

THE COLLECTION AND DISTRIBUTION OF STATISTICAL INFORMATION BY TRADE ASSOCIATIONS.

This discussion treats of the matter of the collection and distribution of trade data and statistics by trade associations. In the past few years this practice has grown so that the majority of trade associations are now collecting and distributing such data. Lately this practice has been generally criticised and in some quarters condemned. The writer believes that such work on the part of trade associations is of value both to the particular associations and to general business interests. Unfortunately some associations may have carried the use of the data and statistics too far. Unfortunately there is a failure on the part of the general public to clearly understand just what trade associations are doing in this regard. What trade associations need at this time is a clearer understanding of the proper uses which may be made of such data and statistical information. What the public needs at this time is a clearer understanding of just what the trade associations are attempting. As soon as the trade associations and the general public clearly understand what can be done and what is being done by way of the collection and distribution of such statistical information, the practice will become approved and the public will no longer criticise it.

TERM "OPEN PRICE ASSOCIATION" IS A MISNOMER.

Associations collecting and distributing statistical information are frequently called "Open Price Associations." "Open Price Associations" is a term that conveys no meaning, and does not properly characterize the matter of the collection and distribution of statistical information by trade associations. The term itself is fanciful and was perhaps invented by Mr. Eddy, and used by him in his book styled "The New Competition." He explains what is meant by

the "Open Price" as (page 115), "A price that is open and above board, that is known to both competitors and customers, that is marked wherever practicable in plain figures, on every article produced, that is accurately printed in every price list issued—a price about which there is no secrecy, no evasions, no preferences. * * * In short, the open price policy means a complete reversal of methods now in vogue." Mr. Eddy contrasts the "open price" with the "secret price" which he says too generally prevails, and which he describes to be a policy of having no fixed price, but of making one price to one customer, and another price to another one, of making trade a matter of bargaining. He says the "secret price" is demoralizing, antiquated, wasteful and productive of unfair competition, while the policy of the "open price," which is not only fixed but published, is modern, economic, fair to all, and will promote fair competition. To promote the adoption and use of the "open price policy" he advocates the formation of "Open Price Associations."

While today the term "Open Price Associations" is being employed generally, it is being used for lack of a better term, and certainly is not to be understood in the way Mr. Eddy used it. Indeed it is best to abandon it, for it only tends to confuse the question, and the public mind has begun to associate with it a conception that the "Open Price Association" is a new scheme to evade the antitrust laws.

What is being done is that the trade association collects, from its various members, certain statistical information, which having been digested and summarized, is transmitted to the various members, to give them a more familiar and intelligent knowledge of what is transpiring in the industry. Recent writers are so treating the matter. For instance, Mr. Naylor, in his book on "Trade Associations," published in 1921, merely characterizes and treats of it as one of the functions of a trades association. So Mr. Frederick, in his book on "Business Research and Statistics," published in 1920, refers to the work of trade associations in compiling

statistics and data of mutual value, and says that, with such information, a very good picture or idea of the trend of conditions is had. He says associations are also giving helpful statistics of production, stocks on hand and costs.

**FUNCTION OF TRADE ASSOCIATIONS IN COLLECTING
AND DISTRIBUTING STATISTICAL DATA.**

It is necessary, therefore, at this point to state briefly what these associations are doing, for it is the purpose of this discussion first to get at a clear understanding of what it is that these associations do, which is today the subject of so much inquiry and criticism, and then pass to the question of whether these things are legal. This is the more necessary, because some associations have gone too far, and have done things not properly within the scope of the collection and distribution of statistical information. It is perhaps these associations and their excessive acts which have occasioned much of the present criticism.

Unfortunately there is a very little literature, general or legal, upon the subject of the trade association activities in the distribution of trade information. The subject is perhaps too new. But many trade associations have tried to present their scheme of operation before the Attorney-General of the United States and the Federal Trade Commission, and be advised if it be legal.

