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TRADE RESTRAINTS—TRADE ASSOCIATIONS—OPEN PRICE AGREEMENTS—SUGAR INSTITUTE CASE—The *Sugar Institute* case,[1] decided March 30, 1936, in a unanimous decision by the Supreme Court, has

[1] Sugar Institute, Inc. v. United States, (U. S. 1936) 56 S. Ct. 629.

been eagerly awaited by those interested in the limits and possibilities, under the anti-trust laws, of so-called self-regulation by industry through permissible activities of trade associations. The decision has been reported to affect some 2,000 trade associations.[2] The case presented such a diversity of practices that any decision in it gave great promise of answering some of the many perplexing questions growing out of the enforcement of the anti-trust laws, which could not heretofore be answered from the decided cases. The fact that the case came up after the demise of the NRA, and the Federal Government's attempt at trade regulation through that medium, gave it peculiar importance to groping industries which desired to maintain, to some extent at least, the stability of price and the curtailment of destructive and unfair competitive practices made possible while the NRA was in operation. Fortunately, the case was carefully presented in the lower court and in the Supreme Court.[3]

The purpose of this comment is to ascertain what the decision in the *Sugar Institute* case adds to the interpretation of the Sherman Anti-Trust Act, and what the Supreme Court's present attitude is toward industrial cooperation through voluntary self-regulation by competitors. Since decisions concerning the legality of trade association activities turn largely upon the peculiar facts in the particular case, it will be profitable to look rather closely at the history of the sugar industry and the practices carried on by it.

I.

About 99 per cent of the sugar consumed in the United States comes from three sources. The most important source is the group of fifteen refiners composing the Sugar Institute. This group refines between 70 and 80 per cent of the total domestic consumption, using raw cane sugar imported from Cuba or from our insular possessions. Next in importance are the refiners making sugar from beets grown in this

[2] N. Y. TIMES, p. 1:4 (March 31, 1936).

[3] United States v. Sugar Institute, Inc., (D. C. N. Y.) March 7, 1934. The district court opinion, though unreported, may be found in C. C. H. FED. TRADE REG. SERV., Court Decision Supp., ¶ 7124 (1934) with the final decree at ¶ 7236, and should be read along with the opinion of the Supreme Court for a better understanding of the case. A resume of the district court's opinion may be found in 1 U. S. LAW WEEK, index p. 595 (1934). The trial of the case occupied about six months, during which time over 100 witnesses gave testimony, filling 10,000 typewritten pages. In the Supreme Court an additional brief was filed on behalf of the Cotton Textile Institute, Window Glass Mfgrs. Association, National Lumber Manufacturers Association, and the Consumers Goods Industrial Committee, organizations which are national in scope and representative of their respective industries.

For a comment on the decision in the district court, see Handler, "The Sugar Institute Case and the Present Status of the Anti-Trust Laws," 36 COL. L. REV. 1 (1936).

country. Of lesser importance are the "offshore" sugar producers who refine sugar in Cuba or our insular possessions and then import it. The refined sugar sold by the members of the Institute is a thoroughly standardized product. Brand names have had little sales value in the industry and it is exceptional when one certain brand can command a higher price than other brands. To manufacturers using sugar, price has always been the most important consideration. Distributors of refined sugar have regarded as satisfactory a gross profit of ten cents per hundred pounds. As a result, the sugar industry is one in which price is all important and a cost differential of a few cents per hundred pounds is regarded as substantial. Added to this picture was the fact of over production of at least 50 per cent starting right after the relaxation of government control following the World War, coupled with a lessening in the consumption of sugar, probably because of the "slimness campaign" carried on by certain advertisers. In the attempts of individual producers to gain as much of the existing market for sugar as possible, highly unfair and uneconomic competitive practices grew up. As early as 1921 the practice developed on the part of some refiners of giving secret concessions from their published prices. It was estimated that by 1927 at least 30 per cent of the sugar sold by refiners carried some kind of secret concession.[4] Due to the secrecy of the concessions every one had to demand them for fear that his competitor would secure a preferred position over him. When it is remembered that the industry is one in which a cost difference of a few cents per hundred pounds is all important, the importance of gaining such a concession can readily be seen. The result was the progressive demoralization of the sugar trade, and the contention of the Institute that the sugar industry was in a sorry condition in 1927 was probably well founded. The secret concession system not only was dishonest but it tended to restrain competition in that the concessionaire's competitors were deceived and were unable to meet his resale prices. The industry was ready for remedial measures and out of this background grew the Sugar Institute. In considering the methods it used, the abuses it was attempting to correct and the condition of the industry must be kept in mind.

