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NATIONAL RECOVERY ADMINISTRATION

DIVISION OF REVIEW

WORK MATERIALS NO. 17

TENTATIVE OUTLINES AND SUMMARIES OF STUDIES IN PROCESS

PART B: LABOR STUDIES

PART C: TRADE PRACTICE STUDIES

Work Materials No. 17 falls into the following parts:

Part A: Industry Studies
Part B: Labor Studies
Part C: Trade Practice Studies
Part D: Administrative Studies
Part E: Legal Studies
Part F: Contributory Materials

December, 1935

C O N F I D E N T I A L

MEMORANDUM TO: SECTION HEADS December 30 1935

SUBJECT: WORK MATERIALS NO. 17

TENTATIVE OUTLINES AND SUMMARIES OF STUDIES IN PROCESS

In order that those working on one study may secure access to allied materials in other studies, these TENTATIVE OUTLINES AND SUMMARIES are made available for confidential use within the Division of Review.

Since these documents were prepared from work that is now in process, they are highly tentative. The outlines are the present operative tables of contents of the studies, but they are of course subject to change as the work progresses. The summaries are, in some cases, forecasts rather than actual summaries of developed manuscripts. Notwithstanding their tentative character, the documents will serve to indicate in some detail the subject matter of the studies now in process in the division. No one will think of these materials as "findings" or "reports" in the usual sense of those terms.

It is expected that these TENTATIVE OUTLINES AND SUMMARIES will result in many conferences, both formal and informal, among those working on the studies--to the ends that effective coordination of the studies may occur and duplication of effort will be reduced to a minimum.

L. C. Marshall
Director, Division of Review

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December, 1935.

LABOR STUDIES (*)

(*) See also the following reports prepared in the Code Administration Studies Section:

A. R. Cleary: Labor Compliance Activities of Code Authorities.
R. M. Wilmotte: Administration of Labor Provisions by Code Authorities.

LABOR STUDIES - INTRODUCTION

Table of Contents

C. Industrial Control Measures
   1. Licensing Bills
   2. Voluntary Agreements
   3. Anti-Trust Law Exemptions
   4. Public Hearings and Congressional Debates

IV. EARLY FORMULATION OF OBJECTIVES BY THE PRESIDENT AND THE ADMINISTRATOR
   A. To Reduce and Relieve Unemployment by the Control of Hours
   B. To Increase Purchasing Power by the Control of Wages
   C. To Improve Standards of Labor by the Control of Other Conditions of Employment
   D. To Induce and Maintain United Action of Labor and Management

V. THE SIGNIFICANCE OF THE NRA SET-UP AND THE CHOICE OF METHODS AND POWERS WITH RESPECT TO THE NATURE OF THE LABOR PROGRAM
   A. Sections 3, 4, and 7 of The Recovery Act; Alternative Methods of Procedure
      1. The Meaning of Each Method
      2. The Use of the Methods by N.R.A.
         (a) Choice of Section 4: P.R.A.
         (b) Choice of Section 3 for All Codes
         (c) Restriction of Section 7 (b) to Geographical Subdivisions
         (d) Absence of Use of Section 7 (c)
   B. Employer Proposed Codes and Code Authority Administration
      1. Employer Proposed Codes and Their Negotiation
         (a) Submission by Industry
            (1) Place of Union Contract
            (2) Collective Bargaining Before Submission
         (b) Pre-Hearing Discussions and Negotiations
         (c) Public Hearings
         (d) Post-Hearing Conferences
         (e) Approvals and Disapprovals
      2. Labor Policy in Code Making
         (a) Relation of Objectives to Policy
         (b) Extent of Formulated or Unformulated Policy
         (c) Contents of Policy
         (d) Influences of Policy on Code Making
         (e) The Place of Exceptions to Policy
         (f) Administration of Policy
      3. Code Authority Administration
         (a) Functions of Code Authorities
         (b) Labor Representation on Code Authority
         (c) Activities of Code Authorities with Respect to Labor Regulations
         (d) Code Administration and N.R.A. Administrative Organization
   C. Labor Advisory Board: Representative Bargaining and Participation in Administration
      1. Labor Participation in Code Making
      2. Designation of Labor Representatives
      3. Development of N.R.A. Labor Policy and Administration
      4. Administration of Codes

D. Interpretation and Administration of Section 7 (a)
   1. Interpretation of Section 7 (a)
   2. Administration of Section 7 (a)

E. The Relation of N.R.A. to Other Federal and State Government Agencies
   1. In Code Making
   2. In Code Content
   3. In Administration
   4. In Compliance

LABOR STUDIES - INTRODUCTION

Preliminary Summary of Findings

The National Recovery Act was passed during a period of widespread unemployment, depressed wages, and a breakdown of many of the normal agencies for industrial stability. The N.R.A. was set up, in the words of the Act, to "reduce and relieve unemployment,.....increase purchasing power,....improve the standards of labor..... (and) induce and maintain united action of labor and management." Though these objectives were explicitly stated in the Preamble, the Act itself indicated only vaguely the goals to be attained or the specific means of realizing them. These were more clearly and definitively outlined by the President and the Administrator.

Just as significant as objectives and policy was the actual administration. N.R.A. could choose among various methods. It relied chiefly upon Section 3(a) of the Act. This choice conditioned the results in so far as standards and collective bargaining were concerned. Similarly, the segregation of the administration of Section 7(a) vitally affected the development of that provision of the Act. These conditioning administrative factors played a considerable part in determining the results of N.R.A.

CONTROL OF HOURS AND REEMPLOYMENT

Table of Contents

(3) Textiles
(4) Other Industries
(f) The Revival of General Movement - January 1935
7. Efforts to Increase Hours

C. Occupational Differentials
1. General Policy
2. Specific Classes
(a) Partial Exemptions
(1) Repair and Maintenance
(2) Continuous Process
(3) Outside Installation
(4) Delivery
(5) Shipping and Stock
(6) Supervisory
(7) Professional and Technical Employees
(8) Key Workers
(9) Other Classes
(b) Complete Exemptions
(1) Managers
(2) Executives
(3) Traveling Salesmen
(4) Emergency Maintenance and Repair

D. Seasonal and Peak Period Adjustments
1. NRA - An Instrument for "Flexibility"
2. Acceptance of Need for Specific Tolerance
(a) Circumstances When Approved
(b) Circumstances When Disapproved
3. Methods of Tolerance
(a) Averaging
(b) Overtime
(1) Base for Overtime
(2) Rate for Overtime
(3) Maximum Limits
(c) Peak
(d) Emergency
(e) Peak - Special Groups
4. Criteria for Determining Selection of Method for Tolerance

E. Daily Hours
1. Need for Specific Regulation
2. Desire for Tolerance
3. Norm Per Day
4. Maximum Per Day
5. Overtime Pay As a Control

F. Days Per Week
1. Legislative Control
2. Desire for Tolerance
3. Norms
4. Compliance
5. Uniformity of Policy

G. Control of Owner-Operator
1. Emergency and Economic Necessity vs Basic Legal and Social Concepts

(a) Right of the Individual to Engage in Commerce and Trade
(b) Interpreting the National Industrial Recovery Act in Relation to the Problem
(c) Constitutional Limitations Involved in Attempted Regulation of Certain Trades and Industries in which the Owner-Operators Abound

2. The Owner-Operator-Proprietor or Worker
(a) A Problem for Trade Associations and Trade Unions
(b) Effect of Regulation upon Development of Cooperatives
(c) Subterfuges to Avoid Jurisdiction of the Recovery Act

3. The Owner-Operator and the Problem of Unemployment
(a) The Small Unit and Working Employer as Answers to Technological Unemployment
(b) Factors Involving Public Relief

4. P.R.A. Substitutions and Early Codes as Guides to Development of Policy

5. Codification and N.R.A. Objectives as Affected by Group Interests
(a) Trade Associations and Small Units
(b) Labor, Organized and Unorganized

H. Working Time
1. Deadheading
(a) Conditions Under Which Issue Arises
(b) Conflict of Interests in Issues
(c) Conflicts of Precedents for Decision
(d) Efforts at Policy Determination

2. Waiting Time
(a) Condition Under Which Issues Arise
(b) Policy Under N.R.A.

3. Split Shift
(a) Conditions Under Which Issues Arise
(b) Policy Under N.R.A.

4. Beginning Time
(a) Conditions Under Which Issue Arises
(b) Policy Under N.R.A.

5. Guaranteed Work Time
(a) Conditions Under Which Issue Arises
(b) Policy Under N.R.A.

6. Lunch Interval
(a) Conditions Under Which Issue Arises
(b) Policy Under N.R.A.

7. Summary

I. Regularization of Employment
1. Objectives of N.R.A.
2. N.R.A. Interest in Regularization
3. N.R.A. Policy

J. Labor Policy on Control of Hours

III. PROBLEMS OF ADMINISTRATION OF HOURS PROVISIONS
A. Nature of the Problem of Administration
B. Weekly Hours
1. Provisions Regulating Weekly Hours
(a) Basic Full Time Week
(1) P.R.A.
a. Original Agreement

(2) Substitutions
(3) Reduction in Full Time Hours Effected by Substitutions

2. N.R.A.
(a) Code Provisions
(b) Comparison of Full time Hours Under P.R.A. and N.R.A.

C. Weekly Hours and Tolerances
1. P.R.A.
(a) The Original Agreement
(b) The Substitutions
(c) The Hours Pattern for Basic and Clerical Employees
2. N.R.A.
(a) Weekly Hour Patterns in N.R.A. Code by Types of Tolerances
(b) Comparison of Hours in N.R.A. Codes and P.R.A.
(c) Contrast in Patterns Among Industries
3. Comparison of Tolerances and Seasonal Behavior of the Industry
4. Significance of Tolerances

D. Administrative Experiences with Varying Types of Tolerances
1. Averaging Without Overtime
(a) Industrial Experience
(1) Exemption, Stays, Exceptions
(2) Technique for Handling Exemptions
(3) Code Revisions
(4) Plant Experience
(b) Personnel Experience
(1) Lay-Off
(2) Unions
(c) Administrative Experience
(1) Interpretations
(2) Code Conflicts
(3) Compliance
(4) Enforcement
(d) Statistical Evaluation of Experience
2. Averaging With Overtime
(a) Industrial Experience
(1) Exemptions, Stays, Exceptions
(2) Technique for Handling Exemptions
(3) Code Revisions
(4) Plant Experience
(5) Personnell Experience
a. Lay-Off
b. Unions
(b) Administrative Experience
(1) Interpretations
(2) Code Conflicts
(3) Compliance
(4) Enforcement
(c) Statistical Evaluation of Experience
3. General Overtime With Maximum Hours
(a) Industrial Experience
(1) Exemptions, Stays, Exceptions
(2) Technique of Handling Exemptions

(3) Code Revisions
(4) Plant Experience
(5) Personnel Experience
a. Lay-Off
b. Unions

(b) Administrative Experience
(1) Interpretations
(2) Code Conflicts
(3) Compliance
(4) Enforcement

(c) Statistical Evaluation of Experience

4. General Overtime With Unlimited Hours
(a) Industrial Experience
(1) Exemptions, Stays, Exceptions
(2) Technique of Handling Exemptions
(3) Code Revisions
(4) Plant Experience
(5) Personnel Experience
a. Lay-Off
b. Unions

(b) Administrative Experience
(1) Interpretations
(2) Code Conflicts
(3) Compliance
(4) Enforcement

(c) Statistical Evaluation of Experience

5. Overtime Provision for Excepted Period
(a) Industrial Experience
(1) Exemptions, Stays, Exceptions
(2) Technique of Handling Exemptions
(3) Code Revisions
(4) Plant Experience
(5) Personnel Experience
a. Lay-Off
b. Unions

(b) Administrative Experience
(1) Interpretations
(2) Code Conflicts
(3) Compliance
(4) Enforcement

(c) Statistical Evaluation of Experience

6. Flat Maximum Hours
(a) Adequacy of the Methods to Meet Seasonal and Peak Periods
(b) Need for Exemptions
(1) Exemptions Granted
a. Criteria for Granting
b. Conditions for Granting
(2) Characteristics of Exemptions Granted
a. Emergency
b. Industry Seasonality
c. Plant Seasonality
d. Others

(c) Adequacy of Exemption Technique for Industrial Needs

(1) Organization
(2) Methods and Procedure
(3) Promptness

E. Evaluation

IV. OCCUPATIONAL DIFFERENTIALS

A. Code Provisions Governing Occupational Differentials
1. P.R.A. and Its Substitutions
2. Code Provisions
3. Pattern of Occupations Exempted by Codes
4. Sigificance of Occupational Hour Differentials (A statistical Study)
5. Occupational Differentials Before N.R.A. and Under Codes (A Statistical Study)

B. Administration of Occupational Differentials
1. Industry's Use of Occupational Differentials
2. Interpretations of Occupation Exemption and the Controversy of Extension of Class
3. Stays, Exemptions and Exceptions
(a) Causes
(b) Extent
(c) Effect
4. Code Maladjustments

C. Limitation of Daily Hours
1. Code Provisions Governing Hours Per Day
(a) Arranged by Degree of Flexibility
(b) Relation of Daily Hours to Weekly Hours
(c) Occupational Differentials
2. Administrative Experience With Daily Hours Provisions
(a) Methods of Limitation
(1) Flat Maximum
a. Adequacy of Such Limitations
b. Need for Exemptions
(2) Overtime Payment
a. Hours Worked in Excess of Basic Hours
b. Administrative Problems
c. Compliance Problems
(3) Unlimited Hours
a. Hours Worked
b. Administrative Problems
c. Compliance Problems
(4) Flexible Hour Arrangement
(5) Limitation Per Day vs Twenty-Four Hour Period

D. Limitation of Days Per Week
1. Code Provisions Governing Days Per Week
(a) Arranged by Degree of Flexibility
(b) Relation of Number of Days to Weekly Hours
(c) Occupational Differentials
2. Administrative Experience
(a) Exemptions
(b) Compliance
(c) Operative Information

E. Defining Working Time
1. Extent of Code Definition and Regulation

(a) Deadheading
(b) Waiting Time
(c) Split Shifts
(d) Beginning Time
(e) Guaranteed Work Time
(f) Lunch Interval

2. Administrative Experience
(a) Exemptions
(b) Enforcement
(c) Issues in Administration

F. Control of Hours of Owner Operator
1. Controls Developed in the Codes
(a) Opening and Closing Hours
(b) Other Labor Provisions
(1) Employer's Hours
(c) Special Trade Practice Provisions
2. Administration of Code Provisions
(a) How N.R.A. Policies Functioned
(1) Local variations based on majority rule
(2) Exemptions and Exceptions
(3) The Problem of Precedents
(b) Compliance and Enforcement
(1) Some practical considerations
(2) Legal Restrictions
(3) Enforcement Machinery
(4) State Recovery Acts and Municipal Ordinances as N.R.A. Auxiliaries
(c) Effectiveness of Regulation

G. Regularization of Employment
1. N.R.A. Code Provisions
2. The Administration of Code Provisions
3. The Automobile Industry
4. Production Control and Regularization of Employment

H. Other General Administrative Problems
1. Code Conflict
2. Compliance And Reenforcement

V. Summary and Evaluation of the Result of N.R.A. Experience
A. Reemployment
1. Unemployment 1933-35
(a) Total by months
2. Employment 1933-35
(a) Total by Months
(b) Total by N.R.A. Industries, Other Industries, Agriculture
(c) Totals by Specific N.R.A. Industries
(1) Manufacturing
a. Class of Employee: Salaried and Wage-Earner
b. Specific Codes
(2) Other Groups
(d) Totals by Codified and Uncodified Industries
(e) A Study of Production, Man Hours and Employment Trends

B. Hours Worked
1. Average Weekly Hours of Employers

(a) By Industry
(1) Reduction in Average Hours
(2) Relation of Reduction to Production and Man Hour Trend
(3) Relation of Reduction to Employment Trends
(4) Relation of Average Weekly Hours to Code Provisions
(b) By Class of Employee
(1) Clerical
(2) Other Special Groups

2. Distribution of Hours Worked
(a) Average of Hours Worked
(1) By Industry
a. Proportion attaining full time
b. Proportion exceeding basic hours
i. By type of class
ii. By type of provision
(b) Relation of Range to P.R.A.
Pre N.R.A.
(1) By Class of Employer
a. Clerical
b. Other Special Groups

C. Elasticity and Reemployment
D. Occupational Exemptions and Reemployment
E. Control of Hours and Regularization of Employment
F. Control of Hours and Owner-Operator

CONTROL OF HOURS AND REEMPLOYMENT

Preliminary Summary of Findings

This study has dealt primarily with the efforts of N.R.A. to have persons reemployed in private industry through the shortening of hours of employment. The amount of reemployment is a function of the volume of business as well as of the restriction of working hours. The variety of the exemptions incorporated in and of the evasions made possible by the codes must all be interrelated in appreciating the final results. Managerial problems were raised, of consequence to the proper conduct of the plants.

The N.R.A. supplemented the Black Thirty-Hour Bill and the Perkins amendment for a flexible hour regulation under a licensing system. The code system was to provide a flexible instrument by which the regulation of hours might be adapted to individual industries, even though no definition of standards to guide the determination were included in the Act. The result of the P.R.A. substitutions was to convert the basic thirty-five hour week for productive employees into a general forty hour week.

The original P.R.A. provided for a forty hour maximum week for non-productive employees and a thirty-five hour week for productive workers. Employers were given the right to work their employees for forty hours, however, during any six weeks before December 31, 1933, the initial termination date of the Agreement. This tolerance was removed by Executive Order from all agreements signed on and after October 1, 1933.

A total of 382 substitutions to the original P.R.A. were approved. Among these were 353 substitutions which modified the hours of labor of productive or factory employees, and 234 which modified the hours of non-productive labor. Substitutions modifying the wage provisions of the Agreement were significantly fewer. There were only 56 modifications of non-productive employees' wages, and 239 modifications of productive wage rates. Industry's greater concern with hour regulations is thus evidenced.

An examination of the revised hours reveals that less than 10 per-cent of the employees in industries operating under P.R.A. substitutions were subject to a flat maximum of forty hours per week. Another seven per cent were subject to flat maximums ranging from thirty-five to fifty per week. The remaining 83 per cent were subject to more flexible types of hour limitations.

The great bulk of clerical workers were allowed, under the P.R.A. substitutions, a forty hour week. About 250 substitutions established flat maximum weekly hours. Most of these were for forty hours, but they ranged from forty-four to fifty-four.

The code set-up yielded similar results. While a small number of codes had basic weeks of less than forty hours, there was a much larger number with more than that number. Furthermore, the codes were so written that most of those providing for forty-hour weeks permitted, in actual practice, much longer working weeks.

Reemployment was most rapid during the early days of the codes, before industry was adjusted to the plan of surmounting the regulation of hours by efficiency methods and by exemptions. Mr. Whiteside's statement of November, 1933, marks the high point of this phase. To assure its application the hearings of March, 1934 were held. The President made a plea for a 10 per cent reduction in hours and only two industries really responded. Officially N.R.A. did not again definitely espouse shorter hours. Labor continued the effort and succeeded in several cases - particularly in the coal, the cotton garment, and the millinery industries. In the cotton textile industry a national strike for a thirty-hour week failed of its objectives. In the slate industry the effort was begun too late. In the boot and shoe industry the project was sent for study to a special research commission.

A study has been made of the exemptions from the basic work week established in the codes. The occupational differentials, though less striking at first blush than the seasonal and peak exemptions, were more permenent, and continued through the entire period and the year. The industries asked for these exemptions on the ground that the persons affected were necessary to develop opportunities for the reemployment of others. Frequently, normal basic hours were accepted by an industry only because such exemptions were granted. However, it often happened not only that the exempt classes were vaguely defined, but also that they embraced large and significant numbers of workers. From the statistical studies completed to date it may be estimated that 12 per cent of the employees covered were excluded by limited occupational exemptions, while another 12 per cent were given total exemptions from the hour provisions. The Administration's policy on the subject was practically unformulated, even though precedents firmly established the exemptions as justified. In individual industries the exemptions affected more than 50 per cent of the employees. In part the situation was due to the loose drafting of the codes, as well as the need for compromise in negotiations. In other cases it was due to sheer ignorance of the significance of these exemptions, and to the Deputies' impatience to have codes approved.

The situation with respect to the seasonal and peak allowances is even more confused. Policy was present, but the enforcement of it was lax. Standards of enforceability were absent. All types of tolerance in the basic hours were permitted in most codes. 115 codes did have flat maximum hours, but otherwise the exemptions tended to nullify the basic hour provisions.

The experience with the flat maximum hour codes indicates that most of the exemptions were not due to the seasonal character of the demand. Accidental factors which are not directly associated with the seasonal peak, however, were rightfully handled by exemptions. The exemption procedure in these cases, though faulty in some particulars, was routinized sufficiently to answer the real needs.

The experience with daily hour regulation and its relation to total weekly hour control stands out as of importance. The most significant project undertaken has been a study by the Bureau of Public Roads on the effect of the length of the day on productivity. N.R.A. files contain little. These findings may be summarized as follows:

"In deadheading the conditions conducive to the problem are rather well defined. An abundance of material is available which exposes the practice from all angles. The industries where this problem makes its appearance are Trucking, Railroads, Motor Vehicle Retailing, and others where transportation is a major labor operation. The material on N.R.A. policy regarding this problem is scarce, being confined to compliance action. The report of the off-duty and deadheading committee undoubtedly would have led to some formal action, probably in the nature of an amendment to codes, had not the action of the Supreme Court ended all moves in that direction.

"The legal regulations pertaining to this problem are chiefly state laws, but the recent amendment to the Interstate Commerce Act will undoubtedly do much to make for uniform handling and enforcement. The issues merge into the question of what constitutes off-duty hours, and many different agencies have rendered opinions on the question. Courts, labor unions, the Department of Labor, industries and others have gone on record with definite statement of their opinions. The results have been found to include (1) the effect of regulation on reemployment, which is very minor, but tends to stabilize employment for those already employed; (2) the effect of regulation on employees' health; and (3) safety for other motorists on the road.

"The absence of adequate code regulation under the N.R.A. would seem to indicate that either (1) the problem presented too many angles to be dealt with hurriedly under the short life of the codes, or (2) opposing influences were strong enough to prevent any adequate coverage of the problem on a nation-wide basis.

"In the problem of waiting time or interruptions of work the matter assumes varying forms, depending on the type of industry or the occupations affected. For instance, in line types of operation we note the occurrence of waiting time when the line breaks down, when materials run short, or for other reasons peculiar to the type. There is the problem for service men who are on call, even though work to keep them fully occupied may not be available. Mechanics in garages and other types of repair shops do not always have an even flow of work, yet must be constantly on hand if they expect to share in available jobs. Truckers must wait for loading and unloading; construction workers are victims of weather, lack of materials, etc.; longshoremen must wait for ships to dock or sail; and many other types of labor find waiting time a constant threat to their pay envelopes.

