UNITED STATES OF AMERICA

Before the

FEDERAL TRADE COMMISSION

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SECRETARY

In the Matter of National Lead Company, a corporation, et al.	Docket No. 5253

Now come the respondents, The Eagle-Picher Company and The Eagle-Picher Sales Company (hereinafter called "Eagle-Picher") by their attorneys, Edmund P. Wood and Richard Serviss, and adopt as their own the exceptions taken by each other respondent herein to the "Trial Examiner's Recommended Decision".

A. In view of the fact that the Recommended Decision of the Trial Examiner treats the practices of Eagle-Picher as incidental or tributary to those of National, thus dispersing direct and indirect reference to them throughout the Recommended Decision, and rendering it difficult to challenge each allusion to Eagle-Picher separately and individually, Eagle-Picher asserts the two following general exceptions to the Trial Examiner's Recommended Decision:

1. As to Count I, the Trial Examiner erred in holding or insinuating that National lawlessly achieved a monopolistic position of industrial dominance, that Eagle-Picher aided, abetted, supported,

and contributed to National's monopolistic delinquency and now participates in the illegal fruits as virtual co-partner in criminal monopoly, that National procured this sinister intimacy by the device of its erstwhile minority stock ownership in Eagle-Picher, and that these conclusions are compelled by the manifest intimations of the evidence, in weighing which the categorical statements of top executives, whose honesty is not questioned, must be disregarded as unqualified, in favor of possible inferences emanating from the extraneous doings and scrivenings of underlings, which, although irrelevant, should be regarded as transcending normal competitive amenities. Eagle-Picher excepts to and objects to each and every item which holds, insinuates, implies, suggests, infers, or intimates to this general effect, positively or negatively, or both.

REASON: The Trial Examiner so erred because he chose to ignore the testimony offered on behalf of Eagle-Picher, and because he disregarded the established law of evidence that inferences cannot be used to contradict direct and positive testimony, unless they are inescapable. More particularly, it was testified that Eagle-Picher had no agreements with National and competed with it actively but had no alternative to following National's prices on products made from pig lead, because Eagle-Picher was not relatively strong enough to start or finish a price war. This direct and positive testimony, which is more particularly identified below in Paragraphs B-1, 2, 3, and 4, stands uncontradicted in the record, and the Trial Examiner's laborious deduction of intricate and sinister conspiracy is completely unnecessary to explain the transparently simple, commonplace competitive situation. (See

Paragraphs (1-f), on Page 10; (7-c1), on Page 43; (6-A), on Page 79; and (7-A1), on Page 80, of the Trial Examiner's Recommended Decision.)

2. As to Count II, the Trial Examiner erred in that, after holding that the price discriminations of the respondents should be treated individually, (Page 57, Paragraph (10-m)), he concluded that Eagle-Picher was violating Section 2(a) of the Clayton Act, without making the appropriate and necessary findings of fact as to Eagle-Picher. More specifically, the Examiner held:

> "The question of discrimination involved in this case is individual and must be considered with respect to each respondent acting alone from the standpoint of effects as between its customers."

However, the Recommended Decision contains no finding that any two or more actual customers of Eagle-Picher were affected by Eagle-Picher's price differentials or that anything more specific than hypothetical competition between hypothetical customers might be affected. The Recommended Decision goes beyond due process of law in recommending a restraining order against Eagle-Picher, in the absence of a clear-cut finding that Eagle-Picher's individual pricing practices substantially affected the competition between identifiable customers.

REASON: At the close of the Commission's case, Eagle-Picher moved to dismiss the complaint, on the ground, among others, that the evidence in respect to violation of Section 2(a) of the Clayton Act was too vague and indefinite to permit proper defense or rebuttal and hence, Eagle-Picher, denied opportunity for intelligent defense, was being deprived of due process of law. The proposed finding that Eagle-Picher has violated this Act is unsupported by any finding as to when, where, how, or whom. If Eagle-Picher's price differentials have substantially lessened competition among its customers, or if their effect may be to substantially lessen competition, then certainly the Recommended Decision should have identified the customers so affected with sufficient particularity to permit Eagle-Picher to at least argue the matter before the Commission.