**THE BUSINESS MAN HAS A RIGHT TO OBTAIN AND USE
STATISTICAL DATA PERTAINING TO HIS INDUSTRY**

Modern business requires that a business man be fully and accurately posted on what is transpiring in his trade. He must know what his competitors are doing. He must know his market, the demand for the product, the supply of the product on hand, the prices that are being paid for it. Further, to operate efficiently, he must know how his costs compare with competitive costs. The old days of American business, when the margin of profit was so great that he need not be familiar with the industry as a whole, and what

his competitors are doing, have passed. Margins of profit are now so small, and competition so keen, he must know all these things to conduct his business.

There can be no question of the individual manufacturer's or dealer's right to get this information for himself. This is but an incident to his right to do business, which is a property right protected under the Constitution. In doing so he may create or employ any agencies to get the information; he may even create a special department in his business, or have an "intelligence" staff. But experience proves that the individual efforts of business men in this direction are far from satisfactory. The knowledge gotten is frequently second-hand and hearsay, inaccurate and not exhaustive. A fact too true to be disputed is that frequently customers falsify to a business man the prices made by competitors, and he finds to his sorrow that he has been deceived. Another fact, which must be regretfully admitted, is that business men at times, to get this information, have employed acts which savor of spying, intriguing with employes of other companies, and other demoralizing practices.

When the same data is collected through the trade association it is more reliable, in greater detail and dependable. If the individual business man may collect the data for himself, the association may do so for all its members, subject, of course, to the proviso that the members use the data severally and independently.

SCOPE OF THE STATISTICAL DATA.

The general scope of the statistical service of trade associations covers data having to do with supply and cost of raw materials, prices obtained on actual sales of the article produced, the volume of the article in the course of manufacture, inventory of stocks on hand, and the amount of unfilled orders.

METHOD OF COLLECTION OF DATA.

Usually, the constitution or by-laws of the trade associa-

tion provide for the collection and distribution of this data. The members are required to file with the secretary, periodically, reports calling for all or a part of the data above indicated.

Blank forms are prepared for the reports. Certain of these forms have to do with sales and show the merchandise sold, the quantity, to whom and where, and the price obtained. Other forms are used to show inventories or stocks on hand, quantities in the course of productions, shipments, and unfilled orders. The members fill out these forms and send them to the secretary of the association. Usually the reports on sales are made daily or weekly, while the reports of stock on hand, production and unfilled orders are made at longer intervals.

DIGESTING AND DISTRIBUTING THE DATA.

When the secretary of the trade association receives reports from the members, he digests, tabulates and summarizes them, and sends the results of such digesting, tabulation and summarization out to the members. For example, there may be periodic summaries of the "Demand and Supply Statistics" showing the number of plants reporting their stocks on hand, unfilled orders, amounts in the course of production, from which it can be determined what, relatively, is the relation of the supply to the demand. The secretary's reports on sales will show the quantities the market is taking and the market price.

To recapitulate the statistical service rendered by trade associations to their members, consists in the collection and distribution of data pertaining to past transactions as to sales, quantities sold, prices obtained, stocks on hand, and, in the course of manufacture, shipments made, orders filled, orders not filled, and, in some cases, the amount of raw materials on hand or available.

This information is sent out periodically by the secretary to each member. Sometimes the information is charted with

curves or symbolized in the shape of a barometer or otherwise.

HOW MEMBERS ARE TO USE THIS DATA.

One fundamental condition pertaining to the theory of statistical information furnished by trade associations is that when it is sent to each member it is to be used by him separately and individually. He is presumed from the data furnished him to use it as he wishes, to draw his own deductions therefrom, and to employ it as he chooses. It is not to be used as a subject for discussion by the association or its members at any meetings. All well conducted associations will not tolerate any discussions, formal or informal, at their meetings dealing with prices, sales or production. When once the information is given to the various members, the service of the association is at an end. Any associations, which, either directly or indirectly, countenance the use of the information by their members collectively as the basis upon which they may agree in any manner upon prices or production, violates the whole theory and purpose of the statistical function of trade associations.

DECISIONS APPLICABLE TO THE COLLECTION AND DISTRIBUTION OF STATISTICAL INFORMATION BY TRADE ASSOCIATIONS.