"The N.R.A. was very definite in its policy on this point. There were 16 or more codes which specifically made the 'availability of the employee a sufficient reason for payment for all hours on duty, whether actively engaged or not. Administrative Orders X-124, 164-7, 118-38, 44-6, 399-10, and 83-12 all dealt specifically with this problem. Interpretations and decisions of the Advisory Council, the Compliance Council and the Code Advice Committee all expressed definitely the N.R.A. policy. The unions in many of their agreements have provisions covering this practice.

"Waiting time is a much easier problem to regulate than deadheading, since violations can more easily be uncovered and reported. Then too this matter can be directly legislated against, whereas the deadheading problem must be regulated by regulating consecutive hours on duty and by the stipulation of minimum hours from and off the vehicle."

The findings with regard to the owner-operator problem may be summarized as follows:

"The difficulties involved in the attempted regulation under the codes of many trades and industries were traceable to the existence of a large number of small entrepreneurs, known as one-man operators or owner-operators, as well as by other titles. The task of classifying those individuals, and of establishing their status as employers or workers, was specially perplexing, and caused a great deal of concern to industry and to organized labor in a number of fields. These entrepreneurs nominally worked for themselves, but frequently employed one or several workers on a limited or relatively permanent basis. In the latter case the common practice was for such proprietor-workers to assume a dual capacity - i.e., as owner and as worker or operator.

"Competitive problems affecting both industry and labor arose. Under approximately 120 codes it was found necessary to attempt regulation of the starting and finishing hours of these employer-workers and owner-operators, in order to protect workers' standards and prevent unfair competition. In addition, a number of other labor and fair trade practice provisions were inserted into the codes for the purpose of attempting some measure of control over owner-operators, and sometimes over members of their families who worked in their establishments. Practical and legal difficulties in administration and enforcement arose from time to time, and efforts were made to establish policies to deal with them.

"Owner-operator competition, while found in a number of fields, became a major problem in the service trades in the trucking, printing and food industries, in the retail groups, in the construction trades and in small specialty manufacturing enterprises. The extent of owner-operator activities, and their effect upon proprietors and workers, is revealed by a statistical analysis, covering a number of trades and industries.

"It became increasinly evident that enforcement of owner-operator code provisions was difficult and unsatisfactory, especially in those fields where Labor was not organized. Also, in cases such as the service trades where, because of the intrastate nature of their operations, it was doubted if regulation and enforcement could proceed on a legal basis, attempts were made to decentralize actual administration and enforcement by encouraging the formulation of State Recovery Acts and municipal ordinances based on the police power.

"Some vitally important issues are involved in this problem, which touch deeply on the historical, legal and social traditions

of the country. Attempted regulation of these persons and groups was decried by many as an invasion of rights which the Constitution and the Recovery Act protected. On the whole organized labor as well as industry pleaded for regulation as a matter of economic necessity. It was contended that regulation of owner-operators would increase employment, eliminate unfair competition and thus promote the purposes of the Recovery Act. On the other hand, vocal and powerful opposition developed, based on the fear that these very small units would be crushed.

"Several months prior to the original expiration date of the Recovery Act the situation was still characterized by uncertainty and confusion; and the invalidation of the codes probably prevented this question from receiving really serious consideration as a basis for future policy."

The problem of the regularization of employment is of special interest. N.R.A. was impressed with the need for reemployment, but within the organization the annual income of workers also became a matter of serious interest. In the early code hearings this problem was discussed, especially in the construction and automobile industries. However, little was done by the code authorities. It was the reopening of the codes in November, 1934, that led to the study of the matter by industries, and the promise of definite action. Many codes contain provisions on the subject, but N.R.A. failed to help by setting up an agency to assist in the development of plans. Production control does not necessarily lead to regularization of employment. It frequently merely places the burden of irregularity on the workers, and results in a mere share-the-work program.

CONTROL OF WAGES

Table of Contents

2. Standards
   (a) Criteria
   (b) Conflict of Criteria
3. Code Provisions
4. Theoretical Issues Underlying Policy

C. Wages Below the Minimum
1. Learners and Apprentices - Inexperienced Workers
   (a) Policy
      (1) The Act
      (2) The First Code
      (3) The President's Reemployment Agreement
      (4) Subsequent N.R.A. Policy
         a. First Model Code
         b. Second and Third Model Codes
         c. Executive Order
         d. Findings of Review Division
         e. The Basic Code
         f. Confidential, Tentative Formulation of Labor Policy
         g. Advisory Council Decisions
         h. Significant Changes in Learner Policy
         i. Federal Apprenticeship Committee Letter
         j. Attitudes of the Boards
            i. Industrial Advisory Board
            ii. Research and Planning Division
            iii. Labor Advisory Board
            iv. Consumers' Advisory Board
         k. Administrative Order No. X-137
         l. The Code Planning Committee
   (b) Code Provisions in Relation to Policy Changes
      (1) Apprentices
         a. Before and After Executive Order #6750-C of June 27, 1934
         b. Typical Provisions in Line with Policy Changes
         c. Increasingly Careful Use of Term
      (2) Learners
         a. No Marked General Change in Provisions
         b. Typical Provisions in Line with Policy Changes
      (3) Bargaining Determinants
         a. The Inexperienced Worker Problem in Collective Bargaining Codes
         b. In Codes with Representative Bargaining and Union Support
   (c) Theoretical Issues Underlying Policy
2. Aged, Handicapped, and Slow Workers
   (a) Policy
      (1) Prior to Executive Order
      (2) Regulation by Executive Order
   (b) Theoretical Issues Underlying Policy
3. Special Classes (Office Boys, Office Girls, Juniors, Special Occupations)
   (a) Policy
   (b) Standards
   (c) Theoretical Issues Underlying Policy
4. Female and Light and Repetitive Occupations
   (a) Policy

(1) Rates for Females
(2) Rates for Light Occupations
(3) Equal Pay for Equal Work
(b) Standards
(c) Theoretical Issues Underlying Policy

D. Geographical and Population Differentials
1. Policy
(a) Policy in Code Writing Period
(1) The National Industrial Recovery Act and Interpretations
(2) The First Code and the P.R.A.
(3) Other Important Codes; the Administrator's Letter
(4) Statements on Administration Policy in the Code Making Period
a. The President, April 22, 1934
b. The Administrator: Retail Code Exemption
c. Dr. Gustav Peck, Administrative Assistant to Executive Officer, April, 1935
(5) Conclusions on Policy in the Code Writing Period
a. Population Differential
b. Geographic Differential
(b) Development of Policy in the Code Administration Period
(1) The Problem Before the Advisory Council
a. The McLaren Rubber Company
b. Proposed Code for the Pacific Coast Dried Fruit Industry
(2) Attempt to Formulate a Definite Policy
a. L. C. Marshall, Assistant Deputy Administrator for Policy, June 6, 1934
b. L. C. Marshall, Assistant Deputy Administrator for Policy, August 26, 1934
c. Committee on Labor Policy, October 25, 1934
d. Revised Model Code, January 7, 1935
(3) Conclusions on Attempt to Formulate Policy
2. Standards
3. Theoretical Issues Underlying Policy

E. Wages Above the Minimum
1. Introduction
(a) The Meaning of the Term
2. Policy
(a) The Formative Period
(1) Statement by the President
(2) Provisions and Interpretations of the President's Reemployment Agreement
(3) The First Code
(4) The Policy Memorandum of October 25, 1933
(5) Model Codes, October 25th and November 6th, 1933
(b) The Formulative Period
(1) Policy Group Period
a. Labor Policy Group
b. Basic or General Code
c. Tentative Formulation of Labor Policy
d. The Electric and Neon Sign Industry Case
(2) Advisory Council Period
a. The Steel Casting Industry Case
b. Questionnaire to N.R.A. Field Offices

2. Aged, Handicapped and Slow Workers
   (a) Code Provisions
   (b) Problems of Administration
      (1) Amendments
      (2) Stays, Exceptions, Exemptions
      (3) Interpretations
      (4) Compliance
      (5) Enforcement
      (6) Code Conflict
      (7) Executive Orders
3. Special Classes
   (a) Code Provisions
   (b) Problems of Administration
      (1) Amendments
      (2) Stays, Exceptions, Exemptions
      (3) Interpretations
      (4) Compliance
      (5) Enforcement
      (6) Code Conflict
      (7) Executive Orders
4. Female and Light Occupations
   (a) Code Provisions
   (b) Problems of Administration
      (1) Amendments
      (2) Stays, Exceptions, Exemptions
      (3) Interpretations
      (4) Compliance
      (5) Enforcement
      (6) Code Conflict
      (7) Executive Orders

D. Population and Geographical Differentials
   1. Problem of Adaptation and Interpretation
      (a) Amendments
      (b) Stays
      (c) Exemptions
      (d) Interpretations
   2. Code Conflict and Code Harmonization
   3. Compliance and Enforcement Problems

E. Wages Above the Minimum
   1. Problems of Application and Interpretation
      (a) Amendments
      (b) Stays
      (c) Exemptions
      (d) Interpretations
   2. Code Conflict
   3. Reporting
   4. Compliance and Enforcement Problems

F. General Compliance and Enforcement Problems

IV. SUMMARY AND EVALUATION OF RESULTS OF N.R.A. EXPERIENCE

A. Experience Under N.R.A.
   1. Wage Movements and Trends
      (a) In Relation to Specific Aspects of Wage Provisions
         (1) Minimum Wages
         (2) Wages Above the Minimum
         (3) Wages Below the Minimum
         (4) Geographical Differentials

(b) In Relation to the P.R.A.
(c) In Relation to Specific Industry Codes
(d) In Relation to Cost of Living
(e) In Relation to General Industry Recovery
(1) Hourly Earnings
(2) Weekly Earnings
(3) Annual Earnings

2. Payroll Experience and Trends
3. Labor Income During the N.R.A. Period
4. Relation of Wage Movements to Industry's Ability to Pay
(a) Labor Cost
(1) Relation to Total Cost
(2) Relation to Selling Price of Product
(3) Relation to Other Cost Items
(b) Significance of Code Wage Increases in Increasing Labor Costs
(c) Industry's Ability to Pay as Evidenced By
(1) Profits
(2) Interest and Capital Payments
(3) Possibilities of Shifting Costs to Consumers or to Other Producers
(d) Relation of Labor Cost to Industry's Ability to Pay Increased Wages

B. Evaluation of Results of N.R.A. Experience

CONTROL OF WAGES

Preliminary Summary of Findings

Minimum Wages.

The problem of increasing the purchasing power of labor by setting minimum rates for workers in industry through codes of fair competition raised a series of questions: (1) What was administration policy in regard to setting the minimum rate? (2) What were the standards followed in drafting the minimum wage provisions of codes? (3) What were the actual code provisions? (4) What were the theoretical implications and issues involved in the whole problem of setting minimum rates for all industry? (5) Were the minimum rates as adopted in codes actually effective, or was administration so weak as to render them in many cases inoperative? (6) What were the actual effects of the code provisions in raising wages?

The objective of the minimum wage legislation was to increase purchasing power. The method was that of minimum rates incorporated in codes for specific industries. The rates were determined by a process of negotiation and bargaining between industry on the one hand and labor and the Administration on the other, where labor was strong and well-organized, and between industry and the Administration, where labor was weak. The Deputy Administrators were aided by Labor Advisers, who were themselves under general instructions to increase purchasing power.

This general plan was in advance of all precedent so far as minimum wage legislation in this country was concerned. Though it was in line with the development and practice of the Wage Boards in Great Britain, it was much more sweeping in scope and more varied in its plan of operation. It was, however, much less well worked out in detail and in effective policy than the British Wage Boards.

Policy with respect to the fixing of minimum wages in codes of fair competition tended to insist (1) that they should represent a substantial increase in minimum rates of pay over those prevailing in June, 1933, (2) that they should not unduly burden industry, and (3) that they should allow the maintenance of a decent standard of living. The P.R.A. indicated that 40 cents for 40 hours was the basic idea of a satisfactory wage. In practice the above standard was exceeded in relatively few codes, and was departed from in many cases where industries pleaded that they could not afford such high rates. Rates as low as 15 cents an hour were approved, provided it was shown that they represented a substantial improvement, and that industry could not afford to pay more. Other important principles which were more or less systematically applied included (1) refusal to reduce rates below the P.R.A. substitution, (2) the maintenance of weekly wages, and (3) the setting of comparable rates in similar and competing industries.

In general, the minimum wages in the codes were negotiated rates, in which industry bargained with Labor and the Administration in cases where Labor was organized and relatively strong, or with the Administration (in which case the interests of labor were represented only indirectly by the Labor Advisory Board) in instances where Labor was unorganized or relatively

weak. In pursuance of the objective of securing fair trade practice provisions in codes to eliminate the evils of unregulated competition, industries were willing to concede higher minimum rates for labor than would otherwise have been the case. Deputies were under general instructions to secure rates that would mean substantial increases in wages, in order to carry out the purposes of the Act. The minima in the codes were, then, essentially bargaining rates of wages.

Wages Below the Minimum

The problem involved in wage rates below the minimum was one of how to take care of workers who were unable to earn the minimum, when the latter was set at such a level as to mean a considerable increase in wages. The questions were at what rates these subminimums should be set, what limits should be placed on their application, and whether they could be administered in such a way as to afford a reasonable relaxation of the standards to take care of substandard workers, without leading to a general breakdown of the minimum rate structure.

The policy with respect to apprentices working under arrangements for over 2,000 hours training allowed them to continue, under the general supervision of the Secretary of Labor, in accordance with an Executive Order dated June 27, 1934. No limitation as to the rate of pay or the number of such apprentices were set in the codes.

The policy with respect to learners, who were defined as persons who had had no previous experiences in an industry, tended, in general, to limit them to five per cent of the total number of employees, to require wages equal to at least eighty per cent of the basic minimum, and to provide a learning period of six weeks or less. The learner was a person who was learning the operation of a particular machine or a single process.

Actual provisions for learners and apprentices varied from these general standards where longer periods were deemed necessary for learning a number of operations. Of the 578 codes 213 contained learner provisions, and 70 contained apprentice provisions.

In the administration of these provisions special exemptions were sometimes granted to allow the number limitation to be exceeded in the case of new establishments, or to take care of emergency or peak period demands.

Policy with respect to aged and handicapped workers was embodied in an Executive Order which permitted wages below the minimum for those certified by State Departments of Labor designated to administer this exception. Four-fifths of the codes had such a provision.

A few codes had a special clause allowing the employment of slow workers at less than minimum rates.

Special occupations were often listed in codes at specified rates below the minimum, or in some cases at a percentage of the basic rate. In 273 codes there were special provisions for office boys, subject to definite wage minimums and to limits on the numbers or proportions of employees who could be so classified. A number of codes included office girls in this class without special definition. Watchmen who worked long hours often had

special rates below the minimum. Helpers for route salesmen or drivers - these being groups which operated in most cases without limit of hours - were often excepted from a minimum wage provision with, a subminimum in terms of a percentage of the basic rate e. g., eighty per cent. Other similar classes were cleaners, janitors, outside workers, etc. Special minima were provided in some codes for persons who received tips, for minors, juniors, newspaper delivery boys, and similar occupations.

In general, policy permitted concessions to industry with respect to these occupations, when accompanied by safeguards prescribing the actual wage or percentage of the minimum, and limiting the number of persons who might be employed under any such concession. Where such provisions were written into the codes, an opportunity developed for bargaining between industry, labor and the Administration as to the actual rates, as well as to the form of the safeguard.

Area Differentials

The Administration set minimum wages in codes of fair competition as a means of increasing purchasing power. The Administrator interpreted Section 7(c) of the Act as permitting differentiation in such minimum rates according to the locality of employment. In the exercise of this power the South was recognized as a low wage area. In general the differentials already existing between the high and low wage areas were decreased by the greater increases in wage rates in the latter; while in the case of codes having many wage districts they were reduced by narrowing the spread in the district minimum rates. This greater increase in wage rates in the low wage districts was considered by the Administration to be necessary to place workers in these districts on a decent standard of living.

In particular industries the extent to which existing differentials were narrowed was influenced (1) by the ability of the members of the industry in the low wage districts to pay the higher rates; (2) by the need of avoiding undue disturbance of competitive conditions among the various producing areas of an industry; (3) by the necessity of preserving the competitive balance between industries; (4) by the preservation of the purchasing power of the farmer, which limited the rise in wage rates in industries directly affected agriculture; and (5) by the cost of living in the low wage area. Special circumstances, as in the Bituminous Coal and Textile Industries, justified a differential rate structure. In general, the extent to which differentials were narrowed depended also on the relative bargaining power of the members of an industry in its various sections, since the power to differentiate in minimum wages according to locality was one of the most effective means available to the Administration to secure voluntary acceptance of a code.

Any significant study of area differentials, which includes population and geographic differentials, must be primarily concerned with the adoption of the codes for the major industries in the first few months of the National Recovery Administration, as this set the mold for the differential rate structure. The development of Administration policy on area differentials in the code administration period is of minor importance.

Wages Above the Minimum

The Administration did not formally or completely explain the meaning of the term "wages above the minimum". It was commonly applied to the workers other than those in the lowest pre-code wage class. The issue was far-reaching and concerned a majority of the workers under codes and a considerable share of the wage bill.

The two major elements of industry, management and labor, had opposing views on the subject. Labor sought an industrial law to protect the wage structure, particularly one which would reinforce the workers' freedon of action and the processes of collective bargaining. It opposed legislation that tended to encroach on or to lessen the force of collective bargaining. Management, on the other hand, opposed legislation that interfered with the self-regulation of business.

The Recovery Act appears to have provided sufficient basic law for the enactment of a complementary law to protect the entire wage structure.

A policy that consideration should be given to the inclusion in codes of some positive provision for wages above the minimum appears to have been established by the Presidential Order accompanying the approval of the first code, that for the Cotton Textile Industry, on July 9, 1933. No provision had been included in the code as proposed. The Presidential Order modified the code to provide for the maintenance of certain existing differentials.

The policy that consideration should be given to this matter appears to have been reaffirmed on July 19, 1933, by the President's Reemployment Agreement, though the clauses on the subject were vague. There was no official announcement that such a provision was required, nor was a pattern to be followed prescribed.

The model code issued for the guidance of industry continued to indicate that provisions with regard to wages above the minimum were desirable, though not mandatory. The patterns offered were indefinite and conflicting.

Notwithstanding the definite affirmation of the President with respect to the first code approved and, later, the President's Reemployment Agreement, no official announcement on policy followed. This may be accounted for by the apparent lack of a well-organized administrative machine in the early days of codification. Neither was there any subsequent announcement, however, which stated that such a provision was mandatory, nor did the Administration offer any definite pattern.

A large number of the executives charged with the responsibility of developing codes appeared to consider that the inclusion of some provision, inoperative though it might be, was necessary to conform to the unwritten policy. Eighty-seven codes, however, were approved without any positive provision for wages above the minimum; and of these thirteen contained no provision on the subject whatever.

The Administration formally announced only one statement of general policy on this matter. This declaration was negative, incomplete and

indefinite. It was the decision of the original Policy Board, contained in Par. No. 8 of the confidential Policy Memorandum issued on October 25, 1933, as follows:

> "No union agreements are to be written into codes nor are schedules of wages to be included in codes. The latter does not forbid two or three basing rates."

The terms "wage schedules" or "basing rates" were not defined. This decision did not prescribe what, if anything, should be incorporated in a code.

Labor's Income During the NRA Period

The year 1934, the culmination of the N.R.A. code period, witnessed an increase in National and Labor income for the first time since 1929; and in addition a larger per cent of the national income went to Labor than ever before. National income increased 11.3 per cent over the preceding year, while Labor's income gained 13.7 per cent.

This latter gain was more than sufficient to offset a 2.5 per cent rise in the cost of living from December, 1933, to November, 1934, with the result that Labor's real income or purchasing power increased, in 1913 dollars, 11.1 per cent.

CONTROL OF OTHER CONDITIONS OF EMPLOYMENT

Table of Contents

1. Industrial
2. Trade Union

F. Abolition of Contracting
1. Economic Conditions Bearing upon Abolition
2. Legislative Means

G. N.R.A. Policy on Contracting

H. N.R.A. Regulation of Contracting
1. Mechanisms
2. Organizations
3. Effect

I. Piece Workers and Contracting Systems

J. Methods of Dealing with Problem

V. Industrial Homework

A. Introduction
1. The Problem of Industrial Homework
2. Homework and the National Industrial Recovery Act
3. Development of N.R.A. Homework Policy

B. Code Experience
1. Summary and Analysis of Code Homework Provisions
2. Industry Studies
(a) Introduction
(b) The Method of Regulation
(1) Lace Industry
(2) Furniture Industry
(3) Needlework Industry in Puerto Rico
(4) Fresh Water Pearl Button Industry
(5) Candlewick Bedspread Industry
(c) The Method of Partial Prohibition
(1) Cotton Garment Industry
(2) Handkerchief Industry
(3) Hosiery Industry
(4) Infants' and Children's Wear Industry
(5) Knitted Outerwear Industry
(d) The Method of Prohibition
(1) Men's Clothing Industry
(2) Artificial Flower and Feather Industry
(3) Pleating, Stitching, Bonnaz and Hand Embroidery Industry
(e) Miscellaneous Methods
(1) Fabricated Metal Industry
3. Compliance: Problems and Technique
4. Summary of Code Experience

C. N.R.A. Efforts at Standardizing the Control of Homework
1. The N.R.A. Homework Committee
2. The Executive Order on Homework
3. Administration of the Executive Order
4. Conclusions

D. Conclusions and Recommendations
1. Critique of the Code System
2. Other Attempts to Control Homework
(a) State Legislation
(b) Union Agreements
(c) Social Agencies

3. Final Summary and Suggestions
   (a) Factors Making for Persistence of Homework
   (b) Factors Tending to Eliminate Homework
   (c) A New Method of Control - Interstate Compacts
   (d) Conclusions

CONTROL OF OTHER CONDITIONS OF EMPLOYMENT

Preliminary Summary of Findings

A host of conditions affecting standards of labor were regulated by code provisions. When the question of the method to be used in dealing with these arose, it became necessary to decide whether an abuse was to be regulated or abolished. The decision would, of course, be governed in each instance by the circumstances. However, even in cases where prohibition was possible, political and tactical reasons frequently dictated regulation as the wiser course. Prohibition was delayed until a later period when regulation had proved manifestly inadequate.

