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No. 268

In the Supreme Court of the United States

October Term, 1935

The Sugar Institute, Inc., et al., Appellants

v.

The United States of America

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

INDEX

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OPINION BELOW

The opinion of the United States District Court for the Southern District of New York (R. 86–260) is not reported.

JURISDICTION

The decree of the District Court was entered on October 9, 1934. (R. 319–326.) Petition for appeal was filed December 7, 1934, and was allowed the same day. (R. 326–327, 358–359.)

Jurisdiction of this Court is conferred by Section 2 of the Act of February 11, 1903, c. 544, 32

Stat. 823 (U. S. C., Title 15, Sec. 29), and by Section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C., Title 28, Sec. 345).

QUESTIONS PRESENTED

This case involves the legality under the Sherman Act of the diversified activities of a trade association, the members of which refine imported raw sugar and together produce from 70% to 80% of all the refined sugar sold in the United States.

One question presented is whether the agreement by the members of this association to sell only at prices and terms openly announced and interchanged with each other in advance of sale, and to adhere to such prices and terms until advance notice of a change therein has been publicly given, is unlawful either (a) in and of itself because of its necessary effect unduly to restrain competition, or (b) because the association and its members employed this agreement, together with many other related restraints, unduly to suppress competition, and with the purpose and effect of maintaining a uniform price structure, relatively high prices for their product, and increased profits.

Other questions presented relate to the legality of various agreements in restraint of trade, some of which appellants deny having made, but most of which they admit and seek to justify. The restraints involved may be classified as follows:

Restraints on brokers and warehousemen, principally the boycotting of brokers and warehousemen engaging in more than one distributive function.

Transportation restraints, particularly the agreement to sell only at delivered prices.

Concerted reduction of the number of consignment points, *i. e.*, interior points where stocks of sugar are maintained by the refiners for the benefit of the local trade.

Concerted prohibition of long-term contracts and quantity discounts.

Concerted prohibition of tolling contracts, *i. e.*, contracts for the processing of raw sugar for the account of the customer.

Restraint upon price guarantees.

Concerted prohibition of used bag allowances and packing of private brands.

Restraints upon the sale of damaged sugar and so-called frozen stocks, and upon resales of sugar.

Collecting and disseminating among themselves statistical information withheld from the trade.

STATUTE INVOLVED

The Act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. C., Title 15, Secs. 1 and 4), known as the Sherman Antitrust Act, provides in part as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is

hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

* * * * *

SEC. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *

STATEMENT

GENERAL NATURE OF THE CASE AND OF THE ISSUES

This is a suit in equity under the Sherman Act involving the legality of the activities of a trade association (herein referred to as the Institnte) composed of the 15 companies which refine virtually all of the imported raw sugar processed in the United States. These companies will sometimes be referred to as members or refiners.[1] The trial

[1] Their names and the abbreviated titles by which they will be referred to are as follows:

The American Sugar Refining Company	American
Arbuckle Bros	Arbuckle
California & Hawaii Sugar Refining Corporation, Ltd	C & H

was extended, the testimony and documentary evidence introduced voluminous, the questions of fact and law presented numerous and varied, and the opinion and findings of the District Court unusually comprehensive. The importance of the case in the administration and interpretation of the Sherman Act is beyond question.

The main issue in the case, as appellants undertake to present it, is whether their agreement to sell only at prices and terms openly announced in advance of sale, supplemented by an agreement not to "discriminate" between customers, is justified as a means of preventing the secret concessions which previously had frequently been given. Implicit in this attempted justification of the restraint is the premise that such concessions could be eliminated only by this kind of an open price agreement. The Government takes issue with this premise; it contends that full publicity of all closed transactions would effectively put an end to secret concessions.

Colonial Sugar Co	Colonial
Godchaux Sugars, Inc	Godchaux
William Henderson	Henderson
Imperial Sugar Co	Imperial
W. J. McCahan Sugar Refining & Molasses Co	McCahan
The National Sugar Refining Co	National
Pennsylvania Sugar Co	Pennsylvania
Revere Sugar Refinery Corporation	Revere
Savannah Sugar Refining Corporation	Savannah
Spreckels Sugar Corporation	Spreckels
Texas Sugar Refining Corporation	Texas
Western Sugar Refinery	Western

The Spreckels Sugar Corporation was organized in January 1929 as a successor to Federal Sugar Refining Co., referred to herein as Federal. (R. 1147.)

It also contends that the agreement to maintain current and future prices cannot be viewed separately and apart from the other restraints which have been established or are admitted; that the various restraints which were imposed are closely linked with one another, because part of a common purpose to establish for their own pecuniary benefit a system of marketing sugar which severely restricted and very largely suppressed competition among the refiners.

Appellants relate all of their agreements, however diverse in themselves, to a few basic principles embodied in the Institute's Code of Ethics (herein referred to as the Code), such as open announcement of future prices and terms, nondiscrimination, and elimination of alleged uneconomic practices. The major issue in this case, as viewed by the Government, is whether these principles, *as they were actually applied and enforced,* went beyond measures reasonably necessary and appropriate to achieve these professed aims and had the effect of seriously curtailing legitimate and fair competition. To illustrate, in the case of the agreement not to discriminate, the primary issue is not whether the restraint involved in an agreement not to allow one customer any advantage over another is, as an abstract proposition, a reasonable restraint of trade permitted by the Sherman Act. The important question is whether the various restraints adopted by this particular trade association and its members, under the guise of abolishing customer discrimination, had the effect and were intended to have the effect, not merely of abolishing real discriminations, but of materially suppressing fair competition by enforcing absolute uniformity in prices and terms on the part of all sellers for all buyers, irrespective of the differing circumstances which might make for legitimate variation in prices or terms between individual buyers or classes of buyers.

It is the position of the Government that the agreement to adhere to prices and terms openly announced in advance of sale and the agreement not to discriminate, as these agreements were in fact applied to the sale of refined sugar (a fully standardized commodity), so suppressed and canalized competition as to reduce it to what appellants themselves describe (Br. pp. 72–76) as "mass bargaining." In short, the economic system envisaged and brought about by the Institute's rules and practices was one where every vestige of competition was eliminated other than that which may be said to exist when the entire body of producers (closely organized) are arrayed on one side against the entire body of unorganized buyers on the other, and the two groups exercise, in a manner not very clear, some kind of "mass" pressure against each other. As a consequence, prices and terms, when they move, always move uniformly.

The same kind of issue arises where appellants' defense is that their restraint was directed at the elimination of a wasteful or uneconomic practice, as in their undertaking to reduce by concerted action the number of consignment points. If appellants should succeed in establishing that it would not be unreasonable to impose by agreement *some* limitation upon the number of consignment points, the question then arising is whether the Institute members stayed within these limitations or whether they undertook to eliminate every possible consignment point, irrespective of its economic value, upon which the interested refiners could reach an agreement; and whether such agreements were reached by a process of trading, bargaining, and compromise in which the primary consideration of each party thereto was securing the greatest net advantage for itself.

Another type of defense interposed by appellants, in their attempted justification of their boycott of brokers and warehousemen, is that they were thereby acting in concert to prevent frauds upon themselves. Assuming that this restraint is open to the defense of reasonableness, it is necessary to determine whether less drastic means of protecting themselves against frauds were not entirely practicable, whether the boycott was enforced in a harsh and arbitrary manner, which suddenly disrupted business setups of long standing and those conducted in entire honesty and good faith, and whether the major purpose in imposing this type of restraint was maintenance of price uniformity.[1]

In this case the Court may decide, although it is not required to decide, that an agreement by substantially all the members of an industry to sell only at prices and terms openly announced in advance of sale and to refrain entirely from transactions which do not fit into this formula as the members of the industry interpret it, has such a dangerous tendency to curtail competition that it must, like a price-fixing agreement by those controlling a substantial part of an industry (*United States* v. *Trenton Potteries Co.,* 273 U. S. 392), be generally condemned as in violation of the Sherman Act. The facts of this case, by showing how far such power, once assumed, is likely to be pressed, indicate the dangers inherent in permitting the members of an industry to exercise by agreement this type of restraint and control. But a narrower decision, which is in general that of the District Court, is open. The decision may be limited to the holding that in the instant case the agreement to announce and maintain current and future prices and terms was in purpose and effect (Fgs. 36–38, R. 273–274) an agreement to maintain a uniform price structure, thereby eliminating and suppressing competition; to maintain relatively high prices for the sugar which the refiners produced; and to improve the financial position of

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[1] On all these points the District Court made findings adverse to appellants. (Fgs. 71, 76, 77, 79, 80; R. 282–284.)

the refiners as a group by limiting and suppressing numerous contract terms and conditions.

The District Court stated the matter as follows (Op., R. 240):

> It may be that in some circumstances an ideal system would be, as defendants contend that it is, one in which all sales are made on the basis of open public announcement definitely stating all prices and terms. But the facts of this industry demonstrate that the operation of this agreement for open announcements has been to aid both in maintaining price levels without regard to the normal effect of supply and demand and in eliminating ofttimes, entirely fair competition. Defendants' professed aims in adopting and enforcing the plan could moreover have been achieved by less drastic and less harmful means. Whatever may be its theoretical merits, it has been clearly proven in this case that defendants' concerted plan has here brought about an undue restraint of trade and for that reason is to be condemned.

THE EVIDENCE TO BE CONSIDERED

For the most part appellants' brief stresses the testimony of officials and employees of the refiners and of the Institute and certain exhibits of a statistical nature compiled by appellants for the purpose of this case. The Government places its chief reliance upon what may be termed first-hand or primary evidence of the restraints imposed, their effects, and the purposes actuating those engaged in the restraints, namely, contemporaneous correspondence and memoranda of the refiners, the Institute and others in the sugar industry, minutes of the meetings of the Institute's Board of Directors and Executive Committee, official Code Interpretations, etc. This type of evidence appellants' brief largely ignores.

The District Court tested the plausibility and trustworthiness of the oral testimony given by representatives of the refiners and of the Institute against this first-hand documentary evidence. Upon the broader and more general issues of fact, such as appellants' underlying purposes, the documentary evidence is necessarily fragmentary; it usually concerns the ramifications and details of some one of the Institute's manifold activities; and it is difficult to convey its full force and effect without dealing with it in burdensome detail. The District Court, having seen the evidence gradually unfold and having mastered its intricacies, was in an exceptional position to appraise its relevancy, significance, and cumulative effect.[1]

[1] Appellants charge (Br., pp. 9–10) that there is no evidence to support the District Court's finding (Fg. 36, R. 273) as to their dominant purposes. In one sense, substantially all the evidence referred to in the court's opinion or in this brief bears upon this finding. This is for the reason that appellants' purposes are manifested by their acts. These purposes will be disclosed as appellants' numerous, but related restraints are later developed. (*Infra*, pp. 25, 115–119, 129–130, 160–163, 168, 198, 201–202, 206–207, 213–217, 220–224, 276–281.) The District Court in its opinion likewise related its discussion of purposes to its discussion of the various restraints which were imposed. (*Infra*, pp. 15–16.)

THE "MENTAL ATTITUDE" OF THE TRIAL JUDGE

Appellants, recognizing the burden resting on them in attacking the District Court's findings of fact, have seen fit (Br., pp. 8–12), to draw into question the "mental attitude" of the trial judge. They concede that no judge could have been "consciously" fairer to both parties. But they charge that the District Court's decision upon many of the important issues of fact was based, not upon the evidence, but upon its "preconceived economic views"; its "completely inflexible and reactionary interpretation" of the antitrust laws; and its "apparently complete distrust of business men and their motives", as a result of which certain of its factual findings were "mere projections of the Court's suspicions of the general motives of business men."

Although Circuit Judge Mack who tried the case is not on trial on this appeal, the Government would feel derelict if it passed over in silence the charge that the District Court's appraisal of the evidence was distorted by subconscious bias or prejudice.

One would expect to find in the District Court's discussion of the legal issues some reflection of its alleged doctrinaire and "reactionary" interpretation of the antitrust laws. What, in fact, was the court's approach? At the outset of its discussion of the law, it said that the antitrust laws "allow competitors a broad field for concerted action" in eliminating frauds and "destructive" practices;

that widespread dissemination of trade statistics "is to be encouraged in aid of sound competition"; and that "in any event a restraint of trade is not illegal unless undue or unreasonable." (Op., R. 235–236.) The test which it proceeded to apply was in full accord with the tenor of the most recent applicable decision by this Court, *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, decided about a year earlier. The court below said (Op., R. 236):

> In this case, it must be determined whether any or all of the restraints of trade went only so far as was necessary to avert unsound and illegal practices or whether the measures adopted went in whole or in part, beyond what was essential or proper for this purpose and in their application, seriously affected sound competition.

The District Court's discussion of the legal aspects of appellants' boycotting activity indicates the entire absence of any disposition to expand the inhibitions of the Sherman Act. The decisions of this Court might reasonably be interpreted as holding that exercise of dominion or control by one group in an industry over another, through the instrumentality of a boycott, constitutes an undue restraint of trade, not open to the justification that the purpose of the parties to the boycott was protection of a common interest.[1] But the District

[1] *Loewe* v. *Lawlor*, 208 U. S. 274; *Eastern States Retail Lumber Dealers Assn.* v. *United States*, 234 U. S. 600; *Binderup* v. *Pathe Exchange*, 263 U. S. 291; *Anderson* v. *Ship-Owners Association*, 272 U. S. 359; *Paramount Famous*

Court, relying principally upon *United States* v. *American Live Stock Co.,* 279 U. S. 435, took a narrower view and one certainly not required by the case cited,[1] that such a boycott was open to the defense of reasonable justification. (Op., R. 245–246.)

The charge that the District Court was influenced more by distrust of business men and their motives than by the evidence is somewhat extraordinary, to say the least, in view of the carefully documented character of the opinion, containing repeated references to the specific evidence on which the court's conclusions were rested.

Certainly no court could have been in a better *position* to appraise the true weight and effect of the evidence. Over 1,650 pages of printed briefs were filed in advance of oral argument; the case was argued during five days in January 1933 and one day in October 1933; the opinion was rendered in March 1934; and the findings of fact, conclusions of law, and decree were entered seven months later and after two more days of oral argument. (R. 263–264, 318.) Probably no opinion ever filed in an antitrust case so fully reviews the facts and practices in the industry relevant to the restraints

Lasky Corporation v. *United States,* 282 U. S. 30; *United States* v. *First National Pictures, Inc.,* 282 U. S. 44.

[1] The case merely held that the Secretary of Agriculture had authority under the Packers and Stockyards Act to require those operating on a live-stock exchange to cease boycotting a corporation insofar as its purchases and sales on the exchange were within its corporate powers, but not insofar as these purchases and sales were *ultra vires.*

involved, or so carefully sets forth the respective contentions of the parties with respect to the evidence.

The findings of fact cover a wide field—both general facts as to the sugar industry and its conduct (representing an analysis and summary of the details of the applicable evidence) and facts of a definite and specific nature. It is a striking commentary upon the painstaking manner with which the court examined the evidence that appellants do not question the accuracy of findings of this character, except for their unfortunate (*infra*, pp. 21–23) attack upon the finding relating to the prior investigations of the Institute made by the Department of Justice.

Appellants state (Br., p. 10) that the District Court first found that the refiners had certain unlawful purposes and then viewed each specific activity in the light of this preliminary finding. The approach of the District Court was exactly the opposite. It measured the purposes which appellants asserted against their actual activities and from its consideration of the entire evidence arrived at a conclusion as to what these purposes were. As it said in its opinion, after summarizing the purposes upon which the defendants insisted (Op., R. 96):

> But it will be apparent from a discussion of the *actual activities* [1] of the Institute and of

[1] In this brief all italics used in quotations are, unless otherwise indicated, supplied.

its members, that these were by no means the dominant purposes.

That the finding as to refiners' dominant purposes was not the court's starting point, but was rather its final resting place, is further indicated by the fact that the opinion contains no equivalent finding as to general purposes. What the opinion does contain are the conclusions at which the court arrived, after study and consideration of the applicable evidence, concerning the purposes of the refiners in adopting or enforcing particular restraints. Finding 36 (R. 273) therefore represents the court's final synthesis of the effect of the entire evidence and of its conclusions based thereon.

The Government is not seeking to avoid a reexamination of the entire case by this Court. But it urges that the extended and conscientious labors of the District Court should not lightly be brushed aside on the mere charge by a disappointed litigant that many of the court's factual findings were the product, not of the evidence, but of suspicion and preconceived economic views. In *United Shoe Machinery Co.* v. *United States,* 258 U. S. 451, 455, an antitrust case with a like voluminous record, this Court said that the District Court's findings "are entitled to the presumption of correctness which is given to conclusions of a chancellor reached upon consideration of conflicting evidence."

APPELLANTS' RELATIONS WITH THE DEPARTMENT OF JUSTICE

While appellants' relations with the Department of Justice (Br., pp. 3–4, 41–46) are not relevant to the issues presented by this appeal and while they have evidently been injected into the case to create a certain atmosphere of hostility to the Government, the latter wishes to point out to what extent appellants have misrepresented the facts or asked the Court to draw erroneous inferences therefrom.

Appellants, contrasting the bringing of this suit with the blessing said to have been given the Code by a former Attorney General, directly imply both inconsistency in the Department's administration of the antitrust laws and doubt, in view of this alleged prior "approval", as to the soundness of the District Court's decision. We propose to test appellants' direct and implied assertions against what actually transpired.

Appellants (Br., pp. 4, 43) twice describe the Code as "approved" by the Attorney General.[1] Colonel Donovan's first letter of January 5, 1928, states that, based upon the "representations" as to "purposes and objects" made to him by refiners' representatives, "we find no basis which would require the institution of proceedings by the Depart-

[1] The finding of the District Court cited in this connection (Br., p. 43) does not support the statement that the Attorney General approved the Code.

ment of Justice." (Ex. X–2.) A few days later, having noticed statements in the press that the Institute plans had been submitted to and "approved" by the Attorney General, he wrote appellants' counsel that any such statement was "erroneous", because the Department "has no authority to approve plans of this character." (Ex. J–3b.) Another letter two days later is to the same effect. (Ex. J–3c.) The Department's letter of January 26, 1928, written after considering the final organization papers, including the Code, states that so long as the purposes of the Institute, as understood by the Department,[1] are maintained and so long as the combination is not found to effect a restraint of interstate commerce, it does not believe that a situation is presented which "warrants the institution of proceedings * * * for violation of the anti-trust laws." (R. 81–82.)

While the documentary proof thus indubitably establishes that the Department never approved the Code, appellants may refer to the oral testimony of their general counsel concerning his conferences with Colonel Donovan as evidencing at least informal approval of the general principles embodied in the Code. Giving this testimony the widest possible application, that is, assuming the

[1] The letter states that the Department understands that the purposes of the Institute are "to stabilize the economic conditions affecting the sugar industry and to eliminate unfair practices in marketing refined sugar."

relevancy of such informal approval and the reliability of the generalized statements by counsel of his own impressions of Colonel Donovan's attitude, it does not support a charge of change of attitude by the Department or a difference between the Department's then interpretation of the law and the decision of the District Court.

Colonel Donovan's alleged informal approval necessarily rested on the Code itself (a document covering less than three pages of the present record, R. 260–263) and the *ex parte* oral statements made by the sponsors of the Code as to its meaning, purpose and application to the problems of the industry.[1] The real content and substance, and therefore the legality, of a Code setting forth certain principles in general language, as this one did, capable of an extended or a narrow application, cannot be judged in advance of the application of these principles, from a mere examination of the paper outline. Yet upon this basis appellants have the temerity to assert (Br., pp. 3–4) that they have been haled into court for having adopted and put into effect substantially the same Code as that which a former Attorney General "had approved and

[1] The minutes of the preorganization meetings of the Institute (Ex. V–2), which apparently were carefully edited (Ex. 434–E, R. 1851; *infra*, note, p. 213), are of the same character as the Code; and the Institute's certificate of incorporation and by-laws (R. 66–81) seem wholly irrelevant to the question of a showing of an agreement in illegal restraint of trade.

helped to frame" and that they "are now here to have this Court decide which Attorney General was right." If their point has merit, they should push it to its logical conclusion and ask this Court to disregard the record in this case and confine its consideration to the three-page Code.

Appellants also urge (Br., pp. 41, 45–46) that their relations with the Department of Justice show their good faith and refute the Court's finding as to their purposes. Assuming the relevancy of good faith, which is very different from purpose, the Government fails to see in the submission of the Code to the Department the slightest evidence of good faith. If the refiners did have undisclosed purposes and objectives, their position would obviously be improved by initially impressing upon the Department their own interpretation of the Code provisions and of the problems of the industry, as well as their good faith. And if suit to test the legality of their acts should later be instituted, this submission could be put forth, as it has been in this case, in proof of their own purity of purpose.

Much the same may be said concerning the offer of access to the Institute files. It is not at all unusual for those suspected of violating the antitrust laws to grant the Department access to their files and in some cases such access has been given after suit has been started. Parties thus investigated generally obtain an opportunity, which may be of material advantage, to explain their conduct.[1]

Appellants' statements (Br., pp. 44–45) concerning the Department's investigation of the Institnte after it was organized are directly and palpably misleading. They assert: Whitney, representing the Department, first visited the Institute in May 1928; he was given a key to the Institute offices and access to its files, records, and correspondence; he "worked there at his pleasure, including Saturdays and Sundays, when no members of the Institute staff were in attendance"; his examination was not completed until December and "his two comprehensive memoranda reviewing each section of the Code and discussing in detail" various questions arising thereunder show the "complete lack of foundation" for the District Court's finding that the Department did not conduct a comprehensive investigation of the restraints involved in this case until the end of 1930. They also assert (Br., p. 46) that literally hundreds of documents which the Government introduced in evidence were made

[1] In this case, for example, the Department sent the Institute portions of the second Whitney memorandum and suggested that it point out " any errors of fact or erroneous conclusions " (Ex. B–3). This report was circulated among members and discussed at several meetings of the Directors; a committee of three Directors was appointed to draw up a memorandum in reply; this memorandum was circulated among the members, approved by the Directors, and then sent to the Department. (Ex. F–3.)

available to and "actually examined by the Department years before the suit was brought."

Appellants' witness, the Vice-Secretary of the Institute, testifying concerning the Whitney examination, said (R. 1150):

> That examination was made in the early summer of 1928 and he was there probably 2 or 3 days. He came back twice afterwards, dropping in for short conferences.

This testimony alone disposes of appellants' careless charge that the court's finding completely lacks foundation in the evidence. Should appellants urge a conflict in the testimony of their own witnesses—since Cummings, the Institute's general counsel, testified more broadly, and also more loosely, as to the Whitney investigation (R. 612-613, 1183c)—the conflict is resolved by one of their exhibits, the Whitney memorandum on the Institute dated December 1, 1928. (Ex. C-3.) The first paragraph of this memorandum reads:

> A previous memorandum, dated June 14, 1928, based on the Sugar Institute office files, explains each section of its Code of Ethics in turn. *As these files have not been gone through since then,* the present memorandum discusses only certain selected topics.

In the face of oral and documentary proof to the contrary, appellants directly imply that one or both of the two Whitney memoranda were based on a thorough examination of the Institute files extending over the period from May to December,

1928. As has been shown, the second memorandum was not based on any examination of these files and, whatever examination was the basis of the first one, began about May 26 (R. 613) and ended before June 14, 1928.

Appellants describe these memoranda as reviewing each section of the Code and they give examples of specific questions discussed therein in detail. The first memorandum was not introduced in evidence and the record shows only that, as stated in the second, it "explains" each section of the Code. The second, while incidentally mentioning certain Code provisions, deals (on a statistical or theoretical basis) solely with prices, margins and profits, plus a very short theoretical discussion of quantity discounts. (Ex. C-3.)

OMISSIONS IN APPELLANTS' BRIEF

Appellants' brief omits all reference to a number of facts and topics which the Government regards as essential to an adequate understanding of the combination. Among these are the percentage of the sugar [1] business controlled by the Institute members (*infra*, pp. 26-27); the cooperation which the Institute sought and obtained from the producers of beet and "off-shore" sugar, as a result of which most of the agreements in restraint of trade effected by and through the Institute governed the conduct of approximately 99% of the

[1] As used in this brief, the word sugar means, unless otherwise indicated, refined sugar.

industry (*infra,* pp. 26, 44–53); the general nature of the Institute organization and of its directive agencies [1] (*infra,* pp. 29–35).

But there are other even more important omissions which in the Government's opinion result in failure to present to the Court a balanced picture of the combination. Appellants, having waived their assignments of error as to several important restraints which the District Court enjoined, do not discuss these restraints or the steps taken in adopting and enforcing them. These restraints and activities are not only frequently closely related to others which are still in issue, but the real significance of the latter and of the Institute's open price plan cannot be judged without reference to the fact that the refiners deemed it necessary to adopt a wide variety of restraints in order to render the so-called basic principles of their Code effective.

Another reason for dealing with restraints enjoined by the District Court but not now directly in issue is that the mere adoption of certain restraints has a bearing upon appellants' general purposes. After direct *price* competition had been severely curtailed by the Institute system,

[1] That the highest executives of the various member companies attended the monthly and weekly meetings of its Board of Directors and Executive Committee and that the Institute had a highly-paid administrative staff show the major role which the refiners themselves believed that the Institute was playing in control and regulation of the industry.

concerted efforts were made to curtail or suppress new forms of competition which developed in matters which had theretofore been stable, such as freight absorptions, credit terms, brokers' commissions, although this competition unquestionably did not violate the Institute's open price and non-discrimination principles.[1] These facts reenforce the other evidence tending to show that the refiners' main concern was with elimination of competition, rather than with the altruistic principles in the terms of which the restraints authorized by the Code were expressed.

In some instances the tactics adopted in carrying out particular restraints and the evidence relating thereto have a material bearing upon the general purposes of the combination. The District Court, in explaining its detailed discussion of evidence relating to concerted efforts to limit the extension of certain credit terms said (Op., R. 191):

> I have gone into this and some other matters more fully perhaps than their intrinsic importance justified because of the light cast by the documents on the motives that actuated defendants and the methods adopted by them.

Appellants have nowhere made a single, unified statement of the entire body of restraints found by the District Court. The Government will attempt such a statement (*infra*, pp. 36–44), in the belief

[1] Fgs. 82, 98, 104–106, 179, 181, R. 285, 288, 290–291, 306; Op., R. 195.

that a picture of the entire scope of the combination will aid in determining both its general character and the meaning and effect of its component parts.

APPELLANTS' DOMINANT POSITION IN THE INDUSTRY

About 99% of the sugar consumed in the United States comes from three sources. First and foremost is the sugar which the Institute members refine in this country from raw cane sugar imported from Cuba or insular possessions. Their production before the Institute was over 80% of total domestic consumption and has since then ranged between 71% and 78.5%. (Fg. 8, R. 267; Op., R. 88.) Next in importance is the sugar made from beets grown in this country, and, third, sugar refined in Cuba or insular possessions and then imported.[1] The following table gives for the 1927–1931 period the sources of the sugar used in the United States, in terms of percentages of the total[2] (Op., R. 88):

[1] This imported refined cane sugar will sometimes be referred to as off-shore sugar and the producers thereof as off-shore producers.

[2] To the extent that refiners' share of the total business decreased somewhat after the Institute while the share of off-shore producers increased, this appears to be largely due to the agreements in restraint of trade adopted by the Institute members, particularly the prohibition of long term contracts, not observed (R. 439) by all the off-shore producers. Thus Coca Cola, whose consumption of sugar in 1931 was equal to 2% of the entire amount of the sugar which

	1927	1928	1929	1930	1931
Refiners (members of the Institute)	82.5	76.0	78.5	76.2	71.0
Beet sugar producers	14.4	19.0	15.0	16.6	20.5
Off-shore producers	2.8	4.4	5.5	6.2	7.8
Refiners of domestic cane	.3	.6	1.0	1.0	.7
Total	100.0	100.0	100.0	100.0	100.0

The above percentages based on national consumption do not show the refiners' monopoly or near-monopoly control of certain markets. The statistics in evidence for the 1928–1931 period show that they monopolize the New England market and that they have furnished on the average over 96% of the sugar used in Delaware, Massachusetts, New Jersey, and West Virginia, and over 89% in such important consuming States as New York and Pennsylvania. (Ex. E–15.)

The principal centers of beet sugar production are the far west and middle west (including Michigan and northern Ohio) and these are the areas in which beet sugar is chiefly marketed. (Ex. 6, p. 18; Ex. E–15.) In Atlantic and Gulf Coast States, except Texas, it is a negligible competitive factor. (*Ib.*)

Off-shore sugar is sold in this country chiefly by four selling agencies, each representing a different

refiners sold in the United States (*infra*, p. 73), gave about 65% of its business to one of the refiners before the Institute and none thereafter; and on the other hand after the Institute gave 60% to 65% of its business to an off-shore producer who before that had received only about 3% of its business. (R. 437.)

off-shore interest. (Fg. 15, R. 268–269.) These selling agents, who are brokers, are H. H. Pike & Co., L. W. & P. Armstrong, Lamborn & Co., and Lowry & Co., and they will be referred to herein as Pike, Armstrong, Lamborn and Lowry. The major markets for off-shore sugar are the middle Atlantic and southern States. (Op., R. 90–91.)

Both beet sugar and off-shore sugar sell at a small differential under members' sugar. (Op., R. 90, 91.) The customary differential for beet sugar is 20¢, and for off-shore sugar 5¢ to 10¢, per hundred pounds. (*Ib.*)

While the relative standing of the refiners among themselves is not of great importance in this case, information as to this will aid in evaluating some of the evidence relating to the acts of individual refiners. The three largest concerns, American, National, and C & H, together do about 60% of the total business of all refiners and the three smallest, Henderson, Texas, and Imperial, together do about 5% of such business.[1] The remaining 35% is divided among the other nine refiners (in 1931, when Spreckels was not operating, among eight).

Since cost of transportation is an important element in the ultimate cost of sugar to purchasers (Fg. 87, R. 286), the location of the refineries of the individual members affected many of the mat-

[1] In 1931 American's share of total production was 27.12%; National's, 19.27%; C. & H.'s, 13.09%; and the shares obtained by Henderson, Texas and Imperial were, respectively, 1.49%, 1.60%, and 1.71%. (Ex. Y–14.)

ters with which the Institute concerned itself. The following shows the seaboard points at which these refineries are located.[1] (Fig. 2, R. 264–265):

Refinery location:	Company
Boston and vicinity	American, Revere.
New York and vicinity	American, Arbuckle, National (3 refineries), Spreckels.
Philadelphia	American, McCahan, Pennsylvania.
Baltimore	American.
Savannah	Savannah.
New Orleans and vicinity	American, Colonial, Godchaux, Henderson.
Texas Coast cities	Imperial, Texas.
San Francisco and vicinity	C & H, Western.

THE INSTITUTE

Officers of five eastern refiners, meeting in the summer of 1927, drew up plans for the organization of a trade association and later, after conferring with representatives of the Attorney General, invited the other refiners to meet with them. (Op., R. 96.) All accepted the invitation. (R. 608.) At the meetings which followed, held on five successive days in December, it was decided to form a trade association and a series of statements of trade practices to be incorporated in the new association's code of ethics were formulated and approved. (Ex. V–2.) The substance of the Code which the Institute adopted is directly drawn from the resolutions adopted at these December meetings, but before they emerged in the Code they went through a considerable metamorphosis in form, due to a

[1] It will be observed that American is the only member with refineries in more than one locality.

double process of converting specific statements of the obligations assumed into more general ones and dressing up these obligations in terms of discrimination and other so-called principles.

The members of the Institute, which is a membership corporation, are the refiners.[1] Its Board of Directors is composed of one representative of each member and in each case this representative has been the president or highest executive officer of his company.[2] Its Executive Committee is made up of members of the Board. (Op., R. 96.) The Board of Directors usually meets monthly and the Executive Committee weekly. (*Ib.*) Other important committees appointed from time to time include an Enforcement Committee (Ex. 21–26, p. 240), a Southern Committee (*ib.*, p. 296), a Com-

[1] At the first meeting of the Institute all the refiners except C & H were elected members (Ex. 21–26, p. 8), although Western did not accept membership until October 1928 (R. 882). C & H became a member October 10, 1929. (Ex. 21–26, p. 306.) For an explanation of its delay in joining the Institute, see *infra*, pp. 46–47. Spreckels, which had previously discontinued operations, resigned as a member as of December 6, 1930. (Ex. 21–26, p. 612.)

[2] At the preorganization meetings in December each refiner was represented by its president or highest executive officer (R. 1036). The Institute's first Board of Directors was drawn wholly from these representatives. (Compare R. 68–69 and Ex. 21–26, p. 5, with Ex. V–2.) For the membership of the Board in later years, see Ex. 21–26, pp. 184a, 362, 606.

W. L. Cummings, frequently referred to as the Institute's general counsel, who was a member of the firm of Sullivan & Cromwell, the Institute's general counsel (R. 585, 587), was also a member of the first Board.

mittee on Consignment Points and Storage Warehouses (*ib.*, p. 15), a Committee on Southern Consignment Points (*ib.*, p. 232), a Committee on Statistics (*ib.*, p. 7), and a Committee on Ethics (*ib.*, pp. 6–7).

In February 1928 Judge Sidney Ballou, at that time general counsel of C & H, was employed as Executive Secretary at an annual salary of $75,000, and upon his death in October 1929 his duties were assumed by the Vice-Secretary, Fred G. Taylor, whose annual salary is $25,000. (Fg. 34, R. 272–273.) Other staff and executive salaries paid by the Institute amount to about $60,000 yearly. (*Ib.*) The Institute's total expenses in 1930 (the only year for which they are shown) were $838,000. (*Ib.*) In that year about $641,000 was spent for "advertising and publicity" and about $30,000 for investigation; and on the average about $450,000 a year has been expended in advertising sugar. (Ex. 21–26, p. 609; Fg. 34, R. 273.) The expenses of the Institute are defrayed by levies on members in proportion to their production. (Fg. 34, R. 273.)

Only two changes in the Code[1] have been made since its adoption. (Footnotes, R. 262, 263; Fg. 32, R. 272.) The changes are minor only in the sense that they both relate to a particular extension of Institute activity and control; the restraints growing out of the changes are of considerable im-

[1] The Code appears in the record at two places (R. 59–61, 260–263) and it also is included in Exhibit 20.

portance and significance (*infra*, pp. 76–124). However, no inference of lack of change or growth can be drawn from the fact that only two changes were made in the Code; the principles which it set forth were so broad and general that they allowed ample room for growth and change. For example, there are 20 printed pages of official rulings [1] (counting only those in effect as of the latest printing of the Code Interpretations) based upon, or interpreting and applying, the following Code provision:

> All discriminations between customers should be abolished. To that end, sugar should be sold only upon open prices and terms publicly announced.

The actual growth and development of Institute activities may be traced in a somewhat formal way in the Code Interpretations; they may be traced more fully in the minutes of the meetings of the Board of Directors and Executive Committee (Ex. 21–26 [2]); they may be traced in greater detail and more realistically in the correspondence of the Institute and its members.

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[1] Ex. 20, Sec. I.

[2] Exhibits 21–26 are the minutes of the Directors and Executive Committee meetings. In effect they constitute a single exhibit and, for the purposes of the record on appeal, they have been mimeographed and bound together in two volumes with blue cover pages. 10 copies have been furnished the Court. The paging is consecutive and is indicated by the figures in the left-hand margins. Asterisks denote portions omitted as immaterial. Exhibit 27, the minutes of Enforcement Committee meetings, likewise has been mimeographed and has a blue cover page. 10 copies have been furnished the Court.

A full reading of the minutes of Directors and Executive Committee meetings (condensed and uncommunicative as they often are[1]) gives a far truer picture than any amount of oral testimony, of the subjects with which the refiners were really concerned and of their actual objectives. The opinion of the District Court reflects its study of these minutes. It said (Op., R. 97):

> Although the defendants have emphasized the reporting and statistical services of the Institute, the minutes and other records of the meetings of members, directors, executive committee and other committees, abundantly demonstrate that the Institute and its members were, to a very high degree occupied in their meetings with the various problems and practices relating to sales and distribution.

A brief description of the character, source and form of Code Interpretations also seems essential to an understanding of the case. These Interpretations, which the minutes and correspondence frequently refer to as rulings, are the more important rulings adopted by the refiners interpreting or amplifying the provisions of the Code. About three-fourths are drawn from resolutions adopted by the Board of Directors and nearly all the remainder

[1] A representative of the Institute's counsel, Sullivan & Cromwell, attended *every* meeting of the Board and of the Executive Committee. (Ex. 21–26.) At least beginning December 1928 all minutes were "submitted to counsel for approval before being circulated among the members." (*Ib.*, p. 170.)

from resolutions of the Executive Committee, a few of the earlier Interpretations being rulings of the Executive Secretary. (Ex. 20.[1]) The Interpretations originally were sent to members in mimeographed form, but later a cumulative loose-leaf system was adopted and new issues were printed from time to time to give effect to changes or additions. (R. 636.)

The General Rules of Procedure of the Executive Committee and of the Executive Secretary and a so-called "Memorandum" on Brokerage Rates are printed in Exhibit 20 on pink paper, the Rules of Procedure at the end of Section I and the Brokerage Rates at the end of Section V. The reason for this is that the Directors, some time after the adoption of the Rules in question, approved a suggestion by counsel that this portion of the Inter-

[1] The composition and arrangement of Exhibit 20, containing the Code Interpretations, require some explanation. The Interpretations are divided into sections, each corresponding to a particular Code provision, and Section I is divided into five parts. Each section and each part of Section I contains the rulings in effect as of the latest printing (11–12–31) of the Interpretations and those in effect as of the various dates of prior printings. The date of the printing is shown at the top of the page. A citation to a Code Interpretation will, unless otherwise indicated, refer to the latest printing thereof.

The ink notation in the lefthand margin opposite each Interpretation shows its source. "D" stands for a resolution of the Board of Directors and "Ex. Com." for a resolution of the Executive Committee, the date of adoption thereof being also shown.

pretations be printed "to be sent to members only"; and they likewise voted, on advice of counsel, to rescind their prior "ruling" fixing the maximum brokerage rates to be charged by members and to issue it "only as a memorandum." (Ex. 21–26, pp. 424, 615.)

But the Institute's open price system, as it was understood and enforced, meant much more than merely an agreement to adhere to prices and terms openly announced in advance of sale. The paragraph of the Code providing for open announcements also declares that all discriminations between customers should be abolished. This agreement, "ostensibly" to abolish discriminations between customers, amounted, in general purpose and effect, to an agreement "not to afford different treatment to different customers, regardless of the varying circumstances of particular transactions or classes of transactions and regardless of the varying situation of particular refiners, distributors or customers or classes thereof." (Fg. 37, R. 273–274.) Under the broad and general Code provision, any practice which was at all likely to disturb the restraints which were adopted or the uniform price structure which the refiners were intent upon establishing was prohibited or controlled, either upon the ground that it permitted discrimination among customers or upon the ground that it did not conform to the spirit of the rule that sugar should be sold upon prices and terms openly announced in advance of sale.[1] The following are illustrative of restraints put into effect under the guise of enforcing these Code principles:

The refiners in complete disregard of the interests of their customers and for the purpose of preserving "the price structure", concertedly refused to enter into long-term contracts, although such contracts "have a real economic value to refiner and to customer." (Fgs. 143–144, 151, R. 299–301.) All quantity discounts, even those "which would result in savings to the refiner", were prohibited; and "no special discounts of any kind" were allowed "regardless of the economic justification therefor." (Fgs. 158–159, R. 302; Op., R. 184.)

THE RESTRAINTS IMPOSED BY THE INSTITUTE AND ITS MEMBERS

The restraints effected by and through the Institute, which are later fully dealt with in the Argument, are here summarized in the language of the District Court's general findings and conclusions. Such a condensed statement, while it presents a formal and somewhat lifeless picture of the conspiracy, serves to show its general character and scope.

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[1] Op., R. 116, 135, 152, 155–156, 161–162, 165, 177–178, 184, 186, 201–202, 206, 212, 237–239, 246–247, 257.

The Institute's open price system was the starting point for much of its activity. The Institute members agreed to sell sugar only upon open prices, terms and conditions publicly announced in advance of sales, and agreed to adhere thereto, without deviation, until new ones had been publicly announced. (Fg. 40, R. 274.) It was further agreed to give the Institute immediate notice of all such announcements and that the Institute should then telegraph these announcements to its members and other interested parties.[1] (Fg. 41, R. 274.)

The assurance to each refiner that no competitor would vary his prices without advance notice "tended in fact, as it naturally would tend, toward maintenance of price levels relatively high as compared with raws." (Fg. 52, R. 278.) Such assurance encouraged refiners to maintain or raise prices and tended to cause them to defer making a decline in price even when they believed market conditions warranted a decline. (Op., R. 226.) In addition, the operation of the agreement for open announcements assisted refiners "in eliminating ofttimes, entirely fair competition" and "in preventing and limiting types of transactions in which private ne-

[1] C. & H., on the advice of its counsel, did not send the Institute such announcements or receive from the Institute the announcements of other members. (Fg. 41, R. 275; R. 712.) The Institute mailed instead of telegraphed the less important and more lengthy announcements concerning selling terms, as distinguisbed from prices. (Fg. 41, R. 274–275; R. 777.)

gotiations are essential." (Op., R. 240; Fg. 51, R. 278.)

In order to prevent any buyer or user of sugar from obtaining it at a price "other than the open prices announced from time to time by refiners", tolling contracts (under which a refiner receives raw sugar, charges a fee for the service of refining, and delivers in exchange the equivalent amount of refined sugar) were prohibited. (Fgs. 169–170, R. 304; Ex. 20, Sec. I, p. C1, par. 2.) Other practices prohibited or restricted by direct agreement or concert of action include: The sale of second-hand sugar [1] (Fg. 195, R. 309); making an allowance to customers for the return of used bags or for the use of the customer's own bags (Fgs. 187–188, R. 307); the sale of sugar by "new or unusual methods," such as the use of bulk containers (Fg. 188, R. 307–308; Ex. 20, Sec. I, p. A1, par. 3 (b)); the sale at a concession of damaged sugar or frozen stock [2] (Fgs. 197–199, R. 310); the packing of sugar under the private brand names of customers (Fg. 191, R. 308); price guarantee, that is, a guarantee against a decline in price between the date the contract was

[1] This is sugar purchased from a refiner and resold by the purchaser, such resale being at a differential below refiners' prices because customers prefer, on equal terms, to buy direct from the refiner. (Fg. 193, R. 309.)