Since writing this article and after it was in the hands of the printer Judge Carpenter rendered a decision in the case of *United States v. American Linseed Company et al.*, in the Eastern Division of the Northern District of Illinois. Here various linseed oil manufacturers were members of a Bureau which undertook to furnish its membership, (1) current quotations on linseed oil, (2) a record of sales of oil including prices and (3) statistics as to stock on hand, and other information of interest. The members furnished the Bureau their quotations and sales and other information, and the Bureau sent the information out to all the members. The Government attacked this plan as one in restraint of trade—mainly on the ground that it tended

toward a stabilization or uniformity of price on any given day.

The following are extracts from Judge Carpenter's decision:

“Associations of merchants and manufacturers, boards of trade and exchanges are of great antiquity. Evidently such associations were not aimed at by the Sherman Act, because they are not mentioned in the Act. A distinction is sought to be drawn between the operations of an exchange and what was done by the defendants through the Armstrong Bureau. An exchange sends out reports of actual sales. The Armstrong Bureau gave out price-lists. It is difficult to understand any ground for declaring one legal and the other illegal. Every producer or merchant desires to obtain for his goods the highest price he can get. The price which he charges is always the highest which he believes the traffic will bear. He cannot charge, ordinarily, more than his competitors. His competitors' price fixes the point above which he cannot go. When the merchant fixes the price at the level of his competitors he is fixing it in competition with his rival just as much as though he had named a lower price. The competition of his rival has prevented him from charging a higher price. If, on the other hand, he finds that he cannot move his goods at the price fixed by his competitors he will naturally lower the price and this will establish a new level. This is the essence of which constitutes competition.”

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“If it is lawful for dealers to get together in an exchange and provide for a dissemination of the prices obtained on actual sales, why should it be unlawful for these producers and dealers in lines where no public exchange has been established, to make some provision for disseminating information of market value or prices? To put it in another way, why should they be limited to the dissemination of the market prices of yesterday, but not those of today.”

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“In order to obtain efficiency in business, as well as in any other human activity, it is necessary to have reliable, immediate and adequate records. With the progress that has been made in the last century it is not to be expected that business alone stood still.”

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“The defendants contend, and I agree, that the term ‘stabilized market’ means the obtaining and distributing of any accurate information that would enable crushers and buyers of linseed oil the better to understand the conditions of the flaxseed and oil market, to the end that the speculative hazards which formerly had worked injury to both seller and buyer would be minimized and eventually eliminated, and the economic law of supply and demand be more intelligently put into operation.”

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“The Armstrong Bureau was organized solely for the purpose of furnishing information not only to the linseed oil crushers, but to those interested in every other industry. It was a Bureau of intelligence, and one which makes for real rather than artificial competition in trade. There was no restriction placed upon any member. He was free to buy from and sell to whomever he chose. The Bureau operated solely as to past transactions, and wherever there is freedom of contract on the part of the constituent members there cannot be a violation of the Sherman Act.”

QUOTATIONS FROM OTHER PERTINENT CASES FOLLOW

Board of Trade of Chicago v. U. S., 246 U. S. 231, *l. c.* 240:

“But within the narrow limits of its operation the rule helped to improve market conditions thus:

“(a) It created a public market for grain ‘to arrive.’ Before its adoption bids were made privately. Men had to buy and sell without adequate knowledge of actual market conditions. This was disadvantageous to all concerned, but particularly so to country dealers and farmers.”

U. S. v. Reading Coal Co., 183 Fed., *l. c.* 442:

The Bureau was started in 1876 by Jones, as a private enterprise in industrial statistics. In 1892, Ruley bought it and the statistics have been compiled in great part from the monthly returns made to the Bureau by the coal companies and the carriers, severally, of the sales and shipments over the respective roads, and the price obtained for the different sizes of coal at tidewater in New York harbor. "Mr. Ruley testified that these compilations have been furnished each month to the press—that is, to the coal trade journals—and thus find their way to the office of every considerable wholesale or retail dealer in anthracite coal. He testifies that they are also furnished to the departments of the general and state governments." * * *

