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NOTES

THE CEMENT DECISION¹ AND BASING-POINT PRICING SYSTEMS

The period since the end of World War II has been marked by a tremendous volume of litigation arising under the federal anti-trust statutes. One of the Government's principal attacks has been aimed at the basing-point system of pricing which has been employed in many basic industries.² This attack marked no new departure on the part of the Government; the Federal Trade Commission has consistently opposed the system,³ and the courts have repeatedly been called upon to review Commission orders aimed at some feature of the basing-point system.⁴

Until recently the system had successfully withstood these attacks. It had weathered a number of proceedings under the Sherman and Clayton Acts.⁵ A provision which would have definitely outlawed it was stricken from the

1. Federal Trade Commission v. Cement Institute, 68 Sup. Ct. 793 (1948). In this case the Federal Trade Commission had found that there was an agreement or understanding among the members of the cement industry to utilize a multiple basing-point system in the sale of cement. The Court upheld the Commission's findings and order requiring the cement manufacturers to cease and desist from said practice. This case will hereinafter be referred to as the *Cement* case. An earlier case against the predecessor of the present Cement Institute will be referred to as the *Old Cement* case. [Cement Mfrs. Protective Ass'n v. United States, 268 U. S. 588, 45 Sup. Ct. 586, 69 L. Ed. 1104 (1925)].

2. Basing-point pricing systems have generally been employed in the maple-flooring, zinc, copper, industrial-benzol, gasoline, cement, southern-pine, oak-flooring, lead, steel, potash and sugar industries. NELSON AND KEIM, PRICE BEHAVIOR AND BUSINESS POLICY 345 (TNEC Monograph 1, 1940). The system has also been employed in selling asphalt shingles and roofing, industrial alcohol, fertilizers, sewer pipe, range boilers, hollow building tile, metal lath, nuts, bolts and rivets. FETTER, THE MASQUERADE OF MONOPOLY 242 (1931). See also BURNS, THE DECLINE OF COMPETITION 291-299 (1936).

3. As early as 1924 the FTC issued a cease-and-desist order aimed at Pittsburgh-Plus, the early manifestation of the basing-point system in the steel industry. Matter of United States Steel Corp., 8 F. T. C. 1 (1924). See FTC, PRICE BASES INQUIRY (1932). Respondent Marquette Cement Co., in the *Cement* case urged that the Commission's reports to the President, and testimony of Commission members before congressional committees showed a previously developed bias and prejudice against the system. 68 Sup. Ct. at 803. This contention received the sympathetic consideration of the lower court, which, however, held that no denial of due process was involved. Marquette Cement Mfg. Co. v. Federal Trade Commission, 147 F. 2d 589 (C. C. A. 7th 1945). Other instances of FTC condemnation of the system may be found in Matter of United States Maltsters Ass'n, 35 F. T. C. 797 (1942); Matter of Hardwood Institute, 34 F. T. C. 661 (1942); Matter of Pine Hill Lime & Stone Co., 33 F. T. C. 427 (1941). Charges have been filed against a number of other groups. U. S. News, May 7, 1948, p. 47.

4. Federal Trade Commission v. A. E. Staley Mfg. Co., 324 U. S. 746, 65 Sup. Ct. 971, 89 L. Ed. 1338 (1945); Corn Products Refining Co. v. Federal Trade Commission, 324 U. S. 726, 65 Sup. Ct. 961, 89 L. Ed. 1320 (1945); Sugar Institute v. United States, 297 U. S. 553, 56 Sup. Ct. 629, 80 L. Ed. 859 (1936); Cement Mfrs. Protective Ass'n v. United States, 268 U. S. 588, 45 Sup. Ct. 586, 69 L. Ed. 1104 (1925); Maple Flooring Mfrs. Ass'n v. United States, 268 U. S. 563, 45 Sup. Ct. 578, 69 L. Ed. 1093 (1925). The most recent Supreme Court work in the general field of anti-trust problems is discussed in 17 U. S. L. WEEK 3017 (July 6, 1948).

5. Sugar Institute v. United States; Cement Mfrs. Protective Ass'n v. United States; Maple Flooring Mfrs. Ass'n v. United States, all *supra* note 4.

Robinson-Patman Act⁶ before it was passed.⁷ Two bills aimed solely at outlawing the basing-point method were introduced in Congress,⁸ but neither was passed. However, in 1945 the system suffered a major set-back in the courts when the Supreme Court upheld the findings of the Federal Trade Commission and ruled that the basing-point system as employed by two major manufacturers of glucose resulted in illegal price discrimination.⁹ Then, in the recent case of *Federal Trade Commission v. Cement Institute*,¹⁰ the Court handed down a decision which may well mean the end of the system as now developed, unless Congress comes to its aid. It is the purpose here to examine the *Cement* decision to determine how it fits in with established anti-trust policy and previous decisions dealing with the basing-point system, and to consider some of its possible results.¹¹

I. THE BASING-POINT SYSTEM

In order to understand the bases for the attacks upon the basing-point system one must first understand its essential features.¹² Under the system, sellers quote only delivered prices;¹³ these prices are computed by adding together the price of the product at a specified point and freight rates from that point to the customer. The specified point is called a basing-point. It may or may not be the situs of the seller's plant, and indeed it sometimes happens

6. 49 STAT. 1526 (1936), 15 U. S. C. A. § 13 (1941).

7. The provision in question read as follows: "(5) That the word 'price' as used in section 2 shall be construed to mean the amount received by the vendor after deducting freight or other transportation, if any, allowed or defrayed by the vendor." 80 CONG. REC. 8224 (1936). If this provision had been retained, sellers would have been forced to quote prices f.o.b. the mill, thus destroying the basing-point system. *Id.* at 8223.

8. 80 CONG. REC. 8223-8224 (1936).

9. *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U. S. 746, 65 Sup. Ct. 971, 89 L. Ed. 1338 (1945); *Corn Products Refining Co. v. Federal Trade Commission*, 324 U. S. 726, 65 Sup. Ct. 961, 89 L. Ed. 1320 (1945).

10. 68 Sup. Ct. 793 (1948).

11. No attempt will be made in this note to analyze or consider in detail the effect of the *Cement* decision upon other types of delivered-price systems—zone prices and universal delivered prices—though unquestionably they are related to the basing-point system, and are in some degree subject to the same legal considerations. See p. 81 *infra*.

12. There is an extensive literature on the subject. For a more complete discussion of the functioning of the system see BURNS, *THE DECLINE OF COMPETITION* 290-371 (1936); FETTER, *THE MASQUERADE OF MONOPOLY* 145-163 (1931); MILLER, *UNFAIR COMPETITION* 172-190 (1941); *THE BASING POINT PROBLEM* (TNEC Monograph 42, 1941); 3 UNITED STATES STEEL CORPORATION, *TNEC PAPERS: THE BASING POINT METHOD* 1-14 (1940); Aulette and Schaffer, *Legality of the "Basing Point" Pricing System*, 33 GEO. L. J. 439 (1945); Clark, *Basing Point Methods of Price Quoting*, 4 CAN. J. OF ECON. & POL. SCI. 477 (1938); Withrow, *Basing-Point and Freight-Zone Price Systems Under the Anti-Trust Laws*, 85 U. OF PA. L. REV. 690 (1937); Notes, *The Legality of Basing-Point Systems*, 45 HARV. L. REV. 548 (1932); *Basing-Point Pricing and Antitrust Policy*, 55 YALE L. J. 558 (1946).

