IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Petitioner, v. THE SUGAR INSTITUTE, INC., ET AL, Defendants.	Equity No. 59-103 Findings of Fact and Conclusions of Law.

This case having been tried in the United States District Court for the Southern District of New York, before the undersigned, Julian W. Mack, United States Circuit Judge, from February 9, 1932, to September 23, 1932, and having been argued January 16 to January 20, 1933, by James Lawrence Fly and Walter L. Rice, Special Assistants to the Attorney General, for the Government, and by John C. Higgins, John Dickinson, S. Pearce Browning, Jr., and Cornelius W. Wickersham for the defendants; upon the pleadings and exhibits filed, stipulations made, and the evidence admitted, the Court, pursuant to Equity Rule $70\frac{1}{2}$, makes the following special findings of fact and reaches the following conclusions of law:

FINDINGS OF FACT

I. Parties and the Sugar Industry.

1. The Sugar Institute, Inc., hereinafter referred to as the Institute, was organized in December, 1927, under the Membership Corporation Laws of New York, as a trade association for the cane sugar refining industry of the United States.

2. The following 15 defendants, being all of the important cane sugar refining companies of the United States, are, or have been, members of the Institute, and are organized and own refineries in seaport cities as indicated in the following table:

The American Sugar Refining Company	New Jersey Corporation	Boston New York Philadelphia Baltimore New Orleans
Arbuckle Bros. (Margaret A. Jamison, Martha A. Jamison)	Partnership. (Margaret A. Jamison and Martha A. Jamison doing business under the firm name and style of Arbuckle Bros.)	New York
California & Hawaiian Sugar Refining Corporation, Ltd.	California Corporation	Crockett, Calif, (near San Francisco).
Colonial Sugars Co. (subsidiary of Cuban-American Sugar Co. which is also a defendant).	New Jersey Corporation	Gramercy, La. (near New Orleans).
Godchaux Sugars, Inc.	New York Corporation	Reserve, La. (near New Orleans).
William Henderson (William Henderson, Hunt Henderson, Christian J. Gambel, Frederick A. Gambel.)	Partnership (William Henderson, Hunt Henderson, Christian J. Gambel and Frederick Gambel, doing business under the firm name and style of William Henderson).	New Orleans.
Imperial Sugar Company	Texas Corporation	Sugar Land, Texas
W. J. McCahan Sugar Refining & Molasses Co.	Delaware Corporation	Philadelphia,
The National Sugar Refining Co. of New Jersey	New Jersey Corporation	3 refineries near New York
Pennsylvania Sugar Company	Pennsylvania Corporation	Philadelphia
Revere Sugar Refinery (Subsidiary of United Fruit Company)	Massachusetts Corporation	Charlestown, Mass.
Savannah Sugar Refinery Corporation	New York Corporation	Savannah, Ga.
Spreckels Sugar Corporation	Delaware Corporation	New York
Texas Sugar Refining Corp.	Delaware Corporation	Texas City, Texas
Western Sugar Refinery (J.D. and A.B. Spreckels Investment Company).	California Corporation (J.D. and A.B. Spreckels Investment Company, doing business under the trade name and style of Western Sugar Refinery).	San Francisco

The foregoing corporations and partnerships will hereinafter be called members or refiners and their trade and corporate names will be abbreviated.

responsible part in the management of the Institute and in the conspiracy and concerted activity hereinafter set forth, and in their respective refining companies. Since the organization of the Institute, each of the following individual defendants has held, *inter alia*, the respective positions indicated in the following list:

Name	Affiliation
J. F. Abbott	Director of the Institute and President of American Sugar Refining Co.
Earl D. Babst	President and Honorary President of the Institute and Chairman of the Board of Directors of American Sugar Refining Co.
W. Edward Foster	Director of the Institute and Vice-Chairman of the Board of Directors of the American Sugar Refining Co.
J. F. Cody	Sales Manager of Arbuckle Bros.
W. H. Goetzinger	Secretary, Member of the Executive Committee, and Director of the Institute, and General Manager of Arbuckle Bros.
George M. Rolph	Director of the Institute and President of California & Hawaiian Sugar Refining Corp., Ltd.
William H. Tyler	Director of the Institute and officer of California & Hawaiian Sugar Refining Corp., Ltd.
C. D. Newman	Sales Manager, Colonial Sugars Co.
George W. Keiser	Director of the Institute and President of Colonial Sugars Co.
Jacob Moog	Director and member of the Executive Committee of the Institute and Senior Vice President of Godchaux Sugars, Inc.
I. H. Kempner	Director of the Institute and President of Imperial Sugar Co.
Harry O. Thompson	Director of the Institute and Sales Manager of Imperial Sugar Co.
Louis V. Place	Director of the Institute and Vice-President of W. J. McCahan Sugar Refining & Molasses Co.
Manuel E. Rionda	Treasurer of the Institute and President of W. J. McCahan Sugar Refining & Molasses Co.
James H. Post	Chairman of the Board of Directors and President of the Institute, and President of National Sugar Refining Co.; Chairman of the Board of Cuban-American Sugar Co.

Charles D. Bruyn	Director and member of Executive Committee of the Institute and Vice-President of National Sugar Refining Co.
William H. Hoodless	Chairman of the Board of Directors and member of Executive Committee of the Institute and Vice-President of Pennsylvania Sugar Co.
Henry E. Worcester	Vice-President, Member of Executive Committee, and Director of the Institute and Vice-President of Revere Sugar Refinery.
Benjamin O. Sprague	Director of the Institute and President of Savannah Sugar Refining Corp.
Thomas Oxnard	Director of the Institute and Vice-President of Savannah Sugar Refining Corp.
Rudolph Spreckels	President and Director of the Institute and President of Spreckels Sugar Corp.
W. W. Harper	Vice-President of Spreckels Sugar Corp.
Edgar H. Stone	Director of the Institute and Director of Spreckels Sugar Corp.
Alexander Smith	Director of the Institute and President of Texas Sugar Refining Corp.
H. B. Moore	Director of the Institute and Vice-President and General Manager of Texas Sugar Refining Corp.
Frank E. Sullivan	Vice-President and Director of the Institute and Executive Vice-President of Western Sugar Refinery.
Fred G. Taylor	Executive Vice-Secretary of the Institute.

4. Defendant Spreckels Sugar Corporation, which was organized under
the control of defendant Rudolph Spreckels on January 22, 1929, to take 183
over the assets of the Federal Sugar Refining Company, a cane sugar refining company controlled by the Spreckels family, became insolvent and closed its refinery August 29, 1930; from the time that the refinery was closed to February 16, 1931, it was engaged in liquidating and selling its sugar stocks; it was placed in the hands of receivers January 19, 1932; from the time of appointment of the receivers continuously up to at least October, 1933, Rudolph Spreckels was endeavoring to obtain a reorganization of the Spreckels Sugar Corporation.

Spreckels Sugar Corporation submitted its resignation from the Institute on December 8, 1930, and the resignation was accepted on January 29, 1931. Spreckels Sugar Corporation and Rudolph Spreckels took a leading, substantial and active part in the organization of the Institute and the conspiracy hereinafter set forth. There is a dangerous probability that Rudolph Spreckels and Spreckels Sugar Corporation will resume operations in the sugar refining industry and, unless restrained, in the conspiracy and activities enjoined by this Court.

5. Defendants W. W. Harper and Edgar H. Stone definitely 184
withdrew from the cane sugar refining industry and the conspiracy and activities here dealt with, a considerable period before the filing of this suit, March 30, 1931, and there appears to be no dangerous probability that they will resume any of said activities.

6. Defendants William Henderson and George M. Rolph have 1
died since the beginning of the trial.

7. The 15 members refine virtually 100% of the imported raw 1
sugar processed in the United States, which in recent years has had a wholesale value of as much as $500,000,000 per year.

8. More than 99% of the sugar consumption in the United 2
States consists of domestic refined sugar (sugar refined by the defendant refiners), beet sugar and "off-shore" refined sugar (cane sugar refined and imported into the United States from foreign countries and insular possessions). Less than 1% consists of Louisiana direct consumption cane sugar.

9. Prior to the formation of the Institute, in January, 1928, 1-2
the members provided in excess of 80% of all sugar, including beet sugar, consumed in the United States. Since the formation of the

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Institute members have supplied 70% to 80% of the sugar consumed. 1, 2.
From 1927 to 1931, inclusive, the importation of off-shore refined sugar has increased gradually from 2.8% to 7.8% of the nation's consumption. This loss of business to off-shore interests has been caused, at least in substantial part, by their practice of granting terms and services which defendants concertedly denied their customers. For example, the business of the Coca Cola Company, the largest consuming purchaser, was thus lost by defendants. During the same period domestic beet sugar constituted from 14.4% to 20.5% of the nation's consumption.

145 note 25

101 note 19

10. The defendant refiners supply more than 90% of the consumption of sugar in New England and the middle Atlantic States, and more than 55% in all except a few States. 1

11. In 1927 American produced 25.06% of the output of the members, National produced 22.07%, California & Hawaiian produced 10.84%. Other members' production ranged downward to 1.13%, produced by Henderson/ Capital employed ranged from Henderson's $2,037,975 to American's $119,854,340. 3

12. The refiners sell and contract for sale and delivery and, pursuant to such sales and contracts, ship and deliver refined sugar by rail, water, truck, and various differential routes into various States other than the States where their refineries are located. Each of the refiners is engaged extensively in interstate trade and commerce in sugar, and the activities of the conspiracy herein dealt with relate directly and substantially to such interstate trade and commerce. The raw sugar from which the refiners make refined sugar is imported principally from Cuba, and to a lesser extent from Puerto Rico, 3

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Hawaii, the Philippine Islands and the Virgin Islands. Ample supplies of raw sugar in a steadily declining market have been available since the formation of the Institute. Raws are obtained by clarifying juice extracted from cane at plantation mills and usually contain about 96 per cent sucrose when imported. The members purchase these raws and by a process of clarification and purification at their refineries produce sugar thoroughly standardized as to physical and chemical properties, containing 100 per cent sucrose and ready for consumption. Sugar, as referred to herein, generally refers to refined cane sugar.

13. Approximately 2% of all cane and beet sugar consumed 5-6
in the United States is distributed by W. H. Edgar & Son, a sugar merchandising firm with headquarters in Detroit, Michigan. The Institute sought and obtained a high degree of cooperation in a number of its practices from W. H. Edgar & Son which, although not a refinery, offered substantial competition to some of the members by reason of its manifold activities.

14. Beet sugar, which is manufactured from sugar beets 3-4
grown chiefly in the middle and far West states and is marketed chiefly in those states, is practically identical with domestic refined cane sugar, and offers substantial competition in many trade areas, but is sold at a varying differential of, roughly, 20 cents per bag (100 pounds) under refined cane sugar, chiefly because of a prejudice which grew up against beet sugar in the early years of the industry when the product was inferior.

15. The Domestic Sugar Bureau is the trade association of 4
the domestic beet sugar manufacturers and its relationships to the members of that industry ~~are substantially~~ similar to those

of the Institute to its members. It was ~~incorporated~~ about the same time. Its "Code of Ethics" is substantially identical with that of the Institute. It is patterned after it and was adopted in cooperation with some of the leaders of the Institute. A high degree of cooperation has existed between the Bureau and the Institute, but the price differential was not fixed between them although it has been more stable since the Institute. Joint meetings have been held and questions of policy discussed and joint action taken. The two associations have continuously communicated with each other by letter, telegraph, or personal contact.

16. Off-shore sugar, refined principally in Cuba, has sold in recent years at a differential of approximately 5¢ to 10¢ per bag (100 pounds) under cane sugar prices, because it has not been on the American market for many years and it is offered in only a limited assortment of grades and packages. It is ordinarily sold in competition with defendants' sugars. It is sold in the United States by four selling agencies, namely, H. H. Pike & Co. (exclusive selling agents for Hershey Corp.); L. W. & P. Armstrong (selling agents for Porto Rico-American Sugar Co., selling "Snow White" sugar); Lamborn & Co. (representing "Viscaya" sugar); and Lowry & Co. (Representing "Limones" sugar). 4-5

17. The Institute sought and obtained a high degree of cooperation from the representatives of the off-shore refineries, but the price differential was not fixed between them. 5

18. The members' refined cane sugar is a standard commodity, although the various brands of granulated cane sugar as well as assorted packages are in some measure economically different 3 141-2 145-146 (Contra to Δ's Finding #18) particularly as to existence of "free competition".

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products, partially because of preferences for certain brands in certain trade areas created by advertising and other means.

II. Pre-Institute Competition and the Secret Concession System.

19. Prior to the formation of the Institute in December, 1927, and its beginning active operation on January 7, 1928, refiners competed actively and vigorously with each other and with beet sugar companies, off-shore refiners and large distributors on prices, terms, conditions, services, and all other material elements of price. Competition manifested itself by the following practices and conditions, among others:

(a) Granting of varied prices as between different trade areas. Within particular trade areas there was a tendency toward uniformity, but such uniformity was not consistent. Prices of particular refiners frequently varied from prices of other refiners. The actual net prices charged as well as the price lists of some refiners substantially varied from those of other refiners. Frequently list and net prices of the same refiners varied as between different trade areas, depending upon competitive conditions. For example, the prices charged in the New England States, where most of the sugar was sold by only two refiners, were generally higher than the prices charged by those refiners in such markets as Chicago, where the supply of sugar was great and virtually all of the refiners competed for orders. Price changes were relatively frequent. Refiners frequently offered special prices and discounts publicly and openly to attract customers. Arbuckle engaged in the competitive practice of openly and publicly announcing "bargain days" and selling at 5¢ per bag under its former announced price for a period of a day or two.