"Counsel for the Government argue (*l. c.* 451) from the fact that these accounts were so rendered to the parties interested, that there must have been some concert or agreement in violation of the act of Congress, among the defendants and others, with reference thereto. We cannot so regard it. It is, of course, possible that the information obtained from these monthly reports of the Statistical Agency or Bureau maintained by Mr. Ruley and his predecessor, might have been of some use to such a combination as is charged in the bill, to maintain rates of freight or prices of coal in the anthracite region, but, in the absence of any direct proof of such a combination, it is a very violent presumption, indeed, that, because of the existence of such statistics and monthly reports, published in all the trade journals of the country and in the hands of every retailer of coal, as well as in those of every producer of coal, there must have been such an illegal combination; and this, too, in the face of the fact that many obviously legitimate and useful purposes were to be subserved by such publications, to which all intelligent persons interested in the conduct of the business of producing, selling, carrying and consuming coal would, for their own information and advantage, refer.

There does not seem to be the slightest direct proof, apart from the presumption we are asked to indulge in, of any illegal combination or contract promoted by the use of these statistics. The reports were public, and there is not the slightest intimation of any secret correspondence between the Statistical Bureau and the defendants. This information, open to every one, was doubtless useful in many legitimate ways to those who subscribed for and supported it. We might as well be asked to draw unfavorable inferences, in the absence of other proof, from the use by the defendants of the statistics published by the state or federal governments, concerning mining operations and the coal supply of the country."

State *ex rel v.* Arkansas Lumber Co., 260 Mo. 212, *l. c.* 313:

"We are not to be understood as declaring as a matter of law under our Missouri anti-trust statutes, that dealers or manufacturers of any vendible commodity of sale or manufacture may not issue a price current. But such a list, or compilation of prices ought either to be compiled and promulgated by an indifferent or wholly disinterested person, or if compiled and promulgated by an interested person it ought to be honestly and fairly compiled; it ought fairly to represent current prices as based on actual sales, or upon actual offers to buy and actual offers to sell, and not misrepresent such prices with a view of boosting any prices of any item or items."

LEHMANN'S LETTER ON THE SUBJECT OF COLLECTION AND DISTRIBUTION OF STATISTICAL INFORMATION BY TRADE ASSOCIATIONS.

In 1915 the Bureau of Corporations issued a work entitled "Trust Laws and Unfair Competition," by Joseph E. Davies, the Commissioner of Corporations, who later became the first Chairman of the Federal Trade Commission.

On page 715 is set out the letter of Mr. F. W. Lehmann as being "a very interesting exposition of the law relating

to co-operative effort." As that letter is so illuminating we quote it in full:

(Letterhead of Lehmann & Lehmann, Attorneys,
St. Louis, Mo., Apr. 8, 1909.)

Mr. George K. Smith,
St. Louis, Missouri.

Dear Sir:

I have given due consideration to the matters we talked about on Tuesday and have found no occasion to change the opinion then expressed.

You have the undoubted right to collect and distribute the fullest information you can get of what is being done in the lumber field, with all details as to the amount of production from day to day, the stock on hand, prices asked and received, etc., and every man who receives this information has the right to act upon it as he thinks proper. If he thinks more is being produced than can be sold, he can reduce the amount of his cutting or cease cutting altogether if he chooses, until conditions improve.

Beyond this, however, you cannot go. There can be no agreement or understanding between two or more lumbermen to limit their production and therefore no course of conduct from which such an agreement or understanding could be inferred by a court or a jury.

If some man should go from one lumberman to another getting from each a statement or a promise that he would limit his output in the future and what each man thus said or promised was communicated to the others, and if this were followed by a limitation of the output, a court or jury would be very likely to infer, despite all protestations to the contrary, that the limitation of output was the result of an agreement or understanding.

So, too, if one lumberman after another declares that he will hereafter curtail his production, and they inform each other of this purpose, and then they act in accordance with their declarations, a court or jury would be very likely to infer that this was all in pursuance of an agreement or understanding.