2.

The officers of the larger refiners met in 1927 and formed the trade association known as the Sugar Institute which formulated and

[4] Among the outstanding methods of secret concessions used were: a simple secret rebate in price, payment of fictitious "brokerage," payment of fictitious "storage," fictitious advertising allowances, secret substitution of higher price grades for grades specified in the contracts, secretly reduced transportation charges, and secret options to buy after the increase in price.

approved a code of ethics. The avowed purpose of the association was to adopt a plan of making the openly announced prices the actual prices and terms. From an attempted adherence to this purpose [5] grew the necessity for many secondary features of the plan. Once the secret and direct price concession was eliminated as a vehicle of discrimination, as it was meant to be by adherence to the basic plan, the pressure for discrimination by those who had profited from it tended to induce the less ethical refiners to adopt certain other practices, such as quantity discounts, fictitious storage charges, freight rebates, etc., as convenient vehicles for such discrimination. It was the Institute's attempt to meet and prevent these practices which raised the real issues in the case. Chief Justice Hughes, in the course of the opinion, said, "For the question, as we have seen, is not really with respect to the practice of making price announcements in advance of sales, but as to defendants' requirements of adherence to said announcements without the deviations which open and fair competition might require or justify." [6] A little later he says, "The 'basic agreement' cannot be divorced from the steps taken to make it effective, and the requirements of the Institute must be viewed in the light of the particular opportunities which they cut off or curtailed. The crucial question—whether in the ostensible effort to prevent unfair competition, the resources of fair competition have been impaired—is presented not abstractly. . . ." [7] So these secondary or supplementary restrictions of the association must be scrutinized closely and understood before attempting any conclusions as to their legality. But before looking at these various restrictions, the elaborate price reporting plan of the Institute merits some attention. Under the plan, sugar was sold upon open prices announced in advance of sale. Members were required to keep posted on their bulletin boards the basic price of sugar. Any changes in price instituted by the member were required to be posted and notification thereof sent to the Institute. The Institute in turn immediately notified the operators of commercial tickers and the other members by telegraph. It was recommended, however, that, except to meet competitive prices already announced, no

[5] The trial court found that the purpose set out in the Code was only incidental to the dominant purpose shown inferentially by the so-called supplementary restrictions, and which purpose was stated by the trial court to be the maintenance of a uniform price structure, maintenance of relatively high prices in regard to raw sugar prices, and improvement of their own financial position by limiting and suppressing numerous contract terms and conditions. While this is certainly one legitimate inference to be drawn from the institution of such restrictions, it seems to the writer that many of the restrictions were forced upon the Institute and had to be employed if the plan was to work at all under the conditions under which it had to operate.

[6] 56 S. Ct. 629 at 636.

[7] 56 S. Ct. 629 at 637.

price changes should be announced later than three o'clock in the afternoon. Whether or not this plan changed the practice of the industry of selling sugar on "moves,"[8] and to what extent selling on "moves" was the traditional practice was sharply contested. The Supreme Court, however, decided that the great bulk of sugar sold had always been sold on "moves," and that this price reporting plan did not greatly change the established practice, at least in its theoretical workings, and that therefore the general features of the plan should not be condemned since it did not restrain competition.[9] How far this implicit approbation may be considered a stamp of approval of such a price plan in other industries will be considered later.

