STRENGTHENING OUR ANTITRUST ADMINISTRATION

An Address

By

STANLEY N. BARNES

Assistant Attorney General
in charge of the Antitrust Division

Prepared for Delivery

Before the

ILLINOIS STATE BAR ASSOCIATION

Palmer House

Chicago, Illinois

December 4, 1953

STRENGTHENING OUR ANTITRUST ADMINISTRATION

Upon entering into any new field of endeavor, it is customary for a person to announce his policy and program. This sometimes leads to embarrassing results when, from time to time during the course of an administration, performance is checked against predictions and promises. But I am still voter enough to believe that any Government official must stand ready to explain, in phrases simple and understandable, what he intends to do, how he intends to do it, and what he has done.

Today, I suppose, it's my turn to match words with deeds - to compare my high hopes on taking office with what's happened since.

And thus far, I do not find myself in an embarrassing position.

Before coming to Washington, my direct experience with antitrust work was indeed sparse. True, I had occasionally expressed polite condolences in response to my friends' complaints of "harassment" by the Antitrust Division. But my prime task was to preside over the courts of a busy metropolis, not to mold antitrust policy.

As a result, I brought to my present position no fixed notion of an antitrust program. Instead, the pattern of my enforcement policies has, of necessity, been traced out case by case. This, I believe, is as it should be. For any program can be only as meaningful as the specific cases which give it life. And the results, in turn, are the best gauge of a program's worth.

So it is that today I shall try to frame the aims we seek and explain why, I believe, each proceeding brings us closer to their achievement.

I am fortunate in not having been more specific thus far in my declarations of antitrust policy because of the way in which antitrust programs come to be. Antitrust programs, unlike Venue, do not spring full blown from anyone's brow, but rather, in the main, spring from complaints made to the Antitrust Division by businessmen and consumers. The heartbeat that keeps the pulse of the Antitrust Division going is found in the decision as to what complaints are investigated, under what legal theories the cases are brought, and in the ends sought to be achieved by the institution of these cases. It seems to me to be a very practical approach - one most helpful to you gentlemen - if I briefly review some of the things that have been done in the last seven months, with a view of forecasting that which lies ahead.

Before doing this, may I make two observations. First, neither Democrats nor Republicans will quarrel with the goal we share, for our competitive ideal transcends the election returns. Fundamental to any antitrust credo is the ideal of a free economy. And, to cull from a recent Supreme Court opinion, basic to this faith "is that goods must stand the cold test of competition; that the public acting through the market's impersonal judgment, shall allocate the nation's resources and thus direct the course its economic development will take."

Economists, along with a few of our more erudite brethren, may fight and die over whether our goal should be dubbed "competition," "workable competition," or "effective competition." Indeed, for many, this battle threatens to become a source of intellectual ferment. Regardless of the label applied, however, all agree that essential to our goal, first, is removal of artificial barriers to market entry and, second, removal of agreed-upon controls over price and distribution. For the consumer is sovereign only so long as prices and production are free to respond to his market action. And allocation of our Nation's resources jibes with consumer preference only when business is unfettered and free to enter popular markets.

My second observation is that the economic aspect of antitrust theory can be very helpful in effective enforcement and, at the same time, can be very confusing. The economic aspects of major cases are important. However, I think it should always be kept in mind that the Sherman Act is a legal tool to aid in the maintenance of fundamental economic principles upon which our capitalistic system is based. Hence, although I desire all possible light, I am not going to be swept up into fanciful excursions in the realm of new and abstract economic theories.

Now let us take a look at the cases that have been instituted. Some proceedings were aimed to open entry into previously clogged markets. Thus, the six manufacturers of railroad couplers had, we charged, successfully barred potential competitors. By our suit seeking compulsory licensing of patents and know-how, we hope to encourage entry of new coupling producers and thus achieve a more competitive price.