[2] Frozen stock was defined as stock which was not to be replaced, which could not be readily marketed at the storage point, and which could not be shipped elsewhere without additional expense. (Ex. 20, Sec. I, p. B2, par. 2 (b).)

made and delivery thereunder (Fgs. 183–184, R. 307); the granting of credit terms favorable to the buyer, such as split billing and the 4-payment plan (Fgs. 173, 176, 177, R. 304–305); the period from which discount for cash payment should begin to run on shipments by differential routes (Fg. 181, R. 306).

The action of the Institute and its members with reference to interchange of statistics was also in undue and unreasonable restraint of trade. (Fg. 66, R. 281.) The Institute furnished its members, but withheld from purchasers, a wide variety of statistical information (compiled chiefly from data supplied by members), thereby placing purchasers at a disadvantage in their dealings with refiners. (Op. R. 106–108, 109.)

Important as the foregoing restraints were, they are overshadowed in importance by three other types of restraint toward the development and enforcement of which the efforts of the Institute and its members were principally directed, i. e., those relating to members' relations with brokers and warehousemen, to transportation methods or terms, and to limitation of consignment points.

Boycotting of Brokers and Warehousemen.—The Institute rules dealing with the employment of brokers and warehousemen—rules enforced by boycott and threat of boycott—did not attain their later stringent and oppressive form until more than a year after the organization of the Institute.

Section 3 (d) of the Code condemns payment of brokerage when any part inures to the benefit of the purchaser. Section 3 (e), as amended at a special meeting of members in May, 1929, prohibits storage of sugar in warehouses "in which customers or brokers are interested, or with which they are in any way affiliated."

Before the Institute, the brokers employed by refiners were frequently also engaged in the business of storing or merchandising sugar, or both, and refiners' customers likewise frequently owned or had an interest in warehouses which stored sugar. (Fg. 69, R. 281.) Pursuant to the agreement embodied in Code 3 (e) as amended, the refiners simultaneously notified their brokers, warehousemen and customers that they must at once elect one and one only of these business activities. (Fg. 71, R. 282.) Machinery to effect this policy was set up. An Enforcement Committee composed of high officials was created; traveling investigators were employed to inquire into suspected combination of functions; if the Directors or one of their committees found such a combination, the concern was "disqualified" as broker or warehouseman, in which case reinstatement could be obtained only upon application of an Institute member, not by the disqualified concern itself. (Fgs. 71, 80, R. 282, 284.) Each refiner submitted to the Institute a list of its brokers and warehouses, which lists were then circulated among all of the members, and a refiner desiring to use a warehouse not on the list was required to give the Institute six days' advance notice. (Fg. 72, R. 282–283.) In case of complaint of affiliation by a non-member within this six-day period, the warehouse was not to be used pending an Institute investigation and action thereon by the Executive Committee. (Ex. 20, Sec. VI, Pars. 5 (a), (b).)

The policy of compelling, by means of a boycott, separation of functions, was effectuated "in a harsh and arbitrary manner without regard to the effect upon third parties"; substantial business set-ups of long standing were suddenly disrupted; and honest concerns "were deliberately made to suffer with the dishonest." (Fg. 80, R. 284.)

The refiners agreed not to employ any broker or warehouseman who did not execute, under oath, an agreement in the form recommended by the Institute. (Fg. 83, R. 285.) The broker's agreement required him to uphold in all transactions "the spirit and letter" of "all letters, circulars or bulletins received by him containing interpretations of the Code * * * or regulations thereunder." (Op., R. 125.)

In order to prevent a growing competition among members in bidding for the services of brokers, the refiners agreed upon the maximum commissions to be paid brokers. (Fg. 82, R. 285.)

Transportation Restraints.—In the early days of the Institute, the Executive Secretary and certain refiners made a determined attempt to enforce the principle embodied in paragraph 3 (c) of the Code, that freight applications on deliveries from consignment should be based solely on all-rail freight applications and not on rates over differential routes, regardless of actual mode of shipment. (Fg. 104, R. 290.) After enforcement of this principle had proved impracticable because of the opposition of refiners whom it adversely affected, the problem of differential rates was met by the adoption, in the two important areas served by differential routes, of a system of delivered prices, coupled with denial of the privilege of purchasing f. o. b. refinery for shipment into such areas. (Fgs. 104–105, R. 290–291.) This system was maintained by agreement and concert of action in the Great Lakes area from April 1929 until May 1931 (which was after the filing of this suit), and it was so maintained in the Warrior River area from December 1929 until about the end of May 1930. (Figs. 105, 113, R. 291, 292.)

The refiners adopted Code Interpretations restricting individual freedom of action in transportation matters in various other respects. The following are the more important restraints so agreed upon and put into effect: That no member employ any water carrier which had not publicly announced its rates and terms or which in any way deviated therefrom.[1] That members, before ship-

[1] Ex. 20, Sec. XII, pars. 1 (a), 1 (b). By threat of withdrawing business, the refiners in the spring of 1930 obtained

ment, submit the terms of every private charter to the Executive Secretary for scrutiny for any indication of rebate or other Code violation.[2] That members adopt certain practices and contract provisions, specified in detail, to prevent defeat of refiners' freight applications by the transiting or diversion of carload shipments.[3] That no member include his own sugar in customers' pool car or pool cargo shipments.[4] That no switching charges be absorbed on deliveries from consignment to buyer's warehouse or spur, except on deliveries in named cities.[5]

Limitation of Consignment Points.—Section 5 of the Code provides that sugar be consigned only to "recognized markets." The Institute admittedly undertook to limit, by concerted action, the

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an agreement from the transportation companies operating on the New York State Barge Canal that they would openly announce rates and terms and adhere thereto until notice of change. (Fg. 125, R. 295.)

[2] Ex. 20, Sec. I, p. C2, par. 3 (c).

[3] Ex. 20, Sec. I, pp. D1–D4, pars. 1–4. The refiners' agreement and their actions thereunder were in aid of "their concerted efforts since the Institute to maintain artificial rate structures"; and it was their purpose to prevent any transiting or diversion, even that done with the consent of the shipping refiner, which would defeat freight applications. (Fg. 122, R. 294.)

[4] Ex. 20, Sec. VII, pars. 2–3; Fg. 127, R. 296.

[5] Ex. 20, Sec. VII, par. 4, printing 1/1/31. It is significant that, after the present suit started, the Directors rescinded this ruling upon the ground that such absorption was "a part of the selling terms," and therefore to be openly announced instead of fixed by direct agreement. (Ex. 21–26, pp. 655–657; Ex. 20, Sec. I, p. A1, par. 1 (b).)

number of cities in which refiners and other sugar producers carry consigned stocks. (Op., R. 167.) By unanimous agreement all consignment points in certain States were eliminated and the number of such points in other States was limited to named cities. (Op., R. 168, Ex. 21–26, pp. 243–244.) Agreements of this character were effected as to every State but three of the 37 States, exclusive of the 11 Western ones.[1]

Prices and Profits.—The effect of the entire Institute program was to maintain the price of refined at much higher levels, compared to the price of raw, than before the Institute, with a consequent "marked increase in margin [between refined and raw prices] and a substantial increase in profits despite a concededly large excess capacity" in the industry. (Fgs. 202–203, R. 311.)

THE COOPERATION OF NONMEMBERS

As previously stated (*supra,* p. 26), 70% to 80% of the sugar consumed in this country is produced by the 15 refiners and substantially all of the balance by the producers of beet and off-shore sugar. The refiners sought and obtained the concurrence of these producers in the restraints which they imposed. (Fg. 13, R. 268; Op., R. 91.)

[1] Ex. 20, Sec. X, par. 1. The Institute did not concern itself with reducing consignment points in the 11 Western States, in which only the two members with refineries on the Pacific Coast competed (Ex. F–15).

Beet Sugar Producers

From the very outset of the Institute, cooperation with a parallel association of beet sugar producers, which they had previously "undertaken" to form, was one of the declared purposes of the Institute, a resolution to this effect being adopted at the Institute pre-organization meetings in December 1927. (Ex. V–2, 12/16/27, pp. 1–2.) The contemplated association was formed in the spring of 1928 under the name of Domestic Sugar Bureau, hereinafter referred to as the Bureau. (Fg. 13, R. 268.) The Bureau adopted a code of ethics which, in its declaration of purposes and in practically all its substantive provisions, is word for word the same as the Institute Code.[1] (Exs. 20, 453.)

Appellants have not excepted to the following finding (Fg. 13, R. 268):

> In connection with practically all Institute activities, it has sought and obtained a high degree of cooperation from the Bureau. Joint meetings have been held, questions of policy have been discussed and joint action

[1] Apart from a few immaterial differences in language, such as substitution of "Bureau" for "Institute", the two codes are the same except in paragraphs 3 (b), 3 (f) and 3 (i). The differences in 3 (b) and 3 (f) are of no substantive importance. 3 (i) of the Institute Code deals with export sales and 3 (i) of the Bureau code limits contracts to "spot" or 30-day contracts. It will be seen (*infra*, pp. 189–190) that the Institute members took concerted action to abolish long-term contracts.

> has been taken. The two associations have continuously communicated with each other by letter, telegraph and personal contact.

A letter [1] written by Rolph, the president of C & H (then a member of the Bureau but not of the Institute), to Ballou, the Institute's Executive Secretary, shows the general purposes of the organization of the Bureau and the nature of its cooperation with the Institute. (Ex. 442–S, R. 1961.) In this letter Rolph says: Institute members had encouraged him, early in 1928, to form the Bureau and had approved his announced object to get all domestic producers (other than Institute members) into one organization and later to endeavor to get the Bureau to join the Institute "so that the industry as a whole would be functioning as one organization". All these other producers except those in Michigan had joined the Bureau and every concern in Michigan was "cooperating 100% with the Bureau". He had inspired many of the inquiries which the Bureau made of the Institute because he believed it advisable to work through

[1] The letter was in reply to one from Ballou setting forth the disadvantages of nonmembership in the Institute. Ballou said that the main disadvantage was the impossibility, without membership, of building up "a feeling of trust and cooperation to replace the atmosphere of suspicion and distrust"; and that members' complaints of violation of "ethics" were "brought around the table for open discussion, with the result that they were usually disproved and always corrected," any correction needed being "along constructive, and not destructive, lines." (Ex. 463, R. 2287.)

the Bureau rather than "direct with the Institute". He expressed confidence that Ballou would agree that "we have played ball with the Institute, if not 100%, as I think we have, at least very nearly so." He concludes [1] (*ib.*, 1966):

> * * * I thoroughly believe the Institute itself could not survive long with 20 or 25 unrestricted sellers in the territory west of the Illinois-Indiana line. We think that the far better course would be to keep all the domestic producers in one unit and use our influence to have that unit gradually amalgamated with the Institute. To this end we are working, * * *.

The following may be cited as typical instances of joint action in carrying out a common program and common objectives: A resolution of the Institute dealing with certain transit matters was to be effective "if and when adopted in substance" by the Bureau.[2] (Ex. 21–26, p. 539.) The Vice-Secretary was instructed to accept Bureau reports

[1] The letter mentions the fact that, as a result of a threatened suit by a large Chicago buyer charging "an illegal combination in restraint of trade," the Institute had "rescinded" certain action, although it had later accomplished the desired end in another manner. The letter then refers to a recent statement by Ballou that he was going to take action which he "knew to be illegal, but the end justified the means." (*Ib.*, 1965.)

[2] Evidently the Bureau adopted the ruling. The resolution was later incorporated (with a partial omission) in the Code Interpretations. (Ex. 20, Sec. I, p. D3, pars. 2(b), 2(d), 2(e).)

on affiliation between warehouses and customers or brokers, without independent investigation by the Institute. (*Ib.,* p. 460.) An Institute resolution limiting consignment points recommended that both the Institute and the Bureau membership control shipments into the territory in question to prevent breaking down the recommended rules. (*Ib.,* p. 243.) The Institute appointed a committee to take steps to reconcile any existing differences in the two codes and their interpretations.[1] (*Ib.,* pp. 299, 312.)

The Off-Shore Producers

Appellants sought and obtained the cooperation of the off-shore producers in many of their activities. (Op., R. 91.) The minutes of a Directors' meeting in July 1928 state (Ex. 21–26, p. 83):

> Some discussion was had with regard to the status of importers and others who were cooperating with the Institute, *sometimes referred to as associate members.* It was the concensus of opinion that no *formal connection* should be established with them but

[1] The minutes of the Directors' and Executive Committee meetings, which the Secretary of the Bureau frequently attended (*ib.*, 113, 143, 217, 298, 329), show Bureau cooperation in connection with price guarantee and rate differentials (*ib.*, 55, 57); transiting and diversion (*ib.*, 310, 334, 348); service charge on less than carload deliveries from consignment (*ib.*, 83, 178); storage in affiliated warehouses (*ib.*, 454, 460); payment by refiners of switching charges (*ib.*, 452); and limitation of consignment points (*ib.*, 174, 243, 255, 280, 401–402, 525, 538).

> that we should continue our relations as we have done in the past.

A brief review of certain Pike correspondence relating chiefly to Institute complaints of alleged departures from Institute rulings in the sale of Hershey off-shore sugar, which Pike represented, will suffice to indicate the extent and character of the participation by off-shore interests in Institute restraints and activities. Pike's active cooperation in the program in restraint of trade is not only implied by its invariable willingness to investigate, correct or explain these alleged departures, but by statements disclosing explicit agreements to adhere to particular Code rulings or other Institute restraints. The correspondence shows the wide variety of business activity brought within the scope of Institute rules and agreements and how carefully the Institute probed into the details of individual transactions, many of comparatively trifling importance.

Pike investigated, denied or promised to correct the following Institute complaints, among others: (1) That Hershey's New Orleans broker was, contrary to "the usual practice in this market", giving buyers a 3¢ drayage allowance on deliveries direct from warehouse;[1] (2) that Hershey was carrying consigned stocks in a certain city;[2] (3) that

[1] Exs. 389-D, 389-E, 389-F, R. 1530-1531.

[2] Pike in its reply said that "we wish to cooperate in every way, and will discourage the opening of new consignment points very strongly." Exs. 389-G, 389-H, R. 1531-1532.

Hershey brokers were selling to retailers in New Orleans and were giving buyers an allowance for returned bags,[1] (4) that Hershey's Louisville brokers had offered sugar on a 60-day contract instead of on a 30-day contract;[2] (5) that its Miami brokers were delaying billing a certain customer;[3] (6) that Hershey was offering certain credit terms (the 4-payment plan) in Georgia after Institute members had agreed to discontinue use of these terms there.[4]

Other illustrations of Pike's cooperation, shown by the correspondence, include: (1) Pike notified all Hershey brokers that it would discontinue consignments in certain southern States "except at points authorized by" the Institute.[5] (2) Pike, in arranging for a change in the management of one of its warehouses, stated that final arrangements would depend upon what warehouses are "approved by" the Institute.[6] (3) Pike advised the Institute that it expected to "live up to the agreement" governing freight applications at Lynchburg.[7] (4) Pike, having given the Institute official notice that it proposed to sell certain sugar as frozen stocks, told the Institute that it felt that it

[1] Exs. 389-M, 389-N, 389-O, R. 1535-1536.
[2] Exs. 389-S, 389-T, 389-U, R. 1532-1539.
[3] Exs. 389-J-1, 389-K-1, R. 1548.
[4] Exs. 389-A-1, 389-B-1, R. 1542-1543.
[5] Ex. 389-D-1, R. 1544.
[6] Ex. 389-H-1, R. 1546-1547.
[7] Ex. 389-Q-1, R. 1551.

had been "called upon to answer entirely too many unnecessary questions" regarding this sugar.[1] (5) The Institute inquired concerning a consignment of Hershey sugar to customers' warehouses, which the Code prohibited, and stated "you have notified us of your intention to adhere to this code."[2]

The correspondence also shows: (1) That Pike was party to an "understanding", reached at Institute meetings at which Pike was represented, concerning freight applications at interior North Carolina points.[3] (2) That Pike was party to an agreement, arrived at after weeks of discussion, concerning abandonment of Wilmington as a consignment point.[4] (3) That Pike had agreed to discontinue Wilmington as a port of entry, although this would he "a very expensive concession".[5]

In the fall of 1929, upon the insistence of Armstrong, which from the beginning had rigidly adhered to the Institute's open price system, the Institute wrote Lamborn and Lowry requesting each of these off-shore selling agents to advise the Institute[6]:

(1) Whether it had any existing contracts taken at different prices or terms than "the regular sell-

[1] Ex. 389–R–1, R. 1552.
[2] Ex. 389–P, R. 1536.
[3] Exs. 389–J, 389–K, R. 1533–1534.
[4] Exs. 389–V, 389–W, 389–Z, R. 1539–1542.
[5] Ex. 389–E–1, R. 1545.
[6] R. 913–915; Exs. 324, 343, 364–A; R. 1420, 1454, 1486.

ing terms" of the Institute and, if so, the prices, terms, and expiration dates of such contracts.

(2) That "beginning immediately, say December 2nd," its publicly announced price basis will be — and its truckage allowance —¢ per hag, and that, in trucking for buyers outside of New York, its charges will be the same as those "established" by members.

(3) That it should understand that its subscription to "Terms" would include "the Institute's Code Rulings", especially as to not storing in warehouses affiliated with buyers or brokers.

(4) That it will "quote sugars only on delivered price basis to such points as are being generally sold on this basis."

(5) That it will in substance follow the ethics and practices of members under present Institute rulings and as they may be changed or initiated from time to time, and that it will give prompt notice in case of any deviation.

The required written assurances were promptly given,[1] and thereafter these two selling agents regularly sent their price announcements to the Institute, which relayed to them the price announcements of members. (R. 915.) The Directors nevertheless adopted a resolution a few days later that

[1] Exs. 324–B, 343–A, 343–B; R. 1422, 1454. Lamborn expressed some indignation at the demand and pointed out that it had previously offered to open all its records to the Vice Secretary for the investigation of any complaint against it. (Ex. 324–B, R. 1424.)

members shall cease to employ brokers who, in handling either member or off-shore sugar, fail to observe Code standards or fail to sell "all such sugars" on openly announced prices and in accordance with the fair trade practices set forth in the Code. (Ex. 21–26, pp. 343–344.) The subsequent slight amendment of this resolution, made upon Lowry's protest, further indicates that the implied threat of boycott thus authorized was primarily directed against the brokers selling off-shore sugar. (*Ib.*, pp. 359, 373; Exs. 344–A to 344–D, R. 1456–1457.)

SUMMARY OF ARGUMENT

In view of the previous summary statement of the restraints imposed by the Institute and its members (*supra*, pp. 36–44) and in view of the detailed nature of the index of the Argument, no additional Summary of Argument is believed to be necessary.

ARGUMENT

I

THE INSTITUTE'S "OPEN PRICE" PLAN

Appellants do not question the District Court's finding that they agreed to sell sugar only upon prices, terms and conditions publicly announced in advance of sales, and to adhere thereto until they had first publicly announced changes. (Fg. 40, R. 274.) The court condemned this agreement because it operated in such a way as "to aid both in maintaining price levels without regard to the normal effect of supply and demand and in eliminating ofttimes, entirely fair competition." (Op., R. 240.) It enjoined (Sec. V, par. 2) concert of action in selling only upon, or in adhering to, prices, terms, conditions or freight applications announced in advance of sale. (R. 321.)

Appellants' agreement to announce future prices and terms and not to deviate therefrom is stated in the Code, and is defended in this Court, as a necessary corollary of the broader principle of non-discrimination between customers. The Code provides: "All discriminations between customers should be abolished. *To that end,* sugar should be sold only upon open prices and terms publicly announced." Appellants' contention is that the restraints imposed by their open price agreement are reasonable because adopted to put an end to discriminatory secret concessions to customers.

The Government submits that this defense of the iron-clad agreement prohibiting any sale of sugar except in accordance with prior public announcement of price and all terms of sale must be rejected for two principal reasons:

(1) The agreement in purpose and effect so far restrained price competition and so far suppressed important and entirely fair forms of competition that the restraint of trade thereby imposed was clearly not a reasonable restraint, even if the agreement had been the only feasible and practi-

cable means of completely preventing sales at secret concessions.

(2) Since prevention of secret concessions and unfair discriminations is the only ground upon which the Institute's open price plan is sought to be justified, and since immediate publicity of closed transactions admittedly will prevent such practices, the plan is clearly an agreement in unreasonable restraint of trade.

A. THE EXTENT TO WHICH THE INSTITUTE'S OPEN PRICE RULES RESTRAINED COMPETITION

The question presented to this Court is not the validity of "open prices" as an abstract principle, but the validity of the system of adhering to openly announced future prices as it functioned in this industry. From the standpoint of pure theory, an open price system of marketing may represent a new and possibly desirable method of competition or it may represent "an old form of combination * * * in a new dress and with a new name."[1] Appellants have entirely divorced their discussion of the open price plan from their discussion of the collateral restraints of trade imposed on the ground that they were necessary to effectuate this plan. Appellants first endeavor to establish the desirability of the principle of open prices as such. Then they assume that this principle is rea-

[1] See *American Column & Lumber Co.* v. *United States*, 257 U. S. 377, 410.

sonable and valid under any and all circumstances and they justify most of their other restraints upon the ground that they fall within this principle. The Government suggests that the reverse is the proper approach, namely, if the Institute's open price plan entailed so many collateral restraints upon otherwise fair competition, this in itself indicates the unreasonableness of the restraint of trade envisaged by and resulting from their open price agreement. The biblical maxim, "By their fruits ye shall know them", may well be applied.

The question of approach is significant from another angle. The restriction of competition brought about solely by the open announcement of future prices and terms and by the agreement to adhere thereto, and the resulting effect upon prices and profits, cannot be precisely segregated, from the standpoint of cause and effect, from the various other restraints imposed by and through the Institute. But the collateral restraints imposed in the name of open prices and non-discrimination (which meant, not only such discrimination as was unfair, but any variation in the cost of sugar to refiners' customers or to the ultimate purchaser) are definite, tangible and easily demonstrated.

(1) Restraints Upon Price Competition

Normally in a free competitive market, although the seller may know what his competitors have been charging and what terms they have been giving, he does not know in advance what price or terms they will grant in the future. He is compelled to fix his own prices and terms on the basis of his knowledge of market conditions and in accordance with the degree of his desire to dispose of his product. Ordinarily, in order to obtaiu a reasonable share of the available orders, he must agree to sell at the lowest price and at the best terms at which he can afford to sell and earn a reasonable profit.[1] When his margin becomes high, he must anticipate that his competitors will offer more liberal terms as well as lower prices, and to be certain that he will not lose orders to a competitor first introducing better prices or terms, he himself is alert to initiate them.

Under the system of announcing prices to competitors in advance of sale, however, he may confidently wait until his competitors announce better prices or terms, hecause he knows that they will not "scoop in" a large volume of orders by being first to initiate attractive offers. He may ignore conditions of supply and demand which would ordinarily require bim to offer better prices or terms, because his competitors have promised him that they will not grant new prices or terms without advance notice to him.

Although there was no direct agreement upon prices as such and appellants did not customarily

[1] This would be particularly true in the sugar industry, which has a large excess of productive capacity and in which competition, therefore, would normally be keen.

consult with one another to persuade reluctant members to follow price announcements, such agreements were not vital to appellants' purpose. (Op., R. 226.) The assurance to each other that they would not vary prices without advance notice was sufficient to defer declines and increase prices without justification. As stated by the court below, each refiner was encouraged to maintain or raise prices by the knowledge that, until public notice was given, his competitors would not lower their announced prices, and even if they believed that market conditions warranted a decline, the tendency was to defer it uutil the traffic would no longer bear the then prevailiug price. (*Ib;* Fg. 52, R. 278.) To illustrate, the court referred to a letter (Ex. 442–S, R. 1964) written to the Institute by C & H (not then a member), stating that—

> there was no market justification for the attempted advance on the part of the Eastern Refiners from $4.90 to $5.00. It was simply an attempt to get the trade to load up on a very weak raw market and which the trade has resentfully protested against times innumerable.

When an announcement of harsher terms or a price increase was posted with the Institute and relayed by it to members, this constituted, in effect, an invitation to follow the advance. Since the advance became effective at a future time, the refiner first making announcement would lose nothing if other refiners failed to follow. Under such a system, it is apparent that the only time when other refiners would refuse to follow an announcement of an advance was when, in their judgment, the market would not bear the higher net prices, that is to say, when the price was so high or the terms so exacting that purchasers would refuse to buy. The extent to which announcements of price advances were followed is indicative of the degree of success attained under this system. Of the 48 attempted moves during the Institute period (a period of declining raw sugar prices), 38, or 79%, resulted in price advances. (Ex. 0–3, Appendix App. Br.)

The effects normally to be anticipated from such a system of adherence to prices announced in advance of sale did eventuate. Broadly speaking, the price of refined is governed by the price of raw, which constitutes 80% of the cost of refined, and raw prices are the measure by which refined prices must be judged. (*Infra,* p. 241.) After the Institute there was, as the District Court found and the evidence discloses, a marked lack of sensitivity of refined prices to raw and expert sugar buyers were no longer able to anticipate changes in refined prices from raw market trends. (*Infra,* pp. 241–245.)

(2) *Restraints upon Terms and Conditions of Sale*

Since sugar is a thoroughly standardized commodity and since after the Institute basis prices were practically uniform (Fg. 17, R. 269), competitive forces at times sought an outlet through the offer of more favorable terms or conditions of sale. Terms of sales are in some cases fully as important as price itself (*infra*, p. 125) and in all cases, because of the narrow gross profit margin upon which jobbers and wholesalers handle sugar (App. Br., p. 65), terms of sale are of substantial importance. The Institnte's major activity was directed at eliminating or controlling competition in terms of sale, and its price reporting system was an essential adjunct to this activity.

The most important terms of sale are transportation terms, *i. e.*, the amount charged the customer in excess of basis f. o. b. refinery price for delivery of the sugar at an interior point. Section 3 (c) of the Code provided that customers, except on deliveries f. o. b. refinery, should be charged for transportation at not less than all-rail rates. Later, after complete enforcement of this Code provision had proved impracticable, a system of selling only at delivered prices and refusing to sell f. o. b. refinery was concertedly adopted and maintained in the chief areas served by cheap water or part-water routes. (*Infra*, pp. 139–140.) The agreement to announce in advance and to adhere to prices and terms played a large part in the carrying out of each of these forms of restraint. Through the system of advance announcement of freight applications and strict adherence thereto, observance of the Code provision that these applications be based on all-rail rates could be readily checked by the Institute, and pressure could be brought and was brought to prevent the offer of more favorable terms. (*Infra,* pp. 130–138.) Likewise when a wholly new marketing system, namely, delivered prices, was concertedly initiated and maintained, this was done through the medium of advance announcement of delivered prices, coupled with the obligation to adhere to the announced terms of sale. (*Infra,* pp. 148–151.)

Another way in which the Institute's open price plan was utilized to eliminate competition was through the prohibition of all transactions which could not be consummated without negotiation between buyer and seller for the purpose of reaching an agreement upon terms suiting the particular needs of the two parties. (Fg. 51, R. 278.) The requirement of open announcement in advance of sales "necessarily in and of itself ended any possibility of special terms when private negotiations were essential." (Op., R. 239.) This is illustrated in the case of long term contracts, which have a real economic value and which before the Institute constituted a method of marketing of very considerable importance. (*Infra,* pp. 191–197.) The Institute principles of open announcement and non-discrimination were held to raise a barrier against both long term contracts capable of open announcement and long term contracts with complicated terms necessitating private negotiations. (*Infra,* pp. 198–200, 213–215; App. Br., p. 172.) The Institute's open price system thus operated to bar long term contracts, although there is nothing inherently nnfair or discriminatory in the sale of sugar for a period of time longer than the customary thirty-day period.

In the same way, in connection with tolling contracts, appellants admit (Br., p. 158) that they were necessarily "a matter of special arrangement" and then assert (Br., p. 162) that for this very reason the Code, "by necessary implication, brands the practice as discriminatory."[1] Numerous other well recognized mercantile practices which were in no sense inherently unfair or discriminatory, but which had to be privately negotiated, for example, used bag allowances, the packing of private brands, the pooling of customers' aud the refiner's sugar to obtain a carload rate, shipment of customer's sugar by privately chartered vessels, were branded as violative of the Institute's theory of open announcement and non-discrimination. (*Infra,* pp. 159–162, 164–165, 222–227.)

(3) *Restraints by Direct Agreement Fostered by the Open Price Plan*

Before dealing with the broader aspects of the restraints resulting from the Institute's open price

[1] It is interesting to note that while appellants deny (Br., pp. 9–10) that there is evidence to support the court's finding that one of their dominant purposes was maintenance of a uniform price structure, their argument at almost every point is an advocacy and defense of a uniform price structure.

system, we point out that in this case there occurred that which was to be expected where a rigid system of future price reporting was coupled with frequent meetings and consultation between the highest executives of the companies dominating the industry. In addition to the less direct restraints upon competition growing out of the open price plan itself, concerted pressure was exerted and direct agreements were made with reference to terms of sale constituting important elements in price. As has been indicated, transportation terms were limited or controlled by direct agreement or concert of action. (*Supra*, pp. 60–61.) Agreements were also entered into governing or fixing the time from which credit should begin to run, the giving of guarantees against the price decline, maximum broker's commissions, the absorption of switching charges, etc.[1]

Appellants' statement (Br., p. 50) that the District Court found that there was no "consultation, collusion or agreement" among the refiners in "price and terms announcements" is, so far as

[1] It is perhaps significant that the off-shore producers, who were not members of the Institute but closely allied with them in the carrying out of various Institute restraints, on many occasions used in their correspondence the word "agreement" or "understanding" to describe the rules or practices which the refiners adopted (*supra*, pp. 50, 51; see *infra*, pp. 153–154), whereas Institute members, perhaps because of the tutoring of counsel, present at all meetings of the Directors or Executive Committee (*supra*, note, p. 33), were more careful to avoid use of such terms.

terms are concerned, not given the slightest support by the findings which they cite. The statement that the court below found no collusion or agreement as to announcement of terms is all the more extraordinary in view of the court's many findings of agreement and collusion with reference to specific terms of sale [1] and its direct general finding to the contrary, reading as follows (Fg. 57, R. 279):

> The Institute and Institute officials in a number of instances rebuked members and non-members for announcing or continuing terms and conditions more favorable than those recommended by the Institute or agreed to by defendants, and otherwise sought to and did induce withdrawal and limitation of such favorable terms and conditions, thereby unduly and unreasonably restraining trade. The use of the Institute as a clearing house for information concerning changes in terms and conditions aided in such activities.

When National announced absorption of switching charges at Louisville, Godchaux called up the Institute and insisted that National withdraw the announcement because of an agreement that any action taken at a Directors' meeting could not be nullified by the consenting members except on 15 days' notice. (Ex. 457-P-6, R. 2234.) The Institute thereupon obtained a written apology from National, which it circulated to members together

[1] Fgs. 104–108, 112, 122, 130, 144, 157, 169, 177, 181, 183, 188, 195; R. 290–292, 294, 296, 299–300, 302, 304–309.

with a statement in which the Institute acknowledged equal responsibility "in having failed to challenge the announcement." (Ex. 457–R–6, R. 2236.) After Imperial had announced that, to meet competition, it would install the barge rate in Texarkana, the Institute requested that it be advised "what competition necessitates barge application," and later rebuked Imperial for its announcement, saying, "We look with some alarm upon this method of adjusting such matters." (Exs. 457–J–2, 457–K–2, 457–P–2; R. 2175, 2177.)

The Institute's function was by no means limited to relaying announcements. It occasionally advised refiners as to proper terms or freight rates, and solicited their adherence to rates or terms announced or contemplated by others. (Exs. 420 Q, 369, 369–A, 385–B, 393–D, 393–E, 457–B–3 to 457–D–3; R. 1755, 1498–1499, 1516, 1596–1597, 2184–2185; Exs. B–8, C–8.) Occasionally, before making announcements of harsher terms, members solicited assurances that other refiners would follow. (Exs. 457–H–1 to 457–K–1, 457–E–3, 457–N–3; R. 2159–2161, 2186, 2190.)

Announcements were sometimes made or prepared in Institute meetings. (Exs. 392, 420–O, 420–V, R. 1594, 1754, 1761–1762.) In June 1928 Colonial's Sales Manager advised his company that an Institute meeting had agreed upon certain terms and that (Ex. 420–O, R. 1754):

> As the Institute does not wish its members to discuss or publish their deliberations, we

> would suggest that in notifying the brokers concerned, that you transpose the resolution into different words and issue it as coming from your office, rather than by authority of the Institute.

After the barge rate in Alabama had been agreed upon at a meeting in April 1928, the Institute advised Hershey that it was "not customary for the Institute to make general announcement when all interested parties are present at a meeting." (Ex. 452–V–2, R. 2117.)

In March 1930 Godchaux wrote the Institute (Ex. 394, R. 1597):

> I consider that one of the most important matters discussed at that meeting was the adoption of a policy by all members that *before they made any drastic changes in the selling terms, they would, if possible, await a Directors' Meeting at which this question could be discussed* by all at interest, or if the matter was of vital importance, that a special Directors' Meeting would be called for a discussion of same before action were taken, rather than after the taking of the contemplated action.

The letter also said (*ib.*, R. 1598):

> Our Company was *severely critized* at the December meeting *for having made the announcement* as regards the rate application in the South, which was later withdrawn, and our action at that time was taken as an example for discussion as to the harmful effects

> of this announcement, and it was pointed out to us that in order to have the Sugar Institute function properly *an announcement of this kind should not be made until after all members had an opportunity of meeting,* and those feeling themselves aggrieved would, at such meeting, present their views, and then if such meeting did not bring about a correction of the situation complained of, any member would then be fully privileged to make public announcement of the change in selling terms.
>
> Unless the points raised herein can be satisfactorily dealt with at the next meeting, then I fear that the Institute is only functioning as a *clearing house* and not functioning for the betterment of sales methods in the sugar industry.

The individual perhaps most influential in bringing about organization of the Institute wrote all of its members at a critical moment deploring terms and conditions *"openly announced"* upon the ground that they broke down the selling structure, and at the same time called for "constructive" rather than "destructive" methods of doing business. (*Infra,* pp. 143–144.) The letter in question had the desired effect. (*Infra,* pp. 145–148.) When the Executive Secretary in a letter to the president of C & H (before it was a member) set forth the reasons why it was desirable for it to become a member, he said that there is "no substitute for personal contact" in building up "a feeling of trust and cooperation", which "is the result only of constant meeting and constant workiug out of mutual problems." (Ex. 463, R. 2287.)

(4) *General Effect of the Restraints resulting from the Open Price Plan*

But the more general and less direct restraints resulting from the Institute's open price plan were at least as serious as the types of restraint previously considered. Under the Institute system each individual buyer was very largely at the mercy of the combination of refiners and those allied with them. Since all prices and terms were listed and uniform and would not, by virtue of agreement, be departed from under any circumstances, a buyer seeking a change in price or terms, or seeking terms of sale adapted to his particular requirements, was either belpless or had to assume the well-nigh impossible burden of bringing about a breach in the prices or terms under which the entire industry was operating. He could succeed only if he could persuade one of the refiners—who within the bounds of the Institute was constantly negotiating and bargaining with his fellow competitors as to the practices to be adopted uniformly and unanimously—to take the lead in announcing more favorable prices or terms.

Buyers not similarly organized were thus at a disadvantage in the competitive struggle because of the absence of competition among sellers, whose first allegiance was to the Institute and its Code of "Ethics". Buyers were in effect reduced to mere order clerks. Appellants' chief economic witness conceded that buyers must be free to negotiate for better bargains if the competitive system is to function truly. He testified on cross-examination (R. 1138):

> If the buyers, due to the inutility of negotiation get in the habit of ordering their commodity without any attention being given to the prices of the different competing sellers, and without any effort being made to get a better price from one seller than from another, because of the fact that he has become convinced that it does him no good and hence the buyers quit the practice of so negotiating, that is not a truly competitive market (if there is no utility in their making a change.)

B. THE DECREE LEAVES OPEN A REMEDY FOR THE SOLE "EVILS" URGED AS JUSTIFYING THE RESTRAINTS IMPOSED BY THE OPEN PRICE PLAN

Appellants concede (Br., p. 71) the correctness of the following finding (Fg. 53, R. 278–279):

> Competition among sugar buyers was so keen that when a discrimination in favor of one became known, others similarly situated would ordinarily bring pressure to secure like favorable treatment. Either they would have succeeded or the discriminatory

> favor would have had to be withdrawn. It is reasonably certain that immediate publicity given to the prices, terms and conditions in all closed transactions, which is not shown to have been impracticable, would in general have resulted in preventing any unfair competition caused by the secret concession system, without an agreement to sell only on the basis of open public announcement in advance of sales.

This concession at once sweeps away the elaborate defense of the Institute's open price system grounded upon the theory that it was necessary to put an end to secret concessions and unfair discriminations. In view of the diverse, thoroughly established, and serious restraints brought about by the agreement to sell only at prices openly announced in advance to the trade and to competitors, and since the evils aimed at may be removed by less drastic means, a heavy burden rests upon appellants to show that the system of marketing which the court below left open would produce consequences equally prejudicial to the public interest or in restraint of free competition.

Appellants have not even attempted to assume this burden. This is shown by the two questions which they pose and assume to answer (Br., pp. 72, 75):

> (a) Would individual bargaining be *more likely to develop* if prices were announced after sales instead of before?

> (b) Would a system of individual bargaining be economically *more desirable* than a system of general public offers to the trade?

It is not sufficient for appellants to obtain a negative answer to these questions. Assuming their relevancy, it is incumbent upon appellants to establish affirmatively that individual bargaining is *less likely to develop* with price announcements after sale instead of before, and that individual bargaining is economically *less desirable* than the system of so-called mass bargaining. We shall, however, deal with the questions on their merits.

(a) Appellants assert (Br., p. 72) that in the marketing of a thoroughly standardized product like sugar, individual bargaining will not be generally practiced under any system of public announcement of prices and terms, whether after sales or before. If appellants genuinely believed that the decree, which prohibits only agreements with respect to *future* price reporting and adherence to prices so reported, would effect no real change in the situation, they would hardly devote so much attention (Br., pp. 47–89) to this aspect of the decree or contest it so vigorously. But it cannot be assumed from the mere fact that a product is standardized and that transactions are given publicity that thereby individual bargaining will be practically non-existent. Appellants' statement assumes a standardization of buyers and of their requirements substantially the equivalent of the standardization of the product itself. Appellants have in part laid the foundation for such an assumption in their description of the system of marketing sugar, but this description vastly over-simplifies the situation.

In the first place, there are two quite different categories of buyers, the distributors who purchase for resale and the manufacturers who purchase sugar for use in making another product. These two different categories of buyers make for variance and complexity in manner and terms of sale if there is substantially a free market. Then there are differences within each of these groups. There is the wholesale grocer serving the needs of a restricted locality and clientele, the chain store, the large jobber in a metropolitan center, the integrated distributor such as Edgar. Like or even greater differences exist among manufacturers, with varying needs as to time and manner of delivery, length of contract period, and quantity of purchase.

In the second place, sugar is not substantially all sold, as appellants have represented, upon precisely the same terms *and at precisely the same dates,* namely, on moves. There is no reliable evidence of the extent to which sugar was purchased upon moves before the Institute. The only statistical evidence as to purchases on moves and purchases at other times is Exhibit O–3 (Appendix App. Br.), but this is almost wholly irrelevant because it shows only sales after the Institute, when the sale of sugar was subject to the various restrictions which the Institute program imposed, and particularly the prohibition of long term contracts. The record indicates that before the Institute a very substantial part of refiners' sugar was sold apart from moves. To take one company alone, Coca Cola, which customarily purchased sugar on long term contracts (R. 438–439), its consumption in 1931 was equal to 2% of all the sugar produced by the refiners and consumed in this country (R. 88, 437). Edgar, whose volume of business was about 2% of all the sugar sold in the United States (R. 444), purchased, before the Institute, a large proportion of his sugar on long term contracts. (*Infra,* pp. 193–195.) The District Court stated that "very substantial quantities" of sugar are sold apart from moves. (Op., R. 102.)

Given a free market, the various factors making for diversity would assert themselves. The individual bargaining always associated with the competitive system would at least act as a salutary break in checking the excesses likely to result from a system under which absolute uniformity in prices and terms was not the mere product of competitive forces, but was induced and maintained by an intricate and detailed body of rules and restrictions adopted by the producers, banded together in a powerful trade association. The history of the Institute is proof of this. The difficulties it encountered and the gradual extension of its prohibitory rules—among the most ruthless being the boycotting of brokers and warehousemen—in order to achieve absolute uniformity in prices and terms to all customers and purchasers, evidence that, quite apart from unfair secret concessions, such uniformity would not result without the throttling of competitive forces.

Appellants contend (Br., pp. 73–74) that publicity after sale rather than before would not lead to greater competition, because the favorable terms announced by the first refiner would immediately be met by all others, by repricing. This contention ignores the fact that there are many kinds of terms of sale, such as those relating to tolling, long term contracts, packing of private brands, reusing customers' bags where repricing could have a very limited application.

Publicity of closed transactions does not necessarily mean publicity within a few moments or hours. Publicity within a day or two, which appellants concede (Br., p. 85) would lead to greater competition than under the Institute system, would still operate to bar unfair concessions or discriminations.

(b) The more important question raised by appellants is whether mass bargaining is more desirable than a system which does not wholly foreclose individual bargaining. Appellants (Br., p. 76) rely almost wholly on the testimony of an economist employed by them as a witness in this case. The weakness of this testimony lies in the fact that it was confined to abstract economic theory; that it did not purport to apply to the facts in the sugar industry as disclosed by the evidence in this case.

