

Syllabus

IN THE MATTER OF
THE CEMENT INSTITUTE ET AL.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914, AND OF SEC. 2 (a) OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED

Docket 3167. Complaint, July 2, 1937—Decision, July 17, 1943

As respects the multiple basing point pricing system as applied by the cement industry, the recognized principle of economics, that uniformity of price tends to result from free competition in the case of a standardized article sold to well informed buyers, does not serve to explain the identical delivered prices of the producers of cement, many sales of which, under the resulting price pattern, have the characteristic of dumping, and the principle cannot explain uniformity of identical offers or sealed bids. Furthermore, it is also true that uniformity of price in a given market is equally consistent with free competition or with monopoly. And when—as in the sale of cement—the price is established by the seller, the price leadership of the governing base mill is accepted by other sellers and there is no bargaining between buyers and sellers, prices are not the result of market action in a true economic sense, but merely expressions of a noncompetitive or monopolistic price structure.

As regards the cement industry's multiple basing point pricing system, under which (1) each mill shrinks its mill net by the amount necessary for it to match the delivered prices established pursuant to said system, each mill or producer waiving its advantage in its natural sales territory in return for reciprocal waiver by the other producers; which (2) tends toward maintaining a price level sufficiently high to permit separate producers to sell cement outside the territory naturally tributary to their respective mills; and under which (3) in the face of a total productive capacity for the industry long substantially in excess of total consumption, the producers, in the 1932 and 1933 depression years, following a decline in consumption to less than 30 percent of capacity, made numerous substantial increases in their base prices, many of which were still in effect, unchanged, in 1938, and, in the case of others, with few exceptions, showed only minor readjustments since early in 1933; and prices, remained unchanged over varying numbers of years and showed a high degree of rigidity; general conditions shown to exist by producers' testimony and other evidence in explanation of the above situation—including evidence concerning the use of cement in connection with other materials, as well as that relating to shifting location of demand for cement—tended to coincide with, rather than contradict, the direct proof of restraints imposed on competition by them.

The failure of Congress in the Robinson-Patman Act to define price as mill net—
or the amount recovered by the cement mills after freight and other charges, under their multiple basing point plan of identical delivered prices—does not avoid the necessity of having some definite concept of price in carrying out the administrative duty of preventing price discrimination under the statute,

and the contention that the history of the act shows an intention on the part of Congress to legalize price discriminations involved in said system, must be rejected. To accept such a contention would attribute to Congress the contradictory intention of prohibiting discriminations that fail to make due allowance for differences in cost of delivery and, at the same time, legalizing them; and would be to recognize the right of a combination engaged in suppressing price competition to define and treat the word "price" in a manner that promotes and is inextricably interwoven with its price fixing objectives.

Where (1) an unincorporated trade association which was organized in 1929 to promote the interests of its members, including practically all domestic producers of Portland cement; followed a 1916 association active until shortly before the 1924 Supreme Court decision in *U. S. v. Cement Mfrs. Protective Assn.*, 268 U. S. 588; was a repository of the authority delegated when partial self-government for the cement industry was authorized under the National Industrial Recovery Act, and controlled the administration of the N. R. A. code for the industry, subject to such limitations as were imposed by the National Recovery Administration; and supplied with an effective vehicle for the promulgation, expression and execution of collective plans and purposes said industry—control of a large portion of which was concentrated in relatively few individuals, directly and through intercorporate relationships; members of which had, by understanding and agreement, developed over many years substantial uniformity of action with respect to practically every marketing procedure involving price or other competition; and in which long pursued competitive restraints had fostered a philosophy of maintaining equality and keeping step, as opposed to a rivalry of excelling in quality, price or terms; (2) the officials and agents of said association or "institute"; and (3) some 75 member corporations who produced and distributed more than three-fourths of the Portland cement made in this country—

- (a) Entered into, cooperated in and carried out planned and common courses of action, understandings and combinations to quote and sell cement at prices calculated and determined in accordance with a multiple basing point delivered price system developed over a period of some 30 years or more, the operative formula of which was that the delivered price at any location should be the lowest combination of base price plus all rail freight; under which nonbase mills quoted and sold at delivered prices determined by lowest combination of base price plus freight from base mills, and which inevitably resulted over an indefinite period of time in identical delivered prices for cement by all sellers at any given location and through its self perpetuating operation in said respect made unnecessary renewed understandings or agreements; and

Where said trade association, its officers and member producers; in connection with and in support of aforesaid system, understandings and undertakings—

- (b) Maintained and operated two freight rate bureaus and published rate books which were used—as were those previously secured from other sources—to provide common freight rate factors for pricing purposes, and thus be able to quote identical delivered prices for cement at all destinations; and regularly made use of all-rail freight rates in calculating delivered prices, even though shipment was made by water transportation or by motor truck at different rates;

- (c) In connection with Government business, determined delivered prices to be bid in accordance with aforesaid formula of lowest combination of base price plus freight; derived so-called f. o. b. prices, use of which automatically produced identical delivered prices, through deducting from said identical delivered prices, reached as aforesaid, particular mill's freight to destination concerned; and, as respects territory where Government land grant rates on Government shipments destroyed uniformity of destination costs through application thereof to aforesaid "f. o. b." prices, interchanged land grant rate information and reached understandings as to rates and prices to be used; under the National Recovery Administration code, filed and systematically disseminated destination prices, thereby facilitating the making of identical Government bids; defeated the Government's policy of deducting commercial freight in land grant rate territory, using said special rates, and awarding bid on basis of lowest delivered price thus arrived at, through insertion in Government bids of the so-called "control clause" under which, in its final form, the Government was limited to deducting from destination cost to it, the lowest rate, whether the actual commercial freight rate, or special Government rate; for 2 or 3 years after the N. R. A. period undertook, for same purpose as with the commercial rates, ascertainment and dissemination of special land grant rates; and through the perfection of their pricing formula and multiple basing point price system in producing identical delivered prices, dealt on an identical base with state governments and the federal government, as well as other purchasers, without systematic exchange of basing point prices or changes therein, which, made known through notice to customers, common customers, and salesmen in the field, became also promptly known to and understood by other producers concerned;
- (d) Made use of the means inherent within the multiple basing point delivered price system and necessary to its successful maintenance, to force recalcitrants, including producers, who prefer more independence of action, wish to exploit natural advantages or desire to break away from the system in seeking particularly attractive business, to adhere thereto, through the imposition by the price leaders and larger chain mills of a punitive base price at the mill of the producer concerned, whereby latter's mill net was absolutely fixed; without usually affecting the mill net or more than a portion of the business of the former, and with possibly only insignificant effect in the case of a large producer with mills at many points; tended thereby to localize the price cuts made and place the maximum effect thereof upon the recalcitrant and impose upon him a much greater loss than that to the producer imposing such disciplinary action; and subjected to such action and failure to increase base prices in harmony with increases elsewhere, State, and other mills which failed to conform to competitors' views of proper practices in the sale of cement, including such matters as secret rebates representing freight advantage deducted from open quotation; price cutting—and particularly during the depression years; and other departures due to benefits of water transportation, or unacceptable practices on the part of producers' customer-dealers in delivering cement into other than the dealer's own locality, etc.;
- (e) Through cooperation among themselves and with other interested groups, including officials of railroads and traffic associations, and those of dealers, took active steps to eliminate the trucking of cement, which some dealers, contractors and other purchasers began to make use of for reasons of economy

or convenience, and which it was desired to eliminate on account of its destructive effect on the delivered price system, through various restrictive activities, including the addition of a 15-cent per barrel charge to the mill base price for delivery to trucks at the mill; conferences directed to the discontinuance, discouragement and prohibition of the practice; and its characterization as an unfair method of competition, following the inclusion of a similar provision in the N. R. A. Code for the industry and the invalidation of the act by the Supreme Court; with result that a large number of mills during the course of the years completely discontinued permitting the practice, while others imposed a penalty in the form of an additional price, or permitted it at full rail destination price, or otherwise in one way or another discouraged it and took action against it;

- (f) Undertook, through understandings and agreements, to prevent purchasers making diversion in transit which interfered with maintenance of uniform delivered prices at each destination, and by means of which purchasers—who under said price system generally paid the freight charges directly to the railroad and paid to the cement producer or shipper the derived f. o. b. or base price—were often able to secure their cement at a lower cost, through making a purchase at the delivered price in effect at some destination where the destination price, under said formula, included a freight factor higher than freight charge to the purchaser's true destination, and causing railroad to divert thereto the shipment, whereby amount received by seller was not changed but purchaser's total payment was less; in various ways, including provisions in codes of ethics before, during and after the N. R. A., standard sales contracts, and provisions in bills of lading worked out with the railroads sought to discourage and prevent the practice; and finally adopted custom of themselves prepaying freight charges on all shipments, whereby diversion of shipments by the consignee to his advantage in price was made impossible thereafter;
- (g) Cooperatively checked so-called "specific job contracts" under which the producers undertook delivery of a specified quantity of cement, at a specified price over a stated period of time, for dealers or contractors, and which presented possibility, in event the purchaser had contracted with one or more manufacturers for more cement than was needed for the job, and in event of price advance of using the excess to his profit, thus affecting the producers' ability to control the delivered price of cement established pursuant to said basing point formula; and having collected and furnished to members information relative to excess quantities of cement thus contracted for and duplications of contracts for specific jobs, took collective action and exerted pressure of collective opinion to bring about their cancelation, and disapproved and banned the practice in question before, during, and after the N. R. A. period;
- (h) Affirmed in broad terms in their code of ethics, and carried forward the substantial uniformity and standardization theretofore achieved by the producer members and prior organizations in the matter of terms and conditions, necessary to complete and total price uniformity and as a supplement to their said delivered price system; including such matters as specifications, costs of testing, standard approved contracts, package charges and rebates, and ultimately discontinued differential to dealers, employed as a means of price cutting; sold to dealers on the same basis as to manufacturers and those consumers accepted as direct customers; and made uniform

terms with respect to cloth sacks, packages, and refunds for good bags returned;

- (i) In connection with harmonizing production with shipments, with a view to maintaining a price level considered satisfactory, among other activities extending over a long period, inculcated a philosophy of maintaining a static condition in the production of cement, to the extent of preserving the individual manufacturer's proportion of the total business and acceptance of the theory of dividing available business among producers in accordance with some predetermined formula; considered and pushed various plans directed to this end; and by agreement carried on an extensive program of cooperatively collecting and disseminating figures showing production, shipment and stock on hand, which not only included totals but also revealed to each member the figures for each of the other members, so that each member was thereby informed of the exact position of each of his competitors; with result that there was a substantial restraint upon the price, production and sales policies of the producers concerned and a tendency to substitute collective opinion for individual judgment; and during and after the N. R. A. period offered organized opposition to the entry of new production and new competition;
- (j) In connection with distribution of cement to and through dealers—through whom producers distributed a large proportion of their product—and irregularities in price or otherwise in the sale of said product involved therein, which tended to disrupt uniformity of price or terms, sought means of eliminating or avoiding such disturbances through agreements and understandings among the producers and their association and with groups of dealers and dealer organizations, to secure uniformity in their dealer policies, to minimize competitive conflicts between themselves and dealers, as well as among dealers, to reduce inequalities in sales by individual dealers, and to minimize price competition among dealers; settled on the practice of giving no discount to dealers, after unsatisfactory experiences with use of discounts and differentials as a means of cutting prices by dealers, and in some cases by manufacturers in cooperation with them; in order to control competition between dealers and manufacturers and among dealers, undertook to sell only to and through dealers, with certain exceptions which they defined, including federal and State governments and their contractors—except in the case of work located entirely within cities or villages—and railroads and concrete product manufacturers; and defined what should constitute a dealer; and, following the rejection of such provisions by the N. R. A., continued in other ways such definition and division of sales;
- (k) In connection with aforesaid division of business put into effect new dealer policies, which provided that sales of cement to the Federal Government for emergency or unemployment relief agencies—such as the Works Progress Administration, Civilian Conservation Corps, and Federal Emergency Relief Administration—should be made by dealers; with result, by reason of said change in a long established practice of selling direct to federal agencies, that the Government, unable to make purchases of cement for such uses directly from the producers, was obliged to purchase its cement requirements in those categories from dealers, at prices including the dealer mark-up and higher by that amount than would have been the case in direct purchases from producers; it was prevented from taking advantage of land grant rates:

in order to reduce its delivered cost of cement; and the sources from which purchases might be made were limited;

- (l) To meet the competition encountered from time to time from imported cement in some of the larger seaport cities and adjacent territory, established arbitrary prices or price zones in the territory affected by the lower prices quoted on the foreign cement, while maintaining higher prices elsewhere under their delivered price system; for a time established a boycott of dealers handling foreign cement in the Boston and New York territory, who, in order to buy cement from the domestic producers during said time, had to discontinue handling the foreign product and agree not to handle it thereafter; and, in the case of a number, maintained a cooperative system of watching the business place of certain importers of the foreign product, in order to check on the trucks of dealers hauling such cement from the importer's warehouse, with the result that dealers in said cities who continued to handle the foreign product were unable to purchase cement from any producer herein concerned; and, after the expiration of the N. R. A. Code, again established arbitrary prices in the areas affected by the imported product, filing notices thereof with the trade practice committee of the association which sent them immediately and before their effective date, to association members doing business in the territory involved;
- (m) Through collective action made the sale of cement—which in cases of different producers, had actually exceeded the minimum agreed requirements by margins ranging all the way up from a small amount to more than 100 percent—subject only to standard specifications of three specified organizations, one of which was dominated by representatives of the producers concerned; resisted other specifications; and gave much publicity to claims that the quality of all cement is practically identical, refraining almost completely from advertising quality differences in cements and brands, of which, in general, dealers and ordinary purchasers are not aware and knowledge of which would tend toward making it impossible for the producers involved to maintain uniform prices for their product; and
- (n) Automatically and inevitably discriminated in price between customers, in violation of section 2 (a) of the Clayton Act as amended through the application of their said multiple basing point price system, under which (1) there were almost as many true sale prices, i. e., the mill nets, as there were customers' locations; (2) higher mill nets were always exacted from customers closer freightwise to the seller than from those at more distant points; (3) each mill knew that in reciprocity for its omission to offer a competitive price to customers located in areas adjacent to its mill, where it had a natural advantage and received its highest actual price, other producers would reciprocally waive their advantages in other areas, in order that there might not anywhere be genuine competition in price; (4) the variation in mill net discriminations was so wide, ranging from a fraction of a cent to amounts substantially in excess of \$1 per barrel, and commonly amounting to 25 cents to 50 cents per barrel that it would be impossible for any of the producer-sellers habitually and openly to obtain them in the form of f. o. b. mill prices, and any attempt to do so would undoubtedly arouse a storm of protest; (5) such discriminations enabled the producers involved to eliminate price competition and were intended so to do; (6) were not made in good faith to meet an equally low price of a competitor, but, on the contrary, with their systematic variations and pattern—the mathematical counterpart

of the delivered price pattern resulting from said system and expression of the effort of each to match the delivered prices of others—were made in order that the delivered prices of all producers selling in any given location might be equally high and equally low; and (7) the delivered prices, if treated as true prices, would not reflect due allowance for differences in the cost of delivery and could not, under the formula, do so in all cases where the point of shipment was not that of the governing base mill upon which the delivered price was calculated;

Effect of which systematic discriminations by each producer among its various customers, as the necessary result of the use of said system, had been and might be substantially to lessen competition, and tend to create a monopoly in the sale and distribution of said product and to injure, destroy and prevent competition with those who grant and exact such discriminations, saved neither by the making of due allowance only for the differences of cost of delivery or other permitted differentials under subsection (a) of the Act, nor by being made in good faith to meet an equally low price of a competitor under subsection (b); and

Capacity, tendency, and effect of which combination and acts and practices performed thereunder and in connection therewith, as above set out, had been and might be to—

- (1) Hinder, lessen, restrain and suppress competition in the sale and distribution of cement in and among the several states, deprive purchasers of cement, both private and governmental, of the benefits of competition in price, and systematically maintain artificial and monopolistic methods and prices in the sale and distribution of such product, including common rate factors used and useful in the pricing thereof;
- (2) Prevent purchasers from utilizing motor trucks or water carriers for the transportation of cement and from obtaining benefits which might accrue therefrom;
- (3) Require that purchases of cement be made on a delivered price basis and prevent and defeat efforts of purchasers to avoid such requirement;
- (4) Frequently deprive agencies of the Federal Government of the benefits of the lower land grant rates, and require certain of its agencies to purchase their requirements of cement through dealers at higher prices than were available in direct purchases from manufacturers;
- (5) Establish and maintain an agreed classification of customers who might purchase cement from manufacturers thereof, maintain uniform terms and conditions of sale, and hinder and obstruct the sale of imported cement through restraints upon those who deal therein; and
- (6) Otherwise promote and maintain the multiple basing point delivered price system of the producers concerned and their association, and obstruct and defeat any form of competition which threatened or tended to threaten the continued use and maintenance of said system and the uniformity of prices created and maintained by its use:

Held, (1) That said combination and acts and practices of said producers and their association, and its officers pursuant thereto, as above set forth, constituted unfair methods of competition in commerce in violation of the provisions of the Federal Trade Commission Act; and

- (2) That their discriminations in price as aforesaid set out, constituted violations of subsection (a) of section 2 of the Clayton Act as amended by the Robinson-Patman Act.

Appearances

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Before *Mr. John W. Norwood*, trial examiner.

Mr. Walter B. Wooden, Assistant Chief Counsel, and *Mr. Everette A. MacIntyre* and *Mr. Lynn C. Paulson*, Special Attorneys, for the Commission.

Donovan, Leisure, Newton & Lombard, of New York City and Washington, D. C., for The Cement Institute, S. W. Storey, G. H. Reiter, the vice-president, treasurer and trustees of said Institute, and AsM Grove Lime & Portland Cement Co., Castalia Portland Cement Co., Coplay Cement Manufacturing Co., Cumberland Portland Cement Co., Dewey Portland Cement Co., Federal Portland Cement Co., Inc., Georgia Cement & Products Co., Hawkeye Portland Cement Co., Hercules Cement Corp., Hermitage Portland Cement Co., Keystone Portland Cement Co., Kosmos Portland Cement Co., Lawrence Portland Cement Co., Missouri Portland Cement Co., Nazareth Cement Co., Oregon Portland Cement Co., Petoskey Portland Cement Co., Pittsburgh Plate Glass Co., Portland Cement Co. of Utah, Valley Forge Cement Co., Vulcanite Portland Cement Co., Wabash Portland Cement Co., and West Penn Cement Co., and along with—

Bulkley, Ledyard, Dickinson & Wright, of Detroit, Mich., for Aetna Portland Cement Co.;

Porter & Taylor, of New York City, for Alpha Portland Cement Co.;

Lewis & Grant, of Denver, Colo., for Arkansas Portland Cement Co., Colorado Portland Cement Co., Nebraska Cement Co., Oklahoma Portland Cement Co., Three Forks Portland Cement Co., and Union Portland Cement Co.;

Harrington, Huxley & Smith, of Youngstown, Ohio, for Bessemer Limestone & Cement Co.;

Call, Murphey & Davis, of Los Angeles, Calif., for California Portland Cement Co.;

Sidley, McPherson, Austin & Burgess, of Chicago, Ill., for Consolidated Cement Corp., Florida Portland Cement Co., Signal Mountain Portland Cement Co., and Trinity Portland Cement Co.;

Burt, Carson & Shadrach, of Canton, Ohio, for Diamond Portland Cement Co.;

Strange, Myers, Hinds & Wight, of New York City, for Edison Cement Corp.;

Barnes, Biddle & Myers, of Philadelphia, Pa., for Giant Portland Cement Co.;

Mr. J. Edward Singleton, of Glen Falls, N. Y., for Glen Falls Portland Cement Co.;

Milbank, Tweed & Hope, of New York City, for Great Lakes Portland Cement Corp., and Lehigh Portland Cement Co.;

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Vinson, Thompson, Meek & Scherr, of Huntington, W. Va., for Green Bag Cement Co. of West Virginia;

Wright, Gordon, Zachry, Parlin & Cahill, of New York City, for Green Bag Cement Co. of Pennsylvania;

Davis, Heil & Davis, of Spokane, Wash., for Idaho Portland Cement Co.;

Chadbourne, Wallace, Parke & Whiteside, of New York City, for International Cement Corporation;

Thompson, Hine & Flory, of Cleveland, Ohio, for Medusa Portland Cement Co.;

Brown & Brown, of Wichita, Kans., for Monarch Cement Co.;

Mr. William D. Burnett, of Los Angeles, Calif., for Monolith Portland Cement Co., and Monolith Portland Midwest Co.;

Stokely, Scrivner, Dominick & Smith, of Birmingham, Ala., for National Cement Co.;

Beekman, Bogue, Stephens & Black and *Mr. Eugene W. Leake*, of New York City, for North American Cement Corporation;

Weter, Roberts & Schefelman, of Seattle, Wash., for Northwestern Portland Cement Co.;

Smith & Feeney, of Mason City, Ia., for Northwestern States Portland Cement Co.;

Clark, Klein, Brucker & Waples, of Detroit, Mich., for Peerless Cement Corporation;

Shearman & Sterling, of New York City, for Pennsylvania-Dixie Cement Corporation;

Crenshaw, Hansell & Gunby, of Atlanta, Ga., for Southern States Portland Cement Co.;

Mr. Richard F. Burges, of El Paso, Tex., for Southwestern Portland Cement Co.;

Witherspoon & Witherspoon, of Spokane, Wash., for Spokane Portland Cement Co.;

Reed, Smith, Shaw & McClay, of Pittsburgh, Pa., for Standard Portland Cement Co.;

Mr. E. G. Miller, of Portsmouth, Ohio, for Superior Cement Corporation;

Cates, Smith & Long, of Knoxville, Tenn., for Volunteer Portland Cement Co.;

Mr. E. H. Molthan, of Philadelphia, Pa., for Whitehall Cement Manufacturing Co.; and

Cowell & Frankhouser, of Coldwater, Mich., for Wolverine Portland Cement Co.;

Chickering & Gregory and *Mr. Walter C. Fox, Jr.*, of San Francisco, Calif., for Calaveras Cement Co.;

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Beaumont, Smith & Harris, of Detroit, Mich., for Huron Portland Cement Co.;

Zimmerman & Norman, of Chicago, Ill., for Marquette Cement Manufacturing Co.;

Pillsbury, Madison & Sutro, of San Francisco, Calif., for Pacific Portland Cement Co.;

Little, Leader, LeSourd & Palmer, of Seattle, Wash., for Superior Portland Cement, Inc.;

Knapp, Cushing, Hershberger & Stevenson, of Chicago, Ill., for Universal Atlas Cement Co.;

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, Calif., for Santa Cruz Portland Cement Co., and along with—

O'Melveny & Myers, of Los Angeles, Calif., for Riverside Cement Co.; and

Earl & Hall & Gerdes, of San Francisco, Calif., for Yosemite Portland Cement Corp.

COMPLAINT

Pursuant to the provisions of an act of Congress entitled, "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914, and commonly known as the Federal Trade Commission Act, the Commission having reason to believe that the respondents herein named have violated the said act of Congress, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, the Commission hereby issues its complaint stating its charges in such respect in count I hereof.

Also pursuant to the provisions of section 2 of an act of Congress, approved October 15, 1914, entitled, "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," commonly known as the Clayton Act, as amended by an act of Congress approved June 19, 1936, commonly known as the Robinson-Patman Act, the Commission having reason to believe that the respondents herein named have violated the said act of Congress, as so amended, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, the Commission issues this its complaint stating its charges in such respect in count II hereof.

COUNT I

CHARGE UNDER FEDERAL TRADE COMMISSION ACT

Description of the Respondents

PARAGRAPH 1. The respondent, The Cement Institute, hereinafter referred to merely as "Institute," is an unincorporated association which includes as its members producers of Portland cement, hereinafter referred to merely as "cement," located in all sections of the United States. The membership of the Institute comprises practically every producer of cement in the United States. It is a trade association formed for the promotion of the mutual interests of its members. The Institute was organized in October 1929; it operates through its officers, trustees, committees, bureaus, and other agents. Its membership is divided into northeastern, southeastern, Chicago, and Kansas City divisions, each with its office. It has freight rate bureaus located at Bethlehem, Pa., and Chicago, Ill.

Respondents, S. W. Storey and G. H. Reiter, are respectively, the president and secretary of the Institute. Respondents, vice-president, treasurer, and trustees, whose names are not known to the Commission, hold the said respective offices in the said Institute.

Respondent, Aetna Portland Cement Co., is a corporation, the place of whose incorporation is not known to the Commission, with its principal place of business at Detroit, Mich.

Respondent, Alpha Portland Cement Co., is a New Jersey corporation, having its principal place of business at Easton, Pa. ?

Respondent, Arkansas Portland Cement Co., is an Arkansas corporation, having its principal place of business at Denver, Colo.

Respondent, Ash Grove Lime & Portland Cement Co., is a Maine corporation, having its principal place of business at Kansas City, Mo. //

Respondent, Beaver Portland Cement Co., is an Oregon corporation, having its principal place of business at Portland, Oreg.

Respondent, Bessemer Limestone & Cement Co., is an Ohio corporation, having its principal place of business at Youngstown, Ohio.

Respondent, Calaveras Cement Co., is a Delaware corporation, having its principal place of business at San Francisco, Calif.

Respondent, California Portland Cement Co., is a California corporation, having its principal place of business at Los Angeles, Calif.

Respondent, Castalia Portland Cement Co., is a Pennsylvania corporation, having its principal place of business at Pittsburgh, Pa.

Respondent, Colorado Portland Cement Co., is a Colorado corporation, having its principal place of business at Denver, Colo.

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Respondent, Consolidated Cement Corporation, is a Delaware corporation, having its principal place of business at Chicago, Ill.

Respondent, Coplay Cement Manufacturing Co., is a Pennsylvania corporation, having its principal place of business at Coplay, Pa.

Respondent, Cumberland Portland Cement Co., is a Delaware corporation, having its principal place of business at Cowan, Tenn.

Respondent, Dewey Portland Cement Co., is a West Virginia corporation, having its principal place of business at Kansas City, Mo.

Respondent, Diamond Portland Cement Co., is an Ohio corporation, having its principal place of business at Middle Branch, Ohio.

Respondent, Edison Cement Corporation, is a New Jersey corporation, having its principal place of business at New York, N. Y.

Respondent, Federal Portland Cement Co., Inc., is a New York corporation, having its principal place of business at Buffalo, N. Y.

Respondent, Florida Portland Cement Co., is a Delaware corporation, having its principal place of business at Chicago, Ill.

Respondent, Georgia Cement & Products Co., is a Georgia corporation, having its principal place of business at Atlanta, Ga.

Respondent, Giant Portland Cement Co., is a Delaware corporation, having its principal place of business at Philadelphia, Pa.

Respondent, Glens Falls Portland Cement Co., is a New York corporation, having its principal place of business at Glens Falls, N. Y.

Respondent, Great Lakes Portland Cement Corporation, is an Indiana corporation, having its principal place of business at Buffalo, N. Y.

Respondent, Green Bag Cement Co. of West Virginia, is a corporation, the place of whose incorporation is not known to the Commission, with its principal place of business at Pittsburgh, Pa.

Respondent, Green Bag Cement Co. of Pennsylvania, is a corporation, the place of whose incorporation is not known to the Commission, with its principal place of business at Pittsburgh, Pa.

Respondent, Hawkeye Portland Cement Co., is a West Virginia corporation, having its principal place of business at Des Moines, Iowa.

Respondent, Hercules Cement Corporation, is a Pennsylvania corporation, having its principal place of business at Philadelphia, Pa.

Respondent, Hermitage Portland Cement Co., is a Delaware corporation, having its principal place of business at Nashville, Tenn.

Respondent, Huron Portland Cement Co., is a Michigan corporation, having its principal place of business at Detroit, Mich.

Respondent, Idaho Portland Cement Co., is an Idaho corporation, having its principal place of business at Inkom, Idaho.

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Respondent, International Cement Corporation, is a Maine corporation, having its principal place of business at New York, N. Y.

Respondent, Keystone Portland Cement Co., is a Pennsylvania corporation, having its principal place of business at Philadelphia, Pa.

Respondent, Kosmos Portland Cement Co., is a Kentucky corporation, having its principal place of business at Louisville, Ky.

Respondent, Lawrence Portland Cement Co., is a Pennsylvania corporation, having its principal place of business at Siegfried, Pa.

Respondent, Lehigh Portland Cement Co. is a Pennsylvania corporation, having its principal place of business at Allentown, Pa. ✓ *Some other*

Respondent, Marquette Cement Manufacturing Co. is an Illinois corporation, having its principal place of business at Chicago, Ill.

Respondent, Medusa Portland Cement Co., is an Ohio corporation, having its principal place of business at Cleveland, Ohio.

Respondent, Missouri Portland Cement Co. is a Missouri corporation, having its principal place of business at St. Louis, Mo.

Respondent, Monarch Cement Co. is a Kansas corporation, having its principal place of business at Humboldt, Kans.

Respondent, Monolith Portland Cement Co., is a Nevada corporation, having its principal place of business at Los Angeles, Calif.

Respondent, Monolith Portland Midwest Co., is a corporation, the place of whose incorporation is not known to the Commission, with its principal place of business at Los Angeles, Calif.

Respondent, National Cement Co., is an Alabama corporation, having its principal place of business at Birmingham, Ala.

Respondent, Nazareth Cement Co., is a Pennsylvania corporation, having its principal place of business at Nazareth, Pa.

Respondent, Nebraska Cement Co., is a Nebraska corporation, having its principal place of business at Denver, Colo.

Respondent, North American Cement Corporation, is a Delaware corporation, having its principal place of business at Albany, N. Y.

Respondent, Northwestern Portland Cement Co., is a Washington corporation, having its principal place of business at Seattle, Wash.

Respondent, Northwestern States Portland Cement Co., is a West Virginia corporation, having its principal place of business at Mason City, Iowa.

Respondent, Oklahoma Portland Cement Co., is an Oklahoma corporation, having its principal place of business at Denver, Colo.

Respondent, Oregon Portland Cement Co., is a Nevada corporation, having its principal place of business at Portland, Oreg.

Respondent, Pacific Portland Cement Co., is a California corporation, having its principal place of business at San Francisco, Calif.

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Respondent, Peerless Cement Corporation, is a Michigan corporation, having its principal place of business at Detroit, Mich.

Respondent, Pennsylvania-Dixie Cement Corporation, is a Delaware Corporation, having its principal place of business at New York, N. Y.

Respondent, Petoskey Portland Cement Co., is a Delaware corporation, having its principal place of business at Petoskey, Mich.

Respondent, Pittsburgh Plate Glass Co., is a Pennsylvania corporation, having its principal place of business at Pittsburgh, Pa.

Respondent, Portland Cement Co. of Utah, is a Wyoming corporation, having its principal place of business at Salt Lake City, Utah.

Respondent, Riverside Cement Co., is a Delaware corporation, having its principal place of business at Los Angeles, Calif.

Respondent, Santa Cruz Portland Cement Co., is a California corporation, having its principal place of business at San Francisco, Calif.

Respondent, Signal Mountain Portland Cement Co., is a Delaware corporation, having its principal place of business at Chicago, Ill.

Respondent, Southern States Portland Cement Co., is a Georgia corporation, having its principal place of business at Rockmart, Ga.

Respondent, Southwestern Portland Cement Co., is a West Virginia corporation, having its principal place of business at El Paso, Tex.

Respondent, Spokane Portland Cement Co., is a Washington corporation, having its principal place of business at Spokane, Wash.

Respondent, Standard Portland Cement Co., is an Ohio corporation, having its principal place of business at Cleveland, Ohio.

Respondent, Superior Cement Corporation, is a corporation, the place of whose incorporation is not known to the Commission, with its principal place of business at Portsmouth, Ohio.

Respondent, Superior Portland Cement, Inc., is a Washington corporation, having its principal place of business at Seattle, Wash.

Respondent, Three Forks Portland Cement Co., is a Montana corporation, having its principal place of business at Denver, Colo.

Respondent, Trinity Portland Cement Co., is a corporation, the place of whose incorporation is not known to the Commission, having its principal place of business at Chicago, Ill.

Respondent, Union Portland Cement Co., is a corporation, the place of whose incorporation is not known to the Commission, having its principal place of business at Denver, Colo.

Respondent, Universal Atlas Cement Co., is an Indiana corporation, having its principal place of business at Chicago, Ill.

Respondent, Valley Forge Cement Co., is a Pennsylvania corporation, having its principal place of business at Catasauqua, Pa.

Respondent, Volunteer Portland Cement Co., is a Delaware corporation, having its principal place of business at Knoxville, Tenn.

Respondent, Vulcanite Portland Cement Co., is a New Jersey corporation, having its principal place of business at Philadelphia, Pa.

Respondent, Wabash Portland Cement Co., is an Indiana corporation, having its principal place of business at Detroit, Mich.

Respondent, West Penn Cement Co., is a Pennsylvania corporation, with its principal place of business at Butler, Pa.

Respondent, Whitehall Cement Manufacturing Co., is a Pennsylvania corporation, having its principal place of business at Philadelphia, Pa.

Respondent, Wolverine Portland Cement Co., is a Michigan corporation, having its principal place of business at Coldwater, Mich.

Respondent, Yosemite Portland Cement Corporation, is a Delaware corporation, having its principal place of business at Merced, Calif.

All of the above-named corporate respondents are producers of cement and members of the Institute. Many of them have mills in more than one locality. They are hereinafter collectively referred to as "producing respondents."

Interstate Character of Producing Respondents' Commerce

PAR. 2. Producing respondents in the regular course of their business in the sale and distribution of cement cause the same to be shipped and transported from the various points of its production in certain respective States through and into other States of the United States. They are in competition among themselves except insofar as such competition has been hindered, lessened, restricted or restrained as alleged in paragraphs 4 to 7, inclusive, hereof. The Institute is not engaged in commerce but is engaged in aiding producing respondents in carrying out said unlawful methods as alleged herein, which directly and substantially affect competition among its members.

The Industry

PAR. 3. Cement is a standard commodity made in standardized specifications not differing substantially among producers in quality except as between recognized and standardized grades thereof. Its production belongs to the class of heavy-goods industries. The carriage charges, for an overwhelming proportion of the sales of cement, constitute a substantial part of the cost to the customer.

Limestone and shale, from which cement is made, and the necessary fuels are found in numerous parts of the country. Cement is produced in widely separated portions of the country and in all sections

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thereof, including the following States named in approximately the order of the volume of their production, namely: Pennsylvania, California, New York, Illinois, Michigan, Ohio, Missouri, Texas, Iowa, Kansas, Tennessee, and Alabama. It is also produced in Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maine, Maryland, Minnesota, Montana, Nebraska, New Jersey, Oklahoma, Oregon, South Dakota, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

During the period from 1920 to 1930, inclusive, the production of cement varied from over 99 million barrels to 178 million barrels, and the value thereof from over \$187,000,000 to over \$288,000,000. Thereafter the production in barrels and value was greatly reduced to a minimum of about 64 million barrels with a valuation of about \$85,000,000 in 1933. The recent trend of production has been strongly upward.

More than one-third of the cement produced in the United States is purchased and used for the building, construction, reconstruction, and repair of highways, and more than one-fourth in the erection of buildings. Cement is purchased by contractors for such jobs and projects in great quantities, by Federal and State Governments and by counties, highway districts and other quasi-municipal bodies having taxing powers.

Respondents' Combination Generally Stated

PAR. 4. For more than 8 years last past, respondents have maintained and now have in effect a combination among themselves to hinder, lessen, restrict, and restrain competition in price, among producing respondents in the course of their aforesaid commerce among the States. The said combination is made effective by mutual understanding or agreement to employ, and by the actual employment of, the methods and practices set forth in paragraphs 5 to 7 inclusive, of this count.

The Basing Point System

PAR. 5. (a) Among other methods employed by producing respondents in pursuance of the combination alleged in paragraph 4 hereof, said respondents, at almost all times and with respect to most of their sales, have cooperatively employed what is known as a multiple basing point system of pricing. Thereunder, all cement, wherever produced, is sold only at delivered prices.

(b) Under the said multiple basing point system, for any destination of cement in the United States there is a governing basing point. There are in the cement industry within the United States approx-

imately 60 basing points, each with its base price. In arriving at a delivered cement price for any destination, the first matter to be ascertained is what basing point governs such destination. This is determined by calculating and comparing the sum of two factors for each basing point likely to govern the destination in question. These factors are the base price and the rate of all-rail freight from each respective basing point to such destination. Whatever basing point proves to have a lower total of these two factors than the corresponding total of the same factors for any other basing point governs the price at the destination in question.

(c) Under said pricing system, each producing respondent, whether its mill be located at a basing point or not, quotes and charges to any given destination in the United States, where it desires to make a sale, a delivered price derived by the use of a formula. Such formula is: the prevailing base price at the governing basing point plus the all-rail rate of freight from said governing basing point to the location of the customer. The said multiple basing point system is hereinafter referred to as "said pricing system."

(d) The result is the quoting of a delivered price by every producing respondent identical with the delivered price quoted by all other respondents which seek business at any given destination point in the United States.

How the System Operates

PAR. 6. The following are illustrative examples of many instances of identical bids received by various branches of the Federal Government from producing respondents.

On June 5, 1934, there were submitted to the War Department for use in the construction of a project for the United States at Fort Peck, Mont., which required 600,000 barrels of cement, 10 identical bids of \$2.7054 per barrel by 10 different producers variously located.

On June 12, 1935, there were submitted to the Department of Justice for use in construction of United States Industrial Reformatory at Chillicothe, Ohio, 14 identical bids by 14 different producers variously located, on an indefinite quantity of cement.

On July 25, 1935, there were submitted to the War Department for delivery at Kansas City, Mo., three identical bids by three different producers variously located, on a quantity of 600,000 barrels of cement.

On September 6, 1935, there were submitted for use in the construction of the United States Northeastern Penitentiary at Lewisburg, Pa., requiring 264 barrels of cement, 15 identical bids by 15 different producers variously located.

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On October 18, 1935, there were submitted to the War Department for delivery at Vicksburg, Miss., 17 identical bids by 17 different producers variously located, on a quantity of 57,000 barrels of cement.

On November 8, 1935, there were submitted to the Bureau of Supplies and Accounts, Navy Department, 18 identical bids by 18 different concerns variously located. (Quantity not known.)

On February 13, 1935, there were submitted to the War Department for use in construction for the United States at Eastport, Maine, on a project requiring 5,000 barrels of cement, 15 identical bids by 15 different producers variously located.

On March 27, 1936, there were submitted to the War Department at New York, N. Y., 16 identical bids by 16 different producers variously located, on a quantity of 16,000 barrels of cement.

On April 23, 1936, there were submitted to the War Department for delivery at Tucumcari, N. Mex., 11 identical bids by 11 different producers, variously located, on a quantity of 6,000 bags of cement.

On June 22, 1936, there were submitted to the Department of Agriculture for use of the Soil Conservation Service, for delivery at Polkton, N. C., 12 identical bids by 12 different producers variously located, on a quantity of 400 barrels of cement.

On June 22, 1936, there were submitted to the same department for use of the same service at Greensboro, N. C., 12 identical bids by 12 different producers variously located, on the same quantity of cement.

On June 25, 1936, there were submitted to the Forestry Service of the Department of Agriculture for use at Tallahassee, Fla., nine identical bids by nine different producers variously located, on a quantity of 6,360 bags of cement.

On July 26, 1936, there were submitted to the War Department for delivery at West Point, N. Y., 17 identical bids by 17 different producers variously located, on a quantity of 7,000 barrels of cement.

On September 8, 1936, there were submitted to the War Department for use by the United States at Fort George G. Meade, Md., requiring an indefinite quantity of cement, 15 identical bids by 15 different producers variously located.

On October 23, 1936, there were submitted to the War Department, for use of the United States at Fort Devers, Mass., requiring 225 barrels of cement, seven identical bids by seven different producers variously located.

The foregoing instances of uniformity in delivered prices under the said pricing system are typical of bids submitted to the Federal Government except for the fact that occasionally there are instances of

price variation in bids made to branches of the Federal Government. In some of such instances, producing respondents have alleged that such price differences were made in error and have requested and have been granted permission to withdraw such bids. The foregoing examples, however, are alleged as actual instances and as typical of the uniformity of bids presented to the Federal Government as respects a majority of the volume of cement purchases by the United States.

Likewise, private buyers as a rule encounter no variation in delivered prices as regards the great preponderance of sales made to them.

The degree of identity of quotations and delivered prices made pursuant to proposals and awards for delivery of cement to states and municipal and quasi-municipal corporations approximates the degree of identity of delivered prices to the various branches of the Federal Government. In the great majority of instances, state and local authorities receive bids entirely identical.

A great number of examples of responses to proposals issued by branches of state governments, counties and quasi-municipal corporations showing entire lack of competition in delivered prices on the part of producing respondents could be given. The following tabulation shows 14 cases of identical bids actually received by a single branch of but one State Government.

State Highway Commission (Oklahoma)—Tabulation of bids on cement purchased from Jan. 1, 1936 to Sept. 1, 1936

Date	Amount	Bidders	Destination	Price bid	
1-6-36	450 bbls.....	Ash Grove Lime & Cement Co.....	Boise City.....	3.03	\$1,363.50
		Monarch Cement Co.....		3.03	1,363.50
		Universal Atlas Cement Co.....		3.03	1,363.50
		Dewey Portland Cement Co.....		3.03	1,363.50
		Oklahoma Portland Cement Co.....		3.03	1,363.50
3-8-36	2,250 bbls.....	Oklahoma Portland Cement Co.....	Clayton.....	2.72	6,120.00
		Dewey Portland Cement Co.....		2.72	6,120.00
		Universal Atlas Cement Co.....		2.72	6,120.00
		Monarch Cement Co.....		2.72	6,120.00
		Ash Grove Lime & Cement Co.....		2.72	6,120.00
		Consolidated Cement Co.....		2.72	6,120.00
		Oklahoma Portland Cement Co.....		2.72	6,120.00
		Oklahoma Portland Cement Co.....		2.55	336.60
		Universal Atlas Cement Co.....		2.55	336.60
3-12-36	132 bbls. (in paper).....	Monarch Cement Co.....	Waynoka.....	2.55	336.60
		Lehigh Portland Cement Co.....		2.55	336.60
		Ash Grove Lime & Cement Co.....		2.55	336.60
		Ash Grove Lime & Cement Co.....		2.42	423.50
		Oklahoma Portland Cement Co.....		2.42	423.50
3-25-36	150 bbls.....	Monarch Cement Co.....	Alva.....	2.42	423.50
		Dewey Portland Cement Co.....		2.77	415.50
		Ash Grove Lime & Cement Co.....		2.77	415.50
		Universal Atlas Cement Co.....		2.77	415.50
		Oklahoma Portland Cement Co.....		2.77	415.50
		Monarch Cement Co.....		2.77	415.50
		Lehigh Portland Cement Co.....		2.77	415.50
		Ash Grove Lime & Cement Co.....		3.03	1,363.50
		Monarch Cement Co.....		3.03	1,363.50
4-9-36	450 bbls.....	Dewey Portland Cement Co.....	Boise City.....	3.03	1,363.50
		Oklahoma Portland Cement Co.....		3.03	1,363.50
		Consolidated Cement Co.....		3.03	1,363.50
		Dewey Portland Cement Co.....		3.03	1,363.50
		Oklahoma Portland Cement Co.....		3.03	1,363.50
4-10-36	390 bbls.....	Consolidated Cement Co.....	Cyril.....	2.87	1,119.30
		Dewey Portland Cement Co.....		2.87	1,119.30
		Oklahoma Portland Cement Co.....		2.87	1,119.30
		Monarch Cement Co.....		2.87	1,119.30
		Ash Grove Lime & Cement Co.....		2.87	1,119.30
		Consolidated Cement Co.....		2.87	1,119.30
		Lehigh Portland Cement Co.....		2.87	1,119.30

4-18-36	132 bbls.....	Dewey Portland Cement Co.....	Buffalo.....	2.86	377.52	87
		Ash Grove Lime & Cement Co.....		2.86	377.52	
		Oklahoma Portland Cement Co.....		2.86	377.52	
		Monarch Cement Co.....		2.86	377.52	
		Universal Atlas Cement Co.....		2.86	377.52	
4-18-36	900 bbls.....	Consolidated Cement Co.....		2.86	377.52	Complaint
		Dewey Portland Cement Co.....	Stilwell.....	2.71	2,439.00	
		Ash Grove Lime & Cement Co.....		2.71	2,439.00	
		Oklahoma Portland Cement Co.....		2.71	2,439.00	
		Monarch Cement Co.....		2.71	2,439.00	
5-16-36	200 bbls. (in paper).....	Universal Atlas Cement Co.....		2.71	2,439.00	
		Consolidated Cement Co.....		2.71	2,439.00	
		Oklahoma Portland Cement Co.....	Perry.....	2.42	484.00	
		Dewey Portland Cement Co.....		2.42	484.00	
		Ash Grove Lime & Cement Co.....		2.42	484.00	
6-20-36	750 bbls.....	Universal Atlas Cement Co.....		2.42	484.00	
		Monarch Cement Co.....		2.42	484.00	
		Ash Grove Lime & Cement Co.....	Boise City.....	3.03	2,272.50	
		Monarch Cement Co.....		3.03	2,272.50	
		Dewey Portland Cement Co.....		3.03	2,272.50	
7-1-36	132 bbls.....	Oklahoma Portland Cement Co.....		3.03	2,272.50	
		Universal Atlas Cement Co.....		3.03	2,272.50	
		Ash Grove Lime & Cement Co.....	Buffalo.....	2.86	377.52	
		Oklahoma Portland Cement Co.....		2.86	377.52	
		Ash Grove Lime & Cement Co.....	Apache.....	2.82	987.00	
7-8-36	350 bbls.....	Monarch Cement Co.....		2.82	987.00	
		Oklahoma Portland Cement Co.....		2.82	987.00	
		Dewey Portland Cement Co.....		2.82	987.00	
		Universal Atlas Cement Co.....		2.82	987.00	
		Lehigh Portland Cement Co.....		2.82	987.00	
8-22-36	900 bbls.....	Consolidated Cement Co.....		2.82	987.00	
		Oklahoma Portland Cement Co.....	Stilwell.....	2.71	2,439.00	
		Lehigh Portland Cement Co.....		2.71	2,439.00	
		Ash Grove Lime & Cement Co.....		2.71	2,439.00	
		Universal Atlas Cement Co.....		2.71	2,439.00	
		Consolidated Cement Co.....		2.71	2,439.00	
		Dewey Portland Cement Co.....		2.71	2,439.00	
		Monarch Cement Co.....		2.71	2,439.00	
		Lone Star Cement Co.....		2.71	2,439.00	

NOTE.—All cement in cloth except as otherwise specified.

Methods for Making System Effective

PAR. 7. In pursuance and in support of their combination averred in paragraphs 4 and 5 hereof, respondents have used many and various means and have followed many practices including the following:

(a) Respondents have prepared and distributed among producers, and from time to time amended, information as to all-rail rates of freight on cement. The said information, except interim amendments, is furnished in the form of rate books, one for each State throughout the country. Each State book shows the carload rate on cement from every basing point, whether within or outside the State, which governs or which under any reasonably possible change of base price or freight rate might govern any territory within the State, to all cities, towns, and other points of reasonably possible destination within the State. This is done under the pretext of furnishing producers with information needed by them to the end that they may know what rate of freight applies to any given transaction. This, however, is not the true motive; the said freight rate information is furnished to the end that, irrespective of actual existing freight rates, all producing respondents shall reach precisely identical results in calculating that factor of the said formula which is measured by the rate of freight from the governing basing point to destination as described in paragraph 5 (c) hereof. The purpose is not accurate rate information but precisely uniform freight rate applications by all producers. Such purpose appears from these facts:

1. If a modification of a rate is made effective at any time for cement, it is the understanding among respondents that none of them shall use the new rate for quoting delivered prices until it shall have been promulgated officially by respondents' freight rate information service. The freight rate books furnished by the Institute to producers rather than any revised official freight rate of the railroad is the freight rate effective for quotation purposes until all interested respondent producers have been officially notified of such change of rates. Thus, for the purpose of arriving at producing respondents' delivered prices the making of rates by the carriers and the supervision thereof by the Interstate Commerce Commission are nullities until the Institute shall have notified all interested producers. (Before such notification, however, the rates as modified from time to time are in force for purposes of computing the freight paid by producing respondents to the railroads as actual carriage charges.)