Child Labor

The child labor question came up at the cotton textile hearings. However, the policy on the subject was dictated by the P.R.A., which prescribed a 16 year age minimum, but permitted exemptions in retail trade and in the newspaper industry. The problems under N.R.A. were, first, that of working out a formula to protect employers from undue liability, while at the same time safeguarding the administration of the clause; and second, that of developing protection for young workers from hazardous occupations. Consequently, the technique of submitting and revising lists of hazardous occupations was developed. On the whole, the available material indicates that child labor was materially reduced under the N.R.A.

Safety and Health

Most of the codes had provisions to regulate conditions affecting safety and health. A Committee on Standards of Safety and Health was established to assure compliance with these provisions, and to arrange for the development of an adequate administrative setup within each industry.

Company Towns, Houses and Stores

The company town presented two different problems. The first was that of the company house. It had exhibited various abuses. N.R.A. tried three different methods of handling this issue. In the first place, it set a higher income minimum, which would permit the worker to take care of the rent. Furthermore, it required that the company house should not become a method of industrial slavery. Workers would not be compelled to live in these places. In some codes the regulations governed the sums to be charged for housing.

The company store was controlled by means of two code features. In the first place, the scrip method of wage payment was prohibited; and when this prohibition was stayed, it was kept under consideration and study. In the second place, many codes prohibited buying at the company store from becoming a condition of employment.

Contracting

The contracting problem is interwoven with our industrial structure.

It related to the issue of risk. Employers wish to shift as large a proportion of this risk as possible to their employees. Their success depends upon the type of piece work or the contracting system developed. In the codes several types of control were established, to eliminate contracting in some cases and its abuses in others.

The following is a summary of the findings on this problem:

"This study deals with the labor aspects of certain types of contracting: (1) Contracting of the sort generally meant when the term is used in the women's clothing industry - the contractor receiving raw materials or partly manufactured goods from the principal, assuming general business responsibility for the manufacture of the garments, and returning them to the principal; (2) contracting or sub-contracting among employees on the employer's premises; (3) contracting with a non-employee for the labor of others to be used on the principal's premises, and (4) contracting as it appears in the construction industry.

"Many causes both labor and non-labor in origin, have operated in the rise and persistence of contracting. There are consequences for labor in the influences which bring about contracting, even though the latter are non-labor in origin. Contracting is not so much a special problem as it is an angle of approach to problems which somehow need treatment.

"The Labor Advisory Board, in its efforts to deal with contracting, started somewhat behind the first attempt on the part of the N.R.A. to frame model code provisions. When it did begin, it stressed the prohibition of "inside" contracting and sub-contracting, and the application of code provisions to contractors' operations. Later, while continuing to emphasize the prohibition of inside contracting or sub-contracting, it attempted to apply to the contractor either the provisions of the code in question, or those of the "code adopted for the industry covering such work", or regulations no less stringent. Finally, while continuing the above principles, it developed two others -- a prohibition of contracting labor service to any one, and a stipulation that a member of an industry must pay the contractor enough to enable him "to comply with the code as to wages, hours and conditions of employment, and in addition a reasonable overhead."

"Contracting provisions appeared chiefly in the codes of the following industry groups: clothing, construction, metal equipment, and stone and clay materials. The contracting provisions of the clothing codes differ greatly from those of others and involved a more detailed treatment of the problem, with provision for further investigation. Non-clothing codes contained as a rule a provision requiring compliance on the part of contractors with standards no less stringent, or with another applicable code; and a provision to prohibit or restrict contracting or sub-contracting among employees, and contracting with non-employees for the labor service of others. Clothing codes usually had provisions requiring sufficient payment by principal to contractor to cover code wages and "reasonable overhead", registration of contractors, and uniform contracts.

Industrial Homework

Homework is a challenge to those interested in improving the conditions under which goods are made. The system is invariably characterized by low wages, long hours, child labor, and unsanitary working conditions. Homework is particularly difficult to regulate. Some question whether regulation is possible at all. Competition among homeworkers tends to lower their earnings. Many such workers are on relief rolls. Actual or potential competition between homeworkers and factory workers tends to lower the standards of the latter. Manufacturers using homework labor have competitive advantages over manufacturers who do not, and in whose plants higher standards are required by law and by union agreement. By using homeworkers manufacturers pass on to them certain overhead costs. There is a question whether the homework system is efficient from the point of view of management. Homework is decentralized production; no supervision is possible. Most people agree that the evils of the homework system should be controlled. The choice lies between regulation, which some think impossible, and complete prohibition, which others think would be too drastic and unfair to the homeworkers.

There was no specific reference in the Recovery Act to homework. The general objectives of the Act depended on code standards. Fair competition was impossible to achieve unless such standards applied to all workers in an industry. Competitive factors made it inevitable that Administration officials should deal with the homework problem, on the insistence both of labor and of the members of industry. The homework problem is a part of the larger problem of the regulation of hours and wages. One clause in the Act was claimed to have relation to homework. This was the provision safeguarding the right of the individual to pursue "the vocation of manual labor and selling.....the products thereof." The legislative history and intent of the Act show that the clause in question was not aimed at industrial homework.

Development of N.R.A. Homework Policy

The roots of the N.R.A. homework policy lay in times before the N.R.A. and in organizations outside it. The Labor Advisory Board carried forward the A.F. of L. attitude that homework should be eliminated. The same position was held by other labor and social organizations. The Consumers' and Industrial Advisory Boards came around to the point of view that homework should be abolished. Early codes prohibiting homework served as precedents. The Homework Committee established by N.R.A. sponsored an Executive Order allowing homework in cases of hardship. This crystallized the N.R.A. policy as follows: Homework should be forbidden except in those instances allowed by the terms of the Executive Order. This policy remained unchanged until the day of the Schechter Decision.

The lack of current information about homework, and the administrative difficulties generated by the lack of uniformity among code provisions on the subject, led to the establishment of an N.R.A. Homework Committee. Its chief purpose was to study the situation and to make recommendations to the Administrator as to sound homework policy. The Committee's attempt to gather information through the medium of questionnaires addressed to industries bore no fruit. It must be recorded as a failure.

Upon the Committee's recommendation the Administrator requested the Department of Labor to conduct a field study, the findings of which might be used by the Committee as a basis for recommendations. With its fact-finding function turned over to the Department of Labor, the Committee was transformed by office order into an advisory body. During this phase of its life it gave assistance to Deputies whenever homework problems arose that required technical analysis or advice. Throughout its existence the Committee was handicapped by the lack of basic information, and the difficulty of getting it when needed. Voluntary aspects of the code system served to defeat the Homework Committee's incipient recommendations for the elimination of disharmonies among code provisions on the subject.

The general policy of N.R.A. toward homework was that wherever possible it should be prohibited in the codes. About 80 codes had abolished homework by May, 1934. Some evidence was brought forward to show that the prohibition of homework brought hardship on a few of the older, crippled and generally most helpless workers. As a result, the N.R.A. Committee sponsored an Executive Order, which had the effect of modifying code prohibitions to the extent of permitting handicapped persons, and those confined to their homes to care for them, to continue doing homework. As the general policy was to prohibit homework, while the purpose of the Executive Order was to relax the prohibition slightly, it was necessary to set up careful regulations to eliminate the possibility of abuse. Thus the Executive Order may be looked upon as the first nation-wide attempt to regulate homework, with uniform standards for control established in all states.

The administration of the Executive Order on homework is largely the story of the efforts of a propaganda organization to break down the code prohibitions through publicity and litigation. The first point of attack was the exclusion of women with dependent children from the exempted classes listed in the Order. Administrative difficulties led to litigation. In New York a Supreme Court Justice issued a writ of mandamus, compelling the State Industrial Commissioner to issue a special homework certificate to a homeworker who did not qualify under the Executive Order. This decision was reversed by a higher court. A number of smaller administrative problems caused no serious trouble.

On September 26, 1934, a conference of state officers authorized to issue homework certificates under the Executive Order met in Boston to discuss problems that had arisen. This conference adopted a resolution which urged "that the National Recovery Administration.....prohibit industrial homework under all codes, subject to the provisions of the Executive Order." The Department of Labor records show that a total of 2,608 homework certificates were issued to May 27, 1935, and that 2,457 applications were denied, 45 revoked, and 81 cancelled. In the list of industries that used the largest number of certificates the Men's Neckwear Industry came first with 807.

A report entitled "Pennsylvania's Experience with Certificated Homeworkers", prepared by the Bureau of Women & Children, Pennsylvania Department of Labor and Industry, concludes - "Homework can never be regulated.....No matter how stringent the regulations, how great the enforcement, how honest the investigators, the sweat-shops will continue to exist unless homework is abolished. The conditions which exist are an

integral part of industrial homework and only when processing of articles in employees' homes is abolished can the conditions growing out of this system of production disappear."

SECTION 7(a) OF THE RECOVERY ACT

Table of Contents

SECTION 7(a) OF THE RECOVERY ACT

Preliminary Summary of Findings

The cause, as distinct from the occasion, of Section 7(a) of the National Recovery Act was labor's belief in collective bargaining, and its efforts to secure legislative safeguards for the practice. Section 7(a) was consequently in the line of succession of the Norris-LaGuardia Act, of the railway labor legislation, and of the war labor policy.

Section 7(a) undertook to give legal protection and status to collective bargaining. The first device for its implementation was the mandatory inclusion of Section 7(a) in the codes. Both in code drafting and in code administration, in a majority of cases, however, the principle was not maintained. Labor boards of many types were created to advise, administer or decide on issues with respect to Section 7(a). Multiplicity of machinery, however, did not compensate for the absence of authority to make the Section work. Still, though these Boards were unable to protect the Section, and to develop detailed policy to further its objectives, they brought to the public attention the content and importance of the union program.

Resort to administrative and executive assistance to safeguard Section 7(a) brought out structural weaknesses in our governmental machinery for the differentiation of function and the delegation of power. The obstructionist attempt of a minority of industries showed that our failure to delimit legislative, executive and judicial function, and to create a system of administrative agencies equipped for the task delegated to them, and our process of court review with its attendant uncertainty as to the status of legislation pending decision, could nullify Congressional policy. The attempts of labor to meet the responsibilities of Section 7(a) showed the force of its argument and the power of the labor movement.

ORIGIN, ORGANIZATION AND OPERATION OF THE LABOR ADVISORY BOARD

Table of Contents

ORIGIN, ORGANIZATION AND OPERATION OF THE

LABOR ADVISORY BOARD

Preliminary Summary of Findings

The Labor Advisory Board was set up immediately after the passage of the Recovery Act, as part of the machinery for tripartite cooperation with the government in its efforts toward recovery. Like the Industrial and the Consumer's Advisory Boards, the Labor Advisory Board membership comprised outstanding representatives from the groups for whose point of view it was the spokesman. The majority were officials of the American Federation of Labor, with one from the Woman's Trade Union League. Two members were persons of recognized standing as interpreters of labor.

The labor members of the Board were in general fully occupied as officers of national or international unions, which were trying to meet the new responsibilities placed upon them by Section 7 (a). The Board, consequently, had but limited command over their time and attention, in spite of their interest and the pressing nature of the issues that arose in connection with the N.R.A. It came, therefore, to rely increasingly upon a staff collected to carry on details. This was true even as regards the formulation of policy with respect to Section 7 (a).

The Labor Advisory Board had no specific duty or power save that of advice. With the development of N.R.A. experience and policy the Board increasingly visualized its own function as embracing the recommendation, review, criticism and refusal to approve proposals affecting labor. It made suggestions intended to further the machinery of labor participation in the N.R.A., including administrative and legislative improvements in code labor provisions, the appointment of labor members on advisory and administrative committees and councils, and labor research.

The Board's limitations lay in the absence of well defined functions, and of authority or established method for carrying out its recommendations. Disagreements with the administrative divisions of the N.R.A., other demands upon its members' time, and differing and ill-clarified concepts of the Board's functions further restricted its usefulness. Nevertheless, it was an important factor in increasing public understanding of labor's goals and methods, and in formulating labor policy.

LEGAL ASPECTS OF CERTAIN LABOR PROBLEMS

I. MINIMUM WAGES

Table of Contents

LEGAL ASPECTS OF CERTAIN LABOR PROBLEMS

I. MINIMUM WAGE LAWS

Preliminary Summary of Findings

I. Federal Regulations of Minimum Wages

A. Public Works

Powers: - Congress has the power to fix minimum wages for all laborers, mechanics, and workmen employed by the United States, the territories or the District of Columbia, and actually engaged in the construction or repair of any of their public works, whether the work is to be performed by reasons directly employed by the United States, the territories or the District of Columbia, or by contractors or sub-contractors.

Congress has the power to require that all contracts to which the United States ia a party, and which relate to the construction of any public works, shall contain the stipulation that the work shall be performed on the basis of minimum wages fixed by Congress.

Constitutional Basis: - The Constitutional basis of the above powers rests upon the right of the Government to prescribe the conditions upon which it will permit work of a public character to be done for it.

B. Private Industries

1. Minimum Wages for Women

Powers: - Congress does not have the power to fix a minimum wage for women in private industries

Constitutional Basis: - - - - The Supreme Court has held that the Fifth Amendment of the United States Constitution guarantees to the people that the Federal Government shall not prohibit them from entering into agreements with respect to wages.

2. Minimum Wages for Minors

Powers: - Congress has the power to fix a minimum wage for all minors employed in the United States, territories or in the District of Columbia.

Constitutional Basis: - The constitutional basis of the above mentioned powers rests on the grant of power to the United States of exclusive control over its property and over the territorial and insular possessions and the District of Columbia. The legislative discretion over such property and the inhabitants of such territories is necessarily vested in Congress, subject to limitations as to reasonableness of the particular enactment. In connection with the regulation of minimum wages for minors reasonableness may be judged by giving due consideration to the health, morals or safety of those involved.

II. State Regulation of Minimum Wages

A. Public Works

Powers: - Unless prohibited by the State constitution, a State legislature has the power to fix a minimum wage for all laborers, mechanics, or workmen employed by the State or by any of its political subdivisions, and actually engaged in the construction or improvement of any of its public works, whether the work is to be performed by the State or a political subdivision, or by contractors or sub-contractors.

A State legislature has the power to require that all contracts to which the State or any of its political subdivisions is a party and which relates to the construction of any of its public works shall contain a stipulation that the work shall be performed on the basis of a minimum wage fixed by the legislature.

Constitutional Basis: - The constitutional basis of the above powers found to exist in the States rests upon the right of the Government to prescribe the conditions upon which it will permit work of a public character to be done for it.

B. Private Industries

Powers: - A State does not have the power to fix a minimum wage for women in industries located within its boundaries.

Constitutional Basis: - The Supreme Court has held that the Fourteenth Amendment of the United States Constitution guarantees to the citizens of each State that the States will not prohibit them from making agreements with respect to wages.

3. Minimum Wages for Minors

Power: - A State has power to fix minimum wages for minors for all industries within its boundaries.

Constitutional Basis: - The constitutional basis of the above mentioned powers is the legitimate exercise of the State police power.

LEGAL ASPECTS OF CERTAIN LABOR PROBLEMS

II. MAXIMUM HOURS

Table of Contents

LEGAL ASPECTS OF CERTAIN LABOR PROBLEMS

II. MAXIMUM HOURS

Preliminary Summary of Findings

I. Federal Regulation of Hours of Labor

A. Public Works

Powers.- Congress has the power to fix the maximum number of hours of labor of all laborers, mechanics, and workmen, irrespective of sex or age, employed by the United States, the territories or the District of Columbia, and actually engaged in the construction or repair of any of their public works, whether the work is to be performed by persons directly employed by the United States, the territories or the District of Columbia, or by contractors or subcontractors.

Congress has the power to require that all contracts to which the United States, a territory or the District of Columbia is a party, and which relate to the construction of any federal public works, shall contain a stipulation that the work shall be performed on the basis of a maximum number of hours fixed by Congress.

Irrespective of any power that it may have in limiting the hours of labor in certain occupations, Congress has the power to declare that a certain number of hours shall constitute a day's work for all laborers, mechanics, and workmen employed by or on behalf of the United States, the territories or the District of Columbia, on any of their public works.

In the exercise of any or all of the above powers, Congress has the power to provide for exceptions to or exemptions from any of the provisions of a particular statute, to fix penalties for violations, and to make special provisions or appropriate classifications within occupational or industrial groups: provided, however, that such special treatment or classifications are not arbitrary or discriminatory, but are reasonable and of uniform operation.

Constitutional Basis:- The constitutional basis of the above powers found to exist in Congress rests upon the right of the government to prescribe the conditions upon which it will permit work of a public character to be done for it.

B. Private Industry

1. Interstate Commerce

Powers:- Congress has the power to fix a maximum number of hours of labor of all employees of common carriers engaged in the transportation or movement of persons or property in interstate or foreign commerce, even though such regulation may, in some measure, affect intrastate commerce: provided, however, that the limitation is

reasonable and has a direct relation to the dangers to passengers or property incident to the strain of excessive hours of duty on the part of such employees.

In the exercise of any or all of these powers, Congress has the power to provide for exceptions to or exemptions from any of the provisions of the particular statute, to fix penalties for violations and to make special provisions or appropriate classifications within the occupational or industrial groups: provided, however, that such special treatment or classifications are not arbitrary or discriminatory, but are reasonable and of uniform operation.

Constitutional Basis:- The constitutional basis of these powers rests on the power of Congress to regulate interstate and foreign commerce.

2. Territorial Jurisdiction

Powers:- Congress has the power to fix a maximum number of hours of labor for women employees in particular occupations located in the Territories or the District of Columbia, provided that work of long continued duration in such occupations is detrimental to the health and morals of such women employees, or of the general public.

Congress has the power to fix a maximum number of hours of labor for all child employees in any gainful occupation in the territories or the District of Columbia: provided that such regulation is reasonable and tends to promote their health, morals and general well being.

In the exercise of any or all of these powers, Congress has the power to provide exceptions to or exemptions from any of the provisions of the particular statute, such as exempting domestic or agricultural occupations, to provide penalties for violations, to make special provisions, such as for cases of emergencies, or to make appropriate classifications within the occupational or industrial groups: provided, however, that such special treatment or classifications are not arbitrary or discriminatory, but are reasonable and of uniform operation.

Constitutional Basis:- The constitutional basis of the above powers rests on the grant of power to the United States of exclusive control over its property, its territorial and insular possessions, and the District of Columbia. The legislative discretion over such property and over the inhabitants of such territories is necessarily vested in Congress, subject to limitations as to the reasonableness of the particular enactment. In connection with regulation of hours of labor reasonableness may be judged by giving due consideration to the health, or morals, or safety of the employees involved, or of the people at large.

II. State Regulation of Hours of Labor

A. Public Works

Powers:- Unless prohibited by the state constitution, a state legislature has the power to fix a maximum number of hours of labor for all laborers, mechanics and workmen, irrespective of sex or age, employed by the state or by any of its political subdivisions, and actually engaged in the construction or improvement of any of its public works, whether the work is to be performed by the state or any of its political subdivisions, or by contractors or subcontractors.

A state legislature has the power to require that all contracts to which the state or any of its political subdivisions is a party, and which relate to the construction of any of its public works, shall contain a stipulation that the work shall be performed on the basis of a maximum number of hours fixed by the legislature.

Irrespective of any power that it may have for the limitation of hours in certain occupations, the legislature has the power to declare that a certain number of hours shall constitute a day's work for all laborers, mechanics and workmen employed by or on behalf of the state or any of its political subdivisions on its public works.

In the exercise of any or all of these powers, the legislature has the power to provide for exceptions to or exemptions from any of the provisions of a particular statute, to fix penalties for violations, to make special provisions, such as for emergencies, and to make classifications within the occupational or industrial groups: provided, however, that such special treatment or classifications are not arbitrary or discriminatory, but are reasonable and of uniform operation.

Constitutional Basis:- The constitutional basis of the above powers found to exist in the states rests in some cases on the proprietary right of the state to condition the terms of its contracts, and in others upon the right of the government to prescribe the conditions upon which it will permit work of a public character to be done for it.

The constitutional basis of the above powers found to exist in the political subdivisions of the states rests on the power of direction of the principal (the state) to its agent (its political subdivision).

B. Private Industry

Powers:- A state legislature has the power to fix a maximum number of hours of labor for women employees in particular occupations, by reason of their sex and physical structure, provided that labor for long consecutive hours in such occupations impairs the health, morals, or safety of such women employees, and that the regulation protects the future of the race.

A state legislature has the power to fix a maximum number of hours of labor in any gainful occupation for all child employees by reason of their tender years, provided that such regulation is reasonable and tends to conserve the health and morals of such children employees.

In the exercise of any or all of these powers, a state legislature has the power to provide for exceptions to or exemptions from any of

the provisions of the particular statute, such as exempting children on farm or domestic work, to fix penalties for violations, to make special provisions, such as for cases of emergencies and to make classifications within the occupational or industrial groups: provided, however, that such special treatment or classifications are not arbitrary or discriminatory, but are reasonable and of uniform operation.

A state legislature has the power to fix a maximum number of hours of labor for all employees, irrespective of sex or age, while employed in occupations which in their nature are hazardous (such as work in underground mines), or which are proven to be peculiarly detrimental to the life or limb or health of the employees (such as work in mills, factories, or manufacturing establishments).

A state legislature has the power to fix a maximum number of hours of labor for all employees, irrespective of sex or age, engaged in the transportation of persons or property (as in connection with street railways, elevators or motor vehicles), provided that such regulation is reasonable and has a direct relation to the safety of the public.

The probabilities are that a state legislature has the power to fix a maximum number of hours for all employees engaged in occupations charged with public interest for a limited or temporary period, if it is to prevent a state-wide paralysis of commerce or to protect the safety of the public from an impending catastrophe, such as a strike.

In the exercise of any or all of these powers, a state legislature has the power to provide for exceptions to or exemptions from any of the provisions of the particular statute, such as excepting repairmen, to fix penalties for violations, to make special provisions, such as for cases of emergency, and to make appropriate classifications within the occupational or industrial groups: provided, however, that the special treatment or classifications are not arbitrary or discriminatory, but are reasonable and of uniform operation.

Constitutional Basis:- The constitutional basis of any or all of the above powers rests in the inherent power of the state to guard and promote the health, morals, safety, or general welfare of the people within the jurisdiction, commonly referred to as the police power.

