U. S. v. International Harvester Co.*, 274 U. S. 693; *U. S. v. Standard Oil of N. J.*, 47 F. 2d 288; *Apalachicola Cools, Inc. v. United States*, 288 U. S. 344; *U. S. v. U. S. Steel Corporation*, 233 Fed. 55, 251 U. S. 417; *U. S. v. Aluminum Co. of America*, 148 F. 2d 416, 424).

67. Sherwin excerpts to the third paragraph of Count Two (page 46) of Section III, and the third subparagraph of Paragraph 8-A (page 87) of Section IV, of the Recommended Decision in so far as such paragraphs incorporate, by reference, the facts relating to zone pricing, price differences, differentials and other features bearing on the issues under Count Two, which are set out in Section III at pages 7-38, inclusive, to the same extent as if the specific exceptions heretofore taken were again restated verbatim. (The citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 8-53, inclusive.)

68. Sherwin excerpts to Paragraph 8-A1 of Section III, and to Paragraph 8-A1 of Section IV, of the Recommended Decision for the reason that the statements contained therein, in so far as Sherwin is concerned, do not accurately portray its basic freight policy as disclosed in the record, and excerpts to the Examiner's failure to correctly describe its pricing and freight policies. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 17, 19, 25, 26, 38, 39, 40 and 46.)

69. Sherwin excerpts to Paragraph 8-A2 of Section III, and to Paragraph 8-A2 of Section IV, of the Recommended Decision for the reason that the freight tabulations set forth in Paragraph 8-A2, and incorporated in Paragraph 8-A2 by reference, are neither applicable to nor properly descriptive of any of Sherwin's shipping or freight practices. (Citations urged in support of this exception are the same as those relied upon in connection with exception 17; Tr. 3777).

70. Sherwin excerpts to Paragraph 8-A3 of Section III, and to Paragraph 8-A3 of Section IV, of the Recommended Decision for the reason that the statements therein contained do not accurately reflect Sherwin's shipping or freight practices as disclosed in the record and neither the citations to the transcript nor the citations to various Commission's Exhibits reveal in any way Sherwin's

freight or shipping policies. (Citations urged in support of the foregoing exception are the same as those relied upon in exception 17; also, Tr. 4070, 1338-1480, 1672-2018).

71. Sherwin excerpts to Paragraph 9 of Count Two of Section III wherein the Examiner has incorporated the evidence set out in Count One of Section III of the Recommended Decision relative to differences in trade, regional, quantity, and quality discounts and charges through differentials between agents and dealers, between containers of different sizes, between 97% or 98% red lead over lower grades, and between cartloads, 5-ton lots, and smaller quantities, into Paragraph 9, Count Two of Section III, by reference. Sherwin, therefore, by reference, reaffirms and incorporates heretofore, each and every exception it has heretofore taken to specific statements by the Trial Examiner relative to the evidence bearing upon the aforementioned subjects and relies upon the same citations which it has heretofore identified with each such specific exception.

72. Sherwin excerpts to Paragraph 9-b of Section III, and to Paragraph 9-B, of the Recommended Decision in so far as the statements contained therein imply that such container differentials as were utilized by Sherwin were utilized as a result of any agreement or understanding with any other respondent herein, or with any one else (RX 210, CX 662-A, CX 662-W, Y, Z1, Z3, Z5, CX 800 A-C, Tr. 3882-3886).

73. Sherwin excerpts to the first sentence in Paragraph 9-c of Section III, and in Paragraph 9-C of Section IV, of the Recommended Decision in so far as such sentences imply that such quality differentials on various grades of red lead as were utilized by Sherwin were utilized as a result of any agreement or understanding with any other respondent herein, or with any one else (RX 209, CX 782-C, CX 823-EP, Tr. 3870-3882).

74. Sherwin excerpts to Paragraph 9-d of Section III, and to Paragraph 9-D of Section IV, of the Recommended Decision for the reason that the statements contained therein do not correctly and accurately reflect Sherwin's pricing policy for cartloads and smaller quantities of oxides, and neither the tabulation therein set forth nor the exhibits therein referred to by the Examiner are applicable in any way to Sherwin's pricing or freight policies for

oxides. (Citations urged in support of the foregoing exception are the same as those relied upon in Exceptions 17, 21, 26, 27, and 28).