13. This is the ideal situation, from the point of view of the basing-point proponent. This "ideal" is not always attained, and from time to time there may be some quotation of prices f.o.b. a mill. Evidence of this situation in the cement industry was produced in the *Cement* case. 68 Sup. Ct. at 811. The FTC failed to find that respondents had refused to make such sales. *Actna Portland Cement Co. v. Federal Trade Commission*, 157 F. 2d 533, 541 (C. C. A. 7th 1946).

that no one manufactures the particular product at the basing-point.¹⁴ When all sellers use one basing-point, the industry is said to operate under a single basing-point system.¹⁵ When, as in the cement industry, a number of different basing-points are used, the industry is said to operate under a multiple basing-point system.¹⁶ The base prices at these different points may be identical, or there may be a considerable differential in particular instances.¹⁷ Under the multiple system, the delivered price which any seller will quote to a buyer is the lowest combination of base price plus freight from that basing-point to the buyer.¹⁸ These freight rates are generally made available to all sellers in some planned manner, through a trade association or other agency, and are not left to individuals to ascertain as best they may.¹⁹ Since all sellers who adopt the system will use the same figures in computing their bids or offers to prospective buyers, the method results in absolute identity of quoted prices, regardless of the relative production costs and relative locations of the various sellers with respect to the particular buyer. When sellers quote identical delivered prices, but incur different transportation costs, it necessarily follows that there is a difference in the net mill price which each seller would receive from a particular buyer—the seller having lowest transportation costs, *i.e.*, normally the one nearest the buyer, receiving the highest mill net. Thus, as applied to one buyer and several sellers, the system results in identity of delivered prices, and variation in net mill return to the several sellers. It is this identity of quoted delivered price, resulting from a common use of factors which are not related to the individual seller's costs, which is the basis of the attacks upon the system as being a type of monopolistic price-fixing.

14. 3 UNITED STATES STEEL CORPORATION, TNEC PAPERS: THE BASING POINT METHOD 2 (1940).

15. The most famous of the single basing-point systems was that developed in the steel industry and known as Pittsburgh-Plus. For a time, practically all the steel in the United States was sold on the basis of the Pittsburgh price plus freight from Pittsburgh to the buyer, regardless of where the steel was manufactured. See generally, DAUGHERTY, DE CHAZEAU, STRATON, *THE ECONOMICS OF THE IRON AND STEEL INDUSTRY* 533-544 (1937); Commons, *The Delivered Price Practice in the Steel Market*, 14 AM. ECON. REV. 505 (1924). The system was condemned as a violation of the Clayton and Federal Trade Commission Acts in *Matter of United States Steel Corp.*, 8 F. T. C. 1 (1924); see Mechem, *The "Pittsburgh Plus" Case*, 10 A. B. A. J. 806 (1924). Other industries using a single basing-point were maple flooring, zinc, copper, industrial benzol, and gasoline. NELSON AND KEIM, *PRICE BEHAVIOR AND BUSINESS POLICY* 345 (TNEC Monograph 1, 1940).

16. Multiple basing-points have been used in the cement, pulp, southern-pine, oak-flooring, lead, steel, potash and sugar industries. *Ibid.*

17. 3 UNITED STATES STEEL CORP., TNEC PAPERS: THE BASING POINT METHOD 18 (1940).

18. *E.g.*, if the base price at basing-point A is \$5.00, and freight from A to the buyer is \$1.00, the price computed from point A would be \$6.00. If the base price at basing-point B is \$4.50 and freight from B to the same buyer is \$1.25, the price from point B would be \$5.75. In such a case all sellers would quote the lower price, \$5.75, and point B would be the basing-point which governed prices in the buyer's vicinity.

19. The cases cited in note 4 *supra* describe the activities of trade associations in this respect. The practice of distributing base price information through trade association channels renders the association particularly vulnerable to charges of concerted price-fixing, and has been generally abandoned.

As applied to one seller and several buyers, the system results in a variation in the mill net which is received from the several buyers.²⁰ This feature of the system is particularly striking in the case of a non-base mill, for not only does the mill receive a different mill net from each buyer, but the buyers also benefit from nearness to the basing-point rather than from nearness to the producing seller. For example, in the case of *Federal Trade Commission v. A. E. Staley Mfg. Co.*,²¹ the Staley Company manufactured glucose at Decatur, Illinois, and sold it at prices computed on Chicago as a basing-point. The Chicago base price was \$2.09; the freight from Chicago to Decatur was 18 cents. Thus when Staley sold to a buyer in Decatur, where the glucose was manufactured, the delivered price was \$2.09 plus \$0.18, or \$2.27, and as no freight charges were actually incurred, the mill net on such sales was \$2.27. But when Staley sold to a buyer in Chicago, the delivered price was \$2.09, and the mill net, after the freight was paid, was only \$1.91. The freight charge from Chicago to Decatur, which was used in computing the delivered price in Decatur, but which was not actually paid for transportation, is known as "phantom freight"; it is an arbitrary burden in the form of a pricing factor which is imposed upon a buyer who is so unfortunate as to be located near the point of production, but away from the price basing-point. The charge from Decatur to Chicago, which was actually paid for transportation, but which was not used in computing the Chicago price, is known as "freight absorption"; it is a benefit which is conferred upon the buyer who happens to be located near the basing-point. The difference in the net price which the seller receives from various buyers by reason of "phantom freight" or "freight absorption" is the basis of the attacks upon the system as a method of illegal price discrimination.

No attempt will be made here to discuss in detail the economic advantages or disadvantages of the system, important though they may be in the ultimate determination of the legality of the system. Suffice it to say that the friends of the system claim that it effects an important saving in time and effort by providing a quick convenient method of arriving at price quotations; that it promotes competition by making it possible for a seller to share in the market outside of his area of natural freight advantage; and that this interpenetration of market areas allows greater diversification of product, and also promotes economic stability by making a producer less subject to local economic conditions. Opponents say that it produces economically wasteful "cross-hauling";²² that it actually does not promote competition, since sellers

20. So long as a mill is a basing-point, and so long as the particular buyers are within the area controlled by this base, mill net will be identical from all buyers, *i.e.*, it will amount to the base price in each instance.

21. 324 U. S. 746, 65 Sup. Ct. 971, 89 L. Ed. 1338 (1945).

22. "Cross-hauling" exists when two or more mills ship like products to customers in each other's natural territory. For example, Mill A ships a barrel of cement to a

who penetrate another's market sell at the other's established price; and that it is actually a means of eliminating price competition and of stabilizing prices at levels above those which would result from true competition.²³

II. THE ANTI-TRUST STATUTES

The statutes under which complaints or prosecutions have been brought against the basing-point system are section 1 of the Sherman Act,²⁴ which outlaws combinations in restraint of trade; section 2 of the Clayton Act,²⁵ as amended by the Robinson-Patman Act,²⁶ which makes it unlawful to discriminate in price between purchasers of like grade and quality; and section 5 of the Federal Trade Commission Act,²⁷ which prohibits unfair methods of competition among the members of an industry.