The record indicates throughout that Eagle-Picher has many customers, and that there is much competition in at least several of the industries in which Eagle-Picher customers engage. The Trial Examiner speculated academically as to hypothetical effects on hypothetical customers, but did not instance from the record any proved violation of law. As basis for the Recommended Order, the Recommended Decision should have found that the effect of Eagle-Picher pricing practice X may be to substantially lessen competition between Eagle-Picher customers A and B. There should have been such a finding in respect to each pigment and each price differential. Instead, the Trial Examiner merely found that the effect of the Eagle-Picher differentials was to maybe lessen competition. In short, the Recommended Decision in substance substitutes "maybe" for "may be" in the statute, which renders defense impossible, and denies Eagle-Picher due process of law.

B. Further, Eagle-Picher excepts to the refusal of the Trial Examiner to make the following findings of fact, proposed to him by Eagle-Picher, and supported by the evidence:

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1. "The Eagle-Picher Company and The Eagle-Picher Sales Company (hereinafter called Eagle-Picher) engage in the business of selling lead pigments in interstate commerce throughout the United States in which business they are second in size to National Lead Company (hereinafter called National). Due to the difference in sizes of the two companies, Eagle-Picher is not in a position to compete with National, on lead pigments manufactured from pig lead, by means of a general policy of price cutting or price war. Nevertheless, it is the policy of Eagle-Picher to compete with National in the sale of lead pigments and Eagle-Picher does so compete actively by means of research which develops different and better products, by means of sales service, by means of technical service to customers providing them with the benefit of Eagle-Picher's research facilities, and by means of national advertising intended to increase consumer acceptance of the Eagle-Picher products."

2. "Eagle-Picher has not acted in concert with the other respondents herein or any of them since the invalidation of the National Industrial Recovery Act, in respect to terms or conditions of sale of lead pigments, and there is no evidence that it has. More specifically, the current situation was correctly summarized by Joel M. Bowlby, president of Eagle-Picher, who testified that since the time he became president of the company, September, 1941, down to the present, no agreements have existed with the other respondents herein or any of them, affecting prices or terms or conditions of sale of lead pigments, and this testimony is uncontradicted."

3. "Particularly, Eagle-Picher research has developed special pigments known as basic lead sulphate, leaded zinc oxide and blue lead which Eagle-Picher manufactures from its own raw materials

and sells in competition with pigments manufactured from pig lead. All of the Eagle-Picher organization has been actively engaged in promoting consumer acceptance and greater utilization of these products in competition with those promoted by the other respondents herein."

4. "Eagle-Picher's research laboratories have developed many special lead oxides for the storage battery industry and Eagle-Picher's technical experts have instructed the company's customers in the manner of their use, which has improved the competitive position of the Eagle-Picher customers in relation to that of the customers of National and that of the large battery manufacturers which produce their own lead oxides."

5. "Eagle-Picher has not indulged in any unfair method of competition by conspiracy or otherwise."

6. "Eagle-Picher has not discriminated among its customers in its sale of lead pigments."

7. "Eagle-Picher cannot compete with National except by selling on a delivered price basis because of National's greater size and greater number of manufacturing plants."

8. "The pricing policies of Eagle-Picher have not had the effect of substantially lessening competition or tending to create a monopoly in the sale of lead pigments, and the record does not purport to evidence a single specific instance of such effect."

9. "The competition of the customers of Eagle-Picher which purchase lead pigments from Eagle-Picher, has not been injured, destroyed or prevented by the pricing policy followed by Eagle-Picher, and the record does not purport to evidence a single specific instance of such effect."

REASONS: Eagle-Picher's proposed exceptions, Nos. 1, 2, 3 and 4, are supported by the testimony of Alvin C. Goetz, Tr. 3328; Harold R. Harner, Tr. 3416; M. F. Chubb, Tr. 3462; W. W. Vasterling, Tr. 3591; J. O. Mitchell, Tr. 3620, J. M. Bowlby, Tr. 3632-A; and W. H. Hayt, Tr. 3659.