2. These freight rate schedules are a matter of great complexity and intricacy. Since thousands of rates are given in each rate book, some errors arise. Producers frequently prepare and maintain their own

freight rate data; yet, if any producer deems any rate given by the Institute to be erroneous, or even if the same be in truth erroneous, it is the understanding of respondents that each will use, in computing delivered price quotations, the rate given in the Institute's rate book rather than the true railroad or Interstate Commerce Commission rate. The Institute's freight rate books are instruments for the maintenance of uniform delivered prices and not primarily of complete and accurate information. In cases where freight rates are reduced and in cases where the Institute's figures are erroneously too high, the better informed and more diligent producing respondents are restrained from making reduced delivered prices, as the result of respondents' understanding that for price quotation purposes the Institute's freight rate schedules, right or wrong, are to be used. This understanding constitutes a safeguard against pleas, whether genuine or spurious, on the part of any producers making any quotation below those submitted by their competitors, that they acted in harmony with formula rather than as intentional price cutters.

(b) Customers have frequently demanded the privilege of buying at the point of production and delivering to destination by truck. This has long been regarded by respondents as a menace to said pricing system because it constituted an element of uncertainty tending to create price competition and to weaken the combination described in paragraphs 4 and 5 hereof. At one time said pricing system broke down, largely as a result of such use of trucks. The respondents, accordingly, have resorted to various means to prevent the use by customers of trucks for delivery. Among these means, has been a concerted effort in certain parts of the country to charge customers requiring delivery to trucks 15 cents per barrel more than producing respondents charge to customers who obtain delivery by rail. At other times, respondents have attempted, with varying success, cooperatively to forbid entirely the loading of cement on trucks furnished by customers. The result of these concerted efforts, so far as successful, has been to eliminate an important source of competition in delivered prices and to prevent savings in cost to consumers buying direct and to those who buy from middlemen.

(c) Among the possible means whereby the said pricing system may be impaired or broken is the diversion of shipments of cement in transit from the anticipated destination to a destination where the price is higher. This amounts to a concession in delivered price in favor of the transferee. Respondents have taken cooperative measures by the use of provisions in their contract forms in order to eliminate such diversions in transit. This tends toward the maintenance of concerted delivered prices.

(d) Under recent acts of Congress appropriating for emergency and other expenditures, the Federal Government has expended large sums of money for cement in the West and in certain parts of the South, where it is entitled to reduced railroad freight rates under land-grant acts of Congress. These rates have never been published for general distribution. In many instances, they are not precisely known to commercial shippers including marketers of cement and are often highly difficult of determination and frequently in dispute. Respondents have thwarted the efforts of Government officials to secure f. o. b. mill prices on cement, both before and during the period of national emergency. If the United States had been able to obtain f. o. b. mill prices for cement, it would have been practicable for it to have elected to purchase from such mill as would have afforded it the maximum benefit of land-grant rates. In lieu of quoting upon proposals of the Federal Government upon an f. o. b. mill basis as called for by government officials, respondents have insisted upon maintaining their said pricing system and to that end have employed in each case a "control clause" by the use of which only delivered prices are quoted to the Federal Government. The control clause is used by all producing respondents bidding on any given job in land-grant territories. Under this control clause, the respondents arbitrarily select the route and approximate the land-grant concession to which the United States is entitled. This results in depriving the United States not only of the full benefit of the land grant rates reserved by acts of Congress but also of the benefit of price competition in its purchases of cement.

(e) Before and during the period that the code of fair competition for the cement industry approved November 27, 1933, pursuant to the National Industrial Recovery Act, was in effect, respondents attempted to obtain approval of a code provision which would require a division of customers into two classes, those to whom cement producers might sell direct and those to whom cement producers would be prohibited from selling direct. These efforts were unsuccessful. Nonetheless, respondents arbitrarily and cooperatively made such classification and division of customers.

(f) Respondents have entered into an understanding whereby they have combined to limit their sales to middlemen to those who fall within respondents' agreed and arbitrary definition of a "cement dealer." Moreover, respondents agree that sales shall be confined to those who fall within such definition of cement dealer with the exception of certain specific classes of customers, arbitrarily selected, who, though not recognized cement dealers, may, nevertheless, purchase cement.

(g) Terms of sale and discounts are uniform and the result of mutual understanding and concert of action among respondents.

(h) A relatively small volume of cement is imported into the United States chiefly from Belgium and Denmark. After paying the tariff charges, it may still be sold in certain seaboard centers at prices lower than the delivered prices at such centers derived under said pricing system. This price competition from foreign sources tends to cause producing respondents, selling at said centers, to make competitive prices and thus to depart from and break down said pricing system. In order to prevent such a break-down, producing respondents who have customers at such centers (1) have threatened to boycott and have boycotted dealer-customers who trade in imported cement; (2) have in some cases resorted to espionage upon dealers; (3) have made concerted and uniform deviations from the prices which would prevail at such centers under said pricing system; and (4) have taken other steps to minimize or prevent genuine price competition in cement resulting from such importation.

(i) Among the functions of respondent Institute, is that of interpreting the policies of cement companies and of formulating official policies for the industry both through its principal office and its officers and trustees and through its regional offices, freight bureaus and committees. These policies as formulated by the Institute promote the combination in paragraphs 4 and 5 hereof described. Where individual action by producing respondents might result in breaking down the said pricing system and result in price competition, it is a frequent practice on the part of members to refer questions of policy to the Institute or to a divisional office of the Institute. Meetings of the Institute and of sectional or local groups of producers are also means for promoting the said described system of pricing.

(j) By united action, respondents have sought to camouflage their combination and to allay public suspicion and criticism so that they may more effectively carry on said combination, by causing public advertisements to be prepared, published, and circulated, in which advertisements respondents falsely represented that the basing point method of pricing cement was practiced in order to discourage monopolistic practices and preserve free competition. Such representations were privately characterized by a prominent producer and trustee of respondent Institute as "sheer bunk and hypocrisy" in a letter written by him during May 1934, to his associated leaders in the Institute. Said producer and trustee also stated in said letter that "the truth is of course—and there can be no serious, respectable discussion of our case unless this is acknowledged—that ours is an industry above all

others that cannot stand free competition, that must systematically restrain competition or be ruined."

The foregoing means and practices set forth in subparagraphs (a) to (j), inclusive, are not exclusively alleged. There are numerous other unlawful means and practices which have been employed under the combination averred in paragraphs 4 and 5.

Effects of the Combination

PAR. 8. The effect of the adoption, continuance, and maintenance of the said pricing system, to the extent that it has been and is followed, has been and is completely to destroy competition in price. Thereunder each producing respondent quotes and charges a delivered price to any given customer wherever said customer may be located, identical with that quoted and charged to that customer by every other producer adhering to the system. This is done by each with the knowledge and the mutual understanding that all other producers following the system will quote and charge delivered prices identical with his own and with one another. Among other effects of the said pricing system, to the extent that the same is used, are the following:

(a) Each producing respondent whose mill is located at a basing point receives its highest net price or true price, when it sells to customers located within the area governed by the basing point where such producer is located. Each producing respondent whose mill is not located at a basing point receives its highest net price or true price from customers located at its own place of production; from customers so located it receives, in addition to the base price at the governing basing point, the rate of all-rail freight from such basing point to customers' location and is obliged to pay no cost of transportation except possibly from one part of the city to another. Both of these classes of producers refrain from so reducing their delivered prices, in the territory where they receive their highest net price, as to obtain or hold their most profitable business. Each reciprocally refrains from price competition and offers no such price concessions as might make it impracticable for more distant producers to obtain the business, because of the greater freight costs which would necessarily be incurred in delivering from their mills. Thus, each respondent producer may sell in the vicinity of mills of other producers without encountering any delivered price competition from the latter producers. In many instances respondent producers thus noncompetitively transport their said products beyond the successive localities or other producers' mills into far distant points of consumption.

(b) In order thus to eliminate price competition, producing respondents' base prices are placed high enough to permit them often

to defray much higher amounts of actual freight than the amount of freight from the governing basing point to destination, which latter they include in the formula price under the said pricing system. This would not occur under conditions of true price competition.

(c) The costs of producing cement vary somewhat due to natural conditions and differences in efficiency. By said pricing system variations in such cost are nullified as an influence and check upon prices. The incentive for any producing respondent to offer lower prices in order to obtain a greater volume of business is largely removed as shown by the fact that under said pricing system each producing respondent shares the territory wherein he obtains his highest net price with far distant producers. Under the said pricing system, delivered prices are charged by respondent producers with little regard to the varying local conditions of supply and demand. Said prices are made through a concert of action, which is formulated and expressed in terms of the said pricing system and applied throughout most, if not all, of the country. Thus respondents maintain, against thousands of private and public consumers in many parts of the United States, an artificial price level little related to and not governed by truly competitive conditions. The result is higher base prices and higher delivered prices to the consuming public.

(d) Even in times of greatly depressed demand, respondents' combination has tended to eliminate the strong trend toward lower prices which normally operates at such times. The maintenance of higher prices delays the return to the market of prospective buyers, who, on account of reduced purchasing power or fear, can, or believe that they can, buy only at lower prices, and thereby delays recovery. Rather than make reductions in price normal to a time of depression respondents have elected to continue the said pricing system and to refrain from making truly competitive prices, even for the respective territories in which, as described in subparagraph (a) of this paragraph 8, they obtain their highest net price, and even though they were then operating far below the respective capacities of their mills. Thus, in definite measure, respondents by their combination in paragraphs 4 and 5 hereof described, have neutralized the natural economic forces which operate to restore prosperity and have so acted in combination as to constitute an influence prolonging the depression.

(e) Under conditions of true price competition, consumers located at points of production normally tend to buy from a local mill. If its prices advance unduly, the competition of the nearest competitor-producer, having similar costs of production and distribution, at once becomes active and restores a more reasonable price. But under respondents' said pricing system the advantages which would nor-

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ally accrue to buyers located near cement mills are destroyed. The buying public pays the same prices precisely as though there were no natural advantages in producing and delivering cement. Each producer charges the same delivered price as every other. The buyer located at the point of production, if he buys from the local producer, pays such producer a greater net price than any buyer located elsewhere. Under the system, no other producer will offer a lower price. Buyers can perhaps purchase from a greater number of producers than would normally quote or sell under true price competition but the conditions under which they buy are monopolistic, not competitive.

(f) Under the said pricing system, producing respondents who follow the same and who are well located with regard to raw materials, means of transportation and proximity to large consuming centers and who are well financed and ably conducted, do not avail themselves of their competitive advantages by offering competitive prices. They do not cause these advantages to be reflected in their price level. The system precludes such producers from seeking volume of business through price reduction as the result of low costs. It, therefore, eliminates part of the natural incentive toward efficiency and economy. The result is a loss to the buying public.

(g) Under the formula, stated in paragraph 5 (c) hereof, the freight rate from the governing basing point, comprising the second factor in the delivered prices, is the all-rail freight rate, and that is true irrespective of whether customers could save money by buying f. o. b. producing point and using their own or hired trucks or barges for delivery purposes. The buying public pays the same delivered prices precisely for cement at respective destinations as though there were no destinations which might be served from any mill by delivery through means cheaper than all-rail transportation. The wrong committed against the consuming public is aggravated by the fact that producers are free under the system themselves to make actual delivery, wholly or in part, by highway or waterway at their option, thus monopolizing the benefits of these cheaper means of delivery intended to inure to the public from governmental expenditures for highways and waterways; and in fact they frequently do avail themselves of these cheaper means of delivery. If, however, genuine competitive conditions prevailed, circumstances would in many instances force competing producers to pass on to consumers the benefits of cheaper means of delivery. Thus the system results in greater costs to the public.

(h) Respondents have made concerted efforts to avoid competition between producers and wholesale dealers in cement in bidding upon

cement for Federal Government jobs. They have brought it about that certain agencies have been constrained to curtail the practice of buying direct from producers and have resorted to more costly purchases in quantity from dealers.

(i) State and Federal Governments and municipal and quasimunicipal corporations have been unable to obtain competitive price quotations and prices. They have been obliged, as the result of respondents' said pricing system, to raise larger sums by taxation, for such public works requiring cement as have been undertaken, than would otherwise be necessary; and the public have been deprived of all benefits which would accrue from competition in price in the cement industry. State and Federal laws requiring competitive bids before the award of public purchases have been thus evaded and rendered nugatory by respondents' uniform delivered price system. The State of South Dakota, finding it impossible to obtain competitive cement bids, deemed it necessary to erect a state cement mill and now operates the same. Thus an important effect of said pricing system upon public-buying agencies, and through them upon the public, has been substantially to increase the cost of public works, to increase taxation, and to deplete individual incomes and thus the system has tended to lessen purchasing power and impede prosperity.

(j) Respondents through their said combination have appropriated to themselves a disproportionate share of the huge funds appropriated by Congress in aid of reemployment and the restoration of prosperity, in that their concert of action has maintained higher prices for cement than would otherwise have prevailed. Most departments and agencies of the United States expending moneys for public works have found it necessary to pay the identical delivered prices uniformly charged by cement producers. One Federal agency, the Tennessee Valley Authority, was however given a reduced price by respondents when it became known that it had under consideration the Federal acquisition of a cement mill. One result of respondents' combination has been to lessen the public benefit from the emergency acts of Congress.

The foregoing subparagraphs (a) to (j) inclusive, are not alleged exclusively or as the only unlawful effects of respondents' combination alleged in paragraphs 4 and 5. There are other effects thereof.

The Public Interest

PAR. 9. The combination of respondents as herein above averred has hindered, lessened, restricted, and restrained the trade of members thereof and still hinders, lessens, restricts, and restrains the same. The

direct and immediate result of the said combination has been and is restraint upon interstate commerce with respect to cement manufactured by any of the producing respondents to be transported beyond the State in which the cement was made. Such confederated action exercises a power which individual action could not exercise or possess, and the necessary tendency and the direct and substantial effect of the combination are injury to the public.

The effect of respondents' combination upon the public interest has been and now is:

1. To bring about the disappearance of prices arrived at through the play of competitive forces; and the adoption by concert of organized producers of prices calculated to preserve the more poorly located, equipped, and conducted units at the expense of the buying public.
2. To lessen the demand for cement and the volume of public and private construction in which cement is used.
3. Correspondingly to lessen the opportunities for employment, both in the cement industry and in the construction industry.
4. To raise the cost of public roads and projects and private structures in which cement is used and thereby either to make them less available to the public or to raise the taxes and rents by which the public pays for them.
5. To encourage the development of excess capacity by the inducements of high prices and of fictitious freight charges obtainable by mills not located at basing points.

PAR. 10. The Federal Trade Commission further alleges that the public interest directly involved herein and set out more particularly in the preceding paragraphs is a part of the larger public interest, within the meaning of the Federal Trade Commission Act, in maintaining the natural regulatory forces of free competition in industry generally. The economic tendency of the respondents' combination upon the public interest, as thus broadly stated, is to lend encouragement to similar impairment of competition in other industries, the effect of which upon the buying power of consumers, the employment of labor, the opportunities for independence in business, the necessity that the Government undertake by regulation to protect the public interest, and the fluctuations of national prosperity, must increase in severity as the extent of competition is reduced. The leaving to private industry of monopolistic special privileges and franchises is at the expense of the purchasing power of the masses of the country, and results inevitably in reducing the opportunity freely to enter industry and commerce.

Violation of the Federal Trade Commission Act

PAR. 11. The acts and practices in this count set forth are all to the prejudice of the public; they have a substantial and dangerous tendency to hinder, lessen, restrict, and restrain, and actually have unduly, directly, and substantially, hindered, frustrated, lessened, restricted, and restrained, competition in interstate commerce in cement; they have increased the price of cement to the buying public. The said acts and practices constitute unfair methods of competition within the intent and meaning of the aforesaid Federal Trade Commission Act.

*COUNT II**THE CHARGE UNDER THE CLAYTON ACT*

PARAGRAPHS 1 TO 5, INCLUSIVE. As paragraphs 1 to 5, inclusive, of count II of this complaint the Commission hereby incorporates paragraphs 1 to 5, inclusive of count I to precisely the same extent as if each and all of them were set forth in full and repeated verbatim in this count.

The Practice of Discrimination Generally Considered

PAR. 6. Delivered prices made under the formula set forth in paragraph 5 (b) hereof are not the actual prices received by producing respondents. This is for the reason that such delivered prices include not only the price of the cement but the price of its transportation. In order to derive the true price received, the price actually paid to the carrier for transportation of the cement to the buyer must be deducted from the delivered price. Sales by producing respondents not located at basing points, and also sales by producing respondents located at basing points to customers outside the territory governed by the basing point where the seller is located, are made at almost as many true prices as there are customers' locations. The respective producing respondents thus discriminate in price in substantial amounts among their customers. These discriminations are made with the purpose to prevent, lessen, and destroy competition in price in commerce on the part of each producing respondent, which grants the discrimination, with all other such producing respondents. It is only through the said described discrimination that respondents are thus enabled to eliminate price competition.

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Examples of Discrimination

PAR. 7. (a) For the purpose of illustrating the discrimination practiced by producing respondents, there are submitted as part of this paragraph 7 tabulations showing base prices and freight rates which, if concurrently in existence, would cause the basing points mentioned therein to be the governing basing points for specific destinations. For present purposes, the said basing point prices and the said freight rates are hypothetical but they are not wholly so, for they constitute the respective base prices and rates of all-rail transportation which were simultaneously in effect at a former period. These tabulations are not included herein as allegations of current discrimination in prices made under said pricing system to customers located at destinations named. They are alleged as typical of the discriminations in price now existing under the said pricing system throughout the United States.

(b) Referring to the "delivered prices" included in the tabulations, it is usual in the trade to add ten cents each for the cloth bags, when delivery is so made, and this sum is refunded to the buyer if the bags are returned in good condition; and also to add sums which will later be deducted as discounts if the buyer qualifies to receive them. Since these sums are generally included in the prices quoted only to be deducted subsequently, they are omitted from the tabulated figures.

(c) For the purpose of the illustrations below set forth, these assumptions are made: (1) that the said pricing system is in full effect; (2) that each producer actually ships all-rail rather than to avail itself of less costly truck or water means of delivery; and (3) that the producer at the respective points of production designated in the tabulation, has customers located at the points named in each respective illustration.

(d) The final item entitled in each case "divergence from maximum price" shows the measure of the discrimination.

(e) The illustrations above described are submitted in tabular form in lieu of extended textual averment and are hereby made a part of this complaint, to wit:

Quotations by—	For delivery at—							
	Albion, Ind.	Brookville, Ind.	Cannelton, Ind.	Greencastle, Ind.	Shoals, Ind.	Boonville, Ind.	Noblesville, Ind.	Franklin, Ind.
<i>Universal-Atlas Cement Co.</i>								
Basing point.....	Buffington, Ind.	Ironton, Ohio	Birmingham, Ala.	Limesdale, Ind.	Mitchell, Ind.	Birmingham, Ala.	Limesdale, Ind.	Limesdale, Ind.
Base price (per bbl.).....	\$1. 40	\$1. 30	\$1. 00	\$1. 40	\$1. 50	\$1. 00	\$1. 40	\$1. 40
Freight from basing point (per bbl.).....	. 40	. 48	. 74	. 25	. 29	. 70	. 32	. 32
Delivered price (less deductions noted in par. 7b).....	1. 80	1. 78	1. 74	1. 65	1. 79	1. 70	1. 72	1. 72
Less actual freight to destination.....	. 40	. 51	. 59	. 46	. 55	. 57	. 44	. 48
Actual price.....	1. 40	1. 27	1. 15	1. 19	1. 24	1. 13	1. 28	1. 24
Divergence from maximum price.....	. 00	. 13	. 25	. 21	. 16	. 27	. 12	. 16
<i>Alpha Portland Cement Co.</i>								
Delivered price (less deductions noted in par. 7b).....	1. 80	1. 78			1. 79		1. 72	1. 72
Less actual freight to destination.....	. 49	. 48			. 48		. 49	. 51
Actual price.....	1. 31	1. 30			1. 31		1. 23	1. 21
Divergence from maximum price.....	. 19	. 00			. 09		. 27	. 29
<i>Lehigh Portland Cement Co.</i>								
Delivered price (less deductions noted in par. 7b).....	1. 80	1. 78	1. 74	1. 65	1. 79	1. 70	1. 72	1. 72
Less actual freight to destination.....	. 49	. 42	. 36	. 34	. 29	. 34	. 40	. 34
Actual price.....	1. 31	1. 86	1. 38	1. 31	1. 50	1. 36	1. 32	1. 38
Divergence from maximum price.....	. 19	. 14	. 12	. 19	. 00	. 14	. 18	. 12
<i>Lone Star Cement Co.</i>								
Delivered price (less deductions noted in par. 7b).....	1. 80	1. 78	1. 74	1. 65	1. 79	1. 70	1. 72	1. 72
Less actual freight to destination.....	. 46	. 42	. 46	. 25	. 40	. 44	. 32	. 32

Quotations by—	For delivery at—							
	Albion, Ind.	Brookville, Ind.	Cannelton, Ind.	Greencastle, Ind.	Shoals, Ind.	Boonville, Ind.	Noblesville, Ind.	Franklin, Ind.
<i>Lone Star Cement Co.—Continued</i>								
Basing point.....	Buffington, Ind.	Ironton, Ohio	Birmingham, Ala.	Limedale, Ind.	Mitchell, Ind.	Birmingham, Ala.	Limedale, Ind.	Limedale, Ind.
Actual price.....	\$1. 34	\$1. 36	\$1. 28	\$1. 40	\$1. 39	\$1. 26	\$1. 40	\$1. 40
Divergence from maximum price.....	. 06	. 04	. 12	. 00	. 01	. 14	. 00	. 00
<i>Louisville Cement Co.</i>								
Delivered price (less deductions noted in par. 7b).....	1. 80	1. 78	1. 74	1. 65	1. 79	1. 70	1. 72	1. 72
Less actual freight to destination.....	. 51	. 42	. 40	. 42	. 36	. 42	. 42	. 34
Actual price.....	1. 29	1. 36	1. 34	1. 23	1. 43	1. 28	1. 30	1. 38
Divergence from maximum price.....	. 53	. 46	. 48	. 59	. 39	. 54	. 52	. 44
<i>Wabash Portland Cement Co.</i>								
Delivered price (less deductions noted in par. 7b).....	1. 80	1. 78	1. 74	1. 65	1. 79	1. 70	1. 72	1. 72
Less actual freight to destination.....	. 30	. 38	. 57	. 44	. 51	. 57	. 40	. 42
Actual price.....	1. 50	1. 40	1. 17	1. 21	1. 28	1. 13	1. 32	1. 30
Divergence from maximum price.....	. 32	. 34	. 57	. 53	. 46	. 61	. 42	. 44
<i>Marquette Cement Mfg. Co.</i>								
Delivered price (less deductions noted in par. 7b).....	1. 80	1. 78	1. 74	1. 65	1. 79	1. 70	1. 72	1. 72
Less actual freight to destination.....	. 49	. 57	. 55	. 49	. 61	. 49	. 49	. 51
Actual price.....	1. 31	1. 21	1. 19	1. 16	1. 18	1. 21	1. 23	1. 21
Divergence from maximum price.....	. 19	. 29	. 57	. 34	. 58	. 55	. 27	. 29

Universal-Atlas Cement Co.

Basing point.....

Base price (per. bbl.).....

Freight from basing pt. (per bbl.).....

Delivered price (less deductions noted in par. 7b).....

Less actual freight to destination.....

Actual price.....

Divergence from maximum price.....

Penn-Dixie Cement Co., Hawkeye Portland Cement Co.

Delivered price (less deductions noted in par. 7b).....

Less actual freight to destination.....

Actual price.....

Divergence from maximum price.....

Dewey Portland Cement Co.

Delivered price (less deductions noted in par. 7b).....

Less actual freight to destination.....

Actual price.....

Divergence from maximum price.....

Clear Lake Iowa	Indianola, Iowa	Dallas Center, Iowa	Luther, Iowa	Perry, Iowa	Ridgeway, Iowa	Donnellson, Iowa	Monmouth, Iowa
Mason City, Iowa	Mason City, Iowa	Mason City, Iowa	Mason City, Iowa	Mason City, Iowa	Mason City, Iowa	Prospect Hill, Alpha, Mo.	Mason City, Iowa, Buffington, Ind.
	\$1. 30	\$1. 30	\$1. 30	\$1. 30	\$1. 30	\$1. 30	\$1. 30
	. 46					. 51	. 51
	1. 76					1. 81	1. 81
	. 61					. 53	. 51
	1. 15					1. 28	1. 30
	. 15					. 02	. 00
1. 57	1. 78	1. 74	1. 74	1. 74	1. 70	1. 81	1. 81
. 44	. 36	. 32	. 32	. 32	. 53	. 46	. 51
1. 13	1. 42	1. 42	1. 42	1. 42	1. 17	1. 35	1. 30
. 61	. 32	. 32	. 32	. 32	. 57	. 39	. 44
\$1. 57	1. 78	1. 74	1. 74	1. 74	1. 70	1. 81	1. 81
. 51	. 53	. 51	. 51	. 51	. 51	. 44	. 34
1. 06	1. 25	1. 23	1. 23	1. 23	1. 19	1. 37	1. 47
. 68	. 49	. 51	. 51	. 51	. 55	. 37	. 27

Quotations by—	For delivery at—							
	Clear Lake, Iowa	Indianola, Iowa	Dallas Center, Iowa	Luther, Iowa	Perry, Iowa	Ridgeway, Iowa	Donnelson, Iowa	Monmouth Iowa
<i>Lone Star Portland Cement Co.</i>								
Basing point-----	Mason City, Iowa	Mason City, Iowa	Mason City, Iowa	Mason City, Iowa	Mason City, Iowa	Mason City, Iowa	Prospect Hill, Alpha, Mo.	Mason City, Iowa, Buffington, Ind.
Delivered price (less deductions noted in par. 7b)-----	\$1. 57	\$1. 78	\$1. 74	\$1. 74	\$1. 74	\$1. 70	\$1. 81	\$1. 81
Less actual freight to destination-----		. 55	. 55	. 55	. 55	. 70	. 53	. 61
Actual price-----		1. 23	1. 19	1. 19	1. 19	1. 00	1. 28	1. 20
Divergence from maximum price-----		. 22	. 26	. 24	. 26	. 45	. 17	. 25
<i>Lehigh Portland Cement Co.</i>								
Delivered price (less the deductions noted in par. 7b)---	1. 57	1. 78	1. 74	1. 74	1. 74	1. 70	1. 81	1. 81
Less actual freight to destination-----	. 27	. 48	. 44	. 44	. 44	. 40	. 53	. 51
Actual price-----	1. 30	1. 30	1. 30	1. 30	1. 30	1. 30	1. 28	1. 30
Divergence from maximum price-----	. 00	. 00	. 00	. 00	. 00	. 00	. 02	. 00
<i>Northwestern States Portland Cement Co.</i>								
Delivered price (less deductions noted in par. 7b)-----	1. 57	1. 78	1. 74	1. 74	1. 74	1. 70	1. 81	1. 81
Less actual freight to destination-----	. 27	. 46	. 40	. 40	. 38	. 40	. 53	. 51
Actual price-----	1. 30	1. 32	1. 34	1. 34	1. 36	1. 30	1. 28	1. 30
Divergence from maximum price-----	. 00	. 38	. 36	. 36	. 34	. 00	. 02	. 00
<i>Marquette Cement Mfg. Co.</i>								
Delivered price (less deductions noted in par. 7b)-----	1. 57	1. 78	1. 74	1. 74	1. 74	1. 70	1. 81	1. 81
Less actual freight to destination-----	. 42	. 61	. 59	. 59	. 59	. 55	. 51	. 44

Actual price-----	1. 15	1. 17	1. 15	1. 15	1. 15	1. 15	1. 30	1. 37	87
Divergence from maximum price-----	. 25	. 23	. 25	. 25	. 25	. 25	. 10	. 03	
Ash Grove Portland Cement Co.									
Delivered price (less deductions noted in par. 7b)-----		1. 78	1. 74	1. 74	1. 74		1. 81	1. 81	
Less actual freight to destination-----		. 53	. 48	. 48	. 46		. 59	. 61	
Actual price-----		1. 25	1. 26	1. 26	1. 28		1. 22	1. 20	
Divergence from maximum price-----		. 66	. 65	. 65	. 63		. 69	. 71	

¹ In the case of producers having more than 1 mill from which shipment might be made, it is assumed that shipment would be made from mill which would net producer the highest price.

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Effect of the Discrimination

PAR. 8. The discrimination in price set forth in paragraphs 6 and 7 of this Count II is the result of respondents' combination and conspiracy alleged in paragraphs 4 and 5 hereof. The effect of said discriminations in price is to injure, destroy, and prevent competition in price on the part of each producing respondent with all others who likewise grant discriminations under respondents' said pricing system. Insofar as said system is followed, every producer knows what every other producer following the system will quote and charge as his delivered price to any given destination and that all delivered prices will be identical. Each said producer knows that, in reciprocity for its omission to offer competitive prices to prospective customers located in the consuming areas adjacent to its mill (where it has a natural advantage and receives its highest actual price), each respective producer will receive the same immunity from price competition when it sells in the consuming areas adjacent to other mills. A difference in delivered price of only 1 cent a barrel will deflect the business away from one manufacturer to another. Thus each reciprocally waives the advantages and neutralizes the disadvantages which it has in certain consuming areas as aforesaid in order that there may not anywhere be genuine competition in price between producers which, except for such reciprocal waiver and neutralization, would be in normal and active competition in price.

Violation of Clayton Act as Amended

PAR. 9. The acts of discrimination in interstate commerce performed in the actual course of such commerce in this Count set forth may have the effect substantially to lessen, and they actually do substantially lessen, competition in cement of like grade and quality; and constitute unlawful discrimination in price within the intent and meaning of section 2 of the aforesaid Clayton Act as amended by the aforesaid Robinson-Patman Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act and to the provisions of an act of Congress entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (Clayton Act), as amended by act approved June 19, 1936 (Robinson-Patman Act), the Federal Trade Commission on July 2, 1937, issued and subsequently served its complaint in this proceeding upon the respondents named

in the caption hereof, charging them with the use of unfair methods of competition in commerce in violation of the provisions of the Federal Trade Commission Act and with discriminations in price in the sale of Portland cement in violation of the provisions of subsection (a) of section 2 of the said Clayton Act as amended.

After the issuance of the said complaint and the filing of respondents' answers thereto, testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before an examiner of the Commission theretofore duly designated by it, and the said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission on the complaint, the answers thereto, testimony and other evidence, report of the trial examiner and the exceptions thereto, briefs in support of and in opposition to the complaint, and oral arguments by opposing counsel, including a general appeal by counsel for respondents from every adverse ruling of the trial examiner without further specification except as to exhibits offered by respondents but not received in evidence; and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. (a) Respondent, ~~The Cement Institute~~ (hereinafter frequently referred to as "Institute"), is a voluntary unincorporated trade association. It was organized in August 1929 for the promotion of the mutual interests of its members and has functioned through its officers, trustees, committees, divisions, bureaus, and other agents. At the time of the issuance of the complaint in this proceeding, practically all domestic producers of portland cement, including all but one of the corporate respondents herein, were members of the Institute. At various times the Institute has had general offices at 11 East Forty-fourth Street, New York, N. Y., and at 111 West Washington Street, Chicago, Ill., and divisional offices in those and other cities.

(b) Respondent, Smith W. Storey (the individual referred to in the complaint as S. W. Storey), was at the time of the issuance of the complaint in this proceeding president of the Institute.

(c) Respondent, George H. Reiter (the individual referred to in the complaint as G. H. Reiter), was manager of the Chicago Division of the Institute from February 1930 to December 1930 and from August 1, 1933, to June 1935. On the latter date he became general man-

ager of the Institute, in December 1935 he was also made its secretary, and continued in both positions until April 1937.

(d) The other officers of the Institute at the time of the issuance of the complaint in this proceeding were Frank G. McKelvey, vice president; Blaine S. Smith, vice president; and Charles F. Conn, treasurer; and the trustees of the Institute at that time were Harold M. Scott, John J. Porter, Harry F. Jennings, A. J. Rooney, B. H. Rader, M. C. Monday, C. B. Condon, Chester A. Brooke, William R. Blair, Charles Boettcher, Ernest E. Duque, Edwin P. Lucas, Charles L. Hogan, John B. John, Frank G. McKelvey, V. N. Roadstrum, Blaine S. Smith, Smith W. Storey, and Joseph S. Young.

(e) Respondent, Aetna Portland Cement Co. (hereinafter frequently referred to as "Aetna"), is a corporation, organized and existing under the laws of the State of Maine, with its principal place of business in Bay City, Mich. It is a producer of cement and has its manufacturing plant at Bay City, Mich. It has another plant at Fenton, Mich., which has not been operated for some time. It became a member of the Institute in June 1933.

(f) Respondent, Alpha Portland Cement Co. (hereinafter frequently referred to as "Alpha"), is a corporation, organized and existing under the laws of the State of New Jersey, with its principal place of business in Easton, Pa. It is a producer of cement and has two manufacturing plants at Martin's Creek, Pa.; and one plant each at Jamesville, N. Y.; Cementon (Catskill), N. Y.; Manheim, W. Va.; La Salle, Ill.; Ironton, Ohio; St. Louis, Mo.; Birmingham, Ala.; and Bellevue, Mich. The last-named plant has not been operated for some time. It was one of the original members of the Institute and continued as a member until May 1931, when it resigned, and thereafter rejoined the Institute in June 1933. (The articles of association of the Institute require the payment of dues for a period of 12 months following notice of resignation.)

(g) Respondent, Arkansas Portland Cement Co. (hereinafter frequently referred to as "Arkansas"), is a corporation, organized and existing under the laws of the State of Arkansas, with its principal place of business in Denver, Colo. It is a producer of cement and has its manufacturing plant at Okay Junction, Ark. It joined the Institute in March 1930, resigned in May 1931, rejoined in June 1933, resigned in February 1936, and rejoined in February 1937.

(h) Respondent, Ash Grove Lime & Portland Cement Co. (hereinafter frequently referred to as "Ash Grove"), is a corporation, organized and existing under the laws of the State of Maine, with its principal place of business in Kansas City, Mo. It is a producer of

cement and has its manufacturing plant at Chanute, Kans. It joined the Institute in January 1930, resigned in February 1931, and re-joined in June 1933. It has a subsidiary, Ash Grove Lime & Portland Cement Co. of Nebraska, with its manufacturing plant at Louisville, Nebr.

(i) Respondent, Beaver Portland Cement Co. (hereinafter frequently referred to as "Beaver"), is a corporation, organized and existing under the laws of the State of Oregon, with its principal place of business in Portland, Oreg. It is a producer of cement and has its manufacturing plant at Gold Hill, Oreg. It became a member of the Institute in June 1933.

(j) Respondent, The Bessemer Limestone & Cement Co. (hereinafter frequently referred to as "Bessemer"), is a corporation, organized and existing under the laws of the State of Ohio, with its principal place of business in Youngstown, Ohio. It is a producer of cement and since July 1, 1935, has operated one manufacturing plant at Bessemer (shipping point Walford), Pa. It joined the Institute in July 1935.

(k) Respondent, Calaveras Cement Co. (hereinafter frequently referred to as "Calaveras"), is a corporation, organized and existing under the laws of the State of Delaware, with its principal place of business in San Francisco, Calif. It is a producer of cement and operates a manufacturing plant at Kentucky House, Calif. It became a member of the Institute in September 1933.

(l) Respondent, California Portland Cement Co. (hereinafter frequently referred to as "California"), is a corporation, organized and existing under the laws of the State of California, with its principal place of business in Los Angeles, Calif. It is a producer of cement and has its manufacturing plant at Colton, Calif. It became a member of the Institute in June 1933.

(m) Respondent, Castalia Portland Cement Co. (hereinafter frequently referred to as "Castalia"), is a corporation, organized and existing under the laws of the State of Pennsylvania, with its principal place of business in Pittsburgh, Pa. After closing its manufacturing plant at Castalia, Ohio, in 1932 it purchased its supplies of cement from Medusa Portland Cement Co. until early in 1938, and that company made shipments of cement pursuant to orders received from Castalia. Respondent is at present in bankruptcy and its affairs are in the hands of a trustee. It became a member of the Institute in March 1930.

(n) Respondent, Colorado Portland Cement Co. (hereinafter frequently referred to as "Colorado"), is a corporation, organized and

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existing under the laws of the State of Colorado, with its principal place of business in Denver, Colo. It is owned by the Ideal Cement Co. and markets cement produced by mills of the latter company located at Portland and Boettcher, Colo. It became a member of the Institute in June 1933, resigned in February 1936, and withdrew its resignation in February 1937.

(o) Respondent, Consolidated Cement Corporation (hereinafter frequently referred to as "Consolidated"), is a corporation, organized and existing under the laws of the State of Delaware, with its principal place of business in Chicago, Ill. It is a producer of cement and has manufacturing plants located at Fredonia, Kans., and Cement City, Mich. Its plant at Mildred, Kans., has been dismantled. It became a member of the Institute in January 1930, resigned in December 1930, and rejoined in June 1933.

(p) Respondent, Coplay Cement Manufacturing Co. (hereinafter frequently referred to as "Coplay"), is a corporation, organized and existing under the laws of the State of Pennsylvania, with its principal place of business in Coplay, Pa. It is a producer of cement and its manufacturing plant consists of two units: one at Coplay, Pa., and the other at Saylor, Pa. It became a member of the Institute in June 1933.

(q) Respondent, Cumberland Portland Cement Co., (hereinafter frequently referred to as "Cumberland"), is a corporation, organized and existing under the laws of the State of Delaware, with its principal place of business at Cowan, Tenn. It is a producer of cement and its manufacturing plant is located at Cowan. It became a member of the Institute in December 1929.

(r) Respondent, Dewey Portland Cement Co. (hereinafter frequently referred to as "Dewey"), is a corporation, organized and existing under the laws of the State of West Virginia, with its principal place of business in Kansas City, Mo. It is a producer of cement and its manufacturing plants are located at Dewey, Okla. and Linwood (near Davenport), Iowa. It became a member of the Institute in January 1930, resigned in December 1930, and rejoined in June 1933.

(s) Respondent, Diamond Portland Cement Co. (hereinafter frequently referred to as "Diamond"), is a corporation, organized and existing under the laws of the State of Ohio, with its principal place of business in Middlebranch, Ohio. It is a producer of cement and its manufacturing plant is located at Middlebranch, Ohio. It became a member of the Institute in February 1930, resigned at the end of that year, and rejoined in June 1933.

(t) Respondent, Edison Cement Corporation (hereinafter frequently referred to as "Edison"), is a corporation, organized and ex-

isting under the laws of the State of New Jersey, with its principal place of business in West Orange, N. J. It is a producer of cement and its manufacturing plant is located at New Village, N. J. It became a member of the Institute in June 1933. Its predecessor corporation, the Edison Portland Cement Co., was a member of the Institute from August 1929 until its assets were taken over by Edison in 1931.

(u) Respondent, The Federal Portland Cement Co., Inc. (hereinafter frequently referred to as "Federal"), is a corporation, organized and existing under the laws of the State of New York, with its principal place of business in Buffalo, N. Y. It is a producer of cement and its manufacturing plant is located at Buffalo, N. Y. Prior to about the middle of 1933 the output of Federal was sold for it by the Bessemer Cement Corporation, but since that time Federal has marketed its own output. It became a member of the Institute in January 1934.

(v) Respondent, Florida Portland Cement Co. (hereinafter frequently referred to as "Florida"), is a corporation, organized and existing under the laws of the State of Delaware, with its principal place of business in Chicago, Ill. It is a producer of cement and its manufacturing plant is located at Tampa, Fla. It became a member of the Institute in December 1929, resigned in December 1930, and rejoined in June 1933.

(w) Respondent, Georgia Cement & Products Co. (hereinafter frequently referred to as "Georgia"), is a corporation, organized and existing under the laws of the State of Georgia, with its principal place of business in Atlanta, Ga. It is a producer of cement and its manufacturing plant is located at Portland, Ga. It became a member of the Institute in December 1929.

(x) Respondent, Giant Portland Cement Co. (hereinafter frequently referred to as "Giant"), is a corporation, organized and existing under the laws of the State of Delaware, with its principal place of business in Philadelphia, Pa. It is a producer of cement and has two manufacturing plants: one located at Egypt, Pa., and the other at Lesley, Pa. It became a member of the Institute in August 1929.

(y) Respondent, The Glens Falls Portland Cement Co. (hereinafter frequently referred to as "Glens Falls"), is a corporation, organized and existing under the laws of the State of New York, with its principal place of business in Glens Falls, N. Y. It is a producer of cement and its manufacturing plant is located at Glens Falls, N. Y. It became a member of the Institute in August 1929.

(z) Respondent, Great Lakes Portland Cement Corporation (hereinafter frequently referred to as "Great Lakes"), is a corporation

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organized and existing under the laws of the State of Indiana, with its principal place of business at Buffalo, N. Y. It is a producer of cement, and the entire output of its manufacturing plant in Buffalo, N. Y., and its clinker grinding plant at Cleveland, Ohio, is marketed by respondent Lehigh Portland Cement Company, which company owns a controlling interest in Great Lakes. It became a member of the Institute in June 1933.

(2a) Respondent, Green Bag Cement Co. of Pennsylvania (hereinafter frequently referred to as "Green Bag of Pennsylvania"), is a corporation, organized and existing under the laws of the State of Pennsylvania, with its principal place of business in Pittsburgh, Pa. It is engaged in marketing the cement produced by its parent corporation, Pittsburgh Coke & Iron Company, in a manufacturing plant located at Neville Island, near Pittsburgh, Pa. It became a member of the Institute in July 1933.

(2b) Respondent, Green Bag Cement Co. of West Virginia (hereinafter frequently referred to as "Green Bag of West Virginia"), is a corporation, organized and existing under the laws of the State of West Virginia, with its principal place of business in Kenova, W. Va. It is a producer of cement and its manufacturing plant is located in Kenova, W. Va. It became a member of the Institute in June 1933.

(2c) Respondent, Hawkeye Portland Cement Co. (hereinafter frequently referred to as "Hawkeye"), is a corporation, organized and existing under the laws of the State of West Virginia, with its principal place of business in Des Moines, Iowa. It is a producer of cement and its manufacturing plant is located at Des Moines, Iowa. It became a member of the Institute in January 1930, resigned in February 1931, and rejoined in June 1933.

(2d) Respondent, Hercules Cement Corporation (hereinafter frequently referred to as "Hercules"), is a corporation, organized and existing under the laws of the State of Pennsylvania, with its principal place of business in Philadelphia, Pa. It is a producer of cement and its manufacturing plant is located at Stockertown, Pa. It became a member of the Institute in August 1929, subsequently resigned, and rejoined in June 1933.

(2e) Respondent, Hermitage Portland Cement Co. (hereinafter frequently referred to as "Hermitage"), is a corporation, organized and existing under the laws of the State of Delaware, with its principal office in Nashville, Tenn. It is a producer of cement and its manufacturing plant is located at Nashville, Tenn. It became a member of the Institute in December 1929.

(2f) Respondent, Huron Portland Cement Co. (hereinafter frequently referred to as "Huron"), is a corporation, organized and existing under the laws of the State of Michigan, with its principal place of business in Detroit, Mich. It is a producer of cement and its principal plant is located at Alpena, Mich., from which plant auxiliary plants at Muskegon, Saginaw, and Detroit, Mich.; Duluth, Minn.; Milwaukee and Green Bay, Wis.; Toledo and Cleveland, Ohio; and Buffalo and Oswego, N. Y., are supplied. It also markets the cement manufactured by the Michigan Alkali Co. at Wyandotte, Mich. It became a member of the Institute in June 1933.

(2g) Respondent, Idaho Portland Cement Co. (hereinafter frequently referred to as "Idaho"), is a corporation, organized and existing under the laws of the State of Idaho, with its principal place of business in Inkom, Idaho. It is a producer of cement and its manufacturing plant is located at Inkom, Idaho. It became a member of the Institute in January 1934.

(2h) Respondent, Lone Star Cement Corporation (hereinafter frequently referred to as "Lone Star"), is a corporation, organized and existing under the laws of the State of Maine, with its principal place of business in New York, N. Y. It is the respondent named in the complaint as International Cement Corporation, its name having been changed to Lone Star Cement Corporation in 1936 when its subsidiary companies in the United States were merged into a single corporation. It is a producer of cement and has 10 domestic manufacturing plants which are located as follows: Hudson, N. Y.; Nazareth, Pa.; Norfolk, Va.; North Birmingham and Spocari, Ala.; New Orleans, La.; Manchester (near Houston), and Harrys (near Dallas), Tex.; Limesdale, Ind.; and Bonner Springs, Kans. Lone Star Cement Co. of New York, Inc., Lone Star Cement Co. of Pennsylvania, Lone Star Cement Co. of Virginia, Lone Star Cement Co. of Alabama, and Lone Star Cement Co. of Louisiana became members of the Institute in December 1929, and Lone Star Cement Co. of Indiana and Lone Star Cement Co. of Kansas became members of the Institute in January 1930. The parent corporation, International Cement Corporation, resigned these memberships in the Institute in October 1930, and in June 1933 all of the Lone Star companies above named rejoined the Institute and the Lone Star Co. of Texas also joined.

(2i) Respondent, Keystone Portland Cement Co. (hereinafter frequently referred to as "Keystone"), is a corporation, organized and existing under the laws of the State of Pennsylvania, with its principal place of business in Philadelphia, Pa. It is a producer of cement and its manufacturing plant is located at Bath, Pa. It became a member of the Institute in June 1933.

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(2j) Respondent, Kosmos Portland Cement Co. (hereinafter frequently referred to as "Kosmos"), is a corporation, organized and existing under the laws of the State of Kentucky, with its principal place of business in Kosmosdale, Ky. It is a producer of cement and its manufacturing plant is located at Kosmosdale, Ky. It became a member of the Institute in June 1933.

(2k) Respondent, Lawrence Portland Cement Co. (hereinafter frequently referred to as "Lawrence"), is a corporation, organized and existing under the laws of the State of Pennsylvania, with its principal place of business in Northampton, Pa. It is a producer of cement and its manufacturing plants are located at Siegfried, Pa., and Thomaston, Maine. It became a member of the Institute in June 1933.

(2l) Respondent, Lehigh Portland Cement Co. (hereinafter frequently referred to as "Lehigh"), is a corporation, organized and existing under the laws of the State of Pennsylvania, with its principal place of business in Allentown, Pa. It is a producer of cement and its active manufacturing plants are located at Sandt's Eddy, Ormrod, New Castle, and Fogelsville, Pa.; Buffalo, N. Y.; Union Bridge, Md.; Mitchell, Ind.; Oglesby, Ill.; Fordwick, Va.; Boyles (near Birmingham), Ala.; Mason City, Iowa; Iola, Kans. and Metaline Falls, Wash. It became a member of the Institute in August 1929, resigned in March 1931, and rejoined in June 1933.

(2m) Respondent, Marquette Cement Manufacturing Co. (hereinafter frequently referred to as "Marquette"), is a corporation, organized and existing under the laws of the State of Illinois, with its principal place of business in Chicago, Ill. It is a producer of cement and its manufacturing plants are located at Oglesby (frequently referred to as La Salle), Ill., and Cape Girardeau, Mo. It became a member of the Institute in June 1933.

(2n) Respondent, Medusa Portland Cement Co. (hereinafter frequently referred to as "Medusa"), is a corporation, organized and existing under the laws of the State of Ohio, with its principal place of business in Cleveland, Ohio. It is a producer of cement and its manufacturing plants are located at York and Wampum, Pa.; Bay Bridge and Silica, Ohio; and Dixon, Ill. Through a wholly owned subsidiary, the Manitowoc Portland Cement Co., it operates another manufacturing plant at Manitowoc, Wis. It has auxiliary plants at Milwaukee, Wis.; Chicago, Ill.; and Holland, Mich. Its plant at Newaygo, Mich., has not been operated since 1931. It became a member of the Institute in August 1929.

(2o) Respondent, Missouri Portland Cement Co. (hereinafter frequently referred to as "Missouri"), is a corporation, organized and

existing under the laws of the State of Missouri, with its principal place of business in St. Louis, Mo. It is a producer of cement and its manufacturing plants are located at Prospect Hill and Sugar Creek, Mo. It became a member of the Institute in January 1930.