Certain general observations concerning these statutes may be helpful in understanding why the courts have reached apparently inconsistent conclusions in different cases. The Sherman Act authorizes three different types of proceedings: (1) criminal prosecutions for misdemeanor, brought by the Attorney-General in a federal court;²⁸ (2) equity proceedings by the Attorney-General to prevent and restrain violations of the Act;²⁹ and (3) suits for treble damages brought by persons injured by violations of the Act.³⁰ The Clayton Act provides for the same types of suits, and adds another which

customer located adjacent to Mill B, and Mill B ships cement to its customer located near Mill A.

23. Arguments pro and con the system are advanced in the materials cited in note 12 *supra*.

24. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." 26 STAT. 209 (1890), 15 U. S. C. A. § 1 (1941).

25. "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities . . . where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided*, That nothing herein contained shall prevent . . . discrimination in price in the same or different communities made in good faith to meet competition . . ." 38 STAT. 730 (1914).

26. "[I]t shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with the customers of either of them: . . . (b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section . . . *Provided, however*, That nothing contained . . . [herein] shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor . . ." 49 STAT. 1526 (1936), 15 U. S. C. A. § 13 (1941).

27. "Unfair methods of competition in commerce . . . are hereby declared unlawful." 38 STAT. 719 (1914), as amended, 52 STAT. 111 (1938), 15 U. S. C. A. § 45 (1941).

28. Sections 2 and 3 of the Act make its violation a misdemeanor. 26 STAT. 209 (1890), 15 U. S. C. A. §§ 2, 3 (1941).

29. 26 STAT. 209 (1890), 15 U. S. C. A. § 4 (1941).

30. 26 STAT. 210 (1890), as amended, 15 U. S. C. A. § 15 (1941).

applies to both Acts: an individual may bring suit to enjoin threatened loss or damage caused by violation of the anti-trust laws.³¹ In addition the Clayton Act empowered the Federal Trade Commission to act of its own motion to enforce certain provisions of the Act, by holding administrative hearings and issuing cease-and-desist orders in appropriate cases.³² Thus the Sherman and Clayton Acts, being partially penal in character,³³ must be strictly construed. Not so with the Federal Trade Commission Act; it may be said to be prophylactic in character. It empowers the Commission to attempt to prevent practices which if left alone might lead to violation of the other Acts.³⁴ The Commission issues a complaint; holds hearings; hands down a cease-and-desist order against improper practices; and applies to the appropriate United States circuit court of appeals for enforcement of the order if necessary. Penalties are imposed under this Act only after a final order of the Commission has been disobeyed.³⁵

The well-recognized differences between court proceedings and administrative hearings affect the cases arising under the various acts. Those under the Sherman and Clayton Acts which originate in a court are handled in the ordinary way. Regular rules of evidence apply, and the trial court exercises its normal functions. In the administrative proceedings instituted by the Commission, the legal rules as to admissibility of evidence are relaxed,³⁶ thus making it easier for the Commission to find that improper acts are being done.³⁷ Too, the Federal Trade Commission acts as prosecutor, judge, and expert jury in its administrative hearings.³⁸

Finally, it may be noted that the Sherman Act was passed before the

31. 38 STAT. 737 (1914), 15 U. S. C. A. § 26 (1941).

32. 38 STAT. 734 (1914), 15 U. S. C. A. § 21 (1941).

33. Greer, Mills & Co. v. Stoller, 77 Fed. 1, 3 (C. C. W. D. Mo. 1896); Progress Corp. v. Green, 163 Misc. 828, 298 N. Y. Supp. 154 (Sup. Ct. 1937) (Robinson-Patman amendment).

34. Fashion Originators' Guild v. Federal Trade Commission, 312 U. S. 457, 466, 61 Sup. Ct. 703, 85 L. Ed. 949 (1941); Butterick Pub. Co. v. Federal Trade Commission, 85 F. 2d 522 (C. C. A. 2d 1936).

35. Federal Trade Commission Act § 5(1), 52 STAT. 114 (1938), 15 U. S. C. A. § 45 (1) (1941).

36. Phelps Dodge Refining Corp. v. Federal Trade Commission, 139 F. 2d 393 (C. C. A. 2d 1943); John Bene & Sons v. Federal Trade Commission, 299 Fed. 468, 471 (C. C. A. 2d 1924). Section 7(c) of the Federal Administrative Procedure Act requires that the evidence must be "reliable, probative, and substantial." Whether this limits an administrative body more than the previously existing rules is uncertain. The United States Attorney-General is of the opinion that it does not. See ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 76 (1948), reprinted in 15 I. C. C. PRACTITIONER'S JOURNAL (No. 5, Feb., 1948).

37. For a general discussion of the problem of judicial review of findings of fact of the Federal Trade Commission, see Freer, *An Analysis of the Federal Trade Commission Procedures as They Relate to the Administrative Procedure Act*, in THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES 414 (N. Y. U. 1947); Hankin, *Conclusiveness of the Federal Trade Commission's Findings as to Facts*, 23 MICH. L. REV. 233 (1925); Note, *Recent Trends in Interpretation of the Federal Trade Commission Act*, 32 MICH. L. REV. 1142 (1934).

38. This is not a denial of due process. Federal Trade Commission v. F. A. Martocchio Co., 87 F. 2d 561, 566 (C. C. A. 8th 1937), cert. denied, 301 U. S. 691 (1937).

basing-point system had developed to an appreciable extent;³⁹ the Clayton and Trade Commission Acts were passed in 1914 before widespread opposition to the system had developed; and the Robinson-Patman Act was passed at a time when the basing-point system was the object of a special attack in the Congress.⁴⁰

III. THE *Cement Institute* DECISION⁴¹

The decision in the *Cement* case, holding the multiple basing-point system as employed in the cement industry to be illegal, was received with consternation and dismay by the cement industry.⁴² Dire predictions as to its economic effect were immediately forthcoming.⁴³ Although the dismay of the industry may be easily understood, the result in the case should not have been entirely unexpected. In 1924 the Federal Trade Commission, in *Matter of United States Steel Corp.*,⁴⁴ had found that the Pittsburgh-Plus⁴⁵ system resulted in price discriminations among customers, and that these discriminations were neither allowed under the exceptions listed in the Clayton Act, nor made in good faith to meet competition. It followed, and the Commission so ruled, that Pittsburgh-Plus was an unfair discrimination which was illegal under section 2 of the Clayton Act.⁴⁶ In addition the Commission found that the system was an unfair method of competition under section 5 of the Federal Trade Commission Act.⁴⁷ Accordingly, the Commission ordered the United States Steel Corporation to cease and desist from selling its products on the Pittsburgh-Plus basis. The Corporation then filed its answer in which it announced that it refused to concede the validity of the order, but stated that it would conform thereto insofar as practicable. Actually it appears that the order simply hastened the transition from the single to the multiple basing-

39. A rudimentary basing-point structure existed in the iron industry in the 1750's. 3 UNITED STATES STEEL CORP., TNEC PAPERS: THE BASING POINT METHOD 15 (1940). However, the system did not develop appreciably until the late 1890's. *Ibid.* Professor Fetter engagingly groups the system together with the machine-gun, aeroplane, and poison gas as inventions of our time. FETTER, THE MASQUERADE OF MONOPOLY 4 (1931).