LEGAL ASPECTS OF CERTAIN LABOR PROBLEMS

III. INDUSTRIAL HOMEWORK

Table of Contents

LEGAL ASPECTS OF CERTAIN LABOR PROBLEMS

III. INDUSTRIAL HOMEWORK

Preliminary Summary of Findings

I. Federal Power to Regulate

A. Public Contracts

Powers:- Congress has the power to require, in the performance of all contracts to which the United States, any of its territories or the District of Columbia is a party, that no material to be furnished thereunder shall be manufactured in whole or in part in any home, but that such material shall be produced in regularly organized factories or plants meeting sanitary and other requirements which Congress may specify. Congress may also establish exceptions to the above, provided such special requirements are reasonable and of uniform application, and are not arbitrary or discriminatory.

Constitutional Basis:- The constitutional basis for the foregoing is the power of Congress to authorize government contracts upon its own terms.

B. Private Industry

Powers:- Congress has the power to require, within the District of Columbia and any of the territories, that no foodstuffs, preparations of tobacco, wearing apparel, bedding, or other products designed for intimate personal consumption or use and produced for sale, shall be manufactured in whole or in part in a home, and that such home manufacture for sale of all other articles shall be conducted only in conformance with regulations which Congress may prescribe. Congress may also establish exceptions to the above, provided such special requirements are reasonable and of uniform application and are not arbitrary or discriminatory.

Congress may prohibit the transportation from all states, territories or districts of the United States, into another state, territory, or district, of products manufactured under conditions which violate laws of the place of destination designed to protect the public health.

Constitutional Basis:- The constitutional basis for the powers enumerated in the last paragraph but one is the right of Congress to enact, for those areas under its exclusive jurisdiction, reasonable legislation affecting the public health and general welfare. The basis for the powers set forth in the last paragraph above is the right of Congress to regulate interstate commerce.

II. State Power to Regulate

A. Public Contracts

Powers:- A State legislature has the power to require, in the performance of all contracts to which the State or any of its political subdivisions is a party, that no material to be furnished thereunder shall be manufactured in whole or in part in any home, but that such material shall be produced in regularly organized factories or plants meeting sanitary and other requirements which the legislature may specify. A State legislature may also establish exceptions to the above, provided such

special requirements are reasonable and of uniform application, and are not arbitrary or discriminatory.

Constitutional Basis:- The constitutional basis for the foregoing is the power of the State to contract upon its own terms.

B. Private Industry

Powers:- A State legislature has the power to require, within the State, that no foodstuffs, preparations of tobacco, wearing apparel, bedding, or other products designed for intimate personal consumption or use and produced for sale, shall be manufactured in whole or in part in a home, and that such home manufacture for sale of all other articles shall be conducted only in conformance with regulations which the State may prescribe. The legislature may also establish exceptions to the above, provided they are reasonable and of uniform application, and are not arbitrary or discriminatory.

Constitutional Basis:- The constitutional basis for the foregoing is the policy power of the State to regulate within its jurisdiction matters affecting the public health and general welfare.

LEGAL ASPECTS OF CERTAIN LABOR PROBLEMS

IV. CHILD LABOR

Table of Contents

LEGAL ASPECTS OF CERTAIN LABOR PROBLEMS

IV. CHILD LABOR

Preliminary Summary of Findings

I. Federal Power to Regulate

A. Public Contracts

Powers. Congress has the power to require, in the performance of all contracts to which the United States, any of its territories or the District of Columbia is a party, that no minor below a specified age shall be employed at any work whatsoever, that occupations which are hazardous in character or dangerous to health shall be restricted to minors above a specified age, and that the hours of employment of all minors shall not exceed a specified daily and weekly maximum number. Congress may also establish exceptions to the above, provided such special requirements are reasonable and of uniform application, and are not arbitrary or discriminatory.

Constitutional Basis. The constitutional basis for the foregoing is the power of Congress to authorize government contracts upon its own terms.

B. Private Industry

Powers. Congress has the power to require, within the District of Columbia or any of the territories of the United States, that no minor below a specified age shall be employed at any work whatsoever, that occupations which are hazardous in character or dangerous to health shall be restricted to minors above a specified age, and that the hours of employment of all minors shall not exceed specified daily and weekly maxima. Congress may also establish exceptions to the above, provided such special requirements are reasonable and of uniform application, and are not arbitrary or discriminatory.

Constitutional Basis. The constitutional basis for the foregoing is the power of Congress to enact, for those areas under its exclusive jurisdiction, reasonable legislation affecting the public health and general welfare.

II. State Power To Regulate

A. Public Contracts

Powers. A State legislature has the power to require, in the performance of all contracts to which the State or any of its political subdivisions is a party, that no minor below a specified age shall be employed at any work whatsoever, that occupations which are hazardous in character or dangerous to health shall be restricted to minors above a specified age, and that the hours of employment of all minors shall not exceed a specified daily and weekly maximum number. The legislature may also establish exceptions to the above, provided such special requirements are reasonable and of uniform application, and are not arbitrary or discriminatory.

Constitutional Basis. The constitutional basis for the foregoing is the power of the State to contract upon its own terms.

B. Private Industry

Powers. A State legislature has the power to require, within the State, that no minor below a specified age shall be employed at any work whatsoever, that occupations which are hazardous in character or dangerous to health shall be restricted to minors above a specified age, and that the hours of employment of all minors shall not exceed a specified daily and weekly maximum number. The legislature may also make special provisions which provide exceptions to the above, provided such special provisions are reasonable and of uniform application, and are not arbitrary or discriminatory.

Constitutional Basis. The constitutional basis for the foregoing is the police power of the State to regulate, within its jurisdiction, matters affecting the public health and general welfare.

LEGAL ASPECTS OF CERTAIN LABOR PROBLEMS

V. RIGHT OF INDIVIDUAL EMPLOYEES TO ENFORCE COLLECTIVE BARGAINING AGREEMENTS

Table of Contents

LEGAL ASPECTS OF CERTAIN LABOR PROBLEMS

V. RIGHT OF INDIVIDUAL EMPLOYEES TO ENFORCE COLLECTIVE BARGAINING

Preliminary Summary of Findings

I. General

The question of the right of an individual employee to enforce the provisions of a union agreement with an employer has been before only two Federal and fourteen state courts.

II. States Where Not Adjudicated

No case upon this question has been adjudicated in any of the following states: Alabama, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming.

III. Courts Holding Against Enforcement by Employee

That the individual employee cannot, under any theory of the law, enforce the provisions of such collective bargaining agreements has been held by the two Federal courts and the courts of the following states: Indiana, Texas, and West Virginia.

IV. Recovery on "Custom and Usage" Theory

The employee has been permitted to recover on the theory of "custom and usage" - i.e., that the parties impliedly contracted in accordance with the terms of the collective bargaining agreement - in the courts of the following states: Arkansas, Kentucky, Massachusetts, Oregon and Tennessee.

V. Recovery on "Agency" Theory

Recovery by the employee has been allowed on the "agency" theory, - i.e., that the labor union was the agent for each one of its members, and that the collective bargaining agreement was binding upon the employer just as though a separate contract had been signed with each employee - in the following state court: New York.

VI. Recovery on "Third Party Beneficiary" Theory

The courts of the following states have permitted recovery on the "third party beneficiary" theory; - i.e., that the employer and the union entered into a contract which vested in the employee, as a beneficiary under the contract, certain rights upon which he was entitled to recover: Mississippi, Missouri, Nebraska, Ohio, South Carolina.

STATISTICAL ANALYSIS OF LABOR PROVISIONS OF THE CODES

Table of Contents

STATISTICAL ANALYSIS OF LABOR PROVISIONS OF THE CODES

Preliminary Summary of Findings

Purpose, Scope, and Method of the Study

The purpose of this study is to summarize the labor provisions of the 578 codes, so that the reader may comprehend the enormous body of administrative labor legislation that constituted the Federal law on hours and wages under the N.R.A. in 1933-1935.

The complete report is a statistical study, with frequency tables of the occurrence of certain code provisions, the code being the unit of counting. To offset variations in the number of employees covered by single codes - from 70 to 2,400,000 - the more important parts of the various tables are weighted by the number of employees concerned. The provisions of the codes covering 50,000 employees or more are presented in greater detail, since these major codes cover 82.6 percent of the 22,554,000 employees under industrial groups. The study is an oversimplification of a very complex variety of codes and of code provisions.

Hour Provisions - The Hours Ceiling

The codes are classified according to the hours ceiling set for "basic employees". The basic employees under each code are those corresponding to the P.R.A. "factory or mechanical workers or artisans" or, in non-manufacturing industries, the group comprising the largest number of employees. The resulting distribution is:

Weekly hours	Number of Codes	Employees covered (thousands)	Percentage of Employees
Less than 40 hours	43	2,179	9.7
40 hours	487	12,898	57.2
More than 40 hours	48	7,477	33.1
Total	578	22,554	100.0

In this classification the 40-hour codes include not only the 115 which established a flat maximum of 40 hours, but also codes providing (1) an average of 40 hours over a specified period; (2) a basic 40-hour week with additional hours (limited or unlimited) whenever the employer wished, provided that specified penalty rates were paid; (3) a basic 40-hour week with longer hours (with or without limits and with or without overtime payments) at certain times - peak periods, emergency repair periods, and other emergencies; or (4) some combination of these elasticities. For some purposes many of the codes classified in the 40-hour group are more-than-40-hour codes, and some classified in the less-than-40-hour group are 40-hour codes

A special analysis has been made of the codes having a maximum week of less than 40 hours, since these are the nearest to the P.R.A. standard of 35 hours for factory workers, and of those with a maximum of more than 40 hours. The latter apply chiefly to the groups which were allowed 40 hours under the P.R.A. -- Sales, Service, Banking and

Transportation.

Consideration has been given also to code standards with respect to hours per day and days per week.

Means of Providing Elasticity in Hours

The provisions to which the codes resorted to provide sufficient flexibility in the hours are next considered. In the case of basic employees the principal devices for securing such elasticity occur as follows:

Provision	Number of Codes	Employees (thousands)	Percentage of employees
Averaging of hours	139	6,283	27.9
General overtime	114	4,243	18.8
Peak period	290	10,773	47.8
Emergency period	103	8,487	37.6

In 115 codes, covering 4,394,000 employees, or 19.5 per cent of the total under codes, none of these four devices appears.

With respect to each device for securing elasticity, certain provisions came to be considered as representing the proper N.R.A. standard, to which a substantial number of codes conformed. The figures show, however, that as a rule a majority of the employees concerned were covered by provisions less strict than the N.R.A. standard, because of the loose provisions in some of the major codes, mainly the early ones.

Hours of Office Workers

Though the study has concentrated on basic employees, attention has been paid to the code provisions for other groups. The hour provisions for office workers have been examined particularly, because the P.R.A. set longer hours for such employees than for factory workers (though not more than 40 in any week) and because there is an impression that the codes adhered to this precedent. The following tables summarize the code provisions:

Hours of Office Workers Compared with Those of Basic Employees	Number of Codes
Hours longer or looser	178
Hours shorter	39
Hours the same	53
No special provision for office workers, and basic hours assumed to apply	308
Total	578

Weekly Hours of Office Workers	Number of Codes
Less than 40 hours	16
40 hours*	497
More than 40 hours	65
Total	578

* Including codes which provided 40 hours with an averaging period or a peak period.

Wage Provisions - The Wage Floor

The codes have been first classified by the minimum wage prescribed for male productive employees, who are considered the basic group. This is more difficult than the classification of maximum hours, both because of the greater range of minimum wages from code to code, and because of the differentials that result in many cases, in two or more minimum rates for basic employees. The figures below summarize a count made, by industry groups, of the numbers of codes having minimum rates within each of the ranges specified:

Hourly rate for male productive workers	Number of Codes Providing a Minimum Wage; At a Flat Rate	With differentials Highest	With differentials Lowest
Over 40¢	23	28	3
40¢	151	133	8
35 to 39¢	67	80	67
30 to 34¢	31	51	139
25 to 29¢	4	5	51
20 to 24¢	1	-	14
Under 20¢	3	1	5
No lower limit	-	-	11
Total	280	298	298

This table shows that the wage floor in the codes turned out to be a wage staircase, with two staircases in the codes with differentials.

The weighting of the table by the percentage of employees covered by each rate changes the picutre to the following:

Hourly rate for male productive workers	Percentage of total employees covered by codes providing a minimum wage: At a flat rate	With differentials Highest rate	With differentials Lowest rate
Over 40¢	1.4	11.6	1.3
40¢	14.3	26.9	4.7
35 to 39¢	1.7	19.3	6.6
30 to 34¢	1.2	18.2	21.2
25 to 29¢	a/	4.7	23.8
20 to 24¢	.1	-	7.0
Under 20¢	.5	.1	3.9
No lower limit	-	-	12.3
Total	19.2	80.8	80.8

a/ Less than one tenth of one percent.

This shows that although nearly half the codes had one flat mimimum rate for male productive workers, more than four fifths of the employees were under codes with differentials. Of the latter, furthermore, seven tenths were covered by codes in which the top rate was 35 cents or more per hour. Five-sixths, however, were covered by codes in which the bottom rate was less than 35 cents per hour, and almost three-tenths by codes with a bottom rate of less than 25 cents.

Means of Providing Elasticity in Wages

A detailed analysis has been made of the two main devices for securing elasticity in wages - differentials in the minimum rates for male productive workers, and subminimum rates for certain other groups. The differentials are expressed in terms of the location of the plant - North or South, in a metropolitan center or a hinterland, in a big city or in a small town; of the 1929 rate; of the division of the industry; or of some combination of these variables. An analysis shows the geographic differential to have been by far the most common. An analysis of the amount of the differentials shows great diversity in the code provisions, as indicated by the following figures:

Amount of differential (cents per hour)	Number of Codes
Under 5¢	73
5¢	66
6 to 9¢	58
10¢	40
11 to 14¢	16
15¢	19
Over 15¢	14
Not specified	12

The analysis which has been made of the subminimum wage provisions is summarized below, in terms of codes:

Subminimum group	Number of Codes Which Provided for the Specified Subminimum groups:			
	Exemption from basic minimum wage	A subminimum wage rate	A limitation of the number exempted	A limitation of the period of exemption
Female workers	158	158	---	---
Learners	213	209	197	201
Apprentices	70	27	49	68
Office boys and girls	274	274	239	---
Old and handicapped persons	376	103	94	---

It is impossible to tell how many employees are covered by these various provisions. Since the total number of employees under the codes having each provision is of some significance, the tables have been weighted by these figures, with the results shown below:

Subminimum group	Number of Codes	Employees covered: Thousands	Employees covered: Percent of total
Female workers	158	3,658	16.2
Office boys and girls	274	6,917	30.7
Old and handicapped persons	376	8,786	39.0
Learners and apprentices	264	11,696	51.9

Wage Provisions Covering Office Workers and Other Special Groups

A total of 383 codes, covering 60 percent of the employees under codes, provided a special minimum wage for office and clerical workers, as compared with 270 codes providing special hours. The weekly wage rates were found to be distributed as follows:

Weekly rate	Number of codes providing a minimum wage: At a flat rate	With differentials: Highest rate	With differentials: Lowest rate
Less than $14.00	5	5	54
$14.00 to $14.99	33	11	103
$15.00	130	103	8
More than $15.00	48	48	2
Total	216	167	167

Thus more codes provided for flat minimum rates than for differentials; but, as in the case of the minimum wages for basic employees, when those in each group are weighted by the employees affected the codes with differentials are found to cover over four fifths of the total.

An analysis has been made of the kind and amount of differentials in 167 codes. The most frequent type was a population differential, following the precedent of the P.R.A. The most frequent amount was $1.00 (in 85 codes), with $2.00 in 46, $3.00 in 21, and more than $3.00 in 15.

SUMMARY AND EVALUATION OF THE RESULTS OF N.R.A. LABOR EXPERIENCE

Table of Contents

SUMMARY AND EVALUATION OF THE RESULTS OF N.R.A. LABOR EXPERIENCE

Preliminary Summary of Findings

The labor provisions of the National Industrial Recovery Act were based upon three theories: the relation of shorter hours to reemployment, the relation of increased wages to the expansion of purchasing power, and the relation of collective bargaining to the labor partner's cooperation in the productive effort necessary for industrial recovery.

Government policy with respect to these theories, embodied in the National Industrial Recovery Act, stimulated a volume of initial cooperative effort toward recovery, that helped to give impetus toward lifting industry out of the slough of depression. Once recovery seemed under way, however, these theories were challenged to the point, in some instances, of violent opposition. Evaluation of their soundness requires analysis of the methods for implementation and the degree of compliance, as well as an estimate of their specific effects as distinct from those of the other forces making for recovery. The history of the improvement following the enactment of the National Industrial Recovery Act and of the recession following the Schechter decision support the principles enunciated, and lay the onus of proof upon their critics.

SURVEY OF LABOR CONDITIONS IN THE TERRITORY OF HAWAII

Table of Contents

XII. Study of Establishments Reverting to pre-N.R.A. Working Conditions as a Result of the Schechter Decision

CHAPTER III. CONCLUSIONS

I. Drifter Employment and Unemployment

II. The Educated Unemployed

III. Effects of the Schechter Decision

IV. The Age of Workers -- Probable Effect on Employment of Old-Age Pension and Retirement Schemes

V. Family Incomes

VI. The Type of Establishment Which Reverted to Pre-N.R.A. Conditions Following the Schechter Decision

CHAPTER IV. PROBLEMS

I. Proper Wages and Hours for the Retail Trade

II. Proper Wages and Hours for the Restaurant Trade

III. Proper Wages and Hours for the Graphic Arts Industry

IV. Proper Wages and Hours for the Automobile Industry

V. Proper Wages and Hours for Manufacturing Industries

VI. Proper Wages and Hours for the Canning Industry

SECTION "C"

TRADE PRACTICE STUDIES

TRADE PRACTICE STUDIES SECTION

DESIGN PIRACY

Table of Contents

APPENDICES

Summaries of Available Information With Respect to Design Piracy in the Following Industries:-

Appendix

A. Dress
B. Fur
C. Furniture
D. Lace
E. Ladies' Handbag
F. Medium and Low Priced Jewelry
G. Millinery
H. Silk Textile
I. Toy and Playthings
J. Similar Summary Treating Collectively the Information Relating to Other Industries Studied

(Other appendices will be used to present detailed data on subjects treated generally in the text)

TRADE PRACTICE STUDIES

DESIGN PIRACY

Preliminary Summary of Findings

I. BACKGROUND

The practice of copying ornamental designs for articles of manufacture --design piracy--is a very old one, which has been dealt with in some manner by every leading nation. In the United States it has become important within the last 25 years, due to the increasing importance of fashion and the growth of large-scale production and of competition. Its effects are felt principally in the fashion industries, such as those producing women's apparel, which are characterized by rapid style shifts and constantly changing designs.

Our Design Patent Laws were first enacted in 1842, at a time when design piracy was not an important problem, and they have continued in force without substantial changes since the amendments of 1902. They do not fully meet the needs of manufacturers in the highly seasonal industries, who develop and introduce novel items.

(1) They are inadequate administratively, because designs must be developed, processed and marketed rapidly and in great numbers to meet fashion trends. Expense prevents the patenting of all at the point of development, while delay in obtaining patents for those designs that have proven commercially successful makes it likely that the protection obtained will be useless. The copyist already will have had an opportunity to process and market copies.

(2) They are inadequate substantively, because protection is limited to designs which differ from all designs previously published in such manner as to be termed inventions. Fashion trends tend to recur, necessitating the re-introduction of old designs or adaptations thereof.

Common law and the equitable principles enforced by courts, the Copyright Laws, and the Federal Trade Commission, as constituted today, are of no practical value to those who would prevent the copying of designs.

II. N.R.A. CODES

Through the medium of the N.R.A. Codes manufacturers and processers in a large variety of industries endeavored to curb design piracy. Only a few code files, relating to fashion or novelty products, however, revealed important activity in connection with design piracy provisions.

The present evidence on the need for protection in codified industries and on the economic structure of those industries as it affects the design problem is meagre. Aside from the fact that code-sponsoring groups were truly representative, there is little data concerning the sentiment of members of the industries with respect to design protection. The files of at least three industries, however, disclosed a decided clash of opinions. Arguments in favor of design protection, as an aid to manufacturers,

distributors, consumers, labor and design creation were met by equally cogent ones intended to show that the same interests would be adversely affected. There was a noticeable lack of reference to the possibility of a reward for designers.

The policy of the N.R.A. with respect to design piracy provisions was a changing one. At first, broad provisions were approved readily in some codes, disapproved in others. Later, there was an effort to limit approval to provisions intended to prevent consumer deception. The Consumers' Advisory Board was the most consistent opponent to all design piracy clauses.

Operative provisions in approved codes varied widely. There was no consistency in connection with requirements for protection, or with the kind, scope or duration of protection afforded. The administration of these provisions, likewise, followed the ideas and needs of the particular industries concerned, was lacking in uniformity. Differing interpretations of similar words were followed. Plans of administration embodied substantive rules not prescribed by the code provisions themselves. The general tendency was to provide trade protection for all newly-introduced designs.

The file surveys disclose no reliable data on the operation and effects of code provisions. Interested parties have claimed that design protection under the codes was highly beneficial to a few industries. With respect to others, isolated statements indicate that the provisions did not meet expectations.

III. OTHER SYSTEMS FOR CONTROL OF PIRACY

A. PRIVATELY CONDUCTED SYSTEMS

In the fashion industries there is a growing movement toward protecting designs through private agencies. The Silk Textile industry has operated a comprehensive system, with apparent success, since 1928. There is evidence of a recent movement toward the establishment of guilds, in the Boot and Show, Dress, and Millinery industries, to enlist retailer cooperation against the marketing of articles embodying designs copied from originals produced by guild members.

Sources investigated disclosed no data on the details of operations and the economic effects of these privately-conducted systems.

B. FOREIGN LAWS

The design laws of all leading foreign countries, with the possible exception of Japan, provide on their face more complete protection for designs than is given by the statutes of the United States. The operation and effects of those laws have not been investigated; hence their significance for a consideration of the design problem cannot be stated.

IV. CONSTITUTIONAL ISSUES

There appears to be ample authority, under the Patent and Copyright Clause of the Constitution of the United States, for Congress to enact

general legislation that would provide increased protection for industrial designs. The principal limitation is that the legislation must tend to advance the useful arts by predicating the grant of rights on the existence of a creating of the mind. Originality is necessary. Under the Constitution, therefore, Congress may not prohibit the copying of all designs which have merely been adopted or copied by the first user - with one exception. Legislation based upon the Commerce Clause of the Constitution might protect such designs when used in interstate commerce.

V. GENERAL

There is a strong tendency among producers of highly-styled goods embodying newly-introduced designs to employ private controls in the effort to prevent copying. These controls, like similar ones set up under N.R.A. codes, afford wide opportunities for abuse, although there is no evidence that abuses have occurred.