(2p) Respondent, The Monarch Cement Co. (hereinafter frequently referred to as "Monarch"), is a corporation, organized and existing under the laws of the State of Kansas, with its principal place of business in Humboldt, Kans. It is a producer of cement and its manufacturing plant is located at Humboldt, Kans. It became a member of the Institute in January 1930, resigned in February 1931, and rejoined in June 1933.

(2q) Respondent, Monolith Portland Cement Co. (hereinafter frequently referred to as "Monolith Portland"), is a corporation, organized and existing under the laws of the State of Nevada, with its principal place of business in Los Angeles, Calif. It is a producer of cement and its manufacturing plant is located at Monolith, Calif. It became a member of the Institute in June 1933.

(2r) Respondent, Monolith Portland Midwest Co. (hereinafter frequently referred to as "Monolith Midwest"), is a corporation organized and existing under the laws of the State of Nevada, with its principal place of business in Los Angeles, Calif. It is a producer of cement and its manufacturing plant is located at Laramie, Wyo. It became a member of the Institute in June 1933.

(2s) Respondent, National Cement Co. (hereinafter frequently referred to as "National"), is a corporation, organized and existing under the laws of the State of Alabama, with its principal place of business in Birmingham, Ala. It is a producer of cement and its manufacturing plant is located at Ragland, Ala. It became a member of the Institute in December 1929.

(2t) Respondent, Nazareth Cement Co. (hereinafter frequently referred to as "Nazareth"), is a corporation, organized and existing under the laws of the State of Pennsylvania, with its principal place of business in Nazareth, Pa. It is a producer of cement and its manufacturing plant is located at Nazareth, Pa. It became a member of the Institute in August 1929.

(2u) Respondent, Nebraska Cement Co. (hereinafter frequently referred to as "Nebraska"), is a corporation, organized and existing under the laws of the State of Delaware. It was incorporated in December 1936 and succeeded to the business of a Nebraska corporation of the same name. Like its predecessor, the present company is controlled by the Ideal Cement Co. and, likewise, it operates a cement manufacturing plant at Superior, Nebr., owned by the Ideal Cement Co. Nebraska Cement Co. (the Nebraska corporation), became

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a member of the Institute in May 1930, resigned in September 1930, and rejoined in June 1933. The Nebraska Cement Co. (the Delaware corporation), succeeded to the Institute membership of its predecessor company.

(2v) Respondent, North American Cement Corporation (hereinafter frequently referred to as "North American"), is a corporation, organized and existing under the laws of the State of Delaware, with its principal place of business in Albany, N. Y. It is a producer of cement and its manufacturing plants are located at Howe's Cave and Catskill, N. Y., and Security, Md. It became a member of the Institute in June 1933.

(2w) Respondent, Northwestern Portland Cement Co. (hereinafter frequently referred to as "Northwestern Portland"), is a corporation, organized and existing under the laws of the State of Washington, with its principal place of business in Seattle, Wash. It is a producer of cement and its manufacturing plant is located at Grotto, Wash. It became a member of the Institute in July 1933.

(2x) Respondent, Northwestern States Portland Cement Co. (hereinafter frequently referred to as "Northwestern States"), is a corporation, organized and existing under the laws of the State of Iowa, with its principal place of business in Mason City, Iowa. It is a producer of cement and its manufacturing plants are located at Mason City and Gilmore City, Iowa. It has continued the membership in the Institute of its predecessor corporation of the same name, which became a member in January 1930.

(2y) Respondent, Oklahoma Portland Cement Co. (hereinafter frequently referred to as "Oklahoma"), is a corporation, organized and existing under the laws of the State of Oklahoma, with its principal place of business in Denver, Colo. It markets the cement produced by Ideal Cement Company at two manufacturing plants at Ada, Okla. It became a member of the Institute in January 1930, resigned in February 1931, and rejoined in June 1933.

(2z) Respondent, Oregon Portland Cement Co. (hereinafter frequently referred to as "Oregon"), is a corporation, organized and existing under the laws of the State of Nevada, with its principal place of business in Portland, Oreg. It is a producer of cement and its manufacturing plants are located at Lime and Oswego, Oreg. It became a member of the Institute in June 1933.

(3a) Respondent, Pacific Portland Cement Co. (hereinafter frequently referred to as "Pacific"), is a corporation, organized and existing under the laws of the State of California, with its principal place of business in San Francisco, Calif. It is a producer of cement and its manufacturing plant is located at Redwood Harbor, Calif.

Its plant at San Juan Bautista, Calif., has not been operated for a number of years. It became a member of the Institute in June 1933.

(3b) Respondent, Peerless Cement Corporation (hereinafter frequently referred to as "Peerless"), is a corporation, organized and existing under the laws of the State of Michigan, with its principal place of business in Detroit, Mich. It succeeded in January 1936 to the business of another corporation of the same name which went into receivership and was dissolved. It is a producer of cement and its manufacturing plants are located at Detroit and Port Huron, Mich. It became a member of the Institute in January 1936 and its predecessor company had previously been a member of the Institute.

(3c) Respondent, Pennsylvania-Dixie Cement Corporation (hereinafter frequently referred to as "Penn-Dixie"), is a corporation, organized and existing under the laws of the State of Delaware, with its principal place of business in New York, N. Y. It is a producer of cement and its manufacturing plants are located at Kingsport and Richard City, Tenn.; Clinchfield, Ga.; Nazareth, Penn Allen, and Bath, Pa.; Portland Point, N. Y.; and West Des Moines, Iowa. It became a member of the Institute in August 1929.

(3d) Respondent, Petoskey Portland Cement Co. (hereinafter frequently referred to as "Petoskey"), is a corporation, organized and existing under the laws of the State of Delaware, with its principal place of business in Petoskey, Mich. It is a producer of cement and its manufacturing plant is located at Petoskey, Mich. It became a member of the Institute in January 1930.

(3e) Respondent, Pittsburgh Plate Glass Co. (hereinafter frequently referred to as "Pittsburgh Plate Glass"), is a corporation, organized and existing under the laws of the State of Pennsylvania, with its principal place of business at Pittsburgh, Pa. It is a producer of cement and its manufacturing plant is located at Fultonham, Ohio. It became a member of the Institute in June 1933.

(3f) Respondent, Portland Cement Co. of Utah (hereinafter frequently referred to as "Portland of Utah"), is a corporation, organized and existing under the laws of the State of Wyoming, with its principal place of business in Salt Lake City, Utah. It is a producer of cement and its manufacturing plant is located in Salt Lake City, Utah. It became a member of the Institute in December 1936.

(3g) Respondent, Riverside Cement Co. (hereinafter frequently referred to as "Riverside"), is a corporation, organized and existing under the laws of the State of Delaware, with its principal place of business in Los Angeles, Calif. It is a producer of cement and its manufacturing plants are located at Crestmore and Oro Grande, Calif.

The latter plant has not been operated since 1928. It became a member of the Institute in June 1933.

(3*h*) Respondent, Santa Cruz Portland Cement Co. (hereinafter frequently referred to as "Santa Cruz"), is a corporation, organized and existing under the laws of the State of California, with its principal place of business in San Francisco, Calif. It is a producer of cement and its manufacturing plant is located at Davenport, Calif. It has auxiliary plants at Alameda, Stockton, and Long Beach, Calif., and Portland, Oreg. It became a member of the Institute in June 1933.

(3*i*) Respondent, Signal Mountain Portland Cement Co. (hereinafter frequently referred to as "Signal Mountain"), is a corporation, organized and existing under the laws of the State of Delaware, with its principal place of business in Chicago, Ill. It is a producer of cement and its manufacturing plant is located at Chattanooga, Tenn. It became a member of the Institute in December 1929, resigned in December 1930, and rejoined in June 1933.

(3*j*) Respondent, Southern States Portland Cement Co. (hereinafter frequently referred to as "Southern States"), is a corporation, organized and existing under the laws of the State of Georgia, with its principal place of business in Rockmart, Ga. It is a producer of cement and its manufacturing plant is located at Rockmart, Ga. It became a member of the Institute in December 1929.

(3*k*) Respondent, Southwestern Portland Cement Co. (hereinafter frequently referred to as "Southwestern"), is a corporation, organized and existing under the laws of the State of West Virginia, with its principal place of business in El Paso, Tex. It is a producer of cement and its manufacturing plants are located at El Paso, Tex.; Victorville, Calif.; and Osborn, Ohio. It became a member of the Institute in January 1930, but paid dues only for its Osborn, Ohio, plant until June 1933, when it began payment of dues for all of its plants.

(3*l*) Respondent, Spokane Portland Cement Co. (hereinafter frequently referred to as "Spokane"), is a corporation, organized and existing under the laws of the State of Washington, with its principal place of business in Spokane, Wash. It is a producer of cement and its manufacturing plant is located at Irvin, Wash. This business was originally organized in 1910 as the International Portland Cement Co., Ltd., which, on or about May 2, 1932, by amendment to its articles of incorporation, changed its name to the Spokane Portland Cement Co. With the consent of this company, a new corporation of the identical name was organized about February 5, 1937, and about February 13, 1937, the original Spokane Portland Cement Co., by amendment to its articles of incorporation, changed its name to International Portland Cement Co., Ltd. About May 5, 1937, the present Spokane

Portland Cement Co. acquired the property and business of the International Portland Cement Co., Ltd., and thereafter the latter company was dissolved. The present Spokane Portland Cement Co. retained and employed the same management and personnel previously employed by its predecessor corporation. The original Spokane Portland Cement Co. became a member of the Institute in June 1933 and paid dues up to the end of 1936. The present Spokane Portland Cement Co. paid dues to the Institute assessed against the original company for January 1937; thereafter paid dues assessed against the International Portland Cement Co., Ltd., for the months of February, March, and April, 1937; thereafter, without formal application for membership, continued to pay dues through September 1937; and on or about March 1, 1938, formally resigned from the Institute.

(3m) Respondent, Standard Portland Cement Co. (hereinafter frequently referred to as "Standard"), is a corporation, organized and existing under the laws of the State of Ohio, with its principal place of business at Painesville, Ohio. It is a producer of cement and its manufacturing plant is located at Painesville, Ohio. It became a member of the Institute in June 1933.

(3n) Respondent, Superior Cement Corporation (hereinafter frequently referred to as "Superior"), is a corporation, organized and existing under the laws of the State of Ohio, with its principal place of business in Portsmouth, Ohio. It is a producer of cement and its manufacturing plant is located at Superior, Ohio. It was formerly known as the Wellston Iron Furnace Co., but by change of corporate name became the Superior Cement Corporation. It became a member of the Institute in January 1930.

(3o) Respondent, Superior Portland Cement, Inc. (hereinafter frequently referred to as "Superior Portland"), is a corporation, organized and existing under the laws of the State of Washington, with its principal place of business in Seattle, Wash. It is a producer of cement and its manufacturing plant is located at Concrete, Wash. Since 1931 it also has leased and operated the Seattle plant of the Pacific Coast Cement Co. It became a member of the Institute in June 1933.

(3p) Respondent, Three Forks Portland Cement Co. (hereinafter frequently referred to as "Three Forks"), is a corporation, organized and existing under the laws of the State of Montana, with its principal place of business in Denver, Colo. It markets the cement produced by a manufacturing plant located at Trident, Mont., which plant is owned and operated by the Ideal Cement Co. It became a member of the Institute in June 1933.

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(3*q*) Respondent, Trinity Portland Cement Co. (hereinafter frequently referred to as "Trinity"), is a corporation, organized and existing under the laws of the State of West Virginia, with its principal place of business in Chicago, Ill. It is a producer of cement and its manufacturing plants are located at Dallas, Fort Worth, and Houston, Tex. It became a member of the Institute in June 1933.

(3*r*) Respondent, Union Portland Cement Co. (hereinafter frequently referred to as "Union"), is a corporation, organized and existing under the laws of the State of Utah, with its principal office in Denver, Colo. It markets the cement produced by a manufacturing plant located at Devils Slide, Utah, which plant is owned and operated by the Ideal Cement Co. It became a member of the Institute in June 1933.

(3*s*) Respondent, Universal Atlas Cement Co. (hereinafter frequently referred to as "Universal"), is a corporation, organized and existing under the laws of the State of Indiana, with its principal place of business in Chicago, Ill. It is a wholly owned subsidiary of the United States Steel Corporation and is a producer of cement, having manufacturing plants located at Buffington, Ind.; Universal and Northampton, Pa.; Duluth, Minn.; Leeds, Ala.; Hannibal, Mo.; Independence, Kans.; Waco, Tex.; and Hudson, N. Y. It was originally known as Universal Portland Cement Co., having changed to its present name about January 1930, shortly after it acquired the assets of the Atlas Portland Cement Co., which included all of the above-mentioned manufacturing plants except those at Buffington, Ind.; Universal, Pa.; and Duluth, Minn. It became a member of the Institute in June 1933.

(3*t*) Respondent, Valley Forge Cement Co. (hereinafter frequently referred to as "Valley Forge"), is a corporation, organized and existing under the laws of the State of Pennsylvania, with its principal place of business in Catasauqua, Pa. It is a producer of cement and its manufacturing plant is located in West Conshohocken, Pa. The entire output of this plant is marketed by the Allentown Portland Cement Co. for the account of the Valley Forge Cement Co., and all the officers and directors of Valley Forge Cement Co. are officers and directors of the Allentown Portland Cement Co. Under date of February 23, 1937, the Institute advised its members that it then represented all members of the cement industry in the United States, with certain exceptions which did not include Valley Forge Cement Co., and in a list of members compiled shortly thereafter Valley Forge is listed, followed parenthetically by Allentown. Through its sales agent, Allentown Portland Cement Co., which became a member of

the Institute in August 1929, Valley Forge was a party to the activities of the Institute.

(3u) Respondent, Volunteer Portland Cement Co. (hereinafter frequently referred to as "Vounteer"), is a corporation, organized and existing under the laws of the State of Delaware, with its principal place of business in Knoxville, Tenn. It is a producer of cement and its manufacturing plant is located at Caswell (near Knoxville), Tenn. It became a member of the Institute in December 1929, resigned in December 1930, and rejoined in June 1933.

(3v) Respondent, Vulcanite Portland Cement Co. (hereinafter frequently referred to as "Vulcanite"), is a corporation, organized and existing under the laws of the State of New Jersey, with its principal place of business in Philadelphia, Pa. Its manufacturing plant at Vulcanite, N. J., has not been operated since 1933. Subsequent to the closing of its plant, Vulcanite has marketed cement manufactured for it by respondent Hercules. It became a member of the Institute in August 1929, resigned in December 1930, and rejoined in June 1933.

(3w) Respondent, Wabash Portland Cement Co. (hereinafter frequently referred to as "Wabash"), is a corporation, organized and existing under the laws of the State of Indiana, with its principal place of business in Detroit, Mich. It is a producer of cement and its plants are located at Stroh, Ind., and Osborn, Ohio. It became a member of the Institute in January 1930, resigned in November 1930, and rejoined in June 1933.

(3x) Respondent, West Penn Cement Co. (hereinafter frequently referred to as "West Penn"), is a corporation, organized and existing under the laws of the State of Pennsylvania, with its principal place of business in Butler, Pa. It is a producer of cement and its manufacturing plant is located at West Winfield, Pa. It became a member of the Institute in August 1929.

(3y) Respondent, The Whitehall Cement Manufacturing Co. (hereinafter frequently referred to as "Whitehall"), is a corporation, organized and existing under the laws of the State of Pennsylvania, with its principal place of business in Philadelphia, Pa. It is a producer of cement and its manufacturing plant is located at Northampton, Pa. It became a member of the Institute in June 1933.

(3z) Respondent, Wolverine Portland Cement Co. (hereinafter frequently referred to as "Wolverine"), is a corporation, organized and existing under the laws of the State of Michigan, with its principal place of business in Coldwater, Mich. It is a producer of cement and its manufacturing plants are located at Quincy and Coldwater, Mich. It became a member of the Institute in June 1933.

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(4a) Respondent, Yosemite Portland Cement Corporation (hereinafter frequently referred to as "Yosemite"), is a corporation, organized and existing under the laws of the State of Delaware, with its principal place of business in Merced, Calif. It is a producer of cement, and its manufacturing plant is located at Merced, Calif. It became a member of the Institute in June 1933.

PAR. 2. The corporate respondents named in paragraph 1, except as otherwise specifically set forth therein, are engaged in the production, sale, and distribution of portland cement, and in the course thereof each competes with others of said respondents to the extent that competition has not been restrained, lessened, or destroyed as hereinafter set forth. Pursuant to sales made in the course and conduct of its said business, or sales made for it, each such corporate respondent regularly transports cement, or causes it to be transported, from the State in which such cement is produced to purchasers thereof at locations outside the State in which such cement is produced; except that Northwestern Portland makes no sales or shipments outside the State of Washington; Superior Portland, with few exceptions, makes sales and shipments outside the State of Washington only to Alaska, and Florida makes few, if any, sales and shipments outside the State of Florida except to destinations outside the continental United States. In general, said corporate respondents have maintained, and now maintain, a constant course of trade and commerce in cement among and between the several States of the United States. The respondents named in sections (a) to (d), inclusive, of paragraph 1 are not individually engaged in the production, sale, or distribution of cement, but have participated in, aided, assisted, and cooperated with the other respondents in planning, doing, and performing the acts and practices hereinafter set forth.

PAR. 3. (a) Portland cement, technical definitions of which appear in the record, is made of finely ground limestone, shale, or slag, and other materials which are heated or "burned" until fused into "clinker," which is then ground into the fine powder usually referred to merely as "cement." The first mill for the commercial manufacture of cement in this country was established in Pennsylvania some 70 years ago. Prior to that time the cement used in this country was imported from abroad. The raw materials and fuel necessary for the production of cement are available in many parts of the United States and its manufacture has gradually spread until there are now cement-producing plants in many States, including Alabama, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota,

Missouri, Montana, Nebraska, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. There are approximately 80 manufacturers of cement in the United States and the total number of mills operated by them is about 150. Cement is a heavy and bulky commodity and the cost of transporting it from point of manufacture to point of use generally constitutes a substantial part of the delivered cost. Freight charges of 30 cents to 60 cents per barrel for delivery are quite usual, charges approximating \$1 per barrel are not uncommon, and in extreme instances the delivery charges sometimes reach amounts such as \$1.33, \$1.52, and \$1.71 per barrel (Com. Exs. 2711-188; 2722-18; and 2671-27). The high transportation cost constitutes one of the factors which have contributed to the extension of the manufacture of cement throughout the United States.

(b) Cement is used in street and highway construction, in water power, irrigation, and flood-control works, in most heavy construction work, in general building, in various public projects, in the production of blocks, pipes, and other products, and in many other ways. In some of these uses cement constitutes a very substantial part of the total cost of all materials used in the project. The aggregate consumption of cement is large, and the total quantity used and the value thereof make it a commodity of material importance in the national economy. Shipments from domestic cement plants during each of the 10 years from 1928 to 1937, inclusive, expressed in terms of barrels to the nearest million were:

Year:	Barrels
1928	176,000,000
1929	170,000,000
1930	159,000,000
1931	127,000,000
1932	81,000,000
1933	64,000,000
1934	75,000,000
1935	75,000,000
1936	113,000,000
1937	114,000,000

(Resp. Exs. 3772-3781.)

(c) Manufacturers customarily market cement by sales to dealers for resale, to processors who sell ready-mixed cement, to manufacturers of cement products such as blocks and pipes, to contractors who use it in construction, to railroads and other large commercial users, and to governmental agencies. In periods of normal business, sales to dealers constitute the most important channel of distribution in terms

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of volume, but in the years 1930 to 1937 public construction, undertaken in part at least as a relief measure to alleviate the effects of the economic depression, was on so large a scale as to make governmental purchases an unusually important outlet for cement during those years.

(d) The quantity unit in the cement industry is a barrel of 376 pounds net weight. Cement is usually packaged in paper or cloth bags containing 94 pounds each, and when thus packaged four bags constitute a barrel of cement, the gross weight of which is 380 pounds.

PAR. 4. (a) Five of the some 80 companies producing cement—Alpha, Lehigh, Lone Star, Penn-Dixie, and Universal—operate 49 out of the approximate total of 150 manufacturing plants. The productive capacity of these 5 respondents exceeds one-third of the total capacity of the industry, and their manufacturing plants are so located as to enable one or more of these respondents effectively to reach all parts of the United States except the West coast in the sale of cement. These respondents and 5 others control more than one-half of the productive capacity of the industry. These 10 and 16 other respondents account for approximately three-fourths of the total capacity of the industry.

(b) There are substantial interrelationships among a number of the corporate respondents. The Cowham Engineering Co. holds stock in, manages, and directs the properties and sales of Florida, Trinity, Signal Mountain, and Consolidated. Great Lakes is controlled by Lehigh and its output marketed by that company. The president of Hermitage is also president of Cumberland. Monolith Portland owns a controlling interest in Monolith Midwest. The president of Medusa was for many years an officer of Petoskey. He resigned as president of Petoskey in 1937 but has continued since that time as a director of that company. All the officers and directors of Valley Forge are officers and directors of the Allentown Portland Cement Co. Bessemer Securities Co. controls Federal and has stock holdings in Bessemer and Peerless. After closing its manufacturing plant in 1932, Castalia secured its supplies of cement from Medusa. Superior Portland leases and operates the Seattle plant of the Pacific Coast Cement Co. After closing its manufacturing plant in 1933, Vulcanite secured its supplies of cement from Hercules. Oklahoma, Three Forks, Union, Nebraska, Colorado, and Arkansas are controlled by the Boettcher interests through the Ideal Cement Co.

(c) The concentration of a large proportion of the industry in the control of relatively few individuals, directly and through the existing relationships among numerous companies, has aided in creating and maintaining unity of purpose among respondents. These fac-

tors also afford a basis for leadership in the industry, as well as the economic power to enforce that leadership. At the time this proceeding was commenced, practically all producers of cement were members of the Institute and the industry thus had an effective vehicle for the formulation, expression, and execution of collective plans and purposes.

PAR. 5. There have been numerous trade organizations and associations in the cement industry over a long period of years. The Association of American Portland Cement Manufacturers was organized in 1902 and grew in size and strength until its membership included substantially all domestic cement manufacturers. In 1916 its name was changed to Portland Cement Association, and it has continued under that name to the present time. Between 1907 and 1911 several members of the Association of American Portland Cement Manufacturers were also members of the Association of Licensed Cement Manufacturers. The Cement Manufacturers Protective Association was organized in 1916 and remained active until shortly before the decision of the Supreme Court in 1924 in the suit brought by the United States against that association and its members (268 U. S. 588). In 1929 The Cement Institute was organized and has continued to the present time. During a period of about 18 months beginning in November 1933, when partial self-government for the cement industry was authorized under the terms of the National Industrial Recovery Act, the Institute was the repository of the authority delegated and through its control of the Code Authority controlled the administration of the Code for the Cement Industry, subject to such limitations as were imposed by the National Recovery Administration. At various times during the life of the organizations named above there were also in existence in the industry other groups or associations of cement producers of a more strictly local or regional nature, such as the Kansas City Cement Bureau. Some of the respondents in this proceeding have been members of and participated in the activities of one or more of each of the groups named above in addition to their activities in the Institute.

PAR. 6. (a) The records of cooperative activity among cement producers which are available in this proceeding, beginning with the Association of American Portland Cement Manufacturers in 1902 and continuing to the present time, show that the cement industry has evidenced a strong aversion to free competition and that its members have, by understandings and agreements, developed and maintained substantial uniformity of action among themselves with respect to practically every marketing procedure which involves price

or other competition. A remarkable continuity of action is also demonstrated. Some of the current practices of the industry, designated by respondents as "customs of the trade," originated in agreements entered into as long as 20 to 30 years ago and have persisted, with the support of collective action, in substantially their original form. Other practices having similar origin have been modified or extended by collective action, as circumstances required, into their current form. Some of the respondents have been parties to substantially all of these activities; other respondents have participated in a lesser degree, or fully or partially for shorter periods of time; other respondents have been mere followers, adopting and supporting the practices of their more active associates; and a few respondents have from time to time, for various reasons, participated only reluctantly in some of the practices, and have occasionally opposed for a time particular instances of group action.

(b) These long-pursued restraints of competition have contributed to, if not created, the belief now generally held by respondents that free and open competition is impracticable for the cement industry and have fostered among the respondents a philosophy of seeking not to excel others in quality or price or in affording terms of sale that would be more attractive to purchasers. Instances where expression has been given to this desire not to excel but merely to maintain equality—to keep step—follow. On May 17, 1934, John Treanor, then president of Riverside and a trustee of the Institute, in writing to a fellow trustee, stated in part:

The truth is of course—and there can be no serious, respectable discussion of our case unless this is acknowledged—that ours is an industry above all others that cannot stand free competition, that must systematically restrain competition or be ruined. * * * (Com. Ex. 7-B).

In a letter of March 5, 1934, to the editor of the Wall Street Journal, Mr. Treanor stated:

Now it is to the credit of the men responsible for the capital invested in the cement business that, in the face of this peculiar menace, they have been as successful as they have been in avoiding the extreme evils of such a system; that, foreseeing the dismal end-product of unrestrained competition, they have, by forbearance and skill, consciously obtained equilibrium at something above the level of ruin, even sometimes within the zone of profit (Com. Ex. 553-3E).

In response to a question as to whether he thought it futile for competitors to try to increase their percentage of the total business available to the whole group, Benjamin F. Affleck, formerly president of Universal, testified in part:

I don't think my opinion as to whether it was futile or not is important. It just is futile. * * * So I should qualify that by saying it wasn't entirely futile. They could get by with a certain increase in percentage for a certain time but they soon ran out (T. 34933).

He also testified:

Q. You don't mean to say, though, that you have no purposes of your own to serve in the making of identical delivered prices on the basing point system?

A. Oh, no, I wouldn't deny that at all. On the contrary, I would say that I was committing suicide if I didn't do that, * * * (T. 34947).

In testifying before the Interstate Commerce Committee of the Senate in 1936 concerning a bid to the Government on a large quantity of cement which was identical to a tenth of a cent with the bids of his competitors, the same witness said in part:

And, as I stated before, this would have been a very attractive order for any one of the four bidders, but we did not care to break the market, and probably the others did not. We have to live with this market a long time, and jobs such as this Beverly job will not be with us year after year. (Com. Ex. 2878-I).

and also:

The CHAIRMAN. On this extremely large order of 365,000 barrels, the largest order that any of these people probably had for many years, how did they know but that you were going to make a lower price?

Mr. AFFLECK. They did not know, but they thought we would have sense enough not to break down the market (Com. Ex. 2878-J).

George H. Reiter, testifying as sales manager of Universal, was asked whether or not he ever bid under the destination price of a competitor calculated upon mill base plus applicable freight rate, and replied:

Well, to the best of my knowledge, no (T. 4039).

F. M. Coogan, president of Alpha, testified:

Q. You say you quote delivered prices because it enables you to meet competition. Aren't you interested in beating competition, or just meeting it?

A. I am interested in meeting the lowest price which I find in any given market.

Q. You are not interested in beating the lowest price that any competitor offers?

A. No, sir; I am not (T. 24340).

A pamphlet, issued by Lone Star entitled "Trade Ethics and Marketing Policies," in explaining cement prices, stated in part:

In the second instance, as we cannot get more than our competitor's price, we quote a price which *we expect will be identical* with that asked by the competitor whose lower freight rate gives his product the advantage at that point. * * * It is equally simple to anticipate the competitor's price at any definite point, just as it is for any competitor to anticipate ours. This usually results in

identical quotations being submitted by several manufacturers at a given time and place (Com. Ex. 1112, pp. 23, 25).

H. C. Koch, vice president of Lone Star, admitted that he testified as a witness in a suit against his company under the Texas antitrust laws:

Q. What is your definition of competition on a price basis?

A. I always construed the word "competition" as matching prices, or in placing yourself in a position to solicit an order on a standardized product on an equality with the other man (T. 33161).

In a letter dated August 20, 1935, Blaine S. Smith, president of Penn-Dixie, in discussing the uniformity of prices for cement, stated in part:

It is quite true that any deviation from the uniform price structure works in cumulative fashion and cannot be limited to a few isolated cases without doing serious harm (Com. Ex. 971-21A).

L. J. Capen, vice president of Dewey, testified in part:

Q. In other words, you want your delivered prices to be the same as those of your competitors?

A. We want to meet competition.

Q. And you mean, by meeting competition, having the prices at given destinations the same as your competitors?

A. Yes, sir (T. 12678).

L. T. Sunderland, president of Ash Grove, testified in part:

Q. Does it mean that you endeavor to make your delivered prices the same as your competitors?

A. We endeavor to meet.

Q. And by meeting them you mean making them the same?

A. Well, we wouldn't want to discredit our product or be charged with being a chiseler by quoting a lower price (T. 13694).

Under date of December 30, 1935, in replying to a protest by the Department of Highways of the State of Nevada against identical bids, Santa Cruz stated in part:

The prices which we quoted are our regular established prices under the classification of State Highway Departments. It is expected that prices would be uniform, otherwise the company quoting the lowest price would receive all the business and the other companies would be left without any (Com. Ex. 1212-B).

In writing to the Louisville Cement Co. under date of July 5, 1919, protesting price irregularities by that company, Kosmos stated in part:

You also recognize an obligation of what I might call sportsmanship to compete with the companies on their own level (Com. Ex. 3211-A).

(c) Within the period since the organization of the Institute there have been, of course, instances where cement manufacturers have made

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concessions in price or terms of sale; from time to time numerous concessions have been made in particular areas; and in the depth of the economic depression in the early 1930's concessions were widespread. These concessions, however, are exceptions to the general practice and policy, which is and has been to maintain continued and regular uniformity in prices and terms and conditions of sale by all manufacturers offering cement at any given location. In conformity with the philosophy of "competition" indicated in this paragraph, cement is customarily sold by respondents upon the basis of service; entertainment to the buyer, and personal relationships, without substantial competition in quality, price, or terms and conditions of sale. Respondent, George H. Reiter, testifying before the Interstate Commerce Committee of the Senate in 1936, said:

The CHAIRMAN. One of your advertisements states [reading]:

Under the old system there were only as many competitive points as there were mills. Now, every village, town, and city is a point of competition.

No village, town, or city has competition in price or quality at the present time, has it?

Mr. REITER. Of course, what that advertisement is trying to do is to defend the destination price.

The CHAIRMAN. Yes; but, as a matter of fact, no town or city has competition as to prices or as to quality of cement, has it?

Mr. REITER. Generally, that is true (Com. Ex. 2878-T).

PAR. 7. (a) Substantially all sales of cement by the corporate respondents are made on the basis of a delivered price; that is, at a price determined by the location at which actual delivery of the cement is made to the purchaser. In determining the delivered price which will be charged for cement at any given location, respondents use a multiple basing-point system. The formula used to make this system operative is that the delivered price at any location shall be the lowest combination of base price plus all-rail freight. Thus, if mill A has a base price of \$1.50 per barrel, its delivered price at each location where it sells cement will be \$1.50 per barrel plus the all-rail freight from its mill to the point of delivery, except that when a sale is made for delivery at a location at which the combination of the base price plus all-rail freight from another mill is a lower figure, mill A uses this lower combination so that its delivered price at such location will be the same as the delivered price of the other mill. At all locations where the base price of mill A plus freight is the lowest combination, mill A recovers \$1.50 net at the mill, and at locations where the combination of base price plus freight of another mill is lower, mill A shrinks its mill net sufficiently to equal that price. Under these conditions it is obvious that the highest mill net which can be recovered by mill A is \$1.50 per barrel, and on sales where it has been necessary

to shrink its mill net in order to match the delivered price of another mill, its net recovery at the mill is less than \$1.50.

(b) Approximately half of the mills operated by the corporate respondents have base prices and are known as base mills. The other mills which have no base prices are known as nonbase mills. The number and identity of base and nonbase mills change from time to time. A base mill may, for reasons its management considers sufficient, become a nonbase mill, and, similarly, a nonbase mill may become a base mill.

(c) Having no base price, a nonbase mill quotes and sells cement at delivered prices determined by the lowest combination of base price plus freight from base mills. The mill net of a nonbase mill is therefore highest in its home location and is less at all other locations by the amount of the freight from its mill to the point of delivery to the purchaser.

(d) In addition to basing points at mill locations, there are a limited number of basing points used for pricing purposes at locations where no cement is produced. There are also basing points common to a number of different mills; that is, several mills may be located in an area from which the freight rates to other locations are the same regardless of where within the given area a mill is located.

(e) Respondents have maintained certain arbitrary variations with respect to basing points. A base may be a dual one; that is, have two prices in effect simultaneously, each applicable in different territory. For example, the Ironton base price south of the Virginia-North Carolina line was higher than its base price north of that line. The application of a base price may also be limited to certain territory and the territory thus excluded be controlled by other bases. The limitation of the Wyandotte base to Michigan territory is an example of this type. In the case of certain adjoining bases a consistent price relationship may be maintained between such bases over periods of years. For example, the Alsen (Hudson Valley) base was for years maintained at 10 cents above the Lehigh Valley base.

(f) Various respondents have described their multiple basing-point system in differing language but without difference in substance. Illustrative of these descriptions, Walter S. Wing, vice president and general manager of Penn-Dixie, testified.

Q. Will you explain, Mr. Wing, what it is that determines which base price shall be applicable at a given destination?

A. The one that makes, with the freight rate, the lowest destination cost (T. 8136).

A. T. Wood, general manager of Green Bag of West Virginia, testified:

Q. In other words, your method of making up delivered prices is to take the base point that you find prevailing and add the freight in the freight rate book?

A. Meeting prices; right (T. 29887).

F. M. Coogan, president of Alpha, testified:

Q. Mr. Coogan, today how do you determine the delivered prices which you quote?

A. We determine our delivered prices by the use of certain mill base prices plus the freight rates to the particular destination using the lowest combination of mill base and freight rates which we arrive at, at that particular destination.

Q. Does your particular company use basing points in calculating your delivered prices, if so, will you tell us to what extent?

A. We do. We use basing points. We use them almost entirely, in fact, almost entirely. There are some few exceptions where you might have, as has been the case, in the past years, where, in order to meet foreign competition there have been, what I call, "arbitrary prices" in certain sections. You will find that once in a while, in order to meet a local competition, or local competitive situation, there are some prices which are not based on some of the mill basis plus freight rates, but, generally speaking, all of our destination prices today are made up on the bases of mill basis plus freight rates to destination (T. 23050).

Charles L. Hogan, president of Lone Star, in testifying before the Interstate Commerce Committee of the Senate in 1936, said:

The CHAIRMAN. All the members of the Cement Institute use the basing-point system, do they?

Mr. HOGAN. Yes.

The CHAIRMAN. They all use the basing-point system?

Mr. HOGAN. So far as I know. You do not mean that they all have basing prices? They do not have.

The CHAIRMAN. How is that?

Mr. HOGAN. They do not all have basing prices (Com. Ex. 2878-M).

Respondent George H. Reiter testified:

A. The Government destination cost would be the lowest sum of any price base plus the applicable lowest rate available to the Government, whether land grant, special or commercial.

Q. And I wanted to extend that into the commercial purchases, and have you state to what extent the same principles applied there.

A. Ordinarily the destination price — let me say the commercial destination price — is the lowest sum of any base price plus the applicable commercial freight rate (T. 3749).

(g) The following is a hypothetical illustration of the system of pricing described: Assume that the base price of mill A, located at town A, is \$1.50 per barrel; that the base price of mill C, located at town G, is the same; that mill B, located at town D, is a nonbase mill; and that the all-rail freight rates are as indicated. Then the delivered prices of cement in the several towns and the mill nets of the several mills would be as shown below:

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	Town A	Town B	Town C	Town D	Town E	Town F	Town G
Freight from mill A-----	0	\$0. 10	\$0. 20	\$0. 30	\$0. 40	\$0. 50	\$0. 60
Freight from mill B-----	\$0. 30	. 20	. 10	0	. 10	. 20	. 30
Freight from mill C-----	. 60	. 50	. 40	. 30	. 20	. 10	0
Delivered price of mill A-----	1. 50	1. 60	1. 70	1. 80	1. 70	1. 60	1. 50
Delivered price of mill B-----	1. 50	1. 60	1. 70	1. 80	1. 70	1. 60	1. 50
Delivered price of mill C-----	1. 50	1. 60	1. 70	1. 80	1. 70	1. 60	1. 50
Mill net of mill A-----	1. 50	1. 50	1. 50	1. 50	1. 30	1. 10	. 90
Mill net of mill B-----	1. 20	1. 40	1. 60	1. 80	1. 60	1. 40	1. 20
Mill net of mill C-----	. 90	1. 10	1. 30	1. 50	1. 50	1. 50	1. 50

(h) Excluding errors made in the application of this pricing formula, it is plain that it will inevitably result in identical delivered prices for cement at any given location by all sellers using it. It is equally plain that this formula, once put into operation, is self-perpetuating in the sense that renewed understandings or agreements are not needed to maintain identical delivered prices over an indefinite period of time. This formula was not evolved and put into operation at one stroke. It came into existence and its territorial application was extended from time to time as a result of understandings and agreements among cement manufacturers. Prior to the organization of the Association of American Portland Cement Manufacturers in 1902, cement was sold f. o. b. mill. In testifying before the Interstate Commerce Committee of the Senate in 1936, B. F. Affleck, president of Universal, said:

In 1901 the Atlas Portland Cement Co., which had built and was operating one of the first plants built in the Lehigh Valley, began to build a large plant at Hannibal, Mo., on the Mississippi River, 100 miles north of St. Louis. The purpose was to better serve the Western territory and to make more profit.

The company then announced it would name all prices delivered instead of f. o. b. mill, and for a time these prices were based on Lehigh Valley base plus freight, the difference between freight from Lehigh Valley and from Hannibal going to increase profits of the Hannibal plant, the customers paying no more than before but getting better service (Com. Ex. 2878-K).

F. M. Coogan, president of Alpha, testified that after 1902 his company, which had formerly sold cement f. o. b. mill, began selling on a delivered-price basis but for a few years continued making a limited number of sales f. o. b. mill. At about this period the domestic cement manufacturing industry was spreading rapidly from its birthplace in the Lehigh Valley. The increasing number of mills at new locations frequently resulted in purchasers buying f. o. b. mill from the nearest mill rather than from a more distant mill. The existence of delivered-price selling and f. o. b. mill selling side by side had an unsettling effect upon prices.

(i) Some of the background of the concert of action among cement manufacturers with respect to prices during this period of time, and out of which the multiple basing-point delivered-price system evolved, is indicated in the following extracts from the minutes of various meetings of the Association of American Portland Cement Manufacturers. Numbers of the respondents in this proceeding were members of that association, and representatives of some of them were present at each of the meetings from the minutes of which extracts are quoted. At a meeting of the association in December 1904, it was announced that the membership of the association then represented approximately 90 percent of the productive capacity in the United States. The minutes of this meeting show the following statement by one of the members:

The main grievance which the Association has here today is the grievance for a uniform price for cement. I feel that I can safely state that two-thirds of those present today are ready to adopt any proceedings that will advance and keep the price of cement where it should be, and if there is any member here who has the ability to present to the Executive Committee something that will accomplish this, I assure them that the Executive Committee will do all in their power to put it in force. Now it is in your hands—not in the hands of the Executive Committee—and I agree with you, and will sustain in any motion that will advance the price of Portland cement for the year (Com. Ex. 3235-U).

At this meeting a representative of Nazareth stated:

Now, if we are going to accomplish anything in the matter of prices, I believe the right place to do it is here. If we are men enough to get together, and if we can trust each other here in this room, we can have our Executive Committee appoint a few among themselves to get together and feel the market, and say what the market price should be; what they estimate the price should be, and then send out circulars to the different members of this Association on that line (Com. Ex. 3235-V).

A representative of Coplay then said:

While we are on this subject today we ought to do something practical; according to our By-Laws, we are here for mutual benefit and not for mutual admiration, and I think we can pass a resolution that will be a basis to steady the market for next year. I do not think it is fair that dealers and consumers are enabled to speculate with our goods. It is not fair to our stockholders to have this condition of things. If there is any speculating to be done with our goods, our stockholders should have this privilege—not dealers. I am sure that if we pass a resolution here, fixing the price say to April first deliveries, then increase price for deliveries after that time, and agree right here to do this, that we can carry this through. This is the time and place that this should be done. (Com. Ex. 3235-V).

After discussion, the following resolution was adopted:

Resolved, That the members of this Association in answering inquiries for prices, confine deliveries up to April 1st, 1905, and quote a higher price for de-

liveries after that date, and that it is the sense of this meeting that the price should not be less than \$1.00 per barrel at the mill for the Lehigh District (Com. Ex. 3235-W).

At an association meeting in Philadelphia in April 1905, a representative of Lehigh made the statement:

You take the Western situation; the remark was made last evening that, likely, Western prices would reach the Lehigh Valley level, and I think that probably that will be the case east of the Mississippi. Our Michigan friends are interested in that proposition, because the West cannot produce sufficient cement for the business that will come up this year in the West. That will tend to bring on shipments from the Lehigh Valley, and will bring the prices out in the Middle West (east of the Mississippi) up to the Lehigh Valley level. I think it would be very interesting to hear from some of our Michigan members. In view of the fact that none of us have a very large stock of cement on hand, it does seem to me that we have good reason to congratulate ourselves on the satisfactory condition of the cement business today (Com. Ex. 3235-X).

This was followed by a statement by a member from Michigan, who concluded:

We are trying to follow our Eastern friends in the Lehigh Valley, and we will be very well satisfied if they keep up their "nerve" (Com. Ex. 3235-Y).

Another member from Michigan stated:

We have lately issued a schedule of prices on a basis of 85 cents in the Lehigh Valley, adding freight, and this price we can get without any trouble. This is all very encouraging (Com. Ex. 3235-Y).

At the same meeting one of the members, Mr. Miller, said in part:

It strikes me that you should appoint a special committee to take charge of the matter of prices and business methods and to report at the next meeting of the Association. Let the committee take the Lehigh Valley for the ground to work upon; no doubt they represent the largest amount of cement manufactured. It seems to me that it would be well if you would appoint a committee, with the majority coming from the Lehigh Valley, to take this matter in hand, formulate some plan, and get together and have a report for the next meeting at Atlantic City, establishing a uniform method (Com. Ex. 3235-Z1).

Thereafter, the proposal for the appointment of such a committee was carried by unanimous vote and Mr. Miller was named as chairman thereof. It appears from the minutes of a meeting of the association in September 1905 that:

The president: Mr. Miller made his report to the Atlantic City meeting, which report was adopted at that meeting. That report is now here, together with a list of the members who have signed the same, together with those who have refused to sign. Forty-six members have signed the report, and three, the Atlas, Pacific and Standard Portland Cement Companies, have refused, the latter two being California companies and the other an Eastern company (Com. Ex. 3235-Z3).

The record does not contain the terms of the agreement signed as indicated in the above quotation. The minutes of a meeting in September 1906 show a report was made by Mr. Miller, as chairman of the committee on trade conditions, which stated in part:

Having passed through both the demoralizing and unbusinesslike methods of one year ago, and now experiencing and enjoying the very opposite, viz, a very healthy condition of our trade, there should be no question which method should govern the management of our business in the future. It may be well, however, at this time to caution the members of our Association not to permit the present favorable conditions to lead them into a false position by adopting more stringent and uncalled-for methods, or unreasonably high prices, and thereby create the false impression that a Trust has secured control of our common industry (Com. Ex. 3235-Z11).

The minutes of a meeting of the association in September 1908 show a letter to the president of the association from Mr. Miller, chairman of the committee on trade conditions, expressing regret that he was unable to be present and stating in part:

I think it fair to assume that the consensus of opinion of the Association is that the lack of unity and cooperation on the part of all the manufacturers in their respective territories is the only lucid explanation of the unwarranted and unfortunate condition which our business has drifted into (Com. Ex. 3235-Z35).

He then proceeded to make a number of recommendations, including the following:

All prices quoted for Portland Cement shall be the prices for delivery at the point required by the purchaser (Com. Ex. 3235-Z36).

(j) In 1900 two employees of the Atlas Portland Cement Co., Messrs. Hurry and Seaman, secured a patent on a method of burning powdered coal in rotary cement kilns. In 1903 the Atlas Portland Cement Co. brought suit for infringement of this patent and final argument was had in July 1906. Before a decision was handed down, a settlement was effected and in November 1906 a new corporation known as the North American Portland Cement Co. was created, the capital stock of which was owned by Atlas Portland Cement Co., Lehigh, Alpha, American Cement Co., Vulcanite, and Lawrence. The new company was granted an exclusive license, with power to sublicense the use of the Hurry and Seaman patent. In December 1907 the Association of Licensed Cement Manufacturers was formed and, pursuant to the terms of an agreement, various companies were licensed under the patent. A supplemental license agreement was entered into on January 13, 1909, to which Atlas Portland Cement Co., Lehigh, Alpha, American Cement Co., Vulcanite, Lawrence, Pennsylvania Cement Co., Penn-Allen Portland Cement Co., Nazareth, Catskill Cement Co., Bath Portland Cement Co., Glens Falls,

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Phoenix Cement Co., Edison, Whitehall, and Northampton Portland Cement companies were parties. The agreement provided that other Portland cement companies which might thereafter be licensed under the patents might also become parties to it. By this agreement the licensees were made subject to compliance with numerous conditions, including:

All prices quoted for Portland cement covered by the (* * *) License Agreement of which this schedule is part made by any of the parties to said License Agreement shall be prices for delivery at the point required by the purchaser. * * * (Com. Ex. 3196-2R).

and, further:

Until the Licensor shall give notice of establishment of delivery points and sections and minimum prices therein, prices in Territory A shall be as follows:

All prices given below are the minimum prices to consumers and subject to the discounts permitted to dealers and distributors by Paragraph (2) of this Schedule and no other discount.

All prices shall be quoted and made delivered.

Delivered prices for wood and cotton shall be the same and for paper 25 cents less, computing the freight at a weight of 400 lbs. for all packages.

Prices in Territory A shall be not less than \$1.20 in wood and cotton and 95 cents in paper plus the Northampton all-rail rate with the following exceptions: * * * (Com. Ex. 3196-2Y).

After a decision in 1910 adverse to the validity of the Hurry and Seaman patents, the licensing agreement was canceled on January 1, 1911.

(k) The extension of the price system under discussion to the Michigan area is indicated in the minutes of a meeting of the Association of American Portland Cement Manufacturers in June 1910 at which representatives of a number of the respondents herein were present. A member representing Wabash stated:

The situation in Michigan is very satisfactory and growing more so. There was a chaotic state there early in the year. There was no unity of action at all among the mills until they formed a little association which comprises all the Michigan mills and one or two across the border. This has resulted in a free interchange of views and an understanding to the effect that the Lehigh prices should govern the prices out here. This understanding has been observed. The price today, based upon the Lehigh price of 80 cents, makes Detroit a price of \$1.25 delivered (Com. Ex. 3235-Z59).

(l) The extension of the basing-point system of pricing into the West, as well as the fact that this extension was not the result of independent action, is shown in a letter of January 25, 1915, from the general sales manager of Colorado to Three Forks, an affiliated company, in which it was stated in part:

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From this date, our prices will be made f. o. b. point of delivery and the price including cost of sacks. The same to be due 30 days from date of invoice, and an allowance of 2¢ per bbl. will be made for cash received within ten days from date of invoice.

PRICE TO APPLY UNTIL FURTHER NOTICE

Use Irvin, Wash., as your basing point, and figure \$1.50 per bbl., including cost of cloth sacks, f. o. b. that point. Add to this the amount of freight from Irvin to point of destination at rates shown in list sent you by our Chicago friends, which you have no doubt received prior to this date. * * * No deviation or exception to the above price will be considered in any instance, and any salesman, or employee, deviating one iota, will be discharged at once. No excuse will be tolerated, and if we do not have salesmen at this time who can secure the business for us on the basis of prices given them, we will have to get salesmen who can. We will give every salesman, and every employee, every assistance possible and complete information, so that they may be thoroughly posted, and we will see that our prices are as low as our legitimate competitors are naming, but no lower if we know it, and on this basis we expect them to secure for us practically all of the business in our territory.

I will write you under personal cover, an explanation of the above sometime, in detail, so that you may know exactly why we are so positive in our statements, but can assure you, that every one of them are ironclad. In this you may know, I will refer to my recent visit to Chicago (Com. Ex. 3210-A, B, C).