The suggestion of this economist that the "massed feeling" of buyers operating upon or in opposition to the massed feeling of sellers would lead to the kind of competition which this witness believed desirable, presupposes substantially free sellers as well as free buyers. (R. 1137.) This situation did not exist under the Institute regime, when direct agreements, various restrictive rules and the cooperative spirit induced by close association with one another in the activities of the Institute, armed the sellers, for the imagined "mass" encounter, with weapons the buyers did not have at their command.

The witness also assumed equally informed buyers and sellers (R. 1141), whereas under the Institute the statistics which the refiners exchanged among themselves, without disclosure to the trade, prevented such equality. Moreover, in addition, to these special disadvantages imposed upon buyers by the Institute system, it may be questioned whether the theory of mass bargaining would function properly where the sellers were 14 or 15 large concerns and the buyers hundreds in number, scattered all over the country, and with divergent interests and needs.

In an attempt to give an appearance of equality to the theory of mass bargaining as applied to this industry, appellants urge (Br., pp. 76–77) that the buyers are represented by brokers who are well informed and exert constant pressure upon refiners on behalf of purchasers. But the commissions of these brokers are paid by the refiners (Op. R. 111) and appellants (Br., p. 137) have declared that any conflicting interest on the part of brokers is inconsistent with "their fiduciary duties as agents of the refiners." Under these circumstances, buyers would be compelled to lean upon a very slender reed in bringing mass pressure to bear, through the refiners' own agents, upon the refiners.

II

Boycotting of Brokers and Warehousemen

The activities of the Institute most strongly criticized by the District Court were those by which it undertook, through the instrumentality of the boycott, to compel brokers, warehousemen and customers to conform their businesses to the rules and policies dictated by the Institute. In carrying out their policies, the Institute and its members acted without regard for the rights and interests of third persons and compelled long-established, lawful businesses to cease or to limit their operations, often with substantial financial loss. No charges were preferred, nor were there any hearings at which the interested concern was represented, or any findings of wrong-doing; the Institute acted almost entirely on the basis of reports of refiners or of Institute-hired investigators disclosing merely some degree of "affiliation" of a broker with a warehouseman or of either of these with a sugar buyer. Every person engaged directly or indirectly in more than one distributive function, and there were many such, was compelled to elect, *practically overnight,* to continue in one only of such functions; no refiner would deal with him until he had made his election to the satisfaction of the refiners and of the Institute.

Sugar is for the most part sold through brokers, who receive commissions from the refiners. (Op., R. 111.) Much of the refiners' sugar is delivered from stocks maintained at interior points, known as consignment points, in warehouses not owned by them.[1] They pay storage charges to the warehousemen. (Op., R. 112.) Brokers as well as warehousemen may confine their activities to the handling of sugar, or of foodstuffs generally, and warehousemen also sometimes store other goods. (*Ib.*) It is customary for a broker or a warehouse to be used by more than one refiner. (Exs. 381, 382, R. 1510, 1512.)

[1] Appellants are mistaken in their statement (Br., p. 127) that they sell their sugar "largely" from consigned stocks. The greater part of refiners' sugar is delivered direct from the refineries, approximately one-third being delivered from consignment. (Ex. W-6; R. 871.)

Prior to the Institute a broker and a warehouseman were frequently one, or either of these might also be a merchant or other user of sugar. (Fg. 69, R. 281.) Appellants do not question the District Court's finding that concerns which thus combined distributive functions frequently performed in various ways a valuable service to the industry. (*Ib.*)

The court found that appellants concertedly adopted against such combination of functions a policy of requiring "an election of only one of these business activities and the complete cessation of each of the others"; and that appellants "entered into, faithfully observed and vigorously enforced an agreement that the refiners should refuse to deal with a broker, warehouseman, or customer, who admittedly, or by Institute finding, was acting directly or indirectly for any of them, or for any beet, off-shore, or other sugar interest, in other than the one elected capacity". (Fg. 70, R. 281–282.) It also found (Fg. 72, R. 282) that disqualified concerns were "as a matter of course" dropped from the lists of recognized brokers and warehouses which were circulated among the members of the Institute.[1]

Appellants attack the finding that among the objectives sought to be achieved by the policy against

[1]Appellants (Br., p. 5) have waived their assignments of error, Nos. 22 and 24, to these findings, which in any event are overwhelmingly supported by the evidence (*infra*, pp. 80–93).

combination of functions the "most important" was "to aid in preserving the uniformity of price structure". (Fg. 79, R. 284.) Appellants contend that their purposes were (1) prevention of secret concessions and discriminations, in keeping with the Institute's "open price" policy, and (2) prevention of fraudulent practices.

It is the Government's position that the question of purposes cannot properly be considered apart from the means and methods used to effectuate the boycott.[1] The facts will disclose that, as the court found (Fg. 79, R. 284), appellants went so far beyond what was necessary to prevent secret concessions or fraud as to negative that this was their principal purpose. The facts will also confirm the court's finding that appellants' primary objective was to prevent any purchaser from obtaining, as a result of the combination of distributive functions, sugar at a lower net cost than the cost to every other purchaser. The facts will also

[1]Appellants, by stating (Br., p. 125) that "the question is not what the refiners did, because the facts are clear in the record" and that the sole question is the reasonableness of their action, avoid any discussion of the extent and scope of their activities with respect to brokers and warehousemen. The importance of these activities is indicated, however, by the fact that they occupied, next to transportation matters, the greatest part of the time and energy of the Institute. (Exs. 21-26, 27.) For this reason, and in order that so far as possible this Court may have before it the full picture presented to the court below, the facts will be set out at some length.

show that, even if the purposes of the refiners were those alleged, they do not justify the restraints which were imposed.

A. EFFECTUATION OF THE RESTRAINT

Although appellants' policy with respect to compelling separation of functions had its inception in the Code of Ethics as first formulated, it did not take on its drastic character and was not made definitely effective until the holding of a special meeting of the directors and members of the Institute on May 2, 1929.[1] Directly following this meeting, on the same day, upon instructions from their representatives at the meeting,[2] each of the refiners

[1] Section 3 of the Code originally condemned: "(d) payment of brokerage where any part thereof inures to the benefit of the purchaser; (e) storage of sugar in customers' warehouses". By resolution adopted May 2, 1929, sub-section (e) was amended to read: "storage of sugar in warehouses in which customers or brokers are interested or with which they are in any way affiliated."

Appellants (Br., pp. 126–127) give the erroneous impression that Section 3 (e) in its final form was embodied in the Code from the beginning and remained "a mere declaration of a sound principle" until put into effect in May, 1929. In fact, the boycotting activities criticized by the District Court were authorized for the first time by Section 3 (e) as amended. In its prior form, which prohibited merely storage with customers, it might (if reasonably applied) have been unobjectionable. (See *infra*, pp. 82, 83 footnote 1.)

[2] Exs. 391–H, 391–N, 391–O, 391–XX; R. 1559, 1560, 1561, 1570. It may be noted that the minutes of the meeting contain no reference to this. (Ex. 21–26, p. 241.)

sent telegrams to its brokers and warehousemen, all worded almost identically as follows:[1]

> Referring to Sugar Institute's 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 * * *. 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.*

To recipients of this telegram who failed to reply immediately, at the suggestion of the Enforcement Committee the following ultimatum was telegraphed two days later, on May 4:[2]

> 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.

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[1] Exs. 49–55, 164, 391, 391–A, 391–C, 391–H, 391–N, 391–O, 391–P, 391–W, 391–X, 391–TT, 391–WW, 391–CCC, 391–SSSS, 391–XXXX, 424, 424–B; R. 1195, 1264, 1556, 1557, 1559, 1560, 1561, 1564, 1569, 1570, 1571, 1592, 1594, 1801.

[2] Exs. 57, 391–B, 391–G, 391–I, 391–Q, 391–UU; R. 1197, 1557, 1558, 1559, 1562, 1569.

On May 7, the Institute informed each member of the "recommendation of the Enforcement Committee that no business should be accepted from any broker who had not signified his election to be exclusively broker to the satisfaction of refiner," and that no further consignments should be made to any warehouse affiliated with a broker "pending complete severance of business." [1]

It is to be noted that what is involved is not a restraint upon storage with customers.[2] What the Government complained of, and what the lower court condemned, was the agreement to compel brokers and customers having *bona fide* warehouses, in which sugar was stored to meet the requirements of the trade generally, to discontinue the warehouse business if they wished to continue to act as brokers or to buy sugar. An affiliated warehouse was condemned although it was recognized to be "strictly a legitimate public warehouse" (Ex. 400–C, R. 1604); or "the only place in Sherman suitable for a sugar storage" (Ex. 302, R. 1352); or a "long-established public warehouse doing a general business" (Ex. 27, p. 5); or "a *bona*

[1] Exs. 391–G, 391–HHH, 391–WWWW, R. 1558, 1573, 1593.

[2] Where a customer is not actually engaged in the warehouse business but sugar is stored with him solely to meet his own needs, the storage charges which he receives are largely in the nature of secret concessions (see R. 864, 868).

fide public warehouse, doing a general warehouse business of considerable volume"[1] (Ex. 27, p. 2).

The many brokers and warehouses affected by appellants' action objected strenuously. One broker-warehouseman wired back that the Institute ruling was a severe blow not only to him, but also to the refiner since it would be difficult to find another suitable warehouse. He pointed out that he was ideally located among the majority of jobbers and that he made only one storage charge of 3¢ per bag, whereas public warehouses charged a higher storage and on a monthly basis. He hoped that the Institute policy would be reconsidered, so that "our relations with trade will not be interrupted." (Ex. 391-FF, R. 1566.) Another broker-warehouseman in a small southern city expressed the hope that there might be a change of policy, "in view there being no public storage here and to

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[1] The discussion in appellants' brief (pp. 133–134) under the heading "The Practice Before the Institute", which is intended to show that storage with customers was practiced only rarely before the Institute, is both irrelevant and misleading. As stated, we are not concerned with storage with customers in the sense intended by the witnesses referred to by appellants. Their own testimony shows that there is a sharp distinction between "public warehouses in which we understood the customer to have an interest or to be in control, and the customer's warehouse which the customer used for his own purpose" (R. 864). The general sales manager of American, who testified as to this distinction, stated that "there were cases where customers had large interests in controlled warehouses that were regarded as public warehouses, with whom we stored, and customers generally

help us offset expense of storage provided for this particular purpose." (Ex. 391–HH, R. 1566.)

A large Louisville broker-warehouseman was in a quandary as to what course to pursue. It was difficult for him to believe that "refiners who have received for a great many years loyal support * * * would ignore this character of service to the extent of concurring in a recommendation that is so manifestly discriminatory." Pointing out that his company owned and operated one of the most complete warehousing plants in the country and had an investment in warehouses of over a quarter of a million dollars, he added, "to say to us that we must divert business created through our

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withdrew sugar from those warehouses. * * * We showed a decided preference for the public warehouses over the private warehouses, *even though they were customer-owned*" (R. 868). In other words, storage in *bona fide* warehouses owned by or affiliated with customers was not exceptional, and the court below so found. (Fg. 69, R. 281, *supra*, p. 78.)

Appellants also would have this Court believe, despite the lower court's finding to the contrary, which was not assigned as error Fg. 69, R. 281 *supra*, p. 78), that storage in brokers' warehouses was exceptional prior to the Institute. The only testimony cited tending to support their broad assertions in this respect is that of an official of Revere, who testified concerning the practice of his own company only. On the other hand, it was testified that of the 200 brokers employed by American between 35 and 40 operated warehouses (R. 864). It appears that, particularly in southern territory, public warehouses were few in number and it was the usual practice of brokers to be also engaged in warehousing (Op., R. 117; Ex. 391–TTT; see *infra*, pp. 83–85). Section 5 of the Code of Ethics, until amended in 1929, approved of storage in "brokers' warehouses."

efforts to our competitors is penalizing loyalty." He felt that before the Institute adopted such a drastic policy, "reputable brokers with large investments in their plants doing a general warehouse business should have had a hearing." He wished the refiners to consider that "before forcing me in a position of having to determine the reconstruction of the business that we have labored diligently to establish, we are entitled to a hearing * * *." (Ex. 424–D, R. 1802.)

A broker-warehouseman of Richmond, Virginia, protested on behalf of the large number of ethical brokers throughout the country, pointing out that the Institute's action resulted not only in the withdrawal of sugar stocks "without notice, from brokers' warehouses leased primarily to render service at a minimum cost to the refineries and their customers, thereby causing monetary loss to such brokers," but also cast "serious reflection upon the integrity and ethics of all brokers". (Ex. 391–QQQ, R. 1576.) The refinery to whom this protest was addressed replied that it took "pleasure in advising that your protest has been added to those already received," and stated that it deeply regretted that the Institute ruling "has worked hardships on some of our brokers." (Ex. 391–RRR, R. 1578.)[1]

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[1] One broker-warehouseman replied "I cannot give up my warehouse and will have to resign as a sugar broker." (Ex. 391–EE, R. 1565.) A Tampa, Florida, concern telegraphed to one of the refiners that, "In consideration of

The refiners were forced to admit that the Institute policy operated harshly in particular instances, and they frequently sought to shift responsibility to the Institute.[1] One refiner, writing Edgar, stated that adherence to the Institute policy "doubtless will be regarded as rather harsh treatment by some customers of long standing". (Ex. 185, R. 1287.) Another refiner, in writing to a broker-warehouseman, stated, "We appreciate the facilities and advantages of your warehouse, but since the Sugar Institute are enforcing the rule without exception we have no option in the matter". (Ex. 400-O, R. 1612.) Still another refiner stated to one of its brokers that it realized that "strict adherence to the Institute's rules not only are disagreeable to you but they will really cost you some money," but advised, "you can see perfectly well that if you do not play a game the way the rules read, you will simply not play the

contract you made with us last year, we negotiated long-term lease on new warehousing facilities which must be considered." (Ex. 391-MMM, R. 1575.) A Charleston, South Carolina, manufacturer's agent responded that, "Service is about the only thing that one broker can excel the other because the prices are all the same and I would certainly dislike very much to give up the storage of this sugar because it means a few cents to me but greater still is that I can watch more closely this service." (Ex. 400-M, R. 1610.)

[1] It was "stated" at a meeting of the Enforcement Committee that disqualification of a warehouse should always be recommended by the Institute "in order that members might be relieved of individual responsibility in the matter." (Ex. 27, p. 49.)

game at all, not only with us but with any other Institute refinery". (Ex. 391–QQQQ, R. 1590.)

The same refiner admitted to another broker, whose warehouse had been disqualified, that it afforded handling service which "was infuitely better than we could get from any other warehouse, but we simply have to swallow the bitter with the sweet and yield to the rules of the Sugar Institute in that matter". (Ex. 400–V, R. 1615.) Another refiner asked one of its brokers to note that the policy in question was "not an Arbuckle matter but an Institute matter". (Ex. 391–AAA, R. 1571.)[1]

B. ENFORCEMENT AGENCIES

At the meeting of May 2, 1929, an Enforcement Committee, composed of high officials of a number of the refiners, was created to see to the carrying out of the May 2nd resolution. (Fg. 71, R. 282.) The Committee met weekly and sometimes more often. (Op., R. 118.) When a concern was believed to combine functions, the Committee reviewed the evidence and determined whether or not it should

[1] On May 4, 1929, the Executive Secretary of the Institute, writing to an official of one of the refineries, stated: "As you are probably aware, we are in the midst of a very thorough housecleaning. I do not expect that we shall escape without litigation, *as we have doubtless had to hurt some of the innocent along with the guilty.* Every member of the Institute, however, is determined that sugar is going to be sold in this country upon an open policy and without discrimination and that we are going to take whatever steps are necessary to secure this result." (Ex. 442–R, R. 1960.)

be "disqualified."[1] The replies received by the refiners to the May 2 wires to brokers and warehousemen were apparently referred to the Enforcement Committee for advice as to whether that Committee considered the replies "as satisfactory." (Ex. 391–III, R. 1573.)

An "auxiliary enforcement committee" was created in February, 1930, to operate in the southern territory, with authority to employ its own investigators at the Institute's expense. This committee was directed, upon receiving its investigative reports, to submit the same with its own recommendations to the Directors, following the procedure pursued by the Enforcement Committee. (Ex. 21–26, p. 393.)

In order to expedite the handling and disposition of complaints, the Executive Vice Secretary was authorized (subject to advice of counsel), acting alone, to make and report his findings in cases of alleged affiliations, the privilege being reserved to any *member*, to have his findings reviewed by the

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[1] The usual practice in blacklisting a warehouse or broker was to state that "-------------- is not qualified to store sugar [or act as broker] for members of the Institute." (Exs. 391–LLLL, 400–V–1, 400–X–1, 400–Y–1, 400–Z–1, 400–C–2; R. 1588, 1623, 1624, 1625, 1626.) On October 30, 1930, counsel for the Institute rendered somewhat belated advice that the phrase "not qualified" was incorrect phraseology, and the use of that phrase in the minutes of committee meetings was discontinued. (Ex. 483–II, R. 2327.)

Executive Committee. (Ex. 20, General Rules of Procedure, Executive Secretary, p. 1.)[1]

C. INVESTIGATIONS

The Institute employed traveling investigators to investigate complaints of alleged affiliation in violation of the Institute policy. (Fg. 71, R. 282.) Complaints were sometimes received of erroneous reports made by investigators. (Ex. 21–26, pp. 388–389, 396; Ex. 27, pp. 96–98, 113–114.) On one occasion the Edgar organization complained of slanderous remarks made by an Institute investigator following an investigation of its records, as a consequence of which Edgar contemplated an action for slander against the Institute and its investigators. (Ex. 201.) A refiner had occasion at another time to assure Edgar that he had been "stressing" on the Executive Secretary the necessity of the Institute investigators conducting themselves properly, "without creating undue gossip" and he promised a "marked improvement in the situation as to their conduct in the future". (Ex. 200, R. 1298.)

One of the leading refiners complained that a copy of the investigator's report should have been

[1] The court below found that appellants sought and obtained the cooperation of non-members in the effectuation of their policy. (Fg. 70, R. 282.) Cooperation between the Institute and the Domestic Sugar Bureau went so far that the Institute Executive Committee ruled that the Bureau's reports of disqualification of warehouses might be accepted without any Institute investigation. (Ex. 21–26, p. 460.)

forwarded to a brokerage concern which was disqualified by the Enforcement Committee and the Directors. It appears that the investigator had not consulted the broker or the company with which it was claimed to be affiliated, and that the broker was able to disprove the charge of affiliation. In calling this matter to the attention of the Institute and asking for a reconsideration, the refiner said (Ex. 426, R. 1806):

> This is not the first time we have experienced similar action on the part of our investigators. I have stated in open meetings several times that I think it is unfair for our investigators not to consult parties who are under investigation and make a report as to their position when the other facts are given to us.

D. BROKERS AND WAREHOUSE LISTS

Members were required to supply the Institute with lists of warehouses and brokers being used by them, and the Institute supplied to members (and also to cooperating nonmembers) "master lists" showing all brokers and warehouses in use by members.[1] Supplementing the list of brokers qualified under the resolution of May 2, members were required to submit a separate list of those brokers who, prior to May 2, were engaged either directly or indirectly with affiliated interests in warehousing or merchandising, in order that the Institute

[1] Ex. 21–26, pp. 92–93, 249; Exs. 381, 382, R. 1510, 1512; Exs. 383, 400–I–3.

might make a separate check on their future activities. (Ex. 391-F, 391-T, R. 1558, 1562.) While the Institute did not recommend warehouses, "it can and will disqualify" any warehouse not complying with the Institute resolution. (Ex. 423-A, R. 1799.)[1]

As previously stated, the court found that brokers or warehouses which were disqualified would, "as a matter of course", be dropped from the lists. (Fg. 72, R. 282.) If refiners wished to use a warehouse not on the list of any refiner, they were required to notify the Institute of their intention "so that other Institute members can voice any objection they may have" (Ex. 400-D-1, R. 1619), and so that the Institute might have an opportunity to investigate. At first 48 hours' prior notice was required (Ex. 388, R. 1527); this was later extended to 72 hours (Ex. 20, Sec. VI, par. 3, printing 8/1/30), and finally to 6 days (*Ib.*, par. 4, printing 3/1/31).

E. BINDING EFFECT OF INSTITUTE DISQUALIFICATION

The findings of the Institute disqualifying brokers or warehouses were regarded as binding on all of the refiners, and were made fully effective.

[1]A warehouse applying to the Institute for recognition was advised (Ex. 423-A): "If you desire a sugar-storage account, your only course is to have some refiner recommend your warehouse to the Institute, at which time we will be very glad to conduct our usual investigation, and if nothing is found which is contrary to the Institute's resolution of May 2nd . . . your firm will be placed upon our *approved list.*"

A refiner assured one of its brokers that the necessity for making an election was "in accordance with requirements on every sugar refinery in the United States". (Ex. 391–V, R. 1563.) Another refiner sought from one of its brokers information as to whether a competitor was employing a particular warehouse, "because this was also a warehouse we were ruled out of, and any attempt on their part to use it I believe would be stopped by the Institute". (Ex. 490–N.) The Vice-Secretary referred to the use of a broker who was found to be merchandising sugar as "one of the rare instances in which members have deliberately and openly disregarded the findings of the Executive Committee in such matters". (Ex. 436, R. 1857.) The Executive Secretary in writing Pike, selling agent for an off-shore producer, concerning the use of a disqualified warehouse, stated, "I trust you will see fit not to leave this one isolated instance in the entire country where any distributor of cane or beet sugar is still using a broker's warehouse with all its attendant evils".[1] (Ex. 389–R, R. 1537.)

[1] This same representative of an off-shore refiner, in making arrangement for the use of a warehouse, stated, "Of course you understand that any arrangements which we may make are temporary, as final arrangements will depend on what warehouses are approved by the Sugar Institute". (Ex 389–H–1, R. 1546.) One of the refiners advised its broker that a broker used by a competitor would have to elect to continue as a broker or a warehouseman, and stated, "this same situation will apply to all representatives of all companies". (Ex. 424–E, R. 1803.)

The Institute foresaw dire consequences if any member should show signs of weakening. When a refiner complained to the Institute that it could not continue to abide by the resolution against storage in brokers' warehouses so long as a nonmember competitor failed to adopt the Institute policy, and threatened to "back-pedal", the Institute replied (Ex. 391–TTT, R. 1578):

> * * * It is of course inconceivable that after having *forced election* on the trade involving in many cases *considerable pecuniary loss* in disposing of warehouse or merchandising business that there should be any back-pedalling without the most disastrous results.

F. HARSH AND ARBITRARY APPLICATION

The District Court found that appellants' policy against combination of functions was effectuated in a "harsh and arbitrary" manner without regard to the effect upon third parties. (Fg. 80, R. 284.) The court observed that when appellants were confronted with special cases where even the possibilities of the "evils" of which they complained were so remote as to be practically nonexistent, they "made no effort to devise a system for correcting abuses which would not involve such serious injustice". (R. 120.) It described as typical of the cases cited by the Government that of the Tampa, Florida, broker who was president of, and owned stock in, a grocery concern whose business was located entirely outside of the territory in which he operated as broker. He had no intention of selling sugar to the grocery company, and could not do so because of the freight situation. Nevertheless, although the two businesses were thus necessarily dissociated, the Enforcement Committee did not regard this state of facts as warranting any exceptional treatment. (Ex. 27, p. 1.) Other similar illustrations are the following:

1. *The A. B. C. Storage Company,* located in Sherman, Texas, was disqualified because of its affiliation with the A. B. C. Candy Company, located in the same building, which was a purchaser of sugar. It appears, however, that the storage company had stored sugar "for years", being used for that purpose by several refiners; it handled sugar in a "most satisfactory way"; there was no other suitable warehouse in Sherman, the only other available storage place being "a most unsatisfactory place to store sugar", not only from the physical standpoint, but because of the owner's manner of handling the sugar. (Exs. 303–N, 303–G–1, R. 1358, 1366.) An Institute investigator, though finding that the storage company was "unquestionably technically affiliated", doubted the existence of any "competitive advantage". (Ex. 303–S, R. 1360.) He found that the storage company stored only for the convenience of local jobbers, that the local trade did not object, since the A. B. C. Candy Company did not sell sugar, and that the method of keeping its records was "per-

fectly in accordance with the requirements of the Institute". (Ex. 303–T, R. 1360.) The storage company reported withdrawals regularly; never mingled refiners' stocks; and took the hard and lumpy sugars for itself (since it had to melt the sugar for candy making), and thus kept the sugar stocks "in nice condition for the jobber and householder". (R. 488.) When the Bureau hesitated to disqualify this warehouse, the Institute pressed it for action, stating, "This is a sore point and we would appreciate anything you can do for its speedy settlement". (Ex. 303–E–1, R. 1365.) After a member of the Institute had complained against the disqualification of this warehouse (Ex. 303–G–1, R. 1366), the Institute, referring only to the Code, replied that "we do not feel that an exception should be made in this case". (Exs. 303–H–1, 303–I–1, R. 1367.) The refiner nevertheless wrote back reiterating that wholesale grocers desired to store there, that the candy company derived no "unfair benefit", and mentioned the unsatisfactory experience of competitors who stored in the only other storage place, particularly to the "condition in which their sugar has become in this storage". (Ex. 303–L–1, R. 1368.) Nevertheless, the Directors voted not to alter their earlier decision. (Ex. 303–O–1, R. 1370.) In consequence, the warehouse has remained idle. (R. 486.)

Obviously, there was here no inadvertent failure to make an exception; the Institute acted deliberately. The matter was continuously before it from

March 3, 1930 (Ex. 303–A, R. 1353) until the final refusal to reconsider on January 29, 1931.

2. *The Houston Central Warehouse,* located in Houston, Texas, occupied an 8-story brick and concrete building adjoining a building using a common loading platform, occupied by a grocery company. (R. 531.) Because both warehouse company and grocery company had common stockholders, the warehouse was disqualified (R. 531–532, 533, Ex. 21–26, p. 280; Ex. 311–B, R. 1379). The warehouse company denied "most emphatically" that the grocery company attempted either to control or profit by its ownership of stock in the warehouse. (Ex. 311–I, R. 1384.) The disqualification of the warehouse was not based upon any charge of wrongdoing. The refiner for which it principally stored sugar stated that it had found its dealings with the warehouse "entirely satisfactory" and "the service rendered by the warehouse to us has been all that we could ask for". (Ex. 311–B, R. 1379.) When the warehouse company complained against the disqualification "in rather forceful terms", the Vice-Secretary was instructed to reply that the Institute's action was the result of "an admitted affiliation" between the warehouse company and the grocery company, "rather than of any alleged unethical practices." (Ex. 27, p. 28.) The letter of the Vice-Secretary reads, in part (Ex. 311–F, R. 1382):

> The Institute recommendations * * * in such matters are not always based upon

> alleged violated ethics * * * but *more often upon the result of an affiliation of interests.* * * *

He added that "we doubt that any advantage would result from a meeting" with the president of the warehouse company.

The president, in requesting a hearing, had written:

> We do not believe that it is in the jurisdiction of the Sugar Institute to absolutely convict and sentence a warehouse without at least giving them an opportunity to be heard.

He complained of "considerable financial loss" as well as embarrassment with "nationally advertised merchandising accounts", resulting from circulation of reports of the Institute's action by the company's competitors. (Exs. 311, 311–G, R. 1377, 1382.) For nearly a year the warehouse company waged a battle for reinstatement, during which time it was preparing to sue for damages (Ex. 21–26, pp. 317, 325, 331; Ex. 311–X, R. 1392), but only after it notified the Institute that the affiliation had been removed (Ex. 311–S, R. 1391) and after a further three months' investigation was the disqualification finally withdrawn. (Ex. 21–26, p. 464.)

3. *Larkin Company,* located in Buffalo, New York, has been in business since 1878 and is engaged in the mail order, retail, wholesale and warehouse business. (R. 520.) It operates 100 retail stores in the vicinity of Buffalo and 40 in the State of Illinois. (*Ib.*) Its Buffalo warehouse has

1,000,000 square feet of space, is built of steel and concrete and carries the lowest insurance rate of any warehouse in Buffalo. (*Ib.*) It stores "practically everything". Because it was "generally understood that this company is owned by or affiliated with the chain store of Larkin Company", which handles some sugar, the Enforcement Committee "were of the opinion that this warehouse must be presumed to be a customers' warehouse". (Ex. 27, p. 1.)

There is no physical connection between the warehouse and the other business of the company; the businesses are separately operated and to all intents and purposes are entirely distinct businesses, no advantage being taken whatsoever of the combination of functions. (R. 520–521, 523.) When the company complained to the Institute, it was told that "they had made the decision and the case would not be reopened; that we were a warehouse and were in the sugar business and that was all there was to it". (R. 522.) An official of the company offered to give a bond that it would not withdraw any sugar from its own warehouse for its own use, but received the reply that the "innocent must suffer with the guilty", and that he "might as well forget it." (*Ib.*) An official of one of the refiners wrote to its broker in Buffalo concerning the Larkin warehouse (Ex. 400–D, R. 1605):

> We admit it is a regular public warehouse but we have the same situation in a great

> many other cases and have taken a firm stand.

The broker feared that it would lose the Larkin business (Ex. 400–C, R. 1604), but was assured "confidentially" that none of the other refiners could use the Larkin warehouse either (Ex. 400–D, R. 1605).

The space for sugar storage in the Larkin warehouse has remained idle. (R. 523.)

4. *Wortz Storage Company,* located at Fort Smith, Arkansas, occupies a steel-girded, concrete building located opposite the building occupied by the Wortz Biscuit Company and is connected with the latter building hy an overhead tunnel. (R. 559–560.) One-quarter of the storage space in the warehouse building is rented by the Biscuit Company for storage purposes, the balance of the building being used as a public warehouse for food products only. (R. 560.) The Warehouse Company used to store sugar and never received any complaints; it always reported withdrawals regularly and never delayed making any reports. (R. 560.)

In October 1930 the Executive Committee found that the Warehouse Company "was affiliated with the Wortz Biscuit Company and hence unqualified to store sugar for members of the Institute". (Ex. 21–26, p. 548.) One of the refiners advised that it "had been forced for the time being to move out of your warehouse but we honestly believe that you are entitled to consideration and most assuredly are going to endeavor to have you reinstated". (Ex. 315–B, R. 1406.)

5. *Bridgman Russell Company*, located in Duluth, Minnesota, is a general dairy products company which also operates a public bonded dry and cold storage business, its gross volume of business per year totaling approximately $10,000,000. (R. 553–554.) It consumes about two cars of sugar a year in its ice cream business and for this reason was disqualified by the Institute as a sugar warehouse. It was informed by the Executive Secretary that "some honest merchants must suffer inconvenience". (Ex. 314–A, R. 1399.) The Vice-Secretary regretted that the necessity of drawing sharp lines might "work a hardship in the individual cases". (Ex. 314–B, R. 1400.) At first the Institute refused to "suspend or cancel the rule" with respect to disqualification of affiliated warehouses. (Ex. 314–D, R. 1402.) Only after the company offered to incorporate its warehouse separately and to use some other type of sugar than granulated, and to give a bond, was an exception made in its case on condition that it buy all of its sugar from other than refiners, brokers or tenants of its own building. (R. 554.)

6. *The Edgar Organization*, controlled by General Edgar of Detroit and his family, represented an exceptional instance of the integration on an extensive scale of practically all distributive functions, including merchandising, brokerage, warehousing, milling and trucking. The partnership of

Edgar & Son, established in 1860 to engage in wholesale merchandising of sugar, syrup and molasses, sold sugar valued at as much as $21,000,000 annually, amounting to 2% of all sugar consumed in the United States. (Ex. 162, R. 1261; R. 443–445.) Edgar Sugar House, incorporated in 1906 with $1,500,000 capital, operated a chain of 15 warehouses in Detroit and in neighboring states. (R. 444.) It had built up a public storage business which consisted of about one-third sugar, but included 100 to 150 other kinds of groceries. (Ex. 162, R. 1262; R. 444.) Edgar Sugar House also engaged to some extent in a general brokerage business, and collected brokerage on sugar sold to Edgar & Son and to the affiliated Isbell Wholesale Stores, a chain of 57 cash and carry stores selling sugar, beans, coffee and similar commodities. (*Ib.*)

In accordanee with the ultimatum of May 2, 1929, Edgar was required to make an immediate election to continue only one of these functions. One refiner informed him, "You will have to hurry up because we can't do business with you until you decide". (R. 455.) Edgar elected brokerage, but protested that the Institute's action was unlawful and that he did not waive "any rights to damages that may ensue from the enforced choice your telegram indicates". (Ex. 58, R. 1200.) As a direct result of the boycott, Edgar was compelled to abandon enterprises of long standing. The 57 Isbell stores were closed. (R. 472.) Edgar & Son lost its merchandising profits valued at as much as $150,000 per year. (R. 457.) His powdered sugar mills were closed and the equipment became obsolete. (R. 457.) Edgar abandoned efficient trucking services, including an arrangement whereby direct deliveries had been made to chain stores resulting in savings of 10¢ to 15¢ per bag. (R. 462–463.) Its trucks became obsolete. (R. 457.) The Edgar organization, which had employed 290 individuals, was reduced to 120. (R. 445.)

After Edgar Sugar House had pointed out the advantageous location of its warehouses and the importance of storing in such warehouses, where sugar could be loaded on trucks with other groceries, an Institute committee after visiting Detroit approved an arrangement whereby Edgar Sugar House leased warehouse space to the Detroit Harbor Terminal Warehouse. (R. 455–457, 481.)[1]

G. SCOPE OF INSTITUTE'S POLICY

A few illustrations will serve to show how thoroughgoing the application of the policy of compelling separation of functions was. Sub-brokers

[1] After dismembering the Edgar organization, the Institute obtained complete cooperation by compelling Edgar, under threat of boycott, to sign the broker's oath, which required him to observe the letter and spirit of all Code rulings and to report violations. (Ex. 70, R. 1214, *infra*, p. 120.) He signed against the advice of his attorney, because he "either had to sign or go out of business". (R. 461.)

The charges of fraud and dishonesty against the Edgar organization, which are elaborated upon in appellants' brief (pp. 141–148) will be considered at another point. (*Infra*, pp. 112–115.)

were covered in addition to brokers and were required to elect the same functions as their principals. (Ex. 391-OO, R. 1567.) Storage of any sugar whatsoever, even that belonging to nonmembers, was forbidden both to brokers (Exs. 179, 180, R. 1282, 1283) and sugar buyers (Ex. 400-F, R. 1607). In response to the inquiry whether a broker who had a warehouse used for the storage of various grocery articles could accept for storage at regular rates sugar not belonging to any member, the Institute replied, "It would be considered a violation of the Code of Ethics for a broker to store any sugar, regardless of ownership, in his own warehouse". (Exs. 391-OOOO, 391-PPPP, R. 1590.)

A landlord-tenant relation came to be regarded as sufficient indication of affiliation to warrant disqualification. A. C. Bradley, an Indianapolis broker, who had been disqualified because of his affiliation with the Bradley Warehouse Company (although the latter "handled absolutely no Institute sugar"—Ex. 400-F-3, R. 1641), disposed of his stock interest in the Warehouse Company and executed a lease of the warehouse space, in order to secure reinstatement. Nevertheless, an official of the refiner for whom he acted as broker, warned him that the situation was only temporarily clarified, and that "the general situation of warehouses is causing much controversy among the sugar companies, both members of the Institute and members of the Domestic Sugar Bureau, and there may be *further legislation* on this subject * * *." (Ex. 400–G–3, R. 1641.) He apparently had in mind that the mere ownership of the warehouse building by a broker might be held to disqualify the broker.

At a subsequent Directors' meeting a resolution submitted by counsel was unanimously adopted providing against the storage of sugar in a warehouse located in a building owned by a customer or broker, or in which a customer or broker has an interest, unless the Executive Committee shall have found that in the exceptional circumstances of the given case such customer or broker does not derive any "unfair advantage" therefrom. (Ex. 21–26, p. 580.) A warehouse company was disqualified by the Executive Committee of the Institute on the basis of its statement that it rented its warehouse space from a wholesale grocery company. (Ex. 21–26, p. 683.) In February, 1930, the Institute advised an off-shore refiner that if a warehouse rented a storehouse from a grocery company this "will of course prohibit the use of this warehouse under the resolution of May 2nd". (Ex. 366–G, R. 1494.)

The furnishing of transportation service to a customer by a broker or warehouseman was deemed to involve "discriminations". The employment of brokers who engaged "directly or indirectly or in any way" in the business of transportation of sugar was barred.[1] (Ex. 21–26, p. 341; Ex. 20, Sec. V, par. 4.)

Rules of procedure adopted from time to time were invariably designed in the interest of the refiners, little regard being shown for the needs or interests of the brokers or warehousemen.[2]

H. ASSERTED PURPOSES OF BOYCOTTING ACTIVITIES

Appellants contend that their boycotting activities were reasonably necessary in order effectively

[1] This resolution prohibited the use not only of brokers who engage in trucking or other transportation, but also those " who in any way perform a service for the buyer contrary to the herein stated duties " or who perform any other activity condemned by the Code of Ethics.

[2] Thus it was provided that a warehouse claiming to be affiliated should not be used pending investigation by the Institute (Ex. 20, Sec. VI, par. 5 (b)). Members were required to remove all stocks from disqualified warehouses within 30 days. (*Ib.*, par. 11.) It was recognized that " the adjustment of the affairs of those brokers who were going out of the warehouse business might take some time ", nevertheless " it was decided that no sugar should be shipped to broker-owned warehouses during the process of adjustment ". (Ex. 21–26, pp. 246–247.) Disqualified warehouses could be reinstated only after further investigation, which could be had only upon formal request from a *member* and not on application of the disqualified warehouse (*Ib.*, par. 10; Ex. 21-26, pp. 343, 539). In the absence of " new evidence ", the Executive Committee was expressly relieved of any obligation to consider a request for reconsideration of a finding of affiliation within 90 days of the making of the finding. (Ex. 21-26, pp. 598, 614.)

to eliminate secret concessions and frauds.[1] The facts narrated would seem to show that, even if this were so, it would not constitute a sufficient justification for what was done, and, in any event, "only clearly proven necessity could justify action which bore so heavily * * * on entirely innocent parties". (Op., R. 248.)

Secret concessions.—While combination of distributive functions facilitated the granting by the refiners of secret concessions (Fg. 73, R. 283), insofar as they intentionally granted such concessions they had it in their power to revise their practices. The court found that, to the extent that the policy of separation of functions was adopted in order to eliminate secret concessions, the refiners were "distrustful of one another" and sought assurance that none of them would use a combination of functions to facilitate secret concessions. (Op., R. 113; Fg. 79, R. 284.) Appellants assert (Br., p. 126) that it is no reflection on their good faith that they wanted "some measure of assurance" that in adhering to the principles adopted they would not be prejudiced by secret violation thereof by any other refiner. Put more bluntly, the assertion is that it was reasonable to compel third per-

[1] Appellants (Br., p. 124) introduce the defense of their boycotting activities with the assertion that their action was essential if the basic principle of the Institute were to be anything more than a pious aspiration. They ignore the possible alternative that, if maintenance of that principle required action as drastic as that herein described, complete effectuation of the principle might be illegal.

sons to discontinue or limit their lawful businesses, often at great financial loss, merely because the refiners did not trust each other. As so stated, the argument is self-refuting.

Alleged frauds. — The fraudulent practices which it is contended were facilitated by the combination of distributive functions are relatively of minor importance[1], and it is not shown that more usual or less drastic methods would have been inadequate to eliminate them. On the contrary, the record discloses that prior to the Institute no real effort was made by the refiners to detect frauds or to encourage greater honesty on the part of brokers or warehousemen. It is evident from the

[1] The principal irregular practice relied upon, that of delaying reports of withdrawals of sugar from warehouses, has, as appellants themselves indicate (Br., pp. 127–128), little bearing except upon the time when credit and discount terms start to run upon sales of the less than one-third of refiners' sugar which is sold out of consignment. While they state that on sales between moves price also is determined by the date of withdrawal, elsewhere in their brief they describe (Br., p. 52) the amount of such sales as negligible.

The assertion (Br., pp. 127–128) that in the sugar industry brokers and warehousemen "act as a check on each other" is inconsistent with the fact that prior to the Institute brokers and warehousemen were commonly one and the same. (*Supra*, pp. 78, 84 footnote.) Nor are warehousemen "agents" of the refiners; clearly they are independent contractors. And brokers are agents of the refiners only in a technical sense. The fiduciary relationship of a broker to a refiner is not that of an employee or exclusive representative. It is customary for a broker to represent more than one refiner, and it is not unusual for a broker to be engaged as well in the sale of other foodstuffs. (*Supra*, p. 77.)

testimony that the refiners were exceedingly lax not only in not requiring immediate notices of withdrawal, but also in paying unearned storage charges. The looseness of the practice which prevailed prior to the Institute is shown by the testimony of an official of National, the second largest refiner, (R. 1064–1065):

> We did not have any general follow-up or audit system of these stocks which were stored in the customer's warehouses. We did not audit all or any substantial portion of them *because of the competitive situation.* Other refiners were doing the same thing, and we did not want to offend the customer.[1]

It seems clear that in the instances where refiners did not have knowledge of the practices in question, this was because they were not much interested in ascertaining the facts. Appellants' witnesses almost invariably testified that the effect of withholding withdrawal reports was to "bunch" such notices at the date of a price decline. (R. 1010, 1053, 1056, 1058, 1059.) One of them testified (R. 1005):

> * * * it is my belief that they [the refiners] knew we were delaying the billing since it was more than a coincidence that

[1] This may be contrasted with appellants' assertion, unsupported by record reference, (Br., p. 140) that the two largest refiners employed traveling auditors to check consigned stocks and to detect instances of delayed billing, and that in the great majority of cases "the auditors had little chance of detecting fraudulent practices".

> reports would come in for a substantial amount of sugar after a decline and just previous to an advance. They never complained.