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(b) Granting of special prices, discounts, and concessions 6-7
without restraint and within the independent discretion of each 143-4
individual refiner;

(c) Granting of long term contracts to large buyers who desired an assurance of a definite price for future deliveries and who undertook to use large quantities over long periods; 91-97

(d) Granting of tolling contracts, whereby owners or purchasers of raw sugar contracted with refiners to refine the sugar for a definite service fee, the compensation sometimes including the refiners' services such as invoicing, making collections, supplying brokerage and storage in addition to refining the sugar; 103-4

(e) Granting of cash discounts and credit terms, such as the four-payment plan, an arrangement permitting the buyer to pay for the sugar in four weekly installments, and split billing, an arrangement which entitled the buyer to varying credits on a portion of a shipment; 104-118

(f) Price guarantees, including (1) contracts whereby the refiner in extensive trade areas guaranteed the price on undelivered balances against decline for a 30-day period or some other stipulated period, and (2) re-pricing, whereby the buyer was given the benefit of a decline in price retroactive within a stipulated time after placing an order; 118 16 19-20

(g) Allowances on used bags, and making use of customers' bags, whereby certain buyers were enabled to make substantial savings; 123 125

(h) Charging varying differentials on grades and packages; 31 (Note 8)

(i) Making resales or sales of "second-hand sugar" whereby the refiners facilitated resale of surplus undelivered sugar ordered by buyers; 129

(j) Packing of sugar under the private brands of customers; 126-7

(k) Making salesof damaged sugar and "frozen stocks" 134-5
(warehoused sugar which could not readily be marketed at prevailing prices) at prices less than the refiners' prevailing prices;

(l) Charging various freight applications to purchasers; 42-49

(m) Making sales of sugar to buyers f.o.b. refinery with 42-49
the privilege of transporting the sugar from refinery to destination by the cheapest water routes and other routes available to the buyer; prior to the Institute, refiners never refused customers the privilege of purchasing f.o.b. refinery except that (1) shipments from American's Baltimore refinery into Central Freight Association territory (the territory east of the Mississippi River, north of the Ohio River, and west of a line from Buffalo to Pittsburgh) were generally billed at the Philadelphia rate, which was 1¢ per 100 pounds higher than the actual Baltimore freight rate to some destination points in the Central Freight Association territory, (2) shipments from Imperial's refinery at Sugarland, Texas, and from Texas' refinery at Texas City, Texas, were billed at the higher New Orleans freight rate to destination point rather than the Texas freight rate, and (3) beet sugar was generally sold on a delivered price basis, using the cane sugar refiners' freight application at destination points;

(n) Competition among refiners in selecting the most efficient and cheapest available differential routes (water routes, water and rail routes, and other routes cheaper than the all-rail routes), and giving buyers the benefit of such savings, which in 42-49 59
some cases amounted to as much as 20¢ or 30¢ per 100 pounds;

(o) Cooperation of refiners with buyers to provide them with the most efficient and cheapest available transportation routes; 43, 46

(p) Freedom on the part of the buyers and refiners in shipping sugar purchased from refineries in pool cars or pool cargoes with refiner's sugar, thereby realizing a saving in freight charges; 82

(q) Shipments to buyer's destination under private charter, whereby water carriers contracted to make shipments for certain purchasers at definite low rates; 81

(r) Conferring upon buyers the benefit of the transit privilege, whereby sugar stored in consignment warehouses along the routes of distribution could be reshipped by rail at the through freight rates, thereby saving the difference between the local rate and the through rate to destination, which sometimes amounted to 10¢ or 20¢ per 100 pounds; 76-78

(s) Permitting purchasers to divert shipments en route, changing destination points; 76-78

(t) Conferring economic advantages upon buyers and enabling them to make savings through (1) direct deliveries to buyer's destination, (2) drop shipments, (3) switching services, and (4) trucking services;

(u) Freedom of distribution of sugar by refiners through brokers, jobbers and warehouses selected independently and without restraint by the individual refiner; 28-30 33, 38 170.

(v) Storing sugar in jobbers' warehouses or brokers' warehouses, thereby permitting brokers and jobbers to earn warehouse fees and enabling them to distribute sugar more efficiently and at smaller net cost; 28-30, 33, 38.

(w) Maintenance of stocks of sugar at various cities throughout the United States, called "consignment points", to convenience and attract buyers, to permit immediate local deliveries of sugars in less than carload lots from assorted stocks in consignment warehouses, and to enable buyers and others to make savings in such warehouse charges which were borne by the refiners; 84-86

(x) Payment of brokerage fees and other brokerage compensation within the discretion of the individual refiner, resulting in competition for brokers' services; and 40

(y) Freedom, generally, to make any and all appropriate prices and terms in the various transactions. 143 See 31 (note 8)

(20) Prior to the formation of the Institute some of the refiners announced nominal list prices, but in some territories maintained lower "selling bases", which were given widespread publicity through brokers, customers, and trade journals. Frequent concessions from these "selling bases" were given by some refiners, hereinafter called "unethical" refiners. 19 6

21. Arbuckle, California & Hawaiian, Henderson, Revere and Western, hereinafter called "eithical" refiners, did not grant concessions from their openly announced "selling bases" in any territory. 6

22. For several years prior to the Institute the practice developed on the part of a majority of the refiners of giving secret concessions from their basis prices. In certain territories where competition was less intense, e. g., New England and the Pacific Coast, the so-called "unethical" refiners did not give concessions, but in large trade areas where competition 6 R. 5018-26 9237-9

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was more intense and concessions were granted, they extended to 60% to 70% of the sugar there sold by the "unethical" refiners. Specific concessions were usually confidential, lest they be defeated by general demand therefor. That concessions and rebates were widely granted was generally known in the trade. Each refiner was able to find out in a general way the approximate prices and terms of his competitors. Many of the contracts carrying concessions revealed that fact on their face, but in the conditions prevailing prior to the Institute it was impossible for refiners and purchasers to know with any degree of accuracy what prices and terms were granted in the innumerable transactions.

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R. 5019
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R. 5026
Total concessions from list price 30%. This not all secret.

23. Various causes contributed to the development of these selling methods on the part of the "unethical" refiners. The members have an over-capacity of at least 50%. There was a substantial lack of statistical information as to the amount of production, deliveries and stocks on hand, thus causing over-production. 7

Uncertainties prevailed in the raw market during this period which made the refined sugar industry highly speculative. Since 1922 most sugar has been sold through brokers, and thus the control of the refiners is more remote. Standardization of the products of the several members has made the sale of their sugar dependent almost entirely upon prices and terms.

24. Concessions granted were largely, although not entirely, arbitrary in character. While they were given principally to the large buyers of sugar, no system was followed in this respect and they were frequently granted to smaller purchasers. While there is little direct evidence that misrepresentations were extensively resorted to, the defendants entertained genuine fears that purchasers were falsely representing prices which they could procure from competing sellers. 7

25. Consumption of sugar in the United States decreased in 1927. The public "slimness campaign" of 1927 had substantial effect in discouraging the use of sugar. There is some evidence that certain distributors refrained from pushing the sales because they could not sell profitably. Other distributors were aggressively making sales, and sugar was generally available to the trade. 8

26. The granting of price concessions by the unethical companies prior to the Institute was not tending, and there was no actual tendency, toward monopoly in either the refining or the distributing industries. The ethical refiners, i. e., those making sales strictly on a list price basis, were fully as prosperous, comparatively, as the unethical companies. The latter took the lead in the formation of the Institute. 7-8

27. The declining profits of 1927 were caused largely by the "slimness campaign", by over-production and by dumping, and not to any substantial extent by the practice of granting concessions. 9

28. The industry was characterized by highly unfair and otherwise uneconomic competitive conditions; arbitrary, secret rebates and concessions were the rule on the part of the majority of the companies in most of the important market areas, and the widespread knowledge of market conditions necessary for intelligent, fair competition were lacking. The refiners were disturbed economically and morally over the then prevailing conditions. One refiner was concerned about the possibility of liability under the Clayton Act because of the discriminations resulting from the various concessions. 9

III. The Sugar Institute.

29. The Institute was organized by defendants in December, 1927, and placed into operation by them on January 7, 1928.

30. The dominant purposes of the defendants in organizing 21-26
the Institute were to eliminate and suppress price competition 9
among themselves and other competitors, to create a uniform 31 Note 8 36,40
price structure and prevent deviations therefrom, to maintain 51
relatively higher price levels of refined sugar, to increase 29 71-72
the refiner's net margins and their profits, and generally to 90
restrain the freedom of themselves and others in the sale and 95
distribution of sugar. The purpose of defendants in engaging 102
in many of the activities was solely to improve the financial 104
position of the members themselves, without regard to the effect 110
thereof upon third parties and the public. // Among the other and 121
less important purposes of the defendants, and by no means the 123
dominant purposes, in organizing the Institute, were: (1) The 126
elimination of secret concessions and selling of sugar on open, 147(a)
publicly announced terms; (2) the gathering of statistics not 158
previously available, as to refined stocks, consumption, location 159
of stocks throughout the country, production and current 160
deliveries; (3) the elimination of practices which they deemed 162 169
wasteful and (4) the institution of an advertising campaign to 176
increase consumption. The Institute was not formed for the 181
primary purpose of discouraging illegal, unethical or immoral 182
practices. Ex 452-R-2

31. As an ostensible basis for the operations of the 9-10
Institute, a "Code of Ethics" was concertedly adopted by defendants at the time the Institute was organized. This was presented

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to and discussed with representatives of the Department of Justice. Thereafter, from time to time changes in and supplements to the Code, known as "Interpretations", were adopted and printed, and these were mailed to the Attorney General's office. The Department was not notified of the important restraints imposed by the defendants through the Institute, nor of the activities charged by the Government and denied by defendants. The Department did not approve or acquiesce in the restraints complained of in the petition.

32. In creating the Institute, in adopting a Code and Code Interpretations, and in acting concertedly thereunder, defendants professed to be interested primarily in eliminating discriminations among customers, fraud, misrepresentation, and immoral practices; but their actual purpose was to suppress competition among themselves and maintain relatively high prices of refined sugar. On the false pretext of accomplishing their professed purposes, they imposed unreasonable and unfair restraints upon the sale and distribution of sugar, without regard to resulting discriminations and injury to innocent distributors, and ignoring the interest of the consuming public in economies of distribution, more efficient service, and cheaper prices.

See references to purposes on p 16 along in connection with Govt's proposed Finding 30.

160, 161, 162 169

159, 160 168, 169, 170 31, 33, 146.

33. The Department of Justice was given complete access to the Institute's files in three investigations in 1928, 1929, and 1930. The Department did not conduct a comprehensive investigation of the restraints involved in this case until November, 1930, when an agent of the Department inspected the Institute's files for a period of approximately six weeks (November 1 - December 10, 1930). The Federal Trade Commission applied to the

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Institute for permission to investigate its files, and the request was refused. The minutes of various Institute meetings omit references to many discussions and agreements on restraints involved in this case, shown by their evidence to have been discussed and agreed upon at such meetings. A number of important announcements withdrawing privileges from the purchasing trade were deliberately made to appear as the individual announcements of refiners, although they were actually prepared concertedly by the defendants. Defendants imposed certain restraints upon distributors despite their recognition of the fact that innocent distributors would have to suffer with the dishonest. They withheld vital statistical information from the purchasing trade. They adhered to a number of restrictive agreements in spite of advice of the Institute's Counsel and other legal counsel, that such restraints were illegal.

R. 4912

See instances cited in Govt Reply Brief, pp. 134-7

Exs 393, 420-V, 420-O

May 2, 1929 telegrams re separation of functions.

R. 2764 Exs 442-R, 400-D.

25, 52 163-4.

See Govt's Brief pp 244-247 Exs 495-A, 448-I 10

the minutes contain so much that is damaging that I don't think it fair to make a finding of deliberate concealment ...

not sufficiently general to warrant comment

34. The Institute has continuously maintained a highly paid executive, statistical, clerical and investigative staff. The expenses of operating the Institute amounted to as much as \$838,000 per year, which included \$75,000 salary for the Executive Secretary, Sydney Ballou, until his death in October, 1929, (\$25,000 per year for the Executive Vice-Secretary, Fred G. Taylor, thereafter), \$15,000 per year for other executive salaries, \$45,000 per year for salaries of stenographers, statisticians, etc., \$85,000 per year for overhead, \$29,000 per year for investigations, and from \$450,000 to \$641,000 per year for a sugar advertising campaign conducted by an independent advertising agency.

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35. The Institute held frequent meetings, including weekly meetings of the Executive Committee composed of certain members of the Board of Directors, monthly meetings of the Board of Directors composed of at least one representative of each refiner, annual and occasional special meetings of the Institute members, and other meetings of various committees. The meetings were devoted largely to problems relating to competitive practices of the refiners, and the principal objective was to eliminate competitive practices which interfere with the maintenance of a uniform price structure, and thereby to substantially lessen competition among refiners. Responsible officers of the different members attended these meetings and performed the extensive travel connected therewith.

IV. Price Reporting

O.K. 36. Defendants agreed to sell sugar "only upon open prices and terms publicly announced", and to adhere without deviation to such prices and terms until they publicly announced changes. 160-163

O.K. 37. Defendants have agreed to, and concertedly enforced, a detailed system of telegraphic price reporting, which requires that all prices and terms and changes therein be publicly announced and posted, and reported almost simultaneously to the Institute, and by it immediately relayed by telegram to all members, the Domestic Sugar Bureau, other refiners and some important distributors. Members are under definite obligation to adhere without deviation to prices and terms so announced, posted, reported and relayed. 160-163

O.K. 38. Although changes in prices and terms are announced practically simultaneously to the Institute and to the purchasing trade, both such announcements are made prior to consummation of any sales at the new prices or terms. 161-162

O.K. 39. In February 1928 the following Code provision was concertedly adopted by the defendants:

> "THREE O'CLOCK NOTICE.
>
> Except to meet a competitive price already announced, the Institute recommends to its Members that they announce changes in price not later than three o'clock of the day before the changed price becomes effective. The first announcement of a change in price should be sent by telegram to the Executive Secretary, he to notify the other Members." 12-13

On November 26, 1928 this provision was changed so as to expressly provide that the individual refiners should notify the trade before they notify the Institute of a change in price and that the Institute

should relay to all members not only the first announcement of
a change but all subsequent announcements. In practice the an-
O.K. nouncement to the Institute has always been sent at about the
same moment as the announcements to the trade. Although members
were advised at an Institute Executive Committee meeting, March
6, 1928, that the Executive Secretary expected them to give him 14
"immediate notice of what they do or decide not to do" after an
initial announcement of a price change, it does not appear that
the members regularly pursued the practice of notifying the In-
stitute that they would not follow particular price changes an-
nounced by other members.