This was followed by letter of January 28, 1915, between the same parties, in which it was stated in part:

I have wired you the basis for quoting all of your territory, which is as follows:

\$1.50 per bbl. f. o. b. Irvin.

\$1.30 per bbl. f. o. b. LaSalle.

\$1.50 per bbl. f. o. b. Mason City.

\$1.10 per bbl. f. o. b. Iola.

Whichever figures lowest.

* * * * *

You have no doubt received lists of rates from Irvin, and I am preparing rates from all other basing points, which I hope to have entirely completed within the next few days. However, you, no doubt, have the correct rates in your office at this time. We want no business on any other terms, or prices, than the above, but want you and your salesmen to keep us thoroughly posted in every instance where you have any idea of any deviation from the above by our competitors. You need have no fear, whatever, of the Lehigh people taking any business except on this basis, as their Chicago office is now in complete charge of their Spokane factory, and will be responsible for every action of every one of their employees, and you may rest assured, that Mr. Brown, as well as all the others, understands this perfectly. Mr. Gowan gave me his personal guarantee of this, and I in turn gave him my guarantee of our strict adherence to this. Of course, nothing has been said to the International people regarding this, as in the first place, I have had no opportunity, and, in the second place, our Chicago friends seem very certain, that the International people would not quote lower than that basis, as they claimed, that the cost at Irvin is fully if not more than \$1.10.

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What do you think of the advisability of seeing Mr. Berry regarding this matter? Of course, we want to work with them and will do nothing, whatever, against them, but we must realize that the Lehigh plant is our strongest competitor, and we must work in harmony with them and keep absolutely in the clear, keeping our business open and above board in every particular. I have not heard definitely whether Mr. Berry will remain this year with the International Company, but I believe from what information I have, that he will. You remember he stated to me, as no doubt he stated to you, that he would not go lower than any basis upon which he knew the Lehigh plant to be selling, which I hope is true. While on this subject I want to call your attention to the fact of not letting any one know, that any understanding, whatsoever, has been agreed upon, and especially never mention this to any of your customers, but simply say to them, that we have reasons to believe, that no lower prices will be named than those we are quoting, because we know the basis to be practically cost of manufacture, at basing points, and no exceedingly large profit can be made by the plants operating at those basing points. Please caution your salesmen particularly in this regard (Com. Ex. 3209-A, B).

The mill at Irvin, Wash., referred to in the correspondence quoted was not the property of either Lehigh or Colorado; it belonged to International Portland Cement Co., Limited, the corporate predecessor of Spokane.

(m) The record does not definitely show the date and manner of the extension of the multiple basing-point delivered-price system to California, but it was in existence there at the time the War Industries Board fixed maximum prices for cement during the first World War. The central California mills used the Davenport mill of Santa Cruz as a basing point until about the middle of 1929, when all mills in that area became basing points. In southern California the basing-point system of pricing is modified by an elaborate system of zone prices applicable in certain areas. The system as used in California does not require separate calculations to determine the delivered price in each transaction. The limited number of points at which sales are made makes it possible for each respondent to publish, and each has published, complete price lists showing the delivered prices at substantially all delivery points.

(n) The multiple basing-point delivered-price system was extended to western Washington in 1931. Its introduction there followed a price war which commenced when two new mills began operating in that territory, one in 1928 and the other in 1929, and was approximately coincident with the leasing of one of these new mills by Superior Portland.

(o) When the Institute was organized in August 1929, the statement of purposes contained in the articles of association included these provision:

To adopt and promulgate a Code of Ethics for the government of the members.
To establish and maintain all such lawful trade customs and usages for the protection of the members as the Institute may deem advisable (Com. Ex. 138-C).

The multiple basing-point delivered-price system was one of the "customs and usages" to be maintained. The Code of Ethics adopted by the Institute, which remained in effect until the beginning of the NRA Code period, included the following:

For manufacturers to divert, or permit purchasers or users of cement to divert, carload shipments of cement, made to one destination, to other destinations in cases where the result of such diversion is to enable purchasers or users of cement to secure cement less than the manufacturer's market price at the point of final delivery, is discriminatory as between purchasers or users, and is therefore an unfair trade practice (Com. Ex. 138-S).

The diversions thus prohibited would not have been inconsistent with f. o. b. mill selling, but would tend to break down a multiple basing-point delivered-price system. This Code of Ethics also provided:

It is further declared, that it is desirable that a standard form of sales contract be drafted and adopted for the use of the Portland Cement industry (Com. Ex. 138-Q).

Pursuant to the last-quoted provision of the Code of Ethics, the Institute on July 14, 1930, submitted a report to its members, stating in part:

It represents a statement of the recommendations of the Institute as to the provisions which should be included in a proper contract for the sale of cement as declared in Article II of the Code of Ethics, quoted above (Com. Ex. 153-M).

Among the recommendations thus made was the following:

PRICE AND QUANTITY. A definite agreement to sell and to buy a specific number of barrels of portland cement at a definite price or prices F. O. B. a specific destination or destinations, subject to terms and conditions as outlined.
* * * (Com. Ex. 153-M).

(p) At the time the National Industrial Recovery Act was approved, the multiple basing-point system of delivered prices was in effect in the cement industry throughout the United States, except in certain limited zones or areas where special prices were in effect. Thus one of the so-called "customs and usages" which the Institute was organized to maintain had been effectively supported and maintained. When the cement industry sought approval of a "Code of Fair Competition under the NRA, the Institute was the vehicle for submitting a proposed code, and in doing so stated in part:

The Institute includes 96 percent in number and 98 percent of the producing capacity of all Portland Cement producers in the United States, and is authorized

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to represent the industry under the National Industrial Recovery Act, the policy and purposes of which are set out in Section 1, Title 1, thereof (Com. Ex. 556, p. 1).

One of the provisions of the suggested code as proposed by the Institute read as follows:

Except in cases where the Committee permits otherwise, all cement quotations and sales shall be F. O. B. point of delivery, and all cement shall be sold on such delivered basis; provided, however, that in making quotations and sales to the Federal Government, cement shall be sold F. O. B. plant, in the event land-grant rates may be availed of by the Federal Government in arriving at the delivered cost (Com. Ex. 556, p. 6).

While the proposed code was pending, Charles F. Conn, president of the Institute, on August 31, 1933, wrote to L. T. Sunderland, president of Ash Grove, and Joseph S. Young, president of Lehigh, saying that it was important that preparation should be made in advance to reply to criticisms and objections which might be offered, and continued:

We [Washington contact committee] therefore request that you gentlemen give consideration to the provisions in the Code and in the supplements thereto, relating to price control (including defense of the present level of prices) and the universal practice of quoting delivered prices only, so that you may be prepared to make a brief statement in support of any phase of this subject, if called upon to do so (Com. Ex. 836-2V).

There was objection within the National Recovery Administration to the pricing system in use in the cement industry and the Institute made special efforts to convince the Consumers Advisory Board of NRA that this system was not objectionable. When approved on November 27, 1933, the Code for the Cement Industry did not contain the provision concerning sales f. o. b. point of delivery which had been submitted by the Institute in its proposed code. However, Exhibit C, annexed to the Code as approved, is described as "Form of Future Specific Sales Contract" and reads in part:

If any of the cement shipped hereunder is reconsigned or diverted by Buyer from the place of delivery specified herein or used for any other purpose, Seller may cancel this contract and refuse to ship any more cement and Buyer agrees to pay Seller's market price at the place of final destination for such cement as has been diverted by Buyer from the place of delivery specified herein or has been used by Buyer for any other purpose than the purpose above specified (Com. Ex. 557).

The Code for the Cement Industry as amended and approved on May 11, 1935, contained the following:

To prevent diversions of cement prohibited by this Code and to insure the broadest field of active competition for all cement business offered, cement

shall not be quoted or sold in quantities or for points of delivery which are not definitely specified (Com. Ex. 560, p. 20).

and

All future sales orders and future sales contracts for the sale of products of the Industry shall contain a definite statement of price, quantities, terms of payment, time and place of delivery, and all other terms of sale necessary to form a complete and unambiguous contract (Com. Ex. 560, p. 21).

The multiple basing-point delivered-price system was continued in full operation during the NRA Code period.

(q) For some seven months after the decision in the Schechter case (295 U. S. 495) the Institute, through its trade practice committee, composed of the same individuals who had previously constituted the Code Authority, attempted to administer some of the provisions of the NRA Code for the Cement Industry. The articles of association of the Institute, as amended December 11, 1935, contained in the statement of purposes of the Institute the following:

To adopt and promulgate a Code of Fair Competition for the government of the industry (Com. Ex. 561, p. 5).

The Institute issued a so-called "Compendium of Established Terms and Marketing Methods of the Portland Cement Industry as Approved by the Board of Trustees of the Cement Institute December 9, 1935," which compendium contained the following provision:

All specific sales orders and specific sales contracts for the sale of Industry Products contain definite statements of price, quantities, terms of payment, time and place of delivery, and all other terms of sale necessary to form a complete and unambiguous contract (Com. Ex. 561, p. 14).

and designated the following as an "unfair trade practice":

Diverting or permitting the diversion of shipments of Industry Products, the effect of which will be to enable a purchaser or user to secure Industry Products at variance with Member's published price terms for point of final destination (Com. Ex. 561, p. 16).

A standard form of sales contract recommended in the Compendium contains the following provision:

If any of the cement shipped hereunder is reconsigned or diverted by Buyer from the place of delivery specified herein or used for any other purpose, Seller may cancel this contract and refuse to ship any more cement and Buyer agrees to pay Seller's market price at the place of final destination for such cement as has been diverted by Buyer from the place of delivery specified herein * * * (Com. Ex. 561, p. 21).

and the recommended contract form also states:

All shipments made on this contract will be at the current destination price of Seller on the date of shipment, if this price is below the contract destination price mentioned herein (Com. Ex. 561, p. 21).

(r) The determination of respondents to maintain the multiple basing-point delivered-price system in the sale of cement and the degree of their resistance to selling f. o. b. mill are illustrated by certain occurrences with respect to the NRA Code for the Cement Industry. Ineffectual efforts to secure bids from cement manufacturers on an f. o. b. mill basis were made during the Code period by purchasing agencies of both State and Federal Governments. The failure of these efforts resulted in protests and objections by such agencies. On May 8, 1934, Barton W. Murray, Deputy Administrator of the National Recovery Administration, telegraphed B. H. Rader, chairman of the Code Authority for the Cement Industry:

I HAVE BEEN REQUESTED BY THE PRESIDENT OF THE UNITED STATES TO ENCOURAGE THE MANUFACTURERS OF CEMENT TO SUBMIT FOB MILL PRICES TO PROSPECTIVE PURCHASERS STOP I URGE THAT THIS QUESTION BE PLACED BEFORE THE CODE AUTHORITY FOR YOUR INDUSTRY AND A REPORT OF THEIR ACTION THEREON PARTICULARLY AS IT AFFECTS PURCHASES BY STATE AND FEDERAL AGENCIES BE MADE TO THIS ADMINISTRATION WITHIN THE NEXT TWO WEEKS (Com. Ex. 6-A).

On May 15, 1934, Mr. Rader replied, saying in part:

* * * WE EARNESTLY REQUEST YOUR COOPERATION TO PROCURE FOR A SMALL REPRESENTATION OF OUR INDUSTRY AN AUDIENCE TO PRESENT TO THE PRESIDENT OF THE UNITED STATES THE FACTS AS WE SEE THEM WHICH WE THINK JUSTIFY THE PRESENT METHOD OF SELLING AND QUOTING OUR PRODUCT * * * (Com. Ex. 6-B)

On May 17, 1934, John Treanor, president of Riverside, wrote Mr. Rader regarding this, saying in part:

I have been thinking about your telephone call, from which I get the impression that you sent a pretty unyielding telegram to Murray—as you say at least that you “did not intend to make any concession before the ‘trading’ starts.”

Now I would have conceded the mill price at once on Federal business and I would have indicated a very open-minded attitude toward the larger question; and this to create the impression, deliberately that something besides obstruction and short range trading can be had out of the cement industry. * * *

* * * * *

The f. o. b. mill price on Federal business is of no real importance, is entirely practical to grant, can and I think will be forced out of us—therefore *good* trading would have been to give it without any trading. Now, when it comes to the larger question of mill price on commercial business, much as I would like to think otherwise, I am convinced that we will have to maintain our basing point position and refuse the President's request. It will not be an easy refusal to defend upon economic grounds. It will be almost impossible to persuade an *unsympathetic* government that we are justified in our refusal. But the least we can do is to prepare the way by an initial showing of open mindedness, which might entitle our later arguments to sympathetic hearing (Com. Ex. 7-A, B).

On May 24, 1934, Mr. Treanor wrote A. E. Morgan, Chairman, Tennessee Valley Authority, in part:

* * * It is certain that the entire cement industry will not voluntarily adopt the f. o. b. mill system, for a very substantial part of it, having made its plant investment with reference to the basing point system, now has a vital interest in keeping that system in force * * * (Com. Ex. 347-C).

On June 4, 1934, Mr. Treanor telegraphed A. E. Morgan, informing him that the industry had requested an audience with the President to "inform him of the confusion which would result from any summary order to change marketing methods long established in the cement industry," and in referring to a suggestion by one of the President's secretaries that the industry have a hearing before Secretary Ickes and Admiral Peoples, said that the industry should not "be required to deal with another committee upon the same subject at the same time" (Com. Ex. 350-C, D). On June 5, 1934, Mr. Rader wrote to C. F. Conn, president of the Institute:

Enclosed is copy of letter from Mr. Murray referring to my letter of May 24th regarding the request from the President to quote f. o. b. mill prices.

Also enclose copy of letter from Mr. M. H. McIntyre to Mr. Murray and copy of Mr. Murray's letter to me.

After the receipt of these letters, Mr. Treanor was in Chicago and I asked him to take the matter up with Dr. Morgan, and I enclose copy of his telegram to Dr. Morgan.

I am now going to wait and see if this telegram produces results before following Mr. McIntyre's letter any further. I feel that we must not be carrying on two hearings on the same subject (Com. Ex. 839-4K).

On June 7, 1934, Dr. Morgan wrote Mr. Treanor, replying to his telegram and saying in part that he had talked with the President on June 5th and "told him that in case the basing point system should be abandoned, I thought it should be only on the development of some other policy which would avoid confusion and which could have general application" (Com. Ex. 350-E). The industry did not comply with the request of the President.

PAR. 8. (a) In order for the pricing formula of lowest combination of base price plus all-rail freight to produce identical prices by all respondents selling or offering to sell at any given delivery point, it is necessary that the freight factor used in the delivered price of each seller be the same. The ascertainment of freight rates involves the use of complicated freight tariffs, knowledge of routing, switching charges, car weights, and other factors. Independent determination of freight rates may readily, and frequently does, result in different individuals reaching varying results.

(b) Members of the industry began many years ago to disseminate freight rate information among themselves in order to avoid quoting

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different delivered prices as a result of having used different freight rate factors in determining those prices. The cooperative preparation and publication of special freight rate books for use by cement producers was commenced about 1914 by various regional associations which included in their memberships some of the present respondents. The Cement Manufacturers Protective Association, the Southeastern Portland Cement Association, the Kansas City Cement Bureau, and other organizations furnished freight rate information. That furnished by the Cement Manufacturers Protective Association until about 1922 was in much the same form as the rate information subsequently supplied by the Institute. When the Protective Association discontinued supplying freight rate information during the pendency of the suit brought against that association by the United States, many cement manufacturers thereafter obtained a similar service from the Nazareth Traffic Bureau. For a few years immediately preceding the organization of the Institute a number of respondents cooperatively compiled common freight rate factors, and others secured such rate factors from the National Traffic Bureau. On November 6, 1929, the traffic manager of the Cowham Engineering Company addressed a letter to the manager of one of the respondent companies under its direction and control explaining the reason for subscribing to the rate service furnished by the National Freight Rate Bureau, and stated in part:

As to the cost, we considered that it was quite reasonable for the reason that if we did not take the service we would have to compile our own rate books, involving additional clerical help and the cost of printing the rate books and supplements. This service cannot be compared with the old plan that was used in furnishing our company with rate books when the general revision of cement rates took effect on April 14, 1928. Due to the fact that it would have been impossible for each company to have compiled all rate books needed between the time that the tariffs were published by the railroad and the effective date, we entered into an arrangement with the other cement companies which provided that each company would compile one or more rate books and bill each company only for the cost of printing, it being thought that the cost of compiling or clerical help furnished by one company would practically offset this cost for all companies. This arrangement was only temporary and is to remain in effect only until such time as the National Freight Rate Bureau can finish compiling all rate books needed in the South (Com. Ex. 988-A).

(c) The Institute has maintained and operated two freight rate bureaus: one in Bethlehem, Pa., managed by the individual who previously operated the Nazareth Traffic Bureau; and one in Chicago, Ill. The Institute has published rate books for substantially every State east of the Rocky Mountains. These rate books show the railroad freight rates on cement from each of a number of points to all destina-

tions in a given State or States. The manner in which this work of the Institute was initiated and superseded previous rate services is indicated in a letter of April 17, 1930, from the traffic manager of Lone Star to various offices of that company, as follows:

The Cement Institute will establish rate bureaus which should function in the near future. It is contemplated that the bureau established at Bethlehem will handle Trunk Line, New England and Southeastern territory. The bureau at Chicago will handle C. F. A. territory, and the bureau at Kansas City Western Trunk Line territory. The bureau at Bethlehem will start immediately to re-issue Trunk Line, which will include Virginia and West Virginia and the New England books. The plan for the Southeast is that those books will be reissued by those that formerly handled those books; this territory will be taken over by the bureau at Bethlehem soon after they are reissued.

Detail instructions will be issued by Mr. Gubernator, Chairman of the Traffic Committee of the bureau, and roughly speaking, will call for a reissue of the Alabama book by the Lehigh at Birmingham; Florida by the Consolidated at Chicago; Georgia by the Alpha at Birmingham; Mississippi by the Lone Star at Birmingham; South Carolina by the National at Birmingham; North Carolina by the Lehigh, Allentown. Tennessee by the Penn-Dixie at Chattanooga. The Kentucky book will be worked out by the Alpha at Chicago in connection with the bureau at that point (Com. Ex. 2460).

(d) The rate books published by the Institute were intended, as were those previously secured from other sources, to provide common freight rate factors for pricing purposes, avoid differences in delivered price quotations resulting from errors in rate calculations or failure to keep abreast of rate changes, and thus enable the corporate respondents to quote identical delivered prices for cement at all destinations; and they were in fact used for that purpose. Illustrative of this are the following extracts from exhibits and testimony. On February 25, 1916, C. N. Apgar, traffic manager of Alpha, wrote the Security Cement & Lime Co. of Hagerstown, Md., as follows:

Replying to your favor of February 24th, would advise that it is the general understanding that the cement companies will use the books published by us. This is the book which we are using and which we will continue to use.

For your information, I might state that the Lehigh Company and ourselves watch the changes and exchange correction notices (Com. Ex. 3199).

In a letter of July 1, 1918, B. L. Swett, the eastern sales manager of Lehigh, wrote the Cement Manufacturers Protective Association:

Have you an extra West Virginia price book? If so, I will greatly appreciate if you can let me have it (Com. Ex. 3200).

The association official replied to Mr. Swett:

Responding to your letter of July 1st, File 65414-C, we are sending you under separate cover a copy of West Virginia Rate Book, which I take it is what you want.

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In your letter you request a price book, which is no doubt a typographical error, inasmuch as you are aware of the fact that this Association does not issue any books in any way connected with price matters (Com. Ex. 3200).

In a letter dated September 3, 1931, Charles L. Hogan, then vice president of Lone Star, advised a divisional manager of that company who had suggested discontinuing the Institute rate service, in part:

From this you will learn that we in this office feel that the freight service is well worth the money that the Institute charges, in that it has a distinct advantage over any individual company record, because it seminate freight rate information to practically all of the companies in a given territory, and thereby serves to prevent variations in quotations by the various companies, which might be due entirely to incorrect freight information (Com. Ex. 2461).

In explaining the recommendation he had made, the divisional manager stated in a letter dated September 10, 1931, that:

Our recommendation was based solely in an effort to economize, feeling that we were sufficiently up to date with our freight rate information; that we should be able with our present organization, to carry on this work in a reasonably satisfactory way, thus saving the company the cost of this service, which we estimated at \$595.00. However, since receiving your letter and Mr. Hogan's letter of the 3rd we have reached the decision that this service is worth all that it costs (Com. Ex. 2462).

On October 4, 1934, J. F. Neylan, then assistant general sales manager of Lone Star, in writing to the Dallas office of that company, stated in part:

You have no doubt received copy of a letter from G. H. Reiter, Manager Chicago Division of The Cement Institute, which was addressed to Members in District #9. This letter has to do with an assessment to cover the compiling and distribution of freight rates on cement from all points of origin to Texas destinations.

We know you appreciate the advisability of having freight rates compiled at one central point and issued to all members operating in any given district in order that everyone may be operating on the same rate. This is being followed in practically every other section of the country and we are of the opinion it should be continued in Texas (Com. Ex. 2417).

Under date of November 7, 1936, the manager of the Institute Rate Bureau in Bethlehem, Pa., wrote to Volunteer explaining the omission from Institute rate books of information on switching charges, stating in part:

As you probably understand, rate books show lowest rate available to any given destination, and are not intended for shipping purposes. And, under these circumstances, we do not carry destinations which are located within switching districts of stations to which rates are published or, as in the instant case, where it is possible to accomplish delivery at the Knoxville rates (Com. Ex. 1002-B; Resp. Ex. 2243-A).

In addition to the office use of the Institute freight rate books, they were frequently furnished by respondents to their salesmen for use in calculating and quoting prices. For example, the sales manager of Edison testified:

Q. Of what value are any of these freight rate services to you?

A. Well, they are only valuable in so far as they are—the books are convenient. The rates are shown in a form that we use them in our business, and they are convenient.

Q. And convenient for what, Mr. Sweeney?

A. For the salesmen who carry them for their particular territories—they can carry them a whole lot more conveniently than they could a long list of freight rates which we might prepare and furnish to them.

Q. You use them mostly for quotation purposes?

A. That is all (T. 35807).

The sales manager of Coplay testified:

Q. Where your salesmen do carry them, do they use them to calculate the delivered price at the different destinations?

A. Presumably they do, but it is understood that all quotations are to be confirmed at the office.

Q. You supply them with the freight rate books so that they may use them for that purpose?

A. Yes, sir (T. 6777).

In writing one of its district sales managers on November 11, 1936, criticizing the use, in computing a price, of a rate which did not appear in the Institute rate book, an official of Lone Star stated in part:

So far as our company is concerned, we have always worked on the policy that the freight rates shown in the rate books are the only rates we will use in the computation of prices. If we have knowledge of any rates that are different from those in the rate books, then we have an obligation to inform the Rate Bureau of the new rate before such a rate is used in computing a price (Com. Ex. 287-B).

(e) The freight rate books first issued by the Institute included conversion tables for use in translating rates quoted by the railroads in terms of cents per hundred pounds into rates in terms of cents per barrel of cement of 380 pounds gross weight, the barrel being the unit used in the quotation and sale of cement. These tables provided for eliminating fractions of a cent in the rate per barrel, presumably to avoid fractions in price quotations, by stating the converted rate in cents per barrel to the nearest cent. In calculating freight charges, railroads apply the rate per hundred pounds to the total weight of a shipment and if the resulting figure ends with a fraction of a cent, they eliminate that fraction. In all instances, therefore, where the conversion of a rate per hundred pounds into a rate per barrel resulted in eliminating a fraction of a cent in the latter rate, a calcula-

tion of the cost of a shipment according to the Institute formula would give a result different from a calculation made according to the method followed by the railroads and on which payment of freight charges must be made. By action of the Institute in May 1937, the conversion tables were omitted from the rate books issued by its bureau in Bethlehem, and they had been previously dropped from the rate books issued by its bureau in Chicago. The same method of conversion into rates per barrel has, however, been continued. The rate books lack information that a genuine rate service would be expected to supply: they give no information which would assist in routing shipments; they give no information concerning minimum car weights; and they give no information respecting switching charges.

(f) When the Institute rate service was organized, there was discussion as to whether rates would be shown in the rate books from basing points only or from all points where cement is produced. A member of a committee of traffic managers, in writing to the chairman on August 6, 1930, stated the problem thus:

Confining the rate books to certain points of origin, would eliminate a lot of extra information that is of no value, while the master rate sheets, showing the rates from all points of origin, would supplement that information so that each subscriber would have all the rates. The method appears to be more economical and more efficient, however, it does not answer the question as to why you show rates from certain points of origin, and not others. This subject has been discussed a number of times, and one of the reasons for showing all the rates in the rate books is to avoid any appearance of preference (Com. Ex. 1139-4H).

The rate books were revised in 1933 to show rates from more producing mills, but rates from all producing points have not been included. These rate books, however, have included rates from points such as ports where no shipments of domestic cement originate, but which have been used as basing points for pricing purposes.

(g) The Institute rate books have regularly been used for pricing purposes, either directly or indirectly, by most of the corporate respondents located in territory covered by the rate books, and this has been done even though a price quotation made on the basis of a converted rate may include an artificial freight rate factor. The following extracts from testimony are illustrative of this. A representative of Federal testified:

Q. And hasn't it been your experience that the price at those various destination points in your sales territory always correspond with the freight rate in the freight rate book, including the correction sheet information plus the controlling base?

A. Yes, generally speaking, I think you are absolutely right there. It is a pattern that we follow on basing prices, we use our freight rate, we add our package plus that constant figure that we have predetermined (T. 30825).

In his testimony, the traffic manager of Volunteer said:

Q. But with the exception of arbitraries, have you ever found a price at a destination point which was not built up on a base plus the Institute freight rate book?

A. No, I don't think that I have.

Q. In your 10 years' experience?

A. I do not think so (T. 31934).

All-rail freight rates have regularly been used in calculating delivered prices, even though shipment was made by water transportation or by motor truck at rates different from the all-rail rate on which the price was calculated. The use of Institute freight rate books was not limited to members of the Institute; nonmembers were permitted to, and some did, purchase rate books from the Institute.

(h) Respondents extended their cooperative rate dissemination activity to land-grant rates for the same purpose as existed with respect to commercial rates discussed above. Land-grant rates are special rates received by the Government from certain railroads. In order to secure the benefit of such rates on a shipment over these railroads, the shipment must be one of Government property on a Government bill of lading. Since such rates are not available under any circumstances to any of the corporate respondents, their cooperative activity with respect thereto emphasizes their true interest in common freight factors—the use thereof as a means of attaining and maintaining identical delivered prices.

(i) Government purchasing officers frequently requested cement bids both f. o. b. mill and at specified delivered points. Respondents ordinarily determined the delivered price to be bid according to the formula of lowest combination of base price plus freight, which produced identical delivered prices. By deducting from the destination price determined in this manner the actual freight from his own mill to the delivery point, each bidder arrived at a so-called f. o. b. mill price which was in fact a derived price. The derived f. o. b. mill prices thus calculated might vary greatly among bidders on a given bid, but resulted in identical cost to the Government at the point of delivery. This method worked satisfactorily to respondents in territory where land-grant rates were not available to the Government, but did not operate very satisfactorily in the case of bids in territory where land-grant rates were available to the Government because the application of land-grant rates to an f. o. b. mill price determined in the manner stated ordinarily destroyed the uniformity of destination costs. Sporadic efforts to correct this difficulty were made by respondents in land-grant territory by using land-grant rates in determining delivered prices and derived f. o. b. mill prices. This would have solved respond-

ents' difficulties if they could have accurately ascertained the applicable land-grant rates. Such rates, however, are a matter between the Government and the railroad concerned. There is no official publication of such rates and it is generally impossible to determine in advance what the rate will be. In practice, the land-grant rate actually paid is determined by the Government upon the facts of the particular shipment, and this figure is controlling unless the railroad successfully contests it before the United States Court of Claims. Respondents, however, did what they could to ascertain the land-grant rates applicable in specific instances, sometimes securing information from the railroads, sometimes from previous lettings, and sometimes from competitors. During this time there was substantial interchange of land-grant rate information among respondents interested in particular bids, and from time to time groups of respondents concerned in the same bid had understandings and agreements as to the rates to be used or the price to be bid.

(j) The land-grant rate problem was not, however, of great importance to respondents until, under the stimulus of the expansion of public works in the early 30's, governmental purchases of cement assumed important proportions. A rapid expansion of such purchases was coincident with the existence of the National Recovery Administration, and it was while operating under their NRA Code that respondents first found a satisfactory answer to the land-grant rate problem. At first the Code Authority for the Cement Industry was satisfied to continue the previous practice. On December 23, 1933, it issued an interpretation to the effect.

* * * that United States Government may be quoted with the use of land grant rates, in exact accordance with the prevailing practice prior to the adoption of this Code (Com. Ex. 716-A).

Under the Code, respondents filed their destination prices with the Code Authority and these were systematically disseminated among respondents by the Code Authority, although the Code did not specifically provide for such dissemination. The result was to facilitate greatly the efforts of respondents to make identical bids to the Government. Purchasing officers of governmental agencies developed a policy of deducting commercial freight from destination prices bid by respondents and then awarding the contract upon the basis of the lowest delivered cost, using land-grant rates. This practice resulted in creating differences in otherwise identical bids.

(k) Respondents, however, found a means of defeating the deduction by the Government of commercial freight in land-grant territory. A clause for insertion in bids to the Government, which became known as the "control clause," was developed and filed with the

Code Authority. This clause went through several changes in form and finally, as most frequently used by respondents, assumed the following form:

"The U. S. Government shall determine its cost f. o. b. cars-----for invoicing purposes on shipments moving on U. S. Government bills of lading to the above named destination only, by subtracting from the above mentioned destination cost to the U. S. Government the land grant rate as determined by the U. S. Government as being applicable from-----to said destination, the actual commercial freight rate or special U. S. Government rate applicable from-----to destination named, whichever rate is the lowest (Com. Ex. 558-C).

The chairman of the Code Authority in a letter dated April 11, 1935, explained the effect of this clause in part as follows:

Under the open price provisions of our Code interested competitors have knowledge of such Government Destination costs filed with us and may meet them if they care to do so, thus making it possible for all interested Members of this Industry to bid on a parity. A control clause usually in the form of that quoted in our General Letter of October 5, 1934, requires the Government to deduct the actual land grant rate from the Government Destination Cost bid and thus in effect continues the parity as between derived prices f. o. b. mill (Com. Ex. 27-K).

In the same communication he also referred to the general letter issued by the Code Authority on November 19, 1934, which expressed the opinion that a member of the industry would be in violation of the Code if he allowed the Government to deduct commercial freight to determine the price f. o. b. mill for cement to be shipped on Federal bills of lading. The Code Authority promoted and furthered the use of the control clause in bids made to the Government by members of the industry, and its use did in fact become widespread. The decision in the Schechter case did not end the use of the control clause in Government bids.

(2) Before respondents developed the method stated above for handling Government bids involving land-grant rates, each proposal upon which bids were requested was generally handled separately and involved cooperation among the respondents concerned which in some instances amounted to agreements upon bids to be made. The exchange of telegrams and letters set out below illustrates how a group of bidders were able to file identical sealed bids. On March 17, 1934, the vice president of Pacific telegraphed the chairman of the Code Authority:

REFERRING PHONE MESSAGE DATE WITH YOU AND YOUR ASSISTANT PERTAINING APPLICATION LAND GRANT RATES STOP SOUTHERN CALIFORNIA MILLS INSISTED ON MAKING PRICES WHERE LAND GRANT RATES INVOLVED STOP BASIS TO USE WAS LIST PRICE AT DESTINATION LESS COMMERCIAL FREIGHT RATE STOP ON LARGE OR-

DER AT NOGALES OPENED EARLY PART OF FEBRUARY CEMENT MANUFACTURERS BID ON THIS FORMULA AND DEVELOPED THAT THROUGH APPLICATION OF LAND GRANT RATES IT MADE CALAVERAS MILL APPROXIMATELY TWO CENTS BARREL LOW AND THEY SECURED BUSINESS STOP IT WAS THEN DECIDED THE ONLY WAY TO QUOTE GOVERNMENT PROJECTS WHERE LAND GRANT OR OTHER SPECIAL RATES WERE USED WHICH WERE LOWER THAN PUBLISHED RATES AS CONTAINED IN RAILROAD COMPANY TARIFFS THE FOLLOWING FORMULA SHOULD BE USED STOP TAKES DESTINATION PRICE DEDUCT FROM ALL INTERESTED MILLS THEIR COMMERCIAL FREIGHT RATE THEN ADD FOR COMPARATIVE PURPOSES THEIR LAND GRANT OR SPECIAL RATE APPLICABLE WHICH WILL GIVE COST TO GOVERNMENT AT DESTINATION FROM VARIOUS MILLS AND THE HIGHEST RATED MILL IF THEY WERE INTERESTED WOULD HAVE TO DEDUCT FROM THEIR MILL PRICE THE DIFFERENCE TO EQUALIZE WITH THE LOWEST RATED MILL AND THIS HAS WORKED OUT IN SATISFACTORY MANNER TO INTERESTED PARTIES FOR THE REASON THAT THE PRICES SO ARRIVED AT AT THE VARIOUS MILLS PLUS RATE GOVERNMENT WOULD PAY WOULD MAKE SAME TOTAL PRICE AT DESTINATION STOP THE GOVERNMENT IS CALLING FOR BIDS AT BONNEVILLE OREGON OPENING MARCH TWENTY THIRD AND THIS FORMULA WAS SUGGESTED TO OREGON MILLS AT CONFERENCE AT SAN FRANCISCO FRIDAY BUT THEY CLAIM IN THEIR OPINION PROPER METHOD TO USE WOULD BE DESTINATION PRICE LESS THE COMMERCIAL OR LAND GRANT RATE AS THE CASE MIGHT BE WITH FREIGHTS EQUALIZED WITH THE LOWEST RATED MILL STOP WILL YOU PLEASE WIRE US FIRST THING MONDAY MORNING SO THAT WE CAN NOTIFY INTERESTED PARTIES HOW WE ALL SHALL FIGURE BONNEVILLE BID BASED BACK TO A MILL PRICE WHICH IN ALL CASES IN OUR OPINION THE MILL PRICE MUST BE THE DIFFERENCE TO EQUALIZE WITH THE LOWEST RATED MILL STOP ALSO APPRECIATE IF ASCERTAIN AND WIRE WHAT MILL PRICE CALAVERAS AND MONOLITH ARE GOING TO USE STOP * * * (Com. Ex. 159-1, 2).

Respondents Beaver and Oregon on the same date also wired the then chairman of the Code Authority concerning the bids on cement for the Bonneville Dam and stated in part:

* * * AN IMMEDIATE RULING BY THE CODE AUTHORITY TO ALL CALIFORNIA OREGON AND WASHINGTON MILLS WHICH WILL PROVIDE A METHOD OF BIDDING EQUITABLE TO ALL WILL BE GREATLY APPRECIATED OTHERWISE WE FEAR MANY VIOLATIONS OF THE CODE WILL BE APPARENT WHEN BIDS ARE OPENED ON THE TWENTY THIRD STOP * * * (Com. Ex. 159-3, 4).

The chairman of the Code Authority wired respondent Beaver on March 22nd:

RETEL AS BONNEVILLE LETTING IS TWENTY THIRD AND PRICES MUST BE ON FILE IN OFFICE OF CODE AUTHORITY FIVE DAYS PRIOR TO USE NO PRICES TERMS AND CONDITIONS FILED TODAY CAN APPLY AND ONLY PRICE ON FILE NOW IS TWO FIFTY SIX GROSS BULK FOB BONNEVILLE STOP * * * (Com. Ex. 159-18).

Oregon, Beaver, Pacific, Santa Cruz, Monolith, and Henry Cowell Lime & Cement Co. bid \$2.56 f. o. b. Bonneville, or derived mill prices equivalent to \$2.56 f. o. b. Bonneville. Calaveras bid \$2.5307296 f. o. b. Bonneville and was low (Com. Ex. 159-40). Thereupon, respondent Santa Cruz filed protest with the Code Authority which concluded:

* * * INASMUCH AS EACH BIDDER WAS REQUIRED TO MAKE AFFIDAVIT THAT ITS BID WAS IN ACCORDANCE WITH TERMS OF THE CODE FOR THE CEMENT INDUSTRY SHOULD NOT CALAVERAS BID BE DISREGARDED? (Com. Ex. 159-25.)

The Code Authority on April 13, 1934, protested to the National Recovery Administration, which, in turn, advised the Secretary of War in part:

You are informed that the Administrator for Industrial Recovery has found that the bid of the Calaveras Cement Company did not comply with the Code. Inasmuch as nearly all the other bids have been found to be in violation of the Code, it is recommended that all bids be rejected (Com. Ex. 159-56).

This recommendation was followed and the bids were rejected. The final result was that on another letting all bids were identical and the contract was awarded by lot.

(m) The filing of "destination cost" prices on Government business under the NRA Code and the dissemination of these prices among respondents bypassed the difficulties of reaching identical delivered prices where land-grant rates were involved. After the Code period, however, the problem was once more with respondents. As a solution, the Institute undertook to collect and disseminate land-grant rates and thus provide common freight factors on Government business, as was done through the rate books for commercial business. The Institute began collecting from its members such information as they had concerning land-grant rates and assigned the responsibility for furnishing such information for specified territories to particular respondents. Under date of December 12, 1935, The Cement Institute circularized its members, stating in part:

At its meeting on December 9 the Board of Trustees instructed the General Manager to collaborate with the Freight Rate Bureau at Chicago in compiling and publishing for the convenience of the Members information regarding current Land Grant Rates on cement from the several points of origin to various destinations.

It is the intention of the Institute to publish a schedule of current Land Grant Rates just as it has long been the practice to compile and publish the actual commercial rates. Where it is impossible to secure the exact Land Grant Rates, the best available information, together with the source thereof, will be published.

We are, therefore, addressing each member and requesting you to send us all the information which you have concerning current Land Grant Rates applicable

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from your mills and also such information as you have concerning Land Grant Rates applicable from other mills. In compiling this data it is necessary that we designate the source of the information regarding such Land Grant Rates. Will you, therefore, indicate in each case the source of your information regarding the respective Land Grant Rates? (Com. Ex. 841-A.)

(n) There being no official publication of land-grant rates, the Institute publication of such rates included figures arrived at by various means: some were secured from railroads; some were determined as a result of previous transactions; some were derived by calculation; some were derived by mileage prorates; and some were obtained by other means. When the amount of a given rate as furnished to the Institute by different sources varied, the lowest of such rates was reported by the Institute. The explanation of the land-grant rate schedules issued by the Institute states in part:

The term *the lowest land grant rates* indicates that in many instances the current applicable land grant rate between two given points was reported variously by different sources, and that the figure included herein was the lowest land grant rate reported to the Institute on the date of issuing this schedule.

In no case does the figure represent a computation by The Cement Institute, which merely serves as the medium for exchanging information. Furthermore, there is no assurance that the stated land grant rate will be the exact one which will be computed and used by the U. S. Government in any particular case (Com. Ex. 841-J).

Under date of January 2, 1936, the Institute in a circular letter to its members gave a more detailed statement with respect to the collection and dissemination of land-grant rates. It stated in part:

Briefly stated, our purpose in this regard is identical with the purpose which we have pursued for many years through our Traffic Bureaus in compiling and distributing information to the members regarding commercial freight rates. In other words, it is recognized that the cost of transportation is a necessary element for each manufacturer to consider when he quotes a price or files a bid on any other basis than f. o. b. mill. The compilation of freight rates provides a convenient instrument for the cement manufacturer in determining a delivery price, whenever he chooses to quote such a price.

* * * * *

During the NRA code period when all cement manufacturers were required to file their prices and terms of sale, the methods which the different companies followed in bidding on Government business was a matter of public record. It became evident that many of the companies labored under difficulties, since it seemed that they were unwilling to deviate from their long established practice of quoting destination prices and yet bids of this nature would not assure to the Government the benefit of land grant rates.

In the Code days, companies which did not desire to quote f. o. b. mill prices to the Government filed their bids with certain control clauses, and as these conditions were made public other companies either adopted them or made certain changes. The result was that it became a widely prevalent practice, in the case of bids to the United States Government, for cement companies to quote what was called a "Government Destination Cost."

In bidding a Government Destination Cost it was the practice of the individual company to quote a figure which was based upon the mill net return (that the company was satisfied with in the particular case) to which was added the land grant or special rate to the destination. In the absence of exact information regarding the applicable land grant rate the company added its best approximation of that rate. The result was the so-called "Government Destination Cost," which was filed as a bid on the condition that the Government could determine the bidder's mill price (for purposes of invoicing) by subtracting the actual land grant rate or some other specified amount.

The so-called open price plan is no longer operative in the cement industry, so that it will no longer be possible for the Cement Institute to handle the filing of prices or of the Government Destination Costs. Nevertheless, the problems which arose under the open price plan continue to exist.

* * * * *

* * * Therefore, it is frankly admitted that, except in rare instances where the Government will make such computations and publish them in advance, it is not possible for anyone to have accurate information regarding the land grant rate applicable at a particular time between two particular points.

Nevertheless, the method of computing such land grant rates is so well known that the discrepancy between the figure arrived at by the Government and the figure arrived at by the railroads or others is negligible. For all practical purposes it is possible to secure estimated land grant rates which are practically identical with the actual ones. For this reason a careful computation of land grant rates amounts to factual data rather than to fanciful or arbitrary figures.

It is further recognized that it is a considerable burden for any individual company to secure information regarding all applicable land grant rates. It is obvious that cooperation of all the companies through the Institute will lessen this burden on each and should make it possible to secure the factual data more promptly and make it available for the assistance of each company (Com. Ex. 95-A, B, C).

A little more than a year after the date of the above communication, the general manager of the Institute notified members that "effective immediately The Cement Institute will discontinue the distribution of information on land-grant rates * * *" (Resp. Ex. 169).

(o) The publication by certain respondents on the Pacific Coast of price lists showing commercial delivered prices at most destinations, and the exchange of such lists among themselves, did not aid such respondents in maintaining identical prices on sales to the Government where land-grant rates were involved. For a time there was some informal interchange of land-grant rates among certain of these respondents. This was followed in 1936 by the organization of the Pacific Coast Cement Institute, composed of members of the Institute and originally intended to become a division of the Institute. The relationship between the Pacific Coast Institute and the Institute was close, and for a considerable time after its organization the president of the former was a trustee of the latter. One of the principal activities of the Pacific Coast Cement Institute was the collection and dis-

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semination of land-grant rate information. In practice, the member respondents requested information on such rates from the secretary of the Pacific Coast Cement Institute as needed, and in replying to such inquiries the secretary sent copies of his letter to others so situated as to be in a position to bid on the particular project. Typical of the letters of notification sent by the secretary is the following:

The Southern Pacific Company general offices at San Francisco advise, under their file No. 2-S-12050-6702, that the following are the current commercial and approximate land-grant rates (in cents per 100 lbs.) on cement, minimum carload weight 60,000 pounds to *Elko, Nevada*.

To Elko, Nev.

From—	Commercial rate	Land grant rate
Davenport, Calif.....	30½	29. 756
Redwood City, Calif.....	30½	None
Cowell, Calif.....	30½	None
Stockton, Calif.....	30½	None
Kentucky House, Calif.....	30½	None
Merced, Calif.....	30½	None
Devils Slide, Utah.....	30½	None
Monolith, Calif.....	47	43. 268
Victorville, Calif.....	61	52. 310
Colton, Calif.....	56	47. 310
Crestmore, Calif.....	56	47. 858
Los Angeles, Calif.....	56	48. 532
Long Beach, Calif.....	59½	50. 814
Salt Lake City, Utah.....	30½	None

(Com. Ex. 564-Q.)

PAR. 9. (a) Respondents' pricing formula, when supplemented by common freight factors, inevitably produces identical prices at any given delivery point by all sellers who use it. Identical prices are important to respondents because, under the conditions which have existed, a difference in price as small as one cent per barrel may divert business from one seller to another. In testifying, numerous officials of respondent companies have stated that ordinarily the commercial prices of all sellers of cement at any given delivery point are the same. An examination and comparison of the invoices in the record covering actual sales of cement made in April 1938 in some 250 widely scattered communities show an extremely high degree of uniformity in the delivered prices of cement at each delivery point by all respondents who made sales there. In particular locations at particular periods of time there have been arbitrary prices, including zone and area prices, and there have been instances where departures from the pricing formula have caused price differences, but in general it is true that the commercial delivered prices of all respondents making sales of cement at any given location have been identical.

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(b) The perfection of respondents' pricing formula in producing identical delivered prices is best illustrated, however, by sealed bids made to public agencies. Instances of bids by various respondents to public agencies, some of which involved the use of commercial rates and some the use of land-grant rates, follow. An abstract of the bids on 8,000 barrels of cement for the Navy Department at Brooklyn, N. Y., opened May 29, 1936, shows the following:

Name of bidder	Price per bbl.	Name of bidder	Price per bbl.
Allentown Portland Cement Co.....	\$2. 43	Lone Star of New York.....	\$2. 43
Alpha.....	2. 43	National.....	2. 43
Coplay.....	2. 43	Nazareth.....	2. 43
Edison.....	2. 43	North American.....	2. 43
Giant.....	2. 43	Penn-Dixie.....	2. 43
Hercules.....	2. 43	Standard Lime & Stone Co.....	2. 43
Keystone.....	2. 43	Universal.....	2. 43
Lawrence.....	2. 43	Vulcanite.....	2. 43
Lehigh.....	2. 43	Whitehall.....	2. 43

(Com. Ex. 387-E, F.)

An abstract of the bids on 1,200 barrels of cement to the United States Engineer Office at Vicksburg, Miss., opened August 30, 1937, shows the following:

Name of bidder	Destination cost to Government, f. o. b. Monroe, La., on Government bills of lading	Amount f. o. b. local switch, Missouri Pacific R.R., Monroe, La.	Name of bidder	Destination cost to Government, f. o. b. Monroe, La., on Government bills of lading	Amount f. o. b. local switch, Missouri Pacific R.R., Monroe, La.
Penn-Dixie.....	\$2, 772	\$3, 060	Lone Star.....	\$2, 772	\$3, 060
Arkansas.....	2, 772	3, 060	Monarch.....	2, 772	3, 060
Universal.....	2, 772	3, 060	National.....	2, 772	3, 060
Cumberland.....	2, 772	3, 060	Consolidated.....	2, 772	No bid
Trinity.....	2, 772	3, 060	Volunteer.....	2, 772	3, 060
Signal Mountain.....	2, 772	3, 060	Georgia.....	2, 772	3, 060
Alpha.....	2, 772	3, 060	Hermitage.....	2, 772	3, 060
Lehigh.....	2, 772	3, 060			

All bids subject to 10 cents per barrel discount for payment in 15 days (Com. Ex. 180-A).

An abstract of bids on 600,000 barrels of cement in bulk and 10,000 barrels sacked in paper to the War Department for the Fort Peck, Mont., dam, opened July 25, 1935, shows the following prices per barrel:

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Name of bidder	Bulk per bbl.	Paper per bbl.	Name of bidder	Bulk per bbl.	Paper per bbl.
Universal.....	\$2. 5054	\$2. 7145	Three Forks.....	\$2. 5054	\$2. 7145
Huron.....	2. 5054	2. 7145			

All bids subject to 10c per barrel discount (Com. Ex. 168-A).

A list of the bids for 500 barrels of cement for the United States Industrial Reformatory at Chillicothe, Ohio, opened June 12, 1936, shows the following:

Name of bidder	Price per bbl.	Name of bidder	Price per bbl.
Alpha.....	\$2. 02	West Penn.....	\$2. 02
Green Bag (West Virginia)....	2. 02	Bessemer.....	2. 02
Southwestern.....	2. 02	Lehigh.....	2. 02
Standard.....	2. 02	Superior.....	2. 02
Universal.....	2. 02	Louisville Cement Co.....	2. 02
Medusa.....	2. 02	Diamond.....	2. 02
Pittsburgh Plate Glass.....	2. 02	Wabash.....	2. 02

All bids were subject to 10 cents per barrel discount for payment in 15 days (Com. Ex. 373-A).

An abstract of the bids for 1,000 barrels of cement for the United States Penitentiary at Leavenworth, Kans., opened September 3, 1935, shows the following:

Name of bidder	Price per bbl.	Name of bidder	Price per bbl.
Universal.....	\$2. 163424	Lehigh.....	\$2. 163424
Ash Grove.....	2. 163424	Monarch.....	2. 163424
Missouri.....	2. 163424	Consolidated.....	2. 17528
Lone Star.....	2. 163424	Dewey.....	2. 163424

All bids subject to a 10 cents per barrel discount for payment in 15 days (Com. Ex. 370).