75. Sherwin excerpts to the first sentence of Paragraph 9-e of Section III, and of Paragraph 9-E of Section IV, of the Recommended Decision in so far as such sentences might imply that such differentials as were utilized by Sherwin in connection with cartload shipments of basic lead carbonate, were utilized as the result of any agreement or understanding with any other respondent herein or any one else, for the reason that the record does not disclose that Sherwin ever sold basic lead carbonate in cartload shipments of 20 tons or more at one-quarter cent per pound less than its card prices for such products prior to 1942 (CX 823-G).

76. Sherwin excerpts to Paragraph 9-f of Section III, and to Paragraph 9-F of Section IV, of the Recommended Decision, for the reason that the statements contained therein are not supported by the record as a whole in so far as Sherwin's sales to dealers purchasing for resale are concerned. (Citations urged in support of the foregoing exception are the same as those relied upon in exceptions 17, 21, 27, and 28; also CX 662 I through R, U, V, Z9 through Z25; Tr. 1338-1480, 1672-2018, 4070.)

77. Sherwin excerpts to Paragraph 10-a of Section III, and to Paragraph 10-A of Section IV, of the Recommended Decision for the reason that the statements therein made are not supported by the record in so far as Sherwin is concerned and the exhibits cited by the Examiner have no relation whatever to Sherwin or its pricing practices. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exceptions 17, 21, 26, and 27; Tr. 1338-1480, 1682-2018, 4070.)

78. Sherwin excerpts to Paragraph 10-b of Section III, and to Paragraph 10-B of Section IV, of the Recommended Decision in so far as the Examiner fails to affirmatively state in such paragraphs that for over twenty years Sherwin has not manufactured or sold oxides for use by the battery manufacturing industry (Tr. 4070).

79. Sherwin excerpts to Paragraphs 10-c and 10-d of Section III, and to Paragraphs 10-C and 10-D of Section IV, of the Recommended Decision for the reason that the Examiner fails to affirmatively state therein that the record does not disclose sales of dry white lead or

80. Sherwin excepts to Paragraph 10-c of Section III, and to Paragraph 10-C of Section IV, of the Recommended Decision for the reason that such paragraphs contain many statements which are either contrary to the evidence or are incomplete statements of the evidence. (Citations urged in support of the foregoing exception are the same as those relied upon in connection with exception 17; also Tr. 1338-1480).

85. Sherwin excepts to Paragraph 10-II of Section IV, of the Report, on the ground that the reason that in so far as Sherwin is concerned, the sales do not support a finding that such sales as to the different locations are differently located at different prices will not have a competitive effect whatever. (Citation omitted.) The exception going exception are the same as the exception 17; also Tr. 1338-1481.

86. Sherwin excepts to Paragraph 10-J of Section IV, of the Report, on the basis of the reason that the statements therein reflect Sherwin's shipping or freight charges, rather than its record, and for the further reason that such quantity or other differentials between Sherwin in the sale of oxides were discounted by their competitive effect whatever between Sherwin and those urged in support of the foregoing. The court has noted those relied upon in exceptions 17, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835,

87. Sherwin excepts to Paragraph 10-K of Section IV, of the contract, in so far as such paragraphs indicate a price for carbonate at a one-quarter cent difference less than carload lots prior to 1942 (C

88. Sherwin excerpts to the first :
Section III, and of Paragraph 10-1.
recommended Decision for the reason that the
are not supported by the record in
dealers purchasing for resale are co-
support of the foregoing exception are
in exceptions 17, 21, 27 and 28; also C
through 225, Tr. 1338-1480, 1672-2018,

89. Sherwin excerpts to the first and last sentences of Paragraph 10-m of Section III of the Recommended Decision in so far as the Examiner characterizes the practices described in Paragraphs 10-b and 10-j as involving discriminations for the reasons set out in connection with exceptions 85 and 86. (Citations urged in support of the foregoing exception are the same as those relied upon in exceptions 17, 21, 26, 27 and 28; also Tr. 1335-1484, 1672-2018, and 4070.)