Thus contrary to their assertions, appellants did have a ready means of discovering at least flagrant cases of delaying reports of withdrawals. It was testified by appellants' witnesses that delaying reports of withdrawals "was a general practice in the trade" (R. 1054), and, "We never received any complaints from the refiners about those practices." (R. 1053.) Thus it is clear that while the refiners were put on notice, they made no real effort to learn the facts, or to discourage the practices complained of.

The court below found that the extent of dishonest practices prior to the Institute was substantial (Fg. 74, R. 283), but it pointed out in its opinion that "In all these matters it is difficult to determine which of the secret concessions were obtained with refiners' consent and which by the dishonest acts". (R. 113–114.) Since voluntary secret concessions were not uncommon in the pre-Institute period, the refiners were presumably not concerned over the fact that other secret concessions were taken without their authority.

The court doubted that such investigations as were conducted by the refiners before the Institute were carried on in more than a half-hearted way. (R. 122.) It was of the opinion, in any event, that if the collective efforts of all of the refiners, acting through the "efficient" Institute, had been directed to the end of detecting frauds, appellants would have had far greater success than was attained by individual refiners prior to the Institute. It suggested the analogy of the familiar trade association activities in collecting credit information, and observed that even had it been necessary to devise an elaborate system of investigations, inspections and circulation of data, such as was employed in the *Cement* case (268 U. S. 588), such activities would not have "taxed unduly either the finances, the efficiency, or the ingenuity of the Institute." The record, the court said, "abundantly reveals the Institute's unlimited resources in these respects." Pointing out that the means actually adopted by appellants necessitated very extensive and expensive activities on their part, the court stated that, "The conclusion is irresistible that 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." [1] (Op., R. 123–124.)

[1] If it be true that the policy adopted by the refiners was "far more practical, simple and effective" (Br., p. 139) than that proposed by the court, it is also true that the policy adopted was far more drastic. Amputation may be the most simple and effective remedy for gangrene, but resort thereto would not ordinarily be had until other less drastic, though perhaps more difficult, methods of cure had been tried. Fur-

Even under conditions as they existed, the court found that "concerns in substantial numbers, which combined distribution functions, maintained entire honesty and good faith in their dealings with the refiners." (Fg. 76, R. 283.) Appellants' failure to consider this fact, and to resort to less drastic methods available for the elimination of fraudulent practices, suggests that they bad an ulterior purpose. Specific evidence showing their purpose, found by the court to he their dominant purpose, to prevent variations in

thermore, the statistics collected at page 139 of appellants' brief to show that little effort on the part of the Institute was required to effectuate the policy against combination of functions are grossly misleading. A better picture is presented by the repeated references throughout the minutes of the Institute meetings (Ex. 21–26) and the minutes of the Enforcement Committee meetings (Ex. 27) showing the extent to which high officials of the refiners and the officials of the Institute devoted their time and energies to this subject.

Serious doubt is cast upon the statement that the Institute employed only three investigators by the statement appearing in the minutes of the Institute meetings to the effect that, rather than to increase the regular force of the Institute, the "agencies of investigation employed [by the Institute] should supply sufficient men to pursue investigations more rapidly." (Ex. 21–26, p. 281.) The Executive Secretary was authorized to arrange "for sufficient help through such agencies to give prompt attention to all complainants." (*Ib.*) The Enforcement Committee and the Southern Committee were separately authorized to employ investigators. (*Ib.*, pp. 246, 393.) In addition, the Institute at various times retained a firm of auditors to audit refiners' stocks in warehouses. (*Ib.*, pp. 214, 220, 309.) To the investigations conducted by the Institute must be added the investigations conducted by the individual refiners. (R. 869.)

the cost of sugar to customers will be pointed out (*infra*, pp. 115–119), but we shall first consider briefly the so-called Edgar irregularities.

I. ALLEGED EDGAR IRREGULARITIES

The paucity of proof of fraudulent practices by brokers or warehousemen is indicated by appellants' great reliance on the alleged Edgar irregularities (Br., pp. 141–148), which they boldly assert are more than sufficient to "justify completely" their policy against combination of functions.

The Edgar situation was in no way typical of those against whom this boycotting policy was applied.[1] The Edgar organization itself was unique. (*Supra*, pp. 100–101.) In addition, most of the alleged irregularities occurred at a time when Edgar, while still under contract with Godchaux to purchase monthly a large quantity of sugar, was being compelled by the Institute to wind up his merchandising activities. This sudden, enforced restriction of his activities necessarily caused him much difficulty and led to some confusion.[2] Moreover, much

[1] A memorandum prepared by Stubbs of American in March 1930 stated, with reference to Edgar shortages and irregularities in the matter of withdrawals, that Edgar "is the *sole* broker with whom we have experienced any such difficulty *even to a remote degree*". (Ex. L–9, p. 5.)

[2] Prior to May 1929 Edgar had been primarily a merchant. Edgar's manager testified that Edgar had an "old system of bookkeeping which we used in merchandising and were trying to switch over to the brokerage but were still continuing this merchandising to dispose of the Godchaux sugars which we had acquired by exchange". (R. 497–498.)

of the testimony was expressly confined by the District Court to the issue of appellants' "good faith" in inaugurating the boycotting policy and the Government restricted its cross-examination to showing that the transactions in question were subsequent to May 2, 1929, and therefore without bearing upon the question of good faith.[1] (R. 1183f–1183l.)

Concerning Edgar's so-called exchange of sugar prior to May 2, 1929, the evidence as to refiners' prior knowledge of and acquiescence in this practice is conflicting. (See R. 490, 496.) There is documentary evidence that American, at least, was aware of the practice. Edgar in a letter to American's president in March 1929 referred to his (Edgar's) practice of "taking over a car of sugar here and giving a car of sugar there," and said, "You are fully familiar with the exchanging of sugars we have done at various times". (Ex. 184, R. 1286.) In any event, Edgar always had on hand at one point or another sufficient sugar to account for all of the refiners' stock. (R. 491, 496.) Edgar's purpose in sometimes exchanging sugars was

[1] The testimony of Stubbs of American concerning his conversations with Edgar's manager in 1930 (R. 1075–1079) were admitted, not as proof of facts, but only to show Stubbs' state of mind, and the Government confined its cross-examination to establishing that appellants' boycotting activities were not based upon this state of mind. (R. 1183f–1183j.) Likewise the irregularities to which Castle, Stone, Harper and Ketcham testified related to matters occurring after May 2, 1929. (R. 1089, 1090, 1094, 1098.)

to facilitate his merchandising activities (R. 454, 495); and, as appellants have indicated (Br., pp. 141–142), whether the refiners profited or lost by the transaction depended upon the intervening price movement. Appellants refer to no evidence that Edgar exchanged sugars in order to take advantage of price changes.

The "Mesch deal" described by appellants as "notorious" (Br., p. 144) involved a purchase made by the Edgar firm in 1930, through a dummy, of only 377 bags of damaged sugar. (R. 471.) The basis for the charge of fraud is merely that the transaction involved the purchase of refiners' sugar by a broker for his own account in violation of restrictions imposed by the Institute. The price paid was that fixed by an employee of the refiner. (R. 471, Ex. 275.)[1]

As to Edgar's refusal to turn over some of his own records to the Institute's investigator, all that this means is that Edgar, whose business the Institute had dismembered and partially destroyed, in this matter stood on his own rights. If any records were withheld, they related only to transiting and an exhaustive Institute investigation (R. 406) developed that the amount of his improper transiting, if any, was negligible and that it was in almost

[1] The Mesch transaction, like those involving the transiting of water-borne sugar, was brought out by the Government on direct examination. (R. 471.)

every case the refiners and not Edgar who profited by such transiting as may have been improper.[1]

J. DOMINANT PURPOSE TO MAINTAIN UNIFORMITY OF PRICE STRUCTURE

One of the grounds of justification urged in the District Court in support of the boycotting policy, but not now pressed, was (Op., R. 114) that a person combining functions might obtain an advantage over a competitor who did not or could not do likewise. As quoted in the opinion below, appellants' brief had urged (R. 115) that "The payment of storage charges to certain customers necessarily gives them an advantage over customers who were not paid storage *and makes the net price of sugar to such customers lower than to the other customers.*"[2] The court found that appellants' dominant purpose was to prevent any such variation in price or, as stated by the court, to maintain "price uniformity." Much direct evidence exists of this purpose.

[1] Edgar was shown to have transited only 27 cars containing some water-borne sugar, of which only 2 were for his own account. (Ex. J–2; R. 505.) On the remaining 25 cars there was no way by which Edgar could profit by the transiting; if anyone profited, it was the refiner. (R. 505.) Furthermore, there was conflicting evidence by experts as to whether water-borne sugar was entitled to transit. (R. 573–579.) The refiners themselves discovered errors in their own transiting. (Exs. J–10, K–10.)

[2] Also that "the result of a broker merchandising sugar is that through the brokerage which he receives he is placed in a preferred position over the ordinary sugar merchant".

The Code Interpretation construing the provision contained in the Code as first promulgated, prohibiting the use of customer-owned warehouses, rested the prohibition entirely upon the ground of preventing "discrimination". The prohibition was designed, it was said, "to eliminate the discrimination resulting from the consideration of monies received from the storage of sugar as lessening the costs of sugars to the buyer". In the case of the ownership by a customer of a licensed warehouse doing a general warehouse business, it was said, "it is a question of fact in individual cases whether the business is conducted in such a way as to reflect *discrimination* in the cost of sugar to the buyer." (Ex. 20, Sec. VI, par. 1, printing 11/26/28.)

At a meeting of the Executive Committee in November, 1928, the Executive Secretary reported that "with the elimination by the Institute of the main forms of *discriminatory* practices, the remaining forms of opportunities for *discriminating* among customers had assumed a relatively greater importance." (Ex. 21–26, p. 150.) Such opportunities for "discriminating" among customers, he referred to as "leaks". Among them he listed "storage in warehouses whose relations with the customers are such that the customer can get a discriminatory advantage *through the elimination of an extra handling, or otherwise.*" (*Ib.*, p. 151.)

At the special meeting of Directors and members on May 2, 1929, when the boycotting program was launched, it was resolved that a broker "shall be deemed to be interested in the business of merchandising or warehousing sugar, if directly or indirectly, such broker shall derive any benefit or advantage therefrom which the broker may, directly or indirectly, employ to *discriminate* between purchasers of sugar; and a customer shall be deemed to be interested in the warehousing of sugar, if directly or indirectly, such customer shall derive any benefit or advantage therefrom which may amount to *discrimination* in favor of such customer in the purchase of sugar." (Ex. 21–26, pp. 239, 240.)

The Vice-Secretary, in writing to one of the members, described the purpose of this resolution to be "to prevent the sugar buyer from receiving some advantage in the way of sharing in the warehouseman's or broker's fee." (Ex. 391–IIII.) The same official wrote Edgar, who had elected to remain a broker, and whom the Institute was seeking to persuade to dispose of his powdered sugar mills and to discontinue furnishing any trucking service for sugar buyers (Ex. 166, R. 1265):

> You appreciate that, whether or not such is the case in this particular instance, this sort of relationship to a refiner's customer offers the widest opportunities for *in effect* splitting your commission with the customer, for *in effect* selling the refiner's sugar to his customer at less than the price publicly quoted by the refiner.

The true basis for the prohibition against storage in warehouses affiliated with customers is indicated in the following testimony of the chief legal adviser to the Institute (R. 627):

> I do not think there is any place to draw the line, if you adopt the principle of not storing with customers. *If the customer, through a corporate affiliation or otherwise, derives a benefit from the storage that his competitors do not derive, I think that is a discriminatory advantage.* What degree of affiliation would amount to an interest in the storage was discussed at some length. It was finally decided that tbe only practical solution was to treat all alike and to refuse to store with any jobber or wholesaler who was affiliated.[1]

In other words, appellants were proceeding upon the theory that any advantage resulting from combination of functions which may reduce the net cost of sugar to the sugar buyer amounts to "an unfair and unlawful discrimination in favor of the customer." (Answer, R. 41.) Appellants' misuse of the term " discrimination " is well demonstrated in the lower court's opinion where the following inconsistency in appellants' position is noted (R. 116):

[1] He also testified (R. 626) that, "A man might be a warehouseman and be perfectly honest, but still if he was affiliated with the sugar industry, and we thought it was discriminatory to some sugar refiners, we believed he should cease storing sugar."

> While urging that to permit some to acquire a preferred position is to discriminate against the others, they contend that "only if it is contrary to the Anti-Trust laws for the refiners to deal on the same basis with their customers *similarly situated* * * * can it be said that they were not justified and acting reasonably in adopting the recommendation against storing with customers." * * * But a customer who combines two or more functions as some did, is not situated similarly to one pursuing only a single occupation.

It is apparent that appellants' purpose to prevent so-called discriminations is none other than the purpose described by the lower court as that to maintain uniformity of price structure.[1] Any possibility of variation in the cost of sugar to the customer was regarded as a "leak" or as "discriminatory," and for that reason principally, and not because of any element of fraud or wrongdoing, was condemned by the Institute.

K. BROKERS' AND WAREHOUSEMEN'S AGREEMENTS

Appellants concertedly exacted from brokers and warehousemen certain agreements or pledges recommended by the Institute. The brokers'

[1] As stated by the court below, by compelling brokers, warehousemen, and customers to follow only a single occupation, refiners aimed also to free themselves from the pressure theretofore exerted upon them to obtain reduced prices or other favors in compensation for the inability or unwillingness to combine occupations. (R. 115.)

pledge[1] (Ex. 70, R. 1214) provides that "the broker hereby solemnly promises, agrees, and upon oath states that he will rigidly and strictly adhere in every way, in spirit and in fact," to the rules of conduct therein set forth. Outstanding among those rules was that requiring the broker to "peruse all letters, circulars or bulletins" received by him containing interpretations of the Code, and to "uphold the spirit and letter of the same" in all transactions unless otherwise specifically authorized by the refiner. As the court below observed, the requirement of general support of the Institute and Code negatives appellants' contention that the broker's pledge was merely a statement of the broker's duties and functions as generally understood in the trade. (Op., R. 126.) The court was of the opiniou that, to the extent that the pledge required brokers to support appellants' activities generally, it was plainly an unreasonable restraint inasmuch as those activities were themselves in large part so. (Op., R. 253.)

The pledge also imposed upon the broker the obligation, among others, not to "give, pay, rebate or divert all or any part" of his commissions directly or indirectly to customers or others connected with them. The broker was obliged to deal only with associate brokers, sub-brokers or agents who executed a similar pledge. All signers of the

[1] The pledge was executed in triplicate, one copy being filed with the Institute.

pledge were obligated to report to the refiners instances of certain Code violations by others which might come to their attention.

Brokers were in effect required to assume the obligations of membership in the Institute without being accorded any of the privileges of membership.

The essence of the warehouse agreement (Ex. 21–26, pp. 202–203), as the lower court found (Fg. 84, R. 285), was that if the warehouse company granted any rebate or concession, secret or otherwise, to any of its customers without granting the same rebate or concession to all, it should forfeit to the refiner employing it an amount equal to such rebate or concession. A high official of one of the leading refiners described the provisions of the warehouse agreement as "particularly stringent". He thought it was "hardly fair to request a warehouse having an unquestioned reputation to sign such a document," and suggested that it might be preferable to seek to eliminate the practices aimed at by enlisting the cooperation of the American Warehousemen's Association. (Ex. 400–A, R. 1603.)

The court found, and its finding is not now questioned,[1] that the refiners agreed to refuse to deal with brokers or warehousemen who failed to sign the respective pledges, and that the Institute

[1]Assignment of Error No. 30 has been waived (App. Br., p. 6).

checked up on several refiners and saw to it that this understanding was carried out. (Fg. 83, R. 285.)

The Institute also checked up on violations of the brokers' or warehousemen's agreements (Ex. 431–R, R. 1834). When one of Lowry's brokers became concerned over an investigation of its activities by the Sugar Institute and sought a report exonerating it of any charges (Ex. 346, R. 1459), the Institute informed Lowry that the broker "should not be worried because he has been investigated," adding (Ex. 346–A, R. 1460):

> Half a dozen brokerage firms in Iowa were investigated at the same time, and in the course of the last year and a half, the Institute has investigated 50 or 60 brokerage concerns. The fact that a broker is investigated by the Institute should not hurt his standing in the slightest, provided he has done nothing contrary to the Code of Ethics. An investigation should be looked upon in the same light as an examination of a bank by a bank examiner.

It was possible for violation of the broker's pledge to result in disqualification of a broker without any opportunity being accorded him to be heard. In one instance, a broker when notified of his disqualification based upon a finding by the Institute that he had violated his pledge, stated that this was the first definite and official information he had received that he had violated the broker's pledge or that he had been disqualified by the Institute, and that he proposed to go directly to the Institute and to demand a statement of the charges, which he felt could be satisfactorily explained. (Ex. 431–C–1, R. 1839.)

The evidence indicates that the Institute's investigations of brokers were not confined to discovering violations of the broker's pledge. A refiner complained about the reports made by Institute investigators concerning its brokers, stating (Ex. 431–F, R. 1829):

> The methods of personal book-keeping are taken to task and in one case the report went so far as to criticise a man's appearance, saying that he was of a laboring type, sincere but with slow mental process and unable to give the service required of a broker in a fluctuating market. Blood relationship seems also a bar.
>
> We take exception to all this. It is impossible in the South with its widely spread towns with small population always to get the energetic, able, aggressive broker which invariably characterizes the sales force of the various refiners doing business in the East. We are glad to get a representative who will sell an occasional car for us even if he spends part of his time soliciting insurance, dabbling in real estate, hoeing cabbages or moonshining.

The court below was of the opinion that appellants could not lawfully take concerted action to compel brokers to refrain from giving rebates, even though refiners independently might well impose such a restraint. (Op., R. 253.) The court reached a similar conclusion with respect to an agreement requiring warehouses to refrain from giving rebates or concessions, with a penalty for violation, observing that appellants' professed aim of preventing secret arbitrary discriminations could have been realized by less drastic means. (*Ib.*) The court referred undoubtedly to its earlier discussion (Op., R. 123) with respect to dealing with wrongful practices by brokers and warehousemen in the same manner as credit risks are determined, in conformity with the decision in the *Cement* case, 268 U. S. 588. Under such a system, through cooperative investigations and the circulation of reports, refiners would be informed as to the manner in which the various brokers and warehousemen conducted their affairs and could determine independently, on the basis of such information, whether they cared to deal with particular brokers or warehousemen who had been found to practice the giving of rebates or concessions.

III

Transportation Restraints

A. THE FACTUAL BACKGROUND

The cost of transporting refiners' sugar from their several seaboard refineries to interior points is a substantial element in the cost of sugar to their customers. (Fg. 87, R. 286.) Where there is a wide variation in transportation rates from different refineries to common markets, the terms which refiners quote for transporting their sugar are of major importance. A cost difference of 5¢ or even less per 100 pounds is substantial (Fg. 94, R. 287), and distributors consider a gross profit of 10¢ per 100 pounds satisfactory (R. 399), but transportation rates to Chicago, where both Pacific Coast and New York refiners sell, ranged from a high of 84¢ by rail from San Francisco to a low of 28¢ hy barge from New York (R. 416, 720–721; Ex. L–4).

It is the custom of the trade to quote sugar f. o. h. refinery. (Fg. 91, R. 286.) Since the f. o. b. price of the several refiners was usually the same or varied only slightly, even before the Institute, a refiner could not sell in territory which enjoyed a lower rail rate from another refinery unless he was willing to absorb the freight differential.[1] (Fgs. 88–89, R. 286.) This absorption was effected by the announcement of "freight applications" to particular destinations, and the application was normally the lowest all-rail rate from any refinery to the given destination. (*Ib.*, R. 722.) Accordingly, except where the purchaser took delivery at

[1] There was another possibility, of which there were two instances before the Institute, that the refiners having a lower freight rate would refuse to sell f. o. b. refinery, thus withholding from purchasers the advantage of the cheapest available transportation and giving the favorably located refiners a freight pick-up. (Fg. 92, R. 286–287.)

a refining city, the actual cost of sugar to him was the f. o. b. refinery price plus the refiner's freight application, irrespective of the amount actually paid for transporting the sugar to point of delivery.[1] (Op., R. 127.)

The situation was complicated by the availability of differential routes to certain areas, which routes were slower and at the same time cheaper than all-rail.[2] (Fg. 94, R. 287.) Not only did customers at interior points purchase large quantities of sugar f. o. b. refinery, which they then shipped over differential routes, but the refiners also used these routes extensively in transporting their sugar to consignment points.[3] (Fg. 95, R.

[1] The freight applications applied both to all-rail shipments direct from the refinery and to deliveries from the refiners' consigned stocks. (Op. R. 131.)

[2] For example, at the time the Institute was formed there were five different all-rail rates from refining points to Chicago, where practically all the refiners sold, these rates ranging from 53½¢ to 84¢. (R. 720.) The all-water rates to Chicago ranged from 29½¢ from New York (in April 1929) to 44¢ from New Orleans, and there were a number of combination rail and water rates varying between 47½¢ and 54½¢. (Op. R. 129.) In the early days of the Institute the freight application was the rail rate from New Orleans, 54¢, and the refiners, on sales from consigned stocks which they had shipped over differential routes, effected a substantial freight pick-up. (Op. R. 133–134; R. 720; Ex. 457–D, R. 2144.)

[3] All the sugar shipped in 1928 for refiners' own account to Illinois, Indiana, Michigan, and Wisconsin was shipped over differential routes. (Ex. 528, Opposite R. 2376.) Edgar chartered barges which it filled to capacity in 1926, 1927, and 1928, and continued to ship by barge in 1929 until

287.) There was therefore a tendency for freight applications to break down to the level of the cheapest service carrying a substantial traffic. (Fg. 97, R. 288.) This tendency increased with the elimination, after the Institute, of all price variation; competition then developed in the freight applications themselves. (Fg. 98, R. 288.) A very considerable part of the activities of the Institute concerned "concerted steps taken by defendants to suppress this new competition." (Op., R. 129.)

The two major restraints successively imposed to suppress this competition were:

(1) The concerted attempt under Section 3 (c) of the Code, hereinafter called Code 3 (c), to prevent the granting of freight applications based on differential rates.

(2) The later concerted adoption and maintenance, in the two important areas served by differential routes, of delivered prices, coupled with denial of the privilege to purchase f. o. b. refinery for shipment to such areas.

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the adoption of delivered prices, "when the axe fell." (R. 463.) Joannes Bros., wholesalers at Green Bay, Wis., built special facilities for barge shipments, which increased in volume from 24,000 bags in 1925 to 92,500 bags in 1927 and 80,000 in 1928, and the advantage of the water rates enabled this concern to extend its marketing territory into northern Wisconsin and Michigan. (R. 396, 399.)

For the years 1929, 1930 and 1931 barge shipments from New Orleans were 35%, 31%, and 33%, respectively, of all deliveries by refiners able to ship from there by barge. (Ex. 454, R. 2119; Op., R. 130.)

B. AGREEMENT TO BASE FREIGHT APPLICATIONS ON ALL-RAIL RATES

Code 3 (c) condemns—

> The use of differential rates on consignments, or otherwise than on direct shipments over differential routes at customers' request.

To state the matter differently, Code 3 (c) represented an undertaking to base freight applications on all-rail rates (Fg., 99, R. 288; Ex. 457, R. 2140), irrespective of whether or not all or a substantial part of the refiners' sugar sold from consignment was moved to the market of destination at lower differential rates. Under this Code provision the refiners concertedly undertook to fix "a substantial element in the price of sugar without any demonstration or even real consideration of the reasonableness of the charge." (Op., R. 253.)

It should be noted that it was early recognized that Code 3 (c) stated a principle impossible of universal application. A Code Interpretation promulgated in March 1928 stated that use of differential rates on consignments cannot be prevented in all markets at all times; that the customer always has the right to order f. o. b. refinery, taking the slower service at his own cost and risk; that if the quantity thus shipped is inconsiderable it should be ignored rather than break down the all-rail freight application; that if, however, customers' differential shipments are sufficient to break the market at the destination point, "this competition must necessarily be met", but in every such instance the Executive Secretary should be fully advised, before sale at a differential rate, "of the necessity of this departure from the strict letter of the Code of Ethics." (Ex. 20, Sec. IV, par. 1, printing 3/29/28.)

Appellants have waived (Br., p. 6) their assignment of error, No. 136 (18), to the provisions of the decree (Sec. V, par. 18, R. 323) enjoining concerted action in determining transportation charges or limiting freight absorptions. A substantial part of the record relates to such concerted action, chiefly centering around Code 3 (c), but the Government, in view of the waiver, will merely describe in a general way the efforts made to enforce Code 3 (c) and certain typical instances where competition in freight applications was suppressed or limited. The Government believes that the action taken in this major field of Institute activity serves to show the purposes of the Institute and its manner of operation, as well as the circumstances leading to the later concerted adoption and maintenance of delivered prices.

The excuse which the refiners offered in the District Court for the restraint which Code 3 (c) both sanctioned and directed was that sale of transportation at less than cost throws a burden upon and discriminates against customers in markets where there is no freight absorption. (Op., R. 135.) As the District Court said, this theory would require no absorptions, but appellants never attempted, or even considered attempting, to prevent the important absorptions due to differing all-rail rates from refining points. Furthermore, a freight application based on a differential rate does not necessarily mean a freight absorption. For example, if the freight application at Chicago is based on the Philadelphia lake and rail rate of 51½¢, Boston, New York, Philadelphia, and New Orleans refiners can all ship to Chicago at lower differential rates. (See Op., R. 129.) The District Court said that it was entirely clear that the so-called discrimination involved in absorption "did not give the defendants the least concern"; that their "whole purpose was to prevent the breakdown of the freight structure, chiefly in the Great Lakes and Warrior River areas." (Op., R. 135.)

For a time desperate efforts were made by the Executive Secretary and those refiners that profited by the principle of Code 3 (c), to make it effective. (*Ib.*) Several refiners, particularly Savannah and McCahan, recognized that the prohibition against absorbing freight arbitrarily decreased the volume of their shipments into certain states and operated so as to "parcel out territory or redistribute the total sugar consumption of the country among its members." (Exs. 452–Q–2, 457–E–2; R. 2111, 2171.) By the summer of 1928 the Code principle had been openly violated in certain areas and it had become clear that enforcement of the rule would eventually meet with at least partial failure in those areas. (Op., R. 135.) However, despite lack of complete success, by concert of action pursuant to Code 3 (c), reductions in freight applications were in numerous instances postponed, prevented or limited. (Op., R. 136.) It will be illuminating to trace the action taken to this end in a few typical instances.

Traditionally in the industry freight applications at Great Lake ports were openly based upon the Philadelphia lake and rail rate during the season of open navigation. (Fg. 96, R. 287.) But in March 1928 when the usual lowering of freight applications in this area appeared imminent, the Institute suddenly called a special meeting of Directors representing Boston, New York and Philadelphia refiners, for the purpose of discussing "means of maintaining the 'all-rail' rate into Chicago and other western markets," the Institute in its notice calling the meeting requesting that no announcement be made as to time of payment on shipments over differential routes at customer's request "until after the conference." (Exs. 457–A, 457–C, R. 2141, 2142.) At this meeting McCahan, at the Executive Secretary's suggestion, agreed to exact certain payment terms on lake and rail shipments (a concession by which it gave up a competitive advantage which it had always exercised in former years), and pressure was brought upon it to agree to exact still stricter payment terms. (Ex. 457–C, R. 2142–2143.)

Another illustration of the concerted effort to prevent reductions in freight applications occurred in May 1928. On May 23, 1928, McCahan announced that it would apply the barge rate on shipments into Western territory. On the following day, "at the insistent request of Judge Ballou", McCahan withdrew this announcement, and a special meeting of the Institute's Executive Committee was called to discuss the matter. (Ex. 457-T, R. 2154.) Place wired Savannah on May 25, 1928, reporting what had transpired at the meeting, as follows (Ex. 457-U, R. 2154):

> Meeting today prevailed upon Pennsylvania and McCahan to continue indefinitely the withdrawal of barge rate application Western territory Stop Personally feel very disappointed but hope matter can be brought up again and decided in our favor before any renewed activity refined.

The next day Place wrote to Ballou (Ex. 457-U-3, R. 2194), stating that it had been suggested at the meeting that—

> we withdraw from Indiana, Illinois, and Wisconsin, or curtail our activities in these States to whatever business drifts our way in spite of our handicaps, maintaining our distribution by activities in other territories. In this connection the statement was made that it makes no difference where or to whom a refiner sells so long as he maintains a proper volume of profitable business.
>
> With this statement I most emphatically do not agree. For years we have cultivated

> bonds of mutual service and good will with our brokers and customers, which we believe are our greatest asset, which no one has the right to expect us to abandon.

In June 1928 Place called attention to the improvement in the Mississippi barge service, which would require Eastern refiners to meet barge competition, and expressed a hope that there would "be no further attempt to block our action on this matter". (Exs. 457-A-1, 476-F, R. 2156, 2312.) The Institute, however, did not let down the bars. At an Institute meeting in October Place read a prepared statement, appealing for relief from the Institute's ruling restraining him from making absorptions in the West. He pointed out that direct barge shipments into Illinois "constituted 77% of the total direct differential shipments into this State", and that because McCahan's "requests to be permitted to meet the barge competition were not favorably considered", its business in Illinois "shows an average decrease of 54% compared with last year". (Ex. 457-E-2, R. 2171.) These decreases, he said, "have been caused solely by an artificial, arbitrary ruling which does not permit us to absorb freight in the same manner that other refiners are doing throughout the United States". He stated that the Philadelphia refiners had refrained from adopting retaliatory measures, and appealed to the New Orleans refiners not to exact "the last drop of blood from their present advantage of the barge route". (*Ib.*) McCahan did not reinstate the announcement which it had withdrawn at the Institute's request and this particular breakdown, "obstructed through the efforts of the Institute" (Op., R. 136), did not occur.[1] (R. 847.)

Throughout the summer of 1928, the Institute endeavored to prevent an extension of the threatened breakdown. (Exs. 457-K, 457-D-1, 457-R-1 to 457-V-1; R. 2149, 2158, 2166-2167.) In May 1928 the Institute wired Savannah that apprehension against future breaking down of freight applications might be allayed "by suggesting that *everybody guarantee against change in freight application.*" (Ex. 457-K, R. 2149.) In August 1928 the Institute, in answer to an inquiry concerning freight applications on deliveries from consignment, said that "the efforts of the Institute are directed primarily to the removal of discrimination between both the *sellers* and buyers of sugar." (Ex. 457-Q-1, R. 2164.) This was sometimes referred to as "equalizing opportunities" of the refiners. (Op., R. 198.) One member assured a distributor that "all of your competition will be on the same basis as your good selves", and that any change in applications "will be arrived at under

[1] On April 16, 1929 (shortly before the adoption of delivered prices), an "understanding" was arrived at in an Institute meeting permitting McCahan to ship sugar to Chicago over the rail and lake route at the all-water rate. (Ex. 457-Q-3, R. 2192.) McCahan assured its competitors that wherever possible this rate would be quoted only on shipments actually moving over all-water routes. (*Ib.*)

the fair auspices of The Sugar Institute, Inc." (Ex. 457–Z–2, R. 2183.)

Another important area of Institute activity in the matter of suppressing competition in freight applications concerned certain Southern States. Early in April 1928 Godchaux complained to the Institute that Hershey and C & H were applying barge rates in Alabama. (Exs. 452–O, 452–P; R. 2082–2085.) The Institute in this connection wired Savannah stating that it believed it "can localize absorptions, if not abolish them altogether", and requested a few days to work out the situation with Hershey and C & H. (Ex. 452–R, R. 2085.) Savannah promised to take no action before the next Directors' meeting. (Ex. 452–Y, R. 2090.) Savannah and Hershey, having also claimed that barge shipments at customer's request had reached such a volume in Alabama, Kentucky and Tennessee as to preclude their obtaining business on a higher basis, the Institute requested the interested members, C & H, and off-shore interests to attend a meeting at the Institute at which the question for discussion would be: "Should freight applications in Alabama, Tennessee, and Kentucky be on the all-rail or the barge basis?" (Ex. 452–G–1, R. 2091.) Each member was requested to furnish statistics showing monthly barge deliveries into that territory. (Exs. 452–P–1 to 452–V–1, R. 2095–2098.)

In an effort to induce the Institute to deny Savannah's request, Moog, chief executive of Godchaux, pointed out that the New Orleans refiners were "respecting Savannah's position" in Georgia, and expected Savannah in turn to respect the advantages of the New Orleans refiners' strategic location. (Ex. 452–J–1, R. 2092.) He suggested that the meeting be postponed until all interests could be represented at the regular monthly Directors' meeting to be held in May, pointing out that if Savannah's request were granted, the New Orleans refiners would be compelled to invade the territory of Texas and Imperial. (Exs. 452–M–1, 452–B–2, R. 2094, 2099.) He explained that Eastern refiners were also concerned, since Savannah's situation had been brought about by their invasion of Georgia and the Carolinas. (Ex. 452–M–1, R. 2094.) He protested that Savannah was endeavoring "to take an unfair advantage of a competitor's evident desire for harmony within the Institute", and expressed his belief that it would take "the pressure of the full Directorate of the Institute to keep Mr. Pardonner's aggressive attitude in check". (Ex. 452–E–2, R. 2101.)

Moog urged Ballou to confine the conference to the question of rates to be applied in Alabama, pointing out that if the discussion embraced Kentucky and Tennessee as well, the Texas refiners should be present, because of the New Orleans refiners' proposal to invade Texas in the event that Kentucky and Tennessee were put on the barge application. (Exs. 452–B–2, 452–M–1; R. 2099, 2094.) Ballou assured Moog that he would "confine decision to points reached by Warrior River service and will try to localize this as far as possible". (Ex. 452-C-2, R. 2099.) Ballou regarded this as the most serious question which had thus far confronted the Institute and as one "threatening the very existence of the Institute". (Exs. 452-O-1, 452-Y-1; R. 2095, 2098.) He particularly urged Savannah to send its President rather than its Sales Manager, because "every Sales Manager is concerned primarily with the volume of sugar which he sells and is not accustomed to looking at the broad view of the profit to the corporation". The only way to handle this situation, he said, was "to get all concerned together and approach the matter in the same spirit of give and take as led to the formation of the Institute". (Ex. 452-Y-1, R. 2098.)

On April 18, 1928, Pardonner, president of Savannah, wrote to Ballou and each of the Institute Directors, threatening to withdraw from the Institute unless he were permitted to meet the barge competition. (Ex. 452-Q-2, R. 2111.) Among other things, he said (*ib.*):

> We take it to be quite obvious that every member of the Institute must be free to protect its own trade. * * * There should be no bylaw, rule, or regulation of the Institute which in any way restricts the freedom of its members in this particular.
>
> * * * * *

> It was never intended, and is not permissible, that it should parcel out territory or redistribute the total sugar consumption of the country among its members. We cannot consent to any policy, rule or regulation which has such an effect or tendency.

The Executive Secretary replied (Ex. 452-R-2, R. 2112):

> The statement that every member of the Institute must be free to protect its own trade, and that any rule or regulation to the contrary should be eliminated, is one of those sweeping generalities the truth or untruth of which depends upon its application and interpretation. * * *
>
> Not all of the methods prohibited by the Code are unethical in the sense of involving moral turpitude. The open use of quantity discounts, for example, is well recognized in mercantile practice. * * * The same might be said of split-billing, the giving of options, or half a dozen other practices enumerated in the Code, before we approach the border line of secret or underhand practices.

The meeting of April 26, 1928 resulted in a temporary compromise, whereby Savannah was permitted to meet the barge competition in Alabama, but not in Kentucky, Tennessee or other states.[1]

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[1] This important meeting was not reported in the Institute minutes. The absence of minutes may be explained by the Institute's reply to a letter from Hershey requesting "a confirmation of the decision":

"Not customary for the Institute to make general announcement when all interested parties are present at a meeting." (Ex. 452-V-2, R. 2117.)

(Exs. 452–T–2, 452–V–2 to 452–Z–2; R. 2116, 2117–2118.)

C. CONCERTED ADOPTION OF DELIVERED PRICES

The District Court found that appellants agreed to maintain and concertedly maintained a system of selling only at delivered prices, with denial of the privilege of purchasing f. o. b. refinery, in the Great Lakes and Warrior River areas. (Fg. 105, R. 291.) The court also concluded that the refiners acted concertedly in adopting the delivered price system.[1] (Op. R. 141, 147.)

Appellants do not contend that the restraints imposed by such agreements are reasonable, and their denial of any agreement or concerted action raises solely a question of fact. The evidence bearing upon this factual issue is so fully discussed in the District Court's opinion (R. 137–157) that the Government will largely paraphrase or quote from the opinion.

One thing which lies at the outset of any consideration of the concerted adoption or maintenance of delivered prices is that both Code 3 (c) and delivered prices have a common objective, that is, to limit or prevent granting of freight applica-

[1] The court stated that it would have made a finding to this effect had not it deemed such a finding unnecessary in view of its finding of concerted *maintenance* of delivered prices. (Fg. 105, R. 291.)

tions based on differential routes.[1] During the period prior to the advent of delivered prices—a period during which, despite strenuous efforts to enforce Code 3 (c), this finally proved impracticable—the refiners were "greatly troubled" about the tendency of freight applications in the Great Lakes and Warrior River areas to fall to the level of the lowest differential rate carrying substantial traffic. (Op., R. 141.) The refiners' transportation problems in these areas, problems which Code 3 (c) had been designed to solve, were finally solved by the adoption of delivered prices. (Fg. 105, R. 290–291.)

Summarizing the effect of the evidence prior to the events immediately preceding the announcement of delivered prices, the court below said (Op., R. 141):

> It reveals, in my judgment, that through contact with one another under Institute auspices, (1) defendants became familiar with the possibilities of a delivered price scheme, (2) their sentiment was crystallized in favor of such a scheme as a solution of their transportation problems, (3) they continued to

[1] As to Code 3 (c), this objective is directly stated in the Code Interpretations. (*Supra*, p. 128.) As to delivered prices, appellants, although they deny concert of action, admit (Br., p. 231) that preventing freight applications based on differential rates was the purpose of the individual refiners in adopting this method of selling. See also the testimony of one of appellants: "The delivered price system was designed to reduce freight absorptions." (R. 825.)

> concern themselves at their meetings in some degree with the question of delivered prices despite counsel's advice.

The court reached these conclusions after reviewing the evidence recited in the next two paragraphs.

An agreement to sell "on a uniform 'delivered' quotation (based on the 'all rail' rate), refusing to sell on an f. o. b. basis for shipment over all differential routes" was discussed at a meeting at the Institute as early as March 1928. (Ex. 457–C, R. 2142.) In May 1928 the Executive Secretary asked the Bureau to send him copies of the sales contracts used by beet sugar companies (which had always sold on delivered prices based on the refiners' prices), and stated that he sought this information in connection with a study of the possibility of changing the present system of selling sugar from an f. o. b. to a "delivered price" basis.[1] (Ex. 457–R, R. 2153.) At a Directors' meeting in June, it was the consensus of opinion that "selling sugar at a delivered price instead of upon seaboard basis * * * would be a desirable change." (Ex. 21–26, p. 68.) A month later, counsel for the Institute, in expressing the opinion that an "agreement" to adopt delivered prices would be illegal, said (Ex. U–4; Op., R. 138–139):

> And we believe that *concerted action taken* by the refiners *as the result of a recommenda-*

[1] The letter clearly indicates that the Executive Secretary was referring to a delivered-price system which denied the privilege of buying f. o. b. refinery. (Op., R. 138.)

> *tion of the Institute* would be construed as an agreement or an understanding. There would be nothing unlawful in any refiner voluntarily, but on his own initiative, changing the basis of his quotations and sales. But if the example of this refiner would be followed immediately by others, such action might appear to have been taken in concert.[1]

Subsequent to this opinion of counsel, the Directors, at a meeting in November, discussed the possibility of basing freight applications upon a system of freight zones and authorized the executive officials of the Institute to ask the assistance of the various traffic managers in studying this possibility. (Ex. 21–26, p. 149.) The Executive Secretary recognized that such a zoning system, with delivered prices for zones instead of for individual cities, was merely a variation of the delivered price system which had been discussed earlier and that, from a legal standpoint, it fell within the same category as delivered prices. (R. 775.) However, Moog, a Director, and Place, later a Director, continued to advocate adoption of delivered prices as a solution of the problem of differential rates. (Exs. 457–W–2, 473, 474; R. 2180, 2302, 2304.) A

[1] Counsel's opinion pointed out that the practical effect of adopting delivered prices would be to raise, in communities served both by rail and water, the price of that part of the sugar which the customer may now have shipped to him by water, and that this would apply to two considerable territories, the Great Lakes and Warrior River areas. It was in these areas that delivered prices were later put into effect.

delivered price system was also advocated by Arbuckle's sales manager (R. 825, 839; Ex. 473, R. 2302). At an Executive Committee meeting in March 1929 there was "a general discussion of * * * the legal aspects of delivered prices."[1] (Ex. 21–26, p. 218.)

This was the situation when in the spring of 1929 the freight applications to the Oreat Lakes area (which before the Institute had always openly fallen during the season of open navigation to the Philadelphia lake and rail rate) began to be lowered, culminating in the Arbuckle announcement on April 24, 1929, of freight applications to several canal and lake ports based on the lowest all-water rate. (Op., R. 142; Fg. 96, R. 287.) The day after this announcement Mr. Rudolph Spreckels,[2] then president of Federal, as well as a Director and later president of the Institute, sent on Federal's letterhead the following letter to all Institute members (*ib.*; Ex. 257, R. 1329):

> It appears obvious that in view of developments during the past few days that the

[1] It would be interesting to know whether this discussion of the "legal aspects" of delivered prices revolved around the possibility left open by counsel that, if there were no *Institute* recommendation, one refiner might "on his own initiative" announce delivered prices, which action, if followed by others, "might appear to have been taken" [but, by implication, would not necessarily have been taken] "in concert."

[2] The president of C & H referred to Mr. Spreckels as the man "who has been given credit for the formation of the Institute." (Ex. 442–S, R. 1962.)