An abstract of the bids to Tennessee Valley Authority on 200,000 to 800,000 barrels of cement, or partial quantity, at Coal Creek, Tenn.; 100,000 to 700,000 barrels, or partial quantity, at Wheeler Dam; 100,000 to 700,000 barrels, or partial quantity, to the Wheeler Dam Authority; and 100,000 to 700,000 barrels, or partial quantity, at Sheffield, Ala., opened October 15, 1934, shows the following:

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Name of bidder	Coal Creek	Wheeler contractor	Wheeler authority	Sheffield, Ala.
Alpha.....		\$1. 8798	\$1. 8398	\$1. 7008
Universal.....		1. 8798	1. 8398	1. 7008
Marquette.....		1. 8798	1. 8398	1. 7008
Lehigh.....		1. 8798	1. 8398	1. 7008
Hermitage.....	\$1. 7384	1. 8798	1. 8398	1. 7008
Cumberland.....	1. 7384	1. 8798	1. 8398	1. 7008
Signal Mountain.....	1. 7384	1. 8798	1. 8398	1. 7008
Lone Star (Alabama).....		1. 8798	1. 8398	1. 7008
National.....		1. 8798	1. 8398	1. 7008
Georgia.....		1. 8798	1. 8398	1. 7008
Penn-Dixie.....	1. 7384	1. 8798	1. 8398	1. 7008
Volunteer.....	1. 7384			

All bids were subject to a 10 cents per barrel discount for payment in 15 days. Some bidders limited their offers to partial quantities (Com. Ex. 401).

An abstract of the bids for 6,000 barrels of cement to the United States Engineer Office at Tucumcari, N. Mex., opened April 23, 1936, shows the following:

Name of bidder	Price per bbl.	Name of bidder	Price per bbl.
Monarch.....	\$3. 286854	Consolidated.....	\$3. 286854
Ash Grove.....	3. 286854	Trinity.....	3. 286854
Lehigh.....	3. 286854	Lone Star.....	3. 286854
Southwestern.....	3. 286854	Universal.....	3. 286854
Oklahoma.....	3. 286854	Colorado.....	3. 286854
U. S. Portland Cement Co.	3. 286854		

All bids subject to 10 cents per barrel discount for payment in 15 days (Com. Ex. 175-A).

(c) The operation of the pricing formula in bids submitted to State agencies is indicated in the following description of a few such bids:

On January 18, 1935, the Louisiana Highway Commission received bids from Trinity, Marquette, Monarch, Universal, Penn-Dixie, Lehigh, Alpha, Arkansas, and Lone Star for 238,000 barrels of cement delivered at 70 different destinations. Although differing as between destinations, all of the bids at each destination were identical, except that Monarch was higher than the other bidders at three destinations (Com. Ex. 2454-A, B).

On March 30, 1937, the Illinois Highway Commission received bids for 125,000 barrels of cement delivered at 102 different destinations. Alpha, Lehigh, Marquette, Universal, Lone Star, and Medusa bid at all destinations; Missouri bid at 71 destinations, Dewey at 56, and Ash Grove at 35. Although differing between destinations, all of the bids received at each of 98 destinations were identical; Dewey was higher than the others at 1 destination, and Lone Star was higher at 2 and lower at 1 destination than the others (Com. Ex. 1879).

In February 1937 the North Carolina Division of Purchase and Contract received bids for 500,000 barrels of cement. Excluding a few destinations at which

only one bid was received, the record shows bids at 144 destinations. Cumberland and National bid at 115 destinations; Southern States, Superior, and Hermitage at 113; Penn-Dixie at 112; Lehigh at 111; Signal Mountain at 110; North American at 97; Medusa and Universal at 94; Lone Star and Volunteer at 92; Alpha at 83; and Standard Lime & Stone at 81. Although differing between destinations, all the bids received for each destination were identical, except that Lone Star was higher than other bidders at 2 destinations, Cumberland was higher than others at 1 destination, Superior was higher at 1, and Volunteer was higher at 1 destination (Com. Ex. 12-A, B).

(d) Sometimes a respondent, who for some reason did not desire to sell at a particular location but did at others, or wished to retain his name on the list of bidders, bid a price higher than the basing-point pattern provided. When a respondent, by reason of miscalculation or mistake, made a bid lower than the basing-point pattern provided, he would sometimes correct or withdraw, or seek to correct or withdraw, such bid.

(e) Except to the extent that the dissemination of delivered prices during the NRA Code period and some seven months thereafter necessarily carried with it an exchange of base prices, and except for limited direct exchanges among certain respondents which the record does not show to have been made under the auspices of the Institute, there has been no systematic exchange among the corporate respondents of basing-point prices or changes in such prices. No such exchange is needed in the successful operation of the multiple basing-point delivered-price system. When a corporate respondent makes a change in its base price, written delivered-price quotations reflecting this change are usually sent to all customers. Through common customers and through salesmen in the field, information concerning this change reaches the other respondents selling cement in that area almost immediately. Examination of a reasonable number of the new price quotations reveals the pattern followed and thus discloses the base price change made. Notices of price increases are usually sent to customers five days in advance of the effective date thereof; and in the case of a decrease, customers are usually given the benefit of the decrease on shipments made during the five days preceding the decrease.

PAR. 10. (a) In the operation of the pricing system hereinbefore described, national in its scope, it is to be expected that there will be some producers who prefer more independence of action than the system permits, who wish to exploit natural advantages, or who cannot resist the temptation to break away from the system in seeking particularly attractive business. This has occurred, and the departures have probably been more frequent among price followers. Successful maintenance of the system requires, therefore, that the price leaders, usually the larger chain mills, possess the power to force recalci-

trants to adhere to the system and that this power be exercised when necessary. The multiple basing-point delivered-price system has inherent within itself means for enforcing its observance. One producer can, by putting a base price into effect at the mill of another producer, absolutely fix the maximum mill net of that producer, usually without affecting the mill net on more than a portion of his own business. If a large producer with mills at many points places a base price upon the mill of another producer, the effect upon his own mill net may be insignificant. The loss to the producer whose mill has been subjected to an involuntary or punitive base is much greater than the loss to the producer who imposes the base, because the net return on all of the former's business is affected. In practice, punitive bases have frequently been lower than the base price of the seller imposing them. An involuntary base tends to localize the price cut made and place the maximum effect thereof upon the producer whose departures from the pricing formula have invited the imposition of a punitive base. Some of the leaders of the cement industry have not hesitated to use this instrument to force adherence to the pricing system used in the cement industry. The following circumstances illustrate the operation of this policy.

(b) In 1927, about a year after the South Dakota State Cement Mill began operating at Rapid City, Lehigh applied an involuntary base to it which resulted in lowering the mill net of the new plant by approximately 60 cents per barrel. A representative of Lehigh testified that before the imposition of this involuntary base the State plant had made many prices lower than its openly published prices. In January 1930, at a time when prices were increased at surrounding basing points, the base price at Rapid City was left unchanged. Correspondence between representatives of Monolith Midwest indicates that the reason the base price at Rapid City was left unchanged was that the State mill had not fully conformed to its competitors' views of what constituted proper practices in the sale of cement. A letter between these representatives dated January 22, 1930, states in part:

Yesterday morning Mr. Morse of the Colorado Portland Cement Co. phoned and said that Mason City base was up 25¢, that he had heard of no changes. Immediately on receipt of this information I telephoned to Mr. Hartley and he told me that he had quotations out raising his mill base 25¢ at points where it applied in Wyoming, Nebraska, North and South Dakota, but that he was having difficulty in the eastern part of his territory and he did not know whether or not he would stand by these quotations. It all depended on whether or not the other manufacturers were going to follow. I assured him that we would follow in Wyoming but that we could not speak for the rest of the industry, although I would take the matter up with the Colorado Portland Cement Co.

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This I did and Mr. Morse assured me that he would raise his prices in Wyoming 25¢, wherever the Rapid City base governed.

I telephoned this information to Mr. Hartley and he said that he would let his quotations stand but he wanted the Colorado Portland Cement Co., to commit themselves to him and asked me to have Mr. Warner telephone him. This I did and late in the afternoon Mr. Morse called me and said that he had been talking to Chicago and had learned from them (I suppose he meant Universal) that Rapid City had quotations out on the new figure but that they accepted business at the old price for shipment during April. Morse said that in view of this he was reluctant to change his quotations until he was sure that Rapid City would stay in line. This morning Mr. Warner telephoned me and said that he was leaving tonight for Chicago to attend a meeting and endeavor to straighten up the situation (Com. Ex. 1202-G).

A second letter between the same parties dated January 30, 1930, states in part:

This morning Mr. Warner, of Colorado Portland Cement Co., advised me by phone that the gas belt mills had increased their base 20¢ per barrel. This means a general increase in prices in practically all of our shipping territory. The basing point will move from Iola to Kansas City. As yet there has been no changes reported from either Sugar Creek or Bonner Springs so we are basing our new prices on \$1.55 Kansas City.

Warner had just returned from Chicago and he says that the powers in the East are inclined to let the Rapid City base stay where it is; in other words, they will not increase price where Rapid City controls until they have some definite assurance from Rapid City that they will abide by it. Warner says that they put out quotations on a base of \$1.65, their mill, and then were willing to accept business for delivery during April. As long as this condition is in effect, it means there will be no change in prices at any Wyoming points controlled by Rapid City. Warner further said that the industry as a whole hesitates to take this matter up with the South Dakota officials because their experience in the past has been that the Governor of South Dakota broadcasts anything that is told to the officials of the cement plant and makes the statement that the cement trusts are trying to control their mill (Com. Ex. 1202-K).

(c) On December 5, 1927, Lone Star imposed an involuntary base at a nonbase mill at Spocari, Ala. In furnishing information to John M. Clark and Arthur R. Burns, two economists, employed by the Institute, Lone Star explained this action by saying:

Spocari producer was found to be passing to buyers, secret rebates (representing freight advantage) deducted from open quotation calculated on N. Birmingham base (Com. Ex. 975-5U).

The following year Lone Star acquired this mill upon which it had imposed an involuntary base.

(d) The tabular statement in paragraph 3 setting forth total sales of cement by years shows the heavy toll the advancing depression began to take in the cement industry in 1930 in the form of reduced sales. This decline in sales volume led some of the respondents to

seek attractive orders through departures from the multiple basing-point delivered-price formula in the form of nonidentical lower prices in particular transactions. As these departures became more frequent, numerous involuntary punitive bases were imposed upon price-cutters. Lehigh placed an involuntary base upon the Painesville, Ohio, mill of Standard. A representative of Lehigh, in explanation of this, testified that Standard's prices appeared to vary from day to day and job to job. Alpha placed involuntary bases upon the Osborn, Ohio, mill of Southwestern and the Fultonham, Ohio, mill of Pittsburgh Plate Glass. A representative of Alpha, in testifying concerning this, indicated that the action was the result of spotty competition. Lehigh placed involuntary bases upon the Louisville, Nebr., mill of Ash Grove and the Kosmosdale, Ky., mill of Kosmos. Involuntary bases were also established at the Ada, Okla., mill of Oklahoma; the Dewey, Okla., mill of Dewey; the Superior, Nebr., mill of Nebraska; the Cape Girardeau, Mo., mill of Marquette; and at other points.

(e) The unsettled price conditions during this period and the imposition of numerous involuntary bases created considerable resentment on the part of some respondents against what was felt to be the arbitrary action of the larger units in the industry, and both conditions contributed to the withdrawal of many members from the Institute and the Portland Cement Association. There was much activity among respondents in seeking to work out the situation, restore price stability, and secure the removal of the involuntary bases. Illustrative of these activities are the following extracts from correspondence among various respondents. On April 23, 1931, W. H. L. McCourtie, president of Trinity, wrote Joseph S. Young, chairman of the committee on public relations of the Portland Cement Association and president of Lehigh. After setting forth how thoroughly Trinity had cooperated with the association since 1916, Mr. McCourtie stated:

* * * In view of the fact, however, that conditions indicate—at least as I see them from this distance—that a dissolution or a disintegration of the Association is now imminent, I can see no very good reason for its acquiring or our giving any information which is intended to be used for the benefit of the industry as a whole.

If one of the larger units in the industry—such as the one with which you are identified—can justify the broadcasting of quotations three or four hundred miles further from its mill than it ever heretofore has made either quotations or shipments, and to which territory it does not expect to make any shipments—the quotations being made simply for the purpose of compelling another manufacturer, legitimately and properly serving that territory, to sell his product at a much lower price than he otherwise would—then I can see no very good reason for maintaining an Association, nor to further attempt any active cooperation with such units.

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Frankly, I cannot make myself enjoy the idea of any other company giving away my money, not only without saying "by your leave," but without a commercial grievance of any kind against us that would in any sense justify such action (Com. Ex. 1195-A, B).

On April 18, 1931, L. T. Sunderland, president of Ash Grove, wrote to Charles Boettcher, who controlled the respondents composing the "Ideal" group, referring to "this cement market debacle" and stating in part:

My present conviction is that the five or six interests which apparently observed the published market at the recent Oklahoma bidding, should get together as soon as possible and organize, for mutual protection and to map out a constructive program. Until at least a few of us can present a solid front and have something constructive to offer, I feel any individual efforts to try to placate our belligerent Eastern friends would be futile at this time and might longer delay market recovery.

On account of commitments I cannot readily change, I shall be away the greater part of next week; but if it is agreeable to you and your mind reacts favorably to the above suggestion I shall be very glad to try and arrange such a conference at Kansas City at the earliest date after my return as may best suit your convenience (Com. Ex. 2245).

On May 28, 1931, Charles Boettcher wrote Frank Powell, president of Southwestern, in part:

I wish you would give me some idea as to what success you people had at the New York Meeting, and whether anything will be done in the near future. As you know, we have this \$1.00 base at Ada and also at the Nebraska plant and I am extremely anxious to have this taken off if it can be done, so if you people have a meeting in the near future, I would like to attend it, or help all I can. Of course, I don't want to go to New York, but if the meeting is in Chicago or this side of Chicago, I will be glad to attend, if you want me to (Com. Ex. 2248).

On June 5, 1931, Charles Boettcher wrote to B. H. Rader, vice president of Lehig, stating:

As I wired you May 29, I went to Kansas City last Monday and returned here Wednesday. We had a pleasant meeting in Kansas City; there were only a few present and everything went off very nicely, but, at the same time, I can't see that we accomplished much. No doubt, you heard all about it from Mr. Norcross, as he represented the committee of twelve appointed to see the various people. We have agreed to join the Association, under certain conditions which could easily be complied with.

When I saw you in Chicago, you said you would do what you could to take off the base at our Ada plant. I am very anxious, Mr. Rader, to have that done and I believe, with your help, it could be done. Will you not kindly advise what you can do for me and when I may look for a change in conditions, that is, when we will have the privilege of putting our own base on our mill. This is not asking a great deal, as your putting a base on our mill does not help you at all and it injures us very much. Will you not please see what you can do for us, and I certainly will be glad to return the compliment (Com. Ex. 2249).

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On August 13, 1931, L. T. Sunderland, president of Ash Grove, wrote Charles Boettcher, president of the Ideal Cement Co.:

After leaving you today I tried to reach Hiram by phone but was unsuccessful, and therefore sent him a personal note, copy herewith, so he could shape his plans accordingly.

I think it leaves the matter in excellent shape since it will allow Hiram time to develop the phases of the situation which he was delegated to try and get straightened out as far as our districts are concerned. In the meantime none of us will be paying additional dues which, we all agree with you, none of us should pay unless, and until, the principle is recognized that each company has the exclusive right to determine its own maximum selling (base) price at its own mill (Com. Ex. 2257).

A copy of the note referred to in the above letter, addressed to Hiram Norcross, reads in part:

After you left I had an opportunity to further discuss the situation with Mr. Boettcher, who authorized me to say his companies would join with others represented today in making application to join the P. C. A., effective January 1, 1932, without attaching to the application any conditions, but with the understanding nevertheless (among ourselves only) that if matters mentioned are not in the way of being straightened out before the annual meeting in November (when the amendments are to be submitted), the applications may be withdrawn (Com. Ex. 2258).

(f) An examination of the details of the imposition of an involuntary base is further illustrative of the practice. Marquette, with a mill at La Salle, Ill., and a nonbase mill at Cape Girardeau, Mo., where it had the benefit of water transportation, frequently departed from formula pricing, and particularly in sales for delivery at locations where it would derive a high mill net. The president of the Cowham Engineering Company, manager of several respondents, wrote the president of one of these on May 6, 1929, stating in part:

A 60¢ Cape Girardeau base, I understand, was very narrowly averted last week. This has been brought about by Marquette and I am not at all sure it will not be the base price there before the Summer is over * * * (Com. Ex. 2379-B).

In bids to the Indiana Highway Commission on November 19, 1929, there were 15 bidders, all of whom except Marquette bid according to the multiple basing-point delivered-price formula. Marquette bid according to the formula at 58 destinations, but bid below formula prices at 32 destinations and was low bidder by a few cents at each of these. It was partially out of line on other bids, and on November 26, 1930, Alpha put an involuntary base of \$1.35 net on Marquette's Cape Girardeau mill, a reduction of 10¢ per barrel, and on December 1st reduced this involuntary base by 10¢ per barrel, making a total reduction of 20¢ per barrel. Alpha explained this action by stating

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that Marquette had made "Special prices to paving contractors later met by Missouri Portland" (Com. Ex. 975-4L). The economic situation was worsening as the depression advanced and departures from formula prices were becoming more frequent. On March 13, 1931, the vice president and manager of the Davenport mill of Dewey wrote F. E. Tyler, president of that concern, in part:

Illinois is taking bids again on March 26, and I am wondering what will happen. If somebody could get Marquette in line to bid with the rest there would be a chance to the awards being made. As long as Marquette continues to cut and take all the business, I doubt if the State will make awards, * * * (Com. Ex. 2178).

By the latter part of May 1931 the Cape Girardeau involuntary base price had been reduced to \$1 per barrel net. On August 13, 1931, the president of Dewey wrote the manager of the Davenport mill of that company in part:

This will acknowledge your letter of August 12th advising the Marquette Company are making deals of 10% off to practically all lineyard lumber companies.

The above practice has of course been chronic with them during a long period of time * * * (Com. Ex. 2185).

When price stability was being approached in some other areas in 1932 on the basis of advanced prices, Lone Star on June 3, 1932, reduced the involuntary base at Cape Girardeau to 75 cents per barrel net. The minutes of a meeting of the board of directors of the Portland Cement Association for July 12, 1932, show the following:

Joseph S. Young reported that he had, with Mr. Rader, interviewed T. G. Dickenson of the Marquette Cement Manufacturing Company, who agreed to take membership in the Association effective July 1.

President Mehren reported that he had been in communication by telephone with F. E. Tyler of the Dewey Portland Cement Company, H. L. Block of the Missouri Portland Cement Company, and C. B. Condon of the Hawkeye Portland Cement Company, who had agreed, provided the Marquette Manufacturing Company resumed membership, to do the same thing.

F. L. Stone reported that the Universal Atlas Company would withdraw for the time being its letter of May 13 regarding the payment of dues on the production of their Buffington, Indiana, Hannibal, Missouri, and Independence, Kansas, plants.

J. B. John advised that the Medusa Portland Cement Company would withdraw its resignation in view of the action outlined above (Com. Ex. 3005-E).

On July 16, 1932, the manager of the association telegraphed Missouri:

Wecker of Marquette just telephoned that he was mailing membership application effective July one (Com. Ex. 3003).

On the same date Marquette increased the base price at its Cape Girardeau mill by 40 cents, making it \$1.15 per barrel net, and this

advance was accepted within a few days by other companies operating in that area. In December 1932 Marquette made two advances of 10 cents per barrel each, thus increasing its Cape Girardeau base to \$1.35 net, and these advances were accepted by other companies. Various price advances were being made at other bases from time to time, and in June 1933 Marquette advanced its Cape Girardeau base to \$1.60 per barrel net. The general advances at various bases resulted in eliminating a number of the involuntary bases which had been imposed. In March 1935 the Cape Girardeau base was advanced to \$1.70 per barrel net, in February 1936 to \$1.75 per barrel net, and in March 1937 Marquette increased the Cape Girardeau base, to use the language in which the advance was described by Universal, "from \$1.75 to \$1.90 or some other figures sufficiently high to make this base price inactive in figuring delivered prices as against other base prices now in effect" (Com. Ex. 3340). Thus, Marquette's Cape Girardeau mill returned to its former status as a nonbase mill.

(g) The opposition to the use of punitive bases which developed among some of the respondents as a result of the numerous instances in which such bases were imposed in 1930, 1931, and 1932 found expression in the tentative draft of a code to be proposed to NRA, as recommended to the trustees of the Institute by the Institute membership in Districts 5, 7, and 8, an area in which many punitive bases had been imposed. The provision suggested was:

Fair competition requires fair standards in the attitude of each member of an industry toward his competitor, to the end that competition may be honest, open, and fair. The following practices are not in accord with this standard and will not be used:

* * * * *

5. For a manufacturer to establish a maximum (base) price at the mill of a competitor constitutes an act of unfair competition (Com. Ex. 828-7F, 7G).

The Code as proposed to the National Recovery Administration by the Institute did not, however, contain any suggested prohibition against involuntary or punitive bases.

(h) The necessity for retaining the compelling force, both actual and potential, of punitive bases in restoring and maintaining uniform prices determined according to the multiple basing-point delivered price formula was evidently recognized and accepted, for when the Institute in December 1935 adopted the "Compendium of Established Trade Methods and Marketing Policies," which listed many practices as unfair, punitive bases were not among the practices so listed. In fact, the president of Kosmos, one of the respondents which had been subjected to an involuntary base, prepared a memorandum dated December 6, 1935, which he submitted to B. H. Rader, vice president

of Lehigh, the company which had imposed the involuntary base on Kosmos, suggesting the systematizing of the method of imposing involuntary bases. He wrote in part:

Practically all manufacturers want an adequate price for their product. Some however, noting the great effect of volume upon costs and the great effect of a cent or two off the price on sales, try to secure both a satisfactory price and an unusual volume by small secret price cuts. So long as these cuts remain really secret (which is seldom) or so long as the great majority of competitors ignore them, such a policy is highly profitable to its followers. But it is very bad economics for the competitors not to meet the real prices: The great overproductive capacity of our industry is largely due to that policy in the past. At the same time it is bad practice, leading straight to chaos, for each manufacturer to take individual action purely on his own information or suspicions; there is too much room in that for biased reports, personal dislikes, hasty assumptions and so forth.

What is needed is that everyone in the industry shall know that if he reduces the going price, no matter by what subterfuge, the general open price will fall to his figure and that this principle will operate with the same certainty as the law of gravity. As a first step to assure such certainty all available sources of information must be used: short of a complete audit of the books, which probably cannot be had, the consensus of opinion of the competitors directly affected is the best criterion of whether a price has actually, by any means whatever, been changed. As a second step there must be a determination on the part of the individual companies, if there has been a deliberate and intentional cut, to follow it, regardless of an apparent temporary loss by so doing. That is the price of stability and in the long run it is the cheapest way of getting stability at a fair level of prices.

A plan to carry out the foregoing might be as follows:

1. Continue reporting past transactions as under the Code and as permitted by the Supreme Court decree in the cement cases.

2. Elect from time to time a Chairman and a Vice-Chairman for each State (or subdivision of a State if found desirable) and hold regular meetings every two weeks, the days being staggered as between adjoining States. Additional emergency meetings could be had on call or the regular meetings could be reduced if the need for them were less. All companies shipping into a State would be asked to send a representative to each meeting.

3. The meeting would be a fact finding jury, each company present having one vote. Any accusation as to a lowered price would be written to the Chairman with supporting facts, anonymously, far enough in advance to enable him to notify the company suspected so that the latter might have its representative present prepared to reply. The Chairman would read the accusation and as far as possible the identity of the accuser would remain unknown in order to reduce personal feeling. After the reply and any discussion that might follow one representative for each company would vote anonymously as to whether the price had actually been changed and, if so, to what amount. In case a company accused did not attend or answer the jury would have to decide without the aid of that side of the case. Without being bound to do so, which would be illegal, there would be a strong influence upon each individual manufacturer to guide his course by the verdict of the jury (Com. Ex. 817-G, II).

Mr. Rader submitted this memorandum to Joseph S. Young, president of Lehigh, who commented on it in a letter to Mr. Rader dated January 6, 1936, in part as follows:

The basic principle upon which the plan is predicated is that force is the only practical stabilizer. What is meant by force, I presume, is price. As you know, I have always been firmly of the opinion that it is only through price control that stabilization can be accomplished and I agree wholeheartedly with the argument that the threat of general price reductions to meet lower competitive prices in the field is the only method that has yet been discovered to insure price maintenance.

* * * * *

To summarize, I question whether there is any difference in principle between Lehigh's conception of market stabilization and the basic theory of price maintenance outlined in the plan. However, before discussions of the plan proceed further I would like to suggest that its proponent submit an outline to his attorneys for a specific opinion * * * (Com. Ex. 817-I, J).

(i) In at least one case failure to conform fully to the pricing and marketing practices established by respondents had results of a personal nature to executives of the company concerned. Harold S. Cree became sales manager of Aetna about 1910 and Oscar Lingeman was general manager of that company for many years. During the time these individuals were its managing officials the company, out of earnings, was able to, and did, greatly improve its original plant and build a much larger plant at Bay City, Mich., which increased the productive capacity of the company to approximately 1,200,000 barrels annually. Aetna's sales cost per barrel was unusually low, and at a time when the average rate of production in the industry was around 23 percent of capacity, Aetna operated at about 70 percent of capacity. The controlling interest in Aetna was held by individuals residing in and near Boston, Mass. F. R. Johnson of Boston, president of the United Shoe Machinery Co. and an official in other companies, was also president of Aetna. Messrs. Cree and Lingeman had followed a somewhat individual course and did not in all instances conform to the pricing and marketing practices used by their competitors. More than once involuntary bases were imposed on Aetna because of such nonconformity, and finally competitors began complaining frequently to F. R. Johnson, bringing to his attention instances of nonconformity. On October 3, 1933, Mr. Johnson wrote Oscar Lingeman, with directions that the letter be read and initialed by Lingeman, Cree, and certain other employees and thereafter returned to him, saying in part:

Referring to the conference which Harold Cree and I attended on Friday last, at which there were also present, Mr. Stone of the Universal Atlas Cement Co., Mr. J. B. John of the Medusa Company, Mr. Rooney of the Huron Company, Mr. Lucas of the Petoskey Company, a representative from the Marquette Company, and later we called on Mr. Emil Stroh of the Wabash Company.

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It seems to me that the results of that conference should be a matter of record.

1. We admit that we had made a blunder when we quoted on the Government—Muskegon and Holland, Mich. Jobs, March, 1933, and I promised that this will not happen again.

2. I did admit that while we quoted regularly on the Indiana letting in December, 1932, we did quote irregularly and different from the others in March, 1933, by using the Wyandotte base. The result of that bidding has been rather disastrous, as I see it.

3. It was stated that the other cement concerns could never find out definitely just what we were doing, when they called us by telephone, and that our answers were evasive. My answer to this was that we *will tell* them at all times how much a particular contract is for; and we are perfectly willing to tell them, if they inquire, at what price we took the order. Moreover, I stated that if we were in doubt or not clear what was going on or we sensed any trouble in the market, we would not hesitate to call up Mr. Rooney or Mr. Lucks, Mr. John or Mr. Jennings, or anyone else, and ask them about the situation, in order that we might know and not unintentionally tear down a situation. They stated that they would answer those questions promptly and freely, and we will do the same.

4. As to the Milwaukee situation and Pipkorn, that was discussed and we agreed that we should not allow a jobber to buy a large amount of cement with an idea that he could use it later on to burst open the market; if he did, then in future we should be careful as to how much cement we sold him, and try to control the situation. I appreciate that when a man buys merchandise and pays for it, it becomes his own and we cannot very well tell him what he shall do, but we must try to prevent a condition of this kind again.

5. We agreed that at any time, whenever we are going to enter a *new territory*, we would carefully survey and look over that territory, to find out what procedure should be followed, what the customs were in that particular territory, in order that we might not knowingly tear down any price structure.

So in summing it all up, I pledged my word and the word of the Aetna Cement Company that we would play the game one hundred percent—there would be no deviation from this in any way; we would be regular in quotations, fair in speech, in impressions and innuendoes, which we would expect others to be. With that general understanding, all trouble caused by chiseling will be eliminated, and we shall go on in a harmonious way (Com. Ex. 20-A, B).

In October 1935 Mr. Cree, in a memorandum to Mr. Lingeman concerning criticisms lodged with Mr. Johnson by competitors, said in part: "This memo would suggest that we do everything that our competitors say that we should do which we know is to their benefit rather than to ours and it makes us realize that they and not ourselves, are running our business, so naturally, to put over their demands, they would hold out an increased price in cement. That is becoming smart business" (Com. Ex. 37-B). On December 13, 1935, Mr. Johnson wrote Mr. Lingeman, saying in part:

I now refer you to our policies, as dated December 6, which were read at the meeting the other day; and for your information I will say there were present at that meeting the following men:

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Mr. Ben Calvin and Mr. William Storey, of the Consolidated Cement Co., Jackson, Mich.;

Mr. J. B. John and Mr. Harry Lucas of the Medusa and Petoskey Cement Companies;

Mr. Burt Rooney of the Huron Cement Co.;

Mr. Frank Mooney, Sales Manager of the Wolverine Cement Company;

Mr. Archie Conkrite (who came in later), of the Universal Atlas;

Mr. Jennings of the Wabash (who likewise came in afterwards);

Mr. D. C. Colburn, Vice Pres. of the Marquette Co.;

Mr. William Russell and Mr. Luck of the Peerless;

Mr. F. R. Johnson, Mr. Oscar Lingeman, and Mr. Harold Cree, of the Aetna Company.

You will remember that at that meeting all things were discussed clearly.

I call your attention to the second page—first paragraph—as it was read at that meeting. Now in the first paragraph, we speak about selling to dealers. It is clearly understood that we sell to a dealer at our regular price. What profit he makes is a matter up to him, and we will not attempt to concern ourselves about that, but he must not deliver that cement, except into his own locality; and he must confine himself to the districts in which he is entitled to operate. If he cannot do that, or will not do that, then we must tell him definitely that we cannot sell him.

Now this is a matter of much importance and I want you and your organization to start at once to see these people, whether it is McCall or who; and no better work can be done than to have Smullens, Sherry, Harold, and yourself if necessary, call on these people and explain the matter clearly to them, so that promised we will do, and we will; and it is up to you, Oscar, to see that it is done; and then when it is done, report to me, but this should not be allowed to drag, and Harold can report to you, as that is his line of operation, and I know he will.

The second thing to be taken up is this question of warehouse situation.

* * *

After discussing warehouses under the control of a distributor named Smith with whom Aetna would continue, Mr. Johnson said:

Other concerns who have had a distributor (as Mr. Smith) have not had good results—perhaps that is because they did not have a good man; so please ask Mr. Smith to assist us in every way, so that we can build up higher prices in the market there, and in Michigan generally, because we have given our word that we will not tear down any price structure—we will build it up—and we don't care if we lose an order now and then; but we do want to sell every barrel of cement that we can, at the full price, and no advantages to be given to the purchaser in any way—trucking or anything else; not that I think he is doing it, but I do want to have him be careful, and be careful with his men.

You know, we in our organization have made mistakes when we should not, and shame on us.

Therefore, those three places are taken care of.

CLEVELAND

See J. B. John about this. Have that O. K'd and as soon as it is arranged, write me, and ask Mr. John to write me.

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PORT HURON

See Mr. Russell and get that straightened out; and when it is, and it is O. K. for both of you, write me and have Russell write me.

As you see, I have started on this thing and I am going to go through with it.

DETROIT IS O. K.
SAULT STE. MARIE

Withdraw from there.

GRAND HAVEN AND TOLEDO

See what you can do in both places that will be satisfactory. It may be wise to withdraw from both places.

* * * * *

I shall hope and expect that you will get right to work at this immediately. I believe it is the intention of you and Harold to work in accordance with my plans as laid down; in fact, I might say that it is very decidedly essential for your future value to this organization to do so, and I don't believe you will disappoint me (Com. Ex. 45-A, B, C, D).

In the spring of the following year a new dispute arose between Wabash and Aetna and a punitive base was again imposed at Bay City by Wabash in June 1936. Mr. Crapo of Huron wrote to Mr. Johnson on July 9, 1936:

I told Lingemann, at the time of our talk, that I was scheduled to leave within a day or two for the 50th Reunion of my Yale College class. I thought at that time that it would be possible for me to come back via Boston.

Before, I left, the Wabash had dropped the base at Bay City. Such incomplete knowledge as I have of this incident, led me to believe that Cree had highjacked a Wabash contract in a manner similar to one taken away from the Wabash a year or two ago, and that the result at this time was the same as before; i. e., the Wabash dropped the base. In the previous instance, the big brothers in the Cement Industry interested themselves in the matter, and accomplished a reconciliation which restored the base price.

It was my belief that you would be so busy on this matter, that it was not a favorable time to go to Boston to discuss the general situation.

It is too bad that Cree made this move, especially after his previous experience (Com. Ex. 909).

A few days after this, Mr. Johnson went to Detroit, discussed the situation with competitors, and then obtained the resignation of Mr. Lingeman and discharged Mr. Cree. Mr. Ben Calvin, present as a representative of Consolidated at the conference on December 6th, mentioned above, was then placed in charge of Aetna. Mr. Calvin proceeded to conduct the affairs of Aetna in a more cooperative manner, frequently discussing policies and prices with competitors. In a report to Mr. Johnson dated May 7, 1937, Mr. Calvin stated: " * * * we are now merchandising our cement according to the

ethics of the industry" and explained that this involved the employment of additional salesmen because he was "In the process of getting business on a new basis" (Com. Ex. 97-A, B).

PAR. 11. (a) From time to time various developments have occurred which threatened to disrupt the operation of respondents' method of maintaining uniform delivered prices by means of the multiple basing-point system and common freight rate factors. One such development has been the desire of some dealers, contractors, and other purchasers to utilize motor trucks for the transportation of cement from respondents' mills or warehouses to destinations within a reasonable distance, particularly where such transportation may be more economical than shipment by rail or where direct delivery to a job by truck is more convenient, as well as cheaper or at least not more expensive than rail shipment, or where purchases of less than a carload quantity are desirable. It is obvious that if a purchaser is allowed to take delivery at the mill in trucks owned or controlled by him, the seller loses control of the destination price.

(b) The trucking of cement began about 1920. At first it was the general practice to sell cement f. o. b. trucks at the mill at the delivered price applicable to the buyer's destination, less the rail freight to that point. Purchasers quickly realized various advantages from trucking. Many of the respondents also recognized the advantages of trucking to the purchaser, but also began to recognize the effects which it had upon the uniform delivered-price system and began to examine and consider the relative advantages and disadvantages of their individual positions with respect to the trucking of cement in comparison with the positions of their competitors. Finally, around 1929 and 1930, the respondents through cooperation, understandings, and agreements among themselves and with other interested groups, began taking active steps to eliminate, discourage, and control the trucking of cement. The primary reason for this activity by respondents was the destructive effect of trucking upon the delivered-price system. There is testimony by some of the respondents stating objections which they had to trucking, such as added handling and loading expense, difficulty of providing loading facilities, dangers arising from trucks moving around their plants, and similar reasons. However, numerous respondents stated their reasons for making changes in their trucking policies prior to the issuance of the complaint herein. This was done in response to a questionnaire sent to Institute members by Professors Clark and Burns in the course of the study undertaken by them for the Institute in 1934 and continued in 1935, 1936, and 1937. Among the reasons given for eliminating, penalizing, or restricting trucking were the following. Lehigh said in part:

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The manufacturer, striving to figure his prices on indeterminate and fluctuating trucking rates and to meet the equally fluctuating and indeterminate rates from his competitors' plant, quickly found himself engaged in blind, reckless and destructive competition (Com. Ex. 969-14M).

Alpha reported in part:

We could not control the deliveries and the many trucking prices disrupted our entire marketing and price structure (Com. Ex. 968-81).

Lone Star reported in part:

Unsatisfactory marketing conditions due to indiscriminatory trucking * * * To protect our rail markets in the trucking zone from possible arbitrary rail price established by distant competing mills to meet this truck competition (Com. Ex. 969-3V).

Trinity reported in part:

Because of uncertainty of price at destination when delivery was made to buyer's trucks at mill, whereas carload prices at destination were determinable (Com. Ex. 967-17G).

Universal reported in part:

* * * therefore we had no control of the delivered price at destination and could not prevent the disruption of marketing practices at destination (Com. Ex. 968-4H).

Lawrence reported in part:

Our business has been built on a delivered price basis and when we were selling to buyer's trucks at the mill our whole price structure within a trucking radius of the mill was jeopardized (Com. Ex. 969-6P).

Many other respondents gave similar reasons, and there is other evidence of a substantial character that the effect of trucking on prices and distribution was the motivating cause of respondents' action with respect to trucking cement.

(c) One of the earliest restrictive steps taken, as shown by the record, was the addition of a 15-cent per barrel charge to the mill base price for delivery to trucks at the mill. On July 25, 1929, the sales manager of Penn-Dixie wrote to the then president of that company, Blaine S. Smith:

A plan is being developed to improve the trucking situation, particularly in the Lehigh Valley.

I understand this morning that the plan as now contemplated puts in a minimum price F. O. B. destinations of \$2.44 cloth, and a price F. O. B. trucks at all mills in the Lehigh Valley and New Jersey districts of \$2.40 cloth.

I will have additional information for you on this subject next Tuesday (Com. Ex. 2853).

By September and October of the same year the Lehigh Valley and New Jersey mills had in effect a 15 cents per barrel differential against delivery to trucks at the mill. This penalty of 15 cents per barrel for

delivery to trucks at the mill did not spread immediately to the Midwest, principally because Universal did not install the charge at its Buffington mill. On November 19, 1929, an official of Southwestern telegraphed from Chicago to another official of that company, stating in part:

VERY QUIET MEETING LIGHT ATTENDANCE ESTABLISHING TRUCKING BASIS OUTLINED KLUGSTON LETTER DOES NOT HAVE SUPPORT IMPORTANT MILLS BUFFINGTON REFUSES ADD FIFTEEN CENTS TO MILL PRICE FOR TRUCK DELIVERY USELESS ATTEMPT CHANGE TO NEW BASIS UNDER THESE CONDITIONS (Com. Ex. 1270-A).

Subsequently, however, Universal did impose the 15 cents premium on truck delivery at its Buffington mill.

(d) Various plans were used by respondents in different localities to discourage or control trucking. Some of these are indicated in a letter of June 16, 1933, from an official of Lone Star to the sales manager of Aetna:

Our company has perhaps the greatest number of plants located close to large consuming centers, and our company is probably better equipped for truck deliveries than any other company in the industry. Yet we have found it absolutely impossible to evolve any plan, and we have tried many, which will permit the use of trucks as a medium of transportation in their present uncontrolled state without seriously affecting our price structure or our earning capacity.

The so-called "Oswego plan" or "Cleveland plan," while not perfect, at least offers a minimum of difficulty as compared with the other plans which have been tried in the past. At Cleveland, for instance, trucking is limited to one county and the price delivered by truck is 5 cents higher than the price f. o. b. cars. Within the limited area of Cuyahoga County, into which trucking is limited from Cleveland, and Lucas County, where trucking is limited from Toledo, the 5 cents surcharge closely approximates the actual cost of moving cement from the nearest rail siding to any destination within the county. The same is true, to a lesser extent, however, around Oswego, yet at Oswego the condition is not so aggravated as to prevent the carload shipper from closely approximating the competition offered by those operating on a trucking basis and makes it possible, to some extent, for the carload shipper to compete without destroying the natural advantage which the local mill or silo should enjoy.

As we have previously stated, this plan is not by any means perfect. There is only one way in our opinion to solve the problem and that is to eliminate trucking entirely until such time as the truck is subject to regulation as a common carrier (Com. Ex. 422-E).

(e) Organized dealers began to oppose trucking because of fear of losing business through direct sales by manufacturers and because of keener competition which resulted among dealers if one dealer was able to deliver cement at a lower price through trucking, and other dealers could not or did not want to truck cement, or for other reasons desired to preserve the conditions existing under rail delivery. While the trucking problem was acute in 1931, W. W. Campbell, president

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of the National Builders Supply Association, promoted a conference of interested parties which was held in New York City on July 22, 1931, and was attended by D. H. McFarland, then president of the Institute, and officials of various railway companies and railway associations. The purpose of the meeting was to discuss means of eliminating or controlling the trucking of cement. In a letter to Mr. McFarland dated July 18, 1931, Mr. Campbell included a postscript:

At this meeting I shall make a brief introductory remark, stating the purpose of and reason for calling the conference, then call on Holway to go more into detail. Afterward I shall call on you to give the Mfrs. angle (Com. Ex. 1470).

Mr. McFarland was called upon at the conference, as set out in the Campbell letter. At this conference it was arranged that railroad representatives would confer with cement manufacturers located on their respective lines. This was done, and some of the results are indicated in the following extracts from letters. J. L. Eysmans, vice president of the Pennsylvania Railroad Co., on August 26, 1931, wrote R. N. Collyer, chairman, Traffic Executive Association—Eastern Territory:

With the exception of the Green Bag Cement Company, Pittsburgh, Pa., with which organization the P. & L. E. is endeavoring to arrange conference, the cement companies assigned to us, as per your memorandum of July 27th, have been interviewed with the following results:

UNIVERSAL ATLAS CEMENT COMPANY:

President B. F. Affleck, of this concern, was interviewed at Chicago on the 7th instant and corroborated the statements made by Messrs. Campbell, Holway and McFarland at the New York conference on July 22nd as to the injurious effect that trucking is having on the cement industry. Mr. Affleck stated that if there is any reasonable indication that the other manufacturers are willing to discontinue the use of trucks or put on a 15¢ differential in those instances in which trucks are used, his company is willing to cooperate.

BESSEMER PORTLAND CEMENT COMPANY:

Representatives of the P. & L. E. and P. R. R. conferred with Mr. J. L. Dankel, Sales Manager, and Mr. G. T. Peterson, Traffic Manager of this company at Youngstown, O., on the 13th instant, in the absence of Vice President Schmutz. These gentlemen expressed themselves as being heartily in accord with the position of the New York conference on the 22nd ultimo and stated that they have been actively interested in the elimination of trucking in the Youngstown district.

* * * * *

They further stated that dealers will not object to this as there is great danger under present conditions of their being eliminated altogether through delivery by trucks direct from mills to consumers.

HERCULES PORTLAND CEMENT COMPANY:

Mr. MacCarey, Traffic Manager of this company, was interviewed at Philadelphia on July 23rd and stated that while they were compelled to buy four

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trucks and trailers several years ago, that with the establishment of short haul rates in Trunk Line territory and also due to understanding with the other cement companies, they laid up their trucks and trailers about a year ago and have not trucked one ton since nor do they propose to do so. He stated, however, that they had a few cases of outside trucking companies coming to their plant and purchasing a few bags of cement but it was only for odd lots and did not amount in the aggregate to one carload per month.

Mr. MacCarey expressed his hearty accord with the contemplated program and promised his sincerest cooperation (Com. Ex. 1149-A, B).

On August 31, 1931, Mr. Eysmans again wrote Mr. Collyer concerning a conference with officials of the Green Bag Cement Co. of Pennsylvania, including A. P. Meyer, and said in part:

Mr. Meyer will make no commitment to discontinue the use of truck transportation, but indicated that if this is done it will be the result of an understanding within the cement industry rather than through intervention by the National Building Material Dealers Association or the railroads (Com. Ex. 1150).

On September 11, 1931, C. J. Brister, vice president of the New York Central Lines, wrote Mr. Collyer:

The Wyandotte Cement Company, Wyandotte, Mich.; Huron Cement Company and Peerless Cement Company, Detroit, Mich., have been interviewed with the following result.

The Peerless Cement Company stated they endeavor to ship via rail at all times, but are confronted with competition created through trucking on the part of other cement companies.

The Wyandotte and Huron companies expressed their desire toward confining their trucking operations to within a radius of twenty-five miles of their plants, but they likewise are affected by general trucking conditions. * * * (Com. Ex. 1152-A).

On September 23, 1931, Mr. Brister again wrote Mr. Collyer, supplementing his previous letter:

* * * Mr. H. F. Jennings, Secretary and General Manager of the Wabash Portland Cement Company, who have a plant at Osborn, Ohio, was interviewed, and he stated he was heartily in favor of the use of railroads, instead of motor trucks, for his shipments.

Mr. W. J. Jennings, General Manager of the Southwestern Portland Cement Company, who also have a plant at Osborn, was likewise interviewed, and he stated they were endeavoring to discourage their dealers specifying truck service, and in order to bring this about, they are adding 15¢ per barrel on movements via truck over their prices for shipments via rail (Com. Ex. 1153).

Representatives of the Central Railroad Co. of New Jersey, the Reading Co., and the Lehigh Valley Railroad, reporting to Mr. Collyer under date of September 3, 1931, stated:

The undersigned had a conference with Colonel E. M. Young, President, Lehigh Portland Cement Company, at Allentown, Pa., on August 12th. We discussed the question raised by the National Building Material Dealers Association at considerable length and Colonel Young, with reservations due to com-

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petitive conditions in the trade at certain points, assured us of his desire to cooperate with the railroads and the Building Material people (Com. Ex. 1146).

On September 3, 1931, John Duffy, vice president of Lehigh Valley Railroad Co., wrote Mr. Collyer in part:

This is to advise that I have called upon Mr. Blaine S. Smith, President of the Pennsylvania Dixie Portland Cement Company, and Messrs. C. L. Hogan, Executive Vice President, and H. C. Koch, Vice President in charge of Sales of the International Portland Cement Company (Lone Star). * * *

Mr. Smith of the Pennsylvania Dixie Company manifested a sympathetic attitude toward the Building Supply Dealers with respect to the position they have taken in this matter. On the other hand, he felt that the best way to control the situation was the making of an arbitrary charge on all cement loaded on trucks at the mills. As you are aware, there has been an agreement among the cement companies to make a charge of 15¢ a barrel in this connection, but I am told that all the companies have not strictly adhered to the agreement.

Messrs. Hogan and Koch expressed an attitude similar to that of Mr. Smith and asserted that they were not using trucks in the East, and at their mills outside of Eastern territory they were loaded only when competitive conditions demanded (Com. Ex. 1145).

On August 3, 1931, J. H. Day, vice president of the Nickel Plate Road, wrote Mr. Collyer in part:

Have talked to Mr. George Cole, Traffic Manager of the Medusa Portland Cement Co., Cleveland, and he has definitely stated to me that the Medusa Portland Cement Co. will be glad to discontinue trucking if the other cement companies will agree to do likewise (Com. Ex. 1144).

(f) On November 23, 1931, E. J. Holway, one of the participants in the conference of July 22, 1931, wrote J. L. Eysmans, vice president of the Pennsylvania Railroad, in part:

A meeting of cement manufacturers was held at Chicago on November 17, 18, and 19. Realizing that the larger manufacturers would undoubtedly travel Sunday night, I arranged to be in Chicago on Monday, the 18th, and visited a number of them, especially the larger ones, leaving the thot with them, how far the legitimate dealer would go along to correct the trucking evil.

I understand that the Universal and Basic, of Pittsburgh, will close their plants to trucks on December 1, and I think the Ohio plants will have a meeting the latter part of this week, and I believe it will be the unanimous opinion of all the Ohio manufacturers that they should follow the Pittsburgh lead, so that I think all plants in Eastern Pennsylvania and all of Ohio, will be closed to trucking by not later than December 31, 1931. * * *

* * * * *

You can readily understand there is no copy of this kept in my files and I would kindly ask that you destroy it (Com. Ex. 1348-A, B).

On November 27, 1931, Universal announced:

In accord with expressed desires of dealers in Pittsburgh District, effective December 1, 1931 platforms at our mill, Universal, Pa., and at our Homestead

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Packing Plant will be closed to all trucking except uncompleted contracts made on a trucking basis prior to that date (Resp. Ex. 2519).