Proposed findings Nos. 5 and 6 are negative in form and are supported by the negative aspects of the record. Proposed finding No. 7 may be found in substance in the Recommended Decision, but the Trial Examiner refused to make this proposed finding with quotable conciseness. Proposed findings Nos. 8 and 9 are negative, and are predicated upon the negative aspects of the record.

C. More specifically, Eagle-Picher excepts to said Recommended Decision in the following particulars:

1. Page 6, under "The Issues":

> "Did National, through its various acquisitions, secure and employ monopolistic control over the lead pigments industry?
>
> Did National's relations with Smelting exert a monopolistic influence over the price of pig lead?
>
> Did National conspire with du Pont with the purpose and effect of maintaining fixed price levels on white lead-in-oil?"

The reason for the exception is that none of these activities comes under Section 5 of the Federal Trade Commission Act, or Section 2(a) of the Clayton Act, or under any other statute under which the Federal Trade Commission has jurisdiction. These issues might pertain to alleged violation by National of Section 2 of the Sherman Act, but the Federal Trade Commission is without power to enforce this section of the Sherman Act, in so far as mere purpose or intent to monopolize is concerned, because intent per se is not an unfair method of competition. These issues, properly, have nothing to do with the Eagle-Picher respondents; Eagle-Picher is not responsible for the sole and long past actions of National, and should not be prejudiced by these false issues relating solely to National.

2. Page 9, (1-e)

This paragraph is faulty, in that Eagle-Picher's production of basic lead sulphate and leaded zinc oxide is not taken into account, and further, in that the record does not justify the holding that Eagle-Picher's percentage of business has been increased by its acquisition of International's lead pigment plant. Eagle-Picher did not buy International's business, and there is no reason to believe that Eagle-Picher received a larger share of it than any other respondent.

3. Page 10, (1-f)

Properly, these facts, if true, are not pertinent to the issues of this case. The statement that it was not shown that National controlled Eagle-Picher through stock ownership is warranted, but this finding alone should disqualify all other evidence pertaining to National's financial interest in Eagle-Picher. The evidence which is discussed in the second paragraph of (1-f) is too trifling for proper consideration in relation to any valid issues in the case.

4. Page 35, (5-e)

The record does not justify the interpretation placed upon it as to Eagle-Picher.

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5. Page 36, (6-a)

There is nothing in the record to justify the Examiner's implication that prices were fixed jointly by National and Eagle-Picher. Eagle-Picher does not except to the finding that the prices set by National "had the effect of placing a ceiling on prices which their smaller competitors could charge and of making profit margins sufficiently narrow to induce these competitors to sell at the highest prices they could get (Pars. 1-f, 2-f, 5-c3)."

6. Page 38, (7-a1) and (7-a2)

These conclusions have nothing to do with any proper issue in the case, as explained in relation to the analysis of "Issues".

7. Page 39, (7-a3)

There is nothing in the record to show that "Respondents National and Eagle-Picher promulgated and adhered to the zone pricing system without deviation and in such manner as to produce identical prices, terms, and conditions of sale." Eagle-Picher in general followed National's pricing, as to products made from pig lead, but did not "promulgate" the pricing system. The accusation is without evidentiary support.

8. Page 40, (7-a7)

This statement is inaccurate, because it does not take into account Eagle-Picher's sale of basic sulphate white lead and blue lead, which competed against National's basic carbonate white lead and red lead, respectively.

9. Page 40, (7-a8)

There is nothing in the record to show that the Eagle-Picher respondents "discussed bases for quotations in sealed bids to municipal, state, and federal purchasing agencies". Paragraph (5-c7), to which the Examiner refers in (7-a8) comprises only an analysis of invoices, and provides no basis for the Trial Examiner's unsupported charge that discussion of quotations in sealed bids took place. There is no such evidence in the record.

10. Page 40, (7-b1)

Eagle-Picher has always admitted following generally the price leadership of National in respect to prices and terms and conditions of sale, of most of its products. There is no evidence in the case to warrant the inference that these prices and terms and conditions of sale were arrived at by collusion between National and Eagle-Picher. The evidence is to the contrary, and is designated with particularity in the exceptions to the Trial Examiner's refusal to make the findings requested by them.