40. In 1919 organized opposition to the basing-point system arose in the form of the Western Association of Rolled Steel Consumers, an organization whose purpose was to bring about the abolition of Pittsburgh-Plus. FETTER, THE MASQUERADE OF MONOPOLY 145-6 (1931). At the time the Robinson-Patman Act was being debated, opposition to the basing-point system was sufficiently strong to cause the introduction of legislation dealing solely with it. 80 CONG. REC. 8224 (1936).

41. Federal Trade Commission v. Cement Institute, 68 Sup. Ct. 793 (1948). See note 1 *supra*.

42. Wall Street Journal, April 27, 1948, p. 3, col. 4.

43. Time, May 10, 1948, p. 46. Decentralization of industry, local monopoly, overturn of established cost patterns, are among general economic results predicted. U. S. News, May 7, 1948, p. 46.

44. 8 F. T. C. 1 (1924).

45. See note 15 *supra*.

46. Note 25 *supra*.

47. Note 27 *supra*.

point method of pricing in the steel industry.⁴⁸ The stage was set for a possible direct ruling by the courts on the basing-point system. Nevertheless, neither party acted; the Commission failed to apply to the courts for enforcement of its order, and the Corporation failed to appeal. The explanation of this failure to have the question adjudicated seems to be that both the Commission and the Corporation were afraid to push the issue at the particular moment. The language of the Court in the *Maple Flooring*⁴⁹ and *Old Cement*⁵⁰ cases, which were decided not long after the Commission's order in the steel case, indicated that the Court might view the basing-point practice with a tolerant eye. On the other hand the case of *United States v. American Linseed Oil Co.*,⁵¹ where the Court had looked with disfavor upon identity of delivered prices, was of recent memory, as was the Government's attempt to dissolve the Steel Corporation under the Sherman Act.⁵² Thus both parties preferred not to press matters to a final decision before the Supreme Court at that time.⁵³

In order to determine the meaning and to evaluate the effect of the *Cement* decision upon the basing-point system, it is first desirable to set out clearly just what the case actually held.⁵⁴ The Federal Trade Commission stated its complaint against the Cement Institute, its 74 affiliated companies, and certain individuals associated with the Institute, in two counts. The first count alleged that respondents were guilty of practices which constituted an unfair method of competition under section 5 of the Federal Trade Commission Act. The factual allegations to support this charge were primarily that respondents had, by means of a combination among themselves, restrained and hindered competition in the sale and distribution of cement; and that this combination had been made effective through mutual agreement or understanding to employ a multiple basing-point system of pricing. It was further alleged that the system had resulted in the quotation of identical prices and terms of

48. BURNS, THE DECLINE OF COMPETITION 306 *et seq.* (1936); FETTER, THE MASQUERADE OF MONOPOLY 158-159 (1931). The Corporation admitted that it had not completely complied with the Commission's order when it filed a petition for review of that order in the circuit court of appeals in 1938. *United States v. Columbia Steel Co.*, 68 Sup. Ct. 1107, 1111 n. 4 (1948).

49. *Maple Flooring Mfrs. Ass'n v. United States*, 268 U. S. 563, 45 Sup. Ct. 578, 69 L. Ed. 1093 (1925).

50. *Cement Mfrs. Protective Ass'n v. United States*, 268 U. S. 588, 45 Sup. Ct. 586, 69 L. Ed. 1104 (1925).

51. 262 U. S. 371, 43 Sup. Ct. 607, 67 L. Ed. 1035 (1923).

52. *United States v. United States Steel Corp.*, 251 U. S. 417, 40 Sup. Ct. 293, 64 L. Ed. 343 (1920).

53. FETTER, THE MASQUERADE OF MONOPOLY 158 (1931); Note, 45 HARV. L. REV. 548 (1932).

54. There has been some confusion as to the meaning of the Court's decision. Members of the Federal Trade Commission itself are not in agreement as to the meaning. Commissioner Mason declared that the decision meant that the "multiple basing point pricing system is out as a matter of law." Commissioner Freer declared that "Certainly, it is unwarranted to assume that the effect of this decision is to outlaw all delivered prices or to require only f.o.b. mill prices." 10 N. A. M. LAW DIGEST 41-42 (June, 1948).

sale for cement at any point in the United States by all of the respondents.⁵⁵ The critical points in count one are thus seen to be: (1) use of a multiple basing-point system, (2) by mutual understanding or agreement, (3) making effective a combination which hindered and restrained competition, (4) thereby violating section 5 of the Federal Trade Commission Act.

Count two of the complaint charged that the multiple basing-point system of sales resulted in systematic price discriminations between the customers of each respondent, and that these discriminations were made with the purpose of destroying price competition among the respondents.⁵⁶ The essential points of this charge are: (1) price discriminations, (2) made for the purpose of destroying competition in violation of the Clayton Act as amended by the Robinson-Patman Act.

The Commission found the respondents guilty on both counts. This finding was sustained by the Supreme Court, so that the holding affirms the existence of each of the factual and legal issues presented in the counts as enumerated above. Each of these points will now be examined separately.

A. Count 1: Violation of Federal Trade Commission Act

(1) Use of a multiple basing-point system

That the cement industry generally used a multiple basing-point system was undisputed.⁵⁷ The Commission specifically found that "Substantially all sales of cement by the corporate respondents are made on the basis of a delivered price. . . . In determining the delivered price which will be charged for cement at any given location, respondents use a multiple basing-point system."⁵⁸ The use of the basing-point system was attended by its natural result—identity of delivered prices of all respondents at a given location. This fact alone is not enough to stamp the system as illegal. In the *Old Cement* case the Court found that a basing-point system was in use and that uniformity of prices had resulted, but it also found that "uniformity has resulted not from maintaining the price at fixed levels, but from the prompt meeting of changes in prices by competing sellers,"⁵⁹ and it therefore found nothing illegal in the price uniformity. Uniformity of prices resulting from acknowledged "price leadership"⁶⁰ is not illegal, so long as there is no agreement or under-

55. 68 Sup. Ct. at 797. The complaint before the Commission set forth these points and supporting facts in great detail. 37 F. T. C. 87, 96-123 (1943).

56. 68 Sup. Ct. at 797.

57. The Commission found that there was some modification of the basing-point system by the use of a zoning system on the part of certain of the respondents. Finding 7(m), 37 F. T. C. 87, 156 (1943).

58. Finding 7(a), *id.* at 147.

59. *Cement Mfrs. Protective Ass'n v. United States*, 268 U. S. 588, 605, 45 Sup. Ct. 586, 69 L. Ed. 1104 (1925).