Lest any segment of the transportation industry feel it is being overlooked, may I express the hope that a similar benefit may stem from our civil suit against a national trailer rental combine. In this new and mushrooming industry, trailer owners lease vehicles to outlets which, in turn, rent trailers to moving householders. Trailer owners, we alleged, discriminated in rents and conditions against trailer lessors not members of the system. By seeking that membership to the combine be granted all qualified applicants and barring discriminatory division of rentals between members and non-members, we hope to promote entry and thus secure for consumers the benefit of a market price.

Finally, more important in preserving freedom of entry is the proceeding against the American Smelting and Refining Company and the St. Joseph Lead Company. That suit strikes at various restrictive practices which have barred entry into the primary lead industry, regulated lead production, as well as limited price competition. As a result of this case, competitive conditions may be secured in this basic industry.

In addition to easing market entry, cases were aimed to unpeg collusively fixed prices. So it is that we proceeded against the Wholesale Produce Buyers' Association in Detroit which, we charged, had boycotted the Detroit terminal in order to bar produce sales to small grocery store operators. To compete with large chain stores and supermarkets, small stores sought to eliminate wholesalers' markup by buying edibles directly from carlot receivers at the produce terminal. Approximately 50 million dollars' worth of fresh fruit and vegetables pass through these terminals each year. By aiming to strike down large buyers' boycott efforts, we hope to permit smaller Detroit stores to sell all important food items at lower prices.

In like fashion, three associations of fuel oil dealers were charged with fixing prices to consumers in certain New England areas. These dealers, we charged, denied Association membership to price cutters and expelled from the group members shading prices. Striking down such price-pegging practices, you will all agree, could make a real difference in the family budget.

Nor are our interests confined to essential products such as food and gasoline. The arts, too, are a matter of antitrust concern. In our suit against New York City theatre scenery and equipment movers, we hope to eliminate their alleged price fixing and market preclusion practices.

These are but examples of the 27 cases instituted thus far this year.

Upon becoming the Assistant Attorney General in charge of the Antitrust Division, I naturally brought with me the thought habits and administrative procedures which I had developed as a judge, particularly during the years that I had served as Presiding Judge. This background first found expression in my announcement to the staff of the Antitrust Division of my determination to make our docket of antitrust cases as current as possible. I am happy to state that 50 per cent more cases have been terminated from May 1 to November 30 of this year than were terminated during the corresponding seven months of last year. This amounted to 25 cases: 9 by court decision, 3 by dismissal, 13 by consent or nolo pleas.

I have been especially active in trying to bring to an end litigation which has been pending an undue length of time. I am quite gratified by the fact that during the past seven months we have terminated one-third of our old cases (18 out of 56) - an old case being one which at the beginning of the current fiscal year had been pending 2-1/2 years - and 8 out of 12 of our oldest cases - those filed between 1941 and 1946, inclusive. The variety of those terminated is indicated by the mention of such typical cases as those against Western Newspaper Union, Boston Market Terminal, Telescope Carts, Switzer Brothers, and Minneapolis Electrical Contractors Association. Also included are major cases in the electrical equipment field against General Electric and Westinghouse, the recent important case against the manufacturers of incandescent lamps with which you are no doubt familiar, and the implementation of the judgment in a case of considerable scope in the chemical field against the world leaders in that area.

Many cases (and more than 50 per cent) have been terminated by the entry of consent judgments. We are currently experimenting with a new procedure involving the negotiation of consent judgments **prior** to the filing of the civil complaint. It is hoped this new procedure will serve to expedite the disposition of antitrust cases, as well as to save both the Government and defense counsel considerable time and expense. However, it should be borne in mind that this procedure remains in an experimental stage. We have refrained from filing six complaints in six different fields of antitrust law. After efforts to arrange consent decrees we are about ready to acknowledge defeat in two and file suit. Two others look very doubtful, and in the two remaining the possibilities of settlement are fairly promising. In the event that we cannot secure adequate cooperation from defense counsel in negotiating such decrees and if the procedure becomes unduly protracted, it will be necessary for us to consider the abandonment of that procedure.