Varying types of proposed legislation heretofore considered by Congress raise many issues requiring further investigation. Would the economic effects of complete design protection be desirable? Is there any system for securing comprehensive protection, which is capable of reasonably effective administration and enforcement? Assuming the possibility of arriving at such a system, there remain undetermined many additional questions concerning the scope of control and the possible impact of such control upon our economic structure.

TRADE PRACTICE STUDIES

BASING POINT SYSTEM IN THE LIME INDUSTRY

Table of Contents

E. The Attitude of Lime Producers to the Basing Point System, Prior to and During the Code Period
   1. Basing Point Prices; The social point of view vs. the business man's point of view.

IV. The Effects of the Basing Point System on Prices
   A. The Nature of Competitive and Monopoly Prices
   B. Competition under the Lime Code Basing Point System
   C. Analysis of Prices of Lime Products
      1. Lime prices as reflected by mill-net returns 1907-1935
      2. Plant net values and methods of production of lime compared with cement
      3. Wheat production and lime production compared
   D. Effect of the Marketing Provisions of the Lime Code on Prices
      1. Increased uniformity and rigidity of prices
   E. Code vs. Pre-code Prices
      1. The report of the Lime Code Authority
      2. Have lime prices increased under the Code
      3. The effect of the Code on the average plant net per ton value and on shipments
      4. Price statistics on lime products do not reflect consumer's prices
      5. The effect of the Code on plant-net-lime values and on gross receipts of lime producers reflected by the replies to the N.R.A. Questionnaire

V. The Effect of the Basing Point System on the Consumer
   A. Price Discrimination Against the Consumer
      1. Agriculture as a consumer of lime
      2. Discrimination against consumers of agricultural lime
      3. Hydrated Lime as a means of increasing prices and its use under the basing point system
   B. Freight-rail and Truck - as a Means of Increasing Delivered Lime Prices
      1. The effect on consumers of the all-rail-freight element in delivered prices
      2. Arbitrary charges for truck and L.C.L. shipments
   C. Discrimination in the Price Structure

VI. Findings, Conclusions and Recommendations
   A. Findings
   B. Conclusions
   C. Recommendations
      1. Further investigations are recommended
   D. Additional Materials Needed to Continue the Investigation: Suggested Sources and Methods of Securing the Necessary Data

TRADE PRACTICE STUDIES

BASING POINT SYSTEM IN THE LIME INDUSTRY

Preliminary Summary of Findings

1. The Basing Point System was not in General Use in the Lime Industry Prior to the Code.

The evidence presented shows conclusively that some of the larger lime producers made use of what may be regarded as the precusor of the basing point system i. e., the quoting of "delivery prices to meet competition" and the absorbing of freight in so doing. While some of these prices were quoted f.o. certain group rate rail centers, there were no established basing points and regular system of open price filing. The Lime Code attempted to force these practices upon all lime producers in the country.

2. The Code of Fair Competition for the Lime Industry appears to have been drawn up in such a way that the large producers exercise a preponderant influence in its administration

Sixteen of the 20 members of the Code Authority were selected by the national Lime Association which in 1933 represented only 23 per cent of the number of plants and 55 per cent of the total lime tonnage. The powers exercised by the Code Authority directly, and indirectly through the District Committees, appear to have changed profoundly the marketing practices of the Lime Industry, by providing uniform identical prices in each district, and by promoting uniform terms and conditions of sale. The latter usually represent the first step in the effective control of the price structure of an industry

3. The Code Appears to have Intensified the Forces which in the Past have Brought about the Gradual Disappearance of the Small Lime Producer and a Rapid Increase in the Size and Number of Large Plants (over 40,000 tons per annum).

The chief factors in the process of elimination of small plants appears have been the use of delivered prices with freight absorption by the large producers, and of high pressure salesmanship in diverting to themselves the natural markets of nearly one thousand lime producers, who have been displaced since 1908 by less than 300 plants in 1934.

4. The Basing Point System in the Lime Code Legalized and Perfected a Method of Price Discrimination known as "Quoting Delivered Prices to Meet Competition"

This practice appears to be the chief cause of the excessive expansion of lime plant capacity, to a point where less than one-third of the potential capacity will suffice for the normal demand for lime products at the prevailing high prices.

5. The Basing Point System in the Code with its Complement - Open Price Filing with a Waiting Period - Appears to be Responsible for the Extraordinary Stability and Rigidity of the Price Structure of Lime Products.

The marketing practices under the Code brought about a complete freezing of the prices of certain types of lime. According to Bureau of Labor Statistics reports the price changes which had been registered prior to the Code continued for nearly two months, after which price changes disappeared altogether.

6. Lime Prices to Consumers Appear to have been Increased Excessively under the Code.

Some of these increases were registered immediately prior to the adoption of the Code. Basing point prices, which generally were lower than the prices to final consumers, were also excessively high, as indicated by the wide divergence between mill net and basing point prices. The markup between mill net returns and the basing point prices for several large producers varied from 15 to 87 per cent.

7. The Basing Point System and its Precursor, "Quoting Delivered Prices to Meet Competition" has Resulted in an Enormous Amount of Uneconomical Crosshauling.

Unnecessary crosshauls represent a huge burden on lime consumers. Forty-three and fifty-five per cent of the plant net value of lime represents the average freight paid in 1934 and in 1932, respectively.

8. The Marketing Practices of the Lime Industry Appear to have Resulted in Price Discrimination against Consumers of Agricultural and Building Lime.

Relatively higher prices on agricultural lime, and what appear to be excessively high prices for hydrated lime, represent a very real burden on the farmer, the Construction Industry and ultimately the home owner. Furthermore, the single basing point for finishing lime (Gibsonburg) appears to be unjustifiable when used by producers outside of the Ohio districts.

9. There Appears to be Evidence of Concerted Action in Fixing Prices at Basing Points in some Districts.

The marketing practices under the Code tend to eliminate price competition at most of the basing points, resulting in excessively high base prices in nearly all the lime districts.

10. The Economies of Production Resulting from Highly Mechanized Labor Saving Plants have not been Passed on to the Consumer.

With the marketing practices in operation under the Code and used prior to the Code by some large companies, the economies of large scale production appear to have been wasted in the absorption of freight, heavy selling expenses and other useless expenditures. The Lime Industry stands first among the durable goods industries of the country in its maintenance of high prices - nearly twice as high as they were before the war and before the modern labor saving inventions had been installed.

11. Under the Operation of the Code the Large Producers have Increased their Gross Profits Far More than the Smaller Plants.

Whereas the small plants (less than 10,000 tons per year) increased the value of their shipments less than 25 per cent, the larger (over 15,000 tons per annum) increased the value of their shipments from 40 to 68 per cent. This trend, if continued, would hasten the extermination of the small lime producer.

12. These Findings and Tentative Conclusions do not Represent Any Indictment of the Individual Members of the Lime Industry, but Rather an Attempt to Depict the Actual Operations and the Effects of Marketing Practices on the Industry and on Society.

The lime producers who inaugurated the practices were engaged primarily in an effort to make their business pay, and many of them may have been completely ignorant of the long range indirect effects of their efforts. However, the evidence points strongly to a considerable amount of concerted action and discrimination, which seems to constitute restraint of trade and to be contrary to the spirit of the law.

TRADE PRACTICE STUDIES

PRODUCTION AND CAPACITY CONTROL UNDER THE NRA

Table of Contents

PART II

CASE STUDIES OF THE PRINCIPAL EFFORTS AT PRODUCTION OR CAPACITY CONTROL

CHAPTER II. PRODUCTION AND CAPACITY CONTROL AS A CURE FOR SICK INDUSTRIES

I. The Conception of a Sick Industry

II. Lumber
- A. Economic Condition of the Industry
- B. Pre-Code Efforts at Control
- C. Results of Code Operation
  1. The Administrative Set-Up
  2. Functioning of Administrative Machinery
  3. Effects of Production Control and Minimum Price Provisions on Quantity of Lumber Produced
  4. Effects of Allocation on Internal Structure and Functioning of the Industry
  5. Conservation Aspects of Production Control
  6. Importation of Red Cedar Shingles
  7. Importation of Mahogany
  8. Failure of Price Control
- D. Outlook for the Future

(Each of the remaining sections of this chapter, dealing with the industries listed below, will take up
- (a) Special features of each industry which let to its classification as a "sick industry";
- (b) Pre-code attempts at control;
- (c) The character, operation and results of code efforts at control; and perhaps
- (d) An analysis of the present situation.

III. Other Industries Treated Are:
1. Cotton Textiles
2. Silk Textiles
3. Copper
4. Furniture
5. Atlantic Mackerel
6. Paper
7. Pyrotechnic Manufacturing
8. Machines Waste Manufacturing

CHAPTER III. INVENTORY CONTROL

I. The Inventory Problem
- A. General Theory
- B. Restriction of Production

II. Carpet and Rug Industry
- A. Economic Organization of Industry
- B. Institute of Carpet and Rug Manufacturers of America
- C. Pre Code Conditions
- D. Effect of Code

Chapter VI. EFFORTS TO PREVENT EXTENSION OF PLANT CAPACITY IN INDUSTRIES NOT HAVING PUBLIC UTILITY CHARACTERISTICS

I. Rayon and Silk Dyeing and Printing Industry
   A. Effect of Inter-company Relationships

II. Lace Industry
   A. Reasons for Code Authority Attitude Toward Capacity Increase

III. Throwing Industry
   A. Code Authority Attitude on Introduction of New Machinery
      1. Effects

IV. Other Textile Industries

V. Structural Clay Products Industry
   A. Justification of Policy of Code Authority

VI. Clay Drain Tile

VII. Floor and Wall Clay Tile Industry

VIII. Clay and Shale Roofing Tile Industry

IX. Cement Industry
   A. Conditions Within Industry
   B. Efforts to Secure Production Control Before and During NRA
      1. Administrative Problems Involved

X. American Glassware
   A. Problem Presented by the Code Authority Trying to Prevent the owners of a burned plant from putting it back into operation

XI. Steel Industry
   A. Degree of Control, Past and Present
   B. Plant Expansion vs Public Interest

XII. Other Industries

Chapter VII. PRODUCTION CONTROL AS AN AID IN SPREADING EMPLOYMENT

I. General Purpose of Plant Hour Limitations in the Garment Trades
   A. Effect on Labor-hour Limitations
   B. Relationship to Curtailed Production
   C. Relationship to Migration of Industry, Efficiency of Operation, Introduction of Machinery

II. Dress Manufacturing

III. Coat and Suit Industry

IV. Men's Clothing

V. Cotton Garment Industry

VI. Millinery

VII. Hat Industry
A. Metropolitan New York vs other Manufacturers regarding Multiple Shifts

VIII. Other Garment Industries

IX. Wallpaper Manufacturing

X. Effects on Employment of Machine-Hour and Labor-Hour Limitations in Other Industries

XI. Reduction of Seasonality in the Automobile Industry
A. Effect of NRA on Annual Show, Seasonal Production, etc.

Chapter VIII. EFFORTS TO PROTECT ONE SECTION OF AN INDUSTRY AGAINST COMPETITION BY ANOTHER SECTION

I. Cast Iron Soil Pipe
A. Alabama Manufacturers vs Northern Manufacturers regarding 27-hour Plan Day

II. Crushed Stone, Sand and Gravel and Slag
A. Portable Plants

III. Dental Laboratory
A. Effect of Hour Limitations on small Laboratories

IV. Other Industries in which Production Control was a Factor in Internal Conflict

Chapter IX. PRODUCTION OR CAPACITY CONTROL AS AN INSTRUMENT OF CONSERVATION

I. Fisheries
A. Reasons for Ineffectiveness of Production Control Provisions

II. Other Industries

III. General Findings Regarding Attitude in Code Administration with Reference to Conservation
A. Immediate considerations. Favored Over long run conservation interests

Chapter X. CONTROLS FOR THE PURPOSE OF REGULATING CONSUMPTION OR RESTRICTING CERTAIN TYPES OF PRODUCTIVE ACTIVITY

I. Distilled Spirits, and Brewing
A. Regulation of production for the purpose of diminishing consumption - or conserving materials, labor power, or availability of equipment - might, in the case of war or other emergency, become one of the most important fields for the exercise of production control.

(Decision as to what other Appendices will appear in the Final Report cannot as yet be made.)

TRADE PRACTICE STUDIES

PRODUCTION AND CAPACITY CONTROL UNDER THE NRA

Summary of Preliminary Findings

Restrictions on production or capacity appeared in NRA codes in a number of forms, the chief of which were the following:

(1) Assignment to each member of an industry of a definite production quota - as in Lumber and Petroleum.

(2) Limitation on the hours for which equipment could be worked (and sometimes on the number of units that could be operated) - as in most of the Textile Codes

(3) Restrictions on the installation of capacity, as in Ice, Steel and numerous other Industries varying widely in character

(4) Inventory control, as in the Carpet and Rug and the Carbon Black industries.

Altogether, the codes of more than one hundred industries contained production control provisions of some type - ranging all the way from absolute limitations and prohibitions to provisions which merely suggested that the Code Authority make a study of conditions in an industry, and submit recommendations to the Administrator with respect to menas for coordinating production and consumption. The industries in which production controls were actually set up included many of the most important in the country. However, there were a number of outstanding codes - such as those for Bituminous Coal and for Machinery Manufacturing - in which production controls were conspicuously absent.

An important objective of the study of production and capacity control under the N.R.A. has been to determine the effect of these provisions. This task has been complicated by the fact that,in the case of most of the more ambitious programs, there had been prior efforts to do much the same thing by industry action. The anti-trust laws had constituted a threat to such industry action. Moreover, controls which were practiced by the majority in an industry were sometimes rendered only partially effective because of independent action taken by minorities. However, examination of the pre-code period shows that in many cases a considerable degree of effectiveness had been attained by industry production control measures. Those exercising such controls were usually eager to obtain, through the N.R.A., the sanction of Government approval; but in some instances it is doubtful as to whether such approval changed the existing situation in any material way.

Another difficulty in determining the result of production control arises from the fact that in many industries production would not in any

case have exceeded the limitations prescribed. Indeed, it is safe to say, generally speaking, that production controls did not appreciably curtail total output - except as production may have been reduced somewhat voluntarily, because of a slackening of demand following price increases. Some of the latter were probably stimulated by the fact that the industry had production control. It is doubtful, however, whether the raising of prices because of production control did in fact check production to any extent. For in several of the industries in which production control was a very important factor in the total situation, there were considerable increases in production. In Lumber and Cotton Textiles, for instance, substantial increases in production were responsible for troublesome expansion of inventories. Eventually this led to more rigorous restrictions on production, and to consequent curtailment of output. Nevertheless, for a rather protracted period, the net effect of these codes appears to have been a stimulation of production.

Another reason for the failure of production control to cause much restriction of production lay in the attitude of the N.R.A., which was in general one of reluctance to apply restrictions. Many proposals to put production controls in codes were rejected or radically modified. Where the code gave the Administration discretion, the policy came, to an increasing extent, to be one of permitting additions to capacity; and of allowing exemptions to restrictions on production in the case of firms whose business activities would otherwise have been seriously hampered.

This policy was not, however, applied uniformly -- partly because Code Authorities sometimes took a strong contrary position. One of the principal lessons which may be drawn from the code experience is the danger that is inherent in an attempt to apply broad restrictive measures to industrial conditions which are far from uniform. Reduction of machine hours to 40 means one thing to a plant which has been operating 50 hours; and something very different and much more disturbing to a company whose business and equipment have long been organized on the basis of 16- or 24-hour operation. A prohibition of the introduction of new machinery may be welcomed by a large concern which has equipment in excess; but may impose a real handicap on a competitor who has never acquired equipment beyond that necessary to meet his orders -- perhaps on a basis of double or triple shifts.

Notwithstanding the often negative and sometimes harmful results of production controls under the codes, it is doubtful whether those industries that had to bear the heaviest burden in the way of increasing wages and spreading employment could have been won to cooperation with the Administration's labor program without the promise of the measure of security that production control appeared to offer. Production control also placed limitations on the ability of the more aggressive concerns in an industry - whether through wage-cutting, or through superior efficiency in operation or in securing business - to overwhelm their competitors. Such limitations on competition may well have made it easier for some of the weaker concerns in an industry to come up to common minimum standards on hours and wages.

The question of future attitude toward production control presents a difficult problem. It has not been possible in this brief summary to describe the underlying conditions in industry which have led industrialists for many years past to seek some measure of production control, or to consider the effects of production control on these more permanent problems. Without attempting to pass judgment as to whether the precise measures of control sought were warranted, the conditions that gave rise to them were frequently such as to warrant group efforts to remedy them in the interest of the public, as well as in that of the industries concerned - provided, of course, that this could be done without serious harm in other directions.

The efforts in connection with the codes to change some of these conditions through production or capacity controls revealed many weaknesses and dangers. In addition to the hardships that tened to fall on particular members of industries, the N.R.A. never developed a sufficiently fundamental and comprehensive policy as to what it was attempting to accomplish. There was a tendency to protect existing interests without giving sufficient consideration to whether the long-run national interest might not warrant changes. Usually, also, the Administration did not have sufficient information as to conditions in the industries whose production and capacity were being regulated.

On the other hand, it is important to recognize that a refusal of the Government to interest itself in production control would not have meant that activities along that line, with the dangers inevitably accompanying their possible advantages, would cease. Efforts at such control were widespread before N.R.A. One reason why most of the well-organized industries do not now want a continuation of N.R.A. is because many members feel they have progressed far enough in the technique of production control to get along by themselves.

This raises two questions. First, how long will these industries be able to do something really effective with respect to control of production? Second, to the extent that they do succeed will the public interest be sufficiently protected?

With reference to the first of these questions, many of those most familiar with the management of trade associations believe that industry controls will at most function only intermittently. Periods of control will probably alternate with periods of confusion. With reference to the second issue, N.R.A. experience has shown that the unchecked administration of controls by bodies solely representative of industries are likely to give rise to actions that discriminate against some members, besides being prejudicial to the public interest.

For these reasons it would appear that, if group action is to be undertaken in an effort to solve the major production and capacity problems with which industry has long been confronted, the government will have to take some part - in the way either of helping to carry through measures that it believes are desirable, or of checking others that it feels would be undesirable. Before the Government can act effectively in these respects, however, it will be necessary to develop a much clearer policy as to what ends are to be desired, and as to what means are practicable, than has yet been done.

TRADE PRACTICE STUDIES

PRICE STUDY OF THE FERTILIZER INDUSTRY

Table of Contents

A. Expressed Purpose of the Plan
B. Degree of Publicity Achieved
   1. Among Sellers
   2. Among Buyers
C. Comparison with Situation Prior to the Code

II. Stabilization of the Market
   A. Effect of Open Price Plan as Envisaged By Its Sponsors
   B. Degree of Stabilization Achieved

CHAPTER IV. COMPETITION AND COOPERATION UNDER THE OPEN PRICE PLAN

I. Control by the Code Authority
   A. Evidence on Whether It Suggested Prices or Terms
   B. Effect of Its Regulations on Prices and Terms

II. Control of Zone Committees
   A. Organization of Zone Committees
   B. Evidence on Whether They Suggested Prices or Terms
   C. Effect of Their Recommendations on Prices and Terms

III. Agreement Among Producers
   A. Evidence on Whether They Discussed Prices and Terms Before Filing Them
   B. Comparison With Situation Prior to the Code

IV. Price Leadership
   A. Description of Price Leadership in Fertilizer and the 10-day Waiting Period
   B. Extent of Leadership by Different Producers (big vs. small)
      1. In General
      2. Price Advances vs. Declines
   C. Price "Following"
      1. Extent to Which Price Leaders Were Followed
      2. Speed With Which Price Leaders Were Followed
      3. Explanation of Delays in Meeting Competition Where Found
   D. The Waiting Period
      1. Advantages
         (a) Convenience in Operation of the Price Filing System
         (b) Efficiency in Making Prices Known to All Producers
         (c) Danger of A Price Cutter Stealing the Market At the Peak of the Selling Season
      2. Danger
         (a) Possibility of Agreement on Uniform Prices or Terms
         (b) Actual Analysis of Schedules Withdrawn During the Waiting Period

CHAPTER V. EFFECT ON PRICES

I. Description of the Products of the Industry

II. Price Trends Reflected in the Schedules

CHAPTER VIII. EFFECT ON TERMS OF SALE

I. Trends in Terms of Sale
   A. Carload vs. Less-Than-Carload Shipments
   B. Quantity Discounts
   C. Manner of Packing
      1. Allowances for Shipment in Bulk
      2. Extras for Shipment in Odd-Sized Bags
   D. Cash Discounts

II. Degree of Uniformity in Terms of Sale

III. Significance of Changes in Terms of Sale
   A. Importance as Methods of Competition
   B. Effect on Purchasing Habits
      1. Effect of Quantity Discounts on Amounts Purchased
      2. Effect of Cash Discounts on Time of Payment

CHAPTER IX. GEOGRAPHIC FACTORS

I. Extent of Interstate Commerce in Fertilizers

II. Relation Between Prices and Terms in Different Zones
   A. Degree of Correspondence in Changes
   B. Degree of Uniformity in Prices and Terms at Any One Time
   C. Effect of Variation in Crops Grown

III. The Delivered Price System
   A. The Changes Before, During, and Since the Code
   B. Effect of the Delivered Price System
      1. Absorption of Freight
      2. Cross-Hauling
      3. Uniformity of Prices

IV. Trucking Allowances
   A. Trends
   B. Reaction of Truckers

CHAPTER X. GENERAL RESULTS

I. Compliance

II. Effect
   A. On Producers in General
   B. On Small Firms
   C. On Consumers

III. General Success

CHAPTER XI. ISSUES IN THE STUDY OF OPEN PRICES

I. Issues on Which Light is Shed By the Present Study
   A. Statement of Problems Which are:
      1. Conclusively Answered

TRADE PRACTICE STUDIES

PRICE STUDY OF THE FERTILIZER INDUSTRY

Preliminary Summary of Findings

The purpose of the fertilizer industry in adopting open prices in its Code was to inform all producers of all prices current in the market. Since it was hoped by this means to discourage price cutting, price stabilization may be termed a coordinate purpose of the plan.

It does not appear that the National Fertilizer Association, which served as filing agency, urged particular lines of action on the members of the industry, or favored any company or group.

The regulations issued by the Code Authority were in line with the instructions laid down in the Code, but they must have tended to increase uniformity in prices and in terms of sale, since they increased uniformity in the bases of quotation.

The recommendations of the Zone Committees looking toward standardization of marketing practices were seldom adopted, but they were sometimes put into effect by general consent; and by this means as well as by the regulations of the Code Authority uniformity was increased through the cooperation fostered by the Code.