90. Sherwin excerpts to the third sentence of Paragraph 10-m of Section III of the Recommended Decision in so far as it states that Sherwin has cooperatively employed discriminatory practices or other methods which produce prices which are identical with those of each of the other respondents, for the reason that such statements are not supported by the record as a whole.

91. Sherwin excerpts to Paragraphs 11-a and 11-b of Section III, and to Paragraphs 11-A and 11-B of Section IV, of the Recommended Decision for the reason that the statements contained therein are not supported by the record and constitute an incorrect statement of the law. (Clayton Act, as amended, Section 2(a); Senate Committee Report 1502, dated February 3, 1946; *P. T. C. vs. Staley*, 324 U. S. 746, together with all citations stated or referred to and relied upon in exceptions 67 through 89).

92. Sherwin excerpts to that portion of the seventh sentence in the third subparagraph of Paragraph 11-c of Section III of the Recommended Decision which reads "in the absence of uneconomic or unlawful factors," for the reason that such statement is unwarranted under the law. (Clayton Act, as amended, Section 2(a); Senate Committee Report 1502, dated February 3, 1946; *P. T. C. vs. Staley*, 324 U. S. 746, together with all citations stated or referred to and relied upon in exceptions 67 through 89).

93. Sherwin adopts as its own each and every exception taken by each other respondent to Sections II, III and IV of the Recommended Decision and incorporates herein, by reference, each such exception together with all citations in support thereof; provided, however, that this exception shall not control in the event there should be a conflict between any specific exception taken by Sherwin, as set out in exceptions 1 through 92, inclusive, and any exception taken by another respondent.

94. Sherwin excerpts to the Examiner's failure to report and to recommend a finding relative to its special defenses as follows:

"Sherwin has not voluntarily or reciprocally surrendered or cancelled any inherent advantage within any territory in consideration of a similar surrender and cancellation of a similar advantage by any other respondent. The various respondents have different delivery costs in shipping lead pigments to their respective customers which is attributable primarily to the location of the plants of the various respondents. In approximately 80% of the United States respondents other than Sherwin have a freight advantage over Sherwin. In that portion of the United States closer to Chicago, freight-wise, than to cities wherein other lead pigment plants are located, all of the respondents who have plants in Chicago or in the Chicago switching area are on an equal footing freightwise. Since Sherwin's only plant for producing either white lead or red lead and litharge is located in Chicago, it has no territory within which it has a freight advantage. National Lead Company is the largest producer of white lead (dry and in oil), red lead (dry and in oil) and litharge. During the period denominated by Trial Counsel for the Commission as the 'normal period' from 1936 to 1941, National Lead produced over 60% of the white lead in oil, from 30% to 55% of the dry white lead and 50% of the red lead and litharge. Its white lead plants are located in Perth Amboy, New Jersey; Philadelphia, Pennsylvania; Chicago, Illinois (where it produces 40% of its white lead); St. Louis, Missouri; and Oakland, California. It produces red lead and litharge in plants located in Brooklyn, New York; Philadelphia, Penna.; Charleston, West Virginia; St. Louis, Missouri; Chicago, Illinois; Dallas, Texas; Atlanta, Georgia; and Los Angeles and San Francisco, California. For the period from 1930-1946 Eagle-Picher produced from 15% to 20% of the white lead in oil and approximately 10% of the dry white lead. The figures for Eagle do not include its production of lead sulphate, which is used extensively by it interchangeably with basic carbonate and which substantially exceeds its production of basic carbonate. Eagle-Picher produced white lead in its plant in Cincinnati, Ohio (plant recently dismantled) and red lead and litharge in Joplin, Missouri and Newark, New Jersey. In 1943 Glidden produced between 8% and 9% of the white lead in oil and approximately 15% to 18% of the dry white lead. It produces red lead and litharge at Hammond, Ind., which is in the Chicago switching area and produces white lead at Scranton, Pennsylvania. In the period from 1937-1943 International Smelting & Refining Company sold from 3% to 4% of the white