In carrying out the basic principle of selling sugar only upon prices and terms publicly announced, the supplementary restriction for which the Institute was most criticized was its treatment of brokers and warehousemen. Refiners sell almost all of their sugar through brokers, and largely from consigned stocks kept in warehouses at terminal points. The Institute abruptly made those who were carrying on the dual functions of broker and warehouseman choose in which capacity they were going to continue business. It was then recommended that refiners deal only with those who had made an election to act as broker only, or as warehouseman only. Third persons carrying on lawful businesses were thus compelled to limit their operations, often causing serious financial loss. Moreover, the innocent had to suffer along with those guilty ones who were using these dual functions to facilitate secret concessions which were often difficult of detection—concessions which took the form of fictitious warehousing fees, when the customer was only storing the sugar for his own use. Whether such drastic steps were necesary to eliminate the admitted evils is hard to determine. That there was potent pressure to induce a continuance of these discriminations is evident from the fact that as one means for their accomplishment was eliminated, others cropped out. Thus the efforts toward adherence to the published prices just described led to the changing of the custom of the industry of selling at f.o.b. prices. Since cost of transportation is a substantial element in the cost of sugar to the customers, and the distributors' profits were so small, the terms which

[8] A "move" takes place when refiners make public announcement that at a fixed time they will advance their selling price to a named figure. Buyers then hurry to place their orders for a considerable supply at the lower price available before the hour fixed for the advance.

[9] In theory, since sugar is a standardized product, no complete move could take place until all the refiners made announcements of an advance in price. But if an increase in price is made and notice sent to the members it is an invitation for others to follow. Since the advance would become effective at a future time the refiner first making the announcement would lose nothing if others failed to follow.

refiners granted for transporting sugar became important. The location of the refiner was important and to sell in certain areas they often had to quote the lowest rate and absorb any difference. When adherence to the announced price was enforced, competition then developed in the freight applications themselves. To cut off this practice, the members of the Institute adopted a plan which in effect resulted in quoting only delivered prices based on all-rail freight rates. This, of course, raised the price of sugar to those who were advantageously located in relation to waterways. Again the question arises whether the measures adopted were necessary to curb the evil. Other transportation activities objected to were related to the prevention of anything that would defeat the freight application. They consisted of agrements with barge companies to make open announcement of their rates and refusal to use trucking companies affiliated with any buyer, broker or warehouseman.

After the advent of the Institute, many of the consignment points, where stock was kept for delivery in less than carload lots, were eliminated. The Government contended this was done in an effort to shift the carrying of consigned stocks from the refiner to the distributor. The Institute contended it was done merely to eliminate the excess found to be unnecessary to the real needs of the trade. Again a nice question of economics is presented, and it is questionable whether or not the trade or the consumers were rèally benefited by the maintenance of such consignment points. The trial court found their elimination to be in restraint of trade and was no doubt justified from the evidence of the rather unsystematic manner in which they were eliminated.

Another alleged restraint was concerted prohibition of long-term contracts or quantity discounts. The trial court found that such arrangements often resulted in economies both to the refiners and to the buyers and that concerted prohibition was arbitrary and prevented the passing on of the savings to the purchaser.

The Institute also performed one of the recognized functions of the trade association, namely, that of collecting and distributing trade statistics. The disputed question in the case arose over who was to receive them. The Institute collected data concerning the production and deliveries of individual refiners, deliveries by states and by different important routes, and the amounts consigned in each state. This information was sent to members, while the distributors received only the statistics bearing on the total melt and total deliveries. The trial court felt that the association restrained trade by giving its members an unfair advantage through the sole possession of such facts. The argument against full disclosure was that buyers in a persistent "buyers market" such as we have today are not in need of such information

and that its only effect is to disclose to them the unfavorable position of the sellers.

3.

There are several methods of approach to the problems involved in a case of this type. The Sherman Act is not a regulatory statute dealing specifically with various courses of conduct that affect the competitive system, but rather it was framed in broad and elastic terms, making the general principles of the common law as to restraints of trade applicable to interstate commerce. Instead of setting up a static body of law, the act was framed in such broad terms that the Court can develop a growing body of principles capable of adapting themselves to changing industrial needs. The aim of Congress was probably the maintenance of an effectively functioning competitive system. To what extent can individual competitors engage in cooperative activities for the purpose of eliminating destructive practices and secure reasonable stability in the light of the apparent legislative intent? Should the industry be able to adopt most any means to bring this about? How much weight should be given to the industry's practical experience as to what is necessary to curb the evils and the appropriateness of the measures adopted? These are the questions that must be faced to get a sensible answer to such a problem. The business history of the past few years has taught us that ruinous competition and sales below the cost of production have their repercussions throughout the whole social structure, bringing about unemployment and the driving of business from small and moderate sized firms into the hands of a few large units. The approach which the courts have taken may roughly be said to involve an examination of the activities engaged in, keeping in mind their effect on the larger competitive situation. Proof of the statement that the act will be interpreted to allow the adoption of reasonable means to protect interstate commerce from injurious and destructive practices, which if considered apart from the whole picture might be considered illegal, is found in the *Appalachian Coals* case.[10] But in the instant case the Court felt, and the Institute in the course of the trial in some respects conceded, that the Institute went further than was necessary to curb the evils threatening the sugar industry. This alone puts a different light on the activities of the association, although probably many of the practices of the Institute would not have been considered as "reasonable means" even if their use were