11. Page 43, (7-c1)

The conclusions stated in this paragraph are excepted to for the reasons set forth in the exception to Paragraph (7-b1).

12. Page 44, (7-c4)

There is no evidence in this record as to what an unrestrained marketing system would provide in the way of price variation for the purposes of bargain and sale. In an industry in which price leadership obtains, some conformity in pricing is to be expected; the assumption to the contrary is without judicial sanction, and must be predicated upon some undisclosed, obscure, out-moded text on economics, of which these respondents have no knowledge.

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13. Page 44, (7-c5)

Inasmuch as the Miller-Tydings Act legalizes the fixing of resale prices, it is not within the province of the Federal Trade Commission to condemn under the Federal Trade Commission Act those who sought and obtained a legal result. A legalized method of competition cannot be an unfair method of competition. After the Miller-Tydings Act was passed, the Commission altered many orders previously issued.

14. Page 44, (7-d1)

The suspension of the enforceability of Schedule A and Article VII, Section 2, of the N.R.A. Code was without legal significance as to those who voluntarily adopted the practices approved therein.

15. Page 45, (7-d2)

There was no conspiracy. The simpler and correct explanation of such conformity of prices, terms and conditions of sale as existed, insofar as Eagle-Picher is concerned, is that Eagle-Picher deliberately and purposefully followed the pricing policy of National as to products made from pig lead, which it had a right to do legally.

16. Page 45, (7-d3)

The delineated activities of National are not in violation of the Federal Trade Commission Act, because monopolistic purpose, even if proved, violates only Section 2 of the Sherman Act, and is not an unfair method of competition. Further, the Federal Trade Commission Act was intended to nip monopolistic tendencies in the bud, whereas the alleged improper conduct of National took place in the long past, and the issue itself is improper in this case.

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17. Page 45, (7-d4)

Eagle-Picher acted within its rights in following generally the pricing policies of the National Lead Company as to products made from pig lead.

18. Page 46, (7-d5) and (7-d6)

The conclusions stated in this paragraph are excepted to for the reasons asserted in the exception to Paragraph (7-d4).

19. Pages 49 and 50, (8-a4)

This item is unsupported by either the record references therein made or any other portion of the record.

20. Page 56, (10-h)

The cases pointed out in Paragraphs 8-a3, a4, 10-a, and d, are not discriminatory in the sense in which the word is used in Section 2(a) of the Clayton Act, and the price differentials shown to exist were not shown to be substantial or to lessen competition between Eagle-Picher's customers.

21. Page 57, (10-j)

It is not shown that the price differences in question were discriminatory in the sense of Section 2(a) of the Clayton Act, that they were substantial, or that they had the tendency or effect of lessening competition between large and small customers, to the injury of the latter.

22. Page 57, (11-a)

The Trial Examiner erred in considering individual sales to customers in premium zones, instead of considering the zone price, that is, the average of all of the transactions within the zone. Zone selling is legal. (Salt Producers Association v. Federal Trade Commission, 134 Fed. (2d) 354). There is no showing that individual customers were damaged or put at a competitive disadvantage in competition with customers in a different zone.

23. Page 58, (11-b)

It is improper to hold that prices are discriminatory and violative of Section 2(a) of the Clayton Act, in the absence of proof that competition, in this case among customers, may be lessened.

24. Page 61, "IV. RECOMMENDED FINDINGS AND CONCLUSIONS"

This section of the Trial Examiner's Recommended Decision, that is, from Page 61 to Page 96, "Recommended Order", is essentially a repetition of the foregoing sections to which specific exceptions have been noted. Eagle-Picher particularly excepts to Page 81, (7-A3); Page 82, (7-A8); Page 84, (7-C1); Page 85, (7-D1); Page 86, (7-D2); Page 87, (7-D4); Page 87, (7-D5); Page 87, (7-D6); Page 89, (8-A4); and Page 92, (10-D); for the reasons previously indicated.

Also, Eagle-Picher excepts to the inclusion of the findings 1-H, 1-I, 1-K, 2-A, 2-B, 2-C, 2-D, 2-E, 2-F, and 3, as improper issues in the case, for the reasons described in relation to exception No. 1.