40. The agreement on the "Three O'clock Notice" in its
original form as quoted above, prohibited any "re-pricing" by
O.K. refiners (the practice of giving buyers the benefit of a price
decline retroactively on contracts taken at a higher price).
Under this provision refiners prevented all re-pricing until ~~12-13~~ 14-15
about August, 1928, when the agreement was changed so as to
provide that the refiners might re-price retroactively to the 15-17
beginning of the day on which a decline in price is announced.
They have continued their obligation not to re-price contracts
taken prior to the day on which price declines are announced.
Although contracts taken on the day of the announcement of a de- 163
cline can thus be re-priced, under the reporting system the re-
O.K. finers are under obligation not to sell or contract to sell any
sugar below their announced and posted prices until after an-
nouncing and posting a price decline. The uniform requirement
as to re-pricing together with the obligation of the refiners
under the price reporting system has had the effect of dis- 15
couraging price declines and shortening the period during which
the purchasing trade had formerly been given price protection
by the refiners.

41. Under the "Three O'clock" rule in its original form, price advances were required to be announced before 3:00 p.m. of the day prior to the effective date of the advance. This and the modified "Three O'clock" rule have had the effect of fixing a definite period of grace during which the trade can buy at the old price, and assuring the members that they will be on an equal competitive basis in their solicitation of orders during such period of grace, thereby encouraging refiners to announce unwarranted advances in the price. Each member is advised before the effective date of an advance whether all members will adopt the advance. Unless all members announce an intention to follow the first announcements of an advance in price, other members will withdraw their announcements of advances before the effective date. Those who have thus announced such future advances take orders at the old price up to the effective date of the advance, and therefore do not lose orders as the result of having announced an advance. The practice of interchanging announcements of future advances and allowing a fixed period of grace during which customers can buy at the old price has had the effect of encouraging members to announce unwarranted price advances and to announce advances sooner than they would have under a system of free and unrestrained competition.

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O.K.

Out.

42. The assurance given by each refiner that none of them would vary the prices or terms without advance notice tended in fact, as it naturally would tend, toward maintenance of price levels relatively high as compared with raws. Refiners are assured of price maintenance by their competitors and the purchasers are discouraged in attempting negotiations for favorable prices or terms.

147
161-3

O.K.

Out.

43. The requirement of open announcement in advance of sales

necessarily in and of itself ended any possibility of special prices or terms when private negotiations were essential, such as complicated long term contracts or tolling contracts. The rule in this way afforded a convenient and frequently adopted reason given by the refiners for not offering special prices or terms regardless of the economic wisdom of the proposed transactions. It substantially restrained competition in the offering of general prices and terms more favorable than those already announced. 161

O.K. out

44. The use of the Institute for relaying announcements of prices and terms is an essential part of defendants' agreement to adhere to and enforce prices and terms openly announced. 11 163

O.K.

45. California & Hawaiian did not exchange price information with the Institute except during a brief period during the early days of the Institute; but it did agree with other refiners not to sell or distribute sugar except upon open prices, terms and conditions announced in advance of sale. 13-14

O.K.

46. There is no evidence that the refiners engaged in a general practice of consulting with each other during the period of grace after one refiner had announced a price advance, for the purpose of pursuading reluctant members to follow the price advance. 140

O.K.

47. The defendants frequently discussed announcements of terms and conditions before making such announcements. In various instances announcements of harsher terms and conditions were made, and announcements of more favorable terms and conditions were suppressed, as the result of such discussions. For example, after discussion and agreement in May, 1929, all members simultaneously announced that they would refuse to deal with brokers, warehousemen and jobbers who combined any of such functions; after the four-payment plan was concertedly withdrawn from certain areas, the 136-9 28-40

106

Institute, on November 29, 1929, circularized its members suggesting that Pikeville "be considered as withdrawn at once from the list of four-payment plan points and that you wire your acceptance of the withdrawal;" McCahan withdrew an annoucement that it would apply the New Orleans barge application (44¢) instead of the Philadelphia rail rate ($54\frac{1}{2}$¢) in certain middle west areas, on the same day that the announcement was made, upon the request of the Executive Secretary; California & Hawaiian temporarily withdrew split billing terms in March, 1928, upon the request of the Institute; announcements of higher delivered prices and refusal to sell f.o.b. refinery were made after extensive discussion and correspondence proposing such a system.

107--- 110 51 111-12 52-63 115-17 120-21 Ex. 452---

48. Institute officers in various instances rebuked members for announcing more favorable terms, and in many instances thereby suppressed or caused the withdrawal of such announcements. For example, when Imperial announced that it would apply the barge rate on rail shipments to Texarkana in December, 1928, the Institute wired Imperial, "please advise what competition necessitates barge application Texarkana", and thereafter Imperial withdrew the barge rate on such shipments; on April 25, 1929, after several refiners had announced water rates in the Great Lakes area, Spreckels wrote all members: "terms and conditions openly announced which greatly break down the entire selling structure are to be deplored"; Godchaux was severely criticized at an Institute meeting in December, 1929, for having announced a freight application in the South, which he later withdrew.

58 51-52 Ex 457-K-2 Ex 457-Q-2 58 Ex 394

49. Where favorable terms had been put into effect by members and non-members the Institute in certain instances specifically authorized all members "to concertedly meet the competition until the Executive Secretary notified the members that such

Ex. 21-26, pp. 75-6, 278, 543, 661, 26 Ex. 451-X, 452-T-2, 452-V-2, 452W-2, 452-X-2, 452-Y-2, 464, 464-A Ex 399 Code II, p1. Ex 387-H.

competitive practices had ceased. On such occasions members concertedly suppressed competitive practices and induced the members engaged therein to make announcements of withdrawal of such terms.

50. After an agreement upon freight applications for the state of Alabama, the Institute announced that it was "not customary for the Institute to make general announcement when all interested parties are present at a meeting." Ex. 452

51. The price reporting system had the important effect of producing uniformity in prices and terms and higher actual prices among the various refiners and to all of their customers, with little regard for varying circumstances of different customers and varying desirability of particular transactions. 147 161-2

uniformity Out

52. The reporting system, requiring refiners to report all changes in prices and terms, had the tendency to prevent the granting of prices and terms more favorable to customers than those already announced. Said reporting system has been for the purpose and has had the effect of substantially and unreasonably restraining competition. 147 161 163

Out repetitions

V. Statistics

53. The following statistical information was supplied exclusively to Institute members:

(a) Each week the Institute sent out an individual report to each refiner showing the total weekly melt (i.e., production), deliveries and stock on hand of all members and the percentage thereof of the refiner so notified. 22

(b) The Institute reported weekly the melt and deliveries for the week of each member as well as his cumulative total melts and deliveries from the beginning of the year to the end of such week. Key letters were used to designate the several refiners; each refiner had a code of all designations. ~~21-24~~

(c) At the end of the contract period on each price move, a report or reports were sent out showing for each refiner the total undelivered and unspecified sugar on the contracts. Reports were also sent out showing by states the total amount of undelivered sugar for each refiner; here, too, the key letters were used instead of names.

(d) Reports of capacities of the several refiners were circulated several times during the Institute period.

(e) An annual compilation of statistics collected by the Institute with analyses thereof was sent out.

The following statistical information was furnished to the Institute members and to several of their competitors as indicated below:

(f) A quarterly statistical report was sent to Institute members and a few others, chiefly representatives of off-shore refiners. 22-23

(g) A weekly report showing total deliveries in each state for such week by all refiners but not by each of them, was sent to the Institute members, Hershey and its sales representative.

(h) Each month a report showing total deliveries by states of all refiners for the month, together with a comparison with the same in each of the four years immediately preceding and the same data for the year to the end of such month, was sent to the same parties.

(i) A weekly report showing by states with some subdivisions thereof total sugars on consignment at consignment points for all refiners but not for each of them, was sent to the same parties.

(j) A similar report showing in transit stocks was sent weekly to the same parties.

(k) Reports showing the amount of sugars moved into each state during the week by all the important differential routes for refiners own account and separately at customers' request together with some analyses thereof were sent to the same parties; some such reports were also sent to L. W. & P. Armstrong, representatives of an off-shore refiner.

(l) A monthly report showing the total cane and beet sugar deliveries separatively by states was sent to Institute members, the Domestic Sugar Bureau and several representatives of off-shore refiners.

The only data disseminated to the purchasing trade were: 23-24

(a) Weekly statistics as to the total melt and total deliveries. These statistics were widely distributed through news agencies, banks, brokers, etc.

(b) Monthly statistics of the total deliveries of all sugar, divided so as to show the amount of domestic cane, imported cane, and beet sugar delivered during the period. These statistics were widely distributed through news agencies, banks, brokers, etc.

54. Data as to capacity of members have been available in a publication known as "Sugar Reference Book and Directory" and, to a lesser degree, in the Annual Reports of the American. Other statistics were not available to the trade except that after the beginning of this action the total and per capita consumption of all sugars by states for the years 1928, 1929 and 1930 were released. 24

55. Fair and open competition in the sugar industry and defendants' professed policy of "open competition" required that the purchasing trade as well as the sellers have full detailed information as to the supply of sugar available in the particular trade areas where they purchased, the production and deliveries of the individual refiners in such areas, the amount of unspecified and undelivered balances under the refiners' outstanding contracts with purchasers, consigned and in transit stocks, amounts moving over various routes, etc. 21 25 52

Cf last sentence defense finding 18 referring to free competition See also opinion p. 161 re open announcements and 145-146, and references to numerous restraints, as to possible existence of "[illegible] competition"

56. The statistics gathered and circulated exclusively among the refiners and their competitors placed them in an unfairly advantageous position with respect to the purchasers. Although purchasers had access to statistics relating to <u>total</u> production and deliveries and could calculate the aggregate stocks on hand, such statistics were of no value to them and were likely to mislead them. Detailed statistics which would enable purchasers to ascertain the conditions of supply and demand in their purchasing areas were withheld and concealed from purchasers by the Institute and its members. The withholding of such information had the effect of substantially lessening the competition among the refiners.

24-25
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57. The Institute failed to procure and exchange certain statistics relating to supply and demand which were essential if perfect competition were to be maintained, such as new business entered each week; also the Institute failed to collect and publish statistics regarding their stocks of raw sugar on hand and the prices paid by them for raw sugar, and each refiner maintained secrecy with respect to such facts, because the refiners did not want their competitors to know of the concessions they were obtaining from the raw sugar sellers, because they feared that raw sugar sellers would "squeeze" a refiner whose raw stock appeared to be low, and because if it became known among the buyers of refined sugar that refiners were buying raw below its then open market quotation, it might to some extent cause purchasers of refined sugar to stop buying in anticipation of a decline in the price of refined sugar. In failing to collect and publish such information, competition to that extent was left imperfect, but the refiners did not thereby obtain any advantage over purchasers of refined which they did not have individually prior to the Institute.

26-27,
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123-4

Op. p.

VI. Boycott of Brokers and Warehousemen

58. For the purpose of suppressing competition defendants concertedly and by agreement required each broker, warehouseman, customer and transportation company immediately to elect exclusively one of such functions, required a complete cessation of all other such functions, and refused to deal with all those who did not immediately elect one such exclusive function and promptly close down their other businesses. 35 31 (note 8)

OK

59. Defendants concertedly required the line of business elected as to each refiner to be the same as that elected as to all their competitors. All members sent the following telegraph messages, concertedly prepared by defendants in an Institute meeting, with virtual simultaneity, to their brokers, warehousemen, and customers: 34, 35 Exs 49-55.

OK

May 2, 1928.

> "Referring to the Sugar Institute recommendation that no brokerage be paid anyone interested in warehousing or merchandising sugar and that no further sugar be stored in sugar brokers or customers warehouses we advise that we have adopted such recommendation as our policy. Brokerage will be paid to sales through brokers out of stock now consigned in brokers warehouses. Please advise us by wire whether you and your affiliated interests desire to deal with us either as broker warehouseman or merchant. Any position taken with us must be consistent with that taken by you with any of our competitors."

Exs 49-55, 391, 391A, 391C, 391H, 391K, 391O, 391P, 391W, 391Z, 391TT, 391WW, 391CCC, 391DDD, 391SSS, 391XXX, 424, 424B.

* * * * * * * * *

May 4, 1928.

> "Referring to our telegram of May second to which we have as yet received no reply please be advised that we can not accept business from any person, firm or corporation until their status as broker exclusively or as merchant exclusively or as warehouseman exclusively has been notified to us and satisfactorily established."

Exs. 391B, 391G, 391I, 391Q, 391UU.

60. Most sales are through brokers (roughly 1,380 in number) on commission paid by members. In the interior much sugar is sold from members' consignment stocks held by them at their own expense in warehouses of others for delivery generally in less 28

than carload lots against purchases in the surrounding vicinity. These warehouses, about 1,488 in number, store sugar only or sugar and a great variety of food products.

61. Prior to the formation of the Institute purchasers of 28
refined sugar frequently operated warehouse or brokerage concerns, and brokers frequently were also warehousemen. The transportation business was occasionally combined with other functions. 83
Such combining of the functions of merchant, broker, warehouseman, and transportation company was frequently the most efficient 33,170
method and a proper method of distributing sugar, resulted in 30
valuable services to the distributing industry and to purchasers and users of sugar, and had the effect of lowering the refiners' net prices in particular areas and decreasing the net cost of 168
sugar to the consumers.

62. Combination of distributive functions had facilitated 28
concessions by the charging of unearned storage, or by making erroneous reports as to withdrawals from consignment. Both of these were frequently authorized or acquiesced in by the members. Often 32
the guiding motive of the member in selecting such distributors was to grant concessions. Some brokers and warehousemen had been guilty of fraud and unfair dealings, but others were entirely 29-30
honest and zealously guarded refiners' interests. Brokers and warehousemen, who were also merchants, had interests adverse to 30
those of the members, but the members had knowingly chosen such agents and permitted a continuation of the diverse interests after full disclosure thereof. Sugar stored with customers was usually openly known in the trade, and concessions involved in this regard could hardly be secret.

63. By such concerted boycotting many substantial business 36-37 33,168
interests were disastrously affected and business organizations of long standing were disrupted. Many businesses required to be abandoned were substantial in nature and almost invariably sub-

stantial in relation to the business properties and business operations of the distributor concerned.