The Attorney General has been disturbed by the widespread use of nolo contendere pleas. In an effort to curb this practice, he has issued instructions that such pleas should not be agreed to by the Government except in the most unusual circumstances. In this connection may I go a step further and say that insofar as criminal contempts are concerned, the likelihood of unusual circumstances being found will be most unusual.

In connection with the general subject of judgment enforcement, may I point out that in view of the large number of antitrust judgments outstanding (approximately 450), I feel that the small number of pending contempt proceedings is disproportionate. With a view to giving our judgments greater significance, I have under consideration special procedures which will lead to wider administration of judgment compliance and hence, I trust, more effective enforcement.

Before the Antitrust Section of the American Bar Association last August I invited counsel for defendants to bring to my attention for review cases where no substantial benefit to the public could be expected to result from trial. While I reiterate this declaration, may I frankly state that there are instances in which I feel that my statements have been too loosely interpreted by defense counsel. Accordingly, may I bespeak the cooperation of defense counsel with respect to this facet of antitrust enforcement and urge careful evaluation of the case in question before it is brought to my attention for the purpose of requesting a dismissal.

The policies and program outlined heretofore become even more important to you when you consider that the public is demanding increased activity on the part of the Antitrust Division. Such a conclusion is justified by our records. Whereas from May 1 to November 20, 1952, 373 complaints were received in the Antitrust Division, during the corresponding seven months of my administration 527 complaints were received in the Antitrust Division. I trust you will not think my remarks to be political in nature when I express the hope that to some extent this increase in complaints has been stimulated by the policies of the new administration.

In view of the limitations of time, it has been necessary to make this statement in summary form and, accordingly, problems have been somewhat simplified. However, I am sure you are aware of the fact that problems do exist - not only day-to-day problems but problems of long-range significance. They are problems of such importance to our whole economy that the Attorney General has appointed a group to study the antitrust laws, substantively and procedurally, with a view to suggesting reforms. They are problems of such urgency that efforts are being made to insure interim reports, one or two of which, it is hoped, can be released within the next several months. The need for such a study is highlighted in a reference by Justice Jackson to one antitrust concept in these words: "Thus we have an abstract right in an abstruse relationship between things in which individually there is no right - a legal concept which either is very profound or almost unintelligible. I cannot be quite sure which." With such problems before it, the progress made by the Committee thus far has been most gratifying to the Attorney General and to me.

It might be of interest to you to hear some of the problems being considered by the six work groups into which the work of the Committee is presently divided.

First: Concepts of Competition and Monopoly; the legal definitions versus economic definitions; the tests and criteria.

Second: Per Se versus the Rule of Reason.

Third: Oligopolies.

Fourth: Implied conspiracies, their relation to and difference from conscious parallelism of action; price leadership; parent versus subsidiary.

Fifth: Robinson-Patman Act, hard and soft competition.

Sixth: Exclusive dealing contracts.

Seventh: Fair Trade and the McGuire Act.

Eighth: Foreign Commerce; the ICI case; extraterritoriality.

Ninth: Exemptions, - Labor, Agricultural

Tenth: Concurrent Jurisdiction.

Eleventh: Patents and Trademarks.

Twelfth: Consent Decrees

Thirteenth: Use of Criminal Prosecutions, grand jury versus discovery proceedings.

I submit that thus far my program reveals no vain pursuit of doctrinal mirages, but rather sound common sense advance in protecting competition. Unlike the cigarette companies, I could never promise that "our brand will be milder." True it is that we seek to pick our targets with care and fairness. But this care, I assure you, signals not antitrust laxity but rather more effective enforcement. My belief is now, as always, that effective and honest antitrust enforcement is your goal as much as mine. We share a common stake in that freedom of action and achievement which is the essence of our competitive ideal. This common stake, I believe, obscures any surface difference in interest and leaves us free to work togeter, through antitrust enforcement, toward a free economy. This is my faith and hope.