What is in fact being done, each and all have a right to know. This is no more than is done every day by the market reports in our daily newspapers. They show for example, the daily receipts of grain and live stock, the prices received, information as to visible

supply, etc., and farmers individually govern themselves accordingly. The man not pressed for money does not ship his grain or live stock to a glutted market. The lumberman may undoubtedly get like information as to his business and may determine his conduct by it.

But the action based upon this information must be individual and independent. If he concludes for himself that the market is overloaded and that he cannot produce at a profit, he may curtail or cease producing altogether and for as long a time as he pleases, but if he concludes that he will continue as he is doing, unless his competitors will also curtail or cease production, and there is a curtailment or cessation as the result of any sort of preconcert, agreement or understanding, the law is violated.

The conditions of the trade, however bad; the price of lumber, however low; the persistence of lumbermen in cutting an amount above the market demands will not legalize an agreement among any number of them to limit the output of their commodity or to fix the price of it. The policy of the law is free competition and it plainly requires that each producer shall conduct his business independently of any compact with his competitors. This does not prohibit any producer from taking into account all the conditions of business in determining his own conduct, and it does not forbid cooperation for the purpose of obtaining information that is useful to each and to all.

I repeat, however, that beyond the collection and distribution of information as to what is being done, you cannot go, and cannot state too strongly that any agreement or understanding, no matter how indirect the means by which it is brought about, falls under the ban of the law.

Respectfully yours,

F. W. Lehmann.

PRACTICE OF FEDERAL TRADE COMMISSION IN THE NEWSPRINT INDUSTRY.

The Federal Trade Commission in many reports and investigations has collected and published statistical information. In one instance it performed this function for an extended period for an industry whose trade association had been dissolved. In its report for the year ending June 30, 1918, it says, on page 17:

“During the last half of 1917 the Commission undertook the collection and compilation of statistics for the newsprint and bookpaper industries, partly in order to supply certain trade information formerly furnished by a trade association, which had been dissolved by judicial decree” • • • “Summaries of statistics are issued monthly for the information of various branches of the government as well as for manufacturers, distributors and customers.”

And in the report for the year ending June 30, 1919, it says, on page 28:

“Weekly and, later, monthly reports were made by paper manufacturers on the output of various grades including newsprint, book, wrapping and hanging paper, together with information as to prices. Similar reports were received periodically from pulp makers for various sizes of product. Publishers also made reports of their consumption both of newsprint and bookpaper. The operations of jobbers and certain other aspects of the paper trade are also reported. The facts so received were compiled and monthly reviews were issued by different branches of the trade giving the more important data.”

PRACTICE OF BUREAU OF CROP ESTIMATES OF THE DEPARTMENT OF AGRICULTURE.

From what has been said, it will naturally occur to any well-informed mind that the statistical service of trade associations is no more than what certain lines of business and industry get from the market reports published in the daily newspapers, or what the farmer gets from the Government reports issued by the Department of Agriculture. As illustrative of this fact, are the following quotations from a pamphlet issued by the Department of Agriculture, Bureau of Crop Estimates, Circular 17, Revised, T. P. 8-26:

“Farmers are benefited by the government crop reports, both directly and indirectly; directly, by being kept informed of crop prospects and prices outside of their own immediate

districts, and indirectly because the disinterested reports of the Government tend to prevent the circulation of false or misleading reports by speculators who are interested in controlling or manipulating prices."

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"In a sense the Bureau of Crop Estimates is a form of farmers' co-operation, where each farm crop reporter gives information about his locality and in return receives information about the entire country, the bureau merely acting as a clearing house for such co-operative exchange."

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"The reports issued by the Bureau of Crop Estimates during the year include data relating to acreages, conditions, yields, supplies, qualities and values of farm crops, numbers by classes, condition and values of farm animals, etc."

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"If the farmer reads the crop estimates and forecasts of the Government as they are issued, he will be in a position to judge for himself what the crop prospects are, as well as probable prices, so that he can decide intelligently how to market his products and how to deal with the local buyers."

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"The more certainty there is as to the probable supply and demand the less chance for speculation and loss in the business of distributing and marketing the crop, which is a benefit both to the producer and to the consumer."