There exists scattered indications that producers occasionally knew of each other's plans before adopting specific price policies; but the mass of evidence showing independent action is so great that it must be presumed that such cooperation was little more frequent under the Code than before.

The system of price leadership is well developed in the fertilizer industry. One company issues a new price schedule and the rest fall in line.

The majority of companies do not follow the price leader at once, but allow a lapse of several days or longer. Usually this is because the price change has occurred during an inactive season in the market, but sometimes it has meant that the companies which delayed the issue of their schedules were taking advantage of the interval to make sales on the old terms.

There was no particular distinction between price leadership on price advances and on declines. The same companies led in both, and the delays in following were about the same in both.

The 10-day waiting period does not appear to have been misused to bring pressure to bear on small companies.

The price schedules were made available to buyers as well as to sellers.

The complexity of the price schedules was very great, due partly to the rulings of the N.R.A. that competition could only be met by filing identical schedules, and to that of the Code Authority that changes could only be made effective by filing complete schedules. This complexity resulted in a good deal of expense to the producers.

Prices on most products rose slightly under the open price plan, but somewhat less than did prices in other industries. Many other factors beside the open price plan undoubtedly contributed to bring about this result.

No significant change in the frequency and size of price movements can be observed under the open price plan, as compared to the pre-code period.

Price uniformity increased distinctly under the Code, but had existed in considerable degree previously. The increase was mainly due to the fact that all parties had constantly at hand reliable information on the state of the market.

Competition in the offering of additional grades continued under the open price plan. The industry welcomed the reduction of grades.

While the available figures indicate that the differential between the price of mixed fertilizers and that of the materials contained in them - the differential that constitutes the cash saving to farmers who buy the materials and do their own mixing - increased under the Code, they are not conclusive. There is no evidence that the amount of home mixing actually increased.

Two basic changes in the methods of distribution were made shortly after the adoption of the Code. The first was the change from the system of selling to independent dealers for resale to farmers to that of shipping to agents (the same persons as the dealers) on consignment. This change was due to a desire to control the ultimate distribution of the product more closely - for example, to prevent excessive mark-ups. So far as known few dealers objected to the change. In some districts the change was not uniformly made, and the result was a less stable market.

The second change was in the method of quotation - which had previously been on a "dealer delivered" basis, although some companies quoted F.O.B. plant but which became almost uniformly "delivered at the farm". This increased price uniformity, but seems to have been acceptable to dealers and farmers.

The delivered price system involved the absorption of freight on distant shipments, a factor present before the Code among the companies which sold on a "dealer, delivered" basis. Cross-hauling, however, does not appear to be an important evil in the industry.

Quantity discounts were almost universally adopted under the Code as a result of an N.R.A. Administrative Order.

Cash discounts were increased early in the Code and made somewhat more uniform. Later they were decreased again, although remaining higher than the original scale.

Terms of sale were generally uniform among the producers, but not completely so.

The price schedules show that there is considerable interstate commerce in the fertilizer industry.

Terms of sale were a good deal alike in the different zones. Prices changed at about the same times, but there were differentials between zones - due chiefly to the location of important plants and to the freight structures.

The industry reduced the trucking allowances to consumers shortly after the commencement of the open price plan. This was authorized by the Code, but caused some complaint on the part of truckers.

Compliance was reasonably good until the last weeks of the Code.- In other words complaints against companies for selling at other than their scheduled terms usually turned out to be unfounded, or were corrected by having the offender sign a compliance agreement.

It appears that small companies benefited under the open price plan, increasing their percentage of the business.

No fertilizer producer or buyer contacted in the course of the study expressed dissatisfaction with the open price plan. It appears to have been almost universally popular.

TRADE PRACTICE STUDIES

A LIMITED SURVEY OF PRICE FILING UNDER N.R.A. CODES

Table of Contents

III. Nature and Extent of Publicity Realized under N.R.A.
  A. Data Available for Dissemination as Conditioned by Scope of Price Filing and Participation of Members
  B. Character of Dissemination of Data by Administrative Agency
  C. Obstacles to Full Publicity

CHAPTER IV. CONTROL UNDER N.R.A. PRICE FILING PLANS

I. The Desire for Control as Revealed by Industry Proposals

II. Control Requirements Set Up in Connection with the Price Filing Provisions in the Codes
  A. Control Over the Price Level
    1. By Cost and Minimum Price Provisions
    2. By Adherence to Filed Prices
  B. Control Over Price Changes
    1. The Waiting Period as a Deterrent
    2. The Limitations Against Discrimination
  C. Control Over the Price Structure
    1. Uniform or Maximum Discounts and Terms
    2. Product Classifications
    3. Customer Classifications
    4. Geographic Price Structure
  D. Controls Over Channels of Trade
    1. Recognition or Non-Recognition of Customary Channels of Trade
    2. Mandatory Trade Differentials
    3. Inclusion or Exclusion of Distributors from Jurisdiction of Price Filing
  E. The Integrated Pattern of Control Provisions in Price Filing Codes

III. Expansion or Modification of the Control Requirements by Code Authority Action
  A. Rules and Regulations to Govern Price Filing
  B. The Immediate Objectives of Code Authority Regulations Pertaining to Control Through the Price Filing Plan
  C. Basis of Authority for Code Authority Regulations

IV. Nature and Extent of Control Realized under N.R.A. Price Filing Plans
  A. Conformance to Control Requirements
    1. Evasions and Subterfuges
  B. Factors Determining the Effectiveness of Control
    1. The Product and Its Market
    2. Nature of the Industry and Degree of Organization
    3. The Price Filing Provisions and the Code as Approved by N.R.A.
    4. The Relative Complexity of the Price Structure
    5. The Administrative Methods Employed
    6. Enforcement Efforts
  C. Application of Controls to Distributors
  D. Need for Other Supplementary Controls to Accomplish Desired Ends
    1. Statistical Reporting and Share-the-Business Plans

2. Production Controls
3. Cost Controls
4. Resale Price Maintenance

CHAPTER V. THE ECONOMIC EFFECTS OF PRICE FILING UNDER N.R.A. CODES

I. The Elimination of Ignorance
   A. Elimination of the Lying Buyer
   B. Elimination of Bid Shopping
   C. Elimination of Secret Rebates on Concessions
   D. Alteration of the Position of Favored Buyers
   E. Other Effects of the Elimination of Ignorance

II. Effects on Leadership in Price Changes (*)
   (*) This topic and others following will be developed so far as practical in terms of the following questions:
   A. What changes can be traced to Price Filing
   B. Do Changes Appear in the Nominal Price or in Terms and Conditions of Sale?
   C. What is the Explanation of any Changes Observed?
   D. Can They be Attributed to the Publicity or to Control Aspects of Price Filing?

III. Effects on the Price Level

IV. Effects on Stability or Flexibility of Prices

V. Effects on Frequency and Magnitude of Price Changes

VI. Effects on Uniformity of Prices and of Terms and Conditions of Sale

VII. Effects on the Price Structure, e.g.
   A. Standardization of Products
   B. Simplification of Price Structure

VIII. Effects on Channels of Trade

IX. Effect on Geographic Competitive Relations of Members and Customers

X. Effects on General Competitive Position of Members

XI. The Issues of Public Policy Raised by the Indicated Economic Effects

CHAPTER VI. THE COMPONENT ELEMENTS OF PRICE FILING PLANS (*)

(*) Topics under this Chapter will be developed in terms of the purposes and controversies expressed in connection with the various elements, their prevalence in N.R.A. codes, their operation and observed effects.

I. Past Prices vs. Current or Future Prices

II. Mandatory vs. Voluntary Plans, and Participation in Plans

III. The Waiting Period Requirement

CHAPTER VIII. FINDINGS AND CONCLUSIONS

APPENDICES

APPENDIX A Exhibits of Materials Pertaining to Price Filing Study

EXHIBIT I Preliminary Outline for Open Price Investigation

EXHIBIT II Distribution of N.R.A. Codes, by Industry Divisions, by Size and by Time of Code Operations

EXHIBIT III Alphabetical List of 191 Codes in Over-All Sample for Price Filing Study

EXHIBIT IV Open Price Plan for the Folding Paper Box Industry

EXHIBIT V N.R.A. Policy Statements Relating to Price Filing

EXHIBIT VI Statistical Program for the Price Filing Unit
(a) Subject Matter Outline
(b) Methodology Outline
(c) Material Specifications Outline
(d) Inspection Study Outline

APPENDIX B Price Filing in the Asphalt Shingle and Roofing Industry

APPENDIX C Price Filing in the Steel Castings Industry

APPENDIX D Price Filing in the Baking Industry

APPENDIX E Price Filing in the Gas Appliance Industry

TRADE PRACTICE STUDIES

A LIMITED SURVEY OF PRICE FILING UNDER N.R.A. CODES

Preliminary Summary of Findings

The price filing plans authorized by N.R.A. codes were not truly government experiments with price filing, despite their varied and mandatory character. They were not a controlled sample and were not subject to informed critical observation or supervision. The original provisions were too dissimilar to fall into any well-defined classes; they operated in every conceivable type of industry and competitive situation, within almost every known combination of code restrictions, and under diverse administrative management. They were subjected to changing policy standards, unevenly applied to open price systems that had already reached one or another stage of confusion, congealment or operating smoothness.

The most characteristic form of price filing under N.R.A. codes involved the mandatory filing of present or future prices below which sales might not take place, the inclusion of all terms of sales in the filing, and the dissemination of identified price lists to competitors, through the medium of a central office, usually that of the Code Authority.

The major differences between the N.R.A. type of price filing plans and those of the pre-code period were: (a) the change from voluntary filing by a group of industry members to the mandatory filing by all members of an industry; (b) the change from the reporting of past transactions to the reporting of present or of future quotations (with a waiting period); (c) the isolation of price reporting as a plan more or less distinct from other statistical reporting.

Price filing appears to serve two clearly distinguishable functions - publicity function and the control or compliance function. These are frequently embodied in the same plan, and are confused in the minds of both of those industry members who participate in the plans and of those who seek to ascertain their effects and the desirable public policy toward them.

Price filing plans under the N.R.A. were designed primarily for the latter function. They were the "checking" rather than the "market" information type of open price provision, in that publicity was to serve as a measure of individual compliance with other price or trade practice provisions (including no sales below cost provisions), as well as an aid to improved knowledge about price levels and price changes.

As a publicity device, price filing was expected to deter price cutting and to prevent uneconomic discrimination among buyers. There is fragmentary evidence that it did have this result in some instances; but the findings are not as yet substantiated by quantitative evidence. In some instances it seems to have deterred, in other to have promoted price cutting. It appears very generally to have promoted price uniformity. The effectiveness of the device as a deterrent to discrimination was

limited by the common practice of permitting customers to have access only to the price filings applicable to their own class.

The effectiveness of price filing in giving publicity to prices was limited by a number of other factors: (a) Dissemination of filed prices was usually undertaken only to members and was comparatively rare in the case of customers. (b) Frequent failure to file, widespread evasion of filed prices, and the filing of minimum rather than actual selling prices were common obstacles to publicity.

Very wide discretionary powers were left to Code Authorities in connection with the operation of open price filing provisions. One use of these powers was progressively to extend requirements for the publication and regularizing of all terms and conditions of sale. Price filing requirements appear to have served frequently as an impetus for standardization and uniform classification of products, customer groups, discounts, differentials, and other terms and conditions of sale. Exceptions to this trend, in the direction of increased differentiation in terms and conditions of sale may appear, however, from more detailed studies.

The rules and regulations of Code Authorities pursuant to price filing provisions shaded imperceptibly into regulations designed to convert the price filing system into a tool for price control. Efforts to use price filing as an instrument of joint action to maintain prices were general. These efforts were not in most cases in the form of collusive agreements or of overt price fixing, but in that of an organized program to restrict individual freedom in pricing practices, and to secure conformity to a pre-determined price minimum and/or price structure. Thus we find relatively few recorded cases of pressure or coercive activity to require the filing of a specified net price, but very extensive evidence of efforts to compel members to abide by code or extra-code regulations concerning certain elements of price, cost floors, methods of quotation, established differentials, etc.

A very close relationship between cost provisions and price filing provisions appears, with the cost provision frequently used to establish Code Authority control over filed prices, and vice versa. The effectiveness of this control was limited and weakened by the progressive reluctance of the N.R.A. to approve mandatory cost accounting systems or to enforce cost restrictions.

The administrative problems connected with the operation of price filing were many and varied. Many arose from the code provisions themselves, which were characteristically too broad or too narrow for a regulatory device to be administered by a combination of private and public authority.

Code provisions proved relatively pliable so far as Code Authority innovations were concerned, because of the wide powers granted in early codes and of the lack of specific limitations and definition of detailed procedures or powers. Administrative interference or corrective action was largely negative in character, since amendments and modifications of existing provisions were made dependant on industry cooperation. N.R.A. policy on price filing was not formulated until June, 1934, when more

than 300 codes had already been written. The General trend was to surround price filing systems with safeguards against abuse, and to limit the function of these systems more definitely to effective publicity. Even as thus limited, the last policy statement says that they should be applied to competitive but not to semi-monopoly industries. Application of policy to effect changes was greatly handicapped by the reluctance of industries to open up the plans to revision.

There was a conspicuous absence of Administrative investigation of the need for proposed price filing plans at the time of their introduction, and a corresponding lack of current supervision or observation of their operation and results after approval.

One result of this spasmodic supervision is the absence in N.R.A. files of any body of collected price filings sufficient to permit a statistical analysis of the primary economic results on price levels, price stability, uniformity, etc.

The effectiveness of price filing performance, and the success of plans in achieving the desired ends of publicity and control, were limited in many industries by difficulties arising from lack of standardization of the product by ambiguities or loopholes in the provision, by evasion of the provisions through subterfuge and otherwise, by the presence of large numbers of small enterprises, and by the fact that distributors in competition with direct sellers were not bound by the price filing requirements.

Administration of price filing provisions was apparently easier and more effective in industries in which the structure of prices was simple or formalized, either prior to the code or by virtue of code provisions.

The frequent demand for supplementary controls over costs, production, resale prices, etc. would indicate that price filing alone is not deemed sufficient to secure effective price control in many industries. There is some evidence that control is facilitated by the use of a market reporting system, which includes other statistical data in addition to prices.

Further and more definite findings on the economical results of price filing plans must await the completion of statistical case studies and the analysis of other work materials.

TRADE PRACTICE STUDIES

LOSS LIMITATION

Table of Contents

CHAPTER III. NON-LEGISLATIVE PRICE STABILIZATION DEVICES

I. Measures Employed in Trade Making for Adoption of Non-Legislative Price Stabilization
   A. Refusal-to-Buy
   B. Sabotage (Switching and Disparagement)
   C. Trade Propaganda
   D. Intra-Industry Politics

II. Description and Evaluation of Methods of Non-Legislative Price Stabilization
   A. Refusal-to-Sell
      1. Purpose of Refusal-to-Sell Policies
      2. Basis of Legal Rights to Refuse to Sell
      3. The Principle of the Device
      4. Mechanics of Operation of Refusal-to-Sell Devices
      5. Legal Limitations on Right to Refuse to Sell
      6. Recent Use of Refusal-to-Sell
      7. Effects of Refusal-to-Sell Policies
   B. Consignment Selling Used as a Price Stabilization Device
      1. Purpose of Consignment Selling
      2. Basis of Legality of Price Stabilization by Consignment Selling
      3. Mechanics of Operation of Consignment Selling
      4. Effects Reported by Manufacturers Experienced in Use of the Device
   C. Manufacturer-Dealer Cooperative Arrangements
   D. Education of Dealers in Benefits of Price Stabilization

CHAPTER IV. FEDERAL LEGISLATIVE PRICE CONTROL DEVICES

I. Pre-code Proposals
   A. Stevens Bill
   B. Metz Bill
   C. Capper-Kelly Bill

II. Loss Limitation Provision of Retail Drug Code
   A. Historical Development of Provision
      1. Relation of "Manufacturer's Wholesale List Price per Dozen" to Merchandise Costs of Large and Small Retail Druggists
      2. Development of Approved "Cost Plus 10%" Provision
      3. Development of Amendment of March 1934
      4. Development of Amendment of September 1934
   B. Alignment of Opposing Forces
      1. Proponents
         (a) Small Independent Druggists, Established National Chains, Non-Cut-Rate Wholesalers and a few Manufacturers
      2. Opponents
         (a) Cut-Rate Independent Drug Store, Small Chains, Cosmetic Shops, and Department Stores
   C. Issues seen by Opposing Forces
      1. Proponents
         (a) Importance of Small Druggist to Society
         (b) Necessity of Price Stabilization to Maintenance of Small Druggist's Existence

B. Analysis of Political Forces behind the Legislative Devices
C. Developments in the Grocery Trade
   1. The Extent and Nature of the Use of the Fair Trade Law
   2. Attitudes of Members of The Trade
   3. Reasons for the Slight Use of the Fair Trade Law
   4. Present Attempts to Set Up Minimum Prices under the Unfair Practices Act of 1935
D. Developments in the Drug Trade
   1. Developments Prior to 1933
   2. Period of the Retail Drug Code
   3. Developments under Amendment 1½
   4. Analysis of Conditions in the Trade Prior to the Passage of Amendment 1½. (Especially the Extent of Price-Cutting as Indicated by Price Studies)
   5. Attitudes of Members of Trade
   6. Procedure of Enforcement
      (a) Methods Employed
      (b) Legal Remedies
         (1) Types and Terms of Contracts
         (2) Use of Restraining Orders and Injunctions
   7. Effectiveness of Enforcement
      (a) Administrative Difficulties
      (b) Degree of Enforcement in the Trade
   8. Effects upon Retail Prices and Margins
      (a) Average Retail Minimum Contractual Margins by Classes of Products
      (b) Comparison with Margins in Great Britain
      (c) Margins on Selected Specific Items (Based upon an Examination of Contracts).
      (d) Comparison of Advertised Drug Prices in San Francisco Examiner during First Six Months of 1933 with Contractual Prices in 1934
      (e) Comparison of Advertised Drug Prices in Stockton during First Six Months of 1933 with Contractual Prices in 1934
      (f) Same as (d) and (e) for Los Angeles
      (g) Same as (d), (e) and (f) for Modesto
      (h) Same as (d), (e), (f), and (g) for Rural Centers
      (i) Comparison of Pre-Contractual and Contractual Prices on 105 items in 20 Independent Drug Stores
      (j) Comparison of California Contractual Prices with Prices on Identical Items in Portland, Oregon and Tacoma, Washington in Period before Oregon and Washington had Fair Trade Laws and in Branches of a Firm Doing Business in All Three States
      (k) Comparison of California Contractual Prices with Boston Prices. (Small sample)
      (l) Comparison of California Contractual Prices with Canadian Prices. (Small sample)
   9. Competitive Adjustments in the Market Traceable to Resale Price Maintenance
   10. Economic Effects of the Application of the Fair Trade Act

II. Other State Permissive Contractual Statutes
- A. New York
- B. New Jersey
- C. Pennsylvania
- D. Maryland
- E. Illinois
- F. Wisconsin
- G. Iowa
- H. Oregon
- I. Washington

III. Other Types of Price Stabilization Legislation in States (other than California)
- A. New Jersey Unfair Competition Law
- B. Connecticut Retail Drug Law

CHAPTER V. POST CODE STRATEGY OF INTERESTS IN THE DRUG TRADE

I. Strategy of Invaders to Gain Control of the Field
- A. Manufacturers
- B. Wholesalers
- C. Retailers

II. Strategy of Those in Power to Remain in Power
- A. Manufacturers
- B. Wholesalers
- C. Retailers

CHAPTER VI.* COMPARATIVE ANALYSIS OF PRICE STABILIZATION DEVICES DISCUSSED

I. Administrative and Legal Difficulties

II. Cost of Operating the Devices

III. Evaluation of the Relative Effectiveness of Such Device

IV. Comparison of the Unique Advantages of Each Device

CHAPTER VII. LEGAL ANALYSIS OF RESALE PRICE MAINTENANCE

I. Statement of the Problem

II. Development of the Law of Restraint of Trade
- A. Early Economic Background
- B. Modern Manifestation Compared with Ancient Idea
- C. Economic Barometers used by Court to Measure Whether a Given Device Harms the Public Interest

III. Development of Law of Unfair Competition
- A. Early Economic Background

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* This Chapter probably will not appear in the January 15, 1936 report of this Study.

B. Development of Good Will Theory
C. General Economic Structure of Resale Price Maintenance as a Merchandising Technique
D. Reason why Resale Price Maintenance was Condemned as in Restraint of Grade

IV. Analysis of Recent Supreme Court Decisions Bearing on Resale Price Maintenance
A. Dr. Miles case; Colgate case, and Beechnut case.
1. Extent and Adequacy of Factual Information before Court
2. Data Necessary to a Determination of Such Cases
3. Value of Cases as Future Precedents
B. Appalachian Coals Case
1. Extent and Adequacy of Factual Information before Court
2. Development of "Rule of Reason"

V. Necessity for Economic Facts and Economic Viewpoint in Future Litigation
Involving Resale Price Maintenance

VI. Extent and Adequacy of Factual Material before NRA Warranting, from a Legal Viewpoint, Code Resale Price Maintenance

CHAPTER IX. - MATERIALS NEEDED FOR A COMPLETE ANALYSIS OF THE PROBLEM

I. Factual Information on Costs, Prices, Volumes, Margins and Profits, and Merchandising Policies
A. Of Retailers using Loss Leaders, and Their Competitors
B. Of Wholesalers Servicing Retailers Using Loss Leaders, and Those Servicing Their Competitors
C. Of Manufacturers whose Products are used as Loss Leaders, or have been used as Loss Leaders, and Other Manufacturers

II. Factual Information on the Shift in Distribution of Commodities through the Various Intermediary Channels as a Result of Loss Leader Selling and Loss Limitation Devices.
A. Private Brands vs. Standard Brands

III. An Evaluation of the Techniques Available for Collection of Such Data
A. Primary Source Material
1. Through Interviews
2. Through Questionnaires
3. Statements made at Public Hearings
4. Correspondence
5. Newspaper Advertisements
6. Price Studies
B. Secondary Source Materials
1. Government Surveys
2. Academic Surveys
3. Trade-Sponsored Surveys
4. Trade Journal Articles

IV. Theories to be examined and Evaluated

V. Recommended Techniques to be Employed

VI. Samples of Questionnaires and Interview Questions Developed for the Use of This Study

VII. Suggested Coverage for a Study.

TRADE PRACTICE STUDIES

LOSS LIMITATION

Preliminary Summary of Findings

Early in the period when codes were being formulated N.R.A. adopted the policy of prohibiting loss leader selling, in order to assist small independent merchants in maintaining and expanding employment and wages. Consequently, many of the retail codes for trades dealing in over-the-counter merchandise contained loss limitation provisions.