64. In many cases the combined functions of the distribu- 33
tors were economical and efficient. Such combinations fre- 36
quently served a useful and economic business purpose, and 33
enabled consumers to receive sugar at a lower cost than would 168 31, 33
otherwise be possible. 146 168, 170

65. Defendants have systematically enforced their concert- 34-35
ed program to compel complete separation of functions through the Institute's Enforcement Committee and traveling investigators. Upon finding that a broker, warehouseman or customer was, directly or indirectly, performing more than one distributive function, or appeared to have any direct or indirect interest in or affiliation with a concern performing another function, the latter concern was declared and listed "disqualified" by the Enforcement Committee. A connection between brokers, warehousemen or customers by partial stock ownership or by kinship was held by defendants to disqualify a distributor, defendants themselves being the final judges as to the eligibility of distributors. Neither actual wrongdoing nor direct control of the second business was deemed by defendants essential to disqualification. Lists were circulated showing those distributors disqualified, and the members thereupon ceased doing business with them. A concern so disqualified had no standing before the Institute and had no means of obtaining a hearing regarding its standing, and reinstatement of a distributor was made only upon the initiative of a member and after a showing of facts by said member consistent with the Institute's policy. The boycott was applied wherever a distributor engaged in a second distributive function of any kind in the sugar industry generally, including the handling of beet or off-shore sugars. Cooperation of the Domestic Sugar Bureau

off-shore interests and Edgar were sought and obtained in this respect. Any violation of the boycott policy resulted in automatic suspension of the distributor thought to be offending. 34

66. A purchaser of refined sugar who combines his business with the functions of warehouseman or broker is not situated similarly to a purchaser who does not combine such functions, and under the competitive system prevailing in the sugar industry prior to the formation of the Institute he might well be entitled to competitive advantages not open to other purchasers. 32 33

67. There is no evidence that the practice of combining the functions of broker, warehouseman and merchants tended to produce monopolies among either distributors or refiners. To any extent that it tended to eliminate brokers, jobbers or warehousemen who did not combine such functions, such eliminations were the result of economies in distribution and the natural result of fair competition as between economically unequal competitors. 32-33

68. Defendants have not shown that it would be economically wise or conducive to fairer competition to create or maintain a distribution set-up composed of brokers, warehousemen, and merchants each independent of the other. 170 169

69. Each refiner submitted to the Institute lists of brokers and warehouses used by them, and such lists were circulated by the Institute among all the refiners for the purpose of aiding in the enforcement of the policy against combination of functions. When brokers or warehouses were disqualified, they were dropped from the lists of the respective refiners. The defendants agreed that they would not use warehouses not on the lists of any of the refiners until after giving 48 hours notice in order to afford the Institute an opportunity to investigate. The period was extended from time to time until finally six days notice was required. 34-35

70. The Institute's policy of requiring complete separa- 36
tion of functions was carried on with complete disregard of the 30 32 170-171.
effects upon third parties and without any effort on the part
of defendants to devise a policy less harsh and fairer to third
parties. Honest merchants, brokers and warehousemen were de-
liberately required to suffer with the dishonest. Defendants com-
pletely ignored the consumers' interest in efficiency and economy
of distribution.

71. In repeated instances the Institute disqualified brokers 36
or warehousemen where their affiliation with jobbers was so
remote as to involve virtually no possibility of fraudulent dealings
or secret concessions through a combination of functions. For
example, a broker in Tampa, Florida, was disqualified because he was
interested in a grocery merchandising concern whose business, because
of the freight situation, was necessarily conducted outside of the
territory in which the broker operated. Many of the disqualified
concerns involved important and substantial interests in the dis-
tribution of sugar.

72. The dominant purpose of defendants in agreeing upon and 31-32, 169
enforcing the boycott was to maintain the members' uniform price 146, 170.
structure, and to free themselves from pressure theretofore exerted
upon them by purchasers, seeking favorable prices. The claimed 169
purpose was the elimination of secret concessions and of frauds.
Defendants could have eliminated secret concessions and frauds
independently and without resorting to drastic boycott policy. Had
defendants used the same effort in discovering and dealing with
actual fraudulent practices as they used in abolishing all function
combinations, such frauds might well have been practically eliminated. 39 38 169 171

73. All refiners have in their own office the ability to de- 37-38, 39
tect any irregularities which might be resorted to either intention-
ally or unintentionally by a broker. Such independent checking
by the refiners was feasible and afforded sufficient information

were trustworthy. Concerted blacklisting and boycotting of brokers, jobbers and warehousemen was not necessary to protect refiners against fraud and irregularities. 39 171

74. The conduct of the defendants themselves prior to the Institute was such as to cause their distributors to understand that honesty was not deemed by them to be the best policy, and thus to lay some foundation for the irregularities which in fact existed in the distributive system. 40

75. The boycott of distributors, as set forth above, was an undue and unreasonable restraint of trade. 175

76. Defendants agreed upon and concertedly adopted and enforced a uniform commission to be paid to all brokers, for the purpose of preventing a growing competition in bidding for brokers' services. This was an undue and unreasonable restraint of trade. 40 175

77. The defendants agreed not to store sugar in any warehouse or to deal with any warehouse which did not enter into a uniform Warehouse Agreement, whereby the warehouses were required to agree to refrain from granting rebates or concessions to customers under penalty of forfeiting to the refiner an amount equal to the amount of the rebate or concession granted. 40-41 176

78. The defendants agreed not to employ the services of any broker or to deal with any broker unless the broker executed a sworn agreement and pledge, under which he obligated himself to uphold the Institute's Code and Interpretations thereunder, peruse all letters, circulars or bulletins containing interpretations of the Institute's Code or regulations thereunder, and conscientiously uphold the spirit and letter of such interpretations or regulations, check and inspect consignments of sugar to detect irregularities and promptly report such irregularities, require sub-brokers to execute similar sworn pledges, not engage in warehousing, merchandising or transporting of sugar, not 41-42 176

VII

FREIGHT RATE AGREEMENTS

(a) Agreements to Fix and Maintain Freight Applications - Code 3(c).

81. Defendants agreed upon and concertedly adopted a rule not to charge differential rates on consignments, or otherwise than on direct shipments over differential routes at customer's request, and thus to charge customers all-rail rates on all deliveries from consignment and on all sugar transported on refiner's account. 176-177 50-51 42-52

82. Sugar being quoted on a refinery basis, freight prepaid, a certain sum, usually more or less than the actual freight rate, is added to the customer's billing on account of transportation, this added charge being known as the "freight application". 43

83. Prior to the formation of the Institute many differential routes (routes which were cheaper than the standard all-rail routes and involved water or combination water and rail transportation) had been available to refiners and buyers, enabling them to transport sugar to various points at rates from 5¢ to 27¢ per 100 pounds cheaper than the all-rail rates. Sugar merchants at interior points had made substantial purchases of sugar f.o.b. refinery for shipment by such differential routes, in order to save the difference between the standard all-rail rates (or other high freight applications prevailing) and the cheaper differential rates. Refiners also made substantial shipments of their own over such differential routes. For example, in 1928, all of the refiners' shipments of sugar into Wisconsin, Illinois, Indiana, and Michigan were shipped over differential routes; between April, 1929, and May, 1931, American shipped 80% of the sugar which it delivered 45 46 46-47

divert or re-transit shipments of sugar in such a manner as to defeat the refiner's freight applications at destination, and report any instances of such diversion or re-transiting. Each refiner obligated himself to file one executed copy of such pledge with the Institute as a condition precedent to dealing with a broker. The action of each member depended entirely upon the action of other members. The broker's pledges were made effective as to all refiners on a fixed date. The Institute diligently checked up on each refiner and required each to submit its sworn brokers pledges. Unsworn pledges were returned by the Institute to the refiner, and it was clearly understood that no refiner could do business with a broker who had not executed such a pledge. Brokers were boycotted for violations of their pledge and of their obligation to support the Institute's program.

79. On January 30, 1931, the Institute adopted an amendment to the brokers pledge providing that if a broker accepted a brokerage fee in any "resale" of sugar at a lower rate than the brokerage fee charged to the refiner in such territory, such lower rate would apply to all commissions paid or payable by the refiner, retroactive to a date 45 days prior to the date of the resale contract. This amendment was adopted for the purpose of benefiting the refiners and discouraging buyers' resales by narrowing their spread and diminishing their profit on resale transactions. 133-4

80. The concerted activities with regard to brokers, warehousemen and merchants were unreasonable and substantially restrained and diverted the interstate distribution of sugar. 176

Opp.

to Detroit, Cleveland, and Chicago over Eastern differential routes; and differential shipments into 21 states from New Orleans refineries were a very substantial percentage of all defendants' sugar delivered in the United States from 1929 to 1931. Prior to the Institute, freight absorptions were frequent and necessary, as refiners invaded territories distant 42 from their refineries. Competition was keen, concessions fre- 47 quent, and there was a tendency to a breakdown to the lowest 48 available rates.

84. The pre-Institute practice whereby the refiners ab- 47-48 sorbed the difference between the actual freight rate paid by the refiner and the refiner's "freight application" was merely a method of decreasing the refiner's net price to his customers. 177

85. Transportation cost is a very substantial element in 177 the cost of sugar to the consumer, and the agreements upon transportation charges were in fact agreements on a substantial element in the ultimate price of sugar.

86. At the outset of the Institute, defendants agreed to 48-49 charge the all-rail rate from refinery to destination on ex- Ex 457, 457-B consignment deliveries, and on all shipments at the instance of the refiners, and to that end defendants concertedly adopted section 3(c) of the Institute's "Code of Ethics", hereinafter called "Code 3(c)", which condemns:

> "The use of differential rates on consignments or otherwise than on shipments over differential routes at customer's request."

Ex 10 (Code 3c)

At about the same time defendants by agreement amplified "Code 50 3(c)" by adopting a Code Interpretation as follows:

Opp.

"1. GENERAL USE OF DIFFERENTIAL ROUTES 50

Absorbing freight means the selling of transportation at less than cost, which is unsound in principle and necessarily throws an undue burden on the consumers at and near the primary markets. It is realized, however, that the use of differential rates on consignments cannot be prevented in all markets at all times. The customer has the right to ship over differential routes from refinery points, taking the slower service at his own cost and risk of the market during the transit period. If the quantity thus shipped is in fact inconsiderable, it should be ignored rather than break down the freight application actually paid on the preponderating quantity of sugar. If, however, sugar can be and is shipped by customers in this manner in sufficient quantity to break the market at the destination point and to render it difficult for refiners to sell their own sugar on the all-rail application, then this competition must necessarily be met. It is a question of fact in every instance, and the Executive Secretary should be fully advised, before sugar actually paying a higher rate is sold on the differential rate, of the necessity of this departure from the strict letter of the Code of Ethics."

87. Pursuant to "Code 3(c)" defendants concertedly charged the standard all-rail rates on all deliveries to customers ex-consignments (deliveries out of consignment warehouses located at or near destination point), despite the fact that a large part of such sugar was transported from the refineries to the consignment warehouses over substantially cheaper differential routes. To the extent that the standard all-rail rate exceeded the actual differential rate paid by the refiner plus the refiner's additional cost of warehousing, the refiner profited at the expense of the customer--thus effecting an increase in the net price which the refiners charged to their customers. 48-49 46 177

88. The evidence does not establish that the refiners' cost in making deliveries ex-consignment were usually equal to or greater 48-49

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than the all-rail rate charged by the refiners under "Code 3(c)". The entire cost of consignment service, including warehouse charges, interest, fire insurance, handling charges, etc., was about 10¢ per 100 pounds. The refiners' savings in making shipments over differential routes as compared with the rail routes were in many instances much more than 10¢ per 100 pounds. In many important markets throughout the United States the refiners could effect substantial freight pick-ups under "Code 3(c)", even in selling out of consignment stocks and after paying the consignment expenses. In April, 1929, the rail rate from New York to Chicago was 56½¢. Differential rates ranged from 29½¢ to 36¢. The cheapest differential rate, therefore, was 27¢ lower than the all-rail rate which the refiners were required to charge under "Code 3(c)". Where refiners' differential shipments were not delivered to consignment warehouses but were rather delivered directly to customers, the refiners would profit at the customers' expense to the amount of the entire difference between the all-rail and the differential rates, there being no warehouse charges or other consignment charges. 49

89. Freight absorptions exceeded freight pick-ups for each year from 1927 through 1931, but these figures cover the entire country and do not reveal the net pick-up in particular trade areas. Seventy per cent of the losses from freight absorptions were those of California & Hawaiian, which are not comparable to the absorptions of other refiners, because California & Hawaiian marketed over extreme distances. (Its sugars are exempt from tariff and it had a special arrangement with producers of raw sugar whereby the latter assumed the freight absorptions.) 49

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90. Defendants were not concerned over the fact that the practice of absorbing a portion of the freight rate might throw an undue burden on consumers at markets where customers pay the actual cost of transportation, nor were they in the least concerned over discriminations involved in freight absorptions. Their whole purpose was to prevent breakdown of the fixed freight applications, chiefly in the Great Lakes and Warrior River areas, where competition among the refiners was keenest. (The Warrior River area included Alabama, Tennessee, Kentucky and parts of Indiana.) 51 47 (Note 14)

91. Because of the agreement involved in "Code 5(c)", and at the insistent request of the Executive Secretary of the Institute, McCahan, after announcing in May, 1928, that it would apply the New Orleans barge rate (44¢) instead of the Philadelphia rail rate (54½¢) in certain Middle West areas, on rail shipments from its Philadelphia refinery, withdrew the announcement on the same day. At a special meeting of the Executive Committee of the Institute on the following day, Pennsylvania and McCahan were prevailed upon to continue indefinitely the withdrawal of the barge rate application in Western territory. Although the rate did break down in the summer of 1928 to the Philadelphia-Chicago rail and lake rate (49½¢), a further breakdown was obstructed through the efforts of the Institute. 51-52

92. After the Institute had made strenuous efforts in the spring of 1928 to enforce the New Orleans rail rate (33¢) in sales by members and non-members to Alabama purchasers, the refiners agreed to charge the New Orleans barge rate (28½¢), and to refrain from quoting the cheaper Mobile rail rate (18½¢). Hershey and Exs. 452 M 452 A, 452B, 452 F, 452 C 452 P, 452 U, 452 V Ex 452-V-2

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California & Hawaiian maintained stocks of sugar at Mobile and had been making rail shipments from Mobile to Alabama points and charging customers the Mobile rail rate of 18½¢. Barge service from Mobile to Alabama points was not available until later in 1928. At a general meeting all refiners concerned agreed to sell sugar in Alabama on the New Orleans barge rate (28½¢) and defendants prevailed upon Hershey to refrain from quoting the Mobile rail rate (18½¢), and to substitute the New Orleans barge rate (28½¢) on rail shipments from Mobile to Alabama points. See Exs cited in Govt Brief, pp 218-237.