60. "Price leadership" is a condition which obtains when a member of an industry occupies such a key position in its functions that other members tend to follow the leader and accept prices set by the important member. Such a situation exists usually

standing.⁶¹ In dealing with a standardized product such as cement, steel or sugar, perfect competitive conditions would tend to produce uniformity in price.⁶²

(2) Mutual understanding or agreement

The Commission found that there was an agreement or understanding among respondent mills to maintain the basing-point system,⁶³ and the Supreme Court held that the finding was supported by the evidence.⁶⁴ In the *Old Cement* case, the Court, in reversing the trial court, held that in a substantially similar fact situation, no agreement was established, either directly or by inference from existing facts.⁶⁵ In that case, however, no such agreement had been charged by the Government, so that the evidence may well not have pointed up the possibility of concerted action. Too, as that was a prosecution under the Sherman Act, the Court was restricted to a consideration of legally admissible evidence presented before the trial court; whereas in the new *Cement* decision the Commission was free to consider and draw inferences from materials which might not have been available at a trial.⁶⁶ The differences in the form of the complaint and the nature of the original proceeding may provide a legal basis for distinguishing the cases, but it is difficult to escape the conclusion that the change in the personnel and philosophy of the Court is the best explanation of how the Court found that the earlier Cement Association was blameless, but sustained a finding of guilt against the successor association under circumstances of marked factual similarity.⁶⁷

Ordinarily, the mere existence of an industry-wide practice which results in identity of prices at any given point would support a strong inference of concerted action. However, neither economists nor the courts are agreed on the question of whether a perfect identity of prices can result from the use of a basing-point system without agreement or understanding. In the *Old Cement* case the record showed the existence of a basing-point system and its

where smaller members fear the result of a price-cutting battle against major producers. See BURNS, *THE DECLINE OF COMPETITION* 76-145 (1936).

61. *United States v. International Harvester Co.*, 274 U. S. 693, 708-709, 47 Sup. Ct. 748, 71 L. Ed. 1302 (1927).

62. Perfect competitive conditions do not exist under normal circumstances in industry today. See FETTER, *THE MASQUERADE OF MONOPOLY* 266 (1931); 3 *UNITED STATES STEEL CORP., TNEC PAPERS: THE BASING POINT METHOD* 20-28 (1940).

63. F. T. C. 87, 147 *et seq.* (1943). The finding is not spelled out, and respondents claimed that no finding was made.

64. 68 Sup. Ct. at 812.

65. 268 U. S. 588, 606, 45 Sup. Ct. 586, 69 L. Ed. 1104 (1925).

66. See note 36 *supra*. An example of such evidence is the Treanor letter—a letter written by the president of one of the respondent companies and a trustee of the Institute to the chairman of the NRA Code Authority for the cement industry. Although the writer was dead at the time of the case, the letter was admitted before the Commission. In it Treanor stated that the cement industry “must systematically restrain competition or be ruined.” 68 Sup. Ct. at 806.

67. A comparison of the Court’s language in the two cases makes this difference appear clearly.

usual price results. The Court there said that "this record wholly fails to establish, either directly or by inference, any concerted action other than that involved in the gathering and dissemination of pertinent information with respect to the sale and distribution of cement . . . ; and it fails to show any effect on price and production except such as would naturally flow from the dissemination of that information in the trade and its natural influence on individual action."⁶⁸ In the new *Cement* case economists testifying as expert witnesses stated that identity of delivered prices resulting from the use of a basing-point system was not necessarily the result of agreement among the members of the industry.⁶⁹ Other economists testified that the system as employed by the cement companies could only result from collusive action.⁷⁰ The Court, after considering these conflicting views, did not hold that it was impossible for the system to exist without collusion, but it indicated strong doubts as to such a possibility: "It may possibly be true . . . that cement producers will, without agreement express or implied and without understanding explicit or tacit, always and at all times . . . charge for their cement precisely, to the fractional part of a penny, the price their competitors charge. Certainly it runs counter to what many people have believed."⁷¹ Similar language was used by the circuit court of appeals in *United States Maltsters Ass'n v. Federal Trade Commission*⁷² and in *Milk and Ice Cream Can Institute v. Federal Trade Commission*.⁷³ On the other hand the same circuit court, in reversing the Commission in the new *Cement* decision found that the evidence was insufficient to support a finding of agreement or understanding to employ the system.⁷⁴ Even the Commission itself was careful to point out that it had not attacked the basing-point system *per se*, and that it was not inferring agreement from the system alone, but from the steps taken to enforce it.⁷⁵

The Commission, then, admits that identity of price merely establishes that a basing-point system was used, and not that there was necessarily an agreement or understanding to use it. If the existence of an agreement or

68. 268 U. S. 588, 606, 45 Sup. Ct. 586, 69 L. Ed. 1104 (1925).

69. For names of the witnesses so testifying see 37 F. T. C. 87, 250 (1943).

70. *Ibid.*

71. 68 Sup. Ct. at 810.

72. "Any other conclusion [than that of agreement to fix prices] would do violence to common sense and the realities of the situation. The fact that petitioners utilized a system which enabled them to deliver malt at every point of destination at exactly the same price is a persuasive circumstance in itself." 152 F. 2d 161, 164 (C. C. A. 7th 1945).

73. "Just how such an unnatural situation could be brought about by members of an industry without a plan or agreement is difficult, if not impossible, to visualize. The mere fact that the situation did exist in and of itself furnishes strong support that the Institute and its members were acting cooperatively and by agreement." 152 F. 2d 478, 481 (C. C. A. 7th 1946) (the charge here was not only that freight information was exchanged, but also base price information).

74. *Aetna Portland Cement Co. v. Federal Trade Commission*, 157 F. 2d 533 (C. C. A. 7th 1946). The court said "Under the circumstances shown, we think it is the inevitable result of any pricing system that cement must be sold at the same place at a uniform price whether it be at the point of production or that of destination." *Id.* at 568.

75. Brief for Commission, cited 68 Sup. Ct. at 819, n. 6.

understanding is necessary to the condemnation of the practice, it becomes important to examine the evidentiary facts upon which the Commission based its finding of concerted action.⁷⁶ The Commission made many findings to support its factual conclusion,⁷⁷ but the Court did not find it necessary to enumerate them all in order to sustain the charge of agreement. Boycotts of members who failed to follow the system; discharge of uncooperative employees; organized opposition to the establishment of new cement plants; establishment of punitive base points; discouragement of shipping of cement by truck or barge; and preparation and distribution of freight rate books were enough to convince the Court that the Commission's findings were supported by sufficient evidence.⁷⁸

How do the facts enumerated by the Court tend to show concerted action among respondents relative to the use of the basing-point system? In the case of punitive base prices,⁷⁹ the first mill to set such a price at a recalcitrant mill would seem to be in an indefensible position under the Robinson-Patman Act.⁸⁰ Other mills, however, if they hope to sell their products in the area controlled by this base must promptly meet this punitive price and maintain it until the offender has conformed to the established pricing system, so that no inference of any agreement at all would be justified from such a situation. However, when all mills quickly boost prices back to a higher than normal level when the offending mill capitulates, an inference of tacit understanding would seem to be reasonable.⁸¹

Organized opposition to the erection of new plants might well support a finding of the existence of a general combination in restraint of trade, rather than a specific agreement to employ the basing-point system. Similarly, the action of the association in preparing and distributing rate books is certainly concerted action—any act of the association must be interpreted as such—but

76. The case of *Triangle Conduit & Cable Co. v. Federal Trade Commission*, 168 F. 2d 175 (C. C. A. 7th 1948), raises a doubt as to whether agreement or understanding is necessary to outlaw the basing-point system. The court interprets the *Cement* decision to mean that it is an unfair method of competition for an individual to use a multiple basing-point system with knowledge that all others in the industry are using the same system. *Id.* at 180-181.