Many in the N.R.A. felt that the loss limitation provisions in the retail codes would lead to increased prices to consumers and to unwarrantedly high profits for manufacturers and wholesalers, since the prices of the latter would of necessity be the base for the scheme.

The attempts under the loss limitation provisions of the retail codes merely reflect a movement which was in operation through various devices, prior to the N.R.A. and which has continued through the same devices and through state legislation since the collapse of the program.

Because of limitations of time and personnel the study has centered upon the retail grocery and retail drug trades because of the importance of loss leader selling in these lines, and because of the fact that different methods of control were attempted in each.

Loss limitation provisions in the various retail codes differed from one another in principle. The Retail Drug, Retail Booksellers and Retail Tobacco codes established base prices, which were the same for both small and large outlets throughout the country. The Retail Food and Grocery and Retail Trade codes established minimum prices based on the individual merchant's invoice cost, which varied greatly in small and in large outlets.

The Drug Code loss limitation provision established, as a minimum price, the manufacturer's wholesale list price per dozen, which is an integral part of the pricing structure of the drug industry and the nearest practicable approach to the small dealer's cost. The Booksellers' Code provision established prices at the full publisher-consumer price. The Retail Tobacco Code set a price lying between the small dealer's cost and the top consumer price.

The Retail Trade Code and the Retail Food and Grocery Code each established, as a minimum price, the net delivered invoice cost or replacement cost, whichever was lower, plus a mark-up for labor costs. The mark-up established for groceries was 6 per cent, and that under the Retail Trade code 10 per cent. In both of these codes there was a provision permitting the small dealer with a high invoice cost to meet the prices of competitors who bought more advantageously.

The two sections of the report dealing with the drug and grocery trades' experience during the N.R.A. will illustrate the administrative difficulties and that inherent problems that arose from the attempt to stabilize prices in these trades.

Experience under the loss limitation provisions of the various codes was brief; hence, little material appears in N.R.A. files on the effects. However, such data as have been gathered from the files and by independent studies indicate that prices to the consumer decreased, on the average, on highly advertised drug products during the operation of the Drug Code's loss limitation provisions. At the same time the small members of the trade, although they took on an additional labof burden, found themselves in a better financial condition. Complete explanation of the seeming paradox of decreasing consumer prices cannot be given without further study, but it is the belief of some representatives of N.R.A. and of the retail drug trade who were responsible for the administration of the code that the following factors account for it:

(a) In the pre-code period the average cut-price store using standard drug products as loss leaders found it necessary to slash prices on a relatively small number of products in order to attract patronage. Such a merchant, under the terms of the code, had to raise prices on these products, but found it necessary to reduce a wide list of products to the code minimum to obtain an advertising advantage.

(b) The small merchant who previously had not entered the price-cutting field or who, through bitter experience, had found he could not survive cut-price competition, now began to cut because there was, for the first time, a fixed limit to the process.

(c) During the code period, more than 100 prominent manufacturers reduced the manufacturer's wholesale list price on their products, while very few raised prices. It is believed that this reduction occurred because the Code minimum on certain products was considerably higher than the competitive cut price, and the manufacturer could not afford to have the price raised by the amount of the difference. Another factor which caused manufacturers to reduce their prices was the lowering of prices on substitute private brand products by cut price stores. Cut price stores did this when they found that the bottom Code price on standard drug products did not bring in the trade, because the small independent merchant had aggressively entered the price competition field.

The individual invoice cost basis of the loss limitation provision of the Retail Grocery Code seemed to be the only method of loss leader control suitable to the competitive alinrment of that trade, and adaptable to its inherent pricing structure. Since it was practically impossible to obtain the invoice cost of the merchant unless he voluntarily offered it, and because in this provision merchants were permitted to meet competition, there is very little data bearing on its effects. It is believed by leaders in the trade that this loss limitation provision aided the small merchant. From a comparative study, however, it would seem that the provision for the grocery trade was not as effective as the one in the Drug Code in accomplishing what was intended. The following facts are indicative:

(a) Whereas the drug trade has about one-sixth as many outlets as the grocery field, the number of compliance, litigation and court cases resulting from the loss limitation provision in the former case, was much greater. The same comparison can be made between the re-

tail drug and the general retail trades. The retail tobacco provision prohibiting sales of cigarettes at less than two for 25 cents led to a great many compliance, litigation and court cases. It is believed that the tobacco and drug provisions had this effect because they accomplished substantially the purpose for which they were designed.

(b) At the hearing before the Senate Finance Committee for the renewal of N.R.A. the Retail drug, tobacco and booksellers' trades were militantly active in requesting Congress to renew the Act, and particularly to continue the loss limitation provisions in their codes. This testimony stood out in contrast to the lukewarm support of the retail grocery trade and the active opposition of the Chairman and Vice-Chairman of the General Retail Code Authority.

In the section of this study dealing with the operation of the retail grocery code it can be seen that difficulties were encountered in administering the exceptions to the loss limitation provision, which provided that, under certain conditions, merchants could sell below the code minimum. These same difficulties were encountered in the drug code.

No evidence that retail grocery prices decreased as did retail drug prices during the code period can be found in the NRA files or in independent studies. In the latter there are some indications to the contrary. It is difficult to weigh this evidence because of the other conditions which developed at the same time in agriculture and in the food industry as a whole. No evidence has been discovered to show that prices on standard drug products were higher during the code period.

Experience under state control measures in the state of California should be of importance to legislators and to members of trade, since this is the only place where such laws have been in effect long enough to produce results.

The California Fair Trade Act was passed in 1931 and amended in 1933. It was enacted primarily because of the demands of organized independent dealers. It permits manufacturers to contract for resale prices on their trade marked products in intra-state commerce. To date, the law is being employed in only a minority of trades; the widest experience under it is in the drug trade. In the latter retail margins under contract average about 31 per cent; contractual prices have increased about 25 per cent over loss leader advertised prices, whereas prices in independent drug stores appear to have decreased slightly. In a number of trades attempts are being made to employ the California Unfair Practices Act of 1935, which prohibits sales below cost of merchandise, plus operating expenses. During the past year the California Fair Trade law was introduced in twenty four states and passed in New York, New Jersey, Pennsylvania, Maryland, Wisconsin, Illinois, Iowa, Washington and Oregon. The experience in these nine states has been so short that no evaluation can be made at present. The results in California, however, should be of assistance in indicating what can be expected elsewhere. Connecticut vetoed the Fair Trade law, but passed the Retail Price Control law instead. This is simply the fair trade practice provisions of the Retail Drug Code.

This recent adoption of state price control laws has been caused by the revival of the pressure for the Capper-Kelly Bill, which was repeatedly introduced in Congress from 1914, after the Miles Decision, and until the passage of the National Industrial Recovery Act. The character of the sponsorship for the state Fair Trade Laws (Junior-Capper-Kelly Bill) has changed and it is today primarily a retailer's movement. The various state retail groups are backing Senator Tydings in a proposal to amend the Sherman Anti-Trust laws. He plans to introduce this amendment at the next session of Congress. This proposal is a substitute for the Capper-Kelly measure. This bill aims to facilitate operation under the State Fair Trade laws by exempting such operation from the Sherman Act.

The emphasis of the part of the study relating to resale price maintenance is laid on the failure of the courts to consider the economic yardstick to be used for determining whether the practice does or does not restrain trade unreasonably. The material now collected and digested indicates that past Supreme Court decisions were made upon an inadequate factual foundation, and hence do not necessarily stand as precedents for future actions, in which the court has the complete picture in the records.

TRADE PRACTICE STUDIES

PROVISIONS AFFECTING CHANNELS OF DISTRIBUTION

Table of Contents

2. Resale price control
   (a) Different types of provisions
   (b) Relation to other devices
3. Trade discounts or differentials
   (Same as 1 above)
4. Quantity discounts
   (Same as 1 above)
5. Discounts or price differentials other than trade or quantity.
   (Same as 1 above)
6. Restrictions on brokerage payments.
   (Same as 1 above)
7. Restrictions on sales to certain types or classes of outlets.
   (Same as 1 above)
8. Restrictions on consignment sales
   (Same as 1 above)
9. Restrictions on size or manner of making shipments
   (Same as 1 above)
10. Price discrimination
    (Same as 1 above)
11. Other devices

C. Effect of N.R.A. policy on programs and devices
   1. N.R.A. policy as a force to either support or to alter any of the programs or devices.
   2. Changes made in the programs or devices to make the same conform to policy.

D. Alternative Programs.
   1. Suggestions for different approach to problems and of substitute programs.
      (a) From members of industry
      (b) From distributors
      (c) From N.R.A. Advisory Boards
   2. Arguments presented in favor of such alternative.
   3. Arguments presented against such alternative.

E. Reasons that each of the programs was suggested.
   1. The corporate structure of the industry.
   2. The nature of the product, i.e., size, weight, value.
   3. The prior experience of the industry in other types of programs
   4. The prior adoption of a program which was in operation or being developed.
   5. Distributor organization and distributor pressure.
   6. Trade Association activity.
   7. Other reasons

F. The programs as suggested and as approved.
   1. Changes made in code during period of consideration.
      (a) The codes as proposed and as approved.
      (b) The eliminations from and additions to original proposals

III. THE CODES IN OPERATION

A. Those codes coming under Program 1.
   1. Administration by Code Authority
   2. Trade Association activity
   3. N.R.A. activity.
   4. Extensions of the code beyond original intent.
   5. Compliance difficulties experienced.

B. Those codes coming under Program 2.
(The same analysis and discussion as is set forth under A above)
C. Those codes coming under Program 3.
(The same analysis and discussion as is set forth under A above)

IV. RESULTS.
A. Analysis of effects of the codes in operation.
1. Those codes coming under Program 1.
(a) Administrative problems involved.
(b) Evidence of injury or benefits to manufacturers by types
(c) Evidence of injury or benefits to distributors by types
(d) Evidence of injury or benefits to the public
2. Those programs under Program 2.
(The same analysis and discussion as is set forth under 1 above)
3. Those programs under Program 3.
(The same analysis and discussion as is set forth under 1 above)

V. THE LAW
1. Status of programs under law immediately prior to N.R.A.
2. Adjudications by courts and Federal Trade Commission in connection with particular industries which had attempted any of the programs and had been tried.

VI. CONCLUSIONS
1. Relative merits of each of the programs
(a) To accomplish immediate ends sought by industry
(b) To accomplish beneficial results ultimately for industry
(c) To accomplish beneficial results immediately for the public
(d) To accomplish beneficial results ultimately for the public
(e) From an administrative or operative standpoint
2. Relative merits of the various devices and combinations of devices utilized to make the programs operative
3. Possibilities present under the N.R.A. to meet the problems through other programs or means

TRADE PRACTICE STUDIES

PROVISIONS AFFECTING CHANNELS OF DISTRIBUTION

Preliminary Summary of Findings

This is a brief summary of findings with respect to trade practice provisions affecting channels of distribution. They are based on the materials in individual summaries prepared by members of the Unit, or in work sheets, or in preliminary summaries of the work on individual industries.

For purposes of clarity these findings are divided into three general classes. First, those concerning the industry problem; second, those concerning the programs developed to meet the problem; and third, those with regard to the operation and effect of the programs so developed.

Problem to be Met by Industry.

The problem results from the many methods of distribution in use within given industries, together with the existence of an unstable price structure, and the efforts by industry to control them.

It has been found, in general, that three types of distribution exist: Direct sales by manufacturers; direct sales combined with sales through distributors; and sales by manufacturers solely to distributors.

It has likewise been found, generally speaking, that accepted practices have been developed for which price quoting make possible the comparison between manufacturers.

It has been found that the lack of uniformity in distribution channels acted as an obstacle in the way of any program looking toward price stability. Manufacturers selling both wholesalers and retailers found that wholesalers undercut their prices to retailers, and manufacturers selling direct to retailers felt the effects of price cutting by wholesalers selling the products of other manufacturers.

Programs Developed to Meet the Problem.

The programs developed undertook to promote price stability by eliminating price competition between manufacturers and distributors, or by controlling such competition. To accomplish this end three alternative programs were developed.

(a) The first contemplated the prohibition of sales to wholesalers or the reduction of the wholesaler's operating margin, either to eliminate wholesalers from competition or to make it impossible for them profitably to undersell the manufacturer.

This program was applied by the Salt and Cement Industries through reducing or eliminating distributor margins. The Asbestos Industry and the Wood Cased Lead Pencil Industry also adopted it in part.

(b) Resale price maintenance contracts - that is, policies of refusing to sell unless the resale prices of manufacturers were observed - or other methods for the control of wholesalers' prices were contemplated by the second type of program.

> This program was adopted by the Business Furniture, the Carpet and Rug, and the Valve and Fitting Industries, through an attempt at rigid customer classification, the establishment of definite differentials between classes of buyers, and requirements that distributors maintain prices established by the manufacturers.

(c) The third type of program contemplated primary reliance by manufacturers on distributors, which meant that certain direct sales by manufacturers were restricted and the operating margin of the distributors protected, even though some loss of direct sales by the manufacturers resulted.

> This program was adopted by the Lumber and Plumbing Fixtures Industries, both of which attempted to protect middlemen by restricting manufacturers' sales and by establishing differentials.

Operation and Effects of the Programs.

The present findings with regard to the operation and effect of the programs are tentative. Those industries which adopted the first program referred to above met with the greatest amount of success. The Salt Industry, the Cement Industry, and the Brake Lining Division of the Asbestos Industry succeeded in effecting a division between the manufacturer market and the distributor market. Each of them have a few large members who are generally the price leaders, and who dominate in the establishment of practices. Prior to the code these industries had succeeded in developing considerable degrees of price uniformity. Under different circumstances, consequently, this type of program might not prove equally successful. In these industries the large manufacturers seem to have an unusual ability to sell directly to a major portion of the market, and in these operations distributors appear to be not all essential. These industries, moreover, were not entirely dependent on the support of the Administration for success in their code program. They could accomplish much without the N.R.A; and the latter, in all probability, served principally to facilitate programs already in progress.

The Wood Cased Lead Pencil Industry was found to have failed to operate satisfactorily under the first program. Here there was a conflict between manufacturers; and the proposals affecting distribution were complicated by the need of eliminating or reducing bitter price competition between manufacturers, before the elimination of competition between manufacturers and distributors could be effective. To accomplish this N.R.A. support was necessary. This being refused, the program failed.

The industries adopting the second program B described above did not meet with any marked success. Of these the Business Furniture Industry came nearest to accomplishing its objective. Government support was necessary to make resale price maintenance programs effective. Such support was given with reluctance, if at all; and even with it enforcement was difficult.

Of the three programs it would appear that the last was the least successful. A part of the result, possibly, can be attributed to the failure of the N.R.A. to support the plan whole-heartedly. At least, the unwillingness of the N.R.A. to approve certain proposals interfered with the carrying out of the programs as planned. In the two codes studied which contained this program a practically complete breakdown developed in its administration.

TRADE PRACTICE STUDIES

GEOGRAPHIC PRICE STRUCTURES

Table of Contents

III. Code of Fair Competition for the Iron and Steel Industry
  A. The Code and Its Origin
    1. Motives and Interests Determining the Character of the Code
    2. Code Provisions
  B. Administration of the Code
    1. Code Authority
    2. NRA Administration
  C. Complaints and Protests
IV. Effects of the Iron and Steel Code
  A. General Effects
    1. Elimination of Secret Price Cutting
    2. Price Leadership
    3. Extras
    4. Channels of Distribution
    5. Resale Price Maintenance
    6. Restriction on New Capacity
    7. Costs
    8. Price Levels
    9. Profits
  B. Effects of the Multiple Basing Point System
    1. Evaluation of the Location and Number of Basing Points Relative to the Volume of Production at Major Producing Points
    2. Evaluation of the Location and Number of Basing Points in Relation to the Costs of Production at Various Points
    3. Location of Basing Points in Areas of Deficit Production
    4. Effects of the Location of Basing Points on the Relative Competitive Positions of Integrated and Non-integrated Rolling and Drawing Mills
    5. Effects on Price Leadership
    6. Comparison of Amount of Freight Absorbed by sellers and Fictitious Freight Paid by Buyers
    7. Effects of the All Rail Freight Provision on Prices
    8. Stability of Production and Profits
  C. Effects of the Abrogation of the Code
    1. Adherence to the Basing Point System
    2. Open Pricing
    3. Price Levels
    4. Production and Capacity
V. Alternative Courses for Dealing with the Problems Engendered by the Present Basing Point System
  A. Abrogation of the System
    1. Effects of the Establishment of a Delivered Price System Irrespective of a Uniform Price Formula
    2. Effects of the Establishment of an F.O.B. Mill Price System
  B. Devices for the Control of the Operation of the Multiple Basing Point System
    1. Effects of the Establishment of New Basing Points
    2. Effects of the Establishment of Restrictions on the Privilege of Freight Absorption
  C. Possible Effects of the Present Trends in the Industry Regardless of Control Attempts on the Multiple Basing Point System and the Geographical Price Structure
    1. The Geographical Shift and Decentralization of the Industry
    2. Trend Toward Integration

5. Types of Distribution
6. Traditional Size of Markets

C. Attempts at Control Before Code

II. The Code and Its General Administration
A. Origin of the Code
B. Provisions of the Approved Code
C. Administration of the Code

III. The Anti-Dumping Provision and Its Operation
A. General Economic Characterization
B. Classification of Cases of Market Determination

CHAPTER V. THE BASING POINT PRACTICE IN THE CEMENT INDUSTRY

I. Historical Development of Pricing Practices
II. Structural Industry Factors Functionally Related to the Basing Point Practice
A. Growth of Capacity
B. Seasonality and Regional Distribution of Sales
C. Rate of Operation and Production Cost
D. Single Mill Companies and Chain Companies
III. The Cement Code
IV. Effects of the Operation of the Basing Point Practice on Sales Distribution, Prices and Profits

CHAPTER VI. FREIGHT EQUALIZATION AND MARKETING ZONES IN THE SALT INDUSTRY

I. Structure of the Industry
A. Production Districts
B. Corporate Structure
C. Distribution Channels
D. Trade Association Activities
II. System of Marketing Zones and Zone Pricing
III. Effects of the Zone System on Sales Distribution, Prices and Profits

CHAPTER VII. THE BASING POINT SYSTEM IN THE LIME INDUSTRY
(This chapter will follow the treatment of the subject as provided by the Special Studies Section)

CHAPTER VIII. FREIGHT EQUALIZATION, ZONES AND BASING POINTS IN A NUMBER OF INDUSTRIES OF MINOR SIGNIFICANCE

I. The Basing Point System in the Cast Iron Soil Pipe Industry
II. Freight Equalization in the Wallpaper Industry
III. Zoning Systems
A. Fertilizer Industry
B. Asphalt Shingle and Roofing Industry
C. Business Furniture Industry
D. Cordage and Twine Industry

CHAPTER IX. FURTHER LINES OF ANALYSIS REQUIRED FOR A FINAL DETERMINATION OF THE CHARACTER AND EFFECTS OF GEOGRAPHIC PRICING PRACTICES

I. Geographic Pricing Practices Not Sufficiently Covered in the Present Report and Methods for Their Treatment

II. Character and Availability of Statistical Data Necessary for a Satisfactory Completion of the Study of Geographic Pricing Methods

APPENDIX. GEOGRAPHIC PRICING ASPECTS OF THE SUGAR INSTITUTE CASE

TRADE PRACTICE STUDIES

GEOGRAPHIC PRICE STRUCTURES

Preliminary Summary of Findings

I. Geographic Pricing Provisions in N. R. A. Codes

A survey of the first 554 codes (including 750 amendments and 195 supplements) shows that 155 of them had some provision relating to transportation costs or to other aspects of geographic pricing. Of these 98 were concerned with the question of f.o.b. or delivered pricing. Of the latter 52 provided for f.o.b. point of origin selling, 29 provided for selling on a delivered basis, and 21 permitted either arrangement.

A group of 90 codes dealt with different kinds of transportation allowances and with prepayment of freight. Forty-four of them prohibited such prepayment or any discriminatory allowances, while 43 permitted some form of freight equalization or similar concessions. Only four codes contained explicit basing point provisions, while two or three others provided for freight equalization points that resemble basing points in certain respects, though the functional differences are substantial.

A number of industries - at least three of them of fair size and importance - had no basing point provisions in their codes, although it is known that basing point systems established in pre-code days continued to be in operation. These instances are of interest from the point of view of N. R. A. problems, because other code provisions, not expressly referring to the basing point practice, supported it in an indirect way.

In addition, geographic pricing devices, other than the transportation provisions mentioned above, were incorporated in some 16 codes in the form of price-filing and anti-dumping zones. Finally, there is a group of codes, some 12 in number, which contained provisions enabling or directing the Code Authority to set up some form of transportation regulations after approval.

Only a small number of the codes that had provisions relating to transportation charges or to other geographical pricing practices could be given detailed treatment. Among these the Iron and Steel, the Cement and the Lime Industries and certain divisions of the Lumber Industry have been analyzed because of the significance of their basing point systems. Only brief reference could be made to the Cast Iron Soil Pipe basing point practice. Freight equalization has been studied in all divisions of the Lumber Industry where it found application, and in the Wallpaper Industry. Zoning systems of various kinds have been treated in the Ice and Salt Industries and, more cursorily, in the Fertilizer, Asphalt Shingle, Business Furniture and Cordage and Twine Industries.

II. Structural Industry Characteristics Functionally Related to Geographic Pricing Practices

The analysis of the above named industries suggests that significant geographic pricing practices have as a rule arisen in functional interrelation with basic factors in economic structure. This suggests that

there are limits to the possibility of modifying or eradicating such practices successfully by court decree or by administrative action, without taking steps to reshape gradually the entire industry structure.

The most essential common traits of industries that use basing points or uniform delivered pricing by zones are the following:

(A) The pattern of competition is far removed from the atomistic one that underlies the theory of free competitive prices. It is typical of the industries examined that they have relatively small numbers of producers, each of whom supplies a significant portion of the total volume of sales. This situation frequently results in price leadership and in a high degree of price stability.

(B) Typically, the products of these industries are highly standardized, and are not sold upon any real or claimed difference in quality. They are of a heavy and bulky nature, so that the cost of transportation is an important element in the ultimate cost to the consumer. This point gains further weight if production is concentrated in limited districts, while consumption is spread more widely through the country.

Under these conditions the competitive advantage of location in proximity to the main consuming areas or to the cheapest transportation facilities, such as waterways, is further accentuated and may become virtually decisive. These things intensify the desire of all producers not so favorably located, and frequently of large and powerful companies with mills in different locations, to establish some control over this factor. Furthermore, a heavy overhead cost is generally prominent in the processes of production under consideration. This factor intensifies both the urge toward a steady and possibly a high rate of operation, and the resistance to the lowering of prices in any local market by any producer.