25. Page 64, (1-J)

Respondents except to the recommended finding that Eagle-Picher's percentage of the lead pigment business has been increased by its recent acquisition of International's lead pigment plant and business. The Trial Examiner is grossly in error as to Eagle-Picher's acquiring International's business, because it did not, and there is

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nothing in the record to suggest that it did. Further, there is nothing in the record to show that Eagle-Picher's acquisition of International's plant in any way increased Eagle-Picher's business or percentage.

26. Page 64, (1-K)

Eagle-Picher objects to the inclusion of the finding that National owned Eagle-Picher stock. In view of the finding that National did not control Eagle-Picher, the inclusion of the finding of the stock ownership is improper. Obviously, the Trial Examiner was prejudiced by this circumstance, and hence exaggerated the importance of trivial contacts between the companies itemized in said Paragraph 1-K. Particularly, Eagle-Picher objects to the statement: "Eagle-Picher's files contained National's price changes on the Pacific Coast", because there was just one casual letter in the Eagle-Picher files, showing one change of price by National on the Pacific Coast, whereas the recommended finding intimates greater intimacy. Eagle-Picher objects to the characterization of the itemized trivia as "direct evidence of close relations between these two respondents". None of the specified contacts between National and Eagle-Picher personnel was improper, and all were trivial. A limited number of casual and isolated lawful contacts, five over fifteen years, is inadequate basis for drawing the inference that the parties were engaged in an illegal conspiracy.

27. Page 79, (6-A)

Eagle-Picher excepts to the first sentence of this paragraph, which treats National and Eagle-Picher as an entity, and further objects to all casual insinuations throughout the report to like effect.

28. Page 80, (7-A1)

Eagle-Picher excepts to the latter part of the first sentence, which asserts that National added to its dominant power by establishing close cooperation with Eagle-Picher. There is nothing in the record to show that Eagle-Picher cooperated with National to a degree greater than that compelled by the position of National which the Trial Examiner held to be dominant. Further, it is the strategy of the Trial Examiner, in his compounding of this paragraph, to tie Eagle-Picher into National's acquisition of competitors many years ago, and its historic relations with American Smelting and Refining Company. If National's early operations were improper, then Eagle-Picher, as its "largest potential competitor", was the chief victim. If National's early history here has any pertinency, then the Federal Trade Commission has been guilty of thirty years' gross dereliction, and the Trial Examiner's present attempt to implicate Eagle-Picher, as an incident to his condemnation of National, merely adds insult to injury. In short, the Trial Examiner's report is hopelessly inconsistent in every particular and respect, including every insinuation, as well as statement, by which it attempts to tie National and Eagle-Picher together as twin culprits. (See Paragraph 7-D-3 on Page 86).

29. Page 82 (7-E1)

Eagle-Picher excepts to the statement in the first and last sentences as not supported by any evidence whatsoever. Eagle-Picher followed National's prices and terms and conditions of sale, because National was the price leader, but there is not one iota of evidence in the record that the prices and terms and conditions of sale resulted from joint action.

30. Page 94, (10-H)

Eagle-Picher objects to the inference of this paragraph that it indulged in discrimination to substantially lessen competition between its customers. There is no evidence whatsoever in the record that any Eagle-Picher price differential substantially lessened competition between Eagle-Picher's customers, and Trial Examiner's Recommended Decision cites no such case.

31. Page 95, (11-A)

The zone system is legal, (Salt Producers Association v. Federal Trade Commission, 134 Fed. (2d) 354.) and hence, the average zone freight is the critical factor in determining legality, rather than specific zone border examples. The record does not show any instance in which Eagle-Picher's customers, located in different zones, were in competition with each other, and none is suggested in the Trial Examiner's Recommended Decision.

32. Page 95, (11-B)

There is no instance of competition between Eagle-Picher's customers being substantially lessened by the quantity differentials referred to in said paragraph, and such quantity differentials are entirely legal.

33. Page 95, (V. RECOMMENDED ORDER)

Eagle-Picher excepts to the order recommended by the Trial Examiner on the ground that each and every provision of it is unwarranted by both the evidence and the law.

Respectfully submitted,

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