93. In enforcing Code 3(c) the Institute from time to time suppressed attempts by various members and non-members to quote differential rates on deliveries ex-consignment, and caused them to quote rail rates on such deliveries, and defendants concertedly imposed various restraints in this respect. 51-52 (See references to Finding 92)

94. The Institute gathered statistics regarding shipments over differential routes for the purpose of ascertaining whether customers were shipping sufficient quantities of sugar over differential routes to break the market at particular destination points. Such statistics were used by members of the Institute, but were withheld and concealed from their customers, who were thereby placed at a disadvantage because of their inability to know when they might reasonably insist upon a breakdown in freight charges. In this respect, as in other respects with statistics, defendants dealt unfairly with the purchasing trade. 52

95. Savannah, McCahan, California & Hawaiian and Western lost business as the result of their obligation to charge higher freight rates under "Code 3(c)", and complained of its enforcement. 51-52

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Because of their resistance to "Code 3(c)", the principle was abandoned at least by the fall of 1929 and probably much earlier, and the Code Interpretation was formally rescinded in September, 1930. The defendants continued other restrictive agreements upon competition in transportation rates, but as the original agreements became ineffective, defendants sought additional means to suppress competition on freight applications, and the principle of "Code 3(c)" was replaced by a system of delivered prices.

96. The foregoing agreements and concert of action regarding freight applications constitute undue and unreasonable restraints of trade. 177

(b) Agreements on Delivered Prices Op R.

97. After much discussion, deliberation and study by the 52-59
Institute and its members over a period of several months, 57
crystallization of sentiment therefor, with leading officials of
the Institute definitely advocating a delivered price plan, and
general agreement as to the desirability, defendants combined in 54 61
adopting and concertedly adopted a system of delivered prices 63
for substantial marketing areas, whereby they concertedly charged 69
their customers higher rail rate applications or rail and water 71
rate applications regardless of the mode of actual transportation, 73
and denied their customers the privilege of purchasing f.o.b. re- 177
finery and making shipments over cheaper differential routes.
Delivered prices were thus concertedly introduced (a) in a sub- 59
stantial and highly competitive marketing area served by the Great 47
Lakes on April 29, 1929, and (b) in a substantial and highly com- 47
petitive marketing area served by the Mississippi-Warrior River 63
Barge Line in December, 1929.

98. The areas affected by said delivered prices were served 45
by various differential routes which offered cheaper transportation
than the standard rail routes. The services over the various
differential routes varied. The differential routes available
included the following:

(a) Ocean and Rail route via Norfolk, available to N. Y., Philadelphia and Baltimore refineries, serves points in many midwestern states. Rates: e.g., N.Y.-Chicago, April 1929, 51½¢ per 100 lbs. (cf. with all rail, 56½¢); Philadelphia-Chicago, 49½¢ (cf. with all rail, 54½¢).

(b) Rail and lake route, available to same refineries, serves points in many midwestern states. Rates: e.g., N.Y.-Chicago, April, 1929, 51½¢ per 100 lbs.; Philadelphia-Chicago, 49½¢.

(c) Canal and lake, available to N.Y. and Philadelphia refineries, serves points in N.Y. and in many western states. Rates: e.g., N.Y.-Chicago, April, 1929, varies from 29½¢ to 36¢ per 100 lbs.; Philadelphia-Chicago, 37¢/

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(d) National Despatch, available to N.Y. and Boston refineries, serves points in many midwestern states. Rates: e.g., N.Y.-Chicago, April, 1929, 51½¢ per 100 lbs., Boston-Chicago, Sept. 1931, 54½¢.

(e) C.A.T. line, available to N.Y. and Boston refineries, serves points in many midwestern states. Rates: e.g., N.Y.-Chicago, April, 1929, 47½¢ per 100 lbs.; Boston-Chicago, Sept. 1931, 47½¢.

(f) Barge services out of New Orleans, via Mississippi and Ohio rivers and by rail to interior points provide differential service chiefly throughout the south and middle western states. Rates: e.g., New Orleans-Chicago, April, 1929, 44¢ (cf. all rail rate of 54¢).

(g) Barge service out of New Orleans up Warrior River and other waters and thence inland by rail. This service available to points in Alabama, Kentucky, Tennessee, and Indiana. Saving over all rail varies, thus rates in Alabama range 6-7¢ less than all-rail.

99. The delivered price included freight applications which were substantially higher than the rates available by several differential routes. For example, delivered prices at Chicago included a 49½¢ (and later 51¢) freight application, although refiners were actually making shipments to Chicago over differential routes at rates as low as 28¢ per 100 lbs.; differential shipments could be made to Cleveland at 18¢ under the delivered price freight application; and differential shipments could be made to Green Bay, Wisconsin, at 18¢ less than the 56.8¢ delivered price application. The delivered price freight applications generally were substantially higher than the actual freight rates over differential routes, and the higher applications were consistently charged the purchasing trade despite the cheaper rates actually paid by the refiners in transporting great quantities of such sugar. 59

100. Numerous buyers in the Great Lakes and the Mississippi-Warrior marketing areas were denied the privilege of purchasing f.o.b. refinery and making shipments over cheaper differential routes, because the refiners were obligated to adhere to the 67-71 67

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Institute's delivered price program, and many buyers seeking the lower rates or deliveries f.o.b. refinery, were so informed by defendants, were denied the lower rates, and denied the right to take possession of sugars at refineries in order to arrange their own shipments. The Institute, its authorized representatives, 70-71
and its members deliberately created the impression that refiners were under mutual obligation not to sell f.o.b. refinery and they took concerted steps to prevent, and concertedly prevented, a breakdown of delivered prices, for the purpose of suppressing competition among themselves. The explanations given by the refiners and their representatives to the effect that the rules of the Institute did not permit sales f.o.b. refinery were not 71
mere excuses or alibis but were the genuine reasons for the refusals to make such sales.

101. Defendants, concertedly and by agreement, sought and obtained assurances from the American selling agencies representing 63
off-shore refiners, including Armstrong, Lamborn, Lowry and Pike, 64-66
and conspired with them to adhere to the Institute's delivered price system. The complete success of the Institute's delivered 64
price plan depended in fair measure upon such a combination with the off-shore interests, whose sugar substantially competed with the defendants' sugar in American markets.

102. The defendants made concerted efforts to maintain artificial freight rate set-ups in territories other than the Great 71
Lakes and Warrior River areas, including Central Freight Association territory and the State of Texas. They endeavored to persuade Hershey (selling off-shore sugar imported from Cuba to Mobile, Ala.) to refrain from quoting lower freight rates to destinations from Mobile, where it maintained large consigned stocks, and to quote the higher rates from New Orleans.

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103. Although the said delivered prices concertedly adopted violated the principle of Code 3(c), the Institute did not discourage, but rather enforced, the delivered prices. Under Code 3(c) and other original Institute Code provisions, the defendants professed a desire to eliminate discriminations among customers and to recognize the customers' right to f.o.b. refinery purchases. Delivered prices clearly resulted in discrimination among customers, creating a discrimination in favor of nearby customers and against customers in the delivered price areas by reason of arbitrarily high prices in such delivered price areas. Defendants were not concerned with the customers' right to purchase f.o.b. refinery. The extent to which freight absorptions may be reflected in higher base prices is speculative. The extent to which the delivered price is higher than actual cost of transportation definitely measures the minimum amount of the discrimination. 71-72

104. Defendants concertedly through the Institute policed delivered prices and investigated alleged violations thereof by refiners and distributors, for the purpose of maintaining delivered prices, and generally enforced said delivered prices. 72-73

105. Delivered prices were withdrawn in the Great Lakes area May 5, 1931, about five weeks after this action was begun, and in the Warrior River area about the end of May, 1930. 73

106. An attempt was made by all of the members, except one, to introduce delivered prices again in November, 1931, but on advice of counsel they refrained from adopting such delivered prices until after the conclusion of this case. 73

107. There is a strong probability that the defendants unless restrained will again seek to adopt delivered prices concertedly. 73

108. Defendants' concerted system of delivered prices was undue and unreasonable restraint of trade. The primary purpose thereof 179 177

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(c) <u>Institute "Information Service" in Transportation Matters.</u>

109. Changes in refiners freight applications were announced in substantially the same manner as price changes. 74

110. Since 1929 the Institute has maintained a loose-leaf "freight book" and has supplied copies to each member. The "freight book" indicates the selling terms such as cash discount periods, price guaranties, special payment plans, etc., in each State; the freight applications prevailing in various markets with special rates or exceptions of particular refiners; and a list of trucking companies used by members who have signed non-rebating agreements. 74-75

111. The reporting of freight applications and the "freight book" were used by the Institute in aid of its efforts to prevent competition in freight applications, under "Code 5 (e)", and were a vital link in the Institute's efforts to maintain delivered prices. The "freight book" was used in aid of the concerted activities of defendant with respect to transportation matters generally and contract terms, and in aid of the various restraints on transportation. At best it is a slight convenience to defendants and its existence is unjustified. 75 179 78 179

(d) <u>Restraints Upon Transiting and Diversion.</u>

112. Railroad tariffs grant transit privileges to shippers or consignees of sugar, permitting them to reship sugar at the balance of the through rate after storing a shipment at intermediate "transit points" designated by the railroad. Such transit privileges can be transferred only by endorsement of the transit billing. Railroads also grant "diversion" privileges, whereby the destination of a shipment may be changed while the sugar is in transit. 76

113. Defendants combined and agreed to eliminate and restrain, and concertedly eliminated and restrained the transiting and diversion privileges of their customers. This was an undue and unreasonable restraint of trade. 78

114. Diversion and transiting have been used by customers as a means of defeating artificial freight application of the refiners. Sometimes refiners consent to such defeating of their own freight application, as a method of granting a concession; and sometimes customers fraudulently defeat refiners' freight applications by misrepresenting the actual destination of the sugar ordered and then transiting or diverting the sugar without the refiner's consent. Defendants' concerted action restrained even the voluntary concessions. 78 78-79

115. The transiting from Hearne, Texas, to Dallas, Texas, is typical of the transiting to defeat refiners' freight applications. In 1928 blanket freight rates were in effect in Texas points both from New Orleans and from the Texas refining point (Sugarland, Texas, and Texas City); the Texas refiners always charged the New Orleans rate, which then was 17¢ higher than their own rate and refused to sell f.o.b. refinery. In 1929 the railroads in Paris put Texas on a mileage basis and New Orleans on a zone basis. Dallas and Hearne, being in the same zone, bore the same tariff rate, 60¢ from New Orleans; but from Sugarland, Texas, Hearne was 28¢ and Dallas 38¢. All refiners, (both New Orleans and Texas refiners) maintained freight applications of 45¢ at Hearne and 55¢ at Dallas, which in each case was the customary rail-rate from Sugarland, Texas, to these points plus 17¢. On a shipment from New Orleans to Hearne the refiner prepaid the actual freight rate of 60¢, but billed the customer for the freight application of 45¢; the refiner thereby absorbed 15¢. If such sugar were diverted or transited from Hearne to Dallas, the railroad charged no additional freight. Therefore, a buyer through diversion or 77-78

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transiting, could transport the sugar to Dallas at a cost to himself of 45¢, thereby defeating the refiner's 55¢ freight application at Dallas. Refiners frequently consented to such diversion and transiting for the deliberate purpose of granting a 10¢ concession to Dallas buyers.

116. The purpose and the effect of the defendants' agreement to prevent transiting and diversion were to suppress competition in freight applications and to maintain their artificial freight rate structures, rather than to combat any fraudulent use of these privileges or to prevent discriminations. Concerted action was not essential to the elimination of such fraud or discrimination. 78-79

117. There is no evidence that the refiners acted unfairly or secretly in inducing the railroads to adopt a master transit tariff to replace the individual railroad tariff on transit. 79-80 180

(e) Restraint on Water Carriers and Private Charters and Other Transportation Services.

118. Defendants concertedly induced water carriers operating on the New York State Barge Canal to agree that they would carry sugar only on the basis of openly announced rates and terms from which they would not deviate. Defendants induced such action by the concerted threat of withholding business from carriers who did not openly announce their rates and terms, and in one instance the refiners temporarily withheld business from a carrier in accordance with the threat. 81

119. There is little evidence that the water carriers indulged in the practice of secret rebating. The dominating purpose of defendants was to effect a stabilization of transportation rates. 81

120. The defendants agreed not to ship their sugar by private charters without first submitting the terms of the private charters to the Executive Secretary of the Institute and permitting him to 82

scrutinize the terms. The purpose of this agreement was to assist in the preservation of the refiners' price structure. 82

121. Defendants concertedly refused to participate with customers in making pool-car or pool-cargo shipments. The defendants' purpose was to prevent customers from obtaining cheaper transportation rates to which they would be entitled if their shipments amounted to a full car or a full cargo. Defendants' purpose was not to prevent discriminations among customers. There is nothing unfair in an apparent discrimination which results solely from the necessary limitations of a refiner's capacity, or from the varying needs or business facilities of customers. 82

122. There was no effective agreement among the defendants to restrict the making up of mixed car lot shipments of sugar and syrup. 82-83

123. Defendants agreed not to use trucks affiliated with any buyer, broker, or warehouse, or trucks the owners of which did not sign non-rebating agreements with the Institute. This boycott is similar to those described above as to other distributors or purchasers and the business justification therefor is equally without merit. 83

124. Defendants agreed to adopt in all territories the practise of not absorbing switching charges on deliveries from consigned stocks to buyer's warehouse or spur, with certain exceptions. In some marketing areas the defendants recouped their switching charges by charging for transportation ex-consignments at a higher rate than they in fact paid in moving their sugar. 83-84

125. In a number of instances the refiners concertedly curtailed the services which they had formerly rendered to their customers, and imposed extra charges for services which they had previously rendered as part of their cost of doing business. For example, they agreed upon extra charges for less than carload 84

deliveries at some points, and concertedly restrained drop-shipments, dock deliveries, and "store door deliveries" to customers, for the purpose of suppressing competition among the refiners.