(C) Another important aspect relates to the historical pattern of growth of the major basing point industries, and to a type of competition between old and new production districts which tends to follow from this pattern. Characteristically, during the earlier stages production was concentrated in a limited area, such as the Pittsburgh district for steel or the Lehigh Valley for cement. As a result of movements of population and with the industrialization of an ever growing part of the country new facilities were set up in regions distant from the original centers.

At first these new production points enjoyed high price levels determin by the prices in the industries' old centers plus freight rates from the latter. But as the productive capacity of the new districts grew, especially where favorable conditions of raw material assembly, cheap labor or the like promoted their easy expansion (in the Great Lakes region, the South, etc.), the dangers of over-capacity and of a ruthless struggle for markets arose. Frequently, under the leadership of large companies with mills in both the old and the new production regions, the industries in question met this situation by developing schemes to strengthen the existing price leadership, and thus to shift the struggle between regions from the field of price competition to other forms of competition for volume.

III. Classification of Geographic Pricing Practices According to their General Economic Effects

The economic effects of the various geographic pricing practices are divided into two classes. The first regards the effects on the general price level aside from any regional differences. The second concerns the variation in results as between geographic sections of the economic community.

With respect to the first point, the most significant distinction appears to be between practices tending to sharpen price competition, and thus to force price levels down, and practices tending to curb excessive price competition and to facilitate price leadership and stabilization. In the former group belong all freight allowances (which may be coupled with f.o.b. or delivered pricing) and, in particular, the practice of sellers of absorbing freight on sales to more or less distant markets. Under the latter category fall all schemes that bring freight absorptions into some orderly system of equalization - especially all limitations on the amount of freight that may be absorbed - as well as basing point systems with a rigidly controlled number of basing points.

Flexible basing point systems, with substantially free choice of new basing points as frequently as circumstances necessitate, have an intermediate position. Under their operation the lowest combination of base price plus freight charge which is economically possible in terms of production and transportation costs, seems theoretically assured for all markets. Practically, however, there is a counteracting tendency in the fact that the notoriety of basing point changes, and of changes of basing point prices, imposes some degree of restraint on firms who otherwise might be inclined to choose a new basing point with a lower basic price.

F.o.b. and delivered pricing as such are not quite determinate in their effects, and may differ in their character under different accompanying conditions. Anti-dumping zones belong definitely in the second group of practices tending to curb price competition. As to price filing zones, judgment must be reserved until the results of the study of the Price Filing Unit are available.

The classification of geographic pricing practices into two main groups, with respect to their effect on price competition, serves to reduce one aspect of the problem to the more general one of price cutting and price fixing. A treatment of this latter lies beyond the scope of the present study.

With regard to the second point mentioned above - the examination of the relative advantages and disadvantages wrought for different localities and regions by the operation of the various geographic pricing practices - the nature of the matter prevents broad generalization. The complexity of the individual situation must be taken into consideration in every case. In general, it may be said with regard to the development of interregional economic relations that two basically different lines of policy are possible.

First, the highest degree of specialization in the field of its best natural equipment may be encouraged for each region; second, a balanced development of as many different lines of economic activity as possible may be regarded as preferable.

Another aspect of importance relates to economies or waste in transportation resulting from different systems of geographic pricing. Only detailed case studies can prove whether any geographic pricing system leads in a given industry to wasteful cross hauling, which might be avoided or reduced under another system, or prevents transportation economies which another system would tend to promote.

MINIMUM PRICE DEVICES

Table of Contents

and Decrease Supply if Too Low
(f) Others - i.e. Effect on Redistribution of Volume to Individual Concerns, etc.

B. Emergency Prices
1. What is an "Emergency"?
(a) Looseness of Concept
2. Purpose of Device
(a) To Allow Price Panic to Quiet Down
(b) To Permit Industry to Develop a Solution for Cause of Emergency
(c) To Indicate that Government will Not Tolerate "Destructive" Price Tactics
3. Extent to Which Used under Codes
4. Implication of Device
(a) To be used for Short, Temporary Period
(b) Same Problem as Raised above for Fixed Prices but Applied to Short Period of Time

C. Cost Protection
1. Underlying Theory
(a) Selling Below Cost an Unfair Competitive Practice
(b) Cost Recovery Essential to Prevent Bankruptcy and to Permit Paying Code Wages and Shortening Hours
(c) Prices will be Low because of Effect of Low Cost Producers
2. Purpose: to fix a Minimum Price Base Predicated on Cost (of Individual or Whole Industry) which shall be Flexible rather than Fixed and Bear a Definite Relation to Cost. Predicated on Use of Standard Cost System for All Members of An Industry
3. Extent to which Used Under Codes
(a) Variation of Device
4. Implication of Device
(a) Assumption that "Cost" Can Be Determined Accurately
(b) Belief that there is No Need to Sell Below Cost and that it is Due to Unfair Practices
(c) Failure to Realize Need for or Wisdom of Selling Below Cost under Given Conditions
(d) Failure to Realize that Device may be Harmful by Raising Prices
(e) Other Implications
5. Device Usually Coupled with Open Price Selling
(a) Lowest Filed Price Usually Prevailed
(b) In Absence of Effective Collusion or Pressure Low Cost Producers Set Price Level

III. NRA Policy
A. Slow Development of Policy
1. Absence of Policy during Early Stages
2. Chronological Development
B. Effect of Shifting NRA Policy on Code Provisions
C. Final Attitude against Price Fixing and Cost Recovery Principles but for Emergency Prices
1. Attitude toward Mandatory Cost Systems
(a) Reasons Advanced for Policy
(b) Failure to Approve Proposed Cost Systems

2. On volume
3. On Competition of Substitute Products
4. On Distribution of Volume between Industry Groups and Individuals
5. On Development of Subterfuges
6. On Compliance Problems
   (a) Extent
   (b) Difficulty of Determining "Cost" or Violation
   (c) Damage Usually Done when Violation Discovered

II. Manufacturing Industries - Producer Goods
Considerations same as for I.

III. Manufacturing Industries - Consumer Goods
Considerations same as for I.

IV. Distribution Trades
Considerations same as for I.

V. Service Trades
Considerations same as for I.

CHAPTER V. CONCLUSIONS - EFFECTIVENESS OF MINIMUM PRICE DEVICES

I. Device Usually Directed against Symptons rather than to Causes of Low Price Levels
   A. To be Effective, must be Supplemented by -
      1. Production Control
      2. Curtailing Access to Industry
      3. Effective Policing
      4. Prompt and Sufficiently Heavy Punitive Devices or Preventative Devices

II. In Absence of Other Regulatory Features, Minimum Price Regulation Tends to Fail
   A. Experiences of Industries Who Used Devices

III. Elements Essential for Success of Minimum Price Regulation under Codes
   A. Small Number of Industry Members
   B. Large Capital Requirements or Difficulty of Entering Industry
   C. Strong Industry Organization
   D. Willingness to Submit to and Abide by Regulation
   E. Unavailability of Substitute Products at Low Prices

IV. Minimum Price Devices as Public Policy
   A. Price Fixing
      1. Rigidity
   B. Emergency Prices
      1. May be Desirable under Certain Conditions
   C. Cost Recovery
      1. Essentially Unacceptable
   D. Absence of Well Formulated Policy
      1. Which Tenets of Laissez Faire Shall be Kept, which Modified, Which Abandoned?

2. What is Ultimate Goal

APPENDIX

I. Legal Aspects of Minimum Price Devices

- A. Historical Review
- B. Self Regulation by Industry
- C. Regulation by Government
- D. Possibilities
  1. Industrial Self Regulation
  2. Governmental Regulation
  3. Combination of Self Governmental Regulation with Particular Reference to Experiences under Codes

II. Price Regulation Prior to Codes

- A. U.S. Experience
  1. War Industries Board
- B. Foreign Experiences
  1. German Cartels
  2. English Trusts

TRADE PRACTICE STUDIES

MINIMUM PRICE DEVICES

Preliminary Summary of Findings

The preliminary conclusions that follow are based on the analysis of regulating experience under the Codes for the following industries: Cleaning and Dyeing, Fur Dressing and Dyeing, Ice, Waste Paper, Agricultural Insecticide, Cast Iron Soil Pipe, Coffee, Luggage and Fancy Leather Goods, Limestone, Screw Machine Products, Throwing, Hardwood Distillation, Malleable Iron, Fire Extinguishing Appliances, Paper Distributing Trade, and Paint, Varnish and Lacquer. The findings will be examined further in the light of additional facts to be established concerning these industries and the additional industries and trades to be examined - i.e., tobacco, lumber, rubber tire, etc., and are subject to revision. The selection of industries was based on the variety of price regulating devices used, and the industrial problems presented.

A. General Conclusions Concerning Price Regulation

1. As a general rule price regulations were not directed toward the solution of basic industry problems. They were aimed at a symptom - i.e., as low price level - rather than at the causes. The basic causes in the 16 industries analyzed thus far may be summarized as follows:

   a. The pressure of fixed charges due to the existence of capacities far in excess of current active demand.

   b. Increasing unit production costs because of lower volume, aside from the incidence of overhead.

   c. Decreasing prices of substitute products.

   d. The struggle by individual producers for the maintenance or the increase of volume, where demand was inelastic and would not increase sufficiently or at least not proportionately, when prices fell. Price competition in this situation could only serve to redistribute the available volume to individual industry members at lower price levels, and could not increase it for the industry as a whole.

2. Code Authorities, as spokesmen for industries seemed generally to underestimate the extent to which price and demand were functions of each other, and to which increased prices could affect demand adversely. Where demand was flexible, the choice usually was made on the side of higher prices without extensive analysis of the possibility that a large turnover with a small unit profit might be preferable to a small turnover at a higher price.

3. Where an industry's products competed with substitute products which sold at lower prices or were more desirable at the same or even somewhat higher prices, a minimum price or cost floor became irrelevant or even damaging.

4. Where the capital necessary to enter an industry was small, attempts at price fixing tended to fail, because the price was apt to attract additional capacity or competitors into the industry and to thus further aggravate the problem.

5. Where there was a marked variation in methods of production or distribution, the fixed price or arbitrary cost base struck at some specific minority group, tending to deprive it of an inherent competitive advantage, sometimes even threatening to drive it or part of it out of business.

6. Where an industry price or price floor was set, concerns which prior to the code had depended on price differentials to attract business tended to be injured, because the business apparently went to concerns with established reputations who were marketing well advertised trademarked products, often with quality guarantees. Price regulatory schemes often failed to make allowance for competition based on price differentials and at times may have been directed against it.

7. Where an industry price floor was set - rather than one predicated on individual cost - the tendency was to set it higher than the prevailing price level.

8. Price control features of codes were at times used to accomplish the same results as pre-code price fixing, illegal under the anti-trust laws.

9. Cohesiveness among industry members and the vitality and degree of control exercised by Code Authorities were much more important for the success of a minimum price plan than such elements as standardization of products or knowledge of costs. The most essential requisite for the successful functioning of price regulation was the willingness of industry members to have their prices regulated.

10. Generally, NRA failed to keep itself well informed as to the actual operation of or as to experience with price regulatory devices.

B. <u>The Fixed Price</u>

1. In the absence of quality standards, a fixed price meant little. Chances for resorting to subterfuges were abundant.

2. In the absence of basic controls, such as regulation of production or the limitation of entry into the industry, fixed prices failed to stick. Attempts to induce industry members to sell for less than the prices fixed were generally successful.

3. Neither N.R.A. nor industry had sufficient data on which to base fixed prices. In the hurry to determine prices in the absence of such data, fixed prices were often predicated on industry's desire, shaved down by N.R.A. for the sake of safety.

C. Emergency Prices

1. No definite standards appear to have been used by N.R.A. to determine what constituted emergencies.

2. Emergency prices were generally set on very fragmentary data.

3. Emergency price declarations appeared as a rule to have aimed at the accomplishment of one or more of the following results:

   a To permit an industry to quiet down from a price panic and resume normal activities.

   b To declare a truce during which the emergency situation might correct itself or the industry might develop a corrective.

   c To make clear that the Government will not tolerate destructive price cutting.

   From the analyses of the industries studied thus far, it appears that these objectives were seldom realized.

D. Cost Floor Protection

1. The term "cost" lends itself to a variety of interpretations. Most difficult or determination are (1) the selection of elements to be included, and (2) the allocation of fixed charges or joint costs. N.R.A. distinguished between cost systems as such and cost formulae used for the determination of price floors. The latter, if approved by N.R.A, were considerably less inclusive as to cost elements, and provided for the allocation of fixed charges more stringently than the cost systems or formulae generally proposed by Code Authorities.

2. Ignorance of costs, so often claimed by Code Authorities as an important cause for improper pricing policies, does not appear to have been of as great significance as was claimed. Prices often had no relation to past or present costs, but had to be adjusted to what the public was willing or able to pay. Generally, present necessity or future anticipations were more important factors than costs predicated on past experience.

3. "Cost" systems or formulae proposed by Code Authorities contained so many arbitrary features that actually they were price determining formulae, and could not be used to establish an individual concern's cost.

4. By arbitrary provisions - such as prescribing that concerns manufacturing their own raw materials nevertheless had to calculate raw material costs as though they had bought on the open market, or providing that overhead could not be figured at less than 33 per cent of the total of raw material cost plus labor - Code Authorities attempted to deprive low cost producers of the right to reflect those costs in lower prices.

5. In industries containing both integrated and non-integrated operations, the success of price regulation depended generally on the good will of the integrated concerns, who were in position to cut prices because of lower costs or of greater flexibility in allocating them.

6. Where individual cost was the criterion, compliance was difficult to obtain because: (a) A violation had to be proved by the books of the alleged violator, who could refuse access to them; and (b) even if access was had to the necessary records, the determination of actual cost was difficult.

7. If a violation was proved, the damage had generally been done because:. (a) Either the violator had obtained the business he was after at the expense of code abiding members, or (b) competitors, unwilling to let him take the business, had followed his price downward, with the result that the price level had been broken.

8. Lack of definite NRA policy during the first year or year and a half permitted Code Authorities to flounder and to incur useless expenses in developing cost systems which NRA in most instances refused to approve.

E. Additional Work to be Done

Additional work with the industries covered, as well as analysis of the experiences of other and important industries, is essential to verify and amplify the preliminary conclusions stated. In addition, attempts should be made to determine whether price regulation, even if ultimately unsuccessful, did not have some effects, temporary or lasting, of a nature felt to be beneficial by the industries concerned. The N.R.A. files examined permit no conclusions on this point.

COMMODITY INFORMATION
Table of Contents

V. Other Misrepresentation Control
   A. Federal Legislation
      1. Nature and Scope of Control Provided by Other Federal laws such as the
         (a) Food & Drug Act
         (b) Securities Act
         (c) Federal Alcohol Control Act
         (d) Postal Laws
   B. Some Types of State Statutes
      1. False Advertising
      2. Misbranding
      3. State NRA Legislation
   C. Private Agencies
      1. Trade Associations
      2. Better Business Bureaus

VI. General Summary
   A. Preliminary Findings as to Misrepresentation and Deception
   B. Suggestions for Further Study

CHAPTER III. STANDARDS AND LABELING

I. The Meaning of Standards
   A. General Definition of Standards as Applied to Commodities in Commerce
      1. Brief Analysis of the Principal Types of Standards
      2. Methods of Application
      3. Purposes Designed to be Effected by Them

II. Standards and Labeling in the Codes
   A. General Survey of the Standards and Labeling Provisions
      1. Number of Codes Containing Each
      2. Breakdown by Principal Types
      3. Enabling Provisions, etc.

III. Operation of the Provisions
   A. Cross-Section View of the Principal Types of Standards and Labeling Provisions in the Codes, and their effect in operation as Illustrated by Specific Code Experience
      1. Mandatory Minimum Standards
      2. Mandatory Maximum Standards
      3. Grade Standards and Labeling
      4. Labeling for Identity
      5. Substandard Labeling
      6. Simplification
      7. Miscellaneous Standards Provisions
   B. Results of the Enabling Provisions with Respect to Standards and Labeling
   C. Necessity for More Comprehensive Information Concerning Operation of the Provisions

IV. Other Standardizing Agencies
   A. General Survey of the Methods and Results of Other Standardizing Agencies and Activities

1. Food and Drug Administration
2. Bureau of Standards
3. American Standards Association
4. American Society for Testing Materials
5. Consumer Groups
6. State Legislation

V. Legal Problems Involving Standards
   A. Consideration of Some of the More Important Legal Aspects of Regulations Affecting Standards and Labeling

VI. General Summary
   A. Preliminary Findings Concerning the Standards and Labeling Provisions
   B. Suggestions for Further Study

TRADE PRACTICE STUDIES

DEVELOPMENT AND CONTROL OF COMMODITY INFORMATION

Preliminary Summary of Findings

PART ONE - MISREPRESENTATION AND DECEPTION

Since Misrepresentative and deceptive practices in commerce are already accepted as basically unlawful, no question of general policy as to their control arises. The principal subjects for consideration relate to form of law and methods of administration.

The available data are not yet sufficient to form a basis for judgment as to the effectiveness of the code method of control of misrepresentative practices. In particular, since much of the effective compliance work in this field appears to have been done by the Code Authorities without recourse to NRA, a more comprehensive record of their activities and experience is essential to such a judgment.

Nevertheless, the evidence at hand indicates that where such practices constituted a serious industry problem, an active and capable Code Authority was often able to apply the provisions for their elimination with a considerable degree of success, and with a minimum of assistance from NRA enforcement agencies or from the courts.

The support of some measure of authority was found essential, however; and a chief difficulty encountered by the Code Authorities in securing compliance with the misrepresentation provisions was the progressive loss of prestige by NRA among their industry members, due to delays and uncertainties of enforcement, even in cases of flagrant violation. Especially they complained of the frequent acceptances of certificates of compliance in such cases, in place of the penalties provided by the Act.

As compared with the principal public agency previously dealing with the subject, the Federal Trade Commission, the N.R.A. and its codes as they were meant to operate, were more comprehensive in their declaration of the law of unfair competition affecting misrepresentation, were under fewer legal restrictions in its application, were more decentralized and direct in their potential machinery of enforcement, and possessed, in the Code Authority system, an informal medium for obtaining compliance only distantly approached by the voluntary cooperation afforded the Commission by some trade associations.

Through its machinery for code amendment and interpretation, also, the N.R.A. provided a flexible and responsible medium for adapting the general law of misrepresentation to the immediate problems of individual industries, with the adequate protection of the interests of industry members apparently afforded, in cases of non-compliance, by the rights of hearing, protest and appeal, with ultimate court review.

With respect to the Federal Trade Commission itself, a great deal of valuable work in the field of misrepresentation has been done by it. Obstacles to its most effective functioning have been found in the dual statutory requirement to show both public interest and actual or potential injury to competitors; in the extent of judicial review; and in the delays incident to the methods provided for making fully operative the Commission's restraining orders.

It is believed that these difficulties might be materially lessened by amending Section 5 of the Federal Trade Commission Act in such a way as to make misrepresentative practices unlawful in themselves, rather than as forms of unfair competition, and by certain procedural changes, such as have been suggested in various quarters, including recommendations by the Commission itself.

PART TWO - STANDARDS AND LABELING

As in the case of misrepresentation the data at present available concerning the operation of the code provisions affecting standards and labeling are insufficient for the formation of conclusive judgments. Furthermore, the problems of standards are so complicated, and differ to such an extent as between different industries, that conclusions concerning them should be largely in terms of the considerations affecting the individual industry, or related industry groups.

From a general view, however, the extent of inclusion in the codes of some form of provision conerning standards or labeling, or both, indicates that these subjects were of interest and importance to industry members or consumers in more than one-third of the total number codified.

Where standards provisions were initiated or actively supported by industries themselves, in the process of codification or later, they were characteristically predicated on industry interests. Where such interests were not concerned, even though provisions were incorporated into the codes, at the instance of consumer groups, for example, they remained largely without effect.

Standards provisions which were restrictive in nature and mandatory in their terms, and which had the effect of prohibiting either the manufacture or the sale of certain products, practically always proved unenforceable, apart from their dubious legality. On the other hand, provisions aiming to prevent the unfair competition of inferior products, by means of sub-standard labeling requirements, met with some measure of success.

The subject of standards is obviously nearly related to that of prices, since price comparisons have little meaning except in relation to comparable commodities. In most instances the industries seeking to incorporate standards provisions in their codes were frankly interested in protecting the price structure. In many cases standardization or classification of products was made mandatory for price filing purposes. In one or two instances a more direct attempt was made to link standardization with price uniformity. In many instances

standardization seems to have been looked upon as a useful, or even a necessary adjunct to measures aiming at price regulation.

As in the case of misrepresentation provisions, failures of enforcement tended to weaken compliance with those relating to standards and labeling. The extent of policing required to check up on observance proved a handicap to the Code Authorities. Enabling clauses failed to bring about effective action is some cases, due to deadlocks between industry groups, consumers and N.R.A. as to the form of the standards to be adopted. In many other cases no attempt was made to take action under such clauses, due to lack of interest or of funds for the purpose.

In the case of some industries in which standardization is carried on most effectively in practice the subject was not brought up in connection with the codes at all. In a number of others standards already adopted in conjunction with the Bureau of Standards or some other agency were incorporated in the codes without change, indicating that that had been found sufficient for the needs of the industries concerned.

In general it appears that the N.R.A. code system, depending upon agreement between industry and the Administration for the adoption of provisions, was not adequate to promote standards activity in the public interest, unless industry interests were also sufficiently involved.

The formulation of a standards program for any industry must be carried out in terms of its individual problems, with full consideration for the most suitable form, and for the interests of all elements of the industry itself, of competitive industries and of the consuming public, whether industrial or ultimate. Specific provision for the periodic review and revision of the standards adopted, to give scope for industry development and to allow for corrections based upon experience, should be incorporated in every program at the time of adoption. Any attempt to make operative a mandatory standards or labeling program requires the assent and cooperation of the industry, if elaborate official policing is to be avoided.

Much of the specific code experience with regard to standards has to do with controversies arising in the course of the adoption or the administration of the provisions, as this is the type of material which would most naturally find its way into the record. It is probable that the story of some of the most successful code work in standards is to be learned only by direct contact with the industries themselves.

In addition to its immediate effect upon standardization during the code period, the N.R.A. gave a widespread impetus to interest in the subject, which in many instances, has tended to persist down to the present time. Evaluation of these results, also, must wait upon more complete development of the subject by means of industry contacts.