UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA	)
	) CASE NO. 97-0853-CR-NESBITT
v.	)
	) Magistrate Judge Robert L. Dubé
ATLAS IRON PROCESSORS, INC., et al.,	) (February 11, 1998, Order of Reference)
	)
	) **MEMORANDUM IN SUPPORT**
Defendants.	) **OF UNITED STATES' MOTION**
	) ***IN LIMINE* TO EXCLUDE**
	) **EVIDENCE OF REASONABLENESS**

The United States anticipates the defendants will attempt to introduce evidence purporting to show the prices they paid for scrap metal were "reasonable" or "competitive." For the reasons discussed below, such evidence is inadmissible.

I

PRICE FIXING IS A *PER SE* VIOLATION OF THE
SHERMAN ACT AND ITS COMMISSION REQUIRES NO OVERT ACT

Section 1 of the Sherman Act, 15 U.S.C. § 1, condemns those agreements that restrain trade unreasonably. Standard Oil Co. v. United States, 221 U.S. 1 (1911). Some agreements, however, have such a pernicious effect on competition and are so lacking in redeeming value, they are conclusively presumed unreasonable, i.e., they are unreasonable *per se*. Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9 (1984). Of those illegal agreements, none is more firmly established as unreasonable *per se* than a horizontal agreement to fix prices. Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980); Standard Oil, 221 U.S. at 1; Northern Pac. Ry., 356 U.S. at 5; Jefferson Parish, 466 U.S. at 9; All Care Nursing Serv., Inc., v. High Tech Staffing Servs., Inc., 135 F.3d 740, 746

(11th Cir. 1998); Cha-Car, Inc. v. Calder Race Course, Inc., 752 F.2d 609, 612 n.6 (11th Cir. 1985); Construction Aggregate Transp., Inc., v. Florida Rock Indus., Inc., 710 F.2d 752, 772 (11th Cir. 1983). In fact, the Supreme Court has referred to horizontal price fixing as "perhaps the paradigm of an unreasonable restraint of trade." National Collegiate Athletic Assoc. v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 101 (1984).

As the Supreme Court explained in United States v. Socony-Vacuum Oil Co., there is no doubt that Congress intended the Sherman Act to serve as the legislative basis for making price fixing *per se* illegal:

> Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination.

310 U.S. 150, 221-22 (1940). And, as the Supreme Court explained in Northern Pacific, the Sherman Act rests on a logical foundation:

> This principle of *per se* unreasonableness . . . avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable -- an inquiry so often wholly fruitless when undertaken.

Northern Pac. Ry., 356 U.S. at 5. In other words, one need not debate what is already common knowledge: price fixing is so inimical to our free enterprise system, there is no justification for it.

To prove a price-fixing conspiracy, the United States need not prove the defendants committed any overt acts in furtherance of their conspiracy. Proof of the violation is not dependent on subsequent events such as the conspiracy's actual effects; rather, the government need only prove that the conspiracy existed. Nash v. United States, 229 U.S. 373, 378 (1913). The agreement itself is the complete offense, whether actually carried out or not. Socony-Vacuum, 310 U.S. at 224-25 n.59; Trenton Potteries, 273 U.S. at 402.

II
PER SE RULE DICTATES EXCLUSION OF "REASONABLENESS" EVIDENCE

The evidentiary effect of the *per se* rule is to prohibit the defendants from claiming, as a defense, that they fixed prices at "reasonable" or "competitive" levels. Catalano, 446 U.S. at 647 ("It has long been settled that an agreement to fix prices is unlawful *per se*. It is no excuse that the prices fixed are themselves reasonable."); Trenton Potteries, 273 U.S. at 397 (Price-fixing agreements may be held to be unlawful "without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed."). Accordingly, no inquiry into the reasonableness of a particular *per se* agreement is permitted. Socony-Vacuum, 310 U.S. at 221. Likewise, any evidence of justification or "reasonableness" after a *per se* agreement has been proved is inadmissible at trial. Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 351 (1982) ("The anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if pro-competitive justifications are offered for some."). The prohibition on "reasonableness" evidence as a defense was perhaps best explained by the Sixth Circuit in Continental Baking Co. v. United States, 281 F.2d 137 (6th Cir. 1960). The Continental Baking court held:

> [A]ny evidence of justification or reasonableness after such an agreement has been established is properly excluded in a Sherman Act case. A defendant cannot say, "I have entered into a price-fixing agreement, but the prices fixed are reasonable ones dictated by economic pressures." The fact that the prices were reasonable is no defense. Once the defendant admits the agreement he may say no more for it is illegal *per se*.

281 F.2d at 143-44 (citations omitted).

III
THE DEFENDANTS MAY NOT INTRODUCE EVIDENCE OF "REASONABLE" PRICES

The Indictment charges a simple agreement among competitors to fix the prices paid to suppliers of scrap metal and to allocate suppliers of scrap metal. The defendants conspired to pay reduced prices to their suppliers with the purpose of reducing their costs and increasing their profits. Most of the scrap suppliers cheated were smaller auto wreckers, junk dealers and individual citizens who wanted a competitive price for the scrap metal sold to the defendants. Such a naked restraint of trade is *per se* unreasonable and, therefore,

illegal pursuant to Section 1 of the Sherman Act. Northern Pac. Ry., 356 U.S. at 5; Jefferson Parish, 466 U.S. at 9. There is no exception to the proscription on the admission of evidence of "reasonableness" of prices as a defense. Accordingly, no evidence related to concerning the "reasonableness" or "competitiveness" of the prices paid to scrap suppliers should be admitted in this case.

Even if such evidence was relevant, it is excludable under Rule 403 of the Federal Rules of Evidence. Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Even if the Court were to find the defendants' evidence marginally relevant as proof of lack of a conspiracy, there is no doubt such evidence would confuse the issues and mislead the jury. The jury would probably believe that, because the prices the defendants' were "reasonable," none of the suppliers were injured and, therefore, none of the defendants were guilty. This is exactly the type of erroneous inference that Rule 403 is designed to protect juries from drawing. For this reason, evidence that the defendants charged "reasonable" prices is also inadmissible pursuant to Rule 403.

If this Court were to admit any such evidence, at the very least this Court should instruct the jury on this issue at the commencement of the trial and whenever such evidence is introduced by the defendants.

IV
CONCLUSION

For the foregoing reasons, the Motion of the United States to Exclude Evidence of Reasonableness should be granted.

Respectfully submitted,

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