lead in oil and from 10% to 15% of the dry white lead. These products were manufactured at its plant in East Chicago, Indiana, which is within the Chicago switching area. International Smelting & Refining Co. discontinued production and sale of white lead and on October 1, 1946 sold its plant at East Chicago, Indiana to Eagle-Picher so that Eagle-Picher now has a plant located in the Chicago area for the production of white lead. Sherwin prepared and introduced in evidence as RX 199 a map which shows the areas within which each plant may ship white lead (dry and in oil) at a freight advantage over any other white lead plant on the basis of railroad and less than railroad freight rates in effect on January 15, 1941. An examination of this exhibit clearly shows that National Lead's Oakland, St. Louis and Philadelphia plants have a freight advantage over any other white lead plant in a major portion of the United States. Eagle-Picher's Cincinnati white lead plant had a freight advantage over any other white lead plant in a substantial area while in operation. Glidden's white lead plant at Scranton, Penna. has a freight advantage over any other white lead plant in the major portions of Pennsylvania and New York. National Lead has a white lead plant in the New York City area and therefore has a freight advantage in New England and the lower portion of New York State over any other plants. National Lead, International Smelting & Refining Company's plant (now owned by Eagle-Picher) and Sherwin all have the same freight advantage in an area surrounding Chicago. The net result is that Glidden has a freight advantage in some territory; Eagle-Picher had a freight advantage in some territory and National Lead has a freight advantage in some territory but Sherwin has no advantage in any territory. This is due to the fact that National Lead and Eagle-Picher (since its acquisition of International Smelting and Refining Company's plant) both have white lead plants in Chicago where Sherwin's sole plant is located and also have one or more plants elsewhere. A similar map relative to red lead (dry and in oil) was introduced as RX. 200. The map is equally applicable to litharge. An examination of this exhibit shows that in a major portion of the United States, National Lead has a freight advantage over other red lead and litharge plants due to the fact that it operates nine red lead and litharge plants strategically placed throughout the whole United States. Eagle-Picher has a freight advantage in part of the country by reason of its plant at Joplin, Missouri. National, Glidden and Sherwin all have red lead and litharge plants in Chicago so they share any freight advantage accruing to Chicago over St. Louis, Missouri.

Charleston, West Virginia and Oakland, California, in all of which cities National Lead has plants. Sherwin has only six shipping points (Detroit, Indianapolis, Minneapolis, Chicago, Duluth and Sioux City) in the area where Chicago has a freight advantage over other cities in which lead pigment plants (other white lead or red lead and litharge) are located. In shipping lead pigments to each of its other more than 45 shipping points or to areas served by such shipping points, Sherwin is at a freight disadvantage to one or more of the other respondents. The identity of the specific producer who has the advantage over Sherwin in each such situation will vary depending upon which one has a plant located closer, freightwise, to such shipping point than Sherwin's plant at Chicago. In those instances where Sherwin ships direct from Chicago to purchasers without charging any freight (irrespective of quantity), it is at a disadvantage, freightwise, to at least one of the other respondents in the entire United States except North and South Dakota, Iowa, Minnesota, Wisconsin, Michigan and the northern parts of Illinois, Indiana and Ohio, and even in this area it does not have an advantage, freightwise, over all other respondents. (EX 578, 664, 741, 882-1, RX 199, RX 200; Tr. 1071-1072, 1230-1231, 1307-1308, 1552, 1560-1561, 1564, 1625, 1647, 1665-1666, 3721-3732, 3732-3740.)

C. In so far as Section V, entitled "Recommended Order", of the Trial Examiner's Recommended Decision is concerned, Sherwin takes the following exceptions:

95. Sherwin excepts to Paragraph 1, including sub-paragraphs 1-A, 1-B, 1-C and 1-D, for the reason that the weight of the reliable, probative and substantial evidence in the record does not show that Sherwin has entered into, cooperated in or carried out any planned common course of action, understanding, agreement, combination or conspiracy to establish and maintain uniform prices, terms, price differentials and/or conditions of sale, or to induce resale price uniformity in connection with the sale and distribution of lead pigments.