> spirit of at least some of the members of the Institute is such that there is little hope of carrying out its purposes—in face of the recent creation of a committee to study situations which have caused trouble in the marketing of sugar, a much worse condition has been precipitated prior to allowing your committee a reasonable opportunity to consider the problems involved and to make recommendations for their correction.
>
> Terms and conditions openly announced, which clearly break down the entire selling structure, are to be deplored. Unless all the members are wholeheartedly determined to cooperate with their fellow members in bettering marketing conditions and each is willing to discontinue discriminatory practices, in the interest of the industry as a whole, there can be no useful purpose served by The Sugar Institute, Inc.
>
> I had hoped that the refiners who organized the Institute had, because of past experience, resolved to cooperate and build up a constructive method of doing business. The idea that refiners would persist in practices which are indefensible in principle and destructive of orderly marketing of sugar, must either be definitely overcome or we may as well close the doors of The Institute.

Thus the man who was probably the real leader in the organization of the Institute stated that "terms and conditions openly announced", conforming to the Institute's basic principles, must be definitely overcome or "we may as well close the doors of The Institute." Arbuckle's announcement was referred to as "discriminatory", *i. e.,* discriminatory not as between customers but as between refiners. The refiners were reminded that the Institute was formed to build up "constructive" and not "destructive" methods of doing business, that is, methods constructive from the standpoint of refiners' profits.

Four days after this letter, American announced delivered prices and all the other refiners immediately followed substantially American's announcement. (Op., R. 143.) These delivered prices included freight applications which were considerably higher than those which other refiners had put into effect prior to American's announcement, and which were considerably higher than the rates by some differential routes. (*Ib.*)

During the period of delivered prices, sugar could have been shipped by water to Cleveland, Green Bay and Chicago at 13¢, 20¢, and 23¢, respectively, under the current freight application. (R. 397, 416, 549.) Almost wholly as a result of the refusal to allow customers to ship by water for their own account, the sales of a wholesaler at Green Bay dropped about 50,000 bags in 1929. (R. 396–397.)

Because of the refusal to sell f. o. b. refinery to inland customers, substantial traffic was diverted from the waterways, which have been developed at great public expense. Because of this refusal, the sugar tonnage of a barge company operating over the New York Barge Canal dropped from 30,000 tons in 1928 to 8,300 tons in 1929, and its profits from $101,000 in 1928 to $4,000 in 1929. (R. 562–563, 567.) Under delivered prices, the refiners retained for themselves the advantages of any barge shipments.[1] As one buyer located on the New York Barge Canal wrote National (Ex. 482–A, R. 2323):

> In other words, the New York Refiners claim for themselves the exclusive right to use the facilities provided by the people of the State of New York for the people of the State of New York.

Appellants' explanation (Br., p. 235) of the Spreckels' letter as nothing more than the "lament of an injured refiner" was expressly rejected by the District Court. (Op., R. 144, 146.) It said: "The document, revealing its purpose only too plainly, indicates, too, that Spreckles was speak-

[1]Although the record does not contain comprehensive figures comparing barge shipments before and after delivered prices, shipments by Government Barge (from New Orleans) at customers' request declined from 5,111,000 bags in 1929 to 3,582,000 bags in 1930, whereas refiners' own shipments by Government Barge declined only from 2,495,000 to 2,471,000 bags. (Ex. 454, R. 2119.) This situation appears to have alarmed the Chairman of the Inland Waterways Corporation, who pointed out that distributors and consumers were being unjustly deprived of any savings incident to Mississippi-Warrior service. (Ex. Q–2.)

ing not entirely as President of Spreckels but also as an official of the Institute." (R. 146.) The court added that "somewhat similar exhortation" had evoked the condemnation of this Court in *American Column & Lumber Co.* v. *United States,* 257 U. S. 377. It pointed out that, under Institute auspices, sentiment in favor of delivered prices as a solution of the Industry's transportation problem had been developed and cleared; that the scheme was advocated by individual refiners despite legal advice to the contrary and that it was to some extent kept alive at Institute meetings and discussed at a time when it was apparent that the transportation problem would soon become acute. (*Ib.*) "With the situation thus primed, it required only some spark to set the scheme in operation." (*Ib.*)

Concerning the testimony of refiners' representatives that each had acted independently, the court, after mentioning that one refiner in a circular to its brokers had attributed adoption of delivered prices to the Institute (Ex. 391–U, R. 1562), said (Op., R. 147):

> In a sense, each refiner may have formed his own judgment, but each was already tutored under Institute auspices to know what was highly desirable in solving the transportation problem. The judgment of each inevitably, though perhaps not consciously, must have been influenced by the knowledge ob-

> tained through Institute activities that all the refiners were agreed as to the wisdom, from their point of view, of delivered prices. It was a judgment which must have been influenced, at a crucial moment, by the strong letter sent out by one of the important figures in the industry and Institute. Individual conduct so plainly influenced and directed by collective activities and the authority of one who spoke at least in part as a representative of the Institute, cannot be deemed independent in any true sense.

Delivered prices were also put into effect in the Warrior River area in December 1929 and were maintained there until May 1930. (Fgs. 105, 113; R. 291, 292.)

In the Great Lakes area delivered prices were maintained from their adoption in April 1929 until May 5, 1931, a little more than a month after the present suit was started. (*Ib.*) On the latter date Arbuckle announced new freight applications in the Great Lakes area which were lower than the delivered prices then in effect and which did not involve refusal to sell f. o. b. refinery. (R. 823–824.)

The Government does not regard appellants' statement (Br., p. 232) of the events leading up to Arbuckle's announcement as a fair summary of the evidence. Arbuckle's chief executive (R. 669) testified that Arbuckle was dissatisfied with the business which it was getting under delivered prices; that it "started to devise a plan in the fall of 1930 for a thorough survey" of the situation, with reference to a new setup of freight applications; that this survey was finished in January 1931; that this preliminary exploration of the subject was tentative and no final decision to adopt the rates which had been worked out was reached until shortly before the actual announcement in May, when reported violations by competitors of their delivered price announcements were "almost the only factor in determining our action." [1] (R. 823–826; particularly R. 826. See also R. 416–417, 419–420.)

D. CONCERTED MAINTENANCE OF DELIVERED PRICES

The District Court's finding that appellants agreed to maintain and concertedly did maintain a system of delivered prices is based upon at least four further specific findings, which may be stated in condensed form as follows:

(1) The Institute sought and obtained the assurance of off-shore selling agencies that they would adhere to delivered prices. (Fg. 107, R. 291.)

(2) The members intentionally created the impression in the trade that they had an understanding not to sell f. o. b. refinery. (Fg. 108, R. 292.)

[1] The testimony of a Government witness that when he suggested to an Arbuckle representative in March, 1931, that it establish water rates, the latter replied that he "had been figuring on it for six months" (R. 417) is in no sense inconsistent with the above. See to the same effect R. 419–420.

(3) The Institute policed delivered prices for the purpose of maintaining them. (Fg. 109, R. 292.)

(4) The members sought to maintain delivered prices in Texas as well as in the Great Lakes and Warrior River areas, when there were signs of a breakdown. (Fg. 112, R. 292.)

Since appellants (Br., pp. 235–247) have not discussed or even mentioned the two latter findings, the Government assumes that they are no longer disputed. It will therefore not set forth the supporting evidence, and merely calls attention to the portion of the opinion (R. 155, 156) bearing upon these findings.

(1) Assurance of Adherence to Delivered Prices Obtained from Off-shore Interests

Appellants' attack upon the finding that the Institute obtained a commitment from off-shore selling agents that they would adhere to delivered prices turns upon the proper construction of a letter written to two of these agents by Taylor, the Vice-Secretary, in the fall of 1929. The circumstances giving rise to the letter were these:

Armstrong and Hershey had advised the Institute almost at the outset that they would conform to its rules. (Ex. 21–26, pp. 20, 34.) In the fall of 1929 Armstrong notified the Institute that, because off-shore competitors were doing business "outside of" code rulings, it would be compelled to change its prior policy of rigid adherence to the Institute's open price system. (Exs. 363–A, 364, 364–A; R. 1484–1487.) Taylor, acting under instructions of the Executive Committee, requested Lamborn and Lowry, who previously had not regularly interchanged price announcements with the Institute, to do so in the future. (Ex. 21–26, pp. 316–317, 339; R. 912–913.) Both agreed to do this, but Armstrong requested that the commitments be put in writing and sent Taylor a letter outlining the assurances which it suggested should be obtained. (R. 914–915.) One of these was (Ex. P–6):

> We will also *follow refiners'* * * * *announcements* made in connection with quoting sugars on a *freight prepaid basis only* to certain points * * *.

Taylor testified (R. 915) that he followed the substance of this letter when on November 30, 1929, he wrote Lamborn and Lowry an identical letter, signed "The Sugar Institute, Inc., Fred G. Taylor, Executive Vice Secretary", reading in part as follows (Exs. 324, 343; R. 1420–1421, 1452–1453):

> You have already indicated your willingness to announce your prices to the Institute * * *. You have also indicated your willingness to subscribe to the general open selling terms adopted by the Institute * * *.
>
> * * * * *
>
> We would also like you to tell us that you will quote sugars only on delivered price

> basis to such points as are being generally sold on this basis. This latter is not an Institute matter but an item of importance to all parties concerned.

Lowry replied in part (Ex. 343–A, R. 1454):

> In selling out-of-town points we use the same prepaid basis as is used by all other refiners, and it has not been our practice to sell sugar f. o. b.

Lamborn said in its reply (Ex. 324–B, R. 1423):

> Lamborn & Company, Inc., have never sold at other than the delivered price basis in those markets which the refining members of the Institute have publicly announced as delivered price markets.

As the District Court said (Op., R. 149): "Plainly, the reasonable inference from this series of letters is that the Institute was seeking assurance that the off-shore sugar would be sold on a delivered price basis." Appellants' attempted explanation (Br., pp. 236–244) that all the Institute was interested in was open announcement or observance of announcements is "entirely inconsistent" with the documents themselves and with their "general tenor". (Op., R. 150.) Both the party instigating the letter and those to whom it was addressed set forth in clear language that what was involved was an assurance to sell at delivered prices in the markets which the refiners had "publicly announced as delivered price markets".

The opinion refers (R. 150–151) to later correspondence between the Institute and Armstrong and Lamborn, as well as to the testimony (R. 1183a–1183b) of the president of Lowry confirming this conclusion. The most striking confirmation of the understanding of the matter by offshore interests is a letter which Lamborn later wrote the Institute in which, after quoting the commitment as to delivered prices which the Institute had requested in its letter of November 30, 1929, Lamborn said that it assumed that a similar "questionnaire" had been sent to Pike, selling agents for Hershey, and that Pike, "with reference to delivered-price markets, indicated to you that they would adhere to the delivered-price basis in the markets where refiners generally sold on such a basis". (Ex. 325, R. 1427.) As the District Court said: "There is no evidence that defendants ever took any definite steps to disabuse the offshore interests of the impression which they certainly had and which defendants now contend is erroneous." (Op., R. 151.)

If assurance as to open announcements was what the Institute sought, the Vice Secretary would not have written that this was an item of importance to all parties concerned, but "not an Institute matter." Appellants suggest (Br., p. 242) that this means that, although delivered prices were not an Institute matter, it was of importance that delivered prices, when announced, should be observed. But the wording of the Institute letter is inconsistent with the proffered explanation. It did not ask the selling agents for an assurance that delivered prices, when or if announced, would be observed; it asked them to state that they will "quote" sugar only on a delivered price basis where this was the practice of the refiners. Furthermore, the previous statement in the letter that these selling agents had already indicated their willingness to "announce" their prices to the Institute and to subscribe to its "general open selling terms" shows that the paragraph dealing with delivered prices was not calling for a declaration of support for the principle of open announcement of prices and terms.

Another feature indicative of the essential weakness of appellants' defence is that Taylor, who testified in detail as to the events leading up to his letter, did not testify directly to the meaning of the crucial paragraph concerning delivered prices. (R. 911-915.)

Appellants have stressed open announcement as the Institute's most vital policy and seek to have this Court interpret the letter to the off-shore selling agents in the light of such declared policy. In this connection it is interesting to note that Taylor in a letter to Armstrong about a month earlier passed on, without comment, a suggestion made by Lamborn and by Lowry that they would be willing to cooperate with the Institute "in the matter of open price announcements, *or some substitute for that practice that may be suitable to all parties concerned"*, a suggestion which Taylor amplified as follows (Ex. 363-B, R. 1484-1485):

> They point out that a number and variety of open price announcements might be a greater disturbing factor than the present system, and suggest the advisability of some clearance, for the benefit of all parties interested in their prices, *without making it public.*

(2) Impression Given the Trade that Delivered Prices Were Concertedly Maintained

The District Court said (Op., R. 152):

> The evidence establishes beyond question that the purchasing trade entertained the belief that defendants inaugurated and maintained delivered prices by concerted action under Institute auspices; a belief deliberately created by the Institute and the refiners.

The court's conclusion was chiefly based upon the following:

(1) The impression which the correspondence previously described (*supra*, pp. 151-153) gave the off-shore selling agents that delivered prices were maintained by agreement, an impression which these agents, as brokers also for Institute members, naturally passed along to the latter's customers.

(2) The impression given Edgar's attorney in a conference with Ballou, that the Institute's delivered price system "was necessary to prevent abuses subversive of the code principles" and that this system could not be changed. (Op., R. 152; R. 394, 1183b.) The District Court was in a better position to judge the general effect of the testimony of this witness than is this Court, guided only by a condensed narrative statement of the evidence.

(3) The statements, both written and oral, by the refiners or their representatives to refiners' customers conveying the impression that they had an understanding among themselves on delivered prices. Henderson stated in a letter to a broker: "We cannot do that [ship f. o. b.] and no other refiner will do it either." (Ex. 457-Z-4, R. 2212.) National, advising a customer that its delivered price in Rochester was the same regardless of how shipment was made, said: "The situation has made it necessary for us to try to cooperate in uniform methods of sale." (Ex. 457-T-3, R. 2193.) National informed a Detroit customer that the reason why it would not ship to the customer by barge was because observance of the contract right to refuse such shipment was necessary in order to insure economy of operation and "the stabilization of trade conditions in Detroit." (Ex. 457-X-5, R. 2225.) A number of different customers testified that, when they tried to purchase f. o. b. refinery after the adoption of delivered prices, they were

told by agents of the refiners that such purchases were barred by the rules of the Institute. (R. 391, 397, 424, 549, 564.) Certain excerpts from the testimony of three of these witnesses, which appellants quote (Br., pp. 246–247), are not inconsistent with the view of their entire testimony adopted by the District Court.

Even if some of this evidence were otherwise susceptible of the interpretation upon which appellants insist, namely, that it shows merely the refiners' determination not to depart from their announced prices and terms, the suggested interpretation becomes scarcely plausible when regard is had for the fact that the refiners, in conferring and communicating with each other concerning alleged departures from delivered prices, viewed such departures from the standpoint of defeat of delivered prices rather than violation of the principle of open announcements.

The minutes of an Enforcement Committee meeting in August 1929 mention a complaint that Buffalo buyers were purchasing their requirements in the name of New York buyers and taking delivery at the barge lines, "thus defeating the Buffalo delivered price." (Ex. 27, p. 22.) In October 1929 the Enforcement Committee considered a rumor that certain sales were being made "in such manner as to defeat the delivered price" at Chicago. (*Ib.*, p. 75.) Godchaux, replying to a letter from the Institute concerning this matter, wrote that all sugar shipped to points "where there is a delivered basis price established" is invoiced "on the delivered basis price", and it asked to be informed whether anyone else "is breaking down the rule mentioned above." (Ex. 457–P–4, R. 2207.) The Institute later advised Godchaux that it had assurances from American and Henderson that they would not under any circumstances permit "any violations of the delivered price at the points in question." (Ex. 457–Q–4, R. 2207.) The letter also said that possibly there were a few points on the fringe of the territory where transiting might be practiced "to defeat our delivered price" at Chicago and other points. (*Ib.*)

Within a week after the first announcement of delivered prices, the Executive Secretary wrote the Bureau, in response to an inquiry from it as to shipments of sugar to Chicago at a low freight rate, that previously sugar purchased f. o. b. New York could be shipped all-water to Chicago by a private charter arranged either by a broker or customer. (Ex. 255, R. 1327–1328.) Ballou then said that the situation which caused this condition "has now been remedied"; that American had "announced a set of delivered prices and declined to sell f. o. b. for water shipment", which action has been "generally followed" by other refiners "so that a repetition of this incident is now impossible." It is therefore evident that the Institute from the outset approved delivered prices and regarded them as a "constructive" solution of a marketing problem, of the kind demanded by a prominent Director of the Institute just before such prices were adopted.

There were complaints to the Institute and its members, both from organized groups and from individuals, in communities which felt that they were discriminated against by delivered prices,[1] but there is no evidence that any steps to give relief were undertaken or considered. As an example of such discrimination, the freight application to Louisville under delivered prices was 52.6¢ although such application in Bloomington, Ill., to which the actual rail rate was the same, was only 44¢. (R. 517.) Complaints on account of delivered prices were also made to the Federal Trade Commission, the Department of Justice, and members of Congress. (R. 517–518, 570; Ex. Q–2.)

E. SUPPLEMENTAL RESTRAINTS ON TRANSPORTATION

(1) Private Charters

In June 1928 the following Code Interpretation was adopted (Ex. 20, Sec. I, p. C1. par. 3 (a)):

> The shipment of sugar by vessels privately chartered *by buyers* at rates other than regularly published freight rates *necessarily results in discrimination through delivery at rates not open to all on equal terms.* It is recommended that neither refiners nor their

[1] R. 507–508, 785; Exs. 304, 482–A, R. 1370, 2322; Exs. U, V.

> representatives should be concerned in the promotion of such charters * * *.

The ruling was adopted a few days after the Executive Secretary had advised the Executive Committee that shipments by vessels privately chartered were used, upon arrival, "to demoralize the market at points of destination." (Ex. 21-26, p. 65.) It illustrates the fact that restraints allegedly adopted to prevent "discrimination" between customers actually had as their purpose maintenance of a uniform price structure. The ruling shows the manner in which the Institute condemned and sought to prevent any one buyer from obtaining transportation at a less cost than other buyers in the same locality, although there was nothing whatsoever unfair about the transaction and it might be due solely to superior enterprise. Preventing all variation in the cost of sugar to their customers or ultimate purchasers, or, as the District Court describes it, a uniform price structure, is thus both the effect and true objective of the Institute's non-discrimination principle. In this way appellants sought to eliminate the opportunity, which price variations afforded, to undersell and thereby disturb the price structure; and to relieve themselves of the pressure to reduce prices to which they would be subjected if some of their customers were obtaining sugar at a less cost than others. (Op., R. 225.)

The two following Code Interpretations adopted in February 1929 have the same general objective (Ex. 20, Sec. I, p. C2, par. 3, printing 3/18/29):

> (b) No member of the Institute should ship sugar on his own account by private charter except when arranged directly between refiner and carrier, and refiner is satisfied no broker, buyer, nor warehouseman is participating in the rate.
>
> (c) Members should, before shipment, submit the terms of every such private charter to the Executive Secretary, who shall scrutinize it for any indications of rebate or other violation of the Code of Ethics.

The situation which undoubtedly gave rise to these rulings is shown by a letter from Ballou to Edgar on March 5, 1929. (Ex. 291, R. 1347–1348.) Ballou wrote that Edgar's success in securing water transportation for sugar from New York had led to reports as to the terms on which Edgar was offering sugar and that these reports had "caused uneasiness." Ballou asked Edgar to confirm Ballou's understanding that it was Edgar's practice to sell upon the "prevailing freight application" used in the market of destination, irrespective of the fact that his cost of transportation was less than this application. Ballou significantly added that "the success of the Institute depends upon keeping various competing interests satisfied that no other interest is obtaining an unfair discriminatory advantage." After the Institute had again written Edgar calling attention to his movement of sugar by chartered boats and asking him to report the rates which he would quote at various points (Ex. 457–0–3, R. 2191), he attended a meeting of the traffic managers of the Institute, when a further attempt was made to get him to disclose what freight applications he would charge his customers. (R. 465.)

Insofar as the rulings apply to shipments by a refiner for his own account, the obvious purpose was to equalize competition among the refiners, a purpose expressly declared in connection with other restraints. (*Supra*, p. 134; *infra*, pp. 178, 180.) Although the rulings only state that the terms of all private charters shall be submitted to the Executive Secretary for scrutiny, American's traffic manager testified that the Institute furnished the reports on private charters to its members. (R. 755.) He also said that he "inspected them closely to see whether I was getting as low rates as my competitors." (*Ib.*)

It is submitted that the court's finding that the rulings in question went further than necessary to prevent "secret" rebating [1] and that the "real aim was to assist in the preservation of the price structure" was a conclusion which the evidence not only supports, but almost necessarily requires.

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[1] The court pointed out that the rulings as to private charters were prompted by "rumors" of rebating, not any known condition of rebating. (Op., R. 165.)

(2) Water Carriers

Appellants in the spring of 1930 obtained from water carriers operating on the New York State Barge Canal an agreement that they would carry sugar only on the basis of openly announced rates and terms, from which they would not deviate without open announcements. (Fg. 125, R. 295.) The agreement provided that the water companies file their rates with the Institute, which would furnish them to members. (R. 565.) The Vice-Secretary in requesting this agreement said that naming different terms and cutting each other's rates "was extremely detrimental to the sugar interests who prefer stabilized or fixed rates * * * so that they would be able to sell it on a firmer basis." (*Ib.*) The agreement was induced by the concerted threat of withholding business from carriers who did not comply. (Fg. 125, R. 295.) A short time before this meeting a Code Interpretation was adopted providing that members should refrain from employing water carriers that did not publicly announce rates and terms, or in any way deviated therefrom. (Ex. 20, Sec. XII, par. 1 (a), (b).)

Appellants (Br., 189) suggest that, upon the analogy of the Interstate Commerce Act, the restraint as to water carriers was reasonable and proper, but there is an essential difference between rate regulation by a governmental body acting under statutory authority and control exercised by a trade association over third persons, enforced by threat of boycott. While each refiner acting independently might properly refuse to do business with a carrier which failed to publish or adhere to its rates, an agreement not to employ such a carrier is clearly an unreasonable restraint of trade, particularly where the primary purpose is to advance the self-interest of those participating in the boycott.

(3) *Pool Shipments*

A minimum cargo varies from 2,000 to 10,000 bags and a minimum carload usually requires 400 to 600 bags. (R. 783.) Customers unable to purchase in such large quantities could, by grouping together, obtain cargo or carload lots. (Op., R. 165.) A Code Interpretation provided that "in no event should refiners make up a pool cargo for buyers by the inclusion of their own sugar." (Ex. 20, Sec. I, p. C2, par. 3(a).)

In justification of this restraint appellants urge (Br. 192) the discrimination that would result from their own participation in pool shipments, since they could not grant the privilege to all customers. But there is, as the court below said, "nothing unfair in an apparent discrimination which results solely from the necessary limitation of a refiner's capacity." (Op., R. 165.) If, as appellants state, participation by the refiner in pool shipments is possible only "on the infrequent occasions when the shipment happened to coincide with the refiner's own requirements," a privilege so limited by the exigencies of the business is not, as appellants further state, a ready means to give a "secret" discrimination to "favored customers." (Br., p. 192.)

(4) *Transiting and Diversion*

Transiting permits storing a shipment at an intermediate "transit point" designated by the carrier and subsequently forwarding it to a point beyond. Diversion permits a change of destination or consignee while goods are in transit. In both cases the through and not the higher combination rate is applied from point of origin to ultimate destination. (Op., R. 159.) Both privileges are therefore valuable to refiners and purchasers in getting sugar to ultimate destination at a cost lower than the combination local rates. Although under the tariffs the transit privilege was granted by the railroads to the shipper or consignee, the custom of the trade was to assign transit billing to the purchasers, so that in practice the transit privilege followed the sugar. (R. 465.) There is evidence that prior to the formation of the Institute buyers were never refused the transit privilege. (R. 412, 466.)

Because of the artificiality in the refiners' freight applications both before and increasingly after the Institute, transiting and diversion might be used to defeat the refiners' announced application at the ultimate destination. (Fg. 120, R. 294.) The freight application at Hearne, Texas, for example, was 45¢ and at Dallas, Texas 55¢.[1] The actual rail rate, however, from New Orleans to both points was 58¢. A customer might defeat the Dallas application of 55¢ by ordering sugar shipped from New Orleans at 45¢ and later diverting or transiting the shipment to Dallas. (Op., R. 160–161; Ex. Q–4.)

For the purpose of maintaining their artificial freight rate structures, appellants agreed to prevent any transiting and diversion by customers which would defeat their freight applications. (Fg. 122, R. 294.) In aid of this restraint detailed recommendations were made for individual action by refiners in preventing such practices. (*Ib.*) Under the Code Interpretations adopted diversions "into higher netting territory than the delivery point named in the contract" were declared unethical, and refiners were required (1) to trace all shipments and, where transited or diverted, to collect from the customer the application at the ultimate destination, (2) to report to the Institute all charges not collected within 30 days, (3) to follow detailed regulations as to shipments to and from transit points, registration of transit balances, and procedure when the transit billing was exercised, and (4) to incorporate in their contracts certain

[1] The application was based upon the actual rate from Sugarland, Texas (28¢ to Hearne and 38¢ to Dallas) plus 17¢. The Texas refiners always charged the New Orleans rate and refused to sell f. o. b. refinery, thus realizing a "pick-up" of 17¢. (Op. R. 160–161.)

clauses designed to facilitate the enforcement of these rules.[1] (Ex. 20, Sec. 1, pp. D1–D4.)[2]

Appellants in their brief (Br. pp. 182–187a) have not attacked the court's finding that insofar as these restraints were designed to prevent fraudulent use of the privileges, concerted action was unnecessary, and that individual refiners could have taken effective steps to prevent the practice of fraud. (Fg. 123, R. 294.) As pointed out by the court, the recommendations of the Institute contemplated individual action by the several refiners (Op., R. 161), and the refiners themselves recognized that the elimination of transit abuses depended upon "good faith and willingness on the part of all concerned to correct this practice".[3] (Ex. 459–X–1, R. 2275.) Appellants, therefore, are not prejudiced in the least in their efforts to combat

[1] By a "Buyers' Consent" clause the buyer authorized the carrier to inform the seller as to the contents of any car transited or diverted and its routing, destination, and complete delivery record at ultimate destination. A "Change in Destination" clause provided that in the event of transiting or diversion the seller's prices and terms at ultimate destination should apply in lieu of the contract prices and terms.

[2] The Code Interpretations were supplemented by additional agreements concerning procedure for particular points (Exs. 459–E to 459–I, 459–L, R. 2242–2245; Ex. 21–26, pp. 280, 375–377), and by recommendations of the Traffic Committee (Ex. 459–E–2; R. 2280).

[3] Prior to the Institute C & H developed a car tracing system, a practice evidently as effective as concerted action since it continued without change after the Institute. (R. 810.)

unauthorized transiting and diversion, especially in view of the fact that the decree itself specifically allows defendants to discuss freely and advise one another as to the most effective means for individual action to prevent fraudulent use of the privileges. (Sec. V, par. 22, R. 323.)

The lack of necessity for concerted action to eliminate fraud indicates the real motive of the defendants in the adoption of these restraints, *i. e.*, the maintenance of the artificial freight structure. To that end the Institute prohibited not only transiting and diversion which the refiner had not authorized but also that which he had permitted. (**Fg.** 122, R. 294.) The evidence clearly shows that appellants were vitally concerned with preventing transiting and diversion of the latter type.

Early in 1929 Imperial complained to the Institute that Godchaux was permitting a Dallas jobber and broker to transit sugar from Hearne into Dallas "thereby defeating the delivered prepaid basis in Dallas of 13¢", and that to effectuate such transiting a special arrangement had been made by Godchaux with a private warehouse in Hearne. (Ex. 459–D–1, R. 2257.) Imperial stated that it was convinced that this practice was in violation of the Code, but that Godchaux had "declined to stop this manipulation" unless the Texas refiners would do certain things. (*Ib.*) Imperial threatened to retaliate unless the Institute undertook "to get the Godchaux Sugars, Inc. to immediately stop this manipulation." (*Ib.*) Shortly thereafter American wrote Godchaux that it would take "every step that can be taken to prevent any customer" from defeating its selling basis by transiting or diverting through Hearne, "provided the practice is generally discontinued." (Ex. 459-F-1, R. 2259.)

In January 1931 American wrote the Institute that the proposed changes in the carriers' Storage-in-Transit rules and the Buyers' Consent clause would be ineffective to prevent transiting in Oklahoma "unless the shippers themselves assume the responsibility of seeing that shipments are not diverted, reconsigned or transited". (Ex. 459-X-1, R. 2275.) It pointed out that certain sugar shipments were being "constantly and continuously manipulated, both openly and covertly, to defeat the proper selling basis." (*Ib.*)

Appellants do not deny the comprehensiveness of their restraints on transiting and diversions, but assert (Br. pp. 186–187) that insofar as a refiner permitted transiting or diversion, he was sanctioning a departure from his announced selling terms and violating the Institute rules governing open announcement of prices and terms in advance of sale. The issue thus raised involves the same considerations as those involved in the Institute's open price plan, which has previously (*supra,* pp. 53–76) been fully considered. As to any discrimination between customers resulting from such transiting or diversion, this "was neither more nor less vicious than the discrimination inherent in the artificiality of freight structures which the defendants either openly or in concert employed." (Fg. 123, R. 294–295.)

Appellants impliedly concede (Br. pp. 185a–185b) the artificiality of the freight structure in Texas, where the Texas refiners, by refusing to sell f. o. b. refinery, obtained a freight "pick-up." Appellants attempt to minimize the Texas situation by asserting (Br. p. 185–b) that the Texas pick-up existed long before the Institute, and that it "was in no way essentially related to or typical of the transiting and diversion problem" with which the refiners were concerned. But while a freight pick-up had existed in Texas before the Institute, after the Institute, when refiners "were deprived of their former competitive devices * * *, competition developed in the freight applications themselves." (Fg. 98, R. 288.) The Government also submits that, contrary to the assertion that the Texas situation was not essentially related to or typical of the restraints on transiting and diversion which were effected, it was largely because of the Texas situation, where the artificiality of the freight structure made the problem most acute, that the restraints on transiting and diversion were adopted. The Texas problem was prominent in refiners' correspondence concerning transiting [1]; a special Institute meeting

[1] Exs. 459–A, 459–D to 459–M, 459–P, 459–Q, 459–S, 459–U, 459–V, 459–B–1 to 459–F–1, 459–K–1; R. 2238, 2239–2245, 2248–2249, 2251, 2252, 2256–2259, 2266.

was devoted exclusively to diversions in Texas (Ex. 459–T, R. 2250); and, in the minutes of the meetings of the Directors and Executive Committee, Texas was referred to in five of the seven instances where there was reference to a particular area in connection with discussion of transiting or diversions.[1]

(5) *Trucking*

Appellants do not take issue with the finding that they agreed to use only trucking concerns not affiliated with any buyer, broker, or warehouse, and then only under non-rebating agreements, or with the finding that "the alleged justification for the general policy and acts pursuant thereto" are "similar to those offered as to brokers and warehousemen." (Fg. 129, R. 296.) Since appellants' boycotting of brokers and warehousemen is fully discussed elsewhere both from the factual (*supra*, pp. 76–124) and from the legal (*infra*, pp. 282–287) angle, we shall not repeat the discussion at this point.

IV

Concerted Restriction of Number of Consignment Points

Before the Institute, the refiners, whose refineries are all on the seaboard, carried stocks in warehouses at various interior cities, called consignment points, from which deliveries were made to customers in carload or less than carload quan-

[1] Ex. 21–26, pp. 280, 298, 310, 354, 375–377, 619.

tities, at the carload rate. (Op., R. 112; Fg. 132, R. 297.) Following the organization of the Institute, its members, by agreement, eliminated all consignment points in many important areas and drastically reduced the number thereof in other important areas. (Op., R. 168; Fg. 132, R. 297.) This action was taken under Section 5 of the Code, which provides that sugar shall be consigned only to "recognized" detention points for reshipment, or to "recognized" markets. The language is highly ambiguous and insofar as the word "recognized" suggests application of some objective test or adoption of prior practice, the implied limitations of the Code were entirely disregarded.[1]

A. EVERY CONSIGNMENT POINT UPON WHICH AGREEMENT COULD BE REACHED WAS ELIMINATED

One of the grounds upon which appellants defend their action is that concerted action to bring about "a mere reduction in the excessive number" of consignment points is not an unreasonable restraint of trade. (Br., p. 223.) The question thus raised is important, namely, whether the refiners merely undertook to eliminate such consignment points as they determined in good faith, npon investigation,

[1] The general counsel of C & H was of the opinion that the Code gave no authority to regulate consignment points. (Ex. 407–N, R. 1654.) The ambiguity of the Code provision completely negatives appellants' suggested inference that the subsequent action of tbe Institute had been informally approved by the Department of Justice at the time the proposed Code was submitted to it.

to be in excess of the real needs of the trade; or whether, in order to shift the cost of carrying consigned stocks from the refiner to the distributor, they undertook to eliminate every consignment point upon which the interested refiners could agree, wholly regardless of the value to the trade of the points eliminated. The evidence indubitably establishes that the latter is what was done.

Appellants' general objectives and what was accomplished in carrying them out are disclosed in a letter written in June, 1929 to the Wilmington Traffic Association by the Executive Secretary concerning elimination of Wilmington, N. C., as a consignment point. (Ex. 447–V, R. 2006–2007.) In this letter the Institute's leading executive, in outlining what he called the "normal method of distribution", declared that it was the "legitimate function" of jobbers and wholesalers to maintain stocks and assortments of grades to meet the needs of retail dealers and to pay "the necessary charges for storage and insurance", but that, due to competition, the refiners have in many places taken over this function "and, moreover, have done it for nothing." The question whether refiners could be required to continue to do this "at their own expense" was the issue, he said, involved in a complaint which the Wilmington Traffic Association had filed with the Federal Trade Commission.

Concerning the Institute's objective, he wrote that it had consistently recommended the cutting down of consignment points with a view to their "ultimate total abolition" and that the Institute's only regret was that the policy of eliminating all consignment points could not at once be put "in effect universally."

Concerning the Institute's success in effecting its program, he wrote:

> For nearly a year past, there have been no consignments carried in New England, New Jersey, Delaware, and Maryland and only at one point (Buffalo) in New York and one point (Pittsburgh) in Pennsylvania. Further west, owing partly to beet competition, it has not been possible to make all the progress desired, but the number of points has been substantially decreased. Recent recommendations covering the South have resulted in the elimination of all consignment points in entire states and the retention of only one or two of the larger cities in other states.
>
> North Carolina is one of the states where the Institute has recommended the entire discontinuance of these so-called consignment points.

This letter covers the ground so fully and is so authoritative that little supplementary evidence seems necessary. Shortly after the Institute was formed a committee of eastern refiners was appointed to suggest consignment points in the East, other than the South, "with a view of eliminating as many as possible."[1] (Ex. 447–A, R. 1991.) In May and June, 1929, the Directors approved a report and later modifications thereof eliminating all consignment points except refinery, port of entry,[2] or storage in transit points,[3] in the following southern States: Arkansas, Florida, Louisiana, North Carolina, South Carolina, Oklahoma, and Texas. (Ex. 21–26, pp. 241–244, 254–255, 258–259.) This report as modified also permitted only one consignment point in Georgia, Kentucky, Mississippi, and Virginia; two in Alabama and four in Tennessee. (*Ib.*) A representative of Savannah truly described the recommendations as eliminating "practically all brokers' consignments in the southern territory." (Ex. 451–B, R. 2029.)

In addition to the agreements put into effect, attempts were made, which very nearly achieved success, to eliminate the sole remaining consignment point in Mississippi (Exs. 451–R–1; 490–P,

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[1] This committee in its report "suggested that no open announcement be made as to * * * the markets to be discontinued * * *, and thus avoid considerable comment." (Ex. 447, R. 1991.)

[2] A "port of entry" is a type of consignment point. While use of this term, which was not defined, "caused confusion" (R. 920), it appears to have signified a port where sugars arrived by water and were stored for local delivery and reshipment, whether or not in carload quantities (Exs. 331, 331–C; R. 1431, 1434).

[3] A storage in transit point was defined in the report as one "established only for minimum carload forwarding, or deliveries in carload quantities by switch movement of carriers." (Ex. 21–26, p. 243.)

R. 2059, 2345) all consignment points in Tennessee (Ex. 21–26, p. 354), all interior consignment points in Texas and Oklahoma (Ex. 451–I, R. 2033), and to reduce the number of consignment points in Arkansas (Exs. 451–W–1, 451–X–1; R. 2063, 2065).

The general situation heretofore described is graphically shown by comparing Exhibits Q–6 and R–6 (Appendix App. Br.), which respectively set forth the location of consignment points on December 31, 1927, and December 31, 1930.

Appellants assert (Br., p. 219) that after a consignment point had been eliminated by agreement, an individual refiner was free later to change his mind and to reinstate an eliminated point. Even if this is true, it is immaterial; the elimination was none the less effected by agreement and continued by agreement. Exhibit R–6 shows that in the entire area east of the Mississippi River (other than Wisconsin[1]) only two points had been so added by refiners as of December 31, 1930. Furthermore, concerted pressure was exerted to prevent change in an agreement once adopted (*infra*, p. 179); and National made a formal request to the Institute when it wished to reinstate Toledo, Ohio, a request which the Institute at first refused. (Ex. 21–26, pp. 475, 538.)

[1] Illinois and northern Michigan, which on the face of Exhibit R–6 appear also to be an exception, are not in fact so since, as appellants state (Br., p. 217), " no recommendations were ever made " as to them.

Appellants have referred (Br., p. 222) to the increase in total consignment points from 344 on December 31, 1927, to 347 on December 31, 1930. These figures do not reflect the true situation since apart from three States, Illinois, Missouri, and Wisconsin, there was between these dates a decrease of 97 in the total number of consignment points.[1] (Ex. S–6; Appendix App. Br.)

B. THE FACTORS GIVEN CONSIDERATION IN AGREEMENTS TO ELIMINATE CONSIGNMENT POINTS—THE WILMINGTON ILLUSTRATION

That the competitive advantages or disadvantages of the several parties to an agreement to eliminate consignment points were the only considerations given weight in arriving at such an agreement, and that no attention was paid to the value to the trade of the service eliminated, is evidenced by the documents bearing upon the agreement to eliminate Wilmington as a port of entry, i. e., as a consignment point. This elimination had been "one of the pivotal points of the compromise" embodied in the agreement[2] previously mentioned

[1] No agreement was reached upon consignment points in Illinois or Missouri. (Op., R. 168.) It is not unlikely that the increase in states where no agreement was reached was partly due to the elimination of consignment points in eastern and southern territory, which enabled refiners to add consignment points in other States without exceeding the total number of their consignment points.

[2] A letter to the Executive Secretary from Savannah said that "when this whole question of consignment points in the South was discussed, no one refiner was wholly satisfied, and the result arrived at was in the nature of a compromise." (Ex. 331–C, R. 1434–1435.)

(*supra*, p. 175), to which Hershey was a party, to abolish substantially all consignment points in the South. (Ex. 389–X, R. 1540.) A memorandum of the Executive Secretary, sent to the interested parties (Exs. 331–C, 331–D; R. 1434, 1435), described the case as "typical of the difficulty of equalizing trade opportunities where the fundamental conditions are so different that an exact equalization is impossible." (Ex. 331, R. 1431–1432.) In this memorandum he outlined the situation substantially as follows:

(1) New York refiners have an all-quantity water rate to Wilmington under which they can ship by water in carload lots without maintaining stocks there. (2) Philadelphia refiners do not have an all-quantity water rate and to obtain the water rate they must either ship in barge loads or break bulk at Wilmington, involving maintenance of stocks. (3) Hershey can ship there only in steamer loads and it "is difficult to see how they can do business at all at or through Wilmington" without maintaining stocks at that point. (4) Savannah has no water service to Wilmington and rail shipments from its refinery to interior points are slower than rail shipments from consigned stocks at Wilmington; and it "wishes to equalize competitive opportunities at such interior points."

The Executive Secretary pointed out that, if stocks are not maintained at Wilmington, the New York refiners, being the only ones who can ship there by water on a carload basis, "are left in control of the situation" in that city. Furthermore, as the memorandum discloses, elimination of Wilmington as a consignment point deprived the interior trade of the quicker service afforded by delivery from consigned stocks at that city.

When Hershey, which had maintained stocks at Wilmington ever since it had started to import sugar, threatened to withdraw from the agreement, Savannah protested that it had made concessions in agreeing to eliminate other consignment points, which it had originally established in order to equalize a "discrepancy in time in transit" in favor of competitors and that, unless the Wilmington agreement was continued, it would feel free to make changes in other Southern States. (Exs. 331-C, 389-W; R. 1435, 1540.) The Executive Secretary thereupon called upon Hershey to consider the matter "closed on the basis already agreed." (Ex. 331-D, R. 1436.) The appeal was successful; as late as December 31, 1930 no consigned stocks were carried at Wilmington. (Ex. R-6.)

C. CONSIGNED STOCKS ARE OF REAL VALUE TO THE TRADE

Appellants attack the District Court's finding that refiners' consignment service "was valuable and beneficial to substantial elements in the trade." (Fg. 135, R. 298.)

Numerous somewhat elaborate arguments can be advanced for and against the value of refiners' consignment service. It is therefore illuminating to apply the practical test of whether refiners themselves believed that the trade considered this service of value. That they did so is manifested by their acts. Appellants' witnesses testified that the reason for the growth in the number of consignment points was the competitive advantage it gave the refiner who maintained stocks, and that no one refiner could withdraw the service unless all his competitors did the same. (R. 813–814, 927.) The refiners considered this service of such great competitive importance that, even during the temporary period required to liquidate stocks on hand after decision to eliminate a consignment point, they set up what one of their witnesses called an "equalization program", under which each refiner reported his stocks on hand to a committee of the Institute and was then permitted "to ship enough sugar to equalize the largest stock." (R. 920–921.) The reason for doing this was that otherwise, when the agreement took effect, one refiner might have large stocks on hand and another small stocks and the former would have the competitive advantage of consignment service for a longer period of time. (*Ib.*)

The president of National stated that "if Edgar persisted in carrying consignment stocks at Grand Rapids, the National could not continue indefinitely to allow him to take that market." (Ex. 224, R. 1308.) In 1928 the Institute made an agreement with Edgar that he would, as a general proposition, carry consigned stocks only at the points recognized by the Institute, but that, if he found it necessary to make an exception, he would "charge ten cents extra per 100 lbs. for such service." (Ex. 228, R. 1311.) The charge was later reduced to 5¢. (R. 452.)