On May 4, 1932, A. P. Meyer of Green Bag of Pennsylvania wrote to Eugene Morris, president of the Central Freight Association, in part:

In November of last year we agreed to discontinue the trucking as of December 1st, at Neville Island, this agreement to continue until July 1, 1932 with the understanding that certain things be corrected in the meantime. * * * (Com. Exs. 2260; 1043-B).

On January 7, 1932, a conference was held in Philadelphia, Pa., attended by W. W. Campbell and E. J. Holway of the National Builders Supply Association, D. H. McFarland, president of the Institute, and representatives of a number of railroad companies, the minutes of which read in part:

It was stated that in southern Ohio and western Pennsylvania substantially all of the cement traffic had been returned to the rails, and that initial steps had been taken having in view like results as to shipments from the lake front district, centering principally at Buffalo, Cleveland, Toledo, Detroit and Chicago (Com. Ex. 1043-4T).

On January 11, 1932, R. A. Williamson, assistant freight traffic manager of the Nickel Plate Railroad, wrote Eugene Morris, chairman of the Central Freight Association, in part:

Cement producers in the entire State of Ohio, with the exception of the northern part of the State, have reached an agreement as far as concerns stabilization of prices, the result of which means that the movement of Cement by truck will be discontinued.

The producers in the northern part of the State, which will include Castalia and Toledo, O., have not as yet reached an agreement but it is hoped that they will do so shortly (Com. Ex. 1043-4V).

(g) The preparation and promulgation of the NRA Code for the Cement Industry afforded respondents an opportunity to consolidate their position with respect to trucking. Section 18 of Article IX of the code declared it an unfair method of competition:

Knowingly to ship cement by any transportation agency which makes payments or concessions by rebates or otherwise for the purpose or with the effect of inducing or influencing the sale or purchase of cement (Com. Ex. 560, p. 18).

Respondents included the same provision in identical language, except for the substitution of the words "industry products" for the word "cement," as section 10 of article V of the "Compendium of Established Terms and Marketing Methods" issued after the Schechter decision. On September 23, 1937, a representative of Universal reported to his superior that trucking was being done from cement

plants in Houston, Tex., and commented, "I thought this wasn't in the rule book" (Com. Ex. 1941). And thereafter, on September 28, 1937, another representative of Universal was instructed to "dig into this and find out all you possibly can about it" (Com. Ex. 1940).

(h) The effectiveness of the movement to control the trucking of cement is shown by the answers of 117 mills of respondents to the Clark and Burns questionnaire previously mentioned. The meaning of the answer by 1 mill is not clear, and of the remaining 116 mills reporting, the status of trucking was approximately as follows: 85 mills reported no trucking permitted under any circumstances; 8 reported trucking permitted, but a penalty in the form of an addition to the price was imposed; 5 reported trucking permitted at full rail destination prices, but 2 of these were limited to trucks under the control of the mill; 1 reported trucking permitted on the basis of destination price at the mill at times, and at other times the addition of a 25 cent penalty to the base price; 4 reported trucking permitted, but limited to certain points; 6 reported trucking permitted at destination prices less freight; and only 7 appeared to have permitted trucking upon the basis of the applicable price at the location of the mill without any restriction. Many of the answers made to the questionnaire, in addition to showing what change, if any, was made in trucking policy, indicated the date of such change. Of the 117 mills, 21 gave no date of change of policy and 5 indicated that trucking had never been permitted. Of the remaining 91 mills, approximately 56 changed to the policies stated above in 1932; and of the others, about one half changed to such policies before 1932 and the remainder after 1932.

PAR. 12. (a) As heretofore pointed out, respondents' multiple basing-point delivered-price system is directed toward the maintenance of uniform prices for cement by all respondents at any given location. Under this system, until recently, purchasers of cement generally paid the freight charges thereon directly to the railroad. This often afforded an opportunity for purchasers to secure cement at a delivered cost lower than the delivered price quotation in effect at the point where the cement was to be used. This was done by making a purchase at the delivered price in effect at some destination where such price included, under respondents' pricing formula, a freight factor higher than the actual freight charges to the purchaser's true destination, and then causing the railroad to divert the shipment to the true destination. Such diversions in transit did not change the amount received by the seller from the amount he would have received had the diversion not been made (though not the same amount as he would have

received had the purchase been made on the basis of the delivered price in effect at the buyer's true destination), but the purchaser, after paying the actual freight to the railroad, received the cement at a delivered cost lower than he could have secured by purchasing at the delivered price in effect at his true destination. This interfered with respondents' desire to maintain uniform delivered prices at each destination, and they undertook, by means of understandings and agreements, to prevent purchasers making diversions in transit.

(b) The "Code of Ethics" adopted by respondents when the Institute was organized contained a provision prohibiting diversions in the following language:

For manufacturers to divert, or to permit purchasers or users of cement to divert, carload shipments of cement, made to one destination, to other destinations in cases where the result of such diversion is to enable purchasers or users of cement to secure cement less than the manufacturer's market price at the point of final delivery, is discriminatory as between purchasers or users, and is therefore an unfair trade practice (Com. Ex. 138-S).

The Institute included a provision in the code which it proposed to NRA similar to that which appeared in the "Code of Ethics" quoted above, and the NRA Code as approved contained a provision making it a violation of the Code:

To divert or permit purchasers or users of cement to divert shipments of cement from one destination to another destination, the result of which will enable the purchaser or user to secure cement at less than the member of the industry's published market price at the point of final destination (Com. Ex. 557, p. 338).

The "Compendium of Established Terms and Marketing Methods" approved by the trustees of the Institute after the expiration of the NRA Code contained a similar provision declaring the following to be an unfair method of competition:

Diverting or permitting the diversion of shipments of Industry Products, the effect of which will be to enable a purchaser or user to secure Industry Products at variance with Member's published price-terms for point of final destination (Com. Ex. 561).

The Compendium also recommended the use of a standard form of sales contract which provided that in the event a buyer diverted a shipment of cement he would pay the seller's price applicable at the place of final delivery. This provision reads:

If any of the cement shipped hereunder is reconsigned or diverted by Buyer from the place of delivery specified herein or used for any other purpose, Seller may cancel this contract and refuse to ship any more cement and Buyer agrees to pay Seller's market price at the place of final destination for such cement as has been diverted by Buyer from the place of delivery specified herein or has been used by Buyer for any other purpose than the purpose above specified;

* * * (Com. Ex. 561, p. 21).

(c) Under respondents' pricing formula it was the practice to quote delivered prices which included freight charges. When a shipment was invoiced to a purchaser, the total amount was ordinarily shown on the invoice and the amount of the freight charge was also stated separately. The purchaser paid the freight charges to the carrier and remitted payment for the balance of the invoice to the seller. The Institute approved a recommendation for a change in this practice, as shown by the minutes of a meeting on December 13, 1929:

Mr. Storey brought up the question of the application of Paragraph 14 of the Code of Ethics. After discussion, on motion of Mr. Kind, seconded by Mr. Storey, it was recommended that in order to prevent diversions in violation of Paragraph 14 of the Code of Ethics, it is desirable that no freight allowances be shown on manufacturers' invoices and that the following notation appear on all such invoices: "Freight allowance does not appear on invoice. Receipted freight bill showing payment of freight charges to destination shown on Bill of Lading will be accepted as part payment of the invoice" (Com. Ex. 136-X).

On January 3, 1930, Luther G. McConnell, then manager of the Institute, telegraphed Hercules concerning this recommendation:

COMPANIES GENERALLY FOLLOWING RECOMMENDATION IN SOUTH-EAST TERRITORY STOP NORTHEAST TERRITORY STILL UNDER DISCUSSION (Com. Ex. 141-5).

In general, respondents were not successful in inducing purchasers to send the receipted freight bills with their remittances, and with a few exceptions respondents did not continue to require receipted freight bills before allowing credit for freight payments made by purchasers.

(d) Traffic representatives of a number of the corporate respondents, in their association on the committee on transportation of the Portland Cement Association and otherwise, worked upon the problem of inducing the railroads to accept bills of lading stamped with a prohibition against diversion without the shipper's consent. In testifying about this, F. M. Coogan, president of Alpha, said in part:

Q. Now, referring again to this matter of diversion in transit, would your traffic manager, Mr. Apgar, work with traffic managers of other cement companies in inducing the American Association of Railroads to accept the stamp on bills of lading regarding diversion?

A. Yes, sir; I think he did.

Q. Do you draw some distinction between your company working with competitors in some such way as that and understanding or agreement between them?

A. I certainly think that we have a perfect right to act with our competitors on anything that will improve or bring about a better freight rate and freight service situation at our mills.

Q. Well, did the stamp restricting diversions come within the category you just named?

A. I think it does, yes.

Q. In what way?

A. Well, it puts a certain moral obligation on the railroads not to divert shipments without the approval of the shipper, and inasmuch as we sell at delivered price we feel that we have a perfect right to control the shipment until it reaches destination (T. 24626).

In March 1935 the traffic advisory committee of the Association of American Railroads recommended the acceptance of bills of lading stamped with a clause prohibiting diversion, and this privilege was availed of by many of the respondents. In a letter to numerous competitors dated December 18, 1935, the traffic manager of Penn-Dixie stated:

As information, the Traffic Executive Committee of the Association of American Railroads at their meeting on March 14, 1935, under Topic #24 approved the acceptance of bills of lading by the railroads bearing notation reading as follows:

"This is the property of the shipper and no reconsignment or diversion is to be made unless authorized by the consignor."

This notation has been stamped on the bills of lading covering shipments moving in the east since the middle of last May and has worked out very satisfactorily. Therefore, if you desire you can tender your bills of lading bearing the same notation.

It would be well if you should desire to use this notation to notify the railroads serving your mill of your intention so as to initiate a smooth working arrangement (Com. Ex. 584-G).

In writing the traffic manager of Lehigh in July 1936 concerning approval of the stamp on bills of lading prohibiting diversion, the freight traffic manager of the Pennsylvania Railroad said in part:

Under advice of Trunk Line Counsel, however, should a consignee request a diversion, the carriers are obligated under their tariffs to ascertain who the real owner is and comply with his instructions (Com. Ex. 749-A).

(e) In July 1930 the Institute recommended to its members that their contracts of sale for cement include "A loss and damage clause protecting seller from liability after delivery to common carrier or against any other loss occurring in transit or storage" (Com. Ex. 153-P). The actual performance of respondents with respect to claims for loss or damage in transit was not entirely uniform. Some respondents declined to assume any responsibility for such loss or damage; some respondents did assume such liability; and other respondents undertook to secure adjustments of freight overcharges or claims for loss or damage in transit for and in behalf of their customers. Over a long term of years respondents have shipped cement to purchasers without prepaying the freight charges and purchasers have paid such charges directly to the carrier. Respondents have, until quite recently, opposed in organized fashion the prepayment of freight charges, except where shipment was made to a point where the carrier required that charges be prepaid or some unusual condi-

tion existed which made prepayment desirable or necessary. Beginning about January 1937, increasing numbers of respondents added to the provision in their terms of sale for the payment of freight charges by the purchaser directly to the carrier an additional provision that such payment be "for the account" of the seller. In practice, there was no accounting between the carrier and the seller respecting the payments received from purchasers, and the procedure of the parties pursuant to this provision was not different from what it previously had been. Some 2 years after the issuance of the complaint in this proceeding the corporate respondents generally began prepaying the freight charges on all shipments of cement. When freight is prepaid, there can be no diversion of shipments by the consignee to his advantage in price.

PAR. 13. (a) For many years it has been customary for the corporate respondents to contract with dealers or contractors for the delivery of a specified quantity of cement at a specified price over a stated period of time, and these contracts are ordinarily referred to as "specific job contracts," although in practice they are merely an option granted to the purchaser. The contractor who undertakes a construction job desires to be protected against price increases until the job for which he has contracted is completed, and if he has purchased cement through a dealer, the dealer desires similar protection. This practice presents the possibility that the dealer and perhaps the contractor, may contract with one or more manufacturers for more cement than is needed for a specific job, and if the price of cement should advance in the meantime, the purchaser may take the excess amount of cement at the lower contract price and resell it or otherwise use it to his advantage or profit. When this occurs, it affects the respondents' ability to control the delivered price of cement and tends to disrupt the market and break down the uniform delivered price established pursuant to the multiple basing-point formula. In order to prevent such interference with prices and marketing practices, respondents have engaged in the cooperative checking of such contracts and have taken collective action to effect their cancellation. The articles of association of the Institute provided for the collection and dissemination of "Information concerning actually closed specific job contracts and other contracts for the future delivery of Portland Cement" (Com. Ex. 138-B).

(b) The interest of respondents in the cancellation of specific job contracts for excessive quantities of cement was largely limited to periods immediately following an advance in price. It was at such times that respondents' interest was most actively expressed. This limitation upon the value of contract checking was recognized by the In-

stitute. In a memorandum describing the activities of the Institute, its general manager, George H. Reiter, wrote in part:

The Institute's present method of filing and reporting contract information is undoubtedly of less value than during a period of a rising market (Com. Ex. 595-E).

(c) The effect of these contracts upon respondents' prices for cement was not a new problem. The report of the committee on trade conditions published in 1915 by the Association of American Portland Cement Manufacturers, of which some of the respondents herein were members, in discussing this subject, stated in part:

Urging dealers to place orders for extended delivery for specific work, and permitting such dealers, at their option, to take more or less cement on such orders *than actual quantity used* in the work, has been one of the most objectionable devices and practices known, and has done more than any other one thing to bring about demoralization (Com. Ex. 3193, pp. 8, 9).

The Portland Cement Association, in which numerous respondents herein were active at the time, published in 1919 a compilation of reports of the trade practice committee "intended to eliminate unfair methods of competition," and for other purposes, stating in part:

Great demoralization results from the ability of dealers to place orders with manufacturers for large amounts for deferred delivery upon the representation that the cement is for specific work which the dealer has sold, all or part of which has in reality not been sold by dealer for such work (Com. Ex. 3192, p. 9).

(d) Very early in its history the Institute organized a method of checking contracts entered into by its members for the sale of cement. Such contracts were reported to the Institute daily by its members, thus enabling the Institute to determine whether there were duplications; that is, whether cement for the same job had been contracted for with more than one member, and also afforded a basis for determining by checking in the field, if necessary, whether the amount contracted for was in excess of the amount needed for the particular job. Members also reported on changes in outstanding contracts previously reported to the Institute, and a summary of the contract information was sent by the Institute to all its members. In 1930 a number of the corporate respondents loaned the services of some of their salesmen as a field force to check specific jobs to determine whether the amount of cement contracted for was excessive, and the Institute also had field engineers in its employment who did like work.

(e) Having collected and furnished to its members information concerning excessive quantities of cement contracted for and duplications of contracts for specific jobs, the Institute did not then leave the matter to the independent judgment of individual members. Collective action and the pressure of collective opinion were exerted to

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bring about contract cancellations. The minutes of a meeting of the board of trustees of the Institute on March 14, 1930, contain the following:

The principal subject discussed was the matter of checking contracts and cancelling any that were found to be without proper supporting evidence (Com. Ex. 604-A).

On April 29, 1930, William J. Jennings, an official of Southwestern, wrote another official of the same company in part:

I spent last Wednesday and Thursday in Chicago at a meeting of the Cement Institute. Each cement company representative took his contracts with him to Chicago, and it took us two days to go over all these different contracts and cancel the duplicates and come to an agreement along the different ones on what they were willing to do (Com. Ex. 1270-K, L).

In writing C. L. Hogan, vice president of Lone Star, on April 28, 1930, concerning a meeting of the Institute, G. E. Pierson, also a vice president of the same company, stated:

At our former meeting held two weeks ago a report was made by the secretary indicating that cancellations up to that time totalled approximately 500,000 barrels. The report at the last meeting indicated subsequent to that time and prior to the last meeting additional cancellations totalling 1,050,000 barrels had been made. During the two-day conference in Chicago it was estimated that cancellations approximating 500,000 barrels were made. There remains additional duplicated bookings to be eliminated and it looks on the face of it at this writing that when the slate is finally cleaned there will have been canceled somewhere in the neighborhood of 2,500,000 barrels. This, I think, speaks well for the work of The Institute and indicates very definitely just how effective this work can be made if it is properly supported by the membership (Com. Ex. 1018-A).

(f) During the NRA Code period the standard form of specific job contract annexed to the Code approved in 1933 contained, among other provisions, the following:

Buyer represents that the aforesaid number of barrels of cement will be used in the construction of the above-described work and agrees that no portion of such cement will be used for any other purpose without the written consent of Seller. If any of the cement shipped hereunder is * * * used for any other purpose, Seller may cancel this contract and refuse to ship any more cement and Buyer agrees to pay Seller's market price at the place of final destination for such cement as * * * has been used by Buyer for any other purpose than the purpose above specified; * * * (Com. Ex. 557, p. 349).

The amended NRA Code for the Cement Industry as approved May 11, 1935, contained a provision requiring the filing with the Code Authority of all contracts or orders for the sale of cement, including quantity and price terms, and, further, "Upon receipt of such filed orders or contracts the agent of the Code Authority shall send digests

thereof to all interested Members of the Industry" (Com. Ex. 560, p. 15). After the Code period, contract provisions similar to those quoted above were incorporated in the specific sales contract form recommended in the "Compendium of Established Terms and Marketing Methods." Collective action to bring about cancellation of excessive or duplicate contracts was also continued after the Schechter decision. On July 22, 1935, George H. Reiter, chairman of the trade practice committee of the Institute, wrote Wabash in part:

The unshipped balance on this contract as of June 30 was 6,538½ barrels and member owning this contract states that they are not shipping at this time and believe that Wabash cement is being furnished.

We find no contract of your company covering this project and inasmuch as there have been raises in price since this contract was awarded we are investigating this matter and request that you advise us whether or not you have a contract covering a portion of these requirements and have failed to file it with this office as required by Section 7, Article VIII, of the Amended Code.

Please make reply within five days of receipt of this letter (Com. Ex. 1014).

On July 23, 1935, the Chicago Division of the Institute wrote the Louisville Cement Co. in part:

We have had our engineer check contract indicated below.

* * * * *

The store and apartment building at 4900 Glenway, the address shown above, was completed in 1929. A new building of the same type is being built at 4927 Glenway but the contractor is Harry Ledermeier. Lee Knose, the contractor listed on your contract is not connected with this job in any way.

We, therefore, believe that no obligation exists under this contract for cement (Com. Ex. 1015-A).

On August 22, 1935, Louisville Cement Co. wrote to one of its representatives in part:

I am enclosing a letter from Bass & Co. asking us to extend the expiration date on the 1,000 barrel contract for the W. B. Hudson job from Sept. 1st to December 1st. I don't know just what to do about this. Representatives of other cement companies have been investigating the three contracts we have at Clarksville and reporting to the Institute that these contracts are not legitimate and that they will require a great deal less cement than the contracts call for. The Institute has been questioning the validity of these contracts. We are on the spot concerning them.

We do not want to ruin our reputation for fair dealing in the industry, but on the other hand we want to be absolutely fair with Bass & Co. at Clarksville. We want to supply on these contracts every barrel of cement that is necessary to fill them, and if it is necessary to extend the expiration date on the W. B. Hudson contract to December 1st in order to do so, then we are perfectly willing to make this extension (Com. Ex. 1015-B).

On September 24, 1935, the Chicago Division of the Institute again took this matter up with the Louisville Cement Co., writing in part:

We have had our engineer check contract indicated below.

* * * * *

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It is our information that Bass & Company are furnishing this cement at the old price on the Post Office job at Clarksville, so naturally they were able to undersell other dealers, as this was bought at a lower price on these fictitious contracts.

May we have your understanding? (Com. Ex. 1015-C).

(g) In order that the contract checking and cancellation carried out by it might appear to be the result of individual action, the Institute attempted to disassociate itself as far as possible from any public connection with the results of this activity. When a member of the Institute, one of the corporate respondents herein, wrote the Institute suggesting that summaries of contracts and cancellations be sent directly to its salesmen to save respondent the necessity of copying information from these reports for the use of its salesmen, the Institute on March 12, 1936, replied in part:

I am afraid that it is out of order to send copies of our Daily Report to salesmen and this has never been done. The reason is that we merely send to members in this matter information for their guidance, and it is the usual practice for member companies to forward a part of this information to field men without identifying it as coming from the Cement Institute.

The purpose of this procedure is to indicate the fact that the company itself is responsible for the information furnished salesmen and also to avoid the implication that the Cement Institute has any authority in the control of contract obligations (Com. Ex. 1932).

PAR. 14. (a) Prices which appear to be uniform may be affected by differences in the accompanying terms and conditions of sale. Standardization of terms and conditions of sale is needed to effect complete and total price uniformity. Respondents' multiple basing-point delivered-price system has been supplemented by uniformity of terms and conditions of sale brought about by collective action. The process of standardizing these terms and conditions through collective action did not begin with the Institute, although it carried forward, supported, and supplemented the uniformity previously created.

(b) The record shows that collective action to establish and maintain uniformity of terms and conditions of sale was carried on by cement manufacturers over a long period of years. At a meeting of the Association of America Portland Cement Manufacturers in September 1905, at which representatives of a number of the corporate respondents herein were present, the following occurred:

Mr. HARDING (Bonneville). I should like to know how many companies are really living up to the agreement with reference to discounts to be made on and after September 1st? We all signed the report in good faith, but I understand that some companies are still making quotations covering 2 percent off in ten days, good until the end of the year.

After considerable discussion on this question the report of the Committee on Trade Conditions was read by the Secretary (Com. Ex. 3235-23).

At a meeting of the same association in December 1905, also attended by representatives of a number of the corporate respondents herein, the president of the association called attention to a change made in the report of the Miller committee in order to eliminate therefrom the references to price and said that all members who signed the original report had, with one exception, agreed to the change. As thus modified, the agreement read in part:

AGREEMENT TO STANDARDIZE THE CUSTOMS AND USAGES IN THE CEMENT TRADE

WHEREAS, We, the undersigned, Manufacturers of America Portland Cement, desire to standardize the customs and usages in the cement trade for the purpose of making all our business transactions more easy, simple, safe and economical;

Therefore, We agree as follows:

* * * * *

Concerning terms of payment: In all cases payment within thirty (30) days after date of shipment from the works to be insisted upon. A one (1) per cent discount for cash to be allowed for payment within ten (10) days from date of invoice. Invoices to be stamped "Positively no discount on this bill after -----" No discount to be allowed on freight and sacks under any conditions. This change to take effect September 1, 1905.

Concerning bags, the following recommendations are made: Bags positively to be paid for with the cement. Discount in no case to be allowed on bags or freight. Count and inspection at mill always to govern. Freight on bags to be prepaid by customers (Com. Ex. 3235-Z8, Z7).

At the same meeting the association unanimously adopted the report of the bag committee and appointed a committee "to put that Resolution in shape for signature, and to present the same to the Association this afternoon." The report referred to reads:

I respectfully report, on behalf of the Committee on Bags, that I have communicated with all members of our association, and have received written replies, in which they express their opinion relative to the charge which should be made for cotton sacks, and also the price of their repurchase, and find that a large majority of the companies are in favor of uniform action. From this information I respectfully report as follows: "That all cotton sacks be charged at the rate of 10 cents each, and be included in the price of cement, and when the cotton sacks, having the label of the respective manufacturers, are returned in good condition, freight prepaid, that each company repurchase the cotton sacks at 7½ cents each" (Com. Ex. 3235-Z8, Z9).

The minutes of a meeting of the same association in March 1906, attended by representatives of a number of the corporate respondents herein, show:

The reason the Association did not act upon Mr. Gerstell's motion (i. e., that the Association agree to charge 15 cents per barrel for cement in paper) was—

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some of the members were of the impression that if we should issue another agreement which would necessitate each member sending out a number of circulars, it would cause much comment among the dealers about the so-called "Cement Trust" (Com. Ex. 3235-Z11).

The minutes of a meeting of the same association in September 1915, attended by representatives of a number of the corporate respondents herein, contain the following:

(The report of the Committee on Trade Conditions was here presented, read and—after discussion—the recommendations approved, but since the Committee were authorized to prepare a special booklet containing their report, the same is not included as part of these minutes.) (Com. Ex. 3236-Z85.)

In the introduction to the publication thus authorized it is stated:

The magnitude and importance of the cement industry demand that the sale and distribution of the product be conducted upon firm and definitely fixed principles, and that doubt and uncertainty be eliminated.

It appears that the importance of this attitude is being more fully appreciated by the cement manufacturers, and that the membership is desirous of a full and free discussion of the various subjects involved in order that the consensus of opinion may be ascertained and established as custom, and so recognized by all cement manufacturers (Com. Ex. 3193, p. 1).

Some of the recommendations made were, in substance:

1. In making delivered prices the manufacturer only guarantee cost at destination and not be responsible for shortage or damage occurring in transit; and, further, that no sales or quotations be made subject to any specifications except those of the United States Government or the American Society for Testing Materials.

2. When cement is tested and kept in sealed bins for the purchaser, a charge of not less than 3 cents per barrel be made.

3. The use of standard forms, as per the accompanying examples, for specific job contracts, contracts with dealers, and orders.

4. Sale of the packages provided for cement on the same terms as the cement is sold, and that cloth sacks be repurchased from the original purchaser only when in serviceable condition or readily repairable.

5. No rebates or concessions in any form to be made to any purchaser or his agent.

6. Trade quotations to be limited to one car for immediate acceptance and 15-day shipment.

7. Change of the cash discount from 2 to 5 cents per barrel.

8. A statement of the conditions necessary for a purchaser to be considered as a dealer, constituting a definition of dealer.

9. No sales to a dealer for shipment to any town other than his home town except at consumer price, excepting towns adjacent to his home town where there is no dealer.

10. In quoting contractors or consumers add not less than 5 cents per barrel to dealer price.

11. No payment of commissions to dealers.

12. Price changes to be effective upon announcement.

13. No guarantees against decline in price (Com. Ex. 3193).

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(c) In 1919 the Portland Cement Association, largely composed of respondents herein, published a pamphlet containing various recommendations adopted by that association. The substance of some of the recommendations was:

1. No sale of cement subject to specifications other than those of the American Society for Testing Materials.
2. When cement is tested and kept in sealed bins for the purchaser, a charge of not less than 3 cents per barrel be made.
3. The use of standard forms, as per the accompanying examples, for dealer contracts and orders.
4. Sale of the packages provided for cement on the same terms as the cement is sold and that cloth sacks be repurchased from the original purchaser only when in serviceable condition or readily repairable.
5. Trade quotations to be limited to one car for immediate acceptance and 15-day shipment.
6. That the 5 cents per barrel discount for payment in 10 days be continued.
7. A statement of the conditions necessary for a purchaser to be considered as a dealer, constituting a definition of dealer.
8. No sales to a dealer for shipment to any town other than his home town except at consumer price, excepting in towns adjacent to his home town where there is no dealer.
9. Manufacturers have for some years made a differential in price between dealers and consumers, first of 5 cents and later 10 cents per barrel (though in some sections of the country some manufacturers still use a 5-cent differential).
10. No payment of commissions to dealers except where clear liability for such payment exists.
11. Price changes to be effective upon announcement.
12. No guarantees against decline in price.
13. Only two classes of buyers to be recognized—dealers and consumers (Com. Ex. 3192).

(d) Having in preceding years created substantial uniformity in terms and conditions of sale, it was not necessary to go over the same route again in minute detail when the Institute was organized in 1929. Affirmation in broad terms was sufficient, and this was given in the Code of Ethics agreed to by members of the Institute. Included in the provisions of this code were prohibitions against:

1. Selling cement except under specifications of the American Society for Testing Materials, American Standards Association, or the United States Government.
2. The payment or absorption by the manufacturer of costs for testing cement for a purchaser.
3. The use of contracts in the sale of cement which do not contain definite statements of price, quantity, terms of payments, time and place of delivery, and all other items necessary to form a complete contract. (The adoption of a standard form of sales contract by the industry was recommended.)
4. Failure to require payment of the manufacturer's published charges for packages and the making of payment or allowances for unserviceable sacks returned or for sacks of another manufacturer.

5. The granting of any form of rebate, refund, credit, or unearned discount, or special services or privileges to one customer not given to others (Com. Ex. 138-N-U).

(e) The differential in price previously granted to dealers was wiped out in 1930 when the effects of the depression caused dealers to cut prices and pass on to purchasers a portion of the trade discount received by them. Lehigh reduced the differential to dealers to 5 cents per barrel, withheld payment until the end of the year, and made payment contingent upon the dealer's satisfactory conduct with respect to the discount. Other respondents followed Lehigh's action, but there was some division among the respondents upon this matter. In a letter of December 12, 1930, Charles L. Hogan, vice president of Lone Star, said in part:

The Lehigh Company and some of those who have joined with them have been making very strenuous efforts to bring all the members of the industry to the Lehigh selling plan. They have been successful to a marked degree, for as stated in a previous letter, the only companies in the East who have not announced that they were going to follow the plan are Whitehall and ourselves. In the Middle West Wabash, Standard Portland Cement at Painesville, Ohio, Marquette and our company are the exceptions, although Missouri Portland has also put in a modified plan which recognizes the 5¢ differential but allows deduction when the invoice is paid. They have not been so successful in the Kansas field for there all of the companies are following the old plan, with the exception of Atlas, Lehigh and Alpha (Com. Ex. 1131-J).

Substantial dealer opposition to the "Lehigh" plan developed. Leaders of the cement industry met and discussed the situation thus created and sought to work out a basis of settlement. The final result was that no differential has been granted to dealers since 1931, and the manufacturer's price was made the same to dealers as to those consumers who are accepted by manufacturers as direct customers.

(f) Each of the above provisions in the Code of Ethics had its counterpart in the NRA Code for the Cement Industry, but such Code was by no means limited to those provisions. The cash discount of 10 cents per barrel appeared in the Code, and the standard forms of contracts annexed to the Code included the package charge of 10 cents for cloth sacks and a refund of 10 cents for each of the seller's bags returned in good condition.

(g) The "Compendium of Established Terms and Marketing Methods" published by the Institute after the NRA Code period contained, among other recommendations, the substance of the provisions mentioned as appearing in the Code of Ethics and the NRA Code. The standard forms of contracts annexed to the Compendium provided for a package charge of 10 cents each for cloth sacks and for the refund thereof to the sellers on sacks returned in good order. The charges

of 15 cents per barrel for packaging cement in paper bags and of 40 cents per barrel for packaging in cloth bags have been continued unchanged for more than 35 years.

PAR. 15. (a) With a view to maintaining a price level considered satisfactory, some of the respondents have been concerned for a long period of years with means of harmonizing production with shipments of cement. These activities have included the inculcation of a philosophy of maintaining a static condition in the production of cement to the extent of preserving the individual manufacturer's proportion of the total business and acceptance of the theory of dividing available business among producers in accordance with some predetermined formula. Respondents have, by agreement, carried on an extensive program of cooperatively collecting and disseminating detailed figures showing the production, shipment, and stocks on hand. These figures are arranged in various ways, not only including totals, but also revealing to each member of the Institute the individual figures for each of the other members. Each member was thus informed of the exact position of each of his competitors.

(b) The minutes of a meeting of the Association of American Portland Cement Manufacturers in September 1903, attended by representatives of a number of the respondents herein, show that consideration was then being given to a situation resulting from an overproduction of cement and lower prices resulting therefrom. A committee was appointed to consider a plan for overcoming these difficulties, the chairman of which suggested that they should have figures—

* * * actual figures of the various mills * * * showing from month to month, stocks on hand and the cement production and capacity of the various mills, * * * (Com. Ex. 3225-O).

The minutes of a meeting of the same association in March 1904, also attended by representatives of a number of the respondents herein, show that arrangements were made for the collection, compilation, and dissemination of statistics for the industry. The minutes of a meeting of the same association in June 1910, attended by representatives of a number of respondents herein, show that by unanimous agreement the statistical reports were broadened to include monthly reports of production and shipments expressed in both actual figures and percentages. In the course of a discussion of stocks on hand, production, and other data at a meeting of the same association in June 1911, also attended by representatives of a number of the respondents herein, W. S. Mallory said:

Yes, sir—that is right, from 25 to 30%; but in the meantime if we continue manufacturing at the present rate—and that is what we are doing now—if we

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continue making cement for the balance of the year as we are making it now, it means just one thing—trouble (Com. Ex. 3235-Z-9).

* * * * *

Now, in regard to that, I have only this suggestion to make. * * * I cannot speak for all the companies. There is one, however, I can speak for, and that is the Edison Company; * * * We have decided on an amount of stock and clinker that we will accumulate, and the moment our shipments fall off in volume, and we have that stock on hand, that moment the Edison Company shuts down. * * * I cannot help saying that it seems to me that every company represented here could do the same thing. If they would do so, that would be a form of co-operation that would be very effective in remedying present conditions, and a plan of operations that would absolutely and effectively solve our problem of over-production for the balance of the year, * * *.

* * * * *

Mr. KELLEY (Virginia). Then, in your opinion, the crux of the whole matter is this: the people who have thirty days' production on hand should shut down for a time?

Mr. MALLORY (Edison). Well, every one can do as they think best, but that is what we are going to do (Com. Ex. 3235-Z100, Z101, Z102).

(c) In September 1933, W. S. Mallory was employed by the Institute as its statistician. From 1926 to 1933 Mr. Mallory had furnished a statistical service on a subscription basis to some 50 of the corporate respondents herein and for many years prior to 1926 he had been active in statistical work designed to aid in controlling the production of cement. His first connection with this work apparently began about 1906 while he was an official of Edison. In 1932 Mr. Mallory began furnishing the figures for individual mills, including production and shipment figures, the mills being identified by key numbers known to all subscribers. The statistical service furnished by Mr. Mallory, both prior to and after the organization of the Institute, included figures purporting to show the productive capacity of each mill. These were said to have been estimated on the basis of the "three highest consecutive months' actual clinker production" of each mill (Com. Ex. 821-M). The total of these figures, however, is less than the total compiled from the individual reports of producers as reported by the United States Bureau of Mines.

(d) In a telegram sent from Chicago under date of November 19, 1929, F. H. Powell, president of Southwestern, stated to a vice president of that company in part:

VERY QUIET MEETING LIGHT ATTENDANCE * * * CONSENSUS
GENERAL OPINION IF CURTAILMENT PRODUCTION COULD BE BROUGHT
ABOUT OTHER GRIEVANCES WOULD SOON BE CLEARED UP * * *
(Com. Ex. 1270-A).

In writing to another official of Southwestern on January 10, 1929 (1930?), concerning an Institute meeting he attended in Chicago, W. J. Jennings stated in part:

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The meeting of this Cement Institute started in the morning and we were still at it along about 8 o'clock at night, and I want to say it was probably the most intensive meeting ever held by the cement industry.

* * * * *

Now, Mr. Merrill, this formation of the Cement Institute is going to put a different aspect on the cement business in this territory. During the meeting, Mr. Mallory, who is statistician for the Cement Institute and who has developed the amount of cement available for each plant throughout the U. S., was called upon to give the capacities of the different plants in the mid-west district. * * * He had us down at 1,500,000 barrels and he had Wabash down at 980,000, and they called on each one of us to state if these amounts named were anywhere near correct. I told them that we could manufacture a great deal more than this and that by the end of this year our capacity would be over 2,000,000. Harry Jennings stated that they also had a 2,000,000 barrel plant or would have by the end of this year. But they would not allow him any advance. I have a promise from Mr. Mallory that he will advance no one in this district until he advises me beforehand. This Mallory was very willing to do as it was after I had been appointed to the Executive Board!

It is the idea of the Cement Institute to get all the member companies to reduce their output to 70% of the capacities allowed them by Mallory, and of course the price would then automatically go back to what it originally was, and some are talking of 40¢ over the present price. This operation on 70% capacity would continue until such time as the country was able to consume more or stocks on hand are reduced to zero (Com. Ex. 1270-B-J).

(e) According to Mr. Mallory's figures, the average percentage of production to capacity for 1930 for the several districts did not exceed 70 percent in any district, the closest approach being 69.9 percent in eastern Missouri, Iowa, Minnesota, and South Dakota; the same in Texas and 69.8 percent in western Missouri, Nebraska, Kansas, Oklahoma, and Arkansas. The average percentages for other districts varied considerably but were substantially below 70 percent (Com. Ex. 2895-A-D). It is not practicable to determine to what extent this resulted from cooperation among respondents or from the effects of general economic conditions in 1930.

(f) The effect of keeping continually before manufacturers the individual production of each, and its relation to the total, aided in creating among many respondents a philosophy of sharing the available business and of not seeking too strenuously to increase their individual shares of the total. In his testimony B. F. Affleck, formerly president of Universal, said that he understood before 1930 and 1931 the futility of attempting to increase his proportion of the total business by price reductions and that others learned that lesson in those years. He also said:

Q. You think it is futile for competitors to attempt to change their percentage of the total business that is available to the whole group?

A. I don't think my opinion as to whether it was futile or not is important. It just is futile.

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Q. Well, why?

A. Because he can't get away with it.

Q. In other words, you don't think it is possible for a concern that has ten percent of the business this year or last year to make it fifteen percent this year?

A. Oh, I didn't mean to convey that idea. The fact of the matter is, our percentage of the total underwent quite a severe shrinkage. We didn't get our percentage in 1931 or 2 and others got more.

Q. And others got more?

A. So I should qualify that by saying it wasn't entirely futile. They could get by with a certain increase in percentage for a certain time but they soon ran out (T. 34933, 34934).

In a memorandum prepared in 1931 or early 1932 by Diamond and circulated by it to competitors, it was stated:

In the year 1930, according to Mr. Mallory's yard-stick, we shipped only 4500 barrels in excess to our fair share of the business, which should be a clear indication that we have not abused our position (Com. Ex. 2662-B).

In a memorandum dated March 9, 1934, Albert Moyer, president of Vulcanite, stated in part:

* * * our tonnage has, even from the start, been in accord with the shipments of other plants in this district (Com. Ex. 426-P).

In a memorandum sent by Mr. Mallory to Nazareth on April 5, 1934, it was stated in part:

First I want to try and show that the theory that it is good business to increase the volume of shipments of any company in excess of its quota share by cutting the market price in order to reduce manufacturing costs is a very costly fallacy not only for the company, but also for the entire industry. * * * (Com. Ex. 821-E).

In writing to the same respondent on November 15, 1933, Mr. Mallory had stated in part:

You may be interested in the results of my last tabulation of the 1933 shipments (January 1st to October 31st), figured out on the percentage share plan. I know there are one or more companies in each district who have ignored this plan entirely and, in the following calculation, I have omitted their shipments in order to learn the results of the operations of the companies who are more inclined to co-operate for the common good.

To enable you to understand just what I mean by "out of balance," I will explain it by using the figures of Districts 1 and 2 * * * the total shipments from the thirty-six plants for the ten months of 1933 (January-October) amount to 13,611,000 barrels and the "out of balance" shipments are 549,000 barrels or 4% of the total shipments, which means that, if the 549,000 barrels were properly redistributed, each of the thirty-six plants would have shipped its percentage share of the total 1933 shipments.

The following gives the results in the districts my work covers:

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	Total plants in district	Number plants in this calculation	Out of balance
Ea. Pa., N. J., Md., N. Y., and Me.....	38	36	4.0%
Ohio, Western Pa., and W. Va.....	19	16	8.1%
Wis., Ill., Ind., and Ky.....	11	10	12.2%
Va., Tenn., Ala., Ga., Fla., and La.....	19	16	7.4%
Ea. Mo., Ia., Minn., and S. Dak.....	13	12	4.5%
W. Mo., Nebr., Kans., Okla., and Ark.....	13	12	8.0%
Texas.....	8	8	13.2%
	121	110	-----

Average for 110 plants out of balance 6.9 percent (Com. Ex. 821-2J).

(g) When the NRA Code was approved November 27, 1933, it contained a provision under which the board of trustees of the Institute was authorized to formulate a plan for the sharing of available business for presentation to the Code Authority for consideration by the Administrator. Earnest and continued efforts to formulate such a plan were made. The Mallory formula, based on productive capacity, and also the so-called "Storey" plan, based upon shipments, were considered. Substantially all members of the industry desired a pro-ration plan, but there was difficulty in agreeing upon a basis for pro-ration. Some respondents had been unable to establish a three-month production record which they felt properly reflected their productive capacity; some objected to any plan which would allow those mills which had failed to cooperate and had expanded their production at the expense of others to retain their gains; and some objected because they thought chain mills might be favored as against individual mills: Consideration was given to other methods of allocating business, but no plan or method was ever approved by NRA.

(h) A plan was suggested by the chairman of the committee on sharing available business (Joseph Brobston) for the allocation of business by districts, dividing the total in each district between chain mills as a group and individual mills as a group and allowing each group to decide upon further division among its individual members. The minutes of a meeting of the members of the Institute for Districts 1 and 2 held on September 12, 1934, show:

The Chair recognized Mr. Conn, who stated that the meeting was called because of a Resolution passed by the Board of Trustees to the effect that the final Storey Committee report be again submitted to the membership in Districts #1 and #2 for such action as those members desire to take.

The Chair recognized by Mr. Coffin, who addressed the meeting relative to his position regarding a plan for sharing available business. After a discussion, the roll call showed that the membership in Districts #1 and #2 was unanimous for some plan of Sharing of Available Business (Com. Ex. 637-L).

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Thereupon Mr. Brobston presented his plan in detail and the minutes further show:

After considerable discussion the Chair recognized Mr. Coffin, who moved that the trustees of Districts #1 and #2, calling in such assistance as they may deem advisable, attempt to formulate a plan of allocation of business in Districts #1 and #2; seconded by Mr. Conn and unanimously carried (Com. Ex. 637-O).

In writing C. F. Conn on September 27, 1934, George F. Coffin stated in part:

A canvass of all the members in Districts 1 and 2 seemed to indicate that in the past the business seemed naturally to fall in figures which showed that 62% of the going business in Districts 1 and 2 fell to the so-called "Chain Companies," and that naturally the remaining 38% fell to the individual or smaller operating units. I think the statement was made that from whatever angle you looked at the picture, the division remained practically the same (Com. Ex. 577-2P).

The minutes of meetings of producers located in these districts do not show the adoption of any plan of allocation but do show that "much labor has already been expended" (Com. Ex. 637-T) upon the subject. Figures for these Districts for the years 1936, 1937, and 1938 prepared by Mr. Mallory and rearranged and translated into terms of percentages, show the extent to which shipments conformed to the 62 percent and 38 percent pattern and the relationship of shipments to clinker capacity.

Districts 1 and 2

	Percent of total shipments			Percent of shipments to capacity ¹		
	1936	1937	1938	1936	1937	1938
Total, chain mills.....	63. 42	63. 93	62. 58	33. 28	37. 46	34. 03
Total, individual mills.....	36. 58	36. 07	37. 42	37. 90	38. 82	37. 37
Lehigh.....	16. 15	16. 72	15. 58	29. 74	42. 41	36. 68
Universal.....	12. 31	13. 03	12. 75	31. 19	34. 30	31. 14
Penn-Dixie.....	7. 77	7. 55	7. 82	33. 05	33. 36	32. 06
Alpha.....	6. 78	5. 78	7. 31	30. 43	26. 96	31. 64
Lone Star.....	6. 46	6. 99	6. 16	42. 02	47. 18	38. 59
North American.....	6. 49	6. 78	6. 25	39. 41	42. 73	36. 54
Lawrence.....	5. 61	5. 21	4. 98	35. 75	34. 51	30. 57
Medusa.....	1. 85	1. 86	1. 72	53. 01	55. 40	47. 55
Vulcanite.....	2. 14	2. 35	2. 33	22. 41	25. 61	23. 58
Edison.....	4. 53	3. 98	3. 68	47. 46	43. 34	37. 23
Coplay.....	2. 82	2. 84	2. 96	31. 03	32. 43	31. 34
Nazareth.....	3. 22	3. 14	3. 40	39. 08	39. 61	39. 86
Hercules.....	3. 28	3. 09	2. 95	37. 79	37. 05	32. 75
Giant.....	2. 37	2. 51	1. 86	28. 48	31. 33	21. 52
Allentown.....	4. 69	4. 88	4. 47	48. 70	52. 62	44. 75
Keystone.....	4. 22	4. 08	4. 78	49. 65	49. 88	54. 18
Glens Falls.....	1. 83	2. 14	3. 26	32. 37	39. 24	55. 43
Federal.....	1. 63	1. 74	1. 66	33. 01	36. 63	32. 45
Whitehall.....	5. 85	5. 31	6. 06	71. 95	67. 80	71. 85

(Com. Ex. 3203-A; 3205-A.)

¹ Includes estimated capacity of National Portland Cement Company. Shipments of this company not available.

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(i) The nature of the statistical data collected and disseminated to its members by the Institute is shown in a letter dated July 26, 1935, from Mr. Mallory to the manager of the Institute:

(A) Gives the percent of clinker production and cement shipments on the basis of clinker capacity for each district for the preceding twelve months; also the amount of clinker and cement produced, and the shipments, for the current year. The purpose of this report is to enable each company to estimate the production and shipments of its plant or plants and to know every month whether it is producing and shipping more or less than the average of all the plants of the district in which the plant is located. Issued monthly.

(B) The purpose of the report marked "B" is to show all stocks on the same basis by using days' supply instead of barrels in order to bring out clearly when the stock of any one district is becoming too large; to illustrate, on June 30th Michigan had enough cement on hand to supply the 1935 rate of demand until about January 15, 1936, without producing any in the meantime. Issued monthly.

(C) Gives the average factory value per barrel of portland cement from 1920 to March 31st, 1935. This report is issued quarterly.

(D) This series of reports gives for each company the amount of clinker and cement produced, the amount of cement shipped, and the clinker and cement stock of the previous month, together with the total production and shipment figures of the previous twelve months. A key sheet for Districts 1 and 2 is attached, as well as the forms used to obtain the information. (Reports for the Rocky Mountain and Pacific Coast districts are not issued.) The purpose of this tabulation is to enable each company to know not only what it is producing and shipping, but also what each of its competitors is doing.

(E) Gives for each State in Districts 1-9 inclusive the dollar amount of building contracts awarded during 1935 up to the current month, together with the amount awarded during the same period for each of the past three years. The purpose of these figures is to indicate in which State or States there is the probability of a change in demand. An estimate of the probable consumption (shipments into States) in each district over a period about six months hence also accompanies these figures in order to give the companies some idea of what the future consumption may be (Com. Ex. 1025-A, B.)

The thought expressed in (D) above was reiterated in a letter by Mr. Mallory to the manager of the Institute dated April 2, 1936, in which he said:

I have no knowledge as to the actual value the reports have to the companies. However, they are issued in the belief that they help the companies by eliminating their suspicions in connection with what their competitors are producing and shipping since they get the facts, and the reports also bring them information about current conditions in the construction industry (Com. Ex. 2379).

A few members of the Institute finally objected to such disclosure of the details of their business to competitors. On July 17, 1936, the president of Marquette wrote the Institute in part:

* * * However, we do object to the manner in which reports are presently issued by the Institute. They show the situation with respect to production, ship-

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ments, and stocks of each individual plant in a given district, designating each plant by a key number. But, since the key is known to us, and we presume to all other manufacturers as well, the result is to make known to each member of the Industry the exact position of each of its competitors.

As in the case of the reporting of contract information, covered by the attached copy of letter, we maintain that such a detailed dissemination of information serves no useful purpose whatsoever. We do not require that information concerning the business of our competitors and we see no reason why they are entitled to such information concerning our business.

All that is necessary or desired is a simple statement once each month exactly similar to the statement produced by the Bureau of Mines. This statement shows the production, shipments, and stocks by districts established by the Bureau many years ago. The district figures cannot be broken down by anyone to show the individual figures of a particular manufacturer. Preferably an effort should be made by the Institute to cause the Bureau of Mines to speed up its monthly compilations and dissemination of these figures. If this were accomplished, there would be no need for duplicating the work through the Institute as is now done (Com. Ex. 1025-G).

The president of Ash Grove, L. T. Sunderland, on August 22, 1936, wrote to Charles F. Conn, chairman of an Institute committee, suggesting the trustees should be advised concerning

The known objections on the part of an uncertain number of the members of our industry to the form in which reports of production, stocks, and shipments have been distributed. Frankly, I question whether we could secure government approval of our present method and forms which reveal to competitors such intimate details of their business operations.

* * * * *

It is well known that such statistics have been misused, and besides, have been a source of constant irritation ever since they were instituted, which I believe was under the NRA. Consideration of this matter is clearly contemplated by Section 2, Page 6 of the report, but I think the Trustees at the time of receiving the report should be informed of the objections which have been registered, both formally and informally, against the revelation of individual statistics (Com. Ex. 870-6H).