77. The findings of the Commission are included under 26 separate paragraphs, and fill 134 pages. 37 F. T. C. 87, 124-258 (1943).

78. 68 Sup. Ct. at 808.

79. When one seller fails to follow the established procedure, another mill may set a low base price at the recalcitrant's mill. All of the latter's sales will then have to be made at a low mill net, perhaps at a loss; whereas only a portion of competitor's sales will be made at this low price. Such a low price is called a "punitive" base. It is usually set by one of the normal price leaders of an industry. *Aetna Portland Cement Co. v. Federal Trade Commission*, 157 F. 2d 533, 565 (C. C. A. 7th 1946). The Supreme Court indicated that the action normally was concerted: "Other producers made the recalcitrant's plant an involuntary base point." 68 Sup. Ct. at 810.

80. The Act allows price discriminations made in good faith to meet competition, but it would not allow discrimination to effect a lower price than a competitor. Note 26, *supra*.

81. The example cited by the Court showed that where the established base price was \$1.45 per barrel, a punitive base of 75 cents was established, and after capitulation of the offending mill the base price rose to \$1.75 per barrel. 68 Sup. Ct. at 810.

the question here is whether or not this action is part of an agreement to maintain the basing-point system. Prior to the formation of the association, it was necessary for each mill to determine freight charges for itself. This entailed a great deal of work and expense and made it difficult to give an immediate quotation to a prospective buyer. The association could perform this service for all its members at a great saving of time and money. If no basing-point system existed, it would hardly be an improper or useless activity for the association to prepare and distribute general freight and transportation information to its members for their convenience.⁸² Thus the compilation and distribution of such information does not necessarily raise an inference that it is done as part of an agreement to utilize a basing-point system. In both the *Maple Flooring*⁸³ and *Old Cement*⁸⁴ cases a similar freight booklet was distributed by the associations involved, and in neither case did the Court find that this fact meant there was concerted action in maintaining the basing-point system. In neither of these cases, prosecuted under the Sherman Act, was there a charge of agreement, but in both the Court discussed the possibility that agreement was a necessary inference from the facts, and rejected it.

Discouragement of shipments by truck or barge, and boycotts of members who dealt in low-cost foreign cement might support an inference of agreement to utilize a basing-point system, though such an inference is not a necessary one. Opposition to shipments by non-rail means could be explained on the same basis as the association's activity in distributing freight rate books—that is, convenience. Because of the great number of truck lines and independent operators, it would be an almost impossible task to prepare a freight booklet covering all truckers; therefore truck rates would have to be figured by the individual seller. On the other hand it cannot be denied that the use of different modes of shipment, with correspondingly different transportation costs, would make it much more difficult for competitors to know just what price other sellers were quoting to a buyer, and the basing-point system would tend to break down on an industry-wide scale.⁸⁵ A similar result would follow when a seller insisted on bringing in low-cost foreign cement. The basing-point system would be seriously damaged if variable selling prices were intro-

82. Exchange of basic price information was condemned in *American Column & Lumber Co. v. United States*, 257 U. S. 377, 42 Sup. Ct. 114, 66 L. Ed. 284 (1921). However, even here Mr. Justice Holmes, dissenting, remarked that "I should have supposed that the Sherman Act did not set itself against knowledge. . . . A combination to get and distribute such knowledge, notwithstanding its tendency to equalize . . . prices, is far from a combination in unreasonable restraint of trade." *Id.* at 412. Compare *United States v. United States Steel Corp.*, 251 U. S. 417, 449, 40 Sup. Ct. 293, 64 L. Ed. 343 (1920). *But see* *United States v. American Linseed Oil Co.*, 262 U. S. 371, 43 Sup. Ct. 607, 67 L. Ed. 1035 (1923).

83. *Maple Flooring Mfrs. Ass'n v. United States*, 268 U. S. 563, 45 Sup. Ct. 578, 69 L. Ed. 1093 (1925).

84. *Cement Mfrs. Protective Ass'n v. United States*, 268 U. S. 588, 45 Sup. Ct. 586, 69 L. Ed. 1104 (1925).

85. BURNS, *THE DECLINE OF COMPETITION* 311, 322 (1936).

duced into the picture. Therefore, refusal to ship by truck, and boycotts of dealers in foreign cement would directly assist in the maintenance of the basing-point system by contributing to the stability of the pricing factors.

The significance of discharging uncooperative employees would depend upon the area of non-cooperation. In the *Cement* case this finding seems to be direct evidence of agreement to maintain the basing-point system. The general manager and the sales manager of Aetna Portland Cement Co. were discharged or persuaded to resign because they failed to follow the established system. The president of Aetna wrote letters to the two employees and informed them that he had agreed, in meetings with heads of other cement companies, that Aetna would cooperate. The competence of the two employees does not appear to have been questioned, for under their leadership Aetna had prospered to the extent that it was operating at 70% of capacity, whereas the industry generally was operating at only 23% of capacity.⁸⁶

Thus of the facts relied upon by the Court, some may support no inference of any agreement, some suggest a general agreement to restrain competition, others logically indicate that there was a specific understanding to make the basing-point system work, and one seems to offer direct proof of such agreement. Such are the facts which were deemed sufficient to condemn the use of a basing-point system in an industry.

(3) Hindrance or restraint of competition

Admitting that the charge of agreement to maintain a basing-point system was proved, there is still a question as to whether the system restrained or hindered competition as charged by the Commission. The industry argues that the use of a basing-point system actually promotes wider competition, since through freight absorption a given mill is enabled to go outside its natural area and compete with others in their own areas. The alternative, f.o.b. mill pricing, they argue, would result in a natural monopoly for each mill within that area where it had a geographical advantage, and would virtually end competition except upon the narrow fringe where areas meet.⁸⁷ The circuit court of appeals accepted this argument when it reversed the Commission on this point.⁸⁸ The Supreme Court was not greatly impressed with the argument that the system resulted in wider competition in a given area, when the prices quoted by all competitors were identical in each instance. The only way in which a mill which accepted the basing-point system could actually quote a lower price to a customer in the natural area of another mill would be for

86. 37 F. T. C. 87, 187-190 (1943).

87. See FETTER, *THE MASQUERADE OF MONOPOLY* 282-299 (1931) for a discussion of the factors affecting this boundary of competition.