Consigned stocks "enabled a jobber to give prompter service to his trade", particularly in the South. (R. 813, 928; Ex. 331–C, R. 1435.) As one of appellants' witnesses testified: "Deliveries from consignment, as far as service to a customer was concerned, was even better than an all-rail shipment. It gave him a spot delivery and eliminated responsibility as to price declines and transportation risks." (R. 727–728.) Also, which is the crux of the matter, when the refiner maintained consigned stocks he, rather than his customers, bore the cost of storage and insurance and the risk of sugar becoming damaged while in storage. (Ex. 447–O, R. 2001; *supra*, p. 173.)

The protests against elimination of consignment points filed by organized bodies such as Chambers of Commerce or traffic associations, as well as by individual customers, further evidence the value to customers of the service which appellants eliminated or restricted by agreement. If the service was of no real value, its elimination would not have provoked such protests.

We have previously mentioned the protest of the Wilmington Traffic Association. (*Supra*, p. 173.)

When Fort Wayne was eliminated as a consignment point, its Chamber of Commerce wrote a letter of protest against what it termed "tearing down the commercial and distribution structure so carefully built in this community"; and it asserted that it felt that "the business interests of Fort Wayne are being seriously discriminated against" in view of the fact that every jobbing town in Indiana can be served by Fort Wayne more advantageously than by Indianapolis. (Exs. 407–F, 407–G; R. 1649–1652.) Counsel of C & H, to whom this protest was addressed, reported to the president of his company that the Chamber of Commerce "may have a good case" and that if Fort Wayne and Indianapolis jobbers are competing against each other for business in outside territory, "it stands to reason that the Indianapolis jobber bas all of the advantages and can do business with less overhead and more profit to himself." (Ex. 407–N, R. 1654.) He added that if the Institute is zealous in its efforts to keep distributors on an equal footing, the Institute, by attempting to regulate storage points, appears to be "defeating one of its fundamental objects." (*Ib.*)

The elimination of Akron evoked many protests, as also did the elimination of Youngstown. (Ex. 21–26, p. 33; Ex. 313, R. 1396.) One of the principal reasons why the Southern Consignment Committee decided to eliminate "practically all" consignment points in the South was because it felt that if certain cities were picked as consignment points and others excluded, " it might be hard to satisfactorily explain to the customers and Chambers of Commerce in the cities excluded as to why their town was left out." (Ex. 451–B, R. 2029.)

Appellants assert (Br., p. 215) that the customer, by ordering for direct shipment from the refinery, can save the expense of trucking the consigned stock to his own place of business. There is nothing to show that such a saving would be sufficient to offset the savings incident to delivery from consigned stocks and, in addition, this saving could be realized only if the customer had a warehouse on a railroad siding and then only if he bought in carload quantities. Many, if not most, of the jobbers and wholesalers in small communities are certainly not so situated as to effect this saving.[1]

Appellants also assert (Br., p. 215) that customers at consignment points "generally ordered" for direct shipment instead of consignment delivery. We leave it to appellants to reconcile this statement (which the record citations do not support) with their earlier statement (Br., p. 127) that refiners sell their sugar "largely from consigned stocks", and with their Exhibit W–6 (Appendix

[1] One of appellants' witnesses testified: "We could not get carload deliveries at our warehouse since we have no switch. If we buy a carload and have it delivered to our warehouse, we have to pay the drayage on it. The location of consignment stocks there serves *a real economic purpose* for our business." (R. 1007.)

App. Br.) showing that consignment deliveries have represented from 26% to 33% of all their deliveries.

D. THERE IS NO SHOWING THAT CONSIGNMENT SERVICE RESULTED IN ECONOMIC WASTE

Upon the basis of a theoretical computation appellants assert (Br., p. 209) that the total "cost to the industry" of consigned stocks varied between \$2,500,000 and \$2,900,000 a year and that this cost to the industry would in the long run "necessarily fall upon the consumer." They also refer to this cost as "economic waste."

The fallacy in these statements results from the fact that the so-called "cost to the industry", which appellants' statement shows to be largely storage charges and interest on investment, is not shown to be an unnecessary or wasteful cost of distribution, prejudicial to the ultimate consumer, but is the cost to the *refiners* of these and similar items which would be otherwise borne by the *distributors,* either in the same, a greater or a less amount. As has been seen (*supra,* p. 173), the Institute frankly recognized that the main effect and objective of its program to eliminate consignment points was to *shift* this expense from the refiners to the distributors.

Upon the question of economic waste, therefore, appellants' figures as to the cost *to them* of consignment service are wholly irrelevant, and they make no attempt to answer the question which is raised, namely, whether this service can be performed more economically by distributors than by refiners. While a really adequate answer would require a thorough study of the distributive system in this industry by disinterested experts, we may call attention to certain considerations.

If we analyze the question of cost and start with the item of carrying charges on investment, it is evident that this is not an additional cost of consignment service. There must be maintained somewhere a reservoir of stocks to meet fluctuating demands; this reservoir may take the form of stocks at the refinery, or stocks held for consumption at consignment points, or both kinds of stocks. If appellants contend that consignment stocks are less fluid and therefore constitute a more wasteful type of reservoir, it must be remembered that the same kind of problem faces the distributor. He can conduct his business with a smaller margin of error and therefore with less waste aud expense if he can rely upon the reservoir provided by consigned stocks, instead of being required to maintain on hand a sufficient quautity of sugar and a sufficient variety of assortments and grades to meet fluctuating demands.

Appellants suggest (Br., p. 213) that the distributor should not object to "being required to exercise a modicum of business intelligence and to give some thought to the requirements of his trade." The refiners, with the efficient statistical service provided by the Institute, should not complain if they are asked to meet the same test. Appellants' principal witness testified that in places where consigned stocks were carried "each refiner consigned stocks for the need of the community for 30 or 60 days." (R. 619.) He likewise testified that he knew "of no place after the withdrawal of a consignment stock where the brokers could not get sugar almost overnight." (R. 620.) If the distributor can thus get sugar "almost over night", it would seem to follow that refiners could replenish their consignment stocks with the same ease and that, with a modicum of business intelligence, they would not build up excessive stocks, sufficient for the needs of the community for 30 or 60 days.

Another important "cost" factor which appellants ignore is that sugar can be and was shipped in large quantities to consignment points by slower and cheaper water or part water routes which the ordinary distributor, whom appellants describe (Br., p. 212) as operating on the basis of weekly sales and deliveries, cannot utilize. (Fgs., 94–95, R. 287.) Incidentally, appellants have not mentioned this saving in transportation expense, a saving directly benefiting the refiner when he sold consigned sugar at all-rail or other rates higher than those under which the sugar was actually transported. (Op., R. 133–134.)

In short, whether or not the evidence establishes affirmatively that consignment service caused no economic waste, it at least is altogether too fragmentary to establish that it did cause economic waste. As to whether such service tends to bring about excess stocks of refined sugar, it would seem, *prima facie,* that 15 large companies, guided by statistics which they alone have power to obtain, could better gauge the requirements of the trade than hundreds of distributors acting independently. To the extent that refiners' lax business methods were at least partially responsible for the piling up of excess stocks, as the District Court believed (Op., R. 171), they cannot urge the results of this laxity in justification of their restraint. In the matter of possible waste incident to warehousing, it would seem that central warehouses storing the sugar of refiners carried at consignment points would be more efficient than the furnishing of warehousing facilities by numerous distributors. Insofar as the distributors would use the same warehouses as those used by the refiners, no waste is involved; it is simply a question of a shifting of the expense. (See R. 428.)

E. CONSIGNMENT SERVICE IS NOT PREJUDICIAL TO THE SMALL REFINER

Appellants contend (Br., p. 208) that small refiners with limited working capital are at a disadvantage as compared with the larger companies in financing the cost of consignment service. But it is also true that, as one of the smallest refiners stated, if the trade is "forced to order in carload lots", the order will probably go to the refiner who can supply a full assortment of grades; whereas, if consigned stocks are maintained, purchasers, who can withdraw soft and powdered sugar from consignment, will probably place some of their orders for standard grades with the small refiner. (Ex. 447–A, R. 1992.) It added that "American may wish to discontinue more consignment markets than * * * we." (*Ib.*) It is significant that the failure to secure agreement upon the removal of numerous consignment points was due to the objection of two of the smaller refiners.[1] (Exs. 447–O, 447–Y–1, R. 1999, 2020.)

V

Prohibition of Long Term Contracts

Contracts permitting the buyer to take delivery more than 30 days after the date of the contract have been referred to in this case as long term contracts.

Appellants have waived their assignment of error, No. 136 (30), to the provisions of the decree (Sec. V, par. 30, R. 324) enjoining agreement or concerted action in refusing to enter into long term contracts, but they have attacked directly or in-

[1] Godchaux, a comparatively small refiner, found that its consignment service in Illinois and Missouri had enabled it to establish a definite clientele which any change of merchandising policy, by reason of discontinuance of consignment service, "would completely destroy." (Ex. 447–Y–1, R. 2021.)

directly a number of the District Court's findings relating to such contracts. (Br. pp. 5–6, 170–179.) Before answering this attack, the Government wishes to describe the extent and character of long term contracts before the Institute and their economic value. Not only must the reasonableness of an open price plan which makes certain types of long term contracts impossible be judged in relation to the actual nature, value, and importance of such contracts, but an understanding of the part which they have played in the sale of sugar has a bearing upon the accuracy and reliability of appellants' description (Br. pp. 48–54) of the move system of marketing sugar. It is largely upon this description that appellants base their criticism (Br. pp. 70–78) of the District Court's suggestion that full publicity of prices and terms in closed transactions would eliminate the evils of secret concessions, without entailing the objectionable and illegal restraint of trade and stifling of competition incident to the operation of the Institute's open price system.

The question whether the Institute members did or did not in fact agree not to make long term contracts is another preliminary matter requiring consideration.

A. THE AGREEMENT NOT TO MAKE LONG TERM CONTRACTS

The District Court regarded refiners' agreement not to enter into long term contracts as one of the important restraints in this case, closely related to the agreement to sell only at prices openly announced in advance of sale and to the general purposes of the combination. Appellants do not undertake to show that the court's finding was erroneous. They have, however, attempted to dismiss this restraint from consideration by the unsupported assertion (Br., p. 172) that "the defendants * * * did not prohibit long term contracts", coupled with the further statement that, since they have no desire to prohibit such contracts, the court's injunction "does not disturb them."

The Government will not under these circumstances review the evidence in support of the court's finding.[1] It leaves the matter with the counter assertion that a full analysis of the evidence would disclose that it is even stronger than the District Court's discussion of it indicates. (Op., R. 175–177.) The District Court began its consideration by saying (R. 174–175):

> Defendants' assertion that subsequent to the Institute, long term contracts were not barred by any agreement, is so inconsistent with the evidence, that I deem it unnecessary to discuss in detail the testimony of the several witnesses and the exhibits which have been introduced on this subject * * *.

[1] The court found that the refiners almost at the outset of the Institute agreed not to make long term contracts and that this agreement has "continued without substantial change." (Fg. 144, R. 299–300.)

If appellants should later reverse their position and should undertake to show that the evidence does not support the finding in question, the Government will probably ask leave to file a reply brief analyzing the evidence.

B. LONG TERM CONTRACTS BEFORE THE INSTITUTE

Before the Institute, long term contracts were readily obtained at all times by manufacturers and they were also granted to chain stores and merchandisers of sugar. (Fg. 142, R. 299.) Their terms and conditions varied. Some called for deliveries in stipulated amounts at definite periods and others for a stipulated amount within the period specified; some named a specific price and others a price below that prevailing at time of delivery.[1] All of the 15 refiners except Arbuckle and Texas are shown to have made long-term contracts during the immediate pre-Institute period.[2] A letter written by the Institute's Executive Secretary in February 1928 specifically states that manu-

[1] Op., R. 173; Exs. 62, 119-121, 123, 126-130, 140-153, 401; R. 1210, 1235-1239, 1248-1255, 1644.

[2] References in preceding note cover American, Federal (i. e. Spreckels), Godchaux, Imperial, McCahan, National, Savannah and Revere. References as to other refiners are: C&H and Western (R. 716), Colonial (R. 384), Henderson (Ex. 398-A, R. 1601), Pennsylvania (Ex. 398, R. 1600-1601). There appears to be no evidence concerning the practice of Texas, a small company operated before the Institute under a joint arrangement with American. (R. 1123.) The only testimony discovered concerning Arbuckle's practice is open to conflicting interpretations. (R. 1044.)

facturers have had the "privilege in the past" of buying under long term contracts. (Ex. 428-C, R. 1813.) The importance of manufacturers as customers is indicated by the fact that they consume about one-third of the refiners' entire output. (R. 594.)

The evidence does not show precisely how extensive was the practice, before the Institute, of making long term contracts, but it is perfectly clear that they were not limited, as appellants directly imply (Br., pp. 170-171), to the Pacific Coast canners, the contracts offered by Revere and those made with a few very large manufacturers.[1] Appellants' further assertion that the long term contracts with large manufacturers carried "other discriminatory concessions" is also objectionable, first, because it implies that a sale for delivery beyond 30 days is in itself discriminatory and second, because the evidence does not show that these contracts, as a general rule, otherwise granted concessions.[2]

In addition to the long term contracts which *on their face* called for delivery beyond 30 days, "the practice was widespread to contract for 30-day de-

[1] Fg. 142, R. 299; Ex. 428-C, mentioned above; Ex. 428, discussed *infra*, pp. 196-197.

[2] Of the limited number of pre-Institute long term contracts in evidence, the following are contracts of sale at a specified price, without any special terms: Exs. 119, 120, 121, 122, 123, 126, 127, 128, 129; R. 1235-1239.

livery although both parties then knew that the refiner would, as he did, extend the time to 40, 50, or 60 days." (Fg. 142, R. 299.)

C. THE ECONOMIC VALUE OF LONG TERM CONTRACTS

The testimony of Revere's chief executive (R. 685) concerning the Edgar-Revere contract made in December 1927 illustrates how a long term contract, carrying a price concession, may be mutually advantageous to buyer and seller and at the same time neither secret nor discriminatory (unless any departure, whatever the circumstances, from a uniform price to every purchaser is regarded as discriminatory). The contract provided for specified maximum and minimum weekly shipments during 1928. (Exs. 152–153, R. 1255.) The price payable was 10¢ a 100 pounds under Revere's list price on the dates the sugar was shipped. (*Ib.*) These terms compelled Edgar to "forego the privilege of buying on a price advance."[1] (R. 691.) Revere considered that it was "a fair contract, not involving a concession in any way, shape or manner" and that each party "gave up something". (*Ib.*) There was "nothing secret about the type of contract"; they were "available to all buyers

[1] Thus if there was a move on April 30 and the price advanced from \$4.80 to \$4.95 (per 100 lbs.), most of Revere's customers would cover their estimated May requirements at the 4.80 price, but the sugar shipped to Edgar as long as this price held would cost him 4.85 (the 4.95 price less the 10¢ discount).

who would agree to take a certain amount of sugar at intervals over a long period of time"; Revere had quoted them "for many years" as "standing order" contracts; and although not included in Revere's telegraphic notices to the trade, they were "generally known." (R. 691, 693.) Revere believed that it was "good business" to make contracts of this type and "tried to sell them because they were to our advantage". (*Ib.*)

As the court below said, a contract such as that offered by Revere, providing for deliveries in stipulated amounts over a long period, "would tend to bring about greater evenness of production through the year and this, as defendants virtually concede, would effect economies for the refiner." (Op., R. 174; R. 939.)

The Edgar-Godchaux contracts indicate the varied benefits which a refiner might derive from a long term contract with special terms. The first contract, made in October 1926, provided for weekly shipments of 10,000 bags until the end of the year at the "prevailing Eastern beet basis" price. (Ex. 140, R. 1248.) Godchaux, as it stated at the time, made this contract because it desired to keep its refinery running at "full capacity" in the November-December period of slack demand. (*Ib.*) The next contract, which ran for a year from December 1926, called for weekly shipments of 10,000 bags and gave Edgar a 10¢ price concession.[1] (Ex. 141, R. 1248–1249.) Codchaux gave this price concession because Edgar agreed to aid in financing Godchaux by making advances up to $250,000 on sugar in transit. (*Ib.*) Near the end of the contract it was renewed with some modifications (including an increase in the weekly shipments from May 1st to August 15th) for a further 2-year period. (Exs. 145–151, R. 1250–1254.)

The contract in December 1928, after the Institute, between Sterling Sugars, Inc., and Coca-Cola is another example of a long term contract drafted to meet the particular requirements of the two parties.[2] It provides for the sale at a fixed price of between 25,000,000 and 56,000,000 pounds of sugar, to be shipped in specified monthly amounts during 1929. (Ex. 103, R. 1228.) It was subject to the contingency that the seller would be able to buy within a month raw sugar to cover the contract requirements, at not more than a certain price. (*Ib.*) The buyer agreed to aid in financing such purchases up to $1,250,000. (*Ib.*)

Notwithstanding these varied advantages of long terms to refiners, "perhaps of more importance" is their value to purchasers, particularly to manufac-

[1] The testimony referring to a 20¢ price concession (R. 450, but see R. 449) was evidently given in the light of the Institute ruling that Edgar was not entitled to brokerage on his purchases. (Ex. 163, R. 1263–1264.) The contract provided that Edgar would receive his "regular brokerage" of 10¢ a bag. (Ex. 142, R. 1249.)

[2] The making of this contract led to Sterling's resignation from the Bureau. (Exs. 107–109, 112; R. 1230–1231.)

turers using sugar in making another product. (Op., R. 174.) A letter written in January 1928 by appellant Moog, senior vice president of Godchaux, to the Institute protesting against its condemnation of long term contracts, states (Ex. 428, R. 1809-1811):

For many years I (Moog) was in charge of a large group of corn and pea canneries (a group including one of the largest concerns preserving fruits), and I can therefore view the question of long term contracts "from the side of the consumer, in this case, the manufacturer". If the business is not to be operated on a speculative basis, it is "positively necessary" that the manufacturer "be placed in a position to fix definitely his cost on sugar." As to canneries, they contract in advance for their supplies of vegetables, cans and boxes and "it has been usual also about this time of year * * * to contract for their supply of sugar." They issue their price lists "far in advance of" the date when their product is to be delivered. As to preservers of fruit, "sugar represents approximately 50% of the finished product". They contract with fruit growers and, based on these contracts and "definitely known" sugar prices, enter into long term contracts and issue price lists. These canners and preservers are not, as a rule, sufficiently large to buy raw sugar on the option market,[1] as a refiner

[1] The District Court said (Op., R. 174) that the "evidence shows that the astute refiner could protect himself against

selling for future delivery would do. The sugar industry must "give some thought to the problems of others, and especially the problems of the consuming public."

Coca Cola's purchasing agent testified that his company used long term contracts, which it had been able to make before the Institute, "because we wanted a fixed price for the cost of raw materials over a period of time as far ahead as possible." (R. 438–439.) In May 1928 a group of large manufacturers using sugar wrote the Institute protesting against what they termed "the cast-iron-clad 30-day contract for all branches of the Trade regardless of their very different needs", which was said to impose a "serious handicap" upon the equitable and successful conduct of their business. (Ex. 418-C, R. 1701–1703.)

We submit, therefore, that the evidence fully sustains the finding of the District Court that long term contracts "have a real economic value to refiner and to consumer." (Fg. 143, R. 299.)

D. THE RELATION OF THE INSTITUTE'S OPEN PRICE PLAN TO LONG TERM CONTRACTS

Appellants do not dispute the correctness of the District Court's conclusion that long term contracts with complicated terms and those with terms

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fluctuations in the raw market by hedging through sugar futures far more readily than the customer, because more familiar with and accustomed to such operations." See also Ex. 418–D, R. 1704; R. 384.

worked out to meet the needs of the particular refiner and particular customer are prevented by the Code requirement that all contract terms be openly announced in advance of sale. (Op., R. 178; Fg. 149, R. 300.) The restraint is admitted, but it is said to be reasonable. (Br., pp. 172–174.) The defense is the usual double one, that the trade which was restrained would permit discrimination among customers and that any system other than their own would not prevent this discrimination. We submit that the defense is woefully weak in both aspects.

What appellants mean by discrimination is shown by their statement (Br., p. 172) that any contract with terms sufficiently complicated to require private negotiation "is necessarily and of its very nature discriminatory". The assertion that, in order to avoid unfair discrimination, every purchaser in the country must purchase upon precisely the same terms, whether he be a wholesale grocer in a small country town, or a large manufacturer with requirements that can be forecast in advance, or a manufacturer with particular seasonal requirements, or a big distributor like Edgar combining several functions, is patently false. As the District Court pointed out, the mere fact that contract terms have been devised adapted to the particular requirements of the seller and of the buyer "does not make the contract necessarily unfairly discriminatory". (Op., R. 178.)

Concerning the remedy against secret concessions suggested by the District Court—an agreement to give full and immediate publicity to the terms of all closed transactions—appellants' answer is that contracts requiring private negotiations have intricate provisions which "could readily be devised in such a way as to cover deliberate and unfair discriminations between customers" and that special terms "could readily be inserted for the purpose of making such a contract unacceptable to more than the particular favored customer or customers." (Br., p. 173.) In other words, the contention is that the refiners, who have been represented in this case as so solicitous to conduct their business on a high ethical plane that they have gone to infinite pains in stamping out even the possibility of one customer's obtaining an advantage over others, would under any other system deliberately scheme to give certain customers secret concessions, in violation of rules adopted to prevent this.

Of course, no rules of a voluntary association can be successful unless carried out in good faith; the genuineness of the desire to achieve the objects in view is of far greater importance than the rules themselves. This the refiners themselves recognized. At an Institute meeting the president of C & H urged that unless the members lived up to "the spirit of the Ethics and not merely the letter of it", the Code "was doomed to failure".

(Ex. 442–S, R. 1963.) See also Ex. 457, R. 2291. Any member of the Institute could, if he so desired, violate its rules and give the grossest kind of secret concession, one concealed not only from other customers but from his fellow members, as was in fact done.[1]

In weighing the reasonableness of the restraint involved in the Institute's open price system, there are other important considerations to be borne in mind, the economic value of long term contracts (*supra*, pp. 193–197) and the fact that this system prevented the open and mutually advantageous type of contract which Revere had previously offered. Its chief executive testified that upon the formation of the Institute, his company changed its policy of making long term contracts (a policy of long standing and one which had been successfully pursued, *supra*, p. 194) "because we considered it was not selling upon our openly announced prices and terms." (R. 691.)

Even if it is assumed that Revere misinterpreted the requirements of the Code, the incident shows the danger of future like "misinterpretations",

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[1] See the secret concession, developed on cross-examination, which McCahan gave one of its customers in November 1930 after the Institute had been functioning for nearly three years, the concession taking the form of a check for $56,000 delivered to the customer by hand. (R. 945–948, 952–954.) It is interesting to note that the excuse for this transaction offered by McCahan's vice president was that his company was convinced that another Institute member, Spreckels, had given a secret concession to this customer. (*Ib.*)

if the Institute's open price system is allowed to stand. Unless the door is opened to free negotiation of long term contracts, it is to be anticipated that the refiners, who have been operating under an understanding not to grant such contracts, will, notwithstanding the court's decree enjoining an agreement to this effect, continue refusing to make contracts of this kind, under the guise of carrying out the principles of non-discrimination and open announcement.

E. EDGAR'S AGREEMENT TO MAINTAIN REFINERS' PRICES

Ballou, the Executive Secretary, told Edgar shortly after the formation of the Institute that he was troubled by Edgar's long term contracts with Godchaux and Revere and that they were going to cause great difficulties in the operation of the Institute. (R. 452.) He thereupon sought and obtained from Edgar an agreement to maintain refiners' prices and terms on the sugar received by Edgar under these contracts. (Fg. 152, R. 301.) The circumstances giving rise to this agreement may or may not be repeated; its present significance lies in its bearing upon the general character and purposes of the combination. The District Court concluded that the agreement, which was not an agreement to sell at publicly announced prices or at nondiscriminatory prices (so far as Edgar's customers were concerned), but to sell at refiners' prices, "threatened the Institute project only insofar as the Institute was concerned with uniformity of price structure" and that refiners' purpose in obtaining the agreement was "to preserve that structure". (Fg. 153, R. 301.)

Appellants admit that the Institute system contemplated price uniformity; they point out (Br., p. 175) that Edgar's long term contracts enabled him to sell at a price "below that offered to any other buyer in the country". While they do not directly deny that an agreement providing for such uniformity had this as its purpose, they suggest that they were actuated by other considerations. (Br., pp. 175–177.) These are stated to be (1) the desire to protect Edgar's competitors against a price-cutting campaign, by which it is said Edgar "could have driven out of the sugar business every buyer in the Middle West with whom he came into competition" and (2) to prevent the sale below refiners' announced prices of sugar exchanged for Godchaux sugar, which sales, it is said, would lead the trade to believe that the refiners were not maintaining their announced prices.

It is obvious that there was no danger that Edgar would engage in the kind of price cutting campaign pictured by appellants. The sugar which he could obtain at a price below that available to other distributors was definitely limited in amount and the Institute system made it impossible for him to obtain further supplies on the same terms. It was to Edgar's advantage to sell the Godchaux and

Revere sugar at refiners' prices if he could and to undersell only to the extent necessary to dispose of his sugar. This is precisely what Edgar did. Although his agreement with the Institute covered only February and March 1928, he did not sell below refiners' prices during 1928 or in 1929 until the summer, when he began to encounter difficulty in selling his Godchaux sugar (a difficulty unquestionably due in large part to the enforced abandonment of his merchandising business, by reason of the refiners' threatened boycott). (R. 454, 484–485.)

As to the exchange of Edgar's Godchaux sugar for sugar of other refiners which Edgar was selling as a broker, this also did not occur until about the middle of 1929 when Edgar found it difficult to dispose of all the sugar he was receiving under the Godchaux contract. (*Ib.*) Therefore, insofar as Edgar did thus exchange sugars, the practice did not begin until more than a year after his price maintenance agreement with the Institute, and the practice in question has no connection whatever with refiners' reasons for making the agreement with Edgar.

F. ENFORCEMENT OF THE WITHDRAWAL PROVISION IN 30-DAY CONTRACTS

The refiners agreed to enforce strictly the terms of their individual contracts relating to the withdrawal of sugar. Before the Institute this was a matter for each refiner to decide for himself in each individual instance. But at an early date the Code was interpreted as requiring strict enforcement of the 30-day delivery provision of time contracts (Ex. 21–26, p. 30) and Code Interpretations were adopted denouncing any indulgence to buyers in this respect as "unethical, discriminatory and unfair" and declaring that "lack of diligence on the part of the refiner in using every reasonable means to enforce" the terms of his contract should be considered a violation of the Code. (Ex. 20, Sec. I, pp. D5–D6, pars. 7 (a), (c).) In further aid of this program, refiners agreed to report to the Institute all unspecified and undelivered balances, by States, on the 30th and 35th days after the entry of each contract. (*Ib.*, p. D6, par. 7 (e).)

The Institute members not only agreed upon the principle of strict enforcement, but they agreed that each would apply the same measures of enforcement and would make uniform announcement thereof.[1] (Ex. 21–26, pp. 266, 275, 277, 283–284, 411, 414, 423, 425, 427–428.) The Enforcement Committee periodically examined the statistics (which were withheld from purchasers) furnished by members as to undelivered balances, checked up

[1] When this policy was being first put into effect, the Directors requested the Executive Secretary "to prepare a uniform letter to be sent to the trade announcing the policy of each refiner in this respect." (Ex. 21–26, p. 275.) The Directors at an adjourned meeting the next day approved, after some changes, the draft letters which had been prepared. (*Ib.*, p. 277.)

on members' enforcement of the 30-day provision, and brought pressure to bear upon those suspected of insufficient zeal. (Ex. 27.) When circumstances were such that some relaxation of contract terms was deemed advisable, the extent of such relaxation was agreed upon. (Op., R. 179; Ex. 21–26, pp. 389, 391.)

The members, in carrying out this program, disregarded the Code's basic principle of open announcement. On one occasion it was decided that 7 days' latitude for effecting delivery of contracts entered on a particular "move" should be granted at the option of the refiner, "but that the trade should not be advised regarding this extra time." (Ex. 27, pp. 124, 127.) On another occasion the Executive Committee recommended that members should continue to require specifications to be furnished on or before the 30th day, but that refiners should have 7 days additional within which to complete deliveries, the latter provision "not to be a public announcement." (Ex. 21–26, p. 394.)

By the agreement to enforce contract terms each refiner surrendered his freedom to conduct his affairs according to his own best business judgment. Here, as in so many other matters, the sole justification offered by appellants is preventing discrimination between customers. (Br., pp. 177–179.)

The only evidence to which appellants refer which even apparently supports their view is the testimony of Lowry (R. 383) that allowing the buyer to postpone withdrawals "could be used as an instrumentality for discrimination". The testimony is in fact irrelevant because Lowry was talking about the pre-Institute situation. Under the conditions then prevailing, a customer might overbuy and, if the price went up and the withdrawal provisions of the contract were not enforced, he would be protected for a longer period than 30 days, whereas, if the price went down, he might confidently expect the refiner to reprice the unwithdrawn portion of the sugar. But the Institute system, which prohibited such repricing, took away any positive advantage in overbuying; if the price went down, the purchaser lost by the practice and if it went up he profited.

Although under the Institute there was little if any motive for deliberate overbuying, it is evident that customers would not correctly gauge their requirements in every instance. The enforcement of uniform rules requiring disregard of all special circumstances and the same treatment of every buyer appears highly unreasonable and arbitrary.

If an altruistic concern for the interests of their customers was the motivating force behind the principle of nondiscrimination, then it would seem that rigid application of the principle would not be insisted on when such application was likely to be unfair to customers, without being necessary to protect them against real discrimination. Skepticism as to whether such altruistic concern was the real purpose of the rule against "discrimination" would be further increased if it appeared that, when the refiners knew that the restraints which they had adopted were substantially prejudicial to important customers, no serious effort was made to meet the latters' needs.[1] The time and attention given to contract enforcement are, however, understandable if refiners' primary concern in this matter was maintenance of a uniform price structure.

VI

Prohibition of Quantity Discounts

A. THE DECREE PROHIBITS ONLY QUANTITY DISCOUNTS WHICH DO NOT RESULT IN DIRECT OR INDIRECT ECONOMIES TO REFINERS

Appellants discuss quantity discounts at length (Br., pp. 105–124, 287–290), without mentioning or describing the acts or action which the District Court enjoined. All that was enjoined (See V, par. 33 R. 324) was agreement or concerted action in—

> Preventing, restraining, or refusing to grant quantity or other discounts *where such discounts reflect, effect, or result in economies to refiners either in direct or indirect costs.*

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[1] See the manufacturers' protest against the Institute ruling against long-term contracts (*supra*, p. 197) and the Institute's self-admitted failure to provide effective relief (Ex. 21-26, p. 190).

Appellants' principal contention is that quantity discounts do not result in any savings to the refiners in direct or indirect costs. Since the decree does not prohibit agreements to refuse such discounts, on the basis of their own showing appellants are not injured by the decree.

The contention that quantity discounts do not effect economies is supplemented by the further contention that, if certain types of contracts—such as those providing for regular deliveries over an extended period or for carload deliveries direct from refinery—do bring savings they are not within the quantity discount provisions of the Code. Appellants assert (Br., pp. 108, 111, 290) that in these instances the discount would be, not for the quantity of the purchase, but for the manner of taking delivery. The necessary conclusion to be drawn from appellants' statement of their position is that they have never intended doing and do not now intend doing what the decree forbids.

Possibly appellants will contend that, granting all this, it does not constitute a sufficient reason for entering a decree against them. But the facts of this case demonstrate that, if the paragraph of the decree relating to quantity discounts is eliminated, there is real and substantial danger that the Institute members will not confine themselves to the limits which they presently assert they intend to observe. Appellants have been found to have engaged in a wide variety of illegal restraints, a number of which (while still denied) are no longer contested.

The District Court has also found that they have concertedly refused to grant discounts "for sales with the type of delivery which would result in savings to the refiner." (Fg. 159, R. 302.) In addition, the quantity discount provisions of the Code may easily be used as a pretext for continuing the concerted refusal to enter into various long term contracts (the importance of which in the sugar industry has already been shown).

The Government is entitled to effective relief. This is particularly so when, as previously stated (*supra*, p. 208), the relief which is granted will not injure the defendants or prohibit anything except what they disclaim doing or intending to do. In the present case every aspect of the sugar industry, in relation to the combination effected through the Institute, has been exhaustively explored, and much that was done has been found to be illegal. Appellants should not now be left free, subject only to the institution of a new suit against them by the Government, to decide to their own satisfaction that, when a contract carries a discount, the discount is for the quantity of the purchase rather than for the manner of taking delivery or for some other variation, such as delayed delivery, from the contract terms offered in the ordinary run of business. The Government should be put in a position where it can, if it suspects departure from the liberal terms of the decree as to quantity discounts, obtain prompt settlement of the issue as a part of this same proceeding.

Concerning the propriety and necessity for effective relief where the defendants in an antitrust case have been found to have engaged in a far-reaching combination in restraint of trade, this Court said in *Local 167* v. *United States,* 291 U. S. 293, 299:

> The United States is entitled to effective relief. To that end the decree should enjoin acts of the sort that are shown by the evidence to have been done or threatened in furtherance of the conspiracy. It should be broad enough to prevent evasion. In framing its provisions doubts should be resolved in favor of the Government and against the conspirators. *Warner & Co.* v. *Lilly & Co.,* 265 U. S. 526, 532.

Appellants' assertion (Br., p. 124), "If the trade is not permitted to eliminate quantity discounts, it is impossible to hope for the elimination of secret price discriminations," is altogether misleading. Its premise is that, because *secret* quantity discounts may be a vehicle for price discrimination, the only possible remedy is to abolish all quantity discounts, secret or otherwise. Appellants might with just as much reason assert that it is necessary to abolish all prices or all payment of brokerage, because these have been vehicles for secret concessions to customers. The point to be kept in mind is that, so far as the element of secrecy is concerned, quantity discounts fall in the same category as prices and all other terms of sale. The possible abuses springing from secrecy of prices or terms and the remedy of publicity proposed by the District Court, as opposed to the Institute's open price system, have already been discussed.

B. LEGAL ASPECTS OF THE RESTRAINT CONDEMNED BY THE DISTRICT COURT

Appellants' legal discussion (Br., pp. 287–290) of quantity discounts does not meet the point in issue. Their argument is directed to the proposition, stated at page 290, that "concert to abolish purely arbitrary 'pseudo' quantity discounts representing no saving in costs is not prohibited by law." Appellants either fail to recognize or deliberately ignore the fact that concerted action of this kind was not enjoined. Appellants do not contend that a quantity discount representing a saving in cost is arbitrary; they impliedly assert that it is not.

The sole legal question presented is whether an agreement to eliminate one element of price competition, quantity discounts, when the agreement is confined to discounts which are in no sense "unfair or subversive of sound competition" (Op., R. 257), is in unreasonable restraint of trade. In the first place, an agreement directly restricting competition cannot ordinarily be justified merely because the practices covered by the agreement give some purchasers an advantage over others, in the competition of purchasers with each other. In the second place, even if this would be a justification where such advantage could be regarded as unfair, the purchase of a large quantity is not the same as the purchase of a lesser amount. Finally, even if we assume that, notwithstanding this difference, such advantage is, in the absence of other facts, unfair, it ceases to be so when the practice in question results in a saving in cost to the seller. In that case the public interest in having purchasers treated alike is overcome by the public interest in preserving methods of sale which promote economy and lower costs.[1]

VII

Restraints Relating to Contract Terms and Conditions

A. TOLLING

Under a tolling contract the refiner accepted raw sugar from the owner and returned to the latter a proportionate amount of refined sugar, making a charge for the service. (Fg. 166, R. 303.) Pre-Institute tolling agreements were made by the refiners with one another, with producers of raws, with manufacturers of products containing sugar, and with sugar merchants. (Fg. 167, R. 304.) Although the subject is not specifically mentioned in

[1] Cf., Section 2 of the Clayton Act, which forbids price discriminations effecting a substantial lessening of competition, but excepts from the prohibition discrimination in price "on account of differences in the * * * quantity of the commodity sold." Even the narrowest possible interpretation of the exception, which appellants urge (Br., p. 289), would apply to quantity discounts representing a saving in cost.

the Code (Ex. 434–I, R. 1853), the Institute prohibited the making of any tolling contracts with purchasers of sugar, and banned tolling arrangements with raw producers unless the latter agreed to sell the tolled sugar in accordance with the Code. (Fg. 169, R. 304.)

The matter of tolling first came before the Institute in 1928 when Savannah reported that it had negotiated a tolling contract with Coca Cola. (Exs. 434, 434–E, R. 1847, 1851.) The refiners were unable to agree as to whether the understanding barring tolling contracts that had apparently been reached in the preorganization meetings, extended to tolling for manufacturers.[1] (Exs. 434–E, 434–I, R. 1851, 1853.) After consideration, the Executive Committee held that a tolling contract, even with a manufacturer, constituted a "discrimination" under the Code in that it enabled a buyer to obtain sugar "at a price other than the open price for sugar as announced from time to time by refiners". (Ex. 434, R. 1847.) The unanimous vote of the

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[1] Savannah wrote that: "Unfortunately the minutes of the conferences in December are more or less incomplete * * *". (Ex. 434–E, R. 1851.) While it distinctly recalled a unanimous agreement to bar tolling contracts, it believed that tolling for manufacturers was not included. (*Ib.*) Another refiner, however, was of the opinion that it had been "unanimously decided that no refiner would toll any raw sugars for any purchaser of refined sugar regardless of whether or not he was a jobber or manufacturer." (Ex. 434–I, R. 1853.)

members, other than Savannah, confirmed this view.[1] (Exs. 434–D, 434–L; R. 1850, 1855.)

At the same time the Executive Committee adopted a resolution condemning as "discriminatory" any agreement by which a manufacturer or other buyer or user of sugar "is enabled to obtain refined sugar at a price other than the open prices as announced from time to time by refiners". (Ex. 21–26, p. 89; Ex. 434–M, R. 1855.)

Subsequently in January 1929, the Board of Directors adopted a resolution prohibiting any tolling arrangement under which the refiner does not retain entire control of the sale of its product "in order that it may be sold in accordance with the Code of Ethics." [2] (Ex. 21–26, p. 188.) Under this resolution it was regarded as permissible to toll for raw sugar producers, provided that they agreed to sell the refined product in accordance with the Code. (R. 1030–1032.)

The activity just described sufficiently refutes appellants' denial (Br., p. 161) that they at any time agreed to eliminate or prohibit tolling contracts, and their statement that the refiners, acting individually, did not *in practice* enter into such contracts with their customers for the reason that

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[1] Savannah regarded its contract as a "legitimate transaction", but was willing to abide by the unanimous opinion of the other refiners. (Ex. 434–E, R. 1851, 1852.)

[2] This resolution represented a change in wording of a resolution adopted earlier, specifically condemning tolling contracts "whether for jobbers, manufacturers, raw sugar producers, or others." (Ex. 21–26, p. 169.)

"it did not seem practicable to make any general offer of such contracts". To the extent that, as testified by appellants' leading witness on this subject (R. 1029–1032), tolling contracts came within the prohibition of the Code because their terms had necessarily to be negotiated and could not therefore be announced in advance, or because they could not be made with all customers alike, this but serves to illustrate again how the broad Code principles may be used to restrain and prohibit normal and lawful contracts. Admittedly legitimate competitive practices may not be stamped out merely because they do not fit into the Institute's ambiguous principles of open announcement and non-discrimination. Only customers using large quantities of sugar and able to finance the purchase of raws would care to obtain tolling contracts. Because *all* customers would not or could not use tolling contracts, is no justification for concertedly denying them to others who are in a position to use them to economic advantage.

The court below found that appellants' dominant purpose in prohibiting and restraining tolling was not, as claimed, to prevent unfair discrimination, but to prevent sales of sugar at prices, terms and conditions which would jeopardize the price structure. (Fg. 170, R. 304.) This is virtually admitted in appellants' brief, where it is stated (p. 161) that the refiners conceived that tolling contracts gave preferential treatment to customers because it enabled them to purchase sugar "at other than the prices open to the general trade"[1]

B. CREDIT TERMS

Although the District Court's findings with respect to restraints on credit terms are not presented for review (App. Br., p. 179), we refer to them in passing because their significance transcends the importance of the restraints themselves and bears upon the general issues in the case. Not only do they illustrate the wide scope of appellants' activities, but they put to a test appellants' broad contention that the Institute was concerned only with open announcements and with the removal of discriminations and the elimination of uneconomic practices. From an analysis of the documentary proof introduced by the Government (Op., R. 186–198), the court found that the activities of the appellants were not concerned, as they contended, with securing open announcements and with the formulation of uniform definitions, but that the

[1] The fact found by the court and relied on by appellants, that tolling contracts were not common prior to the Institute, would be significant only as it shows the great lengths to which appellants went to prevent the purchase of sugar at less than the refiners' uniform price. Moreover, with the restriction upon other forms of competition, in the absence of any prohibition against tolling contracts, there is reason to believe that the demand for such contracts would have increased substantially. The Executive Secretary believed that, "There is going to be tremendous pressure in all directions for contracts of this kind * * *." (Ex. 434, R. 1847, 1848.)

ambiguous Code principles were employed as a cloak for a series of agreements to restrict competition. With the suppression of direct price competition, competitive forces tended to assert themselves in connection with terms of sale, including credit terms, and as each new manifestation of competition developed the Institute busied itself with securing concerted action looking to its suppression or curtailment.