[10] Appalachian Coals v. United States, 288 U. S. 344, 53 S. Ct. 471 (1932). Here the Court approved price fixing by a group which had control of about 12 per cent of the output of the coal in the United States. The objective was to save the industry from ruinous competition, and the plan called for similar agencies in other fields, so that the Court thought sufficient competition in the industry as a whole would be preserved. The case is commented upon in 31 MICH. L. REV. 837 (1933).

indispensable to the correction of the existing evils. The Supreme Court agreed with the trial court in condemning the agreement not to deal with any party acting in the dual capacity of broker and warehouseman except upon conditions imposed by the Institute. In so doing the Court did not make new law but reaffirmed a well-settled principle.[11] The Court has consistently held that the Sherman Act was meant to suppress any combination which restricts the liberty of a trader to engage in business and which, in a sense, boycotts him. The Court might have held these activities to be illegal apart from the fact that it considered them unnecessary to attain any legitimate object. The combined strength of the group invites over-reaching and abuse. The Court also approved, for the same reasons, the enjoining of the elimination by concerted action of long-term contracts and quantity discounts where economies were involved. Arbitrary conditions were being imposed upon all buyers of sugar by this combination which held monopolistic power.

As to the Institute's open price plan, the decision in this case might well be considered as an advance and as an indication of a new attitude. It can be said, from viewing the decisions in the trade association cases as a whole, that any concerted action in fixing uniform prices among independents is illegal per se. How far, then, can a trade association go in this direction (and it is probably the desire of every such association to attain some degree of price stability) without being said to have crossed the line? The Court has held that the fact that the price fixed is reasonable does not make the combination lawful.[12] Nor is it necessary to find a direct agreement to fix prices to make it unlawful. All that is necessary is that in viewing the activities of the association in their entirety, it can be seen that by reason of intent or necessary effect the tendency of the practices indulged in is to bring about the fixing of a uniform price.[13] In the *Maple Flooring* case the Court approved

[11] Loewe v. Lawlor, 208 U. S. 274, 28 S. Ct. 301 (1907); United States v. First Nat. Pictures, 282 U. S. 44, 51 S. Ct. 45 (1930); Paramount Famous Lasky Corp. v. United States, 282 U. S. 30, 51 S. Ct. 42 (1930); Binderup v. Pathé Exchange, Inc., 263 U. S. 291, 44 S. Ct. 96 (1923); Eastern States Retail Lumber Dealers' Assn. v. United States, 234 U. S. 600, 34 S. Ct. 951 (1913).

But see United States v. American Live Stock Comm. Co., 279 U. S. 435, 49 S. Ct. 425 (1928), where refusal to deal with a concern in matters beyond its charter powers was seemingly approved. Some latitude seems to be allowed where credit systems are involved and refusal to deal is based on payments being in arrears and where members were always free to deal on a cash basis. See United States v. Fur Dressers' & Fur Dyers' Assn., Inc., (D. C. N. Y. 1925) 5 F. (2d) 869.

[12] United States v. Trenton Potteries Co., 273 U. S. 392, 47 S. Ct. 377 (1927). See Jaffee and Tobriner, "The Legality of Price-Fixing Agreements," 45 HARV. L. REV. 1164 (1932).