NO ESSENTIAL DIFFERENCE FROM STOCK, GRAIN, PRODUCE AND OTHER EXCHANGE REPORTS.

The purpose of the trade associations in the collection and distribution of statistical information is no more than an effort to furnish to the members of their respective industries the same information furnished in the newspapers and periodicals concerning prices and stocks in the stock and bond markets, the grain markets, the live stock and poultry

markets, the butter and egg exchanges and other produce exchanges.

AMERICAN HARDWOOD LUMBER ASSOCIATION CASE.

There is now pending for decision in the United State Supreme Court the case of *United States v. American Column & Lumber Company*. Here the American Hardwood Lumber Association collected and distributed statistical information, but in connection therewith is charged by the government with doing many other things since this case is likely to be the leading case upon the subject and a decision is likely at a not far distant date, it will be profitable to discuss the questions involved in the case.

It is not the purpose in discussing this case to pass upon the validity or the invalidity of the acts of the American Hardwood Manufacturers Association in the conduct of their so-called "Open Competition Plan," but it is the purpose to point out that most of the things done by that association were apart from and outside of the matter of pure collection and distribution of trades information, and that such things were foreign to the proper purpose of the statistical collection and distribution and are to be measured by wholly different legal rules than those which apply to the collection and distribution of statistical information.

An examination of the decision of this case (*U. S. v. American Column & Lumber Company*, 263 Fed. 147) clearly shows that the American Hard Wood Manufacturers' Association was charged by the Government with acts which went far beyond anything which comes within the scope of the collection and distribution of statistical information. To show this, we set out what the Court says was charged in the Government's bill, and have printed in italics those charges which are extraneous to any matter of collecting and distributing of statistical information.

"The bill then proceeds to state the means resorted to by defendants to accomplish the purpose of the alleged com-

bination and conspiracy, which are, in substance, as follows (hereinafter referred to as overt acts): By joining together as members of a so-called 'Open Competition Plan,' under the slogan 'Co-operation, not competition, is the life of trade;' and by providing and financially supporting at Memphis, Tennessee, a suite of offices, clerical force, and the defendant F. R. Gadd, as manager of statistics, for the successful operation of said plan; by dividing the members of the plan into four geographical groups and holding meetings of each group each month; *by printing and causing to be distributed amongst the defendants recommendations to make oral agreements at such meetings to eliminate competition amongst those defendants who had been competing, and by this means to suppress 'evil practices,' meaning thereby the practice of competing in prices so as to secure business;* by requiring each member of the plan to make monthly 'Stock Reports' to the manager of statistics, showing the normal stock, the entire actual stock, the unsold stock, of each defendant company; and also to make to said manager 'Production Reports,' showing the normal monthly production, the actual monthly production, *and the estimated future production of each defendant company;* and also 'Sales Reports,' showing separately each actual sale of hard wood lumber made by each defendant company, giving the name of the buyer, the kind of lumber sold, the destination, and the selling price; by having these reports tabulated by the manager of statistics and distributed among the members of the plan; *by distributing amongst the defendants printed recommendations to discuss prices at their monthly meetings, and orally discussing at such monthly meetings said stock reports, production reports and sales reports, so as to produce at each of such meetings a mutual exchange of oral statements of approval of high prices reported in the sales report as assurances that the defendants would further sustain such prices by maintaining prices as high as or higher than such prices; by mutually exchanging each month through manager of statistics, in connection with*