126. Each of the foregoing concerted activities unduly and unreasonably restrains and was intended to restrain and suppress competition. 180 181

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VIII. Elimination of Consignment Points

127. Prior to 1925 refiners stored and maintained on their own account stocks of sugar at warehouses at a relatively few strategic points throughout the country, known as consignment points; from them sugar was distributed, generally in less than carload lots, locally and to the surrounding area, direct deliveries being in carload lots. During the period 1925-1927 the number of consignment points generally increased, the refiners being anxious to share in the competitive advantages thereof. 84

128. Defendants concertedly and by agreement have eliminated consignments at many important points and in many important areas, particularly in the northeastern, central and southern states, and in the northwestern Mississippi Valley territory. Increases in consignment points in Illinois, Missouri and Arkansas were due to the Institute's inability to induce Godchaux and beet sugar manufacturers to agree upon reduction of consignment points in those states. The Institute sought and obtained cooperation of the Domestic Sugar Bureau and other non-members in eliminating consignment points in other areas, and without their cooperation such reductions in consignment points could not have been effected. 85-86 181

129. Defendants concertedly and by agreement have restricted reconsignment points (points where sugar is stored only for forwarding in carload lots), and reconsignment warehouses. 86

130. Defendants concertedly and by agreement have eliminated as storage points certain ports of entry. For example, Wilmington, 86-87

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North Carolina, a port of entry, was concertedly eliminated as a storage point, despite the difficulty thereby placed upon Hershey to do business through the port of Wilmington, since it was necessary to break bulk at that point. The elimination of such ports of entry as storage points inevitably eliminated such refiners from competition in the surrounding areas.

131. Small refiners were not necessarily placed at a disadvantage with large refiners by the practice of maintaining consignment stock. 87 89-90

132. There is no evidence that savings which might be effected through certain reductions in consignment points were or would be passed on to the purchasers. Refiners often recouped the expense of maintaining consignment points by charging a service therefor and/or by charging higher freight rates than they actually paid on deliveries ex-consignment. Also, such savings as were made might in the long run be kept by the refiners or used, as was frequently the case, to install new consignment points elsewhere. 87-89

133. The practice of maintaining consignment points was not a wasteful practice. The maintenance of consignment points constituted a valuable service for customers in the surrounding territory. 88-89

134. The elimination of consignments shifted the expense of maintaining assorted stocks of sugar from the refiners to their customers. Customers suffered substantial disadvantages from elimination of consigned stock, because their demand could not be accurately forecast at the time of making carload purchases, customers might be left with a shortage of one assortment and a 88-89 88

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surplus of another, inadequate stock facilities restricted markets of both refiners and customers, financing larger stocks was difficult for customers, and less than carload deliveries were restricted. The marketing area of many large customers was shown to have been restricted by elimination of consignment stock in their area. 86-87 The maintenance of consignment stocks was a valuable competitive service supplied by the refiners. 88

135. It does not appear that the customers who relied upon consignment stocks could have warehoused their own stocks any cheaper than the cost to the refiner of maintaining consignments. The greatest expense of the consigned stocks resulted from the excessive stocks which were accumulated at the consignment points by the refiners prior to the Institute. 89

136. Refiners could have effected substantial economies by more efficient management and the proper use of statistics in the maintenance of consignment stock, without the necessity of eliminating such stock. 89

137. Less than carload deliveries, pool car shipments to buyers, and the opportunity to obtain fresher stock by using direct as against ex-consignment deliveries, and saving trucking charges, did not compensate customers for the loss of consignment points. 89

138. The elimination of consignment stocks at a particular city placed that city and its customers at a material disadvantage with neighboring cities which had the advantages of consigned stock. The trading area of a city deprived of consignment stock was greatly restricted because the jobbers in such cities were obliged to assume the expense of maintaining assorted stocks of sugar. Such elimination was an undue hardship on such communities, unfair and discriminatory. Since wholesalers' margins seldom exceed 20¢ per bag, an added cost of a few cents seriously affected their businesses, and occasionally drove them out of business completely. 89 90

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139. The elimination of consignment points eliminated from the sugar distributing industry the "desk jobbers", who had insufficient capital to maintain warehouses and had been enabled to do business solely because of refiners' consigned stocks. 90

140. The dominating purpose of the defendants in their concerted activities regarding consignment and storage stocks was to increase the net income to the members and to eliminate the disadvantages and expenses of consignments and storage stocks and to shift those disadvantages and expenses to the purchasers. 181

141. In view of the hardship and unfairness resulting from the elimination of consignment points, the concerted elimination thereof was an unjustified, undue and unreasonable restraint of trade. 181

142. Defendants by agreement and concert of action in September, 1928, agreed upon and enforced a 5¢ service charge on all less than carload deliveries ex-consignment. This was discontinued early in 1929. This was an undue and unreasonable restraint of trade and was not justified by the business exigencies. The charge was discriminatory as between deliveries in carload and less than carload lots. 90 181

143. Upon obtaining the unanimous consent of all refiners to eliminate particular consignment points, the Institute notified each refiner of the amount of the largest undelivered balance of any refiner's stock at that point, and then permitted each refiner to ship enough sugar to take care of its current trade demand up to the amount of the largest stock held there by any refiner, and restricted the refiners to such amount. This practice was for the purpose of suppressing competition among the refiners.

See references pp 437-9 Govt's Brief

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IX. Restrictive Agreements on Contract Terms and Conditions of Sale.

(a). Long Term Contracts.

144. For the purpose of suppressing competition among themselves and preserving the Institute's price structure, the defendants have agreed not to enter and have concertedly refused to enter into long term contracts or any contract providing for delivery of sugar over a period longer than thirty days after confirmation of the contract. This was an undue and unreasonable restraint of trade. An exception was made as to canners in the three Pacific Coast states. 146 92a-94 181 93

145. Prior to the Institute refiners frequently granted long term contracts providing for delivery periods ranging up to two years after consummation of the contract. California & Hawaiian and Western granted long term contracts to Pacific Coast canners, and Revere granted them to any customers who were in a position to use them. American, National, Federal, McCahan, Godchaux, Imperial, Savannah, Pennsylvania and Henderson granted long term contracts, calling for long term deliveries on their face, to merchandisers, chain stores and manufacturers. There had been a widespread practice among the refiners of extending the term of thirty-day contracts to forty, fifty or sixty days. 91-92 95

146. Because of the complicated provisions of long term contracts, the differences in the requirements of the various purchasers, and the differences in the needs and circumstances of the various refiners and customers, long term contracts prior to the Institute were privately negotiated by the "ethical" refiners as well as the "unethical." Although the terms of the important contracts became known in the trade, private negotiations were appropriate and necessary. For example, the two year Godchaux-Edgar contract, providing for the delivery of 10,000 to 15,000 bags 91-92 95 96

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weekly for a two-year period commencing December, 1927, at 20¢ under the market price of American and National, called upon Edgar to lend financial aid to the refiner; perhaps no other sugar customer was similarly situated to undertake such a contract.

147. Long term contracts were of great economic and competitive value to the refiners and to the purchasers, particularly manufacturers. It was vital for manufacturers to know as early as possible the cost of the various elements entering into their finished products. The refiners were better situated to hedge on the Sugar Exchange and protect themselves against price fluctuation than were the purchasers. They could even grant long term contracts with a price guarantee and protect themselves against losing money by hedging. 92

148. Some of the long term contracts aided the refiners by providing for substantial deliveries fairly even in amount over long periods, thus tending to bring about evenness of production. 92 95-96

149. At the preliminary organization meeting of the defendants in December, 1927 (prior to the formation of the Institute), the refiners agreed not to enter into contracts calling for deliveries in excess of thirty days. This agreement became part of the Institute's program and continued without substantial change throughout the Institute period. 92a-93

150. Because of strong protest by manufacturers against the abolition of long term contracts, the directors of the Institute approved a form of sixty-day contracts for sugar to be sold in large 175-pound cotton bags, suitable to the manufacturers' need but unattractive to merchandisers; but the contract was to provide for a service charge, no guarantee was to be given, the "usual" differentials were to be charged, and the buyer was to specify delivery date at the inception of the 93

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contract. This form of contract was never actually adopted
by the members of the Institute because of a realization that
the contract would not be acceptable to the trade.

151. Throughout the Institute period buyers were unsuc- 93
cessful in their repeated efforts to obtain long term con-
tracts for delivery beyond thirty days.

152. Despite advice of counsel for California & Hawaiian 94
that an agreement to prohibit long term contracts might be
illegal, and that correspondence referring to such an agreement
might be dangerous, the defendants continued concertedly to
deny long term contracts to their customers throughout the
Institute period.

153. Any alleged discrimination among customers result- 94
ing from the system of granting long term contracts was not
sufficiently serious to warrant the concerted elimination of
all long term contracts.

154. There is no substantial evidence that manufacturers 95
desiring long term contracts had sold or were likely to resell
their sugar.

155. The Institute requirements that prices and terms of 95
all contracts must be openly announced in advance of sales,
aided in the elimination of long term contracts, and was par-
tially for the purpose of preventing such contracts.

156. In eliminating and preventing long term contracts 95
the defendants were not really interested in preventing unfair
discriminations among customers; their purpose was to preserve
the price structure and to suppress competition among the re-
finers. They entirely disregarded the interest of their cus- 95
tomers.

157. In December, 1927, on the eve of the formation of 95-96
the Institute, Godchaux and Revere each entered into a substan-
tial long term contract with Edgar, providing for large sales

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over stated periods, and for substantial price concession 95-96
and other competitive advantages; the confirmation of such
contract was hurried because of the belief by Edgar and by
the respective refiners that the Institute would prohibit
long term contracts, price concessions, and other competitive advantages. For the purpose of preventing these contracts from precipitating competition among the refiners
and for the purpose of preserving the Institute's price
structure, the Institute sought and obtained from Edgar
an assurance that he would maintain Institute prices; and
Edgar did maintain Institute prices at least during most
of the period of these contracts. Edgar was thereby deprived of the competitive advantage of selling below Institute prices, and the consuming trade was kept from participating in the benefit of lower prices. The Institute thereby
suppressed the competition of one of the refiners' most active
competitors and thereby unreasonably restrained trade. These
long term contracts threatened the existence of the Institute
only in so far as the Institute was concerned with uniformity
of price structure and suppression of competition.

158. In deliberately withholding from the purchasing 96-97
trade Institute statistics regarding the amount of undelivered
balances under thirty-day contracts, the defendants dealt unfairly with the trade and violated what defendants professed to
be their most important principle, that of open announcement.

159. In concertedly refusing to extend and in concertedly 97
extending the delivery period of thirty-day contracts, and in
concertedly fixing and restricting such extensions where it was
found impracticable to enforce the letter of such thirty-day
contracts, the defendants restrained the freedom of the various
refiners to modify their contracts or extend their delivery
period independently. Their purpose and the effect thereof was

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(b) Prohibition Against Quantity Discounts

160. Defendants entered into and maintained an agreement not to grant, and concertedly refused to grant, quantity discounts or any discounts based upon savings in distribution expense. 97 102 181

161. Although prior to the Institute there was no practice of systematically grading discounts according to quantity purchased, the majority of discounts were given to large buyers with substantial bargaining power. Many were given to smaller buyers. Many earlier discounts were confidential in nature, but defendants' agreement barred even open discounts systematically graded as to quantity. 98

162. Large quantity sales of sugar normally result in substantial savings in delivery, storage, bookkeeping and other incidental expenses. Large purchasers are more likely to take delivery in carload quantities or other large quantities. Although the large purchases by chain stores involved small deliveries to the individual stores in the chain, and resulted in no substantial savings in such deliveries, many manufacturers and large distributors were in a position to take deliveries in carload lots direct from refinery instead of ex-consignment. 99

163. Pre-Institute long term contracts, such as the Revere contract, the Godchaux-Edgar contract and the Coca Cola contracts frequently provided for specified weekly or monthly deliveries over a considerable period of time. Such large quantity contracts resulted in substantial savings to the refiners by enabling them to effect "greater evenness of production". 99-100

164. Elasticity of demand for sugar has been clearly established, as illustrated by the increase in per capita consumption from 79.34 pounds to 109.30 pounds during the period from 1914 to 100

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1928. One-third of defendants' sugar is bought for use in the making of other products, many of which have a market capable of indefinite expansion. For example, Coca Cola, the largest sugar user in the United States, increased its sugar purchases from 1,840,000 bags in 1928 to 2,250,000 in 1929, an increase equivalent to nearly 1% of all sugar consumed in the United States. Coca Cola shifted its sugar purchases from Institute members to nonmembers because it was concertedly denied special terms by the defendants. The Institute itself spent one and three-quarter million dollars for advertising sugar and the products in which sugar is used, because of a realization by defendants that the demand for sugar and such products is elastic. 100-101

165. Because of the elasticity in the demand for sugar and the products in which sugar is used, quantity discounts may have resulted in substantial increase of sugar consumption in the United States as a whole and in substantial increases in the amount of purchases by manufacturers and distributors granted such quantity discounts. 100

166. Refiners' savings in direct and indirect costs resulting from large quantity purchases supplied ample business reasons for discounts based solely on quantity. 99-100 It is clear, at least in many cases, that even under defendants' economic theory discounts based upon quantity were appropriate. 101

167. The Institute's Code and the defendants' understanding prevented discounts regardless of special circumstances such as a provision for even deliveries over a long period of time. 102

168. Sugar buyers were refused discounts for taking direct carload deliveries rather than deliveries from consignments, 102

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because of the understanding among the refiners that no special discounts of any kind should be allowed regardless of the economic justification therefor.

169. Defendants' purpose in prohibiting quantity discounts was primarily to suppress competition among themselves, to preserve the uniformity of price structure, and secondarily to prevent refiners from cloaking secret, arbitrary concessions in the form of quantity discounts. They clearly disregarded the interests of their customers. The defendants preferred to have all sugar sold in a given trade area at precisely the same prices and terms rather than to effect economies in its sale and distribution. The foregoing restraints regarding quantity discounts were undue and unreasonable. 102 146 181

(c) Restraints on Tolling Contracts

170. Defendants have concertedly suppressed tolling contracts, whereby refiners had refined sugar for producers, manufacturers and jobbers owning raw sugar, for a stipulated tolling fee. Under such tolling contracts refiners benefited by not having to finance the purchase of raw sugar. 103-4 181

171. Defendants, concertedly and by agreement, have prohibited all tolling for purchasers of refined sugar, and regulated all tolling for raw sugar producers by exacting promises from them that all such tolled sugar would be sold in accordance with the Institute's Code. 103

172. Defendants refrained from tolling sugar as the result of their agreements and the Institute's Code provisions. 103

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173. Savannah refrained from entering into tolling contracts after July, 1928, as the result of the Institute's implied threat to concertedly meet and suppress such competition by sanctioning tolling contracts by other refiners. 103

174. The Institute encouraged the Domestic Sugar Bureau to suppress tolling contracts by Sterling Sugars, Ltd., a Louisiana refiner. Sterling resigned from the Domestic Sugar Bureau because of the latter's objection to such tolling contracts. See Exs cited pp 101-3 of Govt's Brief.