96. Sherwin excepts to Paragraph 4, including sub-paragraphs 4-A and 4-B for the reason that the weight of the reliable, probative and substantial evidence in the record fails to disclose (1) that Sherwin has sold lead pigments at different zone delivered prices to customers located in different zones who are in competition with each other; (2) that Sherwin has sold lead oxide's at different quantity

price differentials between carload and 5 ton shipments and between 5 ton and smaller shipments to customers who are in competition with each other, or (3) that even if Sherwin had engaged in the practices hereinabove described in (1) and (2), which is not admitted, any detrimental competitive effect has been shown in the record.

97. Sherwin excerpts to Items 1, 2 and 4 of the Recommended Order for the reason that each and every provision thereof is contrary to both the evidence in the record and to the provisions of the Federal Trade Commission Act and of the Clayton Act, as amended by the Robinson-Patman Act.

D. With respect to the Trial Examiner's Rulings on Proposals for Findings and Conclusions submitted by Sherwin under Rule XXI of the Commission's Rules of Practice, specific exceptions are taken as follows:

98. Sherwin excerpts to the Examiner's denial of the findings requested in Paragraph One relating to Count I.

99. Sherwin excerpts to the Examiner's denial of the findings requested in Paragraph Two relating to Count I.

100. Sherwin excerpts to the Examiner's ruling in deleting the word "negligible" in the third sentence of Paragraph Five relating to Count I.

101. Sherwin excerpts to the Examiner's refusal to grant the finding stated in the fourth sentence of Paragraph Five relating to Count I, which reads "It also sells such products, particularly white lead in oil, in its own several hundred retail stores in transactions which originate and are completed entirely within the confines of a single state". Sherwin has never denied that it is engaged in interstate commerce but contends that the particular phase of its business therein described is not interstate commerce and that sales made by it in its local retail stores are not subject to the jurisdiction of the Commission.

102. Sherwin excerpts to the manner in which the Examiner has ruled on the proposals contained in Paragraphs Six, Seven, Eight, Nine, Ten Eleven and Twelve relating to Count I, and in Paragraphs One through Fourteen relating to Count II, for the reason that the Examiner's ruling does not comply with the require-

ments of Rule XXI and does not furnish it with the specific information contemplated by the rule as to which requested findings were denied in toto, which were denied in part and modified, which were not ruled upon at all or which were adopted in whole or in part. While Sherwin has attempted to take specific exceptions to the many findings in the report which are contrary to findings requested by it, it has not been possible, in some instances, to determine just what action has been taken by the Examiner with respect to specific findings requested by it. Consequently Sherwin finds it necessary, due to the character of the Examiner's rulings, to except to the failure of the Examiner to make each and every finding specifically requested in each of the above enumerated paragraphs of its proposed findings and for such purpose incorporates the proposed finding submitted by it herein by reference. (In support of such exception Sherwin relies upon the record and exhibit citations set out in detail in connection with each of such requested findings).

103. Sherwin excerpts to the Examiner's denial of conclusion of law number 1 as requested by it and reasserts that the mere fact that it is engaged in interstate commerce is not a sufficient basis, in law, for the denial of the conclusion of law requested.

104. Sherwin excerpts to the Examiner's denial of conclusion of law number 2 requested by it and reasserts that the proposed conclusion is a sufficient statement of the law on the point.

105. Sherwin excerpts to the Examiner's denial of conclusion of law number 3 requested by it and reasserts that the conclusion requested is a proper statement of the law on the point.

106. Sherwin excerpts to the Examiner's partial denial of conclusion of law number 4 for the reason that the proposed conclusion properly states the law, and for the further reason that the definition of the term "price" requested in such conclusion has no relation whatever to zones.

107. Sherwin excerpts to the Examiner's denial of conclusion of law number 5 requested by it for the reason that it constitutes a proper statement of the law on the point and for the further reason that the criterion as to whether there has been a violation of the Clayton Act is not difference in price but discrimination in price, plus a detrimental competitive effect.

108. Sherwin excepts to the Examiner's denial of conclusions of law 6, 7, 8 and 9 requested by it for the reason that the denial thereof is contrary to both the evidence and the law.

Respectfully submitted this 21st day of May, 1948.

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