the production reports written predictions by the several defendants that high prices reported in the sales report would continue to be maintained and enhanced, so as to thus furnish further assurance that the action of each defendant in maintaining and enhancing such prices would be supported by like action on the part of other members of the plan; by having distributed by the manager of statistics amongst the defendants printed expositions of the theory of each defendant, to be observed as a guide to prices reported as received by other defendants, to the effect that knowledge regarding prices actually received is all that is necessary to keep prices at reasonably stable and normal levels, there being no agreement to follow the practice of others, although members do naturally follow their most intelligent competitors, if they know what their competitors have been actually doing, this being the theoretical proposition at the basis of the Open Competition Plan; by having questionnaires sent out by the manager of statistics to each member of the plan asking for information showing how the theory of the Open Competition Plan worked in practice, and that the manager of statistics edited these answers and caused to be distributed among the members such parts of them as tended to show that it was successful in producing a steady advance in the price of their product; by printing and causing to be distributed among the defendants arguments against low prices, on the ground of shortage of lumber disclosed by the stock reports, and explaining how the disclosure of such shortage in the stock reports prevented prices from being lowered, followed by arguments for still higher prices on the ground of the shortage disclosed, the continued co-operation to secure higher prices on the ground of shortage in stocks, and the elimination of competition; by causing to be reprinted with approval and distributed amongst themselves, statements emphasizing the advance of prices following the shortage of lumber and urging the defendants against increasing production by night work, which would, in effect, 'kill the goose that laid the golden egg,'

and would be criminal folly, coupled with the suggestion made in the sales report that their combination or association, called the 'Open Competition Plan,' to maintain and enhance prices would not be prosecuted; that prices would continue to advance so long as the shortage of lumber was maintained, and that the Sherman Law, designed to prevent the restraint of trade, should be repealed.'

"It is further alleged that similar means are still being employed, and are about to be further employed by the defendants at Memphis and elsewhere in consummation of their alleged unlawful combination and conspiracy to maintain the prices of hard wood lumber at and enhance it beyond the present high levels, in restraint of interstate commerce in such lumber. It is the doing of these things by the defendants, characterized as overt acts, that the Court is asked to enjoin."

The charge of the government seems to be that the association, after getting this statistical information, went one step further and with it proceeded, formally or informally, to bring about an agreement or concert of action as to enhancing and maintaining prices and as to curtailment of production.

It is but fair to the association and to General Boyle, its attorney, to state the association denies that this was done, and takes the position that the Government has wholly misconstrued the intent and purpose of the speeches, questionnaires, bulletins and booster files used by the Association, and by only quoting excerpts from them has put the association in an incorrect position.

This case was argued before the Supreme Court and was set down for re-argument. It was reargued in October, of this year. The Court recognized the importance of the case by granting additional time for argument. It is to be hoped that the Supreme Court, even if it does not approve of all that was done by the Hardwood Lumber Association, will recognize the right of associations to collect and distribute statistical information. The Government in its brief and on

the argument took the position that all such activity was in contravention of the Sherman Act. Members of the Court, asked some questions of the Government's attorneys, who then conceded to some degree that the mere collection and distribution of information might be legal, but that in this particular case the distribution of the information was in too great detail and had been used as a foundation upon which to bring about curtailment of production and enhancement of prices.

OTHER CASES

The Government has filed other cases which are now pending—for example against the Southern Pine Association in the District Court in St. Louis; against the cement companies in the District Court in Chicago; against cement companies, and the Terra Cotta Association in the District Court in New York City. The writer is informed that in all of these cases the government complains of acts done by the association or bureau, or the companies additional to the mere collection and distribution of statistical information.

RECENT CRITICISM MADE BY THE FEDERAL TRADES COMMISSION.

One criticism against the collection and distribution of statistical data by trade associations is now being made, to wit, that it gives an undue advantage to the members of the association as against the public dealing with them. In his address to Congress on April 12th, 1921, President Harding says:

“I have asked the Federal Trade Commission for a report of its observations, and its attributes, in the main, the failure to adjust consumers' costs to basic production costs to exchange of information by ‘open price associations’, which operate evidently within the law to the very great advantage of their members and disadvantage to the consuming public.”

Excerpts explanatory of the President's above statement taken from the letter of the Commission are as follows:

“One of the purposes of these organizations nominally is to determine uniform cost accounting methods and to steady the market by furnishing the supply which it can readily absorb. These associations collect and publish for the benefit of their members figures of production, production costs, sales, and sales prices and orders and stocks, in pursuance of a plan whereby the members of such associations are to compete among themselves and with others with knowledge of their own and their competitors’ production costs and prices, the available supply and the demand. The collection and public dissemination of such statistical data might make the operation of such associations of benefit to the producer and consumer alike, but, unfortunately, the tendency here manifested to confine the information to members and to bring about uniform prices and to maintain them at an artificially high level by curtailing production or supply through action which tends strongly toward uniformity because based upon common information, but which purports to lack the element of concerted agreement characteristic of the combinations forbidden by the Sherman law.