[13] American Column & Lumber Co. v. United States, 257 U. S. 377, 42 S. Ct.

a price plan which consisted in the collecting and dissemination of information concerning sales and prices dealing exclusively with past and closed transactions.[14] The statistics gathered by the flooring manufacturers did not include current price quotations. It will be remembered that the plan under consideration in the *Institute* case did concern itself also with future and present prices. The trial court enjoined the use of any system for reporting such prices, terms and conditions, or for reporting any notice of a future or contemplated change in price and terms. The Supreme Court refused to include this restriction in the final injunction. The Institute's plan did not prevent selling at a new price as long as the new price was immediately announced. There was no necessity for a "waiting time" before a price decline. Of course, in the case of sales on "moves," [15] sugar could only be sold on previously announced prices because of the very nature of a sugar move. That the Court took into consideration the industry's custom of selling on "moves" when it approved the Institute's price plan is apparent from the opinion. How much weight was given to the fact that the custom of the trade involved announcements of future prices, and how ready the Court would be to approve such a plan in an industry without such a background, cannot be determined until the Court speaks directly on that point. There is language [16] in the decision which could be relied upon by the Court to show that it meant the result to be limited solely to the facts presented in the Institute situation. But the decision can also be taken to stand for the broader principle that a properly devised and operated open price plan is not illegal even though it deals with future prices. On this view of it, the decision may be taken to be an extension of the principle in the *Maple Flooring* case. The danger, of course, in approving any plan involving announcement of future prices lies in the facilities it presents for *sub rosa* agreements to fix prices. As previously stated, any showing that the necessary or intended use of such a plan is to fix uniform prices would seem to be sufficient in the light of the decided cases to cause the Court to hold such a plan to be unlawful. The Court might have been influenced to make the decision it did in the instant case by its belief that implied price fixing agreements would not be likely to result because the members of the industry had always been more ready to cut prices than to fix them.

114 (1921), noted 20 MICH. L. REV. 901 (1922); United States v. American Linseed Oil Co., 262 U. S. 371, 43 S. Ct. 607 (1922).

[14] Maple Flooring Manufacturers' Assn. v. United States, 268 U. S. 563, 45 S. Ct. 578, 592 (1925), noted 24 MICH. L. REV. 316 (1926).

[15] See note 8, supra.

[16] "In determining the relief to be afforded, appropriate regard should be had to the special and historic practice of the sugar industry. . . . We think that a limitation of that sort of publicity fails to take proper account of the practice of the trade in selling on 'moves'. . . . " 56 S. Ct. 629 at 643.

In the *Maple Flooring* case the Supreme Court held that the dissemination of informational statistics was normally an aid to commerce and gave a wider and more scientific knowledge of business conditions. When such was the natural and predominating effect, the activity was said not to be in restraint of trade. The production statistics here reported were only of past transactions. The danger in allowing production statistics to be reported, especially as to future production, lies in the fact that it sets up a vehicle for carrying out *sub rosa* agreements to limit production. The trial court felt that all statistics collected should be available to distributors as well as to refiners. The Supreme Court limited this somewhat by saying that not all information would be of value to the distributors and that such a sweeping decree might necessitate giving them information that might rightly be regarded as of a confidential nature. The Court did decree that the Institute should make available to the purchasing and distributing trade information in which they had a legitimate interest. In this category the Court included information in regard to melt, sales, deliveries, stocks on hand, or on consignment, or in transit, and in regard to new business. Prior to this decision there was some doubt on this point. In the approved plan in the *Maple Flooring* case statistics were sent to the Department of Commerce and so received some publicity. But no special emphasis was placed on that fact by the Court in that case. Here, for the first time, the Court lays down a rule as to the dissemination and use of the collected statistics. To what extent this may be considered as a restriction of trade association activities can only be answered when the words "having a confidential character . . . in which distributors and purchasers have no proper interest" is fully interpreted.[17] In discussing the Institute's concession that it is the "publicity" of closed transactions that prevents future secret concessions, the Court by inference approves the trial court's suggestion that the Institute went further than was necessary for the elimination of such practices. It was the view of the trial court that immediate publicity of terms and prices of all closed transactions would accomplish the desired end in that it would of necessity lead to abandonment of such concessions or their extension to all. But to have this effect it would seem that all the essential facts would have to be given, including the name of the buyer, the amount sold, etc. It is noteworthy that this was one of the features of the statistical service frowned upon by the Court in the *American Column & Lumber* case.[18] The Court's view in that case was that the disclosure

[17] 56 S. Ct. 629 at 644. As previously pointed out, forced disclosure of overproduction and large surplus stocks to a "buyers" market would be a distinct disadvantage to the refiners.

