Supreme Court of the United States

October Term, 1935

No. 268

THE SUGAR INSTITUTE, INC., THE AMERICAN SUGAR REFINING COMPANY, MARGARET A. JAMISON, ET AL.,

Appellants,

v.

THE UNITED STATES OF AMERICA,

Appellee.

Appeal from the District Court of the United States for the Southern District of New York.

REPLY BRIEF FOR APPELLANTS.

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CITATIONS

("A" before page number indicates Appendix)

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Order of Discussion

We will follow the order of discussion in the Government's brief except as hereinafter noted.

We will not attempt to follow the Government through its outline and general summary in the first 52 pages of its brief. Most of the arguments and assertions there are repeated and amplified in the later topical discussions and we will reply to them when we discuss the specific topics.

We will reply here only as to subject matter not later repeated by the Government.

RELATIONS WITH THE DEPARTMENT OF JUSTICE

(See App. Br. pp. 41-47; Govt. Br. pp. 17-23.)

Appellants' relations with the Department of Justice have not, as the Government charges (Br. p. 17) "been injected into the case to create a certain atmosphere of hostility to the Government", but have been cited solely for the purpose of refuting the Trial Court's finding of improper motives and bad faith in the very inception of the Institute (Finding 36, R. 273), and establishing the frank and open manner in which the Institute was formed and conducted as affirmative evidence of the good faith of Appellants.

The Government challenges (Br. p. 17) Appellants' use of the word "approved" in connection with the attitude of the Attorney General's office towards the Institute's Code of Ethics. We do not claim that the Attorney General had any legal authority to issue a formal "approval" of the Institute or its Code. In the limited and technical sense in which the Government construes the word "approved", the Attorney General obviously did not and could not "approve" the Code of Ethics. However, in view of the fact that every last provision of the Code was discussed in detail with the Attorney General's office, the fact that the Code was rewritten in the office of the Attorney General in accordance with the suggestions there made (R. 610-20) and thereafter submitted to the Attorney General's office in final form with a request for advice as to whether there was anything contained therein to which exception was taken (Ex. Y-2), and the fact that no criticism or suggestion was made with respect to a single provision thereof, we submit that the Institute's Code of Ethics may fairly and reasonably be said to have been "approved" by the Attorney General's office in every sense of the word other than the extremely technical sense used by the Government.

The Government attempts (Br. p. 22) to minimize the importance and the thoroughness of the Whitney investigation referred to on pages 44 and 45 of Appellants' brief. It implies that the investigation was brief and cursory by referring to the testimony of Taylor that Whitney was at the Institute offices for two or three days at the time of the first examination, and twice thereafter. The Government overlooks entirely the testimony of Cummings that, during the seven month period between the beginning and the end of the Whitney investigation, "He did not stay at the Institute all the time *but went out and interviewed the various refiners* * * *" (R. 613). The comprehensiveness of the investigation, consisting not merely of examination of the Institute's office files, available to him at all times, but also conferences and discussions with the individual refiners themselves, is clearly evidenced by his memorandum of December 1, 1928 (Ex. C-3).

On the question of the refiners' good faith, it is not the thoroughness of the Whitney investigation that is material. The undisputed facts are that the refiners took their plans at the very beginning to the Attorney General's office, accepted the advice and guidance of that office in framing every provision of their Code of Ethics, invited and urged the Attorney General to send his representatives to the meetings and offices of the Institute so as to observe its operations, opened the office and files of the Institute to the inspection of the Attorney General's agents and cooperated with them in providing all the information they sought (App. Br. pp. 42-46). The refiners could do no more to demonstrate their good faith.

THE DOCUMENTARY EVIDENCE

As stated on page 10 of its brief, the Government relies to a very considerable extent upon the great volume of correspondence which has been introduced into the record in this case as proof of the unlawful restraints with which Appellants have been charged. The letters were written by Institute officials, by members of the Institute, by salesmen, by brokers, by warehousemen, by buyers and by countless other parties. The Institute and the refiners turned over to the Government agents their entire correspondence files and a large corps of the agents spent months of time in examining these hundreds of thousands of documents, to cull out those which were finally introduced in evidence.

It has been utterly impossible for Appellants either in their main brief or in this short reply brief to attempt to discuss more than a small fraction of this volume of documents. Examination of the entire letter from which a single paragraph, sentence or phrase has been quoted, serves in some cases to disclose the extent to which the isolated quotation is misleading. In other cases the letter itself is either ambiguous or misleading because the balance of the correspondence of which it is an integral part does not appear or because the circumstances under which the letter was written do not appear.

For example, on pages 66 and 67 of its brief and again on page 218, the Government quotes at length from a letter of March 6, 1930 from Moog, of Godchaux, to Taylor, Vice-Secretary of the Institute (Ex. 394, R. 1597). These passages are quoted for the purpose of showing the adoption of a policy that announcements of drastic changes in selling terms should not be made until after discussion thereof at an Institute meeting by all interested refiners. *That no such policy was ever adopted* is perfectly clear from the testimony of Taylor with reference to this letter, to which testimony the Government avoids all reference. Taylor testified as follows (R. 1149):

> "I recall the discussion to which Moog refers in Exhibit 394 and the December 7 meeting at which the discussion took place. He said there appeared to be an increasing disposition on the part of refiners who suspected that some other refiner was engaged in an unethical practice, to employ some drastic, destructive, retaliatory action without letting the Institute function as it was supposed to function. He felt that the complaint should be brought to a formal meeting and discussed with other members. The idea met with little sympathy and Sprague of Savannah accused Moog of having recently violated the principle that he was now urgently advocating when he broke down the freight structure in certain southern points below any of the existing freight rates there because of his belief that Savannah was engaged in some unethical practice with respect to its warehousing operations.
>
> "Moog admitted he had gone off half-cocked in that situation, had made what he considered to be an unwarranted announcement and that after Savannah had called his bluff he had withdrawn it. He further stated that if we had had such an understanding as he was now proposing he would have been spared that embarrassment. However, it was merely a suggestion and nothing more was done about it.
>
> "At the meeting of March 13 Moog reiterated what he had said at the other meeting. The other members stated they did not propose to have their

> hands tied in waiting for either a regular or special directors' meeting. If they became convinced that some other member was indulging in some unethical practice or conduct they wanted to be in a position to meet it under open announcement in their own way without delay. The matter was dropped and no attempt was made to clear sentiment with respect to it."

When read in the light of this testimony, which the Government does not mention in its brief, it is clear that what Moog had *advocated* at the meeting referred to in his letter was the discussion at an Institute meeting of *any alleged or suspected unethical practices or violations of the Code before the institution of destructive retaliatory measures.* He was criticized for having failed in the past to practice what he preached and for having gone off "half-cocked" with a destructive and retaliatory rate announcement merely because he *suspected* Savannah had been guilty of unethical practices in connection with warehousing operations. While the policy advocated by Moog could have been justified on sound and reasonable grounds, it was not adopted at either the meeting referred to in his letter or *thereafter,* as Taylor's testimony makes clear. The other members refused to accept the suggestion and insisted upon retaining absolute freedom to take immediately any competitive action they might feel necessary in any situation.

Similarly, on page 134 of the Government's brief, it is stated that "In May 1928 the Institute wired Savannah that apprehension against future breaking down against freight applications might be allayed 'by suggesting that everybody guarantee against change in freight application' (Ex. 457-K, R. 2149)." The Government clearly implies that the *refiners* were apprehensive of a breakdown of freight applications, apparently assuming that the clause quoted from the Exhibit cited was a suggestion that the refiners guarantee *each other* that freight applications would not be reduced. Reference to the Exhibit itself shows how completely it has been misconstrued by the Government.

Examination of the entire Exhibit discloses the fact that *brokers* were apprehensive that there would be difficulty in obtaining new business because of the possibility of a breakdown in freight applications. In other words, brokers feared that *buyers* would hold off placing contracts in order to obtain the benefit of any lower freight applications that refiners might offer at some later date. The Institute suggested that the holding off by the buyers which the brokers apprehended might be avoided if the refiners would "guarantee against change in freight application". A "guarantee against change in freight application" is a *guarantee to the buyer* that if the refiner's announced freight application is reduced after a contract has been entered, the buyer will receive the benefit of the new and lower application announced. A "guarantee against change in freight application" thus has exactly the same meaning as a "guarantee against price decline", a substantially identical trade expression which the Government itself uses on page 221 of its brief.

Again, there are many letters written by the refiners' sales agents, brokers or sub-brokers where a particular demand by a customer is refused with a statement to the effect that "this is against the Code" or "that is prohibited by the Institute". What is actually meant, although frequently not stated clearly or at all, is that the particular concession, term or condition demanded by the customer is one which the refiner has not openly offered and that to grant it to the particular customer would constitute a discriminatory concession and a violation of the Code.

In numerous other instances the Institute is used merely as an "alibi" or excuse for a refiner's refusal to meet with particular demands or to engage in practices which were against the refiner's own policy. For example, on page 86 of its brief, the Government quotes from a Henderson letter to one of its brokers regretting the necessity of "strict adherence to the Institute rules". Referring to this letter Many of Henderson testified (R. 995):

> "* * * I remember unhappily my letter to L. C. Watkins, our broker in Columbus, Georgia (Exhibit 391-Q-Q-Q-Q). * * * The truth is, although I knew perfectly well what the rules of the Institute were and believed in them thoroughly, it was just the weakness of human nature to use the Institute as a sort of buffer to excuse some of our actions that a letter of that sort was written. I am sorry to say that I was blaming the Institute for a policy which I thoroughly believed then as I do now. I used it as a sort of goat. That was not an Institute policy about warehousing. It was our policy."

Referring to similar letters, including Exhibit 400-V (cited on p. 87 of the Government's brief) wherein it was stated that "we simply have to swallow the bitter with the sweet and yield to the rules of the Sugar Institute in that matter", Many testified (R. 996):

> "We blamed the Institute in our letter because naturally in the sales department you want to keep your brokers in a good frame of mind. If you tell them dogmatically that you want this, that or the other thing done, even if you are perfectly right, they sometimes get sore, whereas, if you keep them in a

> good frame of mind—well, this was just a lazy man's way of letting another person be the goat for something that they are not really responsible for."

To a very considerable extent the Government's case has been built upon documents of the type above referred to, which, we believe, fall far short of sustaining the heavy burden which has been placed upon them. A similar attempt to overwhelm the Court with letters of this character was made by the Government in the *Cement* case. The record in that case contains a large number of such letters and the Government's briefs in the lower Court and in this Court leaned heavily on the prejudicial statements culled from them. That line of evidence and argument impressed the trial Court, as was reflected in its opinion, but this Court disregarded it without comment in the opinion, and we submit that the similiar effort of the Government should be disregarded here. Business men and their employees are not familiar with the subtleties of anti-trust law, and it is inevitable that their letters will contain many terms inexactly used, which can be construed prejudicially. It is also inevitable that their brokers and salesmen, not knowing the precise nature of the trade association's operations, will use the association and its "regulations" as a convenient excuse for not granting many favors and special terms sought by customers, even when the real and only reason is the unwillingness of the individual member to grant the request.

In order to sustain its burden of proof in this case the Government must show agreements or concerts which went into actual operation and which unduly restrained competition. The tentative proposals, ambiguous statements and alibi excuses to be found in the correspondence of the refiners and their employees provide no material support for the Government's case.

I.

COMPARATIVE PRICES, MARGINS AND PROFITS IN THE PERIODS BEFORE AND DURING THE INSTITUTE

(See App. Br. pp. 89-104; Govt. Br. pp. 241-63.)

This subject of comparative margins and profits in the pre-Institute and Institute periods is discussed last among the factual topics in the Government's brief. We will discuss it first, because we regard it as the decisive underlying issue in the case.

In discussing this subject, the Government's brief ignores the fact pointed out in Appellants' brief that the prices received for sugar by the refiners in the Institute years ('28 to '31) were much lower than in the pre-Institute years (App. Br. p. 89), and also the fact that the price of refined sugar declined more rapidly every year during the Institute period than the price of raw sugar, thus producing a reduction in the refiners' gross margin each year during the Institute period, from a high of 1.119 in '28, to 1.014 in '29, to 1.012 in '30 and to .936 in '31 (App. Br. pp. 96-97). *This constant and great decrease in the margin, year by year, as the open competition of the Institute began to show its full effect, bringing the margin down to the same level in the three Institute years of 1929 to '31 as in the three years before the Institute, completely negatives the Government's basic claim that the Institute, wielding the power of a monopoly, year by year extended its control over prices and terms until effective competition was practically destroyed.*

Even if it be assumed (contrary to the facts summarized below, pp. 17-25) that the high margin of 1928, as compared with the low margin of 1927, was due to the change from the old competition of secret and discriminatory concessions to the new competition of open prices and terms, without discriminations between customers, the great decrease in margins *to the pre-Institute level* in 1929 and 1930, followed by a further large decrease in 1931, shows conclusively that any tendency toward a higher margin was only temporary and was confined to the single year of readjustment, 1928, and that the new competition, when it settled into its stride, was as effective as the old in holding down the refiners' prices and margins.

That is the fundamental fact in this case, and it cannot be overcome by speculations concerning the probable and imagined effects of the new open competition fostered by the Institute. Speculative arguments of that type, unsupported by any facts, furnish the sole foundation for the Trial Court's decision that the effect of the Institute's operations was to restrain competition and raise prices.

A. The Alleged Lack of Sensitivity in Refined Prices During the Institute Period (Govt. Br. pp. 241-45).

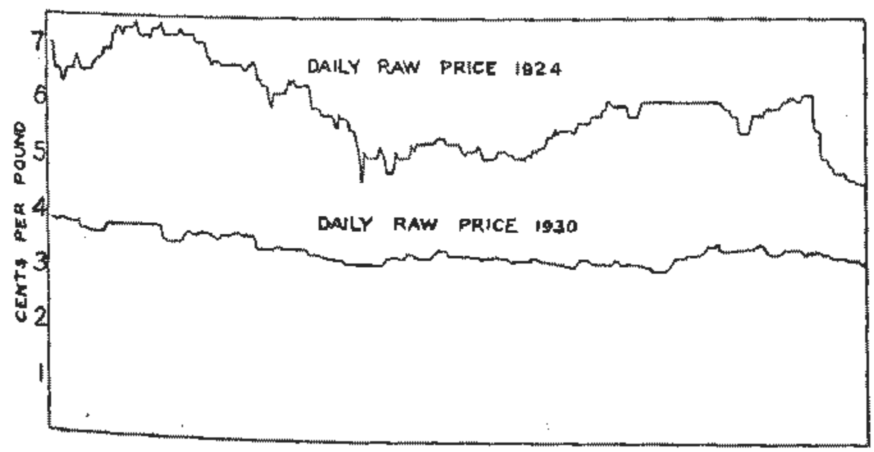
The question of the relative frequency of changes in the price of refined sugar to changes in the price of raw before and during the Institute period has no importance in itself. The really material question is the relative size of the refiners' margins before and during the Institute period. If, during fairly comparable periods before and during the Institute, the margins were the same (as was demonstrated in our main brief, pp. 89-100), the relative *frequency* of refined price changes is immaterial. Rapid fluctuation and instability of prices is not a virtue in itself. Quite the contrary.

In our opening brief, we discussed this question of the relative frequency of price changes before and during the Institute period only because it was the nearest approach to a definite argument or asserted fact advanced by the Trial Court to support the finding that prices and margins were relatively higher during the Institute period than before. Since the margins were the same in the fairly comparable periods before and during the Institute, we pointed out (App. Br. pp. 103a-104) that the open competition fostered by the Institute was as effective as the secret concession competition before the Institute in holding down refiners' margins, and that the relatively fewer price changes during the Institute period obviously resulted from the fact that the "pulling power" of raw price fluctuations had declined, because the average prices of raw were lower and the annual swings or ranges of raw prices were smaller during the Institute period than before.

The Government does not dispute either of these latter facts, because they stand out plainly on the Government's own figures (Govt. Br. pp. 243-44). Nor is there any claim that the refiners were in any way responsible for this settling down of raw prices after 1927 to a lower and more nearly horizontal level. The refiners buy their raw sugar on a world market price over which they have no control. But counsel attempt to minimize the obvious effect of this lower and more nearly horizontal raw price level by pointing out that, within each of the periods, considered by itself, or as between some of the years before and during the Institute, the ratio of refined to raw price changes did not vary in direct proportion either to the lower price of raw or the lesser annual ranges in the price of raw. We made no claim that it did. We merely pointed out the inevitable fact that as the price of raw reached a generally lower level, so that it constituted a smaller part of the total price of refined, and as the annual range of raw price changes became smaller and the raw price level more nearly approached the horizontal, small changes above and below that level would tend to cancel each other and to have less and less effect on the price of refined.

It is not the *number* of raw price changes that is important. It is their combined *size* and *sequence in direction* that determines their effect on refined prices. Ten raw price changes of a fifth of a cent each in the course of a year, *all in the same direction,* would produce ten refined price changes, whereas a hundred alternate fluctuations of one-twentieth of a cent in the course of a year would cancel each other and have no effect at all on the price of refined. The error of the Government and the lower Court on this point lies in their having made their comparison entirely on the basis of the relative *number* of raw and refined price changes, instead of on the basis of the ratio between refined price changes and the size and range of raw price changes.

The point is well illustrated by the accompanying diagram of the daily raw price changes in 1924 and 1930.



(The daily raw prices for the diagram are taken from Ex. 14, p. 11 and Ex. 19, p. 25.)

With a range from high to low of 2.8 cents per pound in 1924, and an average price of 5.964 cents per pound, it is obvious that the 115 changes in the price of raw which took place in that year (Govt. Br. p. 242) would produce many more changes in the price of refined, than the 110 changes in the price of raw (Govt. Br. p. 242) which took place in 1930, with a total range of only .79 of one cent per pound, and an average price of only 3.387 cents per pound. Furthermore, the wide reversal in trend during 1924, from a high of 7.41 cents in February to a low of 4.77 cents in June and back to 6.03 cents in September, a total swing of 3.9 cents in this mid-year reversal alone, represents a swing of price changes greater than the *total* of those for 1930, including hoth the total annual range and the mid-year reversals in that year. And when there is added to the mid-year swing in 1924, the total swings before and after the mid-year reversal, we have total price swings or ranges of 5.43 in that year as compared with total swings or ranges of 1.78 in 1930. Considering the much higher average raw price in 1924, it is therefore clear why the 115 raw price changes in that year produced 48 changes in refined prices, while the 110 raw price changes in 1930 produced only 22 changes in refined prices. Dividing the total swings or ranges in 1924 and 1930 by the number of price changes in the respective years, in order to eliminate the effect of successive fluctuations which merely tended to cancel each other, we find that the average effective price change of raw in 1924 is shown to be .0472 and in 1930 .0162. The average effective price change of raw in 1924 was therefore approximately 3 times as large as in 1930, with 3 times the "pulling power", and yet the number of price changes in refined in 1924 was only 2.2 times as many as in 1930, showing that refined prices in 1930 were relatively *more* sensitive to raw price changes than in 1924.

Graphic illustrations of this tendency of the small fluctuations in the raw price to cancel each other as the wider pre-Institute swings subsided and the raw price level straightened out to more nearly horizontal during the Institute period will be seen on the four charts of the raw and refined price changes in Exhibit O-3 in the Appendix to our main brief. For example, there were 40 raw price changes between September 10 and December 27, 1928, and during that entire period of three and one-half months the price never varied more than 12/100 of a cent above or below the median level line. During that same period the price of refined swung through a much wider range, declining 25/100 of a cent, again declining 20/100, rising 5/100, declining 15/100, rising 10/100, declining 5/100, and rising 10/100. Other similar long periods of comparatively level raw prices, with only small fluctuations above and below the level will be seen on the charts for 1929 to 1931.

Another error of the Government and the lower Court in this connection arises from their failure to take account of the fact that the number of raw price changes from year to year is much more constant than the average size of the price changes. As shown by the Government's own table on page 242 of the brief, they averaged almost the same in number before and during the Institute, being 102 per year in the period from 1924 to 1927, and 100 per year in 1928 to 1930. With the number of raw price changes remaining about the same per annum during the Institute period as before, and with the raw price level lower and the annual swings smaller during the Institute period, it is obvious that the raw price changes during the Institute period would average smaller in size, would have a greater tendency merely to cancel each other, and would thus naturally produce fewer refined price changes in relation to the number of raw price changes. In order that the Court may see the actual way these tendencies worked out in typical years, we present a table on page B of the Appendix hereto showing the actual raw price changes in the pre-Institute and Institute years, classified as to size. (The figures are taken from the Willett & Gray raw price tables in Exs. 14 to 19 and Ex. 8.)

It will be seen from that table that there were many more *small* raw price changes in the Institute years than before. In only one of the pre-Institute years were there any changes of less than 3/100 of a cent per pound, and that was 1925, when there were three such changes. But in each of the Institute years there were many such changes; in 1928 there were 11, in 1929 there were 10, in 1930 there were 35, and in 1931 there were 53. If we include all changes of less than 6/100 of a cent, we find they averaged 37 per annum in the four years before the Institute, and 75 per annum in the four Institute years.

When, in addition to the fact that there was a much larger number of small raw price changes during the Institute period than before, we also take into account the factor previously pointed out—that more of the raw price changes during the Institute tended to cancel each other by reason of the fact that they were mere alternate fluctuations above and below a more nearly horizontal price level, with a much smaller annual range of prices, as shown in the table on page 244 of the Government's brief, and copied in our footnote below,*—it will be seen that there is no foundation at all for the inference of the Trial Court and counsel for the Government that refined prices during the Institute were less "sensitive" to raw price changes than before merely because the relative *number* of refined to raw price changes was smaller.

The ultimate test, of course, of the sensitivity of refined to raw prices is the size of the refiners' margin, and that grew progressively smaller during the Institute period, averaging exactly the same for '29 and '30 as for '25 and '26, being smaller in 1931 than for the average of the three years before the Institute (.936 for '31 as against an average of .977 for '25 to '27), and averaging almost exactly the same for '29 to '31 (.987), as for '25 to '27 (.977) (App. Br. p. 96).

B. Are 1927 and 1928 Fairly Representative Years for Comparison of Margins and Profits in the Periods Before and During the Institute?

In our opening brief we set forth facts and reasons showing that 1927 and 1928 were not fairly representative years in the sugar business and should therefore be excluded in comparing margins and profits before and dur-

*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.

ing the Institute. We will discuss briefly the Government's attack on that showing.

1. *The Economists' "Lag" Principle.* We pointed out that 1927 and 1928 were each years in which the average price of raw sugar was at a level which represented a reversal in the previous trend. The average in 1927 was much *higher* than in 1925 and 1926, reversing the downward trend in average annual raw prices which had started in 1924 and continued through 1926. And the average in 1928 was much *lower* than in 1927, thus again reversing the trend as between 1926 and 1927 (p. 1, Appendix to App. Main Br.). Under the recognized economic principle of relative price inertias, refiners' margins would therefore inevitably be reduced in 1927 and increased in 1928.

Raw material prices are always more volatile than other prices, and with each step away from raw materials in the manufacturing and distributing process, the prices become more stable, ultimate consumers' prices being the last to respond and the most resistant to change. These are facts which are known to all of us from everyday experience. When a retail purchaser has become accustomed to paying a given price for an article, he strongly resists paying a higher price. But he will generally continue to pay an accustomed price without any active effort to force a lower one.

The inevitable effects of this simple and well known fact fully account for the low refiners' margin in 1927 and the higher margin in 1928. Retail purchasers and manufacturing consumers of sugar had become accustomed, year by year since 1923, to substantial annual reductions in the price they paid for sugar (p. A, Appendix hereto). When retail prices were raised in 1927, as the result of the great upthrust in the average price of raw sugar in that year (p. 1, Appendix to App. Main Br.), retail purchasers and manufacturing consumers resisted that increase very energetically. Conclusive evidence of the strength of that resistance is found in the table printed below, which we copy from page 248 of the Government's brief, showing the annual increase or decrease in total sugar consumption in the United States from 1922 to 1931.

Year	Increase or decrease Percent	Year	Increase or decrease 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............	+ 2.9	1931............	—2.2

It will be seen from the foregoing table that the consumption of sugar in the United States decreased 6.6 per cent. in 1927, *the first year after 1923 to show a decrease in consumption.* The decrease for 1927 was larger than for any other year of decrease shown in the Government's table, and was in fact the greatest annual decrease ever known in the sugar business. It is important to note also that the year 1923, which the table shows to have had the next largest drop in annual consumption, was, like 1927, a year of reversal in the general raw price trend, showing a large *upthrust in the average annual price,* as compared with 1922 and 1924. (See p. A, Appendix hereto.) Furthermore, these same two years, 1923 and 1927, are the only years in the entire ten years included in the Government's table *when the refined sugar industry as a whole suffered a net loss on its operations.*

This fatal coincidence between years of upthrust in the average price of raws, and of great reduction in consumption of sugar, and of great losses to the refiners, is obviously not merely accidental. In any year when the raw price level is markedly higher than the year before, so that the refiners must greatly increase their general price to the distributors and the distributors must therefore greatly increase their prices to the consumers, the increase is bound to be resisted by the consumers, and that resistance takes the form of a decrease in consumption, just as it did in 1923 and 1927. And that decreased consumption is inevitably reflected in decreased refiners' margins.

As we pointed out in our opening brief, the sugar distributing trade always operates on a minimum margin, little if any above cost (App. Br. p. 67), so that the effects of reduced consumption, reflecting the sales resistance of the ultimate consumer to increased prices, cannot be compensated, to any considerable extent, by reductions in the distributors' margins. The major shock of a great reduction in annual consumption is therefore passed directly to the refiners, and must be borne by them in reduced margins, the inevitable result of an attempt by them to sell an accustomed volume of production in a market which will not absorb that volume at an increased price fully reflecting a large increase in the price of raws. The refiners are thus caught between the upthrust piston of raw prices and the piston head of consumer resistance, and their ordinary annual profit margin is reduced to a loss, as in 1923 and 1927.

When, in the year succeeding such an upward thrust, raw prices *decline,* consumers' prices remain relatively more stable, the pressure upon the refiners' margin is relieved, and a profitable year results, as in 1928.

Counsel for the Government do not attempt any direct attack on this economic principle of relative price inertias. The principle is too well established and generally known for such an attack to succeed. Their argumentative device is constructed as follows: (a) It ignores the basic factor in the principle of price inertias or lags—the relative inflexibility of cousumers' prices; (b) it misstates the principle by describing it as merely a day-to-day or short-term tendency of processors' price changes to lag behind raw price changes. There is such a tendency, of course, but it is a minor factor in determining processors' margins and profits, and it is not the price inertia to which economists refer in discussing this general principle.

It was the major, long-term inertia, reflected in average annual prices and operating through consumer resistance to advances in accustomed prices and through the consumers' lack of initiative in pressing for reductions in accustomed prices, to which we referred in our discussion of price lags in our opening brief.

On page 247 of their brief, counsel for the Government have constructed a chart which makes the rise above the prior average level appear to have commenced earlier than it actually did commence. They argue from this chart that the lag principle cannot be an important factor in determining refiners' margins and profits, because (a) since the raw price rise commenced early in the latter half of 1926, the day-to-day lag between raw and refined prices would have reduced refiners' margins during the latter part of 1926, making it a poor year; and (b) that since there was some decline in the price of raw between January and December of 1927, the refiners should have profited from the day-to-day lag between refined and raw prices, and 1927 should therefore have been a more profitable year than 1926. If the day-to-day or short-term lag to which counsel refer were an important factor in determining refiners' profits, there would be some substance in their argument. But when the real facts of the situation are understood, it will be clear just how and why 1927 was a disastrous year for the refiners because of the operation of the price inertia principle, which makes all years of sudden upthrust in the average price level of raws bad years.

We present on page C of the Appendix hereto a chart of the day-to-day movements in the price of raw sugar in 1926. The weighted average raw price paid by the refiners in that year was 4.263. It will be seen that the first rise above the year's average annual level of raw prices began on September 7th.

As the chart shows, on September 4th (the nearest date to September 7th for which figures are available) the refiners had 15,934,016 bags of raw and refined sugar in stock. Their stocks of raw and refined on hand on December 31st were 7,453,761 bags. Thus, in addition to selling their purchases of raws in the interim, they liquidated in that period 8,480,255 bags of their accumulated stocks of September 4th, and on their purchases of that stock at the lower prices prevailing before September 7th they realized a large profit by reason of the subsequent rise in raws. Since 72.5% of their sales for the year had taken place before September 20th and they had had a very profitable year up to then, and since the rise in raws above the average affected only 27.5% of the year's sales and they reaped a large inventory profit on 33.8% of those sales out of previously accumulated stocks, the year as a *whole* was very profitable. The sharp rise in raws came too late in the year to materially affect the year's sales or total consumption of sugar. Consumption of sugar in the United States in 1926 was the largest for any year up to then and larger than for any subsequent year except 1929 (Ex. 8, p. 19); and production and deliveries of refined sugar in 1926 were at the peak for the entire period (Govt. Br. p. 249). Refiners do not carry large stocks, and they cannot protect themselves in that way, as many other industries can, against a sharp and *prolonged* rise in their raw material prices, but their inventory profit in the first two or three months of a rise and the cushion afforded during that period by a liquidation of distributors' stocks and a contraction of distributors' margins, gives them protection for a limited time, and so the raw price rise in the Fall of 1926 came too late to overcome the year's favorable total of increased sugar sales and consumption and increased refiners' profits.

But 1927 presented a very different picture. The weighted average raw price paid by the refiners in that year was 4.778, represented by the straight horizontal line on the chart on page 247 of the Government's brief. That was an advance of slightly more than half a cent per pound over the weighted average price they had paid in 1926. That is a great price advance in the sugar business, where very minute fractions of a cent per pound mean the difference between a profit and a loss. In order to maintain in 1927 the margin and profit they had made in 1926, the sugar manufacturers of the United States would bave had to sell as large a volume of sugar as in 1926 at an average price more than half a cent a pound higher, to compensate for the increased average price of raws. *That increase of half a cent a pound, on the 1926 volume (10,950,408,000 pounds), would have amounted to an increase of more* *than $54,000,000 on the total sugar sales in the United States.* Consumer resistance against that increase prevented the refiners from getting either the sales volume or the margin of 1926, and as a result *sugar consumption in 1927 decreased 6.6 per cent., the greatest annual decrease ever recorded, either before or since, the margin was the smallest ever realized in any year for which there are available figures, and the year was so disastrous that the sugar refining industry as a whole lost money.**

For these reasons the margin and financial results in 1927 are not fairly representative of pre-Institute conditions and competition, and do not provide a proper basis of comparison with the margin and financial results during the Institute. The unprecedented drop in national sugar consumption was the obvious underlying cause of the great losses suffered by the industry in that year, and the year should therefore be excluded in calculating the normal margins and profits under pre-Institute conditions.

1928 Should Also Be Excluded.

The reasons for excluding 1928 from the Institute period in arriving at a fair basis of comparison are equally

*There were undoubtedly other factors which helped to accentuate the disastrous results of the drop in consumption in 1927. The record shows that the practice of giving secret and discriminatory concessions was becoming so generally known and was so widely resented that many wholesale and retail distributors were actively discouraging the sale of sugar (R. 597, 817-8, 1004, 1009). And since the refiners had no statistical service in 1927 to keep them informed of the general condition of the industry and especially of the retarded sales and the resulting excessive accumulation of raw and refined stocks, they ignorantly built up a great excess of stocks in the middle of 1927, and in the face of a sharp decrease in consumption and demand they had to dump those stocks at ruinous prices in the latter part of the year (R. 592).

apparent. It was the year of reaction from the great upthrust of the raw price level in 1927, the drop in 1928 being equal to the rise in 1927 (p. 1, Appendix to App. Main Br.). Consumer pressure on the price level was thus immediately relieved, and under the principle of comparative price inertias greater than normal margin and profits were to be expected. After the refiners' losses in 1927 competitive pressure was naturally slower in driving down the price level. It would have been so under any system of competition. And, as we have pointed out before, if the change from the old system of competition by secret concessions and discriminations, to the new system of open competition, contributed to the increase in margin and profits in 1928, the first year of the change, it was a purely temporary tendency, and it disappeared in 1929 and 1930, when the pressure of the new type of competition drove the margin down to the same level as in 1925 and 1926, and profits to substantially the same level (App. Br. pp. 96, 100).

We therefore submit that the fair and proper comparison of margins and profits under the pre-Institnte and Institute conditions is the comparison made in our opening brief, eliminating the exceptional and unrepresentative years 1927 and 1928, and taking 1925 and 1926 to show pre-Institute results, and 1929 and 1930 to show Institute results. Each of those periods had the same downward trend in raw prices, they were periods of substantially equal prosperity in the food processing industry (App. Br. pp. 95-6), and by 1929 and 1930 the new open competition of the Institute had settled into its stride after the period of change in 1928.

C. The Government's use of the Willett & Gray margins in attempting to show higher margins during the Institute.

We are surprised to find that counsel for the Government attempt to use, and to justify their use of the so-called Willett & Gray margin figures in support of their claim that refiners' margins were higher during the Institute period than before (Govt. Br. pp. 250-53). The Willett & Gray margin figures were so completely discredited during the trial that the Trial Court does not anywhere refer to or rely upon them in his Opinion or Findings.

We summarize below the evidence in the record showing the artificial and misleading character of these Willett & Gray "margin" figures:

1. The Willett & Gray Journal which publishes the figures also publishes each year a warning that its "margin" figures are artificial, that they do not purport to be the actual margin of the refiners, that the actual margin of the refiners is much less than the Willett & Gray margin figures, and explaining why. We print in the footnote* the warn-

*"According to price averages based on our daily quotations, the difference or margin between the prices of raw sugar and the prices of refined sugars during 1928 was 1.311 cents per pound. However, it would hardly be fair to say that refiners have been able to obtain in their actual operations a margin of this size. This is due to the fact that they must anticipate raw supplies some time in advance of market changes in refined sugar. Further, refined sugar is not sold in heavy volume except on a relatively small number of days during the year on which there is an important change in price. So that the daily average of raw and refined sugar, which is not weighted, does not represent the actual average price paid by refiners for raw sugars during the year or the actual average price received by them for refined sugar sold during the year. Our information is that the actual margin of the refiners must be materially below the daily average margin shown above."

ing as it was published in the issue of the Willett & Gray Journal of January 10, 1929. It is substantially the same in each annual issue which carries the "margin" figures.

2. Government witness Gardiner, the publisher of the Willett & Gray Journal, described this so-called Willett & Gray "margin" in his testimony as follows:

> "We introduced in our publication a new calculation *which we did not say was refiners' margin.* We always called it Willett & Gray's margin or Willett & Gray's difference between raw and refined sugar. We never claimed it to be anything else and we have frequently commented on it (R. 365). * * * There is a small difference between raw and refined sugar and, as such, it is an interesting piece of statistical information (R. 365). * * * We publish each year the Willett & Gray average margin for that year. We call it the average difference between granulated and centrifugal. *In the calculation of this annual average difference we give the same effect to the price on a day when no sales take place, as on a day when 95% of the sales for that given month are made*" (R. 369).
>
> "It has never been the claim of Willett & Gray nor my claim that the so-called Willett & Gray figures represent either the actual profits or gross margin of the refiners *or any approximation to that profit or gross margin.*
>
> *"The principal reason our margin figures do not represent approximation even of the gross margin or any measure of the net margin is because our figures are not weighted as to the volume of sales of the refiners on the various days represented in our margins nor as to the volume of purchases of raws"* (R. 365-66).

3. The major reason why the Willett & Gray "margin" figure is completely artificial and distorted and why it is always much larger than the refiners' actual margin, will be immediately apparent from an examination of Exhibit O-3, printed in the Appendix to our opening brief. The solid black columns at the bottom of each chart represent the amount of sugar sold eacb day in the year. The sales on the comparatively few move days each year always constitute the great bulk of the yearly sales. They appear on the chart to be spread over several days at each move, but that merely represents the days on which the orders are actually received by the refiners from their brokers or customers, and the sales are always at the price of the day of the move and on orders received by the refiners or their brokers on that day. The move price is, of course, always the lowest price for the period commencing with the day of the move and extending for a considerable time thereafter, because the move is always brought abont by offering sugar at the current price or a lower price on the day of the move, with an announced bigher price immediately following.

In spite of the fact that the great bulk of the sugar is sold on the comparatively few move days, at the low bargain price of that day, the Willett & Gray margin figure for each year is constructed by giving to the price of each of the other days of the year, when little or no sugar is sold and when the nominal price is higher, the same weight as though it were a move day. Thus, in constructing the Willett & Gray margin for the year, the higher price of the more than 300 days when little or no sugar is sold is given more than 30 times the weight of the lower prices on the few days on which the bulk of the sugar is sold, and the Willett & Gray margin is thus certain to be much higher than the actual margin.

How this works out in actual figures may be seen by examining the moves of March 6, May 10 and June 25, 1929, with the intervening prices and sales, as shown on the second chart in Exhibit O-3, Appendix to our opening brief. We present below a tabulation of those daily sales and margins, with the average margin calculated by the Willett & Gray method and by a proper method of weighting.

WILLETT & GRAY DAILY MARGIN AND THE NUMBER OF BAGS OF SUGAR SOLD AT EACH MARGIN

MARCH 27 TO JUNE 26, 1929

SALES ON "MOVE" DAYS

Margin	No. of Days of Margin	Sales in 100-lb. bag equivalents
.915	1	16,220,794
1.105	1	17,294,532
1.173	1	8,267,461

SALES BETWEEN MOVES

Margin		
1.062	5	70,956
1.092	18	659,871
1.132	6	760,701
1.162	12	822,781
1.173	3	48,446
1.174	2	54,905
1.192	5	177,451
1.222	4	515,387
1.233	2	80,855
1.290	4	269,442
1.300	1	10,661
1.320	10	25,661
1.350	5	25,898
1.410	8	81,699
1.444	2	7,966

Average Margin by Willett & Gray Method	Average Margin using Willett & Gray daily margin and weighting it by the amount of sugar sold each day
1.207	1.054

It will be seen that the Willett & Gray method exaggerates the actual margin by 15 cents per hundred pounds in the period set out in the above table.

Willett & Gray used this same erroneous and misleading method as to raw prices in constructing their margin figures, each day's *raw* price during the year being given the same weight, in spite of the fact that the refiners' raw purchases are always heavier in some seasons than in others, and are concentrated on the days when cargoes and contracts are offered.

The resulting "margin" figure is thus so artificial and misleading that it has never been of any practical value to the sugar trade, and no reason appears in the record why the Willett & Gray Journal should publish it at all, even as an "interesting piece of statistical information", which is all the editor claims it to be (R. 365).

Counsel for the Government could not have given much consideration to the effect of the erroneous methods underlying the Willett & Gray margin figures, or they would not have made the statement that the inaccuracy in the figures, which they admitted, was "purely fortuitous and not of a kind to cause a trend in any one direction, and would almost certainly be largely if not entirely cancelled out when the margins for three or four years are averaged" (Govt. Br. p. 251). As we have shown above, and as the Journal and its editor admitted, the error in the method was such that it *always* produced a margin figure which was much *higher* than the actual margin realized by the refiners, because it gave much more weight to the high prices between moves, at which little sugar was sold and which are always higher than the move prices, than it gave to the move prices, at which the bulk of the sugar was sold. Contrary to the

Government's statement, it was the kind of error which *did* produce a "trend"—it always operated to exaggerate the margin and there were no counterbalancing errors, operating "fortuitously" or otherwise, to cancel the exaggeration.

Furthermore, the error in the method did not have the same effect in the pre-Institute and the Institute periods. While it always operated to exaggerate the margins, it exaggerated them much more during the Institute period than before. The reasons for this can be readily demonstrated.

The average number of moves each year was only half as large in the Institute period as in the pre-Institute period. Moves always take place when an advance is announced and the number of advances during the periods in question are shown in the accompanying table (Data from Ex. 8, p. 25; Ex. 17, p. 27):

Year	No. of Advances (Moves)	Year	No. of Advances (Moves)
1924	20	1928	11
1925	16	1929	10
1926	26	1930	10
1927	17	1931	7
Average	19.7	Average	9.5

It is obvious that as the number of days on which moves take place in any year decreases two things must follow, if the Willett & Gray method of working out an average yearly margin is used:

(a) The number of days on which little sugar is sold is increased, and the exaggeration of the margin thus becomes greater; and

(b) With nearly the same amount of sugar sold each year, a larger amount of sugar is sold on each move, as the number of moves decreases. With a larger amount sold on each move, and with a smaller number of moves, the discrepancy between the daily amounts of sales on moves and between moves is increased, and the exaggeration of the margin is necessarily greater.

Furthermore, the abolition of secret concessions and discriminatory deals resulted in a larger percentage of the total year's sales being made on the moves during the Institute than before the Institute. For these and other reasons related to the course of the price of raws during the Institute period, under the Willett & Gray method of calculating an artificial margin figure, the exaggeration of the margin during the Institute period was much greater than before.

In view of the distorted and misleading character of the Willett & Gray margin figures, and of the fact that they were so characterized by their compiler, a Government witness at the trial, and were not referred to or relied upon by the Trial Court, we think Government counsel cannot seriously expect to succeed in their attempt to have them relied upon in this Court.

The Actual Margin Figures of the Defendants. As a part of the presentation to the Trial Court of all of the cost and profit and accounting figures of all of the defendant companies, there was presented complete and detailed figures of the actual cost to each of the companies of all the raw sugar it bought and melted in each year from 1925 to 1931 and the amount it received for all the sugar it sold in each year.

The Government had full opportunity to check these figures before they were presented, and witnesses for each of the companies who had compiled the figures were ready to testify as to the accuracy of the figures and to support their testimony by the records, under cross-examination. Apparently being satisfied with the accuracy of the figures, the Government waived its opportunity of cross-examination and the figures were admitted into evidence by stipulation (R. 1111-14).

Counsel for the Government now say concerning these figures 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" (Govt. Br. p. 251). Since counsel were sufficiently satisfied with the accuracy of these figures at the trial to waive their opportunity to cross-examine and to check them against the records, the insinuation they now make is wholly inexcusable. There is not a scintilla of evidence in the record to support the intimation of counsel that there is any material inaccuracy in these figures.

In a further effort to cast some doubt ou the refiners' margin figures, counsel for the Government make the following points:

> (a) They refer to the fact that the raw prices paid by Colonial are somewhat higher each year than the raw prices reported by Willett & Gray, and they suggest that they are therefore "obviously fictitious bookkeeping transactions between Colonial and its parent company", a raw sugar producer (Govt. Br. pp. 251-2). This statement is correct in the sense that the basis of Colonial's accounting with its parent company for its raw purchases from that company was usually somewhat higher than the general raw market, but the inferences from

this fact suggested by counsel are not correct. Colonial was the only one of the refiners whose raw prices used in the margin figures were on any such basis. The raw prices used by all the other refiners in their margin figures were the actual raw market prices, and Colonial's somewhat artificial basis of accounting with its parent company for its purchases of raw could not have had any appreciable effect on the total margin figure for all the refiners. That figure was arrived at by weighting each refiner's margin according to its actual proportion of the industry's total tonnage of sugar bought and sold. Colonial is one of the smallest of the refiners, doing only about 2% of the total business (Ex. Y-14), and the minor discrepancy between Colonial's accounting figure and the actual market prices for raw could have had only a minute effect upon total figures of the industry. And even that small effect is immaterial in this case, because Colonial *followed the same method for all years,* both before and during the Institute in compiling its margin figures (R. 1112). Since those figures are used in this case only for the purpose of comparing the pre-Institute margin with the margin during the Institute period, this minor discrepancy in Colonial's figures has the same effect in both periods, and the *comparison* is therefore not affected.

(b) The only other attempt to cast doubt on the refiners' margin figures is counsel's statement that there was a "considerable variation on the part of the individual refiners in computing their margin figures" (Govt. Br. p. 252). The "variations" pointed out were merely minor differences *between refiners* in their inclusion or exclusion of small items of expense; and since the record shows that *each refiner followed the same method each year that he followed in all other years in calculating his margin* (R. 1112), these differences between refiners in minor items are immaterial in comparing the Institute and pre-Institute margins.

We submit that there is no merit at all in the Government's criticism of the refiners' margin figures, and they stand as conclusive evidence that in the fairly comparable periods before and during the Institute ('25 and '26; '29 and '30) the margins were exactly the same.* The only way the Government can make it appear that the Institute margin was larger is by including in the pre-Institute figures the margin for 1927, when, as we have pointed out, an unprecedented rise in the average price of raw and an unprecedented drop in consumption forced the margin down to the lowest level on record, reflecting a net loss on the industry's operations for the year; and by including in the figures for the Institute period the unprecedentedly high margin of 1928, the year of reaction from the high

*For the Court's convenience we reprint here the margin table on page 96 of our main brief.

	Actual Average Price Paid by Refiners for Raws	Actual Average Price Received by Refiners for Refined		Actual Average Gross Margin	
1925........	4.431	5.414	Average 1.013	.983	Average .977
1926........	4.263	5.306		1.043	
1927........	4.778	5.682		.904	
1928........	4.278	5.397		1.119	Average 1.048
1929........	3.784	4.798	Average 1.013	1.014	
1930........	3.447	4.459		1.012	
1931........	3.367	4.303		.936	

raw price of 1927 and the first year of the change from the old system of competition by secret concessions to the new system of open prices and terms.

We submit that the comparison we propose is the fair and proper one; and it demonstrates that competition during the Institute was just as effective as the competition before the Institute in holding down the refiners' prices and margins.

D. The Government's Argument on Comparative Profits.

The Government starts its argument on this point (p. 254) with the assertion, quoted from the Court's Opinion and Findings, that "there was a substantial increase in profits during the Institute period". The language just quoted is the only statement in either the Opinion or the Findings as to comparative profits before and during the Institute. Nowhere does the Court attempt to say what the profits were in either period, how much the alleged "substantial" increase was, or what were the facts and figures showing such an increase.

Upon the foundation of this naked assertion that "there was a substantial increase in profits during the Institute period", the Court rests the conclusion that the increase must have been due to restraint of competition by the Institute, and that any restraint which produced a "substantial" increase in profits over the pre-Institute level must have been unreasonable and unlawful.

As we pointed out in our opening brief, this argument based on the alleged increase in profits rests on three false assumptions:—(a) that the profits before the Institute were fair and adequate; (b) that they were such profits as would result from proper economic competition; and (c) that the alleged increase in profits during the Institute was due to restraints on competition. Neither the Trial Court nor counsel for the Government have made any attempt to justify or support any one of these assumptions, and all three of them are disproved by admitted facts in the record.

(a) *Were the profits before the Institute fair and adequate?*

Conceding for the present the Government's claims as to the average earnings before the Institute, as shown by the table on page 256 of its brief, the average net earnings of the refiners in the three years before the Institute were 3.44%. One of the three years, 1927, shows a net loss for the industry, and the average of the other two is only 5.21%. It cannot be successfully contended that these figures show a fair or adequate return in a manufacturing industry. This Court has several times decided that a fair rate of return for public service companies was approximately seven per cent, and that rates which prevented such a return were confiscatory.* Those decisions were based upon the theory that a fair return for public service companies is less than the normal return for manufacturing companies, and the testimony in the case at bar shows that a normal rate of return for manufacturing companies is 10% or more (R. 1167).

We do not contend, of course, that restraints on competition are to be held reasonable merely because the industry in which they are applied has not theretofore been making a normal rate of return. What we do contend is

*7.44%—*United Railways & Electric Co.* v. *West* (1930), 280 U. S. 234; 7%—*Pacific Gas & Electric Co.* v. *San Francisco* (1924), 265 U. S. 403.

that restraints which are otherwise reasonable are not to be condemned as unlawful merely because they may produce a substantial increase above a previous rate of return which was inadequate and greatly below normal. This fallacy vitiates all the reasoning of Government counsel and the Trial Court on this point.

(b) *Were the profits before the Institute such as would result from proper economic competition?*

The Trial Court's own Findings answer this question in the negative. Finding 29 is as follows (R. 271-72):

> "29. The industry was characterized by highly unfair and otherwise uneconomic competitive conditions; arbitrary, secret rebates and concessions were extensively granted by the majority of the companies in most of the important market areas and the widespread knowledge of market conditions necessary for intelligent, fair competition were lacking. The refiners were disturbed economically and morally over the then prevailing conditions. At least one refiner, American, was concerned about the possibility of liability under the Clayton Act because of the discriminations resulting from the various concessions."

It certainly cannot be said that a fair rate of earnings will be realized in an industry which is "characterized by highly unfair and otherwise uneconomic competitive conditions", and in which "arbitrary, secret rebates and concessions are extensively granted by the majority of the companies in most of the important market areas", and in which "the widespread knowledge of market conditions necessary for intelligent, fair competition are lacking".

The actual average earnings of 3.44% shown by the Government's table (p. 256) are about what would be expected from the Court's description of the trade conditions which produced them.

We submit that it is completely illogical for the Court and counsel to assert that unreasonable restraint of competition is shown merely because there was a "substantial" increase in earnings during the Institute period over the low and inadequate rate produced by the uneconomic and deplorable pre-Institute conditions which the Court found and the Government admits. A substantial increase in earnings is to be expected upon correction of such conditions, and the assumption which underlies the argument of counsel and the Court on this point is thus destroyed by the Court's own finding.

(c) *Was the alleged increase in profits during the Institute period due to restraints on competition, or was it due to general economic conditions outside the Institute?*

The Government's method of treating this vital question is to ignore it, just as the Trial Court ignored it in its Opinion and Findings.

Since the Government makes its comparisons between the years 1925 to '27 as the pre-Institute period, and 1928 to '30 as the Institute period, we will use them here. 1928 and '29 were the very peak of this country's prosperity, and it is common knowledge that general corporate earnings for 1928 to '30 were much higher than for 1925 to '27.

The food processing industries not only shared the general prosperity in 1928 and '29, but maintained their high earnings through 1930 and beyond, because the demand for the necessities they produced was the last to decline, and the prices they paid for their raw materials fell very rapidly. They were thus able to stimulate demand by lowering their prices without a drastic reduction of their margins. The food processing industries thus became generally known as "depression-proof", and their earnings held up to near the peak levels until after 1930 (R. 1166).

These same factors were at work in the sugar industry. Sugar consumption for the years in question was as follows (Ex. 8, p. 19):

Average	Year	
5,492,811	1925............	5,510,060 tons
	1926............	5,671,335 tons
	1927............	5,297,050 tons
5,650,997	1928............	5,542,636 tons
	1929............	5,810,980 tons
	1930............	5,599,377 tons

As the table shows, consumption during the Institute period was substantially higher than before, and even in 1930 it was higher than for the pre-Institute period.

Raw sugar declined rapidly in price every year during the Institute period, until it reached the lowest prices ever recorded (Ex. E-16, p. A of the Appendix hereto), and the refiners were thus able to reduce their prices and stimulate consumer demand (Ex. S-17, p. 1, Appendix to App. Main Br.). These underlying conditions were all exceptionally favorable to high margins and profits, but nevertheless, as we have seen (p. 35, *supra*) competition among the refiners brought their margins down to the same level in 1929 and '30 as in 1925 and '26.

The exceptionally favorable underlying conditions in the sugar industry during the Institute period are in sharp contrast with those in the pre-Institute period. It is a matter of common knowledge that general business conditions were then much less favorable and corporate earnings were lower. The general level of raw sugar prices was much higher (Ex. S-17, p. 1, Appendix to App. Main Br.), sugar consumption was lower than during the Institute period (table, p. 40, *supra*), and, as pointed out before, 1927 witnessed the greatest annual decrease in sugar consumption and the greatest earnings losses to the industry of any year for which figures are available.

These contrasting conditions alone are enough to account for the increase in the refiners' earnings during the Institute period, whether that increase be calculated on the basis of the Government's figures or our figures, as set out on page 100 of our main brief.

The assertion of the Government and the Trial Court that any increase in the refiners' earnings during the Institute was due to restraint on competition is a naked assumption, without any support in the record, and it is conclusively negatived by the facts above reviewed.

The Government's References to Excess Capacity. At several places in its argument on comparative profits (and elsewhere in its brief) the Government repeats the assertion that there was a large excess capacity in the sugar refining industry, and in this connection it cites (Br. p. 254) the Trial Court's statement "that there had been, in the post-Institute period, a substantial increase in profits despite a concededly large excess capacity". What bearing the alleged excess capacity of the industry can have in a *comparison* of the pre-Institute and Institute profits is not apparent. The actual capacity of the industry was substantially the same during the pre-Institute and Institute periods (Ex. W-14), until it was reduced during the Institute period by the elimination of Spreckels in 1930.* Since the alleged excess capacity was substantially the same during the Institute period as before, it can have no bearing on a comparison of the profits during the two periods.

There is no substantial excess capacity in the sugar industry if by excess capacity is meant greater capacity than is needed to meet the industry's *peaks of demand,* which occur seasonally and many times every year. These peaks are related to the moves which occur about ten times a year, and they reach their highest points on the moves during the late spring and summer months when the demand for sugar is at the year's maximum. All the refiners then usually operate at from 80% to more than 100% of their rated capacities (capacity being figured on tbe basis of a six-day week) (see Ex. C-15). During the off-peak times all of the refiners have unused capacity, just as do all manufacturers who make products that cannot be successfully stored over long periods, or that cannot be manufactured and marketed except in periodic spurts, because of speculative, or style, or other risks in carrying them. If these valleys of demand could be filled up, the refiners could produce and sell 50% more sugar, but no way has been found to fill them up since the great decrease in foreign sugar sales following the war. The refiners must, nevertheless, still maintain their full capacities to meet the unavoidable peaks of the domestic demand, with the result that their rate of earnings on invested capital is reduced.

But these conditions were the same both before and after the organization of the Institute, and they have no

*The total capacity, in millions of pounds of raw sugar, of all the refiners by years is set out in Exhibit W-14, as follows:

1925	1926	1927	1928	1929	1930	1931
17,094	17,397	17,571	17,685	17,685	17,865	16,665

bearing at all on the question of comparative profits in the two periods—which is the sole point of our present inquiry.

Comparisons, before Deducting Reserves for Depreciation and Taxes

The Government says that we should not have made our comparisons of earnings without deducting depreciation reserves and taxes, and that we did not explain that such deductions had not been made. Neither complaint is justified.

In our opening brief (p. 100) we set out a table showing the earnings of the refiners in the years from 1925 to 1931 on two bases, one of them *before* and the other *after* charging depreciation and taxes. After providing the figures for both bases of comparison, between the Institute and pre-Institute years, we expressly stated that our comparisons would be made on the basis of the figures *before* depreciation and taxes, giving as our reasons the fact that arbitrary changes in charges for depreciation reserves and changes in taxes from year to year, and changes in the ratio of a constant depreciation reserve to net earnings, rendered *comparisons* of earnings through a series of years misleading if made after charges for depreciation and taxes (App. Br. p. 101).

A company earning $1,200,000 in two successive years may show a net, after depreciation, of $500,000 in the first year and $1,000,000 in the second year, an increase of 100%, by setting up a depreciation reserve of $200,000 in the first year and $700,000 in the second year, in spite of identical operating profits in the two years. The lower the company's rate of earnings, the more it is distorted by these changes in charges for depreciation and changes in the rate of taxes. And similarly, a company with net operating earnings of $1,000,000 in one year, and with an increase of only 10%, to $1,100,000 the following year, will show an increase of 100% in rate of net earnings after depreciation, if the depreciation charge is $900,000 in both years.

The only material point of inquiry on this phase of the case is whether there was such an increase in the refiners' prices during the Institute as to show an undue restraint on competition. We have refuted the Government's charge and the Court's finding that there was such an increase by showing that the *margin*, which is the only part of the price of sugar over which the refiners have any control, was the same in the properly comparable periods before and during the Institute.

We submit that when the point of the comparison, as here, is to determine whether there has been such an increase in profits as to show undue restraint of competition, the earnings figures used for the comparison should be those reflecting *operating* profits in the years compared, undistorted by changes from year to year in the annual rates of depreciation and taxes and by the recognized and generally prevalent practice of corporations to charge high rates of depreciation in order to decrease taxes. On this proper basis of comparison, as set out in the table on page 100 of our main brief, the operating profit in 1925 and '26 averaged 6.63% and in 1929 and '30 it averaged 7.08%; an increase so small that it certainly provides no support for the claim of undue restraint of competition, especially in view of the more favorable economic and trade conditions pointed out above (pp. 39-40), which prevailed in the Institute period.

The Government's Various Devices to Exaggerate the Apparent Increase in Earnings

In their brief counsel attempt in various ways to present a set of figures which will provide some support for the claim of a large increase in earnings during the Institute period.

First, they present figures (p. 256) which show the rate of earnings on capital after deducting all depreciation and tax reserves from the time of original construction or purchase, and after charging depreciation and taxes for the years compared. Their table on this basis is as follows:

	Per Cent.	
1925......	2.78	Average 3.44%
1926......	7.65	
1927......	—.12	

	Per Cent.	
1928......	7.64	Average 6.9%
1929......	7.39	
1930......	5.72	
1931......	5.58	

By including the year of loss, 1927, before the Institute, and 1928, the first and best year during the Institute, they thus show an increase in average rate of earnings of 3.46%. But excluding those years, for the reasons heretofore discussed, and using the Government's figures, we find the average for 1925-26 to be 5.21%, and for 1929-30 to be 6.55%, an increase of only 1.34%.

On either basis of comparison, considering the special circumstances relating to 1927 and 1928, and also the more favorable economic and sugar trade conditions in the Institute period and the abolition of the "unfair and otherwise uneconomic competitive conditions" which the Court found to have been present before the Institute (R. 271), the increase was no more than was to be expected, and it provides no support for the finding that it was due to unreasonable and unlawful restraints on competition.

Second, counsel attempt (Br. pp. 256-58) to improve, from the Government's standpoint, the showing of these comparative figures by eliminating the figures for the Spreckels Company, which lost money in all years and was finally obliged to close its doors in the summer of 1930. The President of this company is said by the Government to have been the real leader in the organization of the Institute, and of the alleged conspiracy in restraint of competition (Br. p. 144), and yet his company lost substantially the same amount of money in the two and one-half years it survived during the Institute that it had lost in the three years before the Institute (Ex. E-17, Appendix to Main Brief), and was finally driven out of the business by competition which it could not survive in the year when the alleged conspiracy is claimed by the Government to have been most completely effective. Without discussing the obvious unfairness of this attempt to change the showing of the earnings figures by eliminating the Spreckels losses, we point to the fact that the Government's figures (p. 258), after eliminating the Spreckels losses, show average earnings in 1925-26 of 6.42%, and in 1929-30 of 7.68%.

Third, counsel attempt (Br. pp. 259-60) to make a showing of higher earnings by eliminating not only the Spreckels losses, but also the Federal income taxes of all tbe companies. We have not tried to check their figures because tbey do not disclose the source or basis of the "federal income tax conversion ratios" they use in the elaborate calculations underlying the table on page 260 of their brief, and because we can see no materiality or importance in the figures. So far as comparative earnings are concerned, we point out the fact that, on the basis of these figures, artificially enhanced by the Government's various eliminations, the average earnings for 1925-26 were 7.63% and for 1929-30 they were 8.73%.

Having eliminated from its figures the earnings results of the company with the largest losses, and having made its calculations of earnings before Federal taxes, the Government finally reaches so-called earnings figures averaging 5.52% for 1925-27 and 9.48% for 1928-30, and announces (Br. p. 259):

> "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."

Even if these artificial figures thus built up by the Government were the real earnings figures of the refiners, they would not be "abnormally high". On the contrary, they would still be well below the normal earnings of manufacturing companies as testified to in this case, without contradiction, by Professor Adams, of Yale University, a recognized authority in this field (R. 1167). And they would be well below the normal range of earnings for manufacturing companies, as indicated by this Court's decisions that approximately 7% is a reasonable rate of return for public service companies, *after the deduction of all taxes.*

American versus National. The Government makes one final effort to show high earnings. Having failed to make any attempt, by cross-examination or otherwise, to show that the capital investment figures of the refiners, as stated in their books and presented in evidence at the trial, were too high, and that their earnings ratios were therefore higher than appears in the evidence, the Government now seeks to attack the capitalization and earnings figures by guess and innuendo. Picking out American and National for comparison, counsel point out (Br. pp. 261-62) that American's total output is only about 45% more than National's, and yet its capital is more than three times as large.* From this counsel draw the inference that American's capitalization was too high. The inference that National's capitalization was abnormally low would have been just as logical, and more in accordance with the facts.

Part of the explanation for the difference should have been apparent to counsel from the figures they referred to as to working capital. They point out (Br. pp. 261-62) that American, producing only about 45% more sugar than National, employed $22,400,000 average cash, and average working capital of $35,000,000, whereas the corresponding figures for National are only $2,200,000 and $8,300,000. From these facts counsel draw the conclusion that American's figures "grossly overstate the capital actually employed in the refining business". If counsel had inquired about this matter when the figures were introduced in evidence, they could not have drawn this grossly mistaken and unfair inference. They would have found that this apparent discrepancy is explained by the fact that National follows the policy of borrowing from the banks from time to time to meet the major part of its periodical cash requirements to finance raw sugar purchases and to carry heavy stocks, while American follows the policy of carrying a large cash capital of its own to finance such purchases and stocks. Both policies are common in the business world and each has its advantages and disadvantages.

*The Government states American's average capital to have been "about $90,000,000" (Br. p. 261). It was in fact $85,030,451 (see last page of Exhibit E-17, Appendix to our main brief).

This difference in working capital policy accounts for more than $20,000,000 of the difference in the capitalization of the two companies.

And similarly, if counsel had sought the facts at the trial, they would have found that the remaining disparity between the capitalizations of American and National, which they now "infer" must be due to American's over-capitalization, is fully explained by the facts connected with National's purchase of the Warner refinery at a bargain price in 1927, when the Warner Company was in default on its bonds; the location of National's refineries in the New York area; the history and location of American's five refineries in Boston, New York, Philadelphia, Baltimore and New Orleans; and the pioneering efforts of American in the development of package sugars. All of these matters are outside of the record, and we mention them only in reply to counsel's unjustifiable inferences, outside the record, about the reasons for the difference in the capitalization of these two companies.

We submit that no weight can be given to these unfounded speculations of counsel about the capitalization and other accounting figures of the defendants, which the Government, after full opportunity to do so, failed to question or attack at the trial.

E. Conclusion as to Comparative Margins and Profits.

In the light of the foregoing review of the Government's arguments and the evidence in the record, we submit that the following facts are definitely established:

> (a) During the Institnte period, refiners' prices declined more rapidly than the price of raws, so

that in 1929 and 1930 the refiners' margin averaged the same as in 1925 and 1926, the fairly comparable pre-Institute years, thus demonstrating that competition was just as vigorous and effective under the Institute plan of open prices and terms as it had been before the Institute.

(b) The slight increase of less than 1% in the refiners' net earnings in 1929 and 1930 over 1925 and 1926 is fully accounted for by the more favorable underlying economic conditions in the sugar industry during the Institute period, and by the abolition of the vicious pre-Institute system of secret rebates and concessions, and neither the amount of the increase nor the rate of the refiners' net earnings supports the claim that there was any suppression of effective competition during the Institute period. On the contrary, the slight amount of the increase in earnings and the low rate of the earnings completely negatives the claim that there was any such suppression of competition.

II.

THE INSTITUTE'S OPEN PRICE PLAN

(See App. Br. pp. 55-68; Govt. Br. pp. 53-76.)

The Court's findings leave the Government's case against the Institute's Open Price Plan on tenuous ground. The finding that there was no agreement among the defendants to adopt or maintain prices (Finding 201, R. 310) disproves the major allegation of the petition that the Institute plan was a price-fixing medium. The findings that the secret price system should be abolished in favor of a system of publicizing prices immediately *after* sales (Findings 29, 53, R. 271, 278) remove any objection to the system of publicly announcing prices. All that remains, on this branch of the case, is the Government's claim and the Trial Court's unsupported assertion that the Institute system of announcing prices in *advance* of sales tended to maintain prices. The argument fails because the Institute did not require the announcement of prices in advance of sales, and, as we have seen from actual results (pp. 10-17, *supra*), the price announcement system did not tend to maintain prices.

A. The Open Price Plan Did Not Require the Announcement of Prices in Advance of Sales

The entire argument against the Open Price Plan is based on the premise that it requires the announcement of *future* prices, in advance of sales, meaning, to quote the Government's brief, that it calls for an interchange of prices between competitors in advance of sales (Br. pp. 2, 57). The continuous reference to the Open Price Plan as a system of announcing *future* prices is calculated to create the impression that the refiners were required to give and did give advance information to each other as to the prices they would quote in the future (Br. p. 57). We shall discuss the price announcement provisions and practices in some detail, so that it may be perfectly clear that the Open Price Plan was not at all what the Government pictures it. It was not an agreement or system to announce prices in advance of sales, much less an agreement to interchange price information with competitors in advance of sales.

The price announcement provision of the Code was that "sugar should be sold only upon open prices and terms publicly announced" to the end that "discriminations between customers should be abolished" (R. 261). *When* the announcement was to be made in relation to the time of sale was not specified.

The *practice* of the refiners, before as well as after the Code, has been to announce price *advances* to take effect in a few hours or a day or two, and to announce price *declines* to take effect *immediately* or *retroactively* (R. 660, 664, 671-72, 686, 704). The practice, both in respect to advances and declines, has not been changed by the Institute (R. 661, 664, 672, 686, 705). It is historic in the sugar industry and is peculiarly adapted to the sale of sugar.

As explained in our main brief, the reason price increases are announced to become effective at a future date is to give the trade an opportunity in the meantime to buy sugar at the *lower* price prevailing before the advance becomes effective (R. 664). The great bulk of sugar sales is made on such occasions or "moves", during the period between the announcement of the advance and the effective hour of the advance (R. 663). The historic system of selling sugar on "moves" is dependent on announcing price increases in advance of sale. If advance notice were not given of the increase in price, there would be no opportunity for the trade to make purchases at the lower price. We should not suppose that the government would object to the trade being given this opportunity.

The Institute has not changed the move system, except that the three o'clock notice provision guarantees to the trade a period of at least over night to get in their orders before an advance goes into effect, while prior to the Institute the period was of uncertain duration and often because of the shortage of time buyers could not get their orders in before the advance became effective (R. 664). The Court found, therefore, that the provision for announcing price changes not later than three o'clock was in and of itself advantageous to the trade (Finding 47, R. 277).

Declines, on the other hand, have not been announced in advance of sales. A decline is announced to take effect immediately or retroactively to the opening of business of the day on which the decline is announced (R. 634, 664-65). In either event, all sugar sold on that day prior to the announcement of the decline is repriced at the lower price.* Sometimes declines are made retroactive for several days or several weeks and all the sugar sold during the retroactive period is repriced (R. 676-77, 655). The Code provision in favor of repricing, and the practice of announcing declines to take effect immediately or retroactively, show that there was no requirement that prices be announced in advance of sale.

It may be argued that strict compliance with the provision for selling sugar only on prices openly announced would require the announcement of a lower price before it was given to a customer and, in that sense, would require an announcement in advance of sale. In view of the repricing provision, however, it would not matter in the slightest whether the sale or the announcement came first. Any sales made on that day, whether before or after the

*For a brief period during early 1928, while the Code contained a recommendation against repricing, price declines were announced to take effect the next day. The Code recommendation was changed in August, 1928 and since then declines have been made effective either immediately or retroactively (see App. Main Br. pp. 59-61).

announcement, would take the lower price. What difference would it make, therefore, whether the announcement were made before or after a sale? Why should the refiner hold up making a sale while he put the price announcement on his bulletin board? The Code required no such formalism, and surely the legality of the price announcement system cannot be made to turn on such a technicality. There is no evidence as to the sequence observed or unobserved by the refiners in this matter. The order of procedure was so inconsequential that neither the Government nor the Appellants saw occasion to introduce evidence on the subject.

Certainly, however, the Open Price Plan was not, as described by the Government, an agreement to sell only at prices and terms "interchanged with each other in advance of sales" (Br. p. 2) or a "system of announcing prices to competitors in advance of sale" (Br. p. 57). Whatever may have been the practice of the refiners as to actually posting a new lower price before making a sale at that price, there was no requirement or practice of notifying the Institute or competitors before making sales.

The Code Interpretations recommended that the refiners keep their basis price posted, in accordance with the long established custom in the trade, upon their bulletin boards available to access by the trade, and *after* posting price changes and announcing them to the trade, to notify the Institute of *action which has been taken* (R. 633, 661, 672, 686).

Price announcements became effective the moment they were posted (R. 660, 671-72, 686). Quite some time elapsed between the posting of a price announcement and the relaying of it to the other refiners through the Institute

(R. 633, 637, 662-63, 671-72, 686). The information was out among the trade and sales were actually being made on the basis of the new price before there was any interchange among the refiners. The continuous reference by the Government to the price reporting system as a system of announcing *future* prices to competitors *in advance* of sales, and upon which characterization it rests its entire argument against the Open Price Plan, is without support in the record.

The Government observes (Br. p. 57) that normally the refiner is "compelled to fix his own prices and terms on the basis of his knowledge of market conditions". We agree. The Court found "the widespread knowledge of market conditions necessary for intelligent, fair competition was lacking" during the period preceding the Institute (Finding 29, R. 271). The refiners sought to right the situation by the collection and dissemination of statistics and by a policy of openly announcing prices. The knowledge they sought to gain thereby was not, as the Government claims, any advance knowledge of prices or terms that competitors would grant in the future, but simply the essential knowledge of current market conditions and price quotations. If the refiners are to have any worthwhile knowledge of market conditions they must know the most important factor, the offers of their competitors. The Government's attempt to outlaw that knowledge indicates a belief on its part that each refiner should base his prices and terms on his *ignorance* rather than his knowledge of market conditions, and a desire to return the sugar industry to its pre-Institute state, where the knowledge of market conditions necessary for intelligent and fair competition was lacking.

B. The Open Price Plan Did Not Tend to Maintain Prices

Building upon the false premise that the Institute price announcement system calls for announcing *future* prices, the Government imagines (Br. p. 57) the refiners maintaining prices without regard to conditions of supply and demand in the market, with the confidence that no competitor will "scoop" a large volume of orders by being the first to initiate attractive offers. The picture is so unreal as to disclose complete lack of understanding of the sugar industry.

There are no "scoops" in the sugar business. The initiation of attractive offers would not produce any increase in business unless and until thereafter a price advance was announced. All refiners would follow the attractive offer and unless all followed the advance there would be no move or large volume of orders. In any event, there would be no "scoop". The only way to "scoop" business in sugar is by procuring individual orders on a secret concession basis. The Government's argument in behalf of scoops, like all its arguments, leads back to the secret concession system condemned by the Court.

The Price of Refined Sugar Followed the Price of Raw Sugar

Reference to Exhibit O-3 (Appendix to App. Br.) which charts the course of the raw and refined market during the Institute period, shows that quite uniformly refined prices followed raw prices and that a rise or fall in raw prices precipitated a rise or fall in refined prices. The actual movements of raw and refined as shown by the chart negative the unsupported assertion of the Government's brief (p. 59) that there was a lack of sensitivity of refined prices to raw prices and that the refiners maintained prices even though market conditions warranted a decline. The single example which the Government cites (Br. p. 58) in support of its contention that the refiners tended to keep up prices regardless of declines in the raw market, not only does not support the contention but completely refutes it.

On May 9th, 1929 on a raw market which probably did not justify an advance, although over a month had elapsed since the last move so that a move was indicated, Godchaux announced an increase in price from 4.90 to 5 to be effective at the opening on May 11th. This announcement was followed by three of the eastern refiners. C. & H. did not follow the Godchaux announcement, but on the contrary announced a decline to 4.75 effective at the opening on May 9th, advancing to 5 at the opening May 11th. This announcement was followed by the other refiners. The result was that, while a move took place, and a very large one, it took place at 4.75 rather than at 4.90, so that all of the sugar sold was at a price 15c lower than the price which had prevailed before the advance was announced and at which Godchaux had sought to have the move take place.

George Rolph, President of C. & H., in writing to Sidney Ballou, the Executive Secretary of the Institute, shortly afterwards, expressed his opinion that there was no market justification for the attempted advance from 4.90 and that it was an attempt to get the trade to load up on a weak raw market (Exhibit 442-S. R. 1691). Reflecting this opinion in the action taken by his company, the attempt to precipitate a move at 4.90 was frustrated and the price was actually reduced. The lone example cited by the Government in support of its theory, therefore, disproves the theory and demonstrates that, under the Institute, competition kept refined prices harnessed to raw prices, and further demonstrates that there was no combination among the refiners to maintain prices.

Apparently by noting the fact (Govt. Br. p. 58) that C. & H. was not a member of the Institute at the time of this incident, the Government seeks to convey the impression that it was then acting more independently in price matters than when it later joined the Institute. That impression is contrary to the fact, and also contrary to the Government's contention throughout the case. Although C. & H. did not actually join the Institute until 1929 (R. 709), Rolph and his Company fully cooperated in the Institute's activities from the very beginning, as the Government has always contended (R. 714). They helped organize the beet sugar association (Domestic Sugar Bureau) at the same time the Institute was organized, and joined the Bureau because its members marketed their sugar mainly in C. & H.'s own territory, and Rolph felt he could in that way best help to promote cooperation between the two associations (R. 608, 714; Ex. 442-s, R. 1961). In spite of this close cooperation of C. & H. and the Institute, both before C. & H. joined the Institute in 1929 and after it became a member, C. & H. was always entirely independent of the Institute, as were all other members, in determining its price policies. None of them hesitated to "spike" an announced advance, or to reduce the price, when they felt that market and trade conditions called for such action. Such competitive moves and conflicting announcements and price contests were the common practice throughout the Institute period, as will be seen from an examination of the charts in Exhibit O-3 (Appendix to App. Main Br.) and the typical conflicting price announcements analyzed in our main brief (pp. 78-83), and also those set out in Exhibit N-3 in the Appendix to our main brief.

The notion that the announcement of a price increase would nearly always be followed, and that there was every incentive to announce an advance regardless of the market justification because the refiner announcing it would lose nothing if the other refiners failed to follow, reveals the same lack of realism which characterizes the Government's entire discussion of price announcements.

Refiners were loath to institute an advance unless market conditions required it because of the loss of goodwill that the refiner initiating the advance would suffer in the trade, while the refiners that killed the advance would find favor in the trade. That is why the theory advanced by the Government did not work in practice. Refined prices were not advanced except where the raw market required an advance and then very frequently the advances were not followed (Exhibit 0-3).

The Government's Suggestion that Refined Prices were Advanced on a Falling Raw Market

The Government paints a very misleading picture when it says (Br. p. 59): "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."

The impression created by this statement, whether intentionally so or not, is that the refiners raised prices on a falling raw market. The facts, however, negate the impression. Exhibit O-3 (Appendix to App. Main Br.) charts the price movements for the four years from 1928 through 1931. During that period there were fifty announcements of price advances. Twelve or about thirty per cent. of those announcements were not followed by all of the refiners and proved abortive. Several were met with announcements of declines, and the decline became effective but not the advance. Eighteen or fifty per cent. of the effective advances either originated with or were immediately preceded by a decline in price, so that the sugar was actually "moved" at a reduced price. Such instances cannot fairly be referred to as price advances; they were really price declines although the Government counts them as advances.

The announcements of declines followed by advances occurred at intervals on a declining raw market when customers' stocks were low, because a month or more had elapsed since the last move, and another move was indicated (R. 671). Because the raw market on such occasions did not justify an increase of refined prices from the prevailing level, the move was precipitated by *lowering* the price and then advancing it to a level which might be at, above or below the price level prevailing before the price movement. The effect of such price movements was to *lower* the price at which the sugar was sold, for the sales were made at the reduced price. Such a combination announcement, first a decline and then an advance, all as part of one announcement, was the traditional method of moving sugar on a declining raw market. Except for such mechanics there would be no appreciable amount of sugar sold during the frequently extensive periods of declining raw prices, when sales or moves are obviously as essential as on a rising market.

No significance can be attached to the announcements of advances on a declining raw market when they are preceded or accompanied by a declined price announcement at which the sales take place. Reality and fairness require that one look at the price at which the sales are *actually made* to determine whether the price of sugar is really rising or falling. A glance at the chart (Ex. 0-3, Appendix to App. Main Br.) shows that during the periods of falling raw prices the price of refined likewise fell, although there were several technical advances preceded or accompanied by declines which moved sugar during such periods. For example, the price of raw sugar fell from 4.35 to 3.85 during the last half of 1928. The price of refined fell from 6.10 to 5.25 during the same period; yet there were six moves, precipitated by price declines followed by technical advances during that time. The sugar in each case was sold at a price lower than the price prevailing before the move and the refiner's margin, the spread between the price of raw and refined, was less on each successive move, showing that the price of refined was not only declining but that it was declining more rapidly than the price of raw.

The same observations apply throughout the four year period of the Institute. The refiners did not stop selling nor did the trade stop buying sugar during the periods of decline. Moves took place just the same as when the price was advancing. The difference was that when the price of raws was declining the moves were precipitated by announcing a "bargain day," a combination decline and advance, so that the sugar was actually sold at the lower price. The true relation between the price of raw and refined is shown by the margin between raw and refined. Exhibit S-17 (p. 1, Appendix to App. Br.) and the table on page 96 of our main brief show this margin. They show that during each of the years of the Institute the margin declined. The Exhibit completely negatives the contention of the Government that the refiners maintained refined prices on a declining raw market. The *facts* are that during the Institute period the price of refined sugar declined more rapidly than the price of raw sugar, and that the refiners' margin for '29 and '30 was the same as for '25 and '26 (See App. Main Br., p. 96), and for 1931 it was even lower.

Buyers' Bargaining Power Was Stronger Under the Institute Than Under the Secret Concession System

The Government attempts to make out that competition among sellers and bargaining power of buyers were absent during the Institute period. The brief (p. 69) expresses the thought that buyers were reduced to mere order clerks. The theory is completely rebutted by the facts above cited which demonstrate that during the Institute period the pressure of competition among sellers and bargaining among buyers was so strong as not only to bring down the price of refined sugar but to bring it down further and faster than the price of raw sugar. This is the most tangible manifestation of competition and bargaining power that is possible.

In behalf of its theme that competition and bargaining power were absent under the Institute, the Government refers only to the fact that the price of sugar in any given territory at any given time has been uniform and there has been no opportunity for secret arrangements privately negotiated by an individual buyer for a preferential price for himself. Immediately after these observations, and apparently without noting the inconsistency, the Government assumes the defense of the Court's plan of immediately and openly announcing prices in closed transactions, which plan is based upon the finding and conviction that the secret concession system is evil and should be abolished by publicizing prices. The Court found that "except in so far as another refiner might be giving a lower price by secret concessions" the price of sugar was and necessarily would be uniform and "in any particular trade area was generally uniform both before and after the Institute" (Finding 17, R. 269). It is clear, therefore, from the Court's findings, that under any system of free and open price competition, either the plan suggested by the Court or the Institute plan, the price of sugar or of any other standardized commodity must be uniform. As pointed out in our main brief (p. 73), this is in accord with this Court's decision in the *Cement* case (268 U. S. 605-6), and with the teachings of all the economists. By accepting and attempting to sustain the Court's plan the Government destroys all of its objections to the Institute open price policy which are based on the presence of uniform prices or the absence of secret concessions.

Mass Bargaining versus Individual Bargaining. Bargaining power, particularly the mass bargaining power of buyers, is more effective under a system of openly announced prices than under a secret concession system. Where sugar is sold on a basis of private dickers the individual buyer is concerned not so much with the general price level as with getting an inside price for himself. He is perfectly satisfied if the general price is maintained at a high level so long as he is given some preferential treatment which puts him at a competitive advantage over other buyers. Mass bargaining power is thus diluted under the secret concession system because there is no mass demand for *lower* prices. The demand is merely the individual demand for *preferential* prices. It is also obvious that under the secret concession system the refiners must maintain relatively high general prices to enable themselves to give preferential prices to favored individuals. The majority of the buyers, who get no concessions, thus pay a high price so that the minority may get a low price. That system is the negation of the ideal competitive system where the price is compelled to seek the level at which the trade generally is willing to buy and under which all buyers are equally interested in bringing the price down.

As Prof. Seligman testified at the trial (see quotation in App. Main Br. p. 76) this mass bargaining is more effective than individual dickers.

Experience under the Institute has proved the correctness of the economic theory expressed by Prof. Seligman. By force of mass bargaining power the price of sugar was hammered down until the refiners' margin was lower during the last two years of the Institute (1930 and 1931 when it averaged .904) than it was during the three years preceding the Institute, including the disastrous year 1927 (when it averaged .977; see table p. 96 App. Main Br.). The evidence, in addition to the price movements charted in Exhibit O-3, shows that the pressure of the buyers for lower prices was greater under the Institute than it was before the Institute (R. 1154). When the attempted advance from 4.90 to 5 in May, 1929 was frustrated and the price was broken to 4.75 instead, the President of C. & H.

pointed out that the protests of the trade had caused the reverse movement (Ex. 442-S). The repeated instances where attempted price advances failed*, where they even turned into declines**, prove both the absence of organized action or combination on the part of the refiners and the pressure of mass bargaining power on the part of the buyers.

C. The Court's Plan of Announcing Prices in Closed Transactions is not a Practicable Substitute for the Institute Plan.

The Court recognized and found that the secret concession system was unfair and uneconomic and should be abolished by publicizing prices immediately after sales. The Court's plan for announcing prices, if workable, would eliminate secret concessions But the Court's plan is not practicable in the sugar industry and that is why it is no acceptable substitute for the Institute plan.

As both plans have the same purpose, the choice between them should depend on which plan is better adapted and more serviceable to the sugar industry and trade. The selection between the two plans can hardly turn, as the Government would have it (Br. p. 70), upon our ability or failure "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". This is indeed a curious approach to the matter. The Government asserts certain objections

*January 7, 1929, May 9, 1929, September 4, 1929, June 6, 1930, June 14, 1930, August 6, 1930, August 20, 1930, October 10, 1930, March 5, 1931, March 19, 1931, May 18, 1931, June 18, 1931.

**January 7, 1929, May 9, 1929, March 19, 1931, May 18, 1931, June 18, 1931.

to the Institute plan which we insist are not well founded. It offers another plan and says that the refiners must accept it in place of the Institute plan unless they can sustain the "heavy burden" of showing that the Court's plan has the same objections which the Government says the Institute plan has. There is, of course, no such burden on Appellants. The burden is rather upon the Government to establish the unlawfulness of the Institute plan. That indeed is a heavy burden when the Court has found that the secret concession system defeated fair competition and concluded that fair competition should be restored by publicizing prices. If the Court's plan is legal, it is difficult to see how the Institute plan is illegal. Both plans have the same object and effect, the elimination of secret concessions. The only difference is that the Institute plan is practicable in the sugar industry and the Court's plan is not, and that is why the Institute plan should be preferred.

The first reason the Court's plan is not practicable is that it is not adapted to the historic sugar industry custom of selling on moves, which are dependent upon announcing price increases in advance of sales. The suggestion that prices be announced *after* sales is tantamount to discarding the established system of selling sugar on moves. If the move system is to be preserved, and no suggestions have heretofore been made that it is not a good system and should not be preserved, there is no point in considering the adoption of a price announcement system which calls for announcing prices only *after* sales. That the move system has been of great economic value to the sugar trade, and is the only system which can meet the conditions and requirements of the sugar business was clearly demonstrated in our main brief (pp. 65-68).

The Government does not challenge the fact that the great bulk of sugar has always been sold on moves, before the Institute as well as after, but would like to leave some doubt on the subject. The Government's brief states: "There is no reliable evidence of the extent to which sugar was purchased upon moves before the Institute" (Br. p. 72). The record is replete with evidence that the great bulk of sugar has always been sold on moves and the Court found:

> "* * * The great bulk of sugar always was and is purchased on what is known in the trade as 'moves' * * *" (Finding 45, R. p. 276).

The second reason the Court's plan is not practicable is that it is impossible as a physical matter to publish prices and terms in all closed transactions. There are literally hundreds of thousands of transactions a year. The terms are complicated. When a move is on, sales are made every second, tens of thousands of them in a few hours. The machinery for collecting and disseminating information concerning each transaction is not available, and the information would not be useful if it were available in the rush hours of a move. The pouring forth of innumerable and interminable announcements of individual transactions would only confuse and confound the participants in an established trade custom which now works efficiently to meet the needs of buyers and sellers.

The Court's surprising suggestion that his plan "was not shown to have been impracticable" (Finding 53, R. 278-79) is accounted for by the fact that such a plan was never considered during the trial, and the announcement of it came as a complete surprise in the opinion. And we submit that it requires no express testimony on the point to show that such a plan would destroy the move system.

The Court's plan not only has many practical disadvantages, as compared with the Institute plan, but it has no advantages. For the purpose of comparison, we considered in our main brief the likely presence and effectiveness of buyers' bargaining power under the two plans. It was there demonstrated that both individual bargaining power and mass bargaining power will be as prevalent and as effective under the Institute plan as under the Court's plan.

If the Trial Court proposed its plan on the theory that any decision of this Court had ever held such a plan as that of the Institute unlawful, we submit that the Trial Court was in error, as is shown by our review of the *Maple Flooring* and *Cement* cases and others on this point on pages 279 to 287 of our main brief, and on pages 139 to 141 herein.

Individual Bargaining and Mass Bargaining Will Be as Prevalent Under the Institute Plan as Under the Court's Plan

It is perfectly clear that individual bargaining, if it is desirable, will not be any more induced by a system of announcing prices immediately upon closing transactions than it will by announcing prices in advance of sales (were that the Institute policy). The mere fact of publicity, whether before or after the event of sale, will require all refiners to meet the announced price to all customers. That is the inevitability of the standardization of the product. No refiner can get any higher price for his sugar than any other refiner. No customer will pay any more than any other customer, if he knows it. The result follows, as the Court found, that in the absence of secret concessions the price will be uniform (Finding 17, R. 269).

If by individual bargaining is meant the effort of the individual buyer to bring the price of sugar down, that bargaining will always be present. It will be manifested by refusal to purchase if the price is considered too high and by protestations to the refiners for a lower price. Such bargaining power will be present under any system of publicly announcing prices (See App. Br. pp. 75-83).

If by individual bargaining is meant the private haggling for a preferred secret position, that bargaining will be removed under any system of publicly announcing prices. The only point of such bargaining is to get a better price than other customers. The minute the light of publicity is thrown upon the deal, even after the event, the price will have to be given to the trade generally and the advantage initially obtained by the individual bargainer will disappear.

The Government counters that repricing would not apply to terms of sale, consequently there would be an incentive for an individual customer to negotiate privately for more favorable terms before there was any open announcement. This is imaginery, for, as the Government has emphasized throughout, terms are as important as price, indeed they are an integral part of the price. Favorable terms have to be met as much as favorable prices. Once such terms are publicly announced they will have to be given to all customers by all refiners, the same as a favorable price.

Mass bargaining power would certainly be as prevalent and strong under the Institute system as under the Court's plan. The mass urge for lower sugar prices will not be affected by whether prices are announced in advance or after sales.

The Government does not dispute these facts. It rather reasons that if we believed them we would not insist upon the Institute's system of announcing prices in advance instead of the Court's plan of announcing prices immediately after sales (Br. p. 71). We must repeat, so that it may be absolutely clear, that our objection to the Court's plan is not that it fails to remedy the conditions existing under the secret concession system, but rather that it is entirely unworkable under the system of moves in the sugar industry.

The Government's Attempt to Qualify the Court's Plan for IMMEDIATE Publicity

Final resort is made by the Government to the contention that "publicity of closed transactions does not necessarily mean publicity within a few moments or hours" (Br. p. 74). This thought reveals lack of sincerity in the Government's support of the Court's plan. The Court's finding was:

> "* * * 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 generally have resulted in preventing any unfair competition caused by the secret concession system, * * *." (Finding 53, R. 278-79.)

"Immediate publicity" is what the Court specified. The purpose was to prevent the "unfair competition caused by the secret concession system." Any publicity will tend to prevent secret concessions because, as the Court found, where business is conducted in the open the price must be the same to all customers. The effectiveness of publicity in counteracting the evils of the concession system will to some extent depend upon its immediacy in relation to the transactions publicized. Obviously, the more immediate the publicity, the more effective it will be in compelling the extension to the trade generally of any favorable terms given in a closed transaction. That such was the purpose of the Court is evident from the finding that *immediate* publicity would have such effect. By seeking to hedge and qualify the Court's specification of immediate publicity the Government reveals that it remains an apostle of the secret concession system and would concede as little as possible toward its elimination. This attitude emphasizes the issue in this case. The difference between the parties is not one of methods, as to whether publicity should come before or after the event, but is a difference of business philosophy. The issue remains: the secret concession system or the open price system.

If the secret concession system is to be barred, and if prices are to be publicized, as the Court found desirable, the Institute Open Price Plan remains the only forthright and practicable system of announcing prices in the sugar industry.

III.

REGULATIONS AFFECTING BROKERS AND WAREHOUSEMEN

(See App. Br., pp. 124-52; Govt. Br., pp. 76-124)

The Functions of the Broker and the Warehouseman Are Essentially Inconsistent

The Government asserts (Br. p. 79) that the prevention of secret concessions and frauds was not the real purpose of the election of functions required by the refiners since this end could have been accomplished by other means. Consequently, the Government argues, the refiners' dominant purpose must have been "to aid in preserving the uniformity of price structure." The Government further contends that even if the prevention of secret concessions and frauds was the real purpose of the refiners, the action taken by the refiners was not reasonably necessary for this purpose and hence was unjustified.

The Government completely fails to analyze and appreciate the nature of the functions performed by the broker and the warehouseman, and the extent to which their usefulness to the refiner is impaired and the perpetration of frauds upon the refiner and the granting of secret discriminations is facilitated by a combination of these functions with each other or with the merchandising of sugar. This failure to analyze and understand the facts is responsible for the Government's unwarranted conclusion with respect to the essential purposes of the refiners and the practical necessity of the means taken to achieve those purposes.

As pointed out in Appellant's brief (pp. 127-29), and found by the Trial Court (Finding 75, R. 283), the functions of the broker and the warehouseman are of their very nature inconsistent with each other and with the merchandising of sugar, the combination of such functions creates opportunities for double dealing and the value to the refiner of brokers and warehousemen engaged in such a combination of functions is impaired. No amount of investigation and supervision on the part of the refiners, individually or through the Institute, could remove the basic inconsistency of such a combination of functions or eliminate the constant opportunity for and invitation to double dealing and dishonesty inherent therein.

As pointed out in Appellants' brief, and found by the Trial Court (Finding 74, R. 283), concerns which combined activities, largely because of such combinations of functions, were enabled to and did delay withdrawal reports and charge unearned storage without refiners' consent and *"the extent of such fraudulent practices prior to the Institute was substantial"*. Just how substantial was the prevalence of these frauds upon the refiners, to which they did not consent, is indicated by the conclusion of the Trial Court that dishonest and fraudulent dealings on the part of such concerns was about as common as honesty, in other words that *frauds were perpetrated upon the refiners in approximately fifty per cent of the cases* (R. 114). And yet the Government urges that the refiners acted unreasonably in refusing to continue the existence of the very situation which permitted the perpetration of such frauds.

The Extent of the Frauds Upon the Refiners

Despite these findings of the Trial Court, the Government seeks to minimize the gravity and extent of the fraudulent practices facilitated by and resulting from such a combination of functions by the startling assertion that they were "relatively of minor importance" (Br. p. 107). These are the practices which the Trial Court described as follows:

> "This so-called storage as well as bona fide storage with a customer also enabled him to sell the sugar to his own trade or otherwise to use it without reporting to the refiner the time of withdrawal from consignment for the customer's own account; the customer might then await a drop in the market

> and report the withdrawal as of such later time, thus obtaining the benefit of the lower price. By delaying reports, he might also obtain an extension of credit terms. Brokers who stored sugar might by a similar manipulation of reports, use fluctuations in the market to favor their own customer; they might also divert sugar directly to customers' premises and charge refiners for unearned storage" (R. 112-13).

The Government characterizes as of "minor importance" the dishonest obtaining of extended credit on unreported deliveries and withdrawals from warehouse stocks on the theory that only one-third of all sugar sold by refiners is involved. Apparently, the charging to the refiners of unearned storage is likewise viewed by the Government as of trifling importance because this type of fraud can be perpetrated only with respect to one-third of the refiners' stocks. The Government appears also to minimize the defrauding of the refiners of from five to twenty cents a bag on sugar withdrawn from warehouses between moves through delayed withdrawal reports because of the fact that the volume of such sales is small. In this connection it may be pointed out that volume of sales between moves would be greatly increased if such frauds in connection therewith were further facilitated by unrestricted combination of functions.

The Government further attempts to minimize the importance of such frauds (Br. p. 111) by reference to a statement of the Trial Court that "concerns in substantial numbers which combined distribution functions, maintained entire honesty and good faith in their dealings with the refiners". But the Government overlooks the further statement of the Trial Court that *dishonest dealings by concerns* *engaged in a combination of functions was about as usual as honesty* (R. 114).

The Government's argument (Br. p. 109) that "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 being taken without their authority" scarcely requires an answer. The fact that certain refiners were forced to resort to the granting of secret concessions because of conditions then prevailing in the industry affords no basis for a contention that they were agreeable to and unconcerned over being defrauded in other respects by their own brokers and warehousemen. The fact that the fear of losing customers at times may have prevented them from putting an end to such frauds as they might have been able to discover does not support the Government's argument that such frauds were the result of the refiners' own indifference.

The Refiners' Inability to Prevent Frauds

The Government's assertion (Br. p. 108) that "in instances where refiners did not have knowledge of the practices in question, this was because they were not interested in ascertaining the facts" is wholly unwarranted. The smaller refiners obviously could not afford to undertake the practice of continued and systematic audits. As testified by Cummings (R. 597), "There are hundreds of consignment points around the country and the hundreds of warehouses and stocks from which daily withdrawals are being made make the expense prohibitive. One or two of the largest refiners have some skeleton organization which makes an occasional check on warehouse stocks, but most of the small ones have no such organization." Campiglia testified that even C. & H. "did not employ auditors to check consigned stocks" because it would have been too big a job (R. 711). It is obvious that the expense involved was too great for even the largest refiners to maintain a large enough force of travelling auditors to cover the hundreds of widely scattered points or to check such stocks more than once or twice a year (R. 1050, 1055, 1057). With sugar being withdrawn from consignment warehouses every day in the year, such a check is obviously wholly inadequate.

The efforts of American and National to prevent, by periodic audits, the perpetration of frauds upon themselves are shown in part by the stipulation printed at pages 1105 to 1110 of the record, with respect to the testimony of the travelling auditors of these refiners. The Government, in fact, expressly stipulated that "all of said auditors would testify" that it was their duty to see that the warehouse stocks were properly handled and that withdrawals were promptly reported, and that in cases where they found the delayed reporting of withdrawals they advised the customer or broker that such practices would not be tolerated and that all such withdrawals would have to be reported promptly" (R. 1110).

It is clear from the testimony of various broker-warehousemen that in most cases it was difficult for the refiners to detect, or if they suspected, actually to prove the perpetration of these frauds. One testified that the refiner did not do anything about his diversion of cars to customers, a practice which resulted in the refiner paying storage on sugar that never entered the broker's warehouse (R. 1049-50). A second broker-warehouseman who admitted manipulation of withdrawal reports "to give the customer the benefit of the market, whether it was going up or down" as well as carloads of sugar directly to the customer, testified that "I believed I was deceiving the refiner. I did not think they knew a thing in the world about it" (R. 1053). Another who admitted delayed billing stated that the refiner "knew nothing about it" (R. 1054). And this broker-warehouseman testified that he "had two or three customers who * * * told me I would either have to defer these billings, or in one instance consign sugar to their warehouse, or otherwise they would have to change their source of supply. I complied with their wishes." This witness also testified that White, American's sales manager, had expressly prohibited such practices and that, as far as he knew, American never learned of them (R. 1054-55).

Such testimony as well as the similar testimony given by numerous other witnesses, completely discredits the Government's suggestion that the refiners were indifferent to and could easily have prevented the frauds perpetrated upon them through these combinations of inconsistent functions. But even if full effect were to be given to the Government's assertions, there is no moral or legal principle which required the refiners to continue to submit to dishonesty and fraud or which precludes them from taking measures reasonably necessary to put an end to such practices.

The Refiners' Policy Against Storing with Brokers or Customers

The Government challenges the accuracy of Appellants' statements with respect to the policy of the refiners against storing with customers or brokers even prior to the Institute (Br. pp. 83-84). The Government now concedes "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" (Br. p. 82), but urges that there is a sharp distinction between such warehouses and "public" or "bona fide" warehouses affiliated with or owned by customers.

Referring to the testimony of White, sales manager of American, the Government asserts that the testimony of Appellants' witnesses with regard to the policy of the refiners against storing in customers' warehouses did not apply to the latter class of warehouses. White's testimony (R. 862-68) affords no support for such an assertion. White testified that a "public" warehouse even though affiliated with or controlled by a customer was to be preferred to a "warehouse" in which only the customer's own sugar was stored, but that "prior to the formation of the Institute, American stored sugar in a very limited way with customers *or with warehouses affiliated with customers*" (R. 862-63). He testified that American stored with "about 25 out of 9,600 customers" (R. 863) and stored only in "*several* public warehouses in which customers had control or in which they had an interest".

Equally erroneous is the Government's implication that storage with brokers was the rule rather than the exception prior to the formation of the Institute. Worcester of Revere testified that "A good many years ago we stored in a broker's warehouse. It cost us a great deal of money so we discontinued the practice. That is the only time when we stored with brokers knowingly" (R. 688). Arbuckle, which refused even to maintain consignment points in the period preceding the formation of the Institute, obviously never stored with brokers. White, of American, testified that "it was our policy to store with public warehouses, *not with brokers*" (R. 864). The reason for the refiners' reluctance and general refusal to store in brokers' or customers' warehouses or even in "public" or "bona fide" warehouses affiliated with or controlled by customers is precisely that stated by the Trial Court and already quoted on pages 73-74 of this brief.

It is true, as the Government asserts, (Br. p. 107) that in those cases where the brokerage and warehousing functions were combined prior to the Institute, the refiner was deprived of the check which he would otherwise have received. It does not follow, however, that honest and disinterested reports of the broker and warehouseman were not of great importance to the refiner for the purpose of a check, as shown by the undisputed testimony of the refiners (R. 862, 871, 894-95, 900).

The Government's Contention that Brokers and Warehousemen Are Not Really Refiners' Agents

No useful purpose would be served by a discussion of the Government's contention (Br. p. 107) that the warehousemen paid by the refiners are independent contractors and not agents and that brokers are agents of the refiners only in a technical sense. Regardless of the terminology employed, it is submitted the brokers and warehousemen owe to the refiners who employ them the duty of simple honesty, and the experience of the refiners has demonstrated, as found by the Trial Court, that this duty is disregarded in approximately fifty per cent. of the cases where inconsistent functions are combined. The Government refers (Br. p. 78) to a statement of the Trial Court that "concerns which thus combined distributive functions frequently performed in various ways a valuable service to the industry". Clearly, however, the value to the industry of those concerns which refrained from "double dealing" and the perpetration of frauds upon the refiners was in spite of and not because of such a combination of functions. The Trial Court furthermore conceded that "whether, if secret concessions alone had been eliminated, the combination of functions would generally have resulted in advantage or in economies in the distribution of sugar is on this record largely speculative" (R. 115).

The Separation of Inconsistent Functions Was Essential to the Elimination of Frauds and Secret Concessions

As found by the Trial Court, a combination of distribution functions was at times permitted by the refiners for the purpose of facilitating the grant of secret concessions, difficult of detection, "by paying unearned brokerage or storage commissions, and by acquiescing in or authorizing the delay of withdrawal reports by customer-warehouse or broker-warehouse concerns" (Finding 73, R. 283). With the elimination of the direct concessions by the refiners after the formation of the Institute, it was obvious that pressure would be brought to bear upon brokers and warehousemen in order to secure the more devious forms of discriminatory concessions, that could be given *without the knowledge or consent of the refiner,* in cases where functions were combined.

As found by the Trial Court, frauds were perpetrated upon the refiner in fifty per cent of the cases where functions were combined prior to the formation of the Institute.

If the buyer-warehouse combination were permitted, the customer need not be unduly disturbed over the refiners' refusal of straight price rebates. The double dealing that could be indulged in in this situation was sufficiently profitable to compensate for any inability to secure a simple price concession. If the broker-warehouse combination were permitted, it was inevitable that increased pressure would be brought to bear upon the broker-warehouseman to delay withdrawal reports, giving the customer the benefit of extended credit and of any decline in price between the date the sugar was withdrawn and the date of the broker-warehouseman's report. Meanwhile, the latter would have the benefit of unearned storage. Under this increased pressure the fifty per cent prevalence of dishonesty found by the Trial Court before the Institute would undoubtedly have mounted toward the one hundred per cent mark.

If the granting of discriminatory concessions by the refiners' own brokers and warehousemen and the defrauding of the refiners was to be prevented, it was essential, as a practical matter, that the refiners refuse to permit combinations of functions which facilitated and invited such practices. The Government's contention that the refiners should have permitted the existence of the very cause of such evils, and should have prevented by constant investigations, the results inevitably to be expected therefrom, simply ignores the realities of the situation. The opportunity for discrimination and frauds by the refiners' own brokers and warehousemen existed in every single case where such functions were combined with each other or with the merchandising of sugar. It would have been utterly impossible for the refiners continually to check all such combinations to determine whether their sugar was being properly handled or to discover and prove dishonesty in cases where it existed.

The Necessity of Complete Separation of Functions

The Government points out (Br. p. 86) that while the policy with respect to separation of functions had its inception in the Code of Ethics itself, it was not made definitely effective until May, 1929. It was only after the failure of a year's attempt to prevent the perpetration of frauds upon themselves and the granting of discriminatory concessions by their brokers and warehousemen that the refiners were compelled finally to insist upon a complete separation of these inconsistent functions which made such practices possible. The discussions of the refiners leading up to the final adoption of the policy condemned by the Government were described in detail by Taylor (R. 891-96). The following brief excerpts sufficiently indicate the situation with which the refiners were confronted and the necessity for the requirement of the separation of functions condemned by the Government:

> "Commencing October, 1928, problems or complaints were brought to the Institute by refiners regarding these alleged affiliations of brokers and warehouses with buyers. The discussions continued until May 2, 1929, the time of the adoption of the resolution bearing on that question. * * * It was pointed out by Place that the very discriminations which the Institute had sought to remove from the industry by the adoption of the Code of Ethics were being defeated by brokers who were continuing to merchandise and pay part of their brokerage to customers. In addition, the brokers themselves were

engaged in some instances in merchandising, thereby making themselves preferred customers. They were to all intents and purposes receiving a rebate or a concession on the amount of sugar they purchased and sold for their own accounts. Other members of the Institute referred to the same suhject. * * *

"In the latter part of 1928 these questions became of current importance to the members and as time proceeded the problem became more and more difficult. They had come to look upon this particular question as over-shadowing everything else with which the Institute was concerned at that time.

"Place pointed out that unless something could be done to prevent these brokerage and warehouse practices, which were resulting in discrimination, concessions and affiliation and these practices handled in such a way as to enable the refiner to keep control of his sugar, the Institute might as well fold up its shop and quit. He thought that the fundamental purposes of the Institute were being so impaired as to make its effort in some localities practically useless unless this question could be met. This opinion was shared by practically every member. * * * It was likewise pointed out that * * * the fundamental purposes for which the Institute had been organized were being defeated by the alleged unethical practices of certain warehousemen and brokers at various places. They mentioned particularly the practices of delayed hilling and the fact that brokers engaged in merchandising business enjoyed a preferred position as compared with the regular customer.

"There were many reports by various refiners of rebating by warehousemen. Practically all of the refiners in the Northwest had reports from their brokers and from various customers to the effect that certain brokers and warehousemen were making concessions in terms of service or direct monetary rebates for the purpose of securing business and that in some instances they were actually building up monopolies by this practice."

The Action Taken and Procedure Followed by the Refiners Was Entirely Reasonable

The Government's contention that the refiners acted harshly, arbitrarily and unreasonably in refusing to make an exception in favor of particular warehouses operated or controlled by or affiliated with brokers or buyers on the ground that such warehouses were in fact honestly operated despite their buyer or broker control or affiliation misses the very heart of the problem confronting the refiners. The error here made by the Government is essentially the same as that involved in its argument that the refiners were not justified in refusing to store in "bona fide" or "public warehouses" owned or controlled by or affiliated with customers or brokers. The same evils inherent in the situation where a customer stored, on his own premises or in his own warehouse, sugar intended only for his own use are likewise inherent in the situation where sugar is stored in a broker's warehouse or in a "bona fide" or "public" warehouse owned or operated by or affiliated with a customer.

In all such cases, the *opportunity* for frauds existed *through* the control exercised over the warehouse by the broker or customer, and the refiners could not proceed on the assumption that the temptation would be resisted or that it would be possible for them to detect such frauds by investigations, in the face of their experience to the contrary. It was essential, as a matter of practical necessity, that the refiners adopt, as a basic principle, a policy of refusing to store in such warehouses and to adhere to such a policy without deviation. It would have been utterly impossible for refiners to undertake, in every case of broker-warehouse customer affiliation, to *investigate* such combination for the purpose of determining whether dishonesty and cheating were going on, much less to *establish* the existence of the fraud. A combination of inconsistent functions which created the opportunity for undetectable frauds had to be adopted as the decisive factor.

Although the Government complains of the procedure followed by the refiners in the determination of the existence of a combination of functions, it does not challenge the correctness of a *single finding* of affiliation during the entire period of the Institute's existence. The procedure followed in determining whether or not a warehouse was owned by or affiliated with a buyer or broker is described briefly on pages 136 and 137 of Appellants' brief. It is submitted that such procedure was an entirely reasonable and proper one. Contrary to the Government's understanding (Br. p. 76) representatives of concerns investigated did, at times, attend the hearings with respect to the question of affiliation, as shown by the minutes (Exs. 21-26, pp. 567; Ex. 27, pp. 67, 68, 77). The record and the minutes show that the Institute always stood ready to receive any complaint made with respect to a finding claimed to be erroneous and to alter the finding if it was shown to be incorrect. Fisher testified (R. 878):

> "If a member is not satisfied with the finding of the Executive Committee he appeals to the Board of Directors for a review of the case. We will reconsider a case if someone so desires. Frequently we have changed our findings. A member using the facilities complained of always goes back to the

> warehouse and gets its or the broker's side of the story and protests vigorously if he is convinced that the complaint is not correct. The warehouseman does not personally appear but the member who is using the warehouse does and raises Cain about it if he is convinced the complaint is wrong."

The Government contends that the refiners were not justified in refusing to make exceptions in the application of the general principle which they were forced to adopt and adhere to as a matter of practical necessity. On pages 93 to 102 of its brief, the Government cites various specific examples of alleged "harsh and arbitrary application" of the policy adopted by the refiners. The Houston Central Warehouse of Houston, Texas is one of the Government's examples. This warehouse was owned and controlled by the owners of the Schumacher Company, wholesale grocers, which was next door and had a common loading platform with the warehouse. The Schumacher Company operated the warehouse, through a separate building, as an adjunct to their grocery business, compelling the refiners nominally to pass every shipment of sugar destined to any of the many branches of the Schumacher Company through the warehouse and to pay storage on it, even though the ultimate destination of the shipments was some other city, and intermediate consignment to the Houston Central Warehouse necessitated a back haul. The sugar was never even unloaded at the Houston Central Warehouse although storage was charged. Here was a typical example of abusing the warehouse-customer relationship for the purpose of hi-jacking the refiners (R. 533-35).

Even more surprising is the Government's use of the Edgar organization as an example of the alleged "harsh and arbitrary application" of the principle adopted by the refiners. The chaotic conditions and fraudulent practices resulting from the combined brokerage, warehousing and merchandising operations of the Edgar organization are so fully reviewed in Appellants' brief (pp. 141-48) that it is not necessary here to make any further answer to the Government's efforts to minimize the same (Br. pp. 112-15). However, it is significant that the Government feels constrained to urge that "the Edgar situation was in no way typical" and that "the Edgar organization itself was unique" (Br. p. 112).

The Refiners' Purposes

In support of its contention that the refiners' dominant purposes were "to aid in preserving the uniformity of the price structure" the Government refers to the fact that *one* of the admitted purposes of the refiners was to prevent the discrimination involved in the participation of the customer in the fee paid by the refiner to his broker or warehouseman. For a broker-warehouseman to use, for the purpose of securing a particular customer's business, part of the combined fees paid to him by the refiner is, in effect, just as much an unfair and discriminatory concession and just as prejudicial to other customers of the refiner as the granting of a straight price rebate by the refiner himself. Storage with all customers or in all warehouses owned or controlled by or affiliated with customers, even apart from the facilitation of frauds constantly present in such situations, would be utterly impossible as a practical matter. To adopt this practice with some and refuse to adopt it with other customers would involve a discrimination against those customers to whom the privilege was denied and place them at a serious competitive disadvantage.

While the prevention of discrimination of this type was one of the purposes of the refiners, the assumption of the Government that it was the refiners' dominant and controlling purpose is unwarranted. The refiners' dominant purposes were (a) to prevent pseudo storage arrangements which, as the Government now concedes (Br. p. 82) amounted to nothing more than secret concessions, and (b) to prevent the continuance of the secret concessions and frauds upon the refiners which were obtained and perpetrated by the broker-warehouseman and the customer-warehouseman through the manipulation and falsification of withdrawal reports without the refiners' consent, and which they were helpless to prevent by any other method than the requirement of a complete separation of inconsistent and incompatible functions.

Non-Rebating Agreements

The Government repeats, without attempting to support or justify, the conclusion of the Trial Court that the refiners were not justified in concertedly requiring the brokers and warehousemen whom they employed to refrain from granting rebates and concessions. The only reason stated for such a conclusion is the bare assertion (Br. p. 124) that the refiners' "professed aim of preventing secret arbitrary discriminations could have been realized by less drastic means". The propriety of the refiners' professed aim, the prevention of discriminatory rebates and concessions is not disputed. It is difficult to conceive of any less drastic means or any more proper and reasonable method of accomplishing such a legitimate object than to require their brokers and warehousemen to agree to refrain from such practices.

IV.

TRANSPORTATION

(a) *Code* 3(c)

No useful purpose would be served by an extended review of the Government's discussion (Br. pp. 128-39) of the efforts made in the early months of the Institute's existence to give effect to Code 3(c) and the Code Interpretation adopted thereunder condemning the sale of transportation at less than cost. Although the Government concedes (Br. pp. 130-31) that "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" it fails to refer to the further finding of the Trial Court that "But slight effort was made to enforce Code 3(c) after the summer of 1928. It was abandoned at least by the fall of 1929 and probably much earlier. The Code Interpretation was finally rescinded in September, 1930" (Finding 104, R. 290).

Despite the complete failure and abandonment of the principle because of its impossibility of practical application in the face of the competitive conditions prevailing in the sugar industry, it is believed that the principle can be justified as a proper attempt to prevent discrimination between buyers in different communities through the imposition of an undue burden upon consumers in markets where transportation was on a cost basis and to permit refiners to compete with one another in areas beyond those where they had the lowest freight rates. The basic question involved is whether competition is promoted more effectively by giving nearby and differential route refiners a practical monopoly of any given market or by allowing other refiners access thereto. The question is moot, however, in view of the demonstrated impossibility of the application of the principle in the sugar industry and its complete abandonment under the pressure of competition, long prior to the institution of this suit.

(b) *Delivered Prices*

(See App. Br. pp. 224-47; Govt. Br. 139-59.)

The Government's contention that delivered prices were introduced through an unlawful concert of action is, it is submitted, fully answered by the discussion of this question in Appellants' brief (pp. 224-35) where the competitive conditions which resulted in the adoption of such a policy by the individual refiners are reviewed in detail. In passing, it is desirable to point out the fallacy of the Government's contention (Br. p. 139) that Code 3(c) and delivered prices had "a common objective", that is, to prevent granting of freight applications based on differential routes. Delivered prices, in fact, represented the antithesis of the Institute transportation principle as set forth in Code 3(c) and the Code Interpretation thereunder. Under delivered prices, the buyer was denied the privilege of buying f. o. b. refinery and shipping at his own expense over such route as he chose. Code 3(c) and the Interpretation thereunder, while condemning as unsound the use of differential rates on deliveries from consignment or on rail shipments made by the refiner, *expressly recognized* the right of the customer at all times to buy f. o. b. refinery and "ship over differential routes from refinery points, taking the slower service at his own cost and risk of the market during the transit period" (Opinion, R. 134-35).

In the face of the specific finding of the Trial Court (Finding 105, R. 291) that "the direct evidence is that there was no agreement in introducing the delivered prices", the evidence upon which the Government relies does not warrant the "inference" of unlawful concert of action. An unlawful "combination and conspiracy" concertedly to adopt delivered prices is not established by the fact that, prior to receipt of advice of counsel, the refiners through discussions, "became familiar with the possibilities" of delivered prices or by the fact that delivered prices were regarded as a possible "solution" of the transportation problems confronting the industry. Even giving full effect to the statement of the Trial Court that thereafter, the refiners "concerned themselves at their meetings *in some degree* with the question of delivered prices", the evidence falls far short of that necessary to establish the unlawful concert and conspiracy charged. This last statement of the Court quoted above is, moreover, inaccurate and misleading in the extreme, as pointed out on page 234 of Appellants' brief.

The glaring weakness of the Government's contention that delivered prices were concertedly and unlawfully introduced is evidenced by its heavy reliance (Br. pp. 143-45) upon Rudolph Spreckels' injured outburst discussed at pages 234-235 of Appellants' brief. The letter was nothing more nor less than a bitter complaint by an injured competitor regarding the drastic action taken by Arbuckle.

It was in no sense a plea for delivered prices, and Abbott's detailed testimony (R. 788-91) regarding the factors responsible for American's announcement of delivered prices clearly establishes the lack of foundation for the Government's argument with respect to Spreckels' letter.

Equally inadequate is the evidence relied upon in support of the finding that delivered prices, even if not introduced pursuant to unlawful agreement, were concertedly and unlawfully maintained pursuant to agreement on the part of the refiners. The Government's major contention in this respect is that Appellants sought and obtained from the off-shore selling agents an agreement to adhere to the practice of selling upon delivered prices (Br. pp. 150-55), which contention was, we submit, completely refuted in Appellants' brief (pp. 236-44). The Government, in its discussion of Taylor's letters to Lamborn and Lowry, ignores entirely Taylor's undisputed testimony that he was, at the request of Armstrong, merely asking these sellers to put in writing the statements that they had *previously made to him* with respect to their individual practice regarding delivered prices. It is only by thus ignoring Taylor's clear and unequivocal testimony quoted on pages 238 and 239 of Appellants' brief that the Government's erroneous interpretation of this correspondence is possible. The Government's statement (Br. p. 154) that Taylor did not testify "directly" to the paragraph of his letter concerning delivered prices is a mere quibble. The reason for this paragraph was fully explained by Taylor who testified first that Lamborn and Lowry had orally advised him what their practice was with respect to selling on a delivered price basis, and then testified that, in writing to Lamborn and Lowry, his object was merely to have them "confirm the things which they had stated to me on the previous day and which I had reported to Bass" (See App. Br. pp. 238-39).

In support of its contention that delivered prices were concertedly maintained, the Government further argues (Br. pp. 155-59) that this was "the impression given the trade". The correspondence with the off-shore selling agents has already been discussed. The lack of any reasonable basis for such an "impression" on the part of Edgar's attorney is clear from the review of his testimony on pages 244 and 245 of Appellants' brief. Statements of the type referred to on pages 156 and 157 of the Government's brief have already been discussed (pp. 245-47). The Government further argues (Br. pp. 157-58) that the delivered prices must have been concertedly maintained because the refiners referred at times to instances where delivered prices were "defeated". It is perfectly obvious from the very examples cited by the Government that by "defeat of delivered prices" is meant secret devices to defeat the refiners' open announcements.

On page 150 of its brief, the Government refers to the finding of the Trial Court that "The Institute policed delivered prices for the purpose of maintaining them" (Finding 109, R. 292) and the further finding that "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" (Finding 112, R. 292). The Government's assumption that these findings are no longer disputed because of the fact that these findings are not specifically discussed in Appellants' brief is unwarranted. These findings were specifically assigned as error (A. of E. 42, 45, R. 336) and were not included among those expressly waived on pages 5 and 6 of Appellants' brief. Although limits of space precluded specific discussion of the detailed findings of the Trial Court in these and various other matters, it is perfectly clear from the general discussion of delivered prices in Appellants' brief that the correctness of these findings is challenged, and the challenge successfully supported.

The fact that the Institute investigated alleged departures from delivered prices openly announced by the individual refiners as well as alleged violations of any other price or term openly announced by the refiners, is not for a moment disputed. Appellants, however, deny emphatically that such action was for the purpose of "maintaining" delivered prices in the sense in which the term is used by the Trial Court. The opinion of the Court fails to disclose any basis other than the refiners' efforts to prevent fraudulent transiting and diversions for the finding with respect to the alleged maintenance of delivered prices in Texas. Such efforts were, it is submitted, clearly proper and justified for the reasons developed at length in Appellants' brief (pp. 182-87) in connection with the discussion of transiting and diversion.

(c) *Private Charters*

(See App. Br. p. 190; Govt. Br. pp. 159-62.)

The Code Interpretation referred to on pages 159 and 160 of the Government's brief was not among those held by the Trial Court to be improper. It was a mere recommendation that refiners themselves should not be concerned with the private chartering of vessels *by buyers*. It did not in any sense represent an attempt to limit, restrict or interfere with the buyers' entire freedom of action, as the Government implies. The other two Code Interpretations referred to by the Government (Br. pp. 161-62) are discussed on page 190 of Appellants' brief. They relate solely to private charters for *refiners' own account* and the prevention of secret rebating by the water carriers and have no relation whatsoever to the letter from Judge Ballou to Edgar referred to by the Government. This letter referred to complaints arising out of the confusion between the rates quoted by Edgar as agent for the refiners and the rates quoted by Edgar acting as merchandizer on his own account. The clear and unmistakable purpose of the two Code Interpretations in question was to prevent secret rebating and not "to equalize competition among the refiners" as the Government asserts (Br. p. 162).

(d) *Water Carriers*

(See App. Br. pp. 187-89; Govt. Br. pp. 163-64.)

The Government disputes Appellants' contention that the action taken by refiners with respect to water carriers was both reasonable and proper (App. Br. pp. 187a-188), and asserts (Br. pp. 163-64) that "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." The "essential difference" between the action of the Interstate Commerce Commission and the only action taken by the Institute is clear. The Interstate Commerce Commission fixes rates. The refiners did not attempt to fix, regulate or control the *rates* charged by water carriers. The refiners' sole purpose and effort was to secure *open announcement* of the rates charged by water carriers for the transportation of sugar and to insure that the refiners' own transportation payments would not be used for secret rebating.

(e) *Pool Shipments*

(See App. Br. pp. 191-92; Govt. Br. pp. 164-65.)

The argument advanced by the Government with respect to this phase of the case is, it is submitted, fully answered in Appellants' brief. Appellants submit that, contrary to the Government's contentions, the refiners may properly refrain from granting to a *few* customers a privilege which obviously cannot be afforded to all and where the necessary effect of such action is to prejudice those customers who are not thus favored.

(f) *Transiting and Diversion*

(See App. Br. pp. 182-87a; Govt. Br. pp. 165-71.)

In its discussion of this subject, the Government first asserts, without attempting to justify the assertion, that the refiners' freight applications were "artificial". Having attached, without justifying, the label of "artificiality" the Government then argues that the refiners acted unlawfully in attempting concertedly to prevent fraudulent efforts on the part of buyers to avoid paying the "artificial" application announced by the refiner and embodied in the buyer's contract and to force the refiner to absorb more of the freight cost at point of destination than he had announced.

As pointed out in Appellants' brief (p. 185b), the freight applications which gave rise to the prohlem of transiting and diversion were "artificial" only in the sense that they were *always less than the actual rates charged by the carriers* to the more distant refiners who were competing in a given area, and they thus represented a freight loss by such refiners. To take the very example cited by the Government (Br. p. 166), the actual freight rate from New Orleans to both Hearne and Dallas, Texas was 58c. The New Orleans refiners' announced application at Hearne was 45c, representing a freight absorption of 13c and their announced freight application at Dallas was 55c, representing an absorption of 3c. The Government points out that a buyer might "defeat" the refiner's announced application of 55c at Dallas by ordering the refiner to ship the sugar to Hearne, where the application was only 45c, and then transiting or diverting the sugar to Dallas, without the refiner's knowledge. What the Government attempts to defend, in the name of competition, by terming it merely a "defeat" of the refiner's "artificial" freight application, amounts obviously to a fraudulent device to cheat the refiner out of 10c per bag, the difference between the amount the refiner had contracted with the buyer to absorb on the shipment to Dallas, and the greater amount the refiner was willing to absorb on shipments to Hearne.

The Government does not dispute the fact that the buyer in the very instance above referred to is perpetrating a deliberate fraud upon the refiner, where this device is not consented to. Yet the Government asserts that *concerted* action for the purpose of preventing such frauds is unlawful, without attempting to show how competition is unduly restrained thereby. This argument proceeds upon the implied theory that buyers have a sort of vested or inalienable right to cheat the refiners out of part of the price the buyers contract to pay for sugar by misrepresenting to the refiners the destination to which the sugar is to be shipped.

The Government's further argument (Br. p. 168) that the steps taken by the refiners were unlawful because designed to prevent even such transiting and diversion as the refiner might consent to involves an absurdity already answered in detail in Appellants' brief (pp. 186-87). It borders on the fantastic to argue that a refiner would openly authorize transiting or diversion for the purpose of "defeating" his openly announced freight application at any given point.

The Government's real, underlying contention, although not clearly stated, is that it is unlawful for refiners to refrain concertedly from *secretly* authorizing particular customers to transit or divert shipments for the purpose of obtaining delivery at a price lower than that which the refiner has openly announced at destination point, and at which he *purports* to sell to all of his customers without discrimination. This amounts, in effect, to a contention that, where freight rates are involved the sellers may not lawfully agree that they will refrain from granting secret concessions. Such a contention is indefensible.

If it is lawful for sellers to agree not to give secret concessions, as the Trial Court found and the Government admits, the steps taken to prevent a frustration of this principle through the abuse of the transit and diversion privilege were equally proper and lawful.

V.

CONSIGNMENT POINTS

(See App. Br. pp. 206-24; Govt. Br. pp. 171-88.)

Throughout its entire discussion of this phase of the case, the Government completely overlooks the fact that prior to 1925 consigned stocks were maintained by the refiners at only a few strategic points throughout the country, the points selected being important terminal or junction points from which transshipment would ordinarily be made, or markets from which sugar could be supplied to a large surrounding territory. The purpose was to give prompt service to substantial areas, and not to carry the jobber's sugar for him. It was not until the two or three years immediately preceding the formation of the Institute that the situation developed into abuse and consigned stocks were unnecessarily and wastefully multiplied (App. Br. pp. 206-7). The action taken by the refiners was designed to eliminate waste and abuses of recent origin and not to alter the prior long established and useful practice in the industry.

The Government suggests (Br. p. 172) that the Code recommendation that "sugar shall be consigned only to recognized detention points for reshipment, or to recognized markets" was ambiguous and "completely negatives Appellants' suggested inference that the subsequent action of the Institute had been informally approved by the Department of Justice at the time the proposed Code was submitted to it." This suggestion is not supported by the record. Not only does this provision plainly contemplate a restriction of consignments to important points, but the very evils which the refiners subsequently sought to correct were discussed at length with the Attorney General's office at the time (R. 618-20).

The Government states (Br. pp. 172-73) that the refiners failed to limit the consignment points eliminated to such points as "they determined in good faith upon investigation, to be in excess of the real needs of the trade", but instead undertook to eliminate every consignment point upon which an agreement could be reached. The very fact that all of the refiners could agree that a given consignment point should be abolished was the best evidence that it served no useful purpose. It is submitted by Appellants that, with few exceptions, consigned stocks were of no real value to the trade, that they were not necessary to meet the actual needs of the refiners' customers and that, despite the failure of the refiners even to effect a reduction in the total number of consignment points, the abolition of a large proportion of them would have been a sound and economic ideal.

The Government (Br. p. 174) refers to and quotes from a letter of Judge Ballou, as conclusive evidence of the efforts of the refiners with respect to the elimination of consignment points, efforts which Appellants have never denied but which they admit and defend. The Government, however, refrains from any attempt to argue that consigned stocks were *necessary* or of real value to the trade at any of the points referred to. It is utterly impossible to argue that consigned stocks are either valuable or necessary at such points, for example, as the New England States, New Jersey, Delaware, Maryland, New York or Pennsylvania in view of the immediate deliveries that can be made from New York, Philadelphia, or Baltimore refineries. The same is equally true of the other points referred to on page 175 of the Government's brief.

The Government does not challenge the fact that, even after a consignment point was eliminated, any individual refiner was free to change his mind and to reinstate the point in question, but dismisses this fact as "immaterial" (Br. p. 176). We disagree sharply with the Government's position in this respect, and submit that an agreement with respect to the elimination of consignment points, unnecessary and of no real value to the trade, is entirely lawful and proper so long as every refiner is free to reinstate such points.

The Government's Failure to Meet the Argument as to Economic Waste

The basic question to be determined is whether the maintenance of consigned stocks at literally hundreds of points throughout the entire country, at an annual cost of between two and three million dollars, was justified because of any real value to the trade. It is submitted that the Government has failed entirely to meet Appellants' argument on this fundamental point (App. Br. pp. 211-16).

It is perfectly true, as the Government points out (Br. p. 180) that a refiner who established a consigned stock at any given point obtained a slight competitive advantage over refiners not having a consigned stock at such point. The competitive advantage immediately disappeared as soon as his competitors followed suit and duplicated the consignment. It does not follow, however, that any of these stocks were necessary to or of real value to the trade at that point. The Government fails to distinguish between slight convenience and an actual need.

The Government argues that consigned stocks are of real value to the trade because they "enabled a jobber to give prompter service to his trade" (Br. p. 181). Yet further on in its brief (p. 186), the Government refers to the testimony of one of Appellants' witnesses that he knew "of no place after the withdrawal of a consigned stock where the brokers could not get sugar almost overnight". The Government overlooks the fact that not a single witness testified to any lack of prompt and efficient service in obtaining sugar even at points where consigned stocks were eliminated. It overlooks the testimony of Castle, of National, which sold in the area with the fewest number of consigned stocks (Exs. F-15, R-6) that all of National's customers could be reached by direct shipment within twenty-four hours through the use of transit stocks (R. 927). It overlooks the testimony of Flintom, that the wholesale grocery houses with which he was affiliated had no difficulty at all in filling even emergency requirements after the withdrawal of consigned stocks, that sugar shipments were handled promptly and that consigned stocks were of no real value. The Government's own witnesses testified to their ability to secure prompt deliveries even after the withdrawal of consigned stocks (R. 545, 546).

The Government refers to the fact that the withdrawal of consigned stocks resulted in protests from various Chambers of Commerce, traffic associations and individual distributors. No action of this kind in regard to any practice could be taken to the entire satisfaction of everyone, and the existence of a few isolated complaints is scarcely impressive. Fort Wayne argued its own advantages as against Indianapolis. The burden of the Youngstown complaint was that Akron remained as a consignment point. It was inevitable tbat some of the towns from which consigned stocks were withdrawn because they were unnecessary would object. Wasteful practices in trade and industry always build up interests which feel that they have a vested right in the continuance of the waste, and they are therefore bound to object when the waste is ended.

The Government asserts (Br. p. 183) that there is nothing to show that the savings effected by distributors through taking direct shipments from the refinery instead of trucking sugar at their own expense from consignment warehouses were sufficient to offset "the savings incident to delivery from consigned stocks". In this connection the Government overlooks entirely such testimony as that of Flintom who testified that "our withdrawals from consignment in 1927 were an expensive luxury. There was no saving of money or competitive advantage to us in doing so" (R. 959) and that his concern did not draw upon consigned stocks, even when available, for more than one-sixth of their requirements (R. 956). The Government's sweeping assertion that "many, if not most, of the jobbers and wholesalers in small communities" are unable to effect any savings on direct shipments from the refinery since they do not have warehouses on a railroad siding and are unable to buy in carload quantities, is scarcely justified by the testimony of the single witness referred to.

The Government refers (Br. p. 183) to an apparent inconsistency between the statement in Appellants' brief (p. 127) that refiners sell "largely from consigned stocks" and the statement that customers at consignment points generally ordered for direct shipment instead of consignment delivery and the fact, as shown by Exhibit W-6, that consignment deliveries have represented from 26% to 33% of total deliveries. The statement that refiners sell largely from refined stocks was not meant to imply that the greater portion of all sugar sold is delivered from consigned stocks but merely that a large and substantial amount is sold in this way.

The Government does not challenge the fact that the cost of maintaining consigned stocks varied between \$2,500,000 and \$2,900,000 per year, beyond characterizing these figures as a "theoretical computation" (Br. p. 184). It may be pointed out, in passing, that far from being a mere "theoretical computation" these figures are based upon the undisputed evidence of the Record (See App. Br. p. 209). The Government argues that the cost of maintaining the great numbers of consigned stocks throughout the country has not been shown to be unnecessary or wasteful or "prejudicial to the ultimate consumer" because the cost is one borne by the *refiners* and if not borne by them would fall upon the *distributors*. Such an argument is basically unsound. It is perfectly obvious that any element of additional cost to the refiner is necessarily reflected in an increased basis price for the sugar sold by the refiner and inevitably passed on to the ultimate consumer. That "the cost of increased consignment points might well be reflected in a higher general basis price" was, in fact, conceded by the Trial Court (R. 170). The purpose of the refiners was to eliminate a useless and needless expense. Consignment points were nothing more than a slight convenience to a very limited number of distributors and in no way necessary for the prompt and efficient distribution of sugar.

It is utterly impossible for the Government to defend as a necessary and proper cost of distribution the maintenance of consigned stocks at 13 points in Alabama, 16 points in Georgia, 38 points in Illinois, 17 points in Indiana and 47 points in Texas, as was the situation in 1927. In the states for which the Institute made no recommendations because of a lack of agreement on the part of the refiners the situation went from bad to worse. Between 1927 and 1931 consignment points increased in Arkansas from 5 to 22, in Illinois from 38 to 91, in Missouri from 12 to 63 (Ex. S-6).

The Government argues that "a reservoir of stocks" must be somewhere maintained, either at the refinery or at consignment points and, if consignment stocks are less fluid and therefore a more wasteful type of reservoir, the same problem faces the distributor. Obviously, it is more efficient and far cheaper to maintain a single "reservoir" of stocks at the refinery itself, or a limited number of "reservoirs of stocks" at strategically located points than to establish and maintain literally hundreds of "reservoirs" throughout the entire country. The Government does not attempt to defend as sound, economic, necessary to the distributor or beneficial to the ultimate consumer the maintenance in 1931, for example, of 22 such "reservoirs" in Arkansas, 91 in Illinois or 63 in Missouri (Ex. S-6). This is the situation that developed in the absence of any recommendation or agreement with respect to these states. Yet in those states where the elimination of consigned stocks *was* effected by recommendation and agreement the Government urges in each case that the refiners had unlawfully restrained "competition". Another factor that the Government overlooks in its "reservoir" argument is that the establishment of a reservoir by one refiner at any given point results, as a practical matter, in action on the part of all other refiners, competing in that community. The first "reservoir" is unnecessary since, as the evidence shows, the requirements of the trade could be satisfied promptly by direct shipment from the refinery or from storage-in-transit stocks. The establishment of additional "reservoirs" at the same point by all other refiners competing there simply multiplies the amount of unnecessary stocks by the number of refiners involved.

Contrary to the Government's assumption, the same problem does not confront the distributors. The average distributor must have his own warehouse for the storage not only of sugar but of the countless other food products which he sells to the retail trade. His average turnover is at least a carload of sugar a week (R. 956, 812, 958). He is in a far better position than the refiner to gauge the requirements of the local retail trade. He does not need the maintenance by the refiner of "reservoirs of consigned stocks" if he is willing to exercise even a moderate amount of foresight with respect to ordering his requirements, as the evidence conclusively shows, because he can get any amount and variety of sugar he wants within twenty-four hours or less after ordering it.

The presence of consigned stocks in numerous small communities seriously interfered with the activities of legitimate distributors who had heavy overhead expenses in the operation of their warehouses and in the general maintenance of their business. They were seriously handicapped by the activities of desk jobbers who, without any expense or organization whatsoever and performing no useful function in the trade, were able to maintain themselves when there was a consigned stock on which they could draw. The elimination of such consigned stocks was thus requested at times by distributors themselves (Ex. 27, p. 105).

The Government's final argument (Br. pp. 187-88) that the elimination of consigned stocks was prejudicial to the small refiner because of certain admitted disadvantages is conclusively answered by the fact that no consignment point was eliminated without the cooperation of *all* refiners. Unless the advantage to the small refiner outweighed any such disadvantages, the small refiner would not have agreed to the elimination of the point in question, and the Government solicitude for the small refiner in this matter is therefore unnecessary.

VI.

LONG TERM CONTRACTS

(See App. Br. pp. 170-79; Govt. Br. pp. 188-207.)

The General Question

On pages 170 and 171 of Appellants' brief it was stated as follows:

> "At the time of the formation of the Institute, the great bulk of all sugar was sold under contracts by the terms of which the buyer was obligated to take delivery within thirty days after the date on which the contract was entered (R. 663, 671). The outstanding exception was a special long term contract offered by C. & H. and Western to canners in the Pacific Coast states (R. 716, 882-3). With the possible exception of Revere, no eastern or southern refiner *openly announced and offered to the trade at large or to any special class of buyers,* whether canners, manufacturers or jobbers, any form of contract providing for delivery beyond the usual thirty day period, although certain large buyers such as Edgar, Coca-Cola, National Biscuit and Canada Dry were able to secure special contracts from certain refiners permitting deliveries beyond the usual

> thirty day period and carrying other discriminatory concessions."

The Government challenges the accuracy of the statement above quoted with the assertion (Br. p. 192) that

> "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."

The references given in the footnotes on pages 191 and 192 of the Government's brief, far from indicating any inaccuracies in Appellants' statement, completely substantiate it. With few exceptions, the contracts cited by the Government are those expressly referred to by Appellants. The only additional long term contracts cited by the Government are those obtained by *two* large chain stores (A. & P. and Kroger), *two* distributors (J. J. Meier Company and Gilmer Grocery Co.) and a *few* manufacturers, the only one named being the Wrigley Company. The record shows only that Colonial gave one long term contract, that C. & H. and Western gave long term contracts to canners only and continued to offer such contracts after the formation of the Institute. There is no evidence whatsoever to show that Texas gave such contracts and Goetzinger testified that Arbuckle offered to its customers only a standard thirty day contract and that he had "never heard of any other refiners openly announcing a special kind of long term contract, either to the trade at large or to a special class made up of manufacturers, canners or jobbers" (R. 1044). Aside from the special canners' contract offered by the two Pacific Coast refiners and the special standing order contract offered by Revere to *some* of its customers, there is no evidence in the record to show that more than a handful of buyers in the entire country were ever granted long term contracts.

Referring to Appellants' statement that these special contracts permitting deliveries beyond the usual thirty day period carried *other* discriminatory concessions, the Government states (Br. p. 192) that Appellants imply "that a sale for delivery beyond thirty days is in itself discriminatory". Appellants make no such contention. Appellants contend that an extended delivery period is a discriminatory concession *only* when the privilege is granted secretly to a few favored customers and not offered openly by the refiner to all of his buyers or to all buyers of a particular class. In support of its assertion (Br. p. 192) that "the evidence does not show that these contracts, as a general rule, otherwise granted concessions", the Government refers to nine Coca-Cola contracts "at a specified price, without any special terms". Since the Coca-Cola contracts all involved price concessions (R. 438), obviously no other special terms or concessions were necessary.

The "economic value" of long term contracts is argued at length by the Government (Br. pp. 193-97). No useful purpose would be served by a detailed review of the Government's contentions in this respect. The question to be determined is not the economic value of long term contracts, but whether the refiners may lawfully agree to offer such contracts only upon the basis of open announcement without discrimination among their customers. It may be noted, however, that the only argument made by the Government in support of its contention that such contracts are necessary or valuable to the buyer of sugar is that such contracts enable *manufacturers* to determine the cost of raw materials for a considerable period in advance. The Government overlooks entirely the fact that a manufacturer requiring a fixed price upon raw materials for some time in advance was always free to purchase any quantity of sugar he wished and cover his requirements for such period of time as he desired. If such a practice would entail storage charges on the part of the manufacturer, a similar problem confronted the refiner. Unless the refiner wished to gamble against an advance in the raw sugar market he would be forced to protect himself by buying and storing sufficient raw sugar to cover the amount of the fixed price long term contract.

The Government refers (Br. p. 196) to a statement of the Trial Court that "the astute refiner could protect himself against 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". Such a statement overlooks entirely the fact that the majority of the refiners *do not* operate in raw sugar futures (R. 590). Cummings testified that:

> "There is a difference of opinion in the industry as to hedging and the value of it. * * * There is expense involved and the payment of brokerage fees and they have to put up margins. I have heard some refiners say that hedging was a gambling operation even on the Exchange; that the protection was not definite or certain even there" (R. 623).

Goetzinger of Arbuckle, after thirty years in the sugar refining industry (R. 669), testified that in his opinion it was impossible for a refiner to cover himself by hedging operations (R. 1046). Finally, hedging by all or even a majority of the refiners was not possible. Two or three might hedge as long as the rest refrained, but if many of them attempted it the Exchange would be swamped.

The argument made by the Government on page 198 of its brief involves a serious misstatement of Appellants' position. Contrary to the Government's assertion, Appellants *did not* state or contend "that any contract with terms sufficiently complicated to require private negotiation 'is necessarily and of its very nature discriminatory' ". The statement in Appellants' brief (App. Br. p. 172) which the Government has misconstrued was as follows:

> " * * * We submit that a contract 'arranged by private negotiations' and embodying prices, terms or conditions that are not openly announced and extended to all of the refiner's customers who desire to accept them, is not a 'fair contract' (Finding 144, R. 300) but is necessarily and of its very nature discriminatory."

Neither do Appellants assert or contend, as stated by the Government (Br. p. 198) that "in order to avoid unfair discrimination, every purchaser in the country must purchase upon precisely the same terms". All that Appellants contend is that there be prompt open announcement of the making and offering of any such contract in order that all customers similarly situated may have a reasonable opportunity to take advantage of the same terms.

The Government's statement (Br. p. 200) that the special type of standing order contract formerly offered by Revere to certain of its customers (but not generally announced to the trade, R. 691), was "prevented" by the open price system, is contradicted by the testimony of Worcester, chief executive of Revere, who testified:

"* * * After the adoption of the policy which provided refiners should openly announce their terms there was no longer any reason for us to attempt to give contracts of that type. We did not feel that it was necessary or advisable, either for us or our customers. We did not make any further contracts for deliveries beyond 30 days. *We could have made them if we openly announced them. We felt perfectly free to do anything as long as we announced it openly*" (R. 695).

The Special Edgar Contracts

In connection with its discussion of the finding of the Trial Court that Judge Ballou "sought and obtained from Edgar an assurance that he would maintain refiners' prices and not take advantage of the opportunity afforded by these contracts (with Godchaux and Revere) to cut prices", the Government states that "Appellants admit that the Institute system contemplated price uniformity" (Br. p. 202). This statement is misleading in the extreme and involves an obvious misapprehension of Appellants' position. The Institute system did not "contemplate" price uniformity in the sense the Government implies. In the case of a completely standardized commodity such as sugar, prices are *bound* to be uniform if openly announced and known to buyers and sellers. As found by the Trial Court, uniform prices are to be expected, under a regime of free competition (Opinion R. 221; Finding 17, R. 269) and, in the years of absolutely unrestrained competition before the Institute, prices *were* uniform except for the concealed concessions which were given to favored customers (Opinion, R. 220-22; Finding 17, R. 269). During the period of the Institute, as before the Institute, prices at which the refiners sold were uniform not because of agreement but as an inevitable result of competitive forces. In so far as Edgar obtained his sugar at a concession of ten or twenty cents below that price, he was in a preferred position as far as every other sugar buyer in the country was concerned.

The Government argues that there was no danger that Edgar would engage in the kind of price cutting campaign which Appellants feared and states (Br. pp. 202-3), "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.*" It is obvious, therefore, that competition was not restrained by the assurance Judge Ballou sought from Edgar. He sold at the prices quoted by the refiners when possible and cut prices when necessary. The argument made in Appellants' brief with respect to the justification for the assurance sought by Judge Ballou was in anticipation of a possible claim by the Government that price cutting by Edgar was restrained by efforts of the refiners, which contention the Government does not attempt to make.

Contract Enforcement

The Government challenges the legality of the concerted efforts on the part of the refiners to enforce the terms of their contracts relating to the withdrawal of sugar. The Government argues (Br. pp. 203-4) the desirability of the situation prevailing prior to the formation of the Institute, pointing out that contract enforcement was a matter decided by each refiner in "each individual instance". The practice defended by the Government was one consisting of arbitrary extensions of time to some but not all of the refiner's customers, a practice which was obviously unfair to those customers who were required to live up to the terms of their contracts. These secret and discriminatory extensions, constituting merely one type of concession, were unfair not only to those of the refiner's customers who were denied similar treatment but to other refiners unaware of and thus unable to meet unfair competitive practices of this type.

Confronted with the evidence of its own witness with respect to such discriminatory concessions, the Government characterizes the testimony of Lowry as "irrelevant" (Br. p. 206). Lowry's testimony, cited on page 178 of Appellants' brief, cannot be dismissed as "irrelevant". It goes right to the heart of the situation and clearly establishes the necessity for and the reasonableness of the efforts of the refiners to prevent the continuance of this type of discriminatory concession. Lowry's testimony obviously and necessarily referred to the pre-Institute situation, a situation which could have been corrected only by the concerted efforts of all refiners.

The Government argues that the refiners' efforts at contract enforcement were unjustified because there was little motive for deliberate overbuying after the formation of the Institute. The Government fails to appreciate the obvious fact that such overbuying is discouraged only by the refiners' refusal secretly to reprice such contracts and by the refiners' insistence that buyers accept delivery within the specified contract period. Under the practice prevailing after the Institute, if the trade has overbought on any particular move, an extension of the time within which buyers are required to accept delivery, is granted to *all* of a refiner's customers without discrimination, instead of being granted only to a favored few, as before the Institute.

VII.

QUANTITY DISCOUNTS

(See App. Br. pp. 105-24; Govt. Br. pp. 207-12.)

The Government, in its brief, does not attempt to answer or deny Appellants' basic contention that quantity discounts do not represent or result in any savings to the refiners in either direct or indirect costs. Apparently conceding the correctness of this contention and the error of the findings of the Trial Court to the contrary, the Government merely argues (Br. pp. 207-8) that Appellants are not injured by the terms of the decree, since the decree enjoins only a concerted refusal to grant quantity or other discounts which *do* reflect or result in such savings.

This argument ignores the inconsistency of the terms of the decree which is based upon findings of the Trial Court which Appellants contend, and the Government, in large part, tacitly concedes, are fundamentally erroneous and contrary to the overwhelming weight of the undisputed evidence reviewed at length in Appellants' brief (pp. 107-24). The Trial Court found that "encouragement of large sales through quantity discounts may reasonably be expected to tend in the long run to build up total production and thereby effect economies for the refiners" (Finding 161, R. 303); that "A quantity discount to those wholesalers selling to manufacturers as well as to manufacturers buying directly from the refiner, may well result in a substantial increase in sugar consumption" (Finding 162, R. 303); that "At least in many cases, a discount based solely on quantity would have been justified even under defendants' economic theory" (Finding 164, R. 303); and that "In prohibiting all quantity and other discounts resulting in economies to the refiner, defendants unduly and unreasonably restrained trade" (Finding 165, R. 303).

Reference to the corresponding portion of the Court's opinion discloses that this theoretical argument is based upon the assumption that quantity discounts to such concerns as Coca-Cola would result in increased consumption of their product, increased production and resultant lowered costs on the part of the refiner, justifying the granting of the discount. We believe that we established conclusively in our Main Brief (pp. 110-22) the complete fallacy of the findings of the Trial Court above referred to. The Government in its brief, does not even refer to, much less attempt to defend them.

We submit that appellants are entitled to a reversal of these findings and the provision of the decree based thereon. Appellants have proved and the Government does not deny that quantity discounts on sugar do not, in any case, result in either direct or indirect savings. In the face of this fact, the provision of the decree enjoining a concerted refusal to grant quantity discounts which *do* reflect or result in such savings is wholly unwarranted. It is not based upon past and unlawful misconduct. It implies that quantity discounts do or may reflect or result in savings to the refiners, which implication is completely refuted by the evidence in the Record (App. Br. pp. 107-24). The completely erroneous findings (161(b), 162 and 164, R. 303), when read in connection with Conclusion of Law B 25 (R. 317) and paragraph V 33 (R. 324) constitute a direct adjudication that the discounts described in the findings *do* effect savings to the refiners and that it will hereafter be unlawful for the refiners to concertedly refuse to grant discounts in such cases. These findings are based on the Trial Court's indefensible speculations in the Opinion (R. 183) about savings on sales to manufacturers like Coca-Cola (App. Br. pp. 118-22), and in spite of their manifest error they will become a final adjudication against Appellants on this point unless now reversed.

Quantity Discounts and Long Term Contracts. In a further effort to justify the provision of the decree enjoining a concerted refusal to grant quantity discounts which do reflect savings in costs to the refiners, despite the fact that the record shows quantity discounts do not in any case result in such savings in cost, the Government urges (Br. p. 209) that the quantity discount provisions of the Code "may easily be used as a pretext" for refusing to enter into long term contracts. Such an argument is both illogical and unwarranted. A quantity discount involves merely the question of a concession in price on the basis of the quantity ordered. A long term contract involves merely the question of the time within which a buyer is obligated to accept delivery of sugar purchased. There is no basis for the Government's theory that a refusal to grant an unwarranted concession in price based on the quantity purchased could be used as a "pretext" for a refusal to extend beyond thirty days the delivery period specified in the standard contract. The questions are entirely separate and distinct.

Secret Concessions and Quantity Discounts. The Government asserts (Br. p. 210) that Appellants argue 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." Reference to Appellants' brief (pp. 122-24) will show how completely the Government has misconstrued the argument made by Appellants. The Government overlooks the essential fact that secret quantity discounts are the *only kind* that can exist in the sugar industry. It is only by means of a secretly offered discount that a refiner could attract large customers away from his competitors and increase his total production with the possibility of thereby lowering his indirect costs. In so far as the Government has in mind an openly announced quantity discount, it visualizes a type of discount that has never existed and could not exist in the sugar industry. Quantity discounts in the sugar industry have never been anything other than secret and arbitrary price discrimination and as such were properly condemned by the Code.

Other Discounts. The provision of the decree which the Government seeks to defend enjoins Appellants from concertedly refusing to grant not only quantity discounts but "other discounts" which reflect or result in savings in direct or indirect costs. The contention of the Government (Br. p. 208) that "savings" are effected by direct carload shipments from the refinery as distinguished from ex-consignment deliveries is specious in the extreme. The evidence shows that there is no difference to the refiner as between the cost of a carload and the cost of a less than carload shipment from the refinery (R. 942-43, 966, 973).

All sugar is sold on an f. o. b. refinery basis and from two-thirds to three-quarters of all deliveries are made directly from the refinery. Obviously no real "saving" warranting a "special discount" is effected when sugar is delivered in the regular and normal manner. Such a discount would, of course, amount merely to a different basis price, but clearly the fact that the bulk of all sugar sold is shipped directly from the refinery without the abnormal expense incident to the maintenance of consigned stocks is taken into account and reflected in the f. o. b. refinery basis price.

The question of a "special discount" on direct shipments from the refinery was never even considered, much less restrained, by agreement of the refiners. There is no basis for the entry of a decree enjoining Appellants from concertedly refusing to grant "quantity or other discounts" which reflect or result in savings in direct or indirect costs. No discounts reflecting or resulting in any such savings were ever refused by the refiners.

VIII.

MISCELLANEOUS ACTIVITIES

(a) *Tolling*

(See App. Br. pp. 157-63; Govt. Br. pp. 212-16.)

The only two resolutions adopted by the refiners in connection with this subject are printed on page 160 of Appellants' brief. They express fully the position of the Institute with respect to the question. The Government does not dispute the fact that tolling for raw sugar producers, who would give assurance that refined sugar thus obtained would he sold in accordance with the principles of the Code, was at no time interfered with. The Government contends, however (Br. p. 214), that the Code Interpretation condemning as discriminatory "any contract or agreement entered into by a member of the Institute by which a manufacturer, jobber, 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" constituted an agreement "to eliminate or prohibit tolling contracts".

Appellants fully concede that *in so far as tolling contracts were not openly announced* and made available to all buyers who chose to accept them, they were condemned by the Code Interpretation above quoted. It is submitted that any special arrangement offered privately to one or a few of the refiners' customers whereby they were enabled to obtain sugar at a price other than that openly offered by the refiner to his customers generally was both discriminatory and unfair and as such properly condemned. The Government confuses the question by asserting (Br. p. 215) that such arrangements were condemned because all customers would not or could not *use* tolling contracts. Such arrangements were condemned only in so far as they were not or could not be *offered openly* to all buyers who would or could use them. It is scarcely necessary to state that Appellants do not "virtually admit" as stated by the Government (Br. p. 215) that their purpose with respect to tolling was to prevent sales which would "jeopardize the price structure". Such a conclusion obviously does not follow from the statement in Appellants' brief to which the Government refers.

(b) *Credit Terms*

(See App. Br. pp. 179-80; Gov't Br. pp. 216-21.)

The four payment plan, split billing and cash discount, discussed by the Government (Br. pp. 216-21) under the general heading "Credit Terms", were not reviewed in

Appellants' brief. As there stated (pp. 179-80), these topics are of slight importance, questions of fact alone are raised the determination of which would require a detailed and lengthy review of the evidence, and the only action enjoined by the decree with respect to these subjects is action which Appellants deny having taken in the past and which they have no desire to undertake in the future. In this brief, Appellants will, therefore, do no more than draw attention to one or two statements made in the Government's brief of sufficient general importance to warrant comment.

The Government refers (Br. p. 217) to "the suppression of direct price competition". Appellants deny without qualification that there was ever any desire or attempt upon the part of the refiners to restrain or suppress price competition but, on the contrary, assert that after the formation of the Institute price competition was keener and more effective than ever before (See App. Br. pp. 78-83).

On page 218 of its brief, the Government refers to Moog's letter of May 6, 1930 to Taylor (Ex. 394, R. 1597) and erroneously states that it was "agreed" that a special Directors' meeting would be called before any member made drastic changes in his selling terms. This same exhibit was quoted from at pages 66 and 67 of the Government's brief and the facts in connection therewith have already been set forth in detail in this brief (*supra*, pp. 4-6).

(c) *Price Guarantees and Resales*

(See App. Br. pp. 179-81; Gov't Br. pp. 221-22, 228-31.)

With the single exception hereinafter noted, Appellants have refrained from urging a review by this Court of their assignments of error regarding the Trial Court's findings of fact and the provisions of the decree bearing upon these subjects, for the same reasons as those indicated above in connection with the subject of "Credit Terms". Appellants will, therefore, comment only briefly upon the Government's review of these subjects (Br. pp. 221-22; 228-31).

For the reasons stated on pages 180 and 181 of Appellants' brief, it is submitted that the Trial Court erred in holding unlawful and enjoining Appellants from concertedly

> "Requiring buyers to elect between the guarantee and non-guarantee form of contract at the time of entering the contract or at any other time before delivery or refusing to grant buyers the privilege of changing from one destination to another by resale or otherwise."

The Government does not attempt to dispute the fact, pointed out in Appellants' brief (p. 181), that a refiner's failure to require such election results in a violation of the refiner's own announced prices and terms and an obvious discrimination against the refiner's other customers. The Government contends first that the refiners themselves introduced such discrimination by offering different terms to buyers in the same or different territories and then argues that the refiners acted unreasonably and unlawfully in seeking to prevent such discrimination (Br. pp. 229-30). The Government's entire argument on this point is based solely upon the fact that *one buyer* who represented grocery concerns in both guarantee and non-guarantee territory stated that it did not know, when contracting for sugar, where or how these concerns wanted to take delivery. No reason is shown, however, why this one buyer could not have ascertained before contracting, where and how the concerns which he represented desired to take delivery.

(d) *Used Bag Allowances*

(See App. Br. pp. 164-67; Govt. Br. pp. 222-25.)

In its discussion of this subject, the Government does not dispute the fact pointed out in Appellants' brief (pp. 164-7) that the granting of a special allowance for used bags to only a few chosen customers involves a clear cut discrimination against those customers to whom such an allowance is refused, or the further fact that an "allowance" disproportionate to the actual value of the used bag amounts to nothing more or less than a thinly veiled rebate or concession.

Instead, the Government merely asserts (Br. p. 225) that "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". Such assertion is possible only by ignoring entirely such testimony as that of Goetzinger and Lieneau, quoted on pages 165 and 166 of Appellants' brief. No refiner ever thought of offering such an arrangement generally because, as testified by Lieneau (R. 1028):

> "* * * We would be swamped with our customers' bags and it would be impossible to handle them and to keep them separately in the warehouse."

It was only because such an arrangement never had been offered openly that only a few customers applied for used bag allowances. That used bag "allowances" were furthermore sought as a cloak for secret concessions is clear from such evidence as that of Goetzinger who testified with respect to one customer who "requested Arbuckle to allow him 20c a bag at a time when the new bag was costing us 12½c" (R. 1049). The actual value of the used bag could, moreover, be realized at all times by sale in the used bag market.

(e) *Private Brands*

(See App. Br. pp. 167-70; Govt. Br. pp. 225-28.)

The Government paraphrases and quotes the conclusions of the Trial Court with respect to this subject without attempting to answer or refute the evidence referred to and cited in Appellants' brief (pp. 167-70), which, it is submitted, establishes the lack of foundation for the very findings and conclusions upon which the Government relies. As in the case of used bag allowances, the packing of sugar under private brands was never openly announced and offered as a service to all buyers, but was a service performed for only a few favored customers.

Such a service was obviously discriminatory if performed for only a favored few and the Government fails to refer to any evidence which supports its assertion that private brands could have been offered to and packed for all customers desiring them, an assertion that is completely refuted by the specific testimony referred to in Appellants' brief (pp. 168-70) and ignored entirely by the Government. The packing of sugar under private brands was a completely wasteful practice and it is significant to note that the Government failed to produce a single buyer who could testify that a private brand was of any value whatsoever to him. The Government suggests that any expense involved in the packing of private brands could be met by the imposition of a service charge. Yet if the Institute had recommended the imposition of such a charge and the recommendation been followed by the individual refiners, the Government would even now be condemning another "unlawful and concerted restriction of competition".

(f) *Damaged Sugar and Frozen Stocks*

(See App. Br. pp. 153-57; Govt. Br. pp. 231-33.)

The reasons for the Institute recommendation that damaged sugars and frozen stocks be not applied to any contract not originally calling for them are clearly set forth in Appellants' brief. The Government, in its discussion of this question, has missed entirely the point of Appellant's statement that such a practice was recommended against because, among other reasons, "it involved the repricing, to a single customer, of a contract originally entered into on an entirely different basis". Appellants do not, as the Government implies, condemn repricing if done openly and for all customers. As pointed out in Appellants' brief (p. 60), the Trial Court expressly found that

> "Repricing has been practiced at least since August, 1928. Although expressly sanctioned only as to business of the day of the decline, refiners occasionally have repriced beyond that period."

The application of damaged sugar or frozen stock to a contract originally entered into on an entirely different basis and the consequent repricing of the contract of a single customer is, in and of itself, discriminatory and, contrary to the Government's suggestion, no method could be devised to prevent the discrimination inherent in such a practice.

The Government has not attempted to show how the recommendation that the established practice of selling damaged sugar only on spot transaction be continued, constituted an undue or unreasonable restraint of trade and it is submitted such a contention is wholly unsupported by the evidence.

IX.

STATISTICS

(See App. Br. pp. 196-206; Govt. Br. pp. 233-40.)

In support of the provisions of the decree with respect to the collection and dissemination of statistical information, the Government has merely paraphrased the opinion of the Trial Court. The position taken is that the failure of Appellants to furnish to the purchasing trade *all* statistics collected by the Institute is *per se* an unreasonable restraint of trade under the decisions of this Court in the *Maple Flooring* and *Cement* cases, although much valuable statistical information was furnished to the purchasing trade by the Institute, although no comment or suggestions accompanied such statistical information as was furnished by the Institute to its members only, although no customer evidenced an interest in such information, and although there was no understanding or agreement, express or implied, as to the use of such information by individual members.

As a basis for this position, the Government states (Br. p. 238) that the failure to furnish *all* information collected to the trade gave the refiners an advantage inconsistent with "perfect" competition. This, without more, is enough, in the view of the Government, to condemn the statistical activities of the Institute. Appellants maintain that such a narrow interpretation of the Sherman Act is not only erroneous but has heretofore been rejected by this Court.

In point of fact, the statistical information furnished merely to members did not give the members an unfair advantage or any advantage over the purchasing trade (App. Br. pp. 200-206). The Institute supplied the trade each week with statistical information covering total production and total deliveries of its members and each month with statistical information covering total deliveries of all sugar, divided as between domestic cane, imported cane and beet sugar (Finding 60, R. 280).

The Government contends (pp. 234, 235, 240) that the Institute violated the Sherman Act because it did not also give the trade production and deliveries of individual members, deliveries by states, deliveries by differential routes and consignment and in transit stocks by states. Nowhere in the record is any evidence to be found that lack of this information prejudiced any customer or that any customer would have been interested in receiving it or that any customer asked for the information and was refused. The only places in the record which show requests by third parties for statistical information also disclose that it was freely furnished (Exs. 21-26, pp. 118, 649, 659).

The Government *surmises* that customers were prejudiced in two respects. Where statistics as to shipments by differential routes were relevant in determining a downward revision of freight charges under an Interpretation of Code 3(c), the lack of such statistics by the purchasing trade worked a disadvantage, according to the Government (Br. pp. 238, 239), because the trade did not know when to insist upon a downward revision. We submit that this is a highly fanciful inference, but whatever practice existed under the Code Interpretation of Code 3(c) and whatever use of statistics was made thereunder by members ceased entirely "at least by the fall of 1929 and probably much earlier" (Finding 104, R. 290). Even assuming the soundness of the Government's contention for the period prior to the fall of 1929, any disadvantage to the buyers on this score was ended two years before this case was instituted. and it therefore furnishes no justification for condemning the refiners' subsequent collection of statistics.

The Government also contends (Br. p. 239) that the refiners obtained an unfair advantage by their failure to furnish the trade with statistics concerning unspecified and undelivered balances at the end of the 30-day contract period. The only use to which such statistics could conceivably be put by the refiners would be in determining whether to enforce the 30-day contract withdrawal provision. This is all the Government or lower court suggests. The possession of this information by the buyers, however, could have no possible influence on action by them. Statistics as to withdrawals against specified contracts were only collected by the Institute *at the end* of the contract period. If a customer had withdrawn this sugar at the end of the contract period, he was not interested in what action the refiners took, because his transaction was completed. If a customer had not withdrawn his sugar at the end of the contract period, he was in default under his contract irrespective of what the statistics showed, and it could do him no good to know that others were also in default. In this connection it must be remembered that the rate of withdrawal and the refined stock on hand was known to the trade at all times through the weekly report of the Institute as to production and deliveries.

The Government also repeats as a general criticism the conclusion of the lower court (without any support in the record) that data as to deliveries, consignments and in transit stocks by states would have been valuable to the trade (Govt. Br. p. 235). How such information would have been useful to the trade is not revealed, as the Government has not seen fit to answer the detailed analysis of Appellants on this point (App. Br. pp. 200-204). Data as to deliveries, consignments and in transit stocks by states could not be useful to the trade as indicia of supply, the only use suggested by the Government or the Trial Court. Available supply is not measured by stocks in the various states. Sugar at refinery can be quickly moved wherever needed. The only important or useful index of supply is total refined stock on hand available for delivery when and where needed. This information was available to the trade from the reports furnished by the Institute.

The Decisions of this Court. In determining the legality of the collection and distribution of statistical information by trade associations this Court has never required that *all* the information collected be made available to the buyers as well as the sellers. The *Maple Flooring* and *Cement* cases relied on by the Government indicate that the legality of a plan for collecting and disseminating statistics is determined, not by the *extent* of *distribution* of the statistics, but rather by whether there is any agreement or understanding, express or implied, as to the *use* to be made of the information collected. In the *Maple Flooring* case, data as to average cost to association members of all dimensions and grades of flooring was collected and disseminated *among members only,*[1] although

[1] *Maple Flooring Mfgrs. Assn.* v. *U. S.*, 268 U. S. 563 at pp. 566, 568-570, Record pp. 6, 37, 100, Appellants' Brief, pp. 244-245.

other statistical information was collected and distributed among the purchasing trade generally. The fact that data as to average cost was available only to members of the Association was specifically brought to the attention of this Court.[2] In upholding the legality of the plan, this Court made no distinction between statistics furnished to members only and statistics furnished to the trade.

In the *Cement* case, the statistical information collected related to specific job contracts, production of clinker and ground cement, shipments and stocks on hand and number of bags returned. *None of this information was released to the purchasing trade.*[3] The lower court enjoined the collection and distribution of this information. In reversing the decree, this Court made no requirement that the information thus collected be furnished the trade. The principle announced in the *Maple Flooring* case and reiterated in the *Cement* case was that trade associations which gather statistics "without * * * 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."[4]

As fully discussed later in this brief (*infra*, pp. 136-39) the private circulation among sellers, of the price quotations secretly offered to individual buyers, was held bad in the *Linseed*[5] case because of their concealment from the buyers, but, as will be seen, this is obviously a different case from the failure to disseminate merely collateral and general

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[2]*Maple Flooring Mfgrs. Assn.* v. *U. S.*, 268 U. S. 563, Government's Petition for Rehearing, p. 34.

[3]*Cement Mfgrs. Protective Assn.* v. *U. S.*, 268 U. S. 588, at pp. 600, 601, Record, pp. 12, 90, 159, 1799, 1808, 1811.

[4]*Maple Flooring Assn.* v. *U. S.*, 268 U. S. 563, 586.

[5]*United States* v. *American Linseed Oil Co.*, 262 U. S. 371.

trade statistics. The concealment of these secret discriminatory prices from the buyers was part of a direct conspiracy among the sellers to use the information to the prejudice of the buyers, and this was the ground upon which it was condemned.

The Government and Trial Court in this case attempt to impose a new and additional requirement that *all* information collected be released to the purchasing trade, failing which the collection of *any* statistical information is unlawful, no matter how properly the information is used by individual members of the Association. This restriction is not required to protect the purchasing trade and goes far beyond the decision of this Court in the *Maple Flooring, Cement* and *Linseed* cases.

We submit that the Findings (Nos. 65 and 66), Conclusion (No. 4) and Decree (No. 7) of the Trial Court on this point are clearly erroneous.

THE LAW

I. The Leading Trade Association Cases.

The Government leans heavily on general principles it deduces from the *Hardwood*[1] and *Linseed*[2] cases. These decisions were briefly reviewed in Appellants' opening brief (pp. 253-6; 280-281). We deny most emphatically that they stand for any such inflexible rules-of-thumb as are advocated in this case by the Government; that they abstractly condemn plans, as such, which "are calculated to restrict or suppress fair competition, or to limit the freedom

[1] *American Column & Lumber Co.* v. *United States*, 257 U. S. 377.
[2] *United States* v. *American Linseed Oil Co.*, 262 U. S. 371.

of the participants to engage in business in normal fashion and enter into lawful competitive arrangements" (Br. 263-264), without a finding that they are, as shown by the actual facts in the industrial world, unreasonably injurious to the public.

The Government's argument on this point is a reversion to the pre-rule-of-reason days when transactions were viewed as legal or illegal *"per se"* without much reference to their actual injurious or beneficial effects on the public. This Court has been assuming, since 1911 at least, the burden of ascertaining in each particular instance, *from the facts in that case,* the actual "reasonableness" of each "restraint of trade", of each "limitation" of the freedom of the participants to engage in business or to enter into competitive arrangements. "But the legality of an agreement or regulation", said this Court in the *Chicago Board of Trade*[8] decision, "cannot be determined by so simple a test as whether it restrains competition". Continues the Court:

> *"Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence.* * * * To determine that question the court must ordinarily consider the *facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed;* the *nature* of the restraint and its *effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained,* are all relevant facts * * *."

[8]*Chicago Board of Trade* v. *United States,* 246 U. S. 231.

See also, the *"Oil Cracking"*[4] case (283 U. S. at p. 169); the *International Shoe*[5] case (280 U. S. at p. 297); the *Nash*[6] decision (229 U. S. at p. 376) and the *American Tobacco*[7] opinion (221 U. S. at p. 179) for representative decisions adopting this view of the law.

Notwithstanding the frequent reiteration by this Court of the foregoing principles, counsel for the Government have persisted in urging the contrary doctrine. They did so recently in the *Appalachian Coals*[8] case in a brief signed by two of the same counsel appearing for the Government at bar and they are doing so here. But the vigorous words of the Chief Justice in again repudiating the Government's theory should leave no doubt of its unsoundness. This Court, after pointing out that "The government's contention, which the District Court sustained, is that the plan violates the Sherman Anti-Trust Act—in the view that it eliminates competition among the defendants themselves * * * " disposes of the Government's contention in the following words (pp. 359-361 of 288 U. S.):

> "There is no question as to the test to be applied in determining the legality of the defendants' conduct. The purpose of the Sherman Anti-Trust Act is to prevent *undue* restraints of interstate commerce, to maintain its *appropriate* freedom in the public interest, to afford protection from the subversive or coercive influences of monopolistic endeavor. * * * The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up

[4]*Standard Oil Co.* v. *United States* (1931), 283 U. S. 163.

[5]*International Shoe Co.* v. *Federal Trade Commission* (1930), 280 U. S. 291.

[6]*Nash* v. *United States*, 229 U. S. 373.

[7]*United States* v. *American Tobacco Co.*, 221 U. S. 106.

[8]*Appalachian Coals, Inc.* v. *United States* (1933), 288 U. S. 344.

> the essential standard of reasonableness. They call for vigilance in the detection and frustration of all efforts unduly to restrain the free course of interstate commerce, but they do not seek to establish a mere delusive liberty either by making impossible the normal and fair expansion of that commerce or the adoption of reasonable measures to protect it from injurious and destructive practices and to promote competition *upon a sound basis*."

(The Court here refers to the *Chicago Board of Trade* and other decisions above cited, and continues:)

> "In applying this test, a close and objective scrutiny of particular conditions and purposes is necessary in each case. Realities must dominate the judgment. The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it."

(The Court here quotes from the *Chicago Board of Trade* opinion, and concludes:)

> "It is therefore necessary in this instance to consider the economic conditions peculiar to the coal industry, the practices which have obtained, the nature of defendant's plan of making sales, the reasons which led to its adoption, and the probable consequences of the carrying out of that plan in relation to market prices and other matters affecting the public interest in interstate commerce in bituminous coal."

(As epitomized towards the end of the opinion:)

> "As we stated at the outset, the question under the Act is not simply whether the parties have restrained competition between themselves but as to the nature

and effect of that restraint. *Chicago Board of Trade v. United States, supra;* * * * "

This hope of the Government that the Court will condemn an arrangement as illegal "*per se*" or "in and of itself" (Br. p. 2) crops up throughout its brief. For example, in support of this thought, the *Trenton Potteries*[9] case is cited (Br. p. 9). But only a superficial consideration of that case sustains any such doctrine. It is true that the Court there expressly refused to consider the "reasonableness" of prices fixed by a "price-fixing" combination. However, a close view of this class of cases makes obvious the fallacy of counsels' interpretation of this decision.

We therefore review, for the convenience of the Court in our Appendix to this brief (pp. 1-4) the "price-fixing" cases to show that they are not authority for the condemnation of arrangements as illegal "in and of themselves" without a consideration of their actual effect on the public.

The Hardwood and Linseed Cases

Returning now to a consideration of the *Hardwood*[10] and *Linseed*[11] cases, counsel for the Government present (Br. p. 264) a condensed and general view of these decisions which distorts their real meaning. It requires an understanding of the underlying facts in the cases to enable one to apply the decisions properly to another situation.

The Hardwood[12] *Case*

For the convenience of the Court we submit, at pages 4-16 of the Appendix to this brief, the results of a detailed

[9] *United States* v. *Trenton Potteries Company,* 273 U. S. 392.
[10] 257 U. S. 377.
[11] 262 U. S. 371.
[12] 257 U. S. 377.

examination of the voluminous records, briefs and opinions in the *Hardwood* case.

A careful review of the case shows conclusively, we submit, that it is not in point in the case at bar. There is nothing in the present case that even remotely resembles the active and concerted campaign conducted by the officers and members of the Hardwood Association, through discussions at their meetings and through systematic written propaganda, to restrain competition by curtailing production and increasing prices. Prices and production were not discussed at the meetings of the Sugar Institute, nor did the officers or members of the Institute conduct any written or oral propaganda to curtail production or increase prices. The record in this case is completely bare of any evidence that would bring it within the lines of the decision in the *Hardwood* case.

The Linseed[13] *Case*

The *Linseed* decision is even further away from the case at bar than is the *Hardwood* case. Counsel for the Government baldly deny that the vital feature in that case was that the *prices and quotations gathered were kept secret among the members of the combination,* so that the buyers, the other participants in the trading were to be kept completely in the dark.

As pointed out on page 254 of Appellants' opening brief, the essence of the plan was the *perpetuation* of a system of discriminations to favored customers, kept secret from the buyers but made instantly known to all the sellers. The contract for the "confidential and exclusive" distribution of prices and individual quotations among the sellers

[13] 262 U. S. 371.

disclosed the scheme on its face. A copy of this contract (the "basic price reporting agreement" as it is called by the Government, Br. p. 267) is given in the Appendix to this brief, at pages 16-18.

A study of this plan in the *Linseed* case demonstrates that the mere distribution among the sellers of *published* price lists, was not, as asserted by counsel for the Government, the material part of the scheme. It takes a complete ignorance of the business world to believe that competitors in any line do not immediately obtain each other's published lists. It was the *secret* distribution among the sellers of each other's discounts and private offers to individual buyers, which gave the sellers their vital and unfair advantage over the buyers, who were without this information. Yet counsel for the Government so misunderstand these elementary facts that they draw an entirely erroneous picture of the situation in the *Linseed* case. The agreement permitted *upward* deviations of prices without notice; but when a seller made an offer of a discount or discrimination to any buyer, the Association agreement required the seller to give immediate secret notice, to all of his competitors, that he had made such an offer—a system designed to permit the exacting of full list prices from all customers not being offered discriminations by a competitor, and permitting each seller to temper his discriminatory offers to favored customers in the light of secret information as to the *exact* offers to them by his competitors.

Under this refinement of the secret concession system, the ignorant buyers were held completely at the mercy of the fully informed sellers. The buyers did not know and had no means of finding out what prices and terms were being offered to their competitors, or which ones among their competitors were getting secret discriminatory prices and terms, and the sellers were thus free to practice their discriminations with impunity. This "alleviation from the open selling plan" (as counsel naïvely call it), was an alleviation only to the sellers. It gave "freedom" to the concert of sellers to mulct the mass of buyers through the leverage of an arbitrary system of discriminations kept secret from the buyers, and confined to the favorite concessionaires of the sellers. It was a scheme which held the *buyers* helpless by withholding from them information of an overwhelmingly essential element of their business, the *real* current prices available to their competitors. This system was the exact opposite of the Sugar Institute plan, which forbade secret discriminations and gave to all buyers as well as to all sellers complete and prompt information of every seller's prices and terms, and full freedom to take advantage of such prices and terms.

We respectfully submit that the foregoing analysis of the *Linseed* decision is the correct one as shown not only by the opinion of the Court but by its own analysis of the case in the subsequent *Maple Flooring*[14] opinion.

At pages 389-390 of the *Linseed* opinion, the Court says:

> "* * * Each subscriber 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 a monthly meeting and report upon matters of interest to be there dis-

[14] *Maple Flooring Association* v. *United States* (1924), 268 U. S. 563.

cussed; to comply with all reasonable requirements of the Bureau; *and to divulge no secrets.*

"*With intimate knowledge of the affairs of other producers and obligated as stated, but proclaiming themselves competitors, the subscribers went forth to deal with widely separated and unorganized customers necessarily ignorant of the true conditions.* Obviously they were not *bona fide* competitors; their claim in that regard is at war with common experience *and hardly compatible with fair dealing.*"

"* * * The situation here questioned is wholly unlike an exchange where dealers assemble *and buy and sell openly;* and the ordinary practice of reporting statistics to collectors stops far short of the practice which defendants adopted."

The Court's reference to an exchange and its really "open" buying *and* selling, as the desirable antithesis of the Linseed plan, demonstrates, we submit, the correctness of our interpretation of the *Linseed* decision. The Sugar Institute plan of open prices and terms, available to all buyers, is the nearest approach to the ideal competition of the exchanges that can be realized in an industry where buyers and sellers are widely scattered and cannot assemble in a common trading place.

The Maple Flooring[15] *and Cement*[16] *Cases*

Our brief discussion of the facts in the *Maple Flooring* and *Cement* decisions will be found at pages 256-260 and 280-283 of Appellants' opening brief. Counsel for the Government respond with a generalized reference to the

[15]268 U. S. 563.

[16]*Cement Manufacturers' Association v. United States,* 268 U. S. 588.

holding in these cases which amounts to an invitation to the Court to journey through the mass of records, briefs and opinions in the cases to confirm or reject counsels' generalizations about them. It is not necessary to add to our review of the *Maple Flooring* decision in our opening brief in order to refute counsels' assertions about the effect of that case, but for the convenience of the Court, and especially to demonstrate the futility of a discussion of a prior complicated litigation by mere generalizations, we have added at pages 18-43 of the Appendix to this brief, a detailed statement of the *Cement*[17] case.

From this review, it will be seen that the *Cement* case presents more close parallels to the case at bar than any of the other trade association cases decided by this Court, and that the arguments of Government counsel and of the Trial Court in attempting to sustain their mistaken position in that case, sound strangely like those of Government counsel and Trial Court at bar. The conclusions of this Court in overruling the Government's arguments and reversing the trial judge are stated in full in the Appendix hereto and, we submit, are fairly summarized at pages 259-260 and 280-281 of Appellants' opening brief.

The Cement Case Also Involved a Current Price Reporting Plan

A detailed review of the *Cement* case (Appendix to Reply Brief, pp. 18-43) reveals a highly important aspect of that decision which has been completely overlooked by Government counsel here. That decision approved a *current* price reporting plan. As shown by the trial judge in that

[17] *Cement Manufacturers' Association* v. *United States,* 268 U. S. 588.

case (Appendix p. 35), the exchange of statistics between the sellers of cement included the *prices* contained in each specific job contract and any subsequent changes therein. Now there was, in the trade, a fixed differential between the seller's general price of cement upon a given day and the prices in the specific job contracts; namely, 10 cents per barrel. Hence, as the trial judge concluded, *"each manufacturer is thus apprised"* by the reporting plan of the Cement Manufacturers Association *"of the amount being charged for cement for all purposes by its competitors"*. The Government having proved in the *Cement* case that the prices at which the various cement manufacturers sold cement were uniform, and that when one company did change its quotation, the other companies delayed but little in falling into line (Appendix p. 35), it was strenuously contended by the Government that this reporting by one manufacturer to his competitors of his *current* prices was illegal. But this Court expressly overruled the Government's contention on this point, on a ground equally applicable at bar, namely, "The fact is that any change *in quotation of price* to dealers, promptly becomes well known in the trade through reports of salesmen, agents and dealers of various manufacturers * * * there are frequent changes in price and uniformity has resulted not from maintaining the price at fixed levels but from the prompt meeting of changes in prices by competing sellers" (Appendix pp. 38-39).

Here then, we have a direct decision of this Court overruling the same kind of arguments now being made by the Government at bar against validity of exchanging *current* price information between sellers, where it merely gave additional publicity to the information already known to the trade. That such was the exact situation in the case at bar see Appellants' opening brief, pages 61, 196, 279.

The foregoing aspect of the *Cement* decision is, then, a direct refutation of the counsels' assertion that there is a strong implication, or any implication, in these cases against current price reporting as distinguished from the reporting of past prices (Br. pp. 270-71). And the practical difference between the reporting of "past" and current prices is as unsubstantial in the sugar industry as this Court found it to be in the cement industry. For a full discussion of this fact see Appellants' opening brief at pages 63-65 and 70-75.

II. The "Discriminations" Sought to Be Eliminated as Within Section 2 of the Clayton Act.

Counsel for the Government contend that "the 'discriminations' sought to be eliminated are not within Section 2 of the Clayton Act" (Br., pp. 278-281). In their supporting argument, counsel deal largely with a straw man of their own creation. The dominant evil of the system sought to be corrected by the open price plan of the Sugar Institute was not the mere giving of discriminations. *Really* free competition (*i.e.*, where the *real* quotations and terms are *known* to the trade) in a thoroughly standardized product, such as cement or sugar, will by itself eliminate unfair and unjustifiable discriminations (for a full discussion see Appellants' opening brief, p. 73). The Sugar Institute aimed at the *secrecy* of these discriminations (see Appellants' opening brief, pp. 13-18; 24-30; 62; 68-71). Once the giving of discriminations was shoved out in the open, the fierce competition in the sugar industry put a quick end to such of them as were unjust. No other discriminations were ever successfully eliminated by the Institute or were being affected by it when this suit was commenced.

Consequently, the purpose and effect of the Sugar Institute coincided with the aim of the Clayton Act, as we argue at length in our opening brief (pp. 262-76). Indeed, the Sugar Institute's principal attack on discriminations, by driving them into the open, was a much milder effort than the criminal sanctions against practically *all* real discriminations, secret *and* open, imposed by Congress. We therefore submit that our discussion of the severe policy of Congress in the Clayton Act against discriminations, as supporting the Sugar Institute plan of open prices and terms, has a very direct bearing on this case and is not at all abstract (Govt. Br. p. 281). Counsel make no real attempt to answer that argument but confine themselves to a reiteration of their contention that the Institute's basic plan of open prices and terms was a mere sham to enable them to fix and maintain high prices; a theme, we submit, adequately dealt with in Appellants' opening brief (pp. 4-5; 7-12; 30-40; 41-46; 61-62; 104).

III. Legality of Appellants' Boycotting Activities.

In discussing this subject counsel for the Government revert to their underlying legal theme of *"illegality per se"*. Regardless of whether or not the separation of the brokerage and warehouse functions went beyond what was reasonable to accomplish its legitimate objective, counsel nevertheless contend (Br. p. 282) that the assumption of power, of a group acting in concert, to compel "third parties and strangers involuntarily not to engage in a course of trade except on conditions" is *per se* unlawful. That is to say, this restraint, by concerted action, is *not* to be viewed in the light of the facts as to its *actual* beneficial or injurious effects on the public but is to be outlawed offhand. This is so, say counsel, because the power *may* be abused. (Counsel also take this occasion (Br. pp. 282-83) to reiterate their charges of harshness and arbitrariness, but these have been fully answered, we submit, at pp. 136-152 of Appellants' opening brief.)

For this attempted regression to the discarded rule of invalidity *"per se"*, counsel rely (Br. p. 282) on *Loewe* v. *Lawlor*, 208 U. S. 274; *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. *Shipowners Association*, 272 U. S. 359, more particularly (Br. p. 285) on the *Eastern States Lumber Dealers* and the *First National Pictures* cases.

This indiscriminate lumping of labor and trade cases, both of primary and secondary boycotts and blacklistings, opens up a vast field of the decisions. Isolated cases cannot be properly appraised without a careful plotting of the entire field and the place of each of the cited cases therein. This background we have endeavored to supply in the Appendix hereto (pp. 43-65), which also includes a discussion of all the cases cited by counsel at bar, reserving for the brief proper a review (immediately following) of the *Eastern States*[18] and *First National Pictures*[19] cases, especially relied upon by counsel (Br. pp. 285-87).

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[18]234 U. S. 600.
[19]282 U. S. 44.

The Eastern States[19a] *Case*

As we have tried to show in the Appendix to this Reply brief (pp. 43-65), the essential fallacy of the Government's argument is its fastening upon the wrong element of the situation to determine its illegality. A proper determination of the illegality of an alleged boycotting situation depends not upon calling it names—a "boycott" or "blacklist"—but upon an inquiry as to the reasonableness of the character of the restraint thereby imposed.

This is illustrated by the *Eastern States* case, where the decision turned upon the illegality of suppressing the competition there affected; the subject matter of the restraint being held illegal, it followed, of course, that the boycott there used to accomplish the illegal result must necessarily be held bad.

In the *Eastern States* case, there was a boycott by retail dealers' associations against wholesalers who sold directly to consumers. The Court held illegal a combination to destroy all competition between wholesalers and retailers for the trade of the consumers. *The Court found no reason beyond a selfish purpose to increase the business advantage of the boycotters for this arbitrary exclusion of competitors from the field* and consequently it held such restriction unreasonable. This is the vital consideration omitted in counsels' interpretation of the decision (Br. p. 285). It followed, of course, that any intention to accomplish, and any accomplishing, of this illegal result, such as by use of the boycott or blacklist, or any other concerted means, were equally illegal.

That the foregoing is in accord with this Court's own interpretation of the *Eastern States* case will be seen from

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[19a] 234 U. S. 600.

the following excerpt concerning that decision taken from the *Maple Flooring* opinion (pp. 579-580):

> "There was thus presented a case in which the court could not only see that the combination would necessarily result in a restraint on commerce *which was unreasonable*, but where in fact such restraints had actually been effected by the concerted action of the defendants."

Thus the foundation of the holding was that there was no discernible legal excuse for depriving a wholesaler of his retail trade, and any concerted means used therefor was consequently illegal, whether it was by boycott or otherwise.

The First National Pictures[20] *Case*

In this case a combination of film manufacturers and distributors, controlling the industry, forced on the motion picture exhibitors a practice *compelling a new owner of a theatre either to assume the obligations of his assignor's contracts or to put up a large cash deposit in order to get films from anyone.* As the Trial Court said (p. 818):

> "* * * *the proof is clear that financial and moral responsibility were subordinate considerations,* and the purpose in requiring deposits on new contracts with old theatres *was to induce the new owner to assume and perform the old contracts* * * *.
>
> " * * * In the instant case, however, the real purpose of the defendants was *not* to obtain security for the payment of rentals or other claims which might arise under their contracts, but their purpose was, by requiring security for the performance of

[20]282 U. S. 44.

new contracts, to induce the theatre owner to go on with the old contracts, for the performance of which no security was required."

The following excerpt from the argument of the Government in that case, as summarized by the official reporter at page 47 of 282 U. S., shows the real point of the Government's position which was sustained by this Court:

> "* * * Even if members of an industry can under any circumstances combine to set up extra-legal machinery for enforcing contracts, certainly such a combination should not be sanctioned, *where, as in this case, monopolistic power is exerted to require third persons to assume contracts for which they are not morally or legally liable.*"

The gist of Mr. Justice McReynolds' opinion is contained in the following sentence (p. 54):

> "* * * The obvious purpose of the arrangement is to restrict the liberty of those who have representatives on the Film Boards and secure their concerted action *for the purpose of coercing certain purchasers of theatres by excluding them from the opportunity to deal in a free and untrammeled market.*"

In the *First National* case, the Distributors Association adopted regulations which called for the taking of certain steps by each member of the Association whenever one of the theatres which bought their films changed hands. These regulations were burdensome and were enforced against the *new* owners of the theatres. It was alleged that the purpose of these regulations was to prevent the *prior* owners of the theatres from evading their existing and uncompleted contracts. Undoubtedly, the prevention of such evasion by *reasonable* measures of concert would in itself constitute a legitimate end, as was held in the *Cement* case. But the lower court found, as shown above, that the purpose of the regulations related not so much to the financial and moral questions arising out of these evasions, as it did to the bringing of pressure to bear on the *new* owners to assume and perform the old contracts. In spite of this finding the lower court held the restraint reasonable and hence lawful. This Court reversed the holding for reasons that are readily apparent. The methods employed reached very far beyond the evil sought to be remedied. The effect of the regulation was to impose a heavy affirmative burden upon the new purchasers *who were in no respect parties to the evil sought to be reached.* In other words, the parties burdened hy the regulation were innocent third persons who stepped into the situation as newcomers rather than those who were at the time the members of the industry. Instead of reaching directly at the evil by regulations which would have tended to prevent fraudulent transfers by hearing upon those who might make such transfers, the regulation reached out and sought to prevent the transfer by penalizing the innocent purchaser.

Whether or not a method which attempted to accomplish its purpose by reaching so far afield could ever be held reasonable, there was in the case a countervailing consideration which, when added to this questionable character of the method, produced a cumulative effect against its reasonableness. This consideration was the fact that the sole possible justification for the method was its tendency to advance the private financial interest of the distributors. Apparently this Court concluded that legitimate as might have been concert to advance that end by methods more directly and immediately addressed to the evil sought to be corrected, it would not justify a method going so much further in its results and having the effect of imposing upon innocent third parties contracts which they had never made and which they would not make if they were free agents.

We respectfully submit that in the light of the above, counsel for the Government take a very one-sided and inadequate view of the *First National* decision. The real essence of the situation there was that the combination dominating the motion picture industry said to the exhibitors "make good the defaults of others or get out of business", and it imposed that ironclad regulation on the exhibitors not for the purpose of preventing discriminatory or other practices injurious to the exhibitors or the public, but solely to advance the financial interests of the members of the film combination.

The *First National* and other cases cited by counsel for the Government under the head of "Boycotts" are, therefore, although different from the case at bar, because of the complete absence from those cases of the very element which constitutes the peculiar and special justification of the concerted activities of the Sugar Institute. In the case at bar the central purpose of the regulations of the Sugar Institute was not merely or primarily to protect the financial interests of the refiners, but to maintain and safeguard the type of open and non-discriminatory competition which is in the public interest and in the interest of the buyers, and which it is the object of the Anti-Trust laws to protect. For the accomplishment of this purpose the regulations adopted go no further than is reasonable. When these two additional considerations are thrown into the balance, along with the right of the refiners to protect themselves by reasonable concert against fraud, it would seem clear that the weight of these combined considerations is more than sufficient to counterbalance the incidental disadvantages resulting to particular customers from the loss of the opportunity which they might otherwise enjoy to profit from a discriminatory and unfair competitive situation.

IV. The Government's Real Basic Contention on the Law

In attempting to "distinguish" the *Chicago Board of Trade,*[21] *Appalachian Coals*[22] and *Steel*[23] cases (Br. pp. 287-290) counsel for the Government are driven to an almost open statement of their real underlying contention on the law in the case at bar.

Counsel say that the vital vice in the Sugar Institute plan is the agreement "not to depart from published prices" (Br. p. 288) or the "compulsory adherence to published prices" (Br. p. 289).

Now counsel cannot mean by this that there is in the case at bar any agreement or compulsion to adhere to, or not to depart from, any *particular* prices, either of the individual refiner's own making or of any other. (See Findings 48 and 201, quoted in Appellants' opening brief, pp. 283-284.) Therefore, what counsel must mean, and do mean, is that the basic evil in the Sugar Institute plan is the adherence to the *open* prices; that is, the agreement to abolish the *secrecy* of the prices offered to concessionaires. There is no agreement or cumpulsion to refrain from quoting any

[21]246 U. S. 231.
[22]288 U. S. 344.
[23]*United States* v. *United States Steel Corporation*, 251 U. S. 417.

particular prices at the separate will of *each* refiner. The record shows that the refiners individually changed their prices freely and frequently, each acting entirely upon his own initiative, without agreement or discussion with each other. The only restraint they were under was a restraint against the *secrecy* of such prices given as discriminatory concessions.

In the end, therefore, counsel have been driven to advocate the system of *secret* prices in the sugar industry; to claim that any attempt to eliminate such a vicious practice is, *per se,* an illegal "restraint", to be struck down by this Court without further inquiry.

"Compulsory adherence to published prices," say counsel (Br. p. 289), adroitly shifting the major premise to mean the adherence to published *prices,* "is distinctly alien to the principles of an open exchange". But the "adherence to *published* prices", which is the real major premise in the case at bar, is the very essence of an open exchange, where the *actual* prices *of all offers* as well as the prices in all completed sales are, orally and by ticker and newspaper, immediately published to all. This, indeed, is the foundation of any really ideal system of competition. So hold the Courts (Appellants' opening brief, pp. 249, 261); the economists (Appellants' opening brief, pp. 28-29) and the experiences of the sugar refining industry itself (Appellants' opening brief, pp. 30-34).

We respectfully submit that the basic legal contentions of counsel for the Government are unsound.

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Supreme Court of the United States

October Term, 1935

No. 268

THE SUGAR INSTITUTE, INC., THE AMERICAN SUGAR REFINING COMPANY, MARGARET A. JAMISON, ET AL.,

Appellants,

v.

THE UNITED STATES OF AMERICA,

Appellee.

Appeal from the District Court of the United States for the Southern District of New York.

APPENDIX TO REPLY BRIEF FOR APPELLANTS.

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APPENDIX TO REPLY BRIEF FOR APPELLANTS

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