In testifying with respect to the above-mentioned letter, Mr. Sunderland said in part:

Q. You said that the revelation of such matters to competitors tended to make a mill who was not increasing its business suspicious of the man who was increasing his business?

A. I did (T. 13665).

* * * * *

Q. Has there been any specific harm result to your company from it?

A. Well, that is rather intangible and I couldn't give you any specific case.

Q. What is your belief in regard to it?

A. Well, I believe that when we have been fortunate enough or enterprising enough to do a larger amount of business than some of our competitors, our jealous competitors thought we ought to do, doubtless it would result in activities of theirs that were harmful to us (T. 13669).

(j) Continuing as they did a prior cooperative activity of many years' standing, the statistical services of the Institute in furnishing to each corporate member of the Institute intimate details of the business of each of its competitors and the relationship thereof to the aggregate business, accompanied as they were by other activities set out herein, resulted in substantial restraint upon the price, production, and sales policies of the corporate respondents and tended to substitute collective opinion for individual judgment.

PAR. 16. (a) Another aspect of the cooperation among respondents to prevent increases of production of cement which might interfere with price stability appears in their organized opposition to the entry of new production and new competitors into the cement industry.

(b) The proposed code submitted to NRA by the Institute provided that prior to the establishment of a new plant, an increase in capacity of an existing plant, or the moving of a plant to another location, the Institute might, if it believed the facts warranted such action, petition the President to prohibit the contemplated action. The NRA Code for the Cement Industry, as approved, contained such a provision. At a meeting of the trustees of the Institute on December 7, 1933, it was moved that:

* * * It is the position of this Board that there should not be any increase of productive capacity in any area; seconded by Mr. Affleck and unanimously carried (Com. Ex. 616-D).

At a meeting of the trustees of the Institute on May 10, 1934, the minutes show:

The chair also read a report from Mr. John Treanor, Trustee District #11, in which it was recommended that the Southwestern Company be permitted to relocate 50% of its Victorville plant at Torrance and that the members of the Institute in Southern California accept the statement made by the Southwestern Portland Cement Company that this relocation will not, in any way, increase the productive capacity of the District. After discussion, the Chair recognized Mr. Rader, who moved that the Southwestern Portland Cement Company be granted this permission in accordance with the statements made in their letter; seconded by Mr. Sunderland; unanimously carried (Com. Ex. 620-C, D).

(c) In a circular letter to Institute members dated December 14, 1935, George H. Reiter, general manager of the Institute, advised that:

* * * Colonel John B. Reynolds of the Cement Information Bureau of this organization appeared before the Resolutions Committee for the purpose of presenting and discussing a resolution which he had been requested by officials of the National Association of Manufacturers to draft in regard to the policy of the Reconstruction Finance Corporation in extending loans to units of industries already in a state of excess capacity of production (Com. Ex. 674).

The resolutions committee recommended the insertion of a resolution in opposition to "this harmful practice" in the report of the committee on relations of government to industry. Mr. Reiter then suggested that members of the Institute who were members of State and local associations "can do much by urging these organizations to take similar action and by bringing the matter to the attention of their senators and representatives in Washington."

(d) At least a portion of the mechanics of the opposition to new capacity appears in the activities shown by the record with respect to the completion of a cement plant at Foreman, Ark. On January 11, 1934, a vice president of Arkansas wrote Charles Boettcher, president of the Ideal Cement Co., which controls Arkansas, and stated in part:

We have heard several rumors here to the effect that the cement plant at Foreman, Arkansas, is trying to resume building operations and operate under the Code Authority.

* * * * *

With the curtailment of production of other going concerns, it would be a catastrophe if any additional tonnage were put on the market at this time (Com. Ex. 415-28).

Mr. Boettcher on January 13, 1934, wrote B. H. Rader, chairman of the Code Authority, enclosing a copy of the letter received from Arkansas and stating in part:

My understanding is that the NRA does not encourage building or finishing any old plants. Will you kindly let me know something about this, whether the completion of the Foreman Plant can be stopped, or not (Com. Ex. 415-27).

On March 10, 1934, Mr. Rader wrote Joseph S. Young, president of Lehigh:

I enclose herewith letter from the Reconstruction Finance Corporation, in regard to a loan they are requested to make to complete a Cement Plant in Southwestern Arkansas. Also attached is all the data the Portland Cement Association has available. I am sending this to you as Chairman of the Committee on Building New Cement Plants.

I am also enclosing a few letterheads of the Code Authority, and if you can add some data to this, I wish you would write a letter. You can sign my name to it and forward it. I thought also it might be advisable to have someone call on the Reconstruction Finance Corp., 33 Liberty Street, New York City.

If you agree with me on this method of handling it, wish you would do so and send copies back to me for our files. You will notice he asks for two copies of the data (Com. Ex. 415-22).

On May 24, 1935, Mr. Boettcher wrote Blaine S. Smith, president of Penn-Dixie, who was active in Institute affairs, and stated in part:

At a court hearing connected with the foreclosure sale of the cement plant equipment at Foreman, Arkansas, the other day, I am informed there was

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testimony offered to the effect that the management of the defunct Company anticipated that you would join with them and complete building of the Plant.

I trust that this statement he made was without foundation, Mr. Smith, as I feel that two Plants located as close together as would be ours at Okay and Yours at Foreman would be unable to earn returns on the investment. In fact, it has been my intention to bid on this equipment and if possible, purchase it in order to remove it as a menace to the market in Arkansas. As you know, there are so many Plants which sell into the State of Arkansas that there is very little business for any one of them, and placing this promotion at Foreman into production would make conditions much worse than they are at present, with probable resulting price demoralization (Com. Ex. 500-H).

Mr. Smith replied to this letter on June 8, 1935, in part:

We naturally are interested in seeing no increase in cement productive capacity in the country. There is too much already. But, if this plant is going to be completed anyway, and of course that is their intention, we thought we might be interested in it.

The result of our investigation was not favorable and I doubt if we could become interested. I understand the sale which was scheduled was postponed to a later date (Com. Ex. 500-G).

On September 30, 1935, Coy Burnett, an official of Monolith, telegraphed F. M. Coogan, president of Alpha, who was active in Institute affairs, as follows:

LEARN THAT R. F. C. AUTHORIZED THREE HUNDRED THOUSAND LOAN TO AMERICAN PORTLAND CEMENT AT FOREMAN ARKANSAS FOR PLANT COMPLETION STOP BELIEVE THIS MATTER MERITS INTELLIGENT OPPOSITION (Com. Ex. 942-B).

Mr. Coogan replied by telegram on October 1, 1935, as follows:

TELEGRAM RECEIVED CEMENT INSTITUTE WIRING PROTEST AGAINST LOAN TO FOREMAN ARKANSAS PLANT COPY OF WHICH WILL BE SENT YOU THIS WILL BE FOLLOWED UP VIGOROUSLY BY PERSONAL CONTACTS (Com. Ex. 942-C).

On October 1, 1935, G. F. Coffin, in his capacity as president of the Institute, telegraphed the Chairman of the Reconstruction Finance Corporation, making a strong protest against a loan for the completion of the Foreman plant. On October 8, 1935, Mr. Coffin advised the members of the Institute of the reply received from the Reconstruction Finance Corporation, and stated in part:

I am, therefore, sending you a copy of Mr. Jones' reply. It is evident that additional and energetic effort be made by the membership to forestall this additional excessive capacity. Copy of the letter follows:

"Permit me to acknowledge your telegram of October 1.

"This Corporation has made a commitment to the American Portland Cement Company. The economic justification for this loan was that the Engineers' reports indicated that the plan could operate at a profit if completed according

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to plans and specifications. The record further showed that a very large number of innocent stockholders had invested six or seven hundred thousand dollars in the stock of this Company, which investment represented a total loss to them unless the plant could be completed.

"If the applicant is able to meet the conditions imposed, the Corporation will be compelled to comply with its commitment" (Com. Ex. 1029-B).

On October 10, 1935, R. J. Morris, vice president of the Ideal Cement Co., wrote B. F. Affleck, president of Universal, setting out in detail the conditions imposed by the Reconstruction Finance Corporation with respect to the Foreman loan, and stated:

As I stated to you over the 'phone, this loan is apparently a menace to the entire cement industry, as it will constitute the entry of the U. S. Government in the manufacture of cement (Com. Ex. 553-5Z, 6A).

On October 14, 1935, George F. Coffin, president of the Institute, addressed a letter to all members of the Institute in which he advised of a further protest made by him to the Reconstruction Finance Corporation against a loan for the Foreman plant and continued:

On the whole, I would say that my previous request for help in this situation has met with a very generous response, and R. F. C. by this time, in addition to The Institute's protest, has a large number of individual manufacturers' protests. I think we are making real progress, but additional help is highly desirable. Kindly advise me of any steps that you take along the line of backing up The Institute's protest (Com. Ex. 500-B).

On November 12, 1935, an article by B. C. Forbes entitled "Wasted Taxes" appeared in the Chicago Herald and Examiner sharply criticizing an RFC loan authorized for the Foreman plant. A circular letter to all members of the Institute on November 18, 1935, by George H. Reiter, general manager, contains the following:

The attached syndicated article by B. C. Forbes may already have reached your attention.

The article indicates very clearly Mr. Forbes' friendly interest in this industry, as has previously been shown on a number of occasions. This present article was based on information from various sources compiled and prepared by the Cement Information Bureau of The Cement Institute and personally presented to and discussed with Mr. Forbes by Colonel Reynolds (Com. Ex. 1032-G).

On February 11, 1936, the manager of the Washington office of the Portland Cement Association wrote the Institute in part:

Sorry to be delayed in thanking you for the material which you so promptly sent to us regarding the proposed RFC loan to the American Portland Cement Company at Foreman, Arkansas, and the Washington-Idaho Lime Products Company at Orofino, Idaho.

I am holding the material regarding the former item until we are approached again by Mr. Macartney of the RFC (Com. Ex. 1028-G).

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This and other correspondence in the record indicates that the assistance of the Portland Cement Association, composed largely of members of the Institute, was enlisted in the opposition to the completion of the Foreman plant. This plant was not put into operation.

(e) A similar cooperative plan of opposition through the Institute, and otherwise, against a Reconstruction Finance Corporation loan for a plant at Orofino, Idaho, was carried out in 1936 by respondents but in this instance was unsuccessful. The Institute, through its Cement Information Bureau, also interested itself in opposing the construction of cement plants by States or municipalities.

(f) When the Tennessee Valley Authority had in contemplation the use of millions of barrels of cement and called for bids on cement for its construction work, it received bids from various of the corporate respondents which were substantially identical in price. Thereupon, a study was undertaken by TVA to determine the practicability of building and operating its own cement plant. While this study was in progress John Treanor, president of Riverside and a trustee of the Institute, arranged a meeting of Chairman Arthur E. Morgan of the TVA; Charles F. Conn, president of the Institute; John J. Porter, a trustee of the Institute Blaine S. Smith, president of Penn-Dixie; and himself. In a memorandum to the Board of Directors of TVA dated February 28, 1934, Dr. Morgan dealt in detail with this conference. He stated in part:

We discussed the Tennessee Valley Authority and its building program, and then discussed our need for cement. Mr. Conn and the others present undertook to explain to me the general nature of the organization of the industry. The personal impression I received from listening to them is that, in their opinion, uncontrolled price competition in a staple industry will tend to destroy that industry, that some kind of control is necessary for stabilization, and that the cement industry has sought to bring about such control; that the problem is a difficult one and has not been completely worked out, especially in its relation to the public. There might be superficial appearance of collusion and conspiracy against the public, when in fact there was only an honest effort to stabilize the industry for the benefit of everyone concerned. * * *

He stated a preference for purchasing cement but said that:

Inasmuch as a call for bids results in receiving identical bids for cement, from our point of view as consumers there is no competition; * * *

He suggested a joint examination of costs to determine a fair price which TVA would pay for cement and then stated:

If bids received should not be reasonable in the terms of these findings, then the Tennessee Valley Authority would take such action as it should see fit toward the production of its own cement (Com. Ex. 344-A-E).

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After long-continued negotiations, Dr. Morgan, on September 3, 1934, telegraphed Blaine S. Smith in part:

IT IS IMPERATIVE THAT WE DETERMINE OUR COURSE AS TO PURCHASE OR MANUFACTURE OF CEMENT WITHOUT FURTHER DELAY STOP WE PLAN TO ADVERTISE FOR BIDS FOR CEMENT AND ALSO FOR BUILDING A CEMENT PLANT IMMEDIATELY AFTER THURSDAY MEETING STOP BIDS RECEIVED FOR CEMENT WILL THEN DETERMINE OUR COURSE STOP THURSDAY MEETING SHOULD BRING NEGOTIATIONS TO A CONCLUSION STOP * * * (Com. Ex. 354-A).

On September 5, 1934, John Treanor telegraphed Blaine S. Smith the substance of a telegram he proposed sending to Dr. Morgan. Replying on the same day, Mr. Smith wired Mr. Treanor:

RETEL JUST RECEIVED CONSIDER YOUR PROPOSED WIRE ENTIRELY JUSTIFIED AND WITH SUCH REVISIONS AS YOU MAY MAKE BELIEVE IT SHOULD BE SENT AS NIGHT LETTER TONIGHT AS OUR MEETING IS AT TEN THIRTY CENTRAL STANDARD TIME THURSDAY MORNING SEPTEMBER SIXTH WILL KEEP YOU POSTED (Com. Ex. 562-12H).

Thereupon Mr. Treanor telegraphed Dr. Morgan in part:

* * * THE FACT THAT I HAVE LONG MAINTAINED AND DO MAINTAIN A PERSONAL LOYALTY TO YOU ENTIRELY FREE FROM SELF-INTEREST ALSO ENTITLES ME IN MY JUDGEMENT TO EXPRESS MYSELF FREELY AND FRANKLY IN A PERSONAL WAY NOT IN ANY WAY AS MEMBER OF INDUSTRY COMMITTEE STOP I AM DISCOURAGED AND DISILLUSIONED BY THE CONDUCT OF THIS INVESTIGATION PURPORTING TO BE A FAIR INQUIRY TO DISCOVER THE TRUTH STOP TO MY MIND YOU HAVE KEPT THE WORK [WORD?] OF PROMISE TO THE EAR AND BROKEN IT TO THE HOPE STOP YOU HAVE DONE THIS UNWITTINGLY I BELIEVE THROUGH A DEEPSET GENERAL PREJUDICE AGAINST BUSINESS MEN A PREJUDICE UNWARRANTED AS I BELIEVE IN YOUR CASE AT ANY RATE STOP I THINK THAT WHILE YOU HAVE GONE THROUGH A FORM OF INVESTIGATION OF THIS CEMENT MATTER AND WHILE YOU MAY BELIEVE THAT YOU HAVE TRULY INVESTIGATED IT YOU HAVE NOT OPENED YOUR MIND STOP YOU HAVE IN FACT AS I SEE IT ADOPTED A COURSE CALCULATED MERELY TO COERCE THE COMPANIES BY THREATENED USE OF ARBITRARY POWER TO BUILD THE SHEFFIELD PLANT * * * IS YOUR JUDGMENT FINAL INFALLIBLE AND NOT TO BE QUESTIONED BY THE PEOPLE WHOSE VITAL INTERESTS ARE SO DEEPLY INVOLVED STOP TO ME YOUR PRESENT ACTION IS BALD ASSERTION OF THE IMMENSE POWER WHICH IS YOURS THROUGH YOUR CONTROL OF VAST GOVERNMENT FUNDS STOP IT IS A RUTHLESS DECLARATION THAT THIS POWER CAN BE USED AT WILL WITHOUT OBLIGATION TO JUSTIFY ITS USE STOP IT IS TANTAMOUNT TO ARBITRARY DETERMINATION OF THE INDUSTRY PRICE UNDER THREAT OF DIRE PUNISHMENT IN CASE OF RESISTANCE * * * YOU HAVE THE OPPORTUNITY TO AID IN THE DEVELOPMENT OF A PROCESS OF COOPERATION BETWEEN INDUSTRY AND GOVERNMENT OR TO DEAL THE PROSPECTS OF SUCH COOPERATION AS TO THIS PARTICULAR INDUSTRY A SERIOUS IF NOT A FATAL BLOW STOP I

TELL YOU ALSO AS A FRIEND IN CANDOR AND IN ALL SINCERITY THAT IT IS MY BELIEF THAT IF YOU EMBARK ON THIS PROJECT IN THE FACE OF THE ALTERNATIVE WHICH IS BEFORE YOU COMMA IT WILL RESULT IN DISAPPOINTMENT AND CHAGRIN TO YOU AND YOUR ASSOCIATES AND AN INJURY TO THE ADMINISTRATION OF WHICH YOU ARE A PART STOP I REMAIN WITH KINDEST FEELING (Com. Ex. 354-B-D).

Within a few days thereafter a formula worked out between TVA and members of the industry was accepted. Subsequent thereto, identical bids equivalent to \$1.30 per barrel f. o. b. the second nearest mill, made pursuant to the agreed formula, were accepted and cement was purchased by the Tennessee Valley Authority.

PAR. 17. (a) A large proportion of the cement sold by the corporate respondents is distributed to and through dealers. Irregularities, in price or otherwise, in the sale of cement by dealers tend to disturb uniformity of price and terms of sale among respondents. Means of eliminating or avoiding such disturbances were sought by respondents through agreements and understandings among themselves and with groups of dealers and dealer organizations to secure uniformity in their dealer policies; to minimize competitive conflicts between themselves and dealers, as well as among dealers; to reduce irregularities in sales by individual dealers; and to minimize price competition among dealers.

(b) As in the case of other concerted action by respondents, that taken with respect to dealers and dealer policies began many years ago and the Institute has continued, adapted, and supplemented previous actions as changing conditions and circumstances dictated. As set out in paragraph 14, the Association of American Portland Cement Manufacturers, in which numerous respondents herein were members, recommended in 1915 that a dealer be defined as:

* * * a merchant, firm, or corporation regularly engaged in selling Portland cement and other building materials purchased by him for resale only who is also properly equipped with storage facilities; supplied with teams or trucks; and is recognized in his home town as a building-material dealer (Com. Ex. 3193, p. 12).

and, further: -

* * * that no dealer be quoted for shipment to any town other than his home town except at consumer price, excepting only in towns adjacent to his home town in which there is no dealer (Com. Ex. 3193, p. 2).

The Portland Cement Association, largely composed of respondents herein, recommended in 1919 the adoption by manufacturers of the following dealer definition:

A dealer is a person, firm or corporation *regularly engaged in selling Portland Cement and other merchandise*, especially building materials, purchased by him

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for resale; who is also properly equipped with storage facilities; supplied with teams or trucks; and is recognized in his home town as a building material dealer (Com. Ex. 3192, p. 4).

and, further:

* * * *a dealer should be quoted the consumer price on cement for shipment to any town other than his home town, except that it is proper to quote the dealer price to such a dealer on cement for delivery in towns adjacent to his home town in which there are no dealers (Com. Ex. 3192, p. 9).*

(c) A chronological outline of the cement marketing structure published by Lehigh in 1931 reads in part:

Prior to 1913—Dealers generally were not protected in any way. In some sections attempts had been made to establish dealer protection in one form or another, but none succeeded.

January 1913—On operations requiring less than 7500 barrels each, first efforts were made to quote only through dealers. On jobs requiring more than 7500 barrels, the minimum price was quoted to contractors.

December 1913—The quantity per operation on which the dealer received protection was increased to 15,000 barrels.

Throughout 1914—No general protection was given to dealers on any quantity. However, late in 1914, in the Northeastern States, protection was once more given to dealers generally on jobs of less than 3000 barrels. The quantity was again successively increased to 7500 barrels and 15,000 barrels. In the central West dealers were protected to the extent of 5¢ per barrel regardless of quantity.

February 1915—In all territories contractors were quoted 5¢ per barrel higher than dealers, regardless of quantity.

February 1916—The differential was increased from 5¢ to 10¢ per barrel.

August 1926—The Trade Discount method of quoting was advanced, making price to dealer and consumer the same, but with a 10¢ per barrel dealer discount to dealers on business handled by them.

November 1930—The Service Payment Plan of dealer protection was created.

And, in 1931—The flat price method of quoting without general dealer protection, returned (Com. Ex. 971-33N, 330).

In commenting upon some of the changes made and the underlying causes, Lehigh stated in part:

Before 1913 the flat price method of quoting prevailed most generally—the same price being made to dealers and consumers. The difficulty with this method was that while some manufacturers did not sell carloads to consumers where they had dealer representation, others, without such representation, did quote and sell direct. With the rapid growth of carload business this difficulty led to market conditions so disturbed that both dealer and manufacturer sought to develop methods that would correct these conditions and give both a stable basis of operations

* * * * *

* * * Price discriminations brought the invariable result of secret concessions, inside commissions, unequal and unfair dealing as between buyers in the same market and inevitable trade resentment and resistance (Com. Ex. 971-330).

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With regard to the 10¢-per-barrel differential, Lehigh stated in part:

While the entire industry observed the 10¢ per barrel differential, disquieting happenings indicated that there would be difficulty in maintaining it.

In a desire to obtain attractive carload business, many dealers continued to sell on a 5¢ margin, and thus quoted the manufacturer's product to the consumer at a lower price than the manufacturer himself would quote. The manufacturer who endeavored to uphold the 10¢ differential for dealers soon found himself at a disadvantage in actual selling—the business going to competitive brands on which split differentials were quoted.

* * * * *

The practice of selling through cut dealer differentials again became so general that a complete breakdown of the structure of dealer protection was impending. Manufacturers, dealer associations, and prominent individual dealers again renewed their activities to correct the evils, and there was an urgent call for a new marketing structure (Com. Ex. 971-33V, 33W).

Difficulties arising under the trade discount plan were stated as:

Cutting the Trade Discount by competition between dealers in their own markets. Often this was done to sell other materials.

Shipping for the account of a dealer to markets other than his own. By this practice the manufacturer, using for the purpose a dealer who would cut his differential, sold carload tonnage over a wide territory at less than the manufacturer's own price to the consumer.

The subterfuge dealer, created by the manufacturer to secure attractive business at split discounts.

The "assigned contract," where the dealer—real or subterfuge—received a small commission for the use of his name, enabling the manufacturer to sell direct and pass the Trade Discount on to the consumer (Com. Ex. 971-34B).

(d) Having returned to the practice of giving no discount to dealers, a method of controlling competition between dealers and manufacturers and among dealers was desired. The next step taken appears in the code agreed upon and presented to NRA by the Institute. Among the provisions proposed were the following:

1. Except as otherwise specified, portland cement shall be marketed in each community through the building material dealers, regularly serving such community. This applies to all classes of buyers except as in Paragraph 2. Importers, brokers, and so-called distributors shall be considered as competitors.

2. The following classes of buyers shall be sold direct by a manufacturer and at the same price and under the same terms and conditions of sale as to dealers, except as provided in Paragraph 6:

United States Government.

State Government, counties and parishes when properly authorized to purchase cement for public improvements or maintenance.

Contractors doing any of the foregoing classes of work, except where such work is located entirely within cities or villages.

Railroads filing tariffs with State or Interstate Commissions, including Terminal Railroads and contractors doing work for such railroads.

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Owners or contractors buying for power development, flood control, and water supply projects not requiring dealer service.

Concrete product manufacturers including block, tile, roofing, pipe, piling, and all other precast concrete units, when for their own manufacturing operations but not for resale.

Commercial concrete mixing plants for their own processing operations but not for resale.

3. *Definition of a dealer.*—A cement dealer in the Industry is one who has an established place of business where he is regularly engaged in selling portland cement and other building materials to the public, with facilities to serve the retail trade in a given territory and able and willing to perform all functions devolving upon him in securing, performing and protecting contracts for the delivery of portland cement for specific work on his account.

The dealer's compensation shall come from the sale of his materials to his customer, based on services rendered and the cement manufacturer shall not pay a dealer commissions or other remuneration (Com. Ex. 556, pp. 13, 14).

When approved on November 27, 1933, the Code for the Cement Industry contained the above provisions in substantially identical language. Numerous interpretations of these provisions were issued by the Code Authority during December 1933 and January 1934, determining the application of such provisions in specific cases. On January 24, 1934, by order of the Administrator, these provisions were set aside and were never thereafter a part of the approved NRA Code for the Cement Industry. In response to a subpoena duces tecum calling for communications between Colorado and various parties, including Baxter McClain, manager of the Kansas City Division of the Institute, Colorado produced a mimeographed memorandum dated 2/17/34, bearing no signature except the printed letters "McC.," and reading in part:

Memo to Sales Managers:

Attached hereto a complete copy of Cement Trade Practices revised to and made effective February 17th, 1934.

The pertinent changes from former revisions are in Sections 7 and 8, and specifically in reference to NRM projects (Section 7) and CWA projects (Section 8) * * * If not clear after study call up (Com. Ex. 947-16L).

The above memorandum was accompanied by a mimeographed circular bearing the same date and entitled "Cement Trade Practices (revised to date)" (Com. Ex. 947-16M). This memorandum contains in almost identical language the definition of a dealer which appeared in the provisions of the Code which were set aside on January 25, 1934, and provides, though in much greater detail and with some modifications respecting Government work, for substantially the same division of sales as between manufacturers and dealers as appeared in the stricken portion of the code. The record does not show similar action by other divisions of the Institute at that time and there is evidence

that considerable confusion and uncertainty developed. The Code Authority, however, continued to interest itself in and make suggestions concerning procedure in the method of handling sales in various trade classifications. On April 16, 1934, the chairman of the Code Authority advised all members of the industry "how they may quote a contractor for sale by a dealer a price fixed for such resale by such dealer" (Com. Ex. 1020-F). In the meantime, agreements between respondents and dealers were worked out with respect to classification of trade and division of business between respondents and dealers. On June 8, 1934, the chairman of the Code Authority advised all members of the cement industry in part:

I enclose herewith New Article XI. I am able to advise you that the National Federation of Builders Supply Associations, Inc. have accepted this on the basis that it will be put in for a four or six-months' trial period, and if at the end of that time, it is not working satisfactorily to either the dealers or the manufacturers, we will both go to Washington and try to have it corrected so that it will be satisfactory to both of us (Com. Ex. 1021-A).

Hearing upon the proposal was had before NRA on July 11, 1934, at which a statement on behalf of the cement industry was made by Charles F. Conn in an effort to secure reinstatement of the trade-classification and division-of-business provisions which had been stricken from the Code. This attempt was unsuccessful. Finally, in February 1935, some of the corporate respondents began issuing statements of marketing policy. One respondent, in sending the statement to its salesmen, explained the existing situation by stating in part:

Announcement is made at this time because the Consumer's Advisory Board and the legal division of the NRA have definitely and finally blocked all efforts to include any classification of buyers in our Code. Please understand that the Industry was perfectly willing to compromise with the dealers, and in fact, several such compromises were arrived at during the past year. Action in each case was blocked by the National Recovery Administration. This statement of policy represents practically the last compromise (Com. Ex. 1923).

In making its announcement of policy, Lehigh stated in part:

For sometime efforts have been directed by both dealers and manufacturers toward establishing a policy for the sale of cement which would adequately protect all interests concerned * * * (Com. Exs. 643-B; 873-C).

(e) The policies thus announced provided in substance for approximately the same division of business between respondents and their dealers as was contained in the provisions stricken from the NRA Code. Similar policies which grew out of conferences and agreements between respondents and dealers having been announced by various of the corporate respondents, the National Federation of

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Building Supply Associations advised its directors "and also several hundred outstanding dealers through the United States" under date of February 25, 1935, in part:

You will find enclosed a typical statement of policy such as is being issued by individual cement companies throughout the United States. So far as they have been issued by the cement companies, we believe the statements of policy are identical.

This is not now a Code matter but an Association problem, and the officers of the Federation must ascertain the position which the Industry wishes them to take in regard to this matter.

Will you give this problem your immediate and thoughtful consideration. Before March 4, I would like to have a reply from you, giving the Federation officers your opinion of this announced policy for the distribution of cement and your considered advice as to what action, if any, should be taken by the Industry (Com. Ex. 2390).

The secretary of the Southwestern Lumbermen's Association, in writing to Oklahoma on March 16, 1935, stated in part:

It is our understanding that there will be a meeting of the cement industry in Chicago next Tuesday. We attach herewith a purported declaration of what is being considered at this time by certain manufacturers. Believing that in its final analysis, these are matters that should be negotiated between the dealers and the manufacturers, and recognizing the fact that the Oklahoma Portland Cement Company has strongly favored a dealer policy, we trust the attitude of the Oklahoma Portland Co. in this Chicago conference will be favorable toward maintaining a strong dealer policy (Com. Ex. 737-2B).

On or about March 19, 1935, there was a meeting in Chicago between representatives of the dealers and representatives of the Institute at which changes proposed in the dealer policies announced by cement manufacturers in February were considered. A similar meeting was held in Chicago in April 1935. At these meetings dealer policies were decided upon. On April 29, 1935, the Nebraska Lumber Merchants Association wrote "TO ALL CEMENT COMPANIES SERVING THIS AREA" in part:

We have been informed that the cement distribution policy developed in Chicago on March 19th has been accepted by the majority of the cement industry (Com. Ex. 461).

In writing to the Mountain States Lumber Dealers Association under date of March 2, 1936, the Nebraska Lumber Merchants Association stated in part:

I am rather surprised at your letter regarding cement distribution, for this reason—I was under the impression that the cement distribution statement which was worked out nearly a year ago, was applicable to the entire United States.

Our Trades Relation Committee as well as the Southwestern and Northwestern's Committees, sat in with the heads of the cement industry and worked

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out a cement distribution statement, copy of which is enclosed. I might say that this is the accepted distribution statement used by all cement companies in the Central Middlewest.

* * * * *

You will be interested in knowing that since this statement was adopted, April 30, 1935, there is no record of any cement company having violated it in their transactions. I regret to say that we cannot say that much for our retail dealers (Com. Ex. 1904-A, B).

At a meeting of members of the Sixth District of The Cement Institute held on July 17, 1935, at which George H. Reiter, manager of the Institute, was present, a method of marketing cement substantially identical with the method adopted in the Chicago meetings was agreed upon. The district trustee of the Institute, M. C. Monday, in writing on July 24, 1935, to the various members of the Institute in that district, stated:

I beg to enclose herewith three (3) copies of the Method of Marketing Cement and three (3) copies of the Interpretations in connection with Section 2 of Method of Marketing Cement on State Government Work.

These Plans and Interpretations were unanimously concurred in by all members of the Southeastern District and approved at the meeting held in Knoxville on Wednesday, July 17, 1935 (Com. Ex. 547-4C).

The various understandings and agreements provided in exact and detailed terms for the division of business between manufacturers and dealers; that is, the types of business that would be accepted by cement manufacturers and the types that would be refused and therefore handled by dealers. The details of this division appear in the dealer policies announced by the corporate respondents. The practices thus established were almost completely uniform and were effective over areas which account for the major part of the national cement consumption.

(f) Having agreed upon dealer policies, steps were taken to maintain uniform compliance with such policies. On April 24, 1935, B. H. Rader addressed letters to other trustees of the Institute stating:

Mr. Harloe S. Chaffee, of Buffalo, New York, has been appointed contact man between the National Federation of Builders Supply Association and cement manufacturers by the National Federation.

You will undoubtedly hear from him from time to time on alleged violations of the Sales Policies by manufacturers, and I hope you will give him any information you can that he asks for, as he is trying very hard to do a constructive piece of work between the dealers throughout the country and the manufacturers. I am sure you will find him fair, open and above board with you. He does not want to put any one on the spot but does hope to straighten out as many of the difficulties as he can (Com. Ex. 832-G).

Various of the trustees acknowledged this letter from Mr. Rader, saying: "It will be a pleasure for me to cooperate with Mr. Chaffee

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in any and every way that would seem helpful in this connection" (Com. Ex. 832-D); "We will be glad to be of any service possible to him" (Com. Ex. 832-C); and "Will be glad indeed to cooperate to the fullest possible extent with Mr. Chaffee. If you say he is O. K., that is enough for me" (Com. Ex. 832-E).

PAR. 18. (a) The concerted action of respondents in establishing a specific division of business between themselves and dealers included a division of sales to agencies of the Federal Government. For many years prior to 1935 it was the established practice for producers of cement to make direct sales to Federal agencies. The new dealer policies put into effect in 1935 provided, however, that sales of cement to the Federal Government for emergency or unemployment relief agencies such as the Works Progress Administration, Civilian Conservation Corps, and Federal Emergency Relief Administration should be made by dealers. This change resulted in the Government being unable to make purchases of cement for such uses directly from respondents and in its being obliged to purchase its cement requirements in those categories from dealers. The prices paid dealers necessarily included the dealer mark-up and were higher by that amount than would have been the case in direct purchases from producers. Purchases from dealers also prevented the Government from taking advantage of land-grant rates in order to reduce its delivered cost of cement. A further result was to limit the sources from which purchases might be made.

(b) In order to smooth the path for these changes, the president of the Institute appointed a committee to maintain contact with Government purchasing agencies and, so far as possible, further the respondents' new dealer policies. In writing to George H. Reiter on May 18, 1935, George F. Coffin stated in part:

For the present, as President of The Institute, I am appointing you chairman of what you might call an informal committee, for the purpose of keeping in close touch with the various departments in Washington; and with you I am also appointing:

G. E. Warren,
F. M. Coogan,
E. P. Lucas,

J. F. Neylan,
L. T. Sunderland,
S.W. Storey.

The duty that I am assigning to the members of this committee is to keep in close touch with developments in the purchasing end of material for this governmental work, and report back to me * * * (Com. Ex. 415-373).

This Institute committee cooperated with E. J. Mehren and William Kinney of the Portland Cement Association and with L. I. MacQueen, H. S. Chaffee, Frank Carnahan, and other dealer representatives in presenting the agreed program for division of business to officials of the Procurement Division. After an initial conference with purchas-

ing officials, E. J. Mehren telegraphed George H. Reiter on July 10, 1935:

BELIEVE IT DESIRABLE TO BRING TO WASHINGTON COPIES ORIGINAL CODE AND OF DRAFT OF DIRECT AND DEALER SELLING AGREED ON SUBSEQUENTLY WITH DEALERS ALSO COPIES DECLARED POLICY OF COMPANIES REGARDING DIRECT AND DEALER SELLING (Com. Ex. 415-542).

A letter to all members of the Institute dated July 10, 1935, by George H. Reiter, as chairman of the trade practice committee of the Institute, stated in part:

The Trade Practice Committee met in Chicago on July 9 and designated your Chairman, together with Counsel, to serve as a subcommittee to expedite this work. The subcommittee had a preliminary conference in Washington about ten days ago with Captain H. E. Collins, who is assistant to Admiral Peoples, Director of the U. S. Procurement Division. Also present at this conference was Mr. H. E. Hilts, who is a commodity chief in that division, serving as adviser on cement problems.

The U. S. Procurement Division will have general supervision of the purchase of all materials under the so-called four billion dollar emergency fund. This will include purchases for resettlement programs, for highways, for federal relief activities and for other projects financed by that fund.

We have just received a request from Captain Collins to attend a joint conference to be held Friday afternoon, July 12, at his office in Washington to discuss cement purchases. He requests that both the dealers and the manufacturers of cement should be represented at this conference by a small committee. We are informed that the dealers will be represented by Messrs. Frank Carnahan of the National Retail Lumber Dealers Association and L. I. MacQueen, Secretary of the National Federation of Builders Supply Association. To represent the cement manufacturers President Coffin has designated Mr. John F. Neylan and Mr. George H. Reiter, who are both members of the Trade Practice Committee (Com. Ex. 1022-N).

In a letter to all members of the Institute dated July 15, 1935, advising of the conference had with the Procurement Division, Mr. Reiter stated in part:

The Committee for the Cement Industry explained to Captain Collins that there had developed in the Cement Industry a method of sales and of distribution which was characteristic of the territory east of the Rocky Mountains—that is, excepting in districts 10, 11, and 12, there was a definitely accepted practice of marketing cement throughout the country.

It was therefore stated that the committee believed it would be in accord with such established practices for the United States Government to purchase direct from cement manufacturers in the following cases:

1. Purchases by or for governmental departments not regularly engaged in emergency relief work.
2. Highway pavements and grade crossing elimination projects.
3. Bridge, culvert and repair work awarded as part of highway pavement contracts.

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4. Water supply development work located *outside of and not designed to serve* cities, towns and villages local to such projects.

5. Large water power, flood control and irrigation work located entirely or partly outside of cities, towns or villages.

As to all other purchases and projects, it was indicated that it would be in accord with the established practices of cement manufacturers in Districts 1 to 9 inclusive if the United States Government refrained from purchasing direct. In any such case where the government awards a contract to a contractor such contractor should be permitted to furnish cement which he would secure in accordance with the marketing practices of the cement manufacturers.

Mr. MacQueen, speaking for the dealers, stated that he was in accord with the statement that this plan recognized and preserved the normal method of doing business in the Cement Industry (Com. Ex. 202-E, F).

(c) In a letter dated August 28, 1935, L. I. MacQueen secretary of the National Federation of Builders Supply Associations, stated in part:

There were those who said "it couldn't be done." To them it seemed a hopeless task to buck a Department of the Government which was determined to buy direct. However, it has been done and, in my judgment, it is conservative to say that in excess of \$50,000,000 of business will be held in dealer channels which, but for your help and that of the others who joined with us, would certainly have gone direct. Not only would we have lost this splendid volume, but buying precedents would also have been established which would have continued to cause severe losses for years to come.

Instead of disaster which seemed to be certainly headed in our direction, we have been able to gain a signal victory. We have proved to the Government, to manufacturers and to ourselves that we are alive and willing to fight for our rights. More than 10,000 communications went into Washington, I am informed, either directly to members of Congress or to the Procurement Division. Now they should be convinced that a Builders Supply Industry really does exist (Com. Ex. 2401).

PAR. 19. (a) From time to time the corporate respondents who sell cement in some of the larger seaport cities have encountered competition at such ports, and in territory adjacent thereto, from cement of foreign manufacture imported for sale in this country. The most commonly used method of meeting such competition has been the establishment by respondents of arbitrary prices, or price zones, in the territory affected by the lower prices quoted on foreign cement, at the same time maintaining higher prices elsewhere under the multiple basing-point delivered-price system. For a time beginning late in 1932 or early in 1933 a boycott of dealers who handled foreign cement was established in the Boston, Mass., and New York, N. Y., territories by the corporate respondents engaged in selling cement in those localities. In order for a cement dealer in the affected territory to buy cement from domestic producers during the continuance of this boycott, it was necessary that he discontinue handling foreign cement and

agree not to handle it in the future. After about two years, the respondents concerned reverted to the use of arbitrary price zones. In some localities, including certain Texas ports, persuasion and agreements with dealers were used to combat the importation of cement. The most objectionable feature of imported cement to respondents was its impact upon domestic prices even after the payment of substantial import duties.

(b) In carrying out the boycotts mentioned, the terms used by the participating respondents as the basis on which sales of cement would be made were similar to those stated by Lone Star in its letter of December 31, 1932, to the official in charge of its sales in the New York area:

In keeping with our past performance in other sections of the country, our company has reached the conclusion that in the Metropolitan District, which includes northern New Jersey, you should place in effect immediately the policy of classifying building material dealers who handle foreign cement as competitors, and, as such, decline to sell them Lone Star or "Incor" until such time as it can be shown that they have discontinued handling foreign cement and give their assurance that no additional foreign cement will be handled in the future.

The instructions excepted the sale of any foreign cement which a dealer had on hand, but did not except obligations of dealers for foreign cement not yet received or obligations of dealers for future delivery of foreign cement on bids made on that basis. The instructions continued:

Please arrange to have Mr. Bradley watch as closely as possible the known foreign cement deposits in this town. Likewise instruct the representative of Lone Star Cement Company Pennsylvania covering northern New Jersey to watch the deposits in and around Newark and the other known points with a view to determining whether or not any dealers are drawing cement from these deposits.

The Brooklyn deposits we understand are in lower Brooklyn and at the Boack Terminal. In New Jersey we understand there are one or more deposits at Newark or Port Newark. These should be definitely developed and watched and periodical reports made showing what dealers are drawing cement from the warehouses from time to time (Com. Ex. 1132-A, B).

In the Boston area respondents maintained a cooperative system of watching at the place of business of Jenny & Lux, Inc., importers of foreign cement, to check on dealers' trucks hauling foreign cement from the importer's warehouse. Representatives of various respondents, including Lehigh, Universal, Alpha, Hercules, Lone Star, Lawrence, Allentown Portland Cement Company, Nazareth, Edison, and Giant, took turns in watching the importer's place of business and making lists of dealers' trucks hauling foreign cement. Dealers in New York and in Boston who continued to handle foreign cement

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were unable to purchase cement from any respondent manufacturer. Some dealers, in their efforts to purchase, canvassed all respondents who normally sold cement in the affected territory without being able to purchase. Representatives of a number of respondents, including Lehigh, Universal, and Penn-Dixie, discussed with dealers the ban on purchases of domestic cement by dealers handling foreign cement, and informed some dealers that the matter had been discussed and agreed upon by manufacturers. In these conversations, references were made by respondents' representatives to the Institute and to meetings of respondents for acting upon the question of removing individual dealers from the "blacklist."

(c) In 1935, after the expiration of the NRA Code, arbitrary prices were again established in the areas affected by imported cement. Respondents filed with the trade practice committee of the Institute detailed notices of such arbitrary prices, specifying the price at each destination in advance of the effective date thereof. The trade practice committee immediately sent complete notice of these price filings, before the effective dates thereof, to Institute members doing business in the territory in which the arbitrary prices were announced.

PAR. 20. (a) The matter of making sales of cement subject only to standard specifications has long been a subject of collective action by the cement industry. The minutes of a meeting of the Association of American Portland Cement Manufacturers in December 1904, at which representatives of a number of the corporate respondents herein were present, show the adoption of standard specifications for portland cement. As set out in paragraph 14 hereof, this association recommended in 1915 that no quotations for or sales of cement be made subject to any specifications other than those of the United States Government or the American Society for Testing Materials; the Portland Cement Association, of which many respondents herein were members, in 1919 recommended that no sales of cement be made except subject to specifications of the American Society for Testing Materials; the Code of Ethics adopted by the Institute in 1929 prohibited the sale of cement subject to specifications other than those for the American Society for Testing Materials, American Standards Association, or the United States Government; the NRA Code for the Cement Industry, approved November 27, 1933, provided that all portland cement marketed should comply with specifications of the American Society for Testing Materials, American Standards Association, or Federal Specification Board except if cement was designed to meet unusual conditions not covered by the specifications referred to, the price for such modified cement be filed with the Code Authority; the "Com-

pendium of Established Terms and Marketing Methods" issued by the Institute in 1935, after the NRA Code, provided that portland cement marketed by members comply with specifications of the American Society for Testing Materials, American Standards Association, or Federal Specification Board, and stated that products other than portland cement are sold to meet unusual conditions not covered by the standard specifications for portland cement.

(b) For many years the minimum specifications for portland cement have been standardized and all cement has been sold subject to such minimum specifications. This does not mean that cement was standardized, but merely that it was guaranteed to meet the minimum specifications established. As a matter of fact, the cement produced by some mills has exceeded some of the requirements of the specifications by a relatively small margin, that produced by other mills has exceeded some of these requirements by as much as 100 percent, and that produced by the remaining mills has exceeded these requirements by varying degrees within the extremes stated. In 1930, minimum specifications for high-early-strength cement were adopted. The principal difference between standard cement and high-early-strength cement is the fineness to which the latter is ground, and with the establishment of specifications for high-early-strength cement the fineness requirements for portland cement were discontinued. Some of the cement previously sold as standard approximated in quality the high-early-strength specifications. The cement sold under the high-early-strength specifications has commanded a premium price of approximately 50¢ per barrel more than standard cement.

(c) There is a direct and substantial connection between cement prices and respondents' interest in requiring that only certain agreed specifications be used in making sales of cement, and this connection received recognition at an early date. At the time when specifications were adopted in 1904, a member commented thereon, as shown by the minutes of an association meeting attended by representatives of some of the corporate respondents, as follows:

This will certainly give us a common ground in the cement business on which we can meet, and will enable a standard uniform article to be made at a uniform price, and anything outside of this standard article, will represent additional cost for additional trouble to meet the whims of any individual. I certainly trust this will be dealt with as a commercial question, as well as an engineering one (Com. Ex. 3235-U).

(d) The cement committee of the American Society for Testing Materials, which handles cement specifications, is composed of representatives of manufacturers, consumers, and a general interest group, the manufacturers having representation numerically equal to that of

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all other interests. In fact, however, the tendency has been for the manufacturing representatives to dominate the action of the committee. Over a long period of years there has been an improvement in the quality of cement generally and an increase in the requirements of the specifications, but there has also been considerable opposition to the higher requirements from the manufacturing group.

(e) Respondents have not only refrained almost completely from advertising quality differences in cement, but have in fact given much publicity to the claim that the quality of all portland cement is practically identical. The general attitude of respondents in these matters is well put in a letter dated March 29, 1934, from Charles L. Hogan, president of Lone Star, to B. F. Affleck, chairman of the committee on public relations of the Institute, in which Mr. Hogan in describing conditions which led to public distrust of the cement industry, listed among the reasons therefor:

The absence of quality competition between brands, refusal of manufacturers to bid on non-standard specifications at any price and the resistance which has been put forth by the industry to specifications calling for high quality (Com. Ex. 553-Y).

and:

It is usual in selling a product to claim advantages for it over the competition. These advantages are advanced as a reason for buying a brand in preference to another. We have managed to eliminate brand preference from the marketing of cement, thereby precipitating a scramble for business using weapons wrought from influences which have nothing to do with the product or the merits of the manufacturer's proposition (Com. Ex. 553-2A).

(f) Resistance to specifications other than those collectively accepted by respondents is illustrated by action shown in minutes of Districts 1 and 2 of the Institute for October 26, 1934, as follows:

The Chair recognized Mr. Wetzler, who brought up the question of unfair specifications in the State of New Jersey. After discussion, Mr. Coffin moved that members of the Industry, in Districts #1 and #2, respectfully request the Portland Cement Association to take under consideration, steps to eliminate the unfair specifications now in effect in New Jersey. Seconded by Mr. Blaine S. Smith and unanimously carried (Com. Ex. 637-T).

Also, the minutes of the meeting of the Northeastern Division of the Institute on February 13, 1935, show:

The Chair stated the next matter to be brought to the attention of the meeting was New York State Highway Department Specifications for Portland Cement. After considerable discussion the following Resolution was offered by Mr. Robeson:

Resolved, That a committee be appointed to wait on the New York State Highway Department with a request that they change the strengths in Specifications 15 and 15S to conform with present standard specifications.

Resolution seconded by Mr. Neylan and carried * * * (Com. Ex. 637-X).

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(g) In its advertising the Institute has stressed the theme that portland cement is a standard commodity and negated the idea of there being a difference in quality between brands. Among advertisements published by the Institute statements such as the following appeared:

Since portland cement is a standard product as uniform as any given grade of gasoline, sugar, or wheat, buyers in any town or city will purchase it only from the cement plant that quotes the lowest delivered price (Com. Ex. 2835).

It is the simple and natural way to sell a standardized product like cement (Com. Ex. 2836).

Since cement is a standard product as uniform as wheat or sugar of any given grade, buyers at any point will buy it only from a cement plant that is quoting the lowest price (Com. Ex. 2837).

Since cement is a standard product, conforming to government specifications, buyers will buy it only from a cement plant quoting the lowest delivered price (Com. Ex. 2839).

(h) In general, dealers and ordinary purchasers are not aware of differences in quality among the brands of cement sold by different producers. The possession of such knowledge by these groups would tend toward making it impossible for respondents to maintain uniform prices for cement.

PAR. 21. (a) When price stability was restored in 1932 and a series of substantial advances in the price of cement were made in that year and in 1933 in the face of the continuing depression, the higher prices and the uniformity of those prices, including identical sealed bids on public projects, brought renewed protests from both public and private sources. As a result of the protests and charges against the cement industry and its members, the Institute and its members engaged in a concerted course of action directed toward allaying the criticism and seeking to convince the public that there was no collusion among cement manufacturers. Measures such as those indicated below were taken to accomplish the end sought.

(b) In writing on May 1, 1933, to Joseph S. Young, president of Lehigh, concerning charges of collusion among cement manufacturers made by Governor Horner of Illinois as a result of identical bids on cement made to that State, H. Struckmann, then president of Lone Star, said in part:

I also wish to confirm my statement to you over the phone, that I am completely in accord with Mr. Mehren's opinion that the public should be fully informed relative to the allegations made by Governor Horner.