88. *Aetna Portland Cement Co. v. Federal Trade Commission*, 157 F. 2d 533, 563 (C. C. A. 7th 1946).

such mill to lower its own base price at the site of the other mill, thus indulging in a clear form of local price-cutting, or to lower its own mill base price so as to expand the area controlled by its home base. To lower the base at a competitor's mill would be to invite retaliation and run the risk of losing profits from sales within one's own area; to lower one's own base considerably would be to impose a punitive base price upon oneself. Under such circumstances the probability of real price competition is not 'great.'⁸⁹ Rather, the tendency seems to be to keep one's own base price as high as possible, so as to exact the highest possible profit from sales in one's immediate neighborhood, and then absorb freight as necessary to sell in areas of other mills. Lowering the base price under the system does not really affect the size of the area in which a mill may sell its product, since a mill can, without changing its base price, sell wherever it chooses on equal terms with all other mills. If mills were required to set a single f.o.b. mill price to all customers, the only way in which a given mill could expand its sales territory would be to reduce its price to all customers. This, apparently in the view of the Federal Trade Commission and certain economists, is the only way in which true price competition can come about, since it is the only situation in which there is a true incentive for mills to quote lower prices.⁹⁰

Evidence establishes the fact that in times of economic stress, on a "buyers' market," when the desire to sell cement is great, the system tends to break up on the rocks of individual price competition. This indicates that the basing-point system, so long as it is working, keeps prices at a level high enough to tempt individual firms to "cheat" on the system when times are hard.⁹¹ This combination of facts would seem to justify a finding that the system does act to restrain and hinder price competition among the mills employing it. Indeed, it may be argued that an agreement to employ a formula method of arriving at prices is a conspiracy to fix prices which is clearly illegal under the Sherman Act regardless of the actual economic effect of the combination.⁹² But so long as each mill is free to set its own base prices without consulting anyone else, *i.e.*, so long as each is free to fix its own pricing

89. "[I]t reduces the incentive the seller has to reduce the price charged to consumers in order to expand sales . . . and instead puts him in a position in which it is very generally cheaper for him to expand or protect his volume of sales by reaching out farther from his mill, absorbing freight to a greater distance and accepting a lower mill yield on his additional sales without cutting prices to a consumer." NRA, REPORT ON THE OPERATION OF THE BASING POINT SYSTEM IN THE IRON AND STEEL INDUSTRY 71 (1934); BURNS, THE DECLINE OF COMPETITION 336-338 (1936).

90. FETTER, THE MASQUERADE OF MONOPOLY 278-299, esp. 298 (1931); and see NRA REPORT *supra* note 89.

91. That cement price fluctuation was practically nil, see FTC, PRICE BASES INQUIRY (1932).

92. The Supreme Court has said that "Any combination which tampers with price structures is engaged in an unlawful activity." *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 221, 60 Sup. Ct. 811, 84 L. Ed. 1129 (1940). It would not be unreasonable to claim that an agreement to maintain a basing-point system was an agreement concerning prices, whether or not it be an agreement to "fix" or "tamper" with them.

factors, it is questionable whether an agreement to use a pricing formula is an agreement to fix prices.

(4) Violation of the Federal Trade Commission Act

Respondent Marquette Cement Co. argued that if all the facts found by the Commission were accepted as true, there would still be no unfair method of competition, but rather a combination in restraint of trade, and that the Commission had no power to institute proceedings against activities which violate the Sherman Act.⁹³ Had this contention been upheld, industries under attack by the Commission would have acquired a dilatory resource of the first magnitude.⁹⁴ The contention, found by the Court to be without merit, represents an interesting about-face in industry's arguments as to the jurisdiction of the Commission. In the early days of the Commission's existence there was considerable discussion of what constituted an "unfair method of competition" within the purview of the Federal Trade Commission Act. It was then argued that the Act merely set up a new agency to enforce existing substantive law; that the Commission could only institute proceedings against practices which were prohibited by the Sherman Act or the common law, and was without authority to declare other activities unlawful.⁹⁵ This position did not prevail, and it was accepted that the Commission had power to go outside the existing judicial pronouncements as to unfairness in competition and to outlaw other practices which it, in its informed judgment, found to be prejudicial to fair competition,⁹⁶ subject always to court review as to the reasonableness of the conclusion from the evidence presented. In the *Cement* case Marquette sought to take another step in the evolution of the Commission's jurisdiction by arguing that it included only those activities which were outside the scope of the Sherman Act, rather than being limited to those which were within the compass of that statute. The Court, quite properly in the light of existing authority,⁹⁷ rejected Marquette's contention and held squarely that any conduct which constituted a restraint of trade under section 1 of the Sherman Act would also be an unfair method of competition so as to empower the Trade Commission to proceed under section 5 of its parent Act.

93. 68 Sup. Ct. at 798.

94. "We can conceive of no greater obstacle which this Court could create to the fulfillment of these congressional purposes than to inject into every Trade Commission proceeding . . . a possible jurisdictional question." *Id.* at 799-800.

95. "Petitioner urges that . . . section 5 must be held void for indefiniteness unless the words 'unfair methods of competition' be construed to embrace no more than acts which on September 26, 1914, when Congress spoke, were identifiable as acts of unfair trade." *Sears, Roebuck & Co. v. Federal Trade Commission*, 258 Fed. 307, 311 (C. C. A. 7th 1919).

96. *Federal Trade Commission v. Keppel*, 291 U. S. 304, 310, 54 Sup. Ct. 423, 78 L. Ed. 814 (1934).

97. *Fashion Originators' Guild v. Federal Trade Commission*, 312 U. S. 457, 463, 61 Sup. Ct. 703, 85 L. Ed. 949 (1941).

B. *Count 2: Price Discrimination under the Robinson-Patman Act*

When the Robinson-Patman amendment to the Clayton Act was first presented to Congress, it contained a provision which would have required sellers to charge a single mill price to all buyers in order to avoid a charge of price discrimination. The result would have been expressly to outlaw a delivered price system such as the basing-point method.⁹⁸ The provision was much debated on the floor, and was stricken out by the House Judiciary Committee in order to get the remainder of the bill approved.⁹⁹ With the provision eliminated, it was the belief of some members of Congress that the Act was not intended to affect basing-point systems at all.¹⁰⁰ This argument was strongly pressed in the *Corn Products*¹⁰¹ and *Staley*¹⁰² cases. In those cases the Court answered this contention by stating that the provision which was eliminated would have forbidden all delivered-price systems. The Congress was unwilling to take such a drastic step, and preferred to leave each system to be considered on its individual merits under section 2(a) of the amended Clayton Act.¹⁰³ The position of the Court seems sound, in view of the fact that congressional opinion was divided on the matter.¹⁰⁴

(1) The meaning of discrimination

The economic and legal definitions of the term "discrimination" are not identical. Price differentials between buyers, not based upon differences of costs would be discriminatory under both concepts. However, identity of delivered prices, when accompanied by cost differentials, would also be discriminatory in the view of the economist;¹⁰⁵ whereas identical prices appear not to come within the legislative definition of discrimination regardless of comparative costs in placing the goods in the hands of consumers.¹⁰⁶ Not all price differentials are legally discriminatory. The Robinson-Patman Act spe-

98. See note 7 *supra*. "In effect, this provision of the bill is designed to put an end to price discrimination through the medium of the basing-point or delivered-price system of selling commodities. It will require the use of the f.o.b. method of sale." Report of the House Judiciary Committee on the Patman Bill, H. R. REP. No. 2287, 74th Cong., 2d Sess. 14 (1936).

99. 80 CONG. REC. 8102, 8138, 8224 (1936).

100. *Id.* at 8102, 8138, 8220, 9903.

101. *Corn Products Refining Co. v. Federal Trade Commission*, 324 U. S. 726, 65 Sup. Ct. 971, 89 L. Ed. 1320 (1945).

102. *Federal Trade Commission v. A. E. Staley Mfg. Co.*, 324 U. S. 746, 65 Sup. Ct. 971, 89 L. Ed. 1338 (1945).

103. *Corn Products Refining Co. v. Federal Trade Commission*, 324 U. S. 726, 737, 65 Sup. Ct. 971, 89 L. Ed. 1320 (1945).