The principal credit terms which received the attention of the Institute were the "four payment plan", "split hilling", and the cash discount.

Four-payment plan.—This was a credit arrangement, originating in the Southeast, which permitted payment to be made at the usual 2% discount in four weekly installments. The customer was given immediate possession of a carload of sugar and was obligated to withdraw one-quarter of a carload each week and to pay for the withdrawn portion within the seven-day discount period. (Op., R. 186–187.) Until the filing of this suit appellants concertedly and by agreement substantially and effectively eliminated the areas in which the plan was offered and the extension thereof. (Fg. 173, R. 304–305.) Contrary to their contention, they did not confine their activities to requiring open announcement of the plan. (*Ib.*)

It was in connection with tbe discussion of the evidence supporting these findings that the court made the statement, referred to earlier, that it had gone into this and other matters more fully than their intrinsic importance justified because of the light cast *by the documents* on the motives that actuated appellants and the *methods* adopted by them. (Op., R. 191.) The documents in question are cited and quoted from in the opinion (R. 187–191) and only typical ones will be referred to.

In a letter written by one of the refiners (Ex. 394, R. 1597), he described as one of the most important matters discussed at an Institute meeting "the adoption of a policy by all members that before they made any drastic changes in the selling terms, they would, if possible, await a Directors' meeting at which this question could be discussed by all at interest." It was agreed, he indicated, that a special Directors' meeting would be called, if necessary, in order that the discussion might be had "before rather than after the taking of the contemplated action." He referred particularly to the fact that American had announced the four-payment plan in Texas, and that the plan thereafter spread all through the United States before it was withdrawn and confined to the original territory where it applied.

The court referred to a memorandum made by one of the refiners of a telephone conversation with the office manager of the Institute, in which the latter notified him that a certain city "had been withdrawn from four-payment plan territory", and informed him at the same time that the Institute's counsel had frowned upon an earlier exchange of wires with the Institute on the subject "as letting ourselves open to prosecution by the Department of Justice". (Ex. 420–X–1, R. 1776.) In discussing other evidence indicating concerted action at an Institute meeting with respect to the withdrawal of the four-payment plan in certain Western States, the court noted the fact that the minutes of the meeting in question "contained no entry with respect to four-payment plan matters". (R. 190.)

Split billing.—This referred to the practice of making two billings on one carload of sugar. The California refiners originated split billing to overcome the competitive 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 applicable from the Atlantic Coast and Gulf points. They made two billings to buyers in Middle Western competitive territory, the first for 60,000 pounds payable within seven days after arrival, and the second for the balance payable within 14 days after arrival. (Fg. 175, R. 305.) The practice could be and was at times used as a competitive device to meet other forms of competition, but was suppressed by the Institute. (Fg. 176, R. 305.) The court below found that there is no evil in split billing. To the extent that, prior to the Institute, it may have been used to give a secret concession, this could have been prevented without prohibiting the practice itself. (*Ib.*) The evidence which the court stated negatived appellants' contention that the only obligation of the refiners under the Code was to announce publicly their intention to use split billing, is reviewed in the opinion. (R. 191–194.)

Cash Discount.—The importance of the cash discount in the sugar industry is demonstrated by the fact that it amounts to at least one-half and may exceed the gross margin of the sugar merchant.[1] A customer who did not take advantage of the cash discount was regarded as a bad credit risk. (R. 382.) The court found that the post-Institute elimination of secret concessions tended to cause competition to manifest itself by other means, and that steps taken by the Institute to preserve the traditional 2% discount were designed to prevent such competition. (Fg. 179, R. 306.)

However, the principle activities of the Institute with respect to the cash discount, which occurred prior to the delivered price period, concerned the time when the discount period should begin on shipments by differential routes. Competition in this respect was especially keen between New Orleans and eastern refiners until suppressed by appellants

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[1]Assuming an average cost of $5.00 per hundred pounds of sugar (see Ex. S–17, Appendix, App. Br.), the usual cash discount of 2% amounts to 10¢ as compared with the usual margin of gross profit of from 5¢ to 20¢ per hundred pounds. (R. 377.)

through the Institute, for the purpose, as the court found from a review of the evidence, (a) of equalizing their own opportunities, (b) of discouraging shipments over differential routes, and (c) of preventing a breakdown in the high freight applications which they aimed to maintain. (Op., R. 196–198; Fg. 181, R. 306.)

C. PRICE GUARANTEE

Another restraint, the findings as to which are not now challenged, but which has an important bearing upon appellants' general motives and methods is the suppression and limitation of the priee guarantee. Prior to the Institute refiners offered in some localities a guarantee against price decline between the contract date and the date of delivery. (R. 198–199.) California refiners especially employed the guarantee to equalize the advantage enjoyed hy the other refiners in the shorter transit periods from eastern and southern points. (*Ib.*) Several days after the formation of the Institute members announced withdrawal of the guarantee in all territories. (Exs. 408–C, 467, R. 1658, 2293.) C & II (as yet a nonmember) did not follow. It took the position that tbe guarantee, which it gave openly, was not an evil or unethical. (Ex. 461–C, R. 2286.) Efforts were made to induce C & H to alter its decision; an Institute committee conferred with its president to this end, but without success.[1] (R. 199; Exs. 461–C, 476, R. 2286, 2307.)

Thereupon the eastern and southern refiners reinstated the guarantee, but only to the extent necessary to meet C & H competition. (Fg. 184, R. 307.) Although here again appellants contended that each refiner acted independently and that the Institute was concerned only with public announcement, the court found that the appellants acted concertedly in seeking to prevent any revival of the price guarantee and in restricting the guarantee as to the routes of shipment and territories where it should apply. (Fg. 183, R. 307.)

D. USED BAGS AND BULK CONTAINERS

Substantial savings of 5¢ to 10¢ per bag could be made by customers without substantial expense to refiners by re-using customers' bags. (Fg. 187, R. 307; R. 380–381; Exs. 412–D, 412–G, 412–H, R. 1688, 1690.) For several years prior to the Institute some of the refiners made allowances to certain customers on returned empty bags. (Op.,

[1] The Executive Secretary subsequently had occasion to remind C & H that Institute members had abandoned the guarantee and had thereby left C & H in control of the Chicago market. (Ex. 467, R. 2293.) Pennsylvania had advised him that it "was simply obligated to have its share of the Chicago market and would have to restore the guarantee to get it." (*Ib.*) Other members likewise insisted that unless C & H could be brought into line, they would have to meet this competition (Ex. 21–26, pp. 60, 69), thus indicating the importance of the guarantee from a competitive viewpoint.

R. 203; R. 381; Ex. 385–H, R. 1519; Ex. 21–26, p. 63.) The witness who originated the practice testified that a bag costing 15¢ could be used five to seven times, thus reducing the cost to 2¢ or 3¢ for each time the bag was used. (R. 380–381.) He knew of no case where the practice was used for rebating. It continued in use for a number of years "until stopped by the Institute". (R. 381.)

During the first months of the Institute, in response to a query propounded by American's sales manager as to whether American could make an allowance on the "savings" on package cost which could be had by refilling customers' bags, which were capable of refilling at least a dozen times, the Directors decided that such allowance should be discouraged because it was open to "irregularities and abuse". (Ex. 385–G, R. 1518–1519; Ex. 21–26, pp. 18–19.) This conclusion was incorporated into a Code Interpretation on the same day. (Ex. 20, Sec. I, p. C1, par. 1.) In rejecting a customer's proposal to return bags for refilling, McCahan stated that it appreciated the buyer's thought as to "saving us some expense" but that the Institute ruling stood in the way. (Exs. 412–G, 412–H; R. 1690.)

At a Directors' meeting in January, 1931, National's proposal to amend the Code Interpretations so as to permit an allowance to be made for used bags was unanimously rejected. (Ex. 21–26, p. 615.) Life Savers, Inc. appears to have been assured by National and American that they were both 100% in favor of the use of returnable bags, and protested when they discovered that the plan had been rejected by the Institute members, saying (Ex. 412-I, R. 1691): "If you are really in favor of returnable bags, it is evident that you are letting others tell you how to run your business."

The Institute also took steps to suppress in its experimental stage the use of bulk containers. At a meeting in February 1928, members discussed the proposal of one refiner to make sales in tank cars. They arrived at a "consensus of opinion" that deliveries in bulk would add to the complexities of the business and should be discouraged. (Ex. 21–26, p. 19; Ex. 20, Sec. XI, par. 2, printing 2/17/28.) In December 1928, the following Code Interpretation was adopted (Ex. 20, Sec. I, p. A1, par. 3 (b); Ex. 21–26, p. 176):

> All propositions submitted to or originated by a member of the Institute, involving new or unusual methods of the sale of sugar in any form * * * should, before acceptance, be submitted to the Executive Secretary for consideration as to their possible effect as involving discrimination, or otherwise violating the Code of Ethics.

The District Court concluded that such methods were obviously designed to effect economies and greater convenience in packing and shipping, that the Institute was determined to discourage experiments in this direction, and that the public's interest was deliberately disregarded. (Op., R. 203; Fg. 188, R. 307–308.)

Appellants do not deny having concertedly prohibited used bag allowances, but they seek to justify their action as intended to prevent discrimination. (Br., p. 164.) They state that allowances for used bags are not in themselves harmful to the industry or to anyone engaged in it, and that they were condemned only because it was not possible to handle returned bags for *all* customers. They indicate, however, that only a "few" customers had applied for used bag allowances, and there is no reason to believe that the refiners could not have made arrangements with all customers in a position to use returnable bags and who desired to do so.

The District Court found that appellants could readily have given bag allowances without discrimination between customers. (Fg. 189, R. 308.) It found that appellants' real objection to granting used bag allowances was not, as they claimed, that such allowances would necessarily be discriminatory, but that they might conceivably be made a cloak for secret concessions, although they had not previously been used for this purpose. (*Ib.*)

E. PRIVATE BRANDS

Prior to the Institute some of the refiners packed sugar under private brand names for various customers. (Fg. 191, R. 308.) Appellants state (Br.,

p. 167) that the number of private brands was always extremely limited, but it appears that the practice was "growing" when defendants concertedly stopped it. (Op., R. 206; Ex. K-6; Ex. 21-26, pp. 270, 272.)

Packing under private brands was plainly a legitimate competitive device. (Op., R. 209.) At the very time when defendants were considering steps to stop the practice, they recognized that there was nothing inherently unethical about it; but they feared that it might become "very expensive to the refiners if permitted to continue". (Ex. K-6; Ex. 21-26, p. 270.) It may be that some of the refiners felt that packing private brands involved an unnecessary expense and that they were glad to rid themselves of the competitive practice. Appellants' principal witness on the subject admitted, however, that some of the refiners felt that "private brands were a good thing and they wanted to continue them". (R. 909.) As to this, the business judgment of refiners might reasonably differ. (Op., R. 209.) Although the practice would require refiners to keep separate stocks of bags or other containers for each customer using a private brand, as pointed out by the trial court, some containers would have to be provided in any event, and there was no substantial showing that the printing of a name different from the refiner's own brand or the additional handling involved would entail substantial expense. (Op., R. 208.) At all events, there is no reason why individual refiners might not make a service charge for any additional expense involved. (Fg. 192, R. 308.)

No purpose would be served in reviewing the evidence showing concerted action by appellants in preventing the use of private brands. The evidence is set out in the opinion of the court below (R. 206–208) and the court's findings are not seriously disputed. (App. Br., p. 169.) The court found that appellants agreed that private brand business was not to be generally accepted, and as a result individual refiners refused such business; further, that they would accept such business in no event without reporting it to their competitors, and that such reports were in fact made, for the purpose of affording opportunity for applying concerted pressure against acceptances. (Fg. 191, R. 308.)

The grounds of justification for the restraint urged by appellants are likewise adequately disposed of in the opinion and findings below. The court found that appellants failed to prove that private brands could not have been used for all customers desiring them. (Fg. 192, R. 308.) The court found also that there was no substantial evidence that packing private brands entailed substantial expense to refiners, but if this were not true, there was no reason why individual refiners might not make a service charge. (*Ib.*) The court was of the opinion that packing under private brands is plainly a legitimate competitive device, and that the fear that the practice might become burdensome or might be abused did not suffice to make the restraint of competition reasonable. (Op., R. 209.)

F. RESALES

Resales, sometimes called second-hand sales, occur when a purchaser, usually before he has withdrawn his sugar under his contract with the refiner, resells all or part of it. (Op., R. 209.) Resales are always made at a differential below refiners' prices, because customers prefer, on equal terms, to buy direct from the refiner. (Fg. 193, R. 309.) Because of this differential, they may affect the refiner's first-hand sales adversely. (*Ib.*) The District Court found that appellants had concertedly imposed a variety of restraints upon resales, all but one of which it condemned as unreasonable.[1] (Fgs. 195, 196, R. 309.) Appellants (Br., pp. 179–180) accept these findings except that holding unreasonable concerted action restraining the freedom of the refiners to alter prices and terms subsequent to the contract, where the refiners had differing prices and terms in effect.

The court had found that appellauts concertedly required buyers to elect and specify at the time of making a contract, without the privilege of change,

[1] The court found that defendants concertedly adopted rules limiting customers' privilege of changing specifications and destinations after the contract due date "even where the refiner was responsible for the delay in withdrawal." (Fg. 195, R. 309.)

the prices and terms in cases where the refiner had in effect more than one price, or different terms in different or the same territories. (Fg. 195, R. 309.) Paragraph 44 of the decree enjoins appellants specifically from concertedly requiring buyers to elect between the guarantee and non-guarantee form of contract at the time of entering into the contract or at any other time before delivery, or from refusing to grant buyers the privilege of changing from one destination to another by resale or otherwise.

Appellants contend (Br., p. 181) that the grant to the customer of the "valuable option" of taking subsequent delivery in non-guarantee territory of sugar originally booked under a guarantee contract would be in conflict with the agreement concerning open announcements of prices and terms; would be subject to the possibility of abuse; and if granted to some customers and not others would on this account be discriminatory.

We, of course, do not subscribe to the view that a practice otherwise fair and lawful may be restrained because it does not fit into appellants' theory as to what is within the scope of an open price system. In the view of the Government, as previously stated, that fact tends merely to demonstrate the unreasonableness of the Institute's open price system. With respect to the possible discrimination between customers, the refiners themselves introduced such discrimination by offering different terms to buyers in the same or different territories. (Op., R. 212.) That a buyer might take unfair advantage of the option, if available to him, by ordering on a non-guarantee basis with the expectation of taking delivery later in non-guarantee or guarantee territory depending on whether prices remained stable or fell, might well induce an individual refiner to withhold the option, but does not justify its concerted elimination. The inconvenience to the customer of being required to elect in advance whether he will take delivery in guarantee or non-guarantee territory may greatly exceed that to the refiner from the use of the option in the manner described.

A buyer representing 25 wholesale grocers in Illinois, Missouri and Arkansas testified that in April 1929 American, reversing its earlier practice, refused to ship into non-guarantee territory sugar which had been sold on a guarantee contract.[1] He stated that it was difficult to operate his business with the guarantee restricted in this manner, because he purchased sugar for 30 or 35 points and when entering into a contract he did not know where the sugar was going to be shipped or whether the purchaser would want it shipped by

[1]American later advised this buyer that it had found upon further investigation that the Institute ruling in the matter was not adopted until after the date of the contract in question and that under the circumstances it would be glad to deliver into non-guarantee territory on that particular contract. (Ex. 309–K, R. 1376.)

barge or rail.[1] (R. 525–526; see Exs. 309 to 309-K, R. 1372–1376.)

G. DAMAGED SUGAR AND FROZEN STOCKS

A Code Interpretation provided that in selling damaged sugar at a price concession—

> members should give *prior notice* to the Executive Secretary of the Institute of the location and amount of such sugar with statements as to its condition and the reasons for selling it below the refiner's openly announced price, in order that the Secretary may be prepared to answer complaints that may be made against the member for selling sugar at other than an open price publicly announced. (Ex. 20, Sec. I, p. B1, par. 2 (a).)

A somewhat similar Code Interpretation was adopted with regard to frozen stocks. (Ex. 20, Sec. I, p. B2, par. 2 (b).) Notice before sale enabled the Institute to interfere with legitimate sales of damaged or frozen sugars and was sought and used by the Institute not only to meet charges of arbitrary concessions, but to restrict and control such sales and thus to prevent any disturbance of market prices and to preserve the price structure. (Fg. 198, R. 310.)

Insofar as the purpose was merely to inform the Institute as to the facts so that it would be able to

[1] The guarantee at that time not only was given in certain restricted territories and not in others, but also applied only to rail and not to barge shipments. (R. 526.)

meet charges from members or others of arbitrary concessions by refiners, the court found that notice *after* rather than *before* sales would be adequate, and this finding is not now challenged.[1] (App. Br., p. 154.) Appellants challenge only the findings condemning as unreasonable Institute rulings that frozen stocks and damaged sugar should not be applied to any contracts not originally calling for them; and that such sugar should not be sold except in spot transactions. (Fgs. 199, 200, R. 310.)

As to the former restraint, it is claimed that the practice of applying frozen stocks or damaged sugar on contracts not originally calling for such sugar involves repricing[2] and is in conflict with the principle of open prices publicly announced; also because it might result in discrimination. For reasons already stated (*supra*, p. 229), the mere conflict with the principle of open prices is insufficient justification.

With respect to the possibility of applying damaged or frozen stocks against contracts not originally calling therefor in order to discriminate in favor of particular customers, as the court observed (Op., R. 218), the proper course to pursue was, not to condemn such practice in advance, but

[1] Appellants state expressly that notice to the Institute after sale is sufficient, and that prior notice is not essential to the Institute's purpose.

[2] It may be noted that appellants have abandoned their assignment of error No. 136 (6) regarding the injunction against restraints on repricing. (Br., p. 6.)

to devise methods to prevent any unfair discrimination. There is no substantial evidence that frozen stocks were "deliberately accumulated" at strategic points for the purpose of facilitating discriminations, but if this were true, the refiners were free to discontinue such practice.

With respect to the ruling requiring that all damaged sugar (sold at a concession) should be sold only in spot transactions, this is justified only as likely to discourage the tendency to grant secret concessions in the guise of sales of damaged sugar.[1] But appellants have admitted that notice to the Institute after sales would suffice for this purpose.

VIII

Withholding of Statistical Information From the Trade

The decree below does not prevent the collection or dissemination by or through the Institute of statistical information, but requires only that such statistics as are gathered and distributed among the members with respect to melt (*i. e.,* production), sales, deliveries, stocks on hand, stocks on consignment and in transit, volume of sugar shipped by differential routes, or new business, shall be made

[1] The suggestion that the Institute action in this respect did not amount to a ruling, but only stated the existing practice is disproved by the reference made in a letter of one of the refiners to "the Institute *regulation* that all sales of damaged sugar (at below list prices) *must be 'spot' transactions.*" (Ex. 430–G, R. 1818.)

fully and fairly available to the purchasing and distributing trade. (R. 321–323.) The only attack made by appellants upon this ruling of the court below is on the ground that the information which they kept to themselves would be of no use to the trade. At one point in their brief (p. 204) they state that the sole reason the statistical information in question was not published "was because the refiners had no reason to believe that the buyers wanted it." The decree, therefore, works no hardship on the appellants; the sole question is whether there was in fact any basis for the court's finding that the information in question would be of distinct value to the trade.

The court found that the only data collected by the Institute which were made available to the general trade were weekly statistics as to *total* melt and *total* deliveries, and 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.[1] (Fg. 60, R. 280.)

The Institute collected and disseminated only among members (and sometimes among cooperating nonmembers) data relating to production and deliveries of individual refiners, deliveries by

[1] The court found that the total refined stocks on hand could be computed by subtracting from the total melt of each week the total deliveries during each week (Fg. 61, R. 280), and that data as to the capacity of the several refiners were otherwise available to the public (Fg. 62, R. 280).

States, deliveries by important differential routes by States, and consigned and in transit stocks for the several States. (Fg. 65, R. 280.) The court found that such vital data, if made available to the trade, would have "illuminated the situation in the several trade areas, where the competitive set-ups differed widely," and that by circulating this information among themselves the refiners obtained an unfair advantage with respect to purchasers, and thus unduly restrained trade. (Fgs. 65, 66, R. 280–281.) None of the statistics just referred to were available to the trade from any source except the Institute. (Fg. 64, R. 280.)

At a meeting of the Executive Committee in May 1931 (after the filing of this suit), the Executive Vice-Secretary reported that a representative of a trade publication had suggested that "it would be of benefit to the trade in general if the Institute would release to the trade more statistics than at present." (Ex. 21–26, p. 649.) Thereafter there were released to the trade combined statistics on the total consumption of cane, beet, and foreign and insular refined sugar by States, together with figures showing the per capita consumption by each State, for the earlier years 1928, 1929, and 1930. (*Ib.*, p. 659.)

As the lower court stated (Op., R. 109), while the refiners were, through the statistical information collected and circulated among them, informed with respect to conditions in the several areas in which they were interested, the customer knew the situation only with respect to the country as a whole. It pointed out that statistics reflecting merely the conditions throughout the whole country could have only a limited significance for the individual purchaser and were even likely to mislead him, since the competitive set-ups in the several trade areas differ widely. The court observed that in no States do all the refiners compete and in many of them only a few offer substantial competition [1]; also that the business done by those refiners competing in any trade area is not proportionate to their total sugar production. (Ex. F-15.) In order to be as fully informed on market conditions as the refiner from whom he buys, the customer would obviously have to be informed with respect to the factors which affect competition in his trade area.

Appellants in arguing the contrary rely almost entirely on extreme and somewhat loose statements,[2] all based on the unwarranted assumption

[1] The court referred (R. 109) to Exhibit H-15, which shows that in 1927 there were 3 States in which only three of appellants delivered over 10,000 bags of sugar; 5 States, five; 8 States, six; 4 States, seven; 3 States, eight; 2 States, nine; 1 State, ten; 2 States, eleven, and 1 State, thirteen.

[2] Thus (it is asserted (Br., p. 202) that the weekly deliveries in any given State or group of States "have no bearing at all" on sugar prices, and that, from the buyer's standpoint, an increase or decrease in the weekly deliveries in a given State or group of States would merely reflect "the *usual* seasonal rise and fall in sugar sales". Elsewhere (Br., p. 201) they argue that the statistics on production and deliveries of individual refiners could be useful only in in-

that "refiners' prices are determined by national factors" (Br., p. 204). Only under an arbitrary system of price-making could it be possible for prices not to be substantially influenced by the varying competitive conditions in the different trade areas in which they apply.[1]

Even under appellants' "mass bargaining" system, the buyer is presumed to have an acute knowledge of market conditions. In defense of mass bargaining great reliance is placed upon the fact that brokers, through whom it is said most sugar buyers purchase, are "market experts" and "the best informed class of buyers". (Br., p. 76.) It is contended that in seeking more advantageous prices and terms, brokers continuously hammer away at the refiners "with statistics or information of any kind." (Br., p. 77.) Thus, on the one

forming a particular refiner whether its volume had increased or decreased in comparison with that of other refiners competing in the territories where it operated. They ignore the possibility that such information would be useful in showing conditions of supply and demand in the same territories.

[1] Even if it be true, as appellants contend, that in the sugar industry a price cut in one area will spread rapidly throughout the country, this does not indicate that such a cut in price is based only on "national factors". Thus, while national demand might be normal, a particular refiner finding a slack demand in his particular trade area, might be compelled to reduce his price, even if only temporarily, in order to increase his sales. The customer in that area, if cognizant of the facts, may recognize the opportunity to press for a decreased price or more favorable terms.

hand, appellants argue that under their system prices are maintained at reasonable levels on account of pressure from buyers having full knowledge of market conditions. Yet they contend at the same time that buyers are not interested in knowing fully about market conditions. The lower court was of the opinion that by the failure to circulate to customers the statistical information in question appellants acquired an advantage over their customers inconsistent with the "perfect" competition which they professed to foster and which their economic expert described. (Op., R. 106, 241.)

The following illustrations referred to by the lower court will serve to demonstrate how in fact the withholding of statistics may place the refiners in an advantageous position with respect to their customers.[1]

Reference has previously been made (*supra*, pp. 128–129), in connection with the discussion of Code 3(c), to the Code Interpretation which permitted the refiner to charge less than the all-rail rate where

[1] The absence of evidence of complaints from customers with respect to statistics, so much emphasized by appellants, would seem to have little significance. It does not appear that the customers were aware of the extent to which the refiners circulated statistical information among themselves without disclosing it to the trade, and even if this were known to customers they might well fail to realize that they were legally entitled to obtain the same information as the refiners. If in fact the refiners were taking an unfair advantage, their action is none the less unlawful although the trade was not aware that it was being treated unfairly.

sugar was shipped by customers over a differential route in sufficient quantity to render it difficult for refiners to sell their sugar at the destination point on the all-rail application. The court found that statistics on shipments by differential routes were employed by the refiners to determine whether or not conditions in particular areas served by differential routes necessitated such revision of freight charges. (Fg. 103, R. 290.) The court was of the opinion that concealment of these statistics placed customers at a disadvantage, for, being unaware of true conditions, they could not know when they might reasonably insist on a breakdown in freight charges.

Reference has also been made to the practice, under the Institute, generally to require customers to adhere to contract terms relative to giving specifications for delivery and withdrawal of sugar not later than thirty days after the date of the contract. However, where it appeared, after a move, that it would be impracticable to enforce these terms, the Institute committee in charge of such matters sometimes recommended a later dead line. (Op., R. 110.) The decision as to this, the court stated, depended, in part at least, on what the statistics revealed. The court was of the opinion that appellants obtained an unfair advantage over the trade by keeping to themselves the data concerning the customers' unspecified and undelivered balances at the end of the thirty-day contract period. (*Ib.*)

The lower court found in the opinions in the leading trade-association cases decided by this Court ample authority for condemning as an unlawful restraint of competition the circulation of vital statistical data to the refiners only and not to the trade. In *Maple Flooring Manufacturers' Association* v. *United States,* 268 U. S. 563, 586, the Court stated its decision to be that trade associations which "openly and fairly gather and disseminate" statistical information do not thereby unlawfully restrain trade. Throughout its opinion (pp. 573–574, 582–583, 585), the Court emphasized the full publicity given to the statistical information collected by the Association. On the other hand, one of the grounds (p. 581), although not the principal one, upon which the Court distinguished *United States* v. *American Linseed Oil Company,* 262 U. S. 371, was that the statistical information collected by the Association there involved was made available to members, but was treated as confidential and "concealed from the bnyers". See also *United States* v. *American Linseed Oil Company,* at p. 380; *American Column & Lumber Company* v. *United States,* 257 U. S. 377, 411.

IX

Refiners' Higher Prices, Wider Margins, and Greater Profits in the Post-Institute Period

The effect of the entire Institute program was, as might be expected, to maintain prices at comparatively high levels and to increase refiners' profits substantially.

Since raw sugar represents about 80% of the total cost of making and refining sugar (Fg. 202, R. 311), refined prices are to be judged primarily by their relation to raw prices. The District Court found that in the Institute period "such higher level for the price of refined as compared to that of raws has been maintained, as to negate the prevalence of free competition." (Fg. 203, R. 311.) This finding is supported by the evidence showing (1) lack of sensitivity in refined prices to raw prices, after the Institute, (2) higher refiners' margins after the Institute, and (3) substantially higher profits by the refiners after the Institute.

A. Lack of sensitivity in refined prices to raw, after the Institute

Upon the question of price stability and price levels after the Institute, the District Court first noted that the number of price changes for refined, as compared to the number of price changes for raw, was relatively much less frequent after the Institute than before. (Op., R. 222–223.) The relation between refined and raw changes as given by the District Court, and the data on which the percentages are based are as follows:[1]

Year	Raw price changes	Refined price changes	Ratio of refined to raw changes
			Percent
1924	115	48	41.7
1925	115	43	37.4
1926	85	42	49.4
1927	94	36	38.3
Total	409	169	41.3
1928	101	29	28.7
1929	91	21	23.1
1930	110	22	20.0
Total	302	72	23.8

The first explanation offered by appellants to account for the relative lack of sensitivity of refined to raw prices after the Institute is, as stated by them, "the lower average price of raw during the Institute period", and they directly imply that the District Court failed to take this factor into consideration. (Br., p. 103–a.) The fact is that the court considered and rejected this factor as a sufficient explanation of what took place. (Op., R. 222–223; Fg. 202, R. 311.) The finding is that "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.*"

Aside from the finding itself, the facts of record demonstrate that there is no correlation between

[1] Raw price changes (Ex. 6, back cover); refined price changes (Ex. 14, p. 11; Ex. 15, p. 27; Ex. 17, p. 27; Ex. 19, p. 25).

low raw prices and a small number of refined price changes compared to raw. We set forth below, for purposes of comparison, the weighted average amount paid by refiners per pound of sugar (as computed by them) and the percentage (as previously given) of refined to raw price changes for each year, 1925 to 1930, inclusive:

Year	Average raw price [1]	Ratio of refined to raw price changes
	Cents	*Percent*
1925	4.43	37.4
1926	4.26	49.4
1927	4.78	38.3
1928	4.28	28.7
1929	3.78	23.1
1930	3.45	20.0

[1] Exhibit S-17, Appendix Appellants' Brief.

In both the pre-Institute years for which there is comparative data, the showing is directly the opposite of that required by appellants' theory. In 1926, when the average raw price was lower than in 1925, refined price changes were relatively more frequent than in 1925. In 1927, when the average raw price was higher than in 1926, refined price changes were relatively less frequent than in 1926. Furthermore, the average raw price in 1926 and in 1928 was substantially the same, whereas the ratio of refined to raw price changes in 1926 was 49.4% and in 1928 only 28.7%. Even taking the erroneous basis of calculation used by appellants, that is, averaging raw prices in the three pre-Institute and in the three post-Institute years, the decline was from 4.48 to 3.83, a drop of 14.5%, whereas the ratio of refined to raw price changes in the two periods was 41.3% and 23.8%, respectively, a drop of 42.4%

The facts also do not support the second explanation suggested by appellants (Br., p. 103-a) for the lack of sensitivity after the Institute in refined prices to raw, namely, "a narrower annual range from the high to the low price of raw during the Institute period." The following shows the annual range of raw prices for the 1925–1930 period and, as a basis of comparison, the percentage figures previously given as to price changes:

Year	Range in raw prices [1]	Ratio of refined to raw price changes
		Percent
1925	1.13	37.4
1926	1.19	49.4
1927	.81	38.3
1928	.88	28.7
1929	.62	23.1
1930	.79	20.0

[1] Ex. 8, p. 24.

The above shows no correlation whatever between a narrow range in the price of raw and a low ratio of refined to raw price changes. The range in raw prices in 1928 was greater than in 1927, but the ratio of refined to raw price changes in 1928 was 28.7%, while in 1927 it was 38.3%. The range in the price of raw in 1925 and in 1926 was substantially the same, whereas the foregoing ratio in one year was 37.4% and in the other 49.4%.

The District Court, in finding a marked lack of sensitivity in refined prices to raw, after the Institute, did not rely wholly, or perhaps principally, on figures as to the relative number of price changes. It also gave weight to the testimony of witnesses who were "expert sugar buyers" that since the Institute "they 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." (Op. R. 222, 223.) There is ample testimony (R. 397–398, 412–413, 468–470, 526–527, 550) to support the court's statement and its equivalent finding (Fg. 202, R. 311). In fact, after several witnesses had given testimony of this character, the court suggested that it had become cumulative and that it appeared not to be disputed. (R. 1183c.)

B. 1927 AND 1928 SHOULD NOT BE EXCLUDED IN COMPARING PRE-INSTITUTE WITH POST-INSTITUTE MARGINS AND PROFITS

Appellants contend that there is a lag between a change in the price of raw and a change in the price of refined, with a consequent increase in refiners' margins and profits when the price of raw is falling and a decrease therein when the price of raw is rising. (Br. pp. 90–93.) They then point out that the average *annual* raw price paid by the refiners in 1927 was higher than in 1926 and that in 1928 it was lower than in 1927, and they thereupon denominate 1927 a "freak low year" and 1928 a "freak high year", to be excluded from a comparison of margins and profits before and after the Institute. (Br. pp. 94–102.)

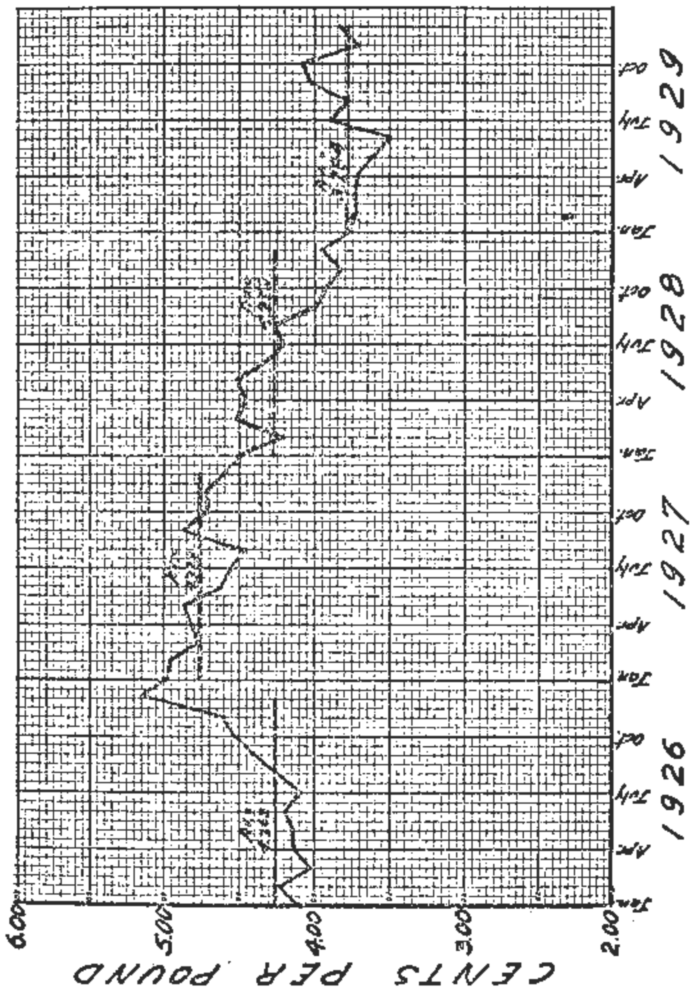
The proposed exclusion of 1927 and 1928 is chiefly based upon a misleading and fallacious comparison of the weighted average *yearly* prices of raw. But the refiners do not purchase their raw sugar on a yearly basis or anything approximating thereto. Appellants themselves state that "the refiners watch the raw market very closely, estimate their *immediate* requirements as carefully as possible, *buying generally from hand to mouth, and purchasing raws from day to day* whenever the raw price seems favorable." (Br. p. 92.) Since, therefore, refiners do not accumulate supplies, but buy from hand to mouth, customarily covering their requirements on a 30-day basis (Ex. 21–26, p. 16), the effect of any lag between raw and refined price changes must be determined on a short-period, preferably a monthly, basis. Appellants' Exhibit D–16, giving the price of raw on the 15th of each month for the 1922–1931 period, furnishes the precise information required and completely refutes appellants' lag argument. The following summarizes the monthly movement of prices there shown for the years 1926, 1927, 1928, and 1929:

Year	Upward	Downward	Unchanged
1926	9	3	0
1927	3	8	1
1928	4	8	0
1929	4	7	1

The chart[1] on the opposite page shows the price movement of raw for these years (using the figures

[1] The figures are charted in the same way in appellants' Exhibit E–16, except that in Exhibit E–16 the price shown by Exhibit D–16 for the 15th of each month is shown as the

in Exhibit D–16). Upon appellants' lag theory, prices should have been falling in 1926 (a very fa-



PRICE MOVEMENT OF RAW SUGAR, 1926–1929, BASED ON FIGURES IN EXHIBIT D–16

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price on the 1st of the following month, whereas the chart on the opposite page shows this as the price on the preceding 1st of the month. The only reason for not reproducing the latter chart is that it covers the entire 1922–1931 period, and also charts other price movements, as a result of which the particular data would not be shown so clearly or in as much detail.

vorable year from the standpoint of margins and profit) and rising in 1927 (a very unfavorable year from the same standpoint). The facts show that the monthly trend of prices in these two years was exactly the reverse, upwards in 1926 and downwards in 1927. In still further refutation of the theory, the downward trend in 1928 (a year of high margins and profits) was little greater than in the unfavorable 1927 year; in 1929 (also a favorable year) the downward trend of prices was distinctly less pronounced than in 1927.

That neither 1927 nor 1928 was an abnormal year is indicated by examining the yearly changes in the total consumption of sugar for the ten years ending with 1931. The percentage increase or decrease from the previous year was (Ex. 8, p. 19):

Year	Increase or decrease	Year	Increase or decrease
	Percent		*Percent*
1922	+24.0	1927	−6.6
1923	−6.1	1928	+4.6
1924	+1.5	1929	+4.8
1925	+13.5	1930	−3.6
1926	+3.9	1931	−2.2

In three of the six years in which consumption increased the percentage of increase exceeded that in 1928; in two of these years the increase was markedly greater. In one of the four years in which consumption declined the percentage of decrease was almost equal to that in 1927.

The yearly changes in refiners' total production and in their total deliveries for 1926–1931 (the years for which they are available) likewise evidence the lack of any abnormality in 1927 or 1928. The changes, and the figures (in millions of pounds) on which they are based, are shown below (Exs. K–15, M–15):

Year	Production	Increase or decrease	Deliveries	Increase or decrease
		Percent		*Percent*
1926	11,408		10,632	
1927	10,836	−5.0	10,161	−4.4
1928	10,261	−5.3	9,779	−3.8
1929	10,727	+4.5	10,179	+4.1
1930	10,317	−3.8	9,924	−2.5
1931	9,336	−9.5	8,918	−10.1

It thus appears that in 1928, alleged to be an abnormally good year, both refiners' production and their deliveries fell in substantially the same amount as they fell in 1927, alleged to be an abnormally bad year. And in the "freak low year" 1927, consumption fell only 6.6%, production 5.0%, and deliveries 4.4%, declines exceeded or substantially equalled as to each set of figures without taking 1931 into account. In that year refiners' production dropped 9.5% and their deliveries 10.1%.

The Government does not contend that 1931 should *necessarily* be excluded in considering the effect of the Institute on price levels and profits; its position is that 1931 *may* reasonably and properly be excluded. The sharp drop in production and deliveries in 1931 tends to show that some of the effects of the abnormal business depression through which the country has been passing made themselves felt in the sugar industry in that year. In addition, it can hardly be doubted that the filing of the present suit in March 1931 had an appreciable effect in mitigating or temporarily removing some of the restraints upon competition attacked in this suit.[1] The Government accordingly will present computations for the post-Institute period on the basis both of the years 1928–1930 and of the years 1928–1931.

C. HIGHER REFINERS' MARGINS AFTER THE INSTITUTE

There are in the record two sets of figures as to refiners' margins, those compiled by Willett & Gray, the leading statistical service dealing with sugar (R. 361), and those compiled by appellants for the purposes of this case. Each set of figures has certain advantages and certain disadvantages which we shall attempt to indicate.

The Willett & Gray margin represents the difference between the daily price of raw and the daily price of refined, averaged for the year, but not weighted according to the volume of purchases or sales on particular days. (R. 365–366.) In the use made in this case of refiners' margins, that is, to compare the average margin for the 3-year period before the Institute with the 3-year or 4-year period thereafter, any inaccuracy, because of absence of weighting, in the margin of a given year does not seriously impair the value of the figures. This is

[1] See the discontinuance of delivered prices (*supra*, pp. 148–149) which may or may not have been due in whole or in part to the pendency of this litigation.

so because such possible inaccuracy, being purely fortuitous and not of a kind to cause a trend in any one direction, would almost certainly be largely if not entirely cancelled out when the margins for three or four years are averaged.[1] Certainly the figures have considerable significance whether precisely accurate or not.

The margin figures compiled by appellants purport to show the weighted average amount paid by the refiners per pound of raw sugar for each of the years 1925 to 1931, inclusive, and the weighted average price received by them per pound of refined sugar for each of these years. The Government, without imputing any bad faith to appellants' accountants or their counsel, nevertheless submits that figures compiled by one party to a litigation, which the other party is unable to check against original sources, must be received with caution.

The kind of inaccuracy that may creep into figures so compiled is revealed by the table (Ex. T-11) giving the average weighted price paid by Colonial for raw sugar, which prices were used in computing appellants' margin figures. Colonial is a subsidiary of the Cuban-American Sugar Company (Fg. 2, R. 265) and the raw sugar costs which it has used are obviously fictitious bookkeeping trans-

[1] For example, the publisher of the Willett & Gray statistical trade journal, a sugar statistician, testified that its raw sugar prices are not weighted "because I have always gone on the principle that during the course of the year the weighting would average itself up." (R. 361, 367.)

actions between it and its parent company. Ex. T-11 gives 4.5907¢ as the average weighted price paid by Colonial per pound of raw sugar in 1928. Of the 101 raw sugar price changes in 1928 quoted by Willett & Gray (Ex. 17, p. 27), only 4 are as high as the figure reported by Colonial as the weighted price paid by it per pound of raw in 1928; the other 97 are all below this reported weighted price. There were only 11 days in the entire year (January 4, January 9, and March 28 to April 5) when raw cost a purchaser on the open market as much as the average weighted cost reported by Colonial and used by appellants in computing their 1928 margin. In each of the other years there is a similar discrepancy between the Willett & Gray figures on the average price of raw and the average price reported by Colonial. (Compare Ex. T-11 with Ex. 8, p. 24.)