175. Defendants' dominating purpose in suppressing tolling contracts was to restrict competition and to prevent the sale of sugar at lower prices, which would jeopardize the Institute's uniform price structure. These restraints are undue and unreasonable. 104 146 181

(d) Restraints on Credit Terms.

1. Four-Payment Plan.

176. Defendants concertedly and by agreement substantially limited and restricted contracts providing for the Four-Payment Plan, whereby the buyer had been given immediate possession of a carload of sugar but was obligated to take title to only one-quarter of each carload each week. The buyer had been allowed terms of 2%, 7 days cash discount upon the amount withdrawn, and had received the benefit of a guarantee against price decline on any unwithdrawn balance. 104-110

177. Defendants did not confine their activities to "open announcements" of the Four-Payment Plan; they actively suppressed the extension of the Plan in various marketing areas for the purpose of restraining competition. The evidence on this point illustrates the improper motives which actuated defendants, and the methods employed by them, in suppressing this and other competitive devices. 106 110

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178. The Four-Payment Plan was a fair and normal competitive device employed by refiners for the purpose of attracting customers. The restraints in regard thereto were undue and unreasonable. 104 181

2. Split Billing.

179. In many areas defendants concertedly eliminated and suppressed the practice of split billing, whereby a buyer was allowed a cash discount of 2% 14 days on part of each carload, in addition to the usual 2%, 7 days on the bulk of the carload. 110-113

180. Defendants concertedly employed coercive tactics to prevent the spread of the practice of split billing into various marketing areas. 111-113

181. Although the practice of split billing was originated by the California refiners to offset the disadvantage resulting from the difference between the 80,000 pound carload minimum prescribed by the railroad tariffs on shipments from the Pacific Coast and the 60,000 pound minimum from the Atlantic Coast and Gulf points, the practice was also applied as a competitive device to meet other forms of competition. For example, California & Hawaiian introduced the practice in Texas in February, 1928, to offset the advantage of other refiners in shipping mixed carloads of sugar and syrup; a year later California & Hawaiian resumed the practice in Texas in order to compete with refiners who carried consigned stocks in that State. On the [redacted]t occasion the Institute induced California & Hawaiian to withdraw split billing in Texas. On the second occasion the Institute specifically authorized its members to engage in split billing in the same territory where California & Hawaiian was engaged in the practice. 110-111,113

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182. Defendants concertedly suppressed split billing when some of the refiners wished to engage in the practice to meet competition in the middle western states where intrastate carload minima were lower than the 60,000 interstate minima. 112

183. There is a dangerous probability that concerted action among the defendants to suppress split billing will be resumed unless they are enjoined. The restraints thereupon were undue and unreasonable. 113 181

3. <u>The Cash Discount</u>.

184. Defendants agreed to restrict the cash discount to 2%, 7 days <u>after arrival</u> and to restrict the time during which refiners were permitted to grant the 2% discount, for the purpose of preventing competition among the refiners in respect to the discount. 113-114

185. Although the pre-Institute cash discount was 2%, 7 days, plus 3 days of grace, the Directors of the Institute agreed to recommend a 2%, 7 days discount without the 3 days grace. 114

186. Defendants concertedly attempted to confine the 2% cash discount to "14 days <u>after shipment</u>" on differential route deliveries (which resulted in harsher payment terms because of the slower differential shipments), for the purpose of discouraging shipments over differential routes and maintaining the all-rail freight application into Western markets. In order to equalize the opportunities of the New Orleans refiners (who were making differential shipments over the Mississippi River), pressure was brought by the Institute upon McCahan to quote 2%, 10 days after shipment. 115-116

187. In May, 1928, New Orleans refiners quoted 2%, 7 days after arrival on barge shipments. Thereupon McCahan threatened to 116-117

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break down the freight applications to the barge basis in order to meet this competition. McCahan did announce such a breakdown, but the Institute induced McCahan to withdraw its announcement of lower freight rates, and thereby suppressed the actual lowering thereof.

188. Defendants engaged in various concerted activities with respect to uniform terms which were for the purpose and with the effect of equalizing their competitive opportunities and suppressing competition among themselves, rather than for the purpose of devising uniform definitions. 117

189. There is a very substantial danger that unless enjoined the defendants may again engage in concertedly fixing uniform and noncompetitive terms of sale. Such restraints as herein described are undue and unreasonable. 118 181

(e) Restraints on the Price Guarantee.

190. Defendants concertedly restricted the use of price guarantee contracts, whereby refiners guaranteed the contract price against decline between the date of entering the contract and the date of delivery. Said restriction covered the period, routes of shipment and territories over which prices might be guaranteed against decline. Defendants concertedly refrained from entering into such guarantee contracts with their customers. 118-121 121

191. All of the defendants, except California & Hawaiian, concertedly withdrew the guarantee early in 1928; and in May, 1928, they concertedly attempted to induce California & Hawaiian, then a nonmember, to withdraw the guarantee on its rail shipments into western and middle western states. The guarantee contract was 118-119

particularly valuable to California & Hawaiian (with its refinery located near San Francisco) because it served to equalize the competitive advantage enjoyed by other refiners in the shorter transit periods from eastern and southern refineries. California & Hawaiian continued to apply the guarantee; thereupon other refiners reinstated the guarantee, but concertedly restricted the guarantee to rail shipments into territory where California & Hawaiian applied the guarantee.

192. Defendants concertedly refused to make guarantee shipments over cheaper differential routes, including the C.A.T. Line rail and water route from New York to Great Lakes points. As a result thereof shipments over the C.A.T. Line declined substantially. 120 121

193. The defendants' purpose was to suppress competition among the refiners resulting from the price guarantee, and not to prevent discriminations among customers or geographical discriminations. The effect was an undue and unreasonable restraint of trade. 181

(f) Restraints on Containers and Used Bags.

194. Defendants concertedly discontinued and prohibited the competitive practices of making allowances to customers for returning used bags or for using customers' own bags. Defendants, through the Institute, concertedly discouraged the sale of sugar in bulk and tank cars, and agreed to submit all "new and unusual methods of sale of sugar" to the Executive Secretary for the purpose of suppressing such methods. In pursuance of this agreement, refiners reported proposals for new sales methods to the Institute. In refraining from such competitive devices, defendants deliberately disregarded the public's interest in the development of more economical methods in the distribution of sugar. 121-122 146 122 123

195. Defendants endeavored to obtain the assurance of the Domestic Sugar Bureau and the beet sugar manufacturers that they would refrain from making allowances on used bags and from permitting customers to use their own bags. 124

196. Without material expense to the refiner, the customer could save 5¢ to 10¢ per bag if he were permitted to use his own bags for the packing of sugar purchased by him. As a result of defendants' concerted action, customers have been denied repeatedly allowances on the return of the used bags and the privilege of using their own bags. For example, prior to the Institute, the National Biscuit Company, one of the largest users of sugar, made substantial savings, amounting to about 8¢ per bag, by an arrangement with Pennsylvania whereby the latter made an allowance on used bags. Such savings were prevented as the result of the defendants' concerted action. Ordinary sugar bags cost about 15¢ each. The secondhand price obtainable is a very small portion thereof. 123 R. 476-478

197. The refiners could readily have engaged in the practice of making allowances on returned used bags or customers' bags without discriminating between their customers. For example, the refiners could have engaged in the practice as to special classes of customers whose business methods were such that they could use the privilege without inconvenience to the refiner. The practice was concertedly suppressed in its experimental stages, without regard for the interests of purchasers and the public, or for the probable economies in sugar distribution. 125-126

198. Difference in the treatment of customers based upon their different business methods does not involve unfair discrimination. 125-126

199. Defendants' purpose was to suppress competition in the practice of making allowances on used bags or customers' bags, under the guise of preventing discriminations among customers; their true purpose was not to prevent such discriminations. 126 181

200. Defendants' activities in this regard are undue and unreasonable restraints of trade.

(g) Restraints on Private Brands.

201. Defendants concertedly and by agreement have elimi- 127-128
nated packing and sale of sugar under the private brands of 181
their customers and have concertedly refused to make such sales.

202. It does not appear that defendants could not have 128-129
supplied private brands to all customers desiring them. Private
brands are not deceptive. It does not appear that packing pri-
vate brands was impracticable or involved substantial additional
expense to the refiners or that the refiners could not have
made appropriate service charges therefor. Packing under pri-
vate brands is clearly a legitimate competitive device and the
substantial restraints thereupon being for the purpose and with
the effect of suppressing competition, are undue and unreason- 181
able.

(h) Restraints on Second-Hand Sugar or Resales.

203. Defendants concertedly suppressed legitimate as well 130
as fictitious resales of "second-hand" sugar (the sale of cus- 131
tomer's excess sugar usually before he has withdrawn his sugar 134
under his contract). 181

204. Resales enabled customers to dispose of excess sugar 129
without paying the cost of brokerage, and also enabled them to
speculate on a price advance by ordering more than their needs
and selling the surplus in the event of an advance or cancelling
the contract in the event of a decline. In many instances the
resale privilege had been used to effect a price concession.

205. For the purpose of suppressing resales of "second- 130-131
hand" sugar in general defendants concertedly adopted code
rules: (a) requiring defendants to invoice the original buyer
in all resales of second-hand sugar; (b) forbidding resales
of unwithdrawn sugar after the due date of contract; (c) pro-

hibiting customers from changing the destination of sugar after 131-133
the due date of the contract where shipment had been delayed by the inability of the refiner to make prompt shipment; (d) requiring the buyer to elect and specify at the time of entry of an order the price and/or terms in cases where the refiner had more than one price or different terms in the same or different territories; (e) prohibiting refiners from reselling sugar under a guarantee contract in non-guarantee territory and requiring the buyer to elect definitely at the time of entering the contract between the guarantee form, where such was available, and the non-guarantee form, and allowing no subsequent switching by resale or otherwise; and (f) requiring that brokers make certain forfeitures to the refiners in the event that they charged brokerage commission in resales at a rate lower than their ordinary commission. These restraints went beyond any requirement of open prices and terms.

206 — 207. Resales in territories where the refiners' prices or terms were different from those prevailing at point of original destination involves no improper discrimination, and no discrimination not inherent in the refiners' own diverse prices and terms in different territories.

(i) Restraints on Sales of Damaged Sugars and Frozen Stocks.

208. By agreement and concerted action defendants re- 135
stricted and controlled the sales of damaged sugars and stocks 146
which were frozen in localities where ready sales at the pre- 181
vailing prices were not practicable.

209. The Institute imposed such restrictions and control 137-139
over numerous sales of damaged sugars and frozen stocks for the purpose of preventing disturbances ~~in~~ and preserving the price structure at the place of sale.

210. Defendants concertedly adopted a code provision 135

requiring the refiners to give prior notice of the location and amount of damaged sugar, its condition, and the reasons for selling it below refiner's openly-announced price, before contracting to sell damaged sugar at price concessions.

211. Defendants agreed to give prior notice to the Institute's Executive Secretary before selling frozen stocks at price concessions, and to limit such sales to instances where the refiner was clearing out consignments not to be replaced. 135-137

212. Refiners frequently gave prior notice to the Institute and obtained the Institute's permission to sell damaged sugar and frozen stocks. 137-138

213. The purpose of requiring such prior notice was to enable interference with such sales and to prevent market disturbances and price competition through such sales, rather than to enable the Institute to answer complaints of arbitrary price concessions by the refiners. 139-140

214. Defendants agreed not to sell damaged sugar or frozen stocks except on spot transactions. 140

215. The sales could not properly be controlled or restricted under the guise of preventing unfair discrimination, because such control or restriction was unnecessary for that purpose. 139-140

X. Alleged Agreement on Basis Prices and General Effect of Institute on Price Levels.

216. The various concerted activities of the defendants, referred to in the previous findings, had the direct and substantial effect of maintaining abnormally high prices for refined sugar, preventing and retarding normal price declines in refined sugar, and increasing the refiners' margins (the difference between cost of raw sugar to the refiner and price at which they sell the refined sugar), and their profits. 146-147(a) 162 145

217. From a physical and chemical point of view, the product of the defendants is standardized. Substantial uniformity in price is normal. There were certain exceptional cases and occasionally certain localities in which particular brands enjoyed such a preference as to command a higher price in sales from dealers to the trade. However, in sales by refiners to manufacturers, price, not brand, is always the vital consideration, and ordinarily one refiner could not, by virtue of preference for his brand, obtain a higher price than another. While unknown or unpopular brands face resistance in entering new territory, it was generally true that even a small price concession would enable the new entrant to sell his sugar. The preferences which prevailed in various localities for particular brands of sugar were not such as to provide a substantial foundation for charging substantially different prices for the different brands of refined cane sugar. 142-143

218. Price variations in different trade areas have been less marked since the Institute, but the elimination of such territorial differences in basis price is not due to direct agreement. 143

219. The relation of refined to raw changes was successively from 1924 to 1930, 41.74%, 37.37%, 49.41%, 38.29%, 28.71%, 144

23.08%, and 20%. As cost of raw is the most important factor in the price of refined, the reasonable inference from these 145
figures is that the post-Institute price of refined has been artificially maintained.

220. Since the Institute, refined sugar prices have not 144
responded as closely as before to the declining cost of raw sugar. Notwithstanding the fact that the cost of raws constitutes about 80% of refined cost, buyers were no longer able to anticipate changes in the refined market from raw market trends, because refined price changes have not responded as closely as before to changes in raw. Defendants' explanation is (1) that the price of raw has declined so greatly in recent years that fluctuations therein are too small to translate themselves into immediate changes in the price of refined, (2) that this impression of the unresponsiveness of refined prices to raws is due to the fact that because of the allowance of a definite period of grace on each price move for purchases at the old price, these purchasers no longer needed to watch the raw market as closely as before. The explanations do not remove the suspicion of price fixing. The post-Institute decrease in the percentage of refined to raw price changes, despite a pre-Institute tendency in this direction, is too marked to be explained by the drop in raw prices; thus, in 1925, 1926 and 1927, when the average price of raws per pound, according to defendants' figures, was 4.431, 4.263, and 4.778 cents respectively, the relation of refined to raw price changes was 37.37%, 49.41% and 38.29%; in 1928, when the average cost of raws was 4.278, it was 28.71%. The witnesses who testified to
the lack of sensitivity in refined prices to raw were expert 145
sugar buyers who, regardless of whether they could be certain of a definite period of grace on each move, naturally studied market conditions carefully in order to determine the opportune

time for buying.