“From its observations of open price associations among manufacturers the Commission has reason to believe that the manufacturers so associated are obtaining a more advantageous result with a corresponding disadvantage to the consumer than is the case where such associations do not exist. Of course open price associations are most effective with commodities which have become in use equivalent to necessities or with commodities for which there is a very strong general demand.”

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“A fundamental difficulty at the present time lies in the fact that there is no complete information available to anyone with reference to the proper adjustment of manufacturers’, wholesalers’ and retailers’ prices in any industry. Only those who are directly concerned in an industrial group organization—such as an open price association—are possessed

of the available information, which, though incomplete, makes possible a manipulation of prices. With no information, the general public is unable to reach a proper conclusion as to the reasonableness of a price at any stage of the producer-consumer line. When it becomes possible for any fact-finding governmental body to determine at any stage the cost which a commodity represents at that stage, it can be determined whether an excessive charge is being placed thereon."

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"The Commission believes that the opposition to the normal operation of economic laws lies in the fact that certain interested groups now by concerted action become possessed of information of which the general public is ignorant, and which enables those who are interested and informed to operate with reference to production and sales prices. If such information were open not only to those interested as manufacturers or sellers, but to the public as consumers and buyers, operations of the public upon such information would create a corrective force which would tend to counteract the possibility of interior control."

WOULD LEGISLATION PREVENTING THE COLLECTION AND DISTRIBUTION OF STATISTICAL INFORMATION BY TRADE ASSOCIATIONS BE VALID?

It is difficult to believe that there could be any widespread agitation to make trade associations desist from such a practice. To compel all the trade associations, whose members are bona fide using the information separately and individually in determining their respective policies as to prices and production, to desist, would be a backward step in the course of prudent and progressive business. Apart from the policy of such a course the question arises, would it be legal?

It is no offense at the common law nor under the anti-trust statutes to collect and distribute such information, when it is not followed by any employment of it by concerted action or agreement among the members. If therefore the practice is to be stopped it must be by legislation as tending to secure or promote the public welfare.

It is very doubtful where such legislation would be within the proper scope of the police power and not unduly discriminatory. Particularly is this true when the Government, through its agricultural, mining, census and other reports is covering much the same ground, and that the reports of the stock, grain and produce exchanges through their reports are doing the same for other industries. The criticism of the Federal Trades Commission will be fully covered by making provision for getting the same information to the public. If, therefore, the public welfare may be preserved in such a manner, to compel the trade association to desist would be an exercise of the police power.

THERE IS NO OBJECTION TO THE SUGGESTION THAT THE STATISTICAL DATA BE MADE PUBLIC.

Secretary Hoover also strongly advocates that the data collected by trade associations should be put before the public. The Department of Commerce is taking steps in this direction, as is later shown. If in fact the trade associations are enjoying an advantage, it would seem that, rather than stop such functioning by the trade associations, this course should be adopted.

Secretary Hoover has recently issued the following statement:

“For some weeks the Department has been making a careful study of the purposes and activities of trade associations. We find that the vast majority of such associated activity is a constructive contribution to national welfare.

“The Department wishes to co-operate with such associations as wish it in the collection of information as to production, stocks of raw and other materials, percentage of industry in active operation, total orders, and other accomplished facts of interest to them and in the making of the information available to the whole public.

“The making of such information currently public acts alike to protect legitimate business enterprise and the public interest.”

Trade Associations, the Department of Justice, the Department of Commerce and the Federal Trades Commission are all alike waiting for the decision of the Supreme Court in the Hardwood Lumber Association Case. It is to be hoped that in the course of the decision some broad and fundamental statements may be made defining the lines within which associations may operate in the collection and distribution of market reports.

Perhaps the Supreme Court could render no greater service at this time to American business than to clear up this question.

T. F. CHAPLIN