[18] American Column & Lumber Co. v. United States, 257 U. S. 377, 42 S. Ct. 114 (1921).

of the name of the buyer makes it easy to check up on the truth of the report as to the price paid and thus makes it easy to bring pressure to bear on the seller to keep him in line, thereby facilitating price fixing. If this analysis of the Court's inference is correct, the decision seems to modify the views in the *Column & Lumber* case.

4.

A final question left to be answered is, does this decision show a recession from the liberal attitude taken by the Court in the *Appalachian Coals* case? A careful consideration of the two decisions will probably lead to an answer in the negative. Throughout the decision in the *Institute* case, the Court seems eager to work out some way in which the refiners may cooperate and remedy the evils which the Institute was organized to correct. It must be remembered that both the trial court and the Supreme Court felt that the Institute went further than was necessary to correct the evils at which it was aimed, and that satisfactory results could have been obtained without invoking the many supplementary restrictions forcing the members to adhere without deviation to the prices and terms which they had announced. There were also other important differences in the two cases. The Appalachian situation was reviewed shortly after the basic plan was drawn up. The *Institute* case was examined after the plan had been in actual operation for several years and the real working of it could be seen. Then, too, the combine in the *Appalachian* case only controlled twelve per cent of the output and the danger of monopolistic control was not so great. Moreover, in the *Appalachian* case a corporation was organized as a common selling agency, thus giving plausibility to the argument that the plan was justified because of the economic benefits which flow from a unified and integrated activity.[19]

In conclusion, it can be said that the case makes it clear that independent units of an industry may lawfully organize and cooperate to correct evils growing out of unrestrained competition. Their agreements will not be condemned merely because they tend to stabilize prices or production, so long as the steps taken are reasonably necessary to that end. Moreover, the reasonableness of the steps taken will be determined on the basis of the facts surrounding the case at the time of the decision. The activities of the Sugar Institute were so varied and numerous that an attempted summary of its practices which were approved or disapproved by the Supreme Court may be of some value to a full and complete understanding of the case. The Supreme

[19] For a review of the liberal judicial treatment under the anti-trust laws given to combinations by fusion, see Hardy, "Loose and Consolidated Combinations under the Antitrust Laws," 21 GEORGETOWN L. J. 123 (1933).

Court approved that part of the decree of the trial court which enjoined the following activities of the Institute: (a) concerted refusal to deal with brokers and warehousemen who engage in more than one distributive function; (b) prohibiting members from shipping sugar on their own account by private charter unless the Institute was satisfied that no broker, buyer, or warehouseman was participating in the rate; (c) concerted refusal to make up a pool cargo for buyers by including some of the refiners' own sugar, thereby aiding the customer to get the benefit of a cargo or carload rate; (d) concerted refusal to allow the temporary storing of a shipment at an intermediate "transit point" designated by the carrier and subsequently forwarding it to a point beyond; (e) concerted refusal to allow change of destination or consignee while goods were in transit; (f) agreement to use only trucking concerns not affiliated with any buyer or distributor and then only under non-rebating agreements; (g) concerted restriction of the number of consignment points; (h) concerted prohibition of long-term contracts; (i) refusal to grant quantity discounts where such discounts reflect economies to refiners in direct or indirect costs. The trial court also enjoined concerted maintenance of delivered prices only, but the Institute waived this issue on appeal. The Supreme Court in modifying the decree seems to have directly or indirectly approved the following cooperative activities: (a) relaying of future prices and terms reported to the Institute by the refiners; (b) collection of statistical information with a duty to distribute it only to those of the trade who would have a legitimate interest in it, it being possible to include in such information data relating to production, deliveries by states, deliveries by important differential routes by states, consigned and in transit stocks for the several states, and deliveries of individual refiners, with the possibility that the last-mentioned might include the names of the buyers.

In making a prediction as to whether the Court would approve or disapprove the same or similar activities in some other industry, it must be remembered that the Court looked at these various practices as a whole and in relation to each other and not as isolated activities. In any event it is clear that the Court would view with suspicion any attempt at direct control of prices or production.

R. F. K.