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I believe that Mr. Mehren's long experience in publicity work would be extremely helpful in creating a better understanding on the part of the public of the situation which Governor Horner has given wide publicity in a rather unfriendly and unjustified manner (Com. Ex. 829-T).

In writing to A. J. R. Curtis, assistant to the general manager of the Portland Cement Association, on September 29, 1933, Joseph S. Young said in part:

In an effort to absolve the industry from charges of conspiracy and collusion attempts have been made from time to time to describe the operation of the multiple base system. To the lay mind any price formula and especially one that smacks of base prices conjures up visions of Pittsburgh plus and the nefarious practices of the steel barons. Therefore, any academic explanation of the price system in the cement industry which is intended to describe the operation of the basing-point system, is likely, regardless of how ably presented, to prove dangerous (Com. Ex. 836-3S).

After stating that explanations made of the pricing formula have unduly accented the importance of the mill price in describing the operation of the system, Mr. Young continued:

The cement industry should encourage the public to view the price as a market price and not as a mill price. Every writer on this subject on the contrary has purposely diverted the attention of the reader to the importance of the basing-point in building up the delivered price. Faced continuously with such an explanation the public has every reason to believe that the cement industry has developed a very clever and foolproof scheme for price manipulation.

* * * * *

Over and above this consideration, however, is the fact that the material included in your release is intended to answer certain of Governor Horner's charges and particularly the charge of collusion in refusing to sell f. o. b. mill. Much of your mimeographed statement is devoted to a reprint of my remarks on delivered prices at the public hearing. The argument I tried to advance was that f. o. b. mill prices, if imposed upon the industry, would result in chaos. If the reader is told on the first page of the release that the industry arrives at a delivered price of adding something to a mill price, it strikes me that he is very likely to wonder why we persist in refusing to sell at a price we say we have. Moreover the reader is bound to cast a skeptical eye at the argument presented in the remainder of the release when in your opening remarks you freely admit that the very mill price that we contend will bring chaos to the industry is not only in existence but in actual use (Com. Ex. 836-3T, 3U).

In replying to Mr. Young on October 7, 1933, Mr. Curtis said in part:

Your point relative to the damaging effect of talking about "mill price" is admirable and I think we were all very dense in our failure to spot that fallacy sooner. With reference to "mill price" discarded, one of the chief stumbling blocks in the discussion of uniformity of prices is removed.

* * * * *

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Public curiosity has been aroused to an extent where unquestionably, we must satisfy it or expect bitter consequences. Certain editors who should be friendly feel that we are gouging. A prominent citizen who has carried on battles for us in an Illinois city informed our fieldmen only a few days ago that he had helped us because he knew there were asphalt, brick and several other rings, but believed the cement people honest; however, he now knew that the latter were tarred with the same stick so he would have to remain quiet and could help us no further.

In an appropriate manner, we should see to it that the incoming and other uninformed public officials are acquainted with this price matter. Isn't it more or less to be expected that a newly elected governor of judicial temperament, lacking in business knowledge but with a political urge suggesting an eye on public expenditures, might be confounded by the riddle of how he can get a dozen bids listing identical quotations at 102 distinctions, except by collusion?

* * * * *

Many employees of the industry honestly believe that there is collusion. Some sales managers have told me so. I know some Association employees think so (Com. Ex. 730-H, I).

In acknowledging a copy of the letter from Mr. Young to Mr. Curtis, Max A. Berns, publicity manager for Universal, wrote Mr. Young on October 4, 1933, in part:

The point you bring out about starting a price equation with a mill price is well taken and in the future we might well avoid starting such discussions with an assumed mill price (Com. Ex. 836-3P).

After pointing out that the question of price uniformity had been thrown into the public arena, he contended:

* * * We scarcely can avoid a discussion of uniform prices because the question has been presented by others to the public.

It is for this reason that, although it may require a long drawn-out effort to accomplish results, it seems important to discuss uniformity of prices as well as point-of-delivery prices. Indeed, it is hardly possible to discuss the latter without admitting the former. And since we must in a discussion of delivered prices admit uniformity, we are almost forced to defend uniformity or else leave the matter solely for others to condemn (Com. Ex. 836-3Q).

(c) The committee on public relations of the Institute, and various important figures in Institute affairs, began working assiduously upon the problems arising from criticisms of the industry, diversions of business to other materials, and threats of competition from publicly owned cement plants. On March 21, 1934, B. F. Affleck, as chairman of the committee on public relations of the Institute, sent a letter to various members which began, "The cement business is in public disfavor," listed evidences of such disfavor, and concluded, "How shall we cure the situation? A committee of the Institute has been studying it, and wants your counsel" (Com. Ex. 950-B). A further communication from the committee dated March 26, 1934, after again

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listing causes for the cement industry being in public disfavor, continued:

A study of 2580 recent newspaper articles and editorials mentioning cement shows only 208, or 8 percent favorable to our industry—92 percent were unfavorable or indifferent.

Analyzing the various points which have been raised against the cement industry, the committee at work on the problem believes the task to be:

1. Removal of misconceptions regarding our commercial practices.
2. Replacing these misconceptions with a favorable attitude based on appreciation of the outstanding contributions of our industry to public health, safety and comfort.

We must convince—

- (a) public officials—federal, state and local.
- (b) newspaper and other editors.
- (c) individuals and groups in the trade.
- (d) our own stockholders and employees.
- (e) the general public.

Internal education, reaching class (d) is a basic and should seek to make our own people enthusiastic about

—our commercial policies and practices.

—our contribution toward making America a better place in which to live.

A thorough job within our industry should give us hundreds of able helpers in putting our case before the public.

Meanwhile your views on the need of a program would be helpful to the committee. Please write promptly (Com. Ex. 950-F, G).

Suggestions received in response to these letters included:

I'm wondering if we cement people might not gain if we followed the program of the packers when they were under fire years ago. They published a good many advertisements giving figures to show they were not getting exorbitant profits (Com. Ex. 950-N).

My suggestion is we start a "Good Will Club" in the industry. Pledge everybody to preach good will. Pledge ourselves and divorce from our minds because we are representatives and executives of a large industry that we can do no wrong, and I am making this statement as though I were of a larger company, and eliminate from the minds of your smaller competitors that you are constantly reminded of Shakespeare's quotation in your attitude toward your competitors and your trade, namely "When I speak, let no dog bark" (Com. Ex. 950-Q).

The quickest way to dispose of this matter is to give advertising matter to all of the papers in the United States—metropolitan, local and farm.

Quite a few years ago this same matter developed and the Advertising Committee of the Association at that time started a campaign of placing paid advertising in all of the metropolitan, city, and county and local papers in the United States, amounting, I think, to from 4000 to 5000 periodicals—the smaller ones being handled through a press agency. The favorable result was almost instantaneous (Com. Ex. 950-R).

The reply made by Charles L. Hogan, president of Lone Star, under date of March 29, 1934, is noteworthy:

Your letter of March 21st is timely. I cannot recall a time when the industry enjoyed full public confidence. We are in this unenviable position even though we have done much as an industry to merit confidence. Through the Portland Cement Association, we have maintained an agency of public contact which has accomplished many constructive acts that have rebounded to the public interest. That ill will exists despite the high standing of the Portland Cement Association suggests we must look elsewhere for the cause.

Sporadic efforts to promote good will have consisted mainly of programs calculated to minimize or stifle newspaper criticism through the buying of space. This advertising carried a message calculated to lend importance and prestige to the industry which did not, however, reach the root of our trouble. Telling interesting facts about cement has failed to remove the public distrust which probably has its origin in the suspicion that a close working understanding, contrary to the public interest, exists between manufacturers. This suspicion is intensified by some of the industry's trade practices.

That some of these practices may be necessary does not remove the distrust arising from a lack of understanding and a failure on the part of the industry to meet the issue squarely in print and through its representatives in the field. We have to thank this representation to a considerable extent for the attitude which the trade holds toward our industry. Salesmen frequently intimate that company heads consult freely and are seldom able to explain convincingly why cement is sold in a certain manner.

Some of the conditions and practices of the industry which have contributed to the public distrust and enabled politicians to verbally chastise us without fear of reprisal are listed below. Some may be more typical of past performance than of present, but both past and present combined to influence the public's attitude. That some practices are in the consumers' interest helps but little if they are misunderstood.

(1) *Standardize product.*

The absence of quality competition between brands, refusal of manufacturers to bid on non-standard specifications at any price and the resistance which has been put forth by the industry to specifications calling for higher quality.

(2) *Uniform destination prices.*

The uninitiated are mystified by the industry's ability to anticipate competitor's price at a given time and place. The uniform refusal of manufacturers to bid mill prices has contributed to the misunderstanding.

(3) *Uniform terms, sales conditions, trade practices.*

This uniformity which in the main is in the public interest is oft times construed as evidence of collusion.

(4) *Lack of a binding contract.*

Because a specific job contract is not a contract but an option to buy, duplication of bookings giving rise to the checking of contracts has in many instances proved annoying to purchasers. The misunderstandings and unpleasantness which accompanies a price change and the complicated rulings with which we have surrounded the marketing of cement both have their origin in the failure to provide a contract that is binding.

(5) *Wasteful solicitation.*

For many years there have been too large a number of men on the road resulting in an uneconomical and unwholesome scramble for available business which

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has raised the question, "Since money can be spent with such freedom, is the price of cement too high?" Some of these doubts have found confirmation in excessive entertainment in which the industry has indulged.

(6) *Cross shipping.*

The ability to buy at a distant point at a very much lower mill net than the manufacturer secures on short-haul business gives rise to a resentment having its origin in the feeling that those who live close to the mill should receive the most favorable price.

(7) *The same price to all classes of users regardless of the volume purchased.*

This is contrary to commonly accepted practice in the marketing of many commodities and results in resentment on the part of the large buyers, particularly those like States which are sold at small per barrel expense.

(8) *Mills without base prices.*

The toleration by the industry of those who poach in high priced areas has not created a feeling of confidence in the desire of management to protect the consumer.

(9) *Concerted action on matters that are properly subject to individual company policy.*

Many instances of this kind have resulted from States asking for bids on bases that differ from accepted trade practice.

(10) *Limitation of competition to a point of sale struggle for an order with all natural differences between companies and products removed.*

It is usual in selling a product to claim advantages for it over the competition. These advantages are advanced as a reason for buying a brand in preference to another. We have managed to eliminate brand preference from the marketing of cement, thereby precipitating a scramble for business using weapons wrought from influences which have nothing to do with the product or the merits of manufacturer's proposition.

It would seem that a logical approach to this problem lies in a careful, thorough and candid scrutiny of our entire marketing system. If we sit around the table and try to analyze the problem and prescribe a remedy for certain ills, both the analysis and the cure will be distorted by tradition and our own experience. Better it is, I think, to learn from the consumer, contractor, dealer, the politician and the well-posted individual, just what our supposed shortcomings are and what they feel we should do to correct them.

I would suggest that a committee made up of younger men in the industry who are familiar with marketing problems and have a knowledge of public relations be designated to conduct this investigation. I would further suggest that the actual contact with the trade and the public be through men not identified with the industry but skilled in making investigations of this type. * * *

Mr. Hogan then listed questions to which answers should be sought and concluded by stating:

After such a survey is made and the report with recommendations distributed, we can then reach a decision based upon facts rather than one based upon hunches (Com. Ex. 553-X-2C).

(d) On April 10, 1934, the committee on public relations of the Institute submitted an elaborate program. It described the objective thus:

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1. To correct misconceptions regarding the practices of the industry held by

- a. Public officials
- b. The newspapers
- c. The public
- d. Other groups

2. To replace the misconceptions with a favorable attitude on the part of the aforesaid groups (Com. Ex. 2190-A).

suggested bringing to the public an appreciation of the industry's contribution to public welfare, comfort, safety and health, mentioning as available themes

*Concrete for sanitation, * * **

*Concrete for comfort, * * **

*Concrete for safety, * * **

*Concrete for health, * * **

*Concrete and Labor, * * **

*Service with Cement, * * ** (Com. Ex. 2190-B).

listed available methods as

- a. *Personal contact
- b. Public addresses
- c. Printed matter
- d. *Publicity
- e. *Paid advertising space
- f. Radio
- g. Moving pictures

*Personal contact, publicity, and paid advertising space should be the chief means employed (Com. Ex. 2190-B).

As to public officials, it was stated in part:

In dealing with public officials, personal contact by men who have the right address, entree and full information is important. These public officials fall, chiefly, into the following groups:

- 1. Federal and State officials
- 2. U. S. Senators and Representatives
- 3. State legislators
- 4. City and County officials.

These contacts should be planned, scheduled and checked up by a central office. Printed work will go on at the same time, will prepare the prospect in advance of the call, will reinforce the effect of the call after it has been made (Com. Ex. 2190-C).

Methods of reaching other groups were listed in part:

Newspapers must also be contacted. Here the contacts may be made both by cementmen and by representatives of the Public Relations Bureau.

Building materials dealers misunderstand the industry. They have no notion of the way the industry builds business for them—nor of the cost of that effort. Here cement company salesmen can be used. Suitable printed matter should be available for use at and after their calls.

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The following groups will be informed largely by the printed word but also, to some extent, through addresses to civic, professional, and other bodies:

The public

Business leaders and financiers

Contractors

Engineers and architects (Com. Ex. 2190-D, E).

The necessity for convincing their own employees was also listed:

No matter how clever the planning, adroit the arguments and skillful the execution, no matter if the expenditure be most liberal, a public relations program will fail unless at least two fundamentals are complied with:

1. The proponents themselves must be fully convinced of the soundness of their case and of the need of presenting it.

Specifically, for us, we must "sell" the cement company executives and employees on

a. The necessity for our public relations program

b. The soundness of our selling practices

c. The contribution which the industry makes to individual and public welfare (Com. Ex. 2190-E).

It suggested a study of marketing practices; the planning of contacts and addresses by the public relations officer; listed and described literature to be prepared and distributed; advocated the use of paid advertising, radio, and moving pictures; and outlined the organization and personnel thought necessary. It tabulated the "Approximate Number of Leaders of Groups to be Convinced" as:

1. Federal officials.....	695
State officials (including highway engineers).....	291
2. Newspapers—primary list.....	2,500
—second class list.....	2,500
Magazines and Journals.....	250
General and Economic Writers.....	200
Financial Editors and Writers.....	305
3. U. S. Senators and Representatives.....	531
4. State Senators.....	1,661
State Representatives.....	5,662
5. County Commissioners.....	8,704
County Engineers.....	2,200
Mayors and City Managers.....	5,750
City Engineers.....	2,120
6. Building Materials Dealers.....	about 30,000
7. Civic Leaders.....	7,500
Financiers.....	15,000
8. Contractors, all lists.....	40,000
9. Concrete Products Mfrs.....	6,500
10. Engineers (civil).....	2,100
Architects.....	14,500
11. Cooperating Organizations.....	250
12. Other industries on common ground.....	4,674

(Com. Ex. 2190-J).

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(e) At a meeting of the board of trustees of the Institute on August 15, 1934, Mr. Affleck reported that:

Representatives of the committee discussed the proposals either formally or informally in all districts but one east of the Rockies. Except in this district, (#10) the underlying strategy of the committee's proposals has been generally approved although some details have been changed in accordance with suggestions submitted.

also that a series of advertisements had been run in a number of publications, and:

In the series of eight ads, the first two were of an introductory nature designed to get the goodwill of the publishers and the readers and the subsequent ads were on various phases of our marketing practices. This series is completed.

The expenditure so far totals, in round figures, \$30,000.

At the meeting in Chicago, the trustees of the Institute also empowered the committee to employ the personnel needed to study the necessary angles of this subject and to carry out a public relations program. On vote of the members of the Public Relations Committee, Colonel John B. Reynolds was employed as of August 1 to head up the Public Relations Bureau.

Temporarily the staff of the committee is headquartered at the offices of the Portland Cement Association in Chicago. This has the approval of the President of the Association. If there is any question about this, this may be a good time to discuss it.

As mentioned in the report of the committee, a vote has been held in districts 1 to 9 inclusive. In some districts this was unanimous—in others it was by a large majority but not unanimous. It may be that representatives of districts 10, 11, and 12 present here today can advise regarding the status in their districts.

* * * The Status of the Public Relation Plan is Districts #10-#11 and #12 was as follows:

District #10—Trustee not present. Previous correspondence indicated disapproval.

District #11—No action taken.

District #12—All but two members approve (Com. Ex. 621-D, E).

Some of the advertisements published as set out above claimed cement was playing a vital part in "Prolonging Our Lives" (Com. Ex. 434); claimed epochal improvements representing "Progress in Cement" (Com. Ex. 435); purported to explain price uniformity in "The 'Going' Price" (Com. Ex. 436), and the delivered price in "Buyers get what they want" (Com. Ex. 2836); compared price uniformity in cement with wheat prices in "wheat and cement" (Com. Ex. 2837); dealt with mill net in "The story of A, B, and C" (Com. Ex. 2838), and with price uniformity in "The Same Economic Law" (Com. Ex. 2839).

(f) The reaction to these advertisements was not entirely favorable and the chairman of the marketing research committee of the Institute, John Treanor, expressed his views in letters to Blaine S. Smith, president of Penn-Dixie, and E. J. Mehren, president of the

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Portland Cement Association, dated July 29, 1934 and July 31, 1934, respectively, in part:

I think efforts to make out our case to the public as to our commercial practices through advertising should be suspended, as futile and wasteful, while the effort is being made to establish our case with the authorities. I think it may hurt us with them. I feel strongly that it is ill-timed * * * (Com. Ex. 938-Y).

and

The worst that can be said is that the economic foundation for some of these discussions of price making is frail. With that opinion I am inclined to agree, believing that no sound defense of our methods of selling cement can be made without the admission that some limitation of competition is necessary in such an industry as cement. This is not a subject which can be presented to the public through advertising, or in any way. It is an argument that has to be made and can be made in special places where it may be calculated to do some good (Com. Ex. 938-2A).

Representations similar to those discussed by Mr. Treanor in the letters mentioned above had previously been characterized by him in his letter to B. H. Rader of the Code Authority on May 17, 1934, thus:

Do you think any of the arguments for the basing-point system, which we have thus far advanced, will arouse anything but derision in and out of the government? I have read them all recently. Some of them are very clever and ingenious. They amount to this however: that we price this way in order to discourage monopolistic practices and to preserve free competition, etc. This is sheer bunk and hypocrisy. The truth is of course—and there can be no serious, respectable discussion of our case unless this is acknowledged—that ours is an industry above all others that cannot stand free competition, that must systematically restrain competition or be ruined * * * (Com. Ex. 7-B).

(g) Having been unsuccessful in its efforts during the summer of 1934 to persuade the Federal Trade Commission to undertake a study of the basing-point system "with the cooperation of the cement industry" (Com. Ex. 958-M), the Institute proceeded to employ James M. Clark and Arthur R. Burns, professors of economics at Columbia University, to make a study of the cement industry. In the early stages of this study Blaine S. Smith, president of Penn-Dixie, in writing to John Treanor, president of Riverside, stated in part:

Joe Young and I have been just now discussing the progress that has been made in connection with the survey of the industry now being conducted by Professors Clark and Burns, particularly in reference to your last two letters to me, copies of which have also been sent to other members of the Marketing Research Committee (Com. Ex. 571-2L).

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He then referred to the suggestions in Mr. Treanor's two letters that each member of the committee "sit down individually and frame his own personal answers to several fundamental points raised by Dr. Clark," pointed out that if this were done "there is every reason to believe that the statements you would receive from the members of the Committee * * * would be at variance and possibly in direct conflict." He also stated:

Altho all of the members of the Committee in the East have had in mind the same objective that you evidently are striving for, namely attempting to mold the professors' minds before any definite conclusions have been reached, it has been our thought that much more could be accomplished by personal contact than through the medium of correspondence. The plan that we have discussed is simply to arrange a meeting shortly with the professors, to which would also be invited—in addition to the members of the Committee—certain sales and traffic experts with general knowledge and wide experience, preferably from companies other than those represented by the Committee. The professors could possibly prepare in advance a list of questions that had proved particularly bothersome. These questions could be submitted to the group of cement men and we would attempt to have those best qualified discuss the points involved with the professors until the matter was threshed out to everyone's satisfaction.

* * * If you are inclined to agree with our views on this matter, will you kindly let me know when you next intend to be East, with the thought that a general meeting between the professors and the cement group could be arranged to suit your convenience.

Joe Young concurs in the thoughts expressed above (Com. Ex. 571-2L, 2M).

Members of the marketing research committee advised and collaborated with Professors Clark and Burns throughout the study and read for criticism and suggestions draft copies of various chapters in the proposed report. On May 25, 1937, Dr. Burns wrote Blaine S. Smith in part:

With further reference to my recent telephone conversation with you, I have now mailed mimeographed copies of the last two chapters of the study. * * *

There now remain four chapters which you have not seen. * * *

* * * I shall do my best to see that the whole of the balance of the study is handed to the stenographer before I leave. I imagine that this material will take some time to digest and that active discussions leading up to the final preparation of the material for publication can be taken up as soon as I return (Com. Ex. 971-29D).

The issuance of the complaint in this proceeding intervened and the report was not published.

PAR. 22. (a) The record contains a very substantial volume of opinion testimony by economists concerning the application of the principles and theories of economics in hypothetical situations purporting to present factual situations shown to exist by the record in this

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proceeding. These witnesses: Edward A. Duddy, Frank A. Fetter, Benjamin A. Hibbard, Edwin G. Nourse, and Jacob Viner, called by the Commission; and Fred R. Fairchild, Ewald T. Grether, Clare E. Griffin, Roland S. Vaile, and Roy B. Westerfield, called by respondents, were by education, training, and experience qualified as experts to give such opinion testimony. In general, this testimony dealt with economic aspects of the multiple basing-point system, prices, various marketing practices, competition and its manifestations, and the economic effects of various marketing practices. It included detailed consideration of the theory of "imperfect competition"; of whether all forms of competitive rivalry, including those commonly designated as quality or service competition, in fact constitute "price competition"; or the principle of "indifference" where "each unit is of equal desirability," and the application of this theory to sellers and to buyers; whether or not the theory of uniform price for a standardized commodity in a competitive market has any application to identical bids or quotations, as distinguished from the price that results from the higgling of the market; of what constitutes a market and the relative importance of the several elements thereof; of the significance of the lack of buyer participation in forming price; and of many other matters.

(b) In broad outline, the testimony of respondents' economic witnesses is to the effect that the multiple basing-point system, uniform delivered prices, and certain other phenomena of respondents' marketing practices as set forth in hypothetical questions, might be the result of or could result from natural evolution through the operation of competitive forces and do not give rise to an inference of collusion. On the other hand, also in broad outline, economic witnesses called by the Commission testified that the basing-point system, uniform delivered prices, and various other phenomena of respondents' marketing practices as set out in hypothetical questions, contravene a number of recognized principles of economics considered reliable indices of competition, and also that the existence of certain of those practices affirmatively indicated the absence of competition, and that as to others, planning and disciplinary means would be required for their continuation.

(c) It is concluded that, in the circumstances present in this proceeding, the recognized principle of economics that uniformity of price tends to result from free competition in the case of a standardized article sold to well-informed buyers does not serve to explain the identical delivered prices of respondents in the offering for sale and sale of cement. There is a well-recognized principle of economics that in the sale of units of equal desirability the seller will not accept less from

one buyer than from another. Under the price pattern heretofore set out in detail, many of respondents' sales have the characteristics of "dumping." The principle that price uniformity may result from competition has no application to identical offers or sealed bids and cannot explain such uniformity. It is also true that uniformity of price in a given market is equally consistent with a condition of free competition or with a condition of monopoly. When—as in the sale of cement—the price is established by the seller, the price leadership of the governing base mill is accepted by other sellers and there is no bargaining between buyers and sellers, fundamental requirements of a true market in the economic sense are lacking, and prices are not the result of market action in a true economic sense but merely expressions of a noncompetitive or monopolistic price structure.

PAR. 23. (a) The multiple basing-point delivered-price system used by the corporate respondents in the sale of cement is a discriminatory method of pricing. This is true whether the systematic variations in price are viewed before or after consideration is given to the cost of delivery by common carrier. The hypothetical illustration set out in subsection (g) of paragraph 7 indicates the types of discriminatory price differences which are systematically exacted in order that each respondent may match the delivered price of other respondents at any given point. It will be observed by reference to this illustration that Mill A, being a basing-point mill, charges the sum of its base price plus freight to destination at all points where its base controls (Towns A, B, C, and D), but in order to match delivered prices in territory where the base of Mill C controls (Towns E, F, and G), it charges the sum of the Mill C base price plus freight from that mill to destination. Viewed from the aspect of Mill C, also a base mill, the result is the same. Mill B, a nonbase mill, sells at delivered prices lower by various amounts in each town other than its home town. Turning to the mill net recovery of these mills for the cement sold, Mill A receives \$1.50 at all points where its base governs but gets \$1.30 in Town E, \$1.10 in Town F, and only 90¢ in Town G. In reverse order, the same is true of Mill C. Mill B receives \$1.80 in its home town, \$1.60 in Towns C and E, \$1.40 in Towns B and F, and \$1.20 in Towns A and G. Each mill shrinks its mill net by the amount necessary for it to match the delivered prices established pursuant to the aforesaid pricing system. It is plain that each mill sells at different delivered prices in different locations, and that the differences between many of these delivered prices are not the result of and do not correspond to the actual differences in the cost of delivery. It is equally plain that the mill nets received for cement from different customers, after giving considera-

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tion to the actual costs of delivery, also vary systematically and are discriminatory.

(b) The following tabulation illustrates the extent to which it is necessary, in the actual operation of the multiple basing-point delivered-price system, for respondents to make variations in the mill nets recovered on different sales of cement in order to maintain identical delivered prices at each destination where sales are made. In the course of the Clark and Burns survey previously mentioned, many of the respondents submitted figures showing their shipments of cement in the months of June 1925, January 1928, June 1932, and January 1933—or such of those months as their records permitted—arranged to show the number of barrels on which the mill net was equal to or less by specified amounts than on sales in the home town of nonbase mills, or the base prices of base mills. In this tabulation such figures as were furnished for the several months have been consolidated and the quantities sold in the several brackets are expressed in terms of percentage of the total sales of each mill during the months covered. The mills shown are the La Salle mill of Alpha (Com. Ex. 972-L), the Fogelsville mill of Lehigh (Com. Ex. 973-0), the Universal mill of Universal (Com. Ex. 973-2B), the Richard City mill of Penn-Dixie (Com. Ex. 972-U), and the Norfolk mill of Lone Star (Com. Ex. 972-0):

Price	Percentage of total sales				
	Alpha	Lehigh	Universal	Penn-Dixie	Lone Star
Base price.....	1. 37	44. 09	10. 33	8. 75	20. 97
0.01 to 5 cents below.....	20. 73	6. 97	11. 68	. 93	1. 42
5.01 to 10 cents below.....	6. 99	7. 46	9. 97	18. 94	1. 56
10.01 to 15 cents below.....	14. 92	9. 22	19. 68	2. 87	7. 49
15.01 to 20 cents below.....	16. 73	18. 24	14. 89	5. 52	4. 47
20.01 to 25 cents below.....	27. 77	3. 29	9. 10	3. 38	4. 72
25.01 to 30 cents below.....	. 94	2. 40	10. 82	6. 58	4. 63
30.01 to 35 cents below.....	. 04	2. 95	3. 60	7. 57	2. 73
35.01 to 40 cents below.....	. 07	1. 45	3. 70	10. 13	4. 60
40.01 to 45 cents below.....	. 54	. 72	3. 33	3. 51	24. 52
45.01 to 50 cents below.....		. 03	1. 52	13. 63	19. 15
50.01 to 55 cents below.....			. 13	9. 54	1. 25
55.01 to 60 cents below.....		. 04	. 29	4. 75	. 56
60.01 to 65 cents below.....			. 44	1. 45	. 13
65.01 to 70 cents below.....				1. 37	. 74
Over 70 cents below.....				. 99	. 11

The above are merely examples, and corresponding data for other mills and other respondents would show similar results, varying in degree but not in principle. In some cases particular mills receive on a portion of their sales amounts in excess of their base prices or equivalent net recovery. This may be due to various reasons such as

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premiums charged for delivery to trucks; or to delivery by owned or hired trucks at a cost less than the all-rail freight at which the delivered price was calculated; or to delivery by water shipment at rates less than the all-rail rate at which the delivered price was calculated; or to combinations of these factors.

(c) Under the pricing system used by respondents there was much cross-hauling of cement. The system contemplates, and in operation results in, each corporate respondent waiving his advantage in his natural sales territory in return for reciprocal waiver by the other corporate respondents. It tends toward maintaining a price level sufficiently high to permit individual corporate respondents to sell cement outside the territory naturally tributary to their respective mills. There is no way within practicable bounds of determining exactly how much cross-hauling actually occurs, and how much of the total sums paid by consumers for cement results from the additional cost of transportation on sales outside the natural territory of the seller. The Institute statistician, W. S. Mallory, made for the Clark and Burns study certain estimates "to obtain the probable freight loss in 1935 due to cross shipments of cement" in a limited territory and reported the results to the chairman of the marketing research committee of the Institute which had supervision of the study for the Institute. His estimate of such freight losses in Districts 1 and 2 for 1933 was \$783,124.46 (Com. Ex. 971-28H). The conditions and assumptions underlying this estimate were stated, and it is obvious that the estimate materially understates the actual freight losses from the cause stated.

(d) At least since 1913 the cement industry has had a total productive capacity substantially in excess of total consumption. From 1921 to 1931 there was a steady and rapid rise in productive capacity which increased the total annual industry capacity by more than 100,000,000 barrels. In 1928, the year of largest consumption, productive capacity exceeded consumption by approximately 25 percent, and between 1931 and 1937, inclusive, consumption has represented less than half of productive capacity.

(e) As heretofore pointed out, in 1932 and 1933, at a time when consumption of cement amounted to less than 30 percent of capacity and had been declining rapidly during the economic depression then existing, respondents made numerous and substantial increases in their prices for cement. Many of the base prices established during the series of price advances which ended early in 1933 were still in effect, unchanged, in 1938. In the case of other bases, with but a few exceptions, only minor readjustments have been made since early in

1933 and prices have remained unchanged over varying numbers of years. Cement prices have shown a high degree of rigidity.

(f) After considering the testimony and other evidence offered by respondents in explanation of these conditions, including that concerning the use of cement in connection with other materials, as well as that relating to shifting location of demand for cement, it is concluded that the general conditions shown to exist tend to coincide with, rather than contradict, the direct proof of restraints imposed upon competition by respondents.

PAR. 24. (a) Count II of the complaint charges that the multiple basing-point system of delivered prices alleged in paragraphs 4 and 5 of Count I constitutes a combination of respondents to discriminate in price which results, and has resulted, in discriminations in price in the sale of cement by the respective respondents in violation of subsection (a) of Section 2 of the Clayton Act as amended. Count II alleges that the delivered prices at which sales are made pursuant to the multiple basing-point delivered-price system "are not the actual prices received by producing respondents," that to derive the true price received by respondents "the price actually paid to the carrier for transportation of the cement to the buyer must be deducted from the delivered price," that sales are made "at almost as many true prices as there are customers' locations," that the respective sellers thus discriminate in price in substantial amounts among their customers, that the purpose and effect of these discriminations is to prevent, lessen, and destroy competition in price among respondents, and it is only through these discriminations that respondents are "enabled to eliminate price competition." This count further alleges that such discrimination in price is the result of respondents' combination to use the multiple basing-point delivered-price system and that under this system each respondent knows that in reciprocity for its omission to offer a competitive price to customers located in areas adjacent to its mill, where it has a natural advantage and receives its highest actual price, other respondents will reciprocally waive their advantages and thus the advantages and disadvantages of each will be neutralized "in order that there may not anywhere be genuine competition in price."

(b) Upon consideration of the record, the Commission finds that each material allegation of Count II, and in particular each of the above-described allegations, is sustained by the evidence. As heretofore pointed out, the discrimination in mill nets by each respondent seller forms a systematic pattern that is the mathematical counterpart of the delivered-price pattern resulting from the multiple basing-point delivered-price system, which system is an expression of the effort of each respondent seller to match the delivered prices of other

respondent sellers. It would be impossible for respondents to maintain their multiple basing-point delivered-price system without automatically creating this systematic pattern of discrimination in mill nets in the sales of each respondent seller. The degree of the mill net discriminations among customers of the respective respondent sellers, as heretofore set out, ranges from a fraction of a cent to amounts substantially in excess of \$1 per barrel, and commonly amounts to 25¢ to 50¢ per barrel. Higher mill nets are always exacted from customers closer freightwise to the seller than from customers at more distant points. It would be impossible for any of respondents sellers habitually and openly to obtain these widely varying mill nets in the form of f. o. b. mill prices, and any attempt so to do would undoubtedly arouse a storm of protest from purchasers.

(c) The evidence shows that respondents have for many years pursued a course inconsistent with any conclusion other than that they recognized mill nets as being the true prices of and for cement. This recognition has been evidenced in many ways. As stated in subsections (a) and (e) of paragraph 12, purchasers of cement generally and customarily paid the freight charges thereon directly to the common carrier and paid to the seller only the amount of the invoice after deducting the amount of the freight paid to the carrier. This was the regular and consistent practice until some time after the issuance of the complaint in this proceeding. As found in subsection (e) of the same paragraph, respondents sought, by concert of action among themselves, to avoid the risks and responsibilities of ownership of cement in transit to the purchaser and by contract to impose such risks and responsibilities on the purchaser. These and other actions of respondents have signified their intention to pass title to cement sold to the purchaser at the time of delivery to the common carrier and at the mill nets applicable to purchasers at particular destinations. In the ordinary course of their business respondents have referred to mill net as the price of cement and have used that term as the equivalent of and interchangeably with price. An illustration of this appears in a letter dated July 26, 1935, from Superior to Professor Arthur R. Burns in which it was stated:

This freight rate of course, does not in any way accrue to us and the net price for our cement at such a delivery point, in fact the only price that is of any advantage to us, is the cement price stripped of freight, package and discount, which of course in my own mind becomes the selling price so far as we are concerned (Com. Ex. 971-17P).

The accounting practices of respondents have been consistent only with the conclusion that they recognized mill net as the true price of cement. Mill net being the only part of the delivered price ordi-

narily received from the buyer and passed through the seller's books as sales income, the total of mill net sales becomes the total sales income with which total costs may be compared to ascertain profit or loss. Respondent sellers have been accustomed to compare average mill net per barrel, as well as mill net per barrel on particular sales, with average cost per barrel. Economic experts testified that under the course of business pursued by respondents, mill net is the true price of cement. Economic experts produced by respondents testified that the amount of price discrimination cannot be determined or expressed except in terms of mill net.

(d) The use of the multiple basing-point delivered-price system by respondents for the purpose and with the effect of producing identical delivered prices at any given destination and thereby avoiding price competition, precludes any defense of the systematic variations in mill nets as being made in good faith to meet an equally low price of a competitor. On the contrary, these systematic variations are made in order that the delivered prices of all respondents selling at any given location may be equally high and equally low. As has been heretofore pointed out, if respondents' delivered prices were treated as true prices they would not reflect due allowance for differences in the cost of delivery. The use of the formula of lowest combination of base price plus freight precludes due allowance being made for differences in actual cost of delivery in all cases where the point of shipment is not that of the governing base mill upon which the delivered price was calculated. The failure to make due allowance for cost of delivery in such delivered prices automatically reflects itself in the varying mill nets. The systematic variations in mill nets resulting from respondents' pricing system are conditioned upon and are in proportion to the failure of the respective respondent sellers to make due allowance in their delivered prices for differences in their actual costs of delivery.

(e) The Commission rejects respondents' contention that the legislative history of the Robinson-Patman Act shows an intention on the part of Congress to legalize whatever price discriminations are involved in respondents' multiple basing-point delivered-price system. The failure of Congress to define price as mill net, on which failure respondents rely, does not avoid the necessity of having some definite concept of price in performing the administrative duty of preventing price discrimination under the statute. In the circumstances of this case, whether price be considered as delivered price under respondents' pricing system or as mill net, there are price discriminations which cannot be explained or justified by differences in cost of delivery and which reflect nothing but respondents' plan and effort to

make their delivered prices identical at each destination. Among the reasons for rejecting respondents' contention is the fact that its acceptance would attribute to Congress the contradictory intention of prohibiting discriminations that fail to make due allowance for differences in cost of delivery and, at the same time, legalizing them. To accept respondents' contention would be to recognize the right of a combination engaged in suppressing price competition to define and treat the word "price" in a manner that promotes and is inextricably interwoven with its price-fixing objectives.

PAR. 25. The Commission concludes from the evidence of record and therefore finds that in the circumstances of this case the systematic discriminations in mill nets by each respondent seller among its various customers which necessarily result from the use of the multiple basing-point delivered-price system are discriminations in price that are unlawful under subsection (a) of Section 2 of the Clayton Act as amended; that the effect of such discriminations in price has been and may be substantially to lessen competition and tend to create a monopoly in the sale and distribution of cement, and has been and may be to injure, destroy, and prevent competition with respondents who grant and exact such discriminations; that such discriminations do not make due allowance for differences in the cost of delivery or for other differentials permitted by subsection (a) of Section 2 of said act; and that such discriminations are not made in good faith to meet an equally low price of a competitor within the meaning of subsection (b) of section 2 of said act.

PAR. 26. The Commission concludes from the evidence of record and therefore finds that the capacity, tendency, and effect of the combination maintained by the respondents herein in the manner aforesaid and the acts and practices performed thereunder and in connection therewith by said respondents, as set out herein, has been and is to hinder, lessen, restrain, and suppress competition in the sale and distribution of cement in, among, and between the several States of the United States; to deprive purchasers of cement, both private and governmental, of the benefits of competition in price; to systematically maintain artificial and monopolistic methods and prices in the sale and distribution of cement, including common rate factors used and useful in the pricing of cement; to prevent purchasers from utilizing motortrucks or water carriers for the transportation of cement and from obtaining benefits which might accrue from the use of such transportation agencies; to require that purchases of cement be made on a delivered price basis, and to prevent and defeat efforts of purchasers to avoid this requirement; frequently to deprive agencies of the Federal Government of the benefits of all or a part of the

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lower land-grant rates available to such purchasers; to require certain agencies of the Federal Government to purchase their requirements of cement through dealers at higher prices than are available in direct purchases from manufacturers; to establish and maintain an agreed classification of customers who may purchase cement from manufacturers thereof; to maintain uniform terms and conditions of sale; to hinder and obstruct the sale of imported cement through restraints upon those who deal in such cement; and otherwise to promote and maintain their multiple basing-point delivered-price system and obstruct and defeat any form of competition which threatens or tends to threaten the continued use and maintenance of said system and the uniformity of prices created and maintained by its use.

CONCLUSION

The aforesaid combination and acts and practices of respondents pursuant thereto and in connection therewith, as hereinabove found, under the conditions and circumstances set forth, constitute unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act; and the discriminations in price by respondents, as hereinabove set out, constitute violations of subsection (a) of Section 2 of an act of Congress entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by act approved June 19, 1936 (the Robinson-Patman Act).

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answers of respondents, testimony and other evidence in support of and in opposition to the allegations of said complaint taken before an examiner of the Commission theretofore duly designated by it, report of the trial examiner and exceptions thereto, various motions and appeals, briefs in support of the complaint and in opposition thereto, and oral arguments of counsel, and the Commission having made its findings as to the facts and its conclusion that said respondents have violated the provisions of the Federal Trade Commission Act and of subsection (a) of Section 2 of an act of Congress entitled "An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by act approved June 19, 1936 (the Robinson-Patman Act):

It is ordered, That respondent, The Cement Institute, an unincorporated association, its officers, trustees, agents, representatives, and employees, and the corporate respondents, Aetna Portland Cement Co., Alpha Portland Cement Co., Arkansas Portland Cement Co., Ash Grove Lime & Portland Cement Co., Beaver Portland Cement Co., The Bessemer Limestone & Cement Co., Calaveras Cement Co., California Portland Cement Co., Colorado Portland Cement Co., Consolidated Cement Corporation, Coplay Cement Manufacturing Co., Cumberland Portland Cement Co., Dewey Portland Cement Co., Diamond Portland Cement Co., Edison Cement Corporation, The Federal Portland Cement Co., Inc., Florida Portland Cement Co., Georgia Cement & Products Co., Giant Portland Cement Co., The Glens Falls Portland Cement Co., Great Lakes Portland Cement Corporation, Green Bag Cement Co. of Pennsylvania, Green Bag Cement Co. of West Virginia, Hawkeye Portland Cement Co., Hercules Cement Corporation, Hermitage Portland Cement Co., Huron Portland Cement Co., Idaho Portland Cement Co., Lone Star Cement Corporation (the corporation named in the complaint as International Cement Corporation), Keystone Portland Cement Co., Kosmos Portland Cement Co., Lawrence Portland Cement Co., Lehigh Portland Cement Co., Marquette Cement Manufacturing Co., Medusa Portland Cement Co., Missouri Portland Cement Co., The Monarch Cement Co., Monolith Portland Cement Co., Monolith Portland Midwest Co., National Cement Co., Nazareth Cement Co., Nebraska Cement Co., North American Cement Corporation, Northwestern Portland Cement Co., Northwestern States Portland Cement Co., Oklahoma Portland Cement Co., Oregon Portland Cement Co., Pacific Portland Cement Co., Peerless Cement Corporation, Pennsylvania-Dixie Cement Corporation, Petoskey Portland Cement Co., Pittsburgh Plate Glass Co., Portland Cement Co. of Utah, Riverside Cement Co., Santa Cruz Portland Cement Co., Signal Mountain Portland Cement Co., Southern States Portland Cement Co., Southwestern Portland Cement Co., Spokane Portland Cement Co., Standard Portland Cement Co., Superior Cement Corporation, Superior Portland Cement, Inc., Three Forks Portland Cement Co., Trinity Portland Cement Co., Union Portland Cement Co., Universal Atlas Cement Co., Valley Forge Cement Co., Volunteer Portland Cement Co., Vulcanite Portland Cement Co., Wabash Portland Cement Co., West Penn Cement Co., The Whitehall Cement Manufacturing Co., Wolverine Portland Cement Co., and Yosemite Portland Cement Corporation, their respective officers, agents, representatives, and employees, in or in connection with the offering for sale, sale, and distribution of portland cement in interstate commerce, do forthwith cease and desist from en-

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tering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between and among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, to do or perform any of the following things:

1. Quoting or selling cement at prices calculated or determined pursuant to or in accordance with the multiple basing-point delivered-price system; or quoting or selling cement pursuant to or in accordance with any other plan or system which results in identical price quotations or prices for cement at points of quotation or sale or to particular purchasers by respondents using such plan or system, or which prevents purchasers from finding any advantage in price in dealing with one or more of the respondents against any of the other respondents.

2. In connection with or in aid or support of any plan, system, acts, or practices prohibited in paragraph 1 above—

(a) Refusing or declining to quote or sell cement at the location of the producing mill at a price effective at such location.

(b) Refusing or declining, when quoting or selling cement at a price effective at the location of the producing mill, to allow purchasers to provide transportation by any means, at any cost, or to any place they may desire.

(c) Quoting or selling cement at f. o. b. mill prices calculated by deducting actual common-carrier transportation charges from delivered-price quotations or delivered prices which are equivalent to the sum of the base price at, plus common-carrier transportation charges from, any point other than the actual shipping point.

(d) Quoting or selling cement ostensibly at f. o. b. mill prices, but which prices, plus common-carrier transportation charges to purchasers' destinations, are systematically equivalent to identical delivered costs to such purchasers from differently located mills.

(e) Quoting or selling cement at delivered prices calculated as or systematically equivalent to the sum of the base price in effect at, plus common-carrier transportation charges from, any point other than the actual shipping point.

(f) Quoting or selling cement at delivered prices which systematically include a common-carrier transportation factor greater or less than the actual cost of such common-carrier transportation from the point of shipment to destination.

(g) Quoting or selling cement at delivered prices which systematically include a freight factor representing transportation by a common carrier having higher rates than the means of transportation actually employed.

(h) Quoting or selling cement at destination-cost figures accompanied by a requirement that for invoicing purposes the f. o. b. mill price shall be determined by making specified deductions from said destination cost figures.

(i) Quoting or selling cement to any instrumentality of the Federal Government in a manner or upon terms which deprive the Government of all or any part of the benefits of land-grant or other special common-carrier rates to which it may be lawfully entitled.

(j) Collecting, compiling, circulating, or exchanging information concerning common-carrier transportation charges for cement used or to be used as a factor in the price of cement, or using, directly or indirectly, any such information so compiled or received as a factor in the price of cement.

(k) Controlling or attempting to control the destination or use of cement after the acquisition of title thereto by the purchaser.

(l) Determining upon any basis for the selection or classification of customers, or using any basis so determined for selecting or classifying customers.

(m) Determining upon the projects or types of projects for which, or the purchasers or classes of purchasers to whom, sales of cement will or will not be made directly by respondents.

(n) Collecting, compiling and circulating, or exchanging statistical data which reveal the individual production, stocks, sales, or shipments of cement of any corporate respondent to other corporate respondents.

(o) Maintaining any form of espionage for the purpose of determining whether or not their customers purchase or deal in imported cement; or discontinuing or threatening to discontinue sales of cement to customers because they purchase or deal in imported cement.

(p) Determining upon any discounts, package charges or refunds thereon, or other terms or conditions of sale, or using any discounts, package charges or refunds thereon, or other terms or conditions of sale so determined.

3. Discriminating in price between or among their respective customers by systematically charging and accepting mill net prices which differ by the amounts necessary to produce delivered costs to purchasers identical with delivered costs available to such purchasers through purchases from other respondents.

4. Using any means substantially similar to those specifically set out in this order with the purpose or effect of accomplishing any of the things prohibited by this order.

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It is further ordered, That for the reasons set out in the findings as to the facts in this proceeding, the case growing out of the complaint herein be, and the same hereby is, closed as to respondent, Castalia Portland Cement Company, without prejudice to the right of the Commission, should future facts so warrant, to reopen the same and resume trial thereof in accordance with its regular procedure.

It is further ordered, That respondents shall, within 60 days after the service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

Syllabus

IN THE MATTER OF

ASSOCIATED LABORATORIES, INC., TRADING AS ALLIED
LABORATORIES, KELP-A-MALT COMPANY, AND SEEDOL
COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 2979. Complaint, Nov. 12, 1936—Decision, July 20, 1943

Where a corporation, engaged in the manufacture and competitive interstate sale and distribution of its "Kelp-A-Malt Tablets"; through advertisements and depictions in newspapers and periodicals, and through radio broadcasts, directly and by implication—

- (a) Represented that through use of its product weak, emaciated, thin, and underweight persons could overcome such conditions; and that those who were without shapeliness could acquire attractive form and figure and develop well-proportioned bodies; and
- (b) Represented that such use enabled tired and run-down persons to regain normal health, strength, and vigor; and those who, by reason of undernourishment or underweight were suffering from such conditions as sour or acid stomach, gas and indigestion, to be relieved;

The facts being that the product in question was wholly incapable of accomplishing such results; as to the ingredients which formed the basis for said claims, there is no relation between deficiency of calcium and phosphorus and the conditions for which it recommended its product, and the amounts of vitamin B₁, iron and iodine in the product were insufficient to be of any therapeutic significance;

With tendency and capacity to mislead and deceive a substantial portion of the purchasing public with respect to the therapeutic properties of said product and benefits to be derived from its use, thereby causing substantial purchase of such product as a result, whereby trade was diverted unfairly to it from its competitors:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice of the public and competitors, and constituted unfair methods of competition in commerce.

As respects the contention that the amounts of certain minerals and vitamins provided by the daily dosage of a certain product—which fell far short of supplying the minimum therapeutic dosage recognized as sufficient—equalled or exceeded the minimum daily requirements according to standards established by the Food and Drug Administration, and that product in question was a food rather than a drug and also a dietary supplement: Such contention had no material bearing upon the issues involved, in that standards referred to presupposed that individual was in good health and not suffering from a deficiency of any of the minerals or vitamins involved, whereas challenged advertisements were directed to those assumed to be deficient therein, in which cases the standards in question have no application; so that, while for those in health the product in question might serve as a dietary supplement and aid in preventing certain mineral or vitamin defi-