221. The increase in refiner's margin and profits since the Institute tends to show that defendants have concertedly suppressed and restrained competition. The post- compared with the pre-Institute period shows a marked increase in margin and a substantial increase in profits despite a concededly large excess capacity. This would naturally follow maintenance of refined price with concurrent raw declines and the evidence shows that prices for refined as compared with raws have been maintained at levels which tend to negate the prevalence of free competition, and to support the inference of concerted action with the effect, normally in these circumstances to be anticipated, of the rise in margins and profits. 145

222. The agreement with the Edgar concern to maintain the prices of the Institute refiners is significant of the purposes of the Institute.

223. Relatively higher post-Institute price levels were caused in part by: 146-147

(a) The collection and dissemination among the refiners of statistical information, which tends at least to stabilize conditions in the industry; and the withholding of such statistics in large part from the purchasing trade, which aids the individual sellers in their effort to maintain high prices.

(b) The steps taken by the defendants to maintain the uniformity of price structure, that is, not uniformity in the basis prices at any given time but in the prices and contract terms at which the several participants in the distribution process obtain their sugar. The uniformity of price structure was maintained by specific restraints on numerous competitive practices. Thus they restrained long term contracts; if these were made at a fixed concession, as the Revere-Edgar contract was, the purchasing distributor would get his sugar at a lower price than his competitor who could not or did not avail himself of such a contract; a similar advantage could be created through quantity discounts, tolling contracts, combination of distribution functions, use of cheap differential route transportation, purchase of damaged or frozen stock sugar and the like. By imposing substantial restraints thereupon, defendants sought to eliminate the possibilities of price variations to distributors or ultimate purchasers at any given time with the opportunity by underselling to disturb the price structure; refiners were thereby relieved, too, of the pressure to reduce prices that would otherwise have been exerted upon them by those who could not or did not get the lower prices or better terms, as has been indicated in the detailed discussion of these restraints. Such relief, too, would tend to aid the individual refiners in maintaining a higher price level.

(c) The stabilizing effects of the friendly cooperative spirit which the Institute brought to the industry.

(d) The assurance which the open price system under the Institute gave to each refiner that the only prices and terms he needed to meet were those openly announced in advance of sales by his competitors. Prior to the Institute, the refiners were able to keep only roughly informed of one another's prices because of the widespread but carefully concealed concessions. Price declines in those days might sometimes have resulted merely from an unfounded belief that other refiners had made secret cuts. Since the Institute, on the other hand, the opposite tendency has prevailed. Each refiner is encouraged to maintain or raise prices by the assurance that until public notice is given his competitors will not lower their announced prices; and even if they believed that market conditions warranted a decline, the tendency would be to defer it until "the traffic would no longer bear" the then prevailing price. The letter of C. & H.'s president to the Institute (written in June 1929) is illustrative. While C. & H. did there lower the price, it charged that the eastern refiners were attempting "to get the trade to load up on a very weak raw market....which the trade has resentfully protested against times innumerable." 147

These factors are largely responsible for the stability of prices and the maintenance of price levels, regardless of supply and demand, observable since the Institute. 147

224. There is no substantial direct evidence that defendants by agreement fixed or maintained basis prices in the sense of agreeing from time to time to maintain, lower, or raise the current basis price. Any such agreement, express or implied, was strenuously denied. The fact that from time to time, one refiner would maintain or lower the price after another's advance thereby causing the latter to be withdrawn, tends to confirm this testimony. 147(a)

Indeed, a direct basis price agreement was not vital to defendants' purpose; in part at least they were able to maintain prices through preserving the price structure, withholding statistics from the trade and effectuating the open price scheme. In the light of the entire evidence, while defendants' common purpose was concertedly to maintain relatively high price levels, no agreement to fix basis prices directly, may be reasonably inferred.

XI. Miscellaneous Activities

(a). Fines and Trials.

225. The Institute devised a system of trials and substantial fines to be imposed upon their members and others for violations of the Institute's policies and rules. While most of the defendants voted in favor of the system of fines and trials, and a number of them notified their distributors and purchasers that the system was to be enforced, and never withdrew such announcements, two of the defendants never expressed approval of the system and it was never placed into operation to the extent of imposing a fine or penalty. The attempt in that regard was abortive and of no substantial importance. 148-149

226. On a number of occasions the Institute investigated detailed activities of its members. The Institute's investigators inspected the private books and records of the members and of certain brokers and other distributors. Trials of two of the members before the Executive Committee, somewhat formal in nature, were held. One of these, involving the conduct of National, was pending at the time the petition was filed in this action, at which time National was in the process of taking an appeal from the decision of the Executive Committee to the Board of Directors. 149 Exs 21-26 pp 590-591, 598 Ex. 438 Ex. 27 page 62

227. In the Fall of 1930 steps were taken to devise a plan for penalizing members 10¢ per undelivered bag for failure to compel buyers to take delivery within the contract period. The plan was not consummated. 149

228. The activities of the defendants in examining the books and records of the various members and of brokers and others in connection with suspected code violations, and the more or less formal trials of refiners, insofar as these were 149

in aid of defendants' other illegal activities were for the purpose of suppressing competition and undue and unreasonable restraint of trade.

(b) Allocation of Production and Territory.

229. While the matter may have received momentary consideration, there is no substantial evidence that there was 149-152 any general allocation of production or of territory. In a number of instances where territorial restrictions were concertedly effectuated, these may have caused particular refiners to withdraw from certain territories or to suffer disadvantages in those particular territories, but the alleged restraints in this regard were merely incidental to defendants' other wrongful activities and will probably end with their cessation. They need not be considered separately and no relief is necessary as to these separate charges.

(c) Blacklisting of Customers.

230. The evidence does not adequately support charge that 154 customers were blacklisted for breach of credit terms or other contract provisions. Names of customers in default were circulated but no general understanding was arrived at to refuse to deal with such customers.

(d) Raw Sugar Polarization Allowances.

231. The sucrose content of raw sugar expressed in terms 155-157 of sugar degrees is determined by polariscopic tests. Raw sugar is bought and sold on a 96° basis, that is, the specified contract price is for 96° raw sugar (containing 96% pure sucrose). If the polariscopic test made after delivery of the sugar to the refiner is higher than the 96°, the refiner pays the producer an allowance over the basic price because of the additional sucrose content. If the sugar tests below 96°, the refiner is

are essential to convenient negotiation. A scale of allowances above 96° and deductions below 96° is appropriate for proper trading purposes and adjustment of accounts.

232. Defendants by agreement and concert of action and in cooperation with raw sugar producers in 1928 devised a scientific and entirely fair and improved scale of polarization allowances and deductions. Agreements in this respect were customary and practically necessary, and were not undue or unreasonable restraints of trade. 156-157

XII. General Conspiracy and Continuance Thereof.

233. All of the concerted activities and restraints referred to in the above findings, except as otherwise limited, constitute parts of a general scheme, combination, agreement and conspiracy to suppress competition, maintain relatively high prices of refined sugar, increase the refiner's margin and profits at the cost of distributors and the consumers, and unreasonably restrain trade and commerce among the several states and in the District of Columbia.

234. All of the concerted activities and restraints referred to in all of the above findings have continued at least up through the end of the trial of this case unless otherwise limited in the specific findings. Defendants make no substantial claim and there is no evidence of abandonment of the activities in general referred to in the above findings.

235. The terms trade or commerce in these findings, unless otherwise stated, refer to interstate trade and commerce in refined sugar. The terms competition, concerted action, and restraints refer respectively to competition, concerted action and restraints in such trade and commerce.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Court reaches the following conclusions of law:

A. In the manner described in the foregoing Findings defendants have engaged in a combination and conspiracy for the purpose and with the effect of suppressing competition, substantially, unreasonably, and unjustifiably restraining and exercising monopolistic control over trade and commerce in sugar, among the several states and in the District of Columbia, in violation of the Act of July 2, 1890, commonly known as the Sherman Anti-Trust Act.

B. Each of the following agreements and concerted activities on the part of defendants, as described in the foregoing Findings, substantially, unreasonably, and unjustifiably restrains said trade and commerce in violation of said Act:

1. The general agreement not to discriminate;
2. The system of reporting and relaying current and future prices, terms, and freight applications;
3. The obligation to adhere to openly announced prices, terms, freight applications, and competitive practices;
4. The obligation to give prior notice of changes in prices, terms, freight applications, and competitive practices;
5. Requiring open announcement of prices, terms, freight applications, and competitive practices;
6. Institute policing of the various prices, terms, freight applications, and competitive practices;

7. The original restraints upon all re-pricing of contracts, and the subsequent restraints upon re-pricing of contracts prior to the day of announcement of a price decline;

8. The gathering and dissemination of statistical information regarding melt, deliveries, stocks on hand, undelivered contract balances, capacities, stocks on consignment, stocks in transit, and the volume of sugar moved by differential routes, and the withholding from the purchasing trade of essential statistical information thus gathered;

9. Requiring or persuading non-members and third parties generally to abide by the Institute's rules, agreements or policies;

10. Concerted action by defendants to meet, suppress, or restrain competitive practices by particular refiners and distributors;

11. The boycott of brokers, warehousemen, jobbers, and transportation companies, and threats thereof;

12. Requiring the various distributors to elect particular functions to the exclusion of others;

13. Requiring the various distributors to cease certain lines of business;

14. The system of exacting pledges and uniform contracts from brokers and obligating them to support the Institute's program, and refusing to deal with brokers who did not comply;

15. The system of exacting uniform non-rebating agreements from warehousemen and subjecting them to

forfeitures, and refusing to deal with warehousemen who did not comply;

16. Maintaining and circulating lists of warehouses, brokers, and trucking concerns employed or to be employed by refiners;

17. Imposing penalties and forfeitures on brokers and other agents of refiners;

18. Fixing brokerage commissions;

19. The agreements on transportation charges and freight applications, including Code 3 (c), and activities supplementary thereto;

20. The system of delivered prices;

21. Refusing to sell f.o.b. refinery;

22. Adopting and maintaining freight applications;

23. Unfairly discriminating between customers and localities in amounts of freight applications;

24. Maintaining and disseminating the "freight book" and a digest of freight applications and selling terms prevailing among the several refiners in different territories, and the information service relating thereto;

25. Restraining transiting and diversions;

26. Inducing water carriers to agree not to carry sugar except on openly announced rates and terms without deviation therefrom, and threatening not to deal with water carriers which did not comply;

27. Restraining private charters;

28. Refusing to participate with customers in pool-car and pool-cargo shipments;

29. Requiring trucking concerns to execute non-rebating contracts, and refusing to deal with trucking concerns affiliated with any buyer, broker or warehouseman, or any trucking concern that did not execute the non-rebating contract;

30. Fixing and restraining absorption of switching charges on deliveries from consigned stocks to buyers' warehouse or broker;

31. Imposing extra charges for services rendered by refiners;

32. Restraining refiners from performing such services as drop shipments, truck deliveries and store door deliveries;

33. Eliminating consignment points, reconsignment points, and storage at ports of entry;

34. Limiting shipments to consignment warehouses;

35. Discriminating between customers and localities by elimination of particular consignment points and maintenance of other consignment points;

36. Imposing a service charge on less than carload deliveries;

37. Restraining and preventing long term contracts;

38. Requiring submission of contracts or information to Institute before entering into contracts or sales;

40. The activities in determining whether and to what extent to relax contract terms;

41. Prohibiting quantity discounts and other discounts;

42. Restraining and preventing tolling contracts;

43. Fixing uniform terms, and preventing special terms, discounts and conditions;

44. Restraining the four-payment plan;

45. Restraining split billing;

46. Fixing and limiting cash discounts;

47. Restraining price guarantees;

48. Prohibiting and restraining allowances on containers and used bags or customers' bags;

49. Restraining packing of private brands;

50. Restraining resales of second-hand sugar;

51. Restraining, regulating and controlling sales of damaged sugar and frozen stocks;

52. The Edgar price fixing agreement;

53. Requiring buyers to elect between the guarantee form and the non-guarantee form of contract at the time of entering the contract, and denying buyers the privilege of changing from one form of contract or from one destination to another by resale or otherwise;

54. Restricting territories over which particular prices, rates and terms should apply;

55. Maintaining artificially high prices of refined sugar, preserving a uniform and non-competitive price structure and preventing and retarding price declines in refined sugar;

56. The Institute's investigations of suspected code violations, its examination of refiners' files and records, and its trials of refiners and their agents charged with code violations, to the extent

that such practices are in aid of other activities and agreements herein found to be illegal.

C. Neither the combination and conspiracy declared illegal in Conclusion A, nor any of the agreements or concerted activities declared illegal in Conclusion B hereinabove, were legally justified by defendants' professed objective of eliminating fraud, misrepresentation, waste, discriminations or secret concessions, or by the special relationship between refiners and those affected by the agreements or concerted activities, or by other facts established in the case.

D. The system of boycotting brokers, warehousemen and jobbers, the system of delivered prices and of refusal to sell f.o.b. refinery, the concerted refusal to engage in tolling, grant long term contracts, and pack private brands of sugar, and the general plan for the maintenance of a relatively high, uniform and non-competitive price structure, as set forth in the above Findings of Fact, constitute monopolistic control, attempts to monopolize and combinations and conspiracies to monopolize trade and commerce among the several states and in the District of Columbia, in violation of said Act.

E. Defendants' concerted activities resulting in the adoption of a master transit tariff, and defendants' agreement upon an improved scale of raw sugar polarization allowances, were fair, reasonable, and justified by the circumstances described in the Findings, and should not be restrained. As the Institute fulfills and may continue to fulfill some lawful purposes, it need not be dissolved.

F. There is a dangerous and immediate probability that each of the defendants, except W. W. Harper and Edgar H. Stone, will continue to engage in the activities herein declared illegal, and each of said defendants should be restrained from further engaging in such activities or similar activities.

_________________, 1934.

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United States Circuit Judge.

Equity No. 59-103

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Petitioner,

vs.

THE SUGAR INSTITUTE, INC., ET AL.,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW