

INERT ANTITRUST ADMINISTRATION: FORMULA PRICING
AND THE CEMENT INDUSTRY

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WE have been told that a streamlining and supercharging of antitrust machinery, to increase its enforcement efficiency, has been undertaken by the Justice Department's Antitrust Division¹ and the Federal Trade Commission.² This may be so, but in at least one instance the increase in streamlining and power rating has apparently been such that the speed of the new model has blurred the vision of the pilots, and the public has suffered a fractured toe in a hitherto unreported hit and run proceeding. The incident occurred in the area of geographical pricing formulas, specifically with reference to their use in the cement industry: it was the dismissal, on August 27, 1953, of the Justice Department's eight year old complaint against the cement industry.³ This dismissal has, not unnaturally, been applauded in the trade press,⁴ and it has deluded two capable specialists in industrial organization;⁵ but its significance seems otherwise to have gone unnoticed.

It is the purpose of this article to suggest that the Justice Department must have experienced at least momentary blindness when it reached the decision

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1. See *Brownell Wants Trust Laws to Aid, Not Stifle, Business—Proud of Case Volume of Terminations*, N.Y. Times, Jan. 29, 1954, p. 1, col. 6; *U.S. Is Abandoning Old Suit on Cement—Most Goals of Antitrust Case Won by Voluntary Action of Defendants*, *id.*, Aug. 28, 1953, p. 25, col. 4.

2. See *F.T.C. Head Lists Big Gains in Year—Hearing of Cases Has Been Speeded, Load Slashed, He Tells Bar Association*, N.Y. Times, Aug. 20, 1954, p. 22, col. 1; *F.T.C. Seeks Means to Enforce Orders—Many Actions Forgotten*, *id.*, Sept. 22, 1953, p. 45, col. 1.

3. *United States v. Cement Institute*, CCH TRADE REG. REP. ¶ 66090 (1953). Defendants' motion that the case be dismissed had been denied on July 18, 1949, *United States v. Cement Institute*, 85 F. Supp. 344 (D. Colo.). The Justice Department's Cement Institute suit, which had been filed on February 28, 1945 in the United States District Court in Denver, Colorado, will be referred to hereinafter as the *Denver Cement* case.

4. *Rock Products*, Oct. 1953, p. 67. This editorial, however, confused the case, attributing the dismissal to the FTC.

5. *DIRLAM & KAHN, FAIR COMPETITION* 128 (1954), cites the Attorney General's announcement as constituting proof of the success of the FTC's *Cement Institute* order, *Cement Institute*, 37 F.T.C. 87 (1943), *ordered enforced*, *FTC v. Cement Institute*, 333 U.S. 683 (1948). The authors seem to have been convinced by the Justice Department's reasoning—which, as will be shown, was fallacious.

to drop the *Denver Cement* case. The Department explained in a press release⁶ that trade practices had been sufficiently altered so as to render unwarranted the continued prosecution of the Government's case. The Department appeared to be relying upon either or both of two sorts of alleged changes in the current cement industry which began in the summer of 1948: (a) a general introduction of posted f.o.b. mill prices available to buyers desiring transportation by truck; and (b) a more frequent occurrence of nonidentical destination prices.⁷ To the extent that reliance was placed upon the alleged widespread change from the industry's custom of refusing to sell at the mill to trucks of buyers, it will be shown that the Justice Department either was careless in evaluating the reliability of its trucking information, or else failed properly to interpret that information. To the extent that reliance was placed upon the reduced frequency of identical destination prices, it will be argued that the Justice Department faltered in its economic analysis by failing to understand that nonidentical prices were essentially a temporary phenomenon, in part a natural result of the postwar cement boom and in part the intentional result of a political strategy designed to secure special legislation permitting geographical pricing formulas.

Most importantly—and unfortunately—the Attorney General's press release evinced confidence that the FTC's outstanding order against the cement industry⁸ would be amply effective in preventing a reintroduction of noncompetitive pricing practices,⁹ the implication being that the Justice Department's prayer for relief was unnecessary. However, it will be demonstrated that one provision in the Department's prayer for relief was in fact distinctly superior to anything found in the FTC's order. Whereas a self-enforcing feature in the Justice Department order would have struck at the heart of formula pricing on commercial sales, the FTC order will not by itself prevent a re-emergence of formula pricing on such sales. The problem of enforcing the FTC order will remain a difficult one, necessitating a venturesome presentation of novel theories of compliance which the current Commission reportedly prefers to avoid.

The superiority of the Justice Department's proposed solution to the problem of noncompetitive pricing over that of the FTC is the crucial fact that makes the Department's dismissal of its *Denver Cement* case regrettable; and it is only in the light of this fact that the inadequacy of the Department's economic analysis of recent developments in the cement industry becomes significant. The superiority of the Justice Department's remedy lay in its recognition of the critical importance of trucking as a factor affecting cement pricing

6. *United States v. Cement Institute*, CCH TRADE REG. REP. ¶ 66090 (Aug. 27, 1953) (Justice Department press release announcing dismissal).

7. *Id.* at p. 66147.

8. *FTC v. Cement Institute*, 333 U.S. 683 (1948), reversing *Aetna Portland Cement Co. v. FTC*, 157 F.2d 533 (7th Cir. 1946), and ordering enforcement of *Cement Institute*, 37 F.T.C. 87 (1943).

9. *United States v. Cement Institute*, CCH TRADE REG. REP. ¶ 66090, at 66147 (Aug. 27, 1953).

practices. Trucking—or, more specifically, *uncontrolled* trucking—is the crucial factor of which the Department of Justice was seemingly once aware but which the FTC and virtually all commentators have overlooked. The differences between the two agencies' remedies must, then, be examined, and the critical factor that distinguishes them must be explained.

FORMULA PRICING AND THE JUSTICE DEPARTMENT'S REMEDY

The FTC entered its order against the cement industry in 1943;¹⁰ the Justice Department filed its complaint in the *Denver Cement* case in 1945,¹¹ while the FTC order was awaiting hearing on appeal. The complaints in both actions sought to enjoin various co-operative marketing practices such as identical pricing on sealed bids, co-operative circulation of freight rate books, co-operative classification of buyers, co-operative efforts to restrict trucking, and formal associational activities such as those undertaken by the Cement Institute. However, whereas the FTC's complaint, findings and order seemed to look primarily toward a Robinson-Patman Act violation,¹² the Justice Department's complaint was not directly concerned with price discrimination.¹³ It sought to enjoin such geographical price discrimination only in the cases of identical sealed biddings and applications of punitive base prices against the mills of price shaders. The Department's complaint was directed rather to the *formula* feature of multiple basing point delivered pricing systems—this formula being the minimum combination of the base prices of rival mills plus fixed, known transportation charges. The Justice Department sought to remove the fixed element upon which systematic formula pricing depends, by asking the court in paragraph 6 of its prayer to require each defendant to offer its buyers

10. Cement Institute, 37 F.T.C. 87 (1943).

11. Complaint, *United States v. Cement Institute*, Civil No. 1291, D. Colo., June 28, 1945.

The Justice Department appeared to have three reasons for filing its complaint. First, in the event that the FTC were to be overruled in both higher courts, it wished to have a complaint ready for trial. Second, the Department disagreed with the FTC as to which pricing practices were more likely to be competitive: while the FTC appeared to be advocating uniform f.o.b. mill pricing, the Justice Department believed in the merits of un-systematic freight absorption and interpenetration of markets. Finally, the Department felt that it had a more effective remedy for formula pricing than was to be found in the FTC order.

Trial of the *Denver Cement* suit was delayed until after the final disposition of the FTC order. Various delays then intervened until, on August 27, 1953, the Department announced dismissal of the suit. *United States v. Cement Institute*, CCH TRADE REG. REP. ¶ 66090 (1953).

12. 49 STAT. 1526 (1936), 15 U.S.C. § 13 (1952), amending 38 STAT. 730 (1914) (price discrimination). The FTC proceedings also charged and found a violation of § 5 of the Federal Trade Commission Act, 38 STAT. 719 (1914), as amended. 15 U.S.C. § 45 (1952) (unfair methods of competition).

13. The Justice Department's suit charged a violation of § 1 of the Sherman Act, 26 STAT. 209 (1890), as amended, 15 U.S.C. § 1 (1952) (contract, combination or conspiracy in restraint of trade).

the *choice* between a delivered price and a posted base price f.o.b. mill, and to allow buyers to arrange their *own* transportation when purchasing at the posted mill price.¹⁴

Unlike a requirement of compulsory f.o.b. mill pricing, paragraph 6 of the Justice Department's prayer would have encouraged freight absorption and interpenetration of markets—of the unsystematic, competitive variety.¹⁵ Delivered prices would continue to be permissible for their legitimate purpose of enabling a seller safely to invade wider market areas. If he could not offer a delivered price, the seller who sought to penetrate markets of rivals would have to offer a reduced f.o.b. mill price to compensate for the additional transportation charges, running the risk that the distant buyer might then engage in arbitrage operations and resell the low-priced cement in the higher-priced local market of the selling mill. The only f.o.b. mill price required by paragraph 6 was the posted (established) base price, which of course would be of interest only to buyers within a mill's natural market. In sum, paragraph 6 offered an affirmative encouragement to competition which would not have been provided by a requirement that all prices be f.o.b. mill.

But more important, paragraph 6 would have promoted competition even more effectively in a negative way, by torpedoing the pricing formula. Formula pricing requires an element of certainty which paragraph 6 would have destroyed, by prying open the cement mills to the trucks of buyers.

The Significance of Uncontrolled Trucking

The Justice Department was well aware that the basic collective interest of cement manufacturers in refusing sales to trucks of local buyers lay in the preservation of a system of *known* transportation charges for use in pricing formulas. When the only transportation available to the buyer is the common carrier, whose rates are published and easily ascertainable, it is a simple

14. "6. That each of the defendant cement manufacturers, and any of their subsidiaries or affiliated companies, their officers, directors, agents, and employees, and their respective successors, assignees, and transferees be required

(a) To quote prices and to sell cement on either an f.o.b. plant basis or a delivered price basis, at the election of the buyer;

(b) To establish for each mill separately the same mill price for all buyers from such mill who are of the same class, purchasing similar quantities, and without reference to destination point or use;

(c) To refrain from varying or changing such base mill price regardless of the mode of transportation employed by the buyer."

Amended Complaint, p. 20, *United States v. Cement Institute*, Civil No. 1291, D. Colo., June 28, 1945.

It is true that the FTC order also prohibited refusals to allow customers to provide their own trucking, but the prohibition was limited to refusals based on "any planned common course of action, understanding, agreement, combination, or conspiracy." *Cement Institute*, 37 F.T.C. 87, 260 (1943).

15. Of course formula pricing also involves freight absorption and interpenetration of markets, but they are of the systematic sort that insulates the sellers from price competition.

matter for the penetrating seller to meet, yet avoid beating, competition at any given destination. He merely quotes a delivered price equal to the rival's base price plus the known transportation charge from the rival's mill to the buyer. If buyers were given the opportunity, they would frequently find it less expensive for short distance hauling to use trucks of private contractors or their own trucks (particularly when excess capacity exists), than to use common carrier trucks or common carrier rails at regulated rates. But the transportation charges in such cases are no longer known to the penetrating seller at the time he quotes his prices: What will be the freight to the buyer who negotiates a freight charge with some independent trucking contractor? Even more, what will be the opportunity cost of freight to the purchaser who hauls in his own, and possibly otherwise idle, truck? The pricing formula no longer works. The distant mill that wishes to penetrate the local market areas of a rival cannot quote a delivered price that will result in an identical cost to the buyer who has the opportunity to arrange his own transportation from the local mill. In the absence of an ascertainable transportation factor, the distant mills will be unable exactly to *meet* competition at many destinations. If they seek to win the patronage of buyers in the local markets of rival mills they will almost certainly have to *beat* competition. The improved bargaining position of the buyers will assure such a result. If such beating of competition were to become prevalent, as seems likely to happen, we might expect a downward pressure to develop on the base mill prices. And such unsystematic pricing, where induced by an unsettled trucking situation, has in the past had a habit of spreading to areas beyond the range of economical trucking.

Evidence abounds in the record of the FTC's *Cement Institute* case¹⁶ as to the destabilizing effect of uncontrolled trucking. For instance, a vice president of Lone Star Cement Corporation, the nation's third largest cement company, with a chain of mills east of the Rocky Mountains, wrote to another concern in November 1929:

"I could write you a thesis on trucking. Properly handled, in territories of small consumption, trucking is a very satisfactory means of transportation. Under all other conditions it exerts a most demoralizing influence over the market affected. . . . The Medusa Company supplies the major requirements of the City of Toledo under a very vicious trucking arrangement. . . . The Detroit market is demoralized. . . . Cleveland has suffered for years as a result of indiscriminate trucking. . . . Pittsburgh has been upset. . . .

"We have been trucking for years from our Houston and Dallas plants in Texas without difficulty. These markets are also served by the Trinity Company. The only trucks served are those operated by a trucking concern which has a published line of rates to the various parts of the cities, which have been zoned and priced for the information of the consumers and producers alike. . . . The delivered prices in various parts

16. Transcript of Record, Cement Institute, 37 F.T.C. 87 (1943). Exhibits available for inspection at offices of FTC, Washington, D.C.

of the cities are based on the mill price to the manufacturer, plus the published cost of transportation from the producer's plant to the zone of the city in question.

"Eastern Pennsylvania and Northern New Jersey for the past few years have been a veritable madhouse. Indiscriminate trucking has brought forth greater and greater concessions by producers, until it finally reached the point at which manufacturers were absorbing thirty and forty cents a barrel in order to lay cement down on the job. . . .

"The question has not yet been solved. I believe we will not reach a solution until trucking is entirely eliminated or else a plan similar to the one which we have followed for years in Texas is adopted."¹⁷

Officials of Lehigh Portland Cement Company, the second largest cement company, with mills in most areas of the country, responded to a questionnaire in the middle thirties as follows:

"The manufacturer, striving to figure his prices on indeterminate and fluctuating trucking rates to meet the equally fluctuating rates from his competitor's plant, quickly found himself engaged in blind, reckless and destructive competition.

.....

"By 1932 it was clear that trucking practices were one of the chief contributory causes of the state of chaos and demoralization in which the industry found itself. When about August 1932, one manufacturer announced he would no longer load trucks but would sell only in carload lots, his action was met by practically all manufacturers in the Lehigh Valley area. This action was primarily the result of the desperate condition of the industry and the general realization that only by the elimination of the destructive practices associated with trucking could there be any hope of improvement."¹⁸

The President of Penn-Dixie Cement Corporation, at the time the fifth largest company, with a chain of mills primarily in Pennsylvania and Tennessee, wrote in 1935:

"[I]f a manufacturer should use the trucks of his customers . . . one customer might feel that since he already had trucks which were not being used, . . . the cement was being delivered at little added cost above mill price while another customer might take into consideration all of his trucking costs including depreciation and interest on his money. The latter customer of course would feel that he could not meet the prices at which the first mentioned customer would resell his cement.

"It is quite true that any deviation from the uniform price structure works in cumulative fashion and cannot be limited to a few isolated cases without doing serious harm."¹⁹

The officials of the cement industry did not content themselves with lamenting the ill effects of uncontrolled trucking; they took action. Beginning in the

17. *Id.*, Commission Exhibit 1203 TT-UU.

18. *Id.*, Commission Exhibit 969-14 M.

19. *Id.*, Commission Exhibit 971-20 Z-21 A.

fall of 1929 arbitrary charges (fifteen cents per barrel), about ten per cent above the base mill price on rail shipments, were placed on truck shipments from many mills in a effort to discourage trucking by minimizing the range of trucking's economic advantage.²⁰ Finally, after a series of industry meetings in 1931 and 1932, trucking was completely eliminated in most regions of the United States.²¹ In one area where trucking was continued—the state of Michigan and certain counties along the Great Lakes—the residual trucking was rigidly controlled. In this Great Lakes area not only was truck delivery limited to particular counties, but even in those counties the transporting trucks were either those of the cement manufacturer or else those of a designated contract or common carrier charging publicly announced truck rates.²² With buyers denied the opportunity of loading their own trucks at the sellers' mills, transportation charges were definitely known and a geographical pricing formula could generate stable, identical destination prices.

Although uncontrolled trucking had its principal impact in eroding geographical pricing formulas, it also tended to upset dealer-manufacturer relations in situations where freight absorption was not involved. Many dealers were opposed to the loading of buyers' trucks at the mills, and supported conferences sponsored by the railroads to abolish trucking. However, it seems likely that the cement manufacturers abolished trucking as much for the purpose of reducing pressures from non-trucking dealers for price concessions as for that of simply pacifying unhappy customers. How had trucking upset dealer relations? Some dealers doing their own trucking were able to pass their realized transportation savings on to consumers in the form of lower prices. Rival dealers (particularly if committed to a capital investment in a rail siding) complained to the manufacturer about such "unfair" transportation advantages and price cutting by their rivals. And of course, frequently the complaints developed into pressures for price concessions. In addition, dealers who performed their own truck transportation were in a position to "violate" exclusive distribution territories. These "unscrupulous" dealers frequently diverted truck shipments into markets of rivals,²³ and such invasions incurred the wrath of rival dealers even if the intruders did not shade their profit margins on such sales. When dealers hauling their own cement dumped at reduced prices into the franchise territories of rival dealers, a situation re-

20. *Id.*, Commission Exhibits 2583, 2584, 1203 UU.

21. Brief for Respondents, vol. III, pp. 1530-1662, *FTC v. Cement Institute*, 333 U.S. 683 (1948).

It is not known at exactly how many cement mills trucking had been allowed, but the cement companies that replied to a 1935 questionnaire sponsored by the Cement Institute indicated that trucking had been permitted at some period during the twenties or early thirties at 112 of their 117 cement mills. *Cement Institute*, 37 F.T.C. 87, 198 (1943).

22. Brief for Respondents, app. A, vol. III, pp. 1453-74, 1667-1703, *FTC v. Cement Institute*, 333 U.S. 683 (1948).

23. Arbitrage was rarely involved in such diversions since the mill price applicable to buyers' trucks was generally identical to (or above) the posted base mill price on rail shipments.

sulted similar to the recent and widely publicized bootlegging of "used" new cars by automobile dealers. As price competition among the dealers increased, the dealers became more insistent in their demands for price reductions by the manufacturers.²⁴ To avoid transferring this price competition to the manufacturers' level, the producers eliminated uncontrolled trucking and proceeded to argue that the action was undertaken merely to appease the majority of the dealers.²⁵ Instead of this "dealer" argument proving that the elimination of uncontrolled trucking was unrelated to the manufacturers' own interests, however, it provided insight into the backlash effect of competitive pressures and served to provide the Justice Department with a supplementary argument in support of the remedy proposed in paragraph 6.

Cement manufacturers have sometimes offered another argument for the regulation or outright elimination of trucking. During the FTC hearings they testified repeatedly that the loading of buyers' trucks was fraught with inconveniences and high costs.²⁶ The intended implication was that sheer practical economy was the motive for eliminating such expensive and unremunerative loading services. Yet the FTC proceedings disclosed that in the period prior to the hearings scarcely any manufacturer cited individual cost disadvantages as an explanation for eliminating the loading of buyers' trucks.²⁷ Furthermore, it seems unlikely that loading trucks would be more costly than loading rail cars; and in any event, any premium that could be justified by the cost differential in the two manners of loading would probably be small, and hardly sufficient to overcome the incentives of buyers to truck. Presumably the Justice Department would have tolerated "extras" to the posted f.o.b. mill price for loading buyers' trucks when they could be fully cost-justified.

The Justice Department's proposed remedy for the basing point system of formula pricing is rarely mentioned in the prolific basing point literature of the last decade, and where it is mentioned its significance is seldom sufficiently explained.²⁸ The omission is quite surprising when one rereads the 1938

24. Transcript of Record, Commission Exhibit 971-9 A-B, Cement Institute, 37 F.T.C. 87 (1943).

25. Brief for Respondents, app. A, vol. III, pp. 1627-67, *FTC v. Cement Institute*, 333 U.S. 683 (1948).

26. *Id.* at 1430-39.

27. In 1934, three years prior to the filing of the FTC's complaint, Professors J. M. Clark and Arthur R. Burns of Columbia University were hired by the Cement Institute to make an economic study of the cement industry. A survey by questionnaire was undertaken. Practically every responding cement manufacturer indicated that loading of buyers' trucks was discontinued primarily because of its effects in unstabilizing prices. For a compilation of the Clark-Burns trucking survey, see Brief for Respondent, app. C, *Aetna Portland Cement Co. v. FTC*, 157 F.2d 533 (7th Cir. 1946).

28. The f.o.b. mill price option is suggested, but not fully developed in STOCKING, *BASING POINT PRICING AND REGIONAL DEVELOPMENT* 3-4, 188 (1954); George, *The Law and Economics of Basing Points, Part III*, *Dun's Review*, Nov. 1948, p. 22; Kaysen, *Basing Point Pricing and Public Policy*, 63 *Q.J. ECON.* 289 (1949). The author has attempted to develop the significance of the optional pricing system in Loescher, *Geographical Pricing Policies and the Law*, 28 *J. BUS.* 211 (1954); *Papers and Proceedings of the American Economic Association*, 45 *AM. ECON. REV.* No. 2, at 524-27 (1955).

classic by J. M. Clark, "Basing Point Methods of Price Quoting."²⁹ In discussing alternatives to the basing point system, Clark considered the possibility of requiring posted f.o.b. mill pricing simultaneously with delivered pricing, at the buyers' option, and decisively ruled out the option system—not on the grounds that it would fail to alter price behavior, but on the contrary, because it would create *excessive* price competition:

"But the greatest effect of such a plan would be on the pricing structure, and the greatest factor in this effect would be the uncertainty of the delivered cost of goods to any buyer. Sellers would be exposed to that form of unfair competition which results when buyers can pretend to have a cheaper alternative source of supply than is really open to them. Prices on rail delivery would be reduced to meet the real or supposed costs of truck delivery; and these reductions, not being open and general, would be of the sort which tend naturally to develop into cut-throat competition, driving prices below costs. . . . Where trucking rates are standardized and known, most of the legitimate economies of trucking can be secured without introducing secrecy, chaos, and cut-throat competition into the pricing system."³⁰

The pre-1932 experience of the cement industry without doubt convinced Clark of the power of uncontrolled trucking to increase price flexibility in the cement industry, but it is unlikely that the majority of economists share Clark's fear that unrestrained competition is likely to be too severe to be "workable." In any event, transportation barriers make for regional markets in the cement industry, and it is hard to believe that oligopolistic restraints would be so lacking (even in the absence of formula pricing) as to permit widespread bankruptcy in the industry during periods of depressed demand. The elimination of any arbitrary trade practices that restrain competition is to be welcomed, and the Justice Department is to be congratulated for having once sought, true to the doctrine of the *Socony-Vacuum* case,³¹ to promote "hard competition" in the cement industry.

THE FEDERAL TRADE COMMISSION'S REMEDY

Although the substance of the Justice Department's complaint in the *Denver Cement* case paralleled much of the FTC's findings and order in the *Cement Institute* case, the Justice Department's theory of the case differed substantially from that of the FTC. Whereas the Justice Department primarily attacked the restrictive transportation policies which permitted and perpetuated formula pricing, the FTC's proceedings appeared to be aimed principally at the freight absorption (geographical price discrimination) which made possible identical destination pricing. In the Commission's Findings as to Fact we read, for example:

29. 4 CAN. J. ECON. & POL. SCI. 477 (1938).

30. 4 *id.* at 487.

31. *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150 (1940).

"[T]here are price discriminations which cannot be explained or justified by differences in cost of delivery and which reflect nothing but respondents' plan and effort to make their delivered prices identical at each destination."³²

The FTC was more concerned with eliminating freight absorption than it was with eliminating such implementing devices as the refusal to sell to buyers' trucks. Paragraph 3 of the FTC's order prohibited any "planned common course of action, understanding, agreement or conspiracy" among respondents involving

"discriminating in price between or among their respective customers by systematically charging and accepting mill net prices which differ by the amounts necessary to produce delivered costs to purchasers identical with delivered costs available to such purchasers through purchases from other respondents."³³

This paragraph appeared to be the heart of the FTC order; and, in fact, in its 1946 brief before the Seventh Circuit the Commission argued that it was the crux of the order. The Commission stated in the brief that

"this case will have been litigated in vain [if paragraph 3 is stricken] even though other provisions of the order stand. For it is this systematic discrimination and failure to make due allowance for differences in cost of delivery that causes the identical matched delivered prices. . . . Paragraphs 1 and 2 of the order are applicable to petitioners collectively and to their use and support of the basing point system. Paragraph 3 is by its nature applicable only to the respective corporate petitioners, but to a practice which to the extent used by all would in effect recreate the system and have the same effect in making delivered prices identical."³⁴

The circuit court believed that paragraph 3 was directed at cement manufacturers in their individual capacity—so that were the Commission sustained, compliance would in effect entail uniform f.o.b. mill pricing.³⁵ The court was not willing to compel such a marked alteration of pricing practices, and it ordered the decree set aside.³⁶

Appealing its case to the Supreme Court, the Commission in its brief explained that the circuit court had misapprehended the meaning and economic effects of the 1943 order. It emphasized that all the prohibitions in the order were of practices engaged in pursuant to a "planned common course of action"; and that the provision involving price discrimination was similarly qualified. Uniform f.o.b. mill pricing, the Commission averred, was not being required—

32. Cement Institute, 37 F.T.C. 87, 256 (1943).

33. *Id.* at 261.

34. Brief for Respondent, pp. 301-02, *Aetna Portland Cement Co. v. FTC*, 157 F.2d 533 (7th Cir. 1946).

35. *Aetna Portland Cement Co. v. FTC*, 157 F.2d 533, 543 (7th Cir. 1946).

36. *Aetna Portland Cement Co. v. FTC*, *supra* note 35, at 573. The court also, upon reviewing the Commission's findings, concluded that the Commission had not found sufficient evidence to support its charge of agreement.

even indirectly. In the words of the brief: "The order therefore leaves each respondent free—provided he acts individually and with that variability in action respecting particular competitive situations which is characteristic of genuine competitive endeavor and a free market—to absorb freight in order to meet a competitor's low price or to sell at a delivered price."³⁷ The Commission in effect was thus conceding that at least sporadic meeting of competition through freight absorption did not constitute a planned common course of action. Given this interpretation of the order, the Supreme Court upheld the Commission's findings and order in the now famous antitrust decision of April 1948.³⁸

The Difficulties of Enforcement

With the Supreme Court emphasizing the qualifying "planned common course of action" preamble to the enumerated prohibitions of the FTC order,³⁹ there is danger that the FTC's victory may prove to be an empty one. The FTC order may make identical quotations on sealed bids illegal per se for all practical purposes, since "planned" use of a formula is almost inevitably involved rather than any "individual" meeting of competition;⁴⁰ and the Commission can, we trust, be expected to check sealed bids to government agencies and to undertake contempt proceedings in the event that identical destination quotations are discovered. But this feature of the order would appear to be the only assured significant achievement. The other easily enforced provisions of the order are really of minor importance—such as the demise of the Cement Institute, the discontinuance of freight rate books, and the prohibition of other co-operative marketing practices involving statistical reports and customer classifications. But the crucial provision of the order, aiming at formula pricing, may never hit its target.

Proving that the Commission's order has been violated pursuant to a "planned common course of action," may be just about impossible when identical destination prices are quoted on commercial sales. In any future compliance proceeding, we may expect defendant cement companies to argue that competition is being met on an "individual basis." A defendant can argue that when quoting freight-absorbing delivered prices it merely meets the destination price quotation that the "individual" customer evidences having received on an invoice or advertising circular from the local cement mill. Presumably

37. Brief for Federal Trade Commission, p. 122, *FTC v. Cement Institute*, 333 U.S. 683 (1948). Moreover, in explaining the anticipated effect of the order, the brief associated systematic freight absorption with "mutual and common use of any pricing formula." *Id.* at 124-25. (Emphasis added.)

38. *FTC v. Cement Institute*, 333 U.S. 683 (1948).

39. "It is thus apparent that the order by its terms is directed solely at concerted, not individual activity on the part of the respondent." *FTC v. Cement Institute*, *supra* note 38, at 728.

40. This would seem to be a reasonable inference from the Supreme Court's emphasis on identical prices as evidence of a conspiracy, in *FTC v. Cement Institute*, *supra* note 39, at 713.

the invoice or advertising circular indicates both the base mill price of the local mill and some publicly announced freight rate. With a well developed system of known freight rates in existence, it is extremely unlikely that FTC investigators will in the future find evidence of overt co-operation in a volume similar to that found in the thirties.

The same sort of enforcement problem will confront the Commission if it seeks to undermine formula pricing through paragraph 2(b) of its order, which prohibits

“refusing or declining, when quoting or selling cement at a price effective at the location of the producing mill, to allow purchasers to provide transportation by any means, at any cost, or to any place they may desire.”⁴¹

Controlled trucking will violate the FTC's order only when a “planned common course of action, understanding, agreement, combination, or conspiracy” is involved.⁴² How will the FTC demonstrate that an “agreement” or “understanding” is the basis for the refusal to sell to buyers' trucks? Will not the companies testify that “individual company policy” dictates the refusal to load buyers' trucks? The rationalizations are not difficult to imagine: “The traffic around the mill would be too congested with buyers' trucks; accidents would occur; buyers' trucks are not of standard size and loading of such trucks would be excessively costly; moreover, our dealers who are not equipped to do their own trucking would suffer a competitive disadvantage.” The clincher in areas of the country where all trucking was permanently discontinued in the early thirties would be: “We no longer have roads and loading platforms to service any trucks.” The fact that loading equipment was allowed to be scrapped because it was no longer needed after the initial agreement to eliminate trucking was made would presumably go unmentioned in the statement of “individual company policy” made by the manufacturer. The difficulty is that although a “planned common course of action” was necessary to eliminate unstabilizing trucking in the years around 1932, once trucking was controlled common planning was no longer necessary to prevent its re-emergence.

In some future suit for compliance charging contempt of the order, an enterprising Commission might seek to challenge identical destination pricing by arguing that compliance requires some *affirmative action* to demonstrate discontinuance of the planned common course of action. Some noncoercive beating of competition might constitute such affirmative action. In the penetration of rivals' markets, absent an “understanding,” individual self-interest and a hunger for tonnage would require a manufacturer to attempt some beating of competition. Or, to demonstrate that the “plan” has been discontinued, a firm could be expected to lower the mill nets that it receives at particular destinations in its natural market in order to avoid always having its destina-

41. Cement Institute, 37 F.T.C. 87, 260 (1943).

42. *Ibid.*

tion prices met by distant competitors. This possible line of compliance action has some merit, although the question how much beating would satisfy the requisite of "some beating" is a poser. But the argument is a novel one,⁴³ and a very persuasive presentation would undoubtedly be necessary to win a contempt verdict in the courts. And contempt proceedings would have to be initiated anew every time the FTC discovered that pricing practices had fallen into the old rut of formula identities.

The Commission might also argue that affirmative action is required to discontinue the implementation of the formula which began when trucking was eliminated or controlled by "planned common course of action," and that willingness to load buyers' trucks is necessary to evidence such affirmative behavior. The advantage of this approach is that once the Commission got uncontrolled trucking reinstated, the mere oligopolistic will to adhere to a system of identical prices would no longer be sufficient to insure formula pricing. Of course, a difficult and extremely persuasive presentation of the required "affirmative action" argument would be necessary for the FTC to convince the courts that contempt of the order was inherent in a continued widespread refusal to sell to buyers' trucks. In sum, whichever route the Commission may choose in seeking compliance with its order, the fact that "planned common course of action" prefaces each prohibition in the order will complicate enforcement problems.

The Adequacy of the FTC Remedy

As has been shown, the FTC order will be difficult to enforce against the mere adherence to a geographical pricing formula and the mere implementation of the formula system by refusing to load buyers' trucks. But with the change in composition of the commissioners that began in the spring of 1953 notice was served that the Commission would not even attempt to apply the novel doctrine of "required affirmative action" to either aspect of formula pricing.⁴⁴ A few months before the Justice Department dismissed the *Denver Cement* case, the new majority of the commissioners reported that they would

43. Application of the argument, rather than its proposal, constitutes the novelty. See Handler's persuasive discussion in *Anti-Trust—New Frontiers and New Perplexities*, 6 RECORD 59 (1951).

44. In *Alabama Metal Lath Co.*, Docket No. 5449, FTC, Feb. 16, 1954 (mimeograph), the Commission dismissed a complaint despite a showing that: (1) respondents had previously operated under a license agreement pursuant to which a set of minimum delivered prices for designated geographical zones had been established; and (2) after the termination of this agreement subsequent price increases by each respondent had been identical in amount and had occurred at approximately the same times. The FTC supported its dismissal by noting that "there is no evidence that these increases resulted from any agreement or understanding between the respondents." *Id.* at p. 3.

The *Alabama Metal Lath* holding appears to represent a difference in viewpoint between the present and the prior membership of the FTC. In *National Lead Co.*, 49 F.T.C. 791 (1953), the old Commission had found a conspiracy to restrain price competition upon a showing of the mere existence of parallel pricing in rigid accordance with a common

not challenge any "individual" freight absorption to meet competition—the only qualification being the vague moral test of "good faith."⁴⁵ The implication seemed to be that the Commission majority did not plan to infer "planned common course of action" from mere patterns of identical delivered prices on commercial sales, no matter how rigid and systematic the identities. It appears that the new leadership of the Commission was prepared to speak much about increasing compliance activity,⁴⁶ but old fashioned collusion was to remain the crucial test of violation. Novel theories and radical approaches were to be avoided.⁴⁷ Therefore, it is not surprising that Commission attorneys with whom I have spoken refer to being helpless when it comes to enforcing the cement order against controlled trucking practices. Anticipating the philosophy of the majority of commissioners, these attorneys have also adopted the conventional approach to compliance. Evidently the Commission has lost certain attorneys who wished to argue that compliance requires affirmative action to eliminate the continuing effects of the past trucking "agreements."

Perhaps the Justice Department is no more venturesome than the FTC; and in any event following the Supreme Court's decision in the FTC's *Cement Institute* case, all but one of the Department's own objectives had been achieved. That one exception was paragraph 6 of the Department's prayer—which, as has been shown, was drawn with markedly superior craftsmanship to that of the corresponding provision of the FTC order. Paragraph 6, requiring cement producers to offer both delivered prices and f.o.b. mill base prices so that buyers could elect to provide their own transportation, was specifically directed at *individual* cement manufacturers—while the corresponding provision of the FTC's order was phrased to affect only *collective* pricing practices. Paragraph 6 would have been virtually self-enforcing—while enforcement of the FTC's order would be complicated by its conspiracy phraseology. While the FTC order is unlikely to affect the pricing practices of the industry, paragraph 6 would have virtually guaranteed a return to competitive pricing.

The superiority of its remedy seems to have been one of the reasons for the Department's commencing its suit in the first place, while the FTC order was being appealed. That superiority was still patent when the Justice Department dismissed its suit on August 27, 1953, with the announcement that "the existing order of the Federal Trade Commission, affirmed by the Supreme

zone formula. As in *Alabama Metal Lath*, the evidence showed that respondents had at one time operated under an actual price fixing agreement.

Of the five Commissioners who sat in *Alabama Metal Lath* only two took part in the *National Lead* case. It is interesting to note that the writer of the majority opinion in *National Lead* delivered a strong dissent in *Alabama Metal Lath*, while the lone dissenter in *National Lead* sided with the majority in the later case.

45. See *Change Reported in View on Pricing—F.T.C.'s New Attitude Toward Controversial Basing Point System Held Significant*, N.Y. Times, June 20, 1953, p. 21, col. 4.

46. See *F.T.C. to Review 14,000 Documents—Orders and Trade Practice Rules to be Sifted in New Compliance Program*, N.Y. Times, June 11, 1954, p. 33, col. 5.

47. See *'Hard-Core' Cases Are F.T.C. Target*, N.Y. Times, March 10, 1954, p. 35, col. 2.

Court in 1948, appears to provide ample protection against a revival of the old practices."⁴⁸

THE CHANGES IN THE CEMENT INDUSTRY SINCE THE CEMENT
INSTITUTE CASE

The Justice Department's press release announcing the dropping of the *Denver Cement* suit emphasized that practices in the cement industry had substantially changed since the decision in the *Cement Institute* case. It pointed out that the Cement Institute had been disbanded in 1946, that the circulation of freight rate books had been discontinued and that substantial variation existed on bids for government contracts.⁴⁹ These three welcome developments were to have been expected as results of the more easily enforced provisions of the FTC order. The Department also asserted that the degree of uniformity in prices on sales to commercial buyers had materially decreased, and that "a majority of the cement companies now sell cement f.o.b. their mills, and permit transportation by truck, when requested to do so by the buyers."⁵⁰ And it concluded on the basis of these "facts" that the conspiracy and its effects had been dissipated, so that a further court decree was no longer necessary—especially in view of the asserted adequacy of the FTC's outstanding order.⁵¹

Two of the "factual" premises on which the Department's conclusions were based are, it is submitted, faulty. First, there is the matter of the proper interpretation to be given to the nonidentities in destination prices. Since 1948 there has been a temporary (and I believe it is only temporary)⁵² shift to a *form*⁵³ of f.o.b. mill selling by most of the cement producers. The existence of the resulting differences in destination prices would indeed have complicated the task of the Justice Department in demonstrating the continued existence of a conspiracy, and winning the approval of paragraph 6 by court decree would not have been an easy matter. However, the significance of the material reduction in uniformity of destination prices is slight in the context of the

48. *United States v. Cement Institute*, CCH TRADE REG. REP. ¶ 66090, at 66147 (Aug. 27, 1953).

49. *Ibid.*

50. *Ibid.* The press release emphasized that the "primary purposes" for which the suit had been filed were, among others, "to break up the practice of the defendant cement companies refusing to sell cement f.o.b. the mill if the buyers so requested; to permit buyers to use truck transportation without being discriminated against in price if they desired to use truck rather than rail transportation." *Id.* at p. 66146.

51. *Id.* at p. 66147.

52. An apparently typical reply to a 1953 trade journal questionnaire concerning pricing practices in the cement industry was that of "a large Midwestern producer: 'As long as we can continue to sell our product without freight absorption, we will do so. When and if it becomes necessary to absorb freight to become competitive, we will do so.'" Quoted in Trauffer, *1953 Seventh Consecutive Peak Year*, Pit and Quarry, Jan. 1954, p. 106, at 110.

53. A majority of mills were quoting prices f.o.b. mill, rail car. Even when quotations were made f.o.b. mill, truck, only a small minority of mills would quote for trucks owned or controlled by the buyers. See text following note 68 *infra*.

cement boom which has persisted since 1948,⁵⁴ for the booming demand is a more likely explanation for the alteration in pricing patterns than any voluntary abandonment of noncompetitive practices. And second, there is the matter of the Justice Department's information regarding trucking, which will be shown to be either irrelevant or erroneous. Not only did the Department lack information to support its statement concerning the prevalence of sales f.o.b. mill to buyers' trucks,⁵⁵ but it failed to make a distinction between controlled and uncontrolled trucking. And only uncontrolled trucking, as we have seen, can destroy the pricing formula.

Economic Conditions and Pricing Strategy

Excess capacity, which had plagued the cement industry since the latter part of the 1920's, finally began to disappear by 1947. Even World War II had not greatly benefited the industry because of the restrictions on construction activity. In terms of percentage of theoretical capacity utilized, 1947 was the best year of activity since 1927, the percentages in 1948 and 1949 were even better, and with the abatement of cement strikes and shortages of kiln fuel and freight cars, the rate of capacity utilized has been still higher in later years.⁵⁶ The construction boom so increased demand for cement that trade journals regularly reported severe shortages during the summer months from 1948 to 1952.⁵⁷

Concomitant with the postwar boom in cement production there began a marked reduction in the amount of freight being absorbed.⁵⁸ Rather than

54. Unlike the steel industry, the cement industry, bolstered by the prolonged construction boom, did not face the temporary contractions in demand that plagued steel in 1949-50 and 1953-54. "Cement has been in tight supply in most areas since the end of the war, even though the industry has increased its capacity by one sixth since 1945." Pit and Quarry, Jan. 1955, p. 104.

55. Upon a request for a list of mills at which cement producers would sell f.o.b. mill to buyers' trucks, I was informed in a letter from Assistant Attorney General Stanley N. Barnes, dated January 28, 1954, that the Justice Department had not compiled such information.

56. Theoretical capacity overstates practical capacity, primarily because of the seasonal nature of demand and the excessive expense involved in constructing sufficient storage capacity to permit year-round kiln operation. Theoretical capacity tended to overstate practical capacity during the latter forties because of labor disputes as well. The following selected annual figures, showing the percentage of theoretical capacity utilized, illustrate the cement boom of the twenties and the one of recent years: 1923—84.9%; 1925—83.5%; 1927—76.3%; 1929—65.9%; 1947—74.9%; 1949—81.0%; 1951—87.4%; 1953—90.3%. U.S. BUREAU OF MINES, MINERALS YEARBOOK (selected years).

57. See Business Week, Sept. 4, 1948, p. 30; Oil and Gas Journal, Jan. 6, 1949, p. 40; Concrete, Oct. 1950, p. 11; Engineering News Record, Oct. 11, 1951, pp. 23-24.

58. Cement shortages began to develop in 1947, see Rock Products, March 1948, p. 151, and two producers in the Lehigh Valley area of Pennsylvania informed the author during an interview in April 1949 that their concerns had begun to withdraw from the markets in much of Virginia prior to the Supreme Court's *Cement Institute* decision. It was more profitable to substitute customers in the unsatiated markets in eastern Pennsylvania, eastern New York and New Jersey, where higher mill nets could be obtained, for customers

continue to service customers in distant markets where adherence to the basing point system entailed large reductions in mill nets (when alternative sales could be made at higher mill nets in less distant markets), cement manufacturers tended to shrink the range of their marketing areas, though they continued to "meet competition" in order to retain certain desired customers in markets where freight absorption was less costly. Some unfulfilled demand was developing in the natural markets of the mills. The price of cement was held down apparently for reasons of administrative policy in many regions of the country, and cement was allocated to customers by non-price rationing, with the sacrifice of at least short run profits. Following the *Cement Institute* decision, a two-fold advantage appeared to follow from a rapid shift to a form of f.o.b. mill pricing. First, the unsatiated demand in the market was such that a producer would rarely lose sales by adhering to a uniform f.o.b. mill price. And so while customers could be retained, profits could be enhanced by eliminating freight absorptions. Customers' good will did not need to be lost in the process, since "confusion" over interpretation of the FTC's order could be made the scapegoat.⁵⁹ Secondly, a political move seems to have been afoot to bring pressure on Congress to legalize categorically the basing point system.⁶⁰ Announcing that the *Cement Institute* decision required uniform mill net f.o.b. pricing, United States Steel Corporation's subsidiary, Universal-Atlas Cement Company, switched to uniform f.o.b. mill pricing in early July 1948.⁶¹ Not only did almost the entire cement industry follow Universal-Atlas' lead,⁶² but within three weeks virtually the entire steel industry followed the similar lead of the Steel Corporation.⁶³

in Virginia markets where the basing point system of pricing entailed large freight absorption. A similar phenomenon had developed much earlier in the steel industry, which had been rationing short supplies since the beginning of World War II. See Senate Special Committee to Study Problems of American Small Business, *Changes in Distribution of Steel, 1940-47*, 81st Cong., 1st Sess., report No. 44, at 25 (1949).

59. See Stocking, *The Law on Basing Point Pricing: Confusion or Competition*, 2 J. Pub. L. 1 (1953).

60. "Adoption last week by several major steel companies of the f.o.b.—mill pricing system that the industry has vigorously opposed for the last quarter century, represented a gamble by the steel industry that unfavorable public and industrial reaction eventually will spur Congress to legalize the basing-point method of computing prices—the practice just discarded, under protest, by both the cement and steel industries." Mullaney, *Steel Ruling Seen as a Boomerang*, N.Y. Times, July 11, 1948, § 3, p. 1F, col. 4. See also *Basing Point Blues*, Wall Street Journal, July 29, 1948, p. 1, col. 6; Latham, *The Politics of Basing Point Legislation*, 15 LAW & CONTEMP. PROB. 272 (1950).

61. N.Y. Times, July 1, 1948, p. 33, col. 1.

62. However, Marquette Cement Mfg. Co. published to its dealers, shortly after the Supreme Court decision, a statement on sales policy indicating its plans to continue to meet competition where its commercial interest was involved. *Marquette States Policy on Supreme Court Decision*, Rock Products, June 1948, p. 97. Moreover, Marquette in a letter to its customers on July 20, 1948 reiterated its position, N.Y. Times, July 22, 1948, p. 39, col. 5, despite reports that most major cement producers had discontinued or were going to discontinue freight absorption. See Wall Street Journal, July 9, 1948, p. 3, col. 1.

63. Wall Street Journal, July 17, 1948, p. 3, col. 1; July 15, 1948, p. 14, col. 1; July 13, 1948, p. 4, col. 4; July 9, 1948, p. 3, col. 1; July 8, 1948, p. 1, col. 6.

It seems exceedingly possible that a primary purpose of the switch in pricing policy was to inflict sufficient price increases on particular customers (who had well-established purchasing relationships with distant mills) so that the disgruntled customers would demand new legislation to approve a regularized basing point system. Although the President in the summer of 1950 vetoed the only such bill that to date has passed both houses of Congress,⁶⁴ bills to legalize basing point systems (or equivalents, in the form of unqualified legalizations of "good faith meeting of competition") have continued to be proposed during each session of Congress.⁶⁵ Given the continuation of the cement boom, and the objectives of political strategy, it is little wonder that Justice Department inquiries disclosed a material reduction in the frequency of identical destination prices on commercial sales. It is a wonder, however, that the Justice Department's analysts neglected, or failed to understand, that formula pricing of the basing point variety is primarily a reserve tool to prevent a weakening in the price level whenever excess capacity develops.

We may expect that upon an eventual easing of the cement boom, competition for commercial sales will lead to a regular meeting of destination prices, performed on a so-called "individual basis"—as recently recommenced in the steel industry.⁶⁶ So long as trucking is controlled, any distant mill seeking to quote identically to a buyer in a rival's natural market need only look at the rival's invoice or advertising circular (showing base price plus reported transportation charge) in order to "meet competition." Under the circumstances, freight absorption will not develop into the unsystematic variety which destabilizes the industry's price structure, unless direct government purchases loom large in volume⁶⁷ and the rivalry unleashed via nonidentical bidding spreads to commercial sales.

There is evidence other than the recent resumption of systematic freight

64. S. 1008 (O'Mahoney), 81st Cong., 1st Sess. (1949), passed by Congress on June 2, 1950, 96 CONG. REC. 7977 (1950), and vetoed by the President on June 16, 1950, 96 CONG. REC. 8721-23 (1950).

65. S. 719 (McCarran), 82d Cong., 1st Sess. (1951); H.R. 2820 (Walter), 82d Cong., 1st Sess. (1951); S. 540 (McCarran), 83d Cong., 1st Sess. (1953); S. 1377 (Capehart), 83d Cong., 1st Sess. (1953); H.R. 4170 (Walter), 83d Cong., 1st Sess. (1953); S. 780 (Capehart), 84th Cong., 1st Sess. (1955); H.R. 4958 (Walter), 84th Cong., 1st Sess. (1955); H.R. 6875 (Walter), 84th Cong., 1st Sess. (1955).

66. Freight absorption on a so-called "individual basis" evidently became routine in the steel industry according to reports in various issues of *Iron Age* during the lull in the demand for steel between September 1953 and November 1954. It was reported that the extensive freight absorption might cost as much as \$70 million in 1954, or an average of 75 cents to \$1.00 per ton. *Iron Age*, July 29, 1954, p. 45. Trucking, however, had been largely controlled in the steel industry and the ensuing freight absorption was apparently very systematic. See Loescher, in *Papers and Proceedings of the American Economic Association*, 45 AM. ECON. REV. No. 2, at 524-27 (1955).

67. The preponderance of cement sales have been to commercial buyers during the postwar period. Even highway work in many states is performed on a contract basis, with the contractor purchasing his cement directly. Sealed bidding is not practiced in the quoting of cement prices to contractors.

absorption in the steel industry, to justify a forecast that some formula pricing system for commercial sales will come to be reinstated in the cement industry. For one thing, of the 55 cement companies that filed compliance reports with the FTC in September 1948, 37 cement companies stated definitely their intention to absorb freight; 15 did not clearly describe their intentions concerning freight absorption; while only 3 indicated that their interpretation of the order had the practical effect of preventing freight absorption.⁶⁸ Furthermore, during the recent period of so-called f.o.b. mill pricing, practically every mill east of the Rocky Mountains has sold f.o.b. mill *only* rail car, or, as in many areas of the Middle West, f.o.b. mill *only* rail car or controlled truck (common carrier, manufacturer's contract carrier, or manufacturer's own trucks).⁶⁹ It seems unlikely that a flagrantly arbitrary system of transportation would have been preserved had not the cement manufacturers planned to reinstitute regularized interpenetration of markets, dependent upon known freight elements. Were sales to remain on a uniform f.o.b. mill basis, the producers would have no real incentive to deny to buyers in their natural markets the convenience and economy of customer-chosen truck transportation.⁷⁰

The Trucking Situation

The Justice Department's statement that "a majority of the cement companies now sell cement f.o.b. their mills, and permit transportation by truck, when requested to do so by the buyers"⁷¹ seems to indicate that the Department made no more than a superficial investigation of the reliability of its trucking information. Transportation data on cement shipments is regularly collected by the Bureau of Mines. Information assembled at the Bureau for 1952 (but as yet unpublished) shows that in nine out of nineteen cement producing districts there was no (or virtually no) trucking.⁷² Even these data, however, markedly understate manufacturers' restrictions on trucking for the

68. Wallace & Douglas, *Antitrust Policies and the New Attack on the Federal Trade Commission*, 19 U. CHI. L. REV. 684, 697 (1952).

69. See also text following note 75 *infra*.

70. One of my colleagues shares in the partnership operation of a building supply dealership at Mitchell, Indiana. A cement mill within one mile of their warehouse will not load the firm's trucks, but requires that they take delivery in trucks of the established trucking contractor or in the cars of the B. & O. Railroad. A saving in transportation charges is denied the building supply firm which possesses unutilized capacity in the form of trucks and drivers.

71. *United States v. Cement Institute*, CCH TRADE REG. REP. ¶ 66090, at 66147 (Aug. 27, 1953).

72. Districts with no (or virtually no) trucking of cement from mills in 1952: District #1—Eastern Pennsylvania and Maryland; District #6—Illinois; District #8—Alabama; District #9—Tennessee; District #10—Virginia, Georgia, Louisiana, Florida, South Carolina, Mississippi; District #11—Iowa; District #13—Kansas; District #14—Western Missouri, Nebraska, Oklahoma, Arkansas; District #15—Texas. This information was gathered by this writer in the offices of the U.S. Bureau of Mines, Washington, D.C., from data prepared by staff members of the Bureau.

reasons that (1) in some districts there may be trucking at a few but not at all mills, and (2) even where trucking exists, the trucking may be controlled.

The author made a survey of cement manufacturers and of certain groups of commercial purchasers⁷³ last year. The findings are that in the period 1953-1954 uncontrolled trucking was, as a rule, being practiced only in the Rocky Mountain and Pacific Coast areas. Controlled trucking was prevalent from mills in western Pennsylvania, western New York, Ohio, Michigan, Indiana, Kentucky, Wisconsin and southern Texas. In the remaining portions of the United States, as a rule, mills shipped cement by rail only. Of some 149 mills in the United States operated in August 1953 by 59 defendant companies in the Justice Department's suit,⁷⁴ only 61 mills (about 41 per cent) shipped by truck at all, and only 25 mills (about 17 per cent) shipped by uncontrolled truck.

But let us examine the particular wording used in the Justice Department's assertion that "a majority of the cement companies now sell cement f.o.b. their mills, and permit transportation by truck, when requested to do so by the buyers."⁷⁵ My research, based on the period 1953-54, would appear to support any of the following different statements:

1. 38 of 59 defendant companies (64 per cent) were allowing *at least some form* of truck transportation from *at least one* of their mills.
2. 30 of 59 defendant companies (51 per cent) were allowing *at least some form* of truck transportation from *each* of their mills.
3. 13 of 59 defendant companies (22 per cent) were allowing *uncontrolled* truck transportation from *at least one* of their mills.
4. 11 of 59 defendant companies (19 per cent) were allowing *uncontrolled* truck transportation from *each* of their mills.

Nondiscriminatory handling of buyers' trucking is, then, limited to just a few companies, and it is found primarily in the Far West. Although buyers' trucking (if not controlled in the future) can be expected to increase price flexibility on the Pacific Coast, it will probably constitute a less significant factor in the Rocky Mountain region, come the eventual easing of demand, because Ideal Cement Co., a multiple plant concern, dominates the area with about 75 per cent of the installed capacity.⁷⁶ In other regions, where uncontrolled

73. Questionnaires were sent to purchasers (producers of ready-mix concrete and concrete products) in mill areas where cement manufacturers had either been unwilling to respond or else insufficiently clear in their responses to the questionnaires.

74. The number of defendant companies had undergone some significant shrinkage since 1945 as attritions and acquisitions had occurred in the industry. In addition to 59 consolidated defendant companies there were 4 other cement companies operating in the industry in the summer of 1953. Each of the non-defendant companies operated a single mill, resulting in a total of 63 companies and 153 mills. Of these 4 non-defendant companies, 2 practiced uncontrolled trucking, 1 controlled trucking, while the transportation policy of the fourth concern (owned by the state of South Dakota) has not been ascertained to date.

75. See note 71 *supra*.

76. Based on data in *Geographical List of Plants*, PIT AND QUARRY HANDBOOK, 1953, at 117-D - 278-D.

trucking provided the important source of price flexibility during the period 1927-1932, trucking is now either nonexistent or regulated.

In sum, it appears that the Justice Department erred both in evaluating the importance of the recent change to nonidentical destination pricing, and in concluding that free trucking had been embraced by the cement industry. And primarily because of these errors, the Department threw away its chance to guarantee free trucking and, through it, competitive pricing.

CONCLUSION

I have intentionally avoided discussing in this essay several important elements in the market structure of the cement industry that condition competitive behavior. No consideration has been given to the relative degree of ownership concentration in each regional cement market; to the significance of multi-plant chain companies and their continued acquisition of independents; or to the problem of geographical price discrimination when practiced between firms of varying size and geographical diversification. The foregoing elements represent many of the important complications that necessarily operate to impede the effectiveness of competition in the cement industry. However, even in the absence of alteration of market structures, there is good reason to believe that competitive behavior would be substantially improved if buyers were given the option of transporting in their own trucks purchases made at a posted f.o.b. mill price. Subsequent to the current cement boom, uncontrolled trucking would tend to transform the formerly sluggish and wasteful nonprice competition into unsystematic freight absorption, conducive to base price flexibility.

The Justice Department has carelessly tossed away an opportunity to gain an effective, self-enforcing order striking at formula pricing in the cement industry. Freight factors continue to be known to all destinations from most mills in the industry. Consequently, when the present feverish demand finally shows some sign of abatement, and freight absorption becomes quite general, we have every reason to believe that the meeting of competition will very much resemble the multiple basing point system of old. It is true that the system of non-base mills will be gone, formal freight rate books will be gone and, let us hope, identical quotations on sealed bids to governmental agencies will continue to be gone. However, it seems likely that meeting of competition in commercial sales on the so-called "individual basis" will still result in systematic freight absorption. The freight absorbing mill will simply meet its competitor's destination price, computed on the rival's base mill price plus the *publicly announced* freight (rail or truck) rate from that mill to destination. So long as cement producers are not compelled to offer buyers an opportunity to purchase at a posted mill price and transport in their own trucks, the essential ingredients of a geographical pricing formula remain. The FTC's outstanding order, because of its "planned common course of action" preamble, will not be easily enforced. Given the eventual resurrection of systematic freight absorption in the cement industry, the order can be used against the

resulting practices only if a bold staff will adopt novel theories of compliance. Yet the present leadership among the commissioners is disinclined to develop and apply novel antitrust law. Nevertheless the public has been told by the Justice Department that substantial and inferredly voluntary changes have been made in the marketing practices of the cement industry, and that the FTC order will be fully efficacious in preventing any re-emergence of noncompetitive pricing. If the *Denver Cement* case was dismissed because it aimed at peripheral violations and threatened "possible extensions of legal theories based upon political and sociological doctrines and belief,"⁷⁷ then do let us have our antitrust policy based more upon "theories, doctrines and belief" and less upon summary analyses and myopic realism.

77. Barnes, *The Judge Looks at Antitrust*, AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW, PROCEEDINGS AT THE ANNUAL MEETING, Aug. 26-27, 1953, pp. 13-17.