The record also discloses a considerable variation on the part of the individual refiners in computing their margin figures. (R. 1112-1114.) Thus two important refiners (C & H and Western) used their raw purchases rather than their raw sugar melt; some refiners adjusted for grade and package differentials and others did not; some added sampling, weighing and customhouse expenses and others did not; and some made accurate computations of freight absorptions and concessions and others did not. (*Ib.*)

The following shows refiners' margins for the years 1925-1931 as computed by Willett & Gray and as computed by appellants, together with the average of each for the pre-Institute and for the post-Institute periods:

Year	Willett & Gray margin[1]			Appellants' computation of margin[2]		
		Cents per pound			*Cents per pound*	
1925		1.149	Average 1.128		0.983	Average 0.977
1926		1.136			1.043	
1927		1.098			.904	
1928	Average 1.228	1.311	Average 1.271	Average 1.020	1.119	Average 1.048
1929		1.258			1.014	
1930		1.247			1.012	
1931		1.096			.938	

[1] Ex. 8, p. 24.
[2] Ex. S-17, Appendix App. Br.

Excluding 1931, the margin was on the average 0.143¢ higher after the Institute than before on the Willett & Gray basis and 0.071¢ higher on appellants' basis. Including 1931, the increase in margin was 0.10¢ on the former basis and 0.043¢ on the latter. But whichever basis is adopted an increase in the margin is very definitely shown. From the figures themselves it is difficult to judge the significance of the increase, but their significance appears when they are applied to the total United States consumption of refiners' sugar in the years following the Institute.

Using as a test the next to the lowest basis for computing the increase, that shown by appellants' figures if 1931 is excluded, namely, 0.071¢ a pound, and multiplying this by the United States consumption of refiners' sugar for the years 1928, 1929 and 1930, namely, 29,282,000,000 pounds (Ex. D-15, R. 88), shows that the increased margin represents additional earnings for these three years of about $20,790,000. In fact, appellants' figures on their profits show an even greater increase. Their consolidated net income (after deducting depreciation and all taxes) was, in round figures, $21,374,000 in the three pre-Institute years and $45,156,000 in the three post-Institute, an increase of $23,782,000. (Ex. E–17, Appendix App. Br.) Thus the increased margin of 7/100 of one cent a pound, which appellants have referred to (Br., p. 98) as "relatively minute", signifies that their profits were more than doubled and that they were enabled to earn something like $7,000,000 more a year.

D. REFINERS' SUBSTANTIALLY HIGHER PROFITS AFTER THE INSTITUTE

The District Court stated that it would not review at length the evidence and the arguments presented as to the exact amount of refiners' profits, because, for the purposes of the case, it was sufficient to point out that there had been in the post-Institute period a substantial increase in profits despite a concededly large excess capacity. (Op., R. 223.) Amplifying this thought, the court said that, since it had found that refined prices as compared with raw prices had been "maintained at levels which tend to negate the prevalence of free competition and to support the inference of concerted action", it was unnecessary to inquire whether or not the refiners had made "excessive" profits. (Op., R.

224.) The court added: "What is condemned, of course, is not profits large or small, but the shackling of the forces of fair competition whatever the financial result." (*Ib.*)

The Government submits that the evidence fully sustains the finding that refiners' profits substantially increased after the Institute. (Fg. 202, R. 311.)

Appellants, in order to show refiners' earnings on capital, set forth (Br., p. 100) certain percentages taken from Exhibit E–17, and all references in appellants' brief to earnings on capital are to these percentages. Appellants fail to state that the percentages in question are based upon refiners' capital *before deducting reserves for depreciation and taxes,* a fact which totally destroys their value as an index to earnings on capital. Of the 21 refineries operated by Institute members, one was constructed in 1859; one in the years 1861, 1865 and 1877; one in 1881; one in 1889, etc. (R. 1124.) The average date of construction was 1898. (*Ib.*) Since the capital shown by Exhibit E–17 is based upon book cost of the fixed assets (R. 1118), the book cost of plants averaging more than 30 years of age is a purely fictitious figure unless depreciation reserves are deducted.

For the years 1926–1931 the combined profits of all refiners (after charging depreciation and taxes), and the percent of these profits to capital (after deducting depreciation and tax reserves) are as follows (Ex. E–17):

Year	Profits	Earnings on capital	
		Percent	
1925	$5,688,210	2.79	Average 3.44%.
1926	15,935,968	7.65	
1927	−250,390	−.12	
Total	$21,373,782		
Average	$7,124,594		
1928	$16,842,575	7.64	Average 6.9%.
1929	16,180,899	Average 6.6%. 7.39	
1930	12,832,848	5.72	
1931	10,699,745	5.58	
Total	$55,856,067		
Average	$13,964,017		

These figures are alone sufficient to sustain the court's finding of a substantial increase in profits. They show that the refiners' return on capital approximately doubled after the Institute, whether 1931 is included or excluded from the comparison. They also show that, including 1931 in the post-Institute period, there was a 96% increase in average earnings.

But the Government is not content merely to show that the evidence sustains the court's finding. It submits that the evidence, properly analyzed, establishes that profits after the Institute were, under all the circumstances, abnormally high.

In the first place, the composite figures for all 15 refiners which have just been set forth are distorted by the inclusion therein of Spreckels (and its predecessor Federal). Spreckels was organized in January 1929 to take over the assets of Federal, which company as early as 1927 was "hopelessly involved in debt to the banks." (R. 1147.) Spreckels went into receivership a year later, in January 1930, and permanently ceased operating in the summer of that year. (R. 953, 1148.) Spreckels (including therein Federal) had a large loss in each of the years 1925 to 1930, inclusive. (Ex. E-17.) Its average annual loss was $1,700,-000. How completely unrepresentative this is, and at variance with every one of the other refiners, is shown by the fact that in the same six-year period, 9 of the other 14 refiners did not have a loss in a single year and by the further fact that in the three years following the Institute only one of the 14 refiners had a loss in any year—Texas in 1930, when its loss was $18,926.

Not only do the figures themselves show that the Spreckels situation was peculiar and altogether unrepresentative, but this is also established by the testimony. Its plant was operated before and after the Institute only about six months a year. (R. 386.) It would build up large stocks and then close the plant, and, as a "very limited seller", it would before the Institute, in order to dispose of its sugar, quote prices in various markets "considerably below the quoted prices of the other refiners". (R. 595. See also Op., R. 221.) The Government therefore submits that in order to get a true picture of conditions in the industry it is necessary to eliminate Spreckels from the computation.

The following shows the capital and profits (with depreciation and taxes deducted in each case) and the ratio of earnings to capital of the 14 refiners other than Spreckels:

Year	Capital	Profits		Earnings on capital	
				Percent	
1925	$186,073,892	$7,101,479		3.82	Average 4.59%.
1926	190,940,724	17,579,453		9.03	
1927	194,692,611	1,770,034		.91	
1928	199,225,646	19,250,919	Average 7.65%.	9.66	Average 8.34%.
1929	202,533,196	16,781,676		8.29	
1930	200,250,585	14,159,209		7.07	
1931	191,676,037	10,699,745		5.58	

It is submitted that average earnings on capital of 8⅓% in an industry burdened with a large excess capacity, admitted in appellants' answer to be 50% (R. 50), covering a period in which in two of the three years production declined (*supra,* p. 249), very strongly indicates an undue restriction of competition and some increment of monopolistic profits. This inference is strengthened by the fact that demand for sugar is relatively very stable, a condition tending to make for a low return on capital, and by the fact that since 1924 annual price fluctuations in raw sugar (constituting 80% of cost) "have been comparatively narrow" (R. 591–592). An average return of 7.65% on capital for the four years 1928–1931 is also, under the circumstances, abnormally high. In 1931 production and deliveries were 14% and 12%, respectively, under the "freak bad year" 1927. (*Supra,* p. 249.)

The Government also submits that any test as to high profits should be made on the basis of profits before deducting Federal income taxes. All figures on profits which we have thus far set forth are either taken directly from Exhibit E–17 or are arrived at by combining the figures there shown and they represent profits after deducting income taxes. Since the record does not disclose the amount of the Federal income tax deduction, we have prepared a computation (set forth on the ~~opposite~~ next page) which shows the approximate profits of the refiners other than Spreckels after deducting depreciation and all taxes other than the Federal income tax. The return on capital on this basis is also shown.

There can be hardly any question that the earnings on capital thus shown, an average of 9.48% for the three post-Institute years and an average of 8.72% for the four post-Institute years, are abnormally high and indicative of restraint of trade and monopolistic control.

Profits before deducting Federal income taxes of refiners other than Spreckels and earnings on capital on this basis

Year	(1) Total profits of companies having profit	(2) Fed. inc. tax conversion ratio	(3) Profits before Fed. inc. tax—col. 1 applied to col. 2	(4) Total losses of companies having losses	(5) Combined profits before Fed. inc. tax—col. 3 minus col. 4	(6) Capital	(7) Earnings on capital—col. 5 divided by col. 6
							Percent
1925	$10, 165, 448	100/87	$11, 684, 423	−$3, 063, 969	$8, 620, 454	$186, 073, 892	4. 63 Average 5.52%
1926	17, 579, 453	1000/865	20, 323, 067	....	20, 323, 067	190, 980, 724	10. 64
1927	4, 769, 330	1000/865	5, 513, 681	−2, 999, 296	2, 514, 385	194, 692, 611	1. 29
1928	19, 250, 919	100/88	21, 876, 044	....	21, 876, 044	199, 225, 646	10. 98 Average 9.48%
1929	16, 781, 676	100/88	19, 070, 086	....	19, 070, 086	202, 533, 196	9. 42
1930	14, 178, 135	100/88	16, 111, 517	−18, 926	16, 092, 591	200, 250, 585	8. 04
1931	12, 061, 873	100/88	13, 706, 673	−1, 362, 128	12, 344, 545	191, 878, 037	6. 43 Average 8.72% (1928–1931)

There are other indications of abnormally high earnings in the post-Institute period. Appellants' figures (Ex. E–17) show that American's earnings on capital (after depreciation and tax deductions) were 9.15% in 1928, 8.16% in 1929, and 7.54% in 1930. At the same time, appellants' figures unmistakably show that American is overcapitalized or that its capital used in the refining business is overstated, or both. Over the period 1925–1931, American prodnced about 45% more sugar than National, the only other really large producer, the production being 18,900,000,000 pounds (Ex. N–16) and 13,000,000,000 pounds (Ex. V–16), respectively. But during this period the capital employed by American, as stated in Exhibit E–17, averaged about $90,000,000 and that employed by National about $23,000,000. In other words, American, with production 45% greater than National, is reported as having employed 400% more capital. Examination of the breakdown of these capital figures in other exhibits confirms the conclusion that the figures given in Exhibit E–17 grossly overstate the capital actually employed by American in the refining business. Bearing in mind that American produced less than 50% more sugar than National, American could not have required nearly 1,000% more cash and over 400% more net working capital than National. Yet the figures underlying Exhibit E–17, and upon which the computations in that exhibit rest, purport to show that during the 1925–1931 period American employed in the refining business average cash of $22,400,000 and average net working capital of $35,000,000, whereas the corresponding figures for National are only $2,200,000 and $8,300,000. (Exs. 512, 520, N–16, V–16.)

Since the capital reported for American is about 40% of the capital reported for all refiners (Ex. E–17, sheet 2), the inflated figures for American's capital materially affect the earnings on capital disclosed by computations based on Exhibit E–17. Accordingly, these earnings, large as they are, substantially understate the earnings on capital actually employed in the business of refining.

E. FACTORS RESPONSIBLE FOR HIGHER PRICES AND PROFITS AFTER THE INSTITUTE

The factors which the District Court found to be most largely responsible for the relative price stability and high price levels in the post-Institute period were: the interchange of important trade statistics, not disclosed to purchasers; the steps taken to maintain uniformity in the price structure, and thus to prevent any price variation to distributors or ultimate purchasers which would enable them, by underselling, to weaken or disturb the price structure;[1] the friendly cooperative spirit

[1] Another reason for refiners' interest in price uniformity was that it relieved them of the pressure, to which they would otherwise be subjected, to give compensatory advantages to those who could not or did not obtain the more favorable prices or terms. (Op. R. 225.)

which the Institute brought to the industry; and the assurance which the open price system gave to each refiner that the only prices, terms, or conditions he need meet were those openly announced in advance of sale by his competitors. (Fg. 204, R. 311–312.)

X

The Illegality of Appellants' Restraints

A. THE LEADING TRADE ASSOCIATION CASES

In considering the application to this case of earlier decisions of this Court, it is recognized that decisions concerning the legality of trade association activities turn largely upon the peculiar facts in the particular cases and that the facts in succeeding cases are seldom so much alike as to permit it to be stated definitely that the decision in one case is controlling in another. Nevertheless, comparison with the decided cases may aid in focusing attention upon the significant features of the present case.

Furthermore, in the leading trade association cases decided by this Court certain underlying principles may be found. It is clear, for example, that no agreement fixing prices or limiting production or allocating territory is essential to a violation of the Sherman Act. *American Column & Lumber Company* v. *United States,* 257 U. S. 377; *United States* v. *American Linseed Oil Company,* 262 U. S. 371. It is necessary only that, viewing the activities of the defendants in their entirety, it can be seen that by reason of intent or necessary effect, they are calculated to restrict or suppress fair competition, or to limit the freedom of the participants to engage in business in normal fashion and enter into lawful competitive arrangements.

In the *American Column & Lumber Company* case exchange of statistical information, which was the basic activity of the Association, was supplemented by propaganda and cooperative effort directed towards the limitation of production and the raising of prices in a manner inconsistent with the maintenance of normal competition, and the entire scheme was held unlawful, although there was no agreement or understanding upon the prices to be charged or upon the extent to which production would be limited.

In the *Linseed* case, association members supplied to a central bureau schedules of their prices and terms and agreed to adhere to those prices and terms, unless more onerous ones were obtained, or unless they notified the bureau by wire of any deviation. In addition, detailed information concerning sales and offers to buy was collected and distributed to members through the bureau. In condemning the arrangement because of its necessary tendency to suppress competition, the Court said (p. 389):

> Certain it is that the defendants are associated in a new form of combination and are resorting to methods which are not normal.

> If, looking at the entire contract by which they are bound together, in the light of what has been done under it the Court can see that its necessary tendency is to suppress competition in trade between the States, the combination must be declared unlawful.

The record disclosed, the Court stated (p. 389), that the defendants, "powerful factors" in the manufacture and distribution of linseed oil, "located at widely separated points and theretofore conducting independent enterprises along customary lines," suddenly agreed to abandon their freedom of action and to reveal to each other the intimate details of their respective affairs. They "subjected themselves to an autocratic Bureau," paid it large fees and deposited funds to insure their obedience. Each agreed "to furnish a schedule of prices and terms and adhere thereto—unless more onerous ones were obtained—until prepared to give immediate notice of departure therefrom for relay by the Bureau." Each also agreed, under penalty of fine, to attend monthly meetings; to comply with all reasonable requirements of the Bureau; and to divulge no secrets.

The Court concluded (p. 390) that "their manifest purpose was to defeat the Sherman Act without subjecting themselves to its penalities." The present case, it is submitted, is substantially analogous to the *Linseed* case in the activities involved and consequently in the purpose to defeat the law without incurring its penalties. Refiners, controlling between 70% and 80% of the entire business (and enjoying the cooperation of non-members who control the remainder of the business), organized an association, to which they contributed as much as $800,000 in a single year, of which sum $75,000 was paid as annual salary to one of the executives. (*Supra,* p. 31.) High officials of the refiners, as members of the Board of Directors or of the Executive, Enforcement, or other committees, met weekly or more often and directed the Institute's affairs and enforced its policies. (Exs. 21–26, 27.)

Not only did the refiners exchange among themselves full information concerning intimate details of their respective businesses (which was not published to the trade, *supra,* pp. 234–235), but in addition, the Institute from time to time examined the several refiners' records and files and held more or less formal trials of refiners, in order to determine whether there had been Code violations. (Fg. 209, R. 312.) Each refiner bound himself to sell only at prices and terms previously announced and this basic agreement was extended and reenforced by numerous specific restraints upon terms and conditions of sale.

The absence of penalties does not distinguish the present case from the *Linseed* case, inasmuch as compliance with Institute regulations and attendance at meetings was secured without the compulsion of penalties—possibly due to advantages expected to be derived, or through moral compulsion.

Clearly, it is also not a ground of distinction that in the *Linseed* case deviations were permitted from reported prices, whereas under the Institute system deviations from reported prices were forbidden. Quite the contrary, the provision for deviations in that case was unquestionably intended to alleviate the otherwise rigid restriction upon individual bargaining which was imposed by the agreement to sell *only* at prices previously announced. It must appear obvious that insofar as the Institute system prohibited any deviation from published prices, the restraint here involved is more stringent than that condemned in the *Linseed* case.

Nor, finally, do we agree that the "vital" feature of the *Linseed* case was the secrecy maintained with respect to prices and statistical data.[1] (See App. Br., p. 254.) While this fact unquestionably had some significance, it seems not open to question that the principal ground of decision in the *Linseed* case was the restraint imposed upon the freedom of the individual to carry on his own affairs and the artificial stabilization of price competition produced by the basic price reporting agreement.

This is confirmed by a fair reading of the subsequent opinions rendered in *Maple Flooring Manufacturers' Association* v. *United States,* 268 U. S.

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[1] In any event, it will be recalled that much of the important statistical data which appellants exchanged among themselves was withheld from the trade. (*Supra*, pp. 234–235.) Likewise, the deliberations of the Institute were to be kept confidential. (Ex. 420–0, R. 1754.)

563, and *Cement Manufacturers' Protective Association* v. *United States,* 268 U. S. 588, particularly that in the former case, where the Court was careful to delimit its decision so as to approve only of the collection and widespread dissemination of statistical information, including data concerning prices exclusively in *actual* transactions. The ground of the decision in this respect was that improved knowledge of market conditions makes it possible for persons engaged in commerce more intelligently to conduct their *individual* businesses, and tends in this way to stabilize trade and industry.

In distinguishing the *Linseed* case, the Court stated affirmatively (p. 583):

> Restraint upon free competition begins when improper use is made of that [statistical] information through any concerted action which operates to restrain the freedom of action of those who buy and sell.

The same thought was further emphasized when the Court added (p. 585):

> We realize that such information gathered and disseminated among the members of a trade or business may be the basis of agreement or concerted action to lessen production arbitrarily or to raise prices beyond the levels of production and price which would prevail if no such agreement or concerted action ensued, and those engaged in commerce were *left free to base individual initiative on full information* of the essential

> elements of their business. Such concerted action constitutes a restraint of commerce and is illegal and may be enjoined as may any other combination or activity necessarily resulting in such concerted action as was the subject of consideration in *American Column & Lumber Co.* v. *United States, supra* and *United States* v. *American Linseed Oil Co., supra.*

The Court seemed to regard as significant the fact that "all reports of sales and prices dealt exclusively with past and closed transactions" (p. 573), and that "the statistics gathered and disseminated do not include current price quotations" (p. 574). In concluding its opinion, the Court stated the scope of its decision as follows:

> *We decide only* that trade associations or combinations of persons or corporations which openly and fairly gather and disseminate information as to the cost of their product, the volume of production, *the actual price which the product has brought in past transactions,* stocks of merchandise on hand, approximate cost of transportation from the principal point of shipment to the points of consumption as did these defendants and who, as they did, meet and discuss such information and statistics without however reaching or attempting to reach any agreement or any concerted action with respect to prices or production or restraining competition, do not thereby engage in unlawful restraint of commerce.

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In the *Cement* case, the Court further gave its approval to the collection and distribution of data which would enable individual manufacturers to discover and thwart the commission of frauds against them. The Court sustained the legality of exchange of credit information where there was no evidence (p. 600) "that there were any consequences from it other than such as would naturally ensue *from the exercise of the individual judgment* of manufacturers in determining * * * whether to extend credit"; and of data concerning the sale of cement under specific job contracts, where, similarly (pp. 594–597, 603), the data in question was not made the basis of any concerted action.

The simple exchange of data approved in the *Cement* case differs so widely from the substantial restraint implicit in appellants' open price system and the numerous specific restraints imposed by them on terms and conditions of sale that appellants attempt in vain (Br., pp. 259–260) to derive comfort from the opinion in that case. With reference to the *Maple Flooring* case, while it may be true, as appellants state, that the price information collected and disseminated by the Association there involved related only to sales already made, and the Court's *decision* was limited to the facts involved, nevertheless the opinion in that case goes further and reveals, if not the conviction, at least the strong implication, that the exchange of current and future prices would be unlawful. That the Court was justified in its attitude in this respect is amply demonstrated by the facts in the present case.

B. APPELLANT'S RESTRAINTS ARE CLEARLY UNREASONABLE AND UNLAWFUL

Regarding the "open announcement" of prices, which the court below found "tended in fact, as it naturally would tend" towards the maintenance of relatively high prices, and which had the effect, as applied in practice by appellants, of barring many legitimate competitive practices, as for example, long term contracts and tolling contracts (*supra*, pp. 197–201, 212–216), appellants have failed to make a convincing showing that the agreement openly to announce current and future prices and to adhere thereto until giving notice of a change is essential to the accomplishment of any lawful objective. While they profess to have been seeking to accomplish the same objectives as those approved in the *Maple Flooring* and *Cement* cases, *i. e.*, placing of competition on a higher plane and providing for the more intelligent conduct of business, they have not shown that the less drastic methods approved in those cases would not have sufficed for these lawful purposes. They admit that publicity given to closed transactions would effectively prevent the secret concessions which they primarily aimed to eliminate. (*Supra,* pp. 69–70.) They do not question, either, the District Court's finding that such publicity would be effective to prevent discriminations between customers, which is the other "evil" principally relied upon. (*Ib.*) The only other ground of justification offered is that adherence to published prices has been the established practice in the sugar industry, and is essential to the traditional "move" system. But this is unfounded. (Op., R. 104–105, 238.) While the publication of their current prices by individual refiners may have been common in the sugar industry, as is the publication of price lists in industry generally, the obligation not to depart from published prices is obviously unusual, and on its face restrictive of the freedom of the parties thereto to conduct their businesses in normal fashion.

It has been shown that the uniform price produced in the process of concerted future price publication, as practiced by appellants, was not necessarily the price which would result in the normal course of competition among sellers and buyers, but rather the price which, in effect, all refiners could "agree" upon. (*Supra,* p. 58.) The tendency of such a system of price making to maintain prices as high as the traffic will bear, and the indisputable fact that prices since the Institute have failed to fluctuate normally in accordance with raw prices, have likewise previously been referred to. (*Supra*, pp. 58, 241–245.)

Attention has been called to the facts, largely ignored by appellants, that in the sugar industry competition with respect to terms and conditions of sale would normally be as keen, and probably as important to buyers, as competition in price, and that the open announcement system was used as a device to bring about and to enforce the numerous specific restraints upon terms and conditions of sale. Theoretically, under a system of open announcements, covering freight rates and terms and conditions of sale, as well as basis prices, each refiner is free to make his own announcements, according to his own business judgment and competitive situation. In the operation of the Institute system, however, by Code Interpretations and informal resolutions, framed with the liberal use of "pious protestations and smug preambles"; by implied understandings, as in the case of delivered prices (*supra*, pp. 140–149), and the price guarantee (Op., R. 201); and by surreptitious specific agreements (which, in some instances, are even now not admitted, in the face of overwhelming proof, see *supra*, pp. 190, 214), important terms were from time to time concertedly fixed, limited or suppressed.

The variety of such restraints practiced by appellants and the disproportionate amount of attention devoted to them shows beyond peradventure that appellants were not, as they claimed, concerned primarily with open announcement of prices and terms.[1] The use of the open announcement system as an aid in bringing about and enforcing the restraints upon terms (Fg. 57, R. 279, *supra,* pp. 62-68) provides additional support for the action of the court below in enjoining its continuance.

Each of the important specific restraints has been separately discussed and shown to be unreasonable. Their unreasonableness becomes even more apparent as they are viewed in their entirety, and it is seen that collectively they are, in large part, calculated to retain for the refiners the advantage of the favorable basis prices produced by the open announcement system, by effectuating the uniformity of price structure which the court found it was appellants' dominant purpose to achieve.[2]

Thus in connection with transportation charges, which were an especially important element in the

[1] The court below observed in its opinion that although appellants "have emphasized the reporting and statistical services of the Institute, the minutes and other records of the meetings of members, directors, executive committee and other committees, abundantly demonstrate that the Institute and its members were, to a very high degree occupied * * * with the various problems and practices relating to sales and distribution." (R. 97.)

[2] The court stated (R. 115) that "most of defendants' activities since the Institute have been designed to preserve * * * 'uniformity in price structure'; this objective was accomplished by preventing combination of functions and by prohibiting or limiting all special terms so that sugar should be sold at the basis price only, with the usual differentials for grades and packages."

net cost of sugar to the customer and with respect to which competition was normally keen, particularly in those areas served by differential routes, in order to preserve uniformity of price structure, appellants first, under Code 3(c), agreed to charge uniformly only the all-rail rate on deliveries from consignment, even though consignment stocks were commonly transported over differential routes at large savings below the all-rail rates. (*Supra*, p. 128; Op., R. 130.) When Code 3(c) proved disadvantageous to some of the refiners and could no longer be enforced, appellants substituted a system of uniform delivered prices, whereby customers were arbitrarily deprived of the advantages of cheaper differential routes.[1]

Because of the artificiality of the freight charges maintained at different times by the refiners, it was possible to use the privileges of transiting and diversion offered by the carriers, in order to obtain delivery of sugar at a cost below the refiners' freight charges. As the court found, the prohibition under the Institute of such transiting and diversion by customers as the refiners might be willing to consent to, was essential to the success of their concerted efforts to maintain the artificial freight structures. (Fg. 122, R. 294.)

[1] The delivered price system is, of course, on a par with the zoning system which was held unlawful in the *Linseed* case, *supra*. (See Op., R. 254.) As has been stated, appellants make no effort to justify the concerted adoption or maintenance of delivered prices.

Further, in the interest of maintaining uniformity in transportation charges, were the regulations concerning private charter and pooled cars and cargoes and the requirement imposed on water carriers, under threat of boycott, that they maintain openly announced rates. (*Supra,* pp. 159, 163, 164.)

Long term contracts and quantity discounts constituted major threats to the maintenance of price uniformity and they were eliminated. (*Supra,* pp. 189, 207.) Even in the extent to which they relaxed enforcement of the 30-day contracts, appellants acted concertedly and uniformly. (*Supra,* p. 203.)

Edgar's agreement that he would sell only at the refiners' prices aided, as the court found it was intended, in securing maintenance of price uniformity. (*Supra,* p. 201.)

Tolling arrangements offered an opportunity to customers in a position to use them, to obtain their supplies at below the refiners' uniform price, but such arrangements were prohibited by agreement. (*Supra,* p. 212.) Credit terms likewise offered opportunities for competition among the refiners but the four-payment plan and split billing were virtually suppressed; and any increase in the cash discount was prohibited. (*Supra,* pp. 216–220.) Even with respect to the length of the discount period, when competition developed between New Orleans and Eastern refiners as to the length of the discount period on shipments over differential routes, the possibility of interference with the prevailing uniformity was removed by agreement. (*Supra*, pp. 220–221.) The price guarantee, an important competitive device, was similarly restricted by concerted action, and the use of returnable bags and bulk containers, which might defeat the desired price uniformity, were barred. (*Supra*, pp. 221, 222.) Also resales of sugar by customers and frozen stocks were regulated so as to prevent any disturbance in the uniform price structure. (*Supra*, pp. 228, 331.)

There is convincing proof also that the compulsory separation of distributive functions, probably the most drastic of the activities of the Institute, was primarily in aid of the maintenance of uniformity of price structure. It was thought that a sugar merchant, by engaging also as a broker or warehouseman, might obtain sugar at a net cost below the refiners' uniform price; and that a combination broker-warehouseman might pass on to customers a portion of the economies accruing from a combination of functions and thus reduce the cost of sugar to such customers below the refiners' uniform price.[1] (*Supra*, pp. 115–119.) Appellants even went so far as to fix uniform brokers' commissions by agreement. (*Supra*, p. 41.)

The court below concluded (R. 225) that appellants by imposing substantial restraints upon the practices in question, "sought to eliminate the pos-

[1] The opinion of the court below states in this connection (R. 115) that "in my judgment it is probable here, as in other aspects of the case *it is certain*, that defendants' real fear was that such function combination endangered the price uniformity that they aimed to maintain."

sibilities of price variations to distributors or ultimate purchasers at any given time with the opportunity by underselling to disturb the price structure." The court added that the 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", and that this would tend also "to aid the individual refiners in maintaining a higher price level."

C. THE "DISCRIMINATIONS" SOUGHT TO BE ELIMINATED ARE NOT WITHIN SECTION 2 OF THE CLAYTON ACT

Although it would seem indisputable that the maintenance of uniformity of price structure was the necessary and proximate effect of their various activities, appellants nevertheless deny that this was their purpose. They pretend to have concerned themselves principally with the elimination of discriminations between customers. Insofar, however, as they regarded as discriminatory almost any variation in the net cost of sugar to customers, it is apparent that the difference between the maintenance of price uniformity and the prevention of "discriminations" is largely one of form of statement. This was illustrated in the discussion of the boycotting activities. (*Supra*, pp. 115–119.) While appellants regard the advantages accruing from the combination of functions as discriminatory, the discrimination involved is neither arbitrary nor unfair; the resulting difference in the net cost of sugar to persons benefiting therefrom is due to a difference of relative economic position, and may not be regarded as objectionable, unless it is desired to prevent any variation of cost as between customers.

Similarly, long term contracts, tolling arrangements and used bag allowances as well as each of the other practices outlawed by appellants in the name of abolishing discriminations, while they may produce a saving to persons desiring to employ them and in a position to do so, the resulting economic advantage is in no way unfair, or discriminatory in the true sense of that term. Differences in the economic situations of different buyers are inevitable in a free competitive system. *Cf. Fairmont Creamery Company* v. *Minnesota*, 274 U. S. 1.

Appellants have carried their anti-discrimination argument to an extreme. In justification for the concerted elimination of the price guarantee (not now presented for review), appellants urged in the court below that they were troubled by the fact that because the guarantee had been offered to customers in some localities and not in others, unfair *geographical* discrimination resulted. (Op., R. 201–202.)

In support of the prohibition contained in Code 3 (c) (likewise not now presented for review) against the absorption of freight costs by the quotation of differential rates on all-rail shipments or deliveries from consignment, it was urged that the absorption of freight costs in some areas is necessarily reflected in higher basis prices and in this way discriminates against customers in areas in which transportation is on a cost basis. (Op., R. 135.) The court pointed out, however, that appellants themselves, under their delivered price system, practiced more serious discrimination, to the extent that some customers were compelled to pay substantially in excess of actual transportation costs. As the court observed, the discrimination in this situation is much more real, since the extent to which the delivered price is higher than the actual cost of transportation definitely measures the discrimination, whereas the extent to which freight absorptions may be reflected in higher basis prices is largely speculative. (Op., R. 156.) The court was of the opinion that appellants were less concerned with abolishing discriminations than they were with preventing any breakdown of the freight structure. (Op., R. 135.)

It will be recalled that the elimination of discriminations between customers purports to be the basic principle of the Code. The basic method which the Code purports to adopt is through the sale of sugar "only upon open prices and terms publicly annonnced." (*Supra,* p. 54.) It has been shown that the *secret* discriminations principally complained of could readily have been abolished by the mere publication of prices and terms in past transactions; that in any event appellants did not confine their activities to open announcement, but that they participated in numerous specific agreements and understandings with respect to terms and conditions of sale; and that far from limiting themselves to secret discriminations they concerned themselves with practices which involved no real discriminations at all, secret or otherwise. The inescapable inference is that appellants were not concerned mainly with abolishing discriminations.

Under the circumstances, it is unnecessary to enter into any discussion of the abstract question discussed at length by appellants (Br., pp. 262–276) as to whether they could lawfully combine together to eliminate discriminations which violated the letter or spirit of the Clayton Act, Section 2. They have failed to show that the discrimination with which they purported to concern themselves had any substantial relation to this section. As the court below stated (Op., R. 238):

> The important fact is that defendants were not primarily interested in conforming or having others conform either to the letter or to the spirit of Section 2 of the Clayton Act. Indeed, they have themselves created arbitrary "discrimination" as, e. g. in the case of delivered prices * * *. What interested defendants was the preservation of the price structure, the maintenance of relatively high prices and the elimination of burdensome competitive practices and of every possibility of a secret concession grant.

D. THE ILLEGALITY OF APPELLANTS' BOYCOTTING ACTIVITIES

Separate grounds exist upon which the activities of appellants with respect to brokers and warehousemen and others combining distributive functions are clearly unlawful, apart from the fact that they went far beyond what was reasonably necessary to accomplish any legitimate objective.

This Court has in the past consistently condemned the assumption by one group in an industry, acting in concert, of the authority to compel "third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes." *Loewe* v. *Lawlor,* 208 U. S. 274. See also: *Eastern States Retail Lumber Dealers Association* v. *United States,* 234 U. S. 600; *United States* v. *First National Pictures, Inc.,* 282 U. S. 44; *Paramount Famous Lasky Corporation* v. *United States,* 282 U. S. 30; *Binderup* v. *Pathe Exchange,* 263 U. S. 291; *Anderson* v. *Ship-Owners Association,* 272 U. S. 359. The dangers inherent in the exercise of such authority by a selfishly motivated group can be no better exemplified than by the facts in the instant case, disclosing the manner in which the Institute, acting on the recommendations of the Enforcement Committee (composed of high officials of the refiners) or of the Vice-Secretary, without notice to the warehouseman or broker concerned, and without any hearing, purported to find the existence of affiliation. On one occasion the Executive Secretary complained that the Institute's legal advisers "object to our being judge, jury, and executioner all at once." (Ex. 183, R. 1285.)

Once disqualified, a concern had no standing itself to apply for reinstatement, and even where an erroneous conclusion was reached the Enforcement Committee was not required to reconsider its finding before 90 days, in the absence of "new evidence." The decisions of the Institute were subject to no impartial review. The right of an injured warehouseman or broker to apply for relief to the courts was illusory. An individual concern, even if financially able to do so, is not likely to attack a powerful combination like the present one in the courts. Brokers and warehousemen with unquestionably meritorious cases sometimes threatened to proceed in the courts, but did not do so (*supra*, pp. 97, 101).

The rigid manner in which appellants applied the literal language of their Code Interpretations in instances, as the lower court said, where even the possibilities of the evils of which appellants complained "were so remote as to be practically non-existent" (Op., R. 120), also supports the Government's contention that the exercise by an interested private group of the broad authority asserted by the Institute over brokers and warehouses is fraught with danger to the freedom of individuals to engage in normal ways in lawful enterprise. Reference may also be repeated to the "ultimatum" method adopted to institute the policy against combination of functions, whereby brokers and warehousemen without prior notice were required to indicate *by wire* their election to continue to represent the refiners in a single capacity, under threat that no refiners would be permitted to continue to deal with them until they had satisfactorily made known their decision.

Appellants have pointed to no case in which the Court has approved concerted refusal to deal as a means of compelling the discontinuance in whole or in part of lawful businesses. In *United States* v. *American Livestock Company,* 279 U. S. 435, referred to by the lower court (Op., R. 245), the Court approved merely the right to refuse to deal with a concern in matters which were beyond its power under its charter and in which therefore it could not lawfully engage.[1]

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[1] The court below also referred (R. 245) to the decree set forth in the opinion in *Swift & Company* v. *United States*, 196 U. S. 375, 394, footnote (and which was sustained by this Court), which contained a provision that left the defendants free to adopt rules " for the giving of credit to dealers where such rules in good faith are calculated solely to protect the defendants against dishonest or irresponsible dealers." It is not clear whether this provision would authorize an agreement to refuse to deal with persons listed on credit blacklists. The provision was quoted in *Cement Manufacturers' Protective Association* v. *United States*, 268 U. S. 588, 604, where, in approving of the legality of the credit systems there involved, the Court seemed to place particular emphasis upon the freedom of the defendants to act upon the credit information collected by the Association, or not, as they chose (pp. 599–600). In any event, the Swift decree did not confer upon the defendants any authority to compel the curtailment by others engaged in the industry, of lawful business activities.

The cases of *Eastern States Retail Lumber Dealers Association* v. *United States, supra,* and *United States* v. *First National Pictures, Inc., supra,* most closely parallel the present case. In the former case, a list of wholesalers who dealt directly with consumers was circulated among the members of the Association composed of retailers. Names were placed on the list as a result of complaints by individual retailers that a wholesaler was selling to one of the retailers' customers. If the wholesaler gave satisfactory assurance that he was no longer selling in competition with retailers, his name would be removed from the list. The Court found that the circulation of the list was intended to have the effect of causing retailers not to trade with the concerns listed. In condemning the understanding not to deal with listed wholesalers as violative of the Sherman Act, the Court said (p. 613):

> The argument that the course pursued is necessary to the protection of the retail trade and promotive of the public welfare in providing retail facilities is answered by the fact that Congress, with the right to control the field of interstate commerce, has so legislated as to prevent resort to practices which unduly restrain competition or unduly obstruct the free flow of such commerce, and private choice of means must yield to the national authority thus exerted.

The *First National Pictures* case involved an agreement among distributors of motion pictures to require purchasers and lessees, as a condition of receiving films, to assume the outstanding exhibition contracts of the former owners or operators of their theatres. Any purchaser or lessee failing to assume such outstanding contracts could be required to deposit, on each new contract, security up to $1,000. This Court did not question the District Court's finding that the purpose of the agreement was to eliminate frauds perpetrated by the colorable transfers of title to theatres in order to evade contractual obligations, or its further finding that such contract repudiation caused the distributors very substantial losses. The District Court pointed out that the abuses sought to be eliminated were general and affected all distributors alike and that "the situation was one which could only be dealt with by joint action of the distributing group, in the protection of their interests as a group." (34 F. (2d) 815, 816.)

Thus the facts in the *First National* case were very much more favorable to the defendants than those here. The purpose of the agreement was to eliminate serious frauds and there was not, as here, evidence of a dominant collateral purpose. The persons affected by the agreement were not required to discontinue any part of their business, but were merely required either to take over the film contracts of their predecessors or to post a certain amount of security. Nevertheless, this Court held the restraint illegal upon the ground (p. 54) that "the obvious purpose of the arrangement" was "to restrict the liberty of" the film producers and to "secure their concerted action for the purpose of coercing certain purchasers of theaters by excluding them from the opportunity to deal in a free and untrammelled market." The arrangement condemned also had this in common with the present case, that the necessary effect of the agreement was to "hurt some of the innocent along with the guilty." (*Supra,* p. 87.)

E. APPALACHIAN COALS, STEEL, AND CHICAGO BOARD OF TRADE CASES

The only remaining authorities relied on by appellants which need be considered are the decisions in *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344; *United States* v. *United States Steel Corporation,* 251 U. S. 417; and *Chicago Board of Trade* v. *United States,* 246 U. S. 231.

The *Appalachian Coals* case came before this Court on a state of facts entirely different from that here presented. The defendants there, controlling a small part of the bituminous coal business, and lacking the power to control prices in any market, organized a common selling agency which had not yet commenced to function when the legality of its existence was presented for decision. The Court found nothing unlawful in the stated purposes of its organizers, but reserved jurisdiction to grant any appropriate relief, "if in actual operation [the selling agency plan] should prove to be an undue restraint upon interstate commerce" or "if it should appear that the plan is used to the impairment of fair competitive opportunities" (p. 378). In the present case the Court has the benefit of a voluminous record revealing the character of the activities of the Sugar Institute during a three-year period. The findings of the court below, which have been shown to be amply supported in the record, show conclusively that those activities were directed primarily at normal and fair competitive practices, and only incidentally at injurious or destructive practices, and resulted in the virtual elimination of price competition in the entire industry.

Nor does the judicial comment in the *Steel* case, *supra,* upon the price policies of the United States Steel Corporation (App. Br., pp. 249–251) have any pertinency here. It is one thing for the dominant competitor in an industry alone to announce its prices voluntarily, leaving its smaller competitors free to make such prices as they please. It is another thing for all competitors to agree not to depart from published prices. The open price practice of the Steel Corporation might well negative any purpose to stifle its competitors. Even if it anticipated that its competitors would follow its prices and terms (which would be to its distinct advantage), no restraint was thereby imposed. In the present case, however, the agreement among refiners to adhere to published prices, together with the numerous supplementary restraints practiced by them, have been shown to have the effect of restraining competition unduly by suppressing price competition and maintaining artifically high price levels and abnormal margins and profits.

In the *Chicago Board of Trade* case, *supra,* appellants pretend to find the first instance of approval by this Court of concerted maintenance of open prices. The Court there sustained the legality of an agreement preventing members of the Chicago Board of Trade from purchasing grain to arrive, after trading hours, at a price other than the closing bid made upon the Exchange. Clearly, there is little resemblance between appellants' open price system and the open price system which prevails in a commodity exchange where complete freedom of the individual to buy and sell prevails. Compulsory adherence to published prices, which constitutes appellants' basic agreement, is distinctly alien to the principles of an open exchange. (See *United States* v. *American Linseed Oil Co., supra,* at p. 390.) Furthermore, the many specific restraints imposed by appellants negative that they were interested in maintaining a free market.

Appellants were not so much concerned with the promotion of free competition as they were with the elimination of competition (called "individual bargaining") and the substitution for it of the system called "mass bargaining", under which all refiners and other sellers, closely organized and cooperating together, are grouped on one side and are supposedly offset by the countless disorganized buyers. Wholly unlike the competitive system, the "mass bargaining" system (App. Br., pp. 75-78) contemplates a uniform price announced by the sellers which is to be kept at a reasonable level, not through competition between individual sellers and buyers, but merely through the protests of buyers, and brokers ("agents" of the sellers), who are supposed to bring "constant pressure" to bear on the refiners for reduced prices and more favorable terms.

CONCLUSION

It is respectfully submitted that the decree of the District Court should be affirmed.

It is further submitted, for the reasons stated in the Government's memorandum in opposition to appellants' motion to be relieved of the obligation of printing exhibits, that the costs of such printing should be borne by appellants.

STANLEY REED,
Solicitor General.
ANGUS D. MACLEAN,
CHARLES H. WESTON,
WALTER L. RICE,
HAMMOND E. CHAFFETZ,
Special Assistants to the Attorney General.
GRANT W. KELLEHER,
Special Attorney.

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