104. Rep. Patman, who sponsored the bill in the House, suggests that the bill would cover basing-point systems under proper circumstances, even after the section in question was stricken out. PATMAN, *THE ROBINSON-PATMAN ACT* 114 (1938).

105. FETTER, *THE MASQUERADE OF MONOPOLY* 382 (1931).

106. Rep. Patman listed a number of inquiries which he had received concerning the meaning of the bill. The question as to whether a seller could set one price for all customers and make no allowances for transportation differences was repeatedly asked and answered in the affirmative. PATMAN, *THE ROBINSON-PATMAN ACT* 114-118 (1938).

cifically provides that differences in price due to differences in cost of manufacture, sale or delivery are not prohibited by the Act.¹⁰⁷

Furthermore, price differentials, though they may be discriminatory from a legal point of view, are not necessarily prohibited by the Robinson-Patman Act. It is necessary to establish that the discriminations lessen competition, tend to create monopoly or prevent or injure competition among persons who either grant or knowingly receive the benefits of the discrimination.¹⁰⁸

Finally, even if there is discrimination, and it does have the proscribed effect on competition, the action may still not fall within the ban of the Act if the seller can show that the discriminatory price was made in good faith to meet competition.¹⁰⁹

(2) Discrimination in the *Cement* case

There seems to be little question but that the basing-point system as employed in the cement industry did result in price differentials among various customers, and that these differentials were not the result of any of the factors which would excuse them under the Act. Consequently, the only real question arises from a consideration of whether the discriminations were made in good faith to meet competition, and whether they had the proscribed effect on competition.

The *Corn Products* and *Staley* cases considered at length the question of good faith in meeting competition.¹¹⁰ The former case held that a single basing-point system employed by a single manufacturer who shipped from more than one plant resulted in illegal price discrimination. The opinion clearly held that collection of "phantom freight" was illegal, but it did not make entirely clear whether freight absorption was prohibited. The *Staley* case held that a company could not adopt a competitor's basing-point system and justify it under the "good faith" proviso. The Court in the *Cement* case stated that "the combined effect of the two cases was to forbid the adoption for sales purposes of any basing point pricing system."¹¹¹ This broad language does not seem to be justified by the two cases. The illegal effect upon competition in those cases lay in the fact that the buyers were in competition with each other, and discriminations in price to these competing buyers resulted in injury to their competition. In the *Cement* case the picture is quite different. Purchasers of cement, are not, generally speaking, competitors.¹¹² Cement is

107. 49 STAT. 1526 (1936), 15 U. S. C. A. § 13 (1941).

108. *Ibid.*

109. *Ibid.*

110. *Supra* notes 102, 103. The meaning of these cases is discussed in Aulette and Schaffer, *Legality of the "Basing Point" Pricing System*, 33 GEO. L. J. 439 (1945).

111. 68 Sup. Ct. at 814.

112. A general discussion of the characteristics of the cement industry, both as to producers and consumers may be found in the opinion of the circuit court of appeals in

used where it is received, and is not generally converted into a manufactured product which competes with others in the ordinary channels of trade. Therefore, the injury to competition must be found to exist in the relations between the seller and his competitors. Such injury is ordinarily much more difficult to establish than in the case where the competition affected is that which exists between buyers. Of course, in the *Cement* case the Federal Trade Commission had found that the basing-point system had hindered and restrained competition between respondents when it was considering the unfair competition charge.¹¹³ This finding, together with the holding in the *Corn Products* and *Staley* cases, clearly brings the cement practice within the ban of the Robinson-Patman Act. It would seem however that a basing-point system not maintained by agreement or understanding with competitors, and not selling to buyers who were themselves competitors, would be legal under these decisions. However, the more recent *Triangle Conduit* case¹¹⁴ casts doubt upon this conclusion, since the court there apparently found a forbidden element of conspiracy in the individual use of a basing-point system with knowledge that others were using the same system.

CONCLUSION

The trend of the cases is toward a requirement of uniform f.o.b. mill prices to all buyers, but this position has not yet been reached. Zone pricing systems, like basing-point systems, are vulnerable under the Robinson-Patman Act, provided the buyers are in competition with each other. A universal delivered-price system, not maintained by agreement with competitors, would seem to be safe so long as the Court holds that "price" as used in the Robinson-Patman Act may mean delivered price.¹¹⁵ However, should the Court decide that "price" means only mill net, the universal delivered price would also fall within the ban of the Act.

It seems likely that basing-point systems will soon be condemned *per se*. Possibly such a holding will not be necessary to eliminate the system. Recent developments indicate that major industries may abandon it rather than face possible conviction of a violation of the law. The steel industry changed to an f.o.b. mill pricing method because "the industry's top legal brains believed the decision would apply to the steel industry—that, consequently, the move was necessary in order to keep from breaking the law."¹¹⁶ Steel regarded the decision in the *Cement* case as the "crowning blow" in the campaign of

the *Cement* case. *Aetna Portland Cement Co. v. Federal Trade Commission*, 157 F. 2d 533, 539-540 (C. C. A. 7th 1946).

113. Finding 26, 37 F. T. C. 87, 257 (1943).

114. *Triangle Conduit & Cable Co. v. Federal Trade Commission*, 168 F. 2d 175, 181 (C. C. A. 7th 1948).

115. See N. A. M. LAW DIGEST 43 (June, 1948).

116. *Iron Age*, Sept. 2, 1948, p. 119.

“pernicious pressure” which the Trade Commission had waged against the system.¹¹⁷ Since the industry had abandoned the system, United States Steel gave up what was apparently a lost cause, and submitted to entry of a consent decree in the original case which arose before the Commission concerning “Pittsburgh-Plus” in 1924.¹¹⁸ The Corporation agreed to adhere to a pricing method which would not conflict with requirements of the Commission.

Thus, industry appears to have admitted defeat in the courts, and is now turning to Congress.¹¹⁹ The Capehart committee was appointed to investigate the impact of the decision upon both large and small business. The recent elections indicate that there is no immediate prospect for less stringent anti-trust laws; however, it is to be presumed that the committee will make findings and recommendations to Congress. Even if all should be agreed that the basing-point method should be rescued by legislative action, there is a serious problem of draftsmanship facing the lawmakers. Changes in the Robinson-Patman Act to allow price discrimination between buyers located in different areas would be relatively simple to draft, but a much more difficult problem is encountered in the Federal Trade Commission Act. In view of the wide latitude allowed the Commission in defining unfair methods of competition, and the nature of the evidentiary facts upon which the Commission has found concerted action, it would seem that only a carefully drawn statute, specifically describing the basing-point system, and expressly exempting it from the ban of the Trade Commission Act would successfully rescue the system.

CLYDE L. BALL

117. *Ibid.*

118. *Time*, Oct. 18, 1948, p. 91.

119. Irvin S. Olds, Chairman of United States Steel Corp., stated that the matter “should receive the attention of Congress.” *N. Y. Times*, April 25, 1948, p. 41, col. 8. E. T. Weir, Chairman of National Steel Corporation, suggested that Congress should step into the picture and save the system. WEIR, *MULTIPLE BASING POINT METHOD IN THE STEEL INDUSTRY* (mimeographed pamphlet privately distributed, 1948). A Congressional committee has been appointed to study the effect of the decision upon business. *Iron Age*, Oct. 7